

FILED
SUPREME COURT
STATE OF WASHINGTON
4/23/2019 3:27 PM
BY SUSAN L. CARLSON
CLERK

NO. 96566-8

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

PHILLIP SCOTT NUMRICH,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW AND
STATEMENT OF GROUNDS FOR
DIRECT REVIEW

ALLEN, HANSEN, MAYBROWN
& OFFENBECHER, P.S.

Todd Maybrown
Cooper Offenbecher
600 University Street, Suite 3020
Seattle, WA 98101
(206) 447-9681

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

1. IDENTITY OF RESPONDING PARTY 1

2. STATEMENT OF RELIEF SOUGHT 1

3. FACTS RELEVANT TO THE MOTION..... 1

4. ARGUMENT..... 6

 A. Introduction..... 6

 B. There is No Basis for Discretionary Review 7

 C. The Trial Court has the Inherent Power to Impose Sanctions to Control and Manage Its Calendar, Proceedings, and Parties 7

 D. *State v. Gassman* is Not Analogous..... 8

 E. The Record Demonstrates that the State’s Conduct was Tantamount to Bad Faith Given the Circumstances of this Case and Can Only be Seen as an Intentional, Improper Effort to Prejudice Mr. Numrich’s Right to Seek Lawful Appellate Review 10

 F. Discretionary Review of the Specific Amount of the Sanctions is Not Warranted 14

 1. The Trial Court’s Fee Award is Justified 15

 a. Hours Worked by Attorneys 15

 b. Hourly Rates 16

 c. The State’s Claims Regarding the Caselaw on the Reasonableness of Attorney Rates are Incorrect 18

G.	This Court Should Award Fees on Appeal	19
5.	CONCLUSION.....	20
PROOF OF SERVICE		
APPENDIX TABLE OF CONTENTS		

TABLE OF AUTHORITIES

Federal Cases

<i>In re U.S. Golf Corp.</i> , 639 F.2d 1197 (5th Cir.1981)	16
<i>Ingram v. Oroudjian</i> , 647 F.3d 925 (9th Cir. 2011).....	16
<i>Norman v. Hous. Auth. of City of Montgomery</i> , 836 F.2d 1292 (11th Cir.1988).....	16
<i>United States v. \$60,201.00 U.S. Currency</i> , 291 F.Supp.2d 1126 (C.D. Cal. 2003)	20

State Cases

<i>Brand v. Dep't of Labor & Indus. of State of Wash.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999)	14
<i>Brown v. State Farm Fire & Cas. Co.</i> , 66 Wn.App. 273, 831 P.2d 1122 (1992).....	17
<i>Broyles v. Thurston Cty.</i> , 147 Wn.App. 409, 195 P.3d 985 (2008).....	17
<i>Costanich v. Washington State Dep't of Soc. & Health Servs.</i> , 164 Wn.2d 925, 194 P.3d 988 (2008)	19
<i>Cowles Pub'g Co. v. Murphy</i> , 96 Wash.2d 584, 637 P.2d 966 (1981)	8
<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990).....	20
<i>In re Recall of Pearsall–Stipek</i> , 136 Wash.2d 255, 961 P.2d 343 (1998) ...	8
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	18
<i>Matsyuk v. State Farm Fire & Cas. Co.</i> , 173 Wn.2d 643, 272 P.3d 802 (2012).....	19
<i>SentinelC3, Inc. v. Hunt</i> , 181 Wn.2d 127, 331 P.3d 40 (2014)	18, 19

<i>State v. Gassman</i> , 175 Wn.2d 208, 263 P.3d (2012).....	8, 9, 10
<i>State v. S.H.</i> , 102 Wn.App. 468, 8 P.3d 1058 (2000).....	10
<i>Steele v. Lundgren</i> , 96 Wn.App. 773, 982 P.2d 619 (1999).....	15, 16
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993)	7
<i>Wilson v. Henkle</i> , 45 Wn.App. 162, 724 P.2d 1069 (1986).....	10, 11

State Statutes

RCW 49.17.190(3).....	1
-----------------------	---

State Rules

CR 11, 26(g)	8
CrR 4.7(h)(7)	8
CrR 8.3(b).....	2
RAP 2.3(b).....	7
RAP 2.3(b)(1), (2), and (3)	7
RAP 2.3(b)(4)	12, 2
RAP 4.2(a).....	7
RAP 18.1.....	20

1. IDENTITY OF RESPONDING PARTY

Phillip Numrich is the defendant below and the Respondent as to this Motion for Discretionary Review.¹

2. STATEMENT OF RELIEF SOUGHT

Mr. Numrich respectfully requests that the Court deny the State's Motion for Discretionary Review.

3. FACTS RELEVANT TO MOTION

In January 2018, following a two-year investigation, the State charged Mr. Numrich with manslaughter in the second degree and a violation of RCW 49.17.190(3), which is the Washington Industrial Safety and Health Act statute that imposes criminal liability on employers for an employee death resulting from a safety violation. These charges related to the death of one of Mr. Numrich's employees following the collapse of a trench during a sewer repair project. *See generally* State's Motion for Discretionary Review and Statement of Grounds for Direct Review, Appendix 12.²

¹ Mr. Numrich is the Petitioner in the Motion for Direct Discretionary review filed under this cause number on March 8, 2019. He is also the Petitioner in Case No. 963657, a related Motion for Direct Discretionary Review filed in September 2018.

² To avoid unnecessary duplication, Mr. Numrich's record cites will refer to the State's Appendix to its Motion for Discretionary Review and Statement of Grounds for Direct Review. Hereafter, "SMDR App." will be used to refer to the Appendix to the State's Motion for Discretionary Review and Statement of Grounds for Direct Review, and "Appendix" will be used to refer to any additional documents that are attached to this Answer. In a few instances, Mr. Numrich has appended declarations of counsel that were filed in superior court, along with certain attachments, because the State's Appendix omitted the declaration attachments.

Following arraignment in January 2018, the parties met and discussed the defendant's anticipated motion to dismiss the manslaughter charge based on Washington's general/specific rule. SMDR App. 219. The parties agreed on a detailed briefing and argument schedule, and jointly requested judicial preassignment – a rarity in King County criminal cases – due to the complexity of the anticipated pretrial litigation. Appendix 17-19. The parties further agreed in the briefing schedule signed by the Criminal Presiding Judge that it was expected that the losing party would seek discretionary review. *Id.*³ Mr. Numrich filed his motion in April 2018. In July 2018, the superior court denied Mr. Numrich's motion to dismiss. SMDR App. 83. In August 2018 the same judge certified the issue for interlocutory review. Appendix 146-47.

In October 2018 – after Mr. Numrich had commenced the anticipated proceedings in this Court – the State notified the defense that it was intending to amend the Information to add a charge of manslaughter in the *first* degree. The timing of this notification was extraordinary because the parties had spent months litigating the propriety of the manslaughter in the second-degree

³ The State asserts that “between February and October of 2018, the case-setting hearing in superior court was repeatedly continued at Numrich's request. As a result, no trial date has ever been set in this case.” SMDR at 4. This misleading statement is clearly intended to suggest that Mr. Numrich has inappropriately delayed these proceedings. The State fails to mention that every single continuance was agreed. The State has never asked to set a trial date. Rather, it was understood by both parties that Mr. Numrich's motion to dismiss was of great magnitude and needed to be appropriately litigated before proceeding further. Soon after charging, Mr. Numrich promptly filed his motion to dismiss. The delays in this case have come from the State for delaying filing the charge for two years, and then for amending on the day its Answer was due in this Court.

charge with an explicit understanding that the losing party would seek discretionary review, during which the State never suggested that it was contemplating an amendment. The State first notified the defense and this Court of its intent to amend *the day its Answer was due in this Court*, nearly a month after Mr. Numrich had filed his first Motion for Discretionary Review and Statement of Grounds for Direct Review, resulting in a finding by the superior court that there were “no additional facts or discovery or new legal theory,” and the State was “using this amendment to obtain dismissal of the discretionary review.” SMDR App. 270.

The superior court granted the State’s motion over Mr. Numrich’s objection. SMDR App. 268-70. Recognizing that these novel issues were pending in a Motion for Direct Discretionary Review before this Court, the superior court simultaneously certified its order to join the pending motion. *Id.* at 270. The superior court recognized the “real frustration” expressed by Mr. Numrich regarding the timing of the motion, explaining, “[w]hat is unusual is to not inform all parties of relevant considerations in light of the appeal. Mere notice of the amendment at the beginning of the appellate process would have remedied the situation.” *Id.*

The superior court acknowledged that amendments can be allowed up to and even in trial, and that terms are highly unusual in a criminal case. The Court explained that this was such a case:

This is a highly unusual case. What is singular here is that the State did not give notice of an amendment in an obvious situation that would have saved countless hours and fees for an appeal, and where the State is using this amendment to obtain dismissal of the discretionary review, and so announcing in the responsive appellate briefing, and where the issues presented by the Amendment are obviously intertwined with the issues on discretionary appeal, and where there are no additional facts or discovery or new legal theory. In this singular instance, it is this Court's decision to award terms measured in attorneys' fees for the defense for work on the discretionary appeal to this point. No fees are awarded for any work done in Superior Court.

SMDR App. 270.

Pursuant to the superior court's request, Mr. Numrich filed a Fee Petition, and both parties filed additional pleadings in support of and opposition to the fee request, as well as motions for reconsideration of different parts of the Order on Motion to Amend. *See, e.g.*, SMDR App. 294-402. Mr. Numrich requested an award of \$18,252.49, which represented 38.1 hours of attorney time of work on matters related to the first motion for discretionary review, and \$292.49 in costs related to payment of the extra filing fee. SMDR App. 294-300.

The superior court denied the motion to reconsider and requested additional information from counsel "listing the number of hours for each lawyer and the subject matter they worked on. This may be done redacted if there is attorney-client work product or privileged areas. The reasonableness of the hourly rates does not need to be addressed. The law

in this area is well-defined and the Court needs to make particularized findings.” SMDR 403-04. Counsel then submitted a supplemental declaration addressing the issues as directed by the Court, along with billing records for all compensable work. SMDR 405-418. Following additional briefing, the Court issued an Order on Defendant’s Fee Petition, finding:

1. Mr. Numrich’s attorneys spent 38.1 hours – 13.6 hours by attorney Todd Maybrown and 24.5 hours by attorney Cooper Offenbecher – working on the Motion for Direct Discretionary Review through November 1, 2018. This was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich. The work was not duplicative or unproductive.
2. The billing rates of Mr. Numrich’s attorneys - \$600 for Mr. Maybrown and \$400 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown Seattle with commensurate experience, and in light of the novelty and difficulty of the questions involved and the seriousness of the charges in this case.
3. Finally, the requested costs of \$292.50 are also reasonable and appropriate given that Mr. Numrich had to pay a second filing fee to present issues related to the Amended Information to the Supreme Court.

SMDR 440-41.⁴

⁴ The State notes that “[n]o hearing was ever held on Numrich’s fee petition.” SMDR at 10. There is no authority requiring a hearing for a fee petition. The State had ample opportunity to be heard and filed significant briefing in opposition to the request.

Mr. Numrich further incorporates by reference the Statement of the Case section of Mr. Numrich's Motion for Discretionary Review at 2-7, filed on March 8, 2019 under this same cause number.

4. **ARGUMENT**

A. **Introduction**

The trial court issued attorney fees *sua sponte*. In briefing and oral argument to the superior court in opposition to the State's Motion to Amend, Mr. Numrich never requested fees. Rather, Mr. Numrich strenuously objected to the State's amendment, arguing it was clearly done to prejudice Mr. Numrich's right to seek interlocutory review as intended by the superior court's certification. The timing and manner of the amendment – in light of the history of this case – made it clear that the State's intent was improper, warranting a sanction by the superior court.

Mr. Numrich argued to the trial court – and maintains to this Court – that the State's egregious conduct warranted denial of the amendment. Mr. Numrich has moved for direct discretionary review of the order granting amendment, which is pending under this cause number. Nevertheless, the trial court determined that awarding fees to Mr. Numrich was the appropriate remedy for the months of wasted time and resources. Although Mr. Numrich separately urges this Court to accept review of the Order on Motion to Amend and reverse the decision permitting the amendment, regarding the narrow

issue addressed in the State's Motion for Discretionary Review, the decision to impose the relatively modest award of \$18,252.49 was well within the court's discretion.

B. There is No Basis for Discretionary Review

The State concedes there is no basis for direct review. SMDR at 24 (“RAP 4.2(a) sets forth the criteria for direct review by this Court of a superior court decision. The State’s motion for discretionary review of the trial court’s order imposing sanctions does not meet any of those criteria”). However, the State argues that discretionary review is warranted under various subsections in RAP 2.3(b). *See* SMDR at 16-18. None of these sections apply here: the trial court did not: so far depart from the usual course of judicial proceedings; commit probable error substantially affecting the status quo or limiting the freedom of a party to act; or commit obvious error rendering future proceedings useless. *See* RAP 2.3(b)(1), (2), and (3).

C. The Trial Court has the Inherent Power to Impose Sanctions to Control and Manage Its Calendar, Proceedings, and Parties

Sanctions decisions are reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Id.* at 339. This

Court has explained that a court's authority to impose sanctions is broad, and derives from its inherent equitable powers to manage its own proceedings:

Various court rules allow the imposition of sanctions. *E.g.*, CR 11, 26(g); CrR 4.7(h)(7). Sanctions, including attorney fees, may also be imposed under the court's inherent equitable powers to manage its own proceedings. *In re Recall of Pearsall–Stipek*, 136 Wash.2d 255, 266–67, 961 P.2d 343 (1998). Moreover, where the court's inherent power is concerned, “[w]e are at liberty to set the boundaries of the exercise of that power.” *Id.* at 267 n. 6, 961 P.2d 343. Trial courts have the inherent authority to control and manage their calendars, proceedings, and parties. *See Cowles Pub'g Co. v. Murphy*, 96 Wash.2d 584, 588, 637 P.2d 966 (1981).

State v. Gassman, 175 Wn.2d 208, 210–11, 263 P.3d 113 (2012).

D. State v. Gassman is Not Analogous

The State rests its Motion for Discretionary review on *Gassman*. *See, e.g.*, SMDR at 14 (“[t]he situation presented here is directly analogous to Gassman”); 16 (“the trial court’s decision ignored unambiguous and clear case law (i.e. Gassman”). The State’s recitation of *Gassman* conveniently omits the critical facts that provided the rationale for this Court’s holding. A review shows why the Numrich case is so different.

In *Gassman*, several codefendants were charged in an original Information with committing crimes “on or about April 15, 2008.” *Gassman*, 175 Wn.2d at 210. When trial began, the State moved to amend the Information to allege the crimes had taken place “on or about April 17, 2008”

(emphasis supplied). *Id.* The defendants objected on the grounds that they had prepared alibi defenses based on the original April 15 date. The trial court called the State’s conduct “careless” (but not “purposeful”) and awarded each defendant \$2,000 in attorney fees for the time spent dealing with the alibi issue. *Id.* On appeal, the only attorney who appealed made several concessions that undercut the entire justification for the fee award, including

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

Id. at 212–13.

Accordingly, Gassman’s claim fell apart on appeal.⁵ In light of the “trial court’s specific description of the State’s behavior as ‘careless,’ and [the attorney’s] concessions in the record and during oral argument,” this Court reversed the sanction award. *Id.* at 213 (internal citations omitted). The State’s conduct in Mr. Numrich’s case is of a different order.

⁵ The State’s discussion of *Gassman* failed to discuss any of the foregoing facts which formed the basis for this Court’s decision. Rather, the State attempts to frame *Gassman* as more egregious than Mr. Numrich’s case. See SMDR at 14 n.10 (“Gassman dealt with a motion to amend *on the day of trial* that entirely mooted the defendant’s trial defense”) (emphasis in original). But in light of the attorney’s fatal concessions, the *Gassman* amendment likely had no legal effect on the proceeding.

E. **The Record Demonstrates that the State's Conduct was Tantamount to Bad Faith Given the Circumstances of this Case and Can Only be Seen as an Intentional, Improper Effort to Prejudice Mr. Numrich's Right to Seek Lawful Appellate Review**

The trial court need not make an express finding of bad faith when imposing sanctions. *Gassman*, 175 Wn.2d at 211. Rather, sanctions are also appropriate “where an examination of the record establishes that the court found some conduct equivalent to bad faith.” *Id.* (citing *State v. S.H.*, 102 Wn.App. 468, 475, 8 P.3d 1058 (2000); *Wilson v. Henkle*, 45 Wn.App. 162, 175, 724 P.2d 1069 (1986)).

The superior court's Order on Motion to Amend was based on the belief that the State “was candid with the Court in admitting that [the prosecutor] did not consider the amendment until very late in the pending appellate process.” Order on Motion to Amend at 1. But that finding is at odds with the State's recent statement that the manslaughter first degree charge was always a “hold back” charge:

Based on the information uncovered during the reopened investigation, I and other KCPAO DPAs believed that there was probable cause to charge the defendant with either/both Manslaughter in the First Degree and Manslaughter in the Second Degree.

SMDR App. 2 ¶ 6. The State further explained that

[i]t was decided to initially file Manslaughter in the Second Degree charges and to reserve the decision on whether to

amend to Manslaughter in the First Degree or to add Manslaughter in the First Degree as a charge in the alternative until the time of trial or until the running of the Statute of Limitations, whichever came first.

SMDR App. 2 ¶ 7. But the State failed to advise the defense or the court about the holdback through months of time-consuming litigation. On April 30, the defense filed its Motion to Dismiss Count 1. Due to the complexity of the issues involved and the nature of the case the parties jointly moved “for pre-assignment of this case for pre-trial management in light of the defendant’s motion to dismiss Count 1.” Appendix 17.

Although the Chief Criminal Presiding Judge declined to pre-assign the case, the court signed a detailed three-page Order Setting Briefing Schedule that had been prepared by the State. *Id.* Both parties acknowledged that “it is anticipated that the party that loses the above described motion to dismiss will likely seek discretionary review of the decision in the court of appeals.” Appendix 18. Thereafter, the State requested an extension to file its response. The defense agreed and the Court signed an Order Amending Briefing Schedule prepared by the State. Appendix 20-21.⁶

Further, extensive briefing followed with no mention of the amendment. On June 13 the State filed a 33-page Response, plus appendices.

⁶ The 5/11/18 and 6/1/18 briefing schedule Orders demonstrate the resources and attention that the parties devoted to the pretrial management of this case. Detailed briefing schedules like those entered in this case are extremely rare in King County criminal cases.

SMDR App. 25. On June 20 the defense filed its Reply. SMDR App. 59. On July 16 the State filed an 11-page “Surreply.” Appendix 23. On July 18 the defense filed a “Surreply.” Appendix 35.

On July 23 the parties appeared for oral argument in front of Judge John Chun. The hearing lasted an hour and five minutes. Appendix 160. The court took the matter under advisement, later informing the parties that it was denying the defense motion. The State prepared a detailed 10-page proposed “Order Denying Defendant’s Motion to Dismiss Count 1.” Appendix 98-107. The defense submitted a detailed objection to the State’s proposed Order. Appendix 162-65. The parties appeared in front of Judge Chun on August 23 for a 22-minute hearing on whether this issue should be certified for discretionary review. *See* Appendix 161. Thereafter, Judge Chun signed the Defendant’s Order Denying Defendant’s Motion to Dismiss Count 1 and Certifying the Issues for Review Pursuant to RAP 2.3(b)(4). Appendix 146.

Proceedings continued without any hint of amendment. Consistent with the expectations of all parties and the court, the defense filed its Notice of Discretionary Review on September 14. SMDR App. 85. On September 27, 2018 the State filed a lengthy Motion to Amend Conditions of Release. On September 28 the defense filed in this Court its Motion for Discretionary Review and its Statement of Grounds for Direct Review in Case No. 963657.

On October 1, following a hearing, the superior court denied the State's Motion to Amend the Conditions of Release. Appendix 157 (Sub. 47).

Not once over these months of litigation, or during any of the preceding significant hearings, or in any of the hundreds of pages of filings, did the State provide notice to the defense, or the Criminal Presiding Judge or the Criminal Motions Judge, that it was contemplating adding manslaughter in the first degree. Rather, the defense and the Court were misled to believe that the decision on manslaughter in the second degree would be the dispositive decision regarding the felony homicide charge.⁷

We now know the State had intended from the outset that manslaughter in the first degree was the appropriate charge for trial. *See* SMDR App. 2 (State conceding that it believed manslaughter in the first degree was appropriate but delaying an amendment decision until closer to trial or the running of the statute of limitations). Nevertheless, the State told

⁷ The State argues that "Numrich's attorneys had never asked if the State was considering any amendments, nor raised the issue of possible amendments, nor engaged in any of the plea negotiations or usual processes that would generally prompt a discussion of possible amendments." SMDR at 5. But prosecutors frequently advise defense attorneys about potential "hold back" charges as part of plea bargaining because it leads to guilty pleas. Given the defense position that the felony charge was extraordinary, the idea of a further amendment to manslaughter in the first degree – a Class A Felony with a standard sentencing range of 6.5 to 8.5 years – was not even on counsel's radar. Everyone recognized that the parties were in full litigation mode. This case was preassigned to a Senior Deputy Prosecuting Attorney who has handled this case since pre-filing and a second DPA, who both appeared at each substantive hearing. The State knew it was litigating a legal issue that absorbed substantial resources, could have resulted in the dismissal of the most serious charge, and would involve a motion for discretionary review. The State's argument that these are not the circumstances that would warrant notice of such an amendment is unavailing.

neither the defense nor the Court of this possibility until the superior court litigation had concluded and the defense had commenced discretionary review proceedings – and then the State used the intended amendment to dissuade this Court from accepting review. *See* Appendix 2 (finding that “the State is using this amendment to obtain dismissal of the discretionary review” and that “there are no additional facts or discovery or new legal theory”). The record demonstrates that the State’s conduct was tantamount to bad faith. The trial court was within its discretion to impose sanctions.

F. Discretionary Review of the Specific Amount of the Sanctions is Not Warranted

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

The superior court ordered the State pay Mr. Numrich \$18,252.49 for work on the first motion for direct discretionary review, which recognized 38.1 hours of attorney time – equivalent to approximately one work week of total time – is imminently reasonable considering the briefing produced (20 page Motion for Discretionary Review; 15 page Statement of Grounds for Direct Review; 10 page Reply); the hundreds of pages of

appendices; the State’s briefing that required analysis and legal research (20 page Answer to Motion for Discretionary Review and 10 page Answer regarding Direct Review); preparation for and completion of oral argument to the Commissioner; the complexity of the litigation; and the importance of the consequences to the client (Mr. Numrich has no prior criminal history and faces felony manslaughter and prison time).

1. The Trial Court’s Fee Award is Justified

a. Hours Worked by Attorneys

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

Here, counsel submitted detailed timesheets, along with a supporting declaration, that documented the compensable time. *See* SMDR App. 418. After reviewing the filings, the superior court found that 38.1 hours – 13.6 hours by attorney Todd Maybrown and 24.5 hours by attorney Cooper Offenbecher – “was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich.” SMDR 440. “The work

was not duplicative or unproductive.” *Id.* The trial court’s findings were based on a detailed record that provided a meaningful opportunity for review.⁸

b. Hourly Rates

A trial court has the inherent knowledge and experience to evaluate the reasonableness of an hourly rate. *See Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011)(Ninth Circuit adopting holdings of other circuits which have held that “judges are justified in relying on their own knowledge of customary rates and their experience concerning reasonable and proper fees”) (*citing Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir.1988) (courts are themselves “experts” as to the reasonableness of attorney fees and award may be based on court’s own experience); *In re U.S. Golf Corp.*, 639 F.2d 1197, 1207 (5th Cir.1981) (same)).

Washington courts have routinely afforded great discretion to the trial court’s own experience evaluating the reasonable of attorney fees:

Generally the testimony of expert witnesses [on the issue of the value of the services of an attorney] is not essential. The court, either trial or appellate, is itself an expert on the question of the value of legal services, and may consider its own knowledge and experience concerning reasonable and proper

⁸ The State argued that “there is no indication that the superior court actively and independently considered the reasonableness of Numrich’s fee petition or the State’s objections to the hourly rates or number of hours billed.” SMDR App. 22. But on December 21, 2018, the court recognized the State’s objections and requested additional information: “Mr. Hinds is correct that Mr. Offenbecker’s [sic] original fee petition was inadequate.” SMDR App. 404. Counsel then provided exactly the information the court requested. Moreover, when the court issued the fee award, the court explicitly handwrote on the order: “The Court has reviewed all extensive pleadings, the time billings in the case, and declines to re-review any of its earlier decisions.” SMDR App. 441.

fees, and may form an independent judgment either with or without the aid of testimony of witnesses as to value.

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

Here, after reviewing the filings, the court found that “[t]he billing rates of Mr. Numrich’s attorneys - \$600 for Mr. Maybrown and \$400 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown Seattle with commensurate experience, and in light of the novelty and difficulty of the questions involved and the seriousness of the charges in this case.” SMDR 441.⁹

The State has never submitted any evidence – or even argued – that the hourly rates are unreasonable. *See e.g., Broyles v. Thurston Cty.*, 147 Wn.App. 409, 452, 195 P.3d 985 (2008)(“it is clear that the trial court evaluated the reasonableness of the plaintiffs’ attorneys’ hourly rates with other

⁹ Mr. Numrich’s initially provided information about counsels’ hourly rates. SMDR 296-97; 351-53. Notably, in the December 21, 2018 order requesting additional information, the court stated: “[t]he reasonableness of the hourly rates does not need to be addressed.” SMDR App. 404. The court’s request for further information about the hours worked – *but not* the hourly rates – makes clear that the court had made an informed assessment that the rates were reasonable.

similarly situated attorneys. In fact, the trial court noted, ‘There was no evidence offered to suggest that the rates charged by Plaintiffs’ counsel were unreasonable.’ Further, the trial court noted that these rates were consistent with those charged by other lawyers in the Puget Sound area”). Here, the experienced King County Superior Court judge was well within his authority to verify the reasonableness of these Seattle hourly rates.

c. The State’s Claims Regarding the Caselaw on the Reasonableness of Attorney Rates are Incorrect

The State’s citations regarding Washington law on the reasonableness of an attorney’s hourly rate are misleading. For example, the State cites *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) and *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014), arguing that “[c]lear and unambiguous Washington caselaw holds that the proof of the reasonableness of the attorney’s hourly rate must consist of something beyond the mere unsupported declaration of the counsel whose hourly rate is in question.” But *Mahler* and *SentinelC3* contain no such holding. Rather, those decisions faulted deficiencies in the *trial court’s* ruling.

For example, in *Mahler*, this Court explained: “[w]e do not know if the trial court considered if there were any duplicative or unnecessary services. We do not know if the hourly rates were reasonable”. *Mahler*, 135 Wn.2d at 435. Here, we know that the trial court considered whether there were any

duplicative or unnecessary services, *because the order explicitly indicates that the trial judge considered the issue*. Here, we know that that the hourly rates are reasonable, *because the order explicitly indicates that the trial judge found the rates were reasonable based on a number of factors*.

In *SentinelC3 Inc.*, this Court emphasized that the trial court had not provided any findings to justify its fee award but had simply issued a “judgment summary” that “recited the amount” of fees. *SentinelC3 Inc.*, 181 Wn.2d at 144 (*citing Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012)(“record must explain, for example, whether the rates billed were reasonable”)). Accordingly, the State’s authority turned on the absence of *any* findings about reasonableness. Here, the order clearly states that the rates are reasonable based on several factors.

G. This Court Should Award Fees on Appeal

Mr. Numrich did not request fees in superior court for time spent preparing and defending its fee petition. However, following the filing of the Notice of Discretionary Review on the fee award, the defense informed the State that it would be seeking fees on appeal related to this issue.

Washington law provides for the recoupment of such fees. “The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes.” *Costanich v. Washington State Dep’t of Soc. &*

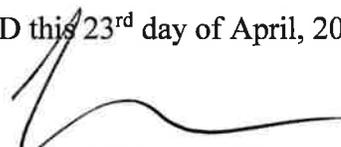
Health Servs., 164 Wn.2d 925, 933, 194 P.3d 988 (2008) (where Department challenged fee award on appeal, claimant was entitled to fees for defending fee award on appeal) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799, 807 (1990)(party entitled to attorney fees on remand for time spent establishing fees on claim for which fees were awarded)). See also *United States v. \$60,201.00 U.S. Currency*, 291 F.Supp.2d 1126, 1131 (C.D. Cal. 2003)("[t]he time attorneys spend in establishing they are entitled to a fee award is generally compensable"). RAP 18.1 provides the procedure for a fee award on appeal.

The intended equitable effect of the fee award was to neutralize the wasted resources spent on the first motion. Mr. Numrich has now spent numerous hours defending his fee petition, which continually diminishes the compensatory effect of the award. This Court should award Mr. Numrich attorney fees and costs spent on this Motion for Direct Discretionary Review.

5. CONCLUSION

For the foregoing reasons, Mr. Numrich respectfully requests that this Court deny the Motion for Discretionary Review regarding sanctions.

RESPECTFULLY SUBMITTED this 23rd day of April, 2019.



TODD MAYBROWN, WSBA #18557
COOPER OFFENBECHER, WSBA #40690
Attorneys for Petitioner

PROOF OF SERVICE

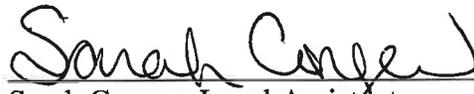
Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 23rd day of April, 2019, I filed the above Answer to Motion for Discretionary Review and Statement of Grounds for Direct Review via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

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 23rd day of April, 2019.



Sarah Conger, Legal Assistant

APPENDIX TABLE OF CONTENTS

Order on Motion to Amend, November 1, 2018	01
Declaration of Cooper Offenbecher in Support of Defendant’s Response to State’s Motion to Reconsider Imposition of Sanctions and Defendant’s Motion to Dismiss Pursuant to CrR 8.3(b) and/or Reconsider Order Motion to Amend.....	04
Declaration of Todd Maybrow in Opposition to State’s Belated Motion to Amend Information	109
Docket from <i>State v. Phillip Numrich</i> , King County Superior Court Case No. 18-1-00255-5 SEA	155
Clerk’s Minutes dated July 19, 2018, in <i>State v. Phillip Numrich</i> , King County Superior Court Case No. 18-1-00255-5 SEA	160
Clerk’s Minutes dated August 23, 2018, in <i>State v. Phillip Numrich</i> , King County Superior Court Case No. 18-1-00255-5 SEA	161
Objection to State’s Proposed Order and Motion for Certification For Review Pursuant to RAP 2.3(b)(4)	162

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
)	
Plaintiff/Petitioner,	)	NO. 18-1-00255-5 SEA
)	
vs.	)	ORDER ON MOTION TO AMEND
)	
PHILLIP NUMRICH)	
)	
Defendant/Respondent.)	
_____)	

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

The real prejudice claimed by the defense are the costs incurred in proceeding with the appellate process and a real frustration that the Prosecutor, who was candid with the Court in admitting that he did not consider the amendment until very late in the pending appellate process. filed this amendment so late. Discretionary appeals are not unusual in this Court's experience. What is unusual is to not inform

1 all parties of relevant considerations in light of the appeal. Mere notice of the amendment at the
2 beginning of the appellate process would have remedied the situation. The defense would have strongly
3 objected, but the outcome would still be the granting of the amendment.

4 Attorney time and money is not the kind of prejudice that leads to a remedy under the criminal
5 rules, and monetary terms are not a remedy. This Court has never awarded terms in a criminal case and
6 they are not a remedy except in highly unusual situations. In the criminal process and in the context of
7 amendments, amendments are allowed up to and even in trial, and the remedy is a continuance or other
8 orders.

9
10 This is a highly unusual case. What is singular here is that the State did not give notice of an
11 amendment in an obvious situation that would have saved countless hours and fees for an appeal, and
12 where the State is using this amendment to obtain dismissal of the discretionary review, and so
13 announcing in the responsive appellate briefing, and where the issues presented by the Amendment are
14 obviously intertwined with the issues on discretionary appeal, and where there are no additional facts or
15 discovery or new legal theory. In this singular instance, it is this Court's decision to award terms
16 measured in the attorneys' fees for the defense for work on the discretionary appeal to this point. No
17 fees are awarded for any work done in Superior Court. The defense shall file a fee petition within 14
18 days of this Order. The State may respond within seven days.

19
20 In light of the Prosecutor's statements on the record, the Motion to Compel Discovery is Denied.
21 He has clearly stated when he considered the amendment and there is not evidence that it was vindictive.
22 A remedy is otherwise provided.

23 The Order Granting the Amendment only is hereby certified for appeal to join the discretionary
24 appeal currently pending in the Washington Supreme Court. Per Judge Chun's Order of 23 August 2018,
25 this Court concludes that the Amendment adds a charge that is inextricably related to the issues of law
26

1 certified by Judge Chun under RAP 2.3(b)(4).

2 The Motion to Amend is Granted.

3 The Court Orders terms sua sponte.

4 The Motion to Compel Discovery is Denied.

5 The Order to Amend is Certified.

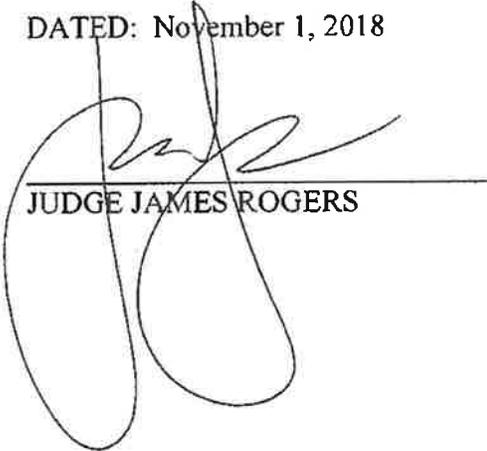
6

7

DATED: November 1, 2018

8

9

10 
JUDGE JAMES ROGERS

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

PHILLIP SCOTT NUMRICH,
Defendant.

NO. 18-1-00255-5 SEA

DECLARATION OF COOPER
OFFENBECHER IN SUPPORT OF
DEFENDANT’S RESPONSE TO STATE’S
MOTION TO RECONSIDER
IMPOSITION OF SANCTIONS AND
DEFENDANT’S MOTION TO DISMISS
PURSUANT TO CrR 8.3(b) AND/OR
RECONSIDER ORDER MOTION TO
AMEND

I, Cooper Offenbecher, do hereby declare:

- 1. Along with Todd Maybrown, I represent Defendant Phillip Numrich in the above-referenced matter.
- 2. Attached hereto as Appendix A is a true and correct copy of the ruling of Commissioner Michael Johnston in Washington State Supreme Court Case No. 96365-7 issued on November 5, 2018.
- 3. Attached hereto as Appendix B is a true and correct copy of the Notice for Direct Discretionary Review that our office filed on behalf of Mr. Numrich on November 16, 2018.

APPENDIX A

FILED
NOV 05 2018
WASHINGTON STATE
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
PHILLIP SCOTT NUMRICH,
Petitioner.

No. 96365-7
RULING

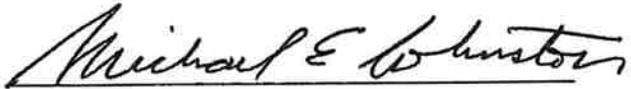
Phillip Numrich seeks direct discretionary review of a King County Superior Court ruling denying his motion to dismiss a charge of second degree manslaughter. He is also charged with criminal violation of the Washington Industrial Safety and Health Act (WISHA). RCW 49.17.190. Both charges arise from a workplace accident that killed a worker inside a trench dug by Mr. Numrich's company. Mr. Numrich argues that RCW 49.17.190 is more specific than the second degree manslaughter statute, RCW 9A.32.070, for a case of this nature, and therefore he may not be charged with both the WISHA violation and second degree manslaughter. Mr. Numrich filed both a statement of grounds for direct review and a motion for discretionary review. The State opposes both direct and discretionary review.

This matter was set for oral argument (by way of teleconference) before me on November 1, 2018. Thirty minutes before argument, I received an email conveying to me a copy of an order by the superior court entered earlier that day, granting the State's

motion to amend the information to add a single count of first degree manslaughter. I first viewed the newly entered order 15 minutes before oral argument. During oral argument, I asked both parties how the order granting the motion to amend affects review of the pending motion for discretionary review. Both parties had little to say about how to proceed in light of the new order but indicated their willingness to cooperate going forward. After argument, I consulted with the clerk of this court.

It is not possible to decide the pending motion for discretionary review until matters are settled with the related order authorizing amendment of the information. The superior court certified the order granting the motion to amend for immediate review together with the pending motion for discretionary review, *see* RAP 2.3(b)(4), but that alone does not get the order before this court for consideration. If Mr. Numrich wishes to seek discretionary review of the newly entered order, he must timely file a separate notice for discretionary review and then a separate motion for discretionary review, *see* RAP 2.1(a)(2) and RAP 2.3, and if he also seeks review in this court, he must file a related statement of grounds for direct review. RAP 4.2(b). Even if Mr. Numrich files these pleadings, the State is entitled to respond. RAP 17.4(e). If the new matter is properly brought before this court, a determination can be made whether to consolidate the motions and statements of grounds for direct review or consider them together as companions.

In light of the foregoing, action on the instant motion for direct discretionary review is deferred until further notice.


COMMISSIONER

November 5, 2018

APPENDIX B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

PHILLIP SCOTT NUMRICH,
Defendant.

NO. 18-1-00255-5 SEA

NOTICE OF DISCRETIONARY
REVIEW TO SUPREME COURT
OF WASHINGTON

Defendant Phillip Scott Numrich seeks review by the Washington Supreme Court of the Order on Motion to Amend filed on November 1, 2018. A copy of the decision is attached to the Notice as Appendix A.

RESPECTFULLY SUBMITTED this 16th day of November, 2018.



Todd Maybrown, WSBA #18557
Cooper Offenbecher, WSBA #40690
Attorneys for Defendant/Appellant

*NOTICE OF DISCRETIONARY REVIEW
TO SUPREME COURT OF WASHINGTON – 1*

**Allen, Hansen, Maybrown &
Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

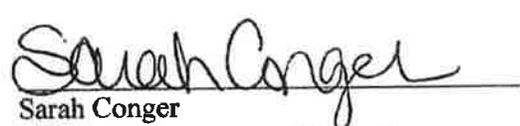
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

CERTIFICATION

I hereby certify that on November 16, 2018, I delivered a copy of the document to which this certification is attached for delivery to all counsel of record and interested parties as follows:

Patrick Hinds, DPA Eileen Alexander, DPA King County Prosecutor's Office King County Courthouse 516 Third Avenue, W554 Seattle, WA 98104 Attorneys for Plaintiff	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email <input checked="" type="checkbox"/> Electronic Delivery (per KCLR 30 via KCSC e-filing system)
--	--

By: 
Sarah Conger
Office Manager/Legal Assistant

*NOTICE OF DISCRETIONARY REVIEW
TO SUPREME COURT OF WASHINGTON - 2*

**Allen, Hansen, Maybrow &
Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
)	
Plaintiff/Petitioner,	)	NO. 18-1-00255-5 SEA
)	
vs.	)	ORDER ON MOTION TO AMEND
)	
PHILLIP NUMRICH)	
)	
Defendant/Respondent.)	
)	

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

The real prejudice claimed by the defense are the costs incurred in proceeding with the appellate process and a real frustration that the Prosecutor, who was candid with the Court in admitting that he did not consider the amendment until very late in the pending appellate process. filed this amendment so late. Discretionary appeals are not unusual in this Court's experience. What is unusual is to not inform

1 all parties of relevant considerations in light of the appeal. Mere notice of the amendment at the
2 beginning of the appellate process would have remedied the situation. The defense would have strongly
3 objected, but the outcome would still be the granting of the amendment.

4 Attorney time and money is not the kind of prejudice that leads to a remedy under the criminal
5 rules, and monetary terms are not a remedy. This Court has never awarded terms in a criminal case and
6 they are not a remedy except in highly unusual situations. In the criminal process and in the context of
7 amendments, amendments are allowed up to and even in trial, and the remedy is a continuance or other
8 orders.

9
10 This is a highly unusual case. What is singular here is that the State did not give notice of an
11 amendment in an obvious situation that would have saved countless hours and fees for an appeal, and
12 where the State is using this amendment to obtain dismissal of the discretionary review, and so
13 announcing in the responsive appellate briefing, and where the issues presented by the Amendment are
14 obviously intertwined with the issues on discretionary appeal, and where there are no additional facts or
15 discovery or new legal theory. In this singular instance, it is this Court's decision to award terms
16 measured in the attorneys' fees for the defense for work on the discretionary appeal to this point. No
17 fees are awarded for any work done in Superior Court. The defense shall file a fee petition within 14
18 days of this Order. The State may respond within seven days.

19
20 In light of the Prosecutor's statements on the record, the Motion to Compel Discovery is Denied.
21 He has clearly stated when he considered the amendment and there is not evidence that it was vindictive.
22 A remedy is otherwise provided.

23 The Order Granting the Amendment only is hereby certified for appeal to join the discretionary
24 appeal currently pending in the Washington Supreme Court. Per Judge Chun's Order of 23 August 2018,
25 this Court concludes that the Amendment adds a charge that is inextricably related to the issues of law
26

1 certified by Judge Chun under RAP 2.3(b)(4).

2 The Motion to Amend is Granted.

3 The Court Orders terms sua sponte.

4 The Motion to Compel Discovery is Denied.

5 The Order to Amend is Certified.

6

7

DATED: November 1, 2018

8

9

10

JUDGE JAMES ROGERS

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

APPENDIX C

FILED
KING COUNTY WASHINGTON

MAY 14 2018

SUPERIOR COURT CLERK
BY Shaylynn Nelson
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1
2
3
4
5
6
7
8 STATE OF WASHINGTON,)
9)
10) Plaintiff,) No. 18-1-00255-5 SEA
11)
12) vs.) ORDER SETTING BRIEFING
13) SCHEDULE
14)
15) PHILLIP NUMRICH,)
16)
17) Defendant)
18)
19)
20)
21)
22)
23)

14 This matter came before this court on the parties' joint motion for pre-assignment of this case for
15 pre-trial management in light of the defendant's motion to dismiss Count 1 (Manslaughter in the
16 Second Degree). The Plaintiff, State of Washington, appeared through counsel Patrick Hinds
and Eileen Alexander. The defendant, Phillip Numrich, was present and appeared through
counsel Todd Maybrown and stand-in counsel Danielle Smith.

17 Following a discussion regarding scheduling, current and potential motions, and other issues, this
18 court declined to pre-assign the case. However, this court indicated that the parties should obtain
19 a hearing date from the motions court and consult in an effort to agree on a briefing schedule.
20 This court indicated that it would enter an order memorializing that briefing schedule. This court
21 further indicated that it would grant a motion to continue the currently scheduled case setting
22 hearing (CSH) in order to accommodate that briefing schedule and motions date.

21 At this time, the following dates are set in this matter:

22 CSH: May 29, 2018
23 Criminal Motion: June 26, 2018
Expiration date: August 27, 2018

ORDER SETTING BRIEFING
SCHEDULE - 1

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733, FAX (206) 296-9009

1 ~~The parties hereby agree to the following schedule:~~ (2)

2 **1. CURRENT & FORTHCOMING MOTIONS:**

3 a. Known current and forthcoming motions:

- 4 i. The parties will jointly move to continue CSH.
- 5 ii. The defendant has moved to dismiss Count 1 (Manslaughter in the Second
6 Degree) on "general vs. specific statute" and equal protection grounds.

7 b. Anticipated forthcoming motions:

- 8 i. At this time it is anticipated that the party that loses the above described
9 motion to dismiss will likely seek discretionary review of the decision in the
10 court of appeals.

11 **2. HEARING DATE(S):**

- 12 a. ~~Assuming this court agrees with the schedule set forth in this order, the parties~~
~~have already set a hearing on June 26, 2018, to address the defendant's motion to~~
13 dismiss before the Honorable John Chun. will T (3)
- 14 b. Hearings related to a petition for review or any other motions will be set in
15 accordance with the court rules as necessary.

16 **3. BRIEFING SCHEDULE:**

17 a. Defendant's motion to dismiss Count 1:

- 18 i. The defendant's brief and related documents in support of his motion to
19 dismiss were filed on April 30, 2018.
- 20 ii. The State shall file and serve its responsive brief and supportive
21 documents by 4:30 p.m. on June 6, 2018.
- 22 iii. The defendant shall file and serve its reply by 4:30 p.m. on June 13, 2018.

- 23 b. The parties shall consult and attempt to agree on a schedule for any briefing
related to a petition for review or any other motions. Any future agreed briefing
schedule can be submitted to this court by email for consideration. Should the
parties be unable to agree, the parties may set a motion before this court.

ORDER SETTING BRIEFING
SCHEDULE - 2

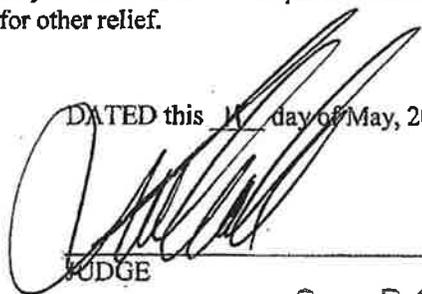
Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733, FAX (206) 296-9009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

4. OTHER:

- a. The parties agree to accept service of all of the above referenced briefs via email.
- b. If a party is unable to comply with the requirements of this schedule (aside from scheduled court hearings), that party may contact the other party to attempt to arrange for an extension of the relevant deadline(s). If the parties cannot agree on such an extension, the party unable to meet the requirements may set a motion to modify the schedule or for other relief.

DATED this 11 day of May, 2018.

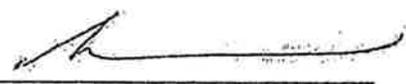


JUDGE

Sean P. O'Donnell



Patrick Hinds, WSBA #34049
 Eileen Alexander, WSBA # 45636
 Deputy Prosecuting Attorneys
 Attorneys for Plaintiff



Todd Maybrown, WSBA # 18557
 Attorney for Defendant

**ORDER SETTING BRIEFING
 SCHEDULE - 3**

Daniel T. Satterberg, Prosecuting Attorney
 Criminal Division
 W554 King County Courthouse
 516 Third Avenue
 Seattle, WA 98104-2385
 (206) 477-3733, FAX (206) 296-9009

FILED
KING COUNTY, WASHINGTON

JUN 01 2018
SUPERIOR COURT CLERK
BY Angela Little
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,) No. 18-1-00255-5 SEA
)
vs.) ORDER AMENDING BRIEFING
) SCHEDULE
PHILLIP NUMRICH,)
)
Defendant)
)
)
)
)
)

This matter came before this court on the agreement of the parties to modify the previously filed briefing schedule.

At this time, the following dates are set in this matter:

Motion hearing: June 26, 2018
CSH: June 26, 2018
Expiration date: September 24, 2018

The Honorable Judge O'Donnell signed the parties' agreed scheduling order on May 11, 2018. In accordance with the terms of that order, the parties hereby agree to amend briefing schedule as follows:

1. DEFENDANT'S MOTION TO DISMISS COUNT 1

- a. The defendant's brief and related documents in support of his motion to dismiss were filed on April 30, 2018.
- b. As noted above, the hearing on the defendant's motions is already scheduled before this court at 1:30 p.m. on June 26, 2018.

ORDER AMENDING BRIEFING
SCHEDULE - 1

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA. 98104-2385
(206) 477-3733, FAX (206) 296-9009

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

- c. The State shall file and serve its response by 4:30 p.m. on June 13, 2018.
- d. The defendant shall file and serve his reply by 4:30 p.m. on June 20, 2018.

Other than the changes noted above, the other terms of the May 11, 2018 Order Setting Briefing Schedule and May 29, 2018 Order on Case Scheduling remain in effect.

DATED this 1st day of June, 2018.

John H. Chun

 JUDGE

JOHN H. CHUN

Patrick Hinds

 Patrick Hinds, WSBA #34049
 Eileen Alexander, WSBA # 45636
 Deputy Prosecuting Attorneys
 Attorneys for Plaintiff

Approved via email

 Todd Maybrown, WSBA # 18557
 Attorney for Defendant

APPENDIX D

FILED

18 JUL 16 PM 2:38

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 18-1-00255-5 SEA

1 *The Honorable John Chun*
2 *Hearing Date: July 19, 2018 at 1:30 p.m.*
3 *With Oral Argument*

4 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

5 THE STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
6 v.	)	No. 18-1-00255-5 SEA
)	
)	
7 PHILLIP NUMRICH,	)	STATE'S SURRESPONSE TO
	)	DEFENDANT'S MOTION TO
8 Defendant.	)	DISMISS COUNT 1
)	

9
10 **I. INTRODUCTION**

11 In his initial brief, the defendant provided neither citations to relevant authority nor any
12 analysis that characterized or supported his motion to dismiss Count 1 on equal protection grounds.
13 These were not provided until his reply brief, which was filed after the State's response. As a result,
14 the State was not given the opportunity to address them in its previously filed responsive briefing
15 opposing the motion. In that context, the State would ask this court to consider this short
16 surrespose that addresses only the equal protection issue. For the reasons outlined below, this
17 court should reject the defendant's equal protection argument and deny his motion to dismiss Count
18 1 on those grounds.

19
20 **II. FACTS¹**

21 The defendant, Phillip Numrich, filed his motion to dismiss Count 1 on April 30, 2018. In
22 his memorandum, Numrich argued, *inter alia*, that the State's filing of manslaughter charges against

23 ¹ The State incorporates by reference the summary of substantive and procedural facts contained in its previously filed response. The additional facts summarized here address only those facts specifically relevant to the State's request that this court consider the State's surrespose.

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 1

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 him violated equal protection. Def. Memo. at 13-14.² Numrich's argument on this point was
2 extremely short and consisted solely of: 1) the factual assertion that he is the first employer in the
3 state who has been charged with a felony based on a workplace fatality even though he cannot have
4 been the first to have committed the crime; and 2) the summary conclusion that prosecuting him for
5 the crime, therefore, violated his right to equal protection. *Id.* Numrich did not provide any
6 citations to relevant legal authority³ or any analysis that further characterized his motion or
7 explained how he believed his right to equal protection had been violated.

8 The State filed its response on June 13, 2018. In its brief,⁴ the State pointed out the cursory
9 nature of Numrich's briefing regarding his equal protection argument. State's Resp. at 30. Based
10 on the minimal briefing provided, the State reasonably interpreted Numrich's claim as being one of
11 improperly selective prosecution and responded accordingly. State's Resp. at 29-33.

12 Numrich filed his reply on June 20, 2018. In this brief, Numrich has now characterized the
13 alleged equal protection violation as being different than it appeared based on his initial briefing
14 and, for the first time, has provided legal authority and analysis that—he asserts—supports his
15 claim. Both the State's response and Numrich's reply were filed timely in accordance with the
16 briefing schedule agreed to by the parties and ordered by the court. However, because
17 Numrich's reply brief was (obviously) filed after the State's response, the State did not have an
18 opportunity to address Numrich's argument as clarified in his reply in its response brief.

19
20 ² The "DEFENDANT'S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER) AND MEMORANDUM OF
21 AUTHORITIES IN SUPPORT THEREOF"—filed on April 30, 2018—will hereinafter be cited to as "Def. Memo."
22 The defendant's "REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT 1
23 (MANSLAUGHTER)" was filed on June 20, 2018 and will hereinafter be cited to as "Def. Reply."

³ The only citation provided by Numrich in this section of his brief was to authority standing for the proposition that
the Washington crime of manslaughter corresponds to the common-law crime of involuntary manslaughter, a lesser
form of homicide. Def. Memo. at 13 n.4.

⁴ The STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT 1 will hereinafter be cited to as
"State's Resp."

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 2

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 The State's initial response was filed much further in advance of oral argument than
2 required by LCR 7(b)(4) based on the parties' agreed briefing schedule. However, that schedule
3 did not contemplate the need for a surresponse. Oral argument in this matter is currently
4 scheduled for 1:30 p.m. on July 19th. Under the rule, the State has until noon on July 17th to file
5 responsive briefing.

6
7 **III. ARGUMENT**

8 In his reply brief, Numrich argues that the State's decision to prosecute him for
9 Manslaughter in the Second Degree violates his right to equal protection because—he asserts—
10 RCW 9A.32.070 and RC 49.17.190(3) criminalize the same act, but the penalty is more severe
11 under the former than the latter. Def. Reply at 21-22. This argument must be rejected for two
12 reasons.

13 **A. THE EQUAL PROTECTION RULE NUMRICH RELIES ON IS NO**
14 **LONGER GOOD LAW IN WASHINGTON**

15 As clarified in his response brief, Numrich's entire equal protection argument is premised on
16 the assertion that, "[u]nder the Washington constitution, equal protection is violated when two
17 statutes declare the same acts to be crimes, but the penalty is more severe under one statute than the
18 other." Def. Reply at 21. Numrich's argument, however, ignores the fact that, while this may have
19 been the rule at one time, it has since been explicitly rejected by Washington courts and is no longer
20 a correct statement of the law.

21 In Washington, the "rule" asserted by Numrich dates back to Olsen v. Delmore, 48 Wn.2d
22 545, 295 P.2d 324 (1956). In Olsen, the Washington Supreme Court, relying on a case from the
23 Oregon Supreme Court, held that:

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 3

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 A statute which prescribes different punishments or different degrees of punishment
2 for the same acts committed under the same circumstances by persons in like
3 situations is violative of the equal protection clause of the Fourteenth Amendment of
the United States Constitution. State v. Pirkey, 203 Or. 697, 281 P.2d. 698 and cases
there cited.

4 Olsen, 48 Wn.2d at 550. The Court then held that, because the relevant portion of Art I, § 12 of the
5 Washington Constitution was substantially identical to the Fourteenth Amendment, such a statute
6 would also violate the Washington Constitution. Id. Then, in State v. Zornes, the Washington
7 Supreme Court subsequently held that the rule from Olsen also applied to situations where two
8 different statutes criminalized the same act and the penalty was more severe under one than the
9 other. 78 Wn.2d 9, 475 P.2d 109 (1970). (For ease of reference, the State will hereinafter refer to
10 this rule as the Olsen/Zornes rule.⁵)

11 In 1979, however, the United States Supreme Court decided United States v. Batchelder,
12 442 U.2d 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In that case, the Court concluded that the fact
13 that two different statutes established different penalties for the same criminal act did *not* violate the
14 equal protection clause of the Fourteenth Amendment. Id. at 124-25. In so doing, the Court
15 rejected the basic legal premise underlying the Olsen/Zornes rule. In 1991, the Washington
16 Supreme Court recognized this fact, noting that Batchelder had abrogated Zornes and that the
17 Olsen/Zornes rule was no longer good law as a result. City of Kennewick v. Fountain, 116 Wn.2d
18 189, 802 P.2d 1371 (1991). See, also, State v. Wright, 183 Wn. App. 719, 730-31, 334 P.3d 22
19 (2014) (equal protection not violated by statutes defining the same offense but prescribing different
20 punishments).

21 Numrich attempts to get around this change in the law by arguing that Fountain only
22 overruled Zornes insofar as Zornes was based the Fourteenth Amendment, but that the

23 ⁵ Cases subsequent to Olsen and Zornes use a number of different phrases and terms to describe or refer to this rule.
The State will use “the Olsen/Zornes rule” simply because it appears to be the most succinct.

1 Olsen/Zornes rule has continued legal efficacy under Art. I, § 12 of the Washington Constitution.

2 Def. Reply at 22 n.5. However, this argument must be rejected.

3 As an initial matter, Numrich has not provided any authority or argument establishing that,
4 in the situation presented here, the equal protection analysis under Art. I, § 12 of the Washington
5 Constitution is any different than the analysis under the Fourteenth Amendment to the United States
6 Constitution. As he has failed to conduct an analysis of the criteria set forth in State v. Gunwall,
7 106 Wn.2d 54, 720 P.2d 808 (1986), his claim must be resolved under the federal constitution rather
8 than under the state constitution. Forbes v. Seattle, 113 Wn.2d 929, 934, 785 P.2d 431 (1990).

9 That is particularly the case where, as here, Washington courts have already found that there
10 is no difference between the rights at issue under the federal and Washington constitutions. As
11 noted above, for example, in Olsen, the Court's decision was based on the Fourteenth Amendment.
12 48 Wn.2d at 550. The only reason the Court also found a violation of the Washington constitution
13 was because "Art. I, § 12, of the constitution of this state...is substantially identical with the equal
14 protection clause of the Fourteenth Amendment." Id. (citing Texas Co. v. Cohn, 8 Wn.2d 360, 112
15 P.2d 522 (1941)). Given that there is no question that (1) Numrich's substantive rights under the
16 federal and state constitutions are identical and (2) his rights under the federal constitution have not
17 been violated, it would be wholly irrational and unreasonable to conclude that his rights under the
18 state constitution have been violated.

19 Moreover, Numrich's argument that Fountain overruled Zornes only on federal law grounds
20 (and that, therefore, the Olsen/Zornes rule is still good law under the Washington Constitution) is
21 not supported by the Court's opinion in Fountain itself. In Fountain, the defendant committed an
22 act that was crime under one statute and an infraction under another. 116 Wn.2d at 191. The
23 defendant argued that, under the Olsen/Zornes rule, prosecuting her for the crime violated her right

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 5

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 to equal protection. Id. The trial court agreed and dismissed the criminal charge. Id. As noted
2 above, on appeal the Court held that Zornes had been abrogated by Batchelder and was no longer
3 good law vis-à-vis the Fourteenth Amendment. Id. at 191-93. The Court also noted that, even if
4 Zornes did apply, the defendant would not have suffered any violation of her right to equal
5 protection. Id. at 193-94. Based on both, the Court reversed the decision of the trial court and
6 remanded the case so that prosecution of the criminal charge could proceed. Id. at 194-95. If—as
7 Numrich now argues—the Olsen/Zornes rule was still good law under Art. I, § 12, the Court would
8 surely have said that and would have conducted an analysis under that provision. It did not.

9 Finally, at least one Washington appellate court has already rejected the argument that
10 Numrich now makes. In State v. Eakins, the defendant challenged his conviction based on the
11 Olsen/Zornes rule. 73 Wn. App. 271, 273, 869 P.2d 83 (1994). In its analysis, the court first noted
12 that the rule was no longer good law vis-à-vis the United States Constitution because it had been
13 “firmly established that the identity of elements in two criminal statutes with disparate penalties
14 does not violate the equal protection clause of the Fourteenth Amendment.” Id. at 275. The court
15 then noted that the relevant rights of a defendant under the Fourteenth Amendment were
16 substantially identical to those under Art. I, § 12 of the Washington Constitution. Id. at 276. The
17 court, therefore, concluded that there was no violation of the defendant’s right to equal protection
18 under either. Id.

19 Given all of the above, Numrich’s entire equal protection argument relies on a rule that has
20 been specifically and explicitly abrogated and is no longer good law in Washington. As a result, his
21 argument can and should be rejected on this basis alone.
22
23

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 6

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 **B. EVEN UNDER THE RULE RELIED ON BY NUMRICH, PROSECUTING**
2 **HIM FOR MANSLAUGHTER DOES NOT VIOLATE HIS RIGHT TO**
3 **EQUAL PROTECTION**

4 Even if the Olsen/Zornes rule was still good law, prosecuting Numrich for manslaughter
5 would not violate his right to equal protection. As Numrich acknowledges,⁶ even under that rule it
6 was well settled that, in a context such as this one, there is no equal protection violation when the
7 crimes the prosecutor has the discretion to charge are different crimes that require proof of different
8 elements. See Fountain, 116 Wn.2d at 193-94; In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345
9 (1985); State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). This is the case even if
10 the prosecutor's decision is based on or influenced by the penalties available following conviction
11 and even when the relative punishments for the two statutes seem illogical to the defendant or the
12 court. Fountain, 116 Wn.2d at 193; Farrington, 35 Wn. App. at 802; State v. Richards, 27 Wn. App.
13 703, 705, 621 P.2d 165 (1980). Indeed, this is the case even when the relevant elements make it
14 easier to prove the violation with the more severe penalty. Zornes, 78 Wn.2d at 21-22.

15 Here, as discussed at length in the State's response brief, the crimes of Manslaughter in the
16 Second Degree and Violation of Labor Safety Regulations with Death Resulting are different
17 crimes with different elements that are aimed at different conduct. State's Resp. at 9-22. This
18 analysis is not changed when Numrich's argument is recast as an equal protection one.

19 Moreover, *Numrich himself explicitly concedes that the two crimes have different mens*
20 *rea elements*. Def. Reply at 5. In this section of his reply, Numrich goes on to argue that proof
21 of the *mens rea* element of RCW 49.17.190(3) will necessarily establish the *mens rea* element of
22 RCW 9A.32.070. Def. Reply at 5-6. Whether true or not, however, that fact is only relevant vis-
23 à-vis the test for concurrency under the "general-specific rule." The test for whether *that* rule

⁶ Def. Reply at 21.

1 applies includes an analysis of whether a violation of the more “specific” statute will necessarily
2 violate the more “general” one. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984).
3 But, as Numrich further concedes, the analysis for purposes of an alleged equal protection
4 violation is separate and distinct and involves different principles than an alleged violation of the
5 “general-specific rule.” Def. Reply at 21. As noted above, the test for an equal protection
6 violation is straightforward and asks simply whether two crimes have different elements. If they
7 do—as Numrich concedes the two statutes at issue in this case do—then there is no equal
8 protection violation. That test applies and that result holds true even if the respective elements of
9 the two crimes make it easier to prove the one carrying the harsher penalty. Zornes, 78 Wn.2d at
10 21-22.

11 Finally, even if this court accepts Numrich’s invitation to consider whether proof of the
12 *mens rea* element of RCW 49.17.190(3) will necessarily establish the *mens rea* element of RCW
13 9A.32.070, his argument still fails because it will not. As discussed at length in the State’s
14 response brief, the concept of *mens rea* involves both the *level* of mental state (e.g. intentional
15 versus knowing versus negligent) and the *object* of the mental state (e.g. the intent to do
16 something in particular). State’s Resp. at 11-12. For two crimes to have the same *mens rea*
17 element, both the level **and** the object of the mental state must be the same. Id. In this context, a
18 violation of RCW 9A.32.070 requires proof that the defendant negligently caused a risk of death to
19 the victim. A defendant’s violation of a statutory duty may be relevant to that issue,⁷ but proof that
20 he or she had any specific *mens rea* vis-à-vis such a violation is not required. On the other hand, a
21 violation of RCW 49.17.190(3) requires proof that the defendant knowingly violated a health or
22 safety provision. No proof is required that the defendant had any specific *mens rea* vis-à-vis the

23 ⁷ Whether a defendant breached a statutory duty is relevant to whether he or she acted with criminal negligence, but is not conclusive on the issue. State v. Lopez, 93 Wn. App. 619, 970 P.2d 765 (1999).

1 risk of death to the victim. Thus, not only do the two statutes have different levels of mental
2 state, *they have mental states that are about different things*. As a result, despite Numrich’s
3 claim to the contrary, proof of the *mens rea* at issue in RCW 49.17.190(3) will not necessarily
4 establish proof of the *mens rea* at issue in RCW 9A.32.070.

5 Numrich’s only real argument against this point boils down to the assertion that
6 Manslaughter in the Second Degree does not require the defendant to be aware of a substantial
7 risk that a death may occur. Def. Reply at 4. But it does. As the State pointed out in its
8 response, in State v. Gamble, 154 Wn.2d 457, 468-69, 114 P.3d 646 (2005), the Court’s entire
9 ruling was predicated on the conclusion that the crime of manslaughter requires proof of the
10 defendant’s mental state *vis-à-vis the death of the victim*. State’s Resp. at 10-12.

11 In his reply, Numrich asserts that Gamble applies only to Manslaughter in the First
12 Degree and does not apply to Manslaughter in the Second Degree. Def. Reply at 4 n.1. This is
13 incorrect. As an initial matter, the language used in Gamble itself establishes that it applies to
14 both first- and second-degree manslaughter. In relevant part, the Gamble Court stated:

15 [M]anslaughter *does* require proof of a mental element vis-à-vis the killing. See
16 RCW 9A.32.060(1)(a) (recklessness); see also RCW 9A.32.070(1) (criminal
negligence).

17 154 Wn.2d at 469 (emphasis in original). In this context, the Court would not have referred to
18 both “recklessness” (the level of *mens rea* for first-degree manslaughter) and “criminal
19 negligence” (the level of *mens rea* for second degree manslaughter) unless it intended its holding
20 to apply to both. Moreover, the Washington State Supreme Court Committee on Jury
21 Instructions has read the logic of Gamble as applying equally to second-degree manslaughter. In
22 its Comments on both WPIC 10.04 (“Criminal Negligence—Definition”) and WPIC 28.06
23 (“Manslaughter—Second Degree—Criminal Negligence—Elements”), the Committee indicated

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 9

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 that, under Gamble, in the context of a charge of second-degree manslaughter, the definition of
2 “criminal negligence” given to the jury must specify that the object of the defendant’s *mens rea*
3 was the risk that death would occur. 2016 Comment to WPIC 10.04; 2016 Comment to WPIC
4 28.06.

5 Finally, despite Numrich’s claim to the contrary,⁸ there *are* cases subsequent to Gamble
6 that have specifically held—in the second-degree manslaughter context—that the object of the
7 *mens rea* of the crime was the risk that the victim might die. The clearest case on point is State
8 v. Latham, 183 Wn. App. 390, 335 P.3d 960 (2014), which Numrich himself cites in his reply.
9 Numrich cites Latham for the proposition that “a person may act with criminal negligence even
10 if she is unaware that there is a substantial risk that a homicide may occur.” Def. Reply at 4.
11 However, that is precisely the opposite of what the case actually held in the context of a second-
12 degree manslaughter charge. In Latham, the defendant argued that Nevada’s crime of voluntary
13 manslaughter was not legally comparable to Washington’s crime of second-degree manslaughter
14 because the *mens rea* elements of the two crimes were different. 183 Wn. App. at 405. In
15 agreeing with the defendant, the court explicitly stated:

16 Henderson’s logic⁹ leads us to hold that to prove criminal negligence in a
17 manslaughter case, the State must prove that a defendant failed to be aware of a
substantial risk that a *homicide*, rather than a wrongful act, may occur.

18 State v. Latham, 183 Wash. App. 390, 406, 335 P.3d 960, 969 (2014) (emphasis in original).

19 Given all of the above, it is apparent that the crimes of Manslaughter in the Second
20 Degree under RCW 9A.32.070 and Violation of Labor Safety Regulations with Death Resulting

21 _____
22 ⁸ Def. Reply at 4.

23 ⁹ In State v. Henderson, the court had indicated that “by applying Gamble’s reasoning, it is logical to assume that
criminal negligence for manslaughter would require the State to prove that a defendant failed to be aware of a
substantial risk that a *homicide* (rather than “a wrongful act”) may occur.” 180 Wn. App. 138, 149, 321 P.3d 298
(2014) (emphasis in original).

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 10

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 under RCW 49.17.190(3) require proof of *mens rea* elements that are entirely different in terms of
2 both level and object. As a result, even if the Olsen/Zornes rule was still good law, under that rule
3 the State has not violated Numrich's right to equal protection by prosecuting him for committing
4 manslaughter.

5
6 **IV. CONCLUSION**

7 For the reasons outlined above and in the State's previously filed response brief, this court
8 should deny Numrich's motion.

9 DATED this 16th day of July, 2018.

10 DANIEL T. SATTERBERG
11 King County Prosecuting Attorney

12
13 By: 
14 Patrick Hinds, WSBA #34049
15 Eileen Alexander, WSBA # 45636
16 Deputy Prosecuting Attorneys
17 Attorneys for Plaintiff

18
19
20
21
22
23
**STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 11**

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

APPENDIX E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Judge John Chun
July 19, 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

DEFENDANT’S SURREPLY IN
SUPPORT OF MOTION TO DISMISS
COUNT 1

I. INTRODUCTION

On July 16, 2018, the State filed a Surreply to Defendant’s Motion to Dismiss Count 1, responding to arguments in Defendant’s Reply regarding the equal protection issue. In reply, Defendant Philip Numrich hereby submits his Surreply in Support of Motion to Dismiss Count 1.¹

¹ To the extent that the Court considers the State’s Surreply, the Court should consider the Defendant’s Surreply. The parties had filed briefing pursuant to a detailed briefing schedule drafted by the State, and amended once at the State’s request to provide the State additional time to file its Response. The defense timely filed its Reply on June 20, 2018. The matter was originally scheduled for hearing on June 26, 2018. However, on June 25 the motion hearing was continued to July 19. At no time prior to the originally scheduled hearing did the State indicate that it would be filing any supplemental briefing. Then, on July 16, the State filed a Surreply, which is more than 10 pages long. Undersigned counsel Mr. Maybrown has been in trial at the RJC since July 9, 2018 in the murder case of *State v. Kime*, 15-1-04719-8. Therefore, if the Court considers the State’s Surreply, this Court should consider this Surreply and find it timely given the circumstances.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

II. DISCUSSION

A. This Court Need Not Reach Questions of Equal Protection Under the State and Federal Constitutions

The State attempts to recast and define the thrust of the Defendant's Motion to Dismiss as an equal protection constitutional argument based on – what the State claims is – caselaw that has been overruled. Indeed, one comes away from reading the State's Surreponse with the sense that this case turns on a constitutional question.

It does not. The defendant's primary argument in support of the Motion to Dismiss is that longstanding Washington common law prohibits prosecution under a general statute where there is a more specific statute. *See* Defendant's Motion to Dismiss at 6-13. Washington's general/specific rule does not involve constitutional or equal protection issues, and Washington courts have never wavered on this authority.

The issue in this case is a question of state common law. Longstanding Washington precedent prohibits prosecution for a general offense whenever the alleged criminal conduct meets the elements of a more specific crime. *See* Defendant's Motion to Dismiss Count 1 at 8-9 (citing scores of Washington cases). Once the court determines that the two statutes are concurrent (*see* Defendant's Reply at 3-21), that ends the inquiry. Although the defense contends that the prosecutor's charging decision in this case violates fundamental notions of equal protection, this Court need not reach the constitutional issue. In fact, this Court can and should apply the time-honored judicial "avoidance" doctrine by electing not to decide unnecessary constitutional issues. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)(Brandeis, J. concurring)(highlighting the rules the Supreme Court has employed to avoid passing upon a large part of all the constitutional questions pressed upon it for decision, and noting "[o]ne branch of the government cannot encroach on the domain of another without danger. The safety of our

1 institutions depends in no small degree on a strict observance of this salutary rule”)(quoting
2 *Union Pacific Railroad Company v. United States*, 99 U.S. 700, 718 (1878)).

3 To the extent that the Court considers the equal protection issues, the Court should consider
4 the following:

5 **B. The Washington Supreme Court Has Already Conducted a *Gunwall***
6 **Analysis and Held that Article I, Section 12 of the Washington**
7 **Constitution Provides Greater Protections than the Fourteenth**
8 **Amendment**

9 The State argues that

10 [a]s an initial matter, Numrich has not provided any authority or argument
11 establishing that, in the situation presented here, the equal protection analysis
12 under Art. I, § 12 of the Washington Constitution is any different than the analysis
13 under the Fourteenth Amendment to the United States Constitution. As he has
14 failed to conduct an analysis of the criteria set forth in *State v. Gunwall*, his claim
15 must be resolved under the federal constitution rather than under the state
16 constitution.

17 State’s Surreply at 5 (internal citations omitted)(citing *State v. Gunwall*, 106 Wn.2d 54
18 (1986)(establishing the framework for determining whether the Washington state constitution
19 provides greater protections than the federal constitution)). The State’s brief seems to suggest that
20 no Washington Court has ever conducted a *Gunwall* analysis on Article I § 12 and the equal
21 protection clause of the Fourteenth Amendment.

22 But the State fails to mention that in *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses*
23 *Lake*, 150 Wn.2d 791 (2004), the Washington Supreme Court *did* conduct a *Gunwall* analysis of
these very constitutional provisions. There, the Court explicitly held that “*article I, section 12 of*
the Washington State Constitution requires an independent constitutional analysis from
the equal protection clause of the United States Constitution.” *Id.* at 811 (emphasis supplied).

In *Grant County*, the Court explained that “although in recent cases this court has held that
the privileges and immunities clause is substantially similar to the equal protection clause, the

1 possibility that article I, section 12 could be analyzed separately from the
2 federal equal protection clause has been left open.” *Id.* at 805 (internal citations omitted). The
3 Court then proceeded to conduct a full analysis under the six *Gunwall* factors. *Id.* at 806-811
4 (highlighting the stark textual differences between Article I § 12 and the equal protection clause;
5 distinct histories of the state and federal provisions; preexisting state law; and the structural
6 difference between the state and federal constitutions). The Court then explained:

7 After considering the *Gunwall* factors, we conclude that article I, section 12 of
8 the Washington State Constitution provides a basis for constitutional challenge
9 independent from the equal protection clause of the United States Constitution.

10 *Id.* at 816. “Once this court has determined that a particular provision of the state constitution has
11 an independent meaning using the factors outlined in *Gunwall*, it need not reconsider whether to
12 apply a state constitutional analysis in a new context.” *State v. McKinney*, 148 Wn.2d 20, 26,
13 (2002).

14 The cases cited by the State all limit their holdings to the federal constitution. In *State v.*
15 *Eakins*, 73 Wn.App. 271, 273 (1994), cited in the State’s Surreply at 6, the defendant argued
16 that the assault statute with which he was charged, and the unlawful firearm display statute,
17 violated his right to equal protection because they authorized the State to charge one person with
18 a felony and another with a misdemeanor for the same act committed under the same
19 circumstances. *Id.* at 273-74. But *Eakins* explicitly noted that it was not deciding whether the
20 analysis was different under the Washington State Constitution: “we do not decide that issue.” *Id.*
21 at 275. Moreover, the *Eakins* Court relied on the same faulty conclusion – that Article I § 12 and
22 the equal protection clause are “substantially similar” – that was later rejected by the Washington
23 Supreme Court in *Grant County*.

1 *State v. Wright*, 183 Wn.App. 719 (2014), cited in the State’s Surreponse at 4, likewise
2 explicitly limited its holding to the federal constitution. *See id* at 730 (“*Alfonso’s* characterization
3 of statutory concurrency as creating an equal protection issue is no longer good law, *at least to the*
4 *extent it was based on the federal constitution*”)(emphasis supplied). And *State v. Fountain*, 116
5 Wn.2d 189 (1991), cited by the State in its Surreponse at 4, also limited its holding to the federal
6 constitution, noting that “*United States v. Batchelder* overrules *Zornes* as to analysis under the
7 *Fourteenth Amendment*.” *Fountain*, 116 Wn.2d at 193 (emphasis supplied)(omitting internal
8 citation to *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)).

9 The State also cites *Olsen v. Delmore*, 48 Wn.2d 545 (1956). Surreponse at 3. In *Olsen*,
10 the Washington Supreme Court held that a statute the prescribed different criminal penalties for
11 the same criminal act was “unconstitutional and therefore invalid, because it violates the equal
12 protection clause of the Fourteenth Amendment of the Federal Constitution, and Art. I, § 12, of
13 the state constitution.” *Olsen*, 48 Wn.2d at 551. Citing a 1941 case regarding excise oil taxes, the
14 *Olsen* court cursorily noted in one sentence that “[s]uch a statute must therefore be violative of
15 Art. I § 12, of the constitution of this state, relating to privileges and immunities, since this
16 provision of the state constitution is substantially identical with the equal protection clause of the
17 Fourteenth Amendment.” *Id.* at 551 (citing *Texas Co. v. Cohn*, 8 Wn.2d 360 (1941)). Relying on
18 *Olsen*, the State argues that “there is no difference between the rights at issue under the federal and
19 Washington constitutions.” State’s Surreponse at 5.

20 But, *Grant County* holds that Article I, Section 12 of the Washington Constitution provides
21 a challenge separate from the equal protection clause of the federal constitution. No post-*Gunwall*,
22 post-*Grant County* Washington Court has ever considered these claims under Article I, Section 12
23 of the Washington constitution. Here, given the prosecutor’s selective and discriminate decision

1 to charge Mr. Numrich with Manslaughter in the Second Degree, this Court should find that the
2 State has violated Mr. Numrich's heightened state constitutional equal protection rights as
3 guaranteed by Article I, Section 12's "privileges and immunities" clause.

4 **C. The Court Should Strike Section B of the State's Surreponse**

5 Section B of the State's Response at 7-11 purports to respond to the equal protection issue
6 that was the State's claimed basis for submitting a Surreponse. However, this section is largely
7 analysis in support of the State's position on the concurrency of the two statutes. *See* Surreponse
8 at 7 (analyzing *mens rea* and the test for concurrency); 8-10 (detailed analysis of whether proof of
9 *mens rea* for RCW 49.17.190(3) necessarily establishes proof of the *mens rea* of manslaughter).

10 To the extent that the Court considers Section B of the State's Surreponse, the Court
11 should consider the following:

12 **D. The State's Surreponse Still Fails to Identify a Legally Plausible**
13 **Scenario under which a Defendant Could Violate the More Specific**
Statute without Violating the General Statute

14 In Washington, the longstanding rule is that

15 where a special statute punishes the same conduct which is punished under a
16 general statute, the special statute applies and the accused can be charged only
17 under that statute. It is not relevant that the special statute may contain additional
18 elements not contained in the general statute; *i.e.*, notice. The determining factor
19 is that the statutes are concurrent in the sense that the general statute will be
20 violated in each instance where the special statute has been violated.

21 *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237, 239-40 (1984)(defendant was improperly
22 charged under first degree theft statute; specific statute regarding failure to return rental car should
23 have been used)(omitting internal citation to *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912
(1979)(solicitation for the purposes of prostitution must be charged under advancing prostitution
statute, rather than the statute which generally prohibits solicitation to commit a crime)).

1 Citing *State v. Gamble*, 154 Wn.2d 457, 468-69 (2005) and *State v. Latham*, 183 Wn.App.
2 390, 406 (2014), the State notes that in a manslaughter case, the State must prove that a defendant
3 failed to be aware of a substantial risk that a homicide occur. Surreponse at 10 (*quoting Latham*,
4 183 Wn.App. at 406). The State’s discussion of this point, and characterization of it as “proof of
5 the defendant’s mental state *vis-à-vis the death of the victim*” (State’s Surreponse at 9) gives off
6 the impression that there is some higher burden – even a *knowledge* requirement – placed on the
7 State in a manslaughter prosecution. But the critical word in the negligence definition in the
8 context of a manslaughter case is that the defendant “failed to be aware” of the risk that a death
9 would occur. This is not a heightened requirement or an additional element. It is simply an
10 absence of knowledge. The “defendant’s mental state *vis-à-vis the death of the victim*” – as the
11 State puts it – is nothing.² The critical question under the general/specific rule is not whether the
12 elements are different, but whether they are concurrent – *i.e.*, whether it is possible to violate the
13 more specific statute, without violating the manslaughter statute.

14 Here, it remains impossible to envision a scenario – and the State still has not suggested
15 any such legally plausible hypothetical – in which a defendant could be guilty of violating RCW
16 49.17.190(3) but simultaneously not violate the Manslaughter in the Second Degree statute. *See*
17 *also* RCW 9A.08.010(d)(2)(“[w]hen a statute provides that criminal negligence suffices to
18 establish an element of an offense, such element also is established if a person acts intentionally,
19 knowingly, or recklessly”).

23 ² In discussing these statutes, the State now seems to concede that both statutes contain the same causation
requirement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendant's previously filed pleadings, the defense respectfully requests this Court dismiss Count 1.

DATED this 18th day of July, 2018.

/s/ Todd Maybrown
TODD MAYBROWN, WSBA #18557
Attorney for Defendant

I certify that on the 18th day of July, 2018, I caused a true and correct copy of this document to be served on DPA Patrick Hinds by email and E-Service.


Sarah Conger, Legal Assistant

APPENDIX F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)

Plaintiff,)

v.) No. 18-1-00255-5 SEA

PHILLIP SCOTT NUMRICH,)

Defendant.)

HEARING

The Honorable John Chun Presiding

July 19, 2018

TRANSCRIBED BY: Bonnie Reed, CET
Reed Jackson Watkins
Court-Certified Transcription
206.624.3005

A P P E A R A N C E S

1

2

3

4 On Behalf of the Plaintiff:

5 PATRICK HALPERN HINDS

6 Eileen Alexander

7 King County Prosecutor's Office

8 516 Third Avenue

9 Seattle, Washington 98104-2390

10

11

12

13

14 On Behalf of the Defendant:

15 TODD MAYBROWN

16 Allen Hansen Maybrown & Offenbecher, PS

17 600 University Street

18 Suite 3020

19 Seattle, Washington 98101-4105

20

21

22

23

24

25

-o0o-

July 19, 2018

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Please be seated.

MR. HINES: Good afternoon, Your Honor. Your Honor, this is State of Washington vs. Phillip Numrich. It's Cause No. 18-1-00255-5 SEA. Patrick Hinds and Eileen Alexander on behalf of State of Washington. Mr. Numrich is present out of custody along with his counsel of record, Mr. Maybrown.

Your Honor, just so the Court is aware, there are a number of spectators in the gallery. People from the Attorney General's Office, from the Department of Labor and Industries as well as some of Mr. Felton's family, who was the decedent in this case.

We're here for a defense motion, so I will defer to Mr. Maybrown in just a moment. One other preliminary housekeeping matter, though, is in this case the -- there was a brief, a response, a reply, a surresponse and a surreply. I'm assuming the Court has received all of those.

THE COURT: I did. And I never heard of a surresponse before, but there it is.

MR. HINES: There it is. In Mr. Maybrown's surreply, he asked the Court to strike a portion of the State's surresponse. I don't know if the Court wants to address that as a preliminary matter from the State's perspective.

1 Arguing why it is -- should not be stricken is part and
2 parcel of arguing the substance, but I'm happy to address it
3 as a preliminary matter if the Court wants to; otherwise,
4 I'll defer to Mr. Maybrown at this point.

5 THE COURT: Let's just go ahead and proceed with argument.
6 Mr. Maybrown.

7 MR. MAYBROWN: Good afternoon, Your Honor. May I approach
8 the bench?

9 THE COURT: That's fine.

10 MR. MAYBROWN: Thank you.

11 Your Honor, not to belabor the point, we don't have any
12 objection to the Court considering as much information as
13 necessary. This is a novel issue, an issue of first
14 impression, and I was a little bit upset that the
15 surresponse was filed so late, especially since the State
16 knew I was in trial. But we encourage the Court to review
17 all the information that the Court deems necessary to
18 resolve this important issue.

19 THE COURT: It sounds like you're withdrawing the
20 objection, then?

21 MR. MAYBROWN: The objection will stand for the record,
22 but we also think that they could make the same argument
23 here today. So I don't want to -- I don't want to limit the
24 Court's ability to review this issue.

25 THE COURT: Then I'm denying the request to strike.

1 MR. MAYBROWN: Okay. Thank you, Your Honor.

2 As the Court is aware, Mr. Numrich is the owner and
3 operator of a business called Alki Construction. During
4 January 2016, Mr. Numrich's company was working on a sewer
5 project in Seattle. During that project, there was a
6 workplace accident where a trench collapsed and tragically
7 one of Mr. Numrich's employees died as a result of the
8 accident. There was an extensive OSHA investigation which
9 led to administrative findings and fines. And months later,
10 in January 2018, the State filed these two charges.

11 Count One is manslaughter in the second degree; Count Two
12 is the more specific defense of a WISHA homicide. And we
13 have argued at some length that this is a violation of the
14 general specific rule by charging the general crime of
15 manslaughter in the second degree.

16 We have also made an equal protection challenge, but I
17 don't think the Court needs to reach it, actually. I think
18 that the underlying general specific challenge is
19 sufficient, and I've cited to the Court the Ashwander case
20 which talks about the court can avoid a constitutional
21 question and should avoid a constitutional question unless
22 it's absolutely necessary.

23 I'll discuss briefly the equal protection claim. But I do
24 want to point out I was a little bit dismayed by the State's
25 response where they claim that we somehow had failed to

1 raise a Gunwall challenge, and in raising the state equal
2 protection claim we should be foreclosed.

3 Without providing the Court the case which showed that the
4 Washington Supreme Court has already done a Gunwall analysis
5 in this area and found that Washington's equal protection
6 clause is different than the federal equal protection
7 clause, so I found that to be a little surprising that they
8 don't bring that to the Court's attention.

9 Practically speaking, I want to get to the bare bones
10 here. WISHA homicide is a very unique statutory scheme. It
11 provides for a special gross misdemeanor level offense with
12 special penalties, unlike penalties for any other gross
13 misdemeanor in the state of Washington. And the question
14 is: Why does the WISHA statute cover basically the
15 waterfront for workplace accidents? Well, as we pointed
16 out, workplace deaths and injuries are somewhat different
17 than what we see in our day-to-day lives. There's been
18 thousands of workplace incidents every year. Seventy-five
19 reported workplace deaths in 2016 alone, the year that this
20 occurred, and I think there's need for very clear guideposts
21 for employers, very clear guidelines in these types of
22 cases, and that's where the enactment of OSHA and these
23 WISHA regulations make good sense.

24 And to accept the State's novel argument here, the Court
25 would essentially throw up into disarray what has previously

1 been the understanding for employers in the state of
2 Washington for 50 years or more, that these are the specific
3 provisions, the criminal penalties that apply in a situation
4 like this. The WISHA homicide statute was enacted first in
5 1973 and amended over the years. The manslaughter in the
6 second degree statute I believe was amended -- or enacted in
7 1975, two years later. There is nothing in the legislation
8 that suggests that the legislature intended to supplement or
9 replace the WISHA homicide statute when it enacted the
10 manslaughter 2. And I think the State has conceded that
11 there's no legislative history that supports their argument
12 in this case.

13 I cited to State v. Pyles, which is a 1973 case, which is
14 interesting. It was decided the same year as the statute
15 was enacted. And that's the case where there's a person
16 who's leaving work and as he's driving off, not at a high
17 rate of speed, one of the people at the -- it was a guard at
18 the place of his business grabs onto the steering wheel, and
19 there's sort of a struggle with the steering wheel. In that
20 case the State charged the defendant with negligent homicide
21 under the manslaughter statute, the older homicide statute.
22 And after a verdict, the trial court reversed and said, you
23 need to charge it in a more specific vehicular statute for
24 negligent homicide, because it was a -- it was an offense
25 that occurred during a driving episode and the negligent

1 homicide, the general statute, was subsumed or preempted, to
2 use the Court's term, of the more general manslaughter
3 statute. And that created what I think does justice to
4 what's going on here. And I'd like to hand up just a very
5 short chart which I think demonstrates what we have going on
6 here.

7 The manslaughter in the second degree statute, the more
8 general statute, covers all kinds of activities leading to
9 death. Whereas the WISHA homicide statute covers deaths
10 that occur in the workplace when the employer is the
11 responsible party and where an employee is injured. And I
12 think that there's a perfect symmetry here where every WISHA
13 homicide is encompassed in the manslaughter in the second
14 degree statute. And that's why there's this --

15 THE COURT: So one cannot conceive of a WISHA homicide
16 that is not manslaughter in the second degree?

17 MR. MAYBROWN: Well, I'm going to discuss that. But the
18 State has spent two years investigating the case. In fact,
19 they had two months to respond to our brief. They got
20 additional time. They spent an additional time submitting a
21 surresponse, and they have not submitted a plausible
22 scenario which would fit outside the general manslaughter in
23 the second degree statute. And no matter how hard they
24 tried -- and I'm sure that they spent a lot of time thinking
25 about it. And the examples that they gave don't work. And

1 I'll talk about that. But if they can't come to the Court
2 and point out, this is a different type of scenario which
3 the WISHA homicide statute was intending to cover that
4 wouldn't fall within the manslaughter statute, they lose.
5 They lose.

6 And it's not simply a matter of -- or an aid to statutory
7 construction. It's actually a rule. And it's a rule for
8 good purposes. The reason we have this rule is to ensure
9 that -- not only that there's clarity, but it preserves the
10 legislative intent to penalize specific conduct in a
11 particular -- and in this case, less onerous way, and to
12 minimize sentencing disparities that result from unfettered
13 discretion. And the statute has been on the books since
14 1973. We've had manslaughter both from the common law and
15 manslaughter in the second degree in 1975.

16 And ask yourself, why is this the first case in the
17 history of the State of Washington that any prosecutor has
18 ever come to a court and argued that this statute would
19 apply? Well, I think there's an obvious answer, because
20 prosecutors who looked at the statute understood that the
21 more specific WISHA homicide statute is what would apply.
22 And that's what the filings would be and that's what they
23 should be. Not manslaughter.

24 THE COURT: Well, surely the State must be aware of that
25 history. So something must be driving their decision to

1 prosecute here.

2 MR. MAYBROWN: I think there is something, and perhaps
3 it's political in nature. Perhaps it's based on some
4 thought that this is a way to change the law. If they want
5 to change the law, they can go to the legislature. They
6 have every power to do that.

7 And this Court I know presides over civil cases as well,
8 and this Court understands that in workplace accidents in
9 civil context, there's very specific rules that are
10 different than in all other areas. And we have Workers'
11 Comp and we have all these systems in place. And remember
12 it was called the grand bargain when they enacted the
13 systems to allow for workers to go to work even though there
14 might be dangerous circumstances, but have very regulated
15 clear guidelines for employers.

16 THE COURT: Are you alluding to a WISHA preemption?

17 MR. MAYBROWN: Well, no, I'm not talking about preemption,
18 because I don't think it's a preemption problem. That would
19 be federal preemption. I'm talking about state Workers'
20 Comp exemptions, and that's state law, how state law
21 applies. This is just a state law problem. And Washington
22 was basically given the authority by the federal government
23 to regulate our employers the way we deem fit, and that was
24 when they passed the WISHA homicide statute, and that's what
25 we've been assuming was the law for all this time since

1 then.

2 The preemption cases the State cites deal with a different
3 issue. That issue is: Is the State -- are the State
4 penalties or the criminal penalties preempted by the federal
5 legislation? Basically, did the feds swallow the whole
6 field? They didn't. They didn't. That's an argument that
7 comes up in firearms' cases and other kinds of cases where
8 they're heavily regulated areas. But it's very clear that
9 the feds intended the states to manage their own criminal
10 systems and that's what's happened.

11 And when there's especially a huge problem in a case like
12 this, it's where the mental state for the specific offense
13 is harder to prove than the mental state for the general
14 offense. And the best case that points that out is
15 Danforth. And that's a case where I believe it was decided
16 by the State Supreme Court. But what happened was, these
17 two fellows who were in Spokane in work release didn't
18 return. And they were, I think, using drugs and getting
19 into other problems, but they failed to return to work
20 release. And the State decided to charge them with escape
21 under the -- it's a Class B felony, as I understand, escape
22 was back then, rather than the more specific statute of
23 failing to return to work release. And the Supreme Court
24 said, no, you have to charge the more specific statute here.
25 And even though the more specific statute has a more onerous

1 mental state, that's the point.

2 The legislature decided when enacting that specific
3 statute dealing with the mental state for failing to return
4 to work release, that was their choice, and that's a choice
5 that they are entitled to make. And you can't use the
6 general escape statute which is easier to prove to try to
7 prosecute somebody. And here we have the exact same
8 example.

9 In the WISHA criminal liability statute, you have to find
10 a knowing and willful violation of these safety regulations.

11 In the manslaughter statute -- and we'll talk a little bit
12 about the mens rea shortly -- it's negligence, criminal
13 negligence.

14 And I've pointed out to the Court that there's a statute
15 that says every time you engage in knowing or intentional or
16 willful conduct, it by definition is negligent, it just is
17 by statute in Washington. That's the way we've enacted the
18 laws.

19 And that's why I want to talk a little bit about how the
20 State gets to where they are. I mean, to make their
21 argument, they try to add something to the statute, the
22 general statute, and then they try to take something away
23 from the specific statute. Their first argument which
24 failed, was: There's no causation requirement. Basically
25 if someone dies as a happenstance after there had been a

1 workplace violation, then you could be responsible for
2 WISHA, but obviously the statute says cause. And we pointed
3 out that that means both direct but for cause and legal
4 cause, or proximate cause. So that argument failed.

5 Their second argument, which I think is interesting and I
6 want to talk about it now because there's a little bit of a
7 challenge here, is whether there's some additional overlay
8 to negligence in manslaughter cases. And this gets us to
9 their argument under Latham and Gamble. And we have to go
10 back in the way back machine to understand Gamble a little
11 bit because what Gamble was is a Supreme Court post-Andrus,
12 (phonetic). And Andrus was that case where the Supreme
13 Court decided that Assault 2 would not be a proper predicate
14 for felony murder, even though there had been a long string
15 of cases before then that had.

16 So what happened in Gamble is the court reversed
17 Mr. Gamble's conviction and told -- and the Court of Appeals
18 said, you return to the Superior Court and impose punishment
19 on manslaughter in the first degree, reckless conduct. And
20 so the Supreme Court was asked to decide: Is manslaughter
21 in the first degree a necessary lesser offense to felony
22 murder?

23 And I think the Court is aware that felony murder is an
24 odd duck in that we come up with this fiction and we say you
25 don't have to prove a mental state in connection with the

1 death. We say, if you committed the crime, like you're a
2 get away driver and your buddy kills somebody or even if
3 your friend, the other coconspirator gets killed, you're
4 responsible for it equally. So basically we come up with
5 this fiction where we say we're not going to worry about
6 what your mental state is, we're going to decide if you were
7 involved in the felony in some sense, you're guilty.

8 So what the Supreme Court wrestled with is: Is it
9 appropriate to send the case back and find the person guilty
10 of manslaughter in the first degree? And the Supreme Court
11 said, no. And they said no because we've said forever that
12 manslaughter in the first degree is not a lesser of felony
13 murder because of the difference in the schemes. And they
14 also have this interesting analysis where they say that
15 because you must -- the risk must be more than a wrongful
16 act. The risk must be a risk of a potential homicide.

17 So at least you now in cases involving manslaughter in the
18 first degree, we understand that there's this additional
19 gloss to what the requirement is. But we need to understand
20 that the difference between a manslaughter in the first
21 degree and a manslaughter in the second degree, and it's
22 night and day.

23 When we're talking about mens rea in Washington, we
24 usually think that's the mental state. I mean, law school
25 101, you have to have an actus reus and a mens rea. And the

1 mens rea usually is intentional conduct or willful conduct,
2 knowing conduct, reckless conduct, and then we also include
3 negligent conduct.

4 But you see, reckless conduct is knowingly -- knowing of a
5 risk and disregarding the risk. Knowing conduct obviously
6 is you know what you're doing, and intentional conduct is
7 you intend the consequences or the act. The difference is
8 for negligence, there's an absence of a mental state.
9 They're not saying that you knew of anything or thought
10 about anything. You said you failed to be aware.

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

17 Justice Chambers was talking about -- and this is at the
18 last page of Gamble, which in my reading is 476 going over
19 to 477. And this is a short concurrence, and he says: "I
20 write separately to say I concur in the majority." But let
21 me explain what's going on here. And he says: "Under the
22 statutory law today, either second degree manslaughter" --
23 the charge we're talking about today -- "a Class B felony or
24 the much more serious charge of second degree felony murder,
25 a Class A felony, may be charged for a negligent assault

1 when the assault is in the death of another.

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

15 And that's why in Henderson and Latham, the other cases
16 they cite, there's some dicta which suggests maybe Gamble
17 applies in manslaughter in the second degree. I don't think
18 I could find any court that's given that instruction in a
19 case. I couldn't find one. And I don't think that I could
20 in a straight face say you have to be aware of something in
21 this situation when it's a failure to be aware. I don't
22 understand how you would do that. And that's why the State
23 gets so tied up in knots. And they come up with two
24 hypotheticals, and I want to talk about them briefly because
25 once you look at their hypotheticals, you realize that they

1 lose.

2 The first hypothetical is, there's an employer who doesn't
3 give his employees hard hats. But in setting up the
4 hypothetical, they say what they were going to be doing that
5 day was no risk, there was no reason to be concerned about
6 someone being hit in the head, and that's what the
7 employer's decision was. But then, unbeknownst to anybody,
8 a hammer falls from the sky from some other workplace and
9 hits an employee --

10 THE COURT: The intervening act?

11 MR. MAYBROWN: Yeah. And of course, it's an intervening
12 act. You can't make a sensible argument that the person is
13 responsible for that. I don't think that you can make a
14 sensible argument that he could ever be found responsible
15 for something falling from the sky. And as we mentioned in
16 a footnote, if the employer reasonably understood that that
17 might happen, then he's guilty of both manslaughter in the
18 second degree and potentially a violation of the WISHA
19 statute. They both apply.

20 Now the second example -- hypothetical that they give is
21 even more perplexing to me, because that has to do with
22 someone who is wearing chaps. And I'm not a logger, I don't
23 fully understand how this works. But I assume that when
24 you're using a chain saw, you want to have protective gear
25 on. That makes sense to me. So what happens in their

1 hypothetical is the employer made sure that his employees
2 wore these chaps so he didn't violate the statute. And then
3 at the end of the day as the person is leaving, he takes off
4 his chaps. And then unbeknownst to the employer who had
5 required him to wear chaps, he goes back in to go back to
6 work and make what they call one final cut. And then
7 there's some situation where the person gets injured and
8 somehow the employer is responsible for that. I think it
9 fails in both respects. One, how is that a knowing and
10 willful violation of the WISHA? It can't be if the employer
11 had no knowledge that he took his chaps off and went back to
12 work when especially he had told -- according to their
13 hypothetical -- all the employers -- all the employees,
14 excuse me, that they need to wear chaps when they're on the
15 job. I mean, how can an employer be responsible if an
16 employee decides it's too hot, I'm not going to wear my
17 helmet today? Hey, you've been specifically directed and
18 told that you need to do that. It doesn't make any sense to
19 me.

20 And also, given that it was the employee's own conduct
21 that caused his death, I don't see how it could fit under
22 manslaughter either. How could it be a failure to
23 appreciate a risk in a situation like that? It doesn't work
24 either way.

25 THE COURT: Could you have a situation where the

1 employer's conduct lands here but not here?

2 MR. MAYBROWN: Well, I don't think so. I don't think
3 so -- I suppose you could get into a situation like this:
4 Let's say the employer decides, I'm going to murder
5 somebody -- and it's a strange hypothetical, but I'm going
6 to murder somebody at my job site. So there's no violation
7 of the WISHA at all. I'm just going to kill him. I think
8 under our understanding of the statutes -- and this is not
9 terribly clear, but since it's an intentional act, the mens
10 rea would be encompassed within -- for the lesser crime of
11 manslaughter, it would be encompassed in that because it's
12 negligent, but more than negligent. Now, if I gave you that
13 scenario, I would never get a lesser included offense
14 instruction because you can only get a lesser if that is
15 possible that the jury could only convict him of that crime.
16 But I can envision, just based in the way the statutes work,
17 that that is at least an intellectual possibility.

18 But that's not what we're dealing with here. We're
19 dealing with a workplace accident. We're not dealing with a
20 claim where they're saying that he knowingly or
21 intentionally killed somebody or even assaulted somebody.
22 That's not what we're talking about. And that's why we're
23 sort of left in the lurch here where the State has had all
24 this time to come up with these hypotheticals, and they're
25 trying -- they're basically trying as hard as they can to

1 ask this Court to add something to the manslaughter in the
2 second degree statute that isn't there. It's not part of
3 the statutory scheme. And they're also asking this Court to
4 sort of rewrite and reinterpret WISHA in the years that have
5 gone by so now they're not burdened. Now we don't have to
6 worry about WISHA. Because the different -- the thing about
7 WISHA that's interesting is you have to prove a knowing and
8 willful violation. It's not enough to prove that it was a
9 negligent violation. And there's a reason for that. The
10 reason for that is because we don't want to be having a
11 situation where every employee -- excuse me, every employer
12 is facing a possible felony manslaughter charge if there was
13 some negligence at their job site. And I think there's
14 reason for that. I suppose if it was a policy decision that
15 it would gum up the works of industry to such a degree that
16 we would not be able to have the type of economy that we do.
17 And I think that that's why we have special rules for
18 employee/employer situations. This is a heavily regulated
19 area, doing sewers, and you have to have a license and you
20 take on that responsibility. And there was a licensing
21 proceeding, and we could even have a trial about whether
22 there was a knowing and willful violation of the WISHA
23 statute. But the State wants to basically subsume that into
24 a much more serious offense, and I don't think that they are
25 close to getting there.

1 THE COURT: I'll allow you time for a brief rebuttal.

2 MR. MAYBROWN: Okay. Thank you.

3 THE COURT: Thank you.

4 I'll hear from the State.

5 MR. HINES: Thank you, Your Honor.

6 THE COURT: So do you concede that this is the first time
7 the State has charged an employer with a felony for a
8 workplace accident?

9 MR. HINES: Your Honor, I would say that as near as I
10 know, it is the first time in the State of Washington that
11 an employer has been charged with a felony for the death of
12 a worker. As pointed out in the State's briefing, however,
13 it's not the first time in the country. There's a long and
14 developing trend of this happening. And I would suggest
15 that that's the answer to what is going on in this case. It
16 is not the failed reference by the defense that this is some
17 sort of political action on the part of the prosecutor's
18 office. But it's a recognition that over time, the
19 understanding of what the law is and what is or is not
20 should be treated as a criminal act and what the prosecutor,
21 who is entitled to make decisions as to how cases are
22 prioritized, wants to put state resources in.

23 THE COURT: Is there a similar trend in the federal
24 context?

25 MR. HINES: I don't know the answer to that, Your Honor.

1 But not that I'm aware of.

2 THE COURT: In the federal context, is there the same
3 general/specific rule?

4 MR. HINES: I also don't know the answer to that Your
5 Honor.

6 THE COURT: Okay.

7 MR. HINES: What I do know, though, is that in doing the
8 research that I've been able to do, all of the cases I have
9 found -- and I specifically focused on and cited to trench
10 collapse cases because there are all sorts of other ways
11 that workers can die on the job -- they are all brought by
12 states, charging things like manslaughter or more
13 traditional crimes, not the sort of specific -- and I'll use
14 the word in air quotes, "specific" or more limited statutes
15 that's in WISHA or OSHA or other states' equivalents.

16 THE COURT: All right. I mention the federal context only
17 because there was a trial in 1995, I believe, in Federal
18 District Court. I believe it was before Judge Carolyn
19 Dimmick. It was a federal prosecution of a defendant --
20 against a defendant named Francis Miller. He owned a
21 fishing company and a boat sank, and there was at least one
22 death. And there was a -- some sort of federal homicide
23 charge brought against him. And I was curious as to whether
24 this issue had been litigated back then. It eventually did
25 go to trial.

1 MR. HINES: I don't know, Your Honor. I'm sorry; Your
2 Honor said this, but do you remember exactly when that was?
3 Because if it predated OSHA, there would not necessarily
4 have been the analysis.

5 THE COURT: 1995.

6 MR. HINES: Okay. Then that would have been well after
7 OSHA. So I don't know the answer to that question.

8 THE COURT: Okay.

9 MR. HINES: To lead off, though, with what the State feels
10 is a response to the last question that you asked defense,
11 and turning to this chart that the defense created, what
12 these statutes create is not a circle within a circle. It's
13 a Venn diagram. We're going to have some cases that are
14 manslaughter in the second degree, some cases that are a
15 violation of this Title 49 statute, and some cases where
16 they overlap and it's a violation of both. And that happens
17 to be the case that we're in here, but that doesn't change
18 the analysis of what they look like nor does that implicate
19 general versus specific analysis.

20 I would suggest as well that the answer to the question --
21 or one of the answers to the question that the Court asked
22 is, you know, would it be possible to have a workplace
23 accident or a workplace incident that resulted in death that
24 would be a manslaughter but not a violation of the Title 49
25 crime? And I think the answer is clearly that yes, that

1 could be possible, because the Title 49 crime talks about a
2 knowing and willful violation of a safety regulation that
3 causes death. If you have a negligent violation of those
4 safety regulations, that wouldn't constitute a violation of
5 that Title 49 crime, but if it did meet the other criteria
6 for manslaughter, it would be a manslaughter in the second
7 degree. And I think that is an answer to the Court's
8 question based just on the language of the statute alone.

9 THE COURT: Would the general/specific rule not preclude
10 prosecution in that context?

11 MR. HINES: It would not, Your Honor, because even if you
12 have a general versus specific statute to use the diagram
13 again. If you have -- general versus specific only applies
14 if you're within both circles. If you're in this area, the
15 outer circle but not the inner circle, you've just charged a
16 different crime because the specific crime doesn't apply to
17 it if the rule doesn't apply. That is, you can't force the
18 State to charge a crime that it can't prove just because
19 there is a more specific crime that floats around out there.
20 But in this case, obviously the State is taking the position
21 that -- and the case law stands for the position that this
22 is not a case that is subject to the general versus specific
23 rule.

24 As an initial point, the State would ask the Court to
25 consider the defense cites -- and cited in their briefing

1 and in their oral argument -- to a number of other cases.
2 And the State pointed out in this -- in its briefing, but
3 would point out here, the limited utility of these other
4 cases. Because in any general versus specific analysis, the
5 rules are fairly clear and straightforward. You can't say,
6 oh, because this case found a general versus specific issue,
7 it necessarily applies here, because those are two different
8 statutes that have different languages -- or different
9 language and deal with different things. So you do have to
10 conduct the analysis. The State isn't arguing really --
11 there doesn't appear to be any conflict between the parties
12 as to what the rules and the law is for how you do this
13 analysis. We just differ in what the analysis tells us in
14 this case.

15 In this case I think it's very important to step back,
16 though, to just sort of some basic principles. Because one
17 of the things we get at with a general versus specific rule
18 is that you don't apply it when you have cases that don't
19 address the same subject matter and aren't in conflict with
20 each other. And that's what you have here. Manslaughter in
21 the second degree talks about the defendant negligently
22 causing the death of another person. This Title 49 crime --
23 and I'm going to call it that just because the -- what I
24 would consider the title of the crime is so lengthy -- talks
25 about knowingly violating a health or safety regulation and

1 that causing death. The focus of those two statutes are on
2 very different things. One has to do with your negligence
3 vis-à-vis the risk of death to another person. The other
4 has to do with a knowing violation of a regulation that
5 happens to cause death. They're aimed at two essentially
6 different actions, two different mental states, two
7 different things that people do. Now that's not to say that
8 can't happen in the same case. They can, as they do here.
9 But they're aimed at different things. So we shouldn't even
10 get to the general versus specific rule. But even if we do,
11 applying that rule to this case doesn't lead to a finding
12 that these statutes are concurrent. And that's the
13 prerequisite for the general versus specific rule; they have
14 to be concurrent. And the test is that every violation of
15 what is alleged to be the specific statute must necessarily
16 violate the general statute.

17 The case law suggests that there's essentially two ways of
18 getting to this. First is you just look at the elements of
19 the crime. The second is you talk about hypotheticals. And
20 both of those in this case show that this is not a general
21 versus specific set of statutes. Looking at the elements,
22 what is different between these two crimes is the mens rea
23 element. And with all due respect to the defense, they're
24 flatly wrong on this. Mens rea consists of two different
25 parts: The level of mens rea and the object of mens rea.

1 Both of those have to be there for -- in consideration of
2 the element of mens rea. And that's sort of obvious. Theft
3 has a mens rea of intent. Murder in the second degree has a
4 mens rea of intent. No one would confuse those two mens
5 reas, though, because they're about different things. And
6 that's exactly what we have the case here.

7 In manslaughter in the second degree, the mens rea of
8 negligence has to be vis-à-vis the risk of death to the
9 decedent. I want to come back and talk about Gamble in just
10 a moment.

11 With regard to the Title 49 crime, the mens rea knowingly
12 is about the violation of a safety regulation. Just looking
13 at its face, those are two incredibly different things.
14 Even if we didn't have Gamble, even if the mens rea was only
15 about manslaughter in the second degree, there still
16 wouldn't be a general versus specific rule, because the mens
17 rea then would be criminal negligence that a wrongful act
18 would occur, which is very different mens rea than the mens
19 rea of knowingly violating a safety regulation.

20 Let's talk about Gamble. Gamble analyzed manslaughter in
21 the first degree and found that the recklessness -- the mens
22 rea of recklessness had to be specifically about the risk of
23 death to the victim. Mr. Maybrowns doesn't believe that
24 Gamble applies to manslaughter in the second degree, and
25 he's entitled to his opinion. He points to the concurrence

1 of Justice Chambers who apparently doesn't believe that
2 Gamble applies to manslaughter in the second degree, and
3 Justice Chambers is obviously entitled to his opinion. But
4 those opinions don't trump the clear case law and other
5 evidence to the contrary that says that Gamble does apply to
6 manslaughter in the second degree.

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

14 Second, the committee -- the Washington State Supreme
15 Court committee on pattern instructions clearly interprets
16 Gamble as applying to manslaughter in the second degree.
17 It's clear from reading their notes in the comments. It's
18 clear from the definition of criminal negligence and the
19 definition for manslaughter in the second degree that they
20 interpret Gamble as holding that the mens rea is not just
21 about a generalized bad act or wrongful act. It has to be
22 about the death of the decedent.

23 And in the Latham case, that is the point of the court's
24 ruling. That is how they arrive at the decision they do.
25 It's not dicta. In Latham, in that portion of the decision,

1 the court was analyzing a Nevada statute and deciding
2 whether it was comparable to a Washington statute. And what
3 the court found in finding that they weren't comparable, is
4 that under the Nevada statute, the mens rea didn't have to
5 be about the death of the decedent, it could be about some
6 other bad act. Whereas in Washington, the mens rea for
7 manslaughter in the second degree, the negligence has to be
8 about the risk of death to the decedent, and that is the
9 reason they found those two statutes were not comparable.

10 Gamble clearly applies to manslaughter in the second
11 degree. And since it does, those mens rea elements, the one
12 for manslaughter in the second degree and the one for the
13 Title 49 violation, are about different things. And in that
14 case it doesn't matter that one has a higher level; that is
15 a general statement of the law knowledge will prove
16 negligence. Just like the intent for theft is the same
17 level as the intent for murder. They're about different
18 things, that makes them different elements. And that is
19 exactly the case here.

20 As a result, on that basis alone I think the Court can
21 conclude that this is not one where these two statutes are
22 concurrent. But also address, though, the hypotheticals
23 posed by the State. Because those hypotheticals do
24 establish situations in which an employer would be guilty of
25 a violation or a crime under Title 49, but not manslaughter.

1 And since that is possible, the rule of concurrency is not
2 met.

3 I would first point out that, you know, in the -- what is
4 missing from the defense analysis is a number of things, but
5 the first of those is a recognition that the regulations
6 that are being talked about in those cases, talk about an
7 affirmative duty of the employer. For example, with regard
8 to the woodcutting and chaps incident. It doesn't get the
9 employer out of liability to say, oh, well, he took his
10 chaps off. The responsibility is on the employer to make
11 sure that they're wearing their chaps. That sort of
12 analysis holds true through all of this and directly
13 addresses that intervening causation issue raised by the
14 defense. Because in each one of those regulations and in
15 scores of regulations that govern in the WISHA scenario, the
16 worker safety scenario, there are independent and
17 affirmative obligations on employers to make sure that
18 things are done a certain way. And if they're not done that
19 way, even if it's because a worker decided not to follow the
20 regulation, if the employer is aware that the regulation is
21 being violate -- excuse me. If the regulation is being
22 violated and the obligation is on the employer to make sure
23 that it's not, that is a violation.

24 But I suggest we step back, though, and talk about this
25 idea, number one, whether the defense is in fact right with

1 this analysis of an intervening cause or a breaking of the
2 chain of proximate causation in a Title 49 context. Because
3 the State would suggest that that actually is not part of
4 the analysis for this Title 49 crime. Because there's no
5 indication that it is, nor is there an indication that it
6 should be. Because if the Court would step back and think
7 about it, a violation of a safety regulation in and of
8 itself is never going to be the proximate cause of a death.
9 There is always going to be some other thing that happens
10 that causes the death. And that's why the statute of that
11 Title 49 -- or that Title 49 crime talks about not that the
12 violation -- excuse me, I was about to misspeak. The
13 language talks about -- it's true, Title 49 there being a
14 violation causing the death. But simply violating a
15 regulation doesn't cause death. There is always going to be
16 some other intervening action of someone or something that
17 causes the death. If we were to find -- if this Court were
18 to find, as the defense asserts, that because there's this
19 intervening action, the person in the hypotheticals would
20 not be guilty of a Title 49 offense, no one would ever be
21 guilt of a Title 49 offense, because there's always going to
22 be that other action.

23 I'd also point out, though, that even if the Court were to
24 accept the defense's argument that there can be an
25 intervening act that would break the chain of proximate

1 causation for purposes of the Title 49 crime, that doesn't
2 end the analysis because that has nothing to do with the
3 analysis that we're really talking about. What we are
4 talking about in the general versus specific context is, is
5 it possible to violate the specific statute without
6 violating the general one? And I would suggest to the Court
7 that in the circumstance that the -- that the -- excuse me.
8 I lost my train of thought. I apologize. I will move on
9 and come back to that.

10 So what the Court can tell and what is an important point
11 is that the question of intervening causation and whether it
12 breaks proximate causation is a question of fact for the
13 jury. So we can't just say, oh, that would never be the
14 proximate cause. What that tells the Court is that there
15 could easily be a scenario -- even if we accept the defense
16 argument about proximate causation being part of the
17 analysis for the Title 49 crime -- you could have a jury
18 that looks at a series of events and says, you know, that
19 other thing that happened, yes, it happened, but we don't
20 think it broke the causal connection, the proximate
21 causation of the death, so we're going to convict this
22 defendant of the Title 49 violation. But because that thing
23 that happened was so unexpected, no one possibly could have
24 conceived of it, he clearly wasn't negligent in failing to
25 guard against it, so we're going to acquit him of the

1 manslaughter.

2 That can happen, even with the interaction of this
3 proximate causation analysis. And because it could happen,
4 that shows that you can violate Title 49 without violating
5 manslaughter -- without committing the crime of
6 manslaughter. And as a result, the test for concurrency
7 fails.

8 The last point I'd leave the Court with is -- on this
9 point, is to point out that in the defense's response to
10 these hypotheticals, there's a subtle twisting and shifting
11 of what the mens rea is. Because in each of those
12 circumstances, again, the question is: Was there a knowing
13 violation of a safety regulation that caused death?

14 What the defense asks the Court to do in those
15 hypotheticals or in rejecting those hypotheticals is to
16 begin inserting an analysis of, well, was there some other
17 thing that could have been anticipated or not anticipated?
18 Would it have been unreasonable or not for the employer to
19 think about that? As soon as you do that, you're not
20 talking about the mens rea for Title 49 anymore, you're
21 talking about the mens rea for manslaughter. And that's the
22 problem with much of the defense argument, is this
23 conflating together of multiple ideas.

24 I'd also point, just as a -- quickly, that even if the
25 general versus specific rule applies, the case law is clear,

1 whether the defense likes it or not, that it is a canon of
2 statutory construction. It's not an independent rule. It's
3 not an equal protection violation in and of itself. It has
4 to be used as part of interpreting legislative intent. Did
5 the legislature intend for one statute to not be charged
6 because of the existence of another one? In that case, I'd
7 direct the Court's attention back as well to the case law
8 cited by the defense that said -- or excuse me, by the State
9 that says that the general versus specific rule can only be
10 applied when the legislative intent to preclude prosecution
11 is crystal clear. That's the language the court used. And
12 here you certainly don't have that.

13 It's clear that when the -- and Congress of the United
14 States enacted OSHA, their intent was to expand, not to
15 contract for protection and the ability to prosecute people
16 for endangering their workers. The State quoted in its
17 brief, the committee reports, interpreting OSHA and talking
18 about OSHA and how OSHA was not intended to be restrictive,
19 and that the Congress continued to encourage prosecution
20 under traditional crimes.

21 When the Washington legislature adopted WISHA, it didn't
22 essentially conduct any different independent legislative
23 intent. It just said, we want to comply with OSHA. And as
24 a result, they essentially adopted that legislative intent
25 of OSHA.

1 Now, Mr. Maybrow points out and argues that, well, since
2 WISHA, the manslaughter statute has been addressed by the
3 legislature and they didn't make it responsive in some way
4 to the WISHA crime. I think that puts the analysis
5 backwards. Because at the time WISHA was enacted, this
6 concept of manslaughter existed, and the legislature took no
7 actions whatsoever, nor is there any intent -- indication of
8 legislative intent that this was somehow going to supercede
9 prosecution for more traditional crimes such as manslaughter
10 in the second degree.

11 But also point out that, you know, if you take the general
12 versus specific rule, even if it applied to these cases and
13 just say, well, that's the end of the inquiry, you end up
14 violating numerous other canons of statutory construction.
15 One of the major and basic ones is that you have to
16 harmonize statutes, and you don't want to create a scenario
17 where absurd results occur. And in this case, the State
18 points out in its brief at least three absurd results that
19 would follow if the Court adopts the defense's
20 interpretation.

21 The first of those is the simple fact that by definition,
22 when you have an employer/employee relationship, that is a
23 relationship that puts an obligation of care on the employer
24 vis-à-vis the employee. On the other hand, as a general
25 matter, people just walking in the streets have no real duty

1 vis-à-vis each other, other than the duty to avoid
2 committing a crime.

3 But if you take the defense's argument as read, what that
4 means is that when an employer causes the death of an
5 employee, someone they have a duty of care for, they would
6 only be liable for a gross misdemeanor. But when one
7 stranger negligently causes the death of another, they'd be
8 on the hook for a felony. That's an absurd result.

9 In addition, a number of the safety regulations at issue
10 in Title 49 and other titles have to do not just with
11 protecting workers but with protecting members of the
12 public. Because some of the accidents that can occur are
13 dangerous. What does that tell you? Well, if you have a
14 workplace incident that kills a worker and a member of the
15 public and involves a violation of the safety regulation,
16 under the defense's interpretation, the death of the
17 employer -- excuse me, the death of employee would only be a
18 misdemeanor, but the death of the member of the public
19 walking down the sidewalk would be a felony. That doesn't
20 make any sense.

21 And finally, as the State pointed out, the WISHA statute
22 talks only about death. Well, there are any number of
23 accidents that cause serious injury to another person. And
24 you can have an injury that is caused by a negligence that
25 would constitute an assault in the third degree. Under the

1 defense's scenario, if you have a violation of a safety
2 regulation that causes a danger to occur where it kills one
3 employee but only seriously injures another, that employer
4 could face liability of a gross misdemeanor for the death,
5 but a felony for the injury. That doesn't make any sense.

6 The only real response the defense has to those scenarios
7 is sort of a throwaway, oh, well, those are far-fetched and
8 there's no indication those would happen.

9 First and foremost, I don't know that I agree with that,
10 but I don't know. But even more so, what we're talking
11 about when we're constructing -- construing statutes is what
12 is possible, what is logically inexorable from the
13 interpretation. And in this case, those absurd results
14 follow logically from what the defense has to say.

15 As a final point on this, the State would just point out
16 that the State's interpretation of these statutes harmonizes
17 a number of different canons of statutory construction and
18 they all reach the same outcome. Whereas the defense's
19 version takes one statute -- a canon of statutory
20 construction and elevates it above all others.

21 If I could really briefly, Your Honor, on the equal
22 protection arguments. Mr. Maybrown is right, I missed the
23 case from Grant County. I made the assertion that I
24 couldn't -- that the defense had not cited, and I could not
25 find a case where a Gunwall analysis had been done. I

1 missed that case. Mea culpa, I apologize. But I think what
2 the defense misses is the implication of what that case
3 holds. If we go back in time, we talk about how this line
4 of cases about equal protection develops, you first have the
5 Olson case. And Olson says that when there is a single
6 statute that prescribes different penalties for the same
7 crime, that violates equal protection. The Olson case --
8 court reaches that conclusion because it violates the 14th
9 Amendment. The Olson court in what Mr. Maybrow
10 characterizes as a throwaway line says: "Since the 14th
11 Amendment and the Article 1, Section 12 are the same, it
12 therefore must also violate the Washington constitution."

13 "Fast-forward a few decades, we have the Zornes case.
14 Zornes expands Olson to apply to when it's two different
15 statutes that criminalize the same act with different
16 penalties. That violates the 14th Amendment, and again
17 without further analysis based on Olson, it therefore, must
18 also violate Article 1, Section 12.

19 Then the United States Supreme Court in Batchelder says,
20 no, that doesn't violate. That scenario where two different
21 statutes have different criminal penalties for the same act,
22 that doesn't violate the 14th Amendment.

23 We then have the Washington case of Fountain that says,
24 oh, well based on Batchelder, Zornes is no longer good law
25 at least as far as it relates to the 14th Amendment. There

1 are then a number of cases where the Washington courts have
2 said the defendant has made a Zornes argument because Zornes
3 has been overruled. At least insofar as the federal
4 constitution, we find no equal protection violation. None
5 of those cases conduct an analysis under Article 1, Section
6 12.

7 As Mr. Maybrown pointed out, though, there is this other
8 case in which a Gunwall analysis is done and where the court
9 concludes the 14th Amendment and Article 1, Section 12 are
10 completely different. They are different rights. Well,
11 what does that mean? It means that all of the equal
12 protection cases that have been cited thus far in Washington
13 have not decided specifically the issue of an Article 1,
14 Section 12 violation because they were all based on the
15 assumption that the 14th Amendment and Article 1, Section 12
16 were the same.

17 This case cited by the defense that shows that they're
18 different means that there has never been an analysis as to
19 whether that scenario violates equal protection or more to
20 the point, the privileges and immunity clause of Article 1,
21 Section 12. In this case, the defense has not submitted any
22 analysis as to how it would violate Article 1, Section 12.
23 They just rely on those old cases. But as they themselves
24 have pointed out with their reference to this Gunwall
25 analysis case, that is not -- that analysis doesn't apply to

1 Article 1, Section 12. So there has been no analysis by
2 this Court on equal protection under Article 1, Section 12.

3 The last thing I would point out, and I thank the Court
4 for the Court's patience, is that even if we were to go to
5 the these old equal protection cases, Zornes and so forth,
6 and apply them as applying the Article 1, Section 12
7 privileges and immunity clause, they all have with them the
8 statement that if the elements of the two crimes are
9 different, there is no equal protection violation, and the
10 State does one over the other. And for the same reason that
11 I discussed previously, in this case the elements of these
12 two crimes are different. So there isn't an equal
13 protection violation.

14 I would point out to the Court that in the defense's
15 reply, they concede that these are different elements. They
16 then go on to make the argument of, well, proving one
17 necessarily proves the other. But that's part of the
18 analysis for the general versus specific rule. It's not
19 part of the analysis for the equal protection rule. Because
20 these crimes have different elements, there is no violation
21 under the equal protection rule, even if we consider Zornes
22 and the cases before and after it as applying in an Article
23 1, Section 12 context.

24 If the Court has questions, I'm happy to address them.
25 Otherwise, thank you.

1 THE COURT: Thank you.

2 Mr. Maybrown.

3 MR. MAYBROWN: Thank you, Your Honor. First of all, I'm
4 going to just answer the Court's question. There have been
5 recent federal cases. There's a very famous federal case
6 that recently was prosecuted against a person named Don
7 Blankenship. This was a horrific mine collapse where 29
8 people died in West Virginia. The Court probably recalls.
9 He was convicted of a single misdemeanor for violating mine
10 and safety standards. That was what he was prosecuted for
11 in federal court. The most horrific disaster -- employer
12 disaster that I can remember. And that's the trend that
13 applies now.

14 The Washington court, though, applies a very specific and
15 different type of general/specific rule, and I completely
16 disagree with the State. There's not one case -- and they
17 can't point to a case -- that says this Court can ignore the
18 general and specific rule and apply these other canons of
19 construction. And in fact, the courts say this -- and sort
20 of about absurd results, that is the weakest, least helpful
21 rule of statutory construction because this Court can
22 envision any scenario where the legislature would have
23 decided it makes more sense to have a regulated scheme like
24 this, that's what applies.

25 THE COURT: I have a question for you.

1 MR. MAYBROWN: Sure.

2 THE COURT: Let's say an employer acts negligently and
3 falls within your larger blue circle but doesn't fall within
4 WISHA homicide, but the negligence causes a death and so it
5 falls within the blue circle. Would the general/specific
6 rule preclude prosecution because there has been legislation
7 in this area?

8 MR. MAYBROWN: Well, I guess I'd have to understand a
9 little bit more about the hypothetical, because as the Court
10 might recall, the WISHA standards are health and safety
11 standards.

12 THE COURT: Right.

13 MR. MAYBROWN: So it's hard for me to envision -- I mean,
14 I can envision --

15 THE COURT: So we've got negligence and -- employer's
16 negligence causes death, but it's not -- it doesn't fall
17 within WISHA homicide.

18 MR. MAYBROWN: It's a one-way ratchet. You're worried
19 about whether every time you violate the specific, you also
20 are encompassed in the general. It doesn't work the other
21 direction. There always can be situations where you might
22 violate the general, but --

23 THE COURT: But not the specific.

24 MR. MAYBROWN: -- but not the specific. But that's not
25 the way the rule works. In the context, the way the rule

1 works is if every time you violate the specific, you
2 necessarily violate the general, you have to charge the
3 specific. And unless I'm --

4 THE COURT: I understand that the two of you disagree on
5 that point. But my point is, could you have negligence that
6 causes death that constitutes manslaughter in the second
7 degree -- or hypothetically, let's say you do have
8 negligence that causes -- employer's negligence causes
9 death, it meets the elements of manslaughter in the second
10 degree but not WISHA homicide.

11 MR. MAYBROWN: Meaning that --

12 THE COURT: Meaning that person could -- under your
13 analysis, that employer could be prosecuted for a felony,
14 but not for the misdemeanor.

15 MR. MAYBROWN: I think if I understand the Court's
16 suggestion, let's say the employer commits something that's
17 not a violation of a regulation.

18 THE COURT: Correct.

19 MR. MAYBROWN: Like -- and the conduct is such that it's
20 negligence. You give your employer drinks and they turned
21 out to be tainted with something and a person dies. I
22 suppose I could envision that scenario, but it doesn't fall
23 within WISHA at all, so we're not in a general/specific
24 problem. If you see what I mean.

25 THE COURT: I see what you're seeing.

1 MR. MAYBROWN: I'm not saying that every time someone dies
2 because an employer does something, we're into this problem.
3 It's only in a workplace accident scenario. And that's why
4 the states claim that somehow bystanders are involved or
5 your shooting missiles off of your job site, this rule would
6 apply. It doesn't. It only applies in this very specific
7 area, which is a workplace accident, and that's what we're
8 talking about. And that's why -- I think this --

9 THE COURT: I'll give you about four more minutes.

10 MR. MAYBROWN: Okay.

11 THE COURT: We do have a hearing at 2:30.

12 MR. MAYBROWN: I got you. I just want to point out a
13 couple things. First of all, the State is asking this Court
14 to decide something that's never been decided before that
15 there's no proximate cause requirement. Every time a
16 statute says "cause," that I am aware of, the cases say both
17 "but for cause" and "legal cause." The only way they can
18 come up with scenarios that would work here is to ask this
19 Court to rule as a matter of law that proximate cause no
20 longer exists.

21 When they're making the arguments about why there's a
22 violation of WISHA that results in death, they're also
23 asking this Court to find that it's -- there's no knowledge
24 requirement. They're saying basically every time you commit
25 a violation, whether it's a known violation, whether it's

1 willful, it doesn't matter anymore. So they're asking the
2 Court to write that out and say that there's liable -- every
3 case there's a violation, whether it's knowing, willful or
4 intentional. That's not what the statute says. And that's
5 what all of their hypotheticals -- you can listen to every
6 argument that they've made, they have not made a persuasive
7 claim at all. And they've had another two months to come up
8 with the scenario to present to the Court that would fit.
9 They can't find one, because it doesn't exist. And that's
10 why Washington's very precise general/specific rule would
11 apply here, and must apply here to preclude this particular
12 prosecution. This Court doesn't have to say anything more
13 than that.

14 And I'm not going to get into the equal protection
15 argument except to say that the State's been wrong all
16 along. And I should note to the Court -- and I don't know
17 if the Court's going to rule, but I should let the Court
18 know that we are also supposed to handle the case scheduling
19 hearing today, and I just wanted to remind the Court because
20 maybe we hadn't mentioned that before. And we have some
21 paperwork, which we can talk about after the Court's ruling.

22 THE COURT: I plan to rule by next week.

23 MR. Hines: Shall we handle the case scheduling?

24 MR. MAYBROWN: And I think that with -- I'll let Mr. Hines
25 suggest to the Court -- I think both sides see this as a

1 novel issue, a case of first impression, a hugely important
2 case not only for my client but also for other defendants in
3 the State of Washington. And we were going to ask the Court
4 to certify the issue if the Court chose not to dismiss. I
5 think the State has also indicated that they may make the
6 same request. So I would ask that the Court extend the case
7 scheduling longer than usual, say for 90 days. I don't want
8 to prejudge what the Court's decision will be, but I think
9 that based on this argument, both sides would likely agree
10 that this is a matter that a higher court is going to have
11 to consider.

12 MR. HINES: Your Honor, yes, from the State's perspective,
13 not to be canny about it, but what the State's position
14 would be --

15 THE COURT: It depends on my ruling?

16 MR. HINES: It depends on the ruling and the basis given
17 for the ruling. And so I don't necessarily disagree with
18 Mr. Maybrown that this may eventually end up in front of the
19 Court of Appeals. But particularly because the question of
20 certification under the RAP may end up being an issue that
21 we have to address as a separate issue before this Court,
22 what I would suggest is that we set this matter for a case
23 setting that's closer in time with the understanding that
24 once we see the Court's ruling, that may then be extended
25 again by agreement of the parties. But if we do need to

1 litigate something further, depending on what the Court
2 rules on that, I just don't want to end up with a situation
3 where the case is way far out and then we end up wishing it
4 wasn't.

5 THE COURT: I think that's a reasonable approach.

6 MR. MAYBROWN: That's fine. I'm in trial, and that's what
7 creates a little bit of uncertainty both for me and my
8 client. And I also think we've previously notified the
9 Court, as the State has, that that's the likely path of this
10 case. Plus, Judge O'Donnell indicated that he recognized
11 this case was going to take quite a bit of time. So there
12 wouldn't be any objection, I think, to say a 60-day
13 extension. That gives the Court whatever time the Court
14 needs, and then if we need to schedule a hearing to come
15 back and address the RAP, because the Court hasn't ruled on
16 it, we could come back.

17 THE COURT: Well, I leave this Court at the end of August.
18 And so I'd like to get this all wrapped up before I leave.

19 MR. HINES: I agree. So the -- before the end -- so I am
20 out of state on vacation from July 30th to August 20. I
21 return on the 21st. The State would then, therefore, ask
22 that if we could set this as a case setting -- I also don't
23 know what Mr. Maybrown's schedule is. I know he's in trial
24 at the RJC, and I don't mean to cause him issues. But to
25 set this very quickly after I come back so that we can

1 determine what we're going to do and whether we need to get
2 any clarification from Your Honor before Your Honor leaves,
3 whether in terms of it's the issue of certification or
4 clarification of the Court's ruling in and of itself.

5 MR. MAYBROWN: And I don't have any objection to the week
6 of the 21st. I have others in my office who could handle it
7 if I'm not available.

8 THE COURT: Okay. That's fine with me.

9 MR. HINES: Okay.

10 MR. MAYBROWN: So I guess I would propose August 23rd. I
11 have the paperwork. We can let Your Honor begin the next
12 hearing and we'll finish up the paperwork and present it
13 that way.

14 THE CLERK: The 23rd at 1:30.

15 MR. MAYBROWN: The 23rd at 1:30.

16 MR. HINES: That works for me.

17 THE COURT: See you then. Okay. Thanks.

18 (Conclusion of hearing)

19

20

21

22

23

24

25

APPENDIX G

Cooper Offenbecher

From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Wednesday, August 22, 2018 10:35 AM
To: Todd Maybrown; Court, Chun
Cc: Alexander, Eileen; Cooper Offenbecher
Subject: RE: State v. Numrich (18-1-00255-5) - on Judge Chun's calendar on Thursday (8/23)
Attachments: Numrich - State's Proposed Order.docx

All,

Per Judge Chun's request, attached is the State's proposed order. The State believes this order summarizes the arguments of the State that the court adopted as the basis for its ruling as indicated in the email below. I have attached it in Word format so that Judge Chun can made edits/alterations/changes as he wishes.

Thanks,
Patrick

Patrick Hinds
King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Hinds, Patrick
Sent: Wednesday, August 22, 2018 7:14 AM
To: 'Todd Maybrown' <Todd@ahmlawyers.com>; Court, Chun <Chun.Court@KingCounty.gov>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Subject: State v. Numrich (18-1-00255-5) - on Judge Chun's calendar on Thursday (8/23)

All,

I just wanted to check in regarding the hearing tomorrow in this matter. As I assume Mr. Maybrown would agree, Judge Chun has already ruled on the defendant's motion to dismiss Count 1. Per the below email exchange, Judge Chun indicated that he agreed with the State's arguments, denied the defendant's motion to dismiss, and asked the State to prepare a proposed order. The State will submit its proposed order a little bit later today so that Mr. Maybrown and the court can have a chance to review it prior to the hearing tomorrow.

The State's understanding of tomorrow's hearing is that we'll be addressing:

- 1) Entry of a written order (and—if necessary—argument on the language of the order);
- 2) The defendant's request that the court certify its ruling per RAP 2.3(b)(4) for purposes of the defendant seeking interlocutory review in the Court of Appeals; and
- 3) CSH/the current status of the case.

Do the court and the defense also have those as being the issues on the table? I just want to make sure we're all on the same page.

Thanks,
Patrick

Patrick Hinds
King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Todd Maybrown <Todd@ahmlawyers.com>
Sent: Monday, July 23, 2018 4:55 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Court, Chun <Chun.Court@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>
Subject: RE: St v Numrich

The defense would not object to the State's proposal.

Todd

Todd Maybrown
Allen, Hansen, Maybrown & Offenbecher, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com

The information contained in this message is intended only for the addressee or addressee's authorized agent. The message and enclosures may contain information that is privileged, confidential, or otherwise exempt from disclosure. If the reader of this message is not the intended recipient or recipient's authorized agent, then you are notified that any dissemination, distribution or copying of this message is prohibited. If you have received this message in error, please notify the sender by telephone and return the original and any copies of the message by mail to the sender at the address noted above.

From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Monday, July 23, 2018 4:36 PM
To: Todd Maybrown <Todd@ahmlawyers.com>; Court, Chun <Chun.Court@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>
Subject: RE: St v Numrich

The State's proposal would be to draft a proposed order and to route it around in advance of the hearing, but with the understanding that the court would not rule on it until after the defense has the opportunity to orally object/argue (as needed) at the hearing on 8/23. I understand the defense concern, but it also seems to make sense to allow the court and the defense to review the State's proposed order in advance of the hearing so that we can determine whether the defense actually has an objection and, if so, so that that everyone can be prepared in the event that argument is needed.

For what it's worth, I believe that Judge Chun is out on leave 8/6 to 8/10. I'm out on leave from 7/30 to 8/20. In that context, I would anticipate getting our proposed order to everyone on 8/21.

Given all of the above, is that proposal acceptable to the court and the defense?

Thanks,
Patrick

Patrick Hinds
King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Todd Maybrown [<mailto:Todd@ahmlawyers.com>]
Sent: Monday, July 23, 2018 3:52 PM
To: Court, Chun <Chun.Court@kingcounty.gov>; Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Cc: Cooper Offenbecher <Cooper@ahmlawyers.com>
Subject: RE: St v Numrich

I will be unavailable for most of the next two weeks. I would ask that any proposed Order be presented at our next Court hearing which is scheduled for August 23, 2018.

Thank you,

Todd

Todd Maybrown
Allen, Hansen, Maybrown & Offenbecher, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com

The information contained in this message is intended only for the addressee or addressee's authorized agent. The message and enclosures may contain information that is privileged, confidential, or otherwise exempt from disclosure. If the reader of this message is not the intended recipient or recipient's authorized agent, then you are notified that any dissemination, distribution or copying of this message is prohibited. If you have received this message in error, please notify the sender by telephone and return the original and any copies of the message by mail to the sender at the address noted above.

From: Court, Chun <Chun.Court@kingcounty.gov>
Sent: Monday, July 23, 2018 3:18 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Alexander, Eileen <Eileen.Alexander@kingcounty.gov>; Todd Maybrown <Todd@ahmlawyers.com>
Subject: St v Numrich
Importance: High

Dear Counsel:

For the reasons argued by the State, the Court is denying the Defense's motion to dismiss Count 1. The Court requests the State submit a proposed order.

Thank you.

Jill
Bailiff to Judge John H. Chun

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 18-1-00255-5 SEA
Plaintiff,)	
)	
vs.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO DISMISS COUNT 1
PHILLIP NUMRICH,)	
)	
Defendant.)	
)	
)	

The State has charged the defendant, Phillip Numrich, with Manslaughter in the Second Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation with Death Resulting under RCW 49.17.190(3) (Count 2). This matter came before this Court on Numrich's motion to dismiss Count 1 on two grounds. For the reasons outlined below, this Court denies Numrich's motion on both grounds.

The "General-Specific Rule"

It is well-established rule of statutory construction that when a defendant's actions violate both a specific and a general statute, the defendant should generally be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Numrich argues that the State's prosecution of him for manslaughter violates this rule. This argument fails for a number of reasons.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT 1 - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 First, the “general-specific rule” is only applied when two statutes address the same subject
2 matter and conflict to the point that they cannot be harmonized. State v. Conte, 159 Wn.2d 797,
3 810, 154 P.3d 194 (2007); State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990). One
4 way of determining this is to examine the elements of the statutes. If the statutes create crimes with
5 different elements, they simply criminalize different conduct and the rule does not apply. State v.
6 Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation presented in this
7 case.

8 To convict a defendant of second-degree manslaughter, the State must prove that: (1) the
9 defendant engaged in an act or acts with criminal negligence; (2) the decedent died as a result of
10 the defendant’s negligent acts; and (3) any of these acts occurred in the State of Washington.
11 RCW 9A.32.070; WPIC 28.05; WPIC 28.06. In this context, a defendant acts with criminal
12 negligence when “he or she fails to be aware of a substantial risk that [death] may occur and his
13 or her failure to be aware of such substantial risk constitutes a gross deviation from the standard
14 of care that a reasonable person would exercise in the same situation.” RCW 9A.080.010 (1)(d);
15 2016 Comment to WPIC 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646
16 (2005)). As a result, second-degree manslaughter requires proof both that the defendant had the
17 mental state of “negligence” and that this mental state specifically related to the risk of death to
18 the decedent. Gamble, 154 Wn.2d at 468-69.¹

19 To convict a defendant of violating RCW 49.17.190(3), by contrast, the State must prove
20 that: (1) the defendant was the employer of the decedent; (2) the defendant willfully and
21 knowingly violated one of the enumerated statutes, regulations, rules, or orders; (3) the violation
22

23 ¹ Numrich asserts that the analysis and conclusion of Gamble applies only to first-degree manslaughter and not
24 second-degree. The State argues that it applies to both levels. This Court agrees with the State’s analysis for the
reasons set forth by the State in its briefing and at oral argument.

1 caused the decedent's death; and (4) any of these acts occurred in the State of Washington. Id.
2 In this context, a defendant acts willfully and with knowledge "with respect to a [fact,
3 circumstance, or result] when he or she is aware of that [fact circumstance or result]. It is not
4 necessary that the person know that the [fact, circumstance, or result] is defined by law as being
5 unlawful or an element of the crime." WPIC 10.02; RCW 9A.08.010(1)(b). Thus, the crime of
6 Violation of Labor Safety Regulation with Death Resulting requires proof that the defendant had the
7 mental state of "knowing" and proof that this mental state specifically related to violating a health or
8 safety provision. RCW 49.17.190(3).

9 As a result, Manslaughter in the Second Degree and Violation of Labor Safety Regulation
10 with Death Resulting have different *mens rea* elements. A violation of RCW 9A.32.070 requires
11 proof that the defendant negligently caused a risk of death to the decedent. In this context, whether
12 or not the defendant violated a statutory duty may be relevant to that issue, but proof that he or she
13 had any specific *mens rea* vis-à-vis such a violation is not required. On the other hand, a violation
14 of RCW 49.17.190(3) requires proof that the defendant knowingly violated a health or safety
15 provision. No proof is required that the defendant had any specific *mens rea* vis-à-vis the risk of
16 death to the decedent.

17 Moreover, the laws are directed at different conduct. Read as a whole, the gravamen of
18 the crime of manslaughter is that the defendant negligently caused the death of another. In
19 contrast, the gravamen of RCW 49.17.190(3) is that the defendant knowingly violated a health or
20 safety regulation and that an employee died as a result. While this distinction may be subtle, its
21 existence and importance is demonstrated by considering the points of the respective laws. The
22 obvious point of RCW 9A.32.070 is to prevent people from acting negligently in a way that risks
23 the death of another. The obvious point of RCW 49.17.190 is to require employers to know and
24

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 3

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 follow applicable safety requirements. As this case demonstrates, there may be times where the
2 State alleges that a given defendant's actions violate both statutes. However, that simply means
3 that the State is asserting that the defendant has committed two different crimes. There is
4 nothing to suggest any intent on the part of the Legislature to preclude the State from prosecuting
5 such a defendant for both.

6 Second, the "general-specific rule" is a canon of statutory construction that is only applied
7 when two statutes are "concurrent." Statutes are concurrent only when the "general" statute is
8 necessarily violated every time the "specific" one is. Shriner, 101 Wn.2d 580. As a result, if it is
9 possible to violate the latter without violating the former, then the statutes are not concurrent and
10 the "general-specific rule" does not apply. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d
11 630 (2006); State v. Heffner, 126 Wn. App. 803, 808, 110 P.3d 219 (2005). Numrich has
12 identified RCW 49.17.190(3) (Violation of Labor Safety Regulations with Death Resulting) as
13 the specific statute and RCW 9A.32.070 (Manslaughter in the Second Degree) as the general.
14 Here it is possible to violate the former without violating the latter.

15 As an initial matter, as described above the two statutes have different elements. In
16 relevant part, RCW 9A.32.070 requires the State to prove that the defendant acted with criminal
17 negligence vis-à-vis the risk of the decedent's death. The State is not required to prove that the
18 defendant willfully and knowingly violated a health or safety regulation.² RCW 49.17.190(3), in
19 contrast, requires the opposite—the State must prove that the defendant willfully and knowingly
20 violated a health or safety regulation, but need not prove that the defendant acted with criminal

21
22
23 ² It is certainly true that, *in this case*, the State is arguing that the fact that Numrich knowingly violated such
24 regulations is part of the proof that he acted negligently. The test for concurrency, however, is based on what is
possible given the elements of the crime. Chase, 134 Wn. App. at 802-03; Heffner, 126 Wn. App. at 808. In that
context, the specific facts of the instant case are irrelevant to that determination. Id.

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 4

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 negligence vis-à-vis the risk of the decedent's death. This difference in elements between the
2 two statutes in and of itself demonstrates that it is possible to violate RCW 49.17.190(3) without
3 also violating RCW 9A.32.070.

4 Moreover, the fact that it is possible to violate the former without violating the latter is
5 also demonstrated by the hypothetical scenarios put forth by the State. In those hypothetical
6 scenarios, the defendant was the employer of the decedent, willfully and knowingly violated a
7 regulation encompassed by the statute, and the decedent died as a result. As a result, the
8 employer-defendant would clearly have violated RCW 49.17.190(3). However, given the
9 particular circumstances described in the hypotheticals, no reasonable person would conclude
10 that the defendant had acted with criminal negligence in the sense that he failed to be aware of a
11 substantial risk that death would occur and his failure constituted a gross deviation from the
12 standard of care that a reasonable person would have exercised. As a result, the defendants in
13 the hypotheticals would not have violated RCW 9A.32.070.

14 Given all of the above, RCW 9A.32.070 and RCW 49.17.190(3) are different statutes that
15 create different crimes with different elements that criminalize different conduct. Moreover, the
16 two statutes are not concurrent. As a result the "general-specific rule" does not apply to them.

17 Third, the "general-specific rule" is a canon of statutory construction specifically used by
18 courts to help determine whether the Legislature intended to preclude the State from charging a
19 more "general" statute when a more "specific" one also applies. Conte, 159 Wn.2d at 803;
20 Heffner, 126 Wn. App. at 807; State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294
21 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at
22 580; State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). It is well recognized that this rule
23 must be used with particular care and should be "applied to preclude a criminal prosecution *only*
24

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 5

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 where the legislative intent is crystal clear.” Conte, 159 Wn.2d at 815 (emphasis added). As a
2 result, the “general- specific rule” must be used in conjunction with other principles of statutory
3 construction, including the general rule that a court must apply the construction that best fulfills
4 the statutory purpose and carries out any express legislative intent and must avoid interpreting
5 statutes in a way that leads to unlikely, absurd, or strained results. See In re Marriage of
6 Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City of Seattle v. Fontanilla, 128 Wn.2d 492,
7 498, 909 P.2d 1294 (1996); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).
8 Here, applying the “general-specific” rule to RCW 9A.32.080 and RCW 49.17.190(3) would
9 undercut the statutory purpose, thwart the intent of the Legislature, and lead to absurd results.

10 RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973
11 (WISHA). RCW 49.17.900. Subsection (3) of the statute is nearly identical to 29 U.S.C. 666(e)
12 of the federal Occupational Safety and Health Act (OSHA). The express legislative history of
13 WISHA is extremely short and does not discuss the proposed criminal sanctions contained in
14 RCW 49.17.190. Rather, the only discussion in the legislative history deals with the need to
15 ensure that Washington’s statutes would be at least as effective as OSHA in order to ensure that
16 Washington had an approved OSIA State Plan that would avoid federal preemption. *Enacting*
17 *the Washington Industrial Safety and Health Act of 1973: Hearing on SB 2389 Before the S.*
18 *Comm. on Labor*, 1973 Leg., 43rd Sess. at 2 (Feb. 2, 1973); See also RCW 49.17.010. As a
19 result, many of the provisions of WISHA are worded very similarly, if not identically, to those in
20 OSHA. In this context, where the provisions of WISHA are identical or analogous to
21 corresponding OSHA provisions, Washington courts will look to federal authority, as the
22 Washington Legislature’s intent would be identical to Congress’s. Clarke v. Shoreline Sch. Dist.
23 No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986); Fahn v. Cowlitz County, 93

24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 6

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 Wn.2d 368, 376, 610 P.2d 857 (1980). Because WISHA is a remedial statute, its provisions
2 must be liberally construed to protect the health and safety of Washington workers. Adkins v.
3 Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257, 756 P.2d 142 (1988); Frank
4 Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25, 36, 329 P.3d 91 (2014);
5 Stute v. P.B.M.C., 114 Wn.2d 454, 788 P.2d 545 (1990).

6 Prior to the enactment of OSHA/WISHA—while such prosecutions may have been rare
7 (as alleged by Numrich)—there was nothing that precluded state prosecutors from bringing
8 felony charges against employers under existing state laws criminalizing, *inter alia*, homicide
9 and assault. In this context, a review of the legislative history for OSHA (which is the basis for
10 the identical language in WISHA) provides no indication that Congress intended to limit or
11 preclude prosecutions under the existing state criminal codes. If Congress had intended OSHA
12 to make employers less criminally liable than under existing law, Congress would have said so.
13 Instead, Congress has said precisely the opposite and has made clear that OSHA was not
14 intended to limit the ability of state prosecutors to bring traditional criminal charges against
15 employers for acts committed in, or related to, the workplace. H.R. REP. NO. 1051, 100th Cong.,
16 2nd Sess. 10 (1988) (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127
17 (1989)). Given all of the above, there is no basis to conclude that Congress (in adopting OSHA)
18 or the Washington Legislature (in adopting WISHA) intended the inclusion of a gross
19 misdemeanor provision to preclude Washington prosecutors from bringing homicide charges
20 under state law against employers following workplace fatalities. Indeed, all evidence of
21 legislative intent is to the contrary. In this context, a ruling from this Court granting Numrich's
22 motion would run directly contrary to the clear intent of the Legislature.

23
24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 7

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 Moreover, one of the most basic canons of statutory construction is that no statute should
2 be construed in a manner that leads to strained or absurd results. State v. Larson, 184 Wn.2d
3 843, 851, 365 P.3d 740 (2015); Becker, 59 Wn. App. at 854. As the State points out in its
4 briefing, a number of absurd results would follow from Numrich’s argument that he can only be
5 prosecuted under RCW 49.17.190(3) and not RCW 9A.32.070. Because the application of the
6 “general-specific rule” he advocates would lead to such absurdities, his interpretation must be
7 rejected.

8 **Equal Protection**

9 Numrich argues that the State’s decision to prosecute him for Manslaughter in the Second
10 Degree violates his right to equal protection because RCW 9A.32.070 and RCW 49.17.190(3)
11 criminalize the same act, but the penalty is more severe under the former than the latter. This
12 argument fails for a number of reasons.

13 First, Numrich has failed to establish that the rule he relies on is the law. In Washington, the
14 “rule” asserted by Numrich dates back to Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956).
15 In Olsen, the Washington Supreme Court, relying on a case from the Oregon Supreme Court, held
16 that:

17 A statute which prescribes different punishments or different degrees of punishment
18 for the same acts committed under the same circumstances by persons in like
19 situations is violative of the equal protection clause of the Fourteenth Amendment of
20 the United States Constitution. State v. Pirkey, 203 Or. 697, 281 P.2d. 698 and cases
there cited.

21 Olsen, 48 Wn.2d at 550. Then, in State v. Zornes, the Washington Supreme Court held that the rule
22 from Olsen also applied to situations where two different statutes criminalized the same act and the
23 penalty was more severe under one than the other. 78 Wn.2d 9, 475 P.2d 109 (1970). Olsen,
24 Zornes, and their progeny also held that such statutory situations would violated Art. I, § 12 of the

ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 8

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 Washington Constitution. However, neither Olsen nor Zornes nor any case applying this rule
2 appears to have separately analyzed Art. I, § 12. Rather, these cases relied purely on the assumption
3 that the privileges and immunities clause of Art. I, § 12 was substantively identical to the equal
4 protection clause of the Fourteenth Amendment. Olsen, 48 Wn.2d at 550.

5 In 1979, the United States Supreme Court concluded that the fact that two different statutes
6 established different penalties for the same criminal act did *not* violate the Fourteenth Amendment.
7 United States v. Batchelder, 442 U.2d 114, 124-25, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In 1991,
8 the Washington Supreme Court recognized this fact, noting that Batchelder had abrogated Zornes
9 and that the rule from Olsen/Zornes was no longer good law as a result—at least insofar as it was
10 based on the Fourteenth Amendment. City of Kennewick v. Fountain, 116 Wn.2d 189, 802 P.2d
11 1371 (1991).

12 In 2004, the Washington Supreme Court conducted a Gunwall analysis and concluded that,
13 despite its earlier assumption in Olsen and Zornes, the privileges and immunities clause of Art. I, §
14 12 is substantively different than the equal protection clause of the Fourteenth Amendment. Grant
15 County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791 (2004). In light of the holding
16 in Grant County, Olsen, Zornes, and their progeny—which were based on an analysis of the
17 Fourteenth Amendment and the incorrect assumption that Art. I, § 12 was identical—can no longer
18 be read as being good law regarding the Washington Constitution either.

19 Given all of the above, the situation Numrich complains of—having two statutes that
20 provide different levels of punishment for the same act—does not violate the Fourteenth
21 Amendment. And Numrich has not provided this Court with any analysis or citation to authority
22 establishing that it violates Art. I, § 12.

23
24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 9

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

1 Second, even if the rule advocated by Numrich was the law, the State prosecuting him for
2 manslaughter would not violate his rights under either the Fourteenth Amendment or Art. I, § 12.
3 Even under Numrich's rule it is well settled that there is no equal protection violation when the
4 crimes the prosecutor has the discretion to charge are different crimes that require proof of different
5 elements. See Fountain, 116 Wn.2d at 193-94; In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345
6 (1985); State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). This is the case even if
7 the prosecutor's decision is based on or influenced by the penalties available following conviction
8 and even when the relative punishments for the two statutes seem illogical to the defendant or the
9 court. Fountain, 116 Wn.2d at 193; Farrington, 35 Wn. App. at 802; State v. Richards, 27 Wn. App.
10 703, 705, 621 P.2d 165 (1980). Indeed, this is the case even when the relevant elements make it
11 easier to prove the violation with the more severe penalty. Zornes, 78 Wn.2d at 21-22.

12 Here, as discussed above, the crimes of Manslaughter in the Second Degree and Violation of
13 Labor Safety Regulations with Death Resulting are different crimes with different elements that
14 are aimed at different conduct. This analysis is not changed when the argument is recast as an
15 equal protection one.

16 **Conclusion**

17 For the reasons set forth above and in the State's briefing and oral argument, Numrich's
18 motion to dismiss Count 1 is DENIED. The Court incorporates by reference its oral rulings,
19 findings, and conclusions.

20
21 Dated August ____, 2018.

22
23 _____
JUDGE JOHN H. CHUN

24
ORDER DENYING DEFENDANT'S MOTION TO
DISMISS COUNT 1 - 10

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010, FAX (206) 296-9009

David Allen

From: Megan Winder <megan.winder@co.thurston.wa.us>
Sent: Monday, April 22, 2019 5:37 PM
To: JC Becker; David Allen
Subject: State v. Birge and State v. Jahner
Attachments: 3557_001.tif

Good afternoon –

As I indicated, I am in trial. The judge has given me permission to end early, so we are on for our 4:00 conversation with Dr. Gilbert.

Attached, please find the medical information that RC provided to me (that she said she'd get to us during the defense interview). I wanted to make sure that you both had it prior to speaking with Dr. Gilbert.

I had been informed, up to this point, that the child had FAS. It appears, after reviewing this, that the child has alcohol exposure and static encephalopathy.

Based on the new information, I intend to qualify Dr. Gilbert as a pediatric expert and expect that she can testify as an expert to the bruising as well as to the static encephalopathy and what that might look like in everyday life.

Dr. Gilbert viewed the photographs.

She has never examined him that I am aware of.

I anticipate that she will also testify that the marks are consistent with a belt, and explain the nature of bruising and marks caused by belts, as well as the force and medical science that supports how marks like this are made on the human anatomy.

We will talk at 4:00 tomorrow – please provide me the phone numbers to call.

Megan

.....
Megan A. Winder
Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney's Office
Special Victims Team Leader
2000 Lakeridge Dr. SW
Olympia, WA 98502
Phone 360.786.5540
Fax 360.754.3358

Honorable Jim Rogers
October 31, 2018 at 2:00 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

DECLARATION OF TODD MAYBROWN
IN OPPOSITION TO STATE'S BELATED
MOTION TO AMEND INFORMATION

I, Todd Maybrown, do hereby declare:

1. I am the attorney representing the Defendant, Phillip Scott Numrich, in the above-entitled case. This Declaration is being submitted in opposition to the State's Motion to Amend.

2. The Defendant, Phillip Scott Numrich, is the owner of Alki Construction LLC ("Alki Construction"). Alki Construction, doing business as Alki Sewer, has worked on numerous plumbing projects in the Puget Sound region since 2012. Alki Construction is duly licensed to do business in the State of Washington and, as such, its job sites are regulated by the Washington Department of Labor and Industries.

3. During January 2016, Alki Construction was working to replace a sewer line at a private residence in West Seattle. Alki Construction uses what is commonly described as a "trenchless pipe repair" during this process. To complete the project, Mr. Numrich and several employees helped to dig and shore two trenches – one near the home and one near the street – at

*DECLARATION OF TODD MAYBROWN IN OPPOSITION
TO STATE'S BELATED MOTION TO AMEND – 1*

**Allcn, Hansen, Maybrown &
Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 the commencement of the work on that project. On January 26, 2016, as the project was nearly
2 completed, one of the construction workers was killed when the dirt wall of the trench nearest to
3 the home collapsed. Mr. Numrich was not present at the job site at the time of the collapse.

4 4. This accident was exhaustively investigated by the Division of Occupational
5 Safety & Health of OSHA. *See* OSHA Investigation No. 1120535. Like this case, the OSHA
6 investigators focused solely upon the events that led to the death of the worker. On July 21, 2016,
7 the Washington Department of Labor and Industries (“WSDLI”) issued a Citation and Notice of
8 Assessment that included a finding that Alki Construction had committed certain violations of the
9 safety regulations in relation to the events of January 26, 2016. Mr. Numrich appealed these
10 findings and assessments and the parties ultimately reached a compromised settlement of all
11 claims.
12

13
14 5. On or about January 18, 2018, the State filed criminal charges against Mr. Numrich
15 relating to this same workplace incident. *See Appendix A* (Charging Documents). The State’s
16 Information includes the following two charges:

17 **Count 1 Manslaughter In The Second Degree**

18 That the defendant PHILLIP SCOTT NUMRICH in King County,
19 Washington, on or about January 26, 2016, with criminal negligence did cause the
20 death of Harold Felton, a human being, who died on or about January 26, 2016;

21 Contrary to RCW 9A.32.070, and against the peace and dignity of the State
22 of Washington.

23 **Count 2 Violation of Labor Safety Regulation with Death Resulting**

24 That the defendant PHILLIP SCOTT NUMRICH in King County,
25 Washington, on or about January 26, 2016, was an employer, and did willfully and
26 knowingly violate the requirements of RCW 49.17.060, and a safety or health
standard promulgated under RCW Chapter 49, and a rule or regulation governing
the safety or health conditions of employment adopted by the Department of Labor

1 and Industries, to-wit: WAC 296-155-657, WAC 296-155- 655 and that violation
2 caused the death of one of its employees, to-wit: Harold Felton;

3 Contrary to RCW 49.17.190 (3), and against the peace and dignity of the
4 State of Washington.

5 Information.

6 6. These charges are ostensibly supported by a Certification for Determination of
7 Probable Cause that was prepared by Mark Joseph, who is identified as a Certified Safety and
8 Health Officer with WSDLI. *See id.* At the outset, Mr. Joseph explained that he is authorized to
9 investigate workplaces for safety violations pursuant to Washington’s Industrial Safety and Health
10 Act (“WISHA”) which is codified at RCW 49.17.

11 7. Throughout the Certification for Determination of Probable Cause, Mr. Joseph
12 opines that Alki Construction had failed to comply with certain WSDLI regulations, such as the
13 provisions identified in WAC 296-155-650 and WAC 296-155-657. *See id.* (Certification at 2).
14 Mr. Joseph also claims that Mr. Numrich is personally responsible for this accident as he is
15 considered the “competent person” for purposes of WSDLI’s regulatory scheme. *See id.*
16 (Certification at 2) (discussing WAC 296-155-655).

17 8. In further support of the charges, Mr. Joseph claims that Alki Construction had
18 failed to comply with certain state regulations when digging and shoring this trench. In particular,
19 Mr. Joseph notes that this project involved what is classified as “Type C” soil and that Alki
20 Construction had failed to follow the “most rigorous shoring standard per WSDLI regulations.”
21 *See id.* (discussing WSDLI regulations and SpeedShore Tab Data). Moreover, Mr. Joseph argues
22 that Alki Construction had failed to properly shore this trench based upon his interpretation of the
23 state regulations:
24
25

26 The WSDLI investigation and the [employee] interview show the Subject Premises
had two SpeedShore protective shores installed in the back trench. [The employee]

*DECLARATION OF TODD MAYBROWN IN OPPOSITION
TO STATE'S BELATED MOTION TO AMEND – 3*

**Allen, Hansen, Maybrow &
Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 reported during his interview that Numrich and Felton placed two shores in the
2 back trench when they initially dug it. One of the shores was installed more than
3 four feet above the bottom of the trench - which is prohibited by both WSDLI
4 regulation and Speed Shore Tab Data. Both WSDLI regulation and SpeedShore
5 Tab Data show the back trench required a minimum of four shores based upon the
6 trench dimensions, and soil type alone.

7 *Id.* (Certification at 3).

8 9. Mr. Joseph also relies upon the conclusions of a “trenching technical expert.” As
9 he explained:

10 In the course of my investigation, I reviewed the analysis of Erich Smith, trenching
11 technical expert for WSDLI. Smith stated, based upon his experience, the
12 SpeedShore Tab Data and WSDLI regulations, the soil type and conditions at the
13 Subject Premise, and the trench dimensions, that a minimum of four shores should
14 have been used on the long edge the back trench.

15 *Id.* (Certification at 4).

16 10. Based upon these alleged “willful” regulatory violations, Mr. Joseph opines that
17 Mr. Numrich is guilty of a violation of WISHA’s criminal provisions as set forth in RCW
18 49.17.190 (3). Moreover, for all of these very same reasons, Mr. Joseph also claims that Mr.
19 Numrich is guilty of manslaughter in the second degree. Mr. Joseph’s certification does not
20 include any claim that Mr. Numrich is guilty of the crime of manslaughter in the first degree.

21 11. Mr. Numrich appeared for arraignment on January 16, 2018. Upon entering his
22 plea of not guilty, Mr. Numrich notified the Court that the prosecution had violated Washington’s
23 “general-specific” rule by filing the felony manslaughter charge in this case. Mr. Numrich’s
24 counsel subsequently met with the assigned prosecutor, DPA Patrick Hinds. Counsel notified
25 DPA Hinds that the defense would be filing a motion to dismiss the manslaughter charge. DPA
26 Hinds notified counsel that the State would contest the defendant’s motion, but he never suggested
that the State could or would file any other charges in this case.

1 12. On April 30, 2018, Mr. Numrich filed his Motion to Dismiss Count 1 (the
2 Manslaughter Charge). *See Appendix B.* In support, Mr. Numrich argued that this prosecution –
3 and the filing of a manslaughter charge – was in direct conflict with Washington’s general-specific
4 rule insofar as each violation of WISHA’s specific statute (RCW 49.17.190(3)) would necessarily
5 support a conviction under the general second-degree manslaughter statute (RCW 9A.32.070).
6 Mr. Numrich also argued that the State’s decision to file manslaughter violated Washington’s
7 equal protection clause.
8

9 13. After obtaining a long extension, the State filed its Response to Defendant’s
10 Motion to Dismiss Count 1 on June 13, 2018. *See Appendix C.* Although the State argued that
11 the filing of a charge of manslaughter in the second degree did not violate the general-specific rule,
12 it never suggested – or even intimated – that it was intending to file any other felony charges in
13 this case.
14

15 14. After reviewing Mr. Numrich’s reply pleadings (*Appendix D*), the State filed a
16 Surreponse. *See Appendix E.* Once again, the State never suggested that it was intending to file
17 any other felony charges in this case.
18

19 15. King County Superior Court Judge John Chun¹ initially heard argument on July
20 19, 2018. The Court declined to issue any ruling on that date and, instead, scheduled a
21 subsequent hearing for August 23, 2018.

22 16. Thereafter, Judge Chun informed the parties that he intended to deny the defense
23 motion. The State subsequently prepared a proposed Order that parroted the arguments in its
24 pleadings. The defense objected to the State’s proposed Order and presented argument why
25 this matter should be certified for review under RAP 2.3(b)(4).
26

¹ Judge Chun has since been appointed to Division One of the Court of Appeals.

1 17. The parties appeared before Judge Chun once again on August 23, 2018. The
2 defense then argued that its motion raised issues of central importance and that immediate
3 review was appropriate at this juncture. In particular, counsel explained how a case involving
4 a single misdemeanor charge was fundamentally different than a case that also included a
5 charge of manslaughter in the second degree. Accordingly, the defense demonstrated that
6 interlocutory review was certain to advance the ultimate termination of the case.²
7

8 18. Judge Chun accepted the defense position. *See Appendix F.* First, the judge
9 refused to sign the State's proposed Order. Second, Judge Chun signed an Order which certified
10 the issue for immediate review:

11 FURTHER, Defendant's Motion for Certification Pursuant to RAP
12 2.3(b)(4) is GRANTED. The Court finds and concludes that this Court's Order
13 Denying Defendant's Motion to Dismiss Count 1 involves controlling questions
14 of law as to which there are substantial grounds for a difference of opinion and
15 that immediate review of the Order may materially advance the ultimate
16 termination of the litigation.

17 *Id.*

18 19. The State chose not to file any motion for reconsideration of Judge Chun's
19 decision. Moreover, during months of proceedings before Judge Chun, the State never once
20 suggested that it was considering file any additional charges in this case.

21 20. Consistent with RAP 2.3, the defendant filed a Notice of Discretionary Review on
22 September 14, 2018. *See Appendix G.* Thereafter, Mr. Numrich filed his Motion for Discretionary
23 Review in the Washington Supreme Court and Statement of Grounds for Direct Review.
24
25

26 ² During earlier stages of the case, the State had notified the superior court that it was likely to seek
interlocutory review if the defense motion was to be granted. Nevertheless, the State objected to the
defendant's request for certification.

1 21. A Commissioner for the Washington Supreme Court ordered the State to file its
2 response to the defendant's motion by October 18, 2018. *See Appendix H.* Argument on the
3 defendant's motion is now scheduled for November 1, 2018.

4 22. Meanwhile, at the State's insistence, the parties appeared before this Court on
5 October 1, 2018. During that hearing, the State argued for a modification of Mr. Numrich's
6 conditions of release. Recognizing that review might be granted in the appellate courts, the
7 parties rescheduled the date for Mr. Numrich's case scheduling hearing. Once again, the State
8 never suggested that it was intending to file any additional charges in this case.

9 23. On October 18, 2018, the same date that the State had been ordered to file its
10 responsive pleadings in the Washington Supreme Court, DPA Hinds sent defense counsel an email
11 in which he claimed that "the State needs to set a hearing to amend the Information in Mr.
12 Numrich's case now." *Appendix I.* Defense counsel promptly responded to his email message
13 and explained:

14 This is an extraordinary motion – given the timing and obvious prejudice that
15 may flow. The defense will not agree to have this motion heard on shortened
16 time and/or without a full hearing. I will need to be present for such a hearing. I
17 am in trial, as you well know, and will not be available over the next few weeks.

18 If you file this motion to amend, we will file an opposition and a motion to
19 dismiss this case pursuant to CrR 8.3(b) based upon government
20 mismanagement. We may raise additional issues as well. We will ask for an
21 evidentiary hearing pertaining to that motion. We will ask for a special setting
22 – ½ day – to litigate these issues.

23 We are now asking for you to produce all of your office's documents and
24 communications relating to this case (including all of your communications –
25 whether they be by email, phone, text, personal computer, etc.), including your
26 office's blue notes, emails, memoranda, etc. If you refuse, we will file a formal
27 motion for discovery. Please consider this email as a request for public
28 disclosure as well. I need a response before we attempt to schedule this motion.

29 *Id.*

30 24. Nevertheless, even after reviewing this message, the State filed pleadings in the
31 Washington Supreme Court that included the following argument during the closing section of its

1 brief: “Here, the State intends to add a count of Manslaughter in the First Degree to the charges
2 against Numrich. The State’s motion to amend the Information is in the process of being
3 scheduled and there is no basis to conclude that it will not be granted.” State’s Response at 18.
4 The State made a conscious decision not to advise the Washington Supreme Court of the
5 defendant’s objection to its tactics.
6

7 25. In addition, the State filed in the Washington Supreme Court a declaration that
8 was purportedly signed by DPA Hinds on October 16, 2018. *See Appendix J.*³ In this
9 declaration, DPA Hinds makes the bald claim: “The State’s motion to amend is not being
10 brought to retaliate against the defendant for seeking discretionary review, to gain advantage in
11 the appellate litigation, or for any other improper purpose.” *Id.*
12

13 26. The State’s claim is contradicted by all available evidence and the procedural
14 history of this litigation. In fact, the State is now hoping to use this 11th-hour action to: (1)
15 undermine this Court’s certification pursuant to RAP 2.3(b)(4); (2) defeat Mr. Numrich’s ability
16 to obtain appellate review of this Court’s ruling; and (3) force Mr. Numrich to relitigate many of
17 the very same issues that have previously been presented in this Court.
18

19 27. Although the defense has requested discovery relevant to these issues, the
20 prosecutor has flatly refused to disclose any of this information. Accordingly, as necessary, the
21 defense has been compelled to file a Motion to Compel Discovery along with this pleading.
22

23 28. Mr. Numrich will be severely prejudiced if the State is permitted to file new a
24 new charge at this late date. Should the Court grant this motion, it will necessarily undermine
25 all prior proceedings in the case. And such an amendment will force the defendant to relitigate
26

³ This declaration had never been filed in the superior court and never previously disclosed to defense counsel. The defense is unaware of any court rule that would permit a party to submit a declaration in the appellate court that had not previously been filed in the superior court.

1 many of the very same issues that have previously been resolved by this court. By granting this
2 amendment, the Court will substantially *delay* the ultimate termination of this case.

3 29. The filing of an Amended Information will place Mr. Numrich in an untenable
4 situation and it will force him to incur unnecessary (and unreasonable) additional legal
5 expenses. Thus, through no fault of his own, Mr. Numrich will now be forced to decide whether
6 it is sensible to press the motion for discretionary review that had been pending in the
7 Washington Supreme Court. While it would be best to stay the course, Mr. Numrich does not
8 have unlimited resources. And it is hard to justify continuation of his appeal, when the defense
9 might be required to relitigate nearly identical issues before a different superior court judge no
10 matter the outcome of that appeal.
11

12 30. I have been a member of the Washington State Bar Association for more than
13 thirty years. Since 1990, my firm has represented countless individuals who have been charged
14 with criminal offenses throughout the State of Washington. I have also represented several
15 companies facing investigations and/or criminal charges. This is the first time I have ever seen
16 the type of gamesmanship as we have seen in this case.
17

18 31. Based upon all available information, it is my belief that the State would have
19 never charged Mr. Numrich with the crime of Manslaughter in the First Degree (a Class A
20 Felony) but for his decision to seek appellate review in this case. The nature and the timing of
21 the State's actions belies the self-serving (but otherwise unsupported) assertions in the State's
22 declaration. To the contrary, it is my belief that the State has failed to provide any explanation
23 or justification for this last-minute amendment – and has likewise refused to produce any
24 discovery relating to its decision-making process – because this amendment is the product of
25 actual vindictiveness. Although the State's motion has yet to be considered by this Court, the
26

1 State has already used this tactic in an effort to dissuade the Washington Supreme Court from
2 accepting review in this case.

3
4 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
5 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF
6 MY KNOWLEDGE.

7 DATED at Seattle, Washington this 30th day of October, 2018.

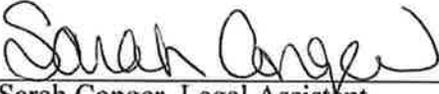
8 /s/ Todd Maybrow
9 TODD MAYBROWN, WSBA #18557
10 Attorney for Defendant
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATION

I hereby certify that on October 30, 2018, I delivered a copy of the document to which this certification is attached for delivery to all counsel of record and interested parties as follows:

<p>Patrick Hinds, Senior DPA Eileen Alexander, DPA King County Prosecutor's Office King County Courthouse 516 Third Avenue, W554 Seattle, WA 98104</p> <p>Attorneys for Plaintiff</p>	<p><input type="checkbox"/> U.S. Mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input checked="" type="checkbox"/> Email</p> <p><input checked="" type="checkbox"/> Electronic Delivery (per KCLR 30 via KCSC e-filing system)</p>
---	--



Sarah Conger, Legal Assistant

APPENDIX A

FILED

18 JAN 05 PM 2:36

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 18-1-00255-5 SEA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
)	
v.	)	No. 18-1-00255-5 SEA
)	
PHILLIP SCOTT NUMRICH,	)	INFORMATION
)	
	)	Defendant.
)	
)	

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse PHILLIP SCOTT NUMRICH of the following crime[s]: **Manslaughter In The Second Degree, Violation of Labor Safety Regulation with Death Resulting**, committed as follows:

Count 1 Manslaughter In The Second Degree

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, with criminal negligence did cause the death of Harold Felton, a human being, who died on or about January 26, 2016;

Contrary to RCW 9A.32.070, and against the peace and dignity of the State of Washington.

Count 2 Violation of Labor Safety Regulation with Death Resulting

That the defendant PHILLIP SCOTT NUMRICH in King County, Washington, on or about January 26, 2016, was an employer, and did willfully and knowingly violate the requirements of RCW 49.17.060, and a safety or health standard promulgated under RCW Chapter 49, and a rule or regulation governing the safety or health conditions of employment adopted by the Department of Labor and Industries, to-wit: WAC 296-155-657, WAC 296-155-655 and that violation caused the death of one of its employees, to-wit: Harold Felton;

INFORMATION - 1

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733 FAX (206) 296-9009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Contrary to RCW 49.17.190 (3), and against the peace and dignity of the State of Washington.

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney

By:



Melinda J. Young, WSBA #24504
Senior Deputy Prosecuting Attorney

INFORMATION - 2

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733 FAX (206) 296-9009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CAUSE NO. 18-1-00255-5 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause prepared by Mark Joseph of the WA State Department of Labor and Industries for case number 317939264.

The State requests bail set in the amount of \$20,000 as the defendant is likely to commit a violent crime and may interfere in the administration of justice. Despite Alki Construction going out of business, the defendant has started a new business with a very similar name and continues to be the owner and operator of a sewer business. Alki Sewer has a website that states Phil Numrich is the proprietor and that it is currently in business. "Yelp," a workplace review website, has reviews from as recent as May 2017 indicating the defendant is still in business. Because his workplace safety measures were so grossly inadequate in this case, causing the death of the victim, his continued operation of a similar business puts other workers at risk.

The State also requests no contact with Maximillion Henry, Jenna Felton, Lucy Felton, Bruce Felton and Pamela Felton. The defendant knows all of these witnesses very well and knew Mr. Henry was speaking to Labor and Industry investigators, continuing to call Mr. Henry to inquire about the investigation. Given the close personal relationship the defendant had previously had with all of these witnesses, and that the defendant contacted Mr. Henry when he learned he was speaking to investigators this year, there is a risk he will obstruct with the administration of justice.

Prosecuting Attorney Case
Summary and Request for Bail
and/or Conditions of Release - 1

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733 FAX (206) 296-9009

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Signed and dated by me this 5th day of January, 2018.



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney



Melinda J. Young, WSBA 24505
Senior Deputy Prosecuting Attorney

Prosecuting Attorney Case
Summary and Request for Bail
and/or Conditions of Release - 2

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 477-3733 FAX (206) 296-9009

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

I, MARK JOSEPH, am a Certified Safety and Health Officer with the Washington State Department of Labor and Industries (“WSDLI”) based out of Bellingham Washington. I am authorized under RCW 49.17 to conduct investigation of workplaces for safety violations, and may under section .070 of the same title and chapter require the attendance and testimony of witnesses and the production of evidence under oath. As such, I have reviewed investigation documents for WSDLI Inspection No. 317939264. I have also conducted an additional investigation in conjunction with the Washington State Office of the Attorney General.

Based upon my review and additional investigation, I declare that the following is true and correct:

Inspection records created by WSDLI show that on January 26, 2016, Harold Felton, an employee of Alki Construction LLC (“Alki”), was completing work replacing a side sewer at a residential home in West Seattle. While Felton finished work in the 8-10 foot deep trench, a cave-in of soil covered him entirely and he perished. The WSDLI conducted an initial investigation into Alki because of Felton’s death. In August of 2017, I was assigned to conduct an additional investigation of Alki, a Washington State Limited Liability Company based in Seattle, WA, and its owner Phillip Numrich. Inspection records and records from the Washington Secretary of State show that Numrich owns, operates, and manages Alki and has done so since its inception. He is the sole owner, operator, and manager of Alki.

On August 28, 2017, I interviewed Jenna Felton, Lucy Felton, Bruce Felton, and Pamela Felton, who are Harold Felton’s widow, sister, father, and mother respectively. Jenna, Lucy, Bruce and Pamela all stated that, when Felton was 21 years old, he suffered a severe traumatic brain injury, which required major surgery and an extended recovery, including re-learning to speak and walk, among other ordinary life activities. After recovery and rehabilitation, Lucy stated that Harold Felton continued to have short-term memory issues. Felton’s family also confirmed that Numrich was a long-time friend of Felton’s, was present when he suffered his brain injury, and was aware of the nature and extent of Felton’s continuing issues.

Inspection records created by WSDLI show homeowners at 3039 36th Ave SW Seattle, WA 98126 (hereinafter “Subject Premises”), hired Alki/Numrich to replace their home’s side sewer pipe. Alki uses a “trenchless” sewer replacement technology wherein two trenches are dug where the sewer exits the home’s concrete foundation and the other where the sewer connects to city’s main sewer in the street. The old sewer is disconnected from the homes foundation and at the street, and a large cable is threaded through the old sewer line. On one end, the operator connects a large cable to the tip of a steel cone, and the other end of the cable is connected to a large hydraulic pulling machine. The operator then connects a new plastic sewer line to the back of the cone, engages the pulling machine, which simultaneously splits open the old sewer while pulling the new plastic sewer in its place. Once the new sewer is laid in place, workers

must enter the trenches and re-connect the new sewer to the home and the city's service connection. Felton was killed by the cave-in during this re-connection process.

Inspection records created by WSDLI show Alki/Numrich commenced work at the Subject Premise on or about January 16, 2016. Numrich and Felton dug one trench at the back corner of the home ("back trench") and another where the old sewer connected to the city's service ("front trench"). The back trench was approximately 8-10 feet deep, 21 inches wide, and six feet long. Because of some worker absences and equipment failure, Numrich put work on hold until January 26, 2016. Leaving a trench open for this long increases the risk of a collapse or cave-in.

Washington law and WSDLI regulations (WAC 296-155-657) require employers to design and implement protective systems for all trenches deeper than four (4) feet to prevent cave-in hazards to workers. Because trenches may vary in dimensions, employers determine how to shore each individual trench by consulting the shoring system's Tabulated Data ("Tab Data"). Alki used an aluminum hydraulic shoring system (tradename "SpeedShore") to shore the back trench.

WSDLI regulations and SpeedShore Tab Data require an employer to determine the soil type or types in which the excavation is made using a recognized soil classification method. Different soil types are more stable or less stable when excavated and require more shoring if they are a less stable soil type and less shoring if they are a more stable soil type. The initial WSDLI investigation confirmed that the soil type at the Subject Premises was "Type C" soil, which is the least stable type of soil and which requires the most rigorous shoring standard per WSDLI regulations and SpeedShore's Tab Data.

In addition, Washington law and WSDLI regulations (WAC 296-155-655) require that a "competent person" inspect any trenches, the adjacent areas, and the protective systems in the trench for evidence of situations that could result in cave-ins. "Competent person" is a legal term defined in the WACs. WAC 296-155-650 defines a "competent person" as someone "who can identify existing or predictable hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees." The provision also requires that the "competent person" be someone who has the "authorization or authority by the nature of their position to take prompt corrective measures to eliminate them." Inspections by the "competent person" must be made daily prior to the start of any work in the trench and must be repeated after every rainstorm or other hazard increasing occurrence. If the "competent person" sees evidence of a situation that could result in a possible cave-in or other hazard, they must remove any employees from the trench until necessary precautions have been taken to ensure their safety. Numrich was the only "competent person" at the Subject Premises during the entire project and on the day when Harold Felton was killed.

During the initial WSDLI investigation, Numrich engaged in a voluntary interview with WSDLI, where he confirmed that he knew the soil at the Subject Premises

was "Type C." Numrich also indicated that he was very concerned with safety and was aware of the requirements in place for protection of workers in trenches.

On November 1, 2017, I interviewed Maximillion Henry, Felton's co-worker at Alki and the only other person who worked on the Subject Premises other than Numrich and Felton. Henry stated that Felton and he arrived at the Subject Premises on the morning of January 26, 2016. The trenches at the subject premises had been "open" (previously dug by Numrich and Felton, and left in that condition) for approximately ten days. Henry also reported that it is very unusual for a trench to be open more than 2-3 days, and that the longer a trench is "open" the less stable it becomes. Henry also stated that it had been raining for several days prior to January 26, 2016; a fact that I corroborated by examining regional atmospheric data and regional precipitation records. Soil saturated by water is less stable than when dry and, therefore, is more prone to collapse or cave-in.

Henry stated during his interview that the trenchless sewer replacement process vibrates the ground when the steel cone splits open the old sewer pipe and the vibrations further destabilize trenches dug during the sewer replacement process. Henry reported that the soil type in and around the Subject Premises was widely known in the sewer replacement industry to be Type C soil.

During his interview, Henry also indicated that Felton had a history of work accidents, which he became aware of after Felton's death. Henry stated that it was Numrich who had informed him of Felton's history of accidents. Henry also stated that Felton was often not aware of his surroundings, and that if Henry knew of his history of work accidents he "never would have had [Felton] helping me."

The WSDLI investigation and the Henry interview show the Subject Premises had two SpeedShore protective shores installed in the back trench. Henry reported during his interview that Numrich and Felton placed two shores in the back trench when they initially dug it. One of the shores was installed more than four feet above the bottom of the trench – which is prohibited by both WSDLI regulation and SpeedShore Tab Data. Both WSDLI regulation and SpeedShore Tab Data show the back trench required a minimum of four shores based upon the trench dimensions, and soil type alone. As a result, the shoring in place in the trench at the Subject Premises was wholly inadequate and, based on Numrich's status as the "competent person" and his statements during his interview that he was aware of trench safety issues, he should have known that the shoring was inadequate.

In his interview, Henry reported that Felton used a vibrating hand tool (tradename "Sawzall") while in the back trench for several minutes after the new sewer was positioned and while connecting it to the home's service. Numrich was present at the jobsite at the time and he and Henry noted both that Felton was using a vibrating tool in the trench and that doing so increased the risk of trench collapse. Numrich did not intervene to stop Felton from using the Sawzall. Instead, Numrich left the jobsite to buy

lunch for all three so that they could eat after Felton and Henry finished attached the sewer.

In his interview, Henry also indicated that Numrich was the “competent person” for the project at the Subject Premises. Neither Henry nor Felton had the requisite knowledge or authority. Henry was not sure whether Numrich inspected the back trench at the beginning of the day prior to Felton entering it to work. However, both the process of pulling the new sewer pipe into place and Felton’s use of the Sawzall tool in the trench vibrated the ground, which increase the risk of a cave-in. Numrich was well aware that the vibrations caused by either the use of vibrating tools or by the pipe replacement process itself would destabilize a trench because Numrich had told Henry this shortly after Henry started working for Alki. Despite this, Numrich did not re-inspect the back trench after either event. Instead he allowed Felton to continue working in the trench while he left the Subject Premises to buy lunch.

According to Henry, Felton was using the Sawzall in the back trench at approximately 10:30 am on January 26, 2016. About 15 minutes later, the trench collapsed, covering Felton and killing him.

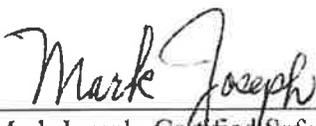
In the course of my investigation, I reviewed the analysis of Erich Smith, trenching technical expert for WSDLI. Smith stated, based upon his experience, the SpeedShore Tab Data and WSDLI regulations, the soil type and conditions at the Subject Premise, and the trench dimensions, that a minimum of four shores should have been used on the long edge the back trench. I also reviewed the analysis of Gary Hicks, regional sales manager for SpeedShore. Hicks stated that four shores would be required on the long edge of the back trench and additionally that each of the four vertical sides of the trench should have been shored to make the trench safe for workers. In other words, the two short sides at either end of the trench should have been shored. Such additional shoring on the ends of a trench is referred to in the industry as “end shoring”. Henry stated during his interview that Alki/Numrich did not own end shoring, and that Henry was not familiar with it or and had never been trained in its use.

On November 17, 2017, an interview was conducted with Gregory Sobole, who is a 14-year firefighter with the Seattle Fire Department (SFD). Sobole is a member of the SFD technical rescue company (Rescue 1, Ladder 7, Aid 14). The technical rescue company responds to specialized incidents such as trench rescues. Sobole has responded to several actual trench cave-ins where he has successfully rescued workers. He also performs annual training with the technical rescue company in trench rescue, with includes hazard identification in trenches. Sobole has taught non-technical rescue company firefighters in basic trench rescue disciplines for ten (10) years. Sobole responded to the Subject Premises, and directly participated in the attempted rescue of Felton by climbing into the back trench during rescue efforts. Based upon his experience and education, Sobole stated that the back trench was not properly shored and was not a safe area to work in. Sobole also noted that there were a number of factors that made the trench more dangers, including the facts that the soil was saturated and had been previously disturbed.

Based on the foregoing, there is evidence that Numrich, as owner of Alki, knowingly failed to properly shore the back trench at the Subject Premise in accordance with WSDLI regulations or with SpeedShore manufacture's Tab Data. In failing to do so, Numrich ignored aggravating factors such as soil saturation, the extended duration the trench was open, and the use of vibrating tools in the back trench. In addition, Numrich, as the "competent person" in charge of safety at the jobsite failed to inspect the trench for hazards as required and failed to remove Felton from the trench until precautions had been taken to ensure his safety. In this context, Numrich's conduct substantially deviated from any known or recognized safety standard and from the standard of care that any reasonable person would exercise in the same situation. Felton died as a result of Numrich's criminal negligence.

Based on all of the above, there is probable cause to believe that Phillip Numrich committed the crime of Manslaughter in the Second Degree within King County in the State of Washington. There is also probable cause to believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting within King County in the State of Washington in violation of RCW 49.17.190.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge. Signed and dated by me this 5th day of JANUARY 2018, at Bellingham, Washington.



Mark Joseph, Certified Safety Health Officer
Washington State Department of Labor & Industries

**[Appendix B – Defendant’s
Motion to Dismiss removed.
It is included in the
Appendix to the State’s
Motion for Discretionary
Review and Statement of
Grounds for Direct Review
at Appendix 10]**

**[Appendix C – State’s
Response to Defendant’s
Motion to Dismiss removed.
It is included in the
Appendix to the State’s
Motion for Discretionary
Review and Statement of
Grounds for Direct Review
at Appendix 25]**

[Appendix D – Reply in Support of Defendant’s Motion to Dismiss removed. It is included in the Appendix to the State’s Motion for Discretionary Review and Statement of Grounds for Direct Review at Appendix 59]

APPENDIX E

FILED

18 JUL 16 PM 2:38

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 18-1-00255-5 SEA

1 *The Honorable John Chun*
2 *Hearing Date: July 19, 2018 at 1:30 p.m.*
3 *With Oral Argument*

4 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

5	THE STATE OF WASHINGTON,)	
)	
6	v.	)	No. 18-1-00255-5 SEA
)	
7)	
8	PHILLIP NUMRICH,	)	STATE'S SURRESPONSE TO
		)	DEFENDANT'S MOTION TO
9		)	DISMISS COUNT 1

10 **I. INTRODUCTION**

11 In his initial brief, the defendant provided neither citations to relevant authority nor any
12 analysis that characterized or supported his motion to dismiss Count 1 on equal protection grounds.
13 These were not provided until his reply brief, which was filed after the State's response. As a result,
14 the State was not given the opportunity to address them in its previously filed responsive briefing
15 opposing the motion. In that context, the State would ask this court to consider this short
16 surrespose that addresses only the equal protection issue. For the reasons outlined below, this
17 court should reject the defendant's equal protection argument and deny his motion to dismiss Count
18 1 on those grounds.

19 **II. FACTS¹**

20 The defendant, Phillip Numrich, filed his motion to dismiss Count 1 on April 30, 2018. In
21 his memorandum, Numrich argued, *inter alia*, that the State's filing of manslaughter charges against
22

23 ¹ The State incorporates by reference the summary of substantive and procedural facts contained in its previously filed response. The additional facts summarized here address only those facts specifically relevant to the State's request that this court consider the State's surrespose.

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 1

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 him violated equal protection. Def. Memo. at 13-14.² Numrich’s argument on this point was
2 extremely short and consisted solely of: 1) the factual assertion that he is the first employer in the
3 state who has been charged with a felony based on a workplace fatality even though he cannot have
4 been the first to have committed the crime; and 2) the summary conclusion that prosecuting him for
5 the crime, therefore, violated his right to equal protection. Id. Numrich did not provide any
6 citations to relevant legal authority³ or any analysis that further characterized his motion or
7 explained how he believed his right to equal protection had been violated.

8 The State filed its response on June 13, 2018. In its brief,⁴ the State pointed out the cursory
9 nature of Numrich’s briefing regarding his equal protection argument. State’s Resp. at 30. Based
10 on the minimal briefing provided, the State reasonably interpreted Numrich’s claim as being one of
11 improperly selective prosecution and responded accordingly. State’s Resp. at 29-33.

12 Numrich filed his reply on June 20, 2018. In this brief, Numrich has now characterized the
13 alleged equal protection violation as being different than it appeared based on his initial briefing
14 and, for the first time, has provided legal authority and analysis that—he asserts—supports his
15 claim. Both the State’s response and Numrich’s reply were filed timely in accordance with the
16 briefing schedule agreed to by the parties and ordered by the court. However, because
17 Numrich’s reply brief was (obviously) filed after the State’s response, the State did not have an
18 opportunity to address Numrich’s argument as clarified in his reply in its response brief.

19
20 ² The “DEFENDANT’S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER) AND MEMORANDUM OF
21 AUTHORITIES IN SUPPORT THEREOF”—filed on April 30, 2018—will hereinafter be cited to as “Def. Memo.”
The defendant’s “REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS COUNT 1
(MANSLAUGHTER)” was filed on June 20, 2018 and will hereinafter be cited to as “Def. Reply.”

22 ³ The only citation provided by Numrich in this section of his brief was to authority standing for the proposition that
23 the Washington crime of manslaughter corresponds to the common-law crime of involuntary manslaughter, a lesser
form of homicide. Def. Memo. at 13 n.4.

⁴ The STATE’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS COUNT 1 will hereinafter be cited to as
“State’s Resp.”

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 2

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 The State's initial response was filed much further in advance of oral argument than
2 required by LCR 7(b)(4) based on the parties' agreed briefing schedule. However, that schedule
3 did not contemplate the need for a surresponse. Oral argument in this matter is currently
4 scheduled for 1:30 p.m. on July 19th. Under the rule, the State has until noon on July 17th to file
5 responsive briefing.

6
7 **III. ARGUMENT**

8 In his reply brief, Numrich argues that the State's decision to prosecute him for
9 Manslaughter in the Second Degree violates his right to equal protection because—he asserts—
10 RCW 9A.32.070 and RC 49.17.190(3) criminalize the same act, but the penalty is more severe
11 under the former than the latter. Def. Reply at 21-22. This argument must be rejected for two
12 reasons.

13 **A. THE EQUAL PROTECTION RULE NUMRICH RELIES ON IS NO**
14 **LONGER GOOD LAW IN WASHINGTON**

15 As clarified in his response brief, Numrich's entire equal protection argument is premised on
16 the assertion that, "[u]nder the Washington constitution, equal protection is violated when two
17 statutes declare the same acts to be crimes, but the penalty is more severe under one statute than the
18 other." Def. Reply at 21. Numrich's argument, however, ignores the fact that, while this may have
19 been the rule at one time, it has since been explicitly rejected by Washington courts and is no longer
20 a correct statement of the law.

21 In Washington, the "rule" asserted by Numrich dates back to Olsen v. Delmore, 48 Wn.2d
22 545, 295 P.2d 324 (1956). In Olsen, the Washington Supreme Court, relying on a case from the
23 Oregon Supreme Court, held that:

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 3

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 A statute which prescribes different punishments or different degrees of punishment
2 for the same acts committed under the same circumstances by persons in like
3 situations is violative of the equal protection clause of the Fourteenth Amendment of
the United States Constitution. State v. Pirkey, 203 Or. 697, 281 P.2d. 698 and cases
there cited.

4 Olsen, 48 Wn.2d at 550. The Court then held that, because the relevant portion of Art I, § 12 of the
5 Washington Constitution was substantially identical to the Fourteenth Amendment, such a statute
6 would also violate the Washington Constitution. Id. Then, in State v. Zornes, the Washington
7 Supreme Court subsequently held that the rule from Olsen also applied to situations where two
8 different statutes criminalized the same act and the penalty was more severe under one than the
9 other. 78 Wn.2d 9, 475 P.2d 109 (1970). (For ease of reference, the State will hereinafter refer to
10 this rule as the Olsen/Zornes rule.⁵)

11 In 1979, however, the United States Supreme Court decided United States v. Batchelder,
12 442 U.2d 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In that case, the Court concluded that the fact
13 that two different statutes established different penalties for the same criminal act did *not* violate the
14 equal protection clause of the Fourteenth Amendment. Id. at 124-25. In so doing, the Court
15 rejected the basic legal premise underlying the Olsen/Zornes rule. In 1991, the Washington
16 Supreme Court recognized this fact, noting that Batchelder had abrogated Zornes and that the
17 Olsen/Zornes rule was no longer good law as a result. City of Kennewick v. Fountain, 116 Wn.2d
18 189, 802 P.2d 1371 (1991). See, also, State v. Wright, 183 Wn. App. 719, 730-31, 334 P.3d 22
19 (2014) (equal protection not violated by statutes defining the same offense but prescribing different
20 punishments).

21 Numrich attempts to get around this change in the law by arguing that Fountain only
22 overruled Zornes insofar as Zornes was based the Fourteenth Amendment, but that the

23 ⁵ Cases subsequent to Olsen and Zornes use a number of different phrases and terms to describe or refer to this rule.
The State will use “the Olsen/Zornes rule” simply because it appears to be the most succinct.

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 4

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 Olsen/Zornes rule has continued legal efficacy under Art. I, § 12 of the Washington Constitution.

2 Def. Reply at 22 n.5. However, this argument must be rejected.

3 As an initial matter, Numrich has not provided any authority or argument establishing that,
4 in the situation presented here, the equal protection analysis under Art. I, § 12 of the Washington
5 Constitution is any different than the analysis under the Fourteenth Amendment to the United States
6 Constitution. As he has failed to conduct an analysis of the criteria set forth in State v. Gunwall,
7 106 Wn.2d 54, 720 P.2d 808 (1986), his claim must be resolved under the federal constitution rather
8 than under the state constitution. Forbes v. Seattle, 113 Wn.2d 929, 934, 785 P.2d 431 (1990).

9 That is particularly the case where, as here, Washington courts have already found that there
10 is no difference between the rights at issue under the federal and Washington constitutions. As
11 noted above, for example, in Olsen, the Court's decision was based on the Fourteenth Amendment.
12 48 Wn.2d at 550. The only reason the Court also found a violation of the Washington constitution
13 was because "Art. I, § 12, of the constitution of this state...is substantially identical with the equal
14 protection clause of the Fourteenth Amendment." Id. (citing Texas Co. v. Cohn, 8 Wn.2d 360, 112
15 P.2d 522 (1941)). Given that there is no question that (1) Numrich's substantive rights under the
16 federal and state constitutions are identical and (2) his rights under the federal constitution have not
17 been violated, it would be wholly irrational and unreasonable to conclude that his rights under the
18 state constitution have been violated.

19 Moreover, Numrich's argument that Fountain overruled Zornes only on federal law grounds
20 (and that, therefore, the Olsen/Zornes rule is still good law under the Washington Constitution) is
21 not supported by the Court's opinion in Fountain itself. In Fountain, the defendant committed an
22 act that was crime under one statute and an infraction under another. 116 Wn.2d at 191. The
23 defendant argued that, under the Olsen/Zornes rule, prosecuting her for the crime violated her right

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 5

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 to equal protection. Id. The trial court agreed and dismissed the criminal charge. Id. As noted
2 above, on appeal the Court held that Zornes had been abrogated by Batchelder and was no longer
3 good law vis-à-vis the Fourteenth Amendment. Id. at 191-93. The Court also noted that, even if
4 Zornes did apply, the defendant would not have suffered any violation of her right to equal
5 protection. Id. at 193-94. Based on both, the Court reversed the decision of the trial court and
6 remanded the case so that prosecution of the criminal charge could proceed. Id. at 194-95. If—as
7 Numrich now argues—the Olsen/Zornes rule was still good law under Art. I, § 12, the Court would
8 surely have said that and would have conducted an analysis under that provision. It did not.

9 Finally, at least one Washington appellate court has already rejected the argument that
10 Numrich now makes. In State v. Eakins, the defendant challenged his conviction based on the
11 Olsen/Zornes rule. 73 Wn. App. 271, 273, 869 P.2d 83 (1994). In its analysis, the court first noted
12 that the rule was no longer good law vis-à-vis the United States Constitution because it had been
13 “firmly established that the identity of elements in two criminal statutes with disparate penalties
14 does not violate the equal protection clause of the Fourteenth Amendment.” Id. at 275. The court
15 then noted that the relevant rights of a defendant under the Fourteenth Amendment were
16 substantially identical to those under Art. I, § 12 of the Washington Constitution. Id. at 276. The
17 court, therefore, concluded that there was no violation of the defendant’s right to equal protection
18 under either. Id.

19 Given all of the above, Numrich’s entire equal protection argument relies on a rule that has
20 been specifically and explicitly abrogated and is no longer good law in Washington. As a result, his
21 argument can and should be rejected on this basis alone.

22
23
STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 6

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 **B. EVEN UNDER THE RULE RELIED ON BY NUMRICH, PROSECUTING**
2 **HIM FOR MANSLAUGHTER DOES NOT VIOLATE HIS RIGHT TO**
3 **EQUAL PROTECTION**

4 Even if the Olsen/Zornes rule was still good law, prosecuting Numrich for manslaughter
5 would not violate his right to equal protection. As Numrich acknowledges,⁶ even under that rule it
6 was well settled that, in a context such as this one, there is no equal protection violation when the
7 crimes the prosecutor has the discretion to charge are different crimes that require proof of different
8 elements. See Fountain, 116 Wn.2d at 193-94; In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345
9 (1985); State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). This is the case even if
10 the prosecutor's decision is based on or influenced by the penalties available following conviction
11 and even when the relative punishments for the two statutes seem illogical to the defendant or the
12 court. Fountain, 116 Wn.2d at 193; Farrington, 35 Wn. App. at 802; State v. Richards, 27 Wn. App.
13 703, 705, 621 P.2d 165 (1980). Indeed, this is the case even when the relevant elements make it
14 easier to prove the violation with the more severe penalty. Zornes, 78 Wn.2d at 21-22.

15 Here, as discussed at length in the State's response brief, the crimes of Manslaughter in the
16 Second Degree and Violation of Labor Safety Regulations with Death Resulting are different
17 crimes with different elements that are aimed at different conduct. State's Resp. at 9-22. This
18 analysis is not changed when Numrich's argument is recast as an equal protection one.

19 Moreover, *Numrich himself explicitly concedes that the two crimes have different mens*
20 *rea elements.* Def. Reply at 5. In this section of his reply, Numrich goes on to argue that proof
21 of the *mens rea* element of RCW 49.17.190(3) will necessarily establish the *mens rea* element of
22 RCW 9A.32.070. Def. Reply at 5-6. Whether true or not, however, that fact is only relevant vis-
23 à-vis the test for concurrency under the "general-specific rule." The test for whether *that* rule

⁶ Def. Reply at 21.

1 applies includes an analysis of whether a violation of the more “specific” statute will necessarily
2 violate the more “general” one. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984).
3 But, as Numrich further concedes, the analysis for purposes of an alleged equal protection
4 violation is separate and distinct and involves different principles than an alleged violation of the
5 “general-specific rule.” Def. Reply at 21. As noted above, the test for an equal protection
6 violation is straightforward and asks simply whether two crimes have different elements. If they
7 do—as Numrich concedes the two statutes at issue in this case do—then there is no equal
8 protection violation. That test applies and that result holds true even if the respective elements of
9 the two crimes make it easier to prove the one carrying the harsher penalty. Zornes, 78 Wn.2d at
10 21-22.

11 Finally, even if this court accepts Numrich’s invitation to consider whether proof of the
12 *mens rea* element of RCW 49.17.190(3) will necessarily establish the *mens rea* element of RCW
13 9A.32.070, his argument still fails because it will not. As discussed at length in the State’s
14 response brief, the concept of *mens rea* involves both the *level* of mental state (e.g. intentional
15 versus knowing versus negligent) and the *object* of the mental state (e.g. the intent to do
16 something in particular). State’s Resp. at 11-12. For two crimes to have the same *mens rea*
17 element, both the level **and** the object of the mental state must be the same. Id. In this context, a
18 violation of RCW 9A.32.070 requires proof that the defendant negligently caused a risk of death to
19 the victim. A defendant’s violation of a statutory duty may be relevant to that issue,⁷ but proof that
20 he or she had any specific *mens rea* vis-à-vis such a violation is not required. On the other hand, a
21 violation of RCW 49.17.190(3) requires proof that the defendant knowingly violated a health or
22 safety provision. No proof is required that the defendant had any specific *mens rea* vis-à-vis the

23 ⁷ Whether a defendant breached a statutory duty is relevant to whether he or she acted with criminal negligence, but is not conclusive on the issue. State v. Lopez, 93 Wn. App. 619, 970 P.2d 765 (1999).

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 8

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 risk of death to the victim. Thus, not only do the two statutes have different levels of mental
2 state, *they have mental states that are about different things*. As a result, despite Numrich’s
3 claim to the contrary, proof of the *mens rea* at issue in RCW 49.17.190(3) will not necessarily
4 establish proof of the *mens rea* at issue in RCW 9A.32.070.

5 Numrich’s only real argument against this point boils down to the assertion that
6 Manslaughter in the Second Degree does not require the defendant to be aware of a substantial
7 risk that a death may occur. Def. Reply at 4. But it does. As the State pointed out in its
8 response, in State v. Gamble, 154 Wn.2d 457, 468-69, 114 P.3d 646 (2005), the Court’s entire
9 ruling was predicated on the conclusion that the crime of manslaughter requires proof of the
10 defendant’s mental state *vis-à-vis the death of the victim*. State’s Resp. at 10-12.

11 In his reply, Numrich asserts that Gamble applies only to Manslaughter in the First
12 Degree and does not apply to Manslaughter in the Second Degree. Def. Reply at 4 n.1. This is
13 incorrect. As an initial matter, the language used in Gamble itself establishes that it applies to
14 both first- and second-degree manslaughter. In relevant part, the Gamble Court stated:

15 [M]anslaughter *does* require proof of a mental element vis-à-vis the killing. See
16 RCW 9A.32.060(1)(a) (recklessness); see also RCW 9A.32.070(1) (criminal
negligence).

17 154 Wn.2d at 469 (emphasis in original). In this context, the Court would not have referred to
18 both “recklessness” (the level of *mens rea* for first-degree manslaughter) and “criminal
19 negligence” (the level of *mens rea* for second degree manslaughter) unless it intended its holding
20 to apply to both. Moreover, the Washington State Supreme Court Committee on Jury
21 Instructions has read the logic of Gamble as applying equally to second-degree manslaughter. In
22 its Comments on both WPIC 10.04 (“Criminal Negligence—Definition”) and WPIC 28.06
23 (“Manslaughter—Second Degree—Criminal Negligence—Elements”), the Committee indicated

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 9

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 that, under Gamble, in the context of a charge of second-degree manslaughter, the definition of
2 “criminal negligence” given to the jury must specify that the object of the defendant’s *mens rea*
3 was the risk that death would occur. 2016 Comment to WPIC 10.04; 2016 Comment to WPIC
4 28.06.

5 Finally, despite Numrich’s claim to the contrary,⁸ there *are* cases subsequent to Gamble
6 that have specifically held—in the second-degree manslaughter context—that the object of the
7 *mens rea* of the crime was the risk that the victim might die. The clearest case on point is State
8 v. Latham, 183 Wn. App. 390, 335 P.3d 960 (2014), which Numrich himself cites in his reply.
9 Numrich cites Latham for the proposition that “a person may act with criminal negligence even
10 if she is unaware that there is a substantial risk that a homicide may occur.” Def. Reply at 4.
11 However, that is precisely the opposite of what the case actually held in the context of a second-
12 degree manslaughter charge. In Latham, the defendant argued that Nevada’s crime of voluntary
13 manslaughter was not legally comparable to Washington’s crime of second-degree manslaughter
14 because the *mens rea* elements of the two crimes were different. 183 Wn. App. at 405. In
15 agreeing with the defendant, the court explicitly stated:

16 Henderson’s logic⁹ leads us to hold that to prove criminal negligence in a
17 manslaughter case, the State must prove that a defendant failed to be aware of a
substantial risk that a *homicide*, rather than a wrongful act, may occur.

18 State v. Latham, 183 Wash. App. 390, 406, 335 P.3d 960, 969 (2014) (emphasis in original).

19 Given all of the above, it is apparent that the crimes of Manslaughter in the Second
20 Degree under RCW 9A.32.070 and Violation of Labor Safety Regulations with Death Resulting

21 _____
⁸ Def. Reply at 4.

22 ⁹ In State v. Henderson, the court had indicated that “by applying Gamble’s reasoning, it is logical to assume that
23 criminal negligence for manslaughter would require the State to prove that a defendant failed to be aware of a
substantial risk that a *homicide* (rather than “a wrongful act”) may occur.” 180 Wn. App. 138, 149, 321 P.3d 298
(2014) (emphasis in original).

STATE’S SURRESPONSE TO DEFENDANT’S
MOTION TO DISMISS COUNT 1 - 10

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 under RCW 49.17.190(3) require proof of *mens rea* elements that are entirely different in terms of
2 both level and object. As a result, even if the Olsen/Zornes rule was still good law, under that rule
3 the State has not violated Numrich's right to equal protection by prosecuting him for committing
4 manslaughter.

5

6 **IV. CONCLUSION**

7 For the reasons outlined above and in the State's previously filed response brief, this court
8 should deny Numrich's motion.

9

DATED this 16th day of July, 2018.

10

DANIEL T. SATTERBERG
King County Prosecuting Attorney

11

12

13

By: 
Patrick Hinds, WSBA #34049
Eileen Alexander, WSBA # 45636
Deputy Prosecuting Attorneys
Attorneys for Plaintiff

14

15

16

17

18

19

20

21

22

23

STATE'S SURRESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1 - 11

Dan Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

APPENDIX F

FILED
KING COUNTY WASHINGTON

AUG 23 2018

SUPERIOR COURT CLERK
BY Andre Jones
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS COUNT 1 AND
CERTIFYING THE ISSUES FOR
REVIEW PURSUANT TO RAP 2.3(b)(4)

THIS MATTER having come before the Court on Defendant's Motion to Dismiss
Count I, and the Court having heard oral argument and having considered the following
pleadings:

1. Defendant's Motion to Dismiss Count 1 (Manslaughter) and Memorandum in Support Thereof;
2. Declaration of Todd Maybrow in Support of Defendant's Motion to Dismiss Count 1;
3. State's Response to Defendant's Motion to Dismiss Count 1;
4. Reply in Support of Defendant's Motion to Dismiss Count 1;
5. Surreply to Defendant's Motion to Dismiss Count 1;
6. Defendant's Surreply in Support of Motion to Dismiss Count 1
7. State's Proposed Order and Correction of the Record; and
8. Defendant's Objection to State's Proposed Order and Motion for Certification Pursuant to RAP 2.3(b)(4).

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Count 1 is DENIED.

First, the Court concludes that this prosecution of the defendant for the crime of Manslaughter in the Second Degree does not violate Washington's general-specific rule. Second, the Court

*ORDER DENYING DEFENDANT'S MOTION TO DISMISS
COUNT 1 AND CERTIFYING THE ISSUES FOR REVIEW
PURSUANT TO RAP 2.3(b)(4) - 1*

ORIGINAL

Allen, Hansen, Maybrow
& Offenbecher, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 concludes that the State's decision to prosecute the defendant for the crime of Manslaughter
2 in the Second Degree does not violate equal protection as defined by the Fourteenth
3 Amendment of the United States Constitution or Washington Constitution Article I, Section
4 12.

5
6 FURTHER, Defendant's Motion for Certification Pursuant to RAP 2.3(b)(4) is
7 GRANTED. The Court finds and concludes that this Court's Order Denying Defendant's
8 Motion to Dismiss Count I involves controlling questions of law as to which there are
9 substantial grounds for a difference of opinion and that immediate review of the Order may
10 materially advance the ultimate termination of the litigation.

11 DATED this 23 day of August, 2018.

12
13
14 
15 Honorable John H. Chun
Superior Court Judge

16 Presented by:

17
18
19 _____
20 Todd Maybrown, WSBA #18557
Attorney for Defendant

21
22 Copy Received; Approved as to Form:

23
24 _____
25 Patrick Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney
26 Attorney for Plaintiff

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS
COUNT I AND CERTIFYING THE ISSUES FOR REVIEW
PURSUANT TO RAP 2.3(b)(4) - 2**

**Allen, Hansen, Maybrown
& Offenbecher, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681**

[Appendices G-H removed to avoid duplication as they are already part of the record.]

APPENDIX I

Cooper Offenbecher

From: Todd Maybrown
Sent: Thursday, October 18, 2018 11:56 AM
To: Hinds, Patrick; Cooper Offenbecher
Cc: Alexander, Eileen
Subject: RE: State v. Phillip Numrich - need to set a hearing

Patrick:

This is an extraordinary motion – given the timing and obvious prejudice that may flow. The defense will not agree to have this motion heard on shortened time and/or without a full hearing. I will need to be present for such a hearing. I am in trial, as you well know, and will not be available over the next few weeks.

If you file this motion to amend, we will file an opposition and a motion to dismiss this case pursuant to CrR 8.3(b) based upon government mismanagement. We may raise additional issues as well. We will ask for an evidentiary hearing pertaining to that motion. We will ask for a special setting – ½ day – to litigate these issues.

We are now asking for you to produce all of your office's documents and communications relating to this case (including all of your communications – whether they be by email, phone, text, personal computer, etc.), including your office's blue notes, emails, memoranda, etc. If you refuse, we will file a formal motion for discovery. Please consider this email as a request for public disclosure as well. I need a response before we attempt to schedule this motion.

Todd

Todd Maybrown
Allen, Hansen, Maybrown & Offenbecher, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
(206) 447-9681 - Phone
(206) 447-0839 - Fax

www.ahmlawyers.com

The information contained in this message is intended only for the addressee or addressee's authorized agent. The message and enclosures may contain information that is privileged, confidential, or otherwise exempt from disclosure. If the reader of this message is not the intended recipient or recipient's authorized agent, then you are notified that any dissemination, distribution or copying of this message is prohibited. If you have received this message in error, please notify the sender by telephone and return the original and any copies of the message by mail to the sender at the address noted above.

From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Thursday, October 18, 2018 11:07 AM
To: Todd Maybrown <Todd@ahmlawyers.com>; Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Subject: State v. Phillip Numrich - need to set a hearing

Todd and/or Cooper,

In light of the possibility that an appellate court (either S Ct or COA) may take discretionary review and the impact that would have on the State's ability to amend charges (due to the running of the three year statute of limitations during the time that the Superior Court would not have authority to rule on a motion to amend), the State needs to set a hearing to amend the Information in Mr. Numrich's case now. A copy of the First Amended Information is attached.

As a courtesy, I wanted to reach out to you re: scheduling before contacting the court. My understanding is that this is a motion that will be addressed on the 8:30 calendar in 1201. I am available any day next week (except Friday the 26th) and any day the week after that (except Monday the 29th). If you could let me know your availability as soon as possible, I would much appreciate it.

Sincerely,
Patrick

Patrick Hinds
King County Prosecuting Attorney's Office
Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

APPENDIX J

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
)
) Plaintiff,)
)
) v.) No. 18-1-00255-5 SEA
)
)
) PHILLIP NUMRICH,)
)
) Defendant.)
)
) DECLARATION OF PATRICK HINDS
)
) RE: STATE'S MOTION TO AMEND
)
)

I, PATRICK HINDS, hereby declare as follows:

1. I am a Senior Deputy Prosecuting Attorney in the King County Prosecuting Attorney's Office and am one of the prosecutors assigned to the above entitled case, and am familiar with the records, files, and discovery therein.
2. The defendant is currently charged by way of Information with Manslaughter in the Second Degree in violation of RCW 9A.32.070 (Count 1) and Violating of Labor Safety Regulation with Death Resulting in violation of RCW 49.17.190(3) (Count 2). The date of violation for both counts is January 26, 2016. The Information was filed on January 5, 2018.
3. At the time of filing and at the present time, the State believes that there is probable cause to charge the defendant with either/both Manslaughter in the First Degree and Manslaughter in the Second Degree.
4. Due to the King County Prosecuting Attorney's generally conservative filing policy, in January it was decided to file Manslaughter in the Second Degree and to reserve the decision of whether to amend to Manslaughter in the First Degree or to add Manslaughter in the First Degree as a charge in the alternative until the time of trial or until closer to the running of the State of Limitations, whichever came first.
5. Per RCW 9A.04.080(1), the Statute of Limitations for Manslaughter in the First Degree is three years from the date of violation. In this case, the statute will run on January 26, 2019.

6. The defendant has moved for discretionary review of the Superior Court's denial of his motion to dismiss. If discretionary review is granted (in either the Supreme Court or the Court of Appeals), the Superior Court will no longer have the authority to rule on the State's motion to amend the Information under RAP 7.2.
7. If discretionary review is granted, the State anticipates that the case will not be mandated back to the Superior Court until after January 26, 2019.
8. As the State interprets the relevant case law, once the statute has run, the State would not be able to amend the Information to change Count 1 to Manslaughter in the First Degree or to add a count of Manslaughter in the First Degree as a charge in the alternative because, although such an amendment would "relate back" to the original Information, it would broaden the original charges. See State v. Warren, 127 Wn. App. 893, 896, 112 P.3d 1284 (2005).
9. Given all of the above, the State is moving to amend the Information now to add a count of Manslaughter in the First Degree in the alternative because, if it does not, it will effectively lose the ability to do so if discretionary review is granted.
10. The State's motion to amend is not being brought to retaliate against the defendant for seeking discretionary review, to gain an advantage in the appellate litigation, or for any other improper purpose.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 16th day of October, 2018 in Seattle, Washington.



Patrick H. Hinds, WSBA #34049
Senior Deputy Prosecuting Attorney

18-1-00255-5 SEA

STATE OF WASHINGTON VS NUMRICH, PHILLIP SCOTT

Criminal - Discretionary Review

[Summary](#)
 [Charges](#)
 [Participants](#)
 [Document List](#)
 [Events](#)
 [Judgments](#)

Documents

Documents List

Sub Number	Date Filed	Document Name	Additional Information	Page #	Seal
-	01/05/2018	CASE SETTING	CASE SETTING INFO		
-	01/05/2018	Comment Entry	12-05-2018S		
-	01/05/2018	FILING FEE ASSESSED	FILING FEE ASSESSED 200.00		
1	01/05/2018	Information	INFORMATION	10	
2	01/05/2018	Order for Warrant	ORDER FOR WARRANT /VACATED	4	
3	01/09/2018	Notice of Appearance and Request for Discovery	NOT OF APPEAR AND REQ FOR DISCOVERY	5	
10	01/16/2018	Order Directing Fingerprinting	ORDER DIRECTING FINGERPRINTING	1	
11	01/16/2018	Declaration	DECLARATION /ANDREW KINSTLER	2	
4	01/16/2018	Notice of Scheduling	NOTICE OF SCHEDULING 02-12-2018	1	
5	01/16/2018	Waiver of Speedy Trial	WAIVER OF SPEEDY TRIAL /05-14-18	1	
6	01/16/2018	Initial Arraignment	INITIAL ARRAIGNMENT	1	
7	01/16/2018	Order on Personal Recognizance	ORDER ON PERSONAL RECOGNIZANCE	3	
8	01/16/2018	Criminal No Contact Order	CRIMINAL NO CONTACT ORDER	1	
9	01/16/2018	Order Establishing Conditions of Release	ORDER ESTABLISHING COND. OF RELEASE	1	

Sub Number	Date Filed	Document Name	Additional Information	Page #	Seal
12	01/24/2018	Sheriff's Return on Warrant of Arrest	SHERIFF'S RETRN ON WARRNT OF ARREST 15.50	5	
13	02/12/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 03-26-2018	1	
14	03/13/2018	Motion and Affidavit / Declaration	MOTION AND AFFIDAVIT/DECLARATION	56	
15	03/19/2018	Objection / Opposition	OBJECTION / OPPOSITION /DEF	19	
16	03/21/2018	Motion Hearing	MOTION HEARING	1	
17	03/21/2018	Order Establishing Conditions of Release	ORDER ESTABLISHING COND. OF RELEASE	1	
18	03/26/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 04-30-2018	1	
19	04/30/2018	Motion to Dismiss	MOTION TO DISMISS /DEF	14	
20	04/30/2018	Declaration	DECLARATION OF TODD MAYBROWN	27	
21	04/30/2018	Affidavit / Declaration / Certificate Of Service	AFFIDAVIT/DCLR/CERT OF SERVICE	1	
22	04/30/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 05-29-2018	1	
23	04/30/2018	Hearing Continued: Unspecified	HEARING CONTINUED: UNSPECIFIED	1	
24	05/11/2018	Note for Motion Docket	NOTE FOR MOTION DOCKET 06-26-2018	2	
25	05/14/2018	Order Setting	ORDER SETTING BRIEFING SCHEDULE 05-29-2018	3	
26	05/29/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 06-26-2018	1	
27	05/29/2018	Hearing Continued: Unspecified	HEARING CONTINUED: UNSPECIFIED	1	
28	06/01/2018	Order	ORDER AMENDING BRIEFING SCHEDULE	2	
29	06/13/2018	Response	RESPONSE /STATE	54	
30	06/20/2018	Reply	REPLY/DEF	27	
31	06/25/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 07-19-2018	1	
32	06/25/2018	Order of Continuance	ORDER OF CONTIN /MOTION HRG /1:30 07-19-2018	1	
33	07/16/2018	Response	SURRESPONSE/STATE	11	
34	07/18/2018	Reply	REPLY/DEF	8	

Sub Number	Date Filed	Document Name	Additional Information	Page #	Seal
35	07/19/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 08-23-2018	1	
35A	07/19/2018	Motion Hearing	MOTION HEARING	1	
36	08/22/2018	Objection / Opposition	OBJECTION / OPPOSITION	7	
37	08/23/2018	Memorandum	MEMORANDUM /STATE	22	
38	08/23/2018	Motion Hearing	MOTION HEARING	1	
39	08/23/2018	Attachment	ATTACHMENT/COUNSELS CORRESPONDENCE	47	
40	08/23/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 10-23-2018	1	
41	08/23/2018	Order Denying Motion / Petition	ORDER DENYING MTN TO DISMISS CT 1	2	
42	09/14/2018	Notice of Discretionary Review to Supreme Court		5	
43	09/27/2018	Motion	MOTION /STATE	53	
43A	09/28/2018	Correspondence	CORRESPONDENCE /COOPER OFFENBECHER	10	
44	10/01/2018	Objection / Opposition	OBJECTION / OPPOSITION /DEF	6	
45	10/01/2018	Motion Hearing	MOTION HEARING	1	
46	10/01/2018	Order for Continuance: Setting	ORDER FOR CONTINUANCE: SETTING 12-05-2018	1	
47	10/01/2018	Order Denying Motion / Petition	ORDER DENYING MT TO AMEND RELEASE	1	
48	10/04/2018	Correspondence	CORRESPONDENCE FROM SUPREME CRT	2	
49	10/30/2018	Objection / Opposition	OBJECTION / OPPOSITION	25	
50	10/30/2018	Declaration	DECLARATION /TODD MAYBROWN	148	
51	10/30/2018	Motion to Compel	MOTION TO COMPEL DISCOVERY /DEF	7	
52	10/31/2018	Reply	REPLY /STATE	39	
53	10/31/2018	Motion Hearing	MOTION HEARING	1	
54	11/01/2018	Order	ORDER ON MOTION TO AMEND/ GRANTED	3	
55	11/01/2018	Amended Information	AMENDED INFORMATION	2	
56	11/13/2018	Motion and Affidavit / Declaration		11	

Sub Number	Date Filed	Document Name	Additional Information	Page #	Seal
57	11/13/2018	Affidavit / Declaration / Certificate Of Service		1	
58	11/13/2018	Declaration	OF PATRICK HINDS	274	
59	11/13/2018	Affidavit / Declaration / Certificate Of Service		1	
60	11/15/2018	Petition	FEE	10	
61	11/16/2018	Notice of Discretionary Review to Supreme Court		6	
62	11/19/2018	ORDER ON CRIMINAL MOTION		1	
63	11/29/2018	Response	DEF	21	
64	11/29/2018	Declaration	COOPER OFFENBECHER	104	
65	11/30/2018	Motion and Affidavit / Declaration	DEF	8	
66	11/30/2018	Notice of Discretionary Review to Supreme Court		5	
67	11/30/2018	Notice	OF ERRATA/DEF	2	
68	11/30/2018	Response	TO MOTION /DEF	21	
69	11/30/2018	Notice		5	
70	11/30/2018	Affidavit / Declaration / Certificate Of Service		1	
71	11/30/2018	Response	TP PETITION /STATE	25	
72	11/30/2018	Affidavit / Declaration / Certificate Of Service		1	
73	12/05/2018	Declaration	OF C OFFENBECHER	3	
75	12/05/2018	Order for Continuance: Setting		1	
76	12/10/2018	Brief	OF STATE'S REPLY	18	
77	12/10/2018	Affidavit / Declaration / Certificate Of Service		1	
80	12/10/2018	Letter	THE SUPREME COURT	2	
81	12/10/2018	Letter	SUPREME COURT	2	
78	12/11/2018	Motion and Affidavit / Declaration	STATE	7	

Sub Number	Date Filed	Document Name	Additional Information	Page #	Seal
79	12/11/2018	Affidavit / Declaration / Certificate Of Service		1	
82	12/17/2018	Response	STATE'S	18	
83	12/17/2018	Affidavit / Declaration / Certificate Of Service		1	
84	12/20/2018	Reply	DEF	6	
85	12/24/2018	Order	ATTORNEY FEES	2	
86	12/31/2018	Declaration	OF COOPER OFFENBECHER	14	
89	01/07/2019	Certificate of Finality	78957-1-1 /CLOSED/OPENED IN ERROR /APPEAL FILED W/SUPREME CT UNDER #96365-7	2	
87	01/08/2019	Response	STATE'S	135	
88	01/08/2019	Affidavit / Declaration / Certificate Of Service		1	
90	01/09/2019	Reply	DEF	4	
91	01/28/2019	Order	ON DEF'S FEE PETITION	2	
92	01/31/2019	Notice		4	
93	02/13/2019	Order for Continuance: Setting		1	
95	03/06/2019	Agreed Order	AMENDING ORDER ON DEF FEE PETITION	2	
96	04/05/2019	ORDER ON CRIMINAL MOTION	PERMITTING OUT OF STATE TRAVEL	2	

Copyright © Journal Technologies, USA. All rights reserved.

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: John Chun
Bailiff: Jill Gerontis
Court Clerk: Dawn Tubbs

Dept. 16
Date: 7/19/2018

Digital Record: W 739
Start: 1:26:56
Stop: 2:32:04

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington v Phillip Numrich

Appearances:

State appearing by DPA Patrick Hinds, Eileen Alexander
Defendant present, represented by counsel Todd Maybrow

MINUTE ENTRY

Defendant's motion to dismiss CT I - - Manslaughter 2

Defendant's motion to strike State's surresponse is denied

Respective counsel present oral argument

Court reserves ruling

Discussion re certification to Court of Appeals. Request is reserved, subject to the Court's ruling

Discussion re case setting

Case setting hearing 8-23-18 at 1:30 p.m.

Order to be presented

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: John H. Chun
Bailiff: Teri Bush
Court Clerk: Andre' Jones
Digital Record: W 739
Start: 1:30:00
Stop: 1:52:10

Dept. 16
Date: 8/23/2018

KING COUNTY CAUSE NO.: 18-1-00255-5 SEA

State of Washington vs. Phillip Numrich

Appearances:

State appearing by DPA Patrick Hinds/Eileen Alexander

Defendant present and represented by counsel Cooper Offenbecher filling in for Todd Maybrown

MINUTE ENTRY

Respective counsel and defendant present

Defendant's motion to dismiss Ct. 1 Manslaughter 2

Counsel make oral arguments

Court's ruling: Defendant's motion is reserved

Orders to be presented

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

OBJECTION TO STATE'S PROPOSED
ORDER AND MOTION FOR
CERTIFICATION FOR REVIEW
PURSUANT TO RAP 2.3(b)(4)

I. INTRODUCTION

COMES NOW the Defendant, Phillip Numrich, by and through his undersigned counsel, and hereby files this objection to the State's proposed Order Denying Defendant's Motion to Dismiss Count 1. Moreover, the defendant now moves this Court to certify the legal issues in this case for review pursuant to RAP 2.3(b)(4).

II. DEFENDANT'S OBJECTION

This Court heard oral argument on Defendant's Motion to Dismiss Count 1 on July 19, 2018. Thereafter, on July 23, 2018, the Court indicated that it would deny the defendant's motion and asked the State to prepare a proposed Order.

This morning, the State circulated a proposed Order Denying Defendant's Motion to Dismiss Count 1. The Order, which spans more than ten pages, does not include any of the factual or legal claims of the defendant. Rather, it merely recasts (and repeats) the legal

*OBJECTION TO STATE'S PROPOSED ORDER AND MOTION
FOR CERTIFICATION PURSUANT TO RAP 2.3(b)(4) – 1*

**Allen, Hansen, Maybrow
& Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 arguments that have been advanced by the State. The defense objects to the State's proposed
2 Order – and each of the factual and legal claims that are set forth within that pleading.

3 Given the lateness of the State's submission¹, the defense is unable to provide an
4 extended discussion regarding each of the legal claims that have been endorsed by the State's
5 proposed Order. However, suffice it to say, the defense strenuously objects to the State's claim
6 that RCW 9A.32.070 and RCW 49.17.190(3) “create different crimes with different elements
7 that criminalize different conduct.” Proposed Order at 5. This claim is untenable, as the
8 submissions in this case make clear that the State is currently intending to rely upon the very
9 same alleged conduct, and nothing more, in an effort to prove that Mr. Numrich is guilty of both
10 of these statutes. Moreover, the novelty of the State's current legal argument – and the fact that
11 no other prosecutor in the State of Washington has ever previously advanced such an argument –
12 should give this Court pause before it signs off on an Order which includes such broad claims.
13
14

15 As an alternative, the defense has prepared a proposed Order that is more appropriate for
16 this proceeding. *See Appendix A.*

17 **III. MOTION FOR CERTIFICATION PURSUANT TO RAP 2.3(B)(4)**

18 During the early stages of these proceedings, both parties notified the Court that they
19 intended to seek interlocutory review of the trial court's decision regarding the novel – and
20 obviously important – legal issues that are presented in this case. This morning, the State
21 advised defense counsel that they are intending to object to certification of this issue. The State's
22 reversal of position is not well taken.
23

24 Pursuant to RAP 2.3(b)(4), discretionary review is appropriate where:

25 The superior court has certified, or all the parties to the litigation have stipulated,
26 that the order involves a controlling question of law as to which there is

¹ The State had previously promised to circulate this proposed Order no later than August 21, 2018.

1 substantial ground for a difference of opinion and that immediate review of the
2 order may materially advance the ultimate termination of the litigation.

3 *Id.*

4 As a threshold matter, there should be no question that the defense has presented a
5 motion that involves controlling questions of law as to which there is substantial ground for a
6 difference opinion. It is noteworthy that the defense has presented legal questions that have yet
7 to be addressed by any appellate court in the State of Washington; and the State is now
8 advancing a position that has never previously been advocated by any other prosecuting attorney.
9 Without attempting to reargue the defendant’s position, it should be apparent that there are
10 substantial grounds for a difference of opinion regarding the parties’ legal claims in this case.
11 For example, notwithstanding the State’s assertions regarding the non-statutory *mens rea*
12 element for manslaughter in the second degree, it is apparent that some of the State’s wisest
13 appellate judges do not agree with the State’s position. *See, e.g., State v. Gamble*, 154 Wn.2d
14 457, 476 (2005) (Chambers, J., concurring) (noting that manslaughter in the second degree and
15 second degree felony murder involve “exactly the same intent”).
16
17

18 Moreover, immediate review of this Court’s Order will materially advance the ultimate
19 termination of this litigation. For, with all due respect, it makes good sense to have an appellate
20 court consider – and resolve these novel legal questions – before the parties prepare this case for
21 trial. In fact, an appellate ruling in this case will help to clarify the legal issues that will be
22 presented to the trial court when the case ultimately proceeds to trial.
23

24 Finally, the defense has presented issues of great public importance – and the ruling in
25 this case is sure to have broad ramifications for employers and businesses throughout the State of
26 Washington. Prompt review is warranted in this case.

*OBJECTION TO STATE’S PROPOSED ORDER AND MOTION
FOR CERTIFICATION PURSUANT TO RAP 2.3(b)(4) – 3*

**Allen, Hansen, Maybrown
& Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 For all of these reasons, and in the interests of justice, this Court should certify these
2 issues for discretionary review pursuant to RAP 2.3(b)(4).

3 DATED this 22nd day of August, 2018.
4

5 

6 TODD MAYBROWN, WSBA #18557
7 Attorney for Defendant
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

*OBJECTION TO STATE'S PROPOSED ORDER AND MOTION
FOR CERTIFICATION PURSUANT TO RAP 2.3(b)(4) - 4*

**Allen, Hansen, Maybrown
& Offenbecher, P.S.**
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

April 23, 2019 - 3:27 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96566-8
Appellate Court Case Title: State of Washington v. Phillip Scott Numrich
Superior Court Case Number: 18-1-00255-5

The following documents have been uploaded:

- 965668_Answer_Reply_20190423152331SC076260_2995.pdf
This File Contains:
Answer/Reply - Answer to Motion for Discretionary Review
The Original File Name was ANSWER TO STATES MOTION FOR DISCRETIONARY REVIEW AND STATEMENT OF GROUNDS FOR DIRECT REVIEW with Appendices.pdf

A copy of the uploaded files will be sent to:

- eileen.alexander@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- patrick.hinds@kingcounty.gov
- todd@ahmlawyers.com

Comments:

The Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Direct Review are contained in one document.

Sender Name: Sarah Conger - Email: sarah@ahmlawyers.com

Filing on Behalf of: Cooper David Offenbecher - Email: cooper@ahmlawyers.com (Alternate Email:)

Address:
600 University Street
Suite 3020
Seattle, WA, 98101
Phone: (206) 447-9681

Note: The Filing Id is 20190423152331SC076260