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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

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PHILLIP SCOTT NUMRICH,

Appellant.

v.

STATE OF WASHINGTON,

Respondent.

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APPELLANT'S REPLY IN SUPPORT OF MOTION FOR DIRECT  
DISCRETIONARY REVIEW

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**A. ARGUMENT IN REPLY**

**1. This Court Should Accept Direct, Discretionary Review Under RAP 4.2(a)(4) and RAP 2.3(b)(4)**

After significant litigation, the superior court declined to sign the State's lengthy proposed order denying the defendant's motion to dismiss based on the general-specific rule. Instead, the superior court certified this issue pursuant to RAP 2.3(b)(4), finding that this issue "involves controlling questions of law as to which there are substantial grounds for a difference of opinion and that immediate review of the Order may materially advance the ultimate termination of the litigation." The whole purpose of RAP 2.3(b)(4) is to give the superior court a clear mechanism to signal to the appellate court that the certified issue is uniquely appropriate for immediate interlocutory review.<sup>1</sup> Although not binding on this court, the considered opinion of the trial court judge should carry significant weight.

Contrary to the State's suggestion that the claimed basis for review is simply that Numrich "has come up with an interesting argument or legal theory as to why the court was wrong" (*see* SAMDR at 17-18), it is clear

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<sup>1</sup> The State cites to *Morning Star Boys Ranch*, 156 Wn.App. 457, 462 (2010) and *In re Dependency of Grove*, 127 Wn.2d 221, 235 (1995) for the proposition that, even where the requirements of RAP 2.3(b)(4) have been met, there is "still a heavy presumption" that discretionary review is not appropriate. State's Answer to Motion for Discretionary Review ("SAMDR") at 16-17. But neither *Morning Star* nor *Grove* dealt with certified issues pursuant to RAP 2.3(b)(4) and do not support the State's claimed proposition.

that this issue involves a legal question as to which there is substantial ground for a difference of opinion, as recognized by the superior court.

The State attempts to minimize this novel prosecution by suggesting that this is “actually a very narrow question that impacts a *very* small number of employers.” SADR (State’s Answer to Statement of Grounds for Direct Review) at 7 (emphasis in original). But in any particular case where direct review is sought under RAP 4.2(a)(4), the question is whether the particular circumstances of that case raise an issue that has broader import. The prosecution of an employer for manslaughter for an employee death is precisely the kind of issue on which Washington employers need prompt determination. Every day, all around Washington, many thousands of workers are in dangerous situations on construction sites, scaffolding, cranes, excavation sites, forestry jobs, maritime situations, and railroad operations. The novelty of this general manslaughter prosecution creates an incredible uncertainty regarding whether Washington employers are criminally liable for felony manslaughter for safety violation deaths. This issue calls out for prompt appellate review.

2. **The Decision Substantially Alters the Status Quo Under RAP 2.3(b)(2)**

The State argues that Numrich has failed to establish that the decision substantially alters the status quo or limits the freedom of a party

to act. SAMDR at 6-7. But to suggest that this does not substantially alter the status quo ignores the obvious: this is the first time the State has ever charged an employer with manslaughter related to a workplace safety violation death.

The State argues that “[a] trial court’s denial of a motion to dismiss is generally insufficient to establish the effect prong of RAP 2.3(b)(2).” SAMDR at 7. But this is no ordinary motion to dismiss. This is a novel manslaughter prosecution of an employer. That the King County Superior Court criminal motions judge certified for interlocutory review the denial of this motion confirms the uniqueness of this issue.

**3. The Trial Court’s Decision was Probably Erroneous under RAP 2.3(b)(2)**

The State concedes that “[i]t is well-established that when a defendant’s actions violate both a specific and a general statute, the defendant should typically be charged under the former rather than the latter. SAMDR at 8 (*citing State v. Shriner*, 101 Wn.2d 576, 580 (1984)(defendant who failed to return rental car could not be charged under general theft statute and should have been charged only with specific criminal possession of a rental car statute)).

**a. The State Incorrectly Characterizes the Issue as Involving an Analysis of whether the Statutes Contain Different Elements.**

In an attempt to contrast second degree manslaughter with RCW 49.17.190(3), the State incorrectly asserts that “[o]ne way of determining [if the general specific rule applies] is to examine the elements of the statutes. If the statutes create crimes with different elements, they simply criminalize different conduct and the rule does not apply.” SAMDR at 8 (citing *State v. Farrington*, 35 Wn.App. 799, 802 (1983)).<sup>2</sup> See also State’s Answer to Statement of Grounds for Direct Review (“SADR” at 3-4). Rather, this Court has explained that the test is whether the statutes are concurrent: “[W]e have consistently applied the rule that when two statutes are concurrent, the specific statute prevails over the general.” *State v. Danforth*, 97 Wn.2d 255, 257 (1982)(work release inmates could not be charged under general escape statute and should have been charged only under the specific failure to return to work release statute).

**b. The Two Statutes are Concurrent**

The general and specific statutes are concurrent in all respects. The manslaughter statute targets all persons and applies where a person engages in culpable conduct that causes the death of another. The specific statute targets a narrow class of persons (employers) and applies where that

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<sup>2</sup> *Farrington* does not stand for the cited proposition. The next sentence in the opinion clarifies that “the test is whether a violation of the special statute necessarily violates the general statute.” *Farrington*, 35 Wn.App. at 802. Indeed, the presence of two statutes with different elements is assumed in any general-specific analysis.

employer engages in culpable conduct that causes the death of a narrow subclass of persons (employees).

The State's reliance on an analysis of the "differences" between the two statutes fails to acknowledge that proof of a higher mental state necessarily establishes proof of a lower mental state. *See* RCW 9A.08.010(d)(2)("[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly"). Therefore, the *mens rea* of second degree manslaughter – criminal negligence - is established in every violation of RCW 49.17.190(3), which requires a "willfully and knowingly" mental state. Despite months of litigation, the State has still offered no legally plausible hypothetical scenario under which it would be possible to violate RCW 49.17.190(3) but not RCW 9A.32.070.<sup>3</sup>

**c. *State v. Gamble's* Discussion of the Mental State for Manslaughter Second Degree is *Dicta* and Requires Clarification from this Court**

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<sup>3</sup> Citing to its Response in the trial court, the State claimed that it "set forth a number of hypothetical examples in which a defendant would have violated RCW 49.17.190(3) but would not have violated RCW 9A.32.070." SAMDR at 12. But Mr. Numrich demonstrated why none of the State's hypotheticals passed muster. *See* Defendant's Reply in Support of Motion to Dismiss Count 1 at 7-10 (attached hereto as Appendix A, as it was not appended to Numrich's Motion for Discretionary Review).

To distinguish second degree manslaughter from RCW 49.17.190(3), the State tries to read into the second-degree manslaughter statute an additional element related to the death of the victim. *See, e.g.*, SAMDR at 10 (“the crime of manslaughter requires proof of the defendant’s mental state *vis-à-vis the death of the victim*”). Relying on *State v. Gamble*, 154 Wn.2d 457 (2005), the State claims that “Numrich presents no compelling argument as to why the *mens rea* for first-degree manslaughter would specifically relate to the risk of the decedent’s death but the *mens rea* for second-degree manslaughter would not.” SADR at 4.

But “recklessness” and “criminal negligence” are categorically different regarding the defendant’s knowledge. A person “acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur...” RCW 9A.08.010(1)(c)(emphasis supplied). By contrast, one “acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur...” RCW 9A.08.010(1)(d)(emphasis supplied). Therefore, in second degree manslaughter, the defendant’s mental state “*vis-à-vis*” the death of the victim is *nothing* - it is a “*fail[ure] to be aware.*” Accordingly, there is no additional element or “object” of the mental state.

The State seizes on one sentence in *Gamble* to support its argument: “[M]anslaughter *does* require proof of a mental element *vis-à-vis* the

killing. See RCW 9A.32.060(1)(a)(recklessness); see also RCW 9A.32.070(1) criminal negligence.” SADR at 5 (quoting *Gamble* 154 Wn.2d at 469)(emphasis in original).

But *Gamble* considered a narrow issue: “[t]he sole dispositive issue before the court is whether *first degree manslaughter* is a lesser included offense of second degree felony murder where assault, as defined in RCW 9A.36.021(1)(a), is the predicate felony.” *Gamble*, 154 Wn.2d at 462 (emphasis supplied). *Gamble* was charged with felony murder. *Id.* at 460. The trial court denied his request for “the offense of *first degree manslaughter* as a lesser included offense.” *Id.* (emphasis supplied). Following conviction, the felony murder conviction was reversed pursuant to *In re Andress*, 147 Wn.2d 602 (2002). *Gamble*, 154 Wn.2d at 461.

On appeal, this Court explained that in a prosecution for second degree felony murder based on a predicate charge of assault in the second degree, “the State was required to prove only that *Gamble* acted intentionally and ‘disregard[ed] a substantial risk that [*substantial bodily harm*] may occur.’” *Gamble*, 154 Wn.2d at 467–68 (internal citations omitted)(Supreme Court’s emphasis). But “[l]ooking to the ‘wrongful act’ caused by a defendant’s actions, to prove manslaughter [in the first degree] the State must show *Gamble* ‘[knew] of and disregard[ed] a substantial risk that a [*homicide*] may occur.’” *Id.* (emphasis in original)

Accordingly, *Gamble*'s analysis turned on the distinction between an element in the predicate felony – disregard of substantial bodily harm – and an element in the first degree manslaughter – disregard of a substantial risk of a *homicide*. Therefore, the operative part of *Gamble* is not the relationship between the mental state and the death – frequently referred to by the State as the “object” of the mental state – but rather the distinction between bodily harm (in the predicate assault felony) and death.

*Gamble*'s holding was limited to first degree manslaughter: “We hold that first degree manslaughter is not a lesser included offense of second degree felony murder where second degree assault, as defined in RCW 9A.36.021(1)(a), is the predicate felony.” Accordingly, the State's attempts to stretch *Gamble* to create a new “element” in second degree manslaughter are misguided. Second degree manslaughter has a mental state of criminal negligence, which requires *no* knowledge.<sup>4</sup> This Court is in the best position to resolve *Gamble*'s lack of clarity recognized by lower courts.

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<sup>4</sup> The State's reliance on comments to the Washington Pattern Jury Instructions is circular, because the sole authority for the comments in WPIC 10.04 and 28.06 is *Gamble* itself. See Comments to WPIC 10.04 and 28.06. And more recent cases to interpret *Gamble* have only added to the confusion. See, e.g., *State v. Henderson*, 180 Wn.App. 138, 148 (2015)(noting that *Gamble* does “not address whether second degree manslaughter's criminal negligence element requires demonstrating that the defendant failed to be aware of a substantial risk that a homicide (rather than ‘a wrongful act’) may occur...we assume without deciding that the mens rea of criminal negligence requires the failure to be aware of a substantial risk that a homicide may occur”); *State v. Latham*, 183 Wn.App. 390, 405 (2014)(holding that *Gamble*'s reasoning applies to second degree manslaughter by relying on *Henderson*). Moreover, the Committee's reliance on *Gamble* is decidedly tepid. See, e.g., Comment to WPIC 10.04 (“...the definition of criminal negligence is likely more

**d. The “Gravamen” and “Obvious Point” of RCW 49.17.190(3) is to Criminalize Precisely these types of Safety Related Workplace Deaths**

The State argues that the Court should focus on a generalized assessment about the “gravamen” and “obvious point” of the statutes. *See* SADR at 11. Under such an analysis, the general-specific rule is most-definitely violated in Mr. Numrich’s case. The “*gravamen*” of RCW 49.17.190(3) – enacted by the legislature as part of WISHA – is that it was intended for situations where employees die as a result of safety violations. The prosecution against Mr. Numrich – an employer charged for the death of his employee on the jobsite – is based on a litany of alleged safety violations and is supported by a Washington State Department of Labor and Industries investigation. Few cases fit more squarely within the gambit of RCW 49.17.190(3) than the prosecution of Mr. Numrich.

**B. THE COURT SHOULD STRIKE ALL REFERENCES TO THE STATE’S 11<sup>TH</sup> HOUR ATTEMPT TO ADD A CHARGE OF MANSLAUGHTER IN THE FIRST DEGREE**

On October 18, 2018, nearly ten months after this case was filed, and two months after the superior court had concluded lengthy proceedings regarding the propriety of the felony homicide charge and certified the issue to the appellate courts, the State notified the defense that it was intending to

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particularized...”; “...the Supreme Court has implied that criminal negligence involves a substantial risk that a *death* may occur”)(underline supplied; italics in original).

amend the charges to add a new felony homicide offense. The notification came the same day that the State's Response pleadings were due in the Supreme Court.

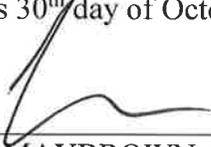
The State's attempt to add Manslaughter in the First Degree is not well taken. Rather, it is the product of gamesmanship, violates fundamental principles of estoppel, prejudices Mr. Numrich's substantial rights, constitutes prosecutorial vindictiveness, is not supported by probable cause, and violates the same general-specific rule that has been the subject of months of litigation. The defense is objecting and seeking discovery regarding the State's tactics, which were an obvious attempt to influence this Court's decision on the eve of oral argument.

Accordingly, the Court should strike and disregard any mention in the State's briefing to a proposed Manslaughter First Degree charge and any pleadings that were not part of the trial court record on the certified issue.

**C. CONCLUSION**

For the foregoing reasons, the Court should grant discretionary review and reverse the superior court decision.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2018.

  
\_\_\_\_\_  
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Attorneys for Appellant

**PROOF OF SERVICE**

Alexandra Olson swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 30<sup>th</sup> day of October, 2018, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply in Support of Motion for Discretionary Review to attorneys for Respondent (who will also be served via the Appellate Court E-File Portal):

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

And mailed to Appellant Phillip Numrich.

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

  
\_\_\_\_\_  
Alexandra Olson, Legal Assistant

# APPENDIX A

Judge John Chun  
June 26, 2018 at 1:30 p.m.

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,  
  
Plaintiff,

v.

PHILLIP SCOTT NUMRICH,  
  
Defendant.

NO. 18-1-00255-5 SEA

REPLY IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS COUNT 1  
(MANSLAUGHTER)

**I. INTRODUCTION**

On June 13, 2018, the State filed its Response to Defendant's Motion to Dismiss Count 1 ("Response"). This memorandum is submitted by way of reply to some of the arguments in the State's Response.

The State's Response is based upon a series of mistaken or false premises. First, the State claims that Washington's general-specific rule is no different than any other tool of statutory construction. Second, the State mistakenly claims the statutes at issue are not concurrent because WISHA's criminal liability statute (RCW 49.17.190(3)) contains no causation requirement. Third, the State references OSHA without noting that a central premise of OSHA was to delegate to states the authority to manage and enforce their own occupational health and safety regulatory schemes,

1 which is precisely what Washington did in 1973 when it enacted RCW 49.17.190(3) to provide  
2 for criminal prosecutions of workplace fatalities. Fourth, the State argues that other courts have  
3 rejected “similar” arguments, without noting that these other cases involved the question of federal  
4 preemption and not the application of a general-specific doctrine such as exists in Washington.  
5 Fifth, in an effort to rewrite WISHA’s explicit criminal statutory scheme, the State strains to apply  
6 other canons of statutory construction, while ignoring the plain reading of the statute and clear  
7 legislative intent. Finally, even though this is the first instance in which an employer has ever been  
8 charged with manslaughter for a workplace accident, the State argues that there is no equal  
9 protection violation in this case. The State’s claims are untenable.

## 10 II. DISCUSSION

### 11 A. Washington’s General-Specific Rule is a Necessary Check on 12 Prosecutorial Discretion.

13 Since as early as 1970, Washington has applied its own, unique version of the “general-  
14 specific rule” when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 Wn.2d 9 (1970).  
15 This rule provides that “where a special statute punishes the same which is [also] punished under  
16 a general statute, the special statute applies, and the accused can be charged only under that  
17 statute.” *State v. Shriner*, 101 Wn.2d 576, 580 (1984) (*quoting State v. Cann*, 92 Wn.2d 193, 197  
18 (1979)). The purpose of the general-specific rule is to preserve the legislature’s intent to penalize  
19 specific conduct in a particular (and less onerous) way and hence to minimize sentence disparities  
20 resulting from unfettered prosecutorial discretion. *See id.* at 581-83. If the prosecutor had  
21 discretion to charge under either statute, he or she could always choose the general statute if it  
22 requires proof of fewer or lesser elements. *See State v. Alfonso*, 41 Wn.App. 121, 126 (1985).  
23 “This result is an impermissible potential usurpation of the legislative function by prosecutors.”  
*State v. Danforth*, 97 Wn.2d 255, 259 (1982).

1 Washington’s general-specific rule for criminal cases is not merely an aid to statutory  
2 construction. Rather, as explained by the Washington Supreme Court, it is a “rule” of clear  
3 application – and a rule with a very specific purpose: “The general-specific rule is a means of  
4 answering the question, Did the legislature intend to give the prosecutor discretion to charge a  
5 more serious crime when the conduct at issue is fully described by a statute defining a less serious  
6 crime?” *State v. Albarran*, 187 Wn.2d 15, 20 (2016). The answer to this question is always “no,”  
7 unless it is clear that the legislature intended to make the general statute controlling. *See*  
8 *Defendant’s Motion* at 9 (*citing* several examples where Washington courts have held that a more  
9 specific criminal statute applied).

10 Here, there is every reason to believe that the legislature intended to make the specific  
11 statute - Violation of Labor Safety Regulation with Death Resulting as defined in RCW  
12 49.17.190(3) – controlling in all cases in which a worker dies during a workplace accident. And  
13 there is no indication that the legislature intended to make the general statute (Manslaughter in the  
14 Second Degree) controlling in such an instance. As the State must concede, there is nothing within  
15 WISHA’s statute or legislative history which would overcome an argument that the general-  
16 specific rule is controlling in this instance.

17 **B. These Two Statutes Are Concurrent.**

18 The State has charged Mr. Numrich with a violation of both the general criminal statute  
19 (Manslaughter in the Second Degree) and specific criminal statute (Violation of Labor Safety  
20 Regulation with Death Resulting) within the same charging document. The State has relied  
21 upon the very same factual allegations to support these two charges. Nevertheless, the State  
22 claims that these two statutes are not concurrent.

1 In order to determine whether two statutes are concurrent, this Court must examine the  
2 elements of each statute to determine whether a person can violate the specific statute without  
3 necessarily violating the general statute. *See, e.g., Shiner*, 101 Wn.2d at 580-81. It is irrelevant  
4 that the specific statute may contain elements not found in the general statute. *See id.* at 580.  
5 Here, it is evident that each violation of the specific statute would necessarily support a  
6 conviction under the general statute.

7 The general statute, Manslaughter in the Second Degree, is violated when, “with  
8 criminal negligence, [the defendant] causes the death of another person.” RPC 9A.32.071. A  
9 person acts with criminal negligence:

10 when he or she fails to be aware of a substantial risk that a wrongful act may  
11 occur and his or her failure to be aware of such substantial risk constitutes a  
12 gross deviation from the standard of care that a reasonable person would exercise  
13 in the same situation.

14 RCW 9A.08.010(1)(d). By its terms, a person may act with criminal negligence even if she is  
15 unaware that there is a substantial risk that a homicide may occur. *See, e.g., State v. Latham*,  
16 183 Wn.App. 390, 405-06 (2014). *See also* WPIC 28.06; WPIC 25.02. Thus, unlike  
17 Manslaughter in the First Degree which requires proof of criminal recklessness, Manslaughter  
18 in the Second Degree does not require proof that the defendant was consciously aware of the  
19 risk of death.<sup>1</sup>

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20 <sup>1</sup> Citing the decision in *State v. Gamble*, 154 Wn.2d 457 (2005), the State claims that the offense of  
21 Manslaughter in the Second Degree requires proof that the defendant’s mental state specifically related  
22 to the risk of death. *See* Response at 10-11. In *Gamble*, the Washington Supreme Court noted that  
23 Manslaughter in the First Degree required proof that the defendant knew of, and disregarded, a risk that  
death might occur. Manslaughter in the Second Degree has no affirmative requirement that the  
defendant be aware of the risk of death. To date, there is no reported decision which provides that this  
same analysis applies in the negligence context. For, to prove criminal negligence, there is no need to  
prove that the defendant had any awareness of the risk in question.

1           The specific WISHA statute, RCW 49.17.190(3), is unambiguously tailored to  
2 workplace fatalities where death results from the violation of a labor safety regulation. Under  
3 WISHA’s criminal liability statute, an employer is guilty of a crime when he or she “willfully  
4 and knowingly violates [clearly delineated safety standards] and that violation *caused* death to  
5 any employee. . .” *Id* (emphasis supplied). Thus, the specific statute requires proof that (1) an  
6 employer knowingly violated clearly delineated safety standards and (2) the violation caused  
7 the death of an employee.

8           The general and specific statutes are concurrent in all respects. The manslaughter statute  
9 targets all persons, and it applies in every case where a person engages in culpable conduct that  
10 causes the accidental death of another person. The specific statute targets a narrow class of  
11 persons (employers) and it applies in each case where that employer engages in culpable  
12 conduct that causes the accidental death of a narrow subclass of persons (an employee).

13                   **1. Proof of Criminal Negligence Establishes Proof of**  
14                   **Knowledge As a Matter of Law. Therefore, the *Mens Rea* for**  
15                   **Manslaughter in the Second Degree is Established in Every**  
                      **Violation of WISHA’S Criminal Liability Statute.**

16           It is true that these two statutes define different *mens rea* elements. The general statute  
17 (Manslaughter in the Second Degree) requires proof of criminal negligence, while the specific  
18 statute (Violation of Labor Safety Regulation with Death Resulting) requires proof of knowing  
19 conduct. But the Washington legislature has already made clear that manslaughter’s lower  
20 *mens rea* requirement is established in each and every case involving knowing conduct. RCW  
21 9A.08.010(1) creates a hierarchy of mental states, with intent representing the highest (most  
22 culpable) mental state and criminal negligence representing the lowest (least culpable). *See*  
23 *State v. Shipp*, 93 Wn.2d 510, 515 (1980). Within this hierarchy, “proof of a higher mental

1 state is necessarily proof of a lower mental state.” *State v. Acosta*, 101 Wn.2d 612, 618 (1984).  
2 As RCW 9A.08.010(d)(2) provides in pertinent part: “When a statute provides that criminal  
3 negligence suffices to establish an element of an offense, such element also is established if a  
4 person acts intentionally, knowingly, or recklessly.” *Id.* So, under Washington law, the *mens*  
5 *rea* element of Manslaughter in the Second Degree is established in every case that a person is  
6 guilty of a violation of RCW 49.17.190(3). The defense assumes that the jury would be so  
7 instructed at any trial in this case. *See* WPIC 10.04.

8 **2. The State’s Response Ignores the Causation Requirement in**  
9 **Both Statutes.**

10 In an effort to sidestep this issue, the State claims that WISHA’s criminal liability statute  
11 is not concurrent with the manslaughter statute because RCW 49.17.190(3) requires no  
12 connection between the wrongful act and the resulting death. *See Response* at 13. In advancing  
13 this premise, the State seems to argue that RCW 49.17.190(3) includes no causation  
14 requirement. To quote the State’s brief:

15 Moreover, the laws are directed at different conduct. Read as a whole, the  
16 gravamen of the crime of manslaughter is that the defendant negligently caused  
17 the death of another. In contrast, the gravamen of RCW 49.17.190(3) is that  
18 the defendant knowingly violated a health or safety regulation and that *an*  
19 *employee happened to die as a result.*

20 Response at 13 (emphasis supplied).

21 But RCW 49.17.190(3) contains no such language. In fact, the unambiguous language  
22 of RCW 49.17.190(3) specifically provides for liability only where there is proof that the  
23 defendant’s “violation *caused death* to an employecc.” *Id.* (emphasis supplied). RCW  
49.17.190(3) is not violated in every case where there is a safety violation and the worker  
“happened to die” at a jobsite. Rather, as in all homicide cases, the State must prove a direct

1 causal connection – both “but for” cause and “proximate” or “legal” cause – between the  
2 wrongful conduct and the death of the employee.

3 Generally, cause of death is a fact question for the jury. *See, e.g., State v. Engstrom*, 79  
4 Wn.2d 469, 476 (1971). “In crimes which are defined to require specific conduct resulting in  
5 a specified result, the defendant's conduct must be the ‘legal’ or ‘proximate’ cause of the result.”  
6 *State v. Rivas*, 126 Wn.2d 443, 453 (1995). This causation element is captured in WPIC 25.02.  
7 *See Appendix A*. A defendant’s conduct is not a proximate cause of the death if, although it  
8 otherwise might have been a proximate cause, a superseding cause intervenes. *See, e.g., State*  
9 *v. Meekins*, 125 Wn.App. 390, 397-98 (2005). This causation element is captured within WPIC  
10 25.03. *See id.* The Washington legislature clearly contemplated these requirements when it  
11 included a causation element within RCW 49.17.190(3).

12 **3. The State’s Hypotheticals Do Not Advance Scenarios Where**  
13 **the Employer is Criminally Liable for a Violation of Labor**  
14 **Safety Regulation with Death Resulting Because In Both**  
15 **Scenarios the Employer’s Actions Were Not the Legal Cause**  
**of the Employee’s Death. Rather, Intervening Acts Operate**  
**to Relieve the Employer of Criminal Liability.**

16 Nevertheless, building on its own false construct, the State now posits two (somewhat  
17 outlandish) hypothetical scenarios in support of the assertion that the specific statute can be  
18 violated in cases which do not also amount to Manslaughter in the Second Degree. Not only  
19 do the proffered scenarios fail to advance the State’s position, but they help to confirm that  
20 these statutes are concurrent.

21 First, the State presents a scenario where a foreperson does not provide hardhats to her  
22 workers on a day where that foreperson believes there will be zero risk of flying objects at the  
23 jobsite. Then, according to this scenario, a worker on the jobsite dies after being struck on the

1 head by an object that was unexpectedly left unattended in an area somewhere above the jobsite,  
2 by a different employer the day before. The State seems to claim, without discussion of the  
3 elements of the underlying offense, that this foreperson is guilty of a violation of RCW  
4 49.17.190(3) because the death “happened” after the violation had occurred. *See* Response at  
5 14-16. How so? Under the facts presented, the foreperson had no reason to believe that her  
6 workers faced any risk of being struck by a flying object left “inadvertently” on the top floor  
7 by the “workmen of a different employer” the previous day. And, given the fluke scenario that  
8 is described (where an unexpected object falls from the sky and strikes a worker on the head)  
9 the violation in question was not the legal cause of the worker’s death.

10 *State v. Bauer*, 180 Wn.2d 929, 940 (2014), is instructive on this point. There, the  
11 defendant left a loaded gun in his house. His girlfriend’s child put the gun in a backpack and  
12 took it to school. While the child was rummaging around in the backpack, the gun discharged,  
13 injuring another student. The Washington Supreme Court considered whether Bauer could be  
14 held criminally liable for Third Degree Assault for the injury to the child. The Court explained  
15 that “‘legal cause’ in criminal cases differs from, and is narrower than, ‘legal cause’ in tort cases  
16 in Washington.” *Id.* at 940. The Court refused to impose criminal liability, explaining “there  
17 is no criminal case in Washington upholding criminal liability based on a negligent act that has  
18 such intervening facts as in this case between the original negligence and the final, specific,  
19 injurious result.” *Id.* at 940.

20 Accordingly, in the State’s first hypothetical, the foreperson would not be criminally  
21 responsible for the unreasonable, unanticipated, *and legally intervening*, actions of workers at  
22 another jobsite from a prior day – actions that were presumably outside of her knowledge and  
23 control. Based upon the State’s own fact pattern, this is a classic example of a case where the

1 death was caused by a new independent intervening act which the defendant, in the exercise of  
2 ordinary care, should not have reasonable anticipated as likely to happen. And this outcome is  
3 fully supported by Washington's jury instructions. *See Appendix A.*<sup>2</sup>

4 The second hypothetical presented by the State describes an equally inapposite scenario.  
5 There, a foreperson of a logging crew complies with all necessary regulations by ensuring that  
6 her workers wear chaps while they are working on downed logs. According to the suggested  
7 scenario, a rogue worker ignores that foreperson's clear directives when he removes his chaps  
8 and returns to a downed log for one final cut. Then, "something goes wrong" and the worker  
9 dies following that final cut. Under the State's hypothetical, there is nothing to indicate that  
10 the foreperson had actual knowledge (or any reason to know) that the worker had removed his  
11 chaps before he returned for that final cut. So, contrary to the State's suggestion, the foreperson  
12 is most certainly *not* guilty of any violation of RCW 49.17.190(3) because she did not commit  
13 a willful or knowing violation of the safety regulations. Further, the experienced employee's  
14 removal of his chaps also constitutes a *legally intervening act* that relieves the employer of  
15 criminal liability. The employer's actions did not constitute the legal cause of the employee's  
16 death. Thus, under the State's second hypothetical, there would be no basis to charge this  
17 foreperson with any criminal offense at all.

18 Try as it might, the State has presented hypothetical scenarios that demonstrate the  
19 weakness of its legal position. With more than two years to investigate and review this case  
20

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21 <sup>2</sup> Insofar as the State would alter the scenario to claim that the foreperson's violation of the regulation  
22 was, in fact, the cause of the worker's death, there is every reason to believe that the foreperson's conduct  
23 would likewise satisfy the elements of the manslaughter statute. For, if the foreperson should have  
known that her workers faced a risk of falling objects from above, her decision to withhold hardhats was  
negligent insofar as she exposed her workers to a substantial risk of death or serious bodily harm. Put  
another way, the foreperson could be held criminally liable under both statutes in every case where she  
should have been aware of the risks from above.

1 (and with two months to respond to the Defendant’s Motion), the State cannot conjure any  
2 plausible scenario in which an employer would be guilty of a violation of WISHA’s criminal  
3 liability statute but not also guilty of a violation of the manslaughter statute. In actuality, it is  
4 impossible to envision a case where an individual would be guilty of Violation of Labor Safety  
5 Regulation with Death Resulting without necessarily committing the offense of Manslaughter  
6 in the Second Degree.

7 **4. This is a Reasonable Interpretation of the Statutory Scheme.**

8 As noted above, Washington’s general-specific rule is more than an aid to statutory  
9 construction. Rather, when the legislature enacts a specific criminal statute it is reasonable to  
10 conclude that the legislature intended to limit prosecutorial discretion and impliedly barred a  
11 prosecution under the general offense whenever the alleged criminal conduct meets the  
12 elements of the more specific crime.

13 The case of *State v. Pyles*, 9 Wn.App. 246 (1973), is instructive. There, the defendant  
14 was an employee of the Western Electric Company. At the end of his shift, he hurried to his  
15 automobile in an attempt to exit the company parking lot and avoid the rush. As the defendant  
16 was driving toward the gate, he was stopped by a security guard. The guard told him to be  
17 careful coming out of the parking lot. The defendant answered, “Sure, okay” and the guard  
18 stepped back. As the defendant proceeded forward, the guard then yelled “Hey” and took a few  
19 quick steps to stay alongside the automobile, reached inside and grabbed the steering wheel. A  
20 struggle for control of the automobile between defendant and the guard ensued as the defendant  
21 continued to accelerate up to, at the most, 20 miles per hour. During the struggle for control,  
22 the automobile headed for a stop sign in the parking lot. The defendant pulled the steering  
23 wheel to the right to avoid the sign and the guard fell off the automobile. He struck the pavement

1 and died five days later as a result of the head injuries received. The State charged the defendant  
2 with manslaughter and he was convicted at trial. Thereafter, the trial court granted the  
3 defendant's motion for arrest of judgment without prejudice to filing a new information  
4 charging negligent homicide on the ground that the prosecutor had no authority to charge  
5 manslaughter. The State filed an appeal. *Id.* at 247-48.

6 The Court of Appeals affirmed the trial court's ruling and explained that the defendant  
7 should have been charged under the negligent homicide statute which applied only to deaths  
8 involving automobile accidents. *Id.* at 250. As the Court succinctly explained, "in all cases  
9 where the negligent homicide statute is applicable, it supersedes the manslaughter statute." *Id.*  
10 at 250. The Court of Appeals adopted this very same reasoning in *State v. Haley*, 39 Wn.App.  
11 164 (1984).

12 Here, by parity of reasoning, the State had no authority to file a charge of Manslaughter  
13 in the Second Degree. For, in all cases where WISHA's criminal liability statute is applicable,  
14 it supersedes the manslaughter statute.

15 The State has presented nothing to suggest that the legislature intended for the more general  
16 statute (manslaughter) to control in this type of situation. To the contrary, the WISHA statute was  
17 first enacted in 1973. The statute includes no indication – either directly or impliedly – that it  
18 intended for the more general manslaughter provisions to remain applicable in cases involving  
19 workplace deaths. In fact, as the State appears to concede, there is nothing within the statute or  
20 legislative history which supports the State's current position. Thus, there is no express evidence  
21 that the Washington legislature intended for the general manslaughter statute to apply to situations  
22 where an employer's violation of a labor safety regulation results in the death of a worker.

1           Moreover, the WISHA statute has been amended several times over the years. Yet the  
2 legislature has never enacted an amendment to subsection (3), and never added any suggestion that  
3 this statute did not supersede a prosecution under the general criminal statute (Manslaughter in the  
4 Second Degree). Simply put, there is no basis to claim that the legislature intended that both the  
5 general and specific statute could (or should) apply in workplace fatality accidents.

6           **C. The State's Analysis of OSHA's Import is Backward. Washington's**  
7           **Passage of WISHA In Response to OSHA Evinces Specific**  
8           **Legislative Intent to Criminalize Workplace Deaths Resulting from**  
9           **Safety Violations Through RCW 49.17.190.**

10           Because, these two statutes are legally concurrent, further analysis of OSHA and other  
11 policy arguments is inapplicable. A finding that the two statutes are concurrent ends the inquiry  
12 with respect to the general-specific doctrine. Nevertheless, in response to the State's arguments  
13 on these issues, the intent is clear that our legislature enacted RCW 49.17.190(3) to criminalize  
14 workplace fatality accidents.

15           Without citation to any authority, the State asserts “[p]rior to the enactment of  
16 OSHA/WISHA, state prosecutors were free to bring felony charges against employers under  
17 existing state laws criminalizing, *inter alia*, homicide and assault.” Response at 20 (citing no  
18 cases or other authority). Undersigned counsel has reviewed scores of cases addressing the  
19 manslaughter statute in effect before WISHA was passed in 1973<sup>3</sup> and has been unable to locate  
20 a single reported Washington appellate decision involving a homicide prosecution against an  
21 employer as a result of the death of an employee due to a safety violation. The State concedes  
22 as much. See Response at 30 (“the filing of these charges against [Numrich] does appear to be

23           <sup>3</sup> Prior to 1975, the manslaughter statute, codified in former RCW 9A.02.020, provided simply that “[i]n  
any case other than those specified in [the statutes criminalizing Murder First and Second Degree, and  
Killing by Duel], homicide, not being excusable or justifiable, is manslaughter.”

1 the first and — so far — only instance in Washington in which an individual defendant has  
2 been charged with a felony offense for having caused the death of an employee in a workplace  
3 incident”). WISHA’s creation of the crime of Violation of Labor Safety Regulation with Death  
4 Resulting, as codified in RCW 49.17.190(3), in response to a federal congressional directive, is  
5 clear legislative intent that such workplace fatalities should be punished under the duly-enacted  
6 legislative scheme.

7 In 1970, Congress passed the Occupational Health and Safety Act, otherwise known as  
8 OSHA. *See* 29 U.S.C. 15, *et. seq.* The State correctly notes that the Congressional intent behind  
9 OSHA was to “assure so far as possible every working man and woman in the Nation safe and  
10 healthful working conditions.” Response at 20 (*quoting* 29 U.S.C. 651(b)). Importantly, one  
11 of the stated purposes of OSHA was

12 encouraging *the States to assume the fullest responsibility for the*  
13 *administration and enforcement of their occupational safety and health laws*  
14 *by providing grants to the States to assist in identifying their needs and*  
15 *responsibilities in the area of occupational safety and health, to develop plans*  
16 *in accordance with the provisions of this chapter, to improve the administration*  
17 *and enforcement of State occupational safety and health laws, and to conduct*  
18 *experimental and demonstration projects in connection therewith;*

19 29 U.S.C. 651(b)(11) (emphasis supplied).

20 “OSHA requires states to comply with its rules or else enact safe workplace standards  
21 at least as effective as OSHA in ensuring worker safety.” *Afoa v. Port of Seattle*, 176 Wn.2d  
22 460, 470 (2013). As the State correctly notes, one of the stated legislative reasons for OSHA  
23 was to ensure that there was a “standard applicable” in the event that an “employee were killed  
or seriously injured on the job.” *State’s Response* at 20 (*quoting* S.Rep.No. 91-1282, at 9  
(1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92<sup>ND</sup> CONG.,  
LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971).

1 WISHA was Washington’s legislation enacted to set the “standard applicable.” *See Afoa*, 176  
2 Wn.2d at 470 (“[o]ur legislature passed WISHA in 1973 to ensure worker safety”).

3 WISHA’s statement of legislative intent also confirms that it was a specific Act to  
4 protect the health and safety of Washington workers:

5 The legislature finds that personal injuries and illnesses arising out of  
6 conditions of employment impose a substantial burden upon employers and  
7 employees in terms of lost production, wage loss, medical expenses, and  
8 payment of benefits under the industrial insurance act. Therefore, in the public  
9 interest for the welfare of the people of the state of Washington and in order to  
10 assure, insofar as may reasonably be possible, safe and healthful working  
11 conditions for every man and woman working in the state of Washington, the  
legislature in the exercise of its police power, and in keeping with the mandates  
of Article II, section 35 of the state Constitution, declares its purpose by the  
provisions of this chapter to create, maintain, continue, and enhance the  
industrial safety and health program of the state, which program shall equal or  
exceed the standards prescribed by the Occupational Safety and Health Act of  
1970 (Public Law 91-596, 84 Stat. 1590).

12 RCW 49.17.010. The laws enacted under WISHA in 1973 constitute Washington’s  
13 comprehensive worker safety regulatory framework:

14 WISHA entrusts to Labor and Industries full responsibility for occupational  
15 safety and health in the state. This responsibility includes authority to  
16 promulgate rules and standards; to provide for the frequency, method, and  
17 manner of making inspections of workplaces without advance notice; to issue  
18 civil orders including abatement and fines; to refer criminal violations to the  
19 local prosecuting authority; to require employers to keep records; to issue  
20 orders shutting down unsafe and unhealthy equipment or work practices; to  
21 investigate and prosecute discriminatory actions against workers; to conduct  
22 research into occupational injury and illness related matters; to provide  
23 consultative services to employers; and to provide for the publication and  
dissemination of informational, educational, or training materials. WISHA  
also authorizes the BIIA to review contested orders issued by the Director of  
Labor and Industries (the Director) under the Act and authorizes further appeal  
to superior court. The Act establishes criminal violations, both misdemeanors  
and gross misdemeanors, for designated actions. Moreover, WISHA  
establishes the two-fold duty of every employer not only to comply with  
promulgated regulations but also to “furnish to each of his employees a place  
of employment free from recognized hazards that are causing or likely to cause  
serious injury or death to his employees.

1 Alan S. Paja, *The Washington Industrial Safety and Health Act: Wisha's Twentieth Anniversary*,  
2 1973-1993, 17 U. Puget Sound L. Rev. 259, 265-66 (1994) (internal citations omitted). Further,  
3 the Washington Supreme Court has confirmed that WISHA, a federally-approved state  
4 occupational safety and health plan, operates to *remove* federal preemption, allocating sole  
5 authority to the individual state to regulate such matters:

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

10 *Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.*, 119 Wn.2d 697, 704 (1992).

11 Accordingly, there can be no doubt that WISHA’s criminal provisions reflect the  
12 legislature’s specific pronouncement on how workplace fatalities should be punished.

13 Even still, the State continually sidesteps the fact ***that there actually is specific***  
14 ***legislative direction regarding how workplace accident fatalities should be prosecuted.*** The  
15 State argues that “there is no basis to conclude that Congress (in adopting OSHA) or the  
16 Washington Legislature (in adopting WISHA) intended the inclusion of a gross misdemeanor  
17 provision to preclude Washington prosecutors from brining homicide charges under state law  
18 against employers following workplace fatalities.” Response at 21. To the contrary, we know  
19 exactly how the Washington legislature intended these types of workplace fatalities be  
20 prosecuted – under RCW 49.17.190(3).

21 The State argues that “[i]f Congress had intended OSHA to make employers less  
22 criminally liable than under existing law, Congress would have said so.” Response at 21. But  
23 we need not guess at legislative intent. The legislature *did* “say so,” in 1973, when it passed

1 WISHA and RCW 49.17.190(3). If our legislature had intended that workplace fatality  
2 accidents be punished under the general manslaughter statute, the Washington legislature would  
3 never have passed a specific statute addressing these precise scenarios. Washington has a  
4 specific statute. Nothing could be more clear than the passage of RCW 49.17.190(3), which –  
5 in response to OSHA’s federal directive – criminalizes the Violation of Labor Safety Regulation  
6 with Death Resulting.

7 **D. The State’s Reliance Upon the Conduct in Other States is Misplaced;**  
8 **None of these Other States Have Addressed any Argument Similar**  
9 **to this Case.**

10 Washington’s general-specific rule is unique. When discussing Washington’s rule, the  
11 Washington Supreme Court has explained:

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

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

19 The State now claims that certain (undescribed) “similar arguments” were rejected by  
20 courts in other states. See Response at 28. In support, the State cites five cases. See *id.* at 25.  
21 These cases primarily deal with issues of federal preemption, and there is no indication that any  
22 one of these jurisdictions applies a rule similar to Washington’s general-specific rule. See, e.g.,  
23 *People v. Chicago Magnet Wire Corp.* 126 Ill.2d 356 (1989) (addressing federal preemption in an

1 OSHA regulated state; no mention of general-specific rule); *People v. Pymm*, 151 A.D.2d 133  
2 (1989) (same; no mention of general-specific rule); *State ex rel. Cornellier v. Black*, 144 Wis.2d  
3 745 (1988) (same; no mention of general-specific rule); *State v. Far West Water & Sewer Inc.*, 224  
4 Ariz. 173 (2010) (addressing claim that prosecution was barred by OSHA’s “savings clause,” and  
5 also applying Arizona’s different, much narrower, rule for resolving a claim of conflict between  
6 two criminal statutes, which permits prosecution under different statutes unless “the elements of  
7 proof essential to conviction under each statute are *exactly the same*”) (emphasis supplied). Thus,  
8 these out of state cases have no bearing upon the legal issues in this case.<sup>4</sup>

9 The State relies heavily upon *People v. Hegedus*, 432 Mich. 598 (1989), in an effort to  
10 support its claim that other courts have reached different results. *See* Response at 24. Not only is  
11 the State’s argument misplaced, but a careful analysis of the *Hegedus* litigation demonstrates that  
12 the State arguments must fail.

13 In *Hegedus*, the defendant was charged with involuntary manslaughter and conspiracy to  
14 violate the Michigan Occupational Safety and Health Act. *See id.* at 602. The charges arose out  
15 of the January 18, 1985, death of William Hatherill, an employee of Jackson Enterprises, a  
16 company for which defendant Hegedus worked as a supervisor. Mr. Hatherill died of carbon

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18  
19 <sup>4</sup> Other anecdotal examples proffered by the State, *see State’s Response* 30, n.18, provide no authority  
20 at all – and certainly do not address the general-specific doctrine presently before this Court. *See, e.g.,*  
21 *People v. Abraham Zafrani*, Superior Court of California, County of Ventura No. 2013029396, 2017  
22 WL 7361303 (Cal.Super.) (State’s citation is to a one page trial court *jury verdict*; no legal decision or  
23 discussion of any kind is included; a search of Westlaw reveals no appellate history); *People v. Luo*, 16  
Cal. App. 5th 663, 674, 224 Cal. Rptr. 3d 526, 536 (Cal. Ct. App. 2017), *review denied* (Jan. 31,  
2018), *cert. denied sub nom. Luo v. California*, 17-1458, 2018 WL 1912311 (U.S. June 4, 2018) (no  
discussion of general-specific rule); *Commonwealth v. Otto* (appears to be an ongoing trial proceeding);  
*People v. Formica*, 15 Misc. 3d 404 (2007) (appears to be a trial level order on a motion to dismiss; no  
discussion of general specific rule); *People v. Cueva*, N.Y. Sup. Ct., No. 01971-2015 and *People v.*  
*Prestia*, N.Y. Sup. Ct. No. 01972-2015 (Westlaw contains no appellate history or decisions for these  
matters).

1 monoxide intoxication while working in a company-owned van. *See id.* The prosecution claimed  
2 that the poor condition of the van’s undercarriage and exhaust system allowed exhaust fumes to  
3 leak inside the van, causing Hatherill's death. *See id.* The lower court granted the defendant’s  
4 motion to dismiss, made on the basis that the defendant either had no duty to inspect the van or no  
5 duty or ability to take it out of service. *See id.* at 602-03. The prosecution appealed.

6 The decision did not address any issue regarding the general-specific doctrine. In fact,  
7 there is no indication that Michigan applies any rule similar to Washington’s general-specific  
8 provision. Rather, on appeal, the Michigan Supreme Court ruled that the prosecution was not pre-  
9 empted by federal law. The Michigan court concluded that Congress did not intend to preclude  
10 the enforcement by this state of its criminal laws simply because the alleged criminal activity  
11 occurred in the employment setting. *See id.* at 624-25. This is not a surprising, or controversial,  
12 decision.

13 Notably, however, the State has failed to advise this Court of the subsequent history in the  
14 *Hegedus* case. On remand, the Court of Appeals dismissed the manslaughter charge. The court  
15 emphasized that the decedent was not an employee of the defendant and explained: “Thus,  
16 although defendant’s conduct may violate OSHA or MIOSHA standards, such conduct does not  
17 constitute the criminal act of involuntary manslaughter.” *People v. Hegedus*, 182 Mich.App. 21,  
18 24 (1990).

19 E. **Applying Washington’s General-Specific Rule Does Not Lead to**  
20 **Absurd Results. Rather, It Implements the Legislature’s Specific**  
21 **Intent**

22 The State asserts that a basic canon of statutory construction is that no statute should be  
23 construed in a manner that leads to strained or absurd results. *See* Response at 22 (*citing State v.*  
*Larson*, 184 Wn.2d 843, 851 (2015)). But whenever courts

1 are tasked with interpreting the meaning and scope of a statute, ‘our fundamental  
2 objective is to determine and give effect to the intent of the legislature. We look  
3 first to the plain language of the statute as “[t]he surest indication of legislative  
4 intent.” “[I]f the statute’s meaning is plain on its face, then the court must give  
5 effect to that plain meaning as an expression of legislative intent.’ ” We may  
6 determine a statute’s plain language by looking to “the text of the statutory  
7 provision in question, as well as ‘the context of the statute in which that  
8 provision is found, related provisions, and the statutory scheme as a whole.

9 *Larson*, 184 Wn.2d at 848 (internal citations omitted). “The surest indication of the legislature’s  
10 intent is the plain meaning of the statute, which we glean ‘from all that the Legislature has said in  
11 the statute and related statutes which disclose legislative intent about the provision in question.’”  
12 *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305 (2011) (quoting *Dep’t of Ecology v.*  
13 *Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11 (2002)).

14 Moreover, the Washington Supreme Court has emphasized that the “absurd results” canon  
15 should be applied exceedingly sparingly, to avoid usurping the province of the legislature:

16 It is true that we “will avoid [a] literal reading of a statute which would result in  
17 unlikely, absurd, or strained consequences.” However, ***this canon of***  
18 ***construction must be applied sparingly.*** (“Although the court should not construe  
19 statutory language so as to result in absurd or strained consequences, ***neither***  
20 ***should the court question the wisdom of a statute even though its results seem***  
21 ***unduly harsh.***” Application of the absurd results canon, by its terms, refuses to  
22 give effect to the words the legislature has written; it necessarily results in a court  
23 disregarding an otherwise plain meaning and inserting or removing statutory  
language, a task that is decidedly the province of the legislature. (“[A] court must  
not add words where the legislature has chosen not to include them.”) This raises  
separation of powers concerns. Thus, in *State v. Ervin*, 169 Wash.2d 815, 824, 239  
P.3d 354 (2010), we held that ***if a result “is conceivable, the result is not absurd.”***

*Five Corners Family Farmers*, 173 Wn.2d at 311 (emphasis supplied) (internal citations omitted).

That the State can invent far-fetched hypothetical situations (*see* Response at 22-23), with  
results with which the State disagrees, does not render a statute absurd and invalid. Here, there is  
no statutory ambiguity that requires the application of canons of construction. RCW 49.17.190

1 and the legislative intent are clear as day. If the State wants to change the penalties for a workplace  
2 fatality accident, the legislature is the appropriate forum.

3 Unfortunately, workplace injury and fatality is a reality. There are tens of thousands of  
4 workplace related injury claims in Washington each year. See  
5 <https://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp>. (in  
6 2017 there were 29,029 compensable worker's compensation injury claims and 20,691 rejected  
7 worker's compensation injury claims). In 2017, 75 traumatic work-related incidents resulted in a  
8 worker's death. See 2017 Washington State Work-Related Fatalities Report,  
9 [http://www.lni.wa.gov/Safety/Research/FACE/Files/2017\\_WorkRelatedFatalitiesInWaState\\_W](http://www.lni.wa.gov/Safety/Research/FACE/Files/2017_WorkRelatedFatalitiesInWaState_W)  
10 AFACE.pdf. In the last decade, there have been 681 traumatic work-related deaths in  
11 Washington. See *id.*

12 The State argues that the defense position would lead to absurd results because it would  
13 mean that a violation of a safety regulation causing death would result in a gross misdemeanor  
14 charge, but a violation of a safety regulation resulting in injury could result in a felony charge of  
15 Assault in the Third Degree. See Response at 23. But the State cannot point to a single case in  
16 which an employer has been charged with Assault in the Third Degree for negligently causing  
17 injury to an employee.

18 The legislature has chosen WISHA to the regulatory framework for handling workplace  
19 safety. For example, RCW 49.17.180 sets forth substantial applicable civil and financial penalties  
20 for safety violations. See, e.g., RCW 49.17.180(1)(penalty of between \$5,000 and \$70,000 for  
21 each willful or repeated violation of a WISHA health and safety regulation). It is not the Court's  
22 role to create new criminal penalties, or go out of its way to construe statutes in a way that would  
23 allow the State to charge every conceivable future scenario. A particular result is not absurd simply

1 because it prevents the State from prosecuting crimes under statutes that have never been used  
2 before in workplace fatality scenarios. RCW 49.17.130(3) is the legislature's vehicle for  
3 criminalizing the workplace fatalities, and this Court should give effect to the legislature's intent.

4 **F. This Prosecution Violates Equal Protection.**

5 Washington's general-specific rule is separate and distinct from any claim under the  
6 Equal Protection Clause. A difference in punishment is relevant to an analysis of an equal  
7 protection violation, but that analysis involves different principles than a violation of  
8 the general/specific rule. *See, e.g., State v. Eakins*, 73 Wn.App. 271, 273 (1994). Under the  
9 Washington constitution, equal protection is violated when two statutes declare the same acts  
10 to be crimes, but the penalty is more severe under one statute than the other. *See, e.g., State v.*  
11 *Leech*, 114 Wn.2d 700, 711 (1990). There is no equal protection violation, however, when the  
12 crimes the prosecutor has the discretion to charge require proof of different elements. *See, e.g.,*  
13 *City of Kennewick v. Fountain*, 116 Wn.2d 189, 193 (1991).

14 In *Fountain*, the defendant was charged with aiding and abetting the crime of driving  
15 while under the influence of alcohol. The district court dismissed the charge as a violation of  
16 her right to equal protection because the same conduct under a second statute was only a civil  
17 traffic infraction punishable by a small fine. The superior court affirmed the dismissal during  
18 a RALJ proceeding. On appeal, the Washington Supreme Court concluded that there was no  
19 constitutional violation because the two statutes at issue had differing burdens of proof. Thus,  
20 relying on *United States v. Batchelder*, 442 U.S. 114 (1979) by analogy, the Washington  
21  
22  
23

1 Supreme Court noted that a prosecutor is permitted to determine how to proceed when two  
2 statutes include different elements or differing burdens of proof. *See id.* at 193.<sup>5</sup>

3 Here, we are faced with the unusual case where the State has charged the defendant for  
4 two concurrent offenses in a single proceeding. Putting aside the problems created by this type  
5 of indiscriminate charging decision (due to the State's violation of the general-specific rule), it  
6 is notable that these two statutes include the same elements, albeit with RCW 49.17.190(3)  
7 defining a smaller universe of criminal offense. In this type of situation, the prosecutor does  
8 not have unbridled authority to charge under the more punitive statute – or under both statutes  
9 – simply as a matter of “discretion.” As the Washington Supreme Court explained in *Fountain*:  
10 “Such discretion does not provide them with the power to predetermine that the sanctions  
11 sought will ultimately be imposed. Unfettered discretion in this sense is of little consequence  
12 to the actual outcome.” *Fountain*, 116 Wn.2d at 194.

13 The prosecutor has offered no valid justification for the indiscriminate charging decision  
14 in this case. Even though there have been thousands of workplace fatalities in Washington  
15 since 1973, the prosecution has offered no explanation – and certainly no just or reasonable  
16 explanation – for the decision to charge an employer in this case with the crime of Manslaughter  
17 in the Second Degree. Here, the prosecutor has decided to rely upon “discretion” in an attempt  
18  
19

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20 <sup>5</sup> The *Fountain* court overruled *State v. Zornes*, 78 Wn.2d 9 (1970), to the extent that it relied upon a  
21 claim under the Fourteenth Amendment. *See Fountain*, 116 Wn.2d at 192-93. The court did not overrule  
22 *Zornes* to the extent that it relied upon Washington Constitution Article 1, Section 12. *See id.* at 193.  
23 Rather, when considering the defendant's claim, the Washington Supreme Court emphasized that the  
prosecutor did not act discriminately, and equal protection was not violated because the prosecution was  
required to prove its case under the “much more difficult burden to sustain.” *Id.* at 194. “The  
prosecutor's discretion would be limited by this consideration; thus, there would be no equal protection  
violation.” *Id.*

1 to predetermine the sanctions that might ultimately imposed. That type of decision runs afoul  
2 of Article 1, Section 12.

3 **III. CONCLUSION**

4 In the history of Washington, as far as both parties can discern, no employer has ever  
5 been charged with a felony offense for having caused the death of an employee in a workplace  
6 accident. In 1973, our legislature enacted a specific statute that criminalized willful violations  
7 of labor safety regulations resulting in death. Such legislation was in keeping with a broader  
8 social shift toward protecting the safety of workers, and constituted a clear directive from the  
9 legislature regarding how such violations should be punished. If Washington chooses to amend  
10 the penalties for the accidental workplace fatalities, it can do so. But that is exclusively the  
11 province of the legislature, not the Courts.

12 Count 1 of the State's Information violates Washington's general-specific rule, as well  
13 as fundamental notions of Equal Protection. Accordingly, for all of these reasons, and in the  
14 interests of justice, this Court should dismiss Count 1 of the State's Information.

15 DATED this 20<sup>th</sup> day of June, 2018.

16 

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

20 I certify that on the 20<sup>th</sup> day of June, 2018, I  
21 caused a true and correct copy of this  
22 document to be served on DPA Patrick  
23 Hinds by email and E-Service.

  
\_\_\_\_\_  
Todd Maybrown, WSBA #18557

# APPENDIX A

THOMSON REUTERS

**WESTLAW** Washington Criminal Jury Instructions[Home](#) [Table of Contents](#)*WPIC 25.02 Homicide—Proximate Cause—Definition*Washington Practice Series TM  
Washington Pattern Jury Instructions--Criminal

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 25.02 (4th Ed)

Washington Practice Series TM  
Washington Pattern Jury Instructions--Criminal  
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part V. Crimes Against Life  
WPIC CHAPTER 25. Homicide**WPIC 25.02 Homicide—Proximate Cause—Definition**

**To constitute [murder] [manslaughter] [homicide by abuse] [or] [controlled substance homicide], there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's [act] [or] [omission] was a proximate cause of the resulting death.**

**The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.**

**[There may be more than one proximate cause of a death].**

**NOTE ON USE**

Use bracketed material as applicable.

The first two paragraphs should be given in all homicide cases in which there is an issue of causal connection between defendant's act and the death of the decedent. Do not use this instruction for vehicular homicide cases; instead use WPIC 90.07 (Vehicular Homicide and Assault—Proximate Cause—Definition).

The bracketed third paragraph should always be used when the evidence supports multiple proximate causes. It should always be included when WPIC 25.03 (Conduct of Another) is given.

**COMMENT**

Cause of death is a question of fact. *State v. Engstrom*, 79 Wn.2d 469, 476, 487 P.2d 205 (1971). When an unforeseeable act breaks the causal connection between the original act and the injury, such intervening cause may excuse the defendant from legal accountability. *State v. Little*, 57 Wn.2d 516, 522, 358 P.2d 120 (1961). In *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000), the court held that the defendant failed to present sufficient evidence to show that the victim's drug use after the stabbing or failure to promptly seek medical attention following release from the hospital was an intervening cause of death. In *State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014), the Supreme Court found that causation in a criminal law is different from causation in tort law. Legal causation in regards to a criminal case is narrower than legal causation in tort cases.

In *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), the Supreme Court found that WPIC 25.02 pertains to "cause in fact", the "but for" consequences of an act, and not "legal causation." In *Dennison*, the defendant argued that the trial court should have given WPIC 25.02, because the decedent's felonious acts superseded the defendant's acts when the decedent overreacted under circumstances not reasonably foreseeable. The Supreme Court rejected this argument, noting that the defendant confused the two elements of proximate cause, cause in fact and legal causation. For a more detailed discussion of "cause in fact" and "legal causation," see the Comment to WPI 15.01, 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

In *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990), a prosecution for first degree felony murder, the court rejected the argument that an instruction based on WPIC 25.02 unconstitutionally relieved the State of proving an element of proximate cause because the instruction did not state that proximate cause is limited by foreseeability. The court held that foreseeability is not an element of proximate cause and that the instruction given "properly stated the law and was not unconstitutional."

See the Comment to WPIC 90.02 (Vehicular Homicide—Elements) for a discussion of the proximate cause requirements under the vehicular homicide statute.

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WPIC25.03 Conduct of Another

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Washington State Supreme Court Committee on Jury Instructions

Part V. Crimes Against Life  
WPIC CHAPTER 25. Homicide

## WPIC 25.03 Conduct of Another

**If you are satisfied beyond a reasonable doubt that the [acts] [or] [omissions] of the defendant were a proximate cause of the death, it is not a defense that the conduct of [the deceased] [or] [another] may also have been a proximate cause of the death[,except as described below].**

**If a proximate cause of the death was a new independent intervening act of [the deceased] [or] [another] which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's [acts] [or] [omissions] have been committed [or begun].]**

**[However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede defendant's original acts and defendant's acts are a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.]**

**NOTE ON USE**

Use bracketed material as applicable. Use WPIC 25.02 (Homicide—Proximate Cause—Definition) including the last paragraph which states that there may be more than one proximate cause of a death, with this instruction.

Use the bracketed second paragraph, as applicable, if the evidence would permit a finding that the conduct of the deceased or another constituted a superseding or intervening cause of death. Use the bracketed third paragraph only when there is an issue whether the resultant harm falls within the general field of danger that should have been foreseen.

**COMMENT**

The first paragraph of this instruction is adapted from the first paragraph of WPI 15.04 (Negligence of Defendant Concurring with Other Causes). See 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.). The second and third paragraphs of this instruction are adapted from WPI 15.05 (Negligence—Intervening Cause). See 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.). The instruction's second paragraph is phrased in terms of another person's acts rather than another person's omissions. A question exists as to whether an omission by a person other than the defendant can qualify as an independent intervening cause. But the Supreme Court found in *State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014), that causation in criminal law is different from causation in civil law. Legal causation in regards to a criminal case is narrower than legal causation in tort cases. *State v. Bauer*, 180 Wn.2d at 929.

It is well established that contributory negligence is not a defense to the crime of manslaughter or negligent homicide. Evidence of contributory negligence, however, may be material to whether the defendant's negligence was a proximate cause of the death or whether the defendant was negligent at all. See *State v. Ramser*, 17 Wn.2d 581, 136 P.2d 1013 (1943), and *State v. Nerison*, 28 Wn.App. 659, 625 P.2d 735 (1981) (citing WPIC 25.03 with approval). But, *State v. Souther* commented that WPIC 25.03 may be confusing. *State v. Souther*, 100 Wn.App. 701, 709, 998 P.2d 350 (2000). *Souther* is a vehicular homicide case. In defending a vehicular homicide case, a defendant may avoid responsibility for a death if the death was caused by a superseding intervening event. *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995). The Court of Appeals believed that WPIC 25.03 may be contradictory because one part of it states that the conduct of another is not a defense, but another part of the instruction states that it could be a defense. In light of *Souther*, the instruction has been revised to make it clear that the second paragraph is an exception to the first paragraph.

In *State v. Perez-Cervantes*, 141 Wn.2d 468, 475–76, 6 P.3d 1160 (2000), the Supreme Court stated that an instruction regarding proximate and intervening cause, "which makes it clear that an independent intervening act of the deceased or another does not supersede the defendant's act unless it was the proximate cause of the victim's death or was not reasonably to be anticipated by the

defendant," permitted the defendant to argue that there was an alternative cause of death if the evidence admitted at trial supported a theory that some act of the victim or another superseded the stabbing as the cause of death.

In *State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014), the Supreme Court distinguished *Perez-Cervantes*. In *Bauer*, the defendant possessed a gun. His girlfriend's child took the loaded gun to school, and the gun discharged. Mr. Bauer was charged and convicted of assault in the third degree. The Supreme Court reversed the conviction finding that legal causation cannot be based on negligent acts similar to those in civil tort cases. *Bauer* distinguishes *Perez-Cervantes*, because the defendant there performed an intentional act that directly caused the harm. Hence, the distinction deals with criminal liability based on a negligent act rather than liability based on an intentional act.

Questions of proximate cause have arisen frequently in vehicular homicide cases. See, e.g., *State v. McAllister*, 60 Wn.App. 654, 806 P.2d 772 (1991) (defendant's conviction in a vehicular homicide prosecution reversed because the defendant's negligence, if any, may have been superseded by the negligence of the defendant's wife in improperly securing a door of the vehicle, which the victim later fell through), overruled on other grounds in *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005); *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984); *State v. Jacobsen*, 74 Wn.2d 36, 442 P.2d 629 (1968). For further discussion of proximate cause under the vehicular homicide statute, see the Comment to WPIC 90.02.

In *State v. Yates*, 64 Wn.App. 345, 824 P.2d 519 (1992), a prosecution for aggravated first degree murder, it was held that the removal of life support from the victim was not a legally cognizable cause of death, since the defendant's conduct created the need for life support in the first instance and the removal of support was not independent of the defendant's conduct. WPIC 25.03 should not be used for similar cases involving removal of life support.

There is a question whether the burden of proof on a superseding cause falls on the State or the defendant. Dicta in *McAllister* suggests that "the State may not need to prove the absence of the defense of superseding cause once it was raised by [the defendant]." *State v. McAllister*, 60 Wn.App. 654, 660–61, 806 P.2d 772 (1991). *McAllister* cited to *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). *Camara* has been overruled by *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), hence, it now appears that the burden of proof falls on the State.

For a general discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses— Introduction).  
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