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CAPITAL CASE

NO. 89881-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH McENROE & MICHELE ANDERSON,

Respondents.

REPLY BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REPLY

Whether the defendants have provided any tenable basis to affirm the trial court's rulings that the sentencing decision in a capital case is an "element" that must be pleaded in an information, and whether the defendants' response to the State's request for reassignment upon remand overcomes the fact that the record shows that reassignment is necessary in the interests of justice.

B. INTRODUCTION

McEnroe and Anderson's response brief and motion to strike¹ mostly respond to a series of straw man arguments while largely ignoring the State's true arguments. This brief will reply to the defendants' arguments by grouping them into three main categories: 1) whether Alleyne v. United States² requires that a capital sentencing decision be considered an element of aggravated murder in Washington; 2) whether this Court's decisions require that an information charging aggravated murder include an allegation that there are not sufficient mitigating

¹ Although the defendants' motion to strike was denied, it is incorporated by reference in their response brief and has also been filed as an appendix to their amended response brief. Accordingly, contrary to what the defendants claim in their motion to modify and what WACDL claims in its motion for permission to file an *amicus curiae* brief, the defendants have, in fact, presented their arguments regarding reassignment to this Court.

² Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

circumstances to merit leniency; and 3) whether this Court should direct that these cases be assigned to a different trial court upon remand.

C. ARGUMENT IN REPLY

1. THE DECISION THAT THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY IS NOT AN ELEMENT OF AGGRAVATED MURDER.

a. McEnroe And Anderson Sidestep The State's Arguments And Authorities Showing That Finding Aggravating Facts Is Very Different From Imposing A Sentence.

McEnroe and Anderson repeatedly assert that the decision to impose the death penalty—*i.e.*, the determination that insufficient mitigating circumstances exist to merit leniency—is a factual decision. They make no attempt, however, to discuss the myriad cases cited by the State showing that the decision whether to impose a death sentence is far more complex, and fundamentally different, than a simple finding of fact. *See* Opening Brief at 12-26. Instead, they simply assert that the State is “misguided in drawing conclusions from cases addressing completely different statutory schemes,”³ and then beg the question by repeating—over and over—that the capital sentencing decision in Washington is a factual decision. Conspicuously absent from the defendants’ brief is any attempt to compare the nature of the jury’s decision whether to impose the

³ Respondent’s Brief (Amended) at 6 (hereinafter “Respondent’s Brief”).

death penalty to the factual findings at issue in the Apprendi⁴/Alleyne line of cases, or any analysis of the cases cited in the State's opening brief.

The State is well aware that state and federal death penalty schemes differ in many respects. The point of the State's argument is that despite the differences among these statutory schemes, they all share two common components. First, all death penalty statutes have a fact-finding component—*i.e.*, procedures for finding aggravating or special circumstances—that is designed to narrow the class of defendants eligible for the death penalty. Second, all have a sentencing component, where the jury or judge considers evidence relevant to guilt, aggravation, and mitigation, and decides whether, considering that array of facts and circumstances, the defendant deserves the death penalty. The fact-finding component is subject to Alleyne; the sentencing component is not. The defendants miss this point, and their failure to address it in any meaningful way is tantamount to a concession that there is no reasoned basis to reject the State's arguments.

b. The Authorities Cited By McEnroe And Anderson Are Easily Distinguished.

Although the defendants argue that the State's reliance on death penalty decisions from other states and from federal courts is "misguided,"

⁴ Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

they rely upon a decision from the Kansas Supreme Court in a non-capital case and a federal habeas decision concerning a repealed Arizona statute in support of an argument that “other courts have applied Alleyne to weighing aggravating and mitigating factors.” Respondent’s Brief at 25-26. But these two cases do not hold that Alleyne applies to weighing aggravating and mitigating factors.

The defendants first rely on State v. Soto, 322 P.3d 334 (Kan. 2014). Soto was convicted of murder, and the State sought a “hard 50” sentence⁵ based on the aggravating circumstance that the crime was committed in “an especially heinous, atrocious, or cruel manner.” Soto, 322 P.3d at 340. The Kansas Supreme Court held that the sentencing scheme was unconstitutional under Alleyne because it provided for judicial fact-finding to increase the mandatory minimum term to 50 years:

[T]he statutory procedure for imposing a hard 50 sentence violates the Sixth Amendment because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt.

Id. at 349. As acknowledged in the State’s opening brief, a finding of aggravating facts is clearly covered by the Apprendi/Alleyne line of cases.

⁵ A “hard 50” sentence requires a mandatory minimum term of 50 years of confinement. Id. at 344 (citing former K.S.A. 2013 Supp. 22-3717(b)(1)).

Thus, Soto is correctly decided, but also inapposite; there will be no judicial fact-finding of aggravating facts in this case.

The defendants also cite Murdaugh v. Ryan, 724 F.3d 1104 (9th Cir. 2013) (petition for certiorari filed, docket no. 13-1057).

Murdaugh beat a man to death with a meat tenderizer and a jackhammer spike, and upon arrest, he admitted to beating another man to death with a meat tenderizer. Murdaugh, 724 F.3d at 1106-07. Murdaugh pleaded guilty to one capital murder and one non-capital murder, and presented no mitigation evidence. Id. at 1108. Applying the now-repealed Arizona capital sentencing statutes, the sentencing judge found aggravating facts, identified mitigating circumstances, weighed them, and imposed a death sentence. The Arizona Supreme Court found error under Ring v. Arizona⁶ because a judge found the aggravating facts instead of a jury. But, because the defendant had pleaded guilty to two gruesome murders, and because he refused to present any evidence in mitigation, the court found the error to be harmless beyond a reasonable doubt.⁷

On habeas review, however, a three-judge panel of the Ninth Circuit held that the Ring error was not harmless. The panel based its

⁶ Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

⁷ After Ring was decided, the Arizona Supreme Court found reversible error in 21 capital cases, but found the error harmless beyond a reasonable doubt in two cases. Murdaugh, at 1114 n.4 (listing cases).

decision on the nature of Arizona's repealed capital sentencing statute, under which the judge simultaneously considered aggravating facts and mitigating circumstances. The panel opined that under the unique facts in Murdaugh's case, a judge could not find aggravating facts independently from mitigating circumstances. Murdaugh, 724 F.3d at 1116. The panel then reasoned that "because the existence or absence of mitigating circumstances directly affected whether Murdaugh was *death eligible* under Arizona law, he had a right to have a jury decide those facts." Id. at 1117 (italics added).⁸

Contrary to the defendants' argument, Murdaugh did not hold that Alleyne transforms the capital sentencing decision into an element of the crime. Rather, the Murdaugh decision is tied to the *eligibility* phase of the case, *i.e.*, finding aggravating facts which, the panel reasoned, was inseparable from considering mitigating circumstances. By contrast, the issue in this case concerns the *selection* decision, not the eligibility decision. In sum, neither Soto nor Murdaugh advances McEnroe and Anderson's argument.

⁸ The court also said that "[i]n practical effect, Ring created a right to have the jury determine all the facts on which a sentence of death depended, both aggravating and mitigating" Id. at 1116 n.7. However, the court did not cite or discuss the many cases that hold that mitigating factors are not part of the eligibility determination. The State of Arizona's petition for certiorari is pending.

c. Chapter 10.95 RCW Does Not Make The Jury's Sentencing Decision A Finding Of Fact.

The defendants also argue that the insufficient mitigation decision is factual because some form or derivation of the word “fact” appears three times in chapter 10.95 RCW. Respondent’s Brief at 9-12. None of these passing references to “fact” transforms the sentencing decision in a capital case into a finding of fact. The primary flaw in the defendants’ reasoning is that it draws conclusions about the nature of the sentencing decision not from the *character* of the decision itself, but rather from the way it is *characterized*.

It is a well-established principle of appellate review that a conclusion of law does not become a finding of fact simply by virtue of the label affixed by the trial court. *See, e.g., Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980) (“Though the trial court labeled the finding that defendants properly rescinded the earnest money agreement a finding of fact, it is a conclusion of law, for the term rescission carries legal implications.”); *State v. Hutsell*, 120 Wn.2d 913, 918-19, 845 P.2d 1325 (1993) (“If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law.”) (quoting *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App.

389, 397, 739 P.2d 717 (1987)).⁹ A determination is either a finding or a conclusion depending on its character, not its label. The defendants' statutory citations carry even less weight than a trial judge's mischaracterization of a finding or a conclusion, because the statutes cited do not define the character of the decision whether to impose the death penalty.

The defendants first cite RCW 10.95.030(2), which provides that “[i]f, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.” Respondent’s Brief at 9. The defendants argue that the words “trier of fact” show that the selection decision is factual. They are mistaken. Matters presented in a special sentencing proceeding are decided by a jury “unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.” RCW 9.95.050(2). In other words, the sentencing decision can be made by a jury or a judge. Thus, the phrase “trier of fact” as used in section .030 is a phrase meant to refer to whomever the decision-maker may be, *i.e.*, a jury or a judge.

⁹ Ironically, this is precisely the point made by Justice Scalia in his Ring concurrence – a point that the defendants have cited numerous times in the trial court. *See Ring*, 536 U.S. at 610 (Scalia, J, concurring) (an element is an element if it functions like an element, even if it is called “Mary Jane”).

The defendants also suggest that use of the “beyond a reasonable doubt” standard for the sentencing decision means that the Legislature has created a factual determination. Respondent’s Brief at 10 (citing RCW 10.95.060). This argument is also unpersuasive. Although the “beyond a reasonable doubt” standard certainly applies to factual determinations, it is also appropriate in this context, as it indicates to the decision-maker that a high level of certainty is required to decide that a defendant should be sentenced to death. In other words, it serves to remind the decision-maker that it should be strongly convinced that its decision is correct; it does not establish that the decision is factual.

The defendants also argue that RCW 10.95.130 shows that the decision is factual because, as part of this Court’s mandatory review, it must determine whether there was “sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4)[.]” Respondent’s Brief at 10. But this language does not transform the jury’s decision into a factual finding. The question posed by section .060(4) is: “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?” The answer to that question necessarily involves consideration of a constellation of facts. On direct review of a death sentence, this Court is not to duplicate the jury’s role

and engage in reweighing the evidence presented at trial in support of aggravating and mitigating factors. Rather, this Court considers whether a rational jury could have concluded that the mitigating circumstances do not outweigh the circumstances of the crime. State v. Woods, 143 Wn.2d 561, 614, 23 P.3d 1046 (2001). All legal conclusions are based on factual predicates. Thus, it is not surprising that this Court's review of the jury's decision that a death sentence is warranted would include a review of the factual predicate for the jury's exercise of judgment. This does not mean that the jury's ultimate sentencing decision is a simple finding of fact.

In summary, even if there are forms of the word "fact" in chapter 10.95 RCW, the section .060(4) decision is clearly not a simple finding of fact, but a complex sentencing decision. The matter should be judged by function, not by label. The decision whether to sentence someone to death is clearly more than a simple finding of fact, and is not in the same category as the factual findings subject to the Apprendi/Alleyne rule.

Finally, it should be noted that for purposes of establishing that Alleyne is not applicable to the decision that insufficient mitigating circumstances exist to merit leniency, the State need only show that the decision at issue is *different* from the fact-finding at issue in the Apprendi/Alleyne line of cases. It is difficult to describe with precision any decision that incorporates both fact and law, and even more difficult

to describe a decision that incorporates fact, law, *and* moral judgment. In this case, it is sufficient to show that the jury will not be engaging in simple fact-finding in the penalty phase of the defendants' trials.

2. WASHINGTON CASES DO NOT REQUIRE THAT INSUFFICIENT MITIGATION TO MERIT LENIENCY BE PLEADED IN AN INFORMATION.

The defendants contend that Washington case law mandates that the absence of sufficient mitigating circumstances must be pleaded in the information, largely relying on State v. Recuenco, 164 Wn.2d 428, 180 P.3d 1276 (2008). Respondent's Brief at 19-20, 23-25. This is incorrect. Recuenco and other similar cases are both distinguishable and inapplicable in this context.

As discussed in the State's opening brief, the issue in Recuenco was whether a sentencing error could be deemed harmless where the sentence imposed (*i.e.*, a firearm enhancement) was not factually supported by the jury's verdict (*i.e.*, a deadly weapon enhancement). Recuenco, 163 Wn.2d at 431 ("This case asks us to determine whether Washington law requires a harmless error analysis where a sentencing factor . . . *was not submitted to the jury.*") (emphasis supplied). In other words, the error in Recuenco (like the error in Apprendi and its progeny) was a violation of the right to a jury trial, not inadequate notice.

Nonetheless, the Recuenco decision also declared that deadly weapon and firearm enhancements must be charged in the information. Id. at 434-35. This is consistent with a long-standing common law rule in Washington. However, this Court has rejected attempts to extend this rule to other types of aggravating circumstances, and there is no basis in Washington law to require the State to charge the absence of sufficient mitigating circumstances in the information.

In State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009), *overruled* by State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), the lead opinion observed that “[i]t is important to note that the rule that a deadly weapon or firearm enhancement must be set forth in the charging instrument preceded Apprendi.”¹⁰ Powell, 167 Wn.2d at 685. Accordingly, the four justices signing the lead opinion expressly “declined to extend the sentence enhancement rule to aggravating circumstances[.]” Id. Although this holding did not command a majority in Powell, it *did* command a majority in Siers. Siers expressly rejected the notion that the Apprendi line of cases requires that aggravating circumstances must be pleaded in

¹⁰ In support of this conclusion, the Powell lead opinion cited In re Personal Restraint of Bush, 95 Wn.2d 551, 627 P.2d 953 (1981), which in turn relied upon State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972) – another case upon which the defendants rely. Respondent’s Brief at 23-24. Frazier, a case that serves as the foundation for the proposition that weapon enhancements are subject to a special charging rule that predates Apprendi, does not support the defendants’ position that the absence of sufficient mitigation to merit leniency must be pleaded in the information.

the information. Further, as Siers correctly held, the grand jury and indictment clauses of the Fifth Amendment do not apply to the states, and thus, “federal indictment requirements relating to aggravating circumstances do not ‘extend to local prosecutions under Washington law when aggravating circumstances are alleged.’” Siers, 174 Wn.2d at 279 (quoting Powell, 167 Wn.2d at 684).

In sum, this Court has held that the rule requiring weapon enhancements to be pleaded in the information should not be extended to other cases where sentencing factors are at issue. Thus, Recuenco does not apply here; Siers does. Accordingly, if aggravating circumstances need not be alleged in the information, then certainly the absence of sufficient mitigating circumstances to merit leniency need not be alleged in the information, either. This is particularly so given the stringent requirements of RCW 10.95.040, which mandates actual notice of the State’s intent to seek the death penalty and personal service of that notice within a specific period of time, or the State is barred from seeking the death penalty. State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994).

McEnroe and Anderson were served with notices of special sentencing proceedings in open court more than five years ago. Those notices complied with the statute, and are more than adequate under the state and federal constitutions. No further notice is required.

3. REASSIGNMENT UPON REMAND IS APPROPRIATE UNDER THE UNUSUAL CIRCUMSTANCES PRESENTED HERE.

McEnroe and Anderson may believe that reassignment of the trial judge in this case is inappropriate, but their tone of outrage and indignation is unwarranted. Reassignment has been ordered by Washington appellate courts across a wide spectrum of cases for a whole host of reasons—and often at the behest of defense counsel—where it is needed to preserve the appearance of fairness. While reassignment is not common, neither is it rare. A request for reassignment should be met with reasoned argument, not invective. Because the defendants have persistently mischaracterized and disparaged the State’s motives and requests, and have largely ignored the legal reasoning underlying them, the State will summarize its position here to avoid any confusion.

a. Reassignment Upon Remand Has Been Found To Be Appropriate In Numerous Washington Cases.

Although no published Washington decision has yet applied the “unusual circumstances” test discussed at length in the State’s opening brief,¹¹ Washington appellate courts have repeatedly ordered cases reassigned upon remand. For example, a case was reassigned where the prosecutor breached a plea agreement at sentencing, because there might

¹¹ See Opening Brief at 41-49.

be some question whether the sentencing judge could disregard the prosecutor's improper sentencing recommendation. State v. Harrison, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003). Cases are reassigned when the defendant's right of allocution at sentencing was neglected, even if the error was inadvertent, because of the possibility that the judge could not set aside the announced sentence and consider the matter anew.

State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996).

Reassignment was appropriate where a court had imposed an exceptional sentence without holding an evidentiary hearing, because it would appear unfair for the same judge to preside after he had already expressed his views as to the appropriate sentence. State v. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996). And reassignment was warranted where the judge participated in other official duties—investigations into prostitution-related activities—that may have influenced the judge's feelings about the defendant, even though there was no direct evidence of bias. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).¹² These cases employ reasoning that resembles the second prong of the “unusual circumstances”

¹² “We do not believe that the respected and able trial judge was ... motivated [by bias]. We fear, however, that the circumstances of the investigation of the defendant's activities as manager of the hotel, coupled with a continuing investigation during the times when the trial judge retained discretionary control over defendant's case could lead a reasonable man to question the fairness and impartiality of the judge. While there was no proof of bias or prejudice, the investigations and activity of the trial judge created the appearance of bias or prejudice.” Id.

test, *i.e.*, “whether reassignment is advisable to preserve the appearance of justice,” as discussed in the State’s opening brief. Opening Brief at 42 (citing, *inter alia*, In re Ellis, 356 F.3d 1198, 1211 (9th Cir. 2004)).

Washington courts have also held that a different judge should conduct proceedings upon remand where it appears that the original judge will have difficulty setting aside prior knowledge of a case or previously expressed opinions about a case. See State v. M.L., 134 Wn.2d 657, 660-61, 952 P.2d 187 (1998) (remanding for disposition before different judge when the original disposition was clearly excessive); see also State v. Sledge, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997) (“We do not cast aspersions on the trial court here by this remedy, but provide for a new judge at the disposition hearing in light of the trial court’s already-expressed views on the disposition.”); In re Custody of R., 88 Wn. App. 746, 763, 947 P.2d 745 (1997) (remanding for proceedings before a different judge where trial judge expressed personal disapproval of party); State v. Finch, ___ Wn. App. ___, 2014 WL 2095073 (No. 44637-5-II, filed May 20, 2014) (new judge ordered upon remand where original judge improperly ordered a polygraph examination of a juvenile sex crime

victim).¹³ These cases employ reasoning similar to the first prong of the “unusual circumstances” test, *i.e.*, “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[.]” Ellis, 356 F.3d at 1211. Moreover, in none of these cases did the appellate court find actual judicial bias. Rather, reassignment was ordered to increase public confidence in the fairness of the proceedings.

As shown by the decisions cited in the State’s opening brief, federal courts handle this issue similarly to Washington courts. A recent study analyzed more than 668 federal appellate decisions where reassignment was ordered, and identified, *inter alia*, 43 cases where reassignment was ordered because a judge had previously expressed strong opinions about the facts, the law, or the proper outcome. Toby J. Heytens, Reassignment, 66 *Stan. L. Rev.* 1, 31 (2014).

In summary, it is clear that reassignment upon remand, while not routine, is also not unprecedented, and may be requested without disparaging the motives of the party requesting it, and without suggesting

¹³ Under a more unusual set of facts, this Court refused to remand to the trial court at all where the trial court had more than once failed to impose a penalty for violations of the Public Records Act at the level that this Court expected. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 470, 229 P.3d 735 (2010).

any actual bias on the part of the judge who is the subject of the reassignment order.

- b. Reassignment Is Called For In These Cases That Have Languished Without A Trial For Years, And Where The Trial Judge's Recent Rulings Would Cause A Reasonable Person To Question His Ability To Fairly And Impartially Bring The Cases To Trial.

As noted above, the defendants' response to the State's request for reassignment largely consists of hyperbole and invective.¹⁴ The State's reasons for requesting reassignment in this case stem from the frustration of more than six years of futile court proceedings, three trips to this Court for wholly avoidable interlocutory review, and recent troubling procedures and comments employed by the trial court.

Nonetheless, the defendants suggest that the State's grievances originate with the trial court's rulings in January and February 2013. This is incorrect. Much earlier in the proceedings, the trial court allowed defendant Anderson's first two teams of lawyers to withdraw; the first withdrawal was granted over the State's objection and the second was granted *ex parte* without prior notice to the State, causing significant delay

¹⁴ The defendants personally disparage the trial prosecutor, a judge who presided over an unrelated capital case, members of the Court of Appeals, and the Seattle Times. As this Court recently noted "[s]uch incivility threatens ... public respect for the courts." State v. Lindsay, ___ Wn.2d ___, 2014 WL 1848454 (No. 88437-4, filed May 8, 2014).

in the case.¹⁵ Moreover, since at least 2011, the State has consistently noted its frustration with the exceedingly slow pace of the litigation.¹⁶ In 2011, what should have been a fairly routine issue—which of the defendants should be tried first—became a battle over the trial court’s interpretation of a local court rule, and a full interlocutory review by this Court that lasted from September 8, 2011 until June 28, 2012.¹⁷

Once the case returned to the trial court, and just as thousands of prospective jurors were poised to appear for jury selection for McEnroe’s trial, the trial court struck the death penalty on a novel legal theory that had not been raised by either defendant or subject to full briefing by the State. CP 279-303. Again, the State voiced its strong objection to the novel ruling and to the delay it would occasion.¹⁸ And in January of this year, the trial court interpreted Alleyne in a novel fashion to overrule settled precedent from this Court and to require the State to amend the

¹⁵ See CP 310-14 (Motion to Withdraw, June 27, 2008); CP 315 (Order Granting Motion to Withdraw, July 14, 2008); CP 316-71 (Motion for Reconsideration, July 30, 2008); CP 372-73 (Order Granting Motion to Withdraw, March 6, 2009); CP 374-76 (Order Sealing Transcript of Ex Parte Motion, March 12, 2009).

¹⁶ See, e.g., Appendix A (State v. McEnroe, No. 86084-0, State’s Motion to Modify Commissioner’s Ruling Regarding Accelerated Review).

¹⁷ This Court unanimously concluded that the trial court’s interpretation of the local rule was incorrect. See State v. McEnroe, 174 Wn.2d 795, 812, 279 P.3d 861 (2012) (“I concur with the majority’s conclusion that (1) King County Local General Rule 15 does not apply to criminal proceedings and (2) GR 15 does not require open filing of documents submitted contemporaneously with a motion to seal while the trial court considers the motion.”) (Fairhurst, J., dissenting).

¹⁸ See CP 304-09 (Reply in Support of Motion for Stay, February 8, 2013).

information. CP 122-29, 260-72. Again, the State expressed its frustration with the court's rulings and failure to properly manage the litigation so that the cases could proceed to trial.¹⁹

Article I, section 10 of the Washington Constitution mandates that justice be administered "openly and without unnecessary delay." These cases have been pending for more than six years without yet litigating a single trial motion, let alone actually trying either case. In short, the defendants are mistaken to suggest that the State's concern about the mismanagement of this litigation is of recent vintage. Moreover, because very little has happened in these cases other than litigating and re-litigating death-penalty-related motions (with more to come, according to the defendants), the third prong of the "unusual circumstances" test is satisfied, as "waste and duplication out of proportion to any gain in preserving the appearance of fairness" is simply not a concern here. Ellis, 356 F.3d at 1211.

In addition to these fundamental managerial difficulties, the State's concerns for the appearance of impartiality have increased over time based on the manner in which the trial court has exercised its authority. The trial court's dismissal of the death penalty notices in 2013 was based on a theory that the defendants never argued and barely defended on appeal,

¹⁹ See RP (1/9/14) 14-16, 24, 33-38.

and that was unequivocally rejected by this Court. State v. McEnroe, 179 Wn.2d 32, 309 P.3d 428 (2013). Even though the court admitted it had been contemplating the ruling for years, it was delivered without advance notice and immediately before McEnroe's trial was to begin. CP 279-91.

The trial court's actions put the State in a seriously compromised position on the eve of trial. It had to decipher the basis for the trial court's ruling, decide whether to seek reconsideration, and then seek emergency interlocutory review in an attempt to avoid the futility and cost of having thousands of already-summonsed King County citizens appear for a trial that would not occur. To make matters worse, the trial court denied the State's request for a stay when the 12-day "grace period" provided in the court's January 31 order expired before this Court could rule on the State's motion for discretionary review. CP 292-303. A reprieve to seek review is worthless if review cannot be *obtained* in that time period, and if the trial court allows a defendant to plead guilty to "non-capital aggravated murder" in the interim, as McEnroe was seeking to do.²⁰

²⁰ The defendants' description of this sequence of events ignores the fact that discretionary review had not been *granted* before the expiration of the trial court's 12-day grace period, when its order dismissing the notices of special sentencing proceedings would have become effective. Motion to Strike, at 11-13. Moreover, the trial court's refusal to grant a stay and the possibility that McEnroe would be allowed to plead guilty to "non-capital aggravated murder" in early February 2013 foreshadowed the trial court's expressly-stated intention a year later to entertain McEnroe's motion to plead guilty if the State did not amend the information.

Moreover, the trial court used its order denying a stay as an opportunity to bolster its reasoning in the face of pleadings filed by the State seeking discretionary review. CP 292-303. That order emphasized the trial judge’s firmly-held belief that his ruling—that it would be fundamentally unfair to try these defendants as capital defendants—was correct. *See* CP 302-03 (stating “[w]ith conviction and sincerity” the court’s confidence “in the correctness of its ruling of January 2013”).

The trial court’s handling of this novel ruling and certitude as to its correctness would understandably cause a reasonable person to question the court’s impartiality. At a minimum, this sequence of events reveals a surprising lack of foresight in managing the litigation. Still, out of respect for the trial court as an institution and this particular trial judge as a person, the State did not seek his removal in 2013, either by this Court or by motion to recuse.

In September 2013, this Court unanimously rejected the trial court’s reasoning and reversed and remanded “with instructions to reinstate the notices of special sentencing proceeding so that the capital prosecutions against McEnroe and Anderson *may finally proceed to trial.*” McEnroe, 179 Wn.2d at 46 (italics added). The cases did not proceed to trial. Instead, litigation of both new and old death penalty motions

resumed. It was only after the trial court issued its latest novel rulings that the State asked that the case be remanded to a different judge.

The defendants also attack the public nature of the State's request to reassign the case, and they lament the "discomfort" and "embarrassment" that this will cause the trial judge. Motion to Strike, at 2-3. But there is no way to *privately* make this request. The subject must be litigated openly, as it was in the many cases cited above where reassignment upon remand was granted in Washington, and as it was in the more than 600 federal cases analyzed by the law review author cited above. A request for reassignment that expresses long-standing concerns about a trial court's handling of an extremely important case is not, as the defendants allege, an attempt to embarrass or intimidate the trial judge or trial courts generally. Rather, the State's request stems from deep concern that public confidence in the entire judicial system is seriously damaged when an important case languishes for more than six years without a trial, and where all indications are that more delay is inevitable.

The defendants also argue that the trial judge's remarks about Camus are "irrelevant to admission of confessions at trial." Motion to Strike, at 4-5 n.6. The defendants mischaracterize the State's arguments, and drain the Camus reference of any meaning by discussing it out of context. To the defendants, the trial court's reasoning was nothing more

than a “fleeting reference.” Motion to Strike, at 11. But the context matters greatly, and shows otherwise.

The trial court wrote, “In a scenario *suggestive of Camus*, a defendant’s early confession and cooperation could become his downfall.” CP 290 (italics added). This reference to Camus was used to bolster the trial court’s ruling that it is fundamentally unfair to seek the death penalty against a defendant who had confessed, as these defendants did, because a similarly-situated defendant who had *not* confessed might escape the death penalty because the case against him or her was weaker. CP 290.

A reasonable person could reasonably question the trial court’s ability to rule on the admissibility of the confessions in these cases where the court has already expressed the strongly-held view that it would be fundamentally unfair, and a violation of the federal constitution, to use those confessions in seeking the death penalty against these defendants.²¹

The trial court has been unable to bring these cases to trial in six and one-half years of litigation, and recent actions and statements of the

²¹ The trial court also wrote that “[w]hile the facts and circumstances of the offense are appropriate considerations for a jury to consider when assessing mitigation at the penalty phase, the strength of the State’s case regarding the defendant’s guilt *is of no relevance*.” CP 287 (italics added). This statement is clearly erroneous. See *Woods*, 143 Wn.2d at 615 (the jury’s imposition of a death sentence was warranted based on “strong evidence” of guilt for “extremely ghastly and violently executed” murders); see also WPIC 31.03 (jurors must consider evidence from the guilt phase during the penalty phase). This statement would understandably also cause a reasonable person to question whether the trial court will remain impartial in deciding what evidence and arguments may be presented to the jury during the penalty phase.

trial court would cause a reasonable person to question whether the court will be able to put aside previously-stated erroneous views and to administer justice without unnecessary delay. The State respectfully asks this Court to order that this case be reassigned upon remand.

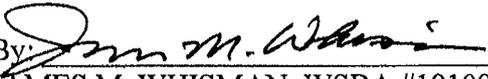
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the Opening Brief of Petitioner, the State asks this Court to issue an order reversing the trial court's rulings with opinion to follow, and to remand these cases for trial before a different department of the King County Superior Court.

DATED this 2nd day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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ANDREA R. VITALICH, WSBA #25535
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Certificate of Service by Electronic and U.S. Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

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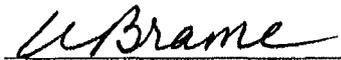
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containing a copy of the Reply Brief of Petitioner in State v. Joseph T.

McEnroe and Michele K. Anderson, Case No. 89881-2, in the Supreme Court
of 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.



Wynne Brame
Done in Seattle, Washington

Date: June 2, 2014

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Cc: Vitalich, Andrea; Whisman, Jim; O'Toole, Scott; O'Connor, Colleen; Sorenson, David; wdpac@aol.com; Hamaji, Leo; Prestia, William
Subject: RE: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 89881-2

Received 6/2/14

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.

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Cc: Vitalich, Andrea; Whisman, Jim; O'Toole, Scott; O'Connor, Colleen; Sorenson, David; wdpac@aol.com; Hamaji, Leo; Prestia, William
Subject: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 89881-2

Please accept for filing the attached documents (Reply Brief of Petitioner) in State of Washington v. Joseph T. McEnroe and Michele K. Anderson, No. 89881-2.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jim Whisman's direction.

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State v. Joseph T. McEnroe and Michele K. Anderson
Supreme Court No. 89881-2

APPENDIX A

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 86084-0
)	
vs.)	
)	
JOSEPH McENROE,)	STATE'S MOTION TO MODIFY
)	COMMISSIONER'S RULING
)	REGARDING ACCELERATED
Appellant,)	REVIEW
)	
)	
)	

1. IDENTITY OF MOVING PARTY

The respondent, the STATE OF WASHINGTON, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

The State asks this Court to modify the Commissioner's ruling that argument during the Fall term or any earlier in the Winter term than February 14, 2012 is not warranted in this case. A copy of the Commissioner's ruling is attached.

3. FACTS RELEVANT TO MOTION

Joseph McEnroe and his co-defendant, Michele Anderson, are charged with six counts of aggravated murder in the first degree for the December 24, 2007 killings of six members of Anderson's family, including two young children. As to each defendant, the State has filed a notice of intent to seek the death penalty. Although this case has been pending for nearly four years, neither defendant has yet gone to trial. A trial date is currently scheduled for October 10, 2011. However, as will be explained further below, that trial date is no longer viable.

After the trial court granted the State's uncontested motion to sever the defendants for trial on grounds that their lengthy, detailed confessions could not be redacted in accordance with the dictates of the Sixth Amendment, the State orally moved to try McEnroe first because at least two of his attorneys had been on the case since December 2007, whereas Anderson's current lead counsel had been on the case for a comparatively short time.¹ In response to this suggestion, McEnroe filed a "Motion to Waive LGR 15 for the

¹ However, this fact continues to become increasingly irrelevant with the passage of time.

Purpose of Filing Defendant's Motion to Seal Defendant's Motion to Have His Trial After Michele Anderson's Trial is Complete." CP 1-11. The gist of this motion is that McEnroe wants to provide the trial court with information regarding "the defense theory of his mitigation case" in order to support his position that Anderson should be tried first, but if the trial court were to deny McEnroe's motion to seal this information, McEnroe wants to withdraw these materials from consideration rather than have the trial court file them in accordance with LGR 15. CP 1-11.

Prior to receiving or considering any of these allegedly sensitive materials, the trial court ruled that the requirements of LGR 15 could not be waived. CP 12-16. However, the trial court also ruled "that in the event of an unfavorable ruling [on a motion to seal such materials] the court will afford counsel a minimum of 30 days to seek review before unredacted materials are filed in the public record." CP 16.

McEnroe did not file his motion regarding the order of the trials or provide any materials to the trial court in support of his position that Anderson should be tried first. Accordingly, the trial court has made no ruling as to whether these as-yet-undisclosed

materials should be sealed or not. Instead, McEnroe filed a notice of discretionary review, a motion for discretionary review, a statement of grounds for direct review, and a motion for accelerated review and/or a stay of the proceedings challenging the trial court's ruling that the requirements of LGR 15 cannot be waived. The State filed an answer, noting that the trial court had not yet denied a motion to seal, that the State would not oppose a motion to seal, that a motion to seal would almost certainly be granted if the materials were as sensitive as McEnroe claimed, and that the trial court had afforded McEnroe a 30-day window in which to seek review in the unlikely event that a motion to seal were to be denied. In other words, the State pointed out that the issue was not ripe and that McEnroe was seeking an advisory ruling from this Court via interlocutory appeal. Nonetheless, the Commissioner granted McEnroe's motion for a stay of proceedings, and on July 12, 2011, this Court granted discretionary and direct review.

The State then filed a motion for accelerated review. McEnroe joined in the State's request for accelerated review and proposed a timetable for briefing and argument that was agreed upon between the parties, including an oral argument date of

October 18, 2011.² Despite the parties' agreement that accelerated review was appropriate on the proposed timetable, on September 8, 2011, the Commissioner granted the motion for accelerated review only insofar as setting the oral argument for February 14, 2012.³ The Commissioner stated that Anderson's trial "is not imminent in any event" because she is "pending an evaluation of her competency" and has a pending motion for discretionary review in the Court of Appeals regarding funding for an expert, and concluded that "there is no urgency" in setting an earlier oral argument date.

The Commissioner discounted the imminence of the October 10, 2011 trial date in a capital murder case that is fast approaching its fourth anniversary based on faulty factual premises.

Unbeknownst to the Commissioner, the Court of Appeals denied Anderson's motion for discretionary review on August 30, 2011. A copy of that ruling is attached. In addition, the report from Western

² This date was proposed because a civil case presenting a related issue is being argued on that date. See Clark v. Smith, No. 84903-0.

³ The Commissioner also denied Michele Anderson's motion to be named a party to the appeal; however, the Commissioner granted Anderson status as *amicus curiae*.

scheduled for February 2012, and given that there is no way of knowing how long it will take for this Court to issue an opinion, it is not an unrealistic estimate that the soonest a trial date could be set under the current timetable is a year or more from now. This is simply unacceptable for a case involving six murder victims -- and their families -- that has already languished for nearly four years.

As the State explained when opposing discretionary review, this case involves an issue that is not actually ripe for review; the trial court has not yet ruled on McEnroe's motion to seal because the trial court has not yet been provided with the allegedly sensitive materials in question. Moreover, the motion concerns only how the trial court should go about deciding who should be tried first. Once this Court issues a decision, the trial court will still have to consider material that is submitted and then make a decision. Undoubtedly, the defendant who is told to go first will likely seek review again in this Court. And the delay will continue.

To bring this case effectively to a standstill (as the trial court has stated it will not set a trial date for either defendant until this appeal is resolved) works an even greater injustice when the State must wait for an advisory opinion on an issue that, in all likelihood,

would have been moot in any event. In the meantime, as the case continues to languish, witnesses' memories continue to fade, the victims' family members continue to be frustrated, huge sums of scarce taxpayer monies continue to be expended, and justice is stalled.

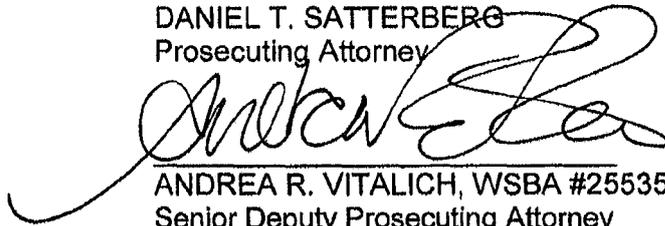
This interlocutory appeal concerns a narrow legal issue. Only 30 pages of clerk's papers have been designated, and no verbatim report of proceedings is necessary. Therefore, as the parties have already agreed, the parties can certainly be prepared to present this appeal on an accelerated timetable.

According to this Court's website, only three oral arguments have been scheduled for the following dates during the Fall term: October 18, 25, and 27, and November 10, 2011. In addition, this Court's Winter term begins in January 2012. Although the Commissioner stated in his ruling that the Court's calendar was "full," the State respectfully asks this Court to consider setting this case in the Fall term, as a special setting, or at the least earlier in the Winter term.

For all of the reasons set forth above, the State asks this Court to modify the Commissioner's ruling under RAP 17.7.

Submitted this 15th day of September, 2011.

DANIEL T. SATTERBERG
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Andrea R. Vitalich', written over a horizontal line.

ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
SUPREME COURT
STATE OF WASHINGTON
SEP -8 P 1:21
BY DONALD R. CARPENTER
CLERK

STATE OF WASHINGTON,
Respondent,
v.
JOSEPH THOMAS McENROE,
Petitioner.

NO. 86084-0
RULING

The King County Prosecuting Attorney has charged Joseph McEnroe and Michele Anderson with aggravated first degree murder, and is seeking the death penalty. The superior court has severed their trials. The State orally moved to try Mr. McEnroe first. In connection with that motion and his apparent request to be tried second, Mr. McEnroe wished to present the superior court with information gathered to support his mitigation defense should a penalty phase trial take place, including possible mental health mitigation. Fearing that the revelation of these materials would be detrimental to his defense, Mr. McEnroe moved to present the materials under seal. But believing that under a local rule (LGR 15) the materials would be filed in the public record if his motion to seal was denied, Mr. McEnroe moved the superior court to waive the local rule for the purpose of filing his motion to seal. And in the event the court denied his motion to seal, he asked for the opportunity to seek review of the ruling prior to openly filing the documents, and the opportunity to withdraw the substantive motion and the supporting documents before they are unsealed.

Ms. Anderson then joined in Mr. McEnroe's motion, asking that LGR 15 also be waived with respect to her motion to seal a supplemental declaration she

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sought to file in connection with motions to continue her trial date and to be tried after Mr. McEnroe.

In an order issued on May 24, 2011, the superior court denied the motion to waive LGR 15 and adopted that rule as the protocol in both prosecutions. The court also denied the defendants' request to be able to withdraw their motions and supporting documents in the event of an unfavorable ruling on their motions to seal. But the court agreed that Mr. McEnroe and Ms. Anderson should be given 30 days to seek review of any ruling on the motion to seal, and said that the court would file the unredacted materials under seal for at least 30 days to permit them the opportunity to seek review.

Only Mr. McEnroe filed a motion for discretionary review of the May 24 order, seeking review directly in this court. He also moved for accelerated review or a stay of proceedings. I issued a temporary stay of the superior court's order and of proceedings relating to the underlying issue of the order of trials, and on July 12, 2011, this court granted discretionary review and continued the stay. The State subsequently filed a motion for accelerated review, and Ms. Anderson filed a motion to be named a party in interest and for permission to submit responsive briefs. These motions are now before me for consideration.

As to the State's motion for accelerated review, the docket for the Fall session is full, and thus oral argument cannot be accelerated to one of the established argument dates. And there is no urgency requiring the holding of a special argument during this session. Although a ruling on the order of the trials will be delayed pending the outcome of this review proceeding, Ms. Anderson's trial is not imminent in any event. She evidently has obtained a stay of proceedings against her pending an evaluation of her competency to stand trial and pending discretionary review by the

Court of Appeals of a superior court order denying her funding for experts.¹ Nonetheless, argument can be scheduled for a date early in the Winter session, and the briefing schedule can be accelerated accordingly, as will be specified below.

With respect to Ms. Anderson's motion, I am not persuaded that she should be granted party status. Following severance, Mr. McEnroe and Ms. Anderson are being separately prosecuted. Ms. Anderson was an aggrieved party as to the denial of the motion to waive LCR 15, entitling her to seek appellate review, *see* RAP 3.1, but she chose not to do so. She explains that she did not seek review because she determined she had sufficient basis for her motion to continue her trial without having to disclose confidential materials. But that was her choice. It would be unfair in this circumstance to grant Ms. Anderson party status. Nonetheless, I agree with Ms. Anderson that she should be heard on this matter, and that a brief from her may assist the court. Therefore, Ms. Anderson is granted *amicus curiae* status, and will be permitted to file a brief as such.

The State's motion for accelerated review is granted to the extent that the briefing schedule is accelerated and oral argument will be held early in the Winter session. Ms. Anderson's motion to be named a party to the motion for discretionary review is denied, but she is granted *amicus curiae* status and permission to file an *amicus* brief. Mr. McEnroe's opening brief will remain due as scheduled on September 26, 2011. The State's brief will be due within 30 days after service of Mr. McEnroe's brief, and Mr. McEnroe's reply brief will be due within 15 days after service of the State's brief. Ms. Anderson must file and serve her *amicus curiae* brief within 30 days after service of the State's brief, and any answer to the *amicus* brief

¹ Court of Appeals Commissioner Neel denied the motion for discretionary review on August 30, 2011. No. 67310-6-I. Ms. Anderson has until September 29, 2011, to file a motion to modify the commissioner's ruling. RAP 17.7.

will be due within 15 days after service. No extensions of time will be granted for any of these briefs. Oral argument will be heard on the afternoon of February 14, 2012.


COMMISSIONER

September 8, 2011

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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August 30, 2011

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CASE #: 67310-6-I
State of Washington, Respondent v. Michele Kristen Anderson, Petitioner
King County No. 07-1-08717-2 SEA

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 30, 2011, regarding petitioner's motion for discretionary review:

RULING ON DISCRETIONARY REVIEW
State v. Michele Anderson, No. 67310-6-I
August 30, 2011

In this capital murder case, Michelle Anderson seeks discretionary review of a trial court order denying her motion to revise the decision of the Office of Public Defense (OPD) denying Anderson's request for the expenditure of public funds for expert services. Anderson sought to file her motion for discretionary review ex parte or under seal in this court, as she did in the trial court.

On July 28, 2011, I ruled as follows:

Under CrR 3.1(f), Anderson's motion to revise OPD's decision was filed ex parte. The State agrees that CrR 3.1(f) makes clear that the defense is permitted to seek funding without disclosing information to the State. The State argues, however, that there are interests that will be unrepresented if Anderson's motion for discretionary review is considered by this court without an adversary's answer. The State suggests options that would allow an adversary's answer without the State being privy to confidential information, such as appointing an amicus.

The question before me at this juncture is very narrow. I conclude that Anderson's motion for discretionary review and any attachments or appendices to the motion, such as copies of the motion and supporting documents that were before the trial court, shall be filed under seal. This court will be in a better position to determine whether an amicus should be appointed to oppose the motion for discretionary review after the motion has been filed.

On August 4, 2011, Anderson filed her motion for discretionary review under seal. Under CrR 3.1(f), an indigent defendant is entitled to the appointment of experts if the services are necessary to the defense. State v. Hoffman, 116 Wn.2d 51, 90, 804 P.2d 577 (1991). The determination is within the trial court's informed discretion. Id. Thus, if discretionary review were granted, this court would review the trial court's decision for an abuse of discretion.

Anderson argues that she has demonstrated a particularized showing that the requested services are necessary and that it is not mere conjecture that the proposed expert services are reasonably likely to produce helpful evidence supporting a potential defense argument. While there may be some showing that the evidence could prove helpful, for the reasons stated by OPD, Anderson has not demonstrated that the requested services are necessary to the defense. Discretionary review is denied.

Page 3 of 3
67310-6-I, State v. Michele Kristen Anderson
August 30, 2011

Therefore, it is

ORDERED that the motion for discretionary review and appendices and attachments shall remain sealed; and it is

ORDERED that discretionary review is denied, and review is dismissed.

Mary S. Neel
Commissioner

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

c: The Hon. Jeffrey Ramsdell

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, William Prestia, and Leo Hamaji, the attorney for the appellant, at The Defender Association, 810 3rd Ave., Suite 800, Seattle, WA 98104-1695, containing a copy of the State's Motion to Modify Commissioner's Ruling, in STATE V. JOSEPH MCENROE, Cause No. 86084-0, 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.

uBrame
Name
Done in Seattle, Washington

9/15/11
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 Society of Counsel Representing Accused Persons, 1401 E. Jefferson St., Suite 200, Seattle, WA 98122-5570, containing a copy of the State's Motion to Modify Commissioner's Ruling, in STATE V. JOSEPH MCENROE, Cause No. 86084-0, 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.

U Brame

Name

Done in Seattle, Washington

9/15/11

Date

Certificate of Service by Electronic and U.S. Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

Attorneys for Respondent McEnroe:

Leo J. Hamaji, WSBA No. 18710
William Prestia, WSBA No. 29912
Kathryn Lund Ross, WSBA No. 6894
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Attorneys for Respondent Anderson:

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containing a copy of Appendix A to the Reply Brief of Petitioner in State v. Joseph T. McEnroe and Michele K. Anderson, Case No. 89881-2, in the Supreme Court of 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.



Wynne Brame
Done in Seattle, Washington

Date: June 2, 2014

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, June 02, 2014 11:28 AM
To: 'Brame, Wynne'
Cc: Vitalich, Andrea; Whisman, Jim; O'Toole, Scott; O'Connor, Colleen; Sorenson, David; wdpac@aol.com; KERwriter@aol.com; Hamaji, Leo; Prestia, William
Subject: RE: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 89881-2

Rec'd 6-2-14

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: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
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Subject: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 89881-2

Please accept for filing the attached documents (Appendix A) in State of Washington v. Joseph T. McEnroe and Michele K. Anderson, No. 89881-2.

Thank you.

James M. Whisman
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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jim Whisman's direction.

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