

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 96566-8

IN THE SUPREME COURT OF WASHINGTON

PHILLIP SCOTT NUMRICH,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR DISCRETIONARY REVIEW

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

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1. IDENTITY OF PETITIONER

Phillip Numrich, the Petitioner and defendant below, asks this Court to grant discretionary review of the decision described in Section 2 below.

2. DECISIONS BELOW

Petitioner asks this Court to review the King County Superior Court's November 1, 2018 Order on Motion to Amend, which granted the State's motion to add a charge of manslaughter in the first degree and simultaneously certified the Order on Motion to Amend for discretionary review to this Court. Appendix 1-3. On December 21, 2018 the superior court denied Mr. Numrich's Motion to Dismiss or Alternatively Reconsider Order on Motion to Amend. Appendix 4-5.

3. ISSUES PRESENTED FOR REVIEW

- A. Should discretionary review be granted where the superior court certified that its decision should be consolidated in this Court with the pending Motion for Direct Discretionary Review in Case No. 96365-7 involving a previously certified, related issue arising out of the same underlying criminal case?
- B. Should discretionary review be granted where the superior court committed probable error substantially altering the status quo when it held that it was "unquestionably the right of the State to amend if it chose," which is an incorrect statement of the law?
- C. Where the State failed to provide notice of an intended amendment throughout months of litigation during which such notification would have been expected, and first provided notice on the day the State's Answer was due in this Court, which resulted in the superior court

finding that there were no additional facts to support the timing of the amendment, and finding that the State was using the amendment to obtain dismissal of Case No. 96365-7:

- a. Did the State’s actions unfairly prejudice Mr. Numrich’s right to seek lawful appellate review?
 - b. Did the State’s actions constitute prosecutorial vindictiveness?
 - c. Is the State estopped from adding a charge of manslaughter in the first degree given the position it took regarding manslaughter in the second degree during months of litigation?
 - d. Did the State’s actions constitute mismanagement?
- D. Should discretionary review be granted where the superior court committed probable error substantially altering the status quo where the State – for the first time ever in Washington – has charged an employer with manslaughter in the first degree for the death of an employee resulting from alleged safety violations, even though there is a specific statute criminalizing such conduct, thereby violating Washington’s “general-specific” rule?

4. STATEMENT OF THE CASE

A. Introduction

On October 18, 2018, 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 State had originally filed a charge of manslaughter in the *second* degree 10 months earlier following a two-year investigation;

- the parties had spent months litigating the propriety of the manslaughter in the second-degree charge with an explicit understanding that the losing party would seek discretionary review;
- during months of legal proceedings involving a defense motion to dismiss the manslaughter in the second-degree charge, the State never provided notice that it was contemplating such an amendment;
- the State first notified the defense of its intent to add manslaughter in the first degree *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;
- the State notified this Court of its intent to add manslaughter in the first degree in its Answer to this Court in an attempt to dissuade this Court from accepting discretionary 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.” Appendix 2.

B. Factual and Procedural Background¹

In January 2018, the State of Washington charged Phillip Numrich with criminal offenses related to an accidental workplace fatality. The charges related to an incident from January 2016 when one of Mr. Numrich’s employees died when a trench collapsed at a residential sewer repair jobsite. The State charged Mr. Numrich under RCW 49.17.190(3), the Washington

¹ The facts and procedural history related to the underlying criminal matter in King County Superior Court Case No. 18-1-00255-5 are further set forth in detail at pp. 1-6 in Mr. Numrich’s Motion for Discretionary Review in Case No. 96365-7, the Motion for Direct Discretionary Review that Mr. Numrich filed seeking review of the superior court’s originally certified order denying the motion to dismiss the manslaughter in the second degree charge. Those facts are incorporated herein by reference. Mr. Numrich is filing a Motion to Consolidate Case No. 96365-7 with the instant matter.

Industrial Health and Safety Act (“WISHA”) statute that imposes criminal liability on employers for workplace fatalities resulting from safety violations. And, in what the State concedes is a first in Washington – the State charged Mr. Numrich with the felony homicide charge of manslaughter in the second degree. *See* Appendix 45-46.² Mr. Numrich has no prior criminal history.

Mr. Numrich filed a motion to dismiss the manslaughter charge, arguing that it violated Washington’s “general-specific rule,” which prohibits charging under a general statute when there is a more specific statute. Appendix 55-68. The superior court denied Mr. Numrich’s motion, but certified the issue pursuant to RAP 2.3(b)(4). Appendix 171-172.

Consistent with all parties’ expectations and the intent of the superior court, Mr. Numrich filed a Notice of Discretionary Review on September 14, 2018. On September 28, 2018, Mr. Numrich timely filed his Motion for Direct Discretionary Review and Statement of Grounds for Direct Review. *See* Case No. 96365-7. Pursuant to a scheduling order, the State was to file its Answer by October 18, 2018. Oral argument was set for November 1, 2018.

C. **The State Attempts to Dissuade this Court from Accepting Review in Case No. 96365-7**

² The original Information was signed by two Senior King County Deputy Prosecuting Attorneys. The first Senior DPA was the Economic Crimes Unit Chair at the time and is now a King County Superior Court Judge. The second Senior DPA is the current Economic Crimes Unit Chair.

On October 18, 2018, the day that the State's Answer was due in Case No. 96365-7, the State sent undersigned counsel an email stating that "the State needs to set a hearing to amend the Information in Mr. Numrich's case now." Appendix 176-177. Defense counsel promptly notified the State of his strong objection, as well as an intent to seek discovery related to the timing and circumstances of the State's tactics. Appendix 177.

Later on October 18, 2018, the State filed its Answer to Motion for Discretionary Review. The State trumpeted its intended amendment, explaining to this Court that discretionary review would be for naught:

Even if this Court were to accept review and rule in Numrich's favor, he will still face felony manslaughter charges. . . . Here, the State intends to add a count of Manslaughter in the First Degree.

State's Answer to Motion for Discretionary Review at 18, Case No. 96365-7. The State added: "The State's motion to amend the Information is in the process of being scheduled and there is no basis to conclude that it will not be granted." *Id.* The State failed to advise this Court that the defense was objecting to the amendment.

On October 30, 2018, the defense filed opposition pleadings and a Motion to Compel Discovery. *See* Appendix 08-187. The State filed a Reply. On October 31, 2018, the parties presented oral argument on the Motion to Amend in front of King County Superior Court Judge James Rogers.

D. The Superior Court's November 1 Order on Motion to Amend and Certification

On November 1, the superior court issued a ruling granting the Motion to Amend. *See* Appendix 1-3. However, the court noted that this was “a highly unusual case” and *sua sponte* awarded attorneys’ fees against the State. *See id* at 2. The court explained that it had “never awarded terms in a criminal case and they are not a remedy except in highly unusual situations.” *Id.* at 2. The superior court simultaneously certified the Order:

The Order Granting the Amendment only is hereby certified for appeal to join the discretionary appeal currently pending in the Washington Supreme Court. Per Judge Chun’s Order of 23 August 2018, this Court concludes that the Amendment adds a charge this is inextricably related to the issues of law certified by Judge Chun under RAP 2.3(b)(4).

Id. at 2-3. In addition, the court found 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.” *Id.* at 2.

Later, on November 1, Commissioner Michael Johnston heard argument in Case No. 96365-7. On November 5, the Commissioner issued a ruling that recognized the new certification, and deferred ruling pending Mr. Numrich’s filing of a separate notice of discretionary review, supporting briefing, and this Court’s consideration regarding “whether to consolidate the motions and statements of ground for direct review or consider them together as companions.” Appendix 188-89.

E. Subsequent Proceedings in the Superior Court

On November 13, 2018, the State filed a Motion to Reconsider the Imposition of Sanctions. The defense filed a Response and a Motion to Dismiss Pursuant to CrR 8.3(b), or Alternatively to Reconsider Order on Motion to Amend. Appendix 190-210; 211-18. *See also* Appendix 219-322 (supporting declaration of counsel). Pursuant to the court's request, the parties filed pleadings regarding Mr. Numrich's Fee Petition.

On December 21, 2018, the superior court issued an Order denying the State's Motion to Reconsider and denying the defense Motion to Dismiss or Reconsider, explaining that "it was unquestionably the right of the State to amend if it chose." Appendix 5. Following additional briefing on the fee issue, on January 28, 2019, the court granted Mr. Numrich's request in full and ordered the State to pay \$18,252.49. Appendix 323-24.

5. ARGUMENT

A. Review Should Be Granted Under RAP 2.3

This case presents an issue of first impression regarding the interpretation of Washington's criminal statutes as they pertain to workplace fatalities resulting from safety violations, specifically an employer's liability for manslaughter in the first degree in light of WISHA's

specific criminal liability statute.³ Additionally, this case presents the opportunity to evaluate imposing limits on a prosecutor's criminal charging power when charging decisions are used to improperly influence the judicial decision-making process.

RAP 2.3(b)(4) provides that discretionary review may be accepted when “[t]he superior court has certified...that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” The superior court recognized that the issues in the Order on Motion to Amend should be resolved by the appellate courts before trial, and certified this issue pursuant to RAP 2.3(b)(4) to join the pending motion in Case No. 96365-7.

RAP 2.3(b)(2) also provides for the acceptance of review when “the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” As discussed *infra*, the superior court committed such error when it granted the State's Motion to Amend.

**B. The Superior Court Committed Probable Error
When it Granted the State's Motion to Amend on**

³ For a defendant with no prior criminal history, manslaughter in the first degree carries a standard range sentence of 6.5 to 8.5 years in prison. The maximum sentence is life in prison.

**an Erroneous Belief that the State Had Unfettered
Discretion to Amend the Information**

The superior court held that “it was unquestionably the right of the State to amend if it chose.” Appendix 5. This was legally erroneous.

Washington law is clear that the State does not have such unfettered discretion: The “trial court cannot permit amendment of the information if substantial rights of the defendant would be prejudiced.” *State v. Lamb*, 175 Wn.2d 121, 130 (2012) (trial court did not abuse discretion in denying State’s motion to amend after defendant had prevailed on a pretrial motion); CrR 2.1(d). Moreover, the court has wide discretion when considering a State’s motion to amend and can deny the amendment even if there is an absence of prejudice. *See State v. Rapozo*, 114 Wn.App. 321, 322-24 (2002) (even though the amendment “would not have prejudiced Rapozo,” the court did not abuse its discretion in denying the motion to amend, noting “the State had ample opportunity to correct the charge before trial as almost two months had passed between charging and trial”).

Washington courts have affirmed dismissal of charges for late motions to amend by the State. For example, in *State v. Michielli*, 132 Wn.2d 22, 239–40 (1997), this Court emphasized that dismissal was appropriate where there was no “justification for the delay in amending the information”:

In this case the State expressly admits that it had all of the information and evidence necessary to file all of the charges in

July 1993. Despite this, the State delayed bringing the most serious of those charges for months, and did so only five days (three business days) before the scheduled trial. Even though the resulting prejudice to Defendant's speedy trial right may not have been extreme, the State's dealing with Defendant would appear unfair to any reasonable person.

Id. at 246. *See also State v. Sherman*, 59 Wn.App. 763, 770 (1990)(affirming dismissal, noting that a defendant may be prejudiced "if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process").

Here, there was likewise no "justification for the delay in amending." Notice was provided to Mr. Numrich *after* he had already commenced a crucial stage in the litigation process. Although prejudice need not be proven, the State's amendment has prejudiced Mr. Numrich because the State used the late amendment to attempt to improperly influence this Court, and because the State's amendment has delayed and will continue to delay these proceedings.⁴ More fundamentally, the State's tactics violate fundamental notions of fairness and due process, and warrant a sanction to deter similar future tactics.

C. The Trial Court Found that the State was Using the Amendment to Obtain Dismissal of Case No. 96365-7. The State's Conduct was an Improper,

⁴ The superior court's Order on Motion to Amend concluded that Mr. Numrich's substantial rights were not prejudiced. Appendix 1. However, the court failed to reconcile that conclusion with its later finding that "the state is using this amendment to obtain dismissal of the discretionary review." Appendix 2. Nor did the Court address the delay in proceedings that was caused by the State's amendment.

**Intentional Effort to Prejudice the Defendant's
Right to Seek Lawful Review**

The superior court found that there was no legitimate explanation for the State's delay, other than to obtain dismissal of the pending appeal:

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.*

Appendix 2 (emphasis supplied).

The State's delay in providing notice of the amendment was extraordinary against the backdrop of months of litigation regarding the propriety of the felony manslaughter charge. There was significant notice and planning regarding the defense motion to dismiss. The defense provided notice at the arraignment on January 18, 2018. Appendix 36 ¶ 11. The parties met to discuss the issue in early 2018. *Id.* The parties requested "pre-assignment of the case for pretrial management." *See* Appendix 194. The court signed a detailed briefing schedule that had been prepared by the State. Appendix 232-36. In the scheduling order, both the defense and the State acknowledged that each party would seek discretionary review if that party lost the motion. Appendix 233.

The pleadings filed by the parties related to the motion reflect an incredible amount of resources over a period of months. *See generally* Appendix 195-196 (listing dates and lengths of pleadings, including “Surreply” and “Surreply” briefs filed). The hearings were lengthy. *See id.* at 196 (noting the July 23, 2018 oral argument lasted an hour and five minutes; August 23, 2018 oral argument on certification lasted 22 minutes). After learning that the Court would be denying the defense motion, the State prepared a detailed 10-page proposed “Order Denying Defendant’s Motion to Dismiss Count 1.” *See* Appendix 313-322.⁵

On September 27, 2018, the State filed a lengthy Motion to Amend Conditions of Release, which was subsequently argued on October 1, 2018 (the motion was denied). Appendix 39. On September 28, 2018, the defense filed in this Court its Motion for Discretionary Review and its Statement of Grounds for Direct Review.

Not once over these many months, or during any of the preceding hearings, or in any of the hundreds of pages of filings, did the State suggest that it was contemplating adding manslaughter in the first degree.⁶ Instead,

⁵ The Court declined to sign the State’s proposed Order.

⁶ The State has variously claimed that manslaughter in the first degree was always a potential charge; that it did not consider the amendment until October 2018 when it first realized the statute of limitations would run in January 2019; and that the defense raised some novel legal theory in its opening briefs to this Court. None of these arguments are availing given the litigation history of this case. Moreover, the superior court made explicit findings that the State was using the amendment to obtain dismissal of the

the State first notified the defense on October 18, 2018, the day its Answer was due in this Court. Then, the State told this Court that discretionary review – and all of the months of litigation in superior court – would be meaningless because even if this Court reversed the superior court and remanded for dismissal, Mr. Numrich would still be facing manslaughter in the *first* degree based on the State’s intended amendment.

The State’s conduct was an obvious attempt to increase the pressure on Mr. Numrich and dissuade this Court from accepting review.

D. The State’s Amendment Violates Due Process

A pre-accusatorial delay “may constitute a violation of due process under the Fifth Amendment if the prejudice to the defendant outweighs the reasons for the prosecutorial delay or the delay is caused by the prosecutor solely to gain a tactical advantage over the defendant.” *See State v. Madera*, 24 Wn.App. 354, 355 (1979). Additionally, constitutional due process principles prohibit prosecutorial vindictiveness. *See State v. Korum*, 157 Wn.2d 614, 627 (2006). Here, the amendment was clearly used by the prosecutor solely to gain a tactical advantage over Mr. Numrich, and was a vindictive response to Mr. Numrich’s lawful right to seek review.

pending Motion for Discretionary Review, and that there were no new facts or legal theory.

Prosecutorial vindictiveness occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.” *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (1987)). Thus, a prosecutorial action is vindictive if it is designed to penalize a defendant for invoking legally protected rights. *See id.* There are two kinds of prosecutorial vindictiveness: a presumption of vindictiveness and actual vindictiveness. *See id.* A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Id.* (quoting *Meyer*, 810 F.2d at 1246). The prosecution may then rebut the presumption by presenting objective evidence justifying the prosecutorial action. *See id.* Actual vindictiveness must be shown by the defendant through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *See Meyer*, 810 F.2d at 1245.

Clearly established federal law in the context of vindictive prosecutions provides that:

[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)(internal citation and quotation marks omitted). *See Blackledge v. Perry*, 417 U.S. 21, 27 (1974)

(holding there was a “realistic likelihood of vindictiveness” when a prosecutor re-indicted a convicted misdemeanor on a felony charge after the defendant invoked an appellate remedy).

In *Blackledge*, the Supreme Court observed that the presumption of vindictiveness applied because “the prosecutor has the means readily at hand to discourage such appeals — by ‘upping the ante’ through a felony indictment whenever a convicted misdemeanor pursues his statutory appellate remedy.” *Id.* at 27-28. The Court held that “it was not constitutionally permissible for the State to respond to [the defendant’s] invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.” *Id.* at 28-29.

Here, the objective circumstances surrounding the State’s motion to amend present a reasonable likelihood of vindictiveness. Before Mr. Numrich initiated review, the prosecutor never once suggested that the State intended to increase the charges. Then, on the cusp of its deadline to file a response in this Court, the State decided to up the ante by filing a far more serious felony offense. Not only will this charge dramatically increase the range of potential punishment, but, in notifying this Court that it would be filing this new charge, the prosecutor sought to dissuade this Court from accepting review.

The threat of an amendment was presented in a time and manner that it is reasonable to conclude that it was intended to: (1) punish the defendant for exercising his legal right to appeal; and (2) dissuade this Court from hearing Mr. Numrich's appeal, as intended by the superior court.

E. The Court's Order on Motion to Amend Violated Fundamental Principles of Estoppel

The State spent months exhaustively analyzing for the court why manslaughter in the *second* degree was the appropriate charge. This involved complex legal analysis comparing the elements of manslaughter in the second degree to RCW 49.17.190(3). The State never suggested that manslaughter in the *first* degree was a possible or legal charge in this case.

The State should be precluded from now taking a contrary position:

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position The doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and . . . waste of time.

Arkison v. Ethan Allen Inc., 160 Wn.2d 535, 538 (2007).

The parties spent six months litigating the State's novel request to charge manslaughter in the second degree. The State is estopped from now claiming that manslaughter in the *first* degree is the appropriate charge.

F. The State's Motion is Not Supported by Probable Cause

RCW 9A.32.060 defines manslaughter in the first degree in relevant part as follows: “A person is guilty of manslaughter in the first degree when . . . he or she recklessly causes the death of another person.” *Id.* To convict a defendant of manslaughter in the first degree, the State must prove that the defendant knew of and disregarded a substantial risk that death may occur. *State v. Gamble*, 154 Wn.2d 457, 467-69 (2005).

The State has conceded that the amendment does not rely on any new facts or legal theory, claiming instead that it has believed since “the time of filing” that there was probable cause to charge Mr. Numrich with manslaughter in the first degree. Appendix 179. But the Certification for Determination of Probable Cause contains no evidence that the defendant actually knew of a substantial risk that a death may occur. *See* Appendix 104-08. Rather, the seven-page Certification concludes that

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.

Appendix 108.

G. The State’s Conduct Constitutes Mismanagement

The State has badly mismanaged this case. CrR 8.3(b) provides for dismissal due to governmental misconduct when there has been prejudice

which materially affect the accused's right to a fair trial. *Id.* Our courts have long held that "governmental misconduct need not be of an evil or dishonest nature; *simple mismanagement* also falls within such a standard." *State v. Sulgrove*, 19 Wn. App. 860, 863 (1978) (emphasis supplied).

In addition to the other prejudice discussed *supra*, the State's tactics are resulting in significant delays of the proceedings. Case No. 96365-7 was on track for timely and orderly consideration in early November 2018. But the State's amendment has thrown this litigation into a tailspin, leading to numerous other proceedings. Mr. Numrich has been forced to waive his speedy trial rights repeatedly to pursue necessary remedies in superior court and perfect the issues related to the amendment in this court. A "[d]efendant's being forced to waive his speedy trial right is not a trivial event." *State v. Michielli*, 132 Wn.2d 229, 245 (1997) (State's delay in amending charges, forcing defendant to waive speedy trial rights to be prepared, is sufficient prejudice for CrR 8.3(b) dismissal).

H. The Manslaughter in the First-Degree Charge Violates the General-Specific Rule⁷

Washington applies its own, unique version of the "general-specific rule" when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78

⁷ To avoid repetition of identical argument, the Argument section of the Motion for Discretionary Review at 10-17, Case No. 96365-7, is incorporated by reference.

Wn.2d 9 (1970). This rule provides that “where a special statute punishes the same which is [also] punished under a general statute, the special statute applies, and the accused can be charged only under that statute.” *State v. Shriner*, 101 Wn.2d 576, 580 (1984). The purpose of the rule is to preserve the legislature’s intent to penalize specific conduct in a particular, less onerous way and hence to minimize sentence disparities resulting from unfettered prosecutorial discretion. *See Shriner*, 101 Wn.2d at 581-83.⁸

“[W]hen two statutes are concurrent, the specific statute prevails over the general.” *State v. Danforth*, 97 Wn.2d 255, 257 (1982). To determine if two statutes are concurrent, the Court should examine whether someone can violate a specific statute without violating the general statute. *See, e.g., State v. Chase*, 134 Wn.App. 792, 800 (2006). The statutes at issue in this case are concurrent because each time an employer is guilty of the WISHA offense, he is likewise guilty of manslaughter.

Each violation of the specific statute, RCW 49.17.190(3), requires proof of a “willful” and “knowing” violation of safety regulations that results in a workplace fatality. Each violation of RCW 9A.32.070 requires proof of “reckless” conduct that results in death. Recklessness is when the defendant “knows of and disregards a substantial risk that a wrongful act

⁸ The Washington courts have applied this rule in several different criminal contexts. *See* Motion for Discretionary Review at 10-11, Case No. 96365-7 (*citing* numerous cases).

may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c). By law, “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.” RCW 9A.08.010(2). Accordingly, it is impossible to envision a case where a defendant might be guilty of the WISHA statute but acquitted of manslaughter.

In addition, the WISHA statutory scheme makes clear that RCW 49.17.190(3) is the statute under which the legislature intended for employers to be prosecuted for these types of workplace accidents, as opposed to the general criminal homicide statutes. *See generally* Motion for Discretionary Review, Case No. 96365-7 at 8-9; 15-16 (discussing civil and criminal penalties; enhanced financial penalties; and legislative intent). The State should not be permitted to avert the mental element that the legislature intended when it enacted the WISHA criminal statute.

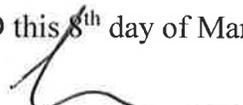
6. **CONCLUSION**

For the foregoing reasons, and in the interest of justice, Petitioner respectfully requests that this Court accept discretionary review.

RESPECTFULLY SUBMITTED this 8th day of March, 2019.



Todd Maybrow, WSBA #18557
Attorney for Petitioner



Cooper Offenbecher, WSBA #40690
Attorney 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 8th day of March, 2019, I filed the above Motion for Discretionary 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 8th day of March, 2018.



Sarah Conger, Legal Assistant

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ALLEN, HANSEN, MAYBROWN, OFFENBECHER

March 08, 2019 - 4:19 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_Exhibit_20190308161054SC245577_1008.pdf
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Exhibit
The Original File Name was Appendix 01 to 180.pdf
- 965668_Motion_Discretionary_Review_20190308161054SC245577_9696.pdf
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Motion for Discretionary Review - Discretionary Review Superior Ct.
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- 965668_Other_20190308161054SC245577_2797.pdf
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Other - Appendix to Motion for Discretionary Review
The Original File Name was Appendix 181 to 323.pdf
- 965668_State_of_Grounds_for_Direct_Rvw_20190308161054SC245577_2429.pdf
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Statement of Grounds for Direct Review
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Comments:

We are designating both Exhibit and Other because we had to split the appendix into two documents because of the size.

Sender Name: Sarah Conger - Email: sarah@ahmlawyers.com

Filing on Behalf of: Cooper David Offenbecher - Email: cooper@ahmlawyers.com (Alternate Email:)

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)

Plaintiff/Petitioner,)

vs.)

PHILLIP NUMRICH)

Defendant/Respondent.)

NO. 18-1-00255-5 SEA

ORDER ON MOTION TO AMEND

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.

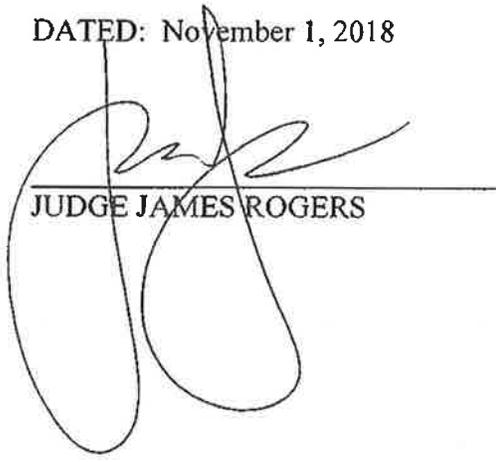
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DATED: November 1, 2018

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9



A handwritten signature in black ink, appearing to read 'James Rogers', is written over a horizontal line. Below the line, the text 'JUDGE JAMES ROGERS' is printed in a serif font. The signature is large and stylized, with a prominent vertical stroke on the left and a large loop on the right.

10

JUDGE JAMES ROGERS

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Honorable James Rogers

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

~~PROPOSED~~ ORDER ON
DEFENDANT'S FEE PETITION

*State Mtn to Reconsider,
Debar Mtn to Dismiss*

On November 1, 2018 this Court awarded attorney fees for work performed on the Supreme Court appeal to that point. Pursuant to this Court's Order, the Defendant filed a Fee Petition. This Court has considered the supporting and opposing pleadings related to the Fee Petition and the records and files herein.

IT IS HEREBY ORDERED

DATED this 29 day of December, 2018.

*as noted
on following
pages.*

Honorable James Rogers
King County Superior Court Judge

~~PROPOSED~~ ORDER ON DEFENDANT'S FEE PETITION - 1

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

1 State v. Numrich

2
3 The State's Motion to Reconsider is properly brought as the Court imposed terms, not
4 sanctions, *sua sponte*. The Court has reviewed the pleadings and the Motion is Denied based
5 upon the reasons listed in the original Order. The Defense Motion to Dismiss or Alternatively,
6 etc., is really a Motion to Reconsider. The additional argument does not change the decision of
7 the Court. The Defense does not address the manner in which this Court addressed the
8 prejudice of fees spent for the appeal, and it was unquestionably the right of the State to amend
9 if it chose. For the nth time, this is a highly unusual procedural situation. This Court does not
10 see fees as a usual remedy in criminal cases. Here, however, they are appropriate.
11

12 Mr. Hinds is correct that Mr. Offenbecker's original fee petition was inadequate. The
13 motion to strike the pleading is Denied, however.

14 Mr. Offenbecker needs to refile within ten days listing the number of hours for each
15 lawyer and the subject matter they worked upon. This may be done redacted if there is
16 attorney-client work product or privileged areas. The reasonableness of the hourly rates does
17 not need to be addressed. The law in this area is well-defined and the Court needs to make
18 particularized findings. Mr. Offenbecker's declaration due in ten days, Mr. Hind's reply in
19 seven days after that. Fees will be awarded, in some amount.
20

21 The parties now need to move forward.

22 December 21, 2018

23
24
25 Hon. James E. Rogers

1 | Page
Hon. Jim Rogers
King County Superior Court
Dept. 45
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

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SUPERIOR COURT CLERK
BY ALICIA OCHSNER
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

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, Manslaughter In The First Degree**, 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;

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

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

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Count 3: Manslaughter In The First Degree

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

Contrary to RCW 9A.32.060(1)(a), 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

Honorable Jim Rogers
October 31, 2018 at 2:00 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 OPPOSITION TO
STATE'S BELATED MOTION TO
FILE AMENDED INFORMATION

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I. INTRODUCTION

On October 18, 2018, nearly ten months after this case was filed and months after this Court had certified to the appellate courts the question regarding the propriety of the felony homicide charge in this case, the State notified the defense that it was intending to amend the charges to add a new felony homicide offense. The State filed this motion in an attempt to undermine this Court's certification to the appellate courts – and to thwart defendant's efforts to obtain prompt appellate review of these matters.

Defendant objects to the State's belated motion to amend and its efforts to accelerate this motion. The defense maintains that the State is engaging in gamesmanship and bad faith litigation tactics. Moreover, the State's motion is the product of vindictiveness and contrary to the due process clauses of the United States Constitution and Washington Constitution.

As discussed further below (and in related pleadings filed by the defense), this Court should deny the State's motion to amend.

II. BACKGROUND¹

A. Background

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.

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

¹ These factual claims are supported by the Declaration of Todd Maybrown.

1 pipe repair” during this process. To complete the project, Mr. Numrich and several employees
2 helped to dig and shore two trenches – one near the home and one near the street – at the
3 commencement of the work on that project. On January 26, 2016, as the project was nearly
4 completed, one of the construction workers was killed when the dirt wall of the trench nearest to
5 the home collapsed. Mr. Numrich was not present at the job site at the time of the collapse.
6

7 This accident was exhaustively investigated by the Division of Occupational Safety &
8 Health of OSHA. *See* OSHA Investigation No. 1120535. Like this case, the OSHA investigators
9 focused solely upon the events that led to the death of the worker. On July 21, 2016, the
10 Washington Department Labor and Industries (“WSDLI”) issued a Citation and Notice of
11 Assessment that included a finding that Alki Construction had committed certain violations of the
12 safety regulations in relation to the events of January 26, 2016. Mr. Numrich appealed these
13 findings and assessments and the parties ultimately reached a compromised settlement of all
14 claims.
15

16 **B. Initial Filing**

17 On or about January 18, 2018, the State filed criminal charges against Mr. Numrich relating
18 to this same workplace incident. The State’s Information includes the following two charges:
19

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

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

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

26 **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

1 knowingly violate the requirements of RCW 49.17.060, and a safety or health
2 standard promulgated under RCW Chapter 49, and a rule or regulation governing
3 the safety or health conditions of employment adopted by the Department of Labor
4 and Industries, to-wit: WAC 296-155-657, WAC 296-155- 655 and that violation
5 caused the death of one of its employees, to-wit: Harold Felton;

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

Information.

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

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

In further support of the charges, Mr. Joseph claims that Alki Construction had failed to comply with certain state regulations when digging and shoring this trench. In particular, Mr. Joseph notes that this project involved what is classified as “Type C” soil and that Alki Construction had failed to follow the “most rigorous shoring standard per WSDLI regulations.” *See id.* (discussing WSDLI regulations and SpeedShore Tab Data). Moreover, Mr. Joseph argues

1 that Alki Construction had failed to properly shore this trench based upon his interpretation of the
2 state regulations:

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

11 *Id.* (Certification at 3).

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

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

19 *Id.* (Certification at 4).

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

25 **C. Defendant’s Motion to Dismiss Count 1 (Manslaughter in the Second**
26 **Degree)**

Mr. Numrich appeared for arraignment on January 16, 2018. Upon entering his plea of
not guilty, Mr. Numrich notified the Court that the prosecution had violated Washington’s
“general-specific” rule by filing the felony manslaughter charge in this case. Mr. Numrich’s

1 counsel subsequently met with the assigned prosecutor, DPA Patrick Hinds. Counsel notified
2 DPA Hinds that the defense would be filing a motion to dismiss the manslaughter charge. DPA
3 Hinds notified counsel that the State would contest the defendant's motion, but he never suggested
4 that the State could or would file any other charges in this case.

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

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

17
18 After reviewing Mr. Numrich's reply pleadings, the State filed a Sur-reply. Once again,
19 the State never suggested that it was intending to file any other felony charges in this case.

20 **D. The Superior Court's Rulings**

21 King County Superior Court Judge John Chun² initially heard argument on July 19,
22 2018. The Court declined to issue any ruling on that date and, instead, scheduled a subsequent
23 hearing for August 23, 2018.

24 Thereafter, Judge Chun informed the parties that he intended to deny the defense
25 motion. The State subsequently prepared a proposed Order that parroted the arguments in its
26

² Judge Chun has since been appointed to Division One of the Court of Appeals.

1 pleadings. The defense objected to the State's proposed Order and presented argument why
2 this matter should be certified for review under RAP 2.3(b)(4).

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

9
10 Judge Chun accepted the defense position. First, the judge refused to sign the State's
11 proposed Order. Second, Judge Chun signed an Order which certified the issue for immediate
12 review:
13

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

20 *Appendix F to Maybrown Declaration.*

21 The State chose not to file any motion for reconsideration of Judge Chun's decision.
22 Moreover, during months of proceedings before Judge Chun, the State never once suggested
23 that it was considering file any additional charges in this case.
24
25

26 ³ 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.

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E. Defendant’s Motion for Discretionary Review

Consistent with RAP 2.3, the defendant filed a Notice of Discretionary Review on September 14, 2018. Thereafter, Mr. Numrich filed his Motion for Discretionary Review in the Washington Supreme Court and Statement of Grounds for Direct Review.

A Commissioner for the Washington Supreme Court ordered the State to file its response to the defendant’s motion by October 18, 2018. Argument on the defendant’s motion is now scheduled for November 1, 2018.

F. Proceedings Before this Court on October 1, 2018

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

G. The State’s Last-Minute Motion to Amend.

On October 18, 2018, the same date that the State had been ordered to file its responsive pleadings in the Washington Supreme Court, DPA Hinds sent defense counsel an email in which he claimed that “the State needs to set a hearing to amend the Information in Mr. Numrich’s case now.” Maybrow Dec. App. I. Defense counsel promptly responded to his email message and explained:

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

1 evidentiary hearing pertaining to that motion. We will ask for a special setting
2 – ½ day – to litigate these issues.

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

9 *Id.*

10 Nevertheless, even after reviewing this message, the State filed pleadings in the
11 Washington Supreme Court that included the following argument during the closing section of its
12 brief: “Here, the State intends to add a count of Manslaughter in the First Degree to the charges
13 against Numrich. The State’s motion to amend the Information is in the process of being
14 scheduled and there is no basis to conclude that it will not be granted.” State’s Response at 18.
15 The State made a conscious decision not to advise the Washington Supreme Court of the
16 defendant’s objection to its tactics.

17 In addition, the State filed in the Washington Supreme Court a declaration that was
18 purportedly signed by DPA Hinds on October 16, 2018. *See Maybrow Dec. J.*⁴ In this
19 declaration, the State makes the bald (but self-serving) claim: “The State’s motion to amend is
20 not being brought to retaliate against the defendant for seeking discretionary review, to gain
21 advantage in the appellate litigation, or for any other improper purpose.” *Id.*

22 The State’s claim is contradicted by all available evidence and the procedural history of
23 this litigation. In fact, the State is now hoping to use this 11th-hour action to: (1) undermine this
24 Court certification pursuant to RAP 2.3(b)(4); (2) to defeat Mr. Numrich’s ability to obtain

25
26 ⁴ 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 appellate review of this Court’s ruling; and (3) to force Mr. Numrich to relitigate many of the very
2 same issues that have previously been presented in this Court. The Court should not condone this
3 type of gamesmanship.

4 Although the defense has requested discovery relevant to these issues, the State has flatly
5 refused to disclose any of this information. Accordingly, the defense has been compelled to file a
6 Motion to Compel Discovery along with this pleading.
7

8 III. DISCUSSION

9 A. Legal Background

10 A trial court may permit an information to be amended at any time before verdict if
11 substantial rights of the defendant are not prejudiced. *See* CrR 2.1(d). Thus, given the mandatory
12 nature of this rule, a “trial court cannot permit amendment of the information if substantial rights
13 of the defendant would be prejudiced.” *State v. Lamb*, 175 Wn.2d 121, 130 (2012). Moreover,
14 the trial court has wide discretion when considering a State’s motion to amend – and the court can
15 deny the amendment even if there is an absence of prejudice. *See Lamb*, 175 Wn.2d at 130-32
16 (trial court did not abuse discretion in denying State’s motion to amend after defendant had
17 prevailed on a pretrial motion). *Accord State v. Rapozo*, 114 Wn.App. 321, 322-24 (2002) (trial
18 court did not abuse discretion in denying State’s motion to amend from a misdemeanor charge to
19 a felony charge).
20

21 Here, there are at least six reasons to deny the State’s motion to amend. First, the State’s
22 motion is the product of gamesmanship and bad faith litigation tactics. Second, the State should
23 be estopped from using this amendment process in an effort to relitigate the issues that have
24 previously been decided by this court. Third, the State’s motion will prejudice the defendant’s
25 substantial rights. Fourth, the State’s motion is both actually and presumptively vindictive. Fifth,
26

1 the State's motion is not supported by probable cause (or any pleadings that establish probable
2 cause) for this Class A felony. Sixth, the State's motion violates Washington's general-specific
3 rule.

4
5 **1. The State's Motion is the Product of Gamesmanship.**

6 This Court should discourage bad faith litigation tactics and gamesmanship. Here, the
7 State has been on notice since the date of arraignment (January 16, 2018) that the defense was
8 claiming that the filing of a felony charge in this case was a violation of Washington's general-
9 specific rule. The parties litigated this very issue for more than six months, leading to considerable
10 expense to the defendant. Then, consistent with this Court's certification pursuant to RAP
11 2.3(b)(4), the defendant filed his motion for discretionary review in the Washington Supreme
12 Court. Notably, this Court had previously explained immediate and prompt review was
13 appropriate to "materially advance the ultimate termination of the litigation."
14

15 Thereafter, on the very same date that it had been ordered to file its response in the
16 Washington Supreme Court, the State sought to file an amendment that would charge a new felony
17 offense. Should the Court grant this motion, it will necessarily undermine all prior proceedings in
18 the case. And such an amendment will force the defendant to relitigate many of the very same
19 issues that have previously been resolved by this court. By granting this amendment, the Court
20 will substantially *delay* the ultimate termination of this case.
21

22 In fact, the filing of an Amended Information will place the defendant in an untenable
23 situation and it will force the defendant to incur unnecessary (and unreasonable) additional legal
24 expenses. Thus, through no fault of his own, the defendant will now be forced to decide whether
25 it is sensible to press the motion for discretionary review that had been pending in the Washington
26 Supreme Court. While it would be best to stay the course, Mr. Numrich does not have unlimited

1 resources. And it is hard to justify continuation of an appeal when the defense might be required
2 to relitigate nearly identical issues before a different superior court judge no matter the outcome
3 of that appeal.

4 Generally speaking, an amended information supersedes the original. *See, e.g., State v.*
5 *Oestreich*, 83 Wn.App. 648, 651 (1996). Thus, should the Court grant the State's motion to
6 amend, it would essentially eviscerate the previous six months of litigation regarding the propriety
7 of the charging decision in this case.

9 The State's decision to file this belated amendment will not ensure justice or fairness in
10 this case. Rather, it will complicate the litigation, lead to unnecessary delays, force the parties to
11 relitigate many of the same issues that have previously been presented in this case, and require the
12 defendant to incur unnecessary legal fees and expenses.

14 A pre-accusatorial delay does not violate the Sixth Amendment, but it may constitute a
15 violation of due process under the Fifth Amendment if "delay is caused by the prosecutor solely
16 to gain a tactical advantage over the defendant." *See State v. Madera*, 24 Wn.App. 354, 355
17 (1979). Here, the evidence very strongly suggests that the State delayed the filing of this amended
18 charge to gain an unfair tactical advantage over the defendant.

20 **2. The State Should Be Estopped from Using this Strategy.**

21 During all prior proceedings in the superior court – including numerous proceedings
22 which discussed the propriety of the State's manslaughter charge – the State never once claimed
23 that it was intending to file a charge of manslaughter in the first degree. Thus, the defense
24 expended months (and countless attorney hours), litigating the question of whether the State's
25 felony charge was precluded by the general-specific rule. This litigation involved complex
26

1 legal analysis – including caselaw, statutory construction, and hypotheticals – comparing the
2 elements of manslaughter second degree to the RCW 49.17.190(3) WISHA statute.

3 The State never filed a motion for reconsideration after Judge Chun certified this legal
4 question for review by the appellate courts. Nor did the State ever advise the Court or the
5 defense that it was intending to amend the charges in this case.
6

7 As such, the State should be precluded from taking a contrary position at this late date:

8 Judicial estoppel is an equitable doctrine that precludes a party from asserting
9 one position in a court proceeding and later seeking an advantage by taking a
10 clearly inconsistent position The doctrine seeks to preserve respect for
judicial proceedings, and to avoid inconsistency, duplicity, and . . . waste of
time.

11 *Arkison v. Ethan Allen Inc.*, 160 Wn.2d 535, 538 (2007).

12 The parties have spent six months litigating the State’s novel request to advance a charge
13 of manslaughter in the second degree. The State is estopped from now-claiming that
14 manslaughter in the *first* degree is the appropriate charge.
15

16 **3. The State’s Motion Will Prejudice the Defendant’s Substantial
Rights.**

17 Every criminal defendant has a constitutional right to file an appeal. Moreover, the First
18 Amendment protects “the right of the people . . . to petition the Government for a redress of
19 grievances.” The amendment in this case will serve to punish the defendant for exercising these
20 rights. The amendment will also serve to delay these proceedings – and it will dramatically
21 increase the defendant’s costs of this litigation.
22

23 The amendment will also cause the defendant to suffer other forms of prejudice. By filing
24 this belated amendment, the State is essentially seeking to dissuade the defendant from pursuing
25 his appeal and to coerce the defendant to enter a plea of guilty before discretionary review is
26 accepted.

1 4. The State's Amendment is Vindictive.

2 The State has claimed that the initial charging decision in this case was “conservative.”
3 *See Maybrow Dec. App. J.* This is a remarkable claim – particularly so since this case is the first
4 of its kind. In fact, the parties agree that before the State filed the second-degree manslaughter
5 charge in this case, no other prosecutor in the State of Washington had ever filed a felony homicide
6 charge based upon a workplace safety violation death. Now, the State seeks to add a charge of
7 Manslaughter in the First Degree, which carries a standard sentencing range of 78-102 months for
8 a defendant with no criminal history.⁵

9
10 Nonetheless, in an attempt to justify his decision up, the prosecutor also contends: “The
11 State’s motion to amend is not being brought to retaliate against the defendant for seeking
12 discretionary review, to gain advantage in the appellate litigation, or for any other improper
13 purpose.” *Id.* But the very opposite is true.

14
15 Constitutional due process principles prohibit prosecutorial vindictiveness. *See State v.*
16 *Korum*, 157 Wn.2d 614, 627 (2006). “Prosecutorial vindictiveness” is the intentional filing of a
17 more serious crime in retaliation for defendant's lawful exercise of procedural right. *See, e.g., State*
18 *v. Bonisio*, 92 Wn.App. 783, 790, *review denied*, 137 Wn.2d 1024 (1998).

19 Prosecutorial vindictiveness occurs when “the government acts against a defendant in
20 response to the defendant's prior exercise of constitutional or statutory rights.” *Korum*, 157
21 Wn.2d at 627 (*quoting United States v. Meyer*, 810 F.2d 1242, 1245 (1987)). Thus, a prosecutorial
22 action is vindictive if it is designed to penalize a defendant for invoking legally protected
23 rights. *See id.* There are two kinds of prosecutorial vindictiveness: a presumption of
24

25
26

⁵ By comparison, Manslaughter in the Second Degree carries a standard sentencing range of 21-27 months for a
 defendant with no criminal history.

1 vindictiveness and actual vindictiveness. *See id.* A presumption of vindictiveness arises when a
2 defendant can prove that “all of the circumstances, when taken together, support a realistic
3 likelihood of vindictiveness.” *Id.* (quoting *Meyer*, 810 F.2d at 1246). The prosecution may then
4 rebut the presumption by presenting objective evidence justifying the prosecutorial action. *See*
5 *id.* Actual vindictiveness must be shown by the defendant through objective evidence that a
6 prosecutor acted in order to punish him for standing on his legal rights. *See Meyer*, 810 F.2d at
7 1245. Clearly established federal law in the context of vindictive prosecutions provides that:

9 [t]o punish a person because he has done what the law plainly allows him to do
10 is a due process violation of the most basic sort, and for an agent of the State to
11 pursue a course of action whose objective is to penalize a person’s reliance on
his legal rights is patently unconstitutional.

12 *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)(internal citation and quotation marks
13 omitted). Certain circumstances give rise to a presumption that the prosecutor or sentencing
14 judge acted with unconstitutional vindictiveness in charging a criminal defendant. *See*
15 *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (holding there was a “realistic likelihood of
16 vindictiveness” when a prosecutor re-indicted a convicted misdemeanor on a felony charge
17 after the defendant invoked an appellate remedy).

18
19 In *Blackledge*, the Supreme Court observed that the presumption of
20 vindictiveness applied because “the prosecutor has the means readily at hand to discourage such
21 appeals — by ‘upping the ante’ through a felony indictment whenever a convicted
22 misdemeanor pursues his statutory appellate remedy.” *Id.* at 27-28.

23
24 Here, the objective circumstances surrounding the State’s motion to amend present a
25 reasonable likelihood of vindictiveness. Before the defendant initiated this appeal, the
26 prosecutor never once suggested that the State intended to increase the charges. Then, on the

1 cusp of its deadline to file a response in the appellate court, the State decided to up the ante by
2 filing a far more serious felony offense in this case. Not only will this charge dramatically
3 increase the range of punishment in this case, but, in notifying the Washington Supreme Court
4 that it would be filing this new charge (even before any such action had been taken in the
5 superior court), the prosecutor sought to dissuade the appellate court from accepting review of
6 the defendant's appeal. The Manslaughter First Degree charge was not the subject of any of
7 the litigation in front of Judge Chun and has no legal bearing on the issues before the
8 Washington Supreme Court. Accordingly, there can be no doubt that the State's trumpeting of
9 the potential Manslaughter First Degree charge to the Washington Supreme Court was solely
10 an intent to improperly influence the appellate proceedings.
11

12 In essence, the threat of an amendment was presented in a time and manner that it is
13 reasonable to conclude that the State's action was intended to serve a dual purpose: (1) to punish
14 the defendant for exercising his legal right to appeal and (2) to dissuade the appellate court from
15 hearing the defendant's appeal.
16

17 This case presents a situation even more extreme than *Blackledge*. Not only is there a
18 realistic likelihood of vindictiveness, but given the timing of these matters, the State's actual
19 vindictiveness is apparent.
20

21 The State has claimed that this filing was not the product of retaliation. Yet, in offering
22 this self-serving claim, the State has failed to present any evidence to support such a claim.

23 Many questions are left unanswered:

- 24 - Why did the State fail to mention the possibility of an amendment during the
25 first ten months of this litigation?
26 - Why did the State fail to mention the possibility of an amendment during all
of the proceedings before Judge Chun?

- 1
- 2 - Why did the State fail to mention this amendment before the defendant
- 3 initiated his appeal, and filed his opening briefs, in the Washington Supreme
- 4 Court?
- 5 - Why did the State first announce his desire to file an amendment on the very
- 6 same day that it was required to submit its response in the Washington
- 7 Supreme Court?

8 Given these circumstances, perhaps it is not too surprising that the State has failed to

9 provide any explanation for its dilatory conduct. However, should this Court feel the need to

10 reach the ultimate issue regarding the prosecutor's actual motivations in this case, it should

11 grant the defendant's motion to obtain discovery from the prosecutor's files. The defense has

12 certainly presented a "colorable claim" of vindictiveness in this case.

13 **5. The State's Motion is Not Supported by Probable Cause.**

14 Manslaughter in the First Degree is a Class A felony. RCW 9A.32.060 defines this

15 crime in relevant part as follows: "A person is guilty of manslaughter in the first degree when .

16 . . he or she recklessly causes the death of another person." *Id.* As noted in *State v. Gamble*,

17 154 Wn.2d 457, 467-69 (2005), this statute demands proof of an additional element. To convict

18 a defendant of manslaughter in the first degree, the State must demonstrate that the defendant

19 knew of and disregarded a substantial risk that death may occur. *See id.* The State cannot

20 establish these elements in this case.

21 In most instances, this type of issue would be resolved by way of a motion under *State*

22 *v. Knapstad*, 107 Wn.2d 346 (1986). But here, the State has presented nothing that could

23 support the filing of this amended charge. The State now claims: "At the time of filing and at

24 the present time, the State believes that there is probable cause to charge the defendant with

25 either/both Manslaughter in the First Degree and Manslaughter in the Second Degree." Yet the

26 State offers no further explanation for such a decision.

1 In filing this motion, the State seems to be asking this Court to rely upon its initial
2 Certification for Determination of Probable Cause. That document contains no evidence that
3 the defendant actually knew of a substantial risk that a death may occur. *See Maybrown Dec.*
4 *App. A.* The State's certification seems to support a claim that the defendant was criminally
5 negligent – and the affiant affirmatively claims that there is evidence to support a charge of
6 manslaughter in the second degree. But that same certification includes no evidence that the
7 defendant actually knew of a substantial risk of death.
8

9 For this reason alone, the Court should deny the State's motion to amend.

10 **6. The State's Motion Violates the General-Specific Rule.**

11 In enacting WISHA (RCW 49.17), the Washington legislature adopted a comprehensive
12 and unified statutory scheme to regulate workplace safety. As part of this scheme, WISHA
13 specifically provides for both civil penalties (RCW 49.17.180) and criminal penalties (RCW
14 49.17.190) due to safety violations or avoidable workplace injuries. The distinct criminal penalties
15 are applicable only in certain enumerated circumstances:
16

17 Any employer who willfully and knowingly violates the requirements of RCW
18 49.17.060, any safety or health standard promulgated under this chapter, any
19 existing rule or regulation governing the safety or health conditions of employment
20 and adopted by the director, or any order issued granting a variance under RCW
21 49.17.080 or 49.17.090 and that violation caused death to any employee shall, upon
22 conviction be guilty of a gross misdemeanor and be punished by a fine of not more
23 than one hundred thousand dollars or by imprisonment for not more than six
24 months or by both; except, that if the conviction is for a violation committed after
25 a first conviction of such person, punishment shall be a fine of not more than two
26 hundred thousand dollars or by imprisonment for not more than three hundred
sixty-four days, or by both.

RCW 49.17.190(3).

This is a unique, and unusual, criminal statute – and it allows for penalties that are not
available in any other misdemeanor-level offense. On the one hand, violators may be required to

1 pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available
2 in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, violators may be
3 sentenced to up to six months in jail, less than what would be available for conviction of other
4 gross misdemeanors. *See id.*

5
6 This punishment scheme provides the exclusive criminal remedy for the types of violations
7 that have been alleged in this case. To prove a crime in such a workplace incident, the State must
8 demonstrate that the employer “*willfully and knowingly*” violated a WISHA rule, regulation, or
9 safety and health standard, and where “that violation cause[s] death to any employee” the employer
10 “shall, upon conviction be guilty of a gross misdemeanor.” RCW 49.17.190(3) (emphasis added).

11 Since as early as 1970, Washington has applied its own, unique version of the “general-
12 specific rule” when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 Wn.2d 9 (1970).
13 This rule provides that “where a special statute punishes the same which is [also] punished
14 under a general statute, the special statute applies, and the accused can be charged only under
15 that statute.” *State v. Shriner*, 101 Wn.2d 576, 580 (1984) (quoting *State v. Cann*, 92 Wn.2d
16 193, 197 (1979)).

17
18 The purpose of the rule is to preserve the legislature’s intent to penalize specific conduct
19 in a particular, less onerous way and hence to minimize sentence disparities resulting from
20 unfettered prosecutorial discretion. *See Shriner*, 101 Wn.2d at 581-83. As the Washington
21 Supreme Court has explained:
22

23 Under the general-specific rule, a specific statute will prevail over
24 a general statute. *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867 (1976) (“It is
25 the law in this jurisdiction, as elsewhere, that where concurrent general and
26 special acts are *in pari materia* and cannot be harmonized, the latter will prevail,
unless it appears that the legislature intended to make the general act
controlling.”). As this court recognized in *Wark*, “It is a fundamental rule that
where the general statute, if standing alone, would include the same matter as

1 the special act and thus conflict with it, the special act will be considered as an
2 exception to, or qualification of, the general statute, whether it was passed before
3 or after such general enactment.” *Id.*; see *State v. Conte*, 159 Wn.2d 797,
803, *cert. denied*, 552 U.S. 992 (2007).

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

6 The general-specific rule is designed to determine whether the legislature intended to
7 limit prosecutorial charging discretion, impliedly barring a prosecution for a general offense
8 whenever the alleged criminal conduct meets the elements of a more specific crime. Thus, to
9 determine if two statutes are concurrent, the Court should examine whether someone can violate
10 a specific statute without violating the general statute. See, e.g., *State v. Chase*, 134 Wn.App.
11 792, 800 (2006).

12
13 The Washington courts have applied this rule in several different contexts. See, e.g.,
14 *Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged
15 under general theft statute and should have been charged only with criminal possession of a
16 rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could
17 not be charged under general escape statute and should have been charged only under the
18 specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972)
19 (defendant who presented another’s credit card at a restaurant could not be charged under
20 general larceny statute, but must instead be charged with crime of procuring meals by fraud);
21 *State v. Thomas*, 35 Wn.App. 598, 604-05 (1983) (elements of unlawful imprisonment are
22 necessarily present in situations where the offense of custodial interference is alleged). See
23 also *State v. Haley*, 39 Wn.App. 164 (1984) (where facts supported either a manslaughter
24 charge or negligent homicide charge, it was the prosecutor’s duty, where an automobile was
25 involved, to charge the more specific negligent homicide).
26

1 The statutes at issue in this case – the general statute of manslaughter in the first degree
2 (RCW 9A.32.060) as alleged in Count -- and the specific statute in WISHA that punishes a
3 violation of labor safety regulations that result in death (RCW 49.17.190(3) as alleged in Count
4 2 – are concurrent statutes. For, each time an employer is guilty of the more specific offense,
5 he is likewise guilty of the more general offense.
6

7 A side-by-side comparison of the elements of each offense establishes this point. The
8 key elements of the general and specific offenses are summarized below:

9

<u>OFFENSE</u>	<u>MENS REA</u>	<u>RESULT</u>
MANSLAUGHTER 1°	RECKLESSNESS	DEATH
RCW 49.17.190(3)	WILFULL AND KNOWING	WORKPLACE DEATH

10
11
12

13
14 Each violation of the specific statute, RCW 49.17.190(3), requires proof of a “willful”
15 and “knowing” violation of safety regulations that results in a workplace fatality.⁶ More
16 generally, each violation of RCW 9A.32.070 requires proof of “reckless” conduct that results
17 in death. Under Washington law, recklessness is defined as a situation when the defendant
18 “knows of and disregards a substantial risk that a wrongful act may occur and his or her
19 disregard of such substantial risk is a gross deviation from conduct that a reasonable person
20 would exercise in the same situation.” RCW 9A.08.010(1)(c). *See also* WPIC 10.03. Thus,
21
22

23 ⁶ WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness
24 as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements
25 or with plain indifference to employee safety.” WAC 296-900-14020. Washington criminal law
26 provides: “a requirement that an offense be committed willfully is satisfied if a person acts knowingly
with respect to the material elements of the offense, unless a purpose to impose further requirements
plainly appears.” RCW 9A.08.010(4).

1 the specific statute requires proof of a greater *mens rea* (“willfully or knowingly”) than the
2 general statute (which requires proof only of criminal negligence). It is noteworthy that
3 Washington’s pattern jury instructions establish that criminal negligence is established in each
4 and every case where there is proof of higher *mens rea* (such as willful, intentional, knowing
5 or reckless conduct). See RCW 9A.08.010(2).
6

7 It is impossible to envision a case where a defendant might be guilty of the specific
8 WISHA statute but acquitted of the more general manslaughter statute. For, as reflected in the
9 State’s charging documents, the WISHA/OSHA standards establish the standard of care for
10 employers in the State of Washington. See, e.g., *Minert v. Harsco Corp.*, 28 Wn.App. 686,
11 873-74 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323 (1978) (OSHA regulation is relevant
12 to the appropriate standard of care); *Kennedy v. Sea-Land Services, Inc.*, 62 Wn.App. 839, 852-
13 53 (1991) (OSHA regulation was relevant to the standard of care). Simply put, in each and
14 every case that a person willfully or knowingly fails to comply with the mandates of WISHA,
15 it can also be said that the employer has engaged in reckless conduct.
16

17 When examining this question, it is important to emphasize that the specific statute,
18 RCW 49.17.190(3), has a significantly higher mental state than the first-degree manslaughter
19 statute. It is hard to persuasively argue that the legislature would have enacted a special
20 misdemeanor-level statute with a higher mental state while also assuming that prosecutors
21 within the state would be authorized to charge under a felony statute with a lower mental state.
22

23 A very similar situation was presented in the *Danforth* case. There, the petitioners, who
24 had been imprisoned for property related crimes, were on work release status at the Geiger work
25 release center in Spokane. Seeking employment in conjunction with that program, the
26 petitioners met each other, became intoxicated, and failed to return to the work release center.

1 The petitioners were returned to Washington and charged with escape in the first degree,
2 pursuant to RCW 9A.76.110. On appeal, the petitioners argued that another statute, RCW
3 72.65.070, deals specifically with an escape from work release. The State, by contrast, argued
4 that they should be permitted to proceed under the general statute, but the Court of Appeals
5 rejected that claim. But the Washington Supreme Court rejected the State's claims:
6

7 [W]e are of the opinion that the specific requirement that the defendant's
8 conduct be willful under RCW 72.65.070 recognizes a valid legislative
9 distinction between going over a prison wall and not returning to a specified
10 place of custody. The first situation requires a purposeful act, the second may
occur without intent to escape. It is easy to visualize situations where a work
release inmate failed to return because of a sudden illness, breakdown of a
vehicle, etc. This explains the requirement of willful action.

11 Finally, this interpretation of the two statutes is necessary to give effect
12 to RCW 72.65.070. RCW 72.65.070 differs significantly from the general
13 escape statute in that the prosecutor must prove the failure to return was willful.
14 Under RCW 9A.76.110, however, a conviction will be sustained if the state
demonstrates that the defendant "knew that his actions would result in leaving
confinement without permission." *State v. Descoteaux*, 94 Wn.2d 31, 35
(1980).

15 Given the choice, a prosecutor will presumably elect to prosecute under
16 the general escape statute because of its lack of a mental intent requirement.
17 Consequently, the result of allowing prosecution under RCW 9A.76.110 is the
complete repeal of RCW 72.65.070. This result is an impermissible potential
usurpation of the legislative function by prosecutors.

18 *Danforth*, 97 Wn.2d at 258-59.

19 The very same situation is presented in this case. By proceeding under the manslaughter
20 statute, the State has claimed that it is simply required to prove that the defendant was reckless
21 – or that his conduct amounted to a gross deviation from the standard of care. Yet to proceed
22 under the specific statute (RCW 10.73.190(3)), the State would need to prove that the defendant
23 engaged in a willful and knowing violation of the applicable safety regulations (which likewise
24 amount to the standard of care in this highly-regulated industry). The State should not be
25
26

1 permitted to dilute or avert the mental element that the legislature had in mind when it enacted
2 the specific WISHA statute.

3 The legislature's intent is also evidenced by the creation of a unique punishment
4 scheme in RCW 49.17.190(3). It is notable that the special misdemeanor-level statute allows
5 for an enhanced fine of up to \$100,000 to \$200,000. By contrast, the maximum fine for a Class
6 A felony, such as Manslaughter in the First Degree, is only \$50,000. Thus, when enacting
7 RCW 49.17.190(3), the legislature was mindful of the fact that it was creating a special
8 misdemeanor-level statute – and a statute that included somewhat reduced custodial penalties
9 along with the potential for financial penalties far greater than authorized for any felony-level
10 offense. This carefully calibrated scheme would become a nullity if the State was permitted to
11 charge both the general and the specific statutes, as they have attempted to do in this case.
12

13 Accordingly, the filing of the Manslaughter in the First Degree charge violates
14 Washington's "general-specific" rule because the legislature enacted a specific criminal statute
15 to address these very types of workplace deaths resulting from safety violations.
16

17 **IV. CONCLUSION**

18 For all of these reasons, and in the interests of justice, the State's motion to amend
19 should be denied.

20 DATED this 30th day of October, 2018.

21
22
23  #40690
24 TODD MAYBROWN, WSBA #18557
25 COOPER OFFEENBECHER, WSBA #40690
26 Attorneys for Defendant

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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>
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Sarah Conger, Legal Assistant

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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 Maybrow, 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

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

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]

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
Tab Data show the back trench required a minimum of four shores based upon the
trench dimensions, and soil type alone.

5 *Id.* (Certification at 3).

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

8
9 In the course of my investigation, I reviewed the analysis of Erich Smith, trenching
10 technical expert for WSDLI. Smith stated, based upon his experience, the
11 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.

12 *Id.* (Certification at 4).

13 10. Based upon these alleged “willful” regulatory violations, Mr. Joseph opines that
14 Mr. Numrich is guilty of a violation of WISHA’s criminal provisions as set forth in RCW
15 49.17.190 (3). Moreover, for all of these very same reasons, Mr. Joseph also claims that Mr.
16 Numrich is guilty of manslaughter in the second degree. Mr. Joseph’s certification does not
17 include any claim that Mr. Numrich is guilty of the crime of manslaughter in the first degree.
18

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

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

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

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

3 DANIEL T. SATTERBERG
4 Prosecuting Attorney

5 By:



6
7 Patrick H. Hinds, WSBA #34049
8 Senior Deputy Prosecuting Attorney

9 By:



10
11 Melinda J. Young, WSBA #24504
12 Senior Deputy Prosecuting Attorney

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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.

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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

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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 MOTION TO DISMISS
COUNT 1 (MANSLAUGHTER) AND
MEMORANDUM OF AUTHORITIES IN
SUPPORT THEREOF

I. INTRODUCTION

COMES NOW the Defendant, Phillip Scott Numrich, by and through his undersigned counsel, and hereby moves this Court to dismiss Count 1 (Manslaughter in the Second Degree) of the State’s Information. This motion is made pursuant to Washington’s “general-specific rule” and the Equal Protection Clause of the state and federal constitutions, and is supported by the Declaration of Todd Maybrow in Support of Defendant’s Motion to Dismiss Count 1. The motion is also supported by the filings and proceedings previously had herein.

1 II. FACTS¹

2 A. Background

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

8 During January 2016, Alki Construction was working to replace a sewer line at a private
9 residence in West Seattle. Alki Construction uses what is commonly described as a “trenchless
10 pipe repair” during this process. To complete the project, Mr. Numrich and several employees
11 helped to dig and shore two trenches – one near the home and one near the street – at the
12 commencement of the work on that project. On January 26, 2016, as the project was nearly
13 completed, one of the construction workers, Harold Felton, was killed when the dirt wall of the
14 trench nearest to the home collapsed. Mr. Numrich, was not present at the job site at the time of
15 the collapse.

16 This accident was exhaustively investigated by the Division of Occupational Safety &
17 Health of OSHA. *See* OSHA Investigation No. 1120535. Like this case, the OSHA investigators
18 focused solely upon the events that led to the death of Harold Felton. On July 21, 2016, the
19 Washington Department Labor and Industries (“WSDLI”) issued a Citation and Notice of
20 Assessment that included a finding that Alki Construction had committed certain violations of the
21 safety regulations in relation to the events of January 26, 2016. *See Maybrown Dec. App. A*

22
23 ¹ For purposes of this motion, the defense has relied upon the facts that are stated in the State’s charging documents
in this case. In doing so, the defense does not intend to adopt these facts or to waive any future claims and defenses
that may be stated in this case.

1 (Declaration of Andrew Kinstler). Mr. Numrich appealed these findings and assessments and the
2 parties ultimately reached a compromised settlement of all claims.

3 This was the first and only time that Alki Construction had faced any such claims or
4 regulatory violations.

5 **B. Procedural History**

6 On or about January 18, 2016, the State filed criminal charges against Mr. Numrich relating
7 to this same workplace incident. The State's Information includes the following two charges:

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

9 That the defendant PHILLIP SCOTT NUMRICH in King County,
10 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;

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

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

14 That the defendant PHILLIP SCOTT NUMRICH in King County,
15 Washington, on or about January 26, 2016, was an employer, and did willfully and
16 knowingly violate the requirements of RCW 49.17.060, and a safety or health
17 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;

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

20 *Maybrown Dec. App. B (Information).*

21 These charges are ostensibly supported by a Certification for Determination of Probable
22 Cause that was prepared by Mark Joseph, who is identified as a Certified Safety and Health Officer
23 with WSDLI. At the outset, Mr. Joseph explained that he is authorized to investigate workplaces

1 for safety violations pursuant to Washington's Industrial Safety and Health Act ("WISHA") which
2 is codified at RCW 49.17.

3 Throughout the Certification for Determination of Probable Cause, Mr. Joseph opines that
4 Alki Construction had failed to comply with certain WSDLI regulations, such as the provisions
5 identified in WAC 296-155-650 and WAC 296-155-657. *See id.* (Certification at 2). Mr. Joseph
6 also claims that Mr. Numrich is personally responsible for this accident as he is considered the
7 "competent person" for purposes of WSDLI's regulatory scheme. *See id.* (Certification at 2).
8 (discussing WAC 296-155-655).

9 In further support of the charges, Mr. Joseph claims that Alki Construction had failed to
10 comply with certain state regulations when digging and shoring this trench. In particular, Mr.
11 Joseph notes that this project involved what is classified as "Type C" soil and that Alki
12 Construction had failed to follow the "most rigorous shoring standard per WSDLI regulations."
13 *See id.* (discussing WSDLI regulations and SpeedShore Tab Data). Moreover, Mr. Joseph argues
14 that Alki Construction had failed to properly shore this trench based upon his interpretation of the
15 state regulations:

16 The WSDLI investigation and the [employee] interview show the Subject Premises
17 had two SpeedShore protective shores installed in the back trench. [The employee]
18 reported during his interview that Numrich and Felton placed two shores in the
19 back trench when they initially dug it. One of the shores was installed more than
20 four feet above the bottom of the trench - which is prohibited by both WSDLI
21 regulation and Speed Shore Tab Data. Both WSDLI regulation and SpeedShore
22 Tab Data show the back trench required a minimum of four shores based upon the
23 trench dimensions, and soil type alone.

Id. (Certification at 3).

Mr. Joseph also relies upon the conclusions of a "trenching technical expert." As he
explained:

1 In the course of my investigation, I reviewed the analysis of Erich Smith, trenching
2 technical expert for WSDLI. Smith stated, based upon his experience, the
3 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.

4 *Id.* (Certification at 4).

5 Based upon these alleged “willful” regulatory violations, Mr. Joseph opines that Mr.
6 Numrich is guilty of a violation of WISHA’s criminal provisions as set forth in RCW 49.17.190
7 (3). Moreover, for all of these very same reasons, Mr. Joseph also claims that Mr. Numrich is
8 guilty of manslaughter in the second degree.

9 **C. The Numrich Prosecution is the First of Its Kind**

10 Sadly, we too often see workplace accidents – and sometimes workplace accidents
11 resulting in death – in our communities. For example, during 2010, seven employees died
12 following an explosion at the Tesoro refinery on the outskirts of Anacortes. Yet this was just a
13 single, extreme case. In 2016, the government documented and reported more than 75
14 workplace fatalities in Washington. See [http://kgmi.com/news/007700-new-report-shows-
15 workplace-deaths-in-washington-are-up-and-disproportionately-affect-men;](http://kgmi.com/news/007700-new-report-shows-workplace-deaths-in-washington-are-up-and-disproportionately-affect-men)
16 [http://www.lni.wa.gov/safety/research/face/files/2016_workrelatedfatalitiesinwastate_waface.
17 pdf](http://www.lni.wa.gov/safety/research/face/files/2016_workrelatedfatalitiesinwastate_waface.pdf). Nevertheless, before the State filed this Information against Phillip Numrich, there has
18 never been any instance where an employer has been charged with a felony offense based on
19 such a workplace incident.

20 Rather, in every situation in which criminal charges were advanced following an
21 employee workplace death, the employer faced a charge that he violated the specific criminal
22 statute (RCW 49.17.130(3)) that covers these types of incidents. For example, in 2016, the
23 King County Prosecuting Attorney charged a family-owned company with a violation of the

1 specific statute after a 19-year-old employee was killed by a rotating auger. *See Maybrown*
2 *Dec. App. C* (charging documents from *State v. Pacific Topsoils*, 16-1-02544-3 SEA).

3 Based upon all available information, no prosecutor in Washington has ever previously
4 attempted to charge an employer with a felony offense based upon a workplace fatality. *See*
5 *Maybrown Dec.* ¶ 3. The novelty of this case has been confirmed by WSDLI officials. In one
6 recent news article, a senior WSDLI official explained: “[T]his is a felony charge,” she said
7 of the case against Numrich. “It’s the first time we know of and we looked back 30, 40 years.”
8 *Maybrown Dec. App. D* (quoted from news article from the Seattle Times, dated January 9,
9 2018).

10 III. DISCUSSION

11 The Court should reject the State’s novel approach in this case. Rather, as discussed below,
12 this prosecution violates the “general-specific rule” and the equal protection clauses of the state
13 and federal constitutions.

14 A. WISHA Provides a Comprehensive Statutory Scheme, Including 15 Specific and Unique Criminal Penalties.

16 In enacting WISHA (RCW 49.17), the Washington legislature adopted a comprehensive
17 and unified statutory scheme to regulate workplace safety. Significantly, the legislature announced
18 its purpose:

19 The legislature finds that personal injuries and illnesses arising out of conditions
20 of employment impose a substantial burden upon employers and employees in
21 terms of lost production, wage loss, medical expenses, and payment of benefits
22 under the industrial insurance act. Therefore, in the public interest for the welfare
23 of the people of the state of Washington and in order to assure, insofar as may
reasonably be possible, safe and healthful working conditions for every man and
woman working in the state of Washington, the legislature in the exercise of its
police power, and in keeping with the mandates of Article II, section 35 of the state
Constitution, declares its purpose by the provisions of this chapter to create,
maintain, continue, and enhance the industrial safety and health program of the

1 state, which program shall equal or exceed the standards prescribed by the
2 Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

3 RCW 49.17.010.

4 As part of this scheme, WISHA specifically provides for both civil penalties (RCW
5 49.17.180) and criminal penalties (RCW 49.17.190) due to safety violations or avoidable
6 workplace injuries. The distinct criminal penalties are applicable only in certain enumerated
7 circumstances:

8 Any employer who willfully and knowingly violates the requirements of RCW
9 49.17.060, any safety or health standard promulgated under this chapter, any
10 existing rule or regulation governing the safety or health conditions of employment
11 and adopted by the director, or any order issued granting a variance under RCW
12 49.17.080 or 49.17.090 and that violation caused death to any employee shall, upon
13 conviction be guilty of a gross misdemeanor and be punished by a fine of not more
14 than one hundred thousand dollars or by imprisonment for not more than six
15 months or by both; except, that if the conviction is for a violation committed after
16 a first conviction of such person, punishment shall be a fine of not more than two
17 hundred thousand dollars or by imprisonment for not more than three hundred
18 sixty-four days, or by both.

19 RCW 49.17.190(3).

20 This is a unique, and unusual, criminal statute – and it allows for penalties that are not
21 available in any other misdemeanor-level offense. On the one hand, a violator may be required to
22 pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available
23 in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, a violator may be
sentenced to not more than six months in jail, significantly less than what would be available for
conviction of any other gross misdemeanor. *See id.*

It is the defense position that this type of punishment scheme provides the exclusive
criminal remedy for the types of violations that have been alleged in this case. To prove a crime
in such a workplace incident, the State must demonstrate that the employer “*willfully and*

1 *knowingly*” violates a WISHA rule, regulation, or safety and health standard and where “that
2 violation cause[s] death to any employee shall, upon conviction be guilty of a gross misdemeanor.”
3 RCW 49.17.190(3) (emphasis added). This gross misdemeanor is unlike any other such offense
4 in the State of Washington, as it allows for extraordinary financial penalties.

5 **B. Washington’s “General-Specific Rule” is Violated in this Case.**

6 It is a violation of equal protection for a prosecutor to be given discretion to charge a
7 defendant with a felony or misdemeanor based upon identical conduct. *See, e.g., State v.*
8 *Zornes*, 78 Wn.2d 9 (1970); *State v. Martell*, 22 Wn.App. 415 (1979). Such a violation is very
9 clearly present in this case – as the filing of the felony charge is a violation of Washington’s
10 “general-specific rule.”

11 The purpose of the rule is to preserve the legislature’s intent to penalize specific conduct
12 in a particular, less onerous way and hence to minimize sentence disparities resulting from
13 unfettered prosecutorial discretion. *See State v. Shriner*, 101 Wn.2d 576, 581-83 (1984). As
14 the Washington Supreme Court has explained:

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

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

1 The general-specific rule is designed to determine whether the legislature intended to
2 limit prosecutorial charging discretion, impliedly barring a prosecution for a general offense
3 whenever the alleged criminal conduct meets the elements of a more specific crime. Thus, to
4 determine if two statutes are concurrent, the Court should examine whether someone can violate
5 a specific statute without violating the general statute. *See, e.g., State v. Chase*, 134 Wn.App.
6 792, 800 (2006). Statutes are concurrent if all of the elements to convict under the general
7 statute are also elements that must be proved for conviction under the specific statute. *See,*
8 *e.g., State v. Wilson*, 158 Wn.App. 305, 314 (2010).

9 The Washington courts have applied this rule in several different contexts. *See, e.g.,*
10 *Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged
11 under general theft statute and should have been charged only with criminal possession of a
12 rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could
13 not be charged under general escape statute and should have been charged only under the
14 specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972)
15 (defendant who presented another's credit card at a restaurant could not be charged under
16 general larceny statute, but must instead be charged with crime of procuring meals by fraud);
17 *State v. Thomas*, 35 Wn.App. 598, 604-05 (1983) (elements of unlawful imprisonment are
18 necessarily present in situations where the offense of custodial interference is alleged). *See*
19 *also State v. Haley*, 39 Wn.App. 164 (1984) (where facts supported either a manslaughter
20 charge or negligent homicide charge, it was the prosecutor's duty, where an automobile was
21 involved, to charge the more specific negligent homicide). *Accord State v. Yarborough*, 905
22 P.2d 209, 216 (New Mexico 1996) (prosecutors violated general-specific rule by charging
23 defendant with involuntary manslaughter as opposed to homicide by watercraft).

1 The statutes at issue in this case – the general statute of manslaughter in the second
2 degree (RCW 9A.32.070) as alleged in Count 1 and the specific statute in WISHA that punishes
3 a violation of labor safety regulations that result in death (RCW 49.17.190(3) as alleged in
4 Count 2 – are concurrent statutes. For, each time an employer is guilty of the more specific
5 offense, he is likewise guilty of the more general offense.

6 A side-by-side comparison of the elements of each offense establishes this point. The
7 key elements of the general and specific offenses are summarized below:

<u>OFFENSE</u>	<u>MENS REA</u>	<u>RESULT</u>
MANSLAUGHTER 2°	CRIMINAL NEGLIGENCE	DEATH
RCW 49.17.190(3)	WILFULL AND KNOWING	WORKPLACE DEATH

11
12 Each violation of the specific statute, RCW 49.17.190(3), requires proof of a “willful”
13 and “knowing” violation of safety regulations that results in a workplace fatality.² More
14 generally, each violation of RCW 9A.32.070 requires proof of “negligent” conduct that results
15 in death. Under Washington law, criminal negligence is defined as a “gross deviation of the
16 standard of care that a reasonable person would exercise in the same situation.” RCW
17 9A.08.010(1)(d). *See also* WPIC 10.04. Thus, the specific statute requires proof of a greater
18 *mens rea* (“willfully or knowingly”) than the general statute (which requires proof only of
19

20
21 ² WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness
22 as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements
23 or with plain indifference to employee safety.” WAC 296-900-14020. Washington criminal law
provides: “a requirement that an offense be committed willfully is satisfied if a person acts knowingly
with respect to the material elements of the offense, unless a purpose to impose further requirements
plainly appears.” RCW 9A.08.010(4).

1 criminal negligence). It is noteworthy that Washington's pattern jury instructions establish that
2 criminal negligence is established in each and every case where there is proof of higher *mens*
3 *rea* (such as willful, intentional, knowing or reckless conduct). See RCW 9A.08.010(2).

4 It is impossible to envision a case where a defendant might be guilty of the specific
5 WISHA statute but acquitted of the more general manslaughter statute. For, as reflected in the
6 State's charging documents, the WISHA/OSHA standards establish the standard of care for
7 employers in the State of Washington. See, e.g., *Minert v. Harsco Corp.*, 28 Wn.App. 686,
8 873-74 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323 (1978) (OSHA regulation is relevant
9 to the appropriate standard of care); *Kennedy v. Sea-Land Services, Inc.*, 62 Wn.App. 839, 852-
10 53 (1991) (OSHA regulation was relevant to the standard of care). Simply put, in each and
11 every case that a person willfully or knowingly fails to comply with the mandates of WISHA,
12 it can also be said that the employer has engaged in negligent conduct or a gross deviation of
13 the standard of care.

14 When examining this question, it is important to emphasize that the specific statute,
15 RCW 49.17.190(3), has a significantly higher mental state than the general manslaughter
16 statute. It is hard to persuasively argue that the legislature would have enacted a special
17 misdemeanor-level statute with a higher mental state while also assuming that prosecutors
18 within the state would be authorized to charge under a general felony statute with a lower mental
19 state.

20 A very similar situation was presented in the *Danforth* case. There, the petitioners, who
21 had been imprisoned for property related crimes, were on work release status at the Geiger work
22 release center in Spokane. Seeking employment in conjunction with that program, the
23 petitioners met each other, became intoxicated, and failed to return to the work release center.

1 The petitioners were returned to Washington and charged with escape in the first degree,
2 pursuant to RCW 9A.76.110. On appeal, the petitioners argued that another statute, RCW
3 72.65.070, deals specifically with an escape from work release. The State, by contrast, argued
4 that they should be permitted to proceed under the general statute, but the Court of Appeals
5 rejected that claim. But the Washington Supreme Court rejected the State's claims:

6 [W]e are of the opinion that the specific requirement that the defendant's
7 conduct be willful under RCW 72.65.070 recognizes a valid legislative
8 distinction between going over a prison wall and not returning to a specified
9 place of custody. The first situation requires a purposeful act, the second may
occur without intent to escape. It is easy to visualize situations where a work
release inmate failed to return because of a sudden illness, breakdown of a
vehicle, etc. This explains the requirement of willful action.

10 Finally, this interpretation of the two statutes is necessary to give effect
11 to RCW 72.65.070. RCW 72.65.070 differs significantly from the general
12 escape statute in that the prosecutor must prove the failure to return was willful.
13 Under RCW 9A.76.110, however, a conviction will be sustained if the state
demonstrates that the defendant "knew that his actions would result in leaving
confinement without permission." *State v. Descoteaux*, 94 Wn.2d 31, 35
(1980).

14 Given the choice, a prosecutor will presumably elect to prosecute under
15 the general escape statute because of its lack of a mental intent requirement.
16 Consequently, the result of allowing prosecution under RCW 9A.76.110 is the
complete repeal of RCW 72.65.070. This result is an impermissible potential
usurpation of the legislative function by prosecutors.

17 *Danforth*, 97 Wn.2d at 258-59.

18 The very same situation is presented in this case. By proceeding under the general
19 manslaughter statute, the State has claimed that it is simply required to prove that the defendant
20 was criminally negligent – or that his conduct amounted to a gross deviation from the standard
21 of care. Yet to proceed under the specific statute (RCW 10.73.190(3)), the State would need to
22 prove that the defendant engaged in a willful and knowing violation of the applicable safety
23 regulations (which likewise amount to the standard of care in this highly-regulated industry).

1 The State should not be permitted to dilute or avert the mental element that the legislature had
2 in mind when it enacted the specific WISHA statute.

3 The legislature's intent is also evidenced by the creation of a unique – and carefully
4 calibrated – punishment scheme in RCW 49.17.190(3). It is notable that the special
5 misdemeanor-level statute allows for an enhanced fine of up to \$100,000 to \$200,000. By
6 contrast, the maximum fine for a Class B felony, such as Manslaughter in the Second Degree,
7 is only \$25,000. Thus, when enacting RCW 49.17.190(3), the legislature was mindful of the
8 fact that it was creating a special misdemeanor-level statute – and a statute that included
9 somewhat reduced custodial penalties along with the potential for financial penalties far greater
10 than authorized for any felony-level offense.³ This carefully calibrated scheme would become
11 a nullity if the State was permitted to charge both the general and the specific statutes, as they
12 have attempted to do in this case.

13 **C. This Prosecution Violates Equal Protection.**

14 The equal protection violation is apparent in this case. Phillip Numrich is the first
15 employer in the state of Washington who has ever been charged with a felony offense based
16 upon a workplace fatality. There is no reason – and certainly no just reason – that he has been
17 singled out for this overzealous treatment.

18 Washington's current second-degree manslaughter statute was first enacted in 1975.⁴ It
19 is unreasonable to conclude that today, nearly 40 years after this law was passed, Mr. Numrich
20

21 ³ Consistent with RCW 9A.20.020, the maximum fine for a Class A felony is \$50,000.

22 ⁴ The crime of manslaughter, as defined in Washington, corresponds to the common-law crime of
23 involuntary manslaughter. The common-law crime of voluntary manslaughter is included in the
Washington definition of second-degree murder. *See, e.g., State v. Johnson*, 69 Wn.2d 264, 272 (1966).
Even older statutes, including Washington Session Laws of 1855, criminalize manslaughter as a lesser
form of homicide. *See Washington Session Laws of 1855 Chapter 11, Section 17.*

1 is the first and only employer who may have violated this statute in the context of a workplace
2 fatality. Rather, it is more reasonable to conclude that the King County Prosecuting Attorney
3 has violated equal protection principles in singling Mr. Numrich out in this instance.

4 **IV. CONCLUSION**

5 For all of these reasons, and in the interests of justice, this Court should dismiss Count
6 1 of the State's Information.

7 DATED this 30th day of April, 2018.

8 
9 _____
10 TODD MAYBROWN, WSBA #18557
11 Attorney for Defendant
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APPENDIX C

FILED

18 JUN 13 PM 4:18

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

1 *The Honorable John Chun*
2 *Hearing Date: June 26, 2018 at 1:30 p.m.*
3 *With Oral Argument*

6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

12
13 **I. INTRODUCTION**

14 At all times relevant to this motion, the defendant, Phillip Numrich, owned and operated a
15 small plumbing and sewer repair business. The victim, Harold Felton, was Numrich's employee
16 and friend. On January 26, 2016, Numrich's negligence caused Felton's death when a trench Felton
17 was working in collapsed, burying him alive under more than six feet of wet dirt. The weight of the
18 dirt crushed Felton and he died of compressional asphyxia.

19 The State has charged Numrich with two crimes for causing Felton's death: Manslaughter
20 in the Second Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation
21 with Death Resulting under RCW 49.17.190(3) (Count 2). Numrich has moved to dismiss Count 1,
22 arguing that the State is precluded from prosecuting him for manslaughter based on the "general-
23 specific rule" and principles of equal protection. For the reasons outlined below, this court should
deny Numrich's motion.

STATE'S RESPONSE TO DEFENDANT'S
MOTIONS 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 **II. FACTS**

2 **A. SUBSTANTIVE FACTS**

3 The facts below are all taken from the discovery already provided to the defense or from
4 publicly available sources. For purposes of the motions before this court, Numrich has not
5 challenged the sufficiency of the evidence nor moved to suppress any. The State will, therefore,
6 confine itself only to those facts particularly relevant to the motions actually before the court.

7 The defendant, Phillip Numrich, is the sole owner, operator, and manager of Alki
8 Construction LLC (hereinafter “Alki Construction”). At the times relevant to this case Alki
9 Construction was doing business as “Alki Sewer.”

10 The victim, Harold Felton, was Numrich’s employee and a long-time friend. In 2000,
11 Felton had an accident that resulted in a significant traumatic brain injury, which affected his
12 memory and judgment. Numrich was with Felton when he suffered the injury and was aware of its
13 long term impacts on him. Felton worked for Numrich off and on over the years following his
14 accident. At the time of his death, Felton had been working for him for several months.

15 In early 2016, Numrich bid on and won the job to replace a sewer line at a residence in
16 West Seattle. Work on the project began the week of January 16, 2016. The process used by
17 Alki Construction on this project is referred to as a “trenchless” sewer replacement. Using this
18 method, companies like Alki Construction can avoid having to dig a trench down to the existing
19 sewer pipe for its entire distance. Instead, only two smaller trenches are generally required—one
20 at either end of the pipe to be replaced. A hydraulic machine is then used to pull a new pipe
21 through the old one, which simultaneously bursts the old pipe and lays the new pipe into place.
22 For the West Seattle project, two trenches were dug at the residence—one where the sewer line
23 connected to the house and one where it connected to the sewer main under the street. The

1 trench nearest the house—the one where Felton died—was approximately seven to ten feet deep,
2 21 inches wide, and six feet long.

3 With a trench of this size, there is a very real risk that the trench can cave-in and injure or
4 kill a worker inside. There are a number of factors that influence how prone to collapse a given
5 trench is. These include the soil condition and type, the depth of the trench, whether the soil was
6 previously disturbed, and the surrounding geography of the trench location. In this case,
7 virtually all of these factors increased the danger of collapse. In addition, a number of other
8 factors that increase the likelihood of a collapse were also present on the day Felton was killed.
9 In particular, the soil was heavily saturated from several days of rain and the trench itself had
10 been “open” for approximately 10 days (i.e. it had been dug 10 days earlier).¹

11 Because of the danger posed to workers in trenches, Washington has an extensive set of
12 laws and regulations that apply to trenching activities on job sites. For a trench the size of the
13 one at issue in this case, these regulations require, *inter alia*, that a system of shores be put into
14 place to pressurize and stabilize the soil to prevent a cave-in. Felton and Numrich did place
15 shores in the trench in question, but the shoring Numrich provided was significantly below the
16 level required by regulations. For a trench of this size, the regulations mandated a minimum of
17 four shores along the length of the trench; only two were actually installed. Moreover, while the
18 regulations required shoring at either end of the trench, no endshores were actually installed. In
19 addition, while the regulations specify that at least two of the four shores be installed no more
20 than four feet above the bottom of the trench, here the two shores actually installed were both
21 above that height.

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¹ As a general matter, the longer a trench is left “open,” the more likely it is to collapse.

1 Also included in Washington regulations is the requirement that a “competent person”
2 inspect any trenches, the adjacent areas, and any protective system installed in the trenches for
3 evidence of situations that could result in a cave-in. “Competent person” is a term defined by
4 WAC 296-155-650 as someone “who can identify existing or predictable hazards in the
5 surroundings that are unsanitary, hazardous, or dangerous to employees.” The provision also
6 requires that the “competent person” be someone who has the “authorization or authority by the
7 nature of their position to take prompt corrective measures to eliminate them.” Inspections by
8 the “competent person” must be made daily prior to the start of any work in the trench and must
9 be repeated after every rainstorm or other hazard-increasing occurrence. If the “competent
10 person” sees any evidence of a situation that could result in a possible collapse or other hazard,
11 they must remove any employees from the trench until necessary precautions have been taken to
12 ensure their safety. Numrich was the only “competent person” at the West Seattle job site during
13 the entire project.

14 On January 26, 2016, Numrich, Felton, and Maximillion Henry (Numrich’s other
15 employee) were at the job site in West Seattle. This was scheduled to be the last day of work on
16 the project and Numrich was under pressure from the home owners to get it completed. Shortly
17 after 10:00 a.m., the new pipe had been pulled through and Felton was in the trench closest to the
18 house working to connect the new pipe to the house’s plumbing. During that time, Felton was
19 using a Sawzall to cut something down in the trench. A Sawzall is an electric saw that uses a
20 reciprocating blade driven by a motor. Due to the action of the motor and blade, such a saw can
21 cause extensive vibrations in the ground when it is used to cut an object—such as a pipe—that is
22 touching or embedded in the ground.²

23 _____
² Ground vibrations serve to disturb the soil, which makes a trench collapse more likely.

1 Numrich was well aware that Felton's use of a vibrating tool inside the trench was
2 dangerous and increased the risk of a trench collapse. Moreover, both Numrich and Henry
3 commented on Felton's use of the tool and the danger it posed. However, despite being the
4 owner of the company, Felton's friend, the person in charge, and the "competent person" at the
5 scene, Numrich made no effort to stop Felton from using the tool and did not re-inspect the
6 trench after Felton was done. Instead, Numrich left the job site to buy lunch.

7 Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton alive
8 under approximately seven feet of wet dirt. When Henry discovered the cave-in, he first
9 attempted to dig down to Felton. When Henry was unable to reach him, he called Numrich and
10 then 911. The Seattle Fire Department arrived at the scene shortly thereafter, but rescuers were
11 unable to free Felton in time to save him. The collapse of the trench was so extensive and
12 complete that—even using industrial vacuum trucks—it took rescuers about three and a half
13 hours to free Felton's body.

14 Specific and/or additional facts are included and discussed below as relevant. The State
15 also incorporates by reference the facts as set forth in the Certification for Determination of
16 Probable Cause prepared by Mark Joseph and the December 8, 2017 Memorandum prepared by
17 staff of the Labor and Industries Division of the Office of the Attorney General. Copies of both
18 of those documents are attached as Appendices A and B.

19 **B. PROCEDURAL FACTS**

20 The Washington State Department of Labor and Industries (WSDLI) initiated an
21 investigation of the incident on the same day that Felton died. During this process, investigators
22 discovered that Numrich had violated (and/or allowed the violation of) numerous safety
23 regulations at the job site. At the conclusion of this initial investigation, WSDLI cited Numrich

1 for a number of willful and serious violations and fined him \$51,500. Through the subsequent
2 appeals and complaint reassumption process, Numrich and WSDLI reached a settlement
3 agreement whereby the monetary penalties were reduced by half (to \$25,750). WSDLI's
4 agreement to such a reduction would usually be predicated upon an employer agreeing to correct
5 the safety violations identified during the investigation. However, based on Numrich's
6 representations that Alki Construction would cease operations once he had paid the penalty
7 imposed by the department and that he did not currently have any employees, WSDLI did not
8 require such corrective actions as a condition of the settlement.³

9 Subsequent to the settlement agreement between WSDLI and Numrich, the case was
10 presented to the King County Prosecuting Attorney's Office (KCPAO) as a potential criminal
11 matter. KCPAO concluded that Numrich had potentially committed criminal violations of the law
12 and WSDLI reopened its investigation. KCPAO ultimately filed the charges at issue in this case
13 (and in this motion) on January 5, 2018. A copy of the Information is attached as Appendix C.

14 Specific and/or additional facts are discussed below as relevant.

15
16 **III. ARGUMENT**

17 **THIS COURT SHOULD DENY NUMRICH'S MOTIONS TO DISMISS COUNT 1**

18 In his memorandum in support of his motion,⁴ Numrich sets forth two arguments in support
19 of his motion to dismiss Count 1. For the reasons discussed below, this court should reject both
20 arguments and deny Numrich's motion.

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22 ³ At this time, despite what Numrich indicated to WSDLI employees, it appears that he has continuously operated Alki Construction and had employees since shortly after the settlement agreement was reached.

23 ⁴ The "DEFENDANT'S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER) AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF" was filed on April 30, 2018 and will hereinafter be cited to as "Def. Memo."

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A. THE "GENERAL-SPECIFIC RULE" DOES NOT REQUIRE DISMISSAL OF COUNT 1

1. Applicable Law

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) (citing State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). However, this rule is subject to important limitations.

As an initial matter, the rule is only intended to be used in situations in which "the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized." State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007) (quoting In re Estate of Kerr, 134 Wn.2d 328, 343, 949 P.2d 810 (1998)). If the two statutes do not relate to the same subject matter and/or can be harmonized, the rule simply does not apply. Id.; State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990). Similarly, the rule only applies when the two statutes are actually "concurrent." Shriner, 101 Wn.2d at 580. In this context, the fact that a specific statute contains additional elements beyond the general statute is not relevant to whether they are concurrent. State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982). However, there is a fundamental difference between: (1) one statute requiring *additional* elements beyond another (the former being more specific than the latter); and (2) two statutes that require *different* elements (and are, thus, simply different offenses). As common sense indicates, where offenses have different elements, they are not concurrent; rather, they are simply different statutes criminalizing different conduct. See State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). Put another way, where two crimes have different elements and criminalize different conduct, the underlying statutes address different subject matters and do not conflict.

1 For purposes of the “general-specific rule,” statutes are concurrent when “the general
2 statute will be violated in each instance in which the special statute has been violated.” Shriner,
3 101 Wn.2d 580. As a result, the test for concurrency requires this court to “examine the
4 elements of each statute to determine whether a person can violate the special statute without
5 necessarily violating the general statute.” State v. Heffner, 126 Wn. App. 803, 808, 110 P.3d
6 219 (2005). If it is possible to violate the “specific” statute without violating the “general” one,
7 the two statutes are not concurrent and the “general-specific rule” does not apply. In this
8 context, whether the defendant’s actions in a specific case violate both statutes is irrelevant.
9 Rather, the question is whether each and every violations of the “specific” statute will
10 necessarily also violate the “general” one. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d
11 630 (2006); Heffner, 126 Wn. App. at 808.

12 Finally, in applying the “general-specific rule” in a specific case, courts must keep in
13 mind that the rule itself is simply a canon of statutory construction used to ascertain legislative
14 intent.⁵ See Conte, 159 Wn.2d at 803; Heffner, 126 Wn. App. at 807; State v. Walker, 75 Wn.
15 App. 101, 105, 879 P.2d 957 (1994); State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294
16 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at
17 580; Cann, 92 Wn.2d at 197. In particular, the “general-specific rule” is specifically used to help
18 determine whether the Legislature intended to preclude the State from charging the more
19 “general” statute when the more “specific” one also applies. See Conte, 159 Wn.2d at 803;

20 _____
21 ⁵ In his memorandum, Numrich indicates that the “general-specific rule” implicates questions of equal protection.
22 Def. Memo. at 8. This is incorrect. Numrich relies on State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970) for this
23 proposition. Id. However, as recognized in Washington case law, Zornes was abrogated by the decision of the
United States Supreme Court in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).
See City of Kennewick v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991); State v. Wright, 183 Wn. App.
719, 730-32, 334 P.2d 22 (2014). As a result, neither the “general-specific rule” nor the choice of the State to
prosecute one concurrent statute over another implicates a defendant’s right to equal protection. Wright, 183 Wn.
App. at 730-32; Fountain, 116 Wn.2d at 192-93.

1 Walder v. Belnap, 51 Wn.2d 99, 101, 316 P.2d 119 (1957). In applying this particular canon of
2 statutory construction, however, Washington courts have held it must be used with care since
3 “the ‘general-specific’ rule should be applied to preclude a criminal prosecution *only where the*
4 *legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815 (emphasis added).

5 **2. The “General-Specific Rule” Does Not Preclude The State From**
6 **Prosecuting Numrich For Manslaughter**

7 Numrich argues that prosecuting him for manslaughter as charged in Count 1 violates the
8 “general-specific rule” and that he can only be prosecuted for violating the statute charged in Count
9 2. Def. Memo. at 8-13. This argument should be rejected for a number of reasons.

10 **a. The “general-specific rule” does not apply to the two statutes at**
11 **issue in this case**

12 The “general-specific rule” only applies when two statutes address the same subject matter
13 and conflict to the point that they cannot be harmonized and/or when they are “concurrent.” Here,
14 neither is the case.

15 *i. The two statutes do not address the same subject matter and*
16 *do not conflict to the point that they cannot be harmonized*

17 As noted above, the “general-specific rule” is a canon of statutory construction that is only
18 applied when two statutes address the same subject matter and conflict to the point that they cannot
19 be harmonized. Conte, 159 Wn.2d 810; Becker, 59 Wn. App. 852. One way of determining this is
20 to examine the elements of the statutes. If the statutes create crimes with different elements, they
21 are simply different statutes that criminalize different conduct and the rule does not apply.

22 Farrington, 35 Wn. App. at 802. That is exactly the situation presented in this case.

23 Under RCW 9A.32.070, “a person is guilty of manslaughter in the second degree when,
with criminal negligence, he or she causes the death of another person.” Thus, a violation of the
statutes requires proof that: (1) the defendant engaged in an act or acts with criminal negligence;

1 (2) the decedent died as a result of the defendant's negligent acts; and (3) any of these acts
2 occurred in the State of Washington. RCW 9A.32.070; WPIC 28.05; WPIC 28.06. In the
3 context of second degree manslaughter, a person acts with criminal negligence when "he or she
4 fails to be aware of a substantial risk that [death] may occur and his or her failure to be aware of
5 such substantial risk constitutes a gross deviation from the standard of care that a reasonable
6 person would exercise in the same situation." RCW 9A.080.010 (1)(d); 2016 Comment to WPIC
7 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005)). As a result, the
8 crime of second degree manslaughter requires proof that the defendant had the mental state of
9 "negligence" and proof that this mental state specifically related to the risk of death to the
10 decedent. Gamble, 154 Wn.2d at 468-69.

11 Under RCW 49.17.190(3), by contrast, a person is guilty of Violation of Labor Safety
12 Regulation with Death Resulting if the person is an employer:

13 who wilfully and knowingly violates the requirements of RCW 49.17.060, any
14 safety or health standard promulgated under this chapter, any existing rule or
15 regulation governing the safety or health conditions of employment and adopted
16 by the director, or any order issued granting a variance under RCW 49.17.080 or
17 49.17.090 and that violation caused death to any employee.

18 Thus, a violation of the statute requires proof that: (1) the defendant was the employer of the
19 decedent; (2) the defendant willfully and knowingly violated one of the enumerated statutes,
20 regulations, rules, or orders; (3) that the violation caused the decedent's death; and (4) that any of
21 these acts occurred in the State of Washington. Id. In this context, a person acts willfully⁶ and
22 with knowledge "with respect to a [fact, circumstance, or result] when he or she is aware of that
23 [fact circumstance or result]. It is not necessary that the person know that the [fact,
circumstance, or result] is defined by law as being unlawful or an element of the crime." WPIC

⁶ For purposes RCW 49.17.190(3), the requirement of willfulness is satisfied if the employer acts knowingly. RCW 9A.08.010(4); WPIC 10.05.

1 10.02; RCW 9A.08.010(1)(b). As a result, the crime of Violation of Labor Safety Regulation with
2 Death Resulting requires proof that the defendant had the mental state of “knowing” and proof that
3 this mental state specifically related to violating a health or safety provision. RCW 49.17.190(3).

4 Numrich argues that proof of the *mens rea* at issue in RCW 49.17.190(3) (willful and
5 knowing) will necessarily establish proof of the *mens rea* at issue in RCW 9A.32.070 (criminal
6 negligence) because proof of a higher level of *mens rea* necessarily establishes proof of a lower
7 level. Def. Memo. at 10-11. But this argument oversimplifies the analysis and ignores the key
8 point that the concept of *mens rea* involves both the level of mental state (e.g. intentional versus
9 knowing versus negligent) and the object of the mental state (e.g. the intent to do something in
10 particular). For two crimes to have the same *mens rea* element, both the level **and** the object of
11 the mental state must be the same. Thus, for example, although the crimes of theft and second
12 degree intentional murder require the same mental state (“intent”), the crimes still have very
13 different *mens rea* elements because the mental states are directed at different things—in theft,
14 the intent is to deprive another of goods or services; in second degree intentional murder, the
15 intent is to cause the death of another. RCW 9A.56.020; RCW 9A.32.050(1)(a). Similarly,
16 second degree intentional murder and second degree felony murder have different *mens rea*
17 elements for exactly the same reason. Although both crimes have a mental state of intent, the
18 object of the intent is different—in intentional murder the intent is to cause death whereas in
19 felony murder the intent is to commit a predicate felony. See State v. Armstrong, 143 Wn. App.
20 333, 341, 178 P.3d 1048 (2008).

21 In analytical frameworks similar to the “general-specific rule,” Washington courts have
22 recognized the legal import of crimes having mental states with different objects. For example,
23 the test for whether one crime is a lesser-included offense of another is very similar to the test for

1 the “general-specific rule.”⁷ In that context, courts have ruled—for example—that while second
2 degree manslaughter is a lesser included offense of second degree *intentional* murder, it is not a
3 lesser included offense of second degree *felony* murder. Gamble, 154 Wn.2d at 468-69. That is
4 because the objects of the mental states for second degree felony murder and second degree
5 manslaughter (intent vis-à-vis a felony versus negligence vis-à-vis a death) are different. Id.
6 Because of that difference alone, the *mens rea* elements for the two crimes are so different that
7 proof of one does not necessarily establish the other. Id.

8 Given all of the above, when the correct analysis of *mens rea* is properly applied to this case,
9 it is clear that Manslaughter in the Second Degree and Violation of Labor Safety Regulation with
10 Death Resulting have entirely 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,⁸ 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. *Thus, not only do the two statutes have different levels of mental state,*
17 *they have mental states that are about different things.* And, as discussed above, when this is the
18 case, the *mens rea* elements are different. As a result, the elements of RCW 49.17.190(3) are
19 different than the elements of RCW 9A.32.070 and proof of the former does not necessarily
20 prove the elements of the latter.

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22 ⁷ Both compare the elements of two offenses to determine whether proof of the elements of one crime necessarily
establishes proof of all of the elements of another. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978);
Heffner, 126 Wn. App. at 808.

23 ⁸ 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 at 808. Numrich has identified RCW 49.17.190(3) (Violation of Labor Safety Regulations with
2 Death Resulting) as the specific statute and RCW 9A.32.070 (Manslaughter in the Second
3 Degree) as the general. And here, despite Numrich's assertion to the contrary,⁹ it is certainly
4 possible to violate the "specific" without violating the "general."

5 As an initial matter, as the analysis in the previous section describes, the two statutes
6 have different elements. In relevant part, RCW 9A.32.070 requires the State to prove that the
7 defendant acted with criminal negligence vis-à-vis the risk of the decedent's death. The State is
8 not required to prove that the defendant willfully and knowingly violated a health or safety
9 regulation.¹⁰ RCW 49.17.190(3), in contrast, requires the opposite—the State must prove that
10 the defendant willfully and knowingly violated a health or safety regulation, but need not prove
11 that the defendant acted with criminal negligence vis-à-vis the risk of the decedent's death. This
12 difference in elements between the two statutes in and of itself demonstrates that it is possible to
13 violate RCW 49.17.190(3) without also violating RCW 9A.32.070.

14 Moreover, the fact that it is possible to violate the former without violating the latter is
15 also demonstrated by consideration of at least three hypotheticals.

16 First, an employer/foreman has a building crew working on a multi-story construction
17 site and knows that he is required to provide a hard hat to each individual employee on the site
18 pursuant to WAC 296-155-205. He also knows that his employees are allowed to—and
19 generally do—remove their hard hats whenever there is no potential exposure to the danger of
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⁹ Def. Memo. at 11.

22 ¹⁰ It is certainly true that, *in this case*, the fact that Numrich knowingly violated such regulations is part of the proof
23 that he acted negligently. As noted above, however, the test for concurrency must be 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.

1 flying or falling objects.¹¹ On a given day, although he knows that the regulations require it, he
2 does not provide hard hats to all of his employees because he does not expect anyone to be doing
3 any work that creates the potential for flying or falling objects and he expects that his crew will
4 not wear them anyway. The employer does not realize, however, that the workmen of a different
5 employer have inadvertently left tools unsecured on a surface on the top floor the previous day.
6 On this day, the vibrations caused by his crew on the first floor cause the unsecured tools above
7 to fall several stories and strike one of his employees in the head. The employee dies from a
8 fractured skull.

9 Second, the employer/foreman of a logging crew knows that, under WAC 296-54-51160,
10 he has a duty to provide leg protection (chaps) to all employees working on a downed tree who
11 operate a chain saw *and* to ensure that his employees actually wear them. At the end of a day's
12 work, an experienced employee notices that one more cut with a chainsaw needs to be made and
13 heads back to a log to make it, shouting a quick explanation to the employer as he goes. In his
14 haste, the employee, who has already removed his chaps, fails to put them back on. The
15 employer does not notice that the employee has removed his chaps, but—knowing that the
16 employee is experienced and only needs to make one more cut—does not actually confirm that
17 he is wearing them. Something goes wrong, the chainsaw cuts the employee's femoral artery,
18 and he bleeds to death.

19 In both of the above hypothetical scenarios, the employer-defendant would clearly have
20 violated RCW 49.17.190(3). In both the defendant was the employer of the decedent, willfully
21 and knowingly violated a regulation encompassed by the statute, and the decedent died as a

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23 ¹¹ Under WAC 296-155-205(2), employees are required to have their hard hats on site and available at all times. An
employee may remove his or her hard hat when there is no potential exposure to a hazard. WAC 296-155-205(3).
However, both (2) and (3) deal with the obligation of the *employee* to *wear* a hard hat. Neither absolves the
employer of the obligation to provide an individual hard hat to all employees on the construction site under WAC
296-155-205(1).

1 result. However, given the particular circumstances, no reasonable person would conclude that
2 either defendant had acted with criminal negligence in the sense that he failed to be aware of a
3 substantial risk that death would occur and his failure constituted a gross deviation from the
4 standard of care that a reasonable person would have exercised. As a result, neither defendant
5 would have violated RCW 9A.32.070.

6 Finally, the third hypothetical is—potentially—this case. Here, the evidence that
7 Numrich violated RCW 49.17.190(3) is virtually indisputable. As a result, should this case go
8 to trial, Numrich will almost certainly argue that, while he violated RCW 49.17.190(3), he did
9 not violate RCW 9A.32.070. And he will be allowed to make that argument precisely because it
10 is legally *possible* to be guilty of the former without being guilty of the latter.

11 Despite the above, Numrich asserts that it is impossible to violate RCW 49.17.190(3)
12 without also violating RCW 9A.32.070. Def. Memo. at 10-11. Numrich’s argument, however,
13 suffers from three fatal flaws.

14 First, Numrich’s entire argument is premised on the assertion that, because “knowing” is
15 a higher level mental state than “criminal negligence,” proof of the *mens rea* element in RCW
16 49.17.190(3) will necessarily prove the *mens rea* element of RCW 9A.32.070. Def. Memo. at
17 10-11. As described above, however, this assertion oversimplifies and mischaracterizes the
18 nature of the *mens rea* elements at issue in the two statutes. Here, because the *mens rea* elements
19 are aimed at different objects—in one statute the mental state must specifically be about the
20 violation of a health or safety regulation, in the other the mental state must specifically be about
21 the risk of death to another—proof of the former will not *necessarily* prove the latter.

22 Second, Numrich claims that “in each and every case that a person willfully or knowingly
23 fails to comply with the mandates of WISHA, it can be said that the employer has engaged in

1 negligent conduct or a gross deviation of the standard of care.” Def. Memo. at 11. But this
2 incorrectly conflates two separate things. Whether or not an employer has violated his duty of
3 care towards his employees is a separate question than whether or not a person has violated the
4 standard of care that a reasonable person would exercise to prevent the substantial risk of
5 wrongful death. As noted above, while a defendant’s breach of a statutory duty is relevant to the
6 issue of whether he acted with criminal negligence, as a matter of law it is not in and of itself
7 conclusive on the issue. Lopez, 93 Wn. App. 619.

8 Finally, Numrich asserts that “[i]t is impossible to envision a case where a defendant
9 might be guilty of [violating RCW 49.17.190(3)] but acquitted of the more general manslaughter
10 statute.” Def. Memo. at 11. As an initial matter, this is simply incorrect. As the first two
11 hypotheticals above indicate, such a scenario is certainly possible.¹²

12 Moreover, Numrich’s argument on this point conflicts with his likely trial defense. As
13 noted above, should this case go to trial, Numrich’s defense will almost certainly revolve around
14 the argument that, although is guilty of Violation of Labor Safety Regulation with Death
15 Resulting, he is not guilty of Manslaughter in the Second Degree. And, while the State believes
16 that Numrich is actually guilty of both, he will be allowed to make that argument precisely
17 because it *is* legally possible to be guilty of the former without being guilty of the latter.¹³ The
18 fact that Numrich will likely take exactly that position at trial undercuts his current claim that it
19 is a legal impossibility.

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22 ¹² And, as noted above, the fact that such hypothetical scenarios could occur in and of itself shows that RCW
9A.32.080 and RCW 49.17.190(3) are not concurrent and, therefore, that the “general-specific rule” does not apply.

23 ¹³ It seems beyond question that, were the State to move to preclude Numrich from making this argument as trial, he
would vehemently and strenuously object. Yet that is the logical and necessary corollary of the argument he
advances in his current motion.

1 Given all of the above, RCW 9A.32.070 and RCW 49.17.190(3) are not concurrent
2 within the meaning of the “general-specific rule” analysis. As a result, the rule does not apply to
3 them.

4 **b. Application of the “general-specific rule” in this case would**
5 **violate more applicable canons of statutory construction**

6 As noted above, the “general-specific rule” is a canon of statutory construction
7 specifically used by courts to help determine whether the Legislature intended to preclude the
8 State from charging a more “general” statute when a more “specific” one also applies. Conte,
9 159 Wn.2d at 803; Heffner, 126 Wn. App. at 807; Thomas, 35 Wn. App. at 601-02; Danforth, 97
10 Wn.2d at 257-58; Shriner, 101 Wn.2d at 580; Cann, 92 Wn.2d at 197. When applying any canon
11 of statutory construction, it must be kept in mind that the fundamental purpose in doing so is to
12 give effect to the intent of the Legislature. In re Estate of Holland, 177 Wn.2d 68, 75-76, 301
13 P.3d 31 (2013). Moreover, Washington courts have expressed that the “general-specific rule”
14 must be used with particular care and that it should be “applied to preclude a criminal
15 prosecution *only where the legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815
16 (emphasis added). Particularly given this context, the “general- specific rule” must be used in
17 conjunction with other principles of statutory construction, including the general rule that a court
18 must apply the construction that best fulfills the statutory purpose and carries out any express
19 legislative intent and must avoid interpreting statutes in a way that leads to unlikely, absurd, or
20 strained results. See In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City
21 of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); State v. Contreras, 124
22 Wn.2d 741, 747, 880 P.2d 1000 (1994). Here, even if the “general-specific” rule could
23 theoretically be applied to RCW 9A.32.080 and RCW 49.17.190(3), Numrich’s motion should

1 still be rejected because applying the rule to these statutes would undercut the statutory purpose,
2 thwart the intent of the Legislature, and lead to absurd results.

3 *i. Applying the rule as Numrich advocates would undercut the*
4 *purpose of the statutes and thwart legislative intent*

5 RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973
6 (WISHA). RCW 49.17.900. Subsection (3) of the statute provides, in relevant part, that:

7 Any employer who wilfully and knowingly violates the requirements of RCW 49.17.060,
8 any safety or health standard promulgated under this chapter, any existing rule or
9 regulation governing the safety or health conditions of employment and adopted by the
10 director, or any order issued granting a variance under RCW 49.17.080 or 49.17.090 and
11 that violation caused death to any employee shall, upon conviction be guilty of a gross
12 misdemeanor and be punished by a fine of not more than one hundred thousand dollars or
13 by imprisonment for not more than six months or by both.....

14 This language is nearly identical to 29 U.S.C. 666(e) of the federal Occupational Safety and
15 Health Act (OSHA) which provides that:

16 Any employer who willfully violates any standard, rule, or order promulgated pursuant to
17 section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that
18 violation caused death to any employee, shall, upon conviction, be punished by a fine of
19 not more than \$10,000 or by imprisonment for not more than six months, or by both;
20 except that if the conviction is for a violation committed after a first conviction of such
21 person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for
22 not more than one year, or by both.

23 The express legislative history of WISHA is extremely short and does not discuss the
proposed criminal sanctions contained in RCW 49.17.190. Rather, the only discussion in the
legislative history deals with the need to ensure that Washington's statutes would be at least as
effective as OSHA in order to ensure that Washington had an approved OSHA State Plan that
would avoid federal preemption. *Enacting the Washington Industrial Safety and Health Act of*
1973: Hearing on SB 2389 Before the S. Comm. on Labor, 1973 Leg., 43rd Sess. at 2 (Feb. 2,
1973); See also RCW 49.17.010. As a result, many of the provisions of WISHA are worded
very similarly, if not identically, to those in OSHA. In this context, where the provisions of

1 WISHA are identical or analogous to corresponding OSHA provisions, Washington courts will
2 look to federal decisions, as the Washington Legislature's intent would be identical to
3 Congress's. Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d
4 793 (1986); Fahn v. Cowlitz County, 93 Wn.2d 368, 376, 610 P.2d 857 (1980).

5 When Congress passed OSHA, its intent was "to assure so far as possible every working
6 man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b).
7 WISHA has the same goal for workers in Washington. RCW 49.17.010. Because WISHA is a
8 remedial statute, its provisions must be liberally construed to protect the health and safety of
9 Washington workers. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 146, 750 P.2d 1257,
10 756 P.2d 142 (1988); Frank Coluccio Constr. Co. v. Dep't of Labor & Indus., 181 Wn. App. 25,
11 36, 329 P.3d 91 (2014); Stute v. P.B.M.C., 114 Wn.2d 454, 788 P.2d 545 (1990).

12 Prior to the enactment of OSHA/WISHA, state prosecutors were free to bring felony
13 charges against employers under existing state laws criminalizing, *inter alia*, homicide and
14 assault. In this context, a review of the legislative history for OSHA (which is the basis for the
15 identical language in WISHA) provides no indication that Congress intended to limit or preclude
16 prosecutions under existing state criminal codes. Rather, the Senate Report on the bill which
17 ultimately became OSHA noted that the legislation "would be seriously deficient if any
18 employee were killed or seriously injured on the job simply because there was no specific
19 standard applicable to a recognized hazard which could result in such a misfortune." S. REP. NO.
20 91-1282, at 9 (1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92ND CONG.,
21 LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971). Indeed,
22 the Senate noted the importance of providing *more* protection than under existing law where
23 "individuals are obliged to refrain from actions which cause harm to others." Id.

1 If Congress had intended OSHA to make employers less criminally liable than under
2 existing law, Congress would have said so. Instead, Congress has said precisely the opposite. In
3 1988, the House Committee on Government Operations submitted a report, entitled "GETTING
4 AWAY WITH MURDER IN THE WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR
5 SAFETY VIOLATIONS," based on a study by the Employment and Housing subcommittee. H.R.
6 REP. NO. 1051, 100th Cong., 2nd Sess. 10 (1988). In this report, the Committee was clear that
7 OSHA was not intended to limit the ability of state prosecutors to bring traditional criminal
8 charges against employers for acts committed in, or related to, the workplace. The Committee
9 stated:

10 [T]he States have clear authority under [OSHA], as it is written, to prosecute
11 employers for acts against their employees which constitute crimes under State
12 law.

13 ...

14 Nothing in [OSHA] or its legislative history suggests that Congress intended to
15 shield employers from criminal liability in the workplace or to preempt
16 enforcement of State criminal laws of general application such as murder,
17 manslaughter, and assault.

18 ...

19 The States have an interest in controlling conduct that endangers the lives of their
20 citizens whether it be at home, at work, or on the road. State and local prosecutors
21 should be commended and encouraged to continue their efforts to protect people
22 in their workplaces by utilizing the historic police power of the State to prosecute
23 workplace injuries and fatalities as criminal acts.

Id. at 9-10 (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989)).

Given all of the above, there is no basis to conclude that Congress (in adopting OSHA) or
the Washington Legislature (in adopting WISHA) intended the inclusion of a gross misdemeanor
provision to preclude Washington prosecutors from bringing homicide charges under state law
against employers following workplace fatalities. Indeed, all evidence of legislative intent is

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1 precisely to the contrary. In this context, there is no support for Numrich’s argument that RCW
2 49.17.190(3) precludes him from being prosecuted for second degree manslaughter for Felton’s
3 death. Rather, such a ruling from this court would run directly contrary to the clear intent of the
4 Legislature.

5 ii. Applying the rule as Numrich advocates would lead to
6 absurd results

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

14 First, woven into the very fabric of OSHA and WISHA is a recognition of the power
15 dynamic at play in the employer-employee relationship and the general responsibility of
16 employers for their employees, including the responsibility to provide reasonably safe and
17 healthy working conditions for the people they employ. As Numrich himself concedes,
18 employers in Washington have a duty of care vis-à-vis their employees. Def. Memo. at 11. In
19 contrast, no such similar responsibility or duty exists between two unrelated strangers. In this
20 context, the application of the “general-specific rule” advocated by Numrich would lead to the
21 absurd result that a person who negligently caused the death of an unrelated stranger—a person
22 for whom he had no responsibility and towards whom he owed no duty of care—could be
23 charged with a felony but a person who knowingly violated a safety regulation which led to the

1 death of an employee—a person for whom he did have responsibility and towards whom he did
2 owe a duty of care—could only be charged with a gross misdemeanor.

3 Second, and similarly, many workplace safety regulations protect the public as well as
4 employees. In that context, it is entirely possible that an employer’s actions could lead to the
5 death of both an employee and a non-employee member of the public at large. In this situation,
6 the application of the “general-specific rule” advocated by Numrich would lead to the absurd
7 result that the exact same action would allow the employer/defendant to be charged with a felony
8 for the death of one person (the non-employee), but only with a gross misdemeanor for the death
9 of the other (the employee).¹⁴

10 Finally, by its own terms, RCW 49.17.130(3) applies only when a knowing violation of a
11 safety regulation leads to the *death* of an employee. Under RCW 9A.36.031(1)(f), a person is
12 guilty of third degree assault—a felony—if he or she “with criminal negligence, causes bodily
13 harm accompanied by substantial pain that extends for a period sufficient to cause considerable
14 suffering.” In this context, the application of the “general-specific rule” advocated by Numrich
15 would lead to the absurd result that an employer who knowingly violated a safety regulation
16 could be charged with a felony if the violation resulted in a worker being injured and surviving,
17 but could only be charged with a gross misdemeanor if the violation resulted in the worker being
18 killed.

19 All three of the above are classic examples of the type of absurd results that this court
20 must avoid in construing statutes. Since all three flow logically and inexorably from Numrich’s
21 argument, this court must reject it.

22
23

¹⁴ This assumes, of course, that there was proof of the different *mens rea* elements of RCW 9A.32.070 and RCW 49.17.190(3).

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c. Courts in other states have rejected Numrich’s argument

As noted above, the Washington Legislature chose to enact WISHA in order to avoid federal preemption by ensuring that Washington’s worker protection statutes were at least as effective as OSHA. Every other state has had to face a similar choice and the nation is roughly evenly split: currently about half of the states (including Washington) have adopted approved OSHA State Plans; the other half have not and have, thus, accepted federal preemption in the field of occupational safety and health law. Mark A. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW § 3.10, at 71 (2015). The issue raised by Numrich—or a close analogy thereof—has been addressed and rejected in states both with and without approved OSHA State Plans.

In Michigan (which has an approved OSHA State Plan similar to Washington’s), for example, the court dealt with an argument virtually identical to Numrich’s in Hegedus, 432 Mich. 598. In Hegedus, an employee of a company died due to carbon monoxide poisoning while working in a company owned van. Id. at 602. The State’s theory of the case was that the poor condition and maintenance of the van allowed exhaust to leak into it and kill the decedent Id. The State charged the defendant—a company supervisor—with involuntary manslaughter under Michigan state law for his role in the incident. Id. The defendant argued that his prosecution for involuntary manslaughter under Michigan’s “general” criminal statutes was precluded and that he could only be prosecuted for violating the more “specific” criminal provisions of MIOSHA (Michigan’s approved OSHA State Plan) or OSHA because they preempted the “general statute.” Id. at 602-06. As noted above, the relevant OSHA provision in question is virtually identical to RCW 49.17.190(3).

1 The Hegedus court roundly rejected this argument and held that prosecution of the
2 defendant for involuntary manslaughter was not precluded or preempted. Id. at 625. The court
3 noted that:

4 [T]here is a “legitimate and substantial purpose” on the part of this state, apart
5 from regulating *occupational* health and safety, in enforcing its criminal laws
6 even though the conduct occurred in the workplace. While deterrence, and thus to
7 some extent regulation, is one aim of general criminal laws, so too is
8 punishment—clearly not one of OSHA’s primary goals. A more important
9 purpose, however, is the protection of employees as members of the general
10 public. While OSHA is concerned with protecting employees as “workers” from
11 specific safety and health hazards connected with their occupations, the state is
12 concerned with protecting the employees as “citizens” from criminal conduct.
13 Whether that conduct occurs in public or in private, in the home or in the
14 workplace, the state’s interest in preventing it, and punishing it, is indeed both
15 legitimate and substantial.

16 Id. at 613-14. The court, therefore, concluded that:

17 The defendant in this case is charged with manslaughter, not simply with a
18 “willful” violation of an OSHA standard. While his conduct, if proved, might also
19 satisfy the elements of that [latter] “crime,” the state has chosen, in a valid
20 exercise of its police powers, to pursue this matter under its own criminal laws.
21 We cannot construe OSHA, the stated purpose of which is “to assure so far as
22 possible ... safe and healthful working conditions and to preserve our human
23 resources,” as a grant of immunity to employers who are responsible for the
deaths or serious injuries of their employees.

16 Id. at 625. Similar results have been reached by courts in other states with approved OSHA State
17 Plans. See, e.g., State v. Far West Water & Sewer Inc., 224 Ariz. 173, 228 P.3d 909 (2010).

18 Courts in states without approved OSHA State Plans have overwhelmingly reached the
19 same conclusion. The Illinois Supreme Court, for example, rejected this argument and held that
20 the state had the power to enact and enforce its traditional criminal laws in this context in order
21 to protect public safety. People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 534 N.Ed.2d 962
22 (1989). New York and Wisconsin reached similar results in People v. Pymm, 151 A.D.2d 133,
23 546 N.Y.S.2d 871 (1989) and State ex rel. Cornellier v. Black, 144 Wis. 2d 745, 425 N.W.2d 21,
(1988), respectively.

by

1 In sum, at least seven states have addressed either Numrich’s argument or the federal
2 preemption variation on it. And every state except Texas has rejected it. Mark A. Rothstein,
3 OCCUPATIONAL SAFETY AND HEALTH LAW § 3.3, at 64-66 (2015).

4 As previously noted, WISHA essentially wholesale imported the OSHA framework—
5 including the legislative intent—into Washington law. As all of the above demonstrate,
6 Congress did not intend for the inclusion of a gross misdemeanor provision in OSHA to preclude
7 or preempt states from bringing homicide charges under state law against employers following
8 workplace fatalities. Similarly, the Washington Legislature did not intend that RCW
9 49.17.190(3)—the WISHA analogue of 29 U.S.C. 666(e)—would preclude prosecution for
10 second degree manslaughter under RCW 9A.32.070.

11 **d. None of Numrich’s additional arguments warrant a different**
12 **outcome**

13 Beyond those addressed above, Numrich makes a few additional assertions in support of
14 his “general-specific rule” argument. None, however, are persuasive.

15 First, Numrich asserts that RCW 49.17.190(3) “has a significantly *higher* mental state
16 than the general manslaughter statute.” Def. Memo. at 11 (emphasis in original). From this,
17 Numrich claims, one can infer a legislative intent that prosecutors not be allowed to charge
18 manslaughter in cases like his. *Id.* However, this argument must fail. As an initial matter, as
19 discussed above, the question of *mens rea* involves an analysis of both the level of the mental
20 state and the object of the mental state. In that context, one statute can only truly be said to have
21 a “higher mental state” than another if both statutes’ mental states are about the same thing.
22 Otherwise, one is not higher than another, they are simply different. That is the case here. As a
23 result, Numrich’s starting premise is flawed—despite his assertion to the contrary, RCW

1 49.17.190(3) does not have a higher mental state than RCW 9A.32.070. Rather, the two statutes
2 simply have different *mens rea* elements.

3 Moreover, even where this not the case, Numrich’s argument on this point still comes
4 down to a question of statutory interpretation. Here, as discussed at length above, the intent of
5 the Legislature was clearly not to limit the authority of the State to bring manslaughter charges
6 (either in addition to, or instead of, charges under RCW 49.17.190(3)) in situations such as this
7 one.

8 Second, Numrich argues that the decision in Danforth supports his position. Def. Memo.
9 at 11-12. But this is also incorrect. As an initial matter, while the analysis used in one “general-
10 specific rule” case may be generally applicable in future cases, the actual holding of any such
11 case is necessarily limited to the two statutes in question (because all of the analysis is ultimately
12 about whether the rule applies *to those two statutes*). In that context, the holding in Danforth—
13 that when a defendant escapes from work release the State can only charge under RCW
14 72.65.070 and not under RCW 9A.76.110—is irrelevant in this case.

15 The analysis in Danforth, in contrast, actually supports the State’s position.¹⁵ The
16 Danforth court summarized the reason for its decision as being based on “sound principles of
17 statutory interpretation and respect for legislative enactments.” 97 Wn.2d at 259. Here, as
18 discussed at length above, those very principles lead to the conclusion that the “general-specific
19 rule” does not apply to the two statutes at issue in this case.

20 Finally, Numrich argues that WISHA creates a “comprehensive and unified statutory
21 scheme to regulate workplace safety.” Def. Memo. at 6. From this, Numrich argues, one must
22 infer a legislative intent to have RCW 49.17.190(3) be the exclusive crime that may be charged
23

¹⁵ It is precisely for this reason that Danforth is cited repeatedly above.

1 in situations such as those presented in this case. *Id.* at 6-8, 13. This argument must also be
2 rejected. As an initial matter, as repeatedly noted, the issue of legislative intent is addressed at
3 length above. Here, there is no indication of any intent—either explicit or implicit—on the part
4 of the Legislature to do any such thing. Rather, every indication is that the Legislature intended
5 WISHA and RCW 49.17.190(3) to expand, not limit, the tools available to the State by providing
6 an option that could be used in conjunction with existing criminal statutes and/or when those
7 statutes did not apply.

8 In addition, arguments very similar to Numrich’s have been addressed and rejected by
9 courts in other states. In *Hegedus*, for example, the defendant argued that the length and scope
10 of OSHA—and its inclusion of some criminal penalties—indicated a congressional intent to
11 “occupy the field” and preclude prosecution under other statutes. The court thoroughly rejected
12 this assertion, noting:

13 The sheer length of the act, in our view, merely reflects the complexity of the
14 subject matter. When considered in the context of that subject matter, the act's
15 apparent comprehensiveness is not surprising. As the United States Supreme
16 Court stated in *New York Dep't of Social Services v. Dublino*, 413 U.S. 405, 415,
17 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973), “The subjects of modern social and
18 regulatory legislation often by their very nature require intricate and complex
19 responses from Congress, but without Congress necessarily intending its
20 enactment as the exclusive means of meeting the problem....”

21 Despite its length and thoroughness, OSHA is far from complete. The
22 incompleteness of OSHA's provisions for criminal penalties is but one example of
23 the incompleteness of the act as a whole, and serves to answer the defendant's
second argument, that the inclusion of such sanctions within the act evidences
Congress' intent to preempt at least that portion of the occupational safety and
health field. The act itself contains only a few very minor criminal sanctions that
can hardly be said to compose a comprehensive and exclusive scheme. Under §
17(e),¹⁶ a wilful violation of a specific OSHA standard that results in an
employee's death is punishable by only up to six months' imprisonment. A similar
violation that “only” seriously injures an employee carries no criminal penalties at
all. A violation of the general-duty clause of § 5(a), even if it results in death, also

¹⁶ 29 USC 17(e) was subsequently recodified as 29 USC 666(e).

1 carries no criminal penalty. Thus, as the Illinois Supreme Court concluded in
2 Chicago Magnet Wire, *supra*:

3 “[I]t seems clear that providing for appropriate criminal sanctions in cases
4 of egregious conduct causing serious or fatal injuries to employees was
5 not considered. Under these circumstances, it is totally unreasonable to
6 conclude that Congress intended that OSHA's penalties would be the only
7 sanctions available for wrongful conduct which threatens or results in
8 serious physical injury or death to workers.” *Id.*, 128 Ill.Dec. at 522, 534
9 N.E.2d at 967.

10 Hegedus, 432 Mich. at 619-20 (internal footnotes omitted).

11 Here, the points raised by the Hegedus court regarding OSHA and its criminal provisions
12 apply with equal force to WISHA and RCW 49.17.190(3). While WISHA is lengthy and broad,
13 that is merely a function of the complexity of the issues it seeks to address. Neither its length nor
14 its breadth equate to it being comprehensive or complete (or even indicate that is intended to be
15 so). And, despite Numrich's claims to the contrary, that is particularly the case when it comes to
16 WISHA's criminal provisions. As with OSHA, WISHA contains only a very few minor criminal
17 sanctions that can hardly be said to compose a comprehensive and exclusive scheme.¹⁷ And,
18 under these circumstances, it is wholly unreasonable to conclude that the Legislature intended
19 that WISHA's penalties would be the only sanctions available for criminal acts that result in the
20 employee deaths.

21 **B. PROSECUTING NUMRICH FOR MANSLAUGHTER DOES NOT**
22 **VIOLATE HIS RIGHT TO EQUAL PROTECTION**

23 Numrich also argues that prosecuting him for manslaughter violates principles of equal
protection. Def. Memo. at 13-14. Numrich's sole support for this argument appears to be the
factual assertion that he is the first employer in the state who has been charged with a felony based

¹⁷ The hypotheticals raised in the section above addressing absurd results highlight just a few of the areas in which WISHA self-evidently fails to comprehensively or completely address possible criminal behavior.

1 on a workplace fatality even though he cannot have been the first to have committed the crime. Id.
2 Numrich fails to provide any citation to legal authority or analysis that further characterizes his
3 motion or explains how that fact is relevant to a claim of an equal protection violation. However,
4 while he does not label it as such, based on the reference to others not being prosecuted for the same
5 offense, it appears that Numrich is asserting that the State has engaging in improper selective
6 prosecution by charging him with manslaughter when it has not charged other similarly situated
7 defendants. This argument must also be rejected because the State's decision to charge him with
8 manslaughter for causing Felton's death does not constitute an unconstitutionally selective
9 prosecution that violates his right to equal protection.

10 As an initial matter, as Numrich points out, the filing of these charges against him does
11 appear to be the first and—so far—only instance in Washington in which an individual defendant
12 has been charged with a felony offense for having caused the death of an employee in a
13 workplace incident. Def. Memo. at 5-6. What Numrich fails to point out, however, is that the
14 filing of such charges in this case is hardly unique in the United States as a whole. Rather, the
15 State's decision to charge Numrich with manslaughter is in keeping with the nationwide trend to
16 charge such cases in this way. The State is aware, for example, of a number of cases in the last
17 10 years where state criminal charges analogous to Washington's second degree manslaughter
18 have been filed against individual employers/supervisors when workers have been killed by
19 collapsing trenches.¹⁸ If the scope is expanded beyond the specific context of trench collapses
20 to other workplace fatalities, the examples of such charges become too numerous to mention
21

22 ¹⁸ See, e.g., People v. Abraham Zafrani, Superior Court of California, County of Ventura No. 2013029396, 2017
23 WL 7361303 (California: defendant, an unlicensed contractor, was found guilty of Involuntary Manslaughter and
Violating a Safety or Health Order Causing Death after an employee was killed in a trench collapse); People v. Luo,
16 Cal. App. 5th 663, 224 Cal. Rptr. 3d 526 (2017) (California: defendants, a general contractor and his project
manager, were found guilty of Involuntary Manslaughter and multiple counts Violating a Safety or Health Order
Causing Death after an employee was killed in a trench collapse); Commonwealth v. Otto.

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1 here. State and local prosecuting authorities nationwide have made it clear—by both their
2 actions and their words¹⁹—that the investigation and charging of criminal behavior in the context
3 of workplace injuries and deaths is a new criminal justice priority. When viewed in this light, it
4 can hardly be said that the State’s decision to file these charges against Numrich makes its
5 treatment of him so selective as to implicate equal protection concerns.

6 Moreover, even if Numrich’s case was entirely unique in the nation, there still would not
7 be a basis for this court to find an equal protection violation warranting dismissal. A “criminal
8 prosecution is presumed to be undertaken in good faith”²⁰ and “prosecutors are vested with wide
9 discretion in determining whether to charge suspects with criminal offenses.”²¹ In exercising this
10 discretion, prosecutors can and do take into account numerous factors in deciding who to prosecute
11 and for what charges. State v. Terrovonia, 64 Wn. App. 417, 421, 824 P.2d 537 (1992). These
12 factors include “consideration of the public interest involved, the strength of the State’s case,
13 deterrence value, the State’s priorities, and the case’s relationship to the State’s general enforcement
14 plan.” Id. In this context,

15 [t]he exercise of a prosecutor's discretion by charging some but not others guilty
16 of the same crime does not violate the equal protection clause of U.S. Const.
amend. 14 or Const. art. 1, § 12 so long as the selection was not “deliberately

17 www.bostonherald.com/topic/kevin_otto (Massachusetts: defendant, owner of a drain pipe company, charged with
18 two counts of manslaughter after two employees were killed in a trench collapse); People v. Formica, 15 Misc. 3d
404, 833 N.Y.S.2d 353 (2007) (New York: defendant, owner and supervisor of construction company, convicted of
19 negligent homicide after two employees were killed in a trench collapse); People v. Cueva, N.Y. Sup. Ct., No.
01971-2015 and People v. Prestia, N.Y. Sup. Ct. No. 01972-2015 (New York: defendants, the foreman and
20 construction supervisor for two construction companies, convicted of negligent homicide after two employees were
killed in a trench collapse).

21 ¹⁹ See, e.g., “District Attorney Jackie Lacey Launches OSHA and Environmental Crimes Rollout Program” (April
17 2014) at http://da.co.la.ca.us/sites/default/files/press/041718_District_Attorney_Launches_OSHA_and_Environmental_Crimes_Rollout_Program.pdf; “Rena Steinzor on the Rise of Local Criminal Prosecutions in
22 Worker Death Cases (March 9, 2018) at <https://www.corporatecrimereporter.com/?s=rena+steinzor>

23 ²⁰ State v. Terrovonia, 64 Wn. App. 417, 421, 824 P.2d 537 (1992).

²¹ Entz, 59 Wn. App. at 119 (citing State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)).

STATE’S RESPONSE TO DEFENDANT’S
MOTIONS TO DISMISS COUNT 1 - 31

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1 based upon an unjustifiable standard such as race, religion, or other arbitrary
2 classification.”

3 State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984) (quoting Oyler v. Boles, 368 U.S. 448,
4 456, 506, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). A defendant claiming an equal protection
5 violation warranting dismissal on these grounds bears the burden of establishing both that the
6 enforcement against him or her was motivated by his or her membership in a given class (i.e.
7 race, religion, or other arbitrary classification) and that it had a discriminatory effect on that
8 class. Terrovonia, 64 Wn. App. at 422-23; State v. Alonzo, 45 Wn. App. 256, 259-60, 723 P.2d
9 1211 (1986).

10 Here, Numrich’s entire argument is based on the assertions that: 1) other defendants who
11 have been charged with a crime in the context of workplace accidents causing death have been
12 charged under RCW 49.17.190(3);²² and 2) no other defendant in Washington has been yet been
13 charged with manslaughter for negligently causing the death of an employee in a workplace
14 incident. Def. Memo. at 5-6, 13-14. However, as noted above, the prosecutors who made the
15 charging decisions—both in previous cases and in this one—are presumed to have acted in good
16 faith and to have properly exercised prosecutorial discretion in taking into account the host of
17 factors that underlie the decision to file charges. Against that backdrop, Numrich has not
18 identified a single iota of evidence that would support the conclusion that his prosecution was
19 either motivated by a discriminatory purpose or had a discriminatory effect. Nor are any such
20 facts apparent in the record. As a result, Numrich has entirely failed to meet his burden of

21
22 ²² Numrich’s sole reference on this point is the King County case of State v. Pacific Topsoils (16-1-02544-3 SEA).
23 Def. Memo at 5-6. The State will simply note in passing the lack of any real relevance that case has towards this
one. The case against Pacific Topsoils involved different regulations, different facts, different equities, and different
potential legal issues. In that context, the State’s decisions to charge that case one way and this case another fall
fully within the broad discretion afforded prosecutors in balancing the factors at issue in charging decisions.

1 establishing unconstitutional selective enforcement and his equal protection argument must be
2 rejected.

3
4 **IV. CONCLUSION**

5 For the reasons outlined above, the State respectfully requests that this court deny the
6 defendant's motions to dismiss Count 1.

7 DATED this 13th day of June, 2018.

8 DANIEL T. SATTERBERG
9 King County Prosecuting Attorney

10
11 By: 
12 Patrick Hinds, WSBA #34049
13 Eileen Alexander, WSBA # 45636
14 Deputy Prosecuting Attorneys
15 Attorneys for Plaintiff

State v. Phillip Numrich
18-4-00255-5 SEA

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix A

(Certification For Determination Of Probable Cause)

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.

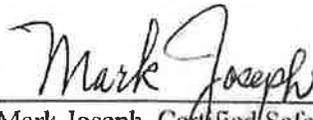
In the course of my investigation, I reviewed the analysis of Erich Smith, trenching technical expert for WSDLI. Smith stated, based upon his experience, the SpeedShore Tab Data and WSDLI regulations, the soil type and conditions at the Subject Premise, and the trench dimensions, that a minimum of four 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

State v. Phillip Numrich
18-4-00255-5 SEA

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix B

(Memorandum)



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

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MEMORANDUM

DATE: December 8, 2017
TO: Melinda Young, Patrick Hinds
FROM: Cody L. Costello, AAG; Martin Newman, AAG; Mark Joseph, Inspector
SUBJECT: Joint Investigation of Alki Construction

This investigation of Alki Construction and its owner Phil Numrich stems from a work related fatality occurring on January 26, 2016. This memorandum, investigation documents and attached interview transcriptions¹ are the joint product of this Office and that of the King County Prosecutor's Office. The following information is an overview of investigation methodology, list of interviewees and potential witnesses, and contains a brief recitation of salient facts and circumstances surrounding the work related fatality. This memorandum is not intended to capture all relevant facts or present a complete analysis of this investigation. For a complete recitation of facts and information, please see King County Prosecutor's Packet (KCPP).

I. INVESTIGATION METHODOLOGY

The KCPP contains all documents reviewed to date by Department investigator Mark Joseph, and Assistant Attorney Generals Cody L. Costello and Martin Newman. For record purposes, the date, time, and location of all interviews were noted at the time of the interview.

¹ An electronic copy of all interview transcripts and investigation documents (KC Prosecutor's Packet) was provided to King County Prosecutor's office on 11/27/17. Citations to interview transcripts are noted by abbreviating the interviewee's initials, "Tr." and the transcript page number. Citation to recorded interviews are noted by abbreviating the interviewee's initials, "Rec." and the hour and minute "HH:MM:SS". Citations to investigation documents are noted by "AI" followed by bates numbering found in the upper middle part of each page.

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All interviews were recorded with the permission of the interviewee. All recorded interviews were transcribed, excepting only the interview of Lt. Spencer Nelson (11/3/17) and Greg Sobole (11/17/17), both employees of the Seattle Fire Department at the time of the interview. Original recordings have been provided along with the KCPP. Seattle Fire Department Incident Photos (AI 237-350) are arranged in date/time taken format. Originals are available either from this office upon request, or from the Seattle Fire Department's Public Disclosure Officer Evan L. Ward (evan.ward@seattle.gov). Request should specify incident report #F160009889 (see also AI 0223-36). Contact information for interviewees and witnesses is listed in endnotes corresponding to each person. The list of interviewees and witnesses reflects individuals who this investigation deemed priority witnesses, but is not necessarily comprehensive. For all potential witnesses see KCPP.

II. INTERVIEWEES AND WITNESSES

A list of interviewees or persons related to this investigation, and the Department of Labor & Industries investigation is described below.

1. Related Persons and Interviewees:

- Harold Felton (deceased): employee of Alki Construction LLC;
- Max Henryⁱ (deceased's co-worker): employee of Alki Construction.
- Phillip Numrichⁱⁱ (deceased's employer): owner of Alki Construction *not interviewed*.
- Lucy Feltonⁱⁱⁱ (deceased's relative): Harold Felton's sister
- Jenna Felton^{iv} (deceased's relative): Harold Felton's wife
- Pamela Felton^v (deceased's relative): Harold Felton's mother
- Bruce Felton^{vi} (deceased's relative): Harold Felton's father.
- Greg Sobole^{vii} (Seattle Fire Department): Fire Fighter (R1),

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- Paul Atwater^{viii} (Seattle Fire Department): Battalion Chief/Acting Safety Officer at incident.
 - Phillip Jose^{ix} (Seattle Fire Department): Deputy Chief of Operations
- 2. Other potential witnesses:**
- Javier Sarmiento^x (Department of Labor & Industries): Inspector
 - Erich Smith^{xi} (Department of Labor & Industries): Inspector
 - Gary Hicks (SpeedShore): SE Regional Sales Mgr.

III. FACTUAL BACKGROUND

On January 26, 2016, Alki Construction commenced the final stages of replacing a residential side sewer at 3039 36th Ave SW, in West Seattle. MH Tr. 5; AI 351, 353. Alki Construction is a Limited Liability Company managed and owned by Phillip Numrich. AI 363-80. The company's work at the time of the incident was primarily to repair or replace side sewers of residential homes. MH Tr. 5. Worker Harold Felton, while completing a connection of the new sewer service in a trench approximately 8-10ft deep, 6ft long, and 21in wide, was covered by a cave-in of Type C soil and perished. On site at the time of the cave-in was Max Henry, co-worker of Felton. Owner Phillip Numrich was onsite in the morning and immediately prior to the cave-in.

A. Victim Profile.

The victim, Harold Felton, was 33 years old, married (Jenna Felton), with one dependent (Grace Felton) at the time of his death. Felton had experience working for a plumbing company approximately 10 years before his death, but had not performed plumbing work in the interim. LF Tr. 5, 15. Before working for Alki Construction, Felton worked for a local print shop in West Seattle. LF Tr. 10. Felton suffered a substantial traumatic brain injury in August 16, 2000, which affected his memory and resulted in changes in his judgment. LF Tr. 6-7, 9, 45-46; JF Tr. 23.

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Felton stopped working in the plumbing industry because of his TBI. (PF Tr. 5); Felton just began working as an apprentice plumber when he suffered his TBI. Family members disputed that the changes to memory or judgment impeded Felton's ability to perform his work for Alki Construction. LF Tr. 38. However Henry, Felton's coworker, stated that Felton had a long history of work accidents, was often unaware of his surroundings, and if Henry knew of Felton's history of work accidents before January 26, 2016 he would "never had had [Felton] helping me." MH T. 27-28. Henry learned of Felton's work history from Numrich after the incident. MH Tr. 32, 83-84. Felton's primary job for Alki Construction was digging trenches, and connecting the newly laid sewer line to the home's existing system and/or street service. MH Tr. 54, 82 (see below for further discussion.) Felton was particularly skilled at making sewer service connections (also called "piping in"), which can be a difficult process that requires experience and practice. MH Tr. 83-84.

B. Side Sewer Replacement – "Trenchless" Technology.

Alki Construction is a sewer replacement company, and uses a method called "trenchless" sewer replacement. MH Tr. 5. The term is counterintuitive because a minimum of two trenches are dug – the first where the home's sewer exits the foundation of the house ("back" hole, MH Tr. 8), and the second where the sewer connects to the city's main sewer in the street ("front" hole, MH Tr. 9). The old sewer is then disconnected from the home's foundation and at the street, and a large cable is threaded through the old sewer. On one end, the operator connects the cable to a splitting "shark" cone, and the other end of the cable is connected to a large hydraulic pulling machine. MH Tr. 5-6; AI 0187-92. The operator connects a new plastic sewer line, consisting of several shorter pipes "fused" together, to the back of the splitting cone and engages the pulling machine, simultaneously splitting or "bursting" open the old pipe, while laying or "pulling" the new plastic pipe in its place. MH Tr. 5-6. The pulling process loosens and

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disturbs the soil as the old pipe is burst open. MH Tr. 38-39. After the new sewer pipe is in place, workers connect the new pipe to the home's connection, and to the main sewer service in the street. MH Tr. 16. The sewer line is then inspected (*see* AI 0357), and the trench filled in. The entire process can be reduced to four core activities: (1) trench digging; (2) set-up and operation of the hydraulic pulling machine; (3) fusing short pipe sections into one new sewer line; (4) connecting the newly laid sewer to the home's service and to the city's main sewer line. Of these core activities, Felton could dig trenches or connect the newly laid pipe to the home or main sewer. He could not operate the hydraulic pulling machine unsupervised, nor did he know how to fuse pipe. MH Tr. 82.

C. Soil and Trench Conditions Prior to Incident.

The trench dimensions at the jobsite were approximately 6 feet long, 21 inches wide², and 7-10 feet deep³ before the cave-in. MH Tr. 10-13. Three of the four sides of the trench were earth, while the fourth side was the concrete foundation of 3039 36th Ave SW. Felton and Numrich dug the trench a week and half before January 26, 2016. MH Tr. 57. During their initial investigation, Department investigators created a side and top view sketch of the trench post cave-in (AI 0057-58); the sketch shows approximate location of the shores placed by Alki Construction, the "dirt line" or topography of the soil post cave-in, and distance measurements.

A jobsite's environmental factors dictate trench-shoring requirements. Factors include soil condition and soil type, the depth of the trench, whether the soil was "previously disturbed", and surrounding geography of the trench location.

² See AI 0019

³ Henry states that before the cave-in, the bottom of the trench was sloped. MH Tr. 10. Henry saw Felton standing in the trench with his head "a foot, foot and half from the top." *Id.* The bid performed by Alki Construction specifies an 8ft trench. AI 0144.

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Normally a trench would be “open” (fully dug) for two to 3 days. MH Tr. 15. The longer a trench is open, the less stable it becomes. *Id.* The trench at 3039 36th Ave SW was open a week and a half, which is very unusual. *Id.* Department inspectors and Seattle Fire Department personnel designated the soil type at the worksite as “Type C” soil. AI 0039-44; *see also* WAC 296-155-66401. Type C soil is the least stable soil, is most prone to cave-in dangers, and requires the most rigorous shoring standard.⁴ The Department and SFD use visual observation, manual testing, and assumptive protocol⁵ to determine soil type. All three methods were used to categorize the soil type at the job site as Type C soil. Numrich was aware the soil at the job site was Type C soil, and the type of soil in that area is widely known in the industry community. MH Tr. 23.

Soil saturation is another factor that affects soil stability. It had been raining for several days before January 26, 2016. MH Tr. 15, 60; AI 0044-48, 185. Conservative estimates show rain fall of 3.24 inches in the 7 days leading up to and including January 26, 2016. AI 0185. Soil that is wet or saturated is much more likely to act as a fluid during a cave-in – flowing around and underneath barriers. GS Rec. 00:46:40-00:51:30; 01:15:30-01:16:30.

Alki Construction placed two SpeedShore brand shores against an 8ft by 4ft “fin board” in the trench to hold back the earth in the trench. AI 0057-58. Department inspectors and Seattle Fire Department universally agree that two shores were insufficient trench shoring based upon

⁴ WAC 296-155-657(3)(b)-(d) requires an employer to select and construct a protective system: in accordance with the tabulated data from the manufacture’s shores being used (Option 2); from other similarly reliable tabulated data (Option 3); or otherwise approved by a registered professional engineer. Tabulated data for SpeedShores, the product used by Alki Construction, is found on at AI 0200 of the KCPP. Table VS-3 Type “C-60” Soil dictates that shoring in a 0-10ft trench shall be spaced no more than six feet horizontally, and four feet vertically. AI 0205. The bottom cylinder shall be a maximum of four feet above the bottom of the excavation. AI 0206 n.6. Examples of typical installation are found at AI 0207.

⁵ Soil that is previously disturbed is assumed to be Type C soil. In this circumstance, the soil was both assumed to be Type C because it was previously disturbed, and confirmed to be Type C by manual and visual testing by Department investigators.

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the trench dimensions, soil type, and water saturation levels. Gary Hicks, regional sales manager for SpeedShore opined as follows:

Due to the fact you are now jacking off the house foundation – this now becomes a site specific application from MFG Tab Data or your refer to what the OSHA requirements say. OSHA and MFG Tab Data is based off pressurizing off dirt walls, not basement walls. The question now become [sic] will the basement wall with stand [sic] as per OSHA requirements the 18,000 pounds of minimum pressure required form hydraulic shoring.

See attached picture on shoring 4 sided pit application – you [sic] application *will require all 4 sides to be shored, you cannot leave vertical standing ends.*

If you could classify this as C60 soil and had soil walls on all 4 sides that you could pressure off of it would take from our Tab Data four hydraulic shores. Two shores in each direction, installed 2 feet from the top and the cylinder now [sic] more than 4 feet of the bottom.

AI 0153. (emphasis added).

Hicks states that because of the unusual shoring application (off of a cement foundation) the company's engineering data (Tab Data) could not apply, and stated that all four sides of the trench would need to be shored. If all four sides of the trench were dirt, the Tab Data for SpeedShore would require four hydraulic shores instead of the two shores placed by Alki Construction. The Department investigator Erich Smith reached the same independent conclusion when asked about shoring requirements for the trench. AI 0358-59.

This investigation has produced no plausible scenario where Alki Construction's shoring on January 26, 2016 was adequate under any known or recognized shoring standard.

D. Events Immediate Prior to and Including Incident.

Work began at the job site between 8:00am – 8:30am, when Henry and Felton arrived together. MH Tr. 43. Numrich arrived at approximately 8:30am – 9:00am. MH Tr. 52. The job was behind schedule after machine failures and worker (Henry's) sickness delayed work, and the

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home owners were frustrated. MH Tr. 62. Numrich begin fusing pipe sections together, which took approximately 45 minutes. At the same time Henry set the "plate" for the hydraulic pulling machine, which determines the angle the new pipe is pulled at. MH Tr. 45. After Numrich complete fusing, Henry, Felton and Numrich carried the new sewer line into position to prepare "pulling" the new line. MH Tr. 46. Once the new sewer was positioned, and the plate set, Henry started the hydraulic pulling machine, which took about 25 minutes to complete operation. Felton then entered the back hole to make the connection with home's service. Felton used a vibrating tool (Sawzall) in the trench for several minutes. Numrich comment to Henry stating, "he's vibrating the heck out of the ground." MH Tr. 39. Numrich was aware that vibrating tools would disturb the ground in a trench and that their use "wasn't a good thing." MH Tr. 42. Numrich made no attempt to stop Felton from operating the vibrating tool in the trench. MH Tr. 41-42. Numrich then left the jobsite to buy lunch for himself and his workers. The time was approximately 10:25

At approximately, 10:30am – 10:35am Henry checked on Felton at the back hole. MH Tr. 9. Felton replied that everything was going fine. *Id.* Henry left to "bed" his pipe in the front hole, which is to secure the newly connected sewer line by re-burying it. MH Tr. 10. After five minutes, Henry went back to check on Felton, and realized that Felton had been buried in the trench. MH Tr. 10. Henry first called Numrich, then 911. MH Tr. 91. Seattle Fire Department dispatched at 10:48am, with first units on scene at 10:53am. AI 0229. At 11:20am, rescue operations transition to recovery. AI 0231. The magnitude of earth that caved-in was so large that Felton's body was not recovered from the trench until 2:15pm, even with the assistance of industrial vacuum trucks. AI 0233.

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E. Numrich Grossly Deviated from Industry Practice By Failing to Properly Shore a Trench He Knew Felton Would Be Working In.

Based upon the above facts and those in the KCPP, this Office believes that Numrich failed to be aware of or ignored the substantial risk that the trench at 3039 36th Ave SW would cave-in, that he failed to appropriately shore the trench per industry standard, and that his conduct in its totality constituted a gross deviation from the industry standard of care. Several facts establish a patent risk of collapse and Numrich's knowledge of those risks:

- (1) The soil type at the job site was Type C soil, which is the least stable and most prone to collapse;
- (2) The soil was heavily saturated from several days of rain, making the trench more prone to collapse;
- (3) The trench had been "open" for approximately 10 days (1 ½ weeks), making the trench more prone to collapse;
- (4) The trench was disturbed from vibrations of the hydraulic pulling machine, and of a Sawzall cutting tool;
- (5) Vibrations within a trench increase the likelihood of trench collapse;
- (6) The shoring in the trench grossly deviated from the industry standard, by:
 - a. Failing to use at a minimum four hydraulic shores;
 - b. Failing to place two shores a maximum four feet from the bottom of the trench, and two shores two feet from the top of the trench;
 - c. Failing to shore the length of the trench where Felton was working to connect the new service (*see* AI 0057-58);
- (7) The failure to properly shore the trench led to its cave-in;
- (8) Numrich was aware that the soil was Type C;

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- (9) Numrich knew that Felton would be working in and around the trench because the connection work that Felton performed was one two tasks that Felton was trained to do;
- (10) Numrich was aware of the soil saturation conditions;
- (11) Numrich knew that Felton operated a Sawzall in the trench immediately prior to its collapse;
- (12) Numrich knew that the operation of a vibrating tool would increase the risk of a trench collapse;
- (13) Numrich knew that Felton had a history of work related accidents and a previous traumatic brain injury.

IV. CONCLUSION

This Office remains available to answer questions regarding this investigation, to provide additional summary or explanation of the above factual recitation, or to further discuss investigation methodology. Department investigators or personnel may be contacted care of:

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Division of Labor & Industries
800 5th Ave, Suite 2000
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Ph: (206) 464-5390
Cell: (206) 552-3027
Email: codyc@atg.wa.gov

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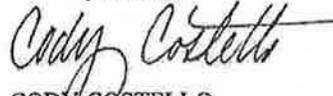
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Page 11

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DATED this 8th day of December, 2017.

ROBERT W. FERGUSON
Attorney General



CODY COSTELLO
Assistant Attorney General
WSBA No. 48225

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ⁱⁱ Mr. Numrich was not contacted by this office during any point in this investigation.

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State v. Phillip Numrich
18-4-00255-5 SEA

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNT 1

Appendix C

(Information)

FILED

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KING COUNTY
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CASE NUMBER: 18-1-00255-5 SEA

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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;

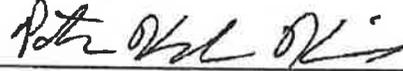
INFORMATION - 1

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

3 DANIEL T. SATTERBERG
4 Prosecuting Attorney

5 By:

6 

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

9 By:

10 

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

APPENDIX D

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

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

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

I. INTRODUCTION

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

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

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

10 II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Response at 13 (emphasis supplied).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 The State has presented nothing to suggest that the legislature intended for the more general
16 statute (manslaughter) to control in this type of situation. To the contrary, the WISHA statute was
17 first enacted in 1973. The statute includes no indication – either directly or impliedly – that it
18 intended for the more general manslaughter provisions to remain applicable in cases involving
19 workplace deaths. In fact, as the State appears to concede, there is nothing within the statute or
20 legislative history which supports the State's current position. Thus, there is no express evidence
21 that the Washington legislature intended for the general manslaughter statute to apply to situations
22 where an employer's violation of a labor safety regulation results in the death of a worker.
23

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

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

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

15 Without citation to any authority, the State asserts "[p]rior to the enactment of
16 OSHA/WISHA, state prosecutors were free to bring felony charges against employers under
17 existing state laws criminalizing, *inter alia*, homicide and assault." Response at 20 (citing no
18 cases or other authority). Undersigned counsel has reviewed scores of cases addressing the
19 manslaughter statute in effect before WISHA was passed in 1973³ and has been unable to locate
20 a single reported Washington appellate decision involving a homicide prosecution against an
21 employer as a result of the death of an employee due to a safety violation. The State concedes
22 as much. See Response at 30 ("the filing of these charges against [Numrich] does appear to be

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

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

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

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

16 29 U.S.C. 651(b)(11) (emphasis supplied).

17 “OSHA requires states to comply with its rules or else enact safe workplace standards
18 at least as effective as OSHA in ensuring worker safety.” *Afoa v. Port of Seattle*, 176 Wn.2d
19 460, 470 (2013). As the State correctly notes, one of the stated legislative reasons for OSHA
20 was to ensure that there was a “standard applicable” in the event that an “employee were killed
21 or seriously injured on the job.” *State’s Response* at 20 (*quoting* S.Rep.No. 91-1282, at 9
22 (1970), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92ND CONG.,
23 LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971).

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

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

5 The legislature finds that personal injuries and illnesses arising out of
6 conditions of employment impose a substantial burden upon employers and
7 employees in terms of lost production, wage loss, medical expenses, and
8 payment of benefits under the industrial insurance act. Therefore, in the public
9 interest for the welfare of the people of the state of Washington and in order to
10 assure, insofar as may reasonably be possible, safe and healthful working
11 conditions for every man and woman working in the state of Washington, the
12 legislature in the exercise of its police power, and in keeping with the mandates
13 of Article II, section 35 of the state Constitution, declares its purpose by the
14 provisions of this chapter to create, maintain, continue, and enhance the
15 industrial safety and health program of the state, which program shall equal or
16 exceed the standards prescribed by the Occupational Safety and Health Act of
17 1970 (Public Law 91-596, 84 Stat. 1590).

18 RCW 49.17.010. The laws enacted under WISHA in 1973 constitute Washington's
19 comprehensive worker safety regulatory framework:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Supreme Court noted that a prosecutor is permitted to determine how to proceed when two
2 statutes include different elements or differing burdens of proof. *See id.* at 193.⁵

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

13 The prosecutor has offered no valid justification for the indiscriminate charging decision
14 in this case. Even though there have been thousands of workplace fatalities in Washington
15 since 1973, the prosecution has offered no explanation – and certainly no just or reasonable
16 explanation – for the decision to charge an employer in this case with the crime of Manslaughter
17 in the Second Degree. Here, the prosecutor has decided to rely upon “discretion” in an attempt
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20 ⁵ The *Fountain* court overruled *State v. Zornes*, 78 Wn.2d 9 (1970), to the extent that it relied upon a
21 claim under the Fourteenth Amendment. *See Fountain*, 116 Wn.2d at 192-93. The court did not overrule
22 *Zornes* to the extent that it relied upon Washington Constitution Article 1, Section 12. *See id.* at 193.
23 Rather, when considering the defendant's claim, the Washington Supreme Court emphasized that the
prosecutor did not act discriminately, and equal protection was not violated because the prosecution was
required to prove its case under the “much more difficult burden to sustain.” *Id.* at 194. “The
prosecutor's discretion would be limited by this consideration; thus, there would be no equal protection
violation.” *Id.*

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

3 **III. CONCLUSION**

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

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

15 DATED this 20th day of June, 2018.

16
17 

18 TODD MAYBROWN, WSBA #18557
19 Attorney for Defendant

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


Todd Maybrown, WSBA #18557

*DEFENDANT'S REPLY IN SUPPORT OF MOTION
TO DISMISS COUNT 1 (MANSLAUGHTER) – 23*

Allen, Hansen, Maybrown
& Offenbecher, P.S.
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Seattle, Washington 98101
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APPENDIX A

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WESTLAW Washington Criminal Jury Instructions

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

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

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

Washington State Supreme Court Committee on Jury Instructions

Part V. Crimes Against Life
WPIC CHAPTER 25. Homicide

WPIC 25.02 Homicide—Proximate Cause—Definition

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

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

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

NOTE ON USE

Use bracketed material as applicable.

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

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

COMMENT

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

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

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

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

[Current as of December 2015.]

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WPIC 25.03 Conduct of Another

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

Washington State Supreme Court Committee on Jury Instructions

Part V. Crimes Against Life
WPIC CHAPTER 25. Homicide

WPIC 25.03 Conduct of Another

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

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

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

NOTE ON USE

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

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

COMMENT

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

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

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

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

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

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

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

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

For a general discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses— Introduction).
[Current as of December 2015.]

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APPENDIX E

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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
	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 **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

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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
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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

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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

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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

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

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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).

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

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

Appeal No. 18-1-00255-5 SEA

ORIGINAL

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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
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14 
15 Honorable John H. Chun
Superior Court Judge

16 Presented by:

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19 _____
20 Todd Maybrow, WSBA #18557
Attorney for Defendant

21
22 Copy Received; Approved as to Form:

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

APPENDIX G

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

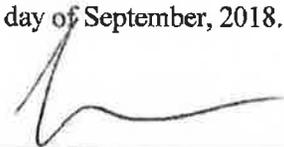
Defendant.

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 Denying Defendant's Motion to Dismiss Count 1 and Certifying the Issues Pursuant for Review Pursuant to RAP 2.3(b)(4) filed on August 23, 2018. A copy of the decision is attached to the Notice as Appendix A.

RESPECTFULLY SUBMITTED this 14th day of September, 2018.



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

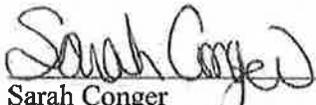
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CERTIFICATE OF SERVICE

CERTIFICATION

I hereby certify that on September 14, 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 type="checkbox"/> Email <input checked="" type="checkbox"/> Electronic Delivery (per KCLR 30 via KCSC e-filing system)
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

By: 
Sarah Conger
Office Manager/Head Legal Assistant

APPENDIX A

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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*

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

11 DATED this 23 day of August, 2018.

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

16 Presented by:

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19 Todd Maybrown, WSBA #18557
20 Attorney for Defendant

21
22 Copy Received; Approved as to Form:

23
24 Patrick Hinds, WSBA #34049
25 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

APPENDIX H

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON



TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

October 1, 2018

LETTER SENT BY E-MAIL ONLY

Todd Maybrown
Cooper David Offenbecher
Allen Hansen Maybrown & Offenbecher, PS
600 University Street, Suite 3020
Seattle, WA 98101-4105

Patrick Halpern Hinds
King County Prosecutor's Office
516 3rd Avenue
Seattle, WA 98104-2390

Re: Supreme Court No. 96365-7 - State of Washington v. Phillip Scott Numrich
King County Superior Court No. 18-1-00255-5 SEA

Counsel:

Both a motion for discretionary review and a statement of grounds for direct review were received and filed on September 28, 2018.

The motion for discretionary review is set for consideration on the Supreme Court Commissioner's November 1, 2018, Motion Calendar. The motion will be determined without oral argument unless a written request for oral argument is served and received for filing by October 18, 2018. The parties are directed to RAP 17.5(a) which provides that "the movant, and any person entitled to notice of the motion who has filed a response to the motion, may present oral argument on a motion to be decided by a commissioner or the clerk."

Any answers to the motion for discretionary review and the statement of grounds for direct review should be served and filed by October 18, 2018. Any reply to any answer to the motion for discretionary review should be served and received for filing by October 26, 2018.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Lennon".

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:as



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 SCt 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

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

March 08, 2019 - 4:19 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_Exhibit_20190308161054SC245577_1008.pdf
This File Contains:
Exhibit
The Original File Name was Appendix 01 to 180.pdf
- 965668_Motion_Discretionary_Review_20190308161054SC245577_9696.pdf
This File Contains:
Motion for Discretionary Review - Discretionary Review Superior Ct.
The Original File Name was Motion for Discretionary Review.pdf
- 965668_Other_20190308161054SC245577_2797.pdf
This File Contains:
Other - Appendix to Motion for Discretionary Review
The Original File Name was Appendix 181 to 323.pdf
- 965668_State_of_Grounds_for_Direct_Rvw_20190308161054SC245577_2429.pdf
This File Contains:
Statement of Grounds for Direct Review
The Original File Name was Statement of Grounds for Direct Review.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:

We are designating both Exhibit and Other because we had to split the appendix into two documents because of the size.

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 20190308161054SC245577

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

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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 MOTION
TO COMPEL DISCOVERY

I. INTRODUCTION

COMES NOW the Defendant, Phillip Numrich, by and through his undersigned counsel, and hereby moves this Court to compel discovery from the State. As discussed below, the defense has made a colorable claim that the State's Motion to Amend is the product of vindictiveness and contrary to the due process clauses of the United States Constitution and Washington Constitution.

II. BACKGROUND¹

Defendant adopts and incorporates the factual statement set forth in the Defendant's Opposition to State's Belated Motion to File Amended Information. A few additional facts are of particular relevance to this claim:

¹ These factual claims are supported by the Declaration of Todd Maybrown.

1 On October 18, 2018, the same date that the State had been ordered to file its response to
2 defendant's motion for discretionary review, DPA Hinds sent defense counsel an email in which
3 he claimed that "the State needs to set a hearing to amend the Information in Mr. Numrich's case
4 now." Maybrow Dec. App. I. Defense counsel promptly responded to his email message and
5 explained:

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

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

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

21 *Id.*

22 Nevertheless, the State filed pleadings in the Washington Supreme Court that included the
23 following argument during the closing section of its brief: "Here, the State intends to add a count
of Manslaughter in the First Degree to the charges against Numrich. The State's motion to
amend the Information is in the process of being scheduled and there is no basis to conclude
that it will not be granted." State's Response at 18. The State made a conscious decision not
to advise the Washington Supreme Court of the defendant's objection to its tactics.

1 In addition, the State filed in the Washington Supreme Court a declaration that was
2 purportedly signed by DPA Hinds on October 16, 2018. *See Maybrown Dec. J.*² In this
3 declaration, DPA Hinds claims: “The State’s motion to amend is not being brought to retaliate
4 against the defendant for seeking discretionary review, to gain advantage in the appellate
5 litigation, or for any other improper purpose.” *Id.*

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

11 Although the defense has requested discovery relevant to these issues, the State has flatly
12 refused to disclose any of this information. Accordingly, the defense seeks discovery to contest
13 the State’s unsupported claims. This discovery is reasonably calculated to disclose facts pertinent
14 to the defendant’s claim that the prosecutor’s motion to the amend is, in fact, the product of
15 vindictiveness.

16 III. DISCUSSION

17 A. Legal Authority in Support of Motion to Compel Discovery.

18 Washington Court Rules and case law recognize that pre-trial discovery is the
19 foundation for all trial and pre-trial preparation. CrRLJ 4.7; *State v. Yates*, 111 Wn.2d 793, 797
20 (1988) (citing Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure*
21 77 (West Pub’g. Co., ed. 1971)). Accordingly, Washington law requires comprehensive pre-
22

23 ² 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 trial discovery to minimize surprise and to allow attorneys to provide effective representation.
2 *Id.*; see also *State v. Dunivin*, 65 Wn.App. 728, 733 (1992). This Court has broad authority to
3 enforce the discovery rules and to craft appropriate remedies for violation of the rules. CrRLJ
4 4.7(h)(7)(i); *Dunivin*, 65 Wn.App. at 731.

5 The defense is now seeking discovery pertinent to its claim of vindictiveness. While the
6 Washington courts have rarely discussed this issue, other courts have noted that this type of
7 motion for discovery is appropriate where the defendant makes a “colorable” claim of
8 vindictiveness. See, e.g., *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009) (as with selective-
9 prosecution cases, defendant seeking discovery must “first come forth with ‘some’ objective
10 evidence tending to show the existence of prosecutorial vindictiveness”); *United States v.*
11 *Benson*, 941 F.2d 598, 611 (7th Cir. 1991) (to compel discovery on a vindictive prosecution
12 claim, a defendant “must show a colorable basis for the claim”); *United States v. Adams*, 870
13 F.2d 1140 (6th Cir. 1989) (where defendant was charged with tax offenses after filing sex
14 discrimination suit against federal agency, affidavit of former IRS employee that criminal
15 proceeding not ordinarily instituted for violation of this kind — that is, where underreported
16 income followed by voluntary amendment of return and payment of deficiency — sufficient to
17 justify discovery). See also *United States v. Armstrong*, 517 U.S. 456, 468 (2000) (viewing
18 “colorable basis” language as typical of the lower courts’ “consensus about the evidence
19 necessary to meet” the standard). The Washington courts have applied the “colorable basis”
20 standard when discussing claims of selective prosecution. See, e.g., *State v. Terrovonia*, 84
21 Wn.App. 417, 423 (1992). Accord *United States v. Sanders*, 211 F.3d 711 (2^d Cir. 2000) (“We
22 see no reason to apply a different standard to obtain discovery on a claim
23 of vindictive prosecution” than that for selective prosecution).

1 **B. This Court Should Order Reasonable Discovery**

2 In an effort to justify its highly unusual actions in this case, the State makes the bald
3 (but self-serving) claim: “The State’s motion to amend is not being brought to retaliate against
4 the defendant for seeking discretionary review, to gain advantage in the appellate litigation, or
5 for any other improper purpose.” Maybrow Dec. App. J. Yet, notably, the prosecutor has
6 presented nothing that could support these claims. The State has offered no explanation for the
7 timing of this motion. The State has offered no explanation for his failure to raise this issue in
8 any of the prior superior court proceedings over the past 10 months. And the State has refused
9 to present anything that could justify the filing of such a novel charge at this juncture of the
10 case. Rather, all of the objective evidence very strongly suggests that the State chose to file
11 this motion in direct response to the defendant’s attempts to obtain appellate review.

12 Here, given the circumstances surrounding the defendant’s motion, all of the objective
13 evidence points towards vindictiveness. The State’s own actions – and its decision to trumpet
14 this motion to amend in its pleadings to the Washington Supreme Court – clearly evidences the
15 State’s intentions. This Court should, in fairness, permit the defendant a fair opportunity to
16 contest DPA Hinds’ self-serving assertions in his declaration.

17 When considering this motion, this Court should reject any argument that the requested
18 materials are protected by the work-product doctrine. This Court also has authority to order the
19 production of information maintained within the prosecutor’s file. While such information might
20 be covered by the work-product doctrine, this information is subject to disclosure when the
21 opposing party has a “substantial need” of the materials. *See, e.g., Dever v. Fowler*, 63 Wn.App.
22 35 (1991).

1 In *Dever*, the prosecutor charged defendant Dever with arson. The prosecutor prepared
2 various documents in anticipation of trial but dismissed the case before trial. Dever then sued
3 the investigating fire marshal (and the city that employed him) for malicious
4 prosecution. When Dever attempted to discover the prosecutor's documents, the prosecutor
5 claimed work product protection. Yet the court of appeals concluded that such documents are
6 nevertheless discoverable if the party seeking discovery shows substantial need of the materials
7 and is unable to obtain the substantial equivalent of the materials by other means. *See id.* at 48.
8 This decision is ordinarily vested in the sound discretion of the trial court. *See id.*

9 Here, all of the circumstantial evidence contradicts the State's self-serving claim that
10 the late attempt to amend the charge is not vindictive. Accordingly, the defense must be
11 afforded the opportunity to take reasonable discovery regarding the State's unsupported claims.

12 IV. CONCLUSION

13 For the foregoing reasons, the defense respectfully requests that the Court order the
14 requested discovery.

15 DATED this 30th day of October, 2018.

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18  #40690
TODD MAYBROWN, WSBA #18557
COOPER OFFEENBECHER, WSBA #40690
Attorneys for Defendant

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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>
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Sarah Conger, Legal Assistant

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

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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 RESPONSE TO STATE’S
MOTION TO RECONSIDER
IMPOSITION OF SANCTIONS

ERRATA FILING

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1 **I. INTRODUCTION**

2 The State’s conduct in this case has resulted in an incredible amount of duplicative and
3 unnecessary work. According to the State’s recent declaration, it believed from the outset of this
4 litigation that Manslaughter in the First Degree would ultimately be an appropriate charge in this
5 case. Nevertheless, the State stayed silent as the defense and the Court labored under the
6 misimpression that the determination of the issues regarding Manslaughter in the Second Degree
7 were determinative in this case.

8 After months of litigation, the day the State’s brief was due in the Supreme Court, for the
9 first time the State notified the defense that it intended to add Manslaughter in the First Degree.
10 The State then signaled to the Supreme Court that discretionary review would be for naught
11 because Mr. Numrich would still face Manslaughter in the First Degree on remand. Despite this
12 Court’s effort to promptly certify and consolidate the Order on Motion to Amend to join the
13 existing appeal, the Washington Supreme Court Commissioner has ruled that Mr. Numrich must
14 completely perfect a second Motion for Direct Discretionary Review. On November 5, 2018, the
15 Commissioner issued a ruling that deferred action on Petitioner’s original Motion for Direct
16 Discretionary Review related to the Order certified by Judge Chun in August 2018. The ruling
17 recognized this Court’s November 1 certification of the Order on Motion to Amend but noted:

18 but that alone does not get the order before this court for consideration. If Mr.
19 Numrich wishes to seek discretionary review of the newly entered order, he must
20 timely file a separate notice for discretionary review and then a separate motion
21 for discretionary review, see RAP 2.1(a)(2) and RAP 2.3, and if he also seeks
22 review in this court, he must file a related statement of grounds for direct review.
23 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 ground for direct review or consider them together as companions.

1 Offenbecher Dec. App. A. Accordingly, the extra work that the defense must complete as a result
2 of the State's untimely motion to amend far exceeds what the Court and the parties contemplated
3 even at the time of the Court's November 1, 2018 Order awarding terms.

4 This Court should deny the State's Motion to Reconsider because the State's failure to
5 timely notify the defense and the Court of its intent to add Manslaughter in the First Degree has
6 resulted in the defense having to complete an inordinate amount of duplicative and unnecessary
7 work in a short period of time.

8 This Response is supported by the supporting Declaration of Cooper Offenbecher.

9 **II. DISCUSSION**

10 **A. This Court Has the Inherent Power to Impose Sanctions to Control
11 and Manage Its Calendar, Proceedings, and Parties**

12 Our Supreme Court has explained that the trial court's authority to impose sanctions is
13 broad:

14 Various court rules allow the imposition of sanctions. *E.g.*, CR 11, 26(g); CrR
15 4.7(h)(7). Sanctions, including attorney fees, may also be imposed under
16 the court's inherent equitable powers to manage its own proceedings. *In re Recall
17 of Pearsall-Stipek*, 136 Wash.2d 255, 266-67, 961 P.2d 343 (1998). Moreover,
18 where the court's inherent power is concerned, "[w]e are at liberty to set the
19 boundaries of the exercise of that power." *Id.* at 267 n. 6, 961 P.2d 343. Trial
20 courts have the inherent authority to control and manage their calendars,
21 proceedings, and parties. *See Cowles Pub'g Co. v. Murphy*, 96 Wash.2d 584, 588,
22 637 P.2d 966 (1981).

23 *State v. Gassman*, 175 Wn.2d 208, 210-11 (2012).

A finding of bad faith is sufficient, but not necessary for the imposition of attorney fees:
"appellate courts have upheld sanctions where an examination of the record establishes that the
court found some conduct equivalent to bad faith." *Id.* at 211 (*citing In re Recall of Pearsall-
Stipek*, 136 Wn.2d 255, 266-67 (1998)). *See, Gassman*, 175 Wn.2d at 209 ("we will uphold
sanctions if we can infer bad faith from the record before us").

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- Although the Chief Criminal Presiding Judge declined to pre-assign the case, the Court requested that the parties agree on a briefing schedule and coordinate with the criminal motions department to schedule a hearing on the motion to dismiss. *Id.*
 - The Court then signed a detailed three-page Order Setting Briefing Schedule that had been prepared by the State and agreed to by the defense. *Id.* At this time, both the defense and the State acknowledged that each party would seek discretionary review if that party lost the Motion:

7

8

1. CURRENT & FORTHCOMING MOTIONS:

9

a. **Known current and forthcoming motions:**

- 10
- 11
- i. **The parties will jointly move to continue CSH.**
 - ii. **The defendant has moved to dismiss Count 1 (Manslaughter in the Second Degree) on “general vs. specific statute” and equal protection grounds.**

12

b. **Anticipated forthcoming motions:**

- 13
- 14
- i. **At this time 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.**

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Id. at 2.

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- Thereafter, the State contacted the defense and requested an extension of the due date within which to file its Response from June 6 to June 13. The defense agreed and the Court signed an Order Amending Briefing Schedule prepared by the State and agreed to by the defense. Sub. 28 (6/1/18 Order Amending Briefing Schedule).¹
 - On June 13 the State filed a 33-page Response, plus appendices. Sub. 29.
 - On June 20 the defense filed its Reply. Sub. 30.

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¹ The 5/11/18 and 6/1/18 briefing schedule Orders are attached to the supporting Declaration of Cooper Offenbecher. These 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 criminal cases King County.

- 1 • On July 16 the State filed an 11-page “Surreply.” Sub. 33.
- 2 • On July 18 the defense filed a “Surreply.” Sub. 34.
- 3 • On July 23 the parties appeared for oral argument in front of Judge John
- 4 Chun. The hearing lasted an hour and five minutes. *See* Sub. 35A
- 5 (Clerk’s Minutes noting hearing from 1:26:56 to 2:32:04). The Court
- 6 took the matter under advisement, later informing the parties that it was
- 7 denying the defense motion.
- 8 • The State prepared a detailed 10-page proposed “Order Denying
- 9 Defendant’s Motion to Dismiss Count 1.” Offenbecher Dec. App. G;
- 10 Sub. 37.
- 11 • The defense submitted a detailed objection to the State’s proposed Order.
- 12 Sub. 36.
- 13 • The parties appeared in front of Judge Chun on August 23 and presented
- 14 argument on whether this issue should be certified for discretionary
- 15 review. *See* Sub. 38. The hearing lasted 22 minutes. *Id.* (Clerk’s Minutes
- 16 noting hearing from 1:30:00 to 1:52:10).
- 17 • Later on August 23, Judge Chun signed the Defendant’s Order Denying
- 18 Defendant’s Motion to Dismiss Count 1 and Certifying the Issues for
- 19 Review Pursuant to RAP 2.3(b)(4). Sub. 41.
- 20 • Consistent with the expectations of all parties and the Court, the defense
- 21 filed its Notice of Discretionary Review on September 14. Sub. 42.
- 22 • On September 27, 2018 the State filed a lengthy Motion to Amend
- 23 Conditions of Release. Sub. 47.
- On September 28 the defense filed in the Washington Supreme Court its
- Motion for Discretionary Review (20 pages plus appendices) and its
- Statement of Grounds for Direct Review (15 pages).
- On October 1 the parties appeared in Criminal Presiding in 1201. Judge
- Ferguson denied the State’s Motion to Amend the Conditions of Release
- and found that any violation of the conditions of release was not willful.
- Sub. 47.

22 Not once over these months of litigation, or during any of the preceding significant
23 hearings, or in any of the hundreds of pages of filings, did the State provide notice to the defense,

1 or Criminal Presiding Judge O'Donnell or then-Criminal Motions Judge Chun, that it was
2 contemplating adding a charge of Manslaughter in the First Degree. Rather, the defense and the
3 Court were misled to believe that the decision on Manslaughter in the Second Degree would be
4 the dispositive decision regarding the felony homicide charge under the general specific-rule.

5 **C. The State's Proffered Reasons for Its Delayed Realization**
6 **Regarding the Importance of Manslaughter in the First Degree are**
7 **Inexplicable and Inconsistent with the Overwhelming Evidence**

8 The State claims that its decision to Move to Amend in mid-October was the result of some
9 novel realization after reading the defense briefs to the Supreme Court:

10 Due to deadlines in other cases and personal matters, I did not start writing the
11 State's responsive briefing or even carefully read the defendant's Supreme Court
12 briefing until about the evening of October 11. When I did so, two things struck
13 me. First, it appeared to me that the defendant's argument that *Gamble* only
14 applied to first-degree manslaughter and that the Supreme Court needed to take
15 direct review specifically to "clarify" that it did not apply to second-degree
16 manslaughter was effectively a concession that the defendant's "general-specific
17 rule" argument would not apply if he was charged with first-degree manslaughter.
18 *See* Appendix F at 18-19; Appendix G at 6, 12. Second, it appeared to me that the
19 defendant's argument that discretionary review was appropriate under RAP
20 2.3(b)(4) largely depended on the assertion that, if he prevailed on the
21 interlocutory appeal, he would not be facing a trial on a felony charge. Appendix
22 F at 20.

23 Hinds Declaration ¶ 32.²

The State's proffered "realizations" do not withstand scrutiny.

² The State concedes its position was opportunistic. *See id* (noting that it "struck" the State that the defendant's argument that *Gamble* "did not apply to second-degree manslaughter was effectively a concession that the defendant's 'general-specific rule' argument would not apply if he was charged with first-degree manslaughter").

1 1. **The State’s Claim that the Defense Raised Some Novel Argument**
2 **about *State v. Gamble* for the First Time In Its Opening Briefs to**
3 **the Washington Supreme Court is Disingenuous and Completely**
4 **Contradicted by the Litigation History in this Case**

5 The State argues that the defense advanced arguments about *State v. Gamble*, 154 Wn.2d
6 475 (2005), for the first time in the Washington Supreme Court pleadings that caused the State to
7 decide to amend to add Manslaughter in the First Degree. *See* Hinds Declaration at ¶ 32.

8 The State omits any mention of the significant treatment of these issues throughout the
9 course of this case:³

10 **a. State’s June 13 Response**

11 The State first raised the issue of *Gamble* in its Response brief filed on June 13. *See, e.g.*
12 State’s Response to Defendant’s Motion to Dismiss at 10 (“the crime of second degree
13 manslaughter requires proof that the defendant had the mental statue of ‘negligence’ and proof that
14 this mental state specifically related to the risk of death to the decedent, *Gamble*, 154 Wn.2d at
15 468-69) (Appendix B to Hinds Declaration). *See also id.* at 12 (discussing *Gamble*).

16 **b. Defendant’s June 20 Reply**

17 On June 20, the defense filed a 23-page Reply which included the following response to
18 the State’s argument regarding *Gamble*:

19 Citing the decision in *State v. Gamble*, 154 Wn.2d 457 (2005), the State claims
20 that the offense of Manslaughter in the Second Degree requires proof that the
21 defendant’s mental state specifically related to the risk of death. *See* Response at
22 10-11. In *Gamble*, the Washington Supreme Court noted that Manslaughter in
23 the First Degree required proof that the defendant knew of, and disregarded, a
 risk that death might occur. Manslaughter in the Second Degree has no

³ The following sections include lengthy block quotations from prior pleadings and hearings. The defense would not ordinarily include such significant quotations, in the interest of brevity. However, it is impossible to appropriately respond to the State’s claim that these issues were never discussed – or were discussed in passing in a single footnote – without looking at the actual significant treatment these issues received. Mere citations or page references do not do justice to the amount of time that was devoted by the parties to discussing the defendant’s argument regarding *Gamble*’s inapplicability to Manslaughter in the Second Degree.

1 affirmative requirement that the defendant be aware of the risk of death. To date,
2 there is no reported decision which provides that this same analysis applies in the
3 negligence context. For, to prove criminal negligence, there is no need to prove
4 that the defendant had any awareness of the risk in question.

5 Defendant's Reply in Support of Motion to Dismiss Count 1 (Manslaughter) at 4, n.1 (Appendix
6 C to Hinds Declaration).⁴

7 **c. State's July 16 Surreponse**

8 On July 16, the State filed an 11-page Surreponse that contained a lengthy response to the
9 defense argument that *Gamble* did not apply to Manslaughter in the Second Degree, *including an*
10 *explicit recognition of Mr. Numrich's position that Gamble only applied to Manslaughter in the*
11 *First Degree:*

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

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

20 154 Wn.2d at 469 (emphasis in original). In this context, the Court would not
21 have referred to both the "recklessness" (the level of *mens rea* for first-degree
22 manslaughter) and "criminal negligence" (the level of *mens rea* for second
23 degree manslaughter) unless it intended its holding to apply to both. Moreover,
Washington State Supreme Court Committee on Jury Instructions has read the
logic of *Gamble* as applying equally to second-degree manslaughter. In its

⁴ The State conceded during oral argument to this Court on October 31 that it understood the defense argument regarding the inapplicability of *Gamble* to second degree manslaughter as early as when the defense filed its Reply brief in Superior Court on June 20:

The defense's argument, which was not raised until its reply, and then only—I believe only in a footnote, is that *Gamble*, which the State is sort of relying on in making that argument, only applies to manslaughter in the first degree. So it's not until that point in time that it's—up until that point in time the State has the—the—I guess the thought or the—the—is sort of considering, as it always does, what charges will we bring for trial.

Transcript of 10/31/18 Hearing on Motion to Amend at 5 (Appendix Q to Hinds Declaration). The State's current filings omit this acknowledgment.

1 Comments on both WPIC 10.04 (“Criminal Negligence—Definition”) and
2 WPIC 28.06 (“Manslaughter—Second Degree—Criminal Negligence—
3 Elements”), the Committee indicated that, under *Gamble*, in the context of a
4 charge of second-degree manslaughter, the definition of “criminal negligence”
5 given to the jury must specify that the object of the defendant’s *mens rea* was
6 the risk that death would occur. 2016 Comment to WPIC 10.04; Comment to
7 WPIC 28.06

8 **Finally, despite Numrich’s claim to the contrary, there are cases**
9 **subsequent to *Gamble* that have specifically held—in the second-degree**
10 **manslaughter context—that the object of the *mens rea* of the crime was the**
11 **risk that the victim might die. The clearest case on point is *State v. Latham*, 183**
12 **Wn. App. 390, 335 P.3d 960 (2014), which Numrich himself cites in his reply.**
13 **Numrich cites *Latham* for the proposition that “a person may act with criminal**
14 **negligence even if she is unaware that there is a substantial risk that a homicide**
15 **may occur.” Def. Reply at 4. However, that is precisely the opposite of what the**
16 **case actually held in the context of a second-degree manslaughter charge. In**
17 ***Latham*, the defendant argued that Nevada’s crime of voluntary manslaughter**
18 **was not legally comparable to Washington’s crime of second-degree**
19 **manslaughter because the *mens rea* elements of the two crimes were different.**
20 **183 Wn. App. at 405. In agreeing with the defendant, the court explicitly stated:**

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

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

State’s Surreply to Defendant’s Motion to Dismiss Count 1 at 9-10 (Offenbecher Dec. App.
D.)(emphasis supplied).

d. Defendant’s July 18 Surreply

Two days, later, the defendant filed a 7-page Surreply that contained further extensive
discussion of the applicability of *Gamble*:

Citing *State v. Gamble*, 154 Wn.2d 457, 468-69 (2005) and *State v. Latham*, 183
Wn.App. 390, 406 (2014), the State notes that in a manslaughter case, the State
must prove that a defendant failed to be aware of a substantial risk that a homicide
occur. Surreply at 10 (*quoting Latham*, 183 Wn.App. at 406). The State’s
discussion of this point, and characterization of it as “proof of the defendant’s
mental state *vis-à-vis* the death of the victim” (State’s Surreply at 9) gives off

1 the impression that there is some higher burden – even a *knowledge* requirement
2 – placed on the State in a manslaughter prosecution. But the critical word in the
3 negligence definition in the context of a manslaughter case is that the defendant
4 “*failed* to be aware” of the risk that a death would occur. This is not a heightened
5 requirement or an additional element. It is simply an absence of knowledge. The
6 “defendant’s mental state *vis-à-vis* the death of the victim” – as the State puts it –
7 *is nothing*.⁵ The critical question under the general/specific rule is not whether
8 the elements are different, but whether they are concurrent – *i.e.*, whether it is
9 possible to violate the more specific statute, without violating the manslaughter
10 statute.

11 Defendant’s Surreply Re Motion to Dismiss at 7 (Offenbecher Dec. App. E)(emphasis in original).

12 **e. July 19 Hearing on Motion to Dismiss In Front of Judge Chun**

13 Then at the July 19 hearing in front of Judge Chun on the Defendant’s Motion to Dismiss,
14 the issues surrounding *Gamble* and its applicability to Manslaughter in the First Degree consumed
15 a significant amount of time. Mr. Maybrown talked at length during his opening argument about
16 *Gamble*:

17 [TODD MAYBROWN]

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

23 * * *

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

**So the reason *Gamble* doesn’t work in a manslaughter 2 case is because
there’s an absence of a mental state.** You’re basically responsible because
you failed to be aware. And we know that’s right if we look at *Gamble* because

⁵ In discussing these statutes, the State now seems to concede that both statutes contain the same causation requirement.

1 – actually, there’s a very helpful concurrence by Justice Chambers, and it
2 basically answers the question here.

3 Justice Chambers was talking about – and this is at the last page of *Gamble*,
4 which in my reading is 476 going over to 477. And this is a short occurrence,
5 and he says: “I write separately to say I concur in the majority.” But let me
6 explain what’s going on here. And he says: “Under the statutory law today,
7 either second degree manslaughter” – the charge we’re talking about today – “a
8 Class B felony or the much more serious charge of second degree felony murder,
9 a Class A felony, may be charged for a negligent assault when the assault is in
10 the death of another.

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

21 **And that’s why in *Henderson and Latham*, the other cases they cite, there’s
22 some dicta which suggests maybe *Gamble* applies in manslaughter in the
23 second degree. I don’t think I could find any court that’s given that
instruction in a case. I couldn’t find one. And I don’t think that I could in a
straight face say you have to be aware of something in this situation when it’s a
failure to be aware. I don’t understand how you would do that. And that’s why
the State gets so tied up in knots.**

Transcript of 7/19/18 Hearing at 13-16 (Offenbecher Dec. App. F)(emphasis supplied). In total,
Mr. Maybrown spent three full transcript pages arguing about why *Gamble* did not apply to
Manslaughter in the Second Degree.

Then, counsel for the State Mr. Hinds spent more than two transcript pages talking about
Gamble and responding to Mr. Maybrown’s argument about the inapplicability of *Gamble* to
Manslaughter in the Second Degree:

[PATRICK HINDS]

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

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

9 Second, the committee – the Washington State Supreme Court committee on
10 pattern instructions clearly interprets *Gamble* as applying to manslaughter in the
11 second degree. It's clear from reading their notes in the comments. It's clear
12 from the definition of criminal negligence and the definition for manslaughter
13 in the second degree that they interpret *Gamble* as holding that the *mens rea* is
14 not just about a generalized bad act or wrongful act. It has to be about the death
15 of the decedent.

13 And in the *Latham* case, that is the point of the court's ruling. That is how they
14 arrive at the decision they do. It's not dicta. In *Latham*, in that portion of the
15 decision the court was analyzing a Nevada statute and deciding whether it was
16 comparable to a Washington statute. And what the court found in finding that
17 they weren't comparable, is that under the Nevada statute, the *mens rea* didn't
18 have to be about the death of the decedent, it could be about some other bad act.
19 Whereas in Washington, the *mens rea* for manslaughter in the second degree,
20 the negligence has to be about the risk of death to the decedent, and that is the
21 reason they found those two statutes were not comparable.

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

22 Transcript of 7/19/18 Hearing at 27-29 (Offenbecher Dec. App. F)(emphasis supplied).

23 The State's pleadings omit any reference to the *Gamble* discussions at the 7/19/18 hearing.

1 **f. State's Proposed Order Denying Defendant's Motion to Dismiss**
2 **Count 1**

3 On August 22 the State presented a proposed Order Denying Defendant's Motion to
4 Dismiss. Offenbecher Dec. App. G; Sub 37. The proposed Order specifically discussed and
5 rejected the defendant's claim that *Gamble* only applied to Manslaughter in the First Degree:

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

10 *Id.* at 2, n.1.⁶

11 **2. The State's Claim that It Did Not Appreciate Until October 2018**
12 **Numrich's Assertion that if He Prevailed He Would Not Be Facing**
13 **a Felony Charge is Unbelievable**

14 The State's second proffered "realization" that caused it to decide to file Manslaughter in
15 the First Degree in October 2018 was that: "it appeared to me that the defendant's argument that
16 discretionary review was appropriate under RAP 2.3(b)(4) largely depended on the assertion that,
17 if he prevailed on interlocutory appeal, he would not be facing a trial on a felony charge." Hinds
18 Declaration ¶ 32. But this was obvious. Of course all parties understood that "if he prevailed on
19 interlocutory appeal, he would not be facing trial on a felony charge." It is beyond axiomatic that
20 when Mr. Numrich moved to dismiss the Manslaughter in the Second Degree charge and the only
21 other charge was the WISHA gross misdemeanor, if he prevailed, he would not be facing the
22 felony charge.

23 ⁶ The Court did not sign the State's Proposed Order, but rather signed the Defendant's proposed Order Denying
the Defendant's Motion to Dismiss Count 1 and Certifying the Issues for Review Pursuant to RAP 2.3(b)(4).

1 **D. The State’s Claim that it Remained Silent About a Manslaughter in**
2 **the First Degree “Hold Back” is Confounding**

3 Prosecutors are never shy about telling defense attorneys about potential hold back
4 charges. Prosecutors do this all the time because it persuades defendants to enter guilty pleas and
5 resolve cases with less litigation risk and less expenditure of resources.

6 The State argues that it “only addresses potential amendment to the charges if” (1) the State
7 is extending a plea offer; (2) the case is actually being set for trial; (3) something happens that
8 brings the issue up; or (4) the defendant’s attorney raises the issue. Motion to Reconsider at 7.
9 The State’s clear suggestion is that discussing potential amendments is somehow a rare occurrence.
10 But undersigned counsel have had scores of cases with the King County Prosecutor’s Office
11 where, during an initial meeting with the DPA identical to the February meeting in this case, the
12 prosecutor indicates that the State has the ability to add charges “X, Y, or Z.”

13 The State’s repeated insistence that it did not mention the amendment because the case had
14 not been “set for trial” glosses over the true point at which prosecutors threaten to amend charges.
15 It is not the setting of trial *per se* but the time at which the State exposes itself to (1) litigation risk;
16 and (2) expenditure of resources.⁷ But in this case, whether the case was “set for trial” or still at
17 the “case scheduling” stage is of no moment. Everyone recognized that the parties were in full

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20 ⁷ In some circumstances, this occurs at the time of trial setting. For example, as this Court well knows, in King
21 County most cases are not assigned to a particular DPA at the time of filing, but rather are handled during the case
22 scheduling stage by the Early Plea Unit (“EPU”) prosecutor responsible for a particular class of cases (i.e. SAU or
23 DV). In most of those cases, there is often little to no significant litigation that occurs during the case scheduling
stage. Rather, the parties are negotiating without expending significant resources, which is the purpose of the EPU
program. In such instances – which constitute the vast majority of criminal cases in King County - the setting of
the trial date and the assignment of a trial DPA marks the time at which the State must put more time into a case
and exposes itself to more risk. The State has an understandable interest in resolving cases without having to
assign a trial DPA, spend time responding to motions, setting up interviews, and exposing itself to the risk of
adverse legal rulings or verdicts.

1 litigation mode with respect to this novel legal issue. There was no negotiating occurring, because
2 the February 2018 meeting between counsel had been fruitless.

3 This is one of those circumstances where the “setting of the trial date” is not the tipping
4 point. First, this case was preassigned to a team of two experienced DPAs: a Senior Deputy
5 Prosecuting Attorney who has handled this case since pre-filing, and a second DPA who has also
6 appeared for the State at every substantive hearing. Second, the State was forced to litigate a legal
7 issue that absorbed substantial resources and would have resulted in the dismissal of the most
8 serious charge if successful.

9 Any reasonable, objective observer would conclude that the State would have notified the
10 defense of its Manslaughter in the First Degree “hold back” before: devoting the substantial
11 resources of these two DPAs to this matter; engaging in months of litigation, involving countless
12 hours of research and writing, hundreds of pages of pleadings; accepting the risk of the dismissal
13 of the most serious count; and facing a likely interlocutory appeal.

14 The State repeatedly asserts that “the defense had never asked the State whether it was
15 considering amending charges for trial.” Motion to Reconsider at 6. But the State misses the forest
16 for the trees. The entire gravamen of the defense’s position – articulated to the State during the
17 February meeting and over the next several months of litigation – was that the State had grossly
18 overcharged this case. Indeed, even the topics identified by the State on page 2 of the Hinds
19 Declaration as being discussed at the February 2018 meeting between counsel – i.e., (1) why the
20 State had filed criminal charges; (2) why the State had filed a felony charge; (3) why the State had
21 filed charges against the defendant as an individual – reflect an implied assumption by the defense
22 that this case was overcharged, both legally and equitably. The defense believed that the WISHA
23 misdemeanor crime was the applicable statute. The Manslaughter in the Second Degree charge

1 represented the first time in Washington history that an employer had ever been charged with a
2 felony homicide crime for a workplace safety accident. As such, the idea of a further extraordinary
3 amendment to Manslaughter in the First Degree – a Class A Felony with a standard sentencing
4 range of 6.5 to 8.5 years – was not even on counsel’s radar.⁸ Implied in counsel’s plea to the State
5 to consider a lesser charge was the obvious – please tell me if you are considering yet *an even*
6 *more serious felony homicide charge.*⁹

7 **E. The State’s Actions Have Resulted in the Defense Having to**
8 **Complete Double the Work to Perfect these Issues in the Supreme**
9 **Court**

10 The State argues that it is possible that the Supreme Court’s decision will establish that the
11 motion to amend “did not have any real impact on the motion for discretionary review.” Motion
12 to Reconsider at 10. The State argues that on one hand, the Supreme Court could grant review on
13 the question of the application of the general-specific rule to both first and second degree
14 manslaughter, or on the other hand, the Supreme Court could deny discretionary review. *Id.* But
15 the State’s position ignores the fact that in order to get these issues in front of the Supreme Court
16 Commissioner, the defense must perfect an entire second Motion for Direct Discretionary Review,
17 including filing a second Notice of Discretionary Review, paying a second filing fee, filing a
18 second Motion for Discretionary Review (20 page limit), filing a second Statement of Grounds for

19 ⁸ Notably, despite the State’s claim that the “information” supporting probable cause for Manslaughter in the First
20 Degree was “contained in the Certification for Determination of Probable Cause and other discovery materials in
21 this case,” (Hinds Declaration at 2) the Certification very clearly states “there is probable cause to believe that
Phillip Numrich committed the crime of Manslaughter in the Second Degree...There is also probable cause to
believe that Phillip Numrich committed the crime of Violation of Labor Safety Regulation with Death Resulting.”
Certification for Determination of Probable Cause at 5 (Sub. 1). There is no mention of first degree manslaughter
or the elements thereof.

22 ⁹ Undersigned counsel have rarely – if ever – *sua sponte* asked a prosecutor whether there are any other more
23 serious charges that the State might add. Although prosecutors frequently threaten to add additional charges, it is
not generally prudent strategy to suggest the possibility or existence of additional charges by volunteering the
question.

1 Direct Review (15 page limit), requesting and preparing for a second oral argument, and attending
2 to the preparation and ancillary issues that accompany any big litigation project. Completing these
3 formal appellate filings – which require specific procedural and formatting nuances, including
4 tables of contents and authorities – is no small undertaking.

5 Whether the Supreme Court accepts both certified issues or not, the defense still must
6 complete double the work. If the State had signaled its amendment at an earlier point, these matters
7 could have been consolidated for certification by Judge Chun, and the defense could have
8 proceeded with a single Motion for Direct Discretionary Review.

9 **F. This Court’s Decision to Award Sanctions in the Form of Attorney
10 Fees Was Warranted and Far From an Abuse of Discretion.**

11 “Sanctions decisions are reviewed for abuse of discretion. A trial court abuses its
12 discretion when its decision is manifestly unreasonable or based on untenable grounds. *Gassman*,
13 175 Wn.2d at 210 (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d
14 299, 338 (1993)). This Court has not abused its discretion.

15 *Gassman*, relied on by the State, is a very different case than the *Numrich* case. In
16 *Gassman*, the trial court imposed attorney fees on the State when, on the day of trial, the State
17 moved to amend the information to allege the crimes had taken place on April 17, 2008. *Id.* at
18 210. Defense counsel objected on the ground that they had prepared alibi defenses for April 15,
19 2008. *Id.* But the only party whose attorney fee award was before the Court on appeal

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

1 *Id.* at 212–13. Given counsel’s concessions, the Court could not “infer any conduct
2 tantamount to bad faith in the record before [it] to support the court’s sanction.” *Id.*

3 Here, the State misled the defense and the Court into believing that this extensive litigation
4 would resolve the issues regarding the applicability of the general-specific statute to the
5 Manslaughter in the Second Degree charge. Apparently, however, the State had intended from the
6 outset that Manslaughter in the First Degree would be an appropriate charge if the case proceeded
7 to trial. The State did not notify the defense or the Court of this intention until the Superior Court
8 litigation had concluded – and then the State used the intended amendment to dissuade the
9 Supreme Court from accepting review. The State’s Amendment was done in a time and manner
10 such that it would improperly influence the appellate court. The State’s subsequent explanations
11 are entirely unavailing – the State knew full well that the defense would argue *Gamble* did not
12 apply to second degree manslaughter because the parties had actively litigated that very issue over
13 a period of months.

14 The State’s conduct has required the defense to perfect a second Motion for Discretionary
15 Review and it substantially prejudices and delays Mr. Numrich’s right to seek lawful appellate
16 review as intended by the Superior Court. The defense recognizes that attorney fees are rarely
17 granted in a criminal case. But this Motion to Amend is entirely different. This Motion to Amend
18 involves conduct tantamount to bad faith in light of the litigation history and the timing and manner
19 in which the Motion to Amend was made. Accordingly, fees are warranted.

1
2 **III. CONCLUSION**

3 For the foregoing reasons, and in the interests of justice, the Court should deny the Motion
4 to Reconsider Sanctions.

5 DATED this 30th day of November, 2018.

6
7 
8 _____
9 COOPER OFFENBECHER, WSBA #40690
10 TODD MAYBROWN, WSBA #18557
11 Attorneys for Defendant

10 I certify that on the 30th day of November,
11 2018, I caused a true and correct copy of
12 this document to be served on DPA Patrick
13 Hinds by E-Service and Email (to be sent
14 by attorney Cooper Offenbecher).

12 
13 Sarah Conger, Legal Assistant

1 specific rule to the Manslaughter in the Second Degree charge in this case would resolve the
2 question of the propriety of a felony homicide charge. Apparently, unbeknownst to the defense
3 and the Court, all the while the State was prepared to later add a charge of Manslaughter in the
4 *First Degree* if the case actually proceeded to trial.

5 Further, the State continues to mislead the Court regarding the procedural history of this
6 case. The State's recent declaration claims that it did not recognize the defendant's argument
7 regarding the inapplicability of *State v. Gamble*, 154 Wn.2d 457 (2005) until mid-October when
8 it read the defendant's opening briefs to the Supreme Court. Hinds Declaration ¶ 32. This is false.

9 The parties extensively addressed the *Gamble* issue throughout the course of this litigation
10 in:

- 11 1. The State's June 13 Response;
- 12 2. The defense's June 20 Reply ("In *Gamble*, the Washington Supreme Court noted
13 that Manslaughter in the First Degree required proof that the defendant knew of,
14 and disregarded, a risk that death might occur. Manslaughter in the Second Degree
15 has no affirmative requirement that the defendant be aware of the risk of death. To
16 date, there is no reported decision which provides that this same analysis applies in
17 the negligence context"). *Id.* at 4, n.1.
- 18 3. The State's July 16 Surreply ("In his reply, Numrich asserts that *Gamble*
19 applies only to Manslaughter in the First Degree and does not apply to
20 Manslaughter in the Second Degree"). *Id.* at 9-10.
- 21 4. The defense's July 18 Surreply ("citing *State v. Gamble*, 154 Wn.2d 457, 468-69
22 (2005) and *State v. Latham*, 183 Wn.App. 390, 406 (2014), the State notes that in
23 a manslaughter case, the State must prove that a defendant failed to be aware of a
substantial risk that a homicide occur ..."). *Id.* at 7.
5. The July 19 oral argument in front of Judge Chun (several pages of transcript
devoted to the respective sides arguing about the defense's position on *Gamble*,
including: "[Senior DPA]: **Let's talk about *Gamble* ...Mr. Maybrow doesn't
believe that *Gamble* applies to manslaughter in the second degree, and he's
entitled to his opinion**"). Transcript at 15-16 (emphasis added).

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6. State’s July 23 Proposed Order Denying Defendant’s Motion to Dismiss Count 1 (proposing that the Court rule: “Numrich asserts that the analysis and conclusion of *Gamble* applies only to first-degree manslaughter and not 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”). *Id.* at 2, n. 1.

The State’s pleadings omit any mention of the foregoing.¹ The claim that the State did not consider the *Gamble* issue until October is flatly contradicted by the evidence. It was central to this litigation and cannot be used as an excuse for the belated amendment.

The State’s notification that it would move to amend to add Manslaughter in the First Degree - on the day its brief was due in the Supreme Court - has thrown this litigation into a tailspin. Despite this Court’s best intentions in promptly certifying the Order on Motion to Amend for consolidation with the existing appeal, Mr. Numrich now has to completely perfect a new Motion for Direct Discretionary Review, thereby further delaying these matters, prejudicing his substantial rights, and incurring additional duplicative and unnecessary costs.

This Court should exercise its discretion to dismiss the whole case, dismiss individual charges, or alternatively reconsider its decision granting the Motion to Amend, as necessary to sanction the State for its mismanagement of this matter.

This Motion is Supported by (1) 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 on Motion to Amend; (2) Defendant’s Response to the State’s Motion to Reconsider Imposition of Sanctions, (3) Defendant’s Opposition to State’s Belated Motion to File Amended Information; and (4)

¹ The foregoing are small excerpts. *See generally* Defendant’s Response to State’s Motion to Reconsider Imposition of Sanctions at 8-15 (providing comprehensive summary, record excerpts, and citations addressing the parties’ extensive treatment of this issue).

1 Declaration of Todd Maybrow in Opposition to State's Belated Motion to Amend, and the records
2 and files herein. The entirety of the foregoing identified pleadings are all incorporated herein by
3 reference.

4 **II. DISCUSSION**

5 A. **CrR 8.3(b) Provides the Authority for the Court to Dismiss For**
6 **Governmental Mismanagement**

7 CrR 8.3(b) provides that:

8 **(b) On Motion of Court.** The court, in the furtherance of justice, after notice
9 and hearing, may dismiss any criminal prosecution due to arbitrary action or
10 governmental misconduct when there has been prejudice to the rights of the
11 accused which materially affect the accused's right to a fair trial. The court shall
12 set forth its reasons in a written order.

13 A long line of appellate decisions in Washington has interpreted this rule to provide for
14 dismissal of criminal charges where governmental misconduct, or even mismanagement, has
15 prejudiced the defense. For example, in *State v. Stephans*, 47 Wn.App. 600, 603 (1987), the
16 Court reasoned that dismissal is appropriate where there has been:

17 a showing of some governmental misconduct or arbitrary action materially
18 infringing upon a defendant's right to a fair trial. The purpose of the rule is to
19 ensure that, once an individual has been charged with a crime, he or she is treated
20 fairly.

21 And in *State v. Sulgrove*, 19 Wn. App. 860, 863 (1978), the Court stated:

22 It should be noted that governmental misconduct need not be of an evil or
23 dishonest nature; *simple mismanagement* also falls within such a standard.

(Emphasis supplied.) *Accord State v. Dailey*, 93 Wn.2d 454 (1980).

In *State v. Brooks*, 149 Wn.App. 373, 383 (2009), the court reiterated that, while CrR
8.3(b) requires a showing of "arbitrary action or governmental misconduct," such misconduct
"need not be of an evil or dishonest nature, simple mismanagement is enough." And in *State*

1 v. *Michielli*, 132 Wn.2d 22, 239–40 (1997), the Washington Supreme Court explained that to
2 justify a dismissal under CrR 8.3:

3 [A] defendant must show arbitrary action or governmental misconduct. . . .
4 Governmental misconduct, however, “need not be of an evil or dishonest nature;
5 *simple mismanagement is sufficient.*”

6 *Blackwell*, 120 Wn.2d at 831, 845 P.2d 1017 (emphasis in original).

7 Washington Courts have not been shy to impose dismissal as a sanction when the
8 mismanagement impedes the defendant’s right to a fair trial. *See, e.g., Brooks, supra* (State’s
9 failure to provide timely discovery and dumping large amounts of discovery on defendant the day
10 of trial was mismanagement which satisfied the requirements of the rule for a dismissal in that it
11 affected the defendant’s right to a speedy trial (citing *State v. Michielli*, 132 Wn.2d 229)); *State v.*
12 *Dailey*, 93 Wn.2d 454, 457 (1980) (affirming dismissal of prosecution, the Court explaining: “we
13 have made it clear that ‘governmental misconduct’ need not be of an evil or dishonest nature,
14 simple mismanagement is sufficient”).

14 **B. The Court Has Broad Discretion to Impose Sanctions for a Belated**
15 **Motion to Amend**

16 The “trial court cannot permit amendment of the information if substantial rights of the
17 defendant would be prejudiced.” *State v. Lamb*, 175 Wn.2d 121, 130 (2012) (trial court did not
18 abuse discretion in denying State’s motion to amend after defendant had prevailed on a pretrial
19 motion); CrR 2.4(f). Moreover, the trial court has wide discretion when considering a State’s
20 motion to amend – and the court can deny the amendment even if there is an absence of
21 prejudice. *See State v. Rapozo*, 114 Wn.App. 321, 322-24 (2002) (even though the amendment
22 “would not have prejudiced Rapozo,” the trial court did not abuse its discretion in denying State’s
23 motion to amend, noting “the State had ample opportunity to correct the charge before trial as
almost two months had passed between charging and trial”).

1 As our Supreme Court explained in *Michielli*:

2 [d]efendant's being forced to waive *his speedy trial right is not a trivial event*. This
3 court, "as a matter of public policy, has chosen to establish speedy trial time limits
4 by court rule and to provide that *failure to comply therewith requires dismissal of*
5 *the charge with prejudice.*" *State v. Duggins*, 68 Wn.App. 396, 399-400, 844 P.2d
6 441 (1993). The State's delay in amending the charges, coupled with the fact that
7 the delay forced Defendant to waive his speedy trial right in order to prepare a
8 defense, can reasonably be considered mismanagement and prejudice sufficient to
9 satisfy CrR 8.3(b).

10 *Michielli*, 132 Wn.2d at 245 (emphasis supplied).

11 The *Michielli* Court emphasized that dismissal was appropriate where there was no
12 "justification for the delay in amending the information":

13 In this case the State expressly admits that it had all of the information and evidence
14 necessary to file all of the charges in July 1993. Despite this, the State delayed
15 bringing the most serious of those charges for months, and did so only five days
16 (three business days) before the scheduled trial. Even though the resulting
17 prejudice to Defendant's speedy trial right may not have been extreme, the State's
18 dealing with Defendant would appear unfair to any reasonable person.

19 *Id.* at 246. *See also State v. Sherman*, 59 Wn.App. 763, 770, 801 P.2d 274, 277 (1990)(affirming
20 dismissal and noting that "if the State inexcusably fails to act with due diligence, and material facts
21 are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process,
22 it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel
23 who has had sufficient opportunity to adequately prepare a material part of his defense, may be
impermissibly prejudiced. *Such unexcused conduct by the State cannot force a defendant to*
choose between these rights")(quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994
(1980))(emphasis in *Sherman*).

1 **III. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS**
2 **CHARGES OR RECONSIDER THE ORDER GRANTING MOTION TO**
3 **AMEND**

4 This case began in an orderly fashion. A detailed briefing schedule set forth deadlines, with
5 all parties and the Court apparently working with a common understanding regarding the relevant
6 charges, and the reality that the losing party would seek discretionary review of the obviously
7 significant legal issue regarding the propriety of the Manslaughter in the Second Degree charge.
8 But the State has badly mismanaged this case. Its belated Motion to Amend was vindictive
9 gamesmanship designed to defeat the defendant's lawful right to seek appellate review, as intended
10 by the Superior Court. The State's subsequent efforts to explain its untimely motion are unavailing
11 and totally contradicted by the record.

12 The State apparently believed from the outset of the litigation that Manslaughter in the
13 First Degree was a likely amendment if this case proceeded to trial, but the State withheld this
14 information from the defense and the Court. The State should have provided notice before
15 misleading the defense and the Court for months into believing that the motion and expected
16 appellate review would bring finality to the issue of the application of the general/specific rule to
17 the felony homicide charge, when in reality the State was prepared to amend the charges regardless
18 of the outcome.

19 The State knew full well that the defense intended to argue that Gamble did not apply to
20 second degree manslaughter because *the State and the defense spent substantial time arguing*
21 *about that issue in numerous briefs and during oral argument to Judge Chun in July.* Any attempt
22 to suggest that the State was not aware of this argument until mid-October is yet another attempt
23 to mislead the Court. The record is clear that this issue was heavily argued throughout the entirety
of the litigation. *See generally* Defendant's Response to State's Motion to Reconsider Imposition

1 of Sanctions at 8-15 (providing comprehensive summary, record excerpts, and citations addressing
2 the parties' extensive treatment of this issue).

3 The State's handling of this case has significantly increased costs and resources expended
4 by the courts and Mr. Numrich and his attorneys, and prejudiced his lawful right to seek timely
5 review of this matter as intended by the Superior Court judges who certified the issues to the
6 appellate courts. Mr. Numrich will inevitably have to waive his speedy trial rights further out as a
7 result of the State's tactics. As our Supreme Court has recognized, a defendant "being forced to
8 waive his speedy trial right is not a trivial event...The State's delay in amending the charges,
9 coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to
10 prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy
11 CrR 8.3(b)." *Michielli*, 132 Wn.2d at 245 (emphasis supplied).

12 The State's handling of this case constitutes mismanagement and reflects conduct
13 tantamount to bad faith warranting sanctions including dismissal of charges as appropriate.

14 IV. CONCLUSION

15 For the foregoing reasons, and in the interests of justice, the defense respectfully moves
16 this Court to dismiss this case or individual charges as appropriate, reconsider and reverse its
17 decision granting the Motion to Amend, or issue such other sanctions as the Court deems fit.

18 DATED this 29th day of November, 2018.

19
20 
21 COOPER OFFENBECHER, WSBA #40690
TODD MAYBROWN, WSBA #18557
Attorneys for Defendant

22 I certify that on the 29th day of November,
2018, I caused a true and correct copy of
this document to be served on DPA Patrick
Hinds by E-Service and Email (to be sent
by attorney Cooper Offenbecher).

23 
Sarah Conger, Legal Assistant

DEFENDANT'S MOTION TO DISMISS PURSUANT TO CrR
8.3(b), OR ALTERNATIVELY TO RECONSIDER ORDER ON
MOTION TO AMEND - 8
Appendix 218

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

Honorable Jim Rogers

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 Maybrow, 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.

1 4. Attached hereto as Appendix C are true and correct copies of the May 14, 2018
2 Order Setting Briefing Schedule and June 1, 2018 Order Amending Briefing Schedule entered
3 in this matter.

4 5. Attached hereto as Appendix D is a true and correct copy of State's Surreponse
5 to Defendant's Motion to Dismiss Count I.

6 6. Attached hereto as Appendix E is a true and correct copy of the Defendant's
7 Surreply in Support of Defendant's Motion to Dismiss Count I filed on July 18, 2018 in this
8 matter.

9 7. Attached hereto as Appendix F is a true and correct copy of a transcript of the
10 July 19, 2018 hearing in front of Judge Chun on the Defendant's Motion to Dismiss Count I.

11 8. Attached hereto as Appendix G is the State's Proposed Order Denying
12 Defendant's Motion to Dismiss Count I, and related correspondence
13

14
15 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
16 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF
17 MY KNOWLEDGE.

18 DATED at Seattle, Washington this 29th day of November, 2018.

19
20 _____
21 COOPER OFFENBECHER, WSBA #40690
22 Attorney for Defendant

22 I certify that on the 29th day of
23 November, 2018, I caused a true and
24 correct copy of this document to be served
25 on DPA Patrick Hinds by E-Service and
26 Email (to be sent by attorney Cooper
Offenbecher).


Sarah Conger, Legal Assistant

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. 9 6 3 6 5 - 7
RULING

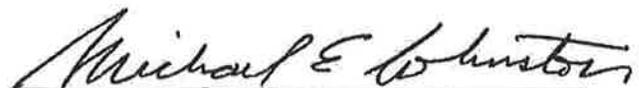
Phillip Numrich seeks direct discretionary review of a King County Superior Court ruling denying his motion to dismiss a charge of second degree manslaughter. He is also charged with criminal violation of the Washington Industrial Safety and Health Act (WISHA). RCW 49.17.190. Both charges arise from 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

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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

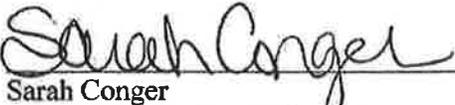
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CERTIFICATE OF SERVICE

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:

<p>Patrick Hinds, 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 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)</p>
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By: 
Sarah Conger
Office Manager/Legal Assistant

APPENDIX A

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

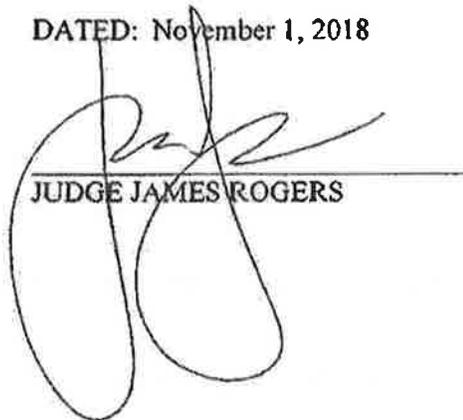
The Motion to Amend is Granted.

The Court Orders terms sua sponte.

The Motion to Compel Discovery is Denied.

The Order to Amend is Certified.

DATED: November 1, 2018



JUDGE JAMES ROGERS

APPENDIX C

FILED
KING COUNTY WASHINGTON

MAY 14 2018

SUPERIOR COURT CLERK
BY Shaylynn Nelson
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

This matter came before this court on the parties' joint motion for pre-assignment of this case for pre-trial management in light of the defendant's motion to dismiss Count 1 (Manslaughter in the 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 Maybrow and stand-in counsel Danielle Smith.

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

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

CSH: May 29, 2018
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:~~ (27)

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~~
13 ~~have already set a hearing on June 26, 2018, to address the defendant's motion to~~
14 ~~dismiss before the Honorable John Chun.~~ (27)

15 b. Hearings related to a petition for review or any other motions will be set in
16 accordance with the court rules as necessary.

17 **3. BRIEFING SCHEDULE:**

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

19 i. The defendant's brief and related documents in support of his motion to
20 dismiss were filed on April 30, 2018.

21 ii. The State shall file and serve its responsive brief and supportive
22 documents by 4:30 p.m. on June 6, 2018.

23 iii. The defendant shall file and serve its reply by 4:30 p.m. on June 13, 2018.

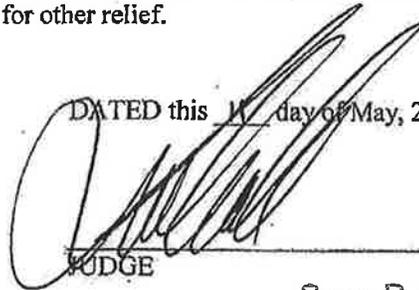
b. The parties shall consult and attempt to agree on a schedule for any briefing
related to a petition for review or any other motions. Any future agreed briefing
schedule can be submitted to this court by email for consideration. Should the
parties be unable to agree, the parties may set a motion before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

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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.



Sean P. O'Donnell



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



Todd Maybrow, 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

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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

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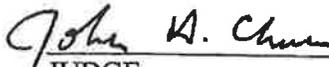
ORIGINAL

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2 c. The State shall file and serve its response by 4:30 p.m. on June 13, 2018.

3 d. The defendant shall file and serve his reply by 4:30 p.m. on June 20, 2018.

4
5 Other than the changes noted above, the other terms of the May 11, 2018 Order Setting Briefing
6 Schedule and May 29, 2018 Order on Case Scheduling remain in effect.

7 DATED this 1st day of June, 2018.

8
9 
10 JUDGE

11 JOHN H. CHUN

12 

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

17 Approved via email

18 Todd Maybrow, WSBA # 18557
19 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,)	
)	
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

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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.”

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:

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

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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

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

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).

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

APPENDIX E

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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 Surreponse 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 Surreponse, 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 Surreponse, 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 Surreponse, this Court should consider this Surreply and find it timely given the circumstances.

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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 Identifv a Legally Plausible**
13 **Scenario under which a Defendant Could Violate the More Specific**
14 **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.

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

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. Surreply 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 Surreply 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”).

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

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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 Maybrow
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

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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

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July 19, 2018

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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. Maybrown 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. Maybrow.

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. Maybrow 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)

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C E R T I F I C A T E

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3 STATE OF WASHINGTON)

4) ss

5 COUNTY OF KING)

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I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

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IN WITNESS WHEREOF, I have hereunto set my hand
this 25th day of September, 2018.

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Bonnie Reed, CET

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APPENDIX G

Cooper Offenbecher

From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Wednesday, August 22, 2018 10:35 AM
To: Todd Maybrow; 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 make 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 Maybrow' <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. Maybrow 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. Maybrow 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 Maybrow <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 Maybrow
Allen, Hansen, Maybrow & Offenbecher, P.S.
One Union Square
600 University Street, Suite 3020
Seattle, Washington 98101-4105
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From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Monday, July 23, 2018 4:36 PM
To: Todd Maybrow <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
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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

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

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

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.

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

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 OSHA 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

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.

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

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.S. 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.

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.

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23 _____
JUDGE JOHN H. CHUN

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

~~PROPOSED~~ ORDER ON
DEFENDANT'S FEE PETITION

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

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

~~PROPOSED~~ ORDER ON DEFENDANT'S FEE PETITION – 1

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

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

5
6 3. Finally, the requested costs of \$292.50 are also reasonable and appropriate given
7 that Mr. Numrich had to pay a second filing fee to present issues related to the Amended
8 Information to the Supreme Court. ~~That necessity would have been avoided had the State~~
9 ~~moved to amend the Information at an earlier point.~~

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

12 DATED this 28 day of January, 2019.

13
14
15 
16 Presiding Judge James Rogers
17 King County Superior Court

18 Presented by:

19
20
21

Cooper Offenbecher, WSBA #40690
22 Attorney for Defendant

23 *The Court reviewed all of*
24 *extensive pleadings, the*
25 *time billings in the*
26 *case, and declines*
to re-review any of its
earlier decisions.

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

March 08, 2019 - 4:19 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

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We are designating both Exhibit and Other because we had to split the appendix into two documents because of the size.

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