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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner.

v.

PHILLIP SCOTT NUMRICH,

Petitioner/Cross-Respondent.

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. ISSUES PRESENTED PERTAINING TO STATE’S CROSS-PETITION..... 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 4

 A. The Trial Court Erred in Denying Petitioner’s Motion to Dismiss the Manslaughter Charges..... 4

 1. The Legislature Established RCW 49.17.190(3) as the Crime for an Employer who Causes the Death of an Employee Due to a Safety Violation 4

 a. Specific Legislative Intent 7

 b. Where the Legislature Did Not Intend to Make the General Statute Controlling, WISHA’s Specific Statute Prevails 9

 2. WISHA Homicide and Manslaughter are Concurrent..... 11

 3. The State has Failed to Advance a Legally Plausible Hypothetical that would Violate the WISHA Statute but not the Manslaughter Statutes..... 15

 a. The State’s Construction Site Hypothetical Fails..... 15

 b. The State’s Logging Crew Hypothetical Fails... 17

 4. Petitioner will not be Conceding he Violated RCW 49.17.190(3)..... 19

5.	The State’s Attempt to Minimize Proximate Cause ...	19
B.	The Trial Court Erred When it Granted the State’s Motion to Amend.....	21
1.	The State Minimizes its Amendment.....	21
2.	The State’s Delay Leads to a Finding of Prosecutorial Vindictiveness.....	29
3.	The State Fails to Address <i>Blackledge v. Perry</i>	30
4.	The State’s Reliance on the Trial Court’s Factual Finding Regarding the Prosecutor’s Intent Cannot Be Squared with the Record	33
5.	To the Extent the State Disagrees that Probable Cause is Required for the Filing of a Criminal Charge, this May be an Issue of First Impression	36
6.	To the Extent that the Superior Court Considered Petitioner’s CrR 8.3(b) Claim, the Trial Court Erred in Denying the Motion	37
7.	The State Mischaracterizes Petitioner’s Argument Regarding the Prosecutor’s Charging Authority.....	39
C.	The Trial Court Did Not Err in Awarding Fees	40
1.	<i>State v. Gassman</i> is Not Analogous	41
2.	The State’s Conduct was Tantamount to Bad Faith....	42
D.	The Trial Court Did Not Abuse Its Discretion in Setting the Fees	43
1.	The Trial Court’s Fee Award is Justified.....	44
a.	Attorney Hours.....	44
b.	Hourly Rates	47

E. This Court Should Award Fees on Appeal 49

V. CONCLUSION..... 50

PROOF OF SERVICE

TABLE OF AUTHORITIES

Federal Cases

<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974)	30, 32
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....	32
<i>Ingram v. Oroudjian</i> , 647 F.3d 925 (9th Cir. 2011)	47
<i>Kalina v. Fletcher</i> , 522 U.S. 118 (1997).....	36
<i>Norman v. Hous. Auth. of City of Montgomery</i> , 836 F.2d 1292 (11th Cir.1988).....	47
<i>Sorenson v. Mink</i> , 239 F.3d 1140 (9th Cir.2001).....	46
<i>Welch v. Metro. Life Ins. Co.</i> , 480 F.3d 942 (9th Cir. 2007)	45, 46

State Cases

<i>Berryman v. Metcalf</i> , 177 Wn.App. 644, 312 P.3d 745 (2013)	45, 46
<i>Brand v. Dep't of Labor & Indus. of State of Wash.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	43
<i>Brown v. State Farm Fire & Cas. Co.</i> , 66 Wn.App. 273, 831 P.2d 1122 (1992).....	47
<i>Broyles v. Thurston Cty.</i> , 147 Wn.App. 409, 195 P.3d 985 (2008)	48
<i>Costanich v. Washington State Dep't of Soc. & Health Servs.</i> , 164 Wn.2d 925, 194 P.3d 988 (2008).....	50
<i>Dennis v. Dep't of Labor & Indus. of State of, Wash.</i> , 109 Wn.2d 467 ..	6, 7
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990).....	50
<i>Flanigan v. Dep't of Labor & Indus.</i> , 123 Wn.2d 418, 869 P.2d 14 (1994).....	6

<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	6
<i>Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.</i> , 119 Wn.2d 697, 836 P.2d 823 (1992).....	9
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	48, 49
<i>Port Townsend Sch. Dist. No. 50 v. Brouillet</i> , 21 Wn.App. 646, 587 P.2d 555 (1978).....	9
<i>SentinelC3, Inc. v. Hunt</i> , 181 Wn.2d 127, 331 P.3d 40 (2014)	48, 49
<i>State v. Bauer</i> , 180 Wn.2d 929, 329 P.3d 67 (2014).....	20, 23
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993)	37
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982)	35
<i>State v. Conte</i> , 159 Wn.2d 797, 154 P.3d 194 (2007).....	9, 10
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	35
<i>State v. Farrington</i> , 35 Wn.App. 799, 669 P.2d 1275 (1983)	15, 16, 17
<i>State v. Gamble</i> , 154 Wn.2d 457, 114 P.3d 646 (2005)	11, 12, 13, 14
<i>State v. Gassman</i> , 175 Wn.2d 208, 263 P.3d (2012)	41, 42
<i>State v. Henderson</i> , 180 Wn.App. 138, 321 P.3d 298 (2015).....	13
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	32
<i>State v. Latham</i> , 183 Wn.App. 390, 335 P.3d 960 (2014)	13
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	39
<i>State v. Rivas</i> , 126 Wn.2d 443, 896 P.2d 57 (1995)	20
<i>Steele v. Lundgren</i> , 96 Wn.App. 773, 982 P.2d 619 (1999)	44

<i>Wark v. Wash. Nat'l Guard</i> , 87 Wn.2d 864, 557 P.2d 844 (1976)	9
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	34, 35

Federal Statutes

29 U.S.C. 651(b)(11)	8
29 U.S.C. § 667.....	8

State Statutes

RCW 49.17.190(3).....	<i>passim</i>
RCW 51.04	5
RCW 51.04.010	5
RCW 51.32.010	7
RCW 51.32.050	7
RCW 51.32.130	7
RCW 9A.08.010(1)(c)	12
RCW 9A.08.010(1)(d)	13
RCW 9A.32.060.....	12, 17, 19
RCW 9A.32.060(1)(a)	13
RCW 9A.32.070.....	12, 16, 19
RCW 9A.32.070(1).....	13
RCW 9A.36.021(1)(a)	11, 12, 14

Other Authorities

Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181 (1985)	35
<i>The Lodestar Method for Calculating A Reasonable Attorney Fee in Washington</i> , 52 Gonz. L. Rev. 1 (2017)	46
<i>The Washington Industrial Safety and Health Act: Wisha's Twentieth Anniversary, 1973-1993</i> , 17 U. Puget Sound L. Rev. 259 (1994)	8
WPIC 10.04.....	13

I. INTRODUCTION

The parties spent nine months intensely litigating the State's novel decision to charge Petitioner with second-degree manslaughter for causing the death of an employee due to an alleged safety violation. Following the superior court's denial of his motion to dismiss, Petitioner filed his anticipated motion for discretionary review. The day its Answer was due in this Court, the State announced that it was moving to amend to add *first*-degree manslaughter. This resulted in Petitioner having to perfect a second motion for discretionary review, delaying the proceedings for months. The State has conceded that it had contemplated the amendment from the time of the original case filing, but did not give notice over the many months of litigation.

The superior court noted that the State's failure to provide earlier notice would have saved "countless hours and fees." Recognizing that it had never previously awarded fees in a criminal case, the court concluded that this was "a highly unusual case." The court ordered that the State pay Petitioner's fees for work on the first motion for discretionary review. Petitioner has sought review of the superior court's order granting the motion to amend, along with the denial of Petitioner's motion to dismiss under the general specific statute. Petitioner also respectfully requests this Court uphold the superior court's fee award.

II. ISSUES PRESENTED PERTAINING TO STATE’S CROSS-PETITION

1. Where the State withheld notice of the first-degree manslaughter amendment during months of litigation when notice would have been expected, resulting in significant additional work by Petitioner on a second motion for discretionary review, did the trial abuse its discretion in awarding fees for the extra work caused by the State’s amendment?

2. Where the trial court issued specific written findings in support of its conclusion that the attorney time was reasonable, did the trial court abuse its discretion in awarding fees for 38.1 hours of attorney time?

3. Where the trial court explicitly found that the attorneys’ hourly rates were reasonable rates for litigation attorneys practicing in Seattle with commensurate experience, and in light of the novelty of the questions involved and the seriousness of the charges, did the trial court abuse its discretion in finding the rates reasonable?

III. STATEMENT OF THE CASE

Petitioner hereby incorporates by reference the Statement of the Case set forth in the Brief of Petitioner at 4-13. Petitioner submits the following additional facts as pertinent to the State’s Cross-Petition:

Following review of Petitioner’s counsel’s time sheets, and consistent with its Order on Motion to Amend awarding fees for work on the motion for

discretionary review up to the point of the amendment (*see* CP 471), on

January 28, 2019 the superior court entered the following order:

On November 1, 2018 this Court ordered the State to pay Mr. Numrich's attorney fees for work performed on the Supreme Court Motion for Direct Discretionary Review to that point. Pursuant to this Court's Order, the Defendant filed a Fee Petition and other pleadings in support of his Fee Petition, including the billing records of Defendant's attorneys. The State filed pleadings opposing the Defendant's Fee Petition. Having considered the supporting and opposing pleadings related to the Fee Petition, and the records and files herein, this Court finds:

1. Mr. Numrich's attorneys spent 38.1 hours – 13.6 hours by Mr. Maybrown and 24.5 hours by Mr. Offenbecher – working on the Motion for Direct Discretionary Review through November 1, 2018. This was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich. The work was not duplicative or unproductive.

2. The billing rates of Mr. Numrich's attorneys – \$600 for Mr. Maybrown and \$400 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown Seattle with commensurate experience, and in light of the novelty and difficulty of the questions involved and the seriousness of the charges in this case.

3. Finally, the requested costs of \$292.50 are also reasonable and appropriate given that Mr. Numrich had to pay a second filing fee to present issues related to the Amended Information to the Supreme Court.

Accordingly, it is hereby ordered that State shall pay the Defendant \$17,960 in legal fees and \$292.49 in costs for a total of \$18,252.49.

CP 1131-32. The court specifically noted: “The Court reviewed all of [the] extensive pleadings, the time billings in the case, and declines to re-review any of its earlier decisions.” CP 1132.

IV. ARGUMENT

A. The Trial Court Erred in Denying Petitioner’s Motion to Dismiss the Manslaughter Charges.

1. The Legislature Established RCW 49.17.190(3) as the Crime for an Employer who Causes the Death of an Employee Due to a Safety Violation

The State argues that application of the general-specific rule would lead to absurd results. Brief of Respondent (“BOR”) at 23. It can hardly be absurd, though, where the State has conceded that Mr. Numrich is the first Washington employer ever prosecuted under the manslaughter statutes for the death of an employee on the job.

RCW 49.17.190(3) was enacted as part of the Washington Industrial Safety and Health Act (“WISHA”). WISHA is a carefully structured regulatory scheme. Our state has a traditionally vibrant economy with a gross domestic product of over \$500 billion.¹ Recent tallies show the volume of employers in Washington: 186,164 employers with a physical establishment,²

¹See Wikipedia, List of U.S. States and Territories by GDP, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_GDP.

²See United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/wa/SBO001212#viewtop>.

and 555,285 small businesses.³ Unfortunately, workplace fatalities are a reality. There are tens of thousands of workplace-related injury claims in Washington each year.⁴ In the last decade, there have been 681 traumatic work-related deaths.⁵ *See id.*

The WISHA provisions reflect the legislature’s decision to provide safety, predictability, and accountability in Washington workplaces. The legislature’s decision to regulate worker’s compensation claims through the Industrial Insurance Act (“IIA”) is analogous. *See* RCW 51.04, *et. seq.* The IIA abolished the jurisdiction of the courts to resolve injury claims for workers injured on the job: “[t]he common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair.” RCW 51.04.010 (“Declaration of Police Power – Jurisdiction of courts abolished”). With certain exceptions, “all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished.” *Id.*

³*See* U.S. Small Business Administration – 2015 Figures, <https://www.sba.gov/sites/default/files/advocacy/Washington.pdf>.

⁴*See*

<https://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp> (29,029 compensable worker’s compensation injury claims and 20,691 rejected worker’s compensation injury claims in 2017).

⁵*See* 2017 Washington State Work-Related Fatalities Report, http://www.lni.wa.gov/Safety/Research/FACE/Files/2017_WorkRelatedFatalitiesInWaState_WAFACE.pdf.

The worker's compensation scheme is, by design, a compromise:

The Industrial Insurance Act (Act) is based on a compromise between workers and employers, under which workers become entitled to speedy and sure relief, while employers are immunized from common law responsibility. The compromise abolishes most civil actions arising from on-the-job injuries and replaces them with an exclusive remedy of workers' compensation benefits.

Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 422, 869 P.2d 14 (1994)(internal citations omitted). The scheme is premised on the concession that workers will necessarily receive less compensation:

In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it.

Dennis v. Dep't of Labor & Indus. of State of Wash., 109 Wn.2d 467, 469, 745 P.2d 1295 (1987).

Here, the State points to disparate criminal outcomes for employers depending on whether an employee or stranger is affected. BOR at 23. But the IIA produces arguably similar "absurd" results. Some would argue that it is absurd for a worker to collect injury compensation – paid for by the employer – when the injury was no fault of the employer, or even when the injury was the worker's fault. But that is precisely what the scheme permits: "no-fault compensation for injuries sustained on the job." *Folsom v. Burger*

King, 135 Wn.2d 658, 664, 958 P.2d 301 (1998).⁶ The IIA balances the need for safety, accountability, and compensation with the need for stability in the economy: “Industrial injuries were viewed as a cost of production.” *Id.* at 470.

Washington’s economy depends on predictable regulations. Similar to the IIA, WISHA is the regulatory framework for workplace safety, and RCW 49.17.190(3) is the crime for employee deaths resulting from safety violations. If employers are to face felony manslaughter charges and years in prison, the legislature will need to make that decision.

a. Specific Legislative Intent

The State asserts “[p]rior to the enactment of OSHA/WISHA, there was nothing that precluded state prosecutors from bringing felony charges against employers under existing state laws criminalizing homicide and assault.” BOR at 22 (citing no cases or other authority). But the State concedes that no Washington prosecutor has ever filed a manslaughter charge against an employer for the death of an employee due to a safety violation. *See* CP 93 (“the filing of these charges against [Numrich] does appear to be the first and — so far — only instance in Washington in which

⁶ This includes death benefits for a worker who dies due to an accident on the job. *See, e.g.*, RCW 51.32.010 (“[e]ach worker injured in the course of his or her employment, or his or her family or dependents in the case of death of the worker”); RCW 51.32.050 (death benefits); RCW 51.32.130 (lump sum for death or permanent disability).

an individual defendant has been charged with a felony offense for having caused the death of an employee in a workplace incident”).

The State cites to the federal Occupational Health and Safety Act (“OSHA”). BOR at 22-23. One of OSHA’s purposes was “encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws.” 29 U.S.C. 651(b)(11). Individual states can assume control of their own standards by submitting a “plan for development and enforcement of State standards to preempt applicable standards.” 29 U.S.C. § 667.

WISHA is Washington’s worker safety regulatory framework:

WISHA entrusts to Labor and Industries full responsibility for occupational safety and health in the state. This responsibility includes authority to promulgate rules and standards; to provide for the frequency, method, and manner of making inspections of workplaces without advance notice; to issue civil orders including abatement and fines; to refer criminal violations to the local prosecuting authority;

* * *

The Act establishes criminal violations, both misdemeanors and gross misdemeanors, for designated actions.

Alan S. Paja, *The Washington Industrial Safety and Health Act: Wisha's Twentieth Anniversary, 1973-1993*, 17 U. Puget Sound L. Rev. 259, 265–66 (1994)(emphasis supplied)(internal citations omitted). Further, this

Court has affirmed that WISHA, a federally-approved state occupational safety and health plan, operates to *remove* federal preemption:

OSHA does not confer federal power on a state which has adopted a federally approved plan, it “merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health.” In fact, WISHA was adopted pursuant to the exercise of the state police power and in keeping with the mandates of article 2, section 35 of the state Constitution.

Inlandboatmen’s Union of the Pac. v. Dep’t of Transp., 119 Wn.2d 697, 704, 836 P.2d 823 (1992). If the legislature had intended that workplace fatality accidents be punished under the general manslaughter statute, it would never have enacted RCW 49.17.190(3).

b. Where the Legislature Did Not Intend to Make the General Statute Controlling, WISHA’s Specific Statute Prevails

The State cites *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007) in support of its argument that application of the general-specific rule in this case would thwart legislative intent. *See* BOR at 21. In *Conte*, this Court observed: when “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.” *Conte*, 159 Wn.2d at 803 (emphasis supplied)(quoting *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)). *See also Port Townsend Sch. Dist. No. 50 v. Brouillet*, 21 Wn.App. 646, 655, 587 P.2d 555 (1978) (“the special statute will prevail

unless it appears that the legislature intended expressly to make the general statute controlling”(emphasis supplied). Here, there is no evidence that the legislature intended to make the general manslaughter statutes controlling.

Additionally, *Conte* is a very different case. In *Conte*, the defendants were charged with offenses related to the filing of a false instrument or record related to City Council lobbying efforts and related campaign finance violations. *Conte*, 159 Wn.2d at 800-01. This Court rejected the argument that the civil campaign finance provisions “preempted” criminal penalties relating to false instruments. *Id.* This Court concluded that the two statutes were not concurrent because the criminal statute required a *mens rea* – knowingly – and applied the higher “beyond a reasonable doubt” standard of proof. *Id.* at 811. Violations of the specific civil statute could occur that would not violate the general criminal statute. *Id.* Additionally, this Court held that the general-specific rule simply “does not apply because one of the statutes at issue is criminal and the other is civil.” *Id.* at 814. This Court explained:

Absent a very clear indication that the legislature intended that a civil statute preclude prosecution under a criminal statute, we will not apply the “general-specific” rule to foreclose the exercise of prosecutorial discretion or to negate the legislature's determination that the conduct described by the criminal statute is subject to prosecution as a crime.

Conte, 159 Wn.2d at 814–15. In Mr. Numrich’s case, the specific statute is very clearly a criminal statute.

2. WISHA Homicide and Manslaughter are Concurrent

The State agrees that proof of “willful” and “knowing” conduct legally satisfies proof of reckless and criminally negligent conduct, but posits that WISHA homicide and manslaughter are not concurrent because the “object” of the mental states is different. BOR at 14. The State argues that “[f]or two crimes to have the same *mens rea* element, both the level *and* the object of the mental state must be the same.” BOR at 12 (emphasis in original).

The authority cited by the State for its claimed distinction about the “object” of the *mens rea* is *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). In *Gamble*, this Court considered “whether first degree manslaughter is a lesser included offense of second degree felony murder where assault, as defined in RCW 9A.36.021(1)(a), is the predicate felony.” *Gamble*, 154 Wn.2d at 462. Relying on the differences between bodily harm and death, this Court reasoned that manslaughter could not be a lesser-included offense of felony murder where assault in the second degree was the predicate felony:

Looking to the “wrongful act” caused by a defendant's actions, to prove manslaughter the State must show Gamble “[knew] of and disregard[ed] a substantial risk that a [homicide] may occur.” On the contrary, to achieve a felony murder conviction here, the State was required to prove only that Gamble acted intentionally and “disregard[ed] a substantial risk that [substantial bodily harm] may occur.” Significantly, the risk contemplated per the assault statute is of “substantial bodily harm,” not a homicide as required by the manslaughter statute. As such, first degree manslaughter requires proof of an element that does not exist in the second

degree felony murder charge the State brought against Gamble. It is thus unamenable to a lesser included offense instruction on the offense of manslaughter.

Id. at 467–68 (*quoting* RCW 9A.08.010(1)(c))(internal footnotes and citations omitted)(bracketing and emphasis in original).

No similar distinction exists in the comparison between WISHA homicide and manslaughter: both statutes require the defendant’s conduct to cause death. *See* RCW 49.17.190(3)(WISHA homicide: “...caused death to any employee”); RCW 9A.32.060(first degree manslaughter: “...causes the death of another person”); RCW 9A.32.070 (second degree manslaughter: “...causes the death of another person”). Unlike the charges in *Gamble* where there was a clear difference between “substantial bodily harm” and death, there is no way to distinguish the object of the mental state in the WISHA statute from the manslaughter statutes.

Moreover, the State’s proposed rule regarding the “object” of the *mens rea* becomes muddled when viewed in the context of second-degree manslaughter. *Gamble*’s holding was limited to first-degree manslaughter. *See Gamble*, 154 Wn.2d at 469-70 (“[w]e hold that first degree manslaughter is not a lesser included offense of second degree felony murder where second degree assault, as defined in RCW 9A.36.021(1)(a), is the predicate felony”). Second-degree manslaughter has a mental state of criminal negligence, which requires *no* knowledge: “A person is criminally

negligent or acts with criminal negligence when he or she *fails to be aware* of a substantial risk...” RCW 9A.08.010(1)(d)(emphasis supplied).⁷ For second-degree manslaughter, the defendant’s mental state “*vis-à-vis* the risk of death to the decedent” (BOR at 14) – is nothing; there is no separate “object” of the mental state.

The State attempts to stretch *Gamble*’s holding to include second-degree manslaughter. BOR at 13 (*citing Gamble* 154Wn.2d at 468-69 with repeated references to “second-degree manslaughter”). But *Gamble*’s consideration of second-degree manslaughter was limited to the following passing reference: “[M]anslaughter *does* require proof of a mental element *vis-à-vis* the killing. *See* RCW 9A.32.060(1)(a)(recklessness); *see also* RCW 9A.32.070(1) (criminal negligence).” (emphasis in original). This Court was very clear in *Gamble* that “[t]he sole dispositive issue before the court is whether first-degree manslaughter is a lesser included offense of

⁷ The State’s reliance on comments to the Washington Pattern Jury Instructions is circular, because the sole authority for the comments in WPIC 10.04 and 28.06 is *Gamble*. *See* Comments to WPIC 10.04 (*citing Gamble*) and 28.06 (*citing Gamble*). Recent cases have added to the confusion. *See, e.g., State v. Henderson*, 180 Wn.App. 138, 148, 321 P.3d 298 (2015)(noting that *Gamble* does “not address whether second degree manslaughter’s criminal negligence element requires demonstrating that the defendant failed to be aware of a substantial risk that a homicide (rather than ‘a wrongful act’) may occur...we assume without deciding that the mens rea of criminal negligence requires the failure to be aware of a substantial risk that a homicide may occur”); *State v. Latham*, 183 Wn.App. 390, 405, 335 P.3d 960 (2014)(holding that *Gamble*’s reasoning applies to second degree manslaughter by relying on *Henderson*). Moreover, the Pattern Instruction Committee’s reliance on *Gamble* is notably equivocal. *See, e.g.,* Comment to WPIC 10.04 (“...the definition of criminal negligence is likely more particularized...”; “...the Supreme Court has implied that criminal negligence involves a substantial risk that a *death* may occur”)(underline supplied; italics in original).

second-degree felony murder where assault, as defined in RCW 9A.36.021(1)(a), is the predicate felony.” *Gamble*, 154 Wn.2d at 462 (internal footnote omitted).

Although the State conceded that the WISHA statute requires a causal connection between the willful and knowing conduct and the employee’s death (BOR at 15, n.11), the State still mischaracterizes the WISHA statute in an attempt to minimize the causal element:

Moreover, the crimes are directed at different conduct. The gravamen of the crime of manslaughter is that the defendant either recklessly or negligently caused the death of another. In contrast, the gravamen of the WISHA misdemeanor is that the defendant knowingly violated a health or safety regulation and that an employee died as a result.

BOR at 14-15 (emphasis supplied).

But the WISHA statute includes no such language. Rather, the statute uses precisely the same causal language as the manslaughter statutes; it very clearly requires that the safety violation “*caused the death* of any employee.” RCW 49.17.190(3) (emphasis supplied). Indeed, the above excerpt from the State’s Response should more accurately read:

Moreover, the crimes are directed at different conduct. The gravamen of the crime of manslaughter is that the defendant either recklessly or negligently caused the death of another. In contrast, the gravamen of the WISHA misdemeanor is that the defendant knowingly violated a health or safety regulation, [which caused the death of an employee.]”

The WISHA statute clearly criminalizes a subset of specific conduct that is also criminalized by the manslaughter statutes.⁸

3. The State has Failed to Advance a Legally Plausible Hypothetical that would Violate the WISHA Statute but not the Manslaughter Statutes

The State has constructed hypothetical scenarios to argue that it is possible to violate RCW 49.17.190(3) without violating the manslaughter statutes. BOR at 16-17. Each of these hypotheticals fails.

a. The State's Construction Site Hypothetical Fails

In the State's first hypothetical, an employer knowingly chooses to not provide hard hats to workers on a multi-story construction site in violation of a state regulation because the employer does not expect falling objects. BOR at 16. The employer does not realize that work done by a different crew earlier in the day had left debris on an upper story. *Id.* An employee dies after some of that debris falls and strikes one of the

⁸ The State's emphasis on whether the statutes address "different conduct" (BOR at 14) is misplaced. First-degree manslaughter does address different conduct – knowing of and disregarding a substantial risk that a homicide may occur – than second-degree manslaughter, which is predicated on a *failure* to be aware of such a risk.

Similarly, the State's argument that the statutes are not concurrent because they have "different elements" (BOR at 11) is also misplaced. For example, citing *State v. Farrington*, 35 Wn.App. 799, 802, 669 P.2d 1275 (1983) (equal protection challenge failed because the two crimes did not have identical elements), the State argues that if "statutes create crimes with different elements, they are simply different statutes that criminalize different conduct, meaning that either or both may be charged." BOR at 11. This is erroneous – any analysis under the general-specific rule involves statutes that have different elements, hence the need for the concurrent analysis.

employees on the head. *Id.* The injury would have been prevented if the employee had been wearing a hard hat. *Id.*⁹

This hypothetical is no different than the crimes for which Mr. Numrich is charged. The employer knows that he is supposed to provide hard hats to his employees so they do not die if something from above hits them in the head. The intentional failure to provide hard hats to her construction workers on a multi-story construction project involving multiple work crews is certainly a “failure to be aware of a substantial risk that a [death] may occur” as required to prove second-degree manslaughter based on criminal negligence. RCW 9A.080.010(1)(d); RCW 9A.32.070. It is also the “know[ing] of and disregard[ing] a substantial risk that a [death] may occur” (first-degree manslaughter based on recklessness).

⁹ The State has advanced variations on these hypotheticals in briefing in prior proceedings, which Petitioner addressed in anticipation in his Opening Brief. BOP at 25-29. However, the State’s current hypotheticals are markedly different. *Compare* BOR at 16-17 *with* CP 77-79. For example, in the superior court, the State’s original hypothetical regarding the construction crew explained that the employer:

does not provide hard hats to all of his employees because he 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. The employer does not realize, however, that the workmen of a different employer have inadvertently left tools unsecured on a surface on the top floor the previous day. On this day, the vibrations caused by his crew on the first floor cause the unsecured tools above to fall several stories and strike one of his employees on the head.

CP 78. None of these facts are in the State’s current hypothetical. Accordingly, Petitioner will focus on addressing the current iterations of the State’s proposed scenarios.

RCW 9A.080.010(1)(c); RCW 9A.32.060.¹⁰ If the construction employer is guilty of any crime because her conduct was the proximate cause of the death (*see infra*), the employer can be said to have violated the WISHA homicide statute as well as the manslaughter statutes.

b. The State's Logging Crew Hypothetical Fails

The State's second hypothetical involves an employer of a logging crew who has a regulatory obligation to ensure that each employee who operates a chain saw wears leg protection (chaps). BOR at 16. At the end of a day's work, an experienced employee heads back to a log to make one more cut with a chainsaw. *Id.* The employee, who had already taken off his chaps, does not put them back on. *Id.* at 17. The employer does not check to confirm that the employee is wearing the chaps because he knows the employee is experienced and only needs to make one more cut. *Id.* The employee dies after accidentally cutting his leg. *Id.*

To the extent that the logging crew employer is guilty of any crime, the employer can be said to have violated the WISHA statute and the

¹⁰ Notably, WAC 296-155-205(1) simply requires that the employer provide a hard hat. The burden to have the hats "on site and readily available" rests with the employee. WAC 296-155-205(2). The employee must wear the hard hat "whenever there is a potential exposure to danger of flying or falling objects." WAC 296-155-205(3). The regulation does not impose any duty on the employer to affirmatively ensure that the employees are wearing the hard hats. As such, the State's hypothetical also fails because the failure to provide the hard hats is not the "but for" cause of the death – the decision to wear the hard hat ultimately rests with the employee and there is no guarantee that the employee would have worn the hard hats even if they had been provided.

manslaughter statutes. The logging employer knows of the reasons for wearing chaps when operating a chainsaw and the dangers of not wearing the chaps. When the employer fails to ensure that his employee – who is on his way to use a chainsaw to cut a tree – is wearing chaps, the employer is failing to be aware of a substantial risk that a death may occur and is also knowing and disregarding a substantial risk that a death may occur.

Nevertheless, the State asserts:

...a reasonable person would not *necessarily* conclude that these employers were either reckless or criminally negligent vis-à-vis the risk of death. As a result, *arguably* neither would have committed manslaughter.

BOR at 17 (emphasis supplied). The State's decidedly tepid claim is unconvincing. Sending your construction crew to work on a multi-story construction project after intentionally not giving them hard hats is both negligent and reckless. Failing to ensure that your employee is wearing the required leg protection before he operates a chainsaw on a downed tree – is negligent and reckless. These scenarios are no different than Mr. Numrich's circumstances, in which the State alleges he violated trench safety regulations. There is simply no legally plausible scenario in which a defendant could violate the WISHA Homicide statute but not also violate the manslaughter statutes.

4. Petitioner will not be Conceding he Violated RCW 49.17.190(3)

Without citation to authority, the State boldly asserts that “the evidence that Numrich committed the WISHA misdemeanor is virtually indisputable. As a result, should this case go to trial, Numrich will almost certainly argue that, while he committed that crime, he did not commit manslaughter.” BOR at 17. The State then uses its own prediction about Petitioner’s trial strategy to argue – circularly, and without citation to authority – that “he will be allowed to make that argument precisely because commission of the WISHA misdemeanor does not necessarily prove manslaughter.” BOR at 18.

Petitioner takes great issue with these claims. First, the State has no idea what Petitioner will do at trial. Petitioner has no intention of conceding WISHA homicide. Second, the question before this Court is whether these statutes are legally concurrent. The State’s claims regarding what arguments Petitioner “will be allowed to make” at trial are not authority.

5. The State’s Attempt to Minimize Proximate Cause

WISHA homicide and manslaughter require proof that the defendant’s conduct “*cause[d]*” the death of another person.” RCW 49.17.190(3); RCW 9A.32.060; RCW 9A.32.070. As in all homicide cases, the State must prove a direct causal connection – both (1) “the actual cause” and (2) the “legal” or

“proximate” cause – between the wrongful conduct and the death. *See State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995).

The State continues to dilute the causal element in RCW 49.17.190(3):

Labor safety regulations exist precisely to guard workers against workplace *accidents*. Almost by definition, accidents happen when unexpected. As a result, an alleged violation of RCW 49.17.190(3) will often involve questions of causation. But Numrich’s argument implies that a violation of a safety regulation could lead to conviction for a WISHA misdemeanor only if the employer actually knew of an ignored a specific and explicit hazard or was personally responsible for causing the accident that killed the employee. That is simply not the law and nothing in [State v. Bauer, 180 Wn.2d 929, 329 P.3d 67 (2014)] or other Washington authority supports such an extreme position.

BOR at 19-20. Petitioner makes no such extreme arguments. Petitioner has never argued that WISHA Homicide requires that the employer personally “caus[ed] the accident.” But the statute does require that the employer’s willful and knowing safety “violation *caused* death to any employee.” RCW 49.17.190(3)(emphasis supplied). The proximate cause requirement is critical given the State’s efforts to marginalize WISHA homicide violations as pertaining only to fringe, “technical” violations.

For example, in the construction crew hypothetical, suppose that the worker who died was hit in the head not by debris from a higher story at the construction site, but instead by an unexpected foul ball hit out of the adjacent baseball field. Assuming the hard hat would have prevented death, the failure

to provide the hat is an actual, “but for” cause of death. But the foul ball would constitute a supervening act that would relieve the employer of criminal liability. Or in the logging crew hypothetical, suppose that the employer properly checked the employee for chaps, but while the employer had his back briefly turned to check someone else for chaps, the first employee intentionally takes off his chaps, starts his chainsaw, cuts himself accidentally and dies. The employee’s act of intentionally removing his chaps after inspection is a supervening act that breaks the chain of legal causation.

But where a construction worker dies from a head injury as a result of the employer’s intentional failure to provide required hard hats, or the logger dies because the employer intentionally decided not to check for chaps, the employers can be said to have violated the manslaughter statutes in the same way that Mr. Numrich is charged. The State’s hypotheticals demonstrate that it is impossible to conceive of a safety violation that results in death where the employer cannot be said to have also violated the manslaughter statutes.

B. The Trial Court Erred When it Granted the State’s Motion to Amend

1. The State Minimizes its Amendment

The State’s brief recitation of the facts leading up to its motion to amend to add first-degree manslaughter fails to acknowledge the gravity of the amendment in the context of this case. BOR at 26-27.

According to the State, it always contemplated amendment if the case proceeded to trial. CP 476 (“I and other KCPAO DPAs believed that there was probable cause to charge the defendant with either/both Manslaughter in the First Degree or to add Manslaughter in the First Degree”; “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”). Despite this, the State intentionally withheld notice as the parties and the court labored through months of heavy litigation, with the defense and the Court believing (apparently erroneously) that they were litigating the dispositive issue regarding the application of the general specific-rule to the propriety of the felony homicide charge.

It is hard to appreciate the gravity of State’s conduct without a careful review of the litigation history. From the outset, this case was vigorously litigated, carefully managed by the superior court, and heavily staffed by a team of experienced prosecutors. At arraignment on January 16, 2018, the State was represented by the (then) chair of the Economic Crimes Unit of the King County Prosecutor’s Office.¹¹ VRP 4. Mr.

¹¹ Mr. Numrich notes the staffing and case management facts because they reflect the resources and attention that the Court and prosecutor’s office invested in this case. This is not a case that sat dormant on King County’s case scheduling calendar for months. Nor is

Numrich’s counsel orally alerted the court of his intent to move to dismiss under the general-specific rule. VRP 8. The State made no mention of any intended amendment.

Less than two weeks later, Mr. Numrich’s counsel met with a team of prosecutors assigned to the Numrich case. CP 278. Counsel discussed the anticipated defense motion to dismiss. CP 477. The State did not disclose its intended amendment. *Id.* (State conceding: “[d]uring this meeting there was no discussion of what amendments to the charges the State might seek at trial”). The parties appeared for ten different hearings between the filing of charges in January 2018 and when the State provided notice of its amendment on October 18, 2018. *See* VRP 4; CP 13; 55; 61; 164; 194; 249; State’s Supp. CP __ (Orders of Continuance for 2/12/18; 3/26/18; 6/25/18; 7/19/18; 8/23/18); Supp. CP __ (3/21/18 Motion Hearing).¹²

Recognizing the novel legal issue, the court signed a detailed three page “Order Setting Briefing Schedule,” that the State had proposed. CP

it a case that was handled by a “talking head”/calendar DPA or an “Early Plea Unit” prosecutor responsible for hundreds of cases. Rather, this case was staffed by a team of experienced, pre-assigned prosecutors. Because this case involved such immediate complex litigation, the superior court carefully managed the case. All of this attention made the State’s belated amendment more egregious.

¹² At most of these hearings the State was represented by two prosecutors. *See id.* (March 21, 2018 hearing - State represented by Senior DPA who is the new chair of the Economic Crimes Unit, and a second prosecutor; July 19, 2018 - same two prosecutors; August 23, 2018 - same two prosecutors; October 1, 2018 hearing - same two prosecutors). At the April 30 and May 29, 2018 hearings the State was represented by the Senior DPA. *Id.*

58-60 (“[t]he defendant has moved to dismiss Count 1 (Manslaughter in the Second Degree) on ‘general vs. specific statute’”). The order, signed by the Criminal Presiding Judge, indicated that it was “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.” CP 59. The State did not disclose the amendment.

First-degree manslaughter was referenced extensively in the ensuing briefing. *See, e.g.*, CP 153 (“Numrich asserts that *Gamble* applies only to Manslaughter in the First Degree and does not apply to Manslaughter in the Second Degree. Def. Reply at 4 n. 1. This is incorrect. As an initial matter, the language used in *Gamble* itself establishes that it applies to both first- and second-degree manslaughter”). Despite discussing first-degree manslaughter, the State did not disclose its intended amendment.

The parties had a lengthy argument on the merits of Mr. Numrich’s motion to dismiss that lasted one hour and six minutes. CP 164. First-degree manslaughter was discussed extensively in the context of *Gamble*:

[DEFENSE COUNSEL]

Their second argument, which I think is interesting and I want to talk about it now because there’s a little bit of a challenge here, is whether there’s some additional overlay to negligence in manslaughter cases. And this gets us to their argument under *Latham* and *Gamble*. And we have to go back in the way back machine to understand *Gamble* a little bit...

* * *

So what the Supreme Court wrestled with is: Is it appropriate to send the case back and find the person guilty of manslaughter in the first degree? . . . **So at least you now [sic] in cases involving manslaughter in the first degree,** we understand that there's this additional gloss to what the requirement is. **But we need to understand that the difference between a manslaughter in the first degree and a manslaughter in the second degree, and it's night and day.**

So the reason *Gamble* doesn't work in a manslaughter 2 case is because there's an absence of a mental state. You're basically responsible because you failed to be aware. And we know that's right if we look at *Gamble* because – actually, there's a very helpful concurrence by Justice Chambers, and it basically answers the question here.

* * *

So what [Justice Chambers is] basically saying is this discussion of – in *Gamble* only has to do with first degree manslaughter. In second degree manslaughter, there basically doesn't have to be this additional gloss that the State is now asking this Court to impose. And the reason Justice Chambers was at least suggesting that that was unfair is because it gives the prosecutor discretion to charge a much more serious crime, murder in the second degree, as opposed to manslaughter in the second degree, and that he thought was not what the legislature would have intended if they understood the consequences. **But he makes it very clear that all this discussion in *Gamble* is very interesting, but it doesn't apply to manslaughter in the second degree.**

And that's why in *Henderson* and *Latham*, the other cases they cite, there's some dicta which suggests maybe *Gamble* applies in manslaughter in the second degree. I don't think I could find any court that's given that instruction in a case. I couldn't find one. And I don't think that I could in a straight face say you have to be aware of

something in this situation when it's a failure to be aware. I don't understand how you would do that. And that's why the State gets so tied up in knots.

VRP 33-36 (emphasis supplied). Defense counsel spent three full transcript pages discussing *Gamble* and first-degree manslaughter.

The State addressed *Gamble* and first-degree manslaughter:

[COUNSEL FOR THE STATE]

Let's talk about *Gamble*. *Gamble* analyzed manslaughter in the first degree and found that the recklessness – the *mens rea* of recklessness had to be specifically about the risk of death to the victim. **Mr. Maybrow doesn't believe that *Gamble* applies to manslaughter in the second degree, and he's entitled to his opinion.** He points to the concurrence of Justice Chambers who apparently doesn't believe that *Gamble* applies to manslaughter in the second degree, and Justice Chambers is obviously entitled to his opinion. But those opinions don't trump the clear case law and other evidence to the contrary that says that *Gamble* does apply to manslaughter in the second degree.

The State talks about this in its briefing. The first is that in *Gamble* itself, when the court announces this rule, it refers to both the *mens rea* of recklessness and the *mens rea* of negligence. It specifically cites to both of them in conjunction with the language of its holding. There would be no reason for the court to do that if they didn't intend to clearly convey that it applied to both.

Second, the committee – the Washington State Supreme Court committee on pattern instructions clearly interprets *Gamble* as applying to manslaughter in the second degree. It's clear from reading their notes in the comments. It's clear from the definition of criminal negligence and the definition for manslaughter in the second degree that they interpret *Gamble* as holding that the *mens rea* is not just about a

generalized bad act or wrongful act. It has to be about the death of the decedent.

* * *

***Gamble* clearly applies to manslaughter in the second degree...**

VRP 47-49 (emphasis supplied). Despite discussions about first-degree manslaughter, the State never disclosed its intended amendment.

The parties had a lengthy argument lasting more than 30 minutes regarding certification. CP 249; VRP 68-83. The State objected to certification but conceded that it had previously indicated it would seek interlocutory review if it lost. VRP 72. There was extensive discussion regarding various procedural outcomes. VRP 73 (“[COUNSEL FOR THE STATE]: If they win, it comes back down here, but there’s still the second count...the problem here is when you have these two counts, an interlocutory appeal in this case is not going to materially advance the termination of the litigation”). The State did not disclose the amendment.

Two more months passed. Mr. Numrich timely filed his anticipated discretionary review pleadings. *See* No. 96365-7. The parties appeared in superior court on the State’s motion to amend conditions of release. CP 249 (motion denied). Still, the State made no mention of the amendment. Not until October 18, 2018, the day its Answer was due in this Court, and two

months after the superior court had certified the issue, did the State disclose its intention to add first-degree manslaughter.

The State notes that Petitioner “repeatedly accused the State of misleading the [superior] court in its explanation” regarding the decision to move to amend to add manslaughter in the first degree. BOR at 37; *id.* at n. 21. Petitioner’s observations stem from the State’s explanations for the amendment, which have contradicted the record. For example, the State argued below that Mr. Numrich advanced novel arguments about *Gamble* for the first time in his September 2018 motion for discretionary review. *See, e.g.*, CP 478 at ¶ 19 (State claiming that the discussion of *Gamble* and first-degree manslaughter was limited to two sentences and a footnote in a single brief); CP at 32-33 ¶ (State claiming it was first “struck” by arguments about *Gamble* and first degree manslaughter on October 11, 2018 when reading Petitioner’s Supreme Court briefing); VRP 89 (claiming “the particular difference that the amendment to add a Man 1 would make did not really become apparent until this briefing got filed, particularly in late September, when this is filed in the Supreme Court”).

As discussed at length above, the State’s claims are flatly contradicted by the record, which demonstrates that *Gamble* and first-degree manslaughter received extensive attention during the superior court litigation.

2. The State's Delay Leads to a Finding of Prosecutorial Vindictiveness

The State argues that it “provided an extensive explanation of why the motion to amend came about how [sic] and when it did.” BOR at 37. But the State has never offered a credible explanation for why – if it knew about the amendment at the time of filing – it withheld this information from the defense and the Court throughout the many months of litigation. The State seeks to shift the blame to Mr. Numrich, pointing out that counsel never asked about possible amendments. BOR at 27 (“[t]here was no discussion of possible amendments to the charges if the case proceeded to trial. Neither the State nor counsel for Numrich raised the issue”)(internal citations omitted). But Mr. Numrich could not guess that the State would amend to first-degree manslaughter, especially when defendant’s motion was that the existing manslaughter charge was so extraordinary.

There were dozens of opportunities between January 2018 and October 2018 for the State to provide notice, which would have given Mr. Numrich and the superior court a reasonable opportunity to reflect on how the amendment might impact the course of these proceedings. Instead, the State waited until the eleventh hour.

3. The State Fails to Address *Blackledge v. Perry*

Petitioner's opening brief contained extensive discussion of *Blackledge v. Perry*, 417 U.S. 21 (1974), in which the United States Supreme Court reversed a conviction where the prosecutor filed a more serious felony charge against the defendant after the defendant filed an appeal. BOP at 39-41 (quoting *Blackledge*, 417 U.S. at 27) ("it was not constitutionally permissible for the State to respond to [defendant's] invocation of his statutory right to appeal by bringing a more serious charge against him").

The State has not addressed *Blackledge* in its Response. The State's conduct here is even more concerning than that in *Blackledge* because it was not just an attempt to exert pressure on the defendant but it was also designed to improperly influence this Court's judicial decision-making process. CP 634 (State announcing to this Court: "[e]ven 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").

In response to Petitioner's observation that the superior court did not consider his claim of prosecutorial vindictiveness (BOP at 37-41), the State argues summarily that "Numrich's claims of prosecutorial vindictiveness were explicitly and specifically argued to, and rejected by, the trial court." But while the superior court concluded that Mr. Numrich's rights were not

substantially prejudiced, it never addressed the fundamental deprivation of due process that is the subject of the prosecutorial vindictiveness cases:

The above-entitled court, having heard a motion [to] amend the information to add the charge of Manslaughter in the First Degree, and having considered the arguments, concludes that the defendant's rights are not substantially prejudiced, and grants the amendment. The trial date is not yet set, and the facts for the new charge are identical. It may even be that the arguments on discretionary appeal are the same arguments, at least from the Defense view. From the State's point of view, it moots the appeal, and the State has so argued to the Supreme Court Commissioner. In such a situation, this Court cannot find prejudice as defined under the law.

CP 470. The references to the "trial date," "facts for the new charge," and "arguments on discretionary appeal" confirm that the court was ruling on whether there had been *prejudice*: "[t]he real prejudice claimed by the defense are the costs incurred in proceeding with the appellate process." CP 470. *See also* CP 471 ("[a]ttorney time and money is not the kind of prejudice that leads to a remedy under the criminal rules"). The superior court misapprehended Petitioner's claim. *See also* CP 977 ("it was unquestionably the right of the State to amend if it chose").

A prosecutorial vindictiveness claim derives from a fundamental deprivation of a defendant's due process rights:

[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). *See also State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006)(prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights”). Specific *prejudice* – such as timing relative to the trial date – need not be proven. *See Blackledge*, 417 U.S. at 27-28 (noting the prosecutor’s “considerable stake in discouraging” appeals and highlighting that “the fear of vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal”). As in *Blackledge*, the due process deprivation in Mr. Numrich’s case was the *punishment* - the filing of the more serious charge in response to the appeal. *Id.* at 28-29.

The State argues that it provided an “explanation [that] constituted exactly the sort of ‘legitimate, articulable, and objective reasons’ for the State’s actions that were sufficient to rebut a presumption of vindictiveness.” BOR at 39. But the State’s references to its “reasons” are deficient because of their generality: the State has still never explained why it intentionally withheld notice during nine months of intensive litigation, despite knowing about it at the time of filing. There is no acceptable “explanation” for this conduct.¹³ The timing and manner of the amendment compel the conclusion

¹³ The State has still produced absolutely no evidence to corroborate its claim that it had considered the amendment at any time before October 2018. Petitioner filed a motion for

that it was done to punish Mr. Numrich for the lawful exercise of his right to appeal, which is precisely what the due process clause prohibits.

4. The State's Reliance on the Trial Court's Factual Finding Regarding the Prosecutor's Intent Cannot Be Squared with the Record

The State argues that this Court should credit the superior court's finding regarding the State's intent related to the motion to amend:

On November 1, 2018, the trial Court issued a written order granting the State's motion to amend. CP 470-72. The court found that the State's counsel had been candid with the court in explaining how and why the motion to amend came about; that there was no evidence that the motion to amend had been brought for an improper purpose; that the delay and alleged waste of time argued by Numrich did not constitute a prejudice warranting denial of the amendment; and that there was no other basis to deny the State's motion.

BOR at 30. But the State mischaracterizes the superior court's findings.

The superior court actually stated 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 (emphasis supplied).

This is simply not true. By the prosecutor's own admissions, the prosecutor *did not* first consider the amendment until very late in the pending appellate process. Quite to the contrary, the prosecutor advised the

discovery to investigate the State's claim that it had considered the amendment at the time of filing, which the superior court denied. CP 472.

court in his sworn declaration that the State had contemplated the amendment from the time of filing. CP 476.

The trial court's finding regarding the timing of the prosecutor's consideration of the amendment is not supported by the factual record and is directly contradicted by the State's own sworn statements. The prosecutor made a conscious decision to *not* advise Mr. Numrich and the court of the possible amendment at the beginning of the litigation, and then sat silent as everyone else in the system – Mr. Numrich, his lawyers, and the court – labored under the false impression that the parties were litigating the dispositive legal issue regarding the felony manslaughter charge.

Because the trial court relied on an erroneous factual finding regarding the prosecutor's intent regarding the amendment, the trial court failed to properly evaluate the important punitive and deterrent purposes of sanctions. *See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993) (“[t]he purposes of sanctions orders are to deter, to punish, to compensate and to educate”); *id.* at 355–56 (“[t]he sanction should insure that the wrongdoer does not profit from the wrong”). This Court has made clear that an important purpose of sanctions is to deter future misconduct:

Misconduct, once tolerated, will breed more misconduct
and those who might seek relief against abuse will instead
resort to it in self-defense.

Fisons Corp., 122 Wn.2d 299 at 355 (quoting Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 184 (1985)). “[S]anctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.” *Id.* at 356.

The State has resources that dwarf those of any individual litigant. Particularly in criminal cases, the disparity between the resources of the State and individuals accused of criminal offenses – many of whom are poor, mentally ill, and come from disadvantaged backgrounds or marginalized groups – is overwhelming. Minor financial sanctions, imposed sporadically to remedy the State’s misconduct in criminal cases, are insufficient to deter future misconduct. In criminal cases, true deterrence is achieved by depriving the State of its charging power.¹⁴

Here, the State employed tactics that were incredibly disruptive to the judicial process and disregarded basic notions of notice and fair dealing. The whiplash effect of the State’s announced amendment was profound. A financial sanction is insufficient to punish and deter the State from engaging

¹⁴ For example, one of the important purposes behind the rule excluding illegally obtained evidence is to deter future misconduct. *See, e.g., State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982)(noting one of the purposes of the exclusionary rule is to “deter the police from acting unlawfully in obtaining evidence”); *State v. Eserjose*, 171 Wn.2d 907, 918, 259 P.3d 172 (2011) (“our state’s exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct”).

in such future misconduct. The State's intentional failure to provide notice of this extraordinary amendment warranted a serious sanction that prohibited it from seeking a conviction on the amended charge.

5. To the Extent the State Disagrees that Probable Cause is Required for the Filing of a Criminal Charge, this May be an Issue of First Impression

Petitioner challenged the amendment based on a lack of probable cause for first-degree manslaughter. BOP at 43-44. The State questions Petitioner's authority, but cites no contrary authority: "[t]he only authority provided by Numrich on this point is one unpublished Court of Appeals case that in turn cites to a Washington Supreme Court *dissent* and another published case dealing with a different issue (the professional conduct requirements for prosecutors)." Response at 41 (emphasis in original). Petitioner maintains that the filing of a criminal charge requires probable cause. *Cf. Kalina v. Fletcher*, 522 U.S. 118, 129 (1997)(observing that because "most prosecutions in Washington are commenced by information," the Certification for Probable Cause satisfies the Fourth Amendment's requirement that arrest warrants be supported by probable cause). If the State disagrees, this appears to be an issue of first impression.

The charging documents do not establish probable cause that Mr. Numrich knew of and disregarded a substantial risk that Mr. Felton would die as required for first-degree manslaughter. At most, the charging documents

allege that Mr. Numrich was negligent related to the trench conditions.¹⁵ 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). But mere “increased” risk does not equate with a *substantial* risk that death would occur. The State fails to identify specific facts to support a finding that Mr. Numrich *knew of* a substantial risk that Mr. Felton would die.

6. To the Extent that the Superior Court Considered Petitioner’s CrR 8.3(b) Claim, the Trial Court Erred in Denying the Motion

The State correctly notes that “[g]overnmental misconduct ‘need not be of an evil or dishonest nature; simple mismanagement is sufficient.’” BOR at 43-44 (*quoting State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). The State cites cases that deal with late discovery or amendments to the charge that occurred close in time to trial. BOR at 44-45.

¹⁵ The State’s repeated references to Mr. Numrich as the “competent person” are misleading. *See, e.g.*, BOR at 41 (“[a]s the owner and operator of the company and the ‘competent person’ for the project, Numrich was well aware of the general risk of death posed to workers in trenches like the one in question”). “Competent person” is simply how the State has characterized Mr. Numrich *after* the investigation concluded, for its own purposes of imposing liability for a regulatory violation. The phrase “competent person” derives from WAC 296-155-650, which defines such person as “[o]ne who can identify existing or predictable hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees. Also has authorization or authority by the nature of their position to take prompt corrective measures to eliminate them. The person must be knowledgeable in the requirements of this part.” WAC 296-155-655 requires that such person inspect the trenches and protective systems. The Labor and Industries investigator’s conclusion was that “Numrich was the only ‘competent person’” at the site on the day Mr. Felton died. CP 453. This title was imposed on him after the fact by the State.

Undersigned counsel has been unable to find any CrR 8.3(b) cases like Mr. Numrich's case. The State let the defense and court labor through months of heavy litigation, including certification for discretionary review and the completion of Petitioner's opening appeal briefing, under the apparently false impression that the parties were resolving the issue of the novel felony homicide charge under the general-specific rule. The defense was shocked when the State disclosed, the day its Answer was due, that it was amending to the Class A felony of first-degree manslaughter. The defense was even more shocked to learn that the State claimed it had always contemplated this amendment. According to the State, it contemplated the amendment regardless of the outcome of the defendant's motion to dismiss and any related interlocutory review.¹⁶ That the State led the defense and the Court through the charade of this litigation, knowing all the while that the outcome was apparently meaningless, is serious mismanagement under CrR 8.3(b).

The State alleges there was no prejudice to Mr. Numrich, but fails to address the delay. *See* BOR at 42-47. This matter was scheduled for oral

¹⁶ It is difficult to understand exactly what the State's plan was. The State knew from the start that the defense would be moving to dismiss under the general-specific rule, and that discretionary review was likely. At the same time, the State knew of its potential amendment. The State appears to be suggesting that if the case had been accepted for review in the absence of an amendment, and this Court had ruled in Mr. Numrich's favor on manslaughter in the second degree – resulting in the case being remanded for trial on just the WISHA homicide charge – that the State would have then simply moved to amend to add manslaughter in the first degree for trial. This result, of course, would have been a tremendous waste of time and resources.

argument in front of this Court's Commissioner on November 1, 2018. But because of the amendment, Petitioner had to perfect an entirely new motion for review, with oral argument occurring on May 9, 2019 and review accepted on July 10, 2019. *See* No. 96365-7. This was an extraordinary delay. Consideration of review was delayed from November 2018 to May 2019, a six-month period of time that was equal to the six months between the original filing of the case and the July 23, 2018 notification from the superior court that it was denying the defense motion to dismiss. *See* CP 193.

The State's amendment severely delayed the proceedings, as Mr. Numrich repeatedly had to waive his speedy trial rights. This Court has recognized that a "[d]efendant's being forced to waive his speedy trial right is not a trivial event." *State v. Michielli*, 132 Wn.2d 229, 245, 937 P.2d 587 (1997). Petitioner has established prejudice under CrR 8.3(b).

7. The State Mischaracterizes Petitioner's Argument Regarding the Prosecutor's Charging Authority

The State argues that "Numrich attempts to try this case on appeal in an effort to persuade this Court to substitute its judgment for that of the prosecuting attorney by dismissing the count of first-degree manslaughter." BOR at 46. But the section of Petitioner's brief cited by the State specifically asks this Court to limit "prosecutorial charging decisions *that are intended to improperly influence the judicial decision-making process.*" BOP at 46

(emphasis supplied). Petitioner’s argument focused on the *unfair* use of the prosecutor’s power:

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.

BOP at 48.

Accordingly, it was the specific use of the State’s charging power, in these unusual circumstances, that Petitioner challenges. If the State had charged – in January 2018 – both first and second-degree manslaughter, the situation would have been entirely different. But here the State used its power in an attempt to manipulate the judicial process. This Court should not condone such conduct, and the appropriate sanction is one that precludes the State from bringing its belated charge.

C. The Trial Court Did Not Err in Awarding Fees

The superior court was well within its authority to award attorneys’ fees given the State’s conduct related to the amendment.

1. *State v. Gassman* is Not Analogous

In support of its argument that the trial court abused its discretion in awarding attorney fees, the State cites to *State v. Gassman*, 175 Wn.2d 208, 263 P.3d 113 (2012). *See* Response at 50 (“[t]he situation presented here is analogous to Gassman”). In *Gassman*, several codefendants were charged with committing crimes “on or about April 15, 2008.” *Gassman*, 175 Wn.2d at 210. At trial, the State moved to amend to allege the crimes had taken place “on or about April 17, 2008” (emphasis supplied). *Id.* The defendants objected on the grounds that they had prepared alibi defenses for April 15. The trial court called the State’s conduct “careless” and awarded \$2,000 in fees for the time spent dealing with the alibi issue. *Id.* On appeal, the only attorney to appeal conceded the entire justification for the fee award:

[the attorney] conceded that he had failed to file a notice of an alibi defense, although required to do so. He also conceded that he was aware of a possible change of date as a cocounsel had alerted him several days before the State moved to amend. [The attorney] further conceded that the “on or about” language relating to April 15 was sufficient to include April 17 for the purpose of notice. Finally, [the attorney] represented to this court that he did not request or need a continuance in response to the motion to amend.

Id. at 212–13. Accordingly, Gassman’s claim fell apart on appeal. In light of the “trial court’s specific description of the State’s behavior as ‘careless,’ and [the attorney’s] concessions in the record and during oral argument,” this

Court reversed the sanction award. *Id.* at 213 (internal citations omitted). The State’s conduct in Mr. Numrich’s case is of a different order.¹⁷

2. The State’s Conduct was Tantamount to Bad Faith

The trial court need not make an express finding of bad faith when imposing sanctions. *Gassman*, 175 Wn.2d at 211. Sanctions are appropriate “where an examination of the record establishes that the court found some conduct equivalent to bad faith.” *Id.*

The parties labored through months of intense litigation. The defense spent significant time preparing a motion for discretionary review. The State elected not to tell the defense or the court about its first-degree manslaughter amendment until the day its Answer was due. This was conduct tantamount to bad faith and provided a more than sufficient basis for the superior court’s order awarding sanctions/terms.¹⁸

¹⁷ The State attempts to frame *Gassman* as more egregious than Mr. Numrich’s case. *See* BOR at 50 (“Gassman dealt with a motion to amend *on the day of trial that entirely mooted the defendant’s trial defense*”) (emphasis in original). But in light of the attorney’s fatal concessions, the *Gassman* amendment likely had no legal effect on the proceeding.

¹⁸ Contrary to the State’s assertion that the trial court “never identified any actual wrongdoing on the part of the State” (BOR at 51), the court identified ample wrongdoing to support its order. *See* CP 471 (“[w]hat 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”); VRP 86 (superior court observing “[t]here’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”).

D. The Trial Court Did Not Abuse Its Discretion in Setting the Fees

An award of attorneys' fees is reviewed for abuse of discretion. *Brand v. Dep't of Labor & Indus. of State of Wash.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999), *as amended* (Apr. 17, 2000). A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

The superior court ordered the State pay Mr. Numrich \$18,252.49 for work on the first motion for direct discretionary review, which recognized 38.1 hours of attorney time – equivalent to approximately one work week of total time. This fee award is eminently reasonable considering the briefing produced (20 page Motion for Discretionary Review; 15 page Statement of Grounds for Direct Review; 10 page Reply); the hundreds of pages of appendices to the briefing; the State's briefing that required analysis and legal research (20 page Answer to Motion for Discretionary Review and 10 page Answer regarding Direct Review); preparation for and completion of oral argument to the Commissioner; the complexity of the litigation; and the importance of the consequences to the client (Mr. Numrich has no prior criminal history and faces first-degree manslaughter and 6.5 to 8.5 years in prison).

1. The Trial Court's Fee Award is Justified

a. Attorney Hours

“[T]he determination of a fee award should not be an unduly burdensome proceeding for the court or the parties. As long as the award is made after considering the relevant facts and the reasons given for the award are sufficient for review, a detailed analysis of each expense claimed is not required.” *Steele v. Lundgren*, 96 Wn.App. 773, 786, 982 P.2d 619 (1999).

Here, counsel submitted detailed timesheets, along with a supporting declaration, that documented the compensable time. CP 978-91. After reviewing the filings, the court found the time – 13.6 hours by attorney Todd Maybrown and 24.5 hours by attorney Cooper Offenbecher – “was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich.” CP 1131. “The work was not duplicative or unproductive.” *Id.* The trial court’s findings were based on a detailed record that provided a meaningful opportunity for review.

The State has argued that “there is no indication that the trial court actively and independently considered the reasonableness of Numrich’s fee petition or the State’s objections to the hourly rates or number of hours billed.” BOR at 56. But on December 21, 2018, the court recognized the State’s objections and requested additional information: “Mr. Hinds is correct that

Mr. Offenbecker's [sic] original fee petition was inadequate." CP 977. The superior court requested that counsel refile a petition "listing the number of hours for each lawyer and the subject matter they worked on. This may be done redacted if there is attorney-client work product or privileged areas." CP 977. To be transparent and streamline the litigation, counsel provided unredacted billing timesheets.¹⁹

The State cites *Berryman v. Metcalf*, 177 Wn.App. 644, 312 P.3d 745 (2013). BOR at 55. In *Berryman*, the Court of Appeals faulted a fee award where there was "no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of Farmer's objections to the hourly rate, the number of hours billed, or the multiplier." *Id.* at 657. But here, the superior court explicitly stated that the time claimed by defense counsel "was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich. The work was not duplicative or unproductive." CP 1131.²⁰ The

¹⁹ Although the first few pages of the timesheets are redacted (*see* CP 982-87), these redactions are for non-compensable work, unrelated to the motion for discretionary review, which was billed to Mr. Numrich in early October 2018 along with work on the motion for discretionary review. Following the superior court's request, counsel redacted all unrelated work. The time entries for work on the motion for discretionary review are unredacted.

²⁰ Contrary to the State's suggestion (BOR at 56), there is no prohibition on "block billing." *See, e.g. Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007)(vacating "the district court's 20 percent across-the-board reduction for block billing" and remanding for an explanation for "how or why ... the reduction ... fairly balance[s] those hours that were

court added: “The Court has reviewed all extensive pleadings, the time billings in the case, and declines to re-review any of its earlier decisions.” CP 1132. The superior court clearly engaged with the fee petition.²¹

Notably, the State never argues that 38.1 hours of attorney time is actually unreasonable. Petitioner assumes that the State invested an equal amount of resources. As is obvious to this Court, both parties put a significant amount of time into this case. 38.1 hours is a very reasonable amount of time to spend on this large litigation project.

actually billed in block format”) *quoting Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001)). The State has previously cited to a law review article written by two attorneys in support of the State’s objection to its characterization of counsel’s billing entries as “block billing.” CP 1002 (*citing* Philip A. Talmadge & Thomas M. Fitzpatrick, The Lodestar Method for Calculating A Reasonable Attorney Fee in Washington, 52 Gonz. L. Rev. 1, 6 n.25 (2017)). The State’s selective quotation from the law review article significantly fails to provide the context of the quote used by the State, which clarifies that:

In the authors' view, ***a certain amount of block billing may be a practical necessity*** because keeping timesheets that constitute a running log could be impractical. However, block billing must be sufficiently detailed to satisfy the applicant's “burden of documenting the appropriate hours expended in the litigation.”

Id. (*quoting Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007)) (emphasis supplied).

²¹ Notably, *Berryman* involved a fee award for 468.55 hours at \$300 per hour with a multiplier of 2.0 for a total of \$281,130. *Berryman* 177 Wn.App. at 656. The Court of Appeals noted that the award was excessive for a “standard damages case” (*id.* at 656) involving “minor soft tissue injury” (*id.* at 650) where \$34,542 was awarded by the jury at trial. *Id.* at 661. The award in Mr. Numrich’s case – slightly more than \$18,000 – which involves the death of an employee and the risk that Mr. Numrich will go to prison for 6.5 to 8.5 years, is paltry by comparison.

b. Hourly Rates

A trial court has the inherent knowledge and experience to evaluate the reasonableness of an hourly rate. *See Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011)(adopting holdings of other circuits holding that “judges are justified in relying on their own knowledge of customary rates and their experience concerning reasonable and proper fees”) (*citing Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir.1988) (courts are themselves “experts” as to the reasonableness of attorney fees and award may be based on court's own experience)).

Washington courts have routinely afforded great deference to the trial court's own experience evaluating the reasonableness of attorney fees:

Generally the testimony of expert witnesses [on the issue of the value of the services of an attorney] is not essential. The court, either trial or appellate, is itself an expert on the question of the value of legal services, and may consider its own knowledge and experience concerning reasonable and proper fees, and may form an independent judgment either with or without the aid of testimony of witnesses as to value.

Brown v. State Farm Fire & Cas. Co., 66 Wn.App. 273, 283, 831 P.2d 1122 (1992)(trial court's conclusion that fees were reasonable, based upon “(1) its own familiarity with [Plaintiff's] attorneys, (2) their general reputation for competence in the legal community, and (3) its finding that the fees were within the range charged by other lawyers”) (quoting S. Speiser, *Attorney's Fees* § 18:14, at 478 (1973)).

Here, the court found that “[t]he billing rates of Mr. Numrich’s attorneys - \$600 for Mr. Maybrown and \$400 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown Seattle with commensurate experience, and in light of the novelty and difficulty of the questions involved and the seriousness of the charges in this case.” CP 1132.²²

The State has never argued that the rates are unreasonable. *See e.g., Broyles v. Thurston Cty.*, 147 Wn.App. 409, 452, 195 P.3d 985 (2008) (“it is clear that the trial court evaluated the reasonableness of the plaintiffs’ attorneys’ hourly rates with other similarly situated attorneys. In fact, the trial court noted, ‘There was no evidence offered to suggest that the rates charged by Plaintiffs’ counsel were unreasonable.’ Further, the trial court noted that these rates were consistent with those charged by other lawyers in the Puget Sound area”). Here, the trial judge was well within his authority to verify the reasonableness of these Seattle hourly rates.

The State’s citations regarding the reasonableness of an attorney’s hourly rate are misleading. For example, the State cites *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) and *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014), arguing that “[c]lear and unambiguous

²² Petitioner provided information about counsels’ hourly rates in his initial fee petition. CP 751-52. Notably, in the superior court’s December 21, 2018 order requesting additional information, the court stated: “[t]he reasonableness of the hourly rates *does not need to be addressed.*” CP 977 (emphasis supplied). This makes clear that the court made an informed assessment that the rates were reasonable based on its own experience.

Washington caselaw holds that the proof of the reasonableness of the attorney's hourly rate must consist of something beyond the mere unsupported declaration of the counsel whose hourly rate is in question." BOR at 53. But *Mahler* and *SentinelC3* contain no such holding.

In *Mahler*, this Court explained: "[w]e do not know if the trial court considered if there were any duplicative or unnecessary services. We do not know if the hourly rates were reasonable". *Mahler*, 135 Wn.2d at 435. See also *SentinelC3 Inc.*, 181 Wn.2d at 144 (trial court's "judgment summary" that "recited the amount" was insufficient: "record must explain, for example, whether the rates billed were reasonable"). In Mr. Numrich's case we know that the court *did* consider whether there were any duplicative or unnecessary services, because the order explicitly indicates that the trial judge considered the issue. We know that the court *did* consider whether the rates were reasonable, because the order explicitly indicates that the trial judge found the rates were reasonable based on a number of factors.

It would become exceedingly burdensome and costly if the law required an attorney to obtain an expert opinion or other supporting evidence for every fee petition. Washington law does not impose such a burden.

E. This Court Should Award Fees on Appeal

"The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts

to the opponent under fee shifting statutes.” *Costanich v. Washington State Dep’t of Soc. & Health Servs.*, 164 Wn.2d 925, 933, 194 P.3d 988 (2008) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799, 807 (1990)(party entitled to attorney fees on remand for time spent establishing fees on claim for which fees were awarded)). The intended effect of the fee award was to neutralize the resources Mr. Numrich spent on the first motion for direct discretionary review. Mr. Numrich has now spent numerous hours defending his fee award, which continually diminishes the compensatory effect of the award. Pursuant to RAP 18.1, Mr. Numrich requests fees for time spent defending the fee award on appeal.

V. CONCLUSION

For the foregoing reasons, the Court is respectfully requested to reverse the superior court and remand for dismissal of the manslaughter charges. This Court should also affirm the superior court’s order awarding fees, and should order that the State pay Petitioner’s fees for time spent defending the fee award.

RESPECTFULLY SUBMITTED this 27th day of March, 2020.

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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 27th day of March, 2020, I filed the above Reply Brief of Petitioner/Cross-Respondent 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 27th day of March, 2020.

Sarah Conger
Sarah Conger, Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

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