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STATE OF WASHINGTON
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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

PHILLIP SCOTT NUMRICH,

Petitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
IV. STATEMENT OF THE CASE.....	4
A. Background Facts.....	4
B. Procedural History of Criminal Case	6
C. The Superior Court’s Ruling.....	9
D. The State Notifies Petitioner it Intends to Amend to Manslaughter in the First Degree and Uses the Amendment to Attempt to Dissuade this Court from Accepting Review	10
E. The Superior Court’s November 1 Order on Motion to Amend and Second Certification	11
F. Subsequent Proceedings in the Superior Court.....	12
V. ARGUMENT	13
A. The WISHA Homicide Statute is the More Specific Statute. Under Washington’s “General-Specific” Rule, The Manslaughter Charges Should be Dismissed.....	13
1. The General Specific Rule	14
2. The WISHA Homicide Crime, RCW 49.17.190(3)....	16
3. WISHA Homicide is Concurrent with the Manslaughter Criminal Statutes	18
4. Legislative History and this Court’s Prior Jurisprudence Compel the Conclusion that the Specific WISHA Statute Controls.....	21
5. WISHA Homicide and Manslaughter Require Criminal Proximate Cause	24

6.	The State Has Failed to Advance Any Legally Plausible Hypothetical Scenario in which the Employer is Criminally Liable for WISHA Homicide but Not Liable for Manslaughter.....	25
B.	The Superior Court Erred When It Granted the State’s Motion to Amend.....	29
1.	The State’s Right to Amend the Information is Circumscribed.....	30
2.	The Superior Court Erred in Allowing the State’s Extraordinary Eleventh-Hour Amendment.....	31
3.	The Superior Court Failed to Consider Petitioner’s Claim that the State’s Amendment Constitutes Prosecutorial Vindictiveness In Violation of the Principles Set Forth in <i>Blackledge v. Perry</i> , 417 U.S. 21 (1974).....	37
4.	The Superior Court Failed to Consider Petitioner’s Claim that the State’s Motion to Amend Violated Fundamental Principles of Estoppel	42
5.	The Superior Court Erred in Concluding that it Had No Power to Deny a Motion to Amend Even if there was No Probable Cause that Petitioner Committed the Newly Charged Offense.....	43
6.	The Superior Court Failed to Consider Petitioner’s Claim that the State’s Conduct Constitutes Mismanagement.....	45
7.	This Case Presents the Opportunity to Consider the Limits on Prosecutorial Charging Decisions that are Intended to Improperly Influence the Judicial Decision-Making Process	46
VI.	CONCLUSION.....	50

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TABLE OF AUTHORITIES

Federal Cases

<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974).....	<i>passim</i>
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....	39
<i>United States v. Lovasco</i> , 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).....	46
<i>United States v. Meyer</i> , 810 F.2d 1242 (D.C. Cir. 1987).....	38

State Cases

<i>Arkison v. Ethan Allen Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	42
<i>Hartig v. City of Seattle</i> , 53 Wn. 432, 102 P. 408 (1909).....	14
<i>Kelley v. Howard S. Wright</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	20
<i>Kennedy v. Sea-Land Services, Inc.</i> , 62 Wn.App. 839, 816 P.2d 75 (1991).....	20
<i>Miles v. Miles</i> , 128 Wn.App. 64, 114 P.3d 671 (2005)	36
<i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008).....	15
State of Washington. <i>See, e.g., Minert v. Harsco Corp.</i> , 28 Wn.App. 686, 625 P.2d 741 (1980).....	20
<i>State v. Albarran</i> , 187 Wn.2d 15, 383 P.3d 1037 (2016)	14, 24
<i>State v. Bale</i> , No. 48042–5–II, No. 47569–3–II, 197 Wn.App. 1077, 2017 WL 702501 (2017).....	43
<i>State v. Bauer</i> , 180 Wn.2d 929, 329 P.3d 67 (2014)	26, 27, 28

<i>State v. Cann</i> , 92 Wn.2d 193, 595 P.2d 912 (1979)	14
<i>State v. Chase</i> , 134 Wn.App. 792, 142 P.3d 630 (2006)	16, 17
<i>State v. Collins</i> , 55 Wn.2d 469, 348 P.2d 214 (1960).....	14
<i>State v. Conte</i> , 159 Wn.2d 797	15
<i>State v. Danforth</i> , 97 Wn.2d 255, 643 P.2d 882 (1982)	15, 16, 21, 22
<i>State v. Descoteaux</i> , 94 Wn.2d 31 (1980).....	22
<i>State v. Engstrom</i> , 79 Wn.2d 469, 487 P.2d 205 (1971).....	25
<i>State v. Gamble</i> , 154 Wn.2d 457, 114 P.3d 646 (2005)	44, 45
<i>State v. Haley</i> , 39 Wn.App. 164 692 P.2d 858 (1984).....	16
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	38, 43
<i>State v. Lamb</i> , 175 Wn.2d 121, 285 P.3d 27 (2012).....	29, 30
<i>State v. Madera</i> , 24 Wn.App. 354, 600 P.2d 1303 (1979).....	37
<i>State v. Meekins</i> , 125 Wn.App. 390, 105 P.3d 420 (2005).....	25
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	30, 31, 46
<i>State v. Mitchell</i> , 30 Wn.App. 49, 631 P.2d 1043 (1981).....	43
<i>State v. Pettitt</i> , 93 Wn.2d 288, 609 P.2d 1364 (1980)	47
<i>State v. Rapozo</i> , 114 Wn.App. 321, 58 P.3d 290 (2002)	30
<i>State v. Rice</i> , 174 Wn.2d 884, 279 P.3d 849 (2012).....	46, 47, 48
<i>State v. Rivas</i> , 126 Wn.2d 443, 896 P.2d 57 (1995)	25
<i>State v. Sherman</i> , 59 Wn.App. 763, 801 P.2d 274 (1990).....	31
<i>State v. Shriner</i> , 101 Wn.2d 576, 681 P.2d 237 (1984)	14, 15

<i>State v. Sulgrove</i> , 19 Wn.App. 860, 578 P.2d 74 (1978)	45
<i>State v. Thomas</i> , 35 Wn.App. 598, 668 P.2d 1294 (1983)	15
<i>State v. Walls</i> , 81 Wn.2d 618, 503 P.2d 1068 (1972)	15
<i>State v. Wilson</i> , 158 Wn.App. 305, 242 P.3d 19 (2010)	13
<i>Wark v. Wash. Nat’l Guard</i> , 87 Wn.2d 864 (1976)	15

State Statutes

RCW 49.17.060	6, 16
RCW 49.17.080	17
RCW 49.17.090	17
RCW 49.17.190	7, 8, 16, 44
RCW 49.17.190(3)16.....	<i>passim</i>
RCW 72.65.070	21, 22
RCW 9A.08.010(1)(d)	18
RCW 9A.08.010(2).....	3, 19
RCW 9A.32.060.....	2, 43
RCW 9A.32.070.....	2, 6, 18
RCW 49.17	16
RCW 49.17.180	16
RCW 9A.20.020.....	17, 23
RCW 9A.32.030.....	18

RCW 9A.76.110..... 22

Other Authorities

WPIC 25.02..... 25, 27, 28

WPIC 25.03..... 25, 27

I. INTRODUCTION

This case presents the opportunity to review the State's criminal charging power in the context of: (1) felony manslaughter charges against an employer for the death of an employee resulting from safety violations, which is an issue of first-impression in Washington; and (2) the State's abuse of its criminal charging power to (a) penalize a criminal defendant for the lawful exercise of his right to appeal, and (b) attempt to unfairly influence the judicial decision-making process.

In January 2018, Petitioner Phillip Numrich became the first employer in the history of Washington to be charged with a felony homicide crime for a workplace fatality resulting from a safety violation when the State charged him with manslaughter in the second degree related to the death of one of his employees. The Washington Industrial Safety and Health Act ("WISHA") provides a specific statute that criminally punishes an employer who violates a safety and health regulation causing the death of an employee. Under Washington's longstanding "general-specific" rule, the more specific statute should have been the exclusive criminal remedy. Based on the general-specific rule, Petitioner moved to dismiss the manslaughter in the second-degree charge. Although the superior court denied Petitioner's motion, the superior court certified its order, recognizing that this was a novel issue warranting prompt discretionary review.

But the day the State's Answer to Petitioner's initial Motion for Discretionary Review was due in this Court, the State informed the defense that it would be moving to add a charge of manslaughter in the *first* degree. The State had never given notice of any such amendment during the many preceding months of substantial litigation. Then, the State used the intended amendment to attempt to dissuade this Court from accepting discretionary review, arguing that review would be meaningless because Petitioner would still face a different felony manslaughter charge even if this Court accepted review and ruled in his favor.

The State's actions violate the general specific rule, and its amendment in response to Petitioner's attempt to seek lawful appellate review, as the superior court intended by certifying the issue, constitutes prosecutorial vindictiveness and a gross breach of the State's duty to treat criminal defendants fairly and uniformly.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it denied Petitioner's motion to dismiss the manslaughter charge and concluded that Washington's manslaughter statute (RCW 9A.32.070) and WISHA homicide statute (RCW 49.17.190(3)) are not concurrent.
2. The superior court erred and abused its discretion when it granted the State's motion to amend – to add a new, more serious manslaughter charge (RCW 9A.32.060) – in response to Petitioner's attempt to obtain appellate review of the denial of the motion to dismiss.

3. The superior court erred and abused its discretion when it denied Petitioner's motion to dismiss or alternatively to reconsider the order granting the State's motion to amend.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the statutes at issue in this case – Washington's general manslaughter statutes and the specific statute in WISHA that punishes a violation of labor safety regulations that results in death – are concurrent statutes under the facts of this case [Assignment of Error 1]?
2. Whether Washington's manslaughter statutes are concurrent with the WISHA homicide statute where the WISHA statute requires proof of a greater *mens rea* (willful and knowing conduct) than Washington's manslaughter statutes (which require proof of reckless or criminally negligent conduct) and where RCW 9A.08.010(2) provides that recklessness and criminal negligence are established in each and every case where there is proof of willful or knowing conduct [Assignment of Error 1]?
3. Whether the superior court erred and applied the wrong legal standard by concluding that prosecutors have "the right" to file amended charges notwithstanding CrR 2.1(d) and clear caselaw which provides that a trial court has wide discretion to deny an amendment even if there is an absence of prejudice [Assignments of Error 2 and 3]?
4. Whether the superior court erred in allowing the State to file a new manslaughter charge even though it was undisputed that: (a) the State failed to provide notice of an intended amendment throughout months of litigation regarding the propriety of the felony homicide charge; (b) the State first provided notice of the proposed amendment on the same day the State's Answer was due in this Court; (c) there were no additional facts to support the timing of the amendment; and (d) the State was using the amendment to obtain dismissal of a pending motion for discretionary review [Assignments of Error 2 and 3]?

5. Whether the superior court erred and abused its discretion by failing to consider Petitioner's claims that: (a) the State's belated amendment was vindictive and interposed in violation of the principles set forth in *Blackledge v. Perry*, 417 U.S. 21 (1974); (b) the State was estopped from adding a charge of manslaughter in the first degree given the position it took regarding manslaughter in the second degree; and (c) the State's actions constituted mismanagement under CrR 8.3(b) [Assignments of Error 2 and 3]?
6. Whether the superior court erred and abused its discretion in concluding that there was no prejudice to the Petitioner where the State's amendment was intended to unfairly prejudice Petitioner's right to seek lawful appellate review and where the State's actions have had the anticipated effect of delaying the proceedings for many months [Assignments of Error 2 and 3]?
7. Whether the superior court erred and abused its discretion in concluding that it had no power to deny a motion to amend even if there was no probable cause to believe that the Petitioner had committed the newly charged offense [Assignment of Error 2]?

IV. STATEMENT OF THE CASE

A. Background Facts

Petitioner Phillip Numrich is the owner and manager of Alki Construction, a limited liability company. Clerks Papers 354¹. Alki Construction is a sewer replacement company that repairs and replaces side sewers of residential homes. CP 354; 355.

¹ The Clerks Papers will hereafter be referred to as "CP."

During January 2016, Alki Construction was working to replace a sewer line at a private residence in West Seattle using what is commonly described as a “trenchless” sewer repair. CP 5.² Petitioner 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. CP 6. Alki Construction used two “SpeedShore” brand shores to shore up the earth in the trench. CP 357.³

Harold Felton was an employee of Alki Construction who was working on the project. CP 355. As explained by the Attorney General:

Mr. Felton’s primary job for Alki Construction was digging trenches, and connecting the newly laid sewer line to the home’s existing system and/or street service. Felton was particularly skilled at making sewer service connections (also called “piping in”), which can be a difficult process that requires experience and practice.

CP 355 (internal citations omitted).

On January 26, 2016, as the project was nearly completed, Harold Felton was killed when the dirt wall of the trench nearest to the home

² The term “trenchless” is counterintuitive. CP 355. The process requires digging at least two trenches – one near the house and one near the street. *Id.* The repair and replacement of the sewer is conducted through a process that involves threading a cable through the old sewer line, bursting open the old pipe, and pulling new plastic pipe back through in place of the old sewer line. *Id.*

³ See Speed Shore Corporation, <https://www.speedshore.com/> (“Speed Shore Corporation, the originator of aluminum hydraulic trench shoring, is recognized worldwide as the industry leader”).

collapsed. CP 5. Petitioner was not present at the job site at the time of the collapse. CP 359.

In July 2016, the Occupational Safety and Health division (“OSHA”) of the WSDLI issued a Citation and Notice of Assessment that included a finding that Alki Construction had committed certain safety violations regarding the events of January 26, 2016. CP 11-12. Petitioner was fined \$51,500 for willful safety violations. CP 52. Ultimately, Mr. Numrich entered into a settlement agreement on the violations. *Id.*

B. Procedural History of Criminal Case

On or about January 5, 2018, the State filed criminal charges against Petitioner relating to this workplace incident. CP 1-2. The Information charged two counts:

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.

*Id.*⁴

The supporting Certification for Determination of Probable Cause was prepared by Mark Joseph, a Certified Safety and Health Officer for the WSDLI. CP 5. In support of the charges, the WSDLI opined that Alki Construction failed to comply with certain state labor and industry safety regulations, such as the provisions identified in WAC 296-155-650 and WAC 296-155-657. CP 6. The Certification for Determination of Probable Cause is replete with references to WSDLI regulations related to the sewer and trenching industry. *See, e.g.*, CP 6 (“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”); (“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”); (“Washington law and WSDLI regulations (WAC 296-155-655) require that a ‘competent person’

⁴ RCW 49.17.190 is part of Washington’s Industrial Safety and Health Act of 1973. This legislative scheme is commonly referred to as “WISHA.”

inspect any trenches, the adjacent areas, and the protective systems in the trench for evidence of situations that could result in cave-ins...Numrich was the only ‘competent person’ at the Subject Premises during the entire project and on the day when Harold Felton was killed”).

Ultimately, WSDLI concluded that “Numrich, as the owner of Alki, knowingly failed to properly shore the back trench at the Subject Premise in accordance with WSDLI regulations.” CP 9. Based upon these alleged willful regulatory violations, WSDLI alleges that there is “probable cause to believe that Philip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting, in violation of RCW 49.17.190.” CP 9. WSDLI also alleges that “there is probable cause that Mr. Numrich committed the crime of Manslaughter in the Second Degree.” CP 9.

On April 30, 2018, Petitioner moved to dismiss the manslaughter charge. CP 14-27. Petitioner argued that under Washington’s general-specific rule, the specific statute precluded prosecution under the general manslaughter statute. CP 19-26. Significant litigation ensued over the next several months. The parties filed multiple rounds of lengthy briefing, including “surreponse” and “sur-reply” briefs. *See generally* CP 19-164.

C. The Superior Court's Ruling

Oral argument occurred on July 19, 2018 in front of King County Superior Court John Chun.⁵ CP 164. The court took the matter under advisement, later notifying the parties that it was denying the defense motion. CP 193. The parties appeared before Judge Chun again on August 23, 2018 and presented argument on the issue of certification for discretionary review. CP 194; Verbatim Report of Proceedings 63-78.⁶

Thereafter, the Court signed an Order which certified the issue for discretionary 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.

CP 248. Petitioner filed a Notice of Direct Discretionary Review to this Court. CP 244. He then timely filed his Motion for Discretionary Review and Statement of Grounds for Direct Review on September 28, 2018. *See* No. 96365-7.

⁵ Judge Chun has since been appointed to Division One of the Court of Appeals.

⁶ The Verbatim Report of Proceedings, which will hereafter be cited as "VRP," includes a reporting of proceedings from hearings on January 16, 2018; April 30, 2018; May 29, 2018; July 19, 2018; August 23, 2018; and October 31, 2018.

D. The State Notifies Petitioner it Intends to Amend to Manslaughter in the First Degree and Uses the Amendment to Attempt to Dissuade this Court from Accepting Review

On October 18, 2018, the day that the State's Answer was due in this Court, the State notified Petitioner's counsel in an email that "the State needs to set a hearing to amend the Information in Mr. Numrich's case now." CP 418. The State attached a proposed Amended Information that added a charge of manslaughter in the first degree. *See id.*; CP 422-23 ("the State is moving to amend the Information now to add a count of Manslaughter in the First Degree"). Petitioner's counsel promptly notified the State of his strong objection, as well as an intent to seek discovery related to the timing and circumstances of the State's tactics. CP 418.

Later the same day, the State filed its Answer in this Court. The State trumpeted its intended amendment, explaining to this Court that discretionary review would be a useless exercise:

Even if this Court were to accept review and rule in Numrich's favor, he will still face felony manslaughter charges. . . . Here, the State intends to add a count of Manslaughter in the First Degree.

CP 634. The State added: "The State's motion to amend the Information is in the process of being scheduled and there is no basis to conclude that it will not be granted." *Id.* The State failed to advise this Court that Petitioner was strongly objecting to the amendment. *See id.*

On October 30, 2018, the defense filed in the superior court lengthy opposition pleadings and a Motion to Compel Discovery. *See* CP 250-274; 423-29. On October 31, 2018, the parties presented oral argument on the Motion to Amend in front of King County Superior Court Judge James Rogers. CP 469; VRP 78-101.

E. The Superior Court’s November 1 Order on Motion to Amend and Second Certification

On November 1, Judge Rogers issued a ruling granting the Motion to Amend. CP 470-72. However, the court noted that this was “a highly unusual case” and *sua sponte* awarded attorneys’ fees against the State. CP 471. The court explained that it had “never awarded terms in a criminal case and they are not a remedy except in highly unusual situations.” *Id.* at

2. Judge Rogers simultaneously certified the Order on Motion to Amend:

The Order Granting the Amendment only is hereby certified for appeal to join the discretionary appeal currently pending in the Washington Supreme Court. Per Judge Chun’s Order of 23 August 2018, this Court concludes that the Amendment adds a charge this is inextricably related to the issues of law certified by Judge Chun under RAP 2.3(b)(4).

CP 471-72. In addition, the court found that “the State is using this amendment to obtain dismissal of the discretionary review” and that “there are no additional facts or discovery or new legal theory.” CP 472.

Later, on November 1, the parties presented argument to Commissioner Michael Johnston on the pending motion for direct

discretionary review. *See* CP 769-70. On November 5, Commissioner Johnston issued a ruling that recognized the new certification. *Id.* Commissioner Johnston deferred ruling on the motion pending Petitioner’s filing of a second notice of discretionary review, supporting briefing, and this Court’s consideration regarding “whether to consolidate the motions and statements of ground for direct review or consider them together as companions.” *Id.* On November 16, 2018, Petitioner filed his second Notice of Discretionary Review, which was subsequently captioned as Case No. 96566-8.

Additional facts pertinent to the State’s amendment will be discussed as necessary in § V(B), *infra*.

F. Subsequent Proceedings in the Superior Court

On November 13, 2018, the State filed a Motion to Reconsider the Imposition of Sanctions. *See* Supplemental Clerk’s Papers⁷ ___. The defense filed a Response and a Motion to Dismiss Pursuant to CrR 8.3(b), or Alternatively to Reconsider Order on Motion to Amend. CP 878-98; 870-77. *See also* CP 766-869. Pursuant to the court’s request, the parties filed pleadings regarding Petitioner’s Fee Petition. CP 749-758; 899-923.

⁷ A supplemental designation of clerk’s papers was filed with the King County Superior Court on November 22, 2019.

On December 21, 2018, the superior court issued an Order denying the State’s Motion to Reconsider and denying the defense Motion to Dismiss or Reconsider, explaining that “it was unquestionably the right of the State to amend if it chose.” CP 976-77. Following additional briefing on the fee issue, on January 28, 2019, the court granted Petitioner’s fee request in full and ordered the State to pay \$18,252.49. CP 1131-32.

Thereafter, the parties completed briefing on the subsequent motion for discretionary review. On July 10, 2019, this Court granted Petitioner’s motion for discretionary review and consolidated Case No. 96566-8 with this matter.⁸

V. ARGUMENT

A. **The WISHA Homicide Statute is the More Specific Statute. Under Washington’s “General-Specific” Rule, The Manslaughter Charges Should be Dismissed.**

The application of the “general-specific” rule and consideration of whether two statutes are concurrent is a question of law reviewed *de novo*. *State v. Wilson*, 158 Wn.App. 305, 314, 242 P.3d 19 (2010).

⁸ This Court also accepted review of the State’s Motion for Direct Discretionary Review of the order imposing sanctions and fees, and consolidated those issues in this matter as well. In accordance with this Court’s July 10, 2019 scheduling letter, Petitioner will respond in his Reply brief to the issues as to which the State is a cross-petitioner.

1. The General Specific Rule

For more than a half-century, Washington has applied the “general-specific rule” when interpreting criminal statutes. *See, e.g., State v. Collins*, 55 Wn.2d 469, 470, 348 P.2d 214 (1960)(“in all cases where the negligent homicide statute is applicable, it supersedes the manslaughter statute”). The rule has deep roots in this Court’s jurisprudence. *See, e.g., Hartig v. City of Seattle*, 53 Wn. 432, 437, 102 P. 408 (1909)(observing, in reference to the initiative and referendum act, “the universally accepted rule that, where general and special concurrent laws are conflicting, the provisions of the special law must obtain”).

In the context of criminal cases, the 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, 681 P.2d 237 (1984) (*quoting State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)).

“The purpose of the general-specific 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.” *State v. Albarran*, 187 Wn.2d 15, 20, 383 P.3d 1037 (2016). As this 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, 197 P.3d 1153 (2008).

Washington courts have applied this rule in several different criminal 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, 643 P.2d 882 (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, 503 P.2d 1068 (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, 668 P.2d 1294

(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, 169, 169 P.2d 858 (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).

“[W]hen two statutes are concurrent, the specific statute prevails over the general.” *Danforth*, 97 Wn.2d at 257. To determine if two statutes are concurrent, the Court examines whether a person can violate the specific statute without violating the general statute. *State v. Chase*, 134 Wn.App. 792, 800, 142 P.3d 630 (2006).

2. The WISHA Homicide Crime, RCW 49.17.190(3)

In enacting WISHA (RCW 49.17), the Washington legislature adopted a comprehensive and unified statutory scheme to regulate workplace safety. As part of this framework, WISHA specifically provides for both civil penalties (RCW 49.17.180) and criminal penalties (RCW 49.17.190) due to safety violations and avoidable workplace injuries and deaths. 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-level 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.*

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). This punishment scheme provides the exclusive criminal remedy for the types of violations that have been alleged in this case.

3. WISHA Homicide is Concurrent with the Manslaughter Criminal Statutes

The specific WISHA homicide statute, RCW 49.17.190(3), is concurrent with the general offenses of manslaughter in the second degree, RCW 9A.32.070, and manslaughter in the first degree, RCW 9A.32.030. Each time an employer is guilty of the specific offense, he is likewise guilty of the general offenses.

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

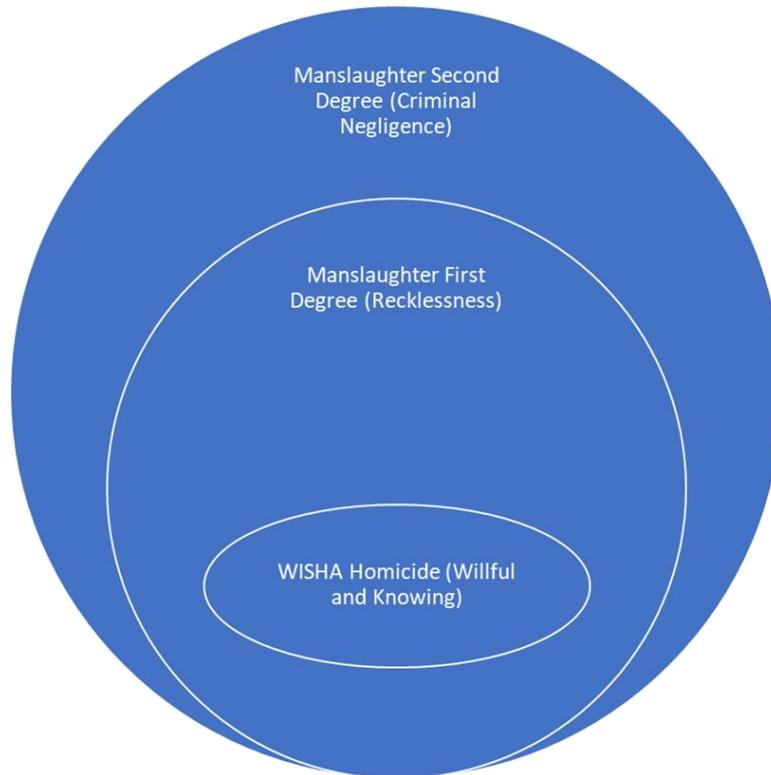
<u>OFFENSE</u>	<u>MENS REA</u>	<u>RESULT</u>
MANSLAUGHTER SECOND DEGREE	CRIMINAL NEGLIGENCE	DEATH
MANSLAUGHTER FIRST DEGREE	RECKLESSNESS	DEATH
WISHA HOMICIDE	WILLFUL AND KNOWING	DEATH OF AN EMPLOYEE

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. Manslaughter in the second degree requires proof of “negligent” conduct that results in death. 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). Manslaughter in the first degree requires proof of “reckless” conduct that results in death. Recklessness is when the defendant “knows of and

disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” Accordingly, the specific statute requires proof of a greater *mens rea* (“willfully or knowingly”) than the general statutes (which require proof only of criminal negligence or recklessness).

Under Washington law, proof of willful and knowing conduct conclusively establishes proof of criminal negligence and recklessness. First, criminal negligence is established in every case where there is proof of a higher *mens rea*. RCW 9A.08.010(2)(“[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly”). Second, recklessness is established in every case in which intentional and knowing conduct is proved. RCW 9A.08.010(2)(“[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly”).

As a result, WISHA homicide offenses constitute a subset of the more general homicide offenses, as illustrated by the following diagram:



It is impossible to envision a legally plausible case where a defendant might be guilty of the specific WISHA statute but acquitted of the more general manslaughter statutes. 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, 625 P.2d 741 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323, 334-35, 582 P.2d 500 (1978) (OSHA regulation is relevant to the appropriate standard of care); *Kennedy v. Sea-Land Services, Inc.*, 62 Wn.App. 839, 852-53, 816 P.2d 75 (1991) (OSHA regulation was relevant to the standard of care). In each and every case that a person willfully and

knowingly violates a safety regulation, it can also be said that the employer has engaged in negligent and reckless conduct.

4. Legislative History and this Court's Prior Jurisprudence Compel the Conclusion that the Specific WISHA Statute Controls

Notably, the legislature enacted a specific criminal statute with a significantly higher mental state than the general manslaughter statutes. 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, they argued that another statute, RCW 72.65.070, deals specifically with an escape from work release. *Id.* at 257. This Court agreed, holding that the general-specific rule prohibited prosecution under the general “escape” statute:

[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).

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

This Court explained the practical effect of having two concurrent statutes, where one has a lower mental state:

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 259.

The same situation is presented here. By proceeding under the general manslaughter statutes, the State is simply required to prove that Petitioner was criminally negligent or reckless. Yet to proceed under the statute specifically enacted by the legislature to punish this conduct, the State would need to prove a willful and knowing violation of the applicable

safety regulations. This would render the specific statute meaningless. The State should not be permitted to avert the mental element that the legislature intended 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 manslaughter in the second degree, a class B felony, is only \$25,000, and the maximum fine for manslaughter in the first degree, a class A felony is only \$50,000. RCW 9A.20.020. Thus, when enacting RCW 49.17.190(3), the legislature was mindful of the fact that it was creating a special statute that included somewhat reduced custodial penalties along with the potential for financial penalties far greater than those authorized for any felony-level offense. This scheme would be nullified if the State was permitted to charge both the general and the specific statutes, as it has attempted to do in this case.

Washington's general-specific rule for criminal cases is not merely an aid to statutory construction. Rather, as explained by this Court, it is a "rule" of clear application 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?” *Albarran*, 187 Wn.2d at 20. The answer to this question is always “no,” unless it is clear that the legislature intended to make the general act controlling.

5. WISHA Homicide and Manslaughter Require Criminal Proximate Cause

During proceedings in the lower courts, the State has argued that RCW 49.17.190(3) requires no causal connection between the wrongful act and the resulting death:

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*.

CP 76 (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. *State v. Engstrom*, 79 Wn.2d 469, 476, 487 P.2d 205 (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, 896 P.2d 57 (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. *State v. Meekins*, 125 Wn.App. 390, 397-98, 105 P.3d 420 (2005); WPIC 25.03 (if an independent intervening act occurs which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, then the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death).

The Washington legislature clearly contemplated these requirements when it included a causation element within RCW 49.17.190(3).

6. The State Has Failed to Advance Any Legally Plausible Hypothetical Scenario in which the Employer is Criminally Liable for WISHA Homicide but Not Liable for Manslaughter

In the superior court proceedings, the State posited hypothetical scenarios in support of the assertion that the specific statute can be violated

in cases which do not also amount to manslaughter. CP 77-79. Not only do the proffered scenarios fail to advance the State's position, but they help to confirm that these statutes are concurrent.

First, the State presented a scenario where a foreperson does not provide hardhats to her workers contrary to a state safety regulation. CP 77. This occurs on a day where that foreperson does not expect anyone to be doing any work that creates the potential for flying or falling objects, and he expects that his crew will not wear them anyway. CP 78. Then, according to this scenario, a worker on the jobsite dies after being struck on the head by an object that was unexpectedly left unsecured in an area somewhere above the jobsite, by a different employer the day before. CP 78. The State claims, without discussion of the elements of the underlying offense, that this foreperson is guilty of a violation of RCW 49.17.190(3) because the death "happened" after the violation had occurred. CP 78-79. But given the fluke scenario that is described (where an unexpected object falls from the sky and strikes a worker on the head) the violation in question was not the legal cause of the worker's death.

State v. Bauer, 180 Wn.2d 929, 329 P.3d 67 (2014), is instructive on this point. There, the defendant left a loaded gun in his house. *Id.* at 933. His girlfriend's child put the gun in a backpack and took it to school. *Id.* While the child was rummaging around in the backpack, the gun discharged,

injuring another student. *Id.* This Court considered whether Bauer could be held criminally liable for Third Degree Assault for the injury to the child. This Court explained that “‘legal cause’ in criminal cases differs from, and is narrower than, ‘legal cause’ in tort cases in Washington.” *Id.* at 940. This Court refused to impose criminal liability, explaining “there is no criminal case in Washington upholding criminal liability based on a negligent act that has such intervening facts as in this case between the original negligence and the final, specific, injurious result.” *Id.* at 940.

Accordingly, in the State’s first hypothetical, the foreperson would not be criminally responsible for the unreasonable, unanticipated, *and legally intervening*, actions of workers at another jobsite from a prior day – actions that were presumably outside of her knowledge and control. Based upon the State’s own fact pattern, this is a classic example of a case where the death was caused by a new independent intervening act which the defendant, in the exercise of ordinary care, could not have reasonably anticipated as likely to happen.

This outcome is fully supported by Washington’s jury instructions. *See* WPIC 25.03, discussed *supra* (intervening act); WPIC 25.02 (Homicide—Proximate Cause—Definition) (proximate cause “means a cause which in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have

happened”). Proximate cause instructions would be given in any prosecution for WISHA homicide. *See* WPIC 25.02, Comment (“[t]he first two paragraphs should be given in all homicide cases in which there is an issue of causal connection between defendant’s act and the death of the decedent”).

The second hypothetical presented by the State describes an equally inapposite scenario. There, a foreperson/employer of a logging crew must comply with state regulations by ensuring that her workers wear chaps while they are working on downed logs. CP 78. According to the suggested scenario, at the end of a day’s work, an “experienced employee” removes his chaps and returns to a downed log for one final cut. CP 78. *Id.* Then, “something goes wrong,” the chainsaw cuts the employee’s femoral artery, and he bleeds to death. *Id.* Under the State’s hypothetical, the employee walked past the employer on the way back to the log, but “the employer does not notice that the employee has removed his chaps” and there is nothing to indicate that employer had reason to believe the employee removed his chaps at the end of the day. *Id.*

But, contrary to the State’s suggestion, the foreperson is most certainly not guilty of any violation of RCW 49.17.190(3). First, she did not commit a willful or knowing violation of the safety regulations. Second, the foreperson’s failure to check the employee for chaps is not the “but for”

cause of the employee's death. Finally, the experienced employee's decision to remove his chaps and return to the log to make one final cut also constitutes a *legally intervening act* that relieves the employer of criminal liability. Thus, under the State's second hypothetical, there would be no basis to charge this foreperson with any criminal offense at all.

The State has presented hypothetical scenarios that only demonstrate the weakness of its legal position. Despite having nearly four years to investigate and review this case, the State cannot conjure any legally plausible scenario in which an employer would be guilty of a violation of WISHA's criminal liability statute but not also guilty of a violation of the manslaughter statutes. In actuality, it is impossible to envision a case where an individual would be guilty of Violation of Labor Safety Regulation with Death Resulting without necessarily committing a manslaughter offense.

B. The Superior Court Erred When It Granted the State's Motion to Amend

"A trial court's ruling on a proposed amendment to an information is reviewed for abuse of discretion." *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012).

1. The State's Right to Amend the Information is Circumscribed

Although the superior court concluded that Petitioner's rights were not substantially prejudiced (CP 470), the court apparently relied at least in part on the erroneous premise that the prosecutor had unfettered discretion to amend the charges. *See* CP 977 ("it was unquestionably **the right** of the State to amend if it chose")(emphasis supplied).

Washington law is clear that the "trial court cannot permit amendment of the information if substantial rights of the defendant would be prejudiced." *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012) (trial court did not abuse discretion in denying State's motion to amend after defendant had prevailed on a pretrial motion); CrR 2.1(d). Moreover, the court has wide discretion when considering a State's motion to amend and can deny the amendment even if there is an absence of prejudice. *See State v. Rapozo*, 114 Wn.App. 321, 322-24, 58 P.3d 290 (2002) (even though the amendment "would not have prejudiced Rapozo," the court did not abuse its discretion in denying the motion to amend, noting "the State had ample opportunity to correct the charge before trial as almost two months had passed between charging and trial").

Washington courts have affirmed dismissal of charges for late motions to amend by the State. For example, in *State v. Michielli*, 132 Wn.2d 229,

239–40, 937 P.2d 587 (1997), this Court emphasized that dismissal was appropriate where there was no “justification for the delay in amending the information”:

In this case the State expressly admits that it had all of the information and evidence necessary to file all of the charges in July 1993. Despite this, the State delayed bringing the most serious of those charges for months, and did so only five days (three business days) before the scheduled trial. Even though the resulting prejudice to Defendant’s speedy trial right may not have been extreme, the State’s dealing with Defendant would appear unfair to any reasonable person.

Id. at 246. *See also State v. Sherman*, 59 Wn.App. 763, 770, 801 P.2d 274 (1990)(affirming dismissal, noting that a defendant may be prejudiced “if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process”).

Here, there was absolutely no justification for the State’s delayed amendment.

2. The Superior Court Erred in Allowing the State’s Extraordinary Eleventh-Hour Amendment

The timing of the State’s October 18, 2018 amendment to add manslaughter in the first degree was stunning. It is impossible to appreciate the significance of this amendment without a detailed review of the litigation history regarding the propriety of the manslaughter in the second degree charge.

The defense motion to dismiss the manslaughter in the second degree charge was an unusually significant piece of litigation for the parties and the superior court. At the outset, there was significant notice and planning regarding this motion to dismiss. Petitioner's counsel provided oral notice at the arraignment on January 18, 2018. VRP 8. The parties met in person to discuss the defense's intended motion to dismiss in early 2018. CP 278. The State never mentioned a potential amendment to manslaughter in the first degree. CP 477 (State conceding that "[d]uring this meeting there was no discussion of what amendments to the charges the State might seek at trial").

The parties requested "pre-assignment of the case for pretrial management." CP 55. The court signed a detailed briefing schedule that had been prepared by the State. CP 58-60. In the scheduling order, both the defense and the State acknowledged that each party would seek discretionary review if that party lost the motion. CP 59 ("[a]t this time it is anticipated that the party that loses the above-described motion to dismiss will likely seek discretionary review of the decision in the court of appeals"). *See also* VRP 60-63 (at oral argument on the motion to dismiss, extensive discussion regarding likely certification, with the State observing "this may eventually end up in front of the Court of Appeals"). At no point during the planning and scheduling process did the State ever mention that

the Information might be amended to the more serious charge of manslaughter in the first degree.

The litigation was fervent, and the parties expended an incredible amount of resources over a period of months. The volume of briefing produced was significant. *See generally* CP 14-54 (Defendant's Motion to Dismiss (14 pages) and supporting declaration and appendices (27 pages); CP 64-117 (State's Response to Motion to Dismiss (33 pages) and supporting appendices (21 pages); CP 118-144 Defendant's Reply (23 pages) plus appendices; CP 145-55 (State's Surreponse (11 pages); CP 156-163 (Defendant's Surreply (11 pages)).

Not once in any of these lengthy pleadings did the State so much as hint to the court or opposing counsel that it was considering an amendment to manslaughter in the first degree.

The superior court hearings were quite long. The July 23, 2018 oral argument on the merits of the motion to dismiss lasted an hour and five minutes. CP 164. The August 23, 2018 oral argument on certification lasted 22 minutes. CP 194. After learning that the court would be denying the defense motion, the State prepared a detailed 10-page proposed "Order Denying Defendant's Motion to Dismiss Count 1." *See* CP 856-69.⁹ These

⁹ The Court declined to sign the State's proposed Order.

details highlight the extraordinary resources and attention that the parties and the superior court devoted to this litigation.

On October 1, 2018 – after the defense had already filed the expected motion for discretionary review and statement of grounds for direct review – the parties appeared in the superior court and presented oral argument regarding the State’s Motion to Amend Conditions of Release, a hearing that lasted for more than 30 minutes. CP 249 (motion denied).

Not once over these many months, or during any of the lengthy hearings, or in any of the hundreds of pages of filed pleadings, did the State suggest that it was contemplating adding manslaughter in the first degree. Only on October 18, 2018 – the day its Answer to Petitioner’s motion for direct discretionary review was due in this Court – did the State notify Petitioner’s counsel that it would be filing a motion to amend the charges to manslaughter in the first degree.

Then in its Answer, the State argued to this Court that discretionary review – and all of the previous months of litigation in superior court – would be meaningless because even if this Court reversed the superior court and remanded for dismissal of manslaughter in the second degree, Mr. Numrich would still be facing manslaughter in the *first* degree based on the State’s intended amendment.

To say that this came as a shock to everyone involved is an understatement. *See, e.g.*, CP 418 (10/18/18 email from Petitioner’s counsel to State)(“[t]his is an extraordinary motion – given the timing and obvious prejudice that may flow”). The superior court expressed similar concern at the October 31, 2018 hearing on the motion to amend:

THE COURT: Really, the question I’m asking is this. There’s a tremendous amount of effort to be done in briefing, motion to dismiss. Presumably during that time you’re thinking: I may add Man 1. Why not give notice back then so it could be incorporated into the arguments during the motion to dismiss and be brought forward with all the rest of everything that’s going on? I mean, you sort of see this whole train moving forward. And so that’s really my question.

VRP 81.

Ultimately, the superior court found that the State was using the amendment to obtain dismissal of the pending motion for discretionary review:

This is a highly unusual case. What is singular here is that the State did not give notice of an amendment in an obvious situation that would have saved countless hours and fees for an appeal, **and where the State is using this amendment to obtain dismissal of the discretionary review, and so announcing in the responsive appellate briefing**, and where the issues presented by the Amendment are obviously intertwined with the issues on discretionary appeal, **and where there are no additional facts or discovery or new legal theory.**

CP 472 (emphasis supplied).

The superior court apparently found that the prosecutor “was candid with the Court in admitting that he did not consider the amendment until very late in the pending appellate process.” CP 470. Insofar as this is a factual finding, it is not supported by substantial evidence, and in fact is directly contradicted by the State’s own assertions. *See Miles v. Miles*, 128 Wn.App. 64, 69, 114 P.3d 671 (2005)(reversing where substantial evidence failed to support trial court’s written findings of fact).

Contrary to the court’s finding, the State has admitted that the amendment was considered at the *outset of the case*, explaining that, at the time of filing, “I and other KCPAO DPAs believed that there was probable cause to charge the defendant with either/both Manslaughter in the First Degree and Manslaughter in the Second Degree.” CP 476. The State admitted that “it was decided to initially file Manslaughter in the Second Degree charges and to reserve the decision on whether to amend to Manslaughter in the First Degree or to add Manslaughter in the First Degree as a charge in the alternative until the time of trial or until closer to the running of the Statute of Limitations, whichever came first.” CP 476.

If it is true that the State knew about this potential amendment all along – but let Petitioner, his counsel, and the superior court labor through months of time-consuming litigation with the (apparently) false impression that the resolution of the motion to dismiss would be dispositive as to the

application of the general-specific rule – the State’s conduct is shocking, and denial of the motion to amend was the only legally appropriate remedy.

In light of the State’s failure to provide notice of the intended amendment throughout months of litigation regarding the propriety of the felony homicide charge; the timing of the State’s notice on the day its Answer was due in this Court; the absence of any additional facts to support the amendment; and the finding that the State was using the amendment to obtain dismissal of the pending motion for discretionary review, the superior court erred in granting the State’s motion to amend.

3. The Superior Court Failed to Consider Petitioner’s Claim that the State’s Amendment Constitutes Prosecutorial Vindictiveness In Violation of the Principles Set Forth in *Blackledge v. Perry*, 417 U.S. 21 (1974)

In granting the motion to amend, the superior court concluded that Petitioner’s “rights are not substantially prejudiced.” CP 470. However, the superior court failed to consider Petitioner’s claim (*see* CP 263-66) that the amendment constituted prosecutorial vindictiveness in violation of his constitutional due process rights.

A pre-accusatorial delay “may constitute a violation of due process under the Fifth Amendment if the prejudice to the defendant outweighs the reasons for the prosecutorial delay or the delay is caused by the prosecutor solely to gain a tactical advantage over the defendant.” *State v. Madera*, 24

Wn.App. 354, 355, 600 P.2d 1303 (1979). Further, constitutional due process principles prohibit prosecutorial vindictiveness. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). Here, the amendment was clearly used by the prosecutor solely to gain a tactical advantage over Mr. Numrich and was a vindictive response to Petitioner's exercise of his lawful right to seek review.

Prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.” *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). Thus, a prosecutorial action is vindictive if it is designed to penalize a defendant for invoking legally protected rights. *Korum*, 157 Wn.2d at 627. There are two kinds of prosecutorial vindictiveness: a presumption of vindictiveness and actual vindictiveness. *Id.* A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Id.* (quoting *Meyer*, 810 F.2d at 1246). The prosecution may then rebut the presumption by presenting objective evidence justifying the prosecutorial action. *Korum*, 157 Wn.2d at 627-28. Actual vindictiveness must be shown by the defendant through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *Meyer*, 810 F.2d at 1245.

Clearly established federal law in the context of vindictive prosecutions provides that:

[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)(internal citations and quotation marks omitted).

In *Blackledge v. Perry*, 417 U.S. 21 (1974), the United States Supreme Court reversed a conviction where the prosecutor filed a more serious felony conviction against the defendant as a result of the defendant exercising his lawful right to appeal. There, Perry was convicted of misdemeanor assault while he was an inmate at an institution. *Id.* at 22. He filed a notice of appeal, seeking a trial de novo. *Id.* “After the filing of the notice of appeal, but prior to the respondent's appearance for trial de novo in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury” for the same incident. *Id.* at 23.

The Court observed the power and incentive that can improperly affect the prosecutor's charging decisions:

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by ‘upping the ante’ through a felony indictment whenever a convicted misdemeanant [sic] pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Id. at 27–28.

Importantly, the Court emphasized that it was the fear of the prosecutor’s vindictive actions that had the potential to improperly affect the justice system:

since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Id. at 28 (internal citations and quotations marks omitted). The Court concluded: “We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.”

Id. at 28–29. Here, as in *Blackledge*, the State should be prohibited from

‘upping the ante’ on Petitioner in response to his lawful exercise of an appellate right.

In Petitioner’s case, however, the State’s tactics were decidedly more concerning. The State’s amendment was not just an attempt to exert pressure on the defendant, it was also designed to improperly influence this Court’s judicial decision-making process. The State’s last-minute tactic was all the more concerning because it was intended to subvert the superior court’s certification for discretionary review.

The objective circumstances surrounding the State’s motion to amend present overwhelming evidence of prosecutorial vindictiveness. Before Mr. Numrich initiated review, the prosecutor never once suggested that the State intended to increase the charges. Then, on the cusp of its deadline to file a response in this Court, the State decided to file a far more serious felony offense, which dramatically increases the range of potential punishment.

The threat of an amendment was presented in a time and manner that it is reasonable to conclude that it was intended to: (1) punish the defendant for exercising his legal right to appeal; and (2) dissuade this Court from accepting discretionary review, as was intended by the superior court’s certification order.

4. The Superior Court Failed to Consider Petitioner's Claim that the State's Motion to Amend Violated Fundamental Principles of Estoppel

The State spent months exhaustively analyzing for the court why Mr. Numrich was criminally negligent and therefore manslaughter in the second degree was the appropriate charge. *See, e.g.*, CP 64 (“On January 26, 2016, Numrich’s negligence caused Felton’s death when a trench Felton was working in collapsed, burying him alive under more than six feet of wet dirt”). This involved complex legal analysis comparing the elements of manslaughter in the second degree to those of RCW 49.17.190(3).

The State never once suggested that Mr. Numrich was reckless and therefore manslaughter in the *first* degree was a possible or legal charge in this case. The State should be precluded from now taking a contrary position:

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and . . . waste of time.

Arkison v. Ethan Allen Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

The parties spent six months litigating the State’s novel request to charge manslaughter in the second degree. The State presented no new evidence to support the more serious charge. The State should be estopped

from now claiming that manslaughter in the *first* degree is the appropriate charge.

5. The Superior Court Erred in Concluding that it Had No Power to Deny a Motion to Amend Even if there was No Probable Cause that Petitioner Committed the Newly Charged Offense

The superior court erroneously concluded that a lack of probable cause does not lead to a dismissal. *See* VRP 97 (“THE COURT: I don't know that that's an argument that needs to be addressed. I don't – and I'm not sure that [lack of] probable cause leads to dismissal in a case. I think it leads to the lack of the power of the Court to impose any conditions on a defendant”). This conclusion is plainly incorrect.

“A criminal charge cannot be filed unless it is supported by probable cause.” *State v. Bale*, No. 48042–5–II, No. 47569–3–II, 197 Wn.App. 1077 at *6, 2017 WL 702501 (2017) (unpublished)(citing *Korum*, 157 Wn.2d at 664 (Madsen, J., dissenting)(“a charge cannot be filed unless it is supported by probable cause”). *See also State v. Mitchell*, 30 Wn.App. 49, 52 n.4, 631 P.2d 1043 (1981)(“it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause”).

RCW 9A.32.060 defines manslaughter in the first degree in relevant part as follows: “A person is guilty of manslaughter in the first degree when . . . he or she recklessly causes the death of another person.” *Id.* Thus, to

convict a defendant of manslaughter in the first degree, the State must prove that the defendant knew of and disregarded a substantial risk that a death may occur. *State v. Gamble*, 154 Wn.2d 457, 467-69, 114 P.3d 646 (2005).

The State has conceded that the amendment does not rely on any new facts or legal theory, claiming instead that the State has believed since “the time of filing” that there was probable cause to charge Mr. Numrich with manslaughter in the first degree. CP 421. But the Certification for Determination of Probable Cause contains no evidence that the defendant actually knew of a substantial risk that a death may occur. *See* CP 5-9. Rather, the seven-page Certification concludes that

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.

CP 9.¹⁰

Because the State has not established probable cause, the amendment to manslaughter in the first degree should have been denied.

¹⁰ At most, the certification raises generalized critiques regarding the sufficiency of the shoring and observes that Petitioner raised concerns about Mr. Felton’s use of a vibrating tool in the trench. CP 7 (noting “increased risk” from using Sawzall). These are the facts supporting the State’s argument that Petitioner was criminally negligent because he failed to be aware of a substantial risk that death would occur. But mere “increased” risk does not equate with a *substantial* risk that death would occur.

6. The Superior Court Failed to Consider
Petitioner's Claim that the State's Conduct
Constitutes Mismanagement

The State badly mismanaged this case. Pursuant to CrR 8.3(b), Petitioner moved to dismiss the manslaughter in the first degree charge, or alternatively, reconsider the order on motion to amend. CP 870-77. The superior court denied the motion, characterizing it as a motion to reconsider. CP 977. The superior court did not address Petitioner's claims regarding CrR 8.3(b) and mismanagement. *See id.*

CrR 8.3(b) provides for dismissal due to governmental misconduct when there has been prejudice which materially affects the accused's right to a fair trial. *Id.* Our courts have long held that "governmental misconduct need not be of an evil or dishonest nature; *simple mismanagement* also falls within such a standard." *State v. Sulgrove*, 19 Wn.App. 860, 863, 578 P.2d 74 (1978) (emphasis supplied). Petitioner moved to dismiss the case pursuant to CrR 8.3(b), or alternatively to reconsider the order granting the amendment. CP 870-77. The superior court denied Petitioner's motion. CP 977.

The original motion for discretionary review was on track for timely and orderly consideration in early November 2018. But the State's amendment threw this litigation into a tailspin, leading to numerous other proceedings. Petitioner has been forced to waive his speedy trial rights

repeatedly to pursue necessary remedies in superior court and perfect the issues related to the amendment in this Court. A “[d]efendant’s being forced to waive his speedy trial right is not a trivial event.” *Michielli*, 132 Wn.2d at 245 (1997) (State’s delay in amending charges, forcing defendant to waive speedy trial rights to be prepared, is sufficient prejudice for an order of dismissal pursuant to CrR 8.3(b)).

The State’s gross mismanagement, which has resulted in unexpected delays of at least six months, warrants the remedy of dismissal of the manslaughter in the first degree charge.

7. This Case Presents the Opportunity to Consider the Limits on Prosecutorial Charging Decisions that are Intended to Improperly Influence the Judicial Decision-Making Process

The decision to file criminal charges entails “awesome consequences.” *United States v. Lovasco*, 431 U.S. 783, 794, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). This Court has noted that a “prosecuting attorney’s most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual and, if so, which available charges to file.” *State v. Rice*, 174 Wn.2d 884, 901-02, 279 P.3d 849 (2012). Prosecutorial standards recognize that “[t]he broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest

effort be made to see that this power is used fairly and uniformly.” *State v. Pettitt*, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980)(quoting former ABA Standards Relating to the Prosecution Function and the Defense Function at 93). *See also Rice*, 174 Wn.2d at 901 (noting “the substantial liberty interests at stake” within the criminal justice system and the “awesome consequences” of criminal prosecution and thus “the need for numerous checks against corruption, abuses of power, and other injustices”).

Here, the sum of the State’s actions against Petitioner reflect an abuse of the prosecutor’s charging power.

Petitioner has no criminal history. Like many other citizens, he is an employer. Tragically, one of his employees died on the job in a workplace accident. Unfortunately, this is not unique.¹¹ The original manslaughter in the second-degree charge was the first of its kind in such a workplace accidental death. The defense objected to the novel charge and diligently litigated a legitimate and likely meritorious legal challenge soon after filing. The issue is novel and debatable. In fact, the State acknowledged early in the case that if the defense prevailed on the motion, the State would seek discretionary review. The superior court swiftly

¹¹ In Washington in the last decade, there have been 681 traumatic work-related deaths. *See* 2017 Washington State Work-Related Fatalities Report, http://www.lni.wa.gov/Safety/Research/FACE/Files/2017_WorkRelatedFatalitiesInWaState_WAFACE.pdf.

certified the initial Order denying the defense motion to dismiss, recognizing that this was a controlling legal issue about which reasonable minds could differ. Everything seemed on track to proceed through the discretionary review process in an orderly fashion.

But then, the State unfairly exercised its charging power in its responsive pleadings when it announced an amendment in an attempt to block this Court's review. The State argued that it made no sense to accept review because another – different – manslaughter charge would be waiting in the wings when the case came back to superior court. Under the State's suggested scenario the months of litigation – planning, scheduling, legal research, briefing (including hundreds of pages of briefing and appendices), and superior and appellate court time and resources – would have amounted to a complete waste.

The tactics employed by the State were underhanded, represent a blatant disregard for court resources, and reflect a dereliction of the prosecutor's duty to exercise its charging discretion "fairly and uniformly." As the superior court noted, there were "no additional facts or discovery or new legal theory." CP 472. It was clear, as the superior court found, that "the State [was] using this amendment to obtain dismissal of the discretionary review." *Id.*

Petitioner's substantial liberty interests are at stake. He was originally charged with an offense that carried a standard range sentence of approximately two years in prison – a charge that has never been brought in the case of a workplace accident and is legally at odds with Washington's carefully constructed WISHA statutory framework. But the State's newest amendment more than quadruples the stakes by charging him with an offense that carries a standard range sentence of 8.5 years in prison and a maximum penalty of life in prison. The State's tactics exponentially increased the potential jeopardy and pressure on Mr. Numrich simply because he was exercising his lawful right to seek appellate review.

The superior court's *sua sponte* remedy was to impose fees to compensate Petitioner for additional legal resources. But this case is not about money; Petitioner never asked for compensation. Mr. Numrich is now facing upwards of a decade in prison as a result of a last-minute decision the State made on the day its Answer was due in this Court. This Court should not condone this conduct, which reflects a gross lack of appreciation for the "awesome consequences" of the State's criminal charging responsibilities.

The superior court's imposition of fees was an insufficient remedy. The State should not be able to buy its way out of a problem that the State,

and only the State, created. Dismissal of the manslaughter in the first-degree charge is the legally appropriate sanction for the State's conduct.

VI. CONCLUSION

For the foregoing reasons, and in the interests of justice, the Court is respectfully requested to reverse the superior court decisions and remand for dismissal of the manslaughter charges.

RESPECTFULLY SUBMITTED this 22nd day of November, 2019.

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PROOF OF SERVICE

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

On the 22nd day of November, 2019, I filed the above Petitioner's Opening Brief via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

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And e-mailed to Petitioner Phillip Numrich.

DATED at Seattle, Washington this 22nd day of November, 2019.

Sarah Conger
Sarah Conger, Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

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