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CAPITAL CASE

NO. 89881-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH McENROE and MICHELE ANDERSON,

Respondents.

DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR
KING COUNTY, THE HONORABLE JEFFREY RAMSDELL

OPENING BRIEF OF PETITIONER

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in issuing an order, dated January 2, 2014, ruling that Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), dictates that the absence of sufficient mitigating circumstances to merit leniency “is an element of the crime for which death is the mandatory punishment.” CP 122-29.

2. The trial court erred in issuing an order, dated January 31, 2014, ruling that if the State does not amend the information to allege the absence of sufficient mitigating circumstances to merit leniency, the trial court will entertain defendant McEnroe’s motion to plead guilty to aggravated first-degree murder without the death penalty. CP 260-72.

B. ISSUES PRESENTED

1. Whether a jury’s finding in a capital case that aggravating factors exist (the eligibility decision) is fundamentally different from the decision that a defendant should receive the death penalty (the selection decision), such that the latter does not constitute fact-finding, and thus, is not an “element” of aggravated first-degree murder.

2. Whether, because the selection decision is not an element of a crime, this Court’s decision in State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007) (holding that the absence of sufficient mitigating

circumstances is not an “element” of aggravated first-degree murder and need not be alleged in the information), is binding precedent.

3. Whether actual written notice of the State’s intent to prove to a jury that there are not sufficient mitigating circumstances to merit leniency, which was served on both defendants and filed more than five years ago as required by RCW 10.95.040, is constitutionally adequate notice.

4. Whether this Court should reverse the trial court’s rulings in an order with opinion to follow so as to minimize further delay in these cases.

5. Whether this Court should remand with instructions that these cases be assigned to a different trial court upon remand in order to preserve the appearance of justice.

C. STATEMENT OF THE CASE

The defendants are charged with six counts of murder in the first degree with aggravating circumstances for the killings of Michele Anderson’s parents Wayne and Judy, brother Scott, sister-in-law Erica, niece Olivia (age 5), and nephew Nathan (age 3) on December 24, 2007. In October 2008, King County Prosecuting Attorney Daniel T. Satterberg filed a notice of special sentencing proceeding as to each defendant in accordance with RCW 10.95.040. State v. McEnroe, 179 Wn.2d 32, 35-36, 309 P.3d 428 (2013).

On January 31, 2013, the trial court issued an order dismissing the notices on grounds that a prosecutor may not consider the strength of the evidence of a defendant's guilt when deciding whether there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. CP 279-303. This Court unanimously reversed the trial court. McEnroe, 179 Wn.2d at 45-46. The Court directed the trial court "to reinstate the notices of special sentencing proceeding so that the capital prosecutions against McEnroe and Anderson may finally proceed to trial." Id. at 46. The Court subsequently denied the defendants' motion for reconsideration, and the mandate issued on December 13, 2013.

RP (12/18/13) 2.

While their motion for reconsideration was still pending in this Court, the defendants filed another spate of motions in the trial court challenging the death penalty on various grounds. One of these motions, which was filed by McEnroe,¹ alleged that the death penalty should be "precluded" based on the United States Supreme Court's decision in Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d

¹ Anderson joined the motion. CP 275.

314 (2013).² CP 1-15. Although Alleyne is a non-capital federal case, McEnroe argued that Alleyne dictates that in capital cases in Washington, the absence of sufficient mitigating circumstances to merit leniency is now an “element” of a new crime called “capital murder,” and that the State’s failure to “charge” this “element” in the information means that “[t]he death penalty should be precluded in this case.” CP 14-15. After the State filed its response,³ the trial court requested additional briefing addressing this Court’s decision in State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012) (holding that aggravating circumstances that may be used to increase a defendant’s sentence under RCW 9.94A.535 need not be alleged in the information); all parties filed additional briefs as requested. CP 83-98.

² In Alleyne, the Supreme Court held that any fact that increases a defendant’s mandatory minimum sentence must be found by a jury, overruling Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002):

Here, the sentencing range supported by the jury’s verdict [for possessing a firearm] was five years’ imprisonment to life. The District Court imposed the 7-year mandatory minimum sentence based on its finding by a preponderance of the evidence that the firearm was “brandished.” Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt. The judge, rather than the jury, found brandishing, thus violating petitioner’s Sixth Amendment rights.

Alleyne, 133 S. Ct. at 2163-64.

³ CP 16-79. The State also asked the trial court to decide the motion without oral argument. CP 80-82.

The trial court then directed the parties to answer a series of questions entitled "Court's Requests for Admission."⁴ The court further directed the parties to answer each question "yes" or "no" without explanation. Both defendants answered the questions as directed. CP 99-100, 276-77. The State objected to the form of the "Court's Requests for Admission," noted that "yes" or "no" answers without explanation were not possible given the way the questions were framed, and asserted that the questions appeared designed to lead to a single, incorrect conclusion. CP 101-11.⁵ McEnroe moved to strike the State's objection and response, but also filed "points in response" to the State's pleading and a statement of additional authorities. CP 112-21. At this point, the trial court had 11 pleadings from the parties on the Alleyne issue.

During oral argument on the motion, the defense maintained that insufficient mitigation to merit leniency was an "element" of the special crime of "capital murder," and that the State could not seek the death penalty because it had not alleged this "element" in the information.

⁴ Although requests for admission are a discovery tool that may be used in civil cases to elicit factual concessions from an opposing party (*see* CR 36), the "Court's Requests for Admission" called for "admissions" as to legal conclusions. CP 102-03.

⁵ In response to the State's concerns, the trial court said that it had entitled the document "Court's Requests for Admission" in order to "make the document easier to find once it's indexed with the clerk's office." RP (12/18/13) 2.

RP (12/18/13) 4-14. The State argued that this Court's decisions in State v. Yates and State v. Siers were controlling on the issue, that Alleyne was distinguishable because it concerns whether a judge rather than a jury may find aggravating facts and does not address charging documents in state courts, and that the fact-finding at issue in the Apprendi⁶/Alleyne line of cases was fundamentally different from the decision whether to impose the death penalty. RP (12/18/13) 15-27, 37.

On January 2, 2014, the trial court issued an order ruling that Alleyne had changed the law so fundamentally that insufficient mitigating circumstances to merit leniency is now "an element of the crime for which death is the mandatory punishment," but that dismissal of the death penalty was "at best premature" and "the death penalty is not stricken at this juncture." CP 29. A few days later, the trial court issued an amended case scheduling order proposing that jury summonses be sent on January 13, and that trial should begin on February 24. CP 130-32.⁷ The State asked the court to clarify the effect of its January 2 ruling on an expedited basis, since it seemed unwise to proceed to trial with uncertainty looming

⁶ Apprendi v. New Jersey, 536 U.S. 545, 1222 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

⁷ That same day, McEnroe filed a pleading entitled "Defendant McEnroe's Change of Plea to Non-Capital Aggravated Murder, As Charged in the Information, Punishable by Mandatory Sentence of Life in Prison Without Release" with supporting motion and various accompanying materials. CP 133-62.

as to whether the defendants were properly charged. *See* RP (1/9/14) 4-8. But at the next hearing, rather than clarify its ruling, the trial court stated repeatedly that it did not know what consequences its ruling would have.

The court conceded that it did not know whether the State needed to amend the information. RP (1/9/14) 14. The court said that it was in “uncharted territory” on an “unsettled question,” and, as to whether notice provided under RCW 10.95.040 was constitutionally sufficient, the court said, “I am not sure what the answer is. I’d like to help you out, but I just don’t know the answer.” RP (1/9/14) 14-15. When the State stressed its need to assess the current posture of the case, the court said, “I can’t tell you exactly how to manage this issue because . . . I honestly don’t know what the appropriate course of action for you would be at this point.” RP (1/9/14) 15. When the State asked what might bring some clarity to the issue, the court replied, “That somebody would bring additional motions, in all candor.” RP (1/9/14) 16. The court admitted that it could not “give [the State] an answer” because the court did not “know what the answer is,” and the court acknowledged that its ruling created “potential minefields that [it did not] know how to navigate.” RP (1/9/14) 16.

McEnroe’s counsel then claimed that McEnroe “actually has entered a plea of guilty to noncapital aggravated murder,” which counsel

described as a lesser crime of “capital murder.” RP (1/9/14) 19-20.⁸ The trial court did not address that claim, but said that “from my humble perspective, Alleyne is kind of a game changer, and it’s a very significant case.” RP (1/9/14) 22. Counsel for the State pointed out that the case could not proceed to trial “with these unanswered questions hanging in the air” and that “the Court’s order essentially raises more questions than it answers.” RP (1/9/14) 24. The court responded:

So are you asking me to tell you what to do next? I am not certain what you want from me. You want some guidance, but I mean, I could tell you go ahead and amend the information. But I don’t know that that necessarily is going to solve the problem. I don’t even know exactly what the amendment would look like.

RP (1/9/14) 24. The State replied that “therein lies the problem,” because moving forward to trial with such significant questions unanswered would be highly problematic. RP (1/9/14) 24. Defense counsel opined that the consequences of the court’s ruling were “more complicated . . . than simply moving to amend,” and that “the criminal justice system is a very complex and moving thing like a big clock.” RP (1/9/14) 32. The trial

⁸ Counsel claimed repeatedly that McEnroe had a right to plead guilty to “noncapital” aggravated murder. *See* RP (1/9/14) 31 (“[W]e stand here with an executed statement of defendant of plea of guilty. We are prepared to enter that, whenever the Court will permit it, to noncapital aggravated murder.”), and 38 (“And just to be clear that we are entering a plea of guilty. Trying to. We would like to lodge the statement on plea of guilty with the Court, at a minimum, and serve it so that there is no question on the record in the future[.]”).

court seemed to agree, stating that “it gets very complicated under these circumstances, because the normal case law in Washington isn’t necessarily directly applicable because of the different notice requirements.” RP (1/9/14) 37-38. After further discussion, it was agreed that the parties would supply even more briefing⁹ and the court would reconvene in two weeks. RP (1/9/14) 33-37.

At the next hearing, the State asked the trial court to reconsider its January 2 ruling. RP (1/22/14) 3-18, 38-39. Defense counsel repeated her previous arguments. RP (1/22/14) 24-25. Counsel also claimed that if the State were to move to amend the information to allege the “element” of insufficient mitigating circumstances, the State would also have to provide a “factual basis” for that “element.” RP (1/22/14) 36. Defense counsel characterized the notice of special sentencing proceeding as a “free-floating document out there” with no legal effect on the sentence the defendants faced. RP (1/22/14) 36.

The trial court admitted finding “this whole process somewhat exasperating, because there is very little good guidance being given to me from the Supreme Court in these cases. Because the longer you look at

⁹ The State provided additional briefing on the issue, including a motion for reconsideration of the trial court’s January 2 ruling (CP 163-85, 225-32), and the defendants provided additional briefing as well (CP 186-224).

them, the more confounding they get.” RP (1/22/14) 40-41. The trial court concluded the hearing by assuring the parties that although the court was concerned with the delay in getting the cases to trial, the court was attempting to carefully adjudicate the issues that had been presented.

RP (1/22/14) 51-52.

On January 31, 2014, the trial court issued a second written ruling denying the State’s motion for reconsideration, reiterating that the absence of sufficient mitigating circumstances is an “element,” and ordering the State to amend the information to allege that “element” by not later than February 17, or the court would entertain McEnroe’s motion to plead guilty to aggravated murder without the death penalty. CP 233-47. The State sought and was granted discretionary and direct review. CP 250-74.

D. ARGUMENT

The central issue in this case is the form of notice that must be given to the defendants; no one disputes that they have actual notice that they are charged with premeditated murder with aggravating circumstances, and that the jury will be asked to decide whether to impose the death penalty. The trial court has ruled, however, that the federal constitution requires notice in the information that the jury might decide that there are insufficient mitigating circumstances to merit leniency.

The trial court's rulings are deficient in at least three key ways. First, the court failed to appreciate that a decision that insufficient mitigating circumstances exist to merit leniency is fundamentally a sentencing decision; it is a moral judgment made by twelve representatives of the community. The jury's answer to the "insufficient mitigation" question is a prerequisite to imposing the death penalty, but it is not a "finding of fact" that constitutes an element of a crime. Thus, it need not be alleged in the information. Second, the trial court erred by ignoring settled precedent from this Court holding that the "insufficient mitigation" question need not be alleged in the information. Third, even if the question were considered an element of a crime, nothing in the state or federal constitution demands that it be placed in the information. For these reasons, the trial court's orders should be reversed.

Additionally, because 6 ½ years and three interlocutory reviews have elapsed without a trial, and in all that time only death penalty-related motions have been heard, the State respectfully requests, if this Court agrees that the trial court erred, that this Court issue an order as quickly as possible remanding the case for trial with a written opinion to follow. Finally, for similar reasons, the State respectfully asks this Court to

consider directing that the case be reassigned to a different department of the superior court.

1. **THE DECISION TO IMPOSE THE DEATH PENALTY IS A SENTENCING DECISION THAT IS LEGALLY DISTINCT FROM SIMPLY FINDING AGGRAVATING FACTS THAT MIGHT JUSTIFY AN INCREASED PENALTY.**

The trial court ruled that under Alleyne, the jury's decision that insufficient mitigating circumstances exist to merit leniency is a finding of fact and, thus, is an element of the crime. The trial court erred. The decision that insufficient mitigating circumstances exist to merit leniency is a moral judgment, not a finding of fact. The trial court's rulings fail to appreciate the unique legal character of the jury's decision, and how that decision functions within the framework of death penalty decision-making. A brief overview of that framework is included here to illustrate the difference between aggravating facts—which under the Apprendi line of cases must be alleged in federal indictments and proved to a jury—and the ultimate decision whether to impose the death penalty.

a. **Background: Relevant Principles Of Death Penalty Decision-Making.**

Any modern death penalty statute must guide juror discretion and allow individualized consideration of the appropriate penalty. Gregg v. Georgia, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Guided discretion is achieved by limiting to a finite list of circumstances the class of murderers eligible for death. Individualized decision-making is achieved by requiring jurors to consider an almost unlimited range of mitigating circumstances that might merit leniency. The United States Supreme Court has recognized that these aims are achieved through “two aspects of the capital decision-making process: the eligibility decision and the selection decision.” Tuilaepa v. California, 512 U.S. 967, 971, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

The eligibility decision is relatively structured and rigid. The class of defendants facing death must be limited to filter out less egregious murders. This is almost universally done by creation of a finite statutory list of aggravating factors. *See, e.g.*, Federal Death Penalty Act (FDPA), 18 U.S.C.A. § 3592(c). The aggravating factors must not be so broad as to defeat the limiting function. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 175, 964 L. Ed. 2d 398 (1980) (“outrageously or wantonly vile” aggravator stricken because it could apply to almost any murder). Pursuant to the Sixth Amendment right to a jury trial and the grand jury and indictment clauses of the Fifth Amendment, aggravating factors must be included in a federal indictment¹⁰ and must be decided by a jury

¹⁰ As will be discussed further below, the grand jury and indictment clauses of the Fifth Amendment do not apply to the states. Siers, 174 Wn.2d at 278-79.

beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

Washington's list of 14 aggravating circumstances includes, *inter alia*, murders committed against public officials like law enforcement officers, corrections officers, firefighters, judges, jurors, prosecutors, defense attorneys and probation officers. See RCW 10.95.020. It also includes murders committed during an escape from custody, or against multiple victims, or for pecuniary gain, or in the course of robbery, rape, burglary, or arson. Id. The list is similar to the aggravating circumstances in the FDPA and in the statutes of many states, although the lists and terminology may vary.¹¹ All these aggravating circumstances identify some fact about the crime that makes it more egregious, in the judgment of the legislature, than the typical murder, and make a defendant eligible to receive a sentence of death.

The selection aspect of the decision-making process, by contrast, is relatively open-ended; wide discretion is permitted in deciding whether to impose the death penalty on eligible defendants. Moreover, states are given wide latitude to devise procedures for making the selection decision,

¹¹ For example, California limits eligibility through a list of "special circumstances." Cal. Penal Code § 190.3(a). "'Special circumstances' in California are the same as 'aggravating factors' in Washington." State v. Pirtle, 127 Wn.2d 628, 673, 904 P.2d 245, 270 (1995).

so long as the decision-maker is free to consider all mitigating circumstances. *Compare* Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (highly structured questions posed to jury; sentence is mandatory based on answers) *with* Gregg, 428 U.S. 153 (jurors should simply “consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment” and may vote for life imprisonment “for any reason satisfactory to you, or without any reason”) *and with* Tuilaepa, 512 U.S. 967 (approving a California statute with a list of factors for consideration at the selection stage, which are not delineated as mitigating or aggravating).

All states permit a wide range of information to be considered in mitigation, but the manner and scope of the inquiry varies by state. “[A] state may shape and structure the jury’s consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.” Buchanan v. Angelone, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998). The selection decision may include “aggravating circumstances” found by a jury at the eligibility stage, and also other non-statutory aggravating evidence.

Our cases indicate...that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not

require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Zant v. Stephens, 462 U.S. 862, 878-79, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Unlike the eligibility decision, the selection decision can be made by a jury, a judge, a panel of judges, or by a judge after receiving a non-binding recommendation from a jury.¹² Still, no matter who decides or what procedure is employed, the selection decision ultimately turns on whether the defendant is *deserving* of the death penalty, and this judgment is not simply a finding of fact.

b. The Appendi Line Of Cases.

Just as the trial court failed to appreciate the overall framework for death penalty decision-making, so too did the court fail to appreciate the distinction between the purely fact-finding decision at issue in Alleyne, and the jury's ultimate decision whether to impose the death penalty. For that reason, the Appendi line of cases is outlined here.

¹² See Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (jury sentencing is not constitutionally compelled); see also Ala. Code §13A-5-47 (2005) (permitting judicial override of jury's decision regarding the death penalty); Mont. Code Ann. §§ 46-18-301, 46-18-305 (2013) (requiring judicial decision on the death penalty); Neb. Rev. Stat. §§ 20-2520, 29-2521 (2008) (requiring jury decision on aggravating factors but mandating a three-judge panel as to the death penalty decision).

The scope of the Sixth Amendment's jury trial right has been in flux as the Supreme Court has attempted to define what facts are "elements" of a crime and what facts are "sentencing factors."

The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime. The question of how to define a "crime"—and, thus, how to determine what facts must be submitted to the jury—has generated a number of divided opinions from this Court. The principal source of disagreement is the constitutional status of a special sort of fact known as a "sentencing factor."

Alleyne, 133 S. Ct. at 2156. In McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Court held that a judge could find facts (possession of a firearm) to increase a mandatory minimum sentence because the facts were "sentencing factors" rather than elements of the crime. However, in Apprendi, the Court concluded that because a fact (racial animus) increased the range of penalties to which a defendant was exposed, it was an element of the crime that had to be proved to a jury beyond a reasonable doubt, regardless of whether it was called a sentencing factor. In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court held that a fact (deliberate

cruelty) had to be decided by a jury because it was a fact that exposed the defendant to greater punishment. In Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), the Court held, consistent with McMillan, that a judge could find a fact (brandishing a firearm) that increased the mandatory minimum sentence for a crime. Then, in Alleyne, the Court overruled Harris and McMillan and held that because mandatory minimum sentences increase the penalty for a crime, a fact (brandishing a firearm) that increases the minimum is an “element” that must be proved to the jury. Alleyne, at 2163-64.

When this issue arose in Ring v. Arizona, a death penalty case, the Court applied the same logic to reach a similar result. Defendant Ring was involved in an armored car robbery in which the driver was murdered. Ring v. Arizona, 536 U.S. 584, 590, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The jury deadlocked on premeditated murder and convicted Ring of felony murder because the evidence only linked him to the proceeds of the robbery. Id. at 591-92. The jury did not consider any aggravating factors. Id. at 592.

At sentencing, the judge was permitted to consider additional evidence, was required to find the presence or absence of aggravating and mitigating factors, and, if the judge found at least one aggravating factor,

he could impose the death penalty if “there are no mitigating circumstances sufficiently substantial to call for leniency.” Id. at 593. Moreover, because Ring had been convicted of only felony murder, he could not be sentenced to death unless the judge found that he “was a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.” Id. at 594.

Before the sentencing hearing, a codefendant, Greenham, pleaded guilty and agreed to testify against Ring. Id. Greenham testified that Ring planned and led the robbery, and personally shot the armored car driver. Id. Based on Greenham’s testimony, the judge found that Ring shot the driver and was a major participant in the crime. Id. The judge found two aggravating factors (pecuniary gain and a heinous, cruel or depraved murder) and a single mitigating circumstance (minimal criminal history). Id. at 595. The judge concluded that the mitigating circumstance did not call for leniency. Id. On appeal, the Arizona Supreme Court struck the “depraved” aggravator, but affirmed the death sentence after reweighing the remaining aggravating factor against the mitigating factor. Id. at 596.

The Supreme Court granted certiorari and reversed, holding that the trial court could not decide the “pecuniary gain” aggravating factor. Such a finding of fact was the functional equivalent of an element and had

to be found by a jury beyond a reasonable doubt. Id. at 597-98.¹³ The Court specifically noted that the issue presented was “tightly delineated.” Id. at 597 n.4. The issues presented did not include whether a judge could find prior convictions or mitigating circumstances, whether the “ultimate determination whether to impose the death penalty” may be made by a judge, whether an appellate court could reweigh aggravating factors and mitigating circumstances after striking an aggravator, or whether the “indictment was constitutionally defective.” Id.

In all of these decisions on the scope of the Sixth Amendment jury trial right and the Due Process right to proof beyond a reasonable doubt, the finding at issue was a traditional *fact* about the crime: possession of a firearm, racial animus, deliberate cruelty, brandishing a firearm, pecuniary gain, or depravity of a murder. In other words, the question was what the defendant did in the commission of the crime. This makes sense, of course, because under Gaudin and Winship the “substance and scope of this right depend upon the proper designation of the *facts* that are elements of the crime.” Alleyne, 133 S. Ct. at 2156 (emphasis supplied).

¹³ The Court overruled its prior decision in Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), which had authorized a judicial finding of fact as to the pecuniary gain aggravator in a capital case.

- c. The Selection Decision In A Capital Case Is Not An Element Of The Crime Because It Is Not A “Fact” That Comprises The Crime; It Is A Judgment As To What Penalty Is Appropriate Under The Totality Of Circumstances.

The selection decision in a capital case is fundamentally different in character from the traditional fact-finding at issue in the Apprendi line. The rule from those cases is limited to traditional fact-finding, which, in a capital case, means the elements of the crime and the aggravating factors that establish *eligibility* for the death penalty. The selection decision is very different. It requires a holistic evaluation of the relative worth of aggravating and mitigating circumstances and a judgment whether, in light of that relative value, the defendant should face a death sentence or a sentence of life imprisonment.

This distinction between fact-finding and sentencing is routinely employed in Washington as to exceptional sentences. Aggravating facts that may justify an exceptional sentence must be proved to a jury. RCW 9.94A.535(3); RCW 9.94A.537; Blakely, 542 U.S. at 303-04. This factual decision makes a defendant *eligible* for an exceptional sentence. However, the ultimate decision—whether the defendant *deserves* a longer sentence—is made by a judge if he or she concludes that the aggravating facts found by the jury are substantial and compelling reasons justifying

an exceptional sentence. RCW 9.94A.535(1); State v. Dunaway, 109 Wn.2d 207, 218, 743 P.2d 1237 (1987), 749 P.2d 160 (1988).

Seven federal circuit courts and eight state courts have considered this issue and all have, using the reasoning described above, held that the selection decision need not be pleaded and proved to a jury:

- United States v. Sampson, 486 F.3d 13, 31 (1st Cir.2007) (“...the requisite weighing constitutes a process, not a fact to be found. ... The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party. Hence, the weighing of aggravators and mitigators does not need to be ‘found.’”) (internal citations omitted)
- United States v. Runyon, 707 F.3d 475, 516 (4th Cir.2013) (“...the reasonable-doubt standard does not apply to the weighing of aggravating and mitigating factors [because] that process constitutes not a factual determination, but a complex moral judgment”)
- United States v. Fields, 483 F.3d 313, 345-46 (5th Cir.2007) (“...the jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a highly subjective, largely moral judgment regarding the punishment that a particular person deserves. . . . In death cases, the sentence imposed at the penalty stage . . . reflects a reasoned moral response to the defendant’s background, character, and crime. . . . The Apprendi/Ring rule applies by its terms only to findings of fact, not to moral judgments.”) (internal quotation marks and citations omitted)
- United States v. Gabrion, 719 F.3d 511, 532-33 (6th Cir.2013) (“Apprendi findings are binary—whether a particular fact existed or not. [The selection decision], in contrast, requires the jury to ‘consider’ whether one type of ‘factor’ ‘sufficiently outweigh[s]’ another so as to ‘justify’ a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights

to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of ‘justify’ is ‘just.’ What [the selection decision] requires, therefore, is not a finding of fact, but a moral judgment.”)

- United States v. Purkey, 428 F.3d 738, 749 (8th Cir.2005) (“...it makes no sense to speak of the weighing process mandated . . . as an elemental fact for which a grand jury must find probable cause. . . . [I]t is . . . the lens through which the jury must focus the facts that it has found to produce an individualized determination regarding whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.”) (internal quotation marks and citations omitted)
- United States v. Mitchell, 502 F.3d 931, 993-94 (9th Cir.2007) (“...the jury’s task [at the selection stage] is no longer to find whether factors exist; rather, each juror is to ‘consider’ the factors already found and to make an individualized judgment whether a death sentence is justified. . . . Thus, the weighing step is an ‘equation’ that ‘merely channels a jury’s discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate.’”) (citations omitted)
- United States v. Fields, 516 F.3d 923, 950 (10th Cir.2008) (weighing of aggravating and mitigating factors is not subject to proof beyond a reasonable doubt) (citing United States v. Barrett, 496 F.3d 1079, 1107-08 (10th Cir.2007)).¹⁴

¹⁴ Eight state courts of last resort agree. See Ex Parte Waldrop, 859 So.2d 1181 (Ala. 2002); People v. Prieto, 30 Cal 4th 226, 262-63, 133 Cal. Rptr. 2d 18, 66 P.3d 1123 (Cal. 2003); Norcross v. State, 36 A.3d 756, 775 (Del. 2011) (citing Brice v. State, 815 A.2d 314, 327 (Del. 2003)); Inman v. State, 4 N.E.3d 190, 195 (Ind. 2014) (citing Ritchie v. State, 809 N.E.2d 258, 265 (Ind. 2004)); Borchardt v. State, 367 Md. 91, 126-27, 786 A.2d 631 (2001) and Evans v. State, 389 Md. 456, 476, 482, 886 A.2d 562 (2005); State v. Nunley, 341 S.W.3d 611, 626 n.3 (Mo. 2011) (limiting State v. Whitfield II, 107 S.W.3d 253 (Mo. 2003)); State v. Gales, 265 Neb. 598, 621-24, 658 N.W.2d 604 (2003); Nunnery v. State, 263 P.3d 235, 251-53 (Nev. 2011) (weighing aggravating and mitigating circumstances is not a fact-finding endeavor, overruling Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002)).

- d. The Selection Decision In Washington Is Likewise Normative, Not Factual, So It Need Not Be Alleged In An Information.

In Washington, the selection decision occurs in a “special sentencing proceeding”; the purpose of the proceeding is “to determine whether or not the death penalty should be imposed.” RCW 10.95.040(1). The statute does not call for “factual findings” by the jury; it provides that “the jury shall *decide* the matters presented in the special sentencing proceeding[.]” RCW 10.95.050 (italics added). The jury must answer this question: “Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?” RCW 10.95.060(4). The jury is not required to consider a finite list of aggravating or mitigating factors, it is not required to explicitly find any particular mitigating factors, and it is not required to explain its reasoning. Id. It is simply asked to “deliberate” and then “answer” the question posed. Id. The jury may decide not to impose a death sentence if “the age of the defendant at the time of the crime *calls for leniency*,” or based on “any other mitigating factor that [it] find[s] to be relevant,” including “the

Federal decisions in habeas corpus cases have reached the same conclusion. Lockett v. Trammel, 711 F.3d 1218, 1252-54 (10th Cir.2013); *see also* Matthews v. Workman, 577 F.3d 1175, 1195 (10th Cir.2009); Lee v. Commissioner, Ala. Dept. of Corr., 726 F.3d 1172, 1197-98 (11th Cir.2013).

appropriateness of the *exercise of mercy.*” WPIC 31.07 (italics added). Such value-laden judgments are distinct from the process of finding objectively verifiable facts.

In this case, the State repeatedly argued to the trial court that the insufficient mitigation decision was normative, not factual, and for this reason is distinct from the aggravating factors discussed in Apprendi and Alleyne. CP 104-06; RP (12/18/13) 15-17, 36-38; RP (1/22/14) 6-7, 15-17, 45-47. The trial court did not address this crucial argument in its rulings except as follows:

The State is correct that the jury’s role in the penalty phase of a death penalty proceeding is unlike any other under Washington law. However, the jury is still being called upon to make a “finding” in regard to a specific statutory directive. The mere uniqueness of the jury’s charge in the penalty phase of a death penalty proceeding does not render it less of a finding.

CP 125-26. This miscasts the State’s argument as a question of simple “uniqueness” rather than addressing the actual argument, to wit: that the character of the decision to impose a death sentence is fundamentally different from the fact-finding at issue in Alleyne, and is therefore not affected by Alleyne.

Finally, as the trial court acknowledged, its rulings create a minefield of problems. What the court failed to recognize, however, is that the problems are insoluble because requiring an information to

“allege” something that is not a fact is virtually impossible. An information does not “allege” a sentencing decision because decisions cannot be alleged like facts. Moreover, it is difficult to envision how mitigating circumstances and their insufficiency could be “alleged,” since the State is likely unaware of mitigating evidence uniquely within the defendant’s knowledge. And, since a jury is permitted to consider any and all manner of mitigation, and may exercise mercy, it is simply not possible to allege the full scope of such possibilities in an information. If the trial court is suggesting that the State must “allege” the legal standard that will be employed in the penalty phase, a legal standard is not a fact, and there is no requirement in the state or federal constitution that legal standards be included in a charging document. In short, the difficulties created by the trial court’s rulings further illustrate the flaws in its reasoning.

For all these reasons, the State respectfully asks that the trial court’s rulings be reversed. Unlike the eligibility decision, the selection decision is a sentencing function that can be carried out by a jury or a judge and need not be determined beyond a reasonable doubt. Therefore, by definition, the criteria for imposing the death penalty cannot be an element of the crime.

2. **BECAUSE THE DECISION TO IMPOSE THE DEATH PENALTY IS NOT FACT-FINDING, THIS COURT'S DECISION IN STATE V. YATES STILL CONTROLS AND THE TRIAL COURT ERRED IN DISREGARDING IT.**

In light of the distinction between the eligibility decision and the selection decision as set forth above, this court's decision in State v. Yates, 161 Wn.2d 714, 759, 168 P.3d 359 (2007) is entirely correct. Therefore, the trial court erred in disregarding Yates in favor of a strained interpretation of Alleyne.

Yates is this Court's most recent decision addressing the claim that the statutory notice requirements for seeking the death penalty must be alleged in the information. Yates unequivocally holds that "[t]he purpose of the charging document—to enable the defendant to prepare a defense—is distinct from the statutory notice requirements regarding the State's decision to seek the death penalty." Yates, 161 Wn.2d at 759.

Accordingly, as will be discussed in greater detail below, when the notice of special sentencing proceeding is filed and served in accordance with RCW 10.95.040, there is no need to include language regarding the absence of sufficient mitigating circumstances in the information. Furthermore, as Yates correctly holds, the Apprendi line of cases (of which Alleyne is merely the most recent) does not concern the adequacy

of a charging document in a state prosecution; “rather, those decisions concerned a defendant’s right to have a jury determine any facts that could increase the sentence beyond the statutory maximum for the charged crime.” Yates, 161 Wn.2d at 758.

Although Yates is controlling, the trial court ruled that it is not bound by Yates in light of its interpretation of Alleyne. CP 127-28. In so doing, the trial court disregarded controlling authority from this Court based on United States Supreme Court authority that does not address the issue at hand. The trial court’s orders may be reversed on this basis alone. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (holding that “once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court”).

Nonetheless, the trial court took issue with Yates because it was decided before State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), in which this Court held that a jury verdict finding that the defendant was armed with a “deadly weapon” did not authorize the trial court to impose a “firearm” enhancement. But Recuenco has no effect on the continuing viability of Yates for several reasons. First, the gravamen of Recuenco is that the *facts as found by the jury* were insufficient to allow the punishment imposed, and thus, the defendant’s right to a jury trial had

been violated. That is not an issue in this case, as a jury will be making both the eligibility determination *and* the selection decision, and the trial court will not be finding any facts in order to impose punishment. Second, as will be explained in detail below, in non-capital cases (such as Recuenco) the charging document is usually (but not always, *see State v. Siers, infra*) the only document that provides notice of the criminal charge to the defendant. This is not true in capital cases, in which strict compliance with RCW 10.95.040 is required.

Furthermore, as the Yates court correctly observed, although the information must provide notice of criminal charges, “we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime.” Yates, 161 Wn.2d at 759 (quoting State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996)) (emphasis in original).¹⁵ In sum, this Court’s

¹⁵ This holding in Yates is entirely consistent with the more recent case of State v. Simms, 171 Wn.2d 244, 250 P.3d 107 (2011). In Simms, the defendant was charged with crimes with firearm enhancements alleged and, because he had previously been convicted of assault with a firearm enhancement, the enhancements for the current charges were subject to the doubling provision of RCW 9.94A.533(3)(d). Simms, 171 Wn.2d at 245-46. On appeal, the defendant argued that the State was required to allege the prior enhancement in the information, citing Recuenco. Id. In rejecting that claim, this Court stated that “[t]he firearm enhancement for Simms’ 2000 assault conviction is not a fact supporting an element of the crimes charged in 2006, because application of RCW 9.94A.533 does *not* result in a sentence beyond the maximum authorized statutory sentence.” Id. at 250-51 (emphasis in original). Rather, “[a]pplication of RCW 9.94A.533 results in the *required* statutory sentence.” Id. at 251 (emphasis in original). In Recuenco, by contrast, both the charge as set forth in the information *and* the jury’s verdict authorized only a deadly weapon enhancement rather than a firearm enhancement. Id. Thus, unlike the defendant in Recuenco, the defendant in Simms “was on notice of the crimes charged to allow him to prepare defense.” Id. at 252.

decision in Yates is both correct and controlling, and the trial court erred in disregarding it.

3. EVEN IF THE ABSENCE OF SUFFICIENT MITIGATION WERE AN "ELEMENT" OF THE CRIME, THE DEFENDANTS HAVE HAD ACTUAL NOTICE FOR MORE THAN FIVE YEARS AND THE INFORMATION NEED NOT BE AMENDED.

The two argument sections above amply demonstrate that the trial court's rulings are erroneous. But even if the absence of sufficient mitigating circumstances to merit leniency *were* an "element" of aggravated first-degree murder in cases where the prosecutor has decided to seek the death penalty, there is still no basis to require the State to amend the information. The state and federal constitutions require the State to provide sufficient notice to apprise a defendant of the charges and to allow the defendant to prepare a defense. In this case, the notices of special sentencing proceedings, which were filed and served more than five years ago, are more than sufficient to provide the required notice. The trial court's rulings are erroneous for this reason as well.

This case is more like Simms than Recuenco. As in Simms, the defendants are "on notice of the crimes charged to allow [them] to prepare a defense." Simms, at 252. Also as in Simms, the application of RCW 10.95.040 and .050 "does *not* result in a sentence beyond the maximum authorized statutory sentence," but rather, the application of those statutes "results in the *required* statutory sentence." Simms, at 250-51 (emphasis in original).

Article 1, section 22 (amend. 10) of the Washington Constitution provides that “the accused shall have the right . . . to demand the nature and cause of the accusation against him” and “to have a copy thereof[.]” The Sixth Amendment of the United States Constitution provides that “the accused shall . . . be informed of the nature and cause of the accusation[.]” The rights afforded under these provisions are the same. State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). In fact, the federal requirements “are actually broader than the state protection,” because in addition to the Sixth Amendment right to notice, “the Fifth Amendment confers the right to be indicted by a grand jury.” Id. Accordingly, “[t]he right to a grand jury indictment entails a more stringently drafted charging document than is required by the Sixth Amendment” or by Article 1, section 22. Id. at 157.

In contrast to the Fifth Amendment, which requires indictment by a grand jury in all federal prosecutions, Article 1, section 25 of the Washington Constitution provides that criminal offenses “may be prosecuted by information or by indictment, as shall be prescribed by law.” And, as this Court held more than 100 years ago, it is the province of the Legislature to enact charging procedures under Article 1, section 25:

Under this provision the question of procedure is left to the legislature; and, if it can be ascertained that the procedure

which was adopted in this case has legislative sanction, it is idle for the courts to concern themselves with the question of policy involved in the legislation.

State v. McGilvery, 20 Wn. 240, 247, 55 P. 115 (1898).

In accordance with this principle, charging documents generally are governed by RCW 10.37.050, which provides that “the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended[.]” RCW 10.37.050(6). Also, CrR 2.1 provides that “the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged” that is signed by the prosecuting attorney. CrR 2.1(a)(1). Under this rule, although amendment of the information should be liberally allowed prior to trial, an amendment still requires permission of the trial court. CrR 2.1(d).

In non-capital cases, Washington courts have developed common-law rules to ensure that criminal defendants receive constitutionally adequate notice of the charges against them. These rules are collectively known as the “essential elements” rule. State v. Kjorsvik, 117 Wn.2d 93, 100-01, 812 P.2d 86 (1991). Under the “essential elements” rule, the essential elements of the crime charged must be alleged in the information.

Id. If one or more elements is missing from the information, the remedy is either (1) *amendment* of the information, which should be liberally allowed before trial under CrR 2.1, or (2) *dismissal without prejudice* to the State's ability to re-file the charges and to proceed with the prosecution anew. See State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987); State v. Vangerpen, 125 Wn.2d 783, 791, 888 P.2d 1177 (1995). In all cases, "[t]he primary goal of the 'essential elements' rule *is to give notice to an accused* of the nature of the crime that he or she must be prepared to defend against." Kjorsvik, 117 Wn.2d at 101 (emphasis supplied); see also Simms, 171 Wn.2d at 250 n.6 (noting that "[t]he rule's purpose is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense").

By contrast, the procedure for providing notice of special sentencing proceedings to defendants in capital cases is governed by a separate legislative enactment. Rather than relying upon RCW 10.37.050, CrR 2.1, and the "essential elements" rule developed at common law, the Legislature enacted RCW 10.95.040: a specific statutory procedure for providing notice in cases where the elected prosecutor has decided that there is reason to believe that there are not sufficient mitigating

circumstances to merit leniency.¹⁶ This statute is far more stringent and precise than RCW 10.37.050(6), CrR 2.1, and the “essential elements” rule because it requires filing, actual notice, and personal service within a specific period of time, or else “the prosecuting attorney may not request the death penalty.” In other words, RCW 10.95.040 not only *meets* constitutional standards for providing notice, it *exceeds* those standards.

Moreover, if the State fails to strictly comply with the notice requirements set forth in RCW 10.95.040, the available remedies do *not* include amendment of the notice or dismissal of the notice without prejudice to the State’s ability to re-file and proceed anew, as would be the case under RCW 10.37.050(6), CrR 2.1(d), and the “essential elements” rule. Rather, as stated above, the remedy for failure to strictly comply

¹⁶ RCW 10.95.040 provides, in its entirety:

- 1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.
- (2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant’s attorney within thirty days after the defendant’s arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.
- (3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

with these notice requirements is that the State cannot ask for the death penalty. State v. Dearbone, 125 Wn.2d 173, 178-82, 883 P.2d 303 (1994). This further demonstrates that the “essential elements” rule does not apply when the State is providing notice of a special sentencing proceeding, because the Legislature has more specifically prescribed both the procedure and the remedy that applies in this context, as is its prerogative. *See McGilvery, supra.*

Furthermore, in order to amend an information, the State must seek permission from the trial court by making a motion to amend. CrR 2.1(d). On the other hand, filing a notice of special sentencing proceeding is an executive decision by the prosecuting attorney, who has made a subjective determination that a jury should consider the death penalty; it is not a decision that requires judicial approval. State v. Monfort, 179 Wn.2d 122, 136-37, 312 P.3d 637 (2013). Also, the prosecutor’s decision whether to file a notice cannot be made unless the prosecutor considers available information about the crime and the defendant, including any mitigating evidence. State v. Pirtle, 127 Wn.2d 628, 641-43, 904 P.2d 245 (1995). But if amending the information were required in addition to filing the notice, the prosecutor would have to ask the trial court for permission to amend under CrR 2.1(d). The law governing a prosecutor’s decision

whether to file a notice of special sentencing proceeding is irreconcilable with the law governing the amendment of an information because the notice requirements are legally independent.

In addition, the fact that the notice provided under RCW 10.95.040 is contained in a separate document rather than in the information is not a basis to preclude or dismiss the death penalty. To the contrary, RCW 10.95.040 stands on its own; there is no legal justification for also requiring amendment of the information to allege what is already set forth in the notices of special sentencing proceedings. Requiring duplicative notice places form over substance and is not constitutionally required.¹⁷

This Court has already recognized this principle. In State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), this Court held that aggravating circumstances need not be alleged in the information, so long as the defendant receives notice of the aggravating circumstances “prior to the proceeding in which the State seeks to prove those circumstances to the jury.” Siers, 174 Wn.2d at 277; *see also id.*, at 279 n.6 (citing numerous cases from other states holding that aggravating circumstances need not be

¹⁷ Additionally, courts must first look to the plain language of a statute to determine its meaning as intended by the Legislature. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The plain meaning of RCW 10.95.040 is that the State must provide notice of special sentencing proceedings by filing and serving a separate document on the defendant. The statute does not require the information to be amended. The “essential elements” rule is inapplicable for this reason as well.

included in the charging document in order to provide adequate notice).¹⁸ Although notice is certainly required, a particular *form* of notice is not. Id. at 281 (holding that “[t]he United States Constitution does not require states to allege aggravating circumstances in local prosecutions,” and “[n]either does the Washington Constitution require aggravators to be alleged in an information” so long as “constitutionally sufficient notice” is provided). Moreover, this Court expressly rejected the argument that the Appendi line of cases requires a different result:

The right to a jury trial serves a different purpose than the “nature and cause” requirement and the due process notice requirement; the former addresses the adequacy of proof of the offense charged and of the aggravating sentencing factors, while the latter simply provides a defendant notice of the charges.

Siers, 174 Wn.2d at 280 (quoting State v. Kendell, 723 N.W.2d 597, 612 (Minn. 2006)).

¹⁸ Numerous aggravated murder cases from other states hold that aggravating circumstances need not be alleged in the charging document. *See, e.g., Stallworth v. State*, 868 So.2d 1128, 1186 (Ala. Crim. App. 2001); McKaney v. Foreman, 209 Ariz. 268, 270-73, 100 P.3d 18 (2004); Terrell v. State, 572 Ga. 34, 40-42, 572 S.E.2d 595 (2002); People v. McClain, 343 Ill. App. 3d 1122, 1137-39, 799 N.E.2d 322 (2003); Soto v. Commonwealth, 139 S.W.3d 827, 840-43 (Ky. 3004); Baker v. State, 367 Md. 648, 686-90, 790 A.2d 629 (2002); State v. Kendell, 723 N.W.2d 597, 610-12 (Minn. 2006); Stevens v. State, 867 So.2d 219, 225-27 (Miss. 2003); State v. Tisius, 92 S.W.3d 751, 766-67 (Mo. 2002); State v. Hunt, 357 N.C. 257, 273-78, 582 S.E.2d 593 (2003); Primeaux v. State, 88 P.3d 893, 899-900 (Okla. Crim. App. 2004); State v. Oatney, 335 Or. 276, 292-97, 66 P.3d 475 (2003); State v. Edwards, 810 A.2d 226, 231-34 (R.I. 2002). In fact, it appears that the only state that expressly requires aggravating circumstances to be alleged in an indictment is New Jersey, which has grand jury and indictment clauses like the Fifth Amendment. *See State v. Fortin*, 178 N.J. 540, 632-46, 843 A.2d 974 (2004). Washington expressly allows charging by information under Article I, section 25.

If it is not constitutionally necessary to allege aggravating circumstances in a charging document, as this Court and nearly every other state court has held, it is certainly not constitutionally necessary to allege the absence of sufficient mitigating circumstances in a charging document, either. Nothing in Alleyne changes this analysis, and the trial court erred in concluding otherwise.

Nonetheless, the trial court questioned the validity of Siers because it is a 5-4 decision, and expressed its preference for the reasoning of the concurring and dissenting justices in State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). CP 128-29. First, a trial court is bound by a decision of this Court whether the majority consists of five justices or nine justices. Second, Siers expressly overrules Powell. Siers, 167 Wn.2d at 281. The trial court's reasoning is unsound.

Further, the trial court reasoned that "neither Siers nor Powell involved a potential sentence that would exceed the maximum penalty authorized for the statutory offense." CP 129. But this case also does not involve "a potential sentence that would exceed the maximum penalty authorized for the statutory offense." The only possible penalties for aggravated first-degree murder are life in prison without the possibility of release or parole, or the death penalty. RCW 10.95.030. Accordingly, the

death penalty does not *exceed* the maximum; it *is* the maximum.¹⁹ The trial court's reasoning is unsound for this reason as well.

In sum, the state and federal constitutions require notice, and the Legislature has the authority to prescribe procedures for providing that notice. In this instance, the Legislature has done so with particularity and specificity in capital cases by enacting RCW 10.95.040. Accordingly, there is no reason to resort to the common law "essential elements" rule that applies in non-capital cases. Therefore, even if the absence of sufficient mitigating circumstances were an "element" of aggravated murder when the State seeks the death penalty, the trial court erred in ruling that the State must amend the information. The notices of special sentencing proceedings filed and served more than five years ago gave the defendants ample notice that the jury could consider the death penalty.

4. THE STATE RESPECTFULLY REQUESTS THAT THIS COURT ISSUE AN ORDER REVERSING THE TRIAL COURT'S RULINGS WITH OPINION TO FOLLOW.

These cases have been pending since December 2007—longer than Olivia and Nathan Anderson were alive—and this is the third interlocutory

¹⁹ As the Missouri Supreme Court explained, "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty." State v. Tisius, 92 S.W.3d 751, 767 (Mo. 2002) (quoting State v. Cole, 71 S.W.3d 163, 171 (Mo. 2002)).

appeal that this Court has considered.²⁰ The delay in these cases is unconscionable. The State respectfully requests that this Court issue an order reversing the trial court's rulings with an opinion to follow so that further delay may be minimized. This Court has employed such a procedure before in order to minimize delay. *See In re Personal Restraint of Cross*, 178 Wn.2d 519, 522, 309 P.3d 1186 (2013) (this Court "denied relief by order with opinion to follow" in a capital case); *Snohomish County v. Anderson*, 123 Wn.2d 151, 153, 868 P.2d 116 (1994) (this Court issued an order affirming the trial court regarding a citizen initiative and noting "that the opinion explaining the decision would be filed in due course"); *Pederson v. Moser*, 99 Wn.2d 456, 458, 662 P.2d 866 (1983) (this Court issued an order affirming the trial court with opinion to follow in a case concerning a recall election). The need to avoid further delay is particularly acute in this case.

Almost all of 2013 was spent on the last interlocutory review. Despite this Court's directive "to reinstate the notices of special sentencing proceeding so that the capital prosecutions against McEnroe and Anderson may finally proceed to trial,"²¹ the trial court almost

²⁰ *See McEnroe*, 179 Wn.2d 32; *see also State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861 (2012).

²¹ *McEnroe*, 179 Wn.2d at 46.

immediately issued two more rulings calling the adequacy of the notices into question. It is well past time to take these cases to trial. Accordingly, the State respectfully requests that this Court issue an order reversing the trial court's rulings with opinion to follow so that these cases can proceed to trial as soon as possible.

5. THE STATE RESPECTFULLY REQUESTS THAT THIS COURT REMAND THIS CASE WITH INSTRUCTIONS THAT IT BE REASSIGNED.

Because it can reasonably be expected that the trial court will have difficulty putting aside its strongly held views regarding its erroneous findings, and to preserve the appearance of justice, the State respectfully asks this Court to remand with instructions to assign this case to a different trial court. The State makes this request with reluctance, but believes it is necessary to move this case forward.

An appellate court has inherent authority and "broad discretion to reassign cases on remand when they feel justice or its appearance requires it." Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F.3d 940, 947 (9th Cir.2013); *see also* United States v. Sears, Roebuck & Co., 785 F.2d 777, 779 (9th Cir.1986). Federal appellate courts order reassignment if "unusual circumstances" are present, which entails consideration of three factors:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

In re Ellis, 356 F.3d 1198, 1211 (9th Cir.2004) (quoting United Nat'l Ins. Co. v. R & D Latex Corp., 242 F.2d 1102, 1118-19 (9th Cir.2001)),²²

Significantly, “[o]nly one of the first two factors must be present to justify reassignment,”²³ because “[t]he first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge.” United States v. Quach, 302 F.3d 1096, 1103 (9th Cir.2002) (citing United States v. Hanna, 49 F.3d 572, 578 (9th Cir.1995)).

The trial court’s conduct and the content of its rulings are relevant in determining whether to order reassignment. Thus, for example, the trial court’s “adamance in making erroneous rulings may justify remand to a

²² This test has not yet been utilized in a published Washington case.

²³ Ellis, 356 F.3d at 1211 (citing United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir.1999)).

different judge,”²⁴ as it can satisfy *both* of the first two “unusual circumstances” factors.²⁵

In Inst. of Cetacean Research v. Sea Shepherd, the plaintiffs, “Japanese researchers who hunt whales in the Southern Ocean,” filed piracy claims after having been “hounded on the high seas for years” by the defendants. Id. at 943. The trial court denied the plaintiffs’ request for a preliminary injunction and dismissed their piracy claims. In reversing, the Ninth Circuit noted serious analytical errors made by the trial court, including that the court’s rulings turned on an “erroneous interpretation” of statutory terms, that the court’s analysis was “off-base” and supported by “no precedent,” and that the court’s reasoning constituted “clear error” that “rested on an implausible determination of the facts and an erroneous application of law[.]” Id. at 944-45. The appellate court drew upon its “broad discretion to reassign cases on remand when they feel justice or its appearance requires it”;

The district court judge has expressed *strong and erroneous views* on the merits of this *high profile case*. Without ourselves reaching any determination as to his ability to proceed

²⁴ Sears, at 780-81.

²⁵ See United States v. Larios, 640 F.2d 938, 943 (9th Cir.1981) (original judge unreasonably refused to wait for transcript of former proceedings before sentencing and was adamant in his belief as to defendant’s culpability; therefore, the appellate court concluded that the judge could not reasonably be expected to ignore his conclusions and adamant beliefs and the appearance of fairness required reassignment).

impartially or impugning his integrity, to preserve the appearance of justice, we conclude reassignment is appropriate. . . . The appearance of justice would be served if the case were transferred to another district judge[.]

Id. at 947-48 (*citing* Ellis, 356 F.3d at 1211, and Quach, 302 F.3d at 1103-04) (emphasis added).

Unusual circumstances warrant reassignment in this case as well. The record establishes that the trial judge “would reasonably be expected upon remand to have substantial difficulty in putting out of his . . . mind [those] previously expressed views or findings determined to be erroneous,” and that “reassignment is necessary to preserve the appearance of justice[.]” Ellis, 356 F.3d at 1211. Moreover, reassignment will not entail waste and duplication out of proportion to the strong interest in preserving the appearance of fairness, as little has been accomplished in this case other than litigating motions regarding the death penalty.

As previously discussed, the trial court dismissed the notices of special sentencing proceedings in January 2013 on grounds that were firmly held but were unanimously reversed by this Court. Exactly one year later, and only four months after this Court’s reversal of the January 2013 ruling, the trial court again ignored binding precedent and ruled that the question of whether there are insufficient mitigating circumstances to merit leniency is an “element” of a new crime called “capital murder” that

must be alleged in the information. The trial court ordered the State to amend the information or allow McEnroe to plead guilty to aggravated murder without the possibility of the death penalty. Under the “unusual circumstances” test, the trial court’s actions in rendering several clearly erroneous rulings regarding the death penalty in one year demonstrates that this case should be reassigned.²⁶

The court’s rulings are troubling in other respects, too. Upon dismissal of the notices of special sentencing proceedings on January 31, 2013, the State asked the trial court to stay the effective date of its ruling so that the State could seek discretionary review. Given that six people had been murdered and the court’s order precluded consideration of the death penalty, a stay to allow appellate review would have been appropriate to prevent prejudice to the State’s interest in carrying out Washington law. The trial court, however, refused to grant a stay, and instead utilized its order denying a stay to augment its earlier ruling

²⁶ The State does not suggest that the trial judge has exhibited a personal bias. Personal bias must stem from “some factor that arose outside of the incidents that have taken place in the courtroom itself,” and is referred to as the “extrajudicial source rule.” Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 81-82 (2d ed. 2007). “The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment.” Sears, 785 F.2d at 780. A request for reassignment does not imply criticism of the trial judge, United States v. Quach, 302 F.3d 1096, 1104 (9th Cir.2002), or a personal grievance against him or her. Sears, at 780. A request to reassign a case should not be made lightly, or without considerable reflection that such a course is required by law. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825-27, 108 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

dismissing the notices. CP 292-303. The trial court's refusal to stay the order dismissing the notices evinces an unusual reluctance to facilitate orderly review on an important legal question, especially where the ruling was entirely novel. The court was also adamant that its ruling was correct.²⁷ The trial court's certitude in its clearly erroneous views calls into question the appearance of justice as this case moves forward.

Another disquieting example derives from the trial court's most recent rulings. After defendant McEnroe filed the current motion to dismiss or "preclude" the death penalty based on Alleyne, the trial court presented the parties with a document entitled "Court's Requests for Admission," in which it directed the parties to answer a series of questions with "yes" or "no" answers; explanation was forbidden. CP 99-100, 276-77. A request for admissions is usually a tool for civil litigants to extract factual concessions from an opponent. The trial court's use of such a device—especially where the language of the requests for

²⁷ The trial court wrote in its order denying a stay that it had been "reflect[ing] upon its decision rendered on January 31, 2013" and had carefully reviewed the State's motion for discretionary review. CP 293. Nevertheless, the trial court concluded that its ruling dismissing the notices of special sentencing proceedings was based on "longstanding and well-founded" legal principles, and stated "[w]ith conviction and sincerity" its confidence "in the correctness of its ruling of January 2013." CP 302-03. This Court concluded that the trial court's analysis was not "based in our case law," and reversed unanimously. McEnroe, 179 Wn.2d at 44. As discussed above, a trial court's adamance that its erroneous rulings are correct can satisfy both of the first two "unusual circumstances" factors; that is certainly the case here.

admission is drawn exclusively from the defense briefing and leads to a preordained result, and where no explanation of an answer is permitted—casts the trial court in a quasi-adversarial role and undercuts the appearance of justice.²⁸

Another troubling sign of the trial court's firmly but mistakenly held views is the court's strongly-worded opinion that it would be unfair to use the defendants' confessions against them in the penalty phase of their trials. In January 2013, as a reason to forbid a prosecutor's consideration of the strength of the evidence in making the decision whether to seek the death penalty, the trial court wrote: "In a scenario *suggestive of Camus*, a defendant's early confession and cooperation could become his downfall." CP 290 (emphasis supplied). French philosopher Albert Camus was a virulent opponent of the death penalty²⁹ and is known for a theory of philosophy centered on the concept of "absurdity" and the

²⁸ The State objected to the "Court's Requests for Admission" on all of these grounds. CP 101-11. The trial court responded that it had entitled the pleading "Court's Requests for Admission" to "make the document easier to find once it's indexed with the clerk's office." RP (12/18/13) 2. This explanation does not address any of the State's substantive objections or concerns.

²⁹ "But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH (1957) available at <http://www.deakinphilosophicalsociety.com/texts/camus/reflections.pdf>.

principle that life is meaningless.³⁰ The trial court's suggestion that the State's use of a voluntary confession would be absurd and ironic—"a scenario suggestive of Camus"—is troubling. As Supreme Court precedent makes clear, voluntary confessions are a valuable and desirable tool for discovering the truth and convicting the guilty.³¹ But even if there were some irony that a defendant's own conduct could strengthen the case against him or her (a debatable claim),³² such alleged irony is hardly a reason to ignore the strength of the evidence. These defendants will certainly challenge the admissibility of their confessions, and the trial judge's views on this subject call into question whether he will put aside his antipathy towards the use of confessions in ruling on their admissibility.

³⁰ Camus's philosophy of the absurd explores the consequences arising from the paradox created by human beings' need to ask ultimate questions about the meaning of existence and the impossibility of receiving an answer. Ronald Aronson, *Albert Camus*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Spring 2012 ed.) <<http://plato.stanford.edu/archives/spr2012/entries/camus/>>.

³¹ "Admissions of guilt are more than merely 'desirable,'[;] they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." Moran v. Burbine, 475 U.S. 412, 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (citing to United States v. Washington, 431 U.S. 181, 186, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977)). "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." McNeil v. Wisconsin, 501 U.S. 171, 181, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (citing and quoting Moran, and rejecting the argument that law enforcement should not be allowed to approach suspects in custody who have not invoked their Sixth Amendment right as to other crimes).

³² Presumably, the court uses the word "ironic" to mean "a state of affairs or events that is the reverse of what was or was to be expected." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (definition of "irony").

Most recently, as detailed above, the trial court ignored settled precedent in favor of a strained reading of Alleyne to conclude that the defendants are entitled to notice where it is clear that they already have notice. The trial court's failure to appreciate the consequences of its rulings is also very troubling.³³

Finally, the third factor of the "unusual circumstances" test—*i.e.*, whether waste and duplication outweighs the benefits of reassignment in preserving the appearance of fairness—should not be a barrier to ordering reassignment here. For the six years and four months that this case has been pending, there have been few if any matters that would need to be re-litigated if this case were reassigned. As the record amply demonstrates, many motions regarding the death penalty have been litigated, and re-litigated, repeatedly; little else has occurred.³⁴

In sum, the record demonstrates that the trial judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind previously expressed views or findings determined

³³ The trial court has not only openly conceded its inability to anticipate the consequences of its rulings, it apparently believes that this Court's decisions are the source of the confusion. RP (1/22/14) 40-41. As discussed above, the court repeatedly stated at the January 9 hearing that it did not know what consequences flowed from its January 2 order. RP (1/9/14) 13-15. As a result, this issue cost several months of the litigants' time even before interlocutory review became necessary.

³⁴ In fact, in the more than six years this case has been pending, there have been no evidentiary hearings (*e.g.* CrR 3.5, CrR 3.6, ER 404(b)) whatsoever.

to be erroneous. Furthermore, reassignment is necessary to preserve the appearance of justice. Lastly, waste and duplication of effort is not a serious concern. For all of these reasons, the State respectfully requests that this Court order that this case be reassigned upon remand.

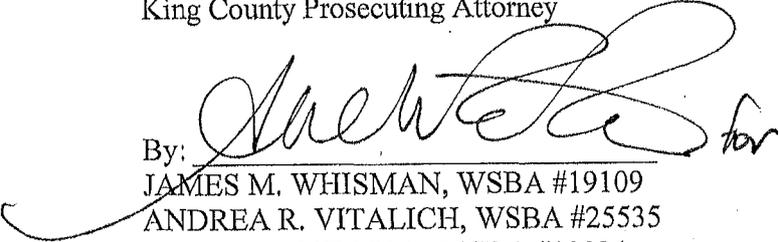
E. CONCLUSION

For the reasons stated above, this Court should reverse the trial court's rulings in an order with full opinion to follow, and remand these cases for trial before a different department of the superior court.

DATED this 18th day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kathryn Lund Ross, Leo Hamaji, and William Prestia, the attorneys for Joseph McEnroe, at Washington Death Penalty Assistance Center and King County Department of Public Defense, 810 Third Avenue, Suite 800, Seattle, WA 98104-1695, containing a copy of the Opening Brief of Petitioner, in STATE V. JOSEPH McENROE & MICHELE ANDERSON, Cause No. 89881-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

04-18-14
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Colleen O'Connor and David Sorenson, the attorneys for Michele Anderson, at King County Department of Public Defense, 1401 E. Jefferson Street, Seattle, WA 98122-5570, containing a copy of the Opening Brief of Petitioner, in STATE V. JOSEPH McENROE & MICHELE ANDERSON, Cause No. 89881-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

04-18-14

Date

OFFICE RECEPTIONIST, CLERK

To: Vitalich, Andrea
Subject: RE: State v. McEnroe and Anderson, No. 89881-2

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Vitalich, Andrea [mailto:Andrea.Vitalich@kingcounty.gov]
Sent: Friday, April 18, 2014 12:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: O'Connor, Colleen; Sorenson, David; Hamaji, Leo; Prestia, William; wdpac@aol.com; O'Toole, Scott; Whisman, Jim; Ly, Bora
Subject: State v. McEnroe and Anderson, No. 89881-2

Dear Supreme Court Clerk,

Please find attached for filing via email the Opening Brief of Petitioner, with certificates of service, for State v. Joseph McEnroe & Michele Anderson, No. 89881.

Thank you,

Andrea Vitalich, WSBA #25535
King County Prosecutor's Office, Appellate Unit
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9655