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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

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PHILLIP SCOTT NUMRICH,

Appellant.

v.

STATE OF WASHINGTON,

Respondent.

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MOTION FOR DISCRETIONARY REVIEW

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& OFFENBECHER, P.S.

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PROOF OF SERVICE

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**1. IDENTITY OF MOVANT**

Phillip Numrich, the movant and defendant below, asks this Court to grant discretionary review of the decision described in Part 2 below.

**2. DECISION BELOW**

Appellant asks this Court to review the decision of the King County Superior Court, recorded in its August 23, 2018 Order Denying Defendant's Motion to Dismiss Count 1 and Certifying the Issues for Review Under RAP 2.3(b)(4). *See App. A.*

**3. ISSUES PRESENTED FOR REVIEW**

1. Should discretionary review be granted where the superior court certified that its decision, in denying defendant's motion to dismiss, involves controlling questions of law to which there is substantial ground for a difference of opinion, and in so ruling recognized the need for interlocutory appellate guidance?
2. Should discretionary review be granted where the superior court committed probable error substantially altering the status quo where the State – for the first time ever in Washington – has charged an employer under the general felony manslaughter statute for the death of an employee resulting from alleged safety violations, even though there is a specific workplace death statute, thereby violating Washington's "general-specific" rule?

**4. STATEMENT OF THE CASE**

**A. Factual Background<sup>1</sup>**

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<sup>1</sup> These facts, and the procedural history, are summarized in the Declaration of Todd Maybrow attached hereto as *Appendix B.*

Phillip Numrich is the owner of Alki Construction LLC (“Alki Construction”). Alki Construction, doing business as Alki Sewer, has worked on numerous plumbing projects in the Puget Sound region since 2012. Alki Construction is licensed to do business in Washington and its job sites are regulated by the Washington Department of Labor and Industries (“WSDLI”).

During January 2016, Alki Construction was working to replace a sewer line at a private residence in West Seattle. Alki Construction uses what is commonly described as a “trenchless pipe repair” during this process. Mr. Numrich and several employees helped to dig and shore two trenches – one near the home and one near the street – at the commencement of the work. On January 26, 2016, as the project was nearly completed, a worker was killed when the dirt wall of the trench nearest to the home collapsed. Mr. Numrich was not present at the job site at the time of the collapse.

On July 21, 2016, the WSDLI issued Alki Construction a citation that alleged certain violations of the safety regulations in relation to the events of January 26, 2016. *See App. B* (Declaration of Andrew Kinstler). Mr. Numrich appealed these findings and assessments and the parties ultimately reached a compromised settlement of all claims.

**B. Procedural History**

On or about January 18, 2018, the State filed criminal charges against Mr. Numrich relating to this workplace incident. The Information charges:

### **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;

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

*App. B* (Information).<sup>2</sup>

These charges are ostensibly supported by a Certification for Determination of Probable Cause that was prepared by Mark Joseph, who is identified as a Certified Safety and Health Officer with WSDLI. Throughout the Certification for Determination of Probable Cause, Mr. Joseph opines that Alki Construction had failed to comply with certain WSDLI regulations, such

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<sup>2</sup> RCW 49.17.190 is part of Washington's Industrial and Health Act of 1973. This legislative scheme is commonly referred to as "WISHA."

as the provisions identified in WAC 296-155-650 and WAC 296-155-657. *See Appendix B* (Certification at 2). Further, Mr. Joseph claims that Alki Construction failed to follow the “most rigorous shoring standard per WSDLI regulations” when digging and shoring the trench. *Id.* (Certification at 3).

Thus, based upon these alleged “willful” regulatory violations, Mr. Joseph opines that Mr. Numrich is guilty of a violation of WISHA’s criminal provisions as set forth in RCW 49.17.190 (3). Moreover, for all of these very same reasons, Mr. Joseph also claims that Mr. Numrich must be guilty of manslaughter in the second degree.

On April 30, 2018, Mr. Numrich filed his Motion to Dismiss Count 1 (the manslaughter charge). *See Appendix C*. In support, Mr. Numrich argued that this prosecution – and the filing of a manslaughter charge – was in direct conflict with Washington’s general-specific rule insofar as each violation of WISHA’s specific statute (RCW 49.17.190(3)) would necessarily support a conviction under the general second-degree manslaughter statute (RCW 9A.32.070). Mr. Numrich also argued that the State’s decision to file the manslaughter violated Washington’s equal protection clause.

On June 13, 2018, the State filed its Response to Defendant’s Motion to Dismiss Count 1 (“Response”). Initially, the State claimed that Washington’s general-specific rule is no different than any other tool of statutory construction. Then, assuming that the general-specific rule could be

applied in this instance, the State argued that the underlying charges were not concurrent because WISHA's criminal liability statute (RCW 49.17.190(3)) contains no causation requirement. Finally, after conceding that this was the first instance in which an employer in Washington had ever been charged with manslaughter based upon a workplace accident, the State claimed that there was no equal protection violation in this case.

**C. The Superior Court's Ruling**

King County Superior Court Judge John Chun<sup>3</sup> initially heard argument on July 19, 2018. The Court declined to issue any ruling on that date and, instead, scheduled a subsequent hearing for August 23, 2018.

Thereafter, Judge Chun informed the parties that he intended to deny the defense motion. The State subsequently prepared a proposed Order that parroted the arguments in its pleadings. The defense objected to the State's proposed Order and presented argument why this matter should be certified for review under RAP 2.3(b)(4). *See App. D (Objection to State's Proposed Order and Motion for Certification for Review Pursuant to RAP 2.3(b)(4)).*

The parties appeared before Judge Chun on August 23, 2018. The defense then argued that this motion raised issues of central importance and that immediate review was appropriate at this juncture. In particular,

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<sup>3</sup> Judge Chun has since been appointed to Division One of the Court of Appeals.

counsel explained how a case involving a single misdemeanor charge was fundamentally different than a case that also included a charge of manslaughter. Accordingly, the defense demonstrated that interlocutory review was certain to advance the ultimate termination of the case.<sup>4</sup>

Judge Chun accepted the defense position. First, the judge refused to sign the State's proposed Order. Second, Judge Chun signed an Order which certified the issue for immediate review:

FURTHER, Defendant's Motion for Certification Pursuant to RAP 2.3(b)(4) is GRANTED. The Court finds and concludes that this Court's Order Denying Defendant's Motion to Dismiss Count 1 involves controlling questions of law as to which there are substantial grounds for a difference of opinion and that immediate review of the Order may materially advance the ultimate termination of the litigation.

*Appendix A.*

## 5. **ARGUMENT**

### **A. Introduction: Discretionary Review is Warranted under RAP 2.3**

Discretionary review is necessary and appropriate to promptly address significant issues regarding the interpretation of Washington's criminal statutes as they pertain to workplace fatalities – including the relationship between WISHA's specific workplace death statute and the

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<sup>4</sup> During earlier stages of the case, the State had notified the superior court that it was likely to seek interlocutory review if the defense motion was to be granted. Nevertheless, the State objected to the defendant's request for certification.

general manslaughter statute. Before this prosecution, it seemed apparent that WISHA's workplace death statute had established a comprehensive and unified scheme of punishment for cases involving workplace-related deaths. To accept the State's claims in this case, however, the WISHA workplace death statute would become superfluous and every such incident would now be subject to prosecution as a manslaughter charge.

RAP 2.3(b)(4) provides that discretionary review may be accepted when "[t]he superior court has certified...that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." The superior court appropriately recognized that this case presents hotly contested issues that should be definitively resolved by the appellate courts before trial, and certified this issue pursuant to RAP 2.3(b)(4). Additionally, RAP 2.3(b)(2) provides for the acceptance of review when "the 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." As discussed *infra*, the superior court committed probable error substantially altering the status quo.

**B. This Prosecution Violates the General-Specific Rule**

In enacting WISHA (RCW 49.17), the Washington legislature adopted a comprehensive and unified statutory scheme to regulate workplace safety. As part of this scheme, WISHA specifically provides for both civil penalties (RCW 49.17.180) and criminal penalties (RCW 49.17.190) due to safety violations or avoidable workplace injuries. The distinct criminal penalties are applicable only in certain enumerated circumstances:

Any employer who willfully and knowingly violates the requirements of RCW 49.17.060, any safety or health standard promulgated under this chapter, any existing rule or 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 shall, upon conviction be guilty of a gross misdemeanor and be punished by a fine of not more than one hundred thousand dollars or by imprisonment for not more than six months or by both; except, that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than two hundred thousand dollars or by imprisonment for not more than three hundred sixty-four days, or by both.

RCW 49.17.190(3).

This is a unique, and unusual, criminal statute – and it allows for penalties that are not available in any other misdemeanor-level offense. On the one hand, violators may be required to pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, violators

may be sentenced to up to six months in jail, less than what would be available for conviction of other gross misdemeanors. *See id.*

This punishment scheme provides the exclusive criminal remedy for the types of violations that have been alleged in this case. To prove a crime in such a workplace incident, the State must demonstrate that the employer “*willfully and knowingly*” violated a WISHA rule, regulation, or safety and health standard, and where “that violation cause[s] death to any employee” the employer “shall, upon conviction be guilty of a gross misdemeanor.” RCW 49.17.190(3) (emphasis added).

Since as early as 1970, Washington has applied its own, unique version of the “general-specific rule” when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 Wn.2d 9 (1970). This rule provides that “where a special statute punishes the same which is [also] punished under a general statute, the special statute applies, and the accused can be charged only under that statute.” *State v. Shriner*, 101 Wn.2d 576, 580 (1984) (quoting *State v. Cann*, 92 Wn.2d 193, 197 (1979)).

The purpose of the rule is to preserve the legislature’s intent to penalize specific conduct in a particular, less onerous way and hence to minimize sentence disparities resulting from unfettered prosecutorial discretion. As the Washington Supreme Court has explained:

Under the general-specific rule, a specific statute will prevail over a general statute. *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867 (1976) (“It is the law in this jurisdiction, as elsewhere, that where concurrent general and special acts are *in pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.”). As this court recognized in *Wark*, “It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.” *Id.*; see *State v. Conte*, 159 Wn.2d 797, 803, cert. denied, 552 U.S. 992 (2007).

*Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 309 (2008).

The Washington courts have applied this rule in several different contexts. See, e.g., *Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged under general theft statute and should have been charged only with criminal possession of a rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could not be charged under general escape statute and should have been charged only under the specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972) (defendant who presented another's credit card at a restaurant could not be charged under general larceny statute, but must instead be charged with crime of procuring meals by fraud); *State v. Thomas*, 35 Wn.App. 598, 604-05 (1983) (elements of

unlawful imprisonment are necessarily present in situations where the offense of custodial interference is alleged). *See also State v. Haley*, 39 Wn.App. 164 (1984) (where facts supported either a manslaughter charge or negligent homicide charge, it was the prosecutor’s duty, where an automobile was involved, to charge negligent homicide).

The statutes at issue in this case – the general statute of manslaughter in the second degree (RCW 9A.32.070) as alleged in Count 1 and the specific statute in WISHA that punishes a violation of labor safety regulations that result in death (RCW 49.17.190(3)) as alleged in Count 2 – are concurrent statutes. For, each time an employer is guilty of the specific offense, he is likewise guilty of the general offense.

A side-by-side comparison of the elements of each offense establishes this point:

<u>OFFENSE</u>	<u>MENS REA</u>	<u>RESULT</u>
MANSLAUGHTER 2°	CRIMINAL NEGLIGENCE	DEATH
RCW 49.17.190(3)	WILFULL AND KNOWING	WORKPLACE DEATH

Each violation of the specific statute, RCW 49.17.190(3), requires proof of a “willful” and “knowing” violation of safety regulations that

results in a workplace fatality.<sup>5</sup> More generally, each violation of RCW 9A.32.070 requires proof of “negligent” conduct that results in death. Under Washington law, criminal negligence is defined as a “gross deviation of the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). Thus, the specific statute requires proof of a greater *mens rea* (“willfully or knowingly”) than the general statute (which requires proof only of criminal negligence). It is noteworthy that Washington’s pattern jury instructions establish that criminal negligence is established in every case where there is proof of a higher *mens rea* (such as willful, intentional, knowing or reckless conduct). *See* RCW 9A.08.010(2).

It is impossible to envision a case where a defendant might be guilty of the specific WISHA statute but acquitted of the more general manslaughter statute. For, as reflected in the State’s charging documents, the WISHA/OSHA standards establish the standard of care for employers in the State of Washington. *See, e.g., Minert v. Harsco Corp.*, 28 Wn.App. 686, 873-74 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323 (1978) (OSHA regulation is relevant to the appropriate standard of care); *Kennedy*

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<sup>5</sup> WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements or with plain indifference to employee safety.” WAC 296-900-14020.

*v. Sea-Land Services, Inc.*, 62 Wn.App. 839, 852-53 (1991) (OSHA regulation was relevant to the standard of care). Simply put, in each and every case that a person willfully or knowingly fails to comply with the mandates of WISHA, it can also be said that the employer has engaged in negligent conduct or a gross deviation of the standard of care.<sup>6</sup>

Notably, the specific statute, RCW 49.17.190(3), has a significantly higher mental state than the general manslaughter statute. It is unreasonable to suggest that the legislature enacted a special misdemeanor-level statute with a higher mental state while also assuming that prosecutors within the state would be authorized to charge under a general felony statute with a lower mental state.

A very similar situation was presented in *Danforth, supra*. There, the petitioners were on work release status. *Danforth*, 97 Wn.2d at 256. While looking for work, the petitioners became intoxicated and failed to return to the work release center. *Id.* The petitioners were arrested and charged with escape in the first degree. *Id.* On appeal, the petitioners argued that another statute, RCW 72.65.070, deals specifically with an escape from work release. *Id.* at 257. This Court held that the general-specific rule prohibited prosecution under the general “escape” statute:

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<sup>6</sup> The defense argument is visually encapsulated in the attached chart. *See App. E.*

[W]e are of the opinion that the specific requirement that the defendant's conduct be willful under RCW 72.65.070 recognizes a valid legislative distinction between going over a prison wall and not returning to a specified place of custody. The first situation requires a purposeful act, the second may occur without intent to escape. It is easy to visualize situations where a work release inmate failed to return because of a sudden illness, breakdown of a vehicle, etc. This explains the requirement of willful action.

Finally, this interpretation of the two statutes is necessary to give effect to RCW 72.65.070. RCW 72.65.070 differs significantly from the general escape statute in that the prosecutor must prove the failure to return was willful. Under RCW 9A.76.110, however, a conviction will be sustained if the state demonstrates that the defendant “knew that his actions would result in leaving confinement without permission.” *State v. Descoteaux*, 94 Wn.2d 31, 35 (1980).

Given the choice, a prosecutor will presumably elect to prosecute under the general escape statute because of its lack of a mental intent requirement. Consequently, the result of allowing prosecution under RCW 9A.76.110 is the complete repeal of RCW 72.65.070. This result is an impermissible potential usurpation of the legislative function by prosecutors.

*Danforth*, 97 Wn.2d at 258-59.

The same situation is presented here. By proceeding under the general manslaughter statute, the State is simply required to prove that the defendant was criminally negligent – or that his conduct amounted to a gross deviation from the standard of care. Yet to proceed under the specific statute (RCW 49.17.190(3)), the State would need to prove a willful and knowing violation of the applicable safety regulations (which amount to the

standard of care in this highly-regulated industry). The State should not be permitted to avert the mental element that the legislature had in mind when it enacted the specific WISHA statute.

The legislature's intent is also evidenced by the creation of a unique – and carefully calibrated – punishment scheme in RCW 49.17.190(3). It is notable that the special misdemeanor-level statute allows for an enhanced fine of up to \$100,000 to \$200,000. By contrast, the maximum fine for a Class B felony, such as Manslaughter in the Second Degree, is only \$25,000. Thus, when enacting RCW 49.17.190(3), the legislature was mindful of the fact that it was creating a special misdemeanor-level statute – and a statute that included somewhat reduced custodial penalties along with the potential for financial penalties far greater than authorized for any felony-level offense.<sup>7</sup> This scheme would become a nullity if the State was permitted to charge both the general and the specific statutes, as they have attempted to do in this case.

In an attempt to side-step these issues, the State has claimed that the general-specific rule is merely a maxim of statutory construction. The State's arguments are misguided. Washington's general-specific rule for criminal cases is not merely an aid to statutory construction. Rather, as

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<sup>7</sup> Consistent with RCW 9A.20.020, the maximum fine for a Class A felony is \$50,000.

explained by the Washington Supreme Court, it is a “rule” of clear application – and a rule with a very specific purpose: “The general-specific rule is a means of answering the question, Did the legislature intend to give the prosecutor discretion to charge a more serious crime when the conduct at issue is fully described by a statute defining a less serious crime?” *State v. Albarran*, 187 Wn.2d 15, 20 (2016). The answer to this question is always “no,” unless it is clear that the legislature intended to make the general act controlling.

The State also claims that these statutes are not concurrent because they have different elements. Yet, in making this argument, the State does not rely upon the statutory language. Rather, it invites the Court to either ignore the language of the statutes or to engraft non-statutory elements that would serve its purpose in this case.

First, the State has argued that RCW 49.17.190(3) requires no causal connection between the wrongful act and the resulting death. *See Response* at 13. To quote the State’s brief:

Moreover, the laws are directed at different conduct. Read as a whole, the gravamen of the crime of 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 happened to die as a result.**

*Id.* (emphasis supplied).

But the unambiguous language of RCW 49.17.190(3) specifically provides for liability only where there is proof that the defendant’s “violation caused death to an employee.” *Id.* (emphasis supplied). Contrary to the State’s claim, RCW 49.17.190(3) is not violated in every case where there is a safety violation and the worker “happened to die” at a jobsite. Rather, as in all homicide cases, the State must prove a direct causal connection – both “but for” cause and “proximate” or “legal” cause – between the wrongful conduct and the death of the employee.

Generally, cause of death is a fact question for the jury. *See, e.g., State v. Engstrom*, 79 Wn.2d 469, 476 (1971). “In crimes which are defined to require specific conduct resulting in a specified result, the defendant’s conduct must be the ‘legal’ or ‘proximate’ cause of the result.” *State v. Rivas*, 126 Wn.2d 443, 453 (1995). This causation element is captured in WPIC 25.02. A defendant’s conduct is not a proximate cause of the death if, although it otherwise might have been a proximate cause, a superseding cause intervenes. *See, e.g., State v. Meekins*, 125 Wn.App. 390, 397-98 (2005). This causation element is captured within WPIC 25.03. *See id.* The Washington legislature clearly contemplated these requirements when it included a causation element within RCW 49.17.190(3).<sup>8</sup>

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<sup>8</sup> Notably, WISHA’s criminal liability statute and the Manslaughter statutes were enacted just two years apart. *See* 1973 Wash. Sess. Laws c 80 § 19 (enacting statute criminalizing Violation of Labor Safety Regulation with Death Resulting); 1975 Wash. Sess. Laws c 260

Second, citing the decision in *State v. Gamble*, 154 Wn.2d 457 (2005), the State has argued that the offense of manslaughter in the second degree requires proof that the defendant's mental state specifically related to the "risk of death." *See Response* at 10-11. In *Gamble*, the Washington Supreme Court noted that the crime of manslaughter in the first degree required proof that the defendant knew of, and disregarded, a risk that death might occur. While this might be true of the higher form of manslaughter (which requires actual knowledge and disregard of the risk at hand), manslaughter in the second degree has no affirmative mental requirement. Thus, insofar as the defendant need not be aware of any such risk where the charge alleges negligent conduct, it is hard to imagine how the *Gamble* analysis could apply in this context.<sup>9</sup> Even if that analysis could apply here, it does not support the State's claims. Simply put, there is no hypothetical scenario where a defendant could engage in a willful violation of the specific safety regulations and thereby cause a workplace death without likewise violating the general manslaughter statute.

**C. This Court Should Grant Discretionary Review to Promptly Address these Paramount Issues**

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§ 9A.32.070 (enacting statute criminalizing Manslaughter in the Second Degree).

<sup>9</sup> Appellant recognizes that the commentators to the WPICs have suggested that WPIC 10.04 might need to be modified in a manslaughter case. *See* WPIC 10.04 (Comments). However, these commentators do not explain why a "similar rationale" should apply in a case involving negligence, where the defendant need not be aware of the risk in question.

The State seems to be arguing that a defendant, like Mr. Numrich, can be charged with a felony-level offense of manslaughter in the second degree in each and every case involving a workplace death. As argued above, the superior court committed probable error when it denied the defendant's motion to dismiss the manslaughter charge. Moreover, the superior court has certified this issue for immediate review under RAP 2.3(b)(4). The court's reasoning is sound.

First, there should be no question that the defense has presented an issue that involves controlling questions of law. Whether Mr. Numrich faces a gross misdemeanor or felony manslaughter charge will bear heavily on pretrial litigation, evidentiary rulings, and of course, conviction and sentencing consequences. This is *the* central issue in this case.

Second, there is substantial ground for a difference of opinion. It is noteworthy that the defense has presented legal questions that have yet to be addressed by any appellate court in the State of Washington; and the State is now advancing a position that has never previously been advocated by any other prosecuting attorney in Washington. Notwithstanding the State's assertions regarding the non-statutory *mens rea* element for manslaughter in the second degree, there remains a dispute regarding *Gamble's* applicability to second degree manslaughter cases. *See, e.g., Gamble*, 154 Wn.2d at 476

(Chambers, J., concurring) (explaining that manslaughter in the second degree and second-degree felony murder involve “exactly the same intent”).

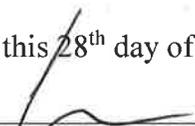
Finally, immediate review of this Court’s Order will materially advance the ultimate termination of this litigation. It is axiomatic that pretrial and trial proceedings will be drastically different if this case involves a felony manslaughter charge, as opposed to a gross misdemeanor offense. A felony manslaughter case will be lengthier, costlier, and necessarily involve more investigation and litigation. Further, the landscape for potential resolution drastically changes if Mr. Numrich is charged with a gross misdemeanor. Perhaps there would be no trial at all.

Important judicial resources will be saved by having this controlling legal issue resolved now. It makes good sense to have an appellate court resolve these novel legal questions before the parties prepare this case for trial. In fact, an appellate ruling in this case will help to clarify the legal issues that will be presented to the trial court when the case ultimately proceeds to trial.

**6. CONCLUSION**

For all of these reasons, and in the interests of justice, the Court should grant discretionary review and reverse the Superior Court decision.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of September, 2018.

  
#40690  
TODD MAYBROWN, WSBA #18557  
COOPER OFFENBECHER, WSBA #40690  
Attorneys for Appellant

**PROOF OF SERVICE**

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 28<sup>th</sup> day of September, 2018, I sent by U.S. Mail, postage prepaid, one true copy of the Statement of Grounds for Direct Review to attorneys for Respondent (who will also be served via the Appellate Court E-File Portal):

Patrick Hinds, Senior DPA  
Eileen Alexander, DPA  
King County Prosecutor's Office  
King County Courthouse  
516 Third Avenue, W554  
Seattle, WA 98104

And mailed to Appellant Phillip Numrich.

DATED at Seattle, Washington this 28<sup>th</sup> day of September, 2018.

  
\_\_\_\_\_  
Sarah Conger, Legal Assistant

# APPENDIX A

**FILED**  
KING COUNTY WASHINGTON

AUG 23 2018

SUPERIOR COURT CLERK  
BY Andre Jones  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS COUNT 1 AND  
CERTIFYING THE ISSUES FOR  
REVIEW PURSUANT TO RAP 2.3(b)(4)

THIS MATTER having come before the Court on Defendant's Motion to Dismiss  
Count I, and the Court having heard oral argument and having considered the following  
pleadings:

1. Defendant's Motion to Dismiss Count 1 (Manslaughter) and Memorandum in Support Thereof;
2. Declaration of Todd Maybrown in Support of Defendant's Motion to Dismiss Count 1;
3. State's Response to Defendant's Motion to Dismiss Count 1;
4. Reply in Support of Defendant's Motion to Dismiss Count 1;
5. Surreponse to Defendant's Motion to Dismiss Count 1;
6. Defendant's Surreply in Support of Motion to Dismiss Count 1
7. State's Proposed Order and Correction of the Record; and
8. Defendant's Objection to State's Proposed Order and Motion for Certification Pursuant to RAP 2.3(b)(4).

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Count 1 is DENIED.

First, the Court concludes that this prosecution of the defendant for the crime of Manslaughter in the Second Degree does not violate Washington's general-specific rule. Second, the Court

ORDER DENYING DEFENDANT'S MOTION TO DISMISS  
COUNT 1 AND CERTIFYING THE ISSUES FOR REVIEW  
PURSUANT TO RAP 2.3(b)(4) - 1

**ORIGINAL**

Allen, Hansen, Maybrown  
& Offenbecher, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1 concludes that the State's decision to prosecute the defendant for the crime of Manslaughter  
2 in the Second Degree does not violate equal protection as defined by the Fourteenth  
3 Amendment of the United States Constitution or Washington Constitution Article I, Section  
4  
5 12.

6 FURTHER, Defendant's Motion for Certification Pursuant to RAP 2.3(b)(4) is  
7 GRANTED. The Court finds and concludes that this Court's Order Denying Defendant's  
8 Motion to Dismiss Count I involves controlling questions of law as to which there are  
9 substantial grounds for a difference of opinion and that immediate review of the Order may  
10 materially advance the ultimate termination of the litigation.

11 DATED this 23 day of August, 2018.

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15 Honorable John H. Chun  
16 Superior Court Judge

17 Presented by:

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19 \_\_\_\_\_  
20 Todd Maybrow, WSBA #18557  
21 Attorney for Defendant

22 Copy Received; Approved as to Form:

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24 \_\_\_\_\_  
25 Patrick Hinds, WSBA #34049  
26 Senior Deputy Prosecuting Attorney  
Attorney for Plaintiff

# APPENDIX B



1 Rather, in all other similar cases, prosecutors have considered whether a criminal charge is  
2 appropriate in light of the unique provisions set forth in RCW 49.17.190.

3 4. The defense maintains that the King County Prosecuting Attorney has violated  
4 the general-specific rule when filing Count 1 in this case. Moreover, there is no reason – and  
5 certainly no just reason – that Phillip Numrich has been singled out for this overzealous  
6 treatment. It is unreasonable to conclude that today, nearly 40 years after RCW 9A.20.020  
7 was enacted, Mr. Numrich is the first and only employer who may have violated this statute in  
8 the context of a workplace fatality. Rather, it is more reasonable to conclude that the King  
9 County Prosecuting Attorney has violated equal protection principles in singling Mr. Numrich  
10 out in this instance.  
11

12  
13 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
14 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST  
15 OF MY KNOWLEDGE.

16 DATED at Seattle, Washington this 30<sup>th</sup> day of April, 2018.

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19 \_\_\_\_\_  
TODD MAYBROWN, WSBA #18557  
Attorney for Defendant

# APPENDIX A

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,  
Plaintiff,

v.

PHILLIP SCOTT NUMRICH,  
Defendant.

NO. 18-1-00255-5 SEA

DECLARATION OF  
ANDREW KINSTLER

I, Andrew Kinstler, do hereby declare:

1. I am an attorney practicing at the firm of Helsell Fetterman in Seattle, Washington. I have been a member of the Washington State Bar Association since 1982.

2. Between January 28, 2016 and August 2016, I represented Phillip Numrich and Alki Construction LLC regarding an investigation that was conducted by the Division of Occupational Safety & Health of the Washington Department of Labor and Industries ("OSHA"). See OSHA Investigation No. 1120535. This OSHA investigation focused upon the events that led to the death of Harold Felton on January 26, 2016.

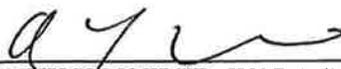
3. Mr. Numrich and I met with the state investigators on several occasions during the OSHA investigation. Mr. Numrich answered all of the investigators questions, and it is my firm belief that Mr. Numrich and Alki Construction LLC cooperated with the OSHA investigation in all respects.

1           4.     During the course of the OSHA investigation process, there was never any  
2 discussion – or even a suggestion – that Alki Construction LLC would not maintain its  
3 contracting license or that Mr. Numrich could no longer work in his chosen field. On the  
4 contrary, the OSHA investigators were fully aware that Mr. Numrich had continued to work as  
5 a sewer contractor after January 26, 2016 and these investigators proposed certain remedial  
6 measures which would help to enhance the safety measures employed by Mr. Numrich and his  
7 company during these ongoing business activities.  
8

9           5.     On July 21, 2016, Washington Labor and Industries issued a Citation and Notice  
10 of Assessment that included a finding that Alki Construction LLC had committed certain  
11 violations of the safety provisions regarding the events of January 26, 2016. Significantly,  
12 when issuing that Citation and Notice of Assessment, Washington Labor and Industries noted  
13 that these violations had been remedied – or that the “situation not believed to any longer exist”  
14 – as of July 21, 2016.  
15

16 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
17 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF  
18 MY KNOWLEDGE.

19           DATED at Seattle, Washington this 18<sup>th</sup> day of January, 2018.

20  
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22 \_\_\_\_\_  
23 ANDREW KINSTLER, WSBA #12703  
24 Attorney at Law  
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# APPENDIX B

FILED

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KING COUNTY  
SUPERIOR COURT CLERK  
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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;

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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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CAUSE NO. 18-1-00255-5 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR  
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause prepared by Mark Joseph of the WA State Department of Labor and Industries for case number 317939264.

The State requests bail set in the amount of \$20,000 as the defendant is likely to commit a violent crime and may interfere in the administration of justice. Despite Alki Construction going out of business, the defendant has started a new business with a very similar name and continues to be the owner and operator of a sewer business. Alki Sewer has a website that states Phil Numrich is the proprietor and that it is currently in business. "Yelp," a workplace review website, has reviews from as recent as May 2017 indicating the defendant is still in business. Because his workplace safety measures were so grossly inadequate in this case, causing the death of the victim, his continued operation of a similar business puts other workers at risk.

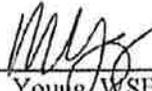
The State also requests no contact with Maximillion Henry, Jenna Felton, Lucy Felton, Bruce Felton and Pamela Felton. The defendant knows all of these witnesses very well and knew Mr. Henry was speaking to Labor and Industry investigators, continuing to call Mr. Henry to inquire about the investigation. Given the close personal relationship the defendant had previously had with all of these witnesses, and that the defendant contacted Mr. Henry when he learned he was speaking to investigators this year, there is a risk he will obstruct with the administration of justice.

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Signed and dated by me this 5th day of January, 2018.



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



Melinda J. Youlg / WSBA 24505  
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 36<sup>th</sup> 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 5<sup>th</sup> day of JANUARY 2018, at Bellingham, Washington.

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

# APPENDIX C

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KING COUNTY  
SUPERIOR COURT CLERK  
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CASE NUMBER: 16-1-02544-3 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	
v.	)	No. 16-1-02544-3 SEA
	)	
PACIFIC TOPSOILS INC.,	)	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 PACIFIC TOPSOILS INC. of the following crime[s]: **Violation of Labor Safety Regulation with Death Resulting**, committed as follows:

Count 1 Violation of Labor Safety Regulation with Death Resulting

That the defendant PACIFIC TOPSOILS INC. in King County, Washington, on or about July 7, 2014, 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 296-803-50005 et seq., WAC 296-809-20002 et seq., and WAC 296-800-14020, and that the violation(s) caused the death of one of its employees, to-wit: Bradley Hogue;

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

DANIEL T. SATTERBERG  
Prosecuting Attorney

By:



Scott A. Peterson, WSBA #17275  
Senior Deputy Prosecuting Attorney  
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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CAUSE NO. 16-1-02544-3 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR  
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause prepared by Timothy Garlock of the Department of Labor and Industries for investigation number 317 385 847.

The State requests the issue of a summons directing a representative of the corporation to appear.

Signed and dated by me this 23rd day of March, 2016.



Scott A. Peterson, WSBA #17275  
Senior Deputy Prosecuting Attorney

**CERTIFICATION FOR THE DETERMINATION OF  
PROBABLE CAUSE**

I, Timothy Garlock, am an Industrial Hygiene Compliance Officer with the Washington State Department of Labor and Industries Division of Occupational Safety and Health and participated in and reviewed the investigation conducted by the Department involving Citation No. 317385847. Predicated on the following facts that were learned during the investigation, there is probable cause to believe Pacific Topsoils, Inc., has willfully and knowingly violated RCW 49.17.190 and safety and health regulations promulgated by the Department resulting in the death of an employee:

Nineteen-year-old Bradley Hogue died on his second day at work for Pacific Topsoils, Inc., when he became entangled in the feeder mechanism of a blower truck while helping spread landscaping material. The cause of death was blunt force injuries to his head, trunk, and torso. Pacific Topsoils, Inc., is a Washington corporation with locations in King and Snohomish Counties which owns a fleet of blower trucks used to spread landscaping material. The blower truck in which Hogue died was a single-axle truck approximately 30 feet long. The hopper of the truck which held the landscaping material had tapered sides and a conveyor belt at the bottom to move material toward the blower mechanism at the back of the truck. The blower mechanism consisted of two rotating vertical augers and a stir rod with attached metal bars designed to feed material into a blower mechanism. A four-inch flexible hose attached to the outlet of the feeder was used to direct and spread landscaping material. A ladder fixed to the rear of the truck allowed employees an observation point to look into the hopper; it was also used to enter the hopper by climbing directly over the augers and blower mechanism.

On July 7, 2014, Hogue and co-workers Jeffrey Skrinisky and Michael Pollardo arrived at the Maltby location of Pacific Topsoils at 6:30 a.m. They loaded the cargo area of the blower truck with landscaping bark and left for a job site in Duvall. They arrived around 8:05 a.m. and spoke to the homeowner who showed them where to spread the bark. Skrinisky and Pollardo took the hose and the remote control used to start and stop the feeder and blower mechanisms to the rear of the home to begin work. Pollardo held the hose while Skrinisky held the remote. As was common practice at Pacific Topsoils, Inc., Hogue climbed into the hopper of the truck with a pitchfork to break up any "tunnels" that might occur. This particular truck, truck No. 302, was one of the oldest trucks in Pacific Topsoils' fleet and was prone to tunneling, a condition in which material above the conveyor belt stopped moving toward the

auger mechanism. Skrinsky started the feeder and blower mechanism on the truck but after two minutes it stopped working. Hogue and Pollardo worked for approximately 30 minutes with the mechanism turned off to clear the jam. Skrinsky and Pollardo returned to the side and rear of the home (out of line of sight or audible communication) while Hogue climbed back into the cargo area of the truck. Skrinsky used the remote control to start the mechanism which stopped working again after a few minutes. Skrinsky and Pollardo called to Hogue, but he did not respond. They called 911 first responders. Duvall police and fire responded and found Hogue entangled in the augers and rotating bars of the feeder mechanism. Hogue was pronounced dead at the scene.

The Bark Blower Truck Operations Manager for Pacific Topsoils told Department investigators he knew of the practice of allowing employees to remain in the cargo area of the blower trucks while they were in operation and that the only safety training they were given was the direction to stay at least one pitchfork length away from the feeder mechanism at the back of the truck. This procedure was not documented in any of Pacific Topsoils' safety materials. Other trucks operated by Pacific Topsoils had signs bearing a warning to stay away from moving machinery while it was operating, including a drawing of a person entangled in a rotating shaft. Maintenance records for truck #302 contain a notation expressing concern about the tunneling problem and the safety of the employees working with the truck and their efforts and suggestions to correct the problem. The records also indicate that the Bark Blower Truck Operations Manager was notified of their concerns. The manual for the Express Blower TM-20, provided by the manufacturer during the investigation, states: "NEVER enter the cargo area of the truck box without first initiating the lockout procedures."

Pacific Topsoils' conduct in directing or allowing Hogue to stand in the hopper of truck No. 302 while the machinery was operating violated both "lock out/tag out" (LOTO) regulations and confined space regulations promulgated by the Department. The violations of the LOTO regulations were a direct cause of Bradley Hogue's death. The Bark Blower Truck Operations Manager's statements to investigators,

combined with other evidence, shows that Pacific Topsoils' violations of the LOTO regulations were willful.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 21 day of MARCH, 2016, at Seattle, Washington.

  
TIMOTHY GABLOCK

# APPENDIX D

## Crime

## Seattle contractor charged with felony for employee's death in 2016 trench collapse



Originally published January 9, 2018 at 6:29 pm Updated January 9, 2018 at 8:46 pm



A distraught co-worker is assisted away from the West Seattle site where a man died after a trench collapsed and buried him in mud on Jan. 26, 2016. (Greg Gilbert/The Seattle Times)

**Harold Felton was working to re-connect a new sewer line to a West Seattle house when the trench where he was working caved in, burying him in wet soil. His boss is accused of criminal negligence in his January 2016 death.**

By Sara Jean Green 

*Seattle Times staff reporter*

A Seattle contractor accused of criminal negligence is believed to be the first employer in state history to face felony charges in connection with an employee's death, according to the state Department of Labor & Industries (L&I).

Phillip Numrich is charged with second-degree manslaughter for allegedly violating and ignoring safety regulations, leading to the collapse of a sewer trench at a West Seattle home in January 2016 that killed 36-year-old Harold Felton, say King County prosecutors.

Numrich, 40, was also charged with violation of labor safety regulation with death resulting, according to the criminal case investigated by a Labor & Industries safety and health officer. A \$20,000 warrant has been issued for his arrest, but as of Tuesday afternoon, he had not been booked into jail, jail and court records show.

A message left on Numrich's business phone was not returned Tuesday.

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"It is significant," Elaine Fischer, an L & I spokeswoman, said of the felony case against Numrich.

She noted an Everett-based landscaper was charged with a misdemeanor crime in 2016 after a 19-year-old employee was killed in a bark-blower truck in Duvall two years earlier.

But "this is a felony charge," she said of the case against Numrich. "It's the first time we know of and we looked back 30, 40 years."

Numrich previously owned Alki Construction, which has since gone out of business. He now owns Alki Sewer, a business that has garnered online reviews as recently as May, charging papers say.

“Because his workplace safety measures were so grossly inadequate in this case, causing the death of the victim, his continued operation of a similar business puts other workers at risk,” senior deputy prosecutors Patrick Hinds and Melinda Young wrote in charging documents.

Harold Felton, 36, died Jan. 26, 2016, when he was buried in a trench cave-in at a West Seattle house as he worked to re-connect a new sewer line to the residence, charging papers say.

Despite rescue efforts by a Seattle Fire Department technical-rescue team, Felton died before firefighters could pull him out of a trench that was 8 to 10 feet deep in unstable, saturated soil, say the charges.

According to a news account, it took several hours to pull Felton's body from the collapsed trench.

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In July 2016, Numrich was fined \$51,500 for willful safety violations over the trench collapse, Fischer said. He appealed and entered a settlement agreement, affirming the violations that November.

Since then, Numrich has been making payments on a reduced fine of \$25,750, according to Fischer.

She said it was King County prosecutors who decided to pursue felony charges — a decision L&I officials fully support.

“There are times when a monetary penalty isn’t enough,” L&I Director Joel Sacks was quoted as saying in a recent news release about the charges against Numrich. “This company knew what the safety risks and requirements were, and ignored them.”

The Seattle Times attempted to contact Felton’s family, but phone numbers listed for relatives appear to have been disconnected.

Ten days before the fatal cave-in, Numrich, Felton and another employee began work to replace a sewer at a house in the 3000 block of 36th Avenue Southwest, digging a trench from where the sewer exited the house’s concrete foundation and another trench where the sewer connects to the city’s sewer main in the street, the charges say.

The charges explain the “trenchless” sewer-replacement technology used by Numrich:

After the old sewer line is disconnected from the home’s foundation and at the street, 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 at the other end, 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 and uses the hydraulic machine to simultaneously split the old sewer line open while pulling the new plastic sewer line into place.

“Once the new sewer is laid in place, workers must enter the trenches to re-connect the new sewer to the home and the city’s service connection,” the charges say. “Felton was killed by the cave-in during this reconnection process.”

One trench was dug at the front of the house and a second behind the house, which is where Felton died, the charges say.

According to the charges, Numrich was the only “competent person” on the work site, a legal definition that means he was supposed to be able to identify existing and predictable hazards that could endanger employees. However, he was away buying lunch when the collapse occurred.

The charges say Numrich confirmed in a voluntary interview that the soil at the house was “Type C,” which is the least-stable kind of soil and requires the most rigorous shoring under state regulations.

Not only did Numrich fail to properly shore up the trench where Felton died, he also left the trench open for 10 days, far exceeding the usual two to three days a trench is

typically left open, say the charges.

During that period, it rained several times, saturating the already-unstable soil and making it more likely to collapse, according to the charges.

Additionally, Numrich witnessed Felton using a handheld vibrating tool inside the back trench, which caused further soil instability, the charges say.

But instead of warning Felton of the danger or ordering him out of the trench, Numrich left the work site to buy lunch for himself and his two employees, say the charges.

Felton died while Numrich was gone, according to the charges.

“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,” the L&I investigator concluded, according to the charges. “Felton died as a result of Numrich’s criminal negligence.”

*Sara Jean Green: 206-515-5654 or sgreen@seattletimes.com*

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# APPENDIX C

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,  
  
Plaintiff,

v.

PHILLIP SCOTT NUMRICH,  
  
Defendant.

NO. 18-1-00255-5 SEA

DEFENDANT’S MOTION TO DISMISS  
COUNT 1 (MANSLAUGHTER) AND  
MEMORANDUM OF AUTHORITIES IN  
SUPPORT THEREOF

**I. INTRODUCTION**

COMES NOW the Defendant, Phillip Scott Numrich, by and through his undersigned counsel, and hereby moves this Court to dismiss Count 1 (Manslaughter in the Second Degree) of the State’s Information. This motion is made pursuant to Washington’s “general-specific rule” and the Equal Protection Clause of the state and federal constitutions, and is supported by the Declaration of Todd Maybrow in Support of Defendant’s Motion to Dismiss Count 1. The motion is also supported by the filings and proceedings previously had herein.

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## II. FACTS<sup>1</sup>

### A. Background

The defendant, Phillip Scott Numrich, is the owner of Alki Construction LLC (“Alki Construction”). Alki Construction, doing business as Alki Sewer, has worked on numerous plumbing projects in the Puget Sound region since 2012. Alki Construction is duly licensed to do business in the State of Washington and, as such, its job sites are regulated by the Washington Department of Labor and Industries (“OSHA”).

During January 2016, Alki Construction was working to replace a sewer line at a private residence in West Seattle. Alki Construction uses what is commonly described as a “trenchless pipe repair” during this process. To complete the project, Mr. Numrich and several employees helped to dig and shore two trenches – one near the home and one near the street – at the commencement of the work on that project. On January 26, 2016, as the project was nearly completed, one of the construction workers, Harold Felton, was killed when the dirt wall of the trench nearest to the home collapsed. Mr. Numrich, was not present at the job site at the time of the collapse.

This accident was exhaustively investigated by the Division of Occupational Safety & Health of OSHA. *See* OSHA Investigation No. 1120535. Like this case, the OSHA investigators focused solely upon the events that led to the death of Harold Felton. On July 21, 2016, the Washington Department Labor and Industries (“WSDLI”) issued a Citation and Notice of Assessment that included a finding that Alki Construction had committed certain violations of the safety regulations in relation to the events of January 26, 2016. *See Maybrown Dec. App. A*

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<sup>1</sup> For purposes of this motion, the defense has relied upon the facts that are stated in the State’s charging documents in this case. In doing so, the defense does not intend to adopt these facts or to waive any future claims and defenses that may be stated in this case.

1 (Declaration of Andrew Kinstler). Mr. Numrich appealed these findings and assessments and the  
2 parties ultimately reached a compromised settlement of all claims.

3 This was the first and only time that Alki Construction had faced any such claims or  
4 regulatory violations.

5 **B. Procedural History**

6 On or about January 18, 2016, the State filed criminal charges against Mr. Numrich relating  
7 to this same workplace incident. The State's Information includes the following two charges:

8 **Count 1 Manslaughter In The Second Degree**

9 That the defendant PHILLIP SCOTT NUMRICH in King County,  
10 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;

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

13 **Count 2 Violation of Labor Safety Regulation with Death Resulting**

14 That the defendant PHILLIP SCOTT NUMRICH in King County,  
15 Washington, on or about January 26, 2016, was an employer, and did willfully and  
16 knowingly violate the requirements of RCW 49.17.060, and a safety or health  
17 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;

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

20 *Maybrown Dec. App. B* (Information).

21 These charges are ostensibly supported by a Certification for Determination of Probable  
22 Cause that was prepared by Mark Joseph, who is identified as a Certified Safety and Health Officer  
23 with WSDLI. At the outset, Mr. Joseph explained that he is authorized to investigate workplaces

1 for safety violations pursuant to Washington’s Industrial Safety and Health Act (“WISHA”) which  
2 is codified at RCW 49.17.

3 Throughout the Certification for Determination of Probable Cause, Mr. Joseph opines that  
4 Alki Construction had failed to comply with certain WSDLI regulations, such as the provisions  
5 identified in WAC 296-155-650 and WAC 296-155-657. *See id.* (Certification at 2). Mr. Joseph  
6 also claims that Mr. Numrich is personally responsible for this accident as he is considered the  
7 “competent person” for purposes of WSDLI’s regulatory scheme. *See id.* (Certification at 2).  
8 (discussing WAC 296-155-655).

9 In further support of the charges, Mr. Joseph claims that Alki Construction had failed to  
10 comply with certain state regulations when digging and shoring this trench. In particular, Mr.  
11 Joseph notes that this project involved what is classified as “Type C” soil and that Alki  
12 Construction had failed to follow the “most rigorous shoring standard per WSDLI regulations.”  
13 *See id.* (discussing WSDLI regulations and SpeedShore Tab Data). Moreover, Mr. Joseph argues  
14 that Alki Construction had failed to properly shore this trench based upon his interpretation of the  
15 state regulations:

16 The WSDLI investigation and the [employee] interview show the Subject Premises  
17 had two SpeedShore protective shores installed in the back trench. [The employee]  
18 reported during his interview that Numrich and Felton placed two shores in the  
19 back trench when they initially dug it. One of the shores was installed more than  
20 four feet above the bottom of the trench - which is prohibited by both WSDLI  
21 regulation and Speed Shore Tab Data. Both WSDLI regulation and SpeedShore  
22 Tab Data show the back trench required a minimum of four shores based upon the  
23 trench dimensions, and soil type alone.

*Id.* (Certification at 3).

Mr. Joseph also relies upon the conclusions of a “trenching technical expert.” As he  
explained:

1 In the course of my investigation, I reviewed the analysis of Erich Smith, trenching  
2 technical expert for WSDLI. Smith stated, based upon his experience, the  
3 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.

4 *Id.* (Certification at 4).

5 Based upon these alleged “willful” regulatory violations, Mr. Joseph opines that Mr.  
6 Numrich is guilty of a violation of WISHA’s criminal provisions as set forth in RCW 49.17.190  
7 (3). Moreover, for all of these very same reasons, Mr. Joseph also claims that Mr. Numrich is  
8 guilty of manslaughter in the second degree.

9 **C. The Numrich Prosecution is the First of Its Kind**

10 Sadly, we too often see workplace accidents – and sometimes workplace accidents  
11 resulting in death – in our communities. For example, during 2010, seven employees died  
12 following an explosion at the Tesoro refinery on the outskirts of Anacortes. Yet this was just a  
13 single, extreme case. In 2016, the government documented and reported more than 75  
14 workplace fatalities in Washington. See [http://kgmi.com/news/007700-new-report-shows-](http://kgmi.com/news/007700-new-report-shows-workplace-deaths-in-washington-are-up-and-disproportionately-affect-men)  
15 [workplace-deaths-in-washington-are-up-and-disproportionately-affect-men;](http://kgmi.com/news/007700-new-report-shows-workplace-deaths-in-washington-are-up-and-disproportionately-affect-men)  
16 [http://www.lni.wa.gov/safety/research/face/files/2016\\_workrelatedfatalitiesinwastate\\_waface.](http://www.lni.wa.gov/safety/research/face/files/2016_workrelatedfatalitiesinwastate_waface.pdf)  
17 [pdf](http://www.lni.wa.gov/safety/research/face/files/2016_workrelatedfatalitiesinwastate_waface.pdf). Nevertheless, before the State filed this Information against Phillip Numrich, there has  
18 never been any instance where an employer has been charged with a felony offense based on  
19 such a workplace incident.

20 Rather, in every situation in which criminal charges were advanced following an  
21 employee workplace death, the employer faced a charge that he violated the specific criminal  
22 statute (RCW 49.17.130(3)) that covers these types of incidents. For example, in 2016, the  
23 King County Prosecuting Attorney charged a family-owned company with a violation of the

1 specific statute after a 19-year-old employee was killed by a rotating auger. *See Maybrow*  
2 *Dec. App. C* (charging documents from *State v. Pacific Topsoils*, 16-1-02544-3 SEA).

3 Based upon all available information, no prosecutor in Washington has ever previously  
4 attempted to charge an employer with a felony offense based upon a workplace fatality. *See*  
5 *Maybrow Dec. ¶ 3*. The novelty of this case has been confirmed by WSDLI officials. In one  
6 recent news article, a senior WSDLI official explained: “[T]his is a felony charge,” she said  
7 of the case against Numrich. “It’s the first time we know of and we looked back 30, 40 years.”  
8 *Maybrow Dec. App. D* (quoted from news article from the Seattle Times, dated January 9,  
9 2018).

### 10 III. DISCUSSION

11 The Court should reject the State’s novel approach in this case. Rather, as discussed below,  
12 this prosecution violates the “general-specific rule” and the equal protection clauses of the state  
13 and federal constitutions.

#### 14 A. WISHA Provides a Comprehensive Statutory Scheme, Including 15 Specific and Unique Criminal Penalties.

16 In enacting WISHA (RCW 49.17), the Washington legislature adopted a comprehensive  
17 and unified statutory scheme to regulate workplace safety. Significantly, the legislature announced  
18 its purpose:

19 The legislature finds that personal injuries and illnesses arising out of conditions  
20 of employment impose a substantial burden upon employers and employees in  
21 terms of lost production, wage loss, medical expenses, and payment of benefits  
22 under the industrial insurance act. Therefore, in the public interest for the welfare  
23 of the people of the state of Washington and in order to assure, insofar as may  
reasonably be possible, safe and healthful working conditions for every man and  
woman working in the state of Washington, the legislature in the exercise of its  
police power, and in keeping with the mandates of Article II, section 35 of the state  
Constitution, declares its purpose by the provisions of this chapter to create,  
maintain, continue, and enhance the industrial safety and health program of the

1 state, which program shall equal or exceed the standards prescribed by the  
2 Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

3 RCW 49.17.010.

4 As part of this scheme, WISHA specifically provides for both civil penalties (RCW  
5 49.17.180) and criminal penalties (RCW 49.17.190) due to safety violations or avoidable  
6 workplace injuries. The distinct criminal penalties are applicable only in certain enumerated  
7 circumstances:

8 Any employer who willfully and knowingly violates the requirements of RCW  
9 49.17.060, any safety or health standard promulgated under this chapter, any  
10 existing rule or regulation governing the safety or health conditions of employment  
11 and adopted by the director, or any order issued granting a variance under RCW  
12 49.17.080 or 49.17.090 and that violation caused death to any employee shall, upon  
13 conviction be guilty of a gross misdemeanor and be punished by a fine of not more  
14 than one hundred thousand dollars or by imprisonment for not more than six  
15 months or by both; except, that if the conviction is for a violation committed after  
16 a first conviction of such person, punishment shall be a fine of not more than two  
17 hundred thousand dollars or by imprisonment for not more than three hundred  
18 sixty-four days, or by both.

19 RCW 49.17.190(3).

20 This is a unique, and unusual, criminal statute – and it allows for penalties that are not  
21 available in any other misdemeanor-level offense. On the one hand, a violator may be required to  
22 pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available  
23 in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, a violator may be  
sentenced to not more than six months in jail, significantly less than what would be available for  
conviction of any other gross misdemeanor. *See id.*

It is the defense position that this type of punishment scheme provides the exclusive  
criminal remedy for the types of violations that have been alleged in this case. To prove a crime  
in such a workplace incident, the State must demonstrate that the employer “*willfully and*

1 *knowingly*” violates a WISHA rule, regulation, or safety and health standard and where “that  
2 violation cause[s] death to any employee shall, upon conviction be guilty of a gross misdemeanor.”  
3 RCW 49.17.190(3) (emphasis added). This gross misdemeanor is unlike any other such offense  
4 in the State of Washington, as it allows for extraordinary financial penalties.

5 **B. Washington’s “General-Specific Rule” is Violated in this Case.**

6 It is a violation of equal protection for a prosecutor to be given discretion to charge a  
7 defendant with a felony or misdemeanor based upon identical conduct. *See, e.g., State v.*  
8 *Zornes*, 78 Wn.2d 9 (1970); *State v. Martell*, 22 Wn.App. 415 (1979). Such a violation is very  
9 clearly present in this case – as the filing of the felony charge is a violation of Washington’s  
10 “general-specific rule.”

11 The purpose of the rule is to preserve the legislature’s intent to penalize specific conduct  
12 in a particular, less onerous way and hence to minimize sentence disparities resulting from  
13 unfettered prosecutorial discretion. *See State v. Shriner*, 101 Wn.2d 576, 581-83 (1984). As  
14 the Washington Supreme Court has explained:

15 Under the general-specific rule, a specific statute will prevail over  
16 a general statute. *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867 (1976) (“It is  
17 the law in this jurisdiction, as elsewhere, that where concurrent general and  
18 special acts are *in pari materia* and cannot be harmonized, the latter will prevail,  
19 unless it appears that the legislature intended to make the general act  
20 controlling.”). As this court recognized in *Wark*, “It is a fundamental rule that  
where the general statute, if standing alone, would include the same matter as  
the special act and thus conflict with it, the special act will be considered as an  
exception to, or qualification of, the general statute, whether it was passed before  
or after such general enactment.” *Id.*; *see State v. Conte*, 159 Wn.2d 797,  
803, *cert. denied*, 552 U.S. 992 (2007).

21 *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*  
22 *(EFSEC)*, 165 Wn.2d 275, 309 (2008).

1           The general-specific rule is designed to determine whether the legislature intended to  
2 limit prosecutorial charging discretion, impliedly barring a prosecution for a general offense  
3 whenever the alleged criminal conduct meets the elements of a more specific crime. Thus, to  
4 determine if two statutes are concurrent, the Court should examine whether someone can violate  
5 a specific statute without violating the general statute. *See, e.g., State v. Chase*, 134 Wn.App.  
6 792, 800 (2006). Statutes are concurrent if all of the elements to convict under the general  
7 statute are also elements that must be proved for conviction under the specific statute. *See,*  
8 *e.g., State v. Wilson*, 158 Wn.App. 305, 314 (2010).

9           The Washington courts have applied this rule in several different contexts. *See, e.g.,*  
10 *Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged  
11 under general theft statute and should have been charged only with criminal possession of a  
12 rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could  
13 not be charged under general escape statute and should have been charged only under the  
14 specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972)  
15 (defendant who presented another's credit card at a restaurant could not be charged under  
16 general larceny statute, but must instead be charged with crime of procuring meals by fraud);  
17 *State v. Thomas*, 35 Wn.App. 598, 604-05 (1983) (elements of unlawful imprisonment are  
18 necessarily present in situations where the offense of custodial interference is alleged). *See*  
19 *also State v. Haley*, 39 Wn.App. 164 (1984) (where facts supported either a manslaughter  
20 charge or negligent homicide charge, it was the prosecutor's duty, where an automobile was  
21 involved, to charge the more specific negligent homicide). *Accord State v. Yarborough*, 905  
22 P.2d 209, 216 (New Mexico 1996) (prosecutors violated general-specific rule by charging  
23 defendant with involuntary manslaughter as opposed to homicide by watercraft).

1 The statutes at issue in this case – the general statute of manslaughter in the second  
2 degree (RCW 9A.32.070) as alleged in Count 1 and the specific statute in WISHA that punishes  
3 a violation of labor safety regulations that result in death (RCW 49.17.190(3) as alleged in  
4 Count 2 – are concurrent statutes. For, each time an employer is guilty of the more specific  
5 offense, he is likewise guilty of the more general offense.

6 A side-by-side comparison of the elements of each offense establishes this point. The  
7 key elements of the general and specific offenses are summarized below:

<u>OFFENSE</u>	<u>MENS REA</u>	<u>RESULT</u>
MANSLAUGHTER 2 <sup>o</sup>	CRIMINAL NEGLIGENCE	DEATH
RCW 49.17.190(3)	WILFULL AND KNOWING	WORKPLACE DEATH

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12 Each violation of the specific statute, RCW 49.17.190(3), requires proof of a “willful”  
13 and “knowing” violation of safety regulations that results in a workplace fatality.<sup>2</sup> More  
14 generally, each violation of RCW 9A.32.070 requires proof of “negligent” conduct that results  
15 in death. Under Washington law, criminal negligence is defined as a “gross deviation of the  
16 standard of care that a reasonable person would exercise in the same situation.” RCW  
17 9A.08.010(1)(d). *See also* WPIC 10.04. Thus, the specific statute requires proof of a greater  
18 *mens rea* (“willfully or knowingly”) than the general statute (which requires proof only of  
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<sup>2</sup> WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements or with plain indifference to employee safety.” WAC 296-900-14020. Washington criminal law provides: “a requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.” RCW 9A.08.010(4).

1 criminal negligence). It is noteworthy that Washington's pattern jury instructions establish that  
2 criminal negligence is established in each and every case where there is proof of higher *mens*  
3 *rea* (such as willful, intentional, knowing or reckless conduct). See RCW 9A.08.010(2).

4 It is impossible to envision a case where a defendant might be guilty of the specific  
5 WISHA statute but acquitted of the more general manslaughter statute. For, as reflected in the  
6 State's charging documents, the WISHA/OSHA standards establish the standard of care for  
7 employers in the State of Washington. See, e.g., *Minert v. Harsco Corp.*, 28 Wn.App. 686,  
8 873-74 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323 (1978) (OSHA regulation is relevant  
9 to the appropriate standard of care); *Kennedy v. Sea-Land Services, Inc.*, 62 Wn.App. 839, 852-  
10 53 (1991) (OSHA regulation was relevant to the standard of care). Simply put, in each and  
11 every case that a person willfully or knowingly fails to comply with the mandates of WISHA,  
12 it can also be said that the employer has engaged in negligent conduct or a gross deviation of  
13 the standard of care.

14 When examining this question, it is important to emphasize that the specific statute,  
15 RCW 49.17.190(3), has a significantly ***higher*** mental state than the general manslaughter  
16 statute. It is hard to persuasively argue that the legislature would have enacted a special  
17 misdemeanor-level statute with a higher mental state while also assuming that prosecutors  
18 within the state would be authorized to charge under a general felony statute with a lower mental  
19 state.

20 A very similar situation was presented in the *Danforth* case. There, the petitioners, who  
21 had been imprisoned for property related crimes, were on work release status at the Geiger work  
22 release center in Spokane. Seeking employment in conjunction with that program, the  
23 petitioners met each other, became intoxicated, and failed to return to the work release center.

1 The petitioners were returned to Washington and charged with escape in the first degree,  
2 pursuant to RCW 9A.76.110. On appeal, the petitioners argued that another statute, RCW  
3 72.65.070, deals specifically with an escape from work release. The State, by contrast, argued  
4 that they should be permitted to proceed under the general statute, but the Court of Appeals  
5 rejected that claim. But the Washington Supreme Court rejected the State's claims:

6 [W]e are of the opinion that the specific requirement that the defendant's  
7 conduct be willful under RCW 72.65.070 recognizes a valid legislative  
8 distinction between going over a prison wall and not returning to a specified  
9 place of custody. The first situation requires a purposeful act, the second may  
10 occur without intent to escape. It is easy to visualize situations where a work  
11 release inmate failed to return because of a sudden illness, breakdown of a  
12 vehicle, etc. This explains the requirement of willful action.

13 Finally, this interpretation of the two statutes is necessary to give effect  
14 to RCW 72.65.070. RCW 72.65.070 differs significantly from the general  
15 escape statute in that the prosecutor must prove the failure to return was willful.  
16 Under RCW 9A.76.110, however, a conviction will be sustained if the state  
17 demonstrates that the defendant "knew that his actions would result in leaving  
18 confinement without permission." *State v. Descoteaux*, 94 Wn.2d 31, 35  
19 (1980).

20 Given the choice, a prosecutor will presumably elect to prosecute under  
21 the general escape statute because of its lack of a mental intent requirement.  
22 Consequently, the result of allowing prosecution under RCW 9A.76.110 is the  
23 complete repeal of RCW 72.65.070. This result is an impermissible potential  
usurpation of the legislative function by prosecutors.

24 *Danforth*, 97 Wn.2d at 258-59.

25 The very same situation is presented in this case. By proceeding under the general  
26 manslaughter statute, the State has claimed that it is simply required to prove that the defendant  
27 was criminally negligent – or that his conduct amounted to a gross deviation from the standard  
28 of care. Yet to proceed under the specific statute (RCW 10.73.190(3)), the State would need to  
29 prove that the defendant engaged in a willful and knowing violation of the applicable safety  
30 regulations (which likewise amount to the standard of care in this highly-regulated industry).

1 The State should not be permitted to dilute or avert the mental element that the legislature had  
2 in mind when it enacted the specific WISHA statute.

3 The legislature's intent is also evidenced by the creation of a unique – and carefully  
4 calibrated – punishment scheme in RCW 49.17.190(3). It is notable that the special  
5 misdemeanor-level statute allows for an enhanced fine of up to \$100,000 to \$200,000. By  
6 contrast, the maximum fine for a Class B felony, such as Manslaughter in the Second Degree,  
7 is only \$25,000. Thus, when enacting RCW 49.17.190(3), the legislature was mindful of the  
8 fact that it was creating a special misdemeanor-level statute – and a statute that included  
9 somewhat reduced custodial penalties along with the potential for financial penalties far greater  
10 than authorized for any felony-level offense.<sup>3</sup> This carefully calibrated scheme would become  
11 a nullity if the State was permitted to charge both the general and the specific statutes, as they  
12 have attempted to do in this case.

13 **C. This Prosecution Violates Equal Protection.**

14 The equal protection violation is apparent in this case. Phillip Numrich is the first  
15 employer in the state of Washington who has ever been charged with a felony offense based  
16 upon a workplace fatality. There is no reason – and certainly no just reason – that he has been  
17 singled out for this overzealous treatment.

18 Washington's current second-degree manslaughter statute was first enacted in 1975.<sup>4</sup> It  
19 is unreasonable to conclude that today, nearly 40 years after this law was passed, Mr. Numrich

20  
21 <sup>3</sup> Consistent with RCW 9A.20.020, the maximum fine for a Class A felony is \$50,000.

22 <sup>4</sup> The crime of manslaughter, as defined in Washington, corresponds to the common-law crime of  
23 involuntary manslaughter. The common-law crime of voluntary manslaughter is included in the  
Washington definition of second-degree murder. *See, e.g., State v. Johnson*, 69 Wn.2d 264, 272 (1966).  
Even older statutes, including Washington Session Laws of 1855, criminalize manslaughter as a lesser  
form of homicide. *See Washington Session Laws of 1855 Chapter 11, Section 17.*

1 is the first and only employer who may have violated this statute in the context of a workplace  
2 fatality. Rather, it is more reasonable to conclude that the King County Prosecuting Attorney  
3 has violated equal protection principles in singling Mr. Numrich out in this instance.

4 **IV. CONCLUSION**

5 For all of these reasons, and in the interests of justice, this Court should dismiss Count  
6 1 of the State's Information.

7 DATED this 30<sup>th</sup> day of April, 2018.

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10 TODD MAYBROWN, WSBA #18557  
11 Attorney for Defendant

# APPENDIX D

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
PHILLIP SCOTT NUMRICH,  
  
Defendant.

NO. 18-1-00255-5 SEA

OBJECTION TO STATE'S PROPOSED  
ORDER AND MOTION FOR  
CERTIFICATION FOR REVIEW  
PURSUANT TO RAP 2.3(b)(4)

**I. INTRODUCTION**

COMES NOW the Defendant, Phillip Numrich, by and through his undersigned counsel, and hereby files this objection to the State's proposed Order Denying Defendant's Motion to Dismiss Count 1. Moreover, the defendant now moves this Court to certify the legal issues in this case for review pursuant to RAP 2.3(b)(4).

**II. DEFENDANT'S OBJECTION**

This Court heard oral argument on Defendant's Motion to Dismiss Count 1 on July 19, 2018. Thereafter, on July 23, 2018, the Court indicated that it would deny the defendant's motion and asked the State to prepare a proposed Order.

This morning, the State circulated a proposed Order Denying Defendant's Motion to Dismiss Count 1. The Order, which spans more than ten pages, does not include any of the factual or legal claims of the defendant. Rather, it merely recasts (and repeats) the legal

1 arguments that have been advanced by the State. The defense objects to the State's proposed  
2 Order – and each of the factual and legal claims that are set forth within that pleading.

3 Given the lateness of the State's submission<sup>1</sup>, the defense is unable to provide an  
4 extended discussion regarding each of the legal claims that have been endorsed by the State's  
5 proposed Order. However, suffice it to say, the defense strenuously objects to the State's claim  
6 that RCW 9A.32.070 and RCW 49.17.190(3) "create different crimes with different elements  
7 that criminalize different conduct." Proposed Order at 5. This claim is untenable, as the  
8 submissions in this case make clear that the State is currently intending to rely upon the very  
9 same alleged conduct, and nothing more, in an effort to prove that Mr. Numrich is guilty of both  
10 of these statutes. Moreover, the novelty of the State's current legal argument – and the fact that  
11 no other prosecutor in the State of Washington has ever previously advanced such an argument –  
12 should give this Court pause before it signs off on an Order which includes such broad claims.  
13  
14

15 As an alternative, the defense has prepared a proposed Order that is more appropriate for  
16 this proceeding. *See Appendix A.*

17 **III. MOTION FOR CERTIFICATION PURSUANT TO RAP 2.3(B)(4)**

18 During the early stages of these proceedings, both parties notified the Court that they  
19 intended to seek interlocutory review of the trial court's decision regarding the novel – and  
20 obviously important – legal issues that are presented in this case. This morning, the State  
21 advised defense counsel that they are intending to object to certification of this issue. The State's  
22 reversal of position is not well taken.  
23

24 Pursuant to RAP 2.3(b)(4), discretionary review is appropriate where:

25 The superior court has certified, or all the parties to the litigation have stipulated,  
26 that the order involves a controlling question of law as to which there is

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<sup>1</sup> The State had previously promised to circulate this proposed Order no later than August 21, 2018.

1 substantial ground for a difference of opinion and that immediate review of the  
2 order may materially advance the ultimate termination of the litigation.

3 *Id.*

4 As a threshold matter, there should be no question that the defense has presented a  
5 motion that involves controlling questions of law as to which there is substantial ground for a  
6 difference opinion. It is noteworthy that the defense has presented legal questions that have yet  
7 to be addressed by any appellate court in the State of Washington; and the State is now  
8 advancing a position that has never previously been advocated by any other prosecuting attorney.  
9 Without attempting to reargue the defendant's position, it should be apparent that there are  
10 substantial grounds for a difference of opinion regarding the parties' legal claims in this case.  
11 For example, notwithstanding the State's assertions regarding the non-statutory *mens rea*  
12 element for manslaughter in the second degree, it is apparent that some of the State's wisest  
13 appellate judges do not agree with the State's position. *See, e.g., State v. Gamble*, 154 Wn.2d  
14 457, 476 (2005) (Chambers, J., concurring) (noting that manslaughter in the second degree and  
15 second degree felony murder involve "exactly the same intent").  
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17

18 Moreover, immediate review of this Court's Order will materially advance the ultimate  
19 termination of this litigation. For, with all due respect, it makes good sense to have an appellate  
20 court consider – and resolve these novel legal questions – before the parties prepare this case for  
21 trial. In fact, an appellate ruling in this case will help to clarify the legal issues that will be  
22 presented to the trial court when the case ultimately proceeds to trial.  
23

24 Finally, the defense has presented issues of great public importance – and the ruling in  
25 this case is sure to have broad ramifications for employers and businesses throughout the State of  
26 Washington. Prompt review is warranted in this case.

1 For all of these reasons, and in the interests of justice, this Court should certify these  
2 issues for discretionary review pursuant to RAP 2.3(b)(4).

3 DATED this 22<sup>nd</sup> day of August, 2018.  
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7 TODD MAYBROWN, WSBA #18557  
8 Attorney for Defendant  
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# APPENDIX E

MANSLAUGHTER  
IN THE SECOND DEGREE

WISHA  
HOMICIDE

**ALLEN, HANSEN, MAYBROWN, OFFENBECHER**

**September 28, 2018 - 4:10 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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