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STATE OF WASHINGTON
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NO. 96365-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP NUMRICH,

Petitioner.

**STATE'S ANSWER TO MOTION
FOR DISCRETIONARY REVIEW**

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A. IDENTITY OF RESPONDING PARTY

The State of Washington is the Respondent in this matter.

B. STATEMENT OF RELIEF SOUGHT

The State respectfully asks this Court to deny discretionary review.

C. FACTS RELEVANT TO THE MOTION

On January 26, 2016, the defendant's reckless disregard for the safety of his employees caused the death of Harold Felton. As a result of his actions, the defendant, Phillip Numrich, is currently charged with Manslaughter in the Second Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation with Death Resulting under RCW 49.17.190(3) (Count 2).¹ Appendix at 1-2.

Numrich is the owner and operator of Alki Construction LLC.² Felton was Numrich's employee and a long-time friend. On January 16, 2016, Numrich's company started working to replace a sewer line at a residence in West Seattle. For this project, Numrich used a method by which a trench was dug down to either end of the pipe to be replaced and then a hydraulic machine was used to pull a new pipe through the old one,

¹ As discussed below, the State will be amending the Information to add a count of Manslaughter in the First Degree under RCW 9A.32.060.

² The substantive facts are drawn from the Certification for Determination of Probable Cause prepared by WSDLI Safety and Health Officer Mark Joseph (Appendix at 3-7) and the Joint Investigation of Alki Construction Memorandum prepared by Officer Joseph and Assistant Attorneys General Cody Costello and Martin Newman (Appendix at 8-18).

simultaneously bursting the old pipe and laying the new one into place.

One of these trenches—dug where the sewer line connected to the house—was 21 inches wide, six feet long, and more than seven feet deep.

With a trench of this depth, there is a substantial risk that the excavation could cave-in and injure or kill a worker inside. A number of factors impact the risk of such a collapse. These include the soil condition and type, the depth of the trench, and whether the soil was previously disturbed. All of these factors increased the likelihood of collapse at the project in West Seattle. By January 26th, a number of other factors increasing the likelihood of a collapse were also present: the trench had been “open” for approximately 10 days and the soil was heavily saturated from several days of rain.

Because of the danger posed to workers in trenches, Washington has regulations that apply to job site excavations. For a trench the size of the one at issue, these regulations required, *inter alia*, that the walls be shored to prevent a cave-in. While shores were placed in the trench, the shoring Numrich provided was wholly insufficient to safely stabilize it.

Also included in Washington regulations is the requirement that a “competent person” regularly inspect any trenches and the protective system installed in them. “Competent person” is a term defined by WAC 296-155-650 as someone “who can identify existing or predictable hazards

in the surroundings that are unsanitary, hazardous, or dangerous to employees.” Inspections by the “competent person” must be made daily prior to the start of any work in a trench and must be repeated after every rainstorm or other hazard-increasing occurrence. If the “competent person” sees any evidence of a situation that could result in a possible collapse, that person must remove all employees from the trench until precautions have been taken to ensure worker safety. Numrich was the only “competent person” at the job site during the project.

On January 26, 2016—10 days after the project started—Numrich, Felton, and Maximillion Henry (Numrich’s other employee) were at the job site. This was scheduled to be the last day of work on the project and Numrich was under pressure from the home owners to complete it.

Shortly after 10:00 a.m., the new pipe had been pulled into place and Felton was working in the trench closest to the house. Felton began using a vibrating tool called a “Sawzall” in the trench. It is well known that this tool can cause extensive vibrations in the ground, which can disturb the soil and make a collapse more likely. Numrich noted and commented to Henry on the dangerous nature of Felton’s use of the tool in the trench.

As noted above, Numrich was the “competent person” for the project and was aware of all of the risk factors present at the site. In addition, Numrich was aware that Felton’s use of a vibrating tool inside

the trench was dangerous and further increased the risk of a collapse. He was also aware that the ground around the trench had already been recently vibrated and disturbed by the process of pulling the new pipe through the old one. However, despite being aware of all these risks and despite being the owner of the company, Felton's friend, the person in charge, and the "competent person" at the scene, Numrich made no effort to halt Felton's hazardous use of the tool and did not re-inspect the trench after Felton was done using it. Instead, Numrich left to buy lunch.

Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton under approximately seven feet of wet dirt. While the Seattle Fire Department arrived at the scene shortly thereafter, rescuers were unable to free Felton in time to save his life and he died of compressional asphyxia.

The State filed charges against Numrich on January 5, 2018. Appendix at 1-2. Numrich subsequently brought a motion to dismiss the second-degree manslaughter charge, arguing that the State's decision to prosecute him for that crime violated both Washington's "general-specific rule" and his right to equal protection. Motion for Discretionary Review at 4.³ The State's response brief was filed on June 13, 2018. Appendix at 19-

³ The State will hereinafter refer to Numrich's Motion For Discretionary Review as "MDR," to the appendices attached thereto as "MDR App.," and to Numrich's Statement Of Grounds For Direct Review as "SOG."

72. The trial court ultimately denied Numrich's motion to dismiss, but granted his motion for RAP 2.3(b)(4) certification. MDR App. A.⁴

D. GROUNDS FOR RELIEF AND ARGUMENT

Numrich seeks direct discretionary review of the trial court's ruling that the State's prosecution of him for second-degree manslaughter does not violate Washington's "general-specific rule."⁵ A motion for discretionary review may be granted *only* if the petitioner demonstrates that the stringent requirements of RAP 2.3(b) are met. Furthermore, even when a case meets one or more of the requirements allowing review under RAP 2.3(b), the language of the rule itself indicates that this Court *may* then accept discretionary review, not that it must. RAP 2.3(b). This Court can and should still exercise its own judgment as to whether review is appropriate under all the circumstances. In exercising its discretion, this

⁴ Numrich's briefing unfairly characterizes many of the procedural facts of this case in a manner that casts the State in an undeservedly negative light. See MDR at 4-6; SOG at 3-5. This also occurred in briefing before the Superior Court and the State was compelled to file a memorandum to correct Numrich's recitation of the facts and to ensure that the record was accurate. Appendix at 73-94. However, the majority of Numrich's current mischaracterizations relate to matters that are not relevant to the issues before this Court. In that context, the State will not attempt to correct every such instance, but will confine itself to addressing only those relevant to the current motion.

⁵ As noted above, the trial court also denied Numrich's motion to dismiss on equal protection grounds. However, while his briefing before this Court contains scattered references to alleged equal protection violations (see, e.g., MDR App. B at 2), Numrich has neither briefed nor asked this Court to grant discretionary review on this issue. As a result, the State will not address it in its briefing and objects to any attempt by Numrich to raise it in his reply or otherwise.

Court starts with the general rule that interlocutory review is highly disfavored and the party seeking discretionary review must meet a heavy burden of demonstrating that immediate review is justified. Minehart v. Morning Star Boys Ranch, 156 Wn. App. 457, 462, 232 P.3d 591 (2010); In re Dependency of Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

Numrich argues that discretionary review is appropriate under RAP 2.3(b)(2) and (4). However, Numrich has failed to demonstrate that this case meets the requirements of either. Moreover, even if Numrich established that this Court *could* accept review under either, he has still failed to meet the heavy burden of showing that immediate interlocutory review is appropriate.

1. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(2)

Under RAP 2.3(b)(2), discretionary review may be accepted if “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” Here, Numrich has failed to establish either that the Superior Court probably erred or that any error has altered the status quo or limited his freedom to act.

a. Even If The Superior Court Probably Erred, Discretionary Review Is Still Not Appropriate

Even if a trial court has committed probable error, that is not in and

of itself a sufficient basis for this Court to take discretionary review under RAP 2.3(b)(2). Rather, the party seeking review also bears the burden of establishing the “effect prong” of the provision—that the erroneous decision substantially altered either the status quo or his or her freedom to act. Id. Numrich can demonstrate neither.

A trial court’s denial of a motion to dismiss is generally insufficient to establish the effect prong of RAP 2.3(b)(2).⁶ See State v. Howland, 180 Wn. App. 196, 206, 321 P.2d 303 (2014). Numrich has failed to present any argument as to how this case falls outside that general rule. Nor has he presented any argument as to how the effect prong of RAP 2.3(b)(2) has been met. Nor does the record present any basis to conclude that it has. Here, the trial court denied a defendant’s motion to dismiss a charge against him—a not uncommon event in the criminal justice system. There is nothing about the ruling that substantially altered the status quo or limited Numrich’s freedom to act. As result, Numrich has failed to establish the effect prong of RAP 2.3(b)(2) and his motion for review under this subsection should be denied for that reason alone.

⁶ The effect prong of RAP 2.3(b)(2) is intended to focus on the effects of injunctions and similar orders that have immediate effect outside the courtroom. Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1547 (1986); Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 Seattle U.L. Rev. 91 (2014).

b. Numrich Has Not Shown That The Trial Court's Decision Was Probably Erroneous

It is well-established that when a defendant's actions violate both a specific and a general statute, the defendant should typically be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Numrich argued to the trial court that the State's prosecution of him for second-degree manslaughter violates this rule. He now argues that the trial court committed probable error when it denied his motion to dismiss on these grounds. His motion must fail because the "general-specific rule" does not require dismissal of Count 1.

First, the "general-specific rule" is only applied when two statutes address the same subject matter and conflict to the point that they cannot be harmonized. State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007). One way of determining this is to examine the elements of the statutes. If the statutes create crimes with different elements, they simply criminalize different conduct and the rule does not apply. State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation here.

Under RCW 9A.32.070, a person is guilty of second-degree manslaughter if, "with criminal negligence, he or she causes the death of another person." In this context, a defendant acts with criminal negligence when he "fails to be aware of a substantial risk that [death] may occur...."

RCW 9A.080.010(1)(d); 2016 Comment to WPIC 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005)). As a result, second-degree manslaughter requires proof both that the defendant had the mental state of “negligence” *and that this mental state specifically related to the risk of death to the decedent.* Gamble, 154 Wn.2d at 468-69.

Under RCW 49.17.190(3), a person is guilty of Violation of Labor Safety Regulations with Death Resulting if the person is an employer who willfully and knowingly violates a specified safety standard and that violation causes the death of an employee. Thus, a criminal violation of RCW 49.17.190(3) requires proof that the defendant had the mental state of “knowing” *and proof that this mental state specifically related to the violation of a safety provision.* Id.

As a result, the two crimes have different *mens rea* elements. A violation of RCW 9A.32.070 requires proof that the defendant was negligent as to the risk of death of the decedent. In that context, whether or not the defendant violated a regulatory duty may be relevant in proving he was criminally negligent, but the State is not required to prove that he knew he was violating such regulations. In contrast, a violation of RCW 49.17.190(3) requires proof that the defendant knew he was violating a safety regulation, but the State is not required to prove that the defendant had any specific *mens rea* vis-à-vis the risk of death to the decedent. Because RCW

9A.32.070 and RCW 49.17.190(3) have different elements, the “general-specific rule” does not apply to them. Farrington, 35 Wn. App. at 802.

Numrich’s only real argument against this point is to assert that second-degree manslaughter does not require the defendant to be aware of a substantial risk that a death may occur because Gamble—which held that the crime of manslaughter requires proof of the defendant’s mental state *vis-à-vis the death of the victim*—only applies to first-degree manslaughter. MDR at 18.⁷ However, this is incorrect. The language this Court used in Gamble established that its holding applied to both first- and second-degree manslaughter. 154 Wn.2d at 469. Furthermore, this Court’s Committee on Jury Instructions has read the logic of Gamble as applying equally to second-degree manslaughter. 2016 Comment to WPIC 10.04; 2016 Comment to WPIC 28.06. Finally, cases since Gamble have assumed or explicitly held that Gamble applies to second-degree manslaughter and that the *mens rea* at issue in the crime is negligence as to the risk of death. State v. Henderson, 180 Wn. App. 138, 149, 321 P.3d 298 (2014); State v. Latham, 183 Wn. App. 390, 405 P.3d 960 (2014).

⁷ The argument that Gamble only applies to first-degree manslaughter plays a large role in Numrich’s argument as to why this Court should take direct review. SOG at 6,12. The State addresses Numrich’s argument on this point in more detail in its Answer To Statement Of Grounds For Direct Review, filed under separate cover, and incorporates that argument by reference here.

Moreover, RCW 9A.32.070 and RCW 49.17.190(3) are directed at different conduct. Read as a whole, the gravamen of the crime of second-degree manslaughter is that the defendant negligently caused the death of another. In contrast, the gravamen of RCW 49.17.190(3) is that the defendant knowingly violated a health or safety regulation and that an employee died as a result. While this distinction may be subtle, its existence and importance is demonstrated by considering the points of the respective laws. The obvious point of RCW 9A.32.070 is to prevent people from acting negligently in a way that risks the death of others, whereas the obvious point of RCW 49.17.190 is to require employers to know and follow applicable safety regulations. As this case demonstrates, there may be times where a defendant has violated both statutes. But there is nothing to suggest any intent on the part of the Legislature to preclude the State from prosecuting such a defendant for both.

Second, the “general-specific rule” only applies when two statutes are “concurrent.” Statutes are concurrent only when the “general” statute is necessarily violated every time the “specific” one is. Shriner, 101 Wn.2d 580. As a result, if it is possible to violate the latter without violating the former, then the statutes are not concurrent and the “general-specific rule” does not apply. See State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d 630 (2006). Here, it is possible to violate RCW 49.17.190(3)

without violating RCW 9A.32.070. As described above, the two statutes have different elements. This difference in elements in and of itself demonstrates that it is possible to violate RCW 49.17.190(3) without also violating RCW 9A.32.070.⁸ Moreover, in its briefing to the trial court, the State set forth a number of hypothetical examples in which a defendant would have violated RCW 49.17.190(3) but would not have violated RCW 9A.32.070. Appendix at 32-34.

Despite this, Numrich argues that it is impossible to violate RCW 49.17.190(3) without also violating RCW 9A.32.070. MDR at 11-13. However, his entire argument is premised on the assertion that, because “knowing” is a higher level mental state than “criminal negligence,” proof of the *mens rea* element in RCW 49.17.190(3) will necessarily prove the *mens rea* element of RCW 9A.32.070. MDR at 11-13. But this assertion oversimplifies and mischaracterizes the nature of the *mens rea* elements at issue in the two statutes. Here, as described above, the *mens rea* elements are aimed at different objects—RCW 49.17.190(3) involves the knowing violation of a regulation whereas RCW 9A.32.070 involves negligence as

⁸ It is certainly true that, *in this case*, the State is arguing that the fact that Numrich knowingly violated safety regulations is part of the proof that he acted negligently. The test for concurrency, however, is based on what is *possible* given the elements of the crime. *Chase*, 134 Wn. App. at 802-03. In that context, the specific facts of the instant case are irrelevant to that determination. *Id.*

to the risk of another's death. Because the objects of the *mens reas* are different, proof of the former will not necessarily prove the latter.

Third, the point of the “general-specific rule” is to assist courts in determining and giving effect to legislative intent; specifically, by helping to answer the question of whether the Legislature intended to preclude the State from charging the more “general” statute. Conte, 159 Wn.2d at 803. In that context, it is well recognized by this Court that the rule should be “applied to preclude a criminal prosecution *only where the legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815 (emphasis added). In this context, Washington courts—including this one—have explicitly referred to the rule as one of statutory construction and/or have treated it as such as they have used it to ascertain and give effect to legislative intent. Id.; State v. Heffner, 126 Wn. App. 803, 807, 110 P.3d 291 (2005); State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at 580. As a result, when this Court uses the rule to determine whether the Legislature intended one statute to preclude prosecution of another when both apply, this Court must take into account the other canons that it uses to construe statutes. These include the general rules that courts must apply the construction that best fulfills the overall statutory purpose and carries out clear legislative intent and must avoid

interpreting statutes in ways that leads to absurd results. See In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Here, interpreting and applying the “general-specific” rule as advocated by Numrich would undercut the statutory purpose, thwart the intent of the Legislature, and lead to absurd results.

RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973 (WISHA). RCW 49.17.900. Subsection (3) of the statute is nearly identical to 29 USCA § 666(e) of the federal Occupational Safety and Health Act of 1970 (OSHA). The express legislative history of WISHA is extremely short and does not discuss the proposed criminal sanctions contained in RCW 49.17.190. Rather, the only discussion in the legislative history deals with the need to ensure that Washington’s statutes would be at least as effective as OSHA in order to avoid federal preemption. *Enacting the Washington Industrial Safety and Health Act of 1973: Hearing on SB 2389 Before the S. Comm. on Labor*, 1973 Leg., 43rd Sess. at 2 (Feb. 2, 1973); See also RCW 49.17.010. Because of this, many of the provisions of WISHA—including RCW 49.17.190(3)—are worded very similarly, if not identically, to provisions in OSHA and are intended to be analogous to them. Where the provisions of a Washington statute

are identical or analogous to a corresponding federal provision, this Court can look to federal authority, as the Legislature's intent is presumed to be identical to Congress's. See Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

Prior to the enactment of OSHA/WISHA, there was nothing that precluded state prosecutors from bringing felony charges against employers under existing state laws criminalizing homicide and assault. Against that backdrop, it is clear that Congress did not intend that the passage of OSHA would limit the ability of state prosecutors to bring such traditional criminal charges against employers for acts committed in the workplace. "Nothing in [OSHA] or its legislative history suggest that Congress intended to...preempt enforcement of State criminal laws of general application such as murder, manslaughter, or assault." H.R. REP. NO. 1051, 100th Cong., 2nd Sess. 10 (1988) (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989)). Given the above, it is evident that neither Congress nor the Washington Legislature intended the inclusion of a gross misdemeanor provision in OSHA/WISHA to preclude Washington prosecutors from being able to bring homicide charges under state law against employers following workplace fatalities.

Finally, accepting Numrich's argument that the Legislature intended for RCW 49.17.190(3) to preclude prosecution under RCW

9A.32.070 in circumstances where both applied would require this Court to violate the general rule that statutes should not be construed in manner that leads to absurd results. Contreras, 124 Wn.2d at 747. In its briefing to the trial court, the State set forth a number of examples of the absurdities that would follow from adopting Numrich’s interpretation. Appendix at 40-41. Since these absurd results flow logically and inexorably from Numrich’s argument, this demonstrates that his interpretation is incorrect and should be rejected.

2. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(4)

Under RAP 2.3(b)(4), discretionary review may be accepted if “[t]he superior court has certified...that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” However, a trial court’s certification is not the end of the inquiry. Rather, this Court can and should conduct its own independent analysis of whether the requirements of RAP 2.3(b)(4) have been met. Moreover, as noted above, even if this Court concludes that they have, it can and should still exercise its own judgment as to whether discretionary review is appropriate and starts with a heavy presumption that it is not. RAP 2.3(b); Morning Star Boys Ranch,

156 Wn. App. at 462; In re Grove, 127 Wn.2d at 235. Here, despite the trial court’s certification, Numrich has failed to establish that this matter actually meets the requirements of RAP 2.3(b)(4).

As an initial matter, Numrich has not shown that the trial court’s decision involves a legal question as to which there is a substantial ground for a difference of opinion. The law regarding the “general-specific rule” and how it is used to analyze two statutes is well settled. Here, as discussed at length above, the trial court’s decision was correct under that law. Similarly, as discussed above and in even more detail in the State’s Answer To Statement Of Grounds For Direct Review, Gamble’s applicability to second-degree manslaughter flows logically from the analysis in Gamble itself and has been accepted by virtually every legal authority that has reviewed the matter.⁹ While Numrich is able to articulate arguments as to why he believes the trial court was incorrect, the rule requires more. The phrase “substantial ground for difference of opinion”—as used in RAP 2.3(b)(4)—does not simply mean that the petitioner disagrees with the lower court and/or has come up with an

⁹ The only contrary authority cited by Numrich is Justice Chambers’s concurring opinion in Gamble itself. MDR at 19-20; SOG at 12. With all due respect to Justice Chambers, this concurrence is of limited utility and authority on the point as it consists of little more than a summary statement without any supporting analysis or citation to other authority and was—self-evidently—not the conclusion adopted by the majority of this Court. 154 Wn.2d at 476 (Chambers, J., concurring).

interesting argument or legal theory as to why the court was wrong. Rather, it generally implies the existence of “two different, but plausible, interpretations of a line of cases” that generally manifests itself as an existing conflict in the appellate case law. Klamath Irr. Dist. v. United States, 69 Fed. Cl. 160, 163 (2005).¹⁰ Numrich cites to no such legal background for this case, nor is the State aware of any.

Moreover, Numrich has failed to show that discretionary review will materially advance the termination of the litigation. Even if this Court were to accept review and rule in Numrich’s favor, he will still face felony manslaughter charges. Numrich’s entire argument to this Court is that the State is precluded from prosecuting him for *second-degree* manslaughter. By its own terms Numrich’s argument does not apply to *first-degree* manslaughter. Here, the State intends to add a count of Manslaughter in the First Degree to the charges against Numrich.¹¹ The State’s motion to amend the Information is in the process of being scheduled and there is no basis to conclude that it will not be granted. As a result, despite Numrich’s assumption/assertion to the contrary,

¹⁰ The language of RAP 2.3(b)(4) was adapted from 28 USCA §1292(b) and federal cases interpreting that provision are instructive by analogy. Karl B. Tegland, 2A Washington Practice Series, Rules Practice, Part III, RAP 2.3 (7th ed.).

¹¹ This is addressed in more detail in the attached Declaration of Patrick Hinds. Appendix at 95-96.

regardless of this Court's ruling on the substantive issue, he will still face a felony manslaughter charge.

Furthermore, even if the State did not add first-degree manslaughter charges and even if this Court were to accept review and rule in Numrich's favor, he will still face criminal trial for violating RCW 49.17.190(3). Numrich attempts to address this point by asserting that the proceedings will be different for a case that involves only a gross misdemeanor. MDR at 20. But this argument fails for two reasons. First, it is disingenuous to suggest that the trial in this case will be substantially different if it involves only the violation of RCW 49.17.190(3). Here, both counts stem from the same series of events and the trial will be essentially identical—in terms of the witnesses called and the evidence adduced—regardless of whether it involves both counts or just Count 2. Indeed, even if both counts are tried, it will likely be the violation of RCW 49.17.190(3) that will require more effort, investigation, and litigation due to its rareness, technical nature, and the lack of established pattern jury instructions and other materials. Second, even were that not the case, Numrich's argument simply misses the point—even if this matter were to go to trial solely on the violation of RCW 49.17.190(3), *it would still be going to trial*. Given that fact alone, it cannot be said that interlocutory appeal will materially advance the termination of the litigation.

E. CONCLUSION.

Numrich asserts that “important judicial resources will be saved” if this Court grants discretionary review. MDR at 20. But that is simply not the case. Litigation in this matter will not end if this Court grants review because, regardless of its decision on the merits, the matter will still go back to the Superior Court for trial. If a conviction results, Numrich will doubtlessly appeal and the case will end up before an appellate court in the future. This is exactly the sort of piecemeal appellate litigation that makes this Court appropriately reluctant to grant discretionary review and “simply substitute two long and expensive appeals for two long and expensive trials.” Crooks, Discretionary Review at 1550. For this reason, as well as all of the other reasons discussed above, Numrich’s motion for discretionary review should be denied.

DATED this 18th day of October, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  _____

EILEEN ALEXANDER, WSBA #45636
PATRICK HINDS, WSBA #34049
Deputy Prosecuting Attorneys
Attorneys for Respondent
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CASE NUMBER: 18-1-00255-5 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
v.	)	No. 18-1-00255-5 SEA
)	
PHILLIP SCOTT NUMRICH,	)	INFORMATION
)	
	)	Defendant.
)	
)	

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse PHILLIP SCOTT NUMRICH of the following crime[s]: **Manslaughter In The Second Degree, Violation of Labor Safety Regulation with Death Resulting**, committed as follows:

Count 1 Manslaughter In The Second Degree

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, with criminal negligence did cause the death of Harold Felton, a human being, who died on or about January 26, 2016;

Contrary to RCW 9A.32.070, and against the peace and dignity of the State of Washington.

Count 2 Violation of Labor Safety Regulation with Death Resulting

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, was an employer, and did willfully and knowingly violate the requirements of RCW 49.17.060, and a safety or health standard promulgated under RCW Chapter 49, and a rule or regulation governing the safety or health conditions of employment adopted by the Department of Labor and Industries, to-wit: WAC 296-155-657, WAC 296-155-655 and that violation caused the death of one of its employees, to-wit: Harold Felton;

INFORMATION - 1

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CRIMINAL DIVISION
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Contrary to RCW 49.17.190 (3), and against the peace and dignity of the State of Washington.

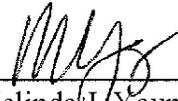
DANIEL T. SATTERBERG
Prosecuting Attorney

By:



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney

By:



Melinda J. Young, WSBA #24504
Senior Deputy Prosecuting Attorney

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

I, MARK JOSEPH, am a Certified Safety and Health Officer with the Washington State Department of Labor and Industries (“WSDLI”) based out of Bellingham Washington. I am authorized under RCW 49.17 to conduct investigation of workplaces for safety violations, and may under section .070 of the same title and chapter require the attendance and testimony of witnesses and the production of evidence under oath. As such, I have reviewed investigation documents for WSDLI Inspection No. 317939264. I have also conducted an additional investigation in conjunction with the Washington State Office of the Attorney General.

Based upon my review and additional investigation, I declare that the following is true and correct:

Inspection records created by WSDLI show that on January 26, 2016, Harold Felton, an employee of Alki Construction LLC (“Alki”), was completing work replacing a side sewer at a residential home in West Seattle. While Felton finished work in the 8-10 foot deep trench, a cave-in of soil covered him entirely and he perished. The WSDLI conducted an initial investigation into Alki because of Felton’s death. In August of 2017, I was assigned to conduct an additional investigation of Alki, a Washington State Limited Liability Company based in Seattle, WA, and its owner Phillip Numrich. Inspection records and records from the Washington Secretary of State show that Numrich owns, operates, and manages Alki and has done so since its inception. He is the sole owner, operator, and manager of Alki.

On August 28, 2017, I interviewed Jenna Felton, Lucy Felton, Bruce Felton, and Pamela Felton, who are Harold Felton’s widow, sister, father, and mother respectively. Jenna, Lucy, Bruce and Pamela all stated that, when Felton was 21 years old, he suffered a severe traumatic brain injury, which required major surgery and an extended recovery, including re-learning to speak and walk, among other ordinary life activities. After recovery and rehabilitation, Lucy stated that Harold Felton continued to have short-term memory issues. Felton’s family also confirmed that Numrich was a long-time friend of Felton’s, was present when he suffered his brain injury, and was aware of the nature and extent of Felton’s continuing issues.

Inspection records created by WSDLI show homeowners at 3039 36th Ave SW Seattle, WA 98126 (hereinafter “Subject Premises”), hired Alki/Numrich to replace their home’s side sewer pipe. Alki uses a “trenchless” sewer replacement technology wherein two trenches are dug where the sewer exits the home’s concrete foundation and the other where the sewer connects to city’s main sewer in the street. The old sewer is disconnected from the homes foundation and at the street, and a large cable is threaded through the old sewer line. On one end, the operator connects a large cable to the tip of a steel cone, and the other end of the cable is connected to a large hydraulic pulling machine. The operator then connects a new plastic sewer line to the back of the cone, engages the pulling machine, which simultaneously splits open the old sewer while pulling the new plastic sewer in its place. Once the new sewer is laid in place, workers

must enter the trenches and re-connect the new sewer to the home and the city's service connection. Felton was killed by the cave-in during this re-connection process.

Inspection records created by WSDLI show Alki/Numrich commenced work at the Subject Premise on or about January 16, 2016. Numrich and Felton dug one trench at the back corner of the home ("back trench") and another where the old sewer connected to the city's service ("front trench"). The back trench was approximately 8-10 feet deep, 21 inches wide, and six feet long. Because of some worker absences and equipment failure, Numrich put work on hold until January 26, 2016. Leaving a trench open for this long increases the risk of a collapse or cave-in.

Washington law and WSDLI regulations (WAC 296-155-657) require employers to design and implement protective systems for all trenches deeper than four (4) feet to prevent cave-in hazards to workers. Because trenches may vary in dimensions, employers determine how to shore each individual trench by consulting the shoring system's Tabulated Data ("Tab Data"). Alki used an aluminum hydraulic shoring system (tradename "SpeedShore") to shore the back trench.

WSDLI regulations and SpeedShore Tab Data require an employer to determine the soil type or types in which the excavation is made using a recognized soil classification method. Different soil types are more stable or less stable when excavated and require more shoring if they are a less stable soil type and less shoring if they are a more stable soil type. The initial WSDLI investigation confirmed that the soil type at the Subject Premises was "Type C" soil, which is the least stable type of soil and which requires the most rigorous shoring standard per WSDLI regulations and SpeedShore's Tab Data.

In addition, Washington law and WSDLI regulations (WAC 296-155-655) require that a "competent person" inspect any trenches, the adjacent areas, and the protective systems in the trench for evidence of situations that could result in cave-ins. "Competent person" is a legal term defined in the WACs. WAC 296-155-650 defines a "competent person" as someone "who can identify existing or predictable hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees." The provision also requires that the "competent person" be someone who has the "authorization or authority by the nature of their position to take prompt corrective measures to eliminate them." Inspections by the "competent person" must be made daily prior to the start of any work in the trench and must be repeated after every rainstorm or other hazard increasing occurrence. If the "competent person" sees evidence of a situation that could result in a possible cave-in or other hazard, they must remove any employees from the trench until necessary precautions have been taken to ensure their safety. Numrich was the only "competent person" at the Subject Premises during the entire project and on the day when Harold Felton was killed.

During the initial WSDLI investigation, Numrich engaged in a voluntary interview with WSDLI, where he confirmed that he knew the soil at the Subject Premises

was “Type C.” Numrich also indicated that he was very concerned with safety and was aware of the requirements in place for protection of workers in trenches.

On November 1, 2017, I interviewed Maximillion Henry, Felton’s co-worker at Alki and the only other person who worked on the Subject Premises other than Numrich and Felton. Henry stated that Felton and he arrived at the Subject Premises on the morning of January 26, 2016. The trenches at the subject premises had been “open” (previously dug by Numrich and Felton, and left in that condition) for approximately ten days. Henry also reported that it is very unusual for a trench to be open more than 2-3 days, and that the longer a trench is “open” the less stable it becomes. Henry also stated that it had been raining for several days prior to January 26, 2016; a fact that I corroborated by examining regional atmospheric data and regional precipitation records. Soil saturated by water is less stable than when dry and, therefore, is more prone to collapse or cave-in.

Henry stated during his interview that the trenchless sewer replacement process vibrates the ground when the steel cone splits open the old sewer pipe and the vibrations further destabilize trenches dug during the sewer replacement process. Henry reported that the soil type in and around the Subject Premises was widely known in the sewer replacement industry to be Type C soil.

During his interview, Henry also indicated that Felton had a history of work accidents, which he became aware of after Felton’s death. Henry stated that it was Numrich who had informed him of Felton’s history of accidents. Henry also stated that Felton was often not aware of his surroundings, and that if Henry knew of his history of work accidents he “never would have had [Felton] helping me.”

The WSDLI investigation and the Henry interview show the Subject Premises had two SpeedShore protective shores installed in the back trench. Henry reported during his interview that Numrich and Felton placed two shores in the back trench when they initially dug it. One of the shores was installed more than four feet above the bottom of the trench – which is prohibited by both WSDLI regulation and SpeedShore Tab Data. Both WSDLI regulation and SpeedShore Tab Data show the back trench required a minimum of four shores based upon the trench dimensions, and soil type alone. As a result, the shoring in place in the trench at the Subject Premises was wholly inadequate and, based on Numrich’s status as the “competent person” and his statements during his interview that he was aware of trench safety issues, he should have known that the shoring was inadequate.

In his interview, Henry reported that Felton used a vibrating hand tool (tradename “Sawzall”) while in the back trench for several minutes after the new sewer was positioned and while connecting it to the home’s service. Numrich was present at the jobsite at the time and he and Henry noted both that Felton was using a vibrating tool in the trench and that doing so increased the risk of trench collapse. Numrich did not intervene to stop Felton from using the Sawzall. Instead, Numrich left the jobsite to buy

lunch for all three so that they could eat after Felton and Henry finished attached the sewer.

In his interview, Henry also indicated that Numrich was the “competent person” for the project at the Subject Premises. Neither Henry nor Felton had the requisite knowledge or authority. Henry was not sure whether Numrich inspected the back trench at the beginning of the day prior to Felton entering it to work. However, both the process of pulling the new sewer pipe into place and Felton’s use of the Sawzall tool in the trench vibrated the ground, which increase the risk of a cave-in. Numrich was well aware that the vibrations caused by either the use of vibrating tools or by the pipe replacement process itself would destabilize a trench because Numrich had told Henry this shortly after Henry started working for Alki. Despite this, Numrich did not re-inspect the back trench after either event. Instead he allowed Felton to continue working in the trench while he left the Subject Premises to buy lunch.

According to Henry, Felton was using the Sawzall in the back trench at approximately 10:30 am on January 26, 2016. About 15 minutes later, the trench collapsed, covering Felton and killing him.

In the course of my investigation, I reviewed the analysis of Erich Smith, trenching technical expert for WSDLI. Smith stated, based upon his experience, the SpeedShore Tab Data and WSDLI regulations, the soil type and conditions at the Subject Premise, and the trench dimensions, that a minimum of four shores should have been used on the long edge the back trench. I also reviewed the analysis of Gary Hicks, regional sales manager for SpeedShore. Hicks stated that four shores would be required on the long edge of the back trench and additionally that each of the four vertical sides of the trench should have been shored to make the trench safe for workers. In other words, the two short sides at either end of the trench should have been shored. Such additional shoring on the ends of a trench is referred to in the industry as “end shoring”. Henry stated during his interview that Alki/Numrich did not own end shoring, and that Henry was not familiar with it or and had never been trained in its use.

On November 17, 2017, an interview was conducted with Gregory Sobole, who is a 14-year firefighter with the Seattle Fire Department (SFD). Sobole is a member of the SFD technical rescue company (Rescue 1, Ladder 7, Aid 14). The technical rescue company responds to specialized incidents such as trench rescues. Sobole has responded to several actual trench cave-ins where he has successfully rescued workers. He also performs annual training with the technical rescue company in trench rescue, with includes hazard identification in trenches. Sobole has taught non-technical rescue company firefighters in basic trench rescue disciplines for ten (10) years. Sobole responded to the Subject Premises, and directly participated in the attempted rescue of Felton by climbing into the back trench during rescue efforts. Based upon his experience and education, Sobole stated that the back trench was not properly shored and was not a safe area to work in. Sobole also noted that there were a number of factors that made the trench more dangers, including the facts that the soil was saturated and had been previously disturbed.

Based on the foregoing, there is evidence that Numrich, as owner of Alki, knowingly failed to properly shore the back trench at the Subject Premise in accordance with WSDLI regulations or with SpeedShore manufacture's Tab Data. In failing to do so, Numrich ignored aggravating factors such as soil saturation, the extended duration the trench was open, and the use of vibrating tools in the back trench. In addition, Numrich, as the "competent person" in charge of safety at the jobsite failed to inspect the trench for hazards as required and failed to remove Felton from the trench until precautions had been taken to ensure his safety. In this context, Numrich's conduct substantially deviated from any known or recognized safety standard and from the standard of care that any reasonable person would exercise in the same situation. Felton died as a result of Numrich's criminal negligence.

Based on all of the above, there is probable cause to believe that Phillip Numrich committed the crime of Manslaughter in the Second Degree within King County in the State of Washington. There is also probable cause to believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting within King County in the State of Washington in violation of RCW 49.17.190.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge. Signed and dated by me this 5th day of JANUARY 2018, at Bellingham, Washington.



Mark Joseph, Certified Safety Health Officer
Washington State Department of Labor & Industries



Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

Labor & Industries Division

800 Fifth Avenue • Suite 2000 • MS TB-14 • Seattle WA 98104-3188 • (206) 464-7740

MEMORANDUM

DATE: December 8, 2017

TO: Melinda Young, Patrick Hinds

FROM: Cody L. Costello, AAG; Martin Newman, AAG; Mark Joseph, Inspector

SUBJECT: **Joint Investigation of Alki Construction**

This investigation of Alki Construction and its owner Phil Numrich stems from a work related fatality occurring on January 26, 2016. This memorandum, investigation documents and attached interview transcriptions¹ are the joint product of this Office and that of the King County Prosecutor's Office. The following information is an overview of investigation methodology, list of interviewees and potential witnesses, and contains a brief recitation of salient facts and circumstances surrounding the work related fatality. This memorandum is not intended to capture all relevant facts or present a complete analysis of this investigation. For a complete recitation of facts and information, please see King County Prosecutor's Packet (KCPP).

I. INVESTIGATION METHODOLOGY

The KCPP contains all documents reviewed to date by Department investigator Mark Joseph, and Assistant Attorney Generals Cody L. Costello and Martin Newman. For record purposes, the date, time, and location of all interviews were noted at the time of the interview.

¹ An electronic copy of all interview transcripts and investigation documents (KC Prosecutor's Packet) was provided to King County Prosecutor's office on 11/27/17. Citations to interview transcripts are noted by abbreviating the interviewee's initials, "Tr." and the transcript page number. Citation to recorded interviews are noted by abbreviating the interviewee's initials, "Rec." and the hour and minute "HH:MM:SS". Citations to investigation documents are noted by "AI" followed by bates numbering found in the upper middle part of each page.

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All interviews were recorded with the permission of the interviewee. All recorded interviews were transcribed, excepting only the interview of Lt. Spencer Nelson (11/3/17) and Greg Sobole (11/17/17), both employees of the Seattle Fire Department at the time of the interview. Original recordings have been provided along with the KCPP. Seattle Fire Department Incident Photos (AI 237-350) are arranged in date/time taken format. Originals are available either from this office upon request, or from the Seattle Fire Department's Public Disclosure Officer Evan L. Ward (evan.ward@seattle.gov). Request should specify incident report #F160009889 (see also AI 0223-36). Contact information for interviewees and witnesses is listed in endnotes corresponding to each person. The list of interviewees and witnesses reflects individuals who this investigation deemed priority witnesses, but is not necessarily comprehensive. For all potential witnesses see KCPP.

II. INTERVIEWEES AND WITNESSES

A list of interviewees or persons related to this investigation, and the Department of Labor & Industries investigation is described below.

1. Related Persons and Interviewees:

- Harold Felton (deceased): employee of Alki Construction LLC;
- Max Henryⁱ (deceased's co-worker): employee of Alki Construction.
- Phillip Numrichⁱⁱ (deceased's employer): owner of Alki Construction *not interviewed*.
- Lucy Feltonⁱⁱⁱ (deceased's relative): Harold Felton's sister
- Jenna Felton^{iv} (deceased's relative): Harold Felton's wife
- Pamela Felton^v (deceased's relative): Harold Felton's mother
- Bruce Felton^{vi} (deceased's relative): Harold Felton's father.
- Greg Sobole^{vii} (Seattle Fire Department): Fire Fighter (R1),

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- Paul Atwater^{viii} (Seattle Fire Department): Battalion Chief/Acting Safety Officer at incident.
 - Phillip Jose^{ix} (Seattle Fire Department): Deputy Chief of Operations
- 2. Other potential witnesses:**
- Javier Sarmiento^x (Department of Labor & Industries): Inspector
 - Erich Smith^{xi} (Department of Labor & Industries): Inspector
 - Gary Hicks (SpeedShore): SE Regional Sales Mgr.

III. FACTUAL BACKGROUND

On January 26, 2016, Alki Construction commenced the final stages of replacing a residential side sewer at 3039 36th Ave SW, in West Seattle. MH Tr. 5; AI 351, 353. Alki Construction is a Limited Liability Company managed and owned by Phillip Numrich. AI 363-80. The company's work at the time of the incident was primarily to repair or replace side sewers of residential homes. MH Tr. 5. Worker Harold Felton, while completing a connection of the new sewer service in a trench approximately 8-10ft deep, 6ft long, and 21in wide, was covered by a cave-in of Type C soil and perished. On site at the time of the cave-in was Max Henry, co-worker of Felton. Owner Phillip Numrich was onsite in the morning and immediately prior to the cave-in.

A. Victim Profile.

The victim, Harold Felton, was 33 years old, married (Jenna Felton), with one dependent (Grace Felton) at the time of his death. Felton had experience working for a plumbing company approximately 10 years before his death, but had not performed plumbing work in the interim. LF Tr. 5, 15. Before working for Alki Construction, Felton worked for a local print shop in West Seattle. LF Tr. 10. Felton suffered a substantial traumatic brain injury in August 16, 2000, which affected his memory and resulted in changes in his judgment. LF Tr. 6-7, 9, 45-46; JF Tr. 23.

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Felton stopped working in the plumbing industry because of his TBI. (PF Tr. 5); Felton just began working as an apprentice plumber when he suffered his TBI. Family members disputed that the changes to memory or judgment impeded Felton's ability to perform his work for Alki Construction. LF Tr. 38. However Henry, Felton's coworker, stated that Felton had a long history of work accidents, was often unaware of his surroundings, and if Henry knew of Felton's history of work accidents before January 26, 2016 he would "never had had [Felton] helping me." MH T. 27-28. Henry learned of Felton's work history from Numrich after the incident. MH Tr. 32, 83-84. Felton's primary job for Alki Construction was digging trenches, and connecting the newly laid sewer line to the home's existing system and/or street service. MH Tr. 54, 82 (see below for further discussion.) Felton was particularly skilled at making sewer service connections (also called "piping in"), which can be a difficult process that requires experience and practice. MH Tr. 83-84.

B. Side Sewer Replacement – "Trenchless" Technology.

Alki Construction is a sewer replacement company, and uses a method called "trenchless" sewer replacement. MH Tr. 5. The term is counterintuitive because a minimum of two trenches are dug – the first where the home's sewer exits the foundation of the house ("back" hole, MH Tr. 8), and the second where the sewer connects to the city's main sewer in the street ("front" hole, MH Tr. 9). The old sewer is then disconnected from the home's foundation and at the street, and a large cable is threaded through the old sewer. On one end, the operator connects the cable to a splitting "shark" cone, and the other end of the cable is connected to a large hydraulic pulling machine. MH Tr. 5-6; AI 0187-92. The operator connects a new plastic sewer line, consisting of several shorter pipes "fused" together, to the back of the splitting cone and engages the pulling machine, simultaneously splitting or "bursting" open the old pipe, while laying or "pulling" the new plastic pipe in its place. MH Tr. 5-6. The pulling process loosens and

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disturbs the soil as the old pipe is burst open. MH Tr. 38-39. After the new sewer pipe is in place, workers connect the new pipe to the home's connection, and to the main sewer service in the street. MH Tr. 16. The sewer line is then inspected (*see* AI 0357), and the trench filled in. The entire process can be reduced to four core activities: (1) trench digging; (2) set-up and operation of the hydraulic pulling machine; (3) fusing short pipe sections into one new sewer line; (4) connecting the newly laid sewer to the home's service and to the city's main sewer line. Of these core activities, Felton could dig trenches or connect the newly laid pipe to the home or main sewer. He could not operate the hydraulic pulling machine unsupervised, nor did he know how to fuse pipe. MH Tr. 82.

C. Soil and Trench Conditions Prior to Incident.

The trench dimensions at the jobsite were approximately 6 feet long, 21 inches wide², and 7-10 feet deep³ before the cave-in. MH Tr. 10-13. Three of the four sides of the trench were earth, while the fourth side was the concrete foundation of 3039 36th Ave SW. Felton and Numrich dug the trench a week and half before January 26, 2016. MH Tr. 57. During their initial investigation, Department investigators created a side and top view sketch of the trench post cave-in (AI 0057-58); the sketch shows approximate location of the shores placed by Alki Construction, the "dirt line" or topography of the soil post cave-in, and distance measurements.

A jobsite's environmental factors dictate trench-shoring requirements. Factors include soil condition and soil type, the depth of the trench, whether the soil was "previously disturbed", and surrounding geography of the trench location.

² See AI 0019

³ Henry states that before the cave-in, the bottom of the trench was sloped. MH Tr. 10. Henry saw Felton standing in the trench with his head "a foot, foot and half from the top." *Id.* The bid performed by Alki Construction specifies an 8ft trench. AI 0144.

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Normally a trench would be “open” (fully dug) for two to 3 days. MH Tr. 15. The longer a trench is open, the less stable it becomes. *Id.* The trench at 3039 36th Ave SW was open a week and a half, which is very unusual. *Id.* Department inspectors and Seattle Fire Department personnel designated the soil type at the worksite as “Type C” soil. AI 0039-44; *see also* WAC 296-155-66401. Type C soil is the least stable soil, is most prone to cave-in dangers, and requires the most rigorous shoring standard.⁴ The Department and SFD use visual observation, manual testing, and assumptive protocol⁵ to determine soil type. All three methods were used to categorize the soil type at the job site as Type C soil. Numrich was aware the soil at the job site was Type C soil, and the type of soil in that area is widely known in the industry community. MH Tr. 23.

Soil saturation is another factor that affects soil stability. It had been raining for several days before January 26, 2016. MH Tr. 15, 60; AI 0044-48, 185. Conservative estimates show rain fall of 3.24 inches in the 7 days leading up to and including January 26, 2016. AI 0185. Soil that is wet or saturated is much more likely to act as a fluid during a cave-in – flowing around and underneath barriers. GS Rec. 00:46:40-00:51:30; 01:15:30-01:16:30.

Alki Construction placed two SpeedShore brand shores against an 8ft by 4ft “fin board” in the trench to hold back the earth in the trench. AI 0057-58. Department inspectors and Seattle Fire Department universally agree that two shores were insufficient trench shoring based upon

⁴ WAC 296-155-657(3)(b)-(d) requires an employer to select and construct a protective system: in accordance with the tabulated data from the manufacturer’s shores being used (Option 2); from other similarly reliable tabulated data (Option 3); or otherwise approved by a registered professional engineer. Tabulated data for SpeedShores, the product used by Alki Construction, is found on at AI 0200 of the KCPP. Table VS-3 Type “C-60” Soil dictates that shoring in a 0-10ft trench shall be spaced no more than six feet horizontally, and four feet vertically. AI 0205. The bottom cylinder shall be a maximum of four feet above the bottom of the excavation. AI 0206 n.6. Examples of typical installation are found at AI 0207.

⁵ Soil that is previously disturbed is assumed to be Type C soil. In this circumstance, the soil was both assumed to be Type C because it was previously disturbed, and confirmed to be Type C by manual and visual testing by Department investigators.

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the trench dimensions, soil type, and water saturation levels. Gary Hicks, regional sales manager for SpeedShore opined as follows:

Due to the fact you are now jacking off the house foundation – this now becomes a site specific application from MFG Tab Data or your refer to what the OSHA requirements say. OSHA and MFG Tab Data is based off pressurizing off dirt walls, not basement walls. The question now become [sic] will the basement wall with stand [sic] as per OSIIA requirements the 18,000 pounds of minimum pressure required form hydraulic shoring.

See attached picture on shoring 4 sided pit application – you [sic] application *will require all 4 sides to be shored, you cannot leave vertical standing ends.*

If you could classify this as C60 soil and had soil walls on all 4 sides that you could pressure off of it would take from our Tab Data four hydraulic shores. Two shores in each direction, installed 2 feet from the top and the cylinder now [sic] more than 4 feet of the bottom.

AI 0153. (emphasis added).

Hicks states that because of the unusual shoring application (off of a cement foundation) the company's engineering data (Tab Data) could not apply, and stated that all four sides of the trench would need to be shored. If all four sides of the trench were dirt, the Tab Data for SpeedShore would require four hydraulic shores instead of the two shores placed by Alki Construction. The Department investigator Erich Smith reached the same independent conclusion when asked about shoring requirements for the trench. AI 0358-59.

This investigation has produced no plausible scenario where Alki Construction's shoring on January 26, 2016 was adequate under any known or recognized shoring standard.

D. Events Immediate Prior to and Including Incident.

Work began at the job site between 8:00am – 8:30am, when Henry and Felton arrived together. MH Tr. 43. Numrich arrived at approximately 8:30am – 9:00am. MH Tr. 52. The job was behind schedule after machine failures and worker (Henry's) sickness delayed work, and the

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home owners were frustrated. MH Tr. 62. Numrich begin fusing pipe sections together, which took approximately 45 minutes. At the same time Henry set the “plate” for the hydraulic pulling machine, which determines the angle the new pipe is pulled at. MH Tr. 45. After Numrich complete fusing, Henry, Felton and Numrich carried the new sewer line into position to prepare “pulling” the new line. MH Tr. 46. Once the new sewer was positioned, and the plate set, Henry started the hydraulic pulling machine, which took about 25 minutes to complete operation. Felton then entered the back hole to make the connection with home’s service. Felton used a vibrating tool (Sawzall) in the trench for several minutes. Numrich comment to Henry stating, “he’s vibrating the heck out of the ground.” MH Tr. 39. Numrich was aware that vibrating tools would disturb the ground in a trench and that their use “wasn’t a good thing.” MH Tr. 42. Numrich made no attempt to stop Felton from operating the vibrating tool in the trench. MH Tr. 41-42. Numrich then left the jobsite to buy lunch for himself and his workers. The time was approximately 10:25

At approximately, 10:30am – 10:35am Henry checked on Felton at the back hole. MH Tr. 9. Felton replied that everything was going fine. *Id.* Henry left to “bed” his pipe in the front hole, which is to secure the newly connected sewer line by re-burying it. MH Tr. 10. After five minutes, Henry went back to check on Felton, and realized that Felton had been buried in the trench. MH Tr. 10. Henry first called Numrich, then 911. MH Tr. 91. Seattle Fire Department dispatched at 10:48am, with first units on scene at 10:53am. AI 0229. At 11:20am, rescue operations transition to recovery. AI 0231. The magnitude of earth that caved-in was so large that Felton’s body was not recovered from the trench until 2:15pm, even with the assistance of industrial vacuum trucks. AI 0233.

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E. Numrich Grossly Deviated from Industry Practice By Failing to Properly Shore a Trench He Knew Felton Would Be Working In.

Based upon the above facts and those in the KCPP, this Office believes that Numrich failed to be aware of or ignored the substantial risk that the trench at 3039 36th Ave SW would cave-in, that he failed to appropriately shore the trench per industry standard, and that his conduct in its totality constituted a gross deviation from the industry standard of care. Several facts establish a patent risk of collapse and Numrich's knowledge of those risks:

- (1) The soil type at the job site was Type C soil, which is the least stable and most prone to collapse;
- (2) The soil was heavily saturated from several days of rain, making the trench more prone to collapse;
- (3) The trench had been "open" for approximately 10 days (1 ½ weeks), making the trench more prone to collapse;
- (4) The trench was disturbed from vibrations of the hydraulic pulling machine, and of a Sawzall cutting tool;
- (5) Vibrations within a trench increase the likelihood of trench collapse;
- (6) The shoring in the trench grossly deviated from the industry standard, by:
 - a. Failing to use at a minimum four hydraulic shores;
 - b. Failing to place two shores a maximum four feet from the bottom of the trench, and two shores two feet from the top of the trench;
 - c. Failing to shore the length of the trench where Felton was working to connect the new service (*see* AI 0057-58);
- (7) The failure to properly shore the trench led to its cave-in;
- (8) Numrich was aware that the soil was Type C;

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- (9) Numrich knew that Felton would be working in and around the trench because the connection work that Felton performed was one two tasks that Felton was trained to do;
- (10) Numrich was aware of the soil saturation conditions;
- (11) Numrich knew that Felton operated a Sawzall in the trench immediately prior to its collapse;
- (12) Numrich knew that the operation of a vibrating tool would increase the risk of a trench collapse;
- (13) Numrich knew that Felton had a history of work related accidents and a previous traumatic brain injury.

IV. CONCLUSION

This Office remains available to answer questions regarding this investigation, to provide additional summary or explanation of the above factual recitation, or to further discuss investigation methodology. Department investigators or personnel may be contacted care of:

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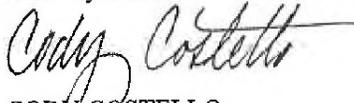
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DATED this 8th day of December, 2017.

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ⁱⁱ Mr. Numrich was not contacted by this office during any point in this investigation.

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CASE NUMBER: 18-1-00255-5 SEA

1 *The Honorable John Chun*
2 *Hearing Date: June 26, 2018 at 1:30 p.m.*
3 *With Oral Argument*

6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7	THE STATE OF WASHINGTON,)	
)	
8		)	No. 18-1-00255-5 SEA
)	
9)	
		)	STATE'S RESPONSE TO
10	PHILLIP NUMRICH,	)	DEFENDANT'S MOTION TO
		)	DISMISS COUNT 1
11)	
)	

12
13 **I. INTRODUCTION**

14 At all times relevant to this motion, the defendant, Phillip Numrich, owned and operated a
15 small plumbing and sewer repair business. The victim, Harold Felton, was Numrich's employee
16 and friend. On January 26, 2016, Numrich's negligence caused Felton's death when a trench Felton
17 was working in collapsed, burying him alive under more than six feet of wet dirt. The weight of the
18 dirt crushed Felton and he died of compressional asphyxia.

19 The State has charged Numrich with two crimes for causing Felton's death: Manslaughter
20 in the Second Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation
21 with Death Resulting under RCW 49.17.190(3) (Count 2). Numrich has moved to dismiss Count 1,
22 arguing that the State is precluded from prosecuting him for manslaughter based on the "general-
23 specific rule" and principles of equal protection. For the reasons outlined below, this court should
deny Numrich's motion.

STATE'S RESPONSE TO DEFENDANT'S
MOTIONS TO DISMISS COUNT 1 - 1

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Seattle, Washington 98104
(206) 296-9000
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1 **II. FACTS**

2 **A. SUBSTANTIVE FACTS**

3 The facts below are all taken from the discovery already provided to the defense or from
4 publicly available sources. For purposes of the motions before this court, Numrich has not
5 challenged the sufficiency of the evidence nor moved to suppress any. The State will, therefore,
6 confine itself only to those facts particularly relevant to the motions actually before the court.

7 The defendant, Phillip Numrich, is the sole owner, operator, and manager of Alki
8 Construction LLC (hereinafter “Alki Construction”). At the times relevant to this case Alki
9 Construction was doing business as “Alki Sewer.”

10 The victim, Harold Felton, was Numrich’s employee and a long-time friend. In 2000,
11 Felton had an accident that resulted in a significant traumatic brain injury, which affected his
12 memory and judgment. Numrich was with Felton when he suffered the injury and was aware of its
13 long term impacts on him. Felton worked for Numrich off and on over the years following his
14 accident. At the time of his death, Felton had been working for him for several months.

15 In early 2016, Numrich bid on and won the job to replace a sewer line at a residence in
16 West Seattle. Work on the project began the week of January 16, 2016. The process used by
17 Alki Construction on this project is referred to as a “trenchless” sewer replacement. Using this
18 method, companies like Alki Construction can avoid having to dig a trench down to the existing
19 sewer pipe for its entire distance. Instead, only two smaller trenches are generally required—one
20 at either end of the pipe to be replaced. A hydraulic machine is then used to pull a new pipe
21 through the old one, which simultaneously bursts the old pipe and lays the new pipe into place.
22 For the West Seattle project, two trenches were dug at the residence—one where the sewer line
23 connected to the house and one where it connected to the sewer main under the street. The

1 trench nearest the house—the one where Felton died—was approximately seven to ten feet deep,
2 21 inches wide, and six feet long.

3 With a trench of this size, there is a very real risk that the trench can cave-in and injure or
4 kill a worker inside. There are a number of factors that influence how prone to collapse a given
5 trench is. These include the soil condition and type, the depth of the trench, whether the soil was
6 previously disturbed, and the surrounding geography of the trench location. In this case,
7 virtually all of these factors increased the danger of collapse. In addition, a number of other
8 factors that increase the likelihood of a collapse were also present on the day Felton was killed.
9 In particular, the soil was heavily saturated from several days of rain and the trench itself had
10 been “open” for approximately 10 days (i.e. it had been dug 10 days earlier).¹

11 Because of the danger posed to workers in trenches, Washington has an extensive set of
12 laws and regulations that apply to trenching activities on job sites. For a trench the size of the
13 one at issue in this case, these regulations require, *inter alia*, that a system of shores be put into
14 place to pressurize and stabilize the soil to prevent a cave-in. Felton and Numrich did place
15 shores in the trench in question, but the shoring Numrich provided was significantly below the
16 level required by regulations. For a trench of this size, the regulations mandated a minimum of
17 four shores along the length of the trench; only two were actually installed. Moreover, while the
18 regulations required shoring at either end of the trench, no endshores were actually installed. In
19 addition, while the regulations specify that at least two of the four shores be installed no more
20 than four feet above the bottom of the trench, here the two shores actually installed were both
21 above that height.

22
23

¹ As a general matter, the longer a trench is left “open,” the more likely it is to collapse.

1 Also included in Washington regulations is the requirement that a “competent person”
2 inspect any trenches, the adjacent areas, and any protective system installed in the trenches for
3 evidence of situations that could result in a cave-in. “Competent person” is a term defined by
4 WAC 296-155-650 as someone “who can identify existing or predictable hazards in the
5 surroundings that are unsanitary, hazardous, or dangerous to employees.” The provision also
6 requires that the “competent person” be someone who has the “authorization or authority by the
7 nature of their position to take prompt corrective measures to eliminate them.” Inspections by
8 the “competent person” must be made daily prior to the start of any work in the trench and must
9 be repeated after every rainstorm or other hazard-increasing occurrence. If the “competent
10 person” sees any evidence of a situation that could result in a possible collapse or other hazard,
11 they must remove any employees from the trench until necessary precautions have been taken to
12 ensure their safety. Numrich was the only “competent person” at the West Seattle job site during
13 the entire project.

14 On January 26, 2016, Numrich, Felton, and Maximillion Henry (Numrich’s other
15 employee) were at the job site in West Seattle. This was scheduled to be the last day of work on
16 the project and Numrich was under pressure from the home owners to get it completed. Shortly
17 after 10:00 a.m., the new pipe had been pulled through and Felton was in the trench closest to the
18 house working to connect the new pipe to the house’s plumbing. During that time, Felton was
19 using a Sawzall to cut something down in the trench. A Sawzall is an electric saw that uses a
20 reciprocating blade driven by a motor. Due to the action of the motor and blade, such a saw can
21 cause extensive vibrations in the ground when it is used to cut an object—such as a pipe—that is
22 touching or embedded in the ground.²

23 _____
² Ground vibrations serve to disturb the soil, which makes a trench collapse more likely.

1 Numrich was well aware that Felton’s use of a vibrating tool inside the trench was
2 dangerous and increased the risk of a trench collapse. Moreover, both Numrich and Henry
3 commented on Felton’s use of the tool and the danger it posed. However, despite being the
4 owner of the company, Felton’s friend, the person in charge, and the “competent person” at the
5 scene, Numrich made no effort to stop Felton from using the tool and did not re-inspect the
6 trench after Felton was done. Instead, Numrich left the job site to buy lunch.

7 Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton alive
8 under approximately seven feet of wet dirt. When Henry discovered the cave-in, he first
9 attempted to dig down to Felton. When Henry was unable to reach him, he called Numrich and
10 then 911. The Seattle Fire Department arrived at the scene shortly thereafter, but rescuers were
11 unable to free Felton in time to save him. The collapse of the trench was so extensive and
12 complete that—even using industrial vacuum trucks—it took rescuers about three and a half
13 hours to free Felton’s body.

14 Specific and/or additional facts are included and discussed below as relevant. The State
15 also incorporates by reference the facts as set forth in the Certification for Determination of
16 Probable Cause prepared by Mark Joseph and the December 8, 2017 Memorandum prepared by
17 staff of the Labor and Industries Division of the Office of the Attorney General. Copies of both
18 of those documents are attached as Appendices A and B.

19 **B. PROCEDURAL FACTS**

20 The Washington State Department of Labor and Industries (WSDLI) initiated an
21 investigation of the incident on the same day that Felton died. During this process, investigators
22 discovered that Numrich had violated (and/or allowed the violation of) numerous safety
23 regulations at the job site. At the conclusion of this initial investigation, WSDLI cited Numrich

1 for a number of willful and serious violations and fined him \$51,500. Through the subsequent
 2 appeals and complaint reassumption process, Numrich and WSDLI reached a settlement
 3 agreement whereby the monetary penalties were reduced by half (to \$25,750). WSDLI's
 4 agreement to such a reduction would usually be predicated upon an employer agreeing to correct
 5 the safety violations identified during the investigation. However, based on Numrich's
 6 representations that Alki Construction would cease operations once he had paid the penalty
 7 imposed by the department and that he did not currently have any employees, WSDLI did not
 8 require such corrective actions as a condition of the settlement.³

9 Subsequent to the settlement agreement between WSDLI and Numrich, the case was
 10 presented to the King County Prosecuting Attorney's Office (KCPAO) as a potential criminal
 11 matter. KCPAO concluded that Numrich had potentially committed criminal violations of the law
 12 and WSDLI reopened its investigation. KCPAO ultimately filed the charges at issue in this case
 13 (and in this motion) on January 5, 2018. A copy of the Information is attached as Appendix C.

14 Specific and/or additional facts are discussed below as relevant.

15
 16 **III. ARGUMENT**

17 **THIS COURT SHOULD DENY NUMRICH'S MOTIONS TO DISMISS COUNT 1**

18 In his memorandum in support of his motion,⁴ Numrich sets forth two arguments in support
 19 of his motion to dismiss Count 1. For the reasons discussed below, this court should reject both
 20 arguments and deny Numrich's motion.

21
 22 ³ At this time, despite what Numrich indicated to WSDLI employees, it appears that he has continuously operated Alki Construction and had employees since shortly after the settlement agreement was reached.

23 ⁴ The "DEFENDANT'S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER) AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF" was filed on April 30, 2018 and will hereinafter be cited to as "Def. Memo."

1 **A. THE “GENERAL-SPECIFIC RULE” DOES NOT REQUIRE DISMISSAL**
2 **OF COUNT 1**

3 **1. Applicable Law**

4 It is well-established rule of statutory construction that when a defendant’s actions violate
5 both a specific and a general statute, the defendant should generally be charged under the former
6 rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (citing State
7 v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). However, this rule is subject to important
8 limitations.

9 As an initial matter, the rule is only intended to be used in situations in which “the two
10 statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized.”
11 State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007) (quoting In re Estate of Kerr, 134
12 Wn.2d 328, 343, 949 P.2d 810 (1998)). If the two statutes do not relate to the same subject
13 matter and/or can be harmonized, the rule simply does not apply. Id.; State v. Becker, 59 Wn.
14 App. 848, 852, 801 P.2d 1015 (1990). Similarly, the rule only applies when the two statutes are
15 actually "concurrent." Shriner, 101 Wn.2d at 580. In this context, the fact that a specific statute
16 contains additional elements beyond the general statute is not relevant to whether they are
17 concurrent. State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982). However, there is a
18 fundamental difference between: (1) one statute requiring *additional* elements beyond another
19 (the former being more specific than the latter); and (2) two statutes that require *different*
20 elements (and are, thus, simply different offenses). As common sense indicates, where offenses
21 have different elements, they are not concurrent; rather, they are simply different statutes
22 criminalizing different conduct. See State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275
23 (1983). Put another way, where two crimes have different elements and criminalize different
conduct, the underlying statutes address different subject matters and do not conflict.

1 For purposes of the “general-specific rule,” statutes are concurrent when “the general
 2 statute will be violated in each instance in which the special statute has been violated.” Shriner,
 3 101 Wn.2d 580. As a result, the test for concurrency requires this court to “examine the
 4 elements of each statute to determine whether a person can violate the special statute without
 5 necessarily violating the general statute.” State v. Heffner, 126 Wn. App. 803, 808, 110 P.3d
 6 219 (2005). If it is possible to violate the “specific” statute without violating the “general” one,
 7 the two statutes are not concurrent and the “general-specific rule” does not apply. In this
 8 context, whether the defendant’s actions in a specific case violate both statutes is irrelevant.
 9 Rather, the question is whether each and every violations of the “specific” statute will
 10 necessarily also violate the “general” one. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d
 11 630 (2006); Heffner, 126 Wn. App. at 808.

12 Finally, in applying the “general-specific rule” in a specific case, courts must keep in
 13 mind that the rule itself is simply a canon of statutory construction used to ascertain legislative
 14 intent.⁵ See Conte, 159 Wn.2d at 803; Heffner, 126 Wn. App. at 807; State v. Walker, 75 Wn.
 15 App. 101, 105, 879 P.2d 957 (1994); State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294
 16 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at
 17 580; Cann, 92 Wn.2d at 197. In particular, the “general-specific rule” is specifically used to help
 18 determine whether the Legislature intended to preclude the State from charging the more
 19 “general” statute when the more “specific” one also applies. See Conte, 159 Wn.2d at 803;

20 _____
 21 ⁵ In his memorandum, Numrich indicates that the “general-specific rule” implicates questions of equal protection.
 22 Def. Memo. at 8. This is incorrect. Numrich relies on State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970) for this
 23 proposition. Id. However, as recognized in Washington case law, Zornes was abrogated by the decision of the
 United States Supreme Court in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).
 See City of Kennewick v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991); State v. Wright, 183 Wn. App.
 719, 730-32, 334 P.2d 22 (2014). As a result, neither the “general-specific rule” nor the choice of the State to
 prosecute one concurrent statute over another implicates a defendant’s right to equal protection. Wright, 183 Wn.
 App. at 730-32; Fountain, 116 Wn.2d at 192-93.

1 Walder v. Belnap, 51 Wn.2d 99, 101, 316 P.2d 119 (1957). In applying this particular canon of
 2 statutory construction, however, Washington courts have held it must be used with care since
 3 “the ‘general-specific’ rule should be applied to preclude a criminal prosecution *only where the*
 4 *legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815 (emphasis added).

5 **2. The “General-Specific Rule” Does Not Preclude The State From**
 6 **Prosecuting Numrich For Manslaughter**

7 Numrich argues that prosecuting him for manslaughter as charged in Count 1 violates the
 8 “general-specific rule” and that he can only be prosecuted for violating the statute charged in Count
 9 2. Def. Memo. at 8-13. This argument should be rejected for a number of reasons.

10 **a. The “general-specific rule” does not apply to the two statutes at**
 11 **issue in this case**

12 The “general-specific rule” only applies when two statutes address the same subject matter
 13 and conflict to the point that they cannot be harmonized and/or when they are “concurrent.” Here,
 14 neither is the case.

15 *i. The two statutes do not address the same subject matter and*
 16 *do not conflict to the point that they cannot be harmonized*

17 As noted above, the “general-specific rule” is a canon of statutory construction that is only
 18 applied when two statutes address the same subject matter and conflict to the point that they cannot
 19 be harmonized. Conte, 159 Wn.2d 810; Becker, 59 Wn. App. 852. One way of determining this is
 20 to examine the elements of the statutes. If the statutes create crimes with different elements, they
 21 are simply different statutes that criminalize different conduct and the rule does not apply.
 22 Farrington, 35 Wn. App. at 802. That is exactly the situation presented in this case.

23 Under RCW 9A.32.070, “a person is guilty of manslaughter in the second degree when,
 with criminal negligence, he or she causes the death of another person.” Thus, a violation of the
 statutes requires proof that: (1) the defendant engaged in an act or acts with criminal negligence;

1 (2) the decedent died as a result of the defendant's negligent acts; and (3) any of these acts
 2 occurred in the State of Washington. RCW 9A.32.070; WPIC 28.05; WPIC 28.06. In the
 3 context of second degree manslaughter, a person acts with criminal negligence when "he or she
 4 fails to be aware of a substantial risk that [death] may occur and his or her failure to be aware of
 5 such substantial risk constitutes a gross deviation from the standard of care that a reasonable
 6 person would exercise in the same situation." RCW 9A.080.010 (1)(d); 2016 Comment to WPIC
 7 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005)). As a result, the
 8 crime of second degree manslaughter requires proof that the defendant had the mental state of
 9 "negligence" and proof that this mental state specifically related to the risk of death to the
 10 decedent. Gamble, 154 Wn.2d at 468-69.

11 Under RCW 49.17.190(3), by contrast, a person is guilty of Violation of Labor Safety
 12 Regulation with Death Resulting if the person is an employer:

13 who wilfully and knowingly violates the requirements of RCW 49.17.060, any
 14 safety or health standard promulgated under this chapter, any existing rule or
 15 regulation governing the safety or health conditions of employment and adopted
 by the director, or any order issued granting a variance under RCW 49.17.080 or
 49.17.090 and that violation caused death to any employee.

16 Thus, a violation of the statute requires proof that: (1) the defendant was the employer of the
 17 decedent; (2) the defendant willfully and knowingly violated one of the enumerated statutes,
 18 regulations, rules, or orders; (3) that the violation caused the decedent's death; and (4) that any of
 19 these acts occurred in the State of Washington. Id. In this context, a person acts willfully⁶ and
 20 with knowledge "with respect to a [fact, circumstance, or result] when he or she is aware of that
 21 [fact circumstance or result]. It is not necessary that the person know that the [fact,
 22 circumstance, or result] is defined by law as being unlawful or an element of the crime." WPIC

23 _____
⁶ For purposes RCW 49.17.190(3), the requirement of willfulness is satisfied if the employer acts knowingly. RCW
 9A.08.010(4); WPIC 10.05.

1 10.02; RCW 9A.08.010(1)(b). As a result, the crime of Violation of Labor Safety Regulation with
2 Death Resulting requires proof that the defendant had the mental state of “knowing” and proof that
3 this mental state specifically related to violating a health or safety provision. RCW 49.17.190(3).

4 Numrich argues that proof of the *mens rea* at issue in RCW 49.17.190(3) (willful and
5 knowing) will necessarily establish proof of the *mens rea* at issue in RCW 9A.32.070 (criminal
6 negligence) because proof of a higher level of *mens rea* necessarily establishes proof of a lower
7 level. Def. Memo. at 10-11. But this argument oversimplifies the analysis and ignores the key
8 point that the concept of *mens rea* involves both the level of mental state (e.g. intentional versus
9 knowing versus negligent) and the object of the mental state (e.g. the intent to do something in
10 particular). For two crimes to have the same *mens rea* element, both the level **and** the object of
11 the mental state must be the same. Thus, for example, although the crimes of theft and second
12 degree intentional murder require the same mental state (“intent”), the crimes still have very
13 different *mens rea* elements because the mental states are directed at different things—in theft,
14 the intent is to deprive another of goods or services; in second degree intentional murder, the
15 intent is to cause the death of another. RCW 9A.56.020; RCW 9A.32.050(1)(a). Similarly,
16 second degree intentional murder and second degree felony murder have different *mens rea*
17 elements for exactly the same reason. Although both crimes have a mental state of intent, the
18 object of the intent is different—in intentional murder the intent is to cause death whereas in
19 felony murder the intent is to commit a predicate felony. See State v. Armstrong, 143 Wn. App.
20 333, 341, 178 P.3d 1048 (2008).

21 In analytical frameworks similar to the “general-specific rule,” Washington courts have
22 recognized the legal import of crimes having mental states with different objects. For example,
23 the test for whether one crime is a lesser-included offense of another is very similar to the test for

1 the “general-specific rule.”⁷ In that context, courts have ruled—for example—that while second
 2 degree manslaughter is a lesser included offense of second degree *intentional* murder, it is not a
 3 lesser included offense of second degree *felony* murder. Gamble, 154 Wn.2d at 468-69. That is
 4 because the objects of the mental states for second degree felony murder and second degree
 5 manslaughter (intent vis-à-vis a felony versus negligence vis-à-vis a death) are different. Id.
 6 Because of that difference alone, the *mens rea* elements for the two crimes are so different that
 7 proof of one does not necessarily establish the other. Id.

8 Given all of the above, when the correct analysis of *mens rea* is properly applied to this case,
 9 it is clear that Manslaughter in the Second Degree and Violation of Labor Safety Regulation with
 10 Death Resulting have entirely different *mens rea* elements. A violation of RCW 9A.32.070 requires
 11 proof that the defendant negligently caused a risk of death to the decedent. In this context, whether
 12 or not the defendant violated a statutory duty may be relevant to that issue,⁸ but proof that he or she
 13 had any specific *mens rea* vis-à-vis such a violation is not required. On the other hand, a violation
 14 of RCW 49.17.190(3) requires proof that the defendant knowingly violated a health or safety
 15 provision. No proof is required that the defendant had any specific *mens rea* vis-à-vis the risk of
 16 death to the decedent. *Thus, not only do the two statutes have different levels of mental state,*
 17 *they have mental states that are about different things.* And, as discussed above, when this is the
 18 case, the *mens rea* elements are different. As a result, the elements of RCW 49.17.190(3) are
 19 different than the elements of RCW 9A.32.070 and proof of the former does not necessarily
 20 prove the elements of the latter.

21 _____
 22 ⁷ Both compare the elements of two offenses to determine whether proof of the elements of one crime necessarily
 establishes proof of all of the elements of another. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978);
Heffner, 126 Wn. App. at 808.

23 ⁸ Whether a defendant breached a statutory duty is relevant to whether he or she acted with criminal negligence, but
 is not conclusive on the issue. State v. Lopez, 93 Wn. App. 619, 970 P.2d 765 (1999).

1 at 808. Numrich has identified RCW 49.17.190(3) (Violation of Labor Safety Regulations with
 2 Death Resulting) as the specific statute and RCW 9A.32.070 (Manslaughter in the Second
 3 Degree) as the general. And here, despite Numrich’s assertion to the contrary,⁹ it is certainly
 4 possible to violate the “specific” without violating the “general.”

5 As an initial matter, as the analysis in the previous section describes, the two statutes
 6 have different elements. In relevant part, RCW 9A.32.070 requires the State to prove that the
 7 defendant acted with criminal negligence vis-à-vis the risk of the decedent’s death. The State is
 8 not required to prove that the defendant willfully and knowingly violated a health or safety
 9 regulation.¹⁰ RCW 49.17.190(3), in contrast, requires the opposite—the State must prove that
 10 the defendant willfully and knowingly violated a health or safety regulation, but need not prove
 11 that the defendant acted with criminal negligence vis-à-vis the risk of the decedent’s death. This
 12 difference in elements between the two statutes in and of itself demonstrates that it is possible to
 13 violate RCW 49.17.190(3) without also violating RCW 9A.32.070.

14 Moreover, the fact that it is possible to violate the former without violating the latter is
 15 also demonstrated by consideration of at least three hypotheticals.

16 First, an employer/foreman has a building crew working on a multi-story construction
 17 site and knows that he is required to provide a hard hat to each individual employee on the site
 18 pursuant to WAC 296-155-205. He also knows that his employees are allowed to—and
 19 generally do—remove their hard hats whenever there is no potential exposure to the danger of
 20

21 _____
⁹ Def. Memo. at 11.

22 ¹⁰ It is certainly true that, *in this case*, the fact that Numrich knowingly violated such regulations is part of the proof
 23 that he acted negligently. As noted above, however, the test for concurrency must be based on what is *possible*
 given the elements of the crime. Chase, 134 Wn. App. at 802-03; Heffner, 126 Wn. App. at 808. In that context, the
 specific facts of the instant case are irrelevant to that determination. Id.

1 flying or falling objects.¹¹ On a given day, although he knows that the regulations require it, he
 2 does not provide hard hats to all of his employees because he does not expect anyone to be doing
 3 any work that creates the potential for flying or falling objects and he expects that his crew will
 4 not wear them anyway. The employer does not realize, however, that the workmen of a different
 5 employer have inadvertently left tools unsecured on a surface on the top floor the previous day.
 6 On this day, the vibrations caused by his crew on the first floor cause the unsecured tools above
 7 to fall several stories and strike one of his employees in the head. The employee dies from a
 8 fractured skull.

9 Second, the employer/foreman of a logging crew knows that, under WAC 296-54-51160,
 10 he has a duty to provide leg protection (chaps) to all employees working on a downed tree who
 11 operate a chain saw *and* to ensure that his employees actually wear them. At the end of a day's
 12 work, an experienced employee notices that one more cut with a chainsaw needs to be made and
 13 heads back to a log to make it, shouting a quick explanation to the employer as he goes. In his
 14 haste, the employee, who has already removed his chaps, fails to put them back on. The
 15 employer does not notice that the employee has removed his chaps, but—knowing that the
 16 employee is experienced and only needs to make one more cut—does not actually confirm that
 17 he is wearing them. Something goes wrong, the chainsaw cuts the employee's femoral artery,
 18 and he bleeds to death.

19 In both of the above hypothetical scenarios, the employer-defendant would clearly have
 20 violated RCW 49.17.190(3). In both the defendant was the employer of the decedent, willfully
 21 and knowingly violated a regulation encompassed by the statute, and the decedent died as a

22 _____
 23 ¹¹ Under WAC 296-155-205(2), employees are required to have their hard hats on site and available at all times. An
 employee may remove his or her hard hat when there is no potential exposure to a hazard. WAC 296-155-205(3).
 However, both (2) and (3) deal with the obligation of the *employee* to *wear* a hard hat. Neither absolves the
employer of the obligation to provide an individual hard hat to all employees on the construction site under WAC
 296-155-205(1).

1 result. However, given the particular circumstances, no reasonable person would conclude that
2 either defendant had acted with criminal negligence in the sense that he failed to be aware of a
3 substantial risk that death would occur and his failure constituted a gross deviation from the
4 standard of care that a reasonable person would have exercised. As a result, neither defendant
5 would have violated RCW 9A.32.070.

6 Finally, the third hypothetical is—potentially—this case. Here, the evidence that
7 Numrich violated RCW 49.17.190(3) is virtually indisputable. As a result, should this case go
8 to trial, Numrich will almost certainly argue that, while he violated RCW 49.17.190(3), he did
9 not violate RCW 9A.32.070. And he will be allowed to make that argument precisely because it
10 is legally *possible* to be guilty of the former without being guilty of the latter.

11 Despite the above, Numrich asserts that it is impossible to violate RCW 49.17.190(3)
12 without also violating RCW 9A.32.070. Def. Memo. at 10-11. Numrich’s argument, however,
13 suffers from three fatal flaws.

14 First, Numrich’s entire argument is premised on the assertion that, because “knowing” is
15 a higher level mental state than “criminal negligence,” proof of the *mens rea* element in RCW
16 49.17.190(3) will necessarily prove the *mens rea* element of RCW 9A.32.070. Def. Memo. at
17 10-11. As described above, however, this assertion oversimplifies and mischaracterizes the
18 nature of the *mens rea* elements at issue in the two statutes. Here, because the *mens rea* elements
19 are aimed at different objects—in one statute the mental state must specifically be about the
20 violation of a health or safety regulation, in the other the mental state must specifically be about
21 the risk of death to another—proof of the former will not *necessarily* prove the latter.

22 Second, Numrich claims that “in each and every case that a person willfully or knowingly
23 fails to comply with the mandates of WISHA, it can be said that the employer has engaged in

1 negligent conduct or a gross deviation of the standard of care.” Def. Memo. at 11. But this
2 incorrectly conflates two separate things. Whether or not an employer has violated his duty of
3 care towards his employees is a separate question than whether or not a person has violated the
4 standard of care that a reasonable person would exercise to prevent the substantial risk of
5 wrongful death. As noted above, while a defendant’s breach of a statutory duty is relevant to the
6 issue of whether he acted with criminal negligence, as a matter of law it is not in and of itself
7 conclusive on the issue. Lopez, 93 Wn. App. 619.

8 Finally, Numrich asserts that “[i]t is impossible to envision a case where a defendant
9 might be guilty of [violating RCW 49.17.190(3)] but acquitted of the more general manslaughter
10 statute.” Def. Memo. at 11. As an initial matter, this is simply incorrect. As the first two
11 hypotheticals above indicate, such a scenario is certainly possible.¹²

12 Moreover, Numrich’s argument on this point conflicts with his likely trial defense. As
13 noted above, should this case go to trial, Numrich’s defense will almost certainly revolve around
14 the argument that, although is guilty of Violation of Labor Safety Regulation with Death
15 Resulting, he is not guilty of Manslaughter in the Second Degree. And, while the State believes
16 that Numrich is actually guilty of both, he will be allowed to make that argument precisely
17 because it *is* legally possible to be guilty of the former without being guilty of the latter.¹³ The
18 fact that Numrich will likely take exactly that position at trial undercuts his current claim that it
19 is a legal impossibility.

22 ¹² And, as noted above, the fact that such hypothetical scenarios could occur in and of itself shows that RCW
9A.32.080 and RCW 49.17.190(3) are not concurrent and, therefore, that the “general-specific rule” does not apply.

23 ¹³ It seems beyond question that, were the State to move to preclude Numrich from making this argument as trial, he
would vehemently and strenuously object. Yet that is the logical and necessary corollary of the argument he
advances in his current motion.

1 Given all of the above, RCW 9A.32.070 and RCW 49.17.190(3) are not concurrent
2 within the meaning of the “general-specific rule” analysis. As a result, the rule does not apply to
3 them.

4 **b. Application of the “general-specific rule” in this case would**
5 **violate more applicable canons of statutory construction**

6 As noted above, the “general-specific rule” is a canon of statutory construction
7 specifically used by courts to help determine whether the Legislature intended to preclude the
8 State from charging a more “general” statute when a more “specific” one also applies. Conte,
9 159 Wn.2d at 803; Heffner, 126 Wn. App. at 807; Thomas, 35 Wn. App. at 601-02; Danforth, 97
10 Wn.2d at 257-58; Shriner, 101 Wn.2d at 580; Cann, 92 Wn.2d at 197. When applying any canon
11 of statutory construction, it must be kept in mind that the fundamental purpose in doing so is to
12 give effect to the intent of the Legislature. In re Estate of Holland, 177 Wn.2d 68, 75-76, 301
13 P.3d 31 (2013). Moreover, Washington courts have expressed that the “general-specific rule”
14 must be used with particular care and that it should be “applied to preclude a criminal
15 prosecution *only where the legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815
16 (emphasis added). Particularly given this context, the “general-specific rule” must be used in
17 conjunction with other principles of statutory construction, including the general rule that a court
18 must apply the construction that best fulfills the statutory purpose and carries out any express
19 legislative intent and must avoid interpreting statutes in a way that leads to unlikely, absurd, or
20 strained results. See In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City
21 of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); State v. Contreras, 124
22 Wn.2d 741, 747, 880 P.2d 1000 (1994). Here, even if the “general-specific” rule could
23 theoretically be applied to RCW 9A.32.080 and RCW 49.17.190(3), Numrich’s motion should

1 still be rejected because applying the rule to these statutes would undercut the statutory purpose,
2 thwart the intent of the Legislature, and lead to absurd results.

3 i. Applying the rule as Numrich advocates would undercut the
4 purpose of the statutes and thwart legislative intent

5 RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973
6 (WISHA). RCW 49.17.900. Subsection (3) of the statute provides, in relevant part, that:

7 Any employer who wilfully and knowingly violates the requirements of RCW 49.17.060,
8 any safety or health standard promulgated under this chapter, any existing rule or
9 regulation governing the safety or health conditions of employment and adopted by the
10 director, or any order issued granting a variance under RCW 49.17.080 or 49.17.090 and
11 that violation caused death to any employee shall, upon conviction be guilty of a gross
12 misdemeanor and be punished by a fine of not more than one hundred thousand dollars or
13 by imprisonment for not more than six months or by both.....

14 This language is nearly identical to 29 U.S.C. 666(e) of the federal Occupational Safety and
15 Health Act (OSHA) which provides that:

16 Any employer who willfully violates any standard, rule, or order promulgated pursuant to
17 section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that
18 violation caused death to any employee, shall, upon conviction, be punished by a fine of
19 not more than \$10,000 or by imprisonment for not more than six months, or by both;
20 except that if the conviction is for a violation committed after a first conviction of such
21 person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for
22 not more than one year, or by both.

23 The express legislative history of WISHA is extremely short and does not discuss the
proposed criminal sanctions contained in RCW 49.17.190. Rather, the only discussion in the
legislative history deals with the need to ensure that Washington's statutes would be at least as
effective as OSHA in order to ensure that Washington had an approved OSHA State Plan that
would avoid federal preemption. *Enacting the Washington Industrial Safety and Health Act of*
1973: Hearing on SB 2389 Before the S. Comm. on Labor, 1973 Leg., 43rd Sess. at 2 (Feb. 2,
1973); See also RCW 49.17.010. As a result, many of the provisions of WISHA are worded
very similarly, if not identically, to those in OSHA. In this context, where the provisions of

1 WISHA are identical or analogous to corresponding OSHA provisions, Washington courts will
2 look to federal decisions, as the Washington Legislature's intent would be identical to
3 Congress's. Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d
4 793 (1986); Fahn v. Cowlitz County, 93 Wn.2d 368, 376, 610 P.2d 857 (1980).

5 When Congress passed OSHA, its intent was "to assure so far as possible every working
6 man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b).

7 WISHA has the same goal for workers in Washington. RCW 49.17.010. Because WISHA is a
8 remedial statute, its provisions must be liberally construed to protect the health and safety of
9 Washington workers. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257,
10 756 P.2d 142 (1988); Frank Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25,
11 36, 329 P.3d 91 (2014); Stute v. P.B.M.C., 114 Wn.2d 454, 788 P.2d 545 (1990).

12 Prior to the enactment of OSHA/WISHA, state prosecutors were free to bring felony
13 charges against employers under existing state laws criminalizing, *inter alia*, homicide and
14 assault. In this context, a review of the legislative history for OSHA (which is the basis for the
15 identical language in WISHA) provides no indication that Congress intended to limit or preclude
16 prosecutions under existing state criminal codes. Rather, the Senate Report on the bill which
17 ultimately became OSHA noted that the legislation "would be seriously deficient if any
18 employee were killed or seriously injured on the job simply because there was no specific
19 standard applicable to a recognized hazard which could result in such a misfortune." S. REP. NO.
20 91-1282, at 9 (1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92ND CONG.,
21 LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971). Indeed,
22 the Senate noted the importance of providing *more* protection than under existing law where
23 "individuals are obliged to refrain from actions which cause harm to others." Id.

STATE'S RESPONSE TO DEFENDANT'S
MOTIONS TO DISMISS COUNT 1 - 20

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1 If Congress had intended OSHA to make employers less criminally liable than under
 2 existing law, Congress would have said so. Instead, Congress has said precisely the opposite. In
 3 1988, the House Committee on Government Operations submitted a report, entitled “GETTING
 4 AWAY WITH MURDER IN THE WORKPLACE: OSHA’S NONUSE OF CRIMINAL PENALTIES FOR
 5 SAFETY VIOLATIONS,” based on a study by the Employment and Housing subcommittee. H.R.
 6 REP. NO. 1051, 100th Cong., 2nd Sess. 10 (1988). In this report, the Committee was clear that
 7 OSHA was not intended to limit the ability of state prosecutors to bring traditional criminal
 8 charges against employers for acts committed in, or related to, the workplace. The Committee
 9 stated:

10 [T]he States have clear authority under [OSHA], as it is written, to prosecute
 11 employers for acts against their employees which constitute crimes under State
 12 law.

13 ...

14 Nothing in [OSHA] or its legislative history suggests that Congress intended to
 15 shield employers from criminal liability in the workplace or to preempt
 16 enforcement of State criminal laws of general application such as murder,
 17 manslaughter, and assault.

18 ...

19 The States have an interest in controlling conduct that endangers the lives of their
 20 citizens whether it be at home, at work, or on the road. State and local prosecutors
 21 should be commended and encouraged to continue their efforts to protect people
 22 in their workplaces by utilizing the historic police power of the State to prosecute
 23 workplace injuries and fatalities as criminal acts.

Id. at 9-10 (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989)).

Given all of the above, there is no basis to conclude that Congress (in adopting OSHA) or
 the Washington Legislature (in adopting WISHA) intended the inclusion of a gross misdemeanor
 provision to preclude Washington prosecutors from bringing homicide charges under state law
 against employers following workplace fatalities. Indeed, all evidence of legislative intent is

1 precisely to the contrary. In this context, there is no support for Numrich’s argument that RCW
2 49.17.190(3) precludes him from being prosecuted for second degree manslaughter for Felton’s
3 death. Rather, such a ruling from this court would run directly contrary to the clear intent of the
4 Legislature.

5 *ii. Applying the rule as Numrich advocates would lead to*
6 *absurd results*

7 Perhaps one of the most basic canons of statutory construction is that no statute should be
8 construed in a manner that leads to strained or absurd results. State v. Larson, 184 Wn.2d 843,
9 851, 365 P.3d 740 (2015); Becker, 59 Wn. App. at 854. Three hypothetical examples
10 demonstrate the absurd results that would follow from Numrich’s argument that he can only be
11 prosecuted under RCW 49.17.190(3) and not RCW 9A.32.070. Because the application of the
12 “general-specific rule” he advocates would lead to such absurdities, his interpretation must be
13 rejected.

14 First, woven into the very fabric of OSHA and WISHA is a recognition of the power
15 dynamic at play in the employer-employee relationship and the general responsibility of
16 employers for their employees, including the responsibility to provide reasonably safe and
17 healthy working conditions for the people they employ. As Numrich himself concedes,
18 employers in Washington have a duty of care vis-à-vis their employees. Def. Memo. at 11. In
19 contrast, no such similar responsibility or duty exists between two unrelated strangers. In this
20 context, the application of the “general-specific rule” advocated by Numrich would lead to the
21 absurd result that a person who negligently caused the death of an unrelated stranger—a person
22 for whom he had no responsibility and towards whom he owed no duty of care—could be
23 charged with a felony but a person who knowingly violated a safety regulation which led to the

1 death of an employee—a person for whom he did have responsibility and towards whom he did
2 owe a duty of care—could only be charged with a gross misdemeanor.

3 Second, and similarly, many workplace safety regulations protect the public as well as
4 employees. In that context, it is entirely possible that an employer’s actions could lead to the
5 death of both an employee and a non-employee member of the public at large. In this situation,
6 the application of the “general-specific rule” advocated by Numrich would lead to the absurd
7 result that the exact same action would allow the employer/defendant to be charged with a felony
8 for the death of one person (the non-employee), but only with a gross misdemeanor for the death
9 of the other (the employee).¹⁴

10 Finally, by its own terms, RCW 49.17.130(3) applies only when a knowing violation of a
11 safety regulation leads to the *death* of an employee. Under RCW 9A.36.031(1)(f), a person is
12 guilty of third degree assault—a felony—if he or she “with criminal negligence, causes bodily
13 harm accompanied by substantial pain that extends for a period sufficient to cause considerable
14 suffering.” In this context, the application of the “general-specific rule” advocated by Numrich
15 would lead to the absurd result that an employer who knowingly violated a safety regulation
16 could be charged with a felony if the violation resulted in a worker being injured and surviving,
17 but could only be charged with a gross misdemeanor if the violation resulted in the worker being
18 killed.

19 All three of the above are classic examples of the type of absurd results that this court
20 must avoid in construing statutes. Since all three flow logically and inexorably from Numrich’s
21 argument, this court must reject it.

22
23

¹⁴ This assumes, of course, that there was proof of the different *mens rea* elements of RCW 9A.32.070 and RCW 49.17.190(3).

1 c. **Courts in other states have rejected Numrich’s argument**

2 As noted above, the Washington Legislature chose to enact WISHA in order to avoid
3 federal preemption by ensuring that Washington’s worker protection statutes were at least as
4 effective as OSHA. Every other state has had to face a similar choice and the nation is roughly
5 evenly split: currently about half of the states (including Washington) have adopted approved
6 OSHA State Plans; the other half have not and have, thus, accepted federal preemption in the
7 field of occupational safety and health law. Mark A. Rothstein, OCCUPATIONAL SAFETY AND
8 HEALTH LAW § 3.10, at 71 (2015). The issue raised by Numrich—or a close analogy thereof—
9 has been addressed and rejected in states both with and without approved OSHA State Plans.

10 In Michigan (which has an approved OSHA State Plan similar to Washington’s), for
11 example, the court dealt with an argument virtually identical to Numrich’s in Hegedus, 432
12 Mich. 598. In Hegedus, an employee of a company died due to carbon monoxide poisoning
13 while working in a company owned van. Id. at 602. The State’s theory of the case was that the
14 poor condition and maintenance of the van allowed exhaust to leak into it and kill the decedent
15 Id. The State charged the defendant—a company supervisor—with involuntary manslaughter
16 under Michigan state law for his role in the incident. Id. The defendant argued that his
17 prosecution for involuntary manslaughter under Michigan’s “general” criminal statutes was
18 precluded and that he could only be prosecuted for violating the more “specific” criminal
19 provisions of MIOSHA (Michigan’s approved OSHA State Plan) or OSHA because they
20 preempted the “general statute.” Id. at 602-06. As noted above, the relevant OSHA provision in
21 question is virtually identical to RCW 49.17.190(3).

1 The Hegedus court roundly rejected this argument and held that prosecution of the
 2 defendant for involuntary manslaughter was not precluded or preempted. Id. at 625. The court
 3 noted that:

4 [T]here is a “legitimate and substantial purpose” on the part of this state, apart
 5 from regulating *occupational* health and safety, in enforcing its criminal laws
 6 even though the conduct occurred in the workplace. While deterrence, and thus to
 7 some extent regulation, is one aim of general criminal laws, so too is
 8 punishment—clearly not one of OSHA's primary goals. A more important
 9 purpose, however, is the protection of employees as members of the general
 10 public. While OSHA is concerned with protecting employees as “workers” from
 11 specific safety and health hazards connected with their occupations, the state is
 12 concerned with protecting the employees as “citizens” from criminal conduct.
 13 Whether that conduct occurs in public or in private, in the home or in the
 14 workplace, the state's interest in preventing it, and punishing it, is indeed both
 15 legitimate and substantial.

16 Id. at 613-14. The court, therefore, concluded that:

17 The defendant in this case is charged with manslaughter, not simply with a
 18 “willful” violation of an OSHA standard. While his conduct, if proved, might also
 19 satisfy the elements of that [latter] “crime,” the state has chosen, in a valid
 20 exercise of its police powers, to pursue this matter under its own criminal laws.
 21 We cannot construe OSHA, the stated purpose of which is “to assure so far as
 22 possible ... safe and healthful working conditions and to preserve our human
 23 resources,” as a grant of immunity to employers who are responsible for the
 deaths or serious injuries of their employees.

16 Id. at 625. Similar results have been reached by courts in other states with approved OSHA State
 17 Plans. See, e.g., State v. Far West Water & Sewer Inc., 224 Ariz. 173, 228 P.3d 909 (2010).

18 Courts in states without approved OSHA State Plans have overwhelmingly reached the
 19 same conclusion. The Illinois Supreme Court, for example, rejected this argument and held that
 20 the state had the power to enact and enforce its traditional criminal laws in this context in order
 21 to protect public safety. People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 534 N.Ed.2d 962
 22 (1989). New York and Wisconsin reached similar results in People v. Pymm, 151 A.D.2d 133,
 23 546 N.Y.S.2d 871 (1989) and State ex rel. Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21,
 (1988), respectively.

ey

1 In sum, at least seven states have addressed either Numrich’s argument or the federal
 2 preemption variation on it. And every state except Texas has rejected it. Mark A. Rothstein,
 3 OCCUPATIONAL SAFETY AND HEALTH LAW § 3.3, at 64-66 (2015).

4 As previously noted, WISHA essentially wholesale imported the OSHA framework—
 5 including the legislative intent—into Washington law. As all of the above demonstrate,
 6 Congress did not intend for the inclusion of a gross misdemeanor provision in OSHA to preclude
 7 or preempt states from bringing homicide charges under state law against employers following
 8 workplace fatalities. Similarly, the Washington Legislature did not intend that RCW
 9 49.17.190(3)—the WISHA analogue of 29 U.S.C. 666(e)—would preclude prosecution for
 10 second degree manslaughter under RCW 9A.32.070.

11 **d. None of Numrich’s additional arguments warrant a different**
 12 **outcome**

13 Beyond those addressed above, Numrich makes a few additional assertions in support of
 14 his “general-specific rule” argument. None, however, are persuasive.

15 First, Numrich asserts that RCW 49.17.190(3) “has a significantly *higher* mental state
 16 than the general manslaughter statute.” Def. Memo. at 11 (emphasis in original). From this,
 17 Numrich claims, one can infer a legislative intent that prosecutors not be allowed to charge
 18 manslaughter in cases like his. *Id.* However, this argument must fail. As an initial matter, as
 19 discussed above, the question of *mens rea* involves an analysis of both the level of the mental
 20 state and the object of the mental state. In that context, one statute can only truly be said to have
 21 a “higher mental state” than another if both statutes’ mental states are about the same thing.
 22 Otherwise, one is not higher than another, they are simply different. That is the case here. As a
 23 result, Numrich’s starting premise is flawed—despite his assertion to the contrary, RCW

1 49.17.190(3) does not have a higher mental state than RCW 9A.32.070. Rather, the two statutes
2 simply have different *mens rea* elements.

3 Moreover, even where this not the case, Numrich’s argument on this point still comes
4 down to a question of statutory interpretation. Here, as discussed at length above, the intent of
5 the Legislature was clearly not to limit the authority of the State to bring manslaughter charges
6 (either in addition to, or instead of, charges under RCW 49.17.190(3)) in situations such as this
7 one.

8 Second, Numrich argues that the decision in Danforth supports his position. Def. Memo.
9 at 11-12. But this is also incorrect. As an initial matter, while the analysis used in one “general-
10 specific rule” case may be generally applicable in future cases, the actual holding of any such
11 case is necessarily limited to the two statutes in question (because all of the analysis is ultimately
12 about whether the rule applies *to those two statutes*). In that context, the holding in Danforth—
13 that when a defendant escapes from work release the State can only charge under RCW
14 72.65.070 and not under RCW 9A.76.110—is irrelevant in this case.

15 The analysis in Danforth, in contrast, actually supports the State’s position.¹⁵ The
16 Danforth court summarized the reason for its decision as being based on “sound principles of
17 statutory interpretation and respect for legislative enactments.” 97 Wn.2d at 259. Here, as
18 discussed at length above, those very principles lead to the conclusion that the “general-specific
19 rule” does not apply to the two statutes at issue in this case.

20 Finally, Numrich argues that WISHA creates a “comprehensive and unified statutory
21 scheme to regulate workplace safety.” Def. Memo. at 6. From this, Numrich argues, one must
22 infer a legislative intent to have RCW 49.17.190(3) be the exclusive crime that may be charged
23

¹⁵ It is precisely for this reason that Danforth is cited repeatedly above.

1 in situations such as those presented in this case. Id. at 6-8, 13. This argument must also be
 2 rejected. As an initial matter, as repeatedly noted, the issue of legislative intent is addressed at
 3 length above. Here, there is no indication of any intent—either explicit or implicit—on the part
 4 of the Legislature to do any such thing. Rather, every indication is that the Legislature intended
 5 WISHA and RCW 49.17.190(3) to expand, not limit, the tools available to the State by providing
 6 an option that could be used in conjunction with existing criminal statutes and/or when those
 7 statutes did not apply.

8 In addition, arguments very similar to Numrich’s have been addressed and rejected by
 9 courts in other states. In Hegedus, for example, the defendant argued that the length and scope
 10 of OSHA—and its inclusion of some criminal penalties—indicated a congressional intent to
 11 “occupy the field” and preclude prosecution under other statutes. The court thoroughly rejected
 12 this assertion, noting:

13 The sheer length of the act, in our view, merely reflects the complexity of the
 14 subject matter. When considered in the context of that subject matter, the act’s
 15 apparent comprehensiveness is not surprising. As the United States Supreme
 16 Court stated in New York Dep’t of Social Services v. Dublino, 413 U.S. 405, 415,
 17 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973), “The subjects of modern social and
 18 regulatory legislation often by their very nature require intricate and complex
 19 responses from Congress, but without Congress necessarily intending its
 20 enactment as the exclusive means of meeting the problem....”

21 Despite its length and thoroughness, OSHA is far from complete. The
 22 incompleteness of OSHA’s provisions for criminal penalties is but one example of
 23 the incompleteness of the act as a whole, and serves to answer the defendant’s
 second argument, that the inclusion of such sanctions within the act evidences
 Congress’ intent to preempt at least that portion of the occupational safety and
 health field. The act itself contains only a few very minor criminal sanctions that
 can hardly be said to compose a comprehensive and exclusive scheme. Under §
 17(e),¹⁶ a wilful violation of a specific OSHA standard that results in an
 employee’s death is punishable by only up to six months’ imprisonment. A similar
 violation that “only” seriously injures an employee carries no criminal penalties at
 all. A violation of the general-duty clause of § 5(a), even if it results in death, also

¹⁶ 29 USC 17(e) was subsequently recodified as 29 USC 666(e).

1 carries no criminal penalty. Thus, as the Illinois Supreme Court concluded in
2 Chicago Magnet Wire, supra:

3 “[I]t seems clear that providing for appropriate criminal sanctions in cases
4 of egregious conduct causing serious or fatal injuries to employees was
5 not considered. Under these circumstances, it is totally unreasonable to
6 conclude that Congress intended that OSHA's penalties would be the only
7 sanctions available for wrongful conduct which threatens or results in
8 serious physical injury or death to workers.” Id., 128 Ill.Dec. at 522, 534
9 N.E.2d at 967.

10 Hegedus, 432 Mich. at 619-20 (internal footnotes omitted).

11 Here, the points raised by the Hegedus court regarding OSHA and its criminal provisions
12 apply with equal force to WISHA and RCW 49.17.190(3). While WISHA is lengthy and broad,
13 that is merely a function of the complexity of the issues it seeks to address. Neither its length nor
14 its breadth equate to it being comprehensive or complete (or even indicate that is intended to be
15 so). And, despite Numrich’s claims to the contrary, that is particularly the case when it comes to
16 WISHA’s criminal provisions. As with OSHA, WISHA contains only a very few minor criminal
17 sanctions that can hardly be said to compose a comprehensive and exclusive scheme.¹⁷ And,
18 under these circumstances, it is wholly unreasonable to conclude that the Legislature intended
19 that WISHA’s penalties would be the only sanctions available for criminal acts that result in the
20 employee deaths.

21 **B. PROSECUTING NUMRICH FOR MANSLAUGHTER DOES NOT**
22 **VIOLATE HIS RIGHT TO EQUAL PROTECTION**

23 Numrich also argues that prosecuting him for manslaughter violates principles of equal
protection. Def. Memo. at 13-14. Numrich’s sole support for this argument appears to be the
factual assertion that he is the first employer in the state who has been charged with a felony based

¹⁷ The hypotheticals raised in the section above addressing absurd results highlight just a few of the areas in which WISHA self-evidently fails to comprehensively or completely address possible criminal behavior.

1 on a workplace fatality even though he cannot have been the first to have committed the crime. Id.
 2 Numrich fails to provide any citation to legal authority or analysis that further characterizes his
 3 motion or explains how that fact is relevant to a claim of an equal protection violation. However,
 4 while he does not label it as such, based on the reference to others not being prosecuted for the same
 5 offense, it appears that Numrich is asserting that the State has engaging in improper selective
 6 prosecution by charging him with manslaughter when it has not charged other similarly situated
 7 defendants. This argument must also be rejected because the State's decision to charge him with
 8 manslaughter for causing Felton's death does not constitute an unconstitutionally selective
 9 prosecution that violates his right to equal protection.

10 As an initial matter, as Numrich points out, the filing of these charges against him does
 11 appear to be the first and—so far—only instance in Washington in which an individual defendant
 12 has been charged with a felony offense for having caused the death of an employee in a
 13 workplace incident. Def. Memo. at 5-6. What Numrich fails to point out, however, is that the
 14 filing of such charges in this case is hardly unique in the United States as a whole. Rather, the
 15 State's decision to charge Numrich with manslaughter is in keeping with the nationwide trend to
 16 charge such cases in this way. The State is aware, for example, of a number of cases in the last
 17 10 years where state criminal charges analogous to Washington's second degree manslaughter
 18 have been filed against individual employers/supervisors when workers have been killed by
 19 collapsing trenches.¹⁸ If the scope is expanded beyond the specific context of trench collapses
 20 to other workplace fatalities, the examples of such charges become too numerous to mention
 21

22 ¹⁸ See, e.g., People v. Abraham Zafrani, Superior Court of California, County of Ventura No. 2013029396, 2017
 23 WL 7361303 (California: defendant, an unlicensed contractor, was found guilty of Involuntary Manslaughter and
 Violating a Safety or Health Order Causing Death after an employee was killed in a trench collapse); People v. Luo,
 16 Cal. App. 5th 663, 224 Cal. Rptr. 3d 526 (2017) (California: defendants, a general contractor and his project
 manager, were found guilty of Involuntary Manslaughter and multiple counts Violating a Safety or Health Order
 Causing Death after an employee was killed in a trench collapse); Commonwealth v. Otto.

1 here. State and local prosecuting authorities nationwide have made it clear—by both their
 2 actions and their words¹⁹—that the investigation and charging of criminal behavior in the context
 3 of workplace injuries and deaths is a new criminal justice priority. When viewed in this light, it
 4 can hardly be said that the State’s decision to file these charges against Numrich makes its
 5 treatment of him so selective as to implicate equal protection concerns.

6 Moreover, even if Numrich’s case was entirely unique in the nation, there still would not
 7 be a basis for this court to find an equal protection violation warranting dismissal. A “criminal
 8 prosecution is presumed to be undertaken in good faith”²⁰ and “prosecutors are vested with wide
 9 discretion in determining whether to charge suspects with criminal offenses.”²¹ In exercising this
 10 discretion, prosecutors can and do take into account numerous factors in deciding who to prosecute
 11 and for what charges. State v. Terrovonia, 64 Wn. App. 417, 421, 824 P.2d 537 (1992). These
 12 factors include “consideration of the public interest involved, the strength of the State’s case,
 13 deterrence value, the State’s priorities, and the case’s relationship to the State’s general enforcement
 14 plan.” Id. In this context,

15 [t]he exercise of a prosecutor's discretion by charging some but not others guilty
 16 of the same crime does not violate the equal protection clause of U.S. Const.
 amend. 14 or Const. art. 1, § 12 so long as the selection was not “deliberately

17 www.bostonherald.com/topic/kevin_otto (Massachusetts: defendant, owner of a drain pipe company, charged with
 18 two counts of manslaughter after two employees were killed in a trench collapse); People v. Formica, 15 Misc. 3d
 404, 833 N.Y.S.2d 353 (2007) (New York: defendant, owner and supervisor of construction company, convicted of
 19 negligent homicide after two employees were killed in a trench collapse); People v. Cueva, N.Y. Sup. Ct., No.
 01971-2015 and People v. Prestia, N.Y. Sup. Ct. No. 01972-2015 (New York: defendants, the foreman and
 20 construction supervisor for two construction companies, convicted of negligent homicide after two employees were
 killed in a trench collapse).

21 ¹⁹ See, e.g., “District Attorney Jackie Lacey Launches OSHA and Environmental Crimes Rollout Program” (April
 17 2014) at http://da.co.la.ca.us/sites/default/files/press/041718_District_Atorney_Launches_OSHA_and_Environmental_Crimes_Rollout_Program.pdf; “Rena Steinzor on the Rise of Local Criminal Prosecutions in
 22 Worker Death Cases (March 9, 2018) at <https://www.corporatecrimereporter.com/?s=rena+steinzor>

23 ²⁰ State v. Terrovonia, 64 Wn. App. 417, 421, 824 P.2d 537 (1992).

²¹ Entz, 59 Wn. App. at 119 (citing State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)).

STATE’S RESPONSE TO DEFENDANT’S
 MOTIONS TO DISMISS COUNT 1 - 31

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1 based upon an unjustifiable standard such as race, religion, or other arbitrary
2 classification.”

3 State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984) (quoting Oyler v. Boles, 368 U.S. 448,
4 456, 506, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). A defendant claiming an equal protection
5 violation warranting dismissal on these grounds bears the burden of establishing both that the
6 enforcement against him or her was motivated by his or her membership in a given class (i.e.
7 race, religion, or other arbitrary classification) and that it had a discriminatory effect on that
8 class. Terrovonia, 64 Wn. App. at 422-23; State v. Alonzo, 45 Wn. App. 256, 259-60, 723 P.2d
9 1211 (1986).

10 Here, Numrich’s entire argument is based on the assertions that: 1) other defendants who
11 have been charged with a crime in the context of workplace accidents causing death have been
12 charged under RCW 49.17.190(3);²² and 2) no other defendant in Washington has been yet been
13 charged with manslaughter for negligently causing the death of an employee in a workplace
14 incident. Def. Memo. at 5-6, 13-14. However, as noted above, the prosecutors who made the
15 charging decisions—both in previous cases and in this one—are presumed to have acted in good
16 faith and to have properly exercised prosecutorial discretion in taking into account the host of
17 factors that underlie the decision to file charges. Against that backdrop, Numrich has not
18 identified a single iota of evidence that would support the conclusion that his prosecution was
19 either motivated by a discriminatory purpose or had a discriminatory effect. Nor are any such
20 facts apparent in the record. As a result, Numrich has entirely failed to meet his burden of

21
22 ²² Numrich’s sole reference on this point is the King County case of State v. Pacific Topsoils (16-1-02544-3 SEA).
23 Def. Memo at 5-6. The State will simply note in passing the lack of any real relevance that case has towards this
one. The case against Pacific Topsoils involved different regulations, different facts, different equities, and different
potential legal issues. In that context, the State’s decisions to charge that case one way and this case another fall
fully within the broad discretion afforded prosecutors in balancing the factors at issue in charging decisions.

1 establishing unconstitutional selective enforcement and his equal protection argument must be
2 rejected.

3
4 **IV. CONCLUSION**

5 For the reasons outlined above, the State respectfully requests that this court deny the
6 defendant's motions to dismiss Count 1.

7 DATED this 13th day of June, 2018.

8 DANIEL T. SATTERBERG
9 King County Prosecuting Attorney

10 By: 
11 _____
12 Patrick Hinds, WSBA #34049
13 Eileen Alexander, WSBA # 45636
14 Deputy Prosecuting Attorneys
15 Attorneys for Plaintiff

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State v. Phillip Numrich
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STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix A

(Certification For Determination Of Probable Cause)

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

I, MARK JOSEPH, am a Certified Safety and Health Officer with the Washington State Department of Labor and Industries (“WSDLI”) based out of Bellingham Washington. I am authorized under RCW 49.17 to conduct investigation of workplaces for safety violations, and may under section .070 of the same title and chapter require the attendance and testimony of witnesses and the production of evidence under oath. As such, I have reviewed investigation documents for WSDLI Inspection No. 317939264. I have also conducted an additional investigation in conjunction with the Washington State Office of the Attorney General.

Based upon my review and additional investigation, I declare that the following is true and correct:

Inspection records created by WSDLI show that on January 26, 2016, Harold Felton, an employee of Alki Construction LLC (“Alki”), was completing work replacing a side sewer at a residential home in West Seattle. While Felton finished work in the 8-10 foot deep trench, a cave-in of soil covered him entirely and he perished. The WSDLI conducted an initial investigation into Alki because of Felton’s death. In August of 2017, I was assigned to conduct an additional investigation of Alki, a Washington State Limited Liability Company based in Seattle, WA, and its owner Phillip Numrich. Inspection records and records from the Washington Secretary of State show that Numrich owns, operates, and manages Alki and has done so since its inception. He is the sole owner, operator, and manager of Alki.

On August 28, 2017, I interviewed Jenna Felton, Lucy Felton, Bruce Felton, and Pamela Felton, who are Harold Felton’s widow, sister, father, and mother respectively. Jenna, Lucy, Bruce and Pamela all stated that, when Felton was 21 years old, he suffered a severe traumatic brain injury, which required major surgery and an extended recovery, including re-learning to speak and walk, among other ordinary life activities. After recovery and rehabilitation, Lucy stated that Harold Felton continued to have short-term memory issues. Felton’s family also confirmed that Numrich was a long-time friend of Felton’s, was present when he suffered his brain injury, and was aware of the nature and extent of Felton’s continuing issues.

Inspection records created by WSDLI show homeowners at 3039 36th Ave SW Seattle, WA 98126 (hereinafter “Subject Premises”), hired Alki/Numrich to replace their home’s side sewer pipe. Alki uses a “trenchless” sewer replacement technology wherein two trenches are dug where the sewer exits the home’s concrete foundation and the other where the sewer connects to city’s main sewer in the street. The old sewer is disconnected from the homes foundation and at the street, and a large cable is threaded through the old sewer line. On one end, the operator connects a large cable to the tip of a steel cone, and the other end of the cable is connected to a large hydraulic pulling machine. The operator then connects a new plastic sewer line to the back of the cone, engages the pulling machine, which simultaneously splits open the old sewer while pulling the new plastic sewer in its place. Once the new sewer is laid in place, workers

must enter the trenches and re-connect the new sewer to the home and the city's service connection. Felton was killed by the cave-in during this re-connection process.

Inspection records created by WSDLI show Alki/Numrich commenced work at the Subject Premise on or about January 16, 2016. Numrich and Felton dug one trench at the back corner of the home ("back trench") and another where the old sewer connected to the city's service ("front trench"). The back trench was approximately 8-10 feet deep, 21 inches wide, and six feet long. Because of some worker absences and equipment failure, Numrich put work on hold until January 26, 2016. Leaving a trench open for this long increases the risk of a collapse or cave-in.

Washington law and WSDLI regulations (WAC 296-155-657) require employers to design and implement protective systems for all trenches deeper than four (4) feet to prevent cave-in hazards to workers. Because trenches may vary in dimensions, employers determine how to shore each individual trench by consulting the shoring system's Tabulated Data ("Tab Data"). Alki used an aluminum hydraulic shoring system (tradename "SpeedShore") to shore the back trench.

WSDLI regulations and SpeedShore Tab Data require an employer to determine the soil type or types in which the excavation is made using a recognized soil classification method. Different soil types are more stable or less stable when excavated and require more shoring if they are a less stable soil type and less shoring if they are a more stable soil type. The initial WSDLI investigation confirmed that the soil type at the Subject Premises was "Type C" soil, which is the least stable type of soil and which requires the most rigorous shoring standard per WSDLI regulations and SpeedShore's Tab Data.

In addition, Washington law and WSDLI regulations (WAC 296-155-655) require that a "competent person" inspect any trenches, the adjacent areas, and the protective systems in the trench for evidence of situations that could result in cave-ins. "Competent person" is a legal term defined in the WACs. WAC 296-155-650 defines a "competent person" as someone "who can identify existing or predictable hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees." The provision also requires that the "competent person" be someone who has the "authorization or authority by the nature of their position to take prompt corrective measures to eliminate them." Inspections by the "competent person" must be made daily prior to the start of any work in the trench and must be repeated after every rainstorm or other hazard increasing occurrence. If the "competent person" sees evidence of a situation that could result in a possible cave-in or other hazard, they must remove any employees from the trench until necessary precautions have been taken to ensure their safety. Numrich was the only "competent person" at the Subject Premises during the entire project and on the day when Harold Felton was killed.

During the initial WSDLI investigation, Numrich engaged in a voluntary interview with WSDLI, where he confirmed that he knew the soil at the Subject Premises

was "Type C." Numrich also indicated that he was very concerned with safety and was aware of the requirements in place for protection of workers in trenches.

On November 1, 2017, I interviewed Maximillion Henry, Felton's co-worker at Alki and the only other person who worked on the Subject Premises other than Numrich and Felton. Henry stated that Felton and he arrived at the Subject Premises on the morning of January 26, 2016. The trenches at the subject premises had been "open" (previously dug by Numrich and Felton, and left in that condition) for approximately ten days. Henry also reported that it is very unusual for a trench to be open more than 2-3 days, and that the longer a trench is "open" the less stable it becomes. Henry also stated that it had been raining for several days prior to January 26, 2016; a fact that I corroborated by examining regional atmospheric data and regional precipitation records. Soil saturated by water is less stable than when dry and, therefore, is more prone to collapse or cave-in.

Henry stated during his interview that the trenchless sewer replacement process vibrates the ground when the steel cone splits open the old sewer pipe and the vibrations further destabilize trenches dug during the sewer replacement process. Henry reported that the soil type in and around the Subject Premises was widely known in the sewer replacement industry to be Type C soil.

During his interview, Henry also indicated that Felton had a history of work accidents, which he became aware of after Felton's death. Henry stated that it was Numrich who had informed him of Felton's history of accidents. Henry also stated that Felton was often not aware of his surroundings, and that if Henry knew of his history of work accidents he "never would have had [Felton] helping me."

The WSDLI investigation and the Henry interview show the Subject Premises had two SpeedShore protective shores installed in the back trench. Henry reported during his interview that Numrich and Felton placed two shores in the back trench when they initially dug it. One of the shores was installed more than four feet above the bottom of the trench – which is prohibited by both WSDLI regulation and SpeedShore Tab Data. Both WSDLI regulation and SpeedShore Tab Data show the back trench required a minimum of four shores based upon the trench dimensions, and soil type alone. As a result, the shoring in place in the trench at the Subject Premises was wholly inadequate and, based on Numrich's status as the "competent person" and his statements during his interview that he was aware of trench safety issues, he should have known that the shoring was inadequate.

In his interview, Henry reported that Felton used a vibrating hand tool (tradename "Sawzall") while in the back trench for several minutes after the new sewer was positioned and while connecting it to the home's service. Numrich was present at the jobsite at the time and he and Henry noted both that Felton was using a vibrating tool in the trench and that doing so increased the risk of trench collapse. Numrich did not intervene to stop Felton from using the Sawzall. Instead, Numrich left the jobsite to buy

lunch for all three so that they could eat after Felton and Henry finished attached the sewer.

In his interview, Henry also indicated that Numrich was the “competent person” for the project at the Subject Premises. Neither Henry nor Felton had the requisite knowledge or authority. Henry was not sure whether Numrich inspected the back trench at the beginning of the day prior to Felton entering it to work. However, both the process of pulling the new sewer pipe into place and Felton’s use of the Sawzall tool in the trench vibrated the ground, which increase the risk of a cave-in. Numrich was well aware that the vibrations caused by either the use of vibrating tools or by the pipe replacement process itself would destabilize a trench because Numrich had told Henry this shortly after Henry started working for Alki. Despite this, Numrich did not re-inspect the back trench after either event. Instead he allowed Felton to continue working in the trench while he left the Subject Premises to buy lunch.

According to Henry, Felton was using the Sawzall in the back trench at approximately 10:30 am on January 26, 2016. About 15 minutes later, the trench collapsed, covering Felton and killing him.

In the course of my investigation, I reviewed the analysis of Erich Smith, trenching technical expert for WSDLI. Smith stated, based upon his experience, the SpeedShore Tab Data and WSDLI regulations, the soil type and conditions at the Subject Premise, and the trench dimensions, that a minimum of four shores should have been used on the long edge the back trench. I also reviewed the analysis of Gary Hicks, regional sales manager for SpeedShore. Hicks stated that four shores would be required on the long edge of the back trench and additionally that each of the four vertical sides of the trench should have been shored to make the trench safe for workers. In other words, the two short sides at either end of the trench should have been shored. Such additional shoring on the ends of a trench is referred to in the industry as “end shoring”. Henry stated during his interview that Alki/Numrich did not own end shoring, and that Henry was not familiar with it or and had never been trained in its use.

On November 17, 2017, an interview was conducted with Gregory Sobole, who is a 14-year firefighter with the Seattle Fire Department (SFD). Sobole is a member of the SFD technical rescue company (Rescue 1, Ladder 7, Aid 14). The technical rescue company responds to specialized incidents such as trench rescues. Sobole has responded to several actual trench cave-ins where he has successfully rescued workers. He also performs annual training with the technical rescue company in trench rescue, with includes hazard identification in trenches. Sobole has taught non-technical rescue company firefighters in basic trench rescue disciplines for ten (10) years. Sobole responded to the Subject Premises, and directly participated in the attempted rescue of Felton by climbing into the back trench during rescue efforts. Based upon his experience and education, Sobole stated that the back trench was not properly shored and was not a safe area to work in. Sobole also noted that there were a number of factors that made the trench more dangers, including the facts that the soil was saturated and had been previously disturbed.

Based on the foregoing, there is evidence that Numrich, as owner of Alki, knowingly failed to properly shore the back trench at the Subject Premise in accordance with WSDLI regulations or with SpeedShore manufacture's Tab Data. In failing to do so, Numrich ignored aggravating factors such as soil saturation, the extended duration the trench was open, and the use of vibrating tools in the back trench. In addition, Numrich, as the "competent person" in charge of safety at the jobsite failed to inspect the trench for hazards as required and failed to remove Felton from the trench until precautions had been taken to ensure his safety. In this context, Numrich's conduct substantially deviated from any known or recognized safety standard and from the standard of care that any reasonable person would exercise in the same situation. Felton died as a result of Numrich's criminal negligence.

Based on all of the above, there is probable cause to believe that Phillip Numrich committed the crime of Manslaughter in the Second Degree within King County in the State of Washington. There is also probable cause to believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting within King County in the State of Washington in violation of RCW 49.17.190.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge. Signed and dated by me this 5th day of JANUARY 2018, at Bellingham, Washington.



Mark Joseph, Certified Safety Health Officer
Washington State Department of Labor & Industries

State v. Phillip Numrich
18-4-00255-5 SEA

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix B

(Memorandum)



Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

Labor & Industries Division

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MEMORANDUM

DATE: December 8, 2017

TO: Melinda Young, Patrick Hinds

FROM: Cody L. Costello, AAG; Martin Newman, AAG; Mark Joseph, Inspector

SUBJECT: **Joint Investigation of Alki Construction**

This investigation of Alki Construction and its owner Phil Numrich stems from a work related fatality occurring on January 26, 2016. This memorandum, investigation documents and attached interview transcriptions¹ are the joint product of this Office and that of the King County Prosecutor's Office. The following information is an overview of investigation methodology, list of interviewees and potential witnesses, and contains a brief recitation of salient facts and circumstances surrounding the work related fatality. This memorandum is not intended to capture all relevant facts or present a complete analysis of this investigation. For a complete recitation of facts and information, please see King County Prosecutor's Packet (KCPP).

I. INVESTIGATION METHODOLOGY

The KCPP contains all documents reviewed to date by Department investigator Mark Joseph, and Assistant Attorney Generals Cody L. Costello and Martin Newman. For record purposes, the date, time, and location of all interviews were noted at the time of the interview.

¹ An electronic copy of all interview transcripts and investigation documents (KC Prosecutor's Packet) was provided to King County Prosecutor's office on 11/27/17. Citations to interview transcripts are noted by abbreviating the interviewee's initials, "Tr." and the transcript page number. Citation to recorded interviews are noted by abbreviating the interviewee's initials, "Rec." and the hour and minute "HH:MM:SS". Citations to investigation documents are noted by "AI" followed by bates numbering found in the upper middle part of each page.

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All interviews were recorded with the permission of the interviewee. All recorded interviews were transcribed, excepting only the interview of Lt. Spencer Nelson (11/3/17) and Greg Sobole (11/17/17), both employees of the Seattle Fire Department at the time of the interview. Original recordings have been provided along with the KCPP. Seattle Fire Department Incident Photos (AI 237-350) are arranged in date/time taken format. Originals are available either from this office upon request, or from the Seattle Fire Department's Public Disclosure Officer Evan L. Ward (evan.ward@seattle.gov). Request should specify incident report #F160009889 (see also AI 0223-36). Contact information for interviewees and witnesses is listed in endnotes corresponding to each person. The list of interviewees and witnesses reflects individuals who this investigation deemed priority witnesses, but is not necessarily comprehensive. For all potential witnesses see KCPP.

II. INTERVIEWEES AND WITNESSES

A list of interviewees or persons related to this investigation, and the Department of Labor & Industries investigation is described below.

1. Related Persons and Interviewees:

- Harold Felton (deceased): employee of Alki Construction LLC;
- Max Henryⁱ (deceased's co-worker): employee of Alki Construction.
- Phillip Numrichⁱⁱ (deceased's employer): owner of Alki Construction *not interviewed*.
- Lucy Feltonⁱⁱⁱ (deceased's relative): Harold Felton's sister
- Jenna Felton^{iv} (deceased's relative): Harold Felton's wife
- Pamela Felton^v (deceased's relative): Harold Felton's mother
- Bruce Felton^{vi} (deceased's relative): Harold Felton's father.
- Greg Sobole^{vii} (Seattle Fire Department): Fire Fighter (R1),

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- Paul Atwater^{viii} (Seattle Fire Department): Battalion Chief/Acting Safety Officer at incident.
 - Phillip Jose^{ix} (Seattle Fire Department): Deputy Chief of Operations
2. **Other potential witnesses:**
- Javier Sarmiento^x (Department of Labor & Industries): Inspector
 - Erich Smith^{xi} (Department of Labor & Industries): Inspector
 - Gary Hicks (SpeedShore): SE Regional Sales Mgr.

III. FACTUAL BACKGROUND

On January 26, 2016, Alki Construction commenced the final stages of replacing a residential side sewer at 3039 36th Ave SW, in West Seattle. MH Tr. 5; AI 351, 353. Alki Construction is a Limited Liability Company managed and owned by Phillip Numrich. AI 363-80. The company's work at the time of the incident was primarily to repair or replace side sewers of residential homes. MH Tr. 5. Worker Harold Felton, while completing a connection of the new sewer service in a trench approximately 8-10ft deep, 6ft long, and 21in wide, was covered by a cave-in of Type C soil and perished. On site at the time of the cave-in was Max Henry, co-worker of Felton. Owner Phillip Numrich was onsite in the morning and immediately prior to the cave-in.

A. Victim Profile.

The victim, Harold Felton, was 33 years old, married (Jenna Felton), with one dependent (Grace Felton) at the time of his death. Felton had experience working for a plumbing company approximately 10 years before his death, but had not performed plumbing work in the interim. LF Tr. 5, 15. Before working for Alki Construction, Felton worked for a local print shop in West Seattle. LF Tr. 10. Felton suffered a substantial traumatic brain injury in August 16, 2000, which affected his memory and resulted in changes in his judgment. LF Tr. 6-7, 9, 45-46; JF Tr. 23.

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Felton stopped working in the plumbing industry because of his TBI. (PF Tr. 5); Felton just began working as an apprentice plumber when he suffered his TBI. Family members disputed that the changes to memory or judgment impeded Felton's ability to perform his work for Alki Construction. LF Tr. 38. However Henry, Felton's coworker, stated that Felton had a long history of work accidents, was often unaware of his surroundings, and if Henry knew of Felton's history of work accidents before January 26, 2016 he would "never had had [Felton] helping me." MH T. 27-28. Henry learned of Felton's work history from Numrich after the incident. MH Tr. 32, 83-84. Felton's primary job for Alki Construction was digging trenches, and connecting the newly laid sewer line to the home's existing system and/or street service. MH Tr. 54, 82 (see below for further discussion.) Felton was particularly skilled at making sewer service connections (also called "piping in"), which can be a difficult process that requires experience and practice. MH Tr. 83-84.

B. Side Sewer Replacement – "Trenchless" Technology.

Alki Construction is a sewer replacement company, and uses a method called "trenchless" sewer replacement. MH Tr. 5. The term is counterintuitive because a minimum of two trenches are dug – the first where the home's sewer exits the foundation of the house ("back" hole, MH Tr. 8), and the second where the sewer connects to the city's main sewer in the street ("front" hole, MH Tr. 9). The old sewer is then disconnected from the home's foundation and at the street, and a large cable is threaded through the old sewer. On one end, the operator connects the cable to a splitting "shark" cone, and the other end of the cable is connected to a large hydraulic pulling machine. MH Tr. 5-6; AI 0187-92. The operator connects a new plastic sewer line, consisting of several shorter pipes "fused" together, to the back of the splitting cone and engages the pulling machine, simultaneously splitting or "bursting" open the old pipe, while laying or "pulling" the new plastic pipe in its place. MH Tr. 5-6. The pulling process loosens and

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disturbs the soil as the old pipe is burst open. MH Tr. 38-39. After the new sewer pipe is in place, workers connect the new pipe to the home's connection, and to the main sewer service in the street. MH Tr. 16. The sewer line is then inspected (*see* AI 0357), and the trench filled in. The entire process can be reduced to four core activities: (1) trench digging; (2) set-up and operation of the hydraulic pulling machine; (3) fusing short pipe sections into one new sewer line; (4) connecting the newly laid sewer to the home's service and to the city's main sewer line. Of these core activities, Felton could dig trenches or connect the newly laid pipe to the home or main sewer. He could not operate the hydraulic pulling machine unsupervised, nor did he know how to fuse pipe. MH Tr. 82.

C. Soil and Trench Conditions Prior to Incident.

The trench dimensions at the jobsite were approximately 6 feet long, 21 inches wide², and 7-10 feet deep³ before the cave-in. MH Tr. 10-13. Three of the four sides of the trench were earth, while the fourth side was the concrete foundation of 3039 36th Ave SW. Felton and Numrich dug the trench a week and half before January 26, 2016. MH Tr. 57. During their initial investigation, Department investigators created a side and top view sketch of the trench post cave-in (AI 0057-58); the sketch shows approximate location of the shores placed by Alki Construction, the "dirt line" or topography of the soil post cave-in, and distance measurements.

A jobsite's environmental factors dictate trench-shoring requirements. Factors include soil condition and soil type, the depth of the trench, whether the soil was "previously disturbed", and surrounding geography of the trench location.

² See AI 0019

³ Henry states that before the cave-in, the bottom of the trench was sloped. MH Tr. 10. Henry saw Felton standing in the trench with his head "a foot, foot and half from the top." *Id.* The bid performed by Alki Construction specifies an 8ft trench. AI 0144.

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Normally a trench would be “open” (fully dug) for two to 3 days. MH Tr. 15. The longer a trench is open, the less stable it becomes. *Id.* The trench at 3039 36th Ave SW was open a week and a half, which is very unusual. *Id.* Department inspectors and Seattle Fire Department personnel designated the soil type at the worksite as “Type C” soil. AI 0039-44; *see also* WAC 296-155-66401. Type C soil is the least stable soil, is most prone to cave-in dangers, and requires the most rigorous shoring standard.⁴ The Department and SFD use visual observation, manual testing, and assumptive protocol⁵ to determine soil type. All three methods were used to categorize the soil type at the job site as Type C soil. Numrich was aware the soil at the job site was Type C soil, and the type of soil in that area is widely known in the industry community. MH Tr. 23.

Soil saturation is another factor that affects soil stability. It had been raining for several days before January 26, 2016. MH Tr. 15, 60; AI 0044-48, 185. Conservative estimates show rain fall of 3.24 inches in the 7 days leading up to and including January 26, 2016. AI 0185. Soil that is wet or saturated is much more likely to act as a fluid during a cave-in – flowing around and underneath barriers. GS Rec. 00:46:40-00:51:30; 01:15:30-01:16:30.

Alki Construction placed two SpeedShore brand shores against an 8ft by 4ft “fin board” in the trench to hold back the earth in the trench. AI 0057-58. Department inspectors and Seattle Fire Department universally agree that two shores were insufficient trench shoring based upon

⁴ WAC 296-155-657(3)(b)-(d) requires an employer to select and construct a protective system: in accordance with the tabulated data from the manufacturer’s shores being used (Option 2); from other similarly reliable tabulated data (Option 3); or otherwise approved by a registered professional engineer. Tabulated data for SpeedShores, the product used by Alki Construction, is found on at AI 0200 of the KCPP. Table VS-3 Type “C-60” Soil dictates that shoring in a 0-10ft trench shall be spaced no more than six feet horizontally, and four feet vertically. AI 0205. The bottom cylinder shall be a maximum of four feet above the bottom of the excavation. AI 0206 n.6. Examples of typical installation are found at AI 0207.

⁵ Soil that is previously disturbed is assumed to be Type C soil. In this circumstance, the soil was both assumed to be Type C because it was previously disturbed, and confirmed to be Type C by manual and visual testing by Department investigators.

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the trench dimensions, soil type, and water saturation levels. Gary Hicks, regional sales manager for SpeedShore opined as follows:

Due to the fact you are now jacking off the house foundation – this now becomes a site specific application from MFG Tab Data or your refer to what the OSHA requirements say. OSHA and MFG Tab Data is based off pressurizing off dirt walls, not basement walls. The question now become [sic] will the basement wall with stand [sic] as per OSIIA requirements the 18,000 pounds of minimum pressure required form hydraulic shoring.

See attached picture on shoring 4 sided pit application – you [sic] application *will require all 4 sides to be shored, you cannot leave vertical standing ends.*

If you could classify this as C60 soil and had soil walls on all 4 sides that you could pressure off of it would take from our Tab Data four hydraulic shores. Two shores in each direction, installed 2 feet from the top and the cylinder now [sic] more than 4 feet of the bottom.

AI 0153. (emphasis added).

Hicks states that because of the unusual shoring application (off of a cement foundation) the company's engineering data (Tab Data) could not apply, and stated that all four sides of the trench would need to be shored. If all four sides of the trench were dirt, the Tab Data for SpeedShore would require four hydraulic shores instead of the two shores placed by Alki Construction. The Department investigator Erich Smith reached the same independent conclusion when asked about shoring requirements for the trench. AI 0358-59.

This investigation has produced no plausible scenario where Alki Construction's shoring on January 26, 2016 was adequate under any known or recognized shoring standard.

D. Events Immediate Prior to and Including Incident.

Work began at the job site between 8:00am – 8:30am, when Henry and Felton arrived together. MH Tr. 43. Numrich arrived at approximately 8:30am – 9:00am. MH Tr. 52. The job was behind schedule after machine failures and worker (Henry's) sickness delayed work, and the

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home owners were frustrated. MH Tr. 62. Numrich begin fusing pipe sections together, which took approximately 45 minutes. At the same time Henry set the “plate” for the hydraulic pulling machine, which determines the angle the new pipe is pulled at. MH Tr. 45. After Numrich complete fusing, Henry, Felton and Numrich carried the new sewer line into position to prepare “pulling” the new line. MH Tr. 46. Once the new sewer was positioned, and the plate set, Henry started the hydraulic pulling machine, which took about 25 minutes to complete operation. Felton then entered the back hole to make the connection with home’s service. Felton used a vibrating tool (Sawzall) in the trench for several minutes. Numrich comment to Henry stating, “he’s vibrating the heck out of the ground.” MH Tr. 39. Numrich was aware that vibrating tools would disturb the ground in a trench and that their use “wasn’t a good thing.” MH Tr. 42. Numrich made no attempt to stop Felton from operating the vibrating tool in the trench. MH Tr. 41-42. Numrich then left the jobsite to buy lunch for himself and his workers. The time was approximately 10:25

At approximately, 10:30am – 10:35am Henry checked on Felton at the back hole. MH Tr. 9. Felton replied that everything was going fine. *Id.* Henry left to “bed” his pipe in the front hole, which is to secure the newly connected sewer line by re-burying it. MH Tr. 10. After five minutes, Henry went back to check on Felton, and realized that Felton had been buried in the trench. MH Tr. 10. Henry first called Numrich, then 911. MH Tr. 91. Seattle Fire Department dispatched at 10:48am, with first units on scene at 10:53am. AI 0229. At 11:20am, rescue operations transition to recovery. AI 0231. The magnitude of earth that caved-in was so large that Felton’s body was not recovered from the trench until 2:15pm, even with the assistance of industrial vacuum trucks. AI 0233.

ATTORNEY GENERAL OF WASHINGTON

December 8, 2017

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E. Numrich Grossly Deviated from Industry Practice By Failing to Properly Shore a Trench He Knew Felton Would Be Working In.

Based upon the above facts and those in the KCPP, this Office believes that Numrich failed to be aware of or ignored the substantial risk that the trench at 3039 36th Ave SW would cave-in, that he failed to appropriately shore the trench per industry standard, and that his conduct in its totality constituted a gross deviation from the industry standard of care. Several facts establish a patent risk of collapse and Numrich's knowledge of those risks:

- (1) The soil type at the job site was Type C soil, which is the least stable and most prone to collapse;
- (2) The soil was heavily saturated from several days of rain, making the trench more prone to collapse;
- (3) The trench had been "open" for approximately 10 days (1 ½ weeks), making the trench more prone to collapse;
- (4) The trench was disturbed from vibrations of the hydraulic pulling machine, and of a Sawzall cutting tool;
- (5) Vibrations within a trench increase the likelihood of trench collapse;
- (6) The shoring in the trench grossly deviated from the industry standard, by:
 - a. Failing to use at a minimum four hydraulic shores;
 - b. Failing to place two shores a maximum four feet from the bottom of the trench, and two shores two feet from the top of the trench;
 - c. Failing to shore the length of the trench where Felton was working to connect the new service (*see* AI 0057-58);
- (7) The failure to properly shore the trench led to its cave-in;
- (8) Numrich was aware that the soil was Type C;

ATTORNEY GENERAL OF WASHINGTON

December 8, 2017

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- (9) Numrich knew that Felton would be working in and around the trench because the connection work that Felton performed was one two tasks that Felton was trained to do;
- (10) Numrich was aware of the soil saturation conditions;
- (11) Numrich knew that Felton operated a Sawzall in the trench immediately prior to its collapse;
- (12) Numrich knew that the operation of a vibrating tool would increase the risk of a trench collapse;
- (13) Numrich knew that Felton had a history of work related accidents and a previous traumatic brain injury.

IV. CONCLUSION

This Office remains available to answer questions regarding this investigation, to provide additional summary or explanation of the above factual recitation, or to further discuss investigation methodology. Department investigators or personnel may be contacted care of:

Cody L. Costello
 Assistant Attorney General
 Division of Labor & Industries
 800 5th Ave, Suite 2000
 Seattle, WA 98104
 Ph: (206) 464-5390
 Cell: (206) 552-3027
 Email: codyc@atg.wa.gov

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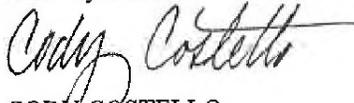
ATTORNEY GENERAL OF WASHINGTON

December 8, 2017

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DATED this 8th day of December, 2017.

ROBERT W. FERGUSON
Attorney GeneralCODY COSTELLO
Assistant Attorney General
WSBA No. 48225

ⁱ Email: henrymd182@hotmail.com; phone: (206) 920-5073; mailing address: 8638 10th Ave SW, Seattle, WA 98106.

ⁱⁱ Mr. Numrich was not contacted by this office during any point in this investigation.

ⁱⁱⁱ Email: not provided; phone: (206) 932-2897; mailing address: 3277 42 Ave SW, Seattle, WA 98116

^{iv} Email: Jfelton67621@gmail.com; phone: (253) 777-2383; mailing address: 952 SW Campus Dr., Apt #43, Federal Way, WA 98023

^v Email: pfdancer@comcast.net; phone (home): (206) 932-2897; phone (mobile): (206) 850-7651; mailing address: 3277 42nd Ave SW, Seattle, WA 98116

^{vi} Email: pfdancer@comcast.net; phone (home): (206) 932-2897; mailing address: 3277 42nd Ave SW, Seattle, WA 98116

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State v. Phillip Numrich
18-4-00255-5 SEA

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix C

(Information)

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CASE NUMBER: 18-1-00255-5 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
v.	)	No. 18-1-00255-5 SEA
)	
PHILLIP SCOTT NUMRICH,	)	INFORMATION
)	
	)	Defendant.
)	
)	

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse PHILLIP SCOTT NUMRICH of the following crime[s]: **Manslaughter In The Second Degree, Violation of Labor Safety Regulation with Death Resulting**, committed as follows:

Count 1 Manslaughter In The Second Degree

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, with criminal negligence did cause the death of Harold Felton, a human being, who died on or about January 26, 2016;

Contrary to RCW 9A.32.070, and against the peace and dignity of the State of Washington.

Count 2 Violation of Labor Safety Regulation with Death Resulting

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, was an employer, and did willfully and knowingly violate the requirements of RCW 49.17.060, and a safety or health standard promulgated under RCW Chapter 49, and a rule or regulation governing the safety or health conditions of employment adopted by the Department of Labor and Industries, to-wit: WAC 296-155-657, WAC 296-155-655 and that violation caused the death of one of its employees, to-wit: Harold Felton;

INFORMATION - 1

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733 FAX (206) 296-9009

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Contrary to RCW 49.17.190 (3), and against the peace and dignity of the State of Washington.

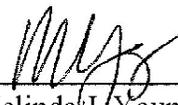
DANIEL T. SATTERBERG
Prosecuting Attorney

By:



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney

By:



Melinda J. Young, WSBA #24504
Senior Deputy Prosecuting Attorney

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CASE NUMBER: 18-1-00255-5 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
v.	)	No. 18-1-00255-5 SEA
)	
)	
PHILLIP NUMRICH,	)	STATE'S PROPOSED ORDER AND
	)	CORRECTION OF THE RECORD
)	
)	

I. INTRODUCTION

In July of 2018, this Court denied the defendant's motion to dismiss Count 1. On August 22, 2018, in accordance with directions from the court and discussions with counsel for the defendant, the State emailed a proposed written order consistent with that ruling to the court's bailiff and defendant's counsel. At the time, the State intended to file its proposed order for the record at the hearing already scheduled on August 23rd. Later on the 22nd, however, the defendant filed his "OBJECTION TO STATE'S PROPOSED ORDER AND MOTION FOR CERTIFICATION FOR REVIEW PURSUANT TO RAP 2.3(b)(4)" (hereinafter "Def. Obj."). The defendant's recitation of the record in this document is incorrect in a number of important respects. The State hereby submits this document both to file its proposed order and to correct the record.¹

¹ In his submission, the defendant also moves this Court to "certify" the issue in question in his motion for purposes of RAP 2.3(b)(4). The State objects to such "certification" and will be opposing the defendant's forthcoming motion for discretionary review in the Court of Appeals. The State will address this point orally at the hearing.

STATE'S PROPOSED ORDER AND CORRECTION
OF THE RECORD - 1

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

1 **II. PROPOSED ORDER**

2 An electronic copy (in Microsoft Word format) of the State's "PROPOSED ORDER
3 DENYING DEFENDANT'S MOTION TO DISMISS COUNT 1" was sent to this Court and
4 counsel for the defendant via email on August 22, 2018. A copy was not filed at that time. The
5 circumstances surrounding the submission of this document are discussed in more detail below. For
6 purposes of the record, a copy of the proposed order is attached as Appendix A.

7
8 **III. CORRECTION OF THE RECORD**

9 This Court heard oral argument on the defendant's motion to dismiss Count 1 on July 19,
10 2018. At the conclusion of argument, this Court reserved ruling and indicated that it would notify
11 the parties when it had reached a decision. This Court continued the case-setting hearing in this
12 matter to August 23, 2018.

13 In scheduling discussions with the court following argument, counsel for the defendant
14 indicated that, if the court denied the defendant's motion, the defendant would seek interlocutory
15 review in the Court of Appeals. In response to questions from the court, counsel for the State
16 indicated that the State could not make a final decision regarding interlocutory appeal until it had a
17 chance to review and consider the court's actual decision.

18 On July 23, 2018, this Court's bailiff contacted counsel for the State and counsel for the
19 defendant via email and indicated that this Court was denying the defendant's motion. Appendix B.
20 In relevant part, the email read: "For the reasons argued by the State, the Court is denying the
21 Defense's motion to dismiss Count 1. The Court requests the State submit a proposed order." Id.

22 Later that day, counsel for the defendant responded to the email from this Court's bailiff.
23 Appendix B. In relevant part, counsel stated: "I will be unavailable for most of the next two weeks.

1 I would ask that any proposed Order be presented at our next Court hearing which is scheduled for
2 August 23, 2018.” Id.

3 Shortly thereafter, counsel for the State responded to the email. Appendix B. In relevant
4 part, counsel stated:

5 The State’s proposal would be to draft a proposed order and to route it around in
6 advance of the hearing, but with the understanding that the court would not rule on it
7 until after the defense has the opportunity to orally object/argue (as needed) at the
8 hearing on 8/23. I understand the defense concern, but it also seems to make sense
9 to allow the court and the defense to review the State’s proposed order in advance of
10 the hearing so that we can determine whether the defense actually has an objection
11 and, if so, so that everyone can be prepared in the event that argument is needed.

12 For what it’s worth, I believe that Judge Chun is out on leave 8/6 to 8/10. I’m out on
13 leave from 7/30 to 8/20. In that context, I would anticipate getting our proposed
14 order to everyone on 8/21.

15 Id.

16 Counsel for the defendant then responded to indicate that the defense had no objection to the
17 State’s proposal. Appendix B.

18 As indicated in the email above, counsel for the State was on vacation from July 30th
19 through August 20th and returned to the office on August 21st. Due to unexpected events that
20 occurred while counsel was out of the office, counsel was unable to complete the State’s proposed
21 order on August 21st. However, the State’s proposed order was sent to this Court and defendant’s
22 counsel via email a little after 10:30 a.m. on August 22nd. Appendix B.

23 Against this backdrop, the defendant’s written objection to the State’s proposed order
mischaracterizes a number of key facts in a way that implies wrongdoing on the part of the State.
The State will correct these mischaracterizations both because they are relevant to the issues before
this Court and to ensure that the record is accurate.

1 First, the defendant's written objection creates the clear implication that the fact that the
2 State did not submit its proposed order until August 22nd was improper and/or somehow deprived
3 the defendant of his right to respond. The defendant asserts, for example, that "given the lateness of
4 the State's submission, the defense is unable to provide an extended discussion regarding each of
5 the legal claims that have been endorsed by the State's proposed Order." Def. Obj. at 2. Similarly,
6 the defendant claims that "the State had previously promised to circulate this proposed Order no
7 later than August 21, 2018." Id. These claims are unsupported by the record. As outlined above,
8 the defendant previously requested that the State not submit its proposed order *until the hearing*
9 *itself on August 23rd*. Appendix B. Given that this was his initial position, the defendant cannot
10 now credibly argue that he was disadvantaged when he was provided the proposed order one day in
11 advance of the hearing instead of two days in advance. Moreover, the defendant's claim that the
12 State's actions deprived him of the ability to provide an extensive written response to the State's
13 proposed order ignores the fact that the State's proposal—which the defendant indicated that he had
14 no objection to—did not include him providing a written response at all, but instead only involved
15 him responding orally at the hearing. Appendix B. In addition, the defendant's claim that the State
16 "promised" to provide its proposed order "no later than" August 21st is wholly unsupported by the
17 actual language of the State's email. Id. The State never made such a promise and at no time was
18 August 21st identified as the latest date that a proposed order would be provided.

19 Second, in his written objection, the defendant creates the clear implication that the State's
20 proposed order is inappropriate because it "does not include any of the factual or legal claims of the
21 defendant" and instead focuses on summarizing the legal arguments that were made by the State.
22 Def. Obj. at 1-2. But that ignores the fact that, in the email in which this Court communicated its
23 ruling, the court explicitly indicated that it was denying the defendant's motion "for the reasons

1 argued by the State.” Appendix B. In that context, it wholly appropriate that the State’s proposed
2 order—which is intended set forth this Court’s ruling and the reasons for it—essentially ignores the
3 defendant’s arguments and summarizes the State’s. *That is what this Court indicated its decision*
4 *was based on.*

5 Similarly, the defendant singles out a specific point—“the State’s claim that RCW
6 9A.32.070 and RCW 49.17.190(3) ‘create different crimes with different elements that criminal
7 different conduct’”—and responds to it as if it were a new argument being advanced for the first
8 time in the State’s proposed order. Def. Obj. at 2. But that point has been at the heart of the State’s
9 argument all along and was explicitly made by the State in both its briefing and at oral argument.
10 While the defendant clearly disagrees with this point, it is part of the “reasons argued by the State”
11 that this Court based its decision on. As a result, it was wholly appropriate for the State to include it
12 in its proposed order.

13 Finally, in his written objection, the defendant claims that the State had previously
14 notified the court that the State intended to seek interlocutory review of the trial court’s decision.
15 Def. Obj. at 2. The defendant further describes the State’s current position—opposing
16 certification of the issue pursuant to RAP 2.3(b)(4)—as being a “reversal of position.” *Id.* These
17 statements are incorrect. The State has certainly taken the position that if it lost the motion to
18 dismiss, it would likely seek interlocutory review of that decision. But the State has also
19 indicated that it could not make a final decision on this until it had a chance to review and
20 consider both the court’s ruling and the rationale for it. And the State has never taken the
21 position that it would necessarily support the defendant’s request for interlocutory review in the
22 event that the State prevailed on the motion.

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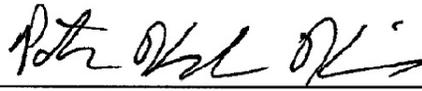
IV. CONCLUSION

The State has submitted this document purely to complete and correct the record. Despite the defendant's suggestions to the contrary, there is nothing improper in the timing of the submission of the State's proposed order or in its contents. The State's proposed order accurately summarizes the analysis that this Court indicated that it based its decision on. As a result, it is an appropriate order and this Court should sign it. Similarly, despite the defendant's suggestions to the contrary, there is nothing untoward in the State opposing the defendant's motions for RAP 2.3(b)(4) certification and/or interlocutory appeal. As noted above, the State will respond orally to the former at the scheduled hearing.

DATED this 22nd day of August, 2018.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____



Patrick Hinds, WSBA #34049
Eileen Alexander, WSBA # 45636
Deputy Prosecuting Attorneys
Attorneys for Plaintiff

Appendix A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 18-1-00255-5 SEA
Plaintiff,)	
)	
vs.)	
	)	ORDER DENYING DEFENDANT'S
PHILLIP NUMRICH,	)	MOTION TO DISMISS COUNT 1
)	
Defendant.)	
)	
)	

The State has charged the defendant, Phillip Numrich, with Manslaughter in the Second Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation with Death Resulting under RCW 49.17.190(3) (Count 2). This matter came before this Court on Numrich’s motion to dismiss Count 1 on two grounds. For the reasons outlined below, this Court denies Numrich’s motion on both grounds.

The “General-Specific Rule”

It is well-established rule of statutory construction that when a defendant’s actions violate both a specific and a general statute, the defendant should generally be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Numrich argues that the State’s prosecution of him for manslaughter violates this rule. This argument fails for a number of reasons.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT 1 - 1

Daniel T. Satterberg, Prosecuting Attorney
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Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 First, the “general-specific rule” is only applied when two statutes address the same subject
2 matter and conflict to the point that they cannot be harmonized. State v. Conte, 159 Wn.2d 797,
3 810, 154 P.3d 194 (2007); State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990). One
4 way of determining this is to examine the elements of the statutes. If the statutes create crimes with
5 different elements, they simply criminalize different conduct and the rule does not apply. State v.
6 Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation presented in this
7 case.

8 To convict a defendant of second-degree manslaughter, the State must prove that: (1) the
9 defendant engaged in an act or acts with criminal negligence; (2) the decedent died as a result of
10 the defendant’s negligent acts; and (3) any of these acts occurred in the State of Washington.
11 RCW 9A.32.070; WPIC 28.05; WPIC 28.06. In this context, a defendant acts with criminal
12 negligence when “he or she fails to be aware of a substantial risk that [death] may occur and his
13 or her failure to be aware of such substantial risk constitutes a gross deviation from the standard
14 of care that a reasonable person would exercise in the same situation.” RCW 9A.080.010 (1)(d);
15 2016 Comment to WPIC 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646
16 (2005)). As a result, second-degree manslaughter requires proof both that the defendant had the
17 mental state of “negligence” and that this mental state specifically related to the risk of death to
18 the decedent. Gamble, 154 Wn.2d at 468-69.¹

19 To convict a defendant of violating RCW 49.17.190(3), by contrast, the State must prove
20 that: (1) the defendant was the employer of the decedent; (2) the defendant willfully and
21 knowingly violated one of the enumerated statutes, regulations, rules, or orders; (3) the violation
22

23 ¹ Numrich asserts that the analysis and conclusion of Gamble applies only to first-degree manslaughter and not
24 second-degree. The State argues that it applies to both levels. This Court agrees with the State’s analysis for the
reasons set forth by the State in its briefing and at oral argument.

1 caused the decedent's death; and (4) any of these acts occurred in the State of Washington. Id.
2 In this context, a defendant acts willfully and with knowledge "with respect to a [fact,
3 circumstance, or result] when he or she is aware of that [fact circumstance or result]. It is not
4 necessary that the person know that the [fact, circumstance, or result] is defined by law as being
5 unlawful or an element of the crime." WPIC 10.02; RCW 9A.08.010(1)(b). Thus, the crime of
6 Violation of Labor Safety Regulation with Death Resulting requires proof that the defendant had the
7 mental state of "knowing" and proof that this mental state specifically related to violating a health or
8 safety provision. RCW 49.17.190(3).

9 As a result, Manslaughter in the Second Degree and Violation of Labor Safety Regulation
10 with Death Resulting have different *mens rea* elements. A violation of RCW 9A.32.070 requires
11 proof that the defendant negligently caused a risk of death to the decedent. In this context, whether
12 or not the defendant violated a statutory duty may be relevant to that issue, but proof that he or she
13 had any specific *mens rea* vis-à-vis such a violation is not required. On the other hand, a violation
14 of RCW 49.17.190(3) requires proof that the defendant knowingly violated a health or safety
15 provision. No proof is required that the defendant had any specific *mens rea* vis-à-vis the risk of
16 death to the decedent.

17 Moreover, the laws are directed at different conduct. Read as a whole, the gravamen of
18 the crime of manslaughter is that the defendant negligently caused the death of another. In
19 contrast, the gravamen of RCW 49.17.190(3) is that the defendant knowingly violated a health or
20 safety regulation and that an employee died as a result. While this distinction may be subtle, its
21 existence and importance is demonstrated by considering the points of the respective laws. The
22 obvious point of RCW 9A.32.070 is to prevent people from acting negligently in a way that risks
23 the death of another. The obvious point of RCW 49.17.190 is to require employers to know and
24

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 3

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1 follow applicable safety requirements. As this case demonstrates, there may be times where the
 2 State alleges that a given defendant's actions violate both statutes. However, that simply means
 3 that the State is asserting that the defendant has committed two different crimes. There is
 4 nothing to suggest any intent on the part of the Legislature to preclude the State from prosecuting
 5 such a defendant for both.

6 Second, the "general-specific rule" is a canon of statutory construction that is only applied
 7 when two statutes are "concurrent." Statutes are concurrent only when the "general" statute is
 8 necessarily violated every time the "specific" one is. Shriner, 101 Wn.2d 580. As a result, if it is
 9 possible to violate the latter without violating the former, then the statutes are not concurrent and
 10 the "general-specific rule" does not apply. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d
 11 630 (2006); State v. Heffner, 126 Wn. App. 803, 808, 110 P.3d 219 (2005). Numrich has
 12 identified RCW 49.17.190(3) (Violation of Labor Safety Regulations with Death Resulting) as
 13 the specific statute and RCW 9A.32.070 (Manslaughter in the Second Degree) as the general.
 14 Here it is possible to violate the former without violating the latter.

15 As an initial matter, as described above the two statutes have different elements. In
 16 relevant part, RCW 9A.32.070 requires the State to prove that the defendant acted with criminal
 17 negligence vis-à-vis the risk of the decedent's death. The State is not required to prove that the
 18 defendant willfully and knowingly violated a health or safety regulation.² RCW 49.17.190(3), in
 19 contrast, requires the opposite—the State must prove that the defendant willfully and knowingly
 20 violated a health or safety regulation, but need not prove that the defendant acted with criminal
 21

22 ² It is certainly true that, *in this case*, the State is arguing that the fact that Numrich knowingly violated such
 23 regulations is part of the proof that he acted negligently. The test for concurrency, however, is based on what is
 24 possible given the elements of the crime. Chase, 134 Wn. App. at 802-03; Heffner, 126 Wn. App. at 808. In that
 context, the specific facts of the instant case are irrelevant to that determination. Id.

1 negligence vis-à-vis the risk of the decedent's death. This difference in elements between the
2 two statutes in and of itself demonstrates that it is possible to violate RCW 49.17.190(3) without
3 also violating RCW 9A.32.070.

4 Moreover, the fact that it is possible to violate the former without violating the latter is
5 also demonstrated by the hypothetical scenarios put forth by the State. In those hypothetical
6 scenarios, the defendant was the employer of the decedent, willfully and knowingly violated a
7 regulation encompassed by the statute, and the decedent died as a result. As a result, the
8 employer-defendant would clearly have violated RCW 49.17.190(3). However, given the
9 particular circumstances described in the hypotheticals, no reasonable person would conclude
10 that the defendant had acted with criminal negligence in the sense that he failed to be aware of a
11 substantial risk that death would occur and his failure constituted a gross deviation from the
12 standard of care that a reasonable person would have exercised. As a result, the defendants in
13 the hypotheticals would not have violated RCW 9A.32.070.

14 Given all of the above, RCW 9A.32.070 and RCW 49.17.190(3) are different statutes that
15 create different crimes with different elements that criminalize different conduct. Moreover, the
16 two statutes are not concurrent. As a result the "general-specific rule" does not apply to them.

17 Third, the "general-specific rule" is a canon of statutory construction specifically used by
18 courts to help determine whether the Legislature intended to preclude the State from charging a
19 more "general" statute when a more "specific" one also applies. Conte, 159 Wn.2d at 803;
20 Heffner, 126 Wn. App. at 807; State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294
21 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at
22 580; State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). It is well recognized that this rule
23 must be used with particular care and should be "applied to preclude a criminal prosecution *only*"
24

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 5

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1 where the legislative intent is crystal clear.” Conte, 159 Wn.2d at 815 (emphasis added). As a
2 result, the “general- specific rule” must be used in conjunction with other principles of statutory
3 construction, including the general rule that a court must apply the construction that best fulfills
4 the statutory purpose and carries out any express legislative intent and must avoid interpreting
5 statutes in a way that leads to unlikely, absurd, or strained results. See In re Marriage of
6 Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City of Seattle v. Fontanilla, 128 Wn.2d 492,
7 498, 909 P.2d 1294 (1996); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).
8 Here, applying the “general-specific” rule to RCW 9A.32.080 and RCW 49.17.190(3) would
9 undercut the statutory purpose, thwart the intent of the Legislature, and lead to absurd results.

10 RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973
11 (WISHA). RCW 49.17.900. Subsection (3) of the statute is nearly identical to 29 U.S.C. 666(e)
12 of the federal Occupational Safety and Health Act (OSHA). The express legislative history of
13 WISHA is extremely short and does not discuss the proposed criminal sanctions contained in
14 RCW 49.17.190. Rather, the only discussion in the legislative history deals with the need to
15 ensure that Washington’s statutes would be at least as effective as OSHA in order to ensure that
16 Washington had an approved OSHA State Plan that would avoid federal preemption. *Enacting*
17 *the Washington Industrial Safety and Health Act of 1973: Hearing on SB 2389 Before the S.*
18 *Comm. on Labor*, 1973 Leg., 43rd Sess. at 2 (Feb. 2, 1973); See also RCW 49.17.010. As a
19 result, many of the provisions of WISHA are worded very similarly, if not identically, to those in
20 OSHA. In this context, where the provisions of WISHA are identical or analogous to
21 corresponding OSHA provisions, Washington courts will look to federal authority, as the
22 Washington Legislature’s intent would be identical to Congress’s. Clarke v. Shoreline Sch. Dist.
23 No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986); Fahn v. Cowlitz County, 93
24

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 6

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1 Wn.2d 368, 376, 610 P.2d 857 (1980). Because WISHA is a remedial statute, its provisions
2 must be liberally construed to protect the health and safety of Washington workers. Adkins v.
3 Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257, 756 P.2d 142 (1988); Frank
4 Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25, 36, 329 P.3d 91 (2014);
5 Stute v. P.B.M.C., 114 Wn.2d 454, 788 P.2d 545 (1990).

6 Prior to the enactment of OSHA/WISHA—while such prosecutions may have been rare
7 (as alleged by Numrich)—there was nothing that precluded state prosecutors from bringing
8 felony charges against employers under existing state laws criminalizing, *inter alia*, homicide
9 and assault. In this context, a review of the legislative history for OSHA (which is the basis for
10 the identical language in WISHA) provides no indication that Congress intended to limit or
11 preclude prosecutions under the existing state criminal codes. If Congress had intended OSHA
12 to make employers less criminally liable than under existing law, Congress would have said so.
13 Instead, Congress has said precisely the opposite and has made clear that OSHA was not
14 intended to limit the ability of state prosecutors to bring traditional criminal charges against
15 employers for acts committed in, or related to, the workplace. H.R. REP. NO. 1051, 100th Cong.,
16 2nd Sess. 10 (1988) (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127
17 (1989)). Given all of the above, there is no basis to conclude that Congress (in adopting OSHA)
18 or the Washington Legislature (in adopting WISHA) intended the inclusion of a gross
19 misdemeanor provision to preclude Washington prosecutors from bringing homicide charges
20 under state law against employers following workplace fatalities. Indeed, all evidence of
21 legislative intent is to the contrary. In this context, a ruling from this Court granting Numrich's
22 motion would run directly contrary to the clear intent of the Legislature.

23
24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 7

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1 Moreover, one of the most basic canons of statutory construction is that no statute should
 2 be construed in a manner that leads to strained or absurd results. State v. Larson, 184 Wn.2d
 3 843, 851, 365 P.3d 740 (2015); Becker, 59 Wn. App. at 854. As the State points out in its
 4 briefing, a number of absurd results would follow from Numrich’s argument that he can only be
 5 prosecuted under RCW 49.17.190(3) and not RCW 9A.32.070. Because the application of the
 6 “general-specific rule” he advocates would lead to such absurdities, his interpretation must be
 7 rejected.

8 Equal Protection

9 Numrich argues that the State’s decision to prosecute him for Manslaughter in the Second
 10 Degree violates his right to equal protection because RCW 9A.32.070 and RCW 49.17.190(3)
 11 criminalize the same act, but the penalty is more severe under the former than the latter. This
 12 argument fails for a number of reasons.

13 First, Numrich has failed to establish that the rule he relies on is the law. In Washington, the
 14 “rule” asserted by Numrich dates back to Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956).
 15 In Olsen, the Washington Supreme Court, relying on a case from the Oregon Supreme Court, held
 16 that:

17 A statute which prescribes different punishments or different degrees of punishment
 18 for the same acts committed under the same circumstances by persons in like
 19 situations is violative of the equal protection clause of the Fourteenth Amendment of
 20 the United States Constitution. State v. Pirkey, 203 Or. 697, 281 P.2d. 698 and cases
 there cited.

21 Olsen, 48 Wn.2d at 550. Then, in State v. Zornes, the Washington Supreme Court held that the rule
 22 from Olsen also applied to situations where two different statutes criminalized the same act and the
 23 penalty was more severe under one than the other. 78 Wn.2d 9, 475 P.2d 109 (1970). Olsen,
 24 Zornes, and their progeny also held that such statutory situations would violated Art. I, § 12 of the

ORDER DENYING DEFENDANT'S MOTION TO
 DISMISS COUNT 1 - 8

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1 Washington Constitution. However, neither Olsen nor Zornes nor any case applying this rule
2 appears to have separately analyzed Art. I, § 12. Rather, these cases relied purely on the assumption
3 that the privileges and immunities clause of Art. I, § 12 was substantively identical to the equal
4 protection clause of the Fourteenth Amendment. Olsen, 48 Wn.2d at 550.

5 In 1979, the United States Supreme Court concluded that the fact that two different statutes
6 established different penalties for the same criminal act did *not* violate the Fourteenth Amendment.
7 United States v. Batchelder, 442 U.2d 114, 124-25, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In 1991,
8 the Washington Supreme Court recognized this fact, noting that Batchelder had abrogated Zornes
9 and that the rule from Olsen/Zornes was no longer good law as a result—at least insofar as it was
10 based on the Fourteenth Amendment. City of Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d
11 1371 (1991).

12 In 2004, the Washington Supreme Court conducted a Gunwall analysis and concluded that,
13 despite its earlier assumption in Olsen and Zornes, the privileges and immunities clause of Art. I, §
14 12 is substantively different than the equal protection clause of the Fourteenth Amendment. Grant
15 County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791 (2004). In light of the holding
16 in Grant County, Olsen, Zornes, and their progeny—which were based on an analysis of the
17 Fourteenth Amendment and the incorrect assumption that Art. I, § 12 was identical—can no longer
18 be read as being good law regarding the Washington Constitution either.

19 Given all of the above, the situation Numrich complains of—having two statutes that
20 provide different levels of punishment for the same act—does not violate the Fourteenth
21 Amendment. And Numrich has not provided this Court with any analysis or citation to authority
22 establishing that it violates Art. I, § 12.

23
24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 9

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1 Second, even if the rule advocated by Numrich was the law, the State prosecuting him for
 2 manslaughter would not violate his rights under either the Fourteenth Amendment or Art. I, § 12.
 3 Even under Numrich's rule it is well settled that there is no equal protection violation when the
 4 crimes the prosecutor has the discretion to charge are different crimes that require proof of different
 5 elements. See Fountain, 116 Wn.2d at 193-94; In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345
 6 (1985); State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). This is the case even if
 7 the prosecutor's decision is based on or influenced by the penalties available following conviction
 8 and even when the relative punishments for the two statutes seem illogical to the defendant or the
 9 court. Fountain, 116 Wn.2d at 193; Farrington, 35 Wn. App. at 802; State v. Richards, 27 Wn. App.
 10 703, 705, 621 P.2d 165 (1980). Indeed, this is the case even when the relevant elements make it
 11 easier to prove the violation with the more severe penalty. Zornes, 78 Wn.2d at 21-22.

12 Here, as discussed above, the crimes of Manslaughter in the Second Degree and Violation of
 13 Labor Safety Regulations with Death Resulting are different crimes with different elements that
 14 are aimed at different conduct. This analysis is not changed when the argument is recast as an
 15 equal protection one.

16 **Conclusion**

17 For the reasons set forth above and in the State's briefing and oral argument, Numrich's
 18 motion to dismiss Count 1 is DENIED. The Court incorporates by reference its oral rulings,
 19 findings, and conclusions.
 20

21 Dated August ____, 2018.

22
 23 JUDGE JOIN IL. CIUN

24
 ORDER DENYING DEFENDANT'S MOTION TO
 DISMISS COUNT 1 - 10

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Appendix B

From: [Hinds, Patrick](#)
To: ["Todd Maybrow"; Court, Chun](#)
Cc: [Alexander, Eileen](#); ["Cooper Offenbecher \(Cooper@ahmlawyers.com\)"](#)
Subject: RE: State v. Numrich (18-1-00255-5) - on Judge Chun's calendar on Thursday (8/23)
Date: Wednesday, August 22, 2018 10:34:00 AM
Attachments: [Numrich - State's Proposed Order.docx](#)

All,

Per Judge Chun's request, attached is the State's proposed order. The State believes this order summarizes the arguments of the State that the court adopted as the basis for its ruling as indicated in the email below. I have attached it in Word format so that Judge Chun can make edits/alterations/changes as he wishes.

Thanks,
Patrick

Patrick Hinds

King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Hinds, Patrick
Sent: Wednesday, August 22, 2018 7:14 AM
To: 'Todd Maybrow' <Todd@ahmlawyers.com>; Court, Chun <Chun.Court@KingCounty.gov>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Subject: State v. Numrich (18-1-00255-5) - on Judge Chun's calendar on Thursday (8/23)

All,

I just wanted to check in regarding the hearing tomorrow in this matter. As I assume Mr. Maybrow would agree, Judge Chun has already ruled on the defendant's motion to dismiss Count 1. Per the below email exchange, Judge Chun indicated that he agreed with the State's arguments, denied the defendant's motion to dismiss, and asked the State to prepare a proposed order. The State will submit its proposed order a little bit later today so that Mr. Maybrow and the court can have a chance to review it prior to the hearing tomorrow.

The State's understanding of tomorrow's hearing is that we'll be addressing:

- 1) Entry of a written order (and—if necessary—argument on the language of the order);

- 2) The defendant's request that the court certify its ruling per RAP 2.3(b)(4) for purposes of the defendant seeking interlocutory review in the Court of Appeals; and
- 3) CSH/the current status of the case.

Do the court and the defense also have those as being the issues on the table? I just want to make sure we're all on the same page.

Thanks,
Patrick

Patrick Hinds

King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Todd Maybrown <Todd@ahmlawyers.com>
Sent: Monday, July 23, 2018 4:55 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Court, Chun <Chun.Court@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>
Subject: RE: St v Numrich

The defense would not object to the State's proposal.

Todd

Todd Maybrown
Allen, Hansen, Maybrown & Offenbecher, P.S.
One Union Square
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From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>

Sent: Monday, July 23, 2018 4:36 PM

To: Todd Maybrow <Todd@ahmlawyers.com>; Court, Chun <Chun.Court@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>

Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>

Subject: RE: St v Numrich

The State's proposal would be to draft a proposed order and to route it around in advance of the hearing, but with the understanding that the court would not rule on it until after the defense has the opportunity to orally object/argue (as needed) at the hearing on 8/23. I understand the defense concern, but it also seems to make sense to allow the court and the defense to review the State's proposed order in advance of the hearing so that we can determine whether the defense actually has an objection and, if so, so that that everyone can be prepared in the event that argument is needed.

For what it's worth, I believe that Judge Chun is out on leave 8/6 to 8/10. I'm out on leave from 7/30 to 8/20. In that context, I would anticipate getting our proposed order to everyone on 8/21.

Given all of the above, is that proposal acceptable to the court and the defense?

Thanks,
Patrick

Patrick Hinds

King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Todd Maybrow [<mailto:Todd@ahmlawyers.com>]

Sent: Monday, July 23, 2018 3:52 PM

To: Court, Chun <Chun.Court@kingcounty.gov>; Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>

Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>

Subject: RE: St v Numrich

I will be unavailable for most of the next two weeks. I would ask that any proposed Order be presented at our next Court hearing which is scheduled for August 23, 2018.

Thank you,

Todd

Todd Maybrown
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From: Court, Chun <Chun.Court@kingcounty.gov>
Sent: Monday, July 23, 2018 3:18 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>; Todd Maybrown <Todd@ahmlawyers.com>
Subject: St v Numrich
Importance: High

Dear Counsel:

For the reasons argued by the State, the Court is denying the Defense's motion to dismiss Count 1. The Court requests the State submit a proposed order.

Thank you.

Jill
Bailiff to Judge John H. Chun

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
)
) Plaintiff,)
)
) v.) No. 18-1-00255-5 SEA
)
)
) PHILLIP NUMRICH,)
)
) Defendant.) DECLARATION OF PATRICK HINDS
) RE: STATE'S MOTION TO AMEND
)
)
 _____)

I, PATRICK HINDS, hereby declare as follows:

1. I am a Senior Deputy Prosecuting Attorney in the King County Prosecuting Attorney's Office and am one of the prosecutors assigned to the above entitled case, and am familiar with the records, files, and discovery therein.
2. The defendant is currently charged by way of Information with Manslaughter in the Second Degree in violation of RCW 9A.32.070 (Count 1) and Violating of Labor Safety Regulation with Death Resulting in violation of RCW 49.17.190(3) (Count 2). The date of violation for both counts is January 26, 2016. The Information was filed on January 5, 2018.
3. At the time of filing and at the present time, the State believes that there is probable cause to charge the defendant with either/both Manslaughter in the First Degree and Manslaughter in the Second Degree.
4. Due to the King County Prosecuting Attorney's generally conservative filing policy, in January it was decided to file Manslaughter in the Second Degree and to reserve the decision of whether to amend to Manslaughter in the First Degree or to add Manslaughter in the First Degree as a charge in the alternative until the time of trial or until closer to the running of the State of Limitations, whichever came first.
5. Per RCW 9A.04.080(1), the Statute of Limitations for Manslaughter in the First Degree is three years from the date of violation. In this case, the statute will run on January 26, 2019.

6. The defendant has moved for discretionary review of the Superior Court's denial of his motion to dismiss. If discretionary review is granted (in either the Supreme Court or the Court of Appeals), the Superior Court will no longer have the authority to rule on the State's motion to amend the Information under RAP 7.2.
7. If discretionary review is granted, the State anticipates that the case will not be mandated back to the Superior Court until after January 26, 2019.
8. As the State interprets the relevant case law, once the statute has run, the State would not be able to amend the Information to change Count 1 to Manslaughter in the First Degree or to add a count of Manslaughter in the First Degree as a charge in the alternative because, although such an amendment would "relate back" to the original Information, it would broaden the original charges. See State v. Warren, 127 Wn. App. 893, 896, 112 P.3d 1284 (2005).
9. Given all of the above, the State is moving to amend the Information now to add a count of Manslaughter in the First Degree in the alternative because, if it does not, it will effectively lose the ability to do so if discretionary review is granted.
10. The State's motion to amend is not being brought to retaliate against the defendant for seeking discretionary review, to gain an advantage in the appellate litigation, or for any other improper purpose.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 16th day of October, 2018 in Seattle, Washington.



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

October 18, 2018 - 2:50 PM

Transmittal Information

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Appellate Court Case Number: 96365-7
Appellate Court Case Title: State of Washington v. Phillip Scott Numrich
Superior Court Case Number: 18-1-00255-5

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