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NO. 96566-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP NUMRICH,

Petitioner.

**STATE'S ANSWER TO MOTION
FOR DISCRETIONARY REVIEW**

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A. IDENTITY OF RESPONDING PARTY

The State of Washington is the Respondent in this matter.

B. STATEMENT OF RELIEF SOUGHT

The State respectfully asks this Court to deny discretionary review.

C. FACTS RELEVANT TO THE MOTION

On January 26, 2016, Phillip Numrich's reckless disregard for the safety of his employees caused the death of Harold Felton when a trench collapsed, burying Felton under seven feet of wet dirt. Although the Seattle Fire Department quickly arrived at the scene, rescuers were unable to free Felton in time and he died of compressional asphyxia.¹

On January 5, 2018, the State charged Numrich with Manslaughter in the Second Degree (under RCW 9A.32.070) and Violation of Labor Safety Regulation with Death Resulting (under RCW 49.17.190(3)). Appendix 281-282. At the time, the State had concluded that there was probable cause to charge Numrich with either first- or second-degree manslaughter. Appendix 2. Due to the generally conservative filing policy of the King County Prosecuting Attorney's Office, second-degree manslaughter was filed initially and the decision of whether to add first-degree manslaughter was reserved to a later time. Appendix 2.

¹ The substantive facts of this case are set forth in more detail in pages 1-5 of the State's Answer To [Numrich's] Motion For Discretionary Review, filed on October 18, 2018, in this Court's case number 96365-7. Appendix 136-162.

Numrich was arraigned on January 16, 2018. Appendix 2. On February 5, 2018, deputy prosecutors met with one of Numrich's attorneys to discuss the case. Appendix 2. During this meeting, it was determined relatively quickly that the State was not willing to offer a plea deal that would allow Numrich to avoid a felony conviction. Appendix 2-3. Plea talks essentially ceased at that point and Numrich's attorney indicated that he would instead move to dismiss the charge of second-degree manslaughter based on the "general-specific rule." Appendix 2-3. During this meeting there was no discussion of possible amendments to the charges if the case proceeded to trial. Appendix 2-3.

On April 30, Numrich filed a motion to dismiss the count of second-degree manslaughter. Appendix 3, 10-24. Following extensive briefing and oral argument, the Superior Court denied Numrich's motion in a written order on August 23, 2018. Appendix 4. Numrich filed a notice of discretionary review of that order on September 14. Appendix 4, 85-86. On September 28, Numrich filed briefing asking this Court to take direct discretionary review of the Superior Court's ruling. Appendix 4, 87-132. The matter was assigned Supreme Court case number 96365-7.

Between February and October of 2018, the case-setting hearing in Superior Court was repeatedly continued at Numrich's request. Appendix 4-5. As a result, no trial date has ever been set in this case.

On October 1, 2018, the parties received a letter from this Court setting a schedule in 96365-7. The schedule required the State to serve and file any answers to Numrich's motions by October 18 and set the matter for consideration by the Commissioner on November 1. At that point, the parties had still not discussed any trial issues, including whether the State was contemplating amendments to the charges. Appendix 4-5. Numrich's attorneys had never asked if the State was considering amendments, nor raised the issue of possible amendments, nor engaged in any of the plea negotiations or usual processes that would generally prompt a discussion of possible amendments. Appendix 4-6. Rather, Numrich's attorneys appeared to so firmly believe that the defense would ultimately prevail on the motion to dismiss that they were not interested in discussing potential trial issues. Appendix 2-5.

While preparing the State's answer to Numrich's motion for discretionary review, counsel for the State noted that the statute of limitations for first-degree manslaughter would run in January of 2019, likely before the discretionary review issues were decided. Appendix 5-6. At that time, counsel for the State consulted with other deputy prosecutors and conducted legal research to determine if further delay in amending the charges would bar a charge of first-degree manslaughter. Appendix 6. It was ultimately determined that there was a very real risk that the statute of

limitations would run on a first-degree manslaughter charge unless a motion to amend was brought in the Superior Court prior to the November 1, 2018 hearing. Appendix 6. Thus, the State communicated its intent to amend in an email to Numrich's attorneys on October 18. Appendix 7.

In the interest of full disclosure, the State also alerted this Court to the proposed amendment, given that the legal arguments in Numrich's motion for discretionary review were predicated on the charge of second-degree manslaughter and the motion could be moot if first-degree manslaughter was added. Appendix 6-7. As a result, the State discussed its intent to amend and the possible consequences of such an amendment in its answer to Numrich's motion for discretionary review filed with this Court on October 18. Appendix 6-7, 143, 160-161. However, this point was only one of the many arguments raised by the State as to why discretionary review should be denied. Appendix 7, 136-162.

A hearing on the motion to amend was scheduled in the Superior Court for October 31, 2018. Appendix 8. Numrich filed briefs in opposition to the State's motion. Appendix 8, 190-232. The State replied and explained both the circumstances surrounding its decision to bring the motion and the timing of it. Appendix 8, 133-135, 233-246. The State also pointed out that Numrich had not demonstrated any legal prejudice that would result from the amendment. Appendix 239-245. Oral argument on

the State's motion to amend was held as scheduled on October 31, 2018. Appendix 8, 247-267. During the hearing, the court questioned the State as to the timing of the motion. Appendix 249-254, 264-266.

In his briefing and at oral argument, Numrich accused the State of, *inter alia*, prosecutorial vindictiveness based on the allegation that the motion to amend was brought to retaliate against him for having sought discretionary review. Appendix 8, 190-232. However, Numrich could not explain how the amendment prejudiced him, other than to argue that it would delay the proceedings and had "wasted" the time of the court and his attorneys. Appendix 201-203, 223-224, 254-264.

On the morning of November 1, 2018, the Superior Court issued a written order granting the State's motion to amend. Appendix 268-271. In that order, the court found that the State's counsel had been candid in explaining how and why the motion came about when it did; that there was no evidence that the motion to amend had been brought for an improper purpose; that the delay and waste of time/money argued by Numrich did not constitute prejudice that would preclude the amendment; and that there was no other basis to deny the State's motion. Appendix 269-270.

However, the court also concluded that the State could and should have given notice of its intent to amend earlier and found that Numrich had incurred costs for appellate litigation due to the untimeliness of the State's

motion. Appendix 270. As a result, the court *sua sponte* imposed sanctions against the State. Appendix 270-271. The court specified that the amount of sanctions was to be “measured in the attorneys’ fees for the defense work on the discretionary appeal to this point.” Appendix 270.

On November 13, 2018, the State filed a motion asking the court to reconsider the imposition of sanctions along with a declaration in support thereof. Appendix 1-274, 283-293. Two days later, Numrich filed his fee petition seeking costs and fees in the amount of \$18,252.49. Appendix 294-303. Over the next several months, the parties engaged in extensive litigation before the Superior Court, including:²

- November 16, 2018 – Numrich filed a notice of discretionary review of the order granting the State’s motion to amend.
- November 29 and 30, 2018 – Numrich filed his response to the State’s motion to reconsider; his own motion to dismiss pursuant to CrR 8.3(b) or, in the alternative, to reconsider the amendment; and a declaration in support thereof. Appendix 304-334.

² The State ultimately filed notices of discretionary review of both the portion of the trial court’s November 1 order imposing sanctions and its eventual order (issued on January 28, 2019) setting the amount of sanctions. Because of the interrelated nature of the issues, this Court ultimately filed both under the same cause number. Appendix 279. And, because the order imposing sanctions was the same order that granted the State’s motion to amend, this Court also included Numrich’s motion for discretionary review in the same cause number. As a result, all three issues are currently before this Court under this cause number. On March 22, 2019, the State filed a single brief that combined both of its motions for discretionary review and statements of grounds for direct review. Numrich’s answers are due on April 23, 2019. The procedural back-and-forth during these months vis-à-vis the amount of sanctions and the State’s notices of discretionary review is discussed in more detail in the State’s materials filed with this Court on March 22, 2019. See, also, Appendix 276-277, 279-280, 294-303, 335-353, 372-378, 405-441.

Between December 10 and 20, 2018, the parties filed their responses and replies in their respective cross-motions. Appendix 354-371, 379-402.

On December 21, 2018, the trial court issued a written ruling that, *inter alia*, denied the State's motion to reconsider the imposition of sanctions, denied Numrich's motion to dismiss pursuant to CrR 8.3(b), and denied Numrich's motion to reconsider the granting of the amendment. Appendix 403-404. The court held that nothing in either parties' motions changed its decision as announced in its November 1 order. Appendix 403-404. On January 28, 2019, the trial court issued a written order awarding fees in the full amount requested by Numrich. Appendix 440-441.

D. GROUNDS FOR RELIEF AND ARGUMENT

Numrich seeks direct discretionary review of the trial court's order granting the State's motion to amend the Information to add a count of first-degree manslaughter.³ A motion for discretionary review may be

³ As noted above, after the State moved for reconsideration of the imposition of sanctions, Numrich moved to dismiss some or all of the charges pursuant to CrR 8.3(b) based on allegations of State mismanagement. Appendix 325-334. That motion was denied by the Superior Court in its December 21, 2018 written order. Appendix 403-404. In his current motion for discretionary review, Numrich repeats his argument that the State has mismanaged this case and that dismissal under CrR 8.3(b) is a remedy. MDR at 17-18. However, Numrich has not sought discretionary review of the order denying his CrR 8.3(b) motion. Nor has Numrich provided any explanation of how an analysis of this case vis-à-vis CrR 8.3 is relevant to the issues currently before this Court. The State's response to Numrich's CrR 8.3(b) motion in the Superior Court is included in the attached Appendix and incorporated by reference. Appendix 379-396. But, as this issue is not properly before this Court, the State does not intend to further respond to Numrich's CrR 8.3 argument unless requested to do so.

granted *only* if the petitioner demonstrates that the stringent requirements of RAP 2.3(b) are met. Furthermore, even when those criteria are established, this Court *may* then accept discretionary review, it is not required to do so. In deciding whether to grant review, this Court starts with the presumption that interlocutory review is highly disfavored and the party seeking it must meet a heavy burden of demonstrating that immediate review is justified. Minehart v. Morning Star Boys Ranch, 156 Wn. App. 457, 462, 232 P.3d 591 (2010); In re Dependency of Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

Numrich argues that discretionary review is appropriate under RAP 2.3(b)(2) and (4). However, Numrich has failed to demonstrate that this case meets the requirements of either. Moreover, even if Numrich established that this Court *could* accept review under either, he has still failed to show that immediate interlocutory review is appropriate.

1. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(2)

Under RAP 2.3(b)(2), discretionary review may be accepted if “[t]he 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.” Here, Numrich has failed to establish that the Superior Court probably erred.

Pursuant to CrR 2.1(d), the court may permit an Information to be amended at any time before verdict so long as “substantial rights of the defendant are not prejudiced.” A defendant opposing amendment bears the burden of “showing specific prejudice to a substantial right.” State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991). A court’s ruling on a State’s motion to amend is discretionary. State v. Powell, 34 Wn. App. 791, 792, 664 P.2d 1 (1983). A court abuses its discretion when it takes a position no reasonable person would adopt. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable people could take differing views regarding the propriety of the court’s actions, the court has not abused its discretion. Demery, 144 Wn.2d at 758. Numrich asserts numerous reasons why the State’s motion to amend should have been denied. These arguments, however, are either based on a faulty interpretation of the record or were considered and rejected by the trial court in its proper exercise of its discretion. In either case, Numrich has failed to demonstrate that the trial court probably abused its discretion in granting the State’s motion to amend.

As an initial matter, in its December 21, 2018 order denying Numrich’s motions to dismiss and/or reconsider the granting of the amendment, the trial court stated in part that “it was unquestionably the right of the State to amend if it chose.” Appendix 404. Numrich now claims that

the use of this phrase establishes that the trial court misunderstood the applicable law and, therefore, probably abused its discretion by applying the wrong legal standard. MDR at 8-10.⁴ But this argument must fail because it is based on reading a single phrase in the court's order in a manner that distorts what the trial court was actually saying.

At the time of the December 21, 2018 order, the trial court was clearly aware that the State does not have an absolute right to amend. Among other things, Numrich pointed this out to the court in his brief in opposition to the State's motion. Appendix 200. In its November 1, 2018 order, the court noted that it was granting the State's motion because it did not find prejudice to Numrich or any other basis to deny it. Appendix 268-271. Numrich subsequently brought a motion asking the court to dismiss and/or reconsider its granting of the amendment. Appendix 325-332. In his briefing in support of those alternative motions, Numrich again pointed out that the court had wide discretion to deny a State's motion to amend even if it found no prejudice. Appendix 329.

On December 21, the trial court issued its written order denying Numrich's motions (as well as various motions from the State). Appendix 403-404. In explaining its reasoning, the court, *inter alia*, stated:

⁴ The State will hereinafter refer to Numrich's Motion for Discretionary Review as "MDR."

The State's Motion to Reconsider is properly brought as the Court imposed terms, not sanctions, *sua sponte*. The Court has reviewed the pleadings and the Motion is Denied based upon the reasons listed in the original Order. The Defense Motion to Dismiss or Alternatively, etc., is really a Motion to Reconsider. The additional argument does not change the decision of the Court. The Defense does not address the manner in which this Court addressed the prejudice of fees spent for the appeal, and it was unquestionably the right of the State to amend if it chose. For the nth time, this is a highly unusual procedural situation....

Appendix 404. Read in the context of the entire order and in conjunction with the court's October 1 order and against the backdrop of the various motions before the court, it is apparent that the phrase "it was unquestionably the right of the State to amend if it chose" was meant as a holding that the State was allowed to amend the charges *in this case*, not as a generalized statement of law that the State always has an unfettered right to amend.

Similarly, Numrich argues that the trial court probably abused its discretion by granting the State's motion to amend despite finding "that there was no legitimate explanation for the State's delay, other than to obtain dismissal of the pending appeal." MDR at 11. But the trial court made no such finding. In its briefing and at oral argument on the motion, the State explained how and why the motion to amend came about when it did. Appendix 133-135, 233-267. This included a specific denial that the motion was being brought to retaliate against Numrich for seeking discretionary review, to gain advantage in the appellate litigation, or for any other

improper purpose. Appendix 135. In granting the motion to amend, the trial court essentially accepted the State's explanation, finding that State's counsel had been candid with the court and that there was no evidence that the State's actions were vindictive or otherwise improper.⁵ Appendix 268-271. In support of its motion for reconsideration of the imposition of sanctions, the State provided even more detailed information as to how and why the motion to amend came about when it did. Appendix 1-9. In his motion to dismiss and/or reconsider, Numrich accused the State of misleading the court in this explanation. Appendix 325-332. In its responsive briefing, however, the State pointed out that all of Numrich's accusations were based on factual recitations that unfairly characterized the facts and/or were simply incorrect. Appendix 379-398. In denying Numrich's motions, the trial court implicitly rejected his accusations and did not disturb its earlier findings regarding the credibility of the State's explanation of events. Appendix 403-404.

In addition, in his briefing before this Court, Numrich also raises a

⁵ In its October 1 order, the trial court accurately recognized that the State had argued that the amendment would be a basis for this Court to deny Numrich's motion for discretionary review in 96365-7. In doing so, the court used the phrase "and where the State is using this amendment to obtain dismissal of the discretionary review, and so announced in the responsive appellate briefing." Appendix 269. Numrich now argues that this phrase means that the court found that the State's reason for seeking the amendment was to gain an advantage in the appellate litigation. MDR at 10-16. But this argument conflates the *effect* of the amendment with the reason for it. The trial court clearly and correctly understood that these were two different things.

number of arguments that were explicitly raised with, and rejected by, the trial court. There is no basis to conclude that the trial court probably abused its discretion when it previously rejecting these arguments.

First, Numrich argues that the State's motion to amend constituted prosecutorial vindictiveness. MDR at 13-16. However, the trial court properly exercised its discretion in explicitly rejecting this argument. Appendix 203-207, 270. "Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right." State v. McKenzie, 31 Wn. App. 450, 452, 642 P.2d 760 (1981). On the other hand, it is well recognized that "an initial charging decision does not freeze prosecutorial discretion" and that prosecutorial vindictiveness must be distinguished from the "rough and tumble" of legitimate plea bargaining and other aspects of pre-trial practice. State v. Lee, 69 Wn. App. 31, 847 P.2d 25 (1993). A defendant asserting prosecutorial vindictiveness in the pre-trial context bears the burden of establishing either actual vindictiveness or "a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." State v. Bonasisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998) (quoting United States v. Wall, 37 F.3d 1443, 1447 (10th Cir. 1994)). If the defendant makes this preliminary showing, the State must justify its decision with "legitimate, articulable, objective reasons' for its actions." Bonasisio, 92

Wn. App. At 791 (quoting Wall, 37 F.3d at 1447).

In this case, Numrich has established neither actual vindictiveness nor a “realistic likelihood of vindictiveness” that would give rise to a presumption of vindictiveness. Bonisisio, 92 Wn. App. At 791. Moreover, the State has provided a lengthy and detailed explanation of how and why the motion to amend came about when it did. Appendix 1-9, 133-135. This explanation provided exactly the sort of “legitimate, articulable, and objective reasons” for the State’s actions that are sufficient to rebut a presumption of vindictiveness.

Second, Numrich argues that the State’s motion to amend violated principles of estoppel. MDR at 16. However, the trial court properly exercised its discretion in rejecting this argument. Appendix 202-203, 268-270. Numrich has not provided any authority in support of the proposition that the doctrine of estoppel applies to a State’s motion to amend criminal charges. Even if it did, the doctrine would not preclude the amendment in this case. Estoppel applies only when a party takes one position in a court proceeding and later seeks an advantage by taking “a clearly inconsistent position.” Arkinson v Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). But the State’s motion to amend to add a charge of first-degree manslaughter as a charge in the alternative to the existing charge of second-degree manslaughter does not involve the State taking any

inconsistent position.

Third, Numrich argues that the charge of first-degree manslaughter is not supported by probable cause. MDR at 16-17. However, the trial court properly exercised its discretion by explicitly rejected this as being an issue it did not need to resolve in ruling on the State's motion to amend.⁶ Appendix 207-208, 262-263, 268-271. Numrich has not provided any authority or compelling argument suggesting that the trial court was incorrect or that probable cause—or the lack thereof—is relevant to the consideration of whether a State's motion to amend should be granted.

Moreover, even if probable cause was a necessary prerequisite to amendment, here there is probable cause supporting the charge of first-degree manslaughter. A person is guilty of first-degree manslaughter when he or she “recklessly causes the death of another person.” RCW 9A.32.060(1). In this context, a person acts recklessly when “he or she knows of and disregards a substantial risk that [death] may occur and this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation.” RCW 9A.080.010(2)(c); WPIC 10.03; 2016 Comment to WPIC 10.03 (citing State v. Gamble, 154 Wn.2d

⁶ The trial court pointed out that the question of whether there was probable cause was only an issue vis-à-vis the court's power to impose conditions and that this did not need to be resolved in this case because there was clearly probable cause for the other two crimes already charged. Appendix 262-263.

457, 467-68, 114 P.3d 646 (2005).

The substantive facts of Numrich's crime and the reasonable inferences that can be drawn from them are set forth in detail in the Certification for Determination of Probable Cause and the State's Answer to Numrich's Motion for Discretionary Review in case number 96365-7. Appendix 136-162, 442-446. These substantive facts establish probable cause for the charge of first-degree manslaughter. As the owner and operator of the company and the "competent person" for the project, Numrich was well aware of the general risk of death posed to workers in trenches like the one in question. Appendix 146-148, 442-446. He was further aware that the risk was substantially elevated given all of the risk factors that were present at this particular job site on this particular day. Appendix 146-149, 442-446. However, despite being aware of all these risks and being the person responsible for guarding against them, Numrich made no effort to address these hazards and did not re-inspect the trench after they had arisen. Appendix 148-149, 442-446. The trench then collapsed with Felton inside, killing him. Appendix 149, 442-446. Given all the above, there is ample probable cause to conclude that Numrich knew of and disregarded a substantial risk that death might occur, that his disregard of this risk was a gross deviation from the conduct a reasonable person would exercise in the situation, and that Felton died as a result.

Finally, Numrich argues prosecuting him for first-degree manslaughter violates Washington’s “general-specific rule.” MDR at 18-20. However, the trial court properly exercised its discretion in rejecting this argument. Appendix 211-217. The “general-specific rule” applies when two statutes address the same subject matter and cannot be harmonized. State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007). However, if the statutes create crimes with different elements, they simply criminalize different conduct and the rule does not apply. State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation here. Under RCW 9A.32.060, a person is guilty of first-degree manslaughter if, “he or she recklessly causes the death of another person.” As a result, first-degree manslaughter requires proof that the defendant had the mental state of “recklessness” *and that this mental state specifically related to the risk of death to the decedent*. Gamble, 154 Wn.2d at 468-69. In contrast, a person is guilty of violating RCW 49.17.190(3) if the person is an employer who knowingly violates a specified safety standard and that violation causes the death of an employee. Thus, a criminal violation of RCW 49.17.190(3) requires proof that the defendant had the mental state of “knowing” *and proof that this mental state specifically related to the violation of a safety provision*. Id.

As a result, the two crimes have different *mens rea* elements. A

violation of RCW 9A.32.060 requires proof that the defendant was reckless as to the risk of death of the decedent. In that context, whether or not the defendant knowingly violated a safety regulation may be relevant, but it is not an element of the crime. In contrast, a violation of RCW 49.17.190(3) requires proof that the defendant knew he was violating a safety regulation, but the State is not required to prove that the defendant had any specific *mens rea* vis-à-vis the risk of death to the decedent. Because RCW 9A.32.060 and RCW 49.17.190(3) have different elements, the “general-specific rule” does not apply to them. Farrington, 35 Wn. App. at 802.

2. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(4)

Under RAP 2.3(b)(4), discretionary review may be accepted if “[t]he superior court has certified...that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” However, a trial court’s certification is not the end of the inquiry. Rather, this Court can and should conduct its own independent analysis of whether the requirements of RAP 2.3(b)(4) have been met. Moreover, as noted above, even if this Court concludes that they have, it can and should still exercise its own judgment as to whether discretionary review is appropriate and starts with

a heavy presumption that it is not. RAP 2.3(b); Morning Star Boys Ranch, 156 Wn. App. at 462; In re Grove, 127 Wn.2d at 235. Here, despite the trial court's certification, Numrich has failed to establish that this matter actually meets the requirements of RAP 2.3(b)(4).

First, Numrich has not shown that this matter involves a legal question as to which there is a substantial ground for a difference of opinion. The law regarding the pre-trial amendment of criminal charges is well-settled. While Numrich clearly disagrees with the trial court's ruling, RAP 2.3(b)(4) requires more. As used in the rule, the phrase "substantial ground for difference of opinion" does not simply mean that the petitioner disagrees with the lower court and can articulate an argument as to why the court was wrong. Rather, it generally implies the existence of "two different, but plausible, interpretations of a line of cases" that generally manifests itself as an existing conflict in the appellate case law. Klamath Irr. Dist. v. United States, 69 Fed. Cl. 160, 163 (2005). Numrich cites to no such legal background for this case, nor is the State aware of any.

Second, Numrich has failed to show that discretionary review will materially advance the termination of the litigation. Even if this Court were to accept review and rule in Numrich's favor in both this this matter and in 96365-7, he will *still* face a criminal trial for violating RCW 49.17.190(3). And such a trial will not be substantially different merely

because it “only” involves this gross misdemeanor. Here, all of the counts stem from the same series of events and the trial will be essentially identical regardless of which counts are being tried. Indeed, even if all the counts are tried, it will likely be the violation of RCW 49.17.190(3) that will require the most effort, investigation, and litigation due to its rareness, technical nature, and the lack of established pattern jury instructions and other materials. Moreover, even if this matter were to go to trial solely on the violation of RCW 49.17.190(3), *it would still be going to trial*. Given that fact alone, it cannot be said that interlocutory appeal will materially advance the termination of the litigation.

E. CONCLUSION.

For all of the reasons discussed above, Numrich’s motion for discretionary review should be denied.

DATED this 16th day of April, 2019.

Respectfully submitted,

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Note: Many of the documents included in this Appendix themselves included numerous appendices that are duplicated elsewhere in the Appendix or are not particularly relevant to the issues raised in this motion. In the interest of brevity, those duplicative or irrelevant appendices have been omitted from this Appendix.

1 *The Honorable James E. Rogers*
2 *Hearing Date: TBD*
3 *Oral Argument Requested*

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

6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8	THE STATE OF WASHINGTON,)	
)	
	v.	)	No. 18-1-00255-5 SEA
)	
)	
10	PHILLIP NUMRICH,	)	DECLARATION OF PATRICK HINDS
		)	FOR PURPOSES OF STATE'S
	Defendant.	)	MOTION TO RECONSIDER
)	

12 I, PATRICK HINDS, hereby declare as follows:

- 14 1. I am a Senior Deputy Prosecuting Attorney (DPA) in the King County Prosecuting
15 Attorney's Office (KCPAO) and am one of the DPAs assigned to the above entitled case. I
16 am familiar with the records, files, and discovery therein.
- 17 2. As addressed in my previous Declaration, the State's recent motion to amend the charges
18 against the defendant was not brought for any improper purpose. (See ¶ 39 below.) Nor was
19 the State's delay in seeking the amendment the result of bad faith.
- 20 3. All of the charges in this case stem from the death of Harold Felton while he was employed
21 by and working for the defendant. Felton died on January 26, 2016.
- 22 4. The Washington State Department of Labor and Industries (WSDLI) initiated an
23 investigation of the incident on the same day that Felton died. During that process, WSDLI
24 investigators discovered that the defendant had violated (and/or had allowed the violation of)
numerous safety regulations at the job site. At the conclusion of this initial investigation,
WSDLI cited the defendant for a number of willful and serious violations and fined him.
Through a subsequent administrative process, the defendant and WSDLI reached a settlement
agreement in November of 2016.
5. Subsequent to the settlement agreement between WSDLI and the defendant, the case was
brought to the attention of KCPAO. Based on a review of the initial investigation materials,

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO
RECONSIDER - 1

State's Answer to Motion
for Discretionary Review

Appendix - 1

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1 KCPAO concluded that the defendant had potentially committed criminal violations of the
 2 law. In the late spring of 2017, KCPAO asked that WSDLI reopen its investigation. WSDLI
 3 agreed and the bulk of this reopened investigation was completed by early December of
 4 2017.

5 6. Based on the information uncovered during the reopened investigation, I and other KCPAO
 6 DPAs believed that there was probable cause to charge the defendant with either/both
 7 Manslaughter in the First Degree and Manslaughter in the Second Degree. This information
 8 is contained in the Certification for Determination of Probable Cause and other discovery
 9 materials in this case.

10 7. Due to KCPAO’s generally conservative filing policy, it was decided to initially file
 11 Manslaughter in the Second Degree charges and to reserve the decision on whether to amend
 12 to Manslaughter in the First Degree or to add Manslaughter in the First Degree as a charge in
 13 the alternative until the time of trial or until closer to the running of the Statute of
 14 Limitations, whichever came first.¹

15 8. On January 5, 2018, the State filed an Information charging the defendant with Manslaughter
 16 in the Second Degree (Count 1) and Violation of Labor Safety Regulation with Death
 17 Resulting (Count 2).

18 9. The defendant was arraigned on January 16, 2018, and a case-setting hearing was set for
 19 February 12.²

20 10. On February 5, I and another KCPAO DPA met with one of the defendant’s attorneys (Todd
 21 Maybrow) in my office to discuss this case. The discussion covered a variety of topics.
 22 Throughout the discussion, however, my impression was that defendant’s counsel was
 23 primarily focused on three issues: 1) why the State has filed criminal charges, 2) why the
 24 State had filed a felony charge, and 3) why the State had filed charges against the defendant
 as an individual rather than against his company.

a. During this meeting, there was a cursory discussion of the possibility of a plea.
 However, once it was determined that the State was not inclined to offer a plea
 deal that would allow the defendant to avoid a felony conviction, discussion of the
 potential for a plea essentially ceased and the defendant’s attorney indicated that
 the defense would pursue the strategy of moving to dismiss Count 1 based on the
 “general-specific rule.” It was my impression that the defense firmly believed it

¹ KCPAO’s filing policy is part of its written Filing And Disposition Standards (FADS), which are publicly
 available online, including *inter alia*, at <https://www.kingcounty.gov/depts/prosecutor/criminal-overview/fads.aspx>.
 Under this policy, the State’s standard practice is to initially file the lowest possible degree and number of charges that
 reflect the nature of the defendant’s criminal conduct. If the defendant elects to go to trial, however, KCPAO reserves
 the right to amend the charges and/or to add additional offenses, enhancements, and/or aggravators in order to ensure that
 the charges for trial accurately reflect the full nature and severity of the defendant’s conduct.

² From this point forward, all dates referenced were in 2018 unless otherwise specified.

1 would prevail on this motion and that, therefore, the defendant was not inclined to
 2 plead guilty to any felony.

3 b. During this meeting there was no discussion of what amendments to the charges
 4 the State might seek at trial. Neither the State nor counsel for the defendant raised
 5 the issue. It was my impression that the defense so firmly believed it would
 6 prevail on the motion to dismiss that it was not interested in discussing potential
 7 trial issues.

8 11. Between February and April, the defendant repeatedly continued the case-setting hearing.

9 12. On April 30, the defendant filed his motion to dismiss Count 1. Appendix A. At the time, no
 10 hearing date was set for the motion.

11 13. In his brief, the defendant argued that the State’s prosecution of him for Manslaughter in the
 12 Second Degree violates the “general-specific rule.” Appendix A at 8-13. Under this rule,
 13 when a defendant’s actions violate both a specific and a general statute, the defendant should
 14 typically be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d
 15 576, 580, 681 P.2d 237 (1984). The rule only applies when two statutes are “concurrent.” Id.
 16 Statutes are concurrent only when the “general” statute is necessarily violated every time the
 17 “specific” one is. Id. In his brief, the defendant argued that this test was met in this case
 18 because proof of the “knowing” *mens rea* element of RCW 49.17.190(3) would necessarily
 19 prove the “criminal negligence” *mens rea* element of RCW 9A.32.070. Appendix A at 10-
 20 11.

21 14. On May 14, the parties entered an agreed Order Setting Briefing Schedule—approved by the
 22 Honorable Judge Sean O’Donnell—setting the defendant’s motion for oral argument before
 23 the Honorable Judge John Chun on June 26. The order also continued the case-setting
 24 hearing to the same date so that Judge Chun could hear it in conjunction with the motion to
 dismiss.

15 15. On June 1, the parties entered an agreed Order Amending Briefing Schedule, which was
 16 approved by Judge Chun.

17 16. The State filed its response brief on June 13, in compliance with the amended briefing
 18 schedule. Appendix B.³

19 17. In its brief, the State argued, *inter alia*, that proof of the *mens rea* element of RCW
 20 49.17.190(3) would not necessarily establish the *mens rea* element of RCW 9A.32.070

21 ³ Many of the documents attached as appendices to this Declaration themselves had one or more appendices
 22 attached. Many of those are either separately attached as appendices to this Declaration or are not particularly
 23 relevant to the issues related to the State’s current motion for reconsideration. As a result, for reasons of brevity, the
 24 State will generally attach the body of a referenced document as an appendix, but will omit the appendices that were
 attached thereto. (So, for example, the State is attaching the body of its response brief as Appendix B, but is not
 including the three appendices that were attached to the brief when it was filed.)

1 because the *mens rea* elements in question were *about* different things—knowingly violating
2 a safety regulation versus negligence as to the risk of the decedent’s death. Appendix B at
10-14. In making this argument, the State relied on State v. Gamble, 154 Wn.2d 457, 114
3 P.3d 646 (2005). Id.

4 18. On June 20, the defendant filed his reply brief. Appendix C.

5 19. In this brief, the defendant asserted that Gamble only applies to first-degree manslaughter.
Appendix C at 4. However, this is done as two sentences and a footnote as part of a much
6 larger overall reply to the State’s argument. Id.

7 20. On July 19, Judge Chun hear oral argument on the defendant’s motion and took the matter
under advisement.

8 21. Following oral argument, the parties and the court engaged in a discussion regarding
9 scheduling. As part of that, I indicated that I would be out of the office on a previously
10 scheduled vacation from July 30 through August 20. Judge Chun granted the defendant’s
motion to continue the case-setting hearing to August 23.

11 22. During this discussion, the defense indicated that, if Judge Chun denied the defendant’s
12 motion to dismiss, the defense would seek discretionary review of that decision. In response
to questions from the court, I indicated that the State could not make a final decision as to its
position on discretionary review until it knew the court’s ruling and the basis for that ruling.

13 23. On July 23, Judge Chun’s bailiff contacted the parties via email. Appendix D. In relevant
14 part, her email stated that “[f]or the reasons argued by the State, the Court is denying the
Defense’s motion to dismiss Count 1.” Id.

15 24. On August 23, the parties appeared before Judge Chun and argued: 1) what language the court
16 should use in its written order denying the defendant’s motion; and 2) whether the court should
“certify” the order within the meaning of RAP 2.3(b)(4). The court continued the case-setting
17 hearing to October 23. Later that day, Judge Chun issued his written order formally denying the
defendant’s motion to dismiss, but granting his motion for RAP 2.3(b)(4) certification.

18 25. On September 14, the defendant filed a notice of discretionary review to the Washington
19 Supreme Court. Appendix E. This document indicated that he was seeking review of Judge
Chun’s denial of his motion to dismiss, but did not otherwise set forth any argument. Id.

20 26. Shortly thereafter, the State became aware that the defendant had violated his conditions of
21 release. On September 27, the State filed a brief—along with extensive supporting
documentation—in support of its motions to revoke the defendant’s release on personal
22 recognizance, to impose bail, and to amend his conditions of release.

23 27. On September 28, the defendant filed his Motion for Discretionary Review and Statement of
Grounds for Direct Review in the Supreme Court. Appendix F; Appendix G.

24
DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE’S MOTION TO
RECONSIDER - 4

State’s Answer to Motion
for Discretionary Review

Appendix - 4

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- 1 28. Prior to this point, to the best of my memory, I had never had any conversation with any of
2 the attorneys who appeared for the defendant regarding any issues related to trial, including
3 what amendments to the charges the State might make if/when the case was set for trial. As
4 noted above, my impression was that the defense so firmly believed it would prevail on the
5 substance of the motion that it was not interested in discussing potential trial issues.
- 6 29. After initial charges have been filed, I typically do not address the possibility of amending
7 the charges with the defendant's attorney unless: 1) I am extending a plea offer; 2) the case is
8 actually being set for trial; 3) some other specific thing happens that brings up the issue (e.g.
9 new information is uncovered, the defendant commits a new crime, etc.); or 4) the
10 defendant's attorney raises the issue. As of September 28, none of those things had
11 happened in this case.
- 12 30. On October 1, the parties appeared before the court on the State's motion. The Honorable
13 Judge Marshall Ferguson found that the defendant had violated his conditions of release but that
14 his violation was not willful. The court, therefore, denied the State's motion. At the time, the
15 defendant's next case-setting hearing was scheduled for October 23. The defendant moved to
16 continue that hearing. The State did not object and the hearing was continued to December 5.
- 17 31. Later on October 1, the parties received a letter from the Supreme Court Deputy Clerk setting a
18 schedule for the defendant's motion for direct discretionary review. The schedule required the
19 State to serve and file any answers to the defendant's motions by October 18 and set the matter
20 for consideration on the Commissioner's Motion Calendar on November 1.
- 21 32. Due to deadlines in other cases and personal matters, I did not start writing the State's
22 responsive briefing or even carefully read the defendant's Supreme Court briefing until about
23 the evening of October 11. When I did so, two things struck me. First, it appeared to me that
24 the defendant's argument that Gamble only applied to first-degree manslaughter and that the
Supreme Court needed to take direct review specifically to "clarify" that it 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. See
Appendix F at 18-19; Appendix G at 6,12. Second, it appeared to me that the defendant's
argument that discretionary review was appropriate under RAP 2.3(b)(4) largely depended on
the assertion that, if he prevailed on interlocutory appeal, he would not be facing trial on a
felony charge. Appendix F at 20.
33. Based on the above, two things occurred to me. First, if the defendant was conceding that his
motion to dismiss would not apply to a charge of first-degree manslaughter, that would be a
wholly valid basis for the State to move to amend to either change Count 1 from second-
degree manslaughter to first-degree or to add a Count 3 of first-degree manslaughter as a
charge in the alternative. Second, if the defendant was conceding that his motion to dismiss
would not apply to a charge of first-degree manslaughter, the fact that the State would/could
amend to that charge (or to add that charge) rebutted his argument that discretionary review
was appropriate under RAP 2.3(b)(4).

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO
RECONSIDER - 5

State's Answer to Motion
for Discretionary Review

Appendix - 5

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1 34. Until that point, I had not thought about or considered a potential amendment of the charges
 2 since early 2018 because none of the events—described in ¶ 29 above—that usually trigger
 such thoughts/considerations/discussions had taken place.

3 35. In thinking about how a potential amendment would play out, it occurred to me that I could
 4 not remember what the Statute of Limitations for first-degree manslaughter actually was. I
 5 consulted RCW 9A.04.080(1) and was surprised when I was reminded that it was only three
 years. I realized that meant the Statute of Limitations for first-degree manslaughter would run
 in this case on January 26, 2019.

6 36. Over the next week I consulted with other DPAs in KCPAO as to how best to proceed. As
 7 part of that, I also conducted legal research to determine if it was feasible to continue to delay
 bringing the motion to amend. I ultimately determined that it would not. That was based on
 8 the following series of conclusions:

- 9 a. If discretionary review was granted, the case almost certainly would not be
 mandated back to the Superior Court until after January 26, 2019.
- 10 b. If discretionary review was granted, the Superior Court would no longer have the
 11 authority to rule on the State’s motion to amend under RAP 7.2.
- 12 c. Once the Statute of Limitations had run, the State would not be able to amend the
 13 Information to change Count 1 to first-degree manslaughter or to add a count of
 14 first-degree manslaughter 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).

15 37. With regard to the issue of the charges in Superior Court, it was decided that the appropriate
 course of action would be to bring a motion to amend as soon as possible.

16 38. With regard to the issue of the motions for discretionary review and direct review in the
 17 Supreme Court, it was decided that the appropriate course of action was to alert the Supreme
 Court that the State was moving to amend the charges to add first-degree manslaughter and
 18 to argue the impact this would have on the question of whether discretionary review was
 appropriate under RAP 2.3(b)(4).

19 39. It was expected that the defendant would like claim that the State’s actions were vindictive.
 20 In that context, I drafted a two-page Declaration that set forth the reason why the State was
 seeking the amendment at that time. Appendix H. This document was created with the
 21 intention that it would be attached to the State’s standard two-page Motion and Order to
 Amend that would ultimately be provided to the Superior Court. Because it was anticipated
 22 that this document would be filed in Superior Court in short order—and because it contained
 relevant information—the Declaration was included in the Appendix to the State’s Answer to
 23 Motion for Discretionary Review that was filed in the Supreme Court. While the inclusion of
 such a document is unusual, it seemed appropriate given the circumstances. Moreover, the
 24 State is not aware of any court rule or other authority that precluded attaching it.

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40. Due to deadlines in other cases and personal matters, I was not able to complete the State's Answer to Motion for Discretionary Review or the State's Answer to Statement of Grounds for Direct Review until the afternoon of October 18. The two briefs were served and filed at approximately 2:50 p.m.. Appendix I; Appendix J.
41. In the State's Answer to Motion for Discretionary Review, the State argued, *inter alia*, that the defendant's argument regarding State v. Gamble effectively conceded that his "general-specific rule" argument did not apply to first-degree manslaughter, that the State was moving to amend to add that charge, and that this undercut his argument for discretionary review under RAP 2.3(b)(4). Appendix I at 18-19. However, the State also argued that there were numerous other reasons aside from the potential amendment why review was inappropriate under the rule. Appendix I at 16-19.
42. Earlier on October 18, I had emailed the defendant's attorneys to advise them that the State would be seeking to amend the charges. My email explained why the State was bringing the motion at that time and providing a copy of the First Amended Information. Appendix K at 2-3. I indicated that I was contacting them as a courtesy before contacting the court to schedule the hearing and asked that the defense let me know its availability for such a hearing in the next two weeks. Id.
43. Shortly thereafter, one of the defendant's attorneys responded to my email. Appendix K at 2. In this response, the defendant's attorney, *inter alia*, asserted that he would not be available for a hearing for several weeks, made a discovery demand/public records request for "all of [KCPAO's] documents and communications relating to this case," and indicated that the defense would not agree to even attempt to schedule the motion to amend until the State responded to that request. Id.
44. Shortly after 5 p.m., I responded to this email. Appendix K at 3. In my response, I indicated, *inter alia*, that the motion to amend needed to be scheduled within the next two weeks, but that the State was willing to agree to have it heard at a special time and/or at the Maleng Regional Justice Center (MRJC) (rather than the downtown courthouse) in order to make it possible for the defense to appear. Id. I again asked that the defense identify dates and times over the following two weeks when the defense would be available for the motion. Id.
45. By 3 p.m. the next day (October 19), the State had still received no response to this email.
46. As it appeared that the defense did not intend to respond to or acknowledge the State's second email, I contacted the court (via email with a carbon copy to the defendant's attorneys) shortly after 3 p.m. on October 19 to ask that the matter be set for a contested motion to amend. Appendix L. In taking this action, the State complied with the local court rules and standard procedures for the King County Superior Court as set forth in the court's Criminal Department Manual. In the email, I highlighted the defense availability issues that I was aware of and proposed two dates and times that I believed would work for the motion to be heard. Id. However, I also indicated that I was available at almost any time over the following eight court days if a different date or time was preferable for the defense. Id. I

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO
RECONSIDER - 7

State's Answer to Motion
for Discretionary Review

Appendix - 7

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1 also noted that the State would have no objection to having the motion heard at the MRJC.
 2 Id.

3 47. The two-page Motion and Order to Amend and the Declaration described in ¶ 39 above were
 4 attached to this email. Appendix H; Appendix L.

5 48. Over the next several days, there were a number of emails back and forth between the State,
 6 the defense, and the court. Appendix L. The defense initially took the position that it was
 7 not available for a hearing on any date identified by the State. Appendix L at 4. Eventually,
 8 however, the defense agreed to appear for a hearing, but asked that it be set on October 31.
 9 Appendix L at 1.

10 49. On October 30, the defendant filed his response to the State's motion to amend, the
 11 Declaration of Todd Maybrow in support thereof, and his own motion to compel discovery.
 12 Appendix M; Appendix N; Appendix O.

13 50. In these documents, the defendant argued that the court should deny the State's motion to
 14 amend on a number of grounds. Appendix M at 11-24; Appendix N at 8-10. The defendant
 15 did not request that the court impose terms or other sanctions in any of these documents.
 16 Appendix M; Appendix N; Appendix O.

17 51. On October 31, the State filed its reply. Appendix P. As the defendant had not mentioned
 18 terms, let alone ask that the court impose them, the State did not address the propriety of such
 19 a sanction in its brief. Id.

20 52. The parties appeared before the Honorable Judge James Rogers on October 31 for a hearing
 21 on the State's motion to amend. A transcript of the hearing is attached as Appendix Q. The
 22 defendant did not mention or request the imposition of terms or other sanctions at any point
 23 during the hearing. Id. Nor did the court mention that it was considering the possibility of
 24 imposing terms. Id. As a result, the State did not address the propriety of such a sanction
 during the hearing. Id.

53. In his response materials, the defendant provided a recitation of the procedural posture of the
 case that I felt was highly slanted and that unfairly characterized many of the procedural facts
 of the case in way that cast the State in a negative light. Appendix M at 2-10; Appendix N at
 4-10; Appendix O at 1-6. This was repeated at the oral argument on the motion. Appendix
 Q at 8-11, 14-15. At that time, however, the State was unaware that the court was considering
 sanctioning the State based on the timing of its motion. As a result, the State focused on
 correcting and setting forth the facts only to the extent necessary for the resolution of the
 issues it believed to be before the court. Appendix P; Appendix Q. The State did not set
 forth the more comprehensive procedural history of the case that it would have if the
 defendant had requested terms or if the State had been aware that the court was considering
 imposing such a sanction.

54. Judge Rogers issued a written decision in the morning on November 1 granting the State's
 motion to amend and denying the defendant's motion to compel discovery. Appendix R.

DECLARATION OF PATRICK HINDS FOR
 PURPOSES OF STATE'S MOTION TO
 RECONSIDER - 8

State's Answer to Motion
 for Discretionary Review

Appendix - 8

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1 The court also *sua sponte* sanctioned the State by imposing terms “measured in the attorneys’
 2 fees for the defense for work on the discretionary appeal to this point.” Appendix R at 2.
 The court also certified its ruling on the order to amend for purposes of RAP 2.3(b)(4).

3 55. In the afternoon of November 1, the parties appeared telephonically before Supreme Court
 4 Commissioner Michael Johnston for oral argument on the defendant’s motion for direct
 5 discretionary review. During the argument, Commissioner Johnston expressed uncertainty as
 6 to whether the Court could address Judge Rogers’s ruling granting the motion to amend as
 part of the existing motion for discretionary review or whether the defendant would have to
 file a separate motion for discretionary review on that issue.

7 56. During this oral argument, the defendant’s attorney argued, *inter alia*, that the “general-
 specific rule” precluded the State from prosecuting him for first-degree manslaughter.

8 57. On November 5, Commissioner Johnston ordered that Judge Rogers’s ruling granting the
 9 motion to amend could not be addressed as part of the defendant’s existing motion for
 10 discretionary review, but would need to be addressed via a separate motion for discretionary
 11 review if the defendant chose to bring one. Appendix S. In this context, Commissioner
 12 Johnston deferred ruling on the defendant’s current motion for discretionary review until
 13 matters were more settled. Id.

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

16 Signed and dated by me this 13th day of November, 2018 in Seattle, Washington.

17 

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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix A

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

FILED

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CASE NUMBER: 18-1-00255-5 SEA

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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 (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
11 death of Harold Felton, a human being, who died on or about January 26, 2016;

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

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

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

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

Maybrow Dec. App. B (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

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-](http://kgmi.com/news/007700-new-report-shows-workplace-deaths-in-washington-are-up-and-disproportionately-affect-men)
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/fac/fac/files/2016_workrelatedfatalitiesinwastate_wafac.](http://www.lni.wa.gov/safety/research/fac/fac/files/2016_workrelatedfatalitiesinwastate_wafac.pdf)
17 [pdf](http://www.lni.wa.gov/safety/research/fac/fac/files/2016_workrelatedfatalitiesinwastate_wafac.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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix B

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

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,)
)
) Plaintiff,)

8 v.)

No. 18-1-00255-5 SEA

9)
10 PHILLIP NUMRICH,)
) Defendant.)

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

12 **I. INTRODUCTION**

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

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

STATE'S RESPONSE TO DEFENDANT'S
MOTIONS TO DISMISS COUNT 1 - 1

State's Answer to Motion
for Discretionary Review

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.

22
 23

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 **III. ARGUMENT**

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

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

21 _____
 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."

1 **A. THE “GENERAL-SPECIFIC RULE” DOES NOT REQUIRE DISMISSAL**
 2 **OF COUNT 1**

3 **1. Applicable Law**

4 It is well-established rule of statutory construction that when a defendant’s actions violate
 5 both a specific and a general statute, the defendant should generally be charged under the former
 6 rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (citing State
 7 v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). However, this rule is subject to important
 8 limitations.

9 As an initial matter, the rule is only intended to be used in situations in which “the two
 10 statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized.”
 11 State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007) (quoting In re Estate of Kerr, 134
 12 Wn.2d 328, 343, 949 P.2d 810 (1998)). If the two statutes do not relate to the same subject
 13 matter and/or can be harmonized, the rule simply does not apply. Id.; State v. Becker, 59 Wn.
 14 App. 848, 852, 801 P.2d 1015 (1990). Similarly, the rule only applies when the two statutes are
 15 actually "concurrent." Shriner, 101 Wn.2d at 580. In this context, the fact that a specific statute
 16 contains additional elements beyond the general statute is not relevant to whether they are
 17 concurrent. State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982). However, there is a
 18 fundamental difference between: (1) one statute requiring *additional* elements beyond another
 19 (the former being more specific than the latter); and (2) two statutes that require *different*
 20 elements (and are, thus, simply different offenses). As common sense indicates, where offenses
 21 have different elements, they are not concurrent; rather, they are simply different statutes
 22 criminalizing different conduct. See State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275
 23 (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.

STATE’S RESPONSE TO DEFENDANT’S
 MOTIONS TO DISMISS COUNT 1 - 7

State’s Answer to Motion
 for Discretionary Review

Appendix - 32

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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
 by the director, or any order issued granting a variance under RCW 49.17.080 or
 49.17.090 and that violation caused death to any employee.

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

23 _____

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.

21 _____
 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 Moreover, the laws are directed at different conduct. Read as a whole, the gravamen of
 2 the crime of manslaughter is that the defendant negligently caused the death of another. In
 3 contrast, the gravamen of RCW 49.17.190(3) is that the defendant knowingly violated a health or
 4 safety regulation and that an employee happened to die as a result. While this distinction may be
 5 subtle, its existence and importance is demonstrated by considering the points of the respective
 6 laws. The obvious point of RCW 9A.32.070 is to prevent people from acting negligently in a
 7 way that risks the death of another. The obvious point of RCW 49.17.190 (when read in
 8 conjunction with RCW 49.17.180) is to require employers to know and follow applicable health
 9 and safety requirements. As this case demonstrates, there may be times where a given
 10 defendant's actions violate both statutes. However, that simply means that such a defendant has
 11 committed two different crimes. Numrich points to no legislative history and provides no
 12 compelling analysis indicating any intent on the part of the Washington Legislature that, in that
 13 context, the State should not be able to prosecute such a defendant for both.

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. As a result,
 16 the "general-specific rule" simply does not apply to them.

17 *ii. The two statutes are not concurrent*

18 As noted above, the "general-specific rule" is a canon of statutory construction that is only
 19 applied when two statutes are "concurrent." The two statutes at issue are not.

20 As noted above, statutes are concurrent only when the "general" statute is necessarily
 21 violated every time the "specific" one is. Shriner, 101 Wn.2d 580. As a result, if it is possible to
 22 violate the latter without violating the former, then the statutes are not concurrent and the
 23 "general-specific rule" does not apply. Chase, 134 Wn. App. at 802-03; Heffner, 126 Wn. App.

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
 20

21 _____
 22 ⁹ Def. Memo. at 11.

23 ¹⁰ It is certainly true that, *in this case*, the fact that Numrich knowingly violated such regulations is part of the proof
 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

22 _____
 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.

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
that violation caused death to any employee shall, upon conviction be guilty of a gross
misdemeanor and be punished by a fine of not more than one hundred thousand dollars or
by imprisonment for not more than six months or by both.....

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

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

16 The express legislative history of WISHA is extremely short and does not discuss the
17 proposed criminal sanctions contained in RCW 49.17.190. Rather, the only discussion in the
18 legislative history deals with the need to ensure that Washington's statutes would be at least as
19 effective as OSHA in order to ensure that Washington had an approved OSHA State Plan that
20 would avoid federal preemption. *Enacting the Washington Industrial Safety and Health Act of*
21 *1973: Hearing on SB 2389 Before the S. Comm. on Labor, 1973 Leg., 43rd Sess. at 2 (Feb. 2,*
22 *1973); See also RCW 49.17.010. As a result, many of the provisions of WISHA are worded*
23 *very similarly, if not identically, to those in OSHA. In this context, where the provisions of*

STATE'S RESPONSE TO DEFENDANT'S
MOTIONS TO DISMISS COUNT 1 - 19

State's Answer to Motion
for Discretionary Review

Appendix - 44

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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
 law.

12 ...

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

15 ...

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

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

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

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).

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

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

10 In Michigan (which has an approved OSHA State Plan similar to Washington’s), for
 11 example, the court dealt with an argument virtually identical to Numrich’s in Hegedus, 432
 12 Mich. 598. In Hegedus, an employee of a company died due to carbon monoxide poisoning
 13 while working in a company owned van. Id. at 602. The State’s theory of the case was that the
 14 poor condition and maintenance of the van allowed exhaust to leak into it and kill the decedent
 15 Id. The State charged the defendant—a company supervisor—with involuntary manslaughter
 16 under Michigan state law for his role in the incident. Id. The defendant argued that his
 17 prosecution for involuntary manslaughter under Michigan’s “general” criminal statutes was
 18 precluded and that he could only be prosecuted for violating the more “specific” criminal
 19 provisions of MIOSHA (Michigan’s approved OSHA State Plan) or OSHA because they
 20 preempted the “general statute.” Id. at 602-06. As noted above, the relevant OSHA provision in
 21 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.

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

12 The defendant in this case is charged with manslaughter, not simply with a
 13 “willful” violation of an OSHA standard. While his conduct, if proved, might also
 14 satisfy the elements of that [latter] “crime,” the state has chosen, in a valid
 15 exercise of its police powers, to pursue this matter under its own criminal laws.
 We cannot construe OSHA, the stated purpose of which is “to assure so far as
 possible ... safe and healthful working conditions and to preserve our human
 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.

3y

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 WISIA 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
 regulatory legislation often by their very nature require intricate and complex
 responses from Congress, but without Congress necessarily intending its
 enactment as the exclusive means of meeting the problem....”

18 Despite its length and thoroughness, OSHA is far from complete. The
 19 incompleteness of OSHA’s provisions for criminal penalties is but one example of
 the incompleteness of the act as a whole, and serves to answer the defendant’s
 20 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
 21 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
 22 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

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.

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 _____
 18 www.bostonherald.com/topic/kevin_otto (Massachusetts: defendant, owner of a drain pipe company, charged with
 19 two counts of manslaughter after two employees were killed in a trench collapse); *People v. Formica*, 15 Misc. 3d
 20 404, 833 N.Y.S.2d 353 (2007) (New York: defendant, owner and supervisor of construction company, convicted of
 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
 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
 22 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
 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)).

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

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
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix C

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

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KING COUNTY
Judge John Chun
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CASE NUMBER: 18-1-00255-5 SEA

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

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

I. INTRODUCTION

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

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

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

10 II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

20
21 ¹ Citing the decision in *State v. Gamble*, 154 Wn.2d 457 (2005), the State claims that the offense of
22 Manslaughter in the Second Degree requires proof that the defendant’s mental state specifically related
23 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**
16 **Violation of WISHA'S Criminal Liability Statute.**

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

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

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

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

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

20 Response at 13 (emphasis supplied).

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

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

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

12 **3. The State’s Hypotheticals Do Not Advance Scenarios Where**
13 **the Employer is Criminally Liable for a Violation of Labor**
14 **Safety Regulation with Death Resulting Because In Both**
15 **Scenarios the Employer’s Actions Were Not the Legal Cause**
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 employec'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 WISIIA statute was
17 first enacted in 1973. The statute includes no indication – either directly or impliedly – that it
18 intended for the more general manslaughter provisions to remain applicable in cases involving
19 workplace deaths. In fact, as the State appears to concede, there is nothing within the statute or
20 legislative history which supports the State's current position. Thus, there is no express evidence
21 that the Washington legislature intended for the general manslaughter statute to apply to situations
22 where an employer's violation of a labor safety regulation results in the death of a worker.

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

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

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

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

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

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

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

5 The legislature finds that personal injuries and illnesses arising out of
6 conditions of employment impose a substantial burden upon employers and
7 employees in terms of lost production, wage loss, medical expenses, and
8 payment of benefits under the industrial insurance act. Therefore, in the public
9 interest for the welfare of the people of the state of Washington and in order to
10 assure, insofar as may reasonably be possible, safe and healthful working
11 conditions for every man and woman working in the state of Washington, the
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 WISIA’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 OSIIA’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
17

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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.’”
12 *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305 (2011) (quoting *Dep’t of Ecology v.*
13 *Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11 (2002)).

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

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

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

25 That the State can invent far-fetched hypothetical situations (*see* Response at 22-23), with
26 results with which the State disagrees, does not render a statute absurd and invalid. Here, there is
27 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 Unfortunatcly, workplacc 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/Rescarch/FACE/Files/2017_WorkRelatedFatalitiesInWaState_W
10 [AFACE.pdf](#). In the last decade, there have been 681 traumatic work-related deaths in
11 Washington. See *id.*

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

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

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

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

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

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

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

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
18
19

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.

20 
21 _____
22 Todd Maybrown, WSBA #18557

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix D

Email From Judge Chun's Bailiff (7/23/18)

Hinds, Patrick

From: Court, Chun
Sent: Monday, July 23, 2018 3:18 PM
To: Hinds, Patrick; Alexander, Eileen; Todd Maybrown
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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix E

[Defendant's] NOTICE OF DISCRETIONARY REVIEW
TO SUPREME COURT OF WASHINGTON

FILED

18 SEP 14 PM 4:10

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

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

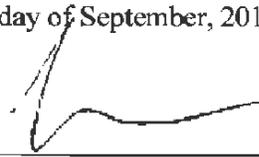
Defendant.

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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix F

[Defendant's] MOTION FOR DISCRETIONARY REVIEW

FILED
SUPREME COURT
STATE OF WASHINGTON
9/28/2018 4:10 PM
BY SUSAN L. CARLSON
CLERK

NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON

PHILLIP SCOTT NUMRICH,

Appellant.

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR DISCRETIONARY REVIEW

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

Todd Maybrown, Esq.
Cooper Offenbecher, Esq.
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PROOF OF SERVICE

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WPIC 25.0217
WPIC 25.0317

1. **IDENTITY OF MOVANT**

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

2. **DECISION BELOW**

Appellant asks this Court to review the decision of the King County Superior Court, recorded in its August 23, 2018 Order Denying Defendant's Motion to Dismiss Count 1 and Certifying the Issues for Review Under RAP 2.3(b)(4). *See App. A.*

3. **ISSUES PRESENTED FOR REVIEW**

1. Should discretionary review be granted where the superior court certified that its decision, in denying defendant's motion to dismiss, involves controlling questions of law to which there is substantial ground for a difference of opinion, and in so ruling recognized the need for interlocutory appellate guidance?
2. 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 under the general felony manslaughter statute for the death of an employee resulting from alleged safety violations, even though there is a specific workplace death statute, thereby violating Washington's "general-specific" rule?

4. **STATEMENT OF THE CASE**

A. **Factual Background**¹

¹ These facts, and the procedural history, are summarized in the Declaration of Todd Maybrow attached hereto as *Appendix B*.

Phillip 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 licensed to do business in Washington and its job sites are regulated by the Washington Department of Labor and Industries (“WSDLI”).

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. Mr. Numrich and several employees helped to dig and shore two trenches – one near the home and one near the street – at the commencement of the work. On January 26, 2016, as the project was nearly completed, a worker was killed when the dirt wall of the trench nearest to the home collapsed. Mr. Numrich was not present at the job site at the time of the collapse.

On July 21, 2016, the WSDLI issued Alki Construction a citation that alleged certain violations of the safety regulations in relation to the events of January 26, 2016. *See App. B* (Declaration of Andrew Kinstler). Mr. Numrich appealed these findings and assessments and the parties ultimately reached a compromised settlement of all claims.

B. Procedural History

On or about January 18, 2018, the State filed criminal charges against Mr. Numrich relating to this workplace incident. The Information charges:

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.

App. B (Information).²

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. Throughout the Certification for Determination of Probable Cause, Mr. Joseph opines that Alki Construction had failed to comply with certain WSDLI regulations, such

² RCW 49.17.190 is part of Washington's Industrial and Health Act of 1973. This legislative scheme is commonly referred to as "WISHA."

as the provisions identified in WAC 296-155-650 and WAC 296-155-657. *See Appendix B* (Certification at 2). Further, Mr. Joseph claims that Alki Construction failed to follow the “most rigorous shoring standard per WSDLI regulations” when digging and shoring the trench. *Id.* (Certification at 3).

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

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

On June 13, 2018, the State filed its Response to Defendant’s Motion to Dismiss Count 1 (“Response”). Initially, the State claimed that Washington’s general-specific rule is no different than any other tool of statutory construction. Then, assuming that the general-specific rule could be

applied in this instance, the State argued that the underlying charges were not concurrent because WISHA's criminal liability statute (RCW 49.17.190(3)) contains no causation requirement. Finally, after conceding that this was the first instance in which an employer in Washington had ever been charged with manslaughter based upon a workplace accident, the State claimed that there was no equal protection violation in this case.

C. **The Superior Court's Ruling**

King County Superior Court Judge John Chun³ initially heard argument on July 19, 2018. The Court declined to issue any ruling on that date and, instead, scheduled a subsequent hearing for August 23, 2018.

Thereafter, Judge Chun informed the parties that he intended to deny the defense motion. The State subsequently prepared a proposed Order that parroted the arguments in its pleadings. The defense objected to the State's proposed Order and presented argument why this matter should be certified for review under RAP 2.3(b)(4). *See App. D (Objection to State's Proposed Order and Motion for Certification for Review Pursuant to RAP 2.3(b)(4))*.

The parties appeared before Judge Chun on August 23, 2018. The defense then argued that this motion raised issues of central importance and that immediate review was appropriate at this juncture. In particular,

³ Judge Chun has since been appointed to Division One of the Court of Appeals.

counsel explained how a case involving a single misdemeanor charge was fundamentally different than a case that also included a charge of manslaughter. Accordingly, the defense demonstrated that interlocutory review was certain to advance the ultimate termination of the case.⁴

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

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

Appendix A.

5. **ARGUMENT**

A. Introduction: Discretionary Review is Warranted under RAP 2.3

Discretionary review is necessary and appropriate to promptly address significant issues regarding the interpretation of Washington's criminal statutes as they pertain to workplace fatalities – including the relationship between WISHA's specific workplace death statute and the

⁴ 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.

general manslaughter statute. Before this prosecution, it seemed apparent that WISHA's workplace death statute had established a comprehensive and unified scheme of punishment for cases involving workplace-related deaths. To accept the State's claims in this case, however, the WISHA workplace death statute would become superfluous and every such incident would now be subject to prosecution as a manslaughter charge.

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 appropriately recognized that this case presents hotly contested issues that should be definitively resolved by the appellate courts before trial, and certified this issue pursuant to RAP 2.3(b)(4). Additionally, RAP 2.3(b)(2) 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 probable error substantially altering the status quo.

B. This Prosecution Violates the General-Specific Rule

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

Any employer who willfully and knowingly violates the requirements of RCW 49.17.060, any safety or health standard promulgated under this chapter, any existing rule or regulation governing the safety or health conditions of employment and adopted by the director, or any order issued granting a variance under RCW 49.17.080 or 49.17.090 and that violation caused death to any employee shall, upon conviction be guilty of a gross misdemeanor and be punished by a fine of not more than one hundred thousand dollars or by imprisonment for not more than six months or by both; except, that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than two 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 pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, violators

may be sentenced to up to six months in jail, less than what would be available for conviction of other gross misdemeanors. *See id.*

This 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 knowingly**” violated a WISHA rule, regulation, or safety and health standard, and where “that violation cause[s] death to any employee” the employer “shall, upon conviction be guilty of a gross misdemeanor.” RCW 49.17.190(3) (emphasis added).

Since as early as 1970, Washington has applied its own, unique version of the “general-specific rule” when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 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) (quoting *State v. Cann*, 92 Wn.2d 193, 197 (1979)).

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. As the Washington Supreme Court has explained:

Under the general-specific rule, a specific statute will prevail over a general statute. *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867 (1976) (“It is the law in this jurisdiction, as elsewhere, that where concurrent general and 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 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).

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

The Washington courts have applied this rule in several different contexts. See, e.g., *Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged under general theft statute and should have been charged only with criminal possession of a rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could not be charged under general escape statute and should have been charged only under the specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972) (defendant who presented another’s credit card at a restaurant could not be charged under general larceny statute, but must instead be charged with crime of procuring meals by fraud); *State v. Thomas*, 35 Wn.App. 598, 604-05 (1983) (elements of

unlawful imprisonment are necessarily present in situations where the offense of custodial interference is alleged). *See also State v. Haley*, 39 Wn.App. 164 (1984) (where facts supported either a manslaughter charge or negligent homicide charge, it was the prosecutor's duty, where an automobile was involved, to charge negligent homicide).

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

A side-by-side comparison of the elements of each offense establishes this point:

<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

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.⁵ More generally, each violation of RCW 9A.32.070 requires proof of “negligent” conduct that results in death. Under Washington law, criminal negligence is defined as a “gross deviation of the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). Thus, the specific statute requires proof of a greater *mens rea* (“willfully or knowingly”) than the general statute (which requires proof only of criminal negligence). It is noteworthy that Washington’s pattern jury instructions establish that criminal negligence is established in every case where there is proof of a higher *mens rea* (such as willful, intentional, knowing or reckless conduct). *See* RCW 9A.08.010(2).

It is impossible to envision a case where a defendant might be guilty of the specific WISHA statute but acquitted of the more general manslaughter statute. For, as reflected in the State’s charging documents, the WISHA/OSHA standards establish the standard of care for employers in the State of Washington. *See, e.g., Minert v. Harsco Corp.*, 28 Wn.App. 686, 873-74 (1980); *Kelley v. Howard S. Wright*, 90 Wn.2d 323 (1978) (OSHA regulation is relevant to the appropriate standard of care); *Kennedy*

⁵ WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements or with plain indifference to employee safety.” WAC 296-900-14020.

v. Sea-Land Services, Inc., 62 Wn.App. 839, 852-53 (1991) (OSHA regulation was relevant to the standard of care). Simply put, in each and every case that a person willfully or knowingly fails to comply with the mandates of WISHA, it can also be said that the employer has engaged in negligent conduct or a gross deviation of the standard of care.⁶

Notably, the specific statute, RCW 49.17.190(3), has a significantly ***higher*** mental state than the general manslaughter statute. It is unreasonable to suggest that the legislature enacted a special misdemeanor-level statute with a higher mental state while also assuming that prosecutors within the state would be authorized to charge under a general felony statute with a lower mental state.

A very similar situation was presented in *Danforth, supra*. There, the petitioners were on work release status. *Danforth*, 97 Wn.2d at 256. While looking for work, the petitioners became intoxicated and failed to return to the work release center. *Id.* The petitioners were arrested and charged with escape in the first degree. *Id.* On appeal, the petitioners argued that another statute, RCW 72.65.070, deals specifically with an escape from work release. *Id.* at 257. This Court held that the general-specific rule prohibited prosecution under the general “escape” statute:

⁶ The defense argument is visually encapsulated in the attached chart. *See App. E.*

[W]e are of the opinion that the specific requirement that the defendant's conduct be willful under RCW 72.65.070 recognizes a valid legislative distinction between going over a prison wall and not returning to a specified 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.

Finally, this interpretation of the two statutes is necessary to give effect to RCW 72.65.070. RCW 72.65.070 differs significantly from the general escape statute in that the prosecutor must prove the failure to return was willful. 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).

Given the choice, a prosecutor will presumably elect to prosecute under the general escape statute because of its lack of a mental intent requirement. 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.

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

The same situation is presented here. By proceeding under the general manslaughter statute, the State is simply required to prove that the defendant was criminally negligent – or that his conduct amounted to a gross deviation from the standard of care. Yet to proceed under the specific statute (RCW 49.17.190(3)), the State would need to prove a willful and knowing violation of the applicable safety regulations (which amount to the

standard of care in this highly-regulated industry). The State should not be permitted to avert the mental element that the legislature had in mind when it enacted the specific WISIA statute.

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

In an attempt to side-step these issues, the State has claimed that the general-specific rule is merely a maxim of statutory construction. The State's arguments are misguided. Washington's general-specific rule for criminal cases is not merely an aid to statutory construction. Rather, as

⁷ Consistent with RCW 9A.20.020, the maximum fine for a Class A felony is \$50,000.

explained by the Washington Supreme Court, it is a “rule” of clear application – and a rule with a very specific purpose: “The general-specific rule is a means of answering the question, Did the legislature intend to give the prosecutor discretion to charge a more serious crime when the conduct at issue is fully described by a statute defining a less serious crime?” *State v. Albarran*, 187 Wn.2d 15, 20 (2016). The answer to this question is always “no,” unless it is clear that the legislature intended to make the general act controlling.

The State also claims that these statutes are not concurrent because they have different elements. Yet, in making this argument, the State does not rely upon the statutory language. Rather, it invites the Court to either ignore the language of the statutes or to engraft non-statutory elements that would serve its purpose in this case.

First, the State has argued that RCW 49.17.190(3) requires no causal connection between the wrongful act and the resulting death. *See Response* at 13. To quote the State’s brief:

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

Id. (emphasis supplied).

But the unambiguous language of RCW 49.17.190(3) specifically provides for liability only where there is proof that the defendant's "violation caused death to an employee." *Id.* (emphasis supplied). Contrary to the State's claim, 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 causal connection – both "but for" cause and "proximate" or "legal" cause – between the wrongful conduct and the death of the employee.

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

⁸ Notably, WISHA's criminal liability statute and the Manslaughter statutes were enacted just two years apart. *See* 1973 Wash. Sess. Laws c 80 § 19 (enacting statute criminalizing Violation of Labor Safety Regulation with Death Resulting); 1975 Wash. Sess. Laws c 260

Second, citing the decision in *State v. Gamble*, 154 Wn.2d 457 (2005), the State has argued 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 the crime of manslaughter in the first degree required proof that the defendant knew of, and disregarded, a risk that death might occur. While this might be true of the higher form of manslaughter (which requires actual knowledge and disregard of the risk at hand), manslaughter in the second degree has no affirmative mental requirement. Thus, insofar as the defendant need not be aware of any such risk where the charge alleges negligent conduct, it is hard to imagine how the *Gamble* analysis could apply in this context.⁹ Even if that analysis could apply here, it does not support the State's claims. Simply put, there is no hypothetical scenario where a defendant could engage in a willful violation of the specific safety regulations and thereby cause a workplace death without likewise violating the general manslaughter statute.

C. This Court Should Grant Discretionary Review to Promptly Address these Paramount Issues

§ 9A.32.070 (enacting statute criminalizing Manslaughter in the Second Degree).

⁹ Appellant recognizes that the commentators to the WPICs have suggested that WPIC 10.04 might need to be modified in a manslaughter case. *See* WPIC 10.04 (Comments). However, these commentators do not explain why a "similar rationale" should apply in a case involving negligence, where the defendant need not be aware of the risk in question.

The State seems to be arguing that a defendant, like Mr. Numrich, can be charged with a felony-level offense of manslaughter in the second degree in each and every case involving a workplace death. As argued above, the superior court committed probable error when it denied the defendant's motion to dismiss the manslaughter charge. Moreover, the superior court has certified this issue for immediate review under RAP 2.3(b)(4). The court's reasoning is sound.

First, there should be no question that the defense has presented an issue that involves controlling questions of law. Whether Mr. Numrich faces a gross misdemeanor or felony manslaughter charge will bear heavily on pretrial litigation, evidentiary rulings, and of course, conviction and sentencing consequences. This is *the* central issue in this case.

Second, there is substantial ground for a difference of opinion. It is noteworthy that the defense has presented legal questions that have yet to be addressed by any appellate court in the State of Washington; and the State is now advancing a position that has never previously been advocated by any other prosecuting attorney in Washington. Notwithstanding the State's assertions regarding the non-statutory *mens rea* element for manslaughter in the second degree, there remains a dispute regarding *Gamble's* applicability to second degree manslaughter cases. *See, e.g., Gamble*, 154 Wn.2d at 476

(Chambers, J., concurring) (explaining that manslaughter in the second degree and second-degree felony murder involve “exactly the same intent”).

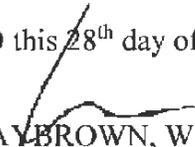
Finally, immediate review of this Court’s Order will materially advance the ultimate termination of this litigation. It is axiomatic that pretrial and trial proceedings will be drastically different if this case involves a felony manslaughter charge, as opposed to a gross misdemeanor offense. A felony manslaughter case will be lengthier, costlier, and necessarily involve more investigation and litigation. Further, the landscape for potential resolution drastically changes if Mr. Numrich is charged with a gross misdemeanor. Perhaps there would be no trial at all.

Important judicial resources will be saved by having this controlling legal issue resolved now. It makes good sense to have an appellate court resolve these novel legal questions before the parties prepare this case for trial. In fact, an appellate ruling in this case will help to clarify the legal issues that will be presented to the trial court when the case ultimately proceeds to trial.

6. CONCLUSION

For all of these reasons, and in the interests of justice, the Court should grant discretionary review and reverse the Superior Court decision.

RESPECTFULLY SUBMITTED this 28th day of September, 2018.


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State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix G

[Defendant's] STATEMENT OF GROUNDS
FOR DIRECT REVIEW

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NO. 96365-7

IN THE SUPREME COURT OF WASHINGTON
(King County Superior Court No. 18-1-00255-5 SEA)

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP SCOTT NUMRICH,

Appellant.

STATEMENT OF GROUNDS FOR
DIRECT REVIEW

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WPIC 10.0416

Phillip Numrich seeks direct review of the King County Superior Court's Order Denying Defendant's Motion to Dismiss Count 1 and Certifying the Issues for Review Under RAP 2.3(b)(4) filed on August 23, 2018. A copy of the decision is attached hereto as *Appendix A*.

I. NATURE OF THE CASE AND DECISION

Phillip 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 licensed to do business in Washington and its job sites are regulated by the Washington Department of Labor and Industries ("WSDLI").

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. Mr. Numrich and several employees helped to dig and shore two trenches – one near the home and one near the street – at the commencement of the work. On January 26, 2016, as the project was nearly completed, a worker was killed when the dirt wall of the trench nearest to the home collapsed. Mr. Numrich was not present at the job site at the time of the collapse.

On July 21, 2016, the WSDLI issued Alki Construction a citation that alleged certain violations of the safety regulations in relation to the events of January 26, 2016. *See Appendix B to Motion for Discretionary Review*

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

On or about January 18, 2018, the State filed criminal charges against Mr. Numrich relating to this workplace incident. The Information charges:

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.

¹ A copy of the King County Superior Court's August 23, 2018 Order is attached as *Appendix A*. Subsequent references to *Appendices B-E*, which provide support for the facts contained herein, refer to appendices to Appellant's contemporaneously filed Motion for Discretionary Review.

*Appendix B (Information).*²

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. 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 Appendix B (Certification at 2).* Further, Mr. Joseph claims that Alki Construction failed to follow the “most rigorous shoring standard per WSDLI regulations” when digging and shoring the trench. *Id.* (Certification at 3).

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

On April 30, 2018, Mr. Numrich filed his Motion to Dismiss Count 1 (the manslaughter charge). *See Appendix C.* In support, Mr. Numrich argued that this prosecution – and the filing of a manslaughter charge – was in direct conflict with Washington’s general-specific rule insofar as each violation of

² RCW 49.17.190 is part of Washington’s Industrial and Health Act of 1973. This legislative scheme is commonly referred to as “WISHA.”

WISHA's specific statute (RCW 49.17.190(3)) would necessarily support a conviction under the general manslaughter statute (RCW 9A.32.070). Mr. Numrich also argued that the State's decision to file the manslaughter charge violated Washington's equal protection clause.

On June 13, 2018, the State filed its Response to Defendant's Motion to Dismiss Count 1 ("Response"). Initially, the State claimed that Washington's general-specific rule is no different than any other tool of statutory construction. Then, assuming that the general-specific rule could be applied in this instance, the State argued that the underlying charges were not concurrent because WISHA's criminal liability statute (RCW 49.17.190(3)) contains no causation requirement. Finally, after conceding that this was the first instance in which an employer in Washington had ever been charged with manslaughter based upon a workplace accident, the State claimed that there was no equal protection violation in this case.

King County Superior Court Judge John Chun³ initially heard argument on July 19, 2018. The Court declined to issue any ruling on that date and, instead, scheduled a subsequent hearing for August 23, 2018.

Thereafter, Judge Chun informed the parties that he intended to deny the defense motion. The State subsequently prepared an Order that parroted

³ Judge Chun has since been appointed to Division One of the Court of Appeals.

the arguments in its pleadings. The defense objected to the State's proposed Order and presented argument why this matter should be certified for review under RAP 2.3(b)(4). *See App. D (Objection to State's Proposed Order and Motion for Certification for Review Pursuant to RAP 2.3(b)(4))*.

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

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

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

⁴ 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.

II. ISSUES PRESENTED FOR REVIEW

1. Should direct review be granted where this case of first impression – the prosecution of an employer for felony manslaughter for the death of an employee resulting from alleged safety violations – has broad implications across the Washington business landscape and therefore involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination?
2. Should direct review be granted, where the superior court certified that its decision, in denying defendant’s motion to dismiss, involves controlling questions of law to which there is substantial ground for a difference of opinion, and in so ruling recognized the need for interlocutory appellate guidance?
3. Should direct 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 under the general felony manslaughter statute for the death of an employee resulting from alleged safety violations, even though there is a specific workplace death statute, thereby violating Washington’s “general-specific” rule?
4. Should direct review be granted to clarify this Court’s comments in *State v. Gamble*, 154 Wn.2d 457 (2005) with respect to a defendant’s mental state *vis-à-vis* the victim in a criminal negligence homicide case?

III. GROUNDS FOR DIRECT REVIEW: THIS CASE INVOLVES A FUNDAMENTAL AND URGENT ISSUE OF BROAD PUBLIC IMPORT REQUIRING PROMPT AND ULTIMATE DETERMINATION UNDER RAP 4.2(A)(4)

A. RAP 4.2(a)(4)

A party may seek direct review in this Court of: “A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(4). The State’s novel prosecution in this matter presents such a case.

B. The *Numrich* Case is the First Time a Washington Prosecutor Has Ever Charged an Employer with Manslaughter Relating to a Workplace Fatality Accident

This is a case of first impression. The King County Prosecutor’s Office charged an employer with manslaughter relating to the death of his employee caused by alleged safety violations. Both parties agree that no prosecutor in Washington has ever previously filed such a charge.

This is not happenstance. There is a specific WISHA statute that criminalizes these very types of violations. RCW 49.17.190(3) provides that “[a]ny employer who willfully and knowingly violates [applicable health and safety standards]...and that violation caused death to any employee shall, upon conviction be guilty of a gross misdemeanor and be punished by a fine of not more than one hundred thousand dollars or by imprisonment for not more than six months or by both.”

The Washington legislature specifically enacted RCW 49.17.190(3) to punish employers for workplace fatalities arising from health and safety violations. Accordingly, charging Mr. Numrich with the general statute of

manslaughter in the second degree violates Washington's longstanding "general-specific" rule.

C. The Manslaughter Charge Filed Against the Employer in this Case Very Clearly Violates Washington's General-Specific Rule

Since as early as 1970, Washington has applied its own, unique version of the "general-specific rule" when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 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) (quoting *State v. Cann*, 92 Wn.2d 193, 197 (1979)).

Washington courts have applied this rule in a variety of contexts involving criminal cases. *See, e.g., Shriner*, 101 Wn.2d at 580-83 (defendant who failed to return rental car could not be charged under general theft statute and should have been charged only with criminal possession of a rental car statute); *State v. Danforth*, 97 Wn.2d 255, 257-59 (1982) (work release inmates could not be charged under general escape statute and should have been charged only under the specific failure to return to work release statute); *State v. Walls*, 81 Wn.2d 618, 622 (1972) (defendant who presented another's credit card at a restaurant could not be charged under general larceny statute, but must instead be charged with

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

A side-by-side comparison of the elements of each offense establishes this point:

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RCW 49.17.190(3)	WILFULL AND KNOWING	WORKPLACE DEATH

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.⁵ More generally, each violation of RCW 9A.32.070 requires proof of “negligent” conduct that results in death. Under Washington law, criminal negligence is defined as a “gross deviation of the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). Thus, the specific statute requires proof of a greater *mens rea* (“willfully or knowingly”) than the general statute (which requires proof only of criminal negligence). In fact, Washington’s pattern jury instructions establish that criminal negligence is established in every case where there is proof of a higher *mens rea* (such as willful, intentional, knowing or reckless conduct). See RCW 9A.08.010(2).

A very similar situation was presented in *Danforth, supra*. There, the petitioners were on work release status. *Danforth*, 97 Wn.2d at 256. While looking for work, the petitioners became intoxicated and failed to return to the work release center. *Id.* The petitioners were arrested and charged with escape in the first degree. *Id.* On appeal, the petitioners argued that another statute, RCW 72.65.070, deals specifically with an

⁵ WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements or with plain indifference to employee safety.” WAC 296-900-14020.

escape from work release. *Id.* at 257. This Court held that the general-specific rule prohibited prosecution under the general “escape” statute:

[W]e are of the opinion that the specific requirement that the defendant's conduct be willful under RCW 72.65.070 recognizes a valid legislative distinction between going over a prison wall and not returning to a specified 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.

Finally, this interpretation of the two statutes is necessary to give effect to RCW 72.65.070. RCW 72.65.070 differs significantly from the general escape statute in that the prosecutor must prove the failure to return was willful. 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).

Given the choice, a prosecutor will presumably elect to prosecute under the general escape statute because of its lack of a mental intent requirement. 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.

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

The same situation is presented here. By proceeding under the general manslaughter statute, the State is simply required to prove that the defendant was criminally negligent – or that his conduct amounted to a gross deviation from the standard of care. Yet to proceed under the specific

statute (RCW 10.73.190(3)), the State would need to prove that the defendant engaged in a willful and knowing violation of the safety regulations. The State should not be permitted to avert the mental element that the legislature had in mind when it enacted the specific WISHA statute.

Relying on *State v. Gamble*, 154 Wn.2d 457 (2005), the State attempts to differentiate manslaughter and the WISHA statute by arguing that 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*, this Court noted that the crime of manslaughter in the first degree required proof that the defendant knew of, and disregarded, a risk that death might occur. *Id.* at 468. While this might be true of first degree manslaughter, manslaughter in the second degree has no affirmative mental requirement. Because the defendant need not be aware of any such risk, it is hard to imagine how the *Gamble* analysis could apply.⁶ *See, e.g., Gamble*, 154 Wn.2d at 476 (Chambers, J., concurring) (explaining that manslaughter in the second degree and second-degree felony murder involve "exactly the same intent"). This Court is in the best position to clarify *Gamble*'s applicability to second degree manslaughter.

⁶ Appellant recognizes that the commentators to the WPICs have suggested that WPIC 10.04 might need to be modified in a manslaughter case. *See* WPIC 10.04 (Comments). The commentators note that *Gamble*'s extension to cases involving criminal negligence is "implied." However, the comments do not explain why a "similar rationale" should apply in a case involving negligence, where the defendant need not be aware of the risk.

Accordingly, the WISHA punishment scheme provides the exclusive criminal remedy for the types of violations that have been alleged in this case. Nevertheless, the State here attempts to break new ground by charging an employer with felony manslaughter.⁷

D. The Potential Liability of Washington Employers for Felony Manslaughter as a Result of Workplace Safety Violations is an Urgent Issue Warranting Prompt and Ultimate Determination by this Court

This Court should accept review now to provide Washington businesses with prompt and authoritative guidance on the pressing question of whether an employer can be held criminally liable for felony manslaughter and subject to a term of imprisonment as a result of safety violations causing the death of an employee.

Washington State has a vibrant economy with a gross domestic product of over \$500 billion.⁸ According to recent Census figures there are 186,164 employers in Washington with a physical establishment.⁹ And a

⁷ The unique features of the WISHA statute further make it clear that the legislature intended RCW 49.17.190(3) to be the sole criminal statute applicable in cases of workplace accident fatalities. The statute allows for penalties that are not available in any other misdemeanor-level offense. On the one hand, violators may be required to pay a stiff fine (up to \$100,000 for a first violation of the provision), well beyond what is available in any other misdemeanor offense. *See* RCW 9A.20.020. On the other hand, violators may be sentenced to up to six months in jail, less than what would be available for conviction of other gross misdemeanors. *See id.*

⁸ *See* Wikipedia, List of U.S. States and Territories by GDP, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_GDP.

⁹ *See* United States Census Bureau,

recent tally by the Small Business Administration showed there were 555,285 small businesses in Washington.¹⁰ Unfortunately, workplace fatality is a reality. There are tens of thousands of workplace related injury claims in Washington each year.¹¹ In 2017, 75 traumatic work-related incidents resulted in a worker's death.¹² In the last decade, there have been 681 traumatic work-related deaths. *See id.*

Washington's economy depends on a predictable regulatory framework. The legislature has chosen WISHA to the regulatory framework for handling workplace safety. WISHA, in turn, provides a specific statute criminalizing workplace deaths caused by safety violations.

This case of first impression certainly involves an issue of broad public import that is at least as fundamental, urgent and demanding prompt and ultimate determination as other issues directly reviewed under this Rule. *See, e.g., State v. Chen*, 178 Wn.2d 350 (2013)(redactions in criminal defendant's competency evaluation); *Alverado v. WPPSS*, 111 Wn.2d 424

<https://www.census.gov/quickfacts/fact/table/wa/SBO001212#viewtop>.

¹⁰ *See* U.S. Small Business Administration · 2015 Figures, <https://www.sba.gov/sites/default/files/advocacy/Washington.pdf>.

¹¹ *See*

<https://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp> (in 2017 there were 29,029 compensable worker's compensation injury claims and 20,691 rejected worker's compensation injury claims).

¹² *See* 2017 Washington State Work-Related Fatalities Report, http://www.lni.wa.gov/Safety/Rsearch/FACE/Files/2017_WorkRelatedFatalitiesInWaState_WAFACE.pdf.

(1988) (mandatory urinalysis); *Cougar Mountain Associates v. King County*, 111 Wn.2d 742 (1988) (subdivision application); *Hartley v. State*, 103 Wn.2d 768 (1985) (automobile wrongful death); *In re Marriage of Hadley*, 88 Wn.2d 649 (1977) (property division).

This case squarely presents the question of whether an employer can be charged with felony manslaughter related to a workplace accident death where Washington's legislature very clearly enacted a more specific statute to criminalize these very types of safety-related workplace fatalities. This Court has yet to address this important question.

This Court should grant swift review and resolve these crucial issues. The defense has presented issues of great public importance – and the ruling in this case is sure to have broad ramifications for employers and businesses throughout the State of Washington.

RESPECTFULLY SUBMITTED this 28th day of September, 2018.


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State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix H

DECLARATION OF PATRICK HINDS
RE: STATE'S MOTION TO AMEND

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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.

- 1 6. The defendant has moved for discretionary review of the Superior Court's denial of his
2 motion to dismiss. If discretionary review is granted (in either the Supreme Court or the
3 Court of Appeals), the Superior Court will no longer have the authority to rule on the State's
4 motion to amend the Information under RAP 7.2.
- 5 7. If discretionary review is granted, the State anticipates that the case will not be mandated
6 back to the Superior Court until after January 26, 2019.
- 7 8. As the State interprets the relevant case law, once the statute has run, the State would not be
8 able to amend the Information to change Count 1 to Manslaughter in the First Degree or to
9 add a count of Manslaughter in the First Degree as a charge in the alternative because,
10 although such an amendment would "relate back" to the original Information, it would
11 broaden the original charges. See State v. Warren, 127 Wn. App. 893, 896, 112 P.3d 1284
12 (2005).
- 13 9. Given all of the above, the State is moving to amend the Information now to add a count of
14 Manslaughter in the First Degree in the alternative because, if it does not, it will effectively
15 lose the ability to do so if discretionary review is granted.
- 16 10. The State's motion to amend is not being brought to retaliate against the defendant for
17 seeking discretionary review, to gain an advantage in the appellate litigation, or for any other
18 improper purpose.

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

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

22 

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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix I

STATE'S ANSWER TO MOTION
FOR DISCRETIONARY REVIEW

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 96365-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP NUMRICH,

Petitioner.

**STATE'S ANSWER TO MOTION
FOR DISCRETIONARY REVIEW**

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A. IDENTITY OF RESPONDING PARTY

The State of Washington is the Respondent in this matter.

B. STATEMENT OF RELIEF SOUGHT

The State respectfully asks this Court to deny discretionary review.

C. FACTS RELEVANT TO THE MOTION

On January 26, 2016, the defendant's reckless disregard for the safety of his employees caused the death of Harold Felton. As a result of his actions, the defendant, Phillip Numrich, is currently charged 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).¹ Appendix at 1-2.

Numrich is the owner and operator of Alki Construction LLC.² Felton was Numrich's employee and a long-time friend. On January 16, 2016, Numrich's company started working to replace a sewer line at a residence in West Seattle. For this project, Numrich used a method by which a trench was dug down to either end of the pipe to be replaced and then a hydraulic machine was used to pull a new pipe through the old one,

¹ As discussed below, the State will be amending the Information to add a count of Manslaughter in the First Degree under RCW 9A.32.060.

² The substantive facts are drawn from the Certification for Determination of Probable Cause prepared by WSDLI Safety and Health Officer Mark Joseph (Appendix at 3-7) and the Joint Investigation of Alki Construction Memorandum prepared by Officer Joseph and Assistant Attorneys General Cody Costello and Martin Newman (Appendix at 8-18).

simultaneously bursting the old pipe and laying the new one into place.

One of these trenches—dug where the sewer line connected to the house—was 21 inches wide, six feet long, and more than seven feet deep.

With a trench of this depth, there is a substantial risk that the excavation could cave-in and injure or kill a worker inside. A number of factors impact the risk of such a collapse. These include the soil condition and type, the depth of the trench, and whether the soil was previously disturbed. All of these factors increased the likelihood of collapse at the project in West Seattle. By January 26th, a number of other factors increasing the likelihood of a collapse were also present: the trench had been “open” for approximately 10 days and the soil was heavily saturated from several days of rain.

Because of the danger posed to workers in trenches, Washington has regulations that apply to job site excavations. For a trench the size of the one at issue, these regulations required, *inter alia*, that the walls be shored to prevent a cave-in. While shores were placed in the trench, the shoring Numrich provided was wholly insufficient to safely stabilize it.

Also included in Washington regulations is the requirement that a “competent person” regularly inspect any trenches and the protective system installed in them. “Competent person” is a term defined by WAC 296-155-650 as someone “who can identify existing or predictable hazards

in the surroundings that are unsanitary, hazardous, or dangerous to employees.” Inspections by the “competent person” must be made daily prior to the start of any work in a trench and must be repeated after every rainstorm or other hazard-increasing occurrence. If the “competent person” sees any evidence of a situation that could result in a possible collapse, that person must remove all employees from the trench until precautions have been taken to ensure worker safety. Numrich was the only “competent person” at the job site during the project.

On January 26, 2016—10 days after the project started—Numrich, Felton, and Maximillion Henry (Numrich’s other employee) were at the job site. This was scheduled to be the last day of work on the project and Numrich was under pressure from the home owners to complete it. Shortly after 10:00 a.m., the new pipe had been pulled into place and Felton was working in the trench closest to the house. Felton began using a vibrating tool called a “Sawzall” in the trench. It is well known that this tool can cause extensive vibrations in the ground, which can disturb the soil and make a collapse more likely. Numrich noted and commented to Henry on the dangerous nature of Felton’s use of the tool in the trench.

As noted above, Numrich was the “competent person” for the project and was aware of all of the risk factors present at the site. In addition, Numrich was aware that Felton’s use of a vibrating tool inside

the trench was dangerous and further increased the risk of a collapse. He was also aware that the ground around the trench had already been recently vibrated and disturbed by the process of pulling the new pipe through the old one. However, despite being aware of all these risks and despite being the owner of the company, Felton's friend, the person in charge, and the "competent person" at the scene, Numrich made no effort to halt Felton's hazardous use of the tool and did not re-inspect the trench after Felton was done using it. Instead, Numrich left to buy lunch.

Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton under approximately seven feet of wet dirt. While the Seattle Fire Department arrived at the scene shortly thereafter, rescuers were unable to free Felton in time to save his life and he died of compressional asphyxia.

The State filed charges against Numrich on January 5, 2018. Appendix at 1-2. Numrich subsequently brought a motion to dismiss the second-degree manslaughter charge, arguing that the State's decision to prosecute him for that crime violated both Washington's "general-specific rule" and his right to equal protection. Motion for Discretionary Review at 4.³ The State's response brief was filed on June 13, 2018. Appendix at 19-

³ The State will hereinafter refer to Numrich's Motion For Discretionary Review as "MDR," to the appendices attached thereto as "MDR App.," and to Numrich's Statement Of Grounds For Direct Review as "SOG."

72. The trial court ultimately denied Numrich's motion to dismiss, but granted his motion for RAP 2.3(b)(4) certification. MDR App. A.⁴

D. GROUNDINGS FOR RELIEF AND ARGUMENT

Numrich seeks direct discretionary review of the trial court's ruling that the State's prosecution of him for second-degree manslaughter does not violate Washington's "general-specific rule."⁵ A motion for discretionary review may be granted *only* if the petitioner demonstrates that the stringent requirements of RAP 2.3(b) are met. Furthermore, even when a case meets one or more of the requirements allowing review under RAP 2.3(b), the language of the rule itself indicates that this Court *may* then accept discretionary review, not that it must. RAP 2.3(b). This Court can and should still exercise its own judgment as to whether review is appropriate under all the circumstances. In exercising its discretion, this

⁴ Numrich's briefing unfairly characterizes many of the procedural facts of this case in a manner that casts the State in an undeservedly negative light. *See* MDR at 4-6; SOG at 3-5. This also occurred in briefing before the Superior Court and the State was compelled to file a memorandum to correct Numrich's recitation of the facts and to ensure that the record was accurate. Appendix at 73-94. However, the majority of Numrich's current mischaracterizations relate to matters that are not relevant to the issues before this Court. In that context, the State will not attempt to correct every such instance, but will confine itself to addressing only those relevant to the current motion.

⁵ As noted above, the trial court also denied Numrich's motion to dismiss on equal protection grounds. However, while his briefing before this Court contains scattered references to alleged equal protection violations (*see, e.g.*, MDR App. B at 2), Numrich has neither briefed nor asked this Court to grant discretionary review on this issue. As a result, the State will not address it in its briefing and objects to any attempt by Numrich to raise it in his reply or otherwise.

Court starts with the general rule that interlocutory review is highly disfavored and the party seeking discretionary review must meet a heavy burden of demonstrating that immediate review is justified. Minehart v. Morning Star Boys Ranch, 156 Wn. App. 457, 462, 232 P.3d 591 (2010); In re Dependency of Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

Numrich argues that discretionary review is appropriate under RAP 2.3(b)(2) and (4). However, Numrich has failed to demonstrate that this case meets the requirements of either. Moreover, even if Numrich established that this Court *could* accept review under either, he has still failed to meet the heavy burden of showing that immediate interlocutory review is appropriate.

1. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(2)

Under RAP 2.3(b)(2), discretionary review may be accepted if “[t]he 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.” Here, Numrich has failed to establish either that the Superior Court probably erred or that any error has altered the status quo or limited his freedom to act.

a. Even If The Superior Court Probably Erred, Discretionary Review Is Still Not Appropriate

Even if a trial court has committed probable error, that is not in and

of itself a sufficient basis for this Court to take discretionary review under RAP 2.3(b)(2). Rather, the party seeking review also bears the burden of establishing the “effect prong” of the provision—that the erroneous decision substantially altered either the status quo or his or her freedom to act. Id. Numrich can demonstrate neither.

A trial court’s denial of a motion to dismiss is generally insufficient to establish the effect prong of RAP 2.3(b)(2).⁶ See State v. Howland, 180 Wn. App. 196, 206, 321 P.2d 303 (2014). Numrich has failed to present any argument as to how this case falls outside that general rule. Nor has he presented any argument as to how the effect prong of RAP 2.3(b)(2) has been met. Nor does the record present any basis to conclude that it has. Here, the trial court denied a defendant’s motion to dismiss a charge against him—a not uncommon event in the criminal justice system. There is nothing about the ruling that substantially altered the status quo or limited Numrich’s freedom to act. As result, Numrich has failed to establish the effect prong of RAP 2.3(b)(2) and his motion for review under this subsection should be denied for that reason alone.

⁶ The effect prong of RAP 2.3(b)(2) is intended to focus on the effects of injunctions and similar orders that have immediate effect outside the courtroom. Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1547 (1986); Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 Seattle U.L. Rev. 91 (2014).

b. Numrich Has Not Shown That The Trial Court's Decision Was Probably Erroneous

It is well-established that when a defendant's actions violate both a specific and a general statute, the defendant should typically be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Numrich argued to the trial court that the State's prosecution of him for second-degree manslaughter violates this rule. He now argues that the trial court committed probable error when it denied his motion to dismiss on these grounds. His motion must fail because the "general-specific rule" does not require dismissal of Count 1.

First, the "general-specific rule" is only applied when two statutes address the same subject matter and conflict to the point that they cannot be harmonized. State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194 (2007). One way of determining this is to examine the elements of the statutes. If the statutes create crimes with different elements, they simply criminalize different conduct and the rule does not apply. State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation here.

Under RCW 9A.32.070, a person is guilty of second-degree manslaughter if, "with criminal negligence, he or she causes the death of another person." In this context, a defendant acts with criminal negligence when he "fails to be aware of a substantial risk that [death] may occur...."

RCW 9A.080.010(1)(d); 2016 Comment to WPIC 10.04 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005)). As a result, second-degree manslaughter requires proof both that the defendant had the mental state of “negligence” *and that this mental state specifically related to the risk of death to the decedent.* Gamble, 154 Wn.2d at 468-69.

Under RCW 49.17.190(3), a person is guilty of Violation of Labor Safety Regulations with Death Resulting if the person is an employer who willfully and knowingly violates a specified safety standard and that violation causes the death of an employee. Thus, a criminal violation of RCW 49.17.190(3) requires proof that the defendant had the mental state of “knowing” *and proof that this mental state specifically related to the violation of a safety provision.* Id.

As a result, the two crimes have different *mens rea* elements. A violation of RCW 9A.32.070 requires proof that the defendant was negligent as to the risk of death of the decedent. In that context, whether or not the defendant violated a regulatory duty may be relevant in proving he was criminally negligent, but the State is not required to prove that he knew he was violating such regulations. In contrast, a violation of RCW 49.17.190(3) requires proof that the defendant knew he was violating a safety regulation, but the State is not required to prove that the defendant had any specific *mens rea vis-à-vis* the risk of death to the decedent. Because RCW

9A.32.070 and RCW 49.17.190(3) have different elements, the “general-specific rule” does not apply to them. Farrington, 35 Wn. App. at 802.

Numrich’s only real argument against this point is to assert that second-degree manslaughter does not require the defendant to be aware of a substantial risk that a death may occur because Gamble—which held that the crime of manslaughter requires proof of the defendant’s mental state *vis-à-vis the death of the victim*—only applies to first-degree manslaughter. MDR at 18.⁷ However, this is incorrect. The language this Court used in Gamble established that its holding applied to both first- and second-degree manslaughter. 154 Wn.2d at 469. Furthermore, this Court’s Committee on Jury Instructions has read the logic of Gamble as applying equally to second-degree manslaughter. 2016 Comment to WPIC 10.04; 2016 Comment to WPIC 28.06. Finally, cases since Gamble have assumed or explicitly held that Gamble applies to second-degree manslaughter and that the *mens rea* at issue in the crime is negligence as to the risk of death. State v. Henderson, 180 Wn. App. 138, 149, 321 P.3d 298 (2014); State v. Latham, 183 Wn. App. 390, 405 P.3d 960 (2014).

⁷ The argument that Gamble only applies to first-degree manslaughter plays a large role in Numrich’s argument as to why this Court should take direct review. SOG at 6,12. The State addresses Numrich’s argument on this point in more detail in its Answer To Statement Of Grounds For Direct Review, filed under separate cover, and incorporates that argument by reference here.

Moreover, RCW 9A.32.070 and RCW 49.17.190(3) are directed at different conduct. Read as a whole, the gravamen of the crime of second-degree manslaughter is that the defendant negligently caused the death of another. In contrast, the gravamen of RCW 49.17.190(3) is that the defendant knowingly violated a health or safety regulation and that an employee died as a result. While this distinction may be subtle, its existence and importance is demonstrated by considering the points of the respective laws. The obvious point of RCW 9A.32.070 is to prevent people from acting negligently in a way that risks the death of others, whereas the obvious point of RCW 49.17.190 is to require employers to know and follow applicable safety regulations. As this case demonstrates, there may be times where a defendant has violated both statutes. But there is nothing to suggest any intent on the part of the Legislature to preclude the State from prosecuting such a defendant for both.

Second, the “general-specific rule” only applies when two statutes are “concurrent.” Statutes are concurrent only when the “general” statute is necessarily violated every time the “specific” one is. Shriner, 101 Wn.2d 580. As a result, if it is possible to violate the latter without violating the former, then the statutes are not concurrent and the “general-specific rule” does not apply. See State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d 630 (2006). Here, it is possible to violate RCW 49.17.190(3)

without violating RCW 9A.32.070. As described above, the two statutes have different elements. This difference in elements in and of itself demonstrates that it is possible to violate RCW 49.17.190(3) without also violating RCW 9A.32.070.⁸ Moreover, in its briefing to the trial court, the State set forth a number of hypothetical examples in which a defendant would have violated RCW 49.17.190(3) but would not have violated RCW 9A.32.070. Appendix at 32-34.

Despite this, Numrich argues that it is impossible to violate RCW 49.17.190(3) without also violating RCW 9A.32.070. MDR at 11-13. However, his entire argument is premised on the assertion that, because “knowing” is a higher level mental state than “criminal negligence,” proof of the *mens rea* element in RCW 49.17.190(3) will necessarily prove the *mens rea* element of RCW 9A.32.070. MDR at 11-13. But this assertion oversimplifies and mischaracterizes the nature of the *mens rea* elements at issue in the two statutes. Here, as described above, the *mens rea* elements are aimed at different objects—RCW 49.17.190(3) involves the knowing violation of a regulation whereas RCW 9A.32.070 involves negligence as

⁸ It is certainly true that, *in this case*, the State is arguing that the fact that Numrich knowingly violated safety 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. In that context, the specific facts of the instant case are irrelevant to that determination. Id.

to the risk of another's death. Because the objects of the *mens reas* are different, proof of the former will not necessarily prove the latter.

Third, the point of the “general-specific rule” is to assist courts in determining and giving effect to legislative intent; specifically, by helping to answer the question of whether the Legislature intended to preclude the State from charging the more “general” statute. Conte, 159 Wn.2d at 803. In that context, it is well recognized by this Court that the rule should be “applied to preclude a criminal prosecution *only where the legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815 (emphasis added). In this context, Washington courts—including this one—have explicitly referred to the rule as one of statutory construction and/or have treated it as such as they have used it to ascertain and give effect to legislative intent. Id.; State v. Heffner, 126 Wn. App. 803, 807, 110 P.3d 291 (2005); State v. Thomas, 35 Wn. App. 598, 601-02, 668 P.2d 1294 (1983); State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at 580. As a result, when this Court uses the rule to determine whether the Legislature intended one statute to preclude prosecution of another when both apply, this Court must take into account the other canons that it uses to construe statutes. These include the general rules that courts must apply the construction that best fulfills the overall statutory purpose and carries out clear legislative intent and must avoid

interpreting statutes in ways that leads to absurd results. See In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Here, interpreting and applying the “general-specific” rule as advocated by Numrich would undercut the statutory purpose, thwart the intent of the Legislature, and lead to absurd results.

RCW 49.17.190 is part of the Washington Industrial Safety and Health Act of 1973 (WISHA). RCW 49.17.900. Subsection (3) of the statute is nearly identical to 29 USCA § 666(e) of the federal Occupational Safety and Health Act of 1970 (OSHA). 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 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. Because of this, many of the provisions of WISHA—including RCW 49.17.190(3)—are worded very similarly, if not identically, to provisions in OSHA and are intended to be analogous to them. Where the provisions of a Washington statute

are identical or analogous to a corresponding federal provision, this Court can look to federal authority, as the Legislature's intent is presumed to be identical to Congress's. See Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

Prior to the enactment of OSHA/WISHA, there was nothing that precluded state prosecutors from bringing felony charges against employers under existing state laws criminalizing homicide and assault. Against that backdrop, it is clear that Congress did not intend that the passage of OSHA would limit the ability of state prosecutors to bring such traditional criminal charges against employers for acts committed in the workplace. "Nothing in [OSHA] or its legislative history suggest that Congress intended to...preempt enforcement of State criminal laws of general application such as murder, manslaughter, or assault." H.R. REP. NO. 1051, 100th Cong., 2nd Sess. 10 (1988) (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989)). Given the above, it is evident that neither Congress nor the Washington Legislature intended the inclusion of a gross misdemeanor provision in OSHA/WISHA to preclude Washington prosecutors from being able to bring homicide charges under state law against employers following workplace fatalities.

Finally, accepting Numrich's argument that the Legislature intended for RCW 49.17.190(3) to preclude prosecution under RCW

9A.32.070 in circumstances where both applied would require this Court to violate the general rule that statutes should not be construed in manner that leads to absurd results. Contreras, 124 Wn.2d at 747. In its briefing to the trial court, the State set forth a number of examples of the absurdities that would follow from adopting Numrich's interpretation. Appendix at 40-41. Since these absurd results flow logically and inexorably from Numrich's argument, this demonstrates that his interpretation is incorrect and should be rejected.

2. DISCRETIONARY REVIEW IS NOT WARRANTED UNDER RAP 2.3(b)(4)

Under RAP 2.3(b)(4), discretionary review may be accepted if “[t]he superior court has certified...that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” However, a trial court's certification is not the end of the inquiry. Rather, this Court can and should conduct its own independent analysis of whether the requirements of RAP 2.3(b)(4) have been met. Moreover, as noted above, even if this Court concludes that they have, it can and should still exercise its own judgment as to whether discretionary review is appropriate and starts with a heavy presumption that it is not. RAP 2.3(b); Morning Star Boys Ranch,

156 Wn. App. at 462; In re Grove, 127 Wn.2d at 235. Here, despite the trial court’s certification, Numrich has failed to establish that this matter actually meets the requirements of RAP 2.3(b)(4).

As an initial matter, Numrich has not shown that the trial court’s decision involves a legal question as to which there is a substantial ground for a difference of opinion. The law regarding the “general-specific rule” and how it is used to analyze two statutes is well settled. Here, as discussed at length above, the trial court’s decision was correct under that law. Similarly, as discussed above and in even more detail in the State’s Answer To Statement Of Grounds For Direct Review, Gamble’s applicability to second-degree manslaughter flows logically from the analysis in Gamble itself and has been accepted by virtually every legal authority that has reviewed the matter.⁹ While Numrich is able to articulate arguments as to why he believes the trial court was incorrect, the rule requires more. The phrase “substantial ground for difference of opinion”—as used in RAP 2.3(b)(4)—does not simply mean that the petitioner disagrees with the lower court and/or has come up with an

⁹ The only contrary authority cited by Numrich is Justice Chambers’s concurring opinion in Gamble itself. MDR at 19-20; SOG at 12. With all due respect to Justice Chambers, this concurrence is of limited utility and authority on the point as it consists of little more than a summary statement without any supporting analysis or citation to other authority and was—self-evidently—not the conclusion adopted by the majority of this Court. 154 Wn.2d at 476 (Chambers, J., concurring).

interesting argument or legal theory as to why the court was wrong. Rather, it generally implies the existence of “two different, but plausible, interpretations of a line of cases” that generally manifests itself as an existing conflict in the appellate case law. Klamath Irr. Dist. v. United States, 69 Fed. Cl. 160, 163 (2005).¹⁰ Numrich cites to no such legal background for this case, nor is the State aware of any.

Moreover, Numrich has failed to show that discretionary review will materially advance the termination of the litigation. Even if this Court were to accept review and rule in Numrich’s favor, he will still face felony manslaughter charges. Numrich’s entire argument to this Court is that the State is precluded from prosecuting him for *second-degree* manslaughter. By its own terms Numrich’s argument does not apply to *first-degree* manslaughter. Here, the State intends to add a count of Manslaughter in the First Degree to the charges against Numrich.¹¹ 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. As a result, despite Numrich’s assumption/assertion to the contrary,

¹⁰ The language of RAP 2.3(b)(4) was adapted from 28 USCA §1292(b) and federal cases interpreting that provision are instructive by analogy. Karl B. Tegland, 2A Washington Practice Series, Rules Practice, Part III, RAP 2.3 (7th ed.).

¹¹ This is addressed in more detail in the attached Declaration of Patrick Hinds. Appendix at 95-96.

regardless of this Court's ruling on the substantive issue, he will still face a felony manslaughter charge.

Furthermore, even if the State did not add first-degree manslaughter charges and even if this Court were to accept review and rule in Numrich's favor, he will still face criminal trial for violating RCW 49.17.190(3). Numrich attempts to address this point by asserting that the proceedings will be different for a case that involves only a gross misdemeanor. MDR at 20. But this argument fails for two reasons. First, it is disingenuous to suggest that the trial in this case will be substantially different if it involves only the violation of RCW 49.17.190(3). Here, both counts stem from the same series of events and the trial will be essentially identical—in terms of the witnesses called and the evidence adduced—regardless of whether it involves both counts or just Count 2. Indeed, even if both counts are tried, it will likely be the violation of RCW 49.17.190(3) that will require more effort, investigation, and litigation due to its rareness, technical nature, and the lack of established pattern jury instructions and other materials. Second, even were that not the case, Numrich's argument simply misses the point—even if this matter were to go to trial solely on the violation of RCW 49.17.190(3), *it would still be going to trial*. Given that fact alone, it cannot be said that interlocutory appeal will materially advance the termination of the litigation.

E. CONCLUSION.

Numrich asserts that “important judicial resources will be saved” if this Court grants discretionary review. MDR at 20. But that is simply not the case. Litigation in this matter will not end if this Court grants review because, regardless of its decision on the merits, the matter will still go back to the Superior Court for trial. If a conviction results, Numrich will doubtlessly appeal and the case will end up before an appellate court in the future. This is exactly the sort of piecemeal appellate litigation that makes this Court appropriately reluctant to grant discretionary review and “simply substitute two long and expensive appeals for two long and expensive trials.” Crooks, Discretionary Review at 1550. For this reason, as well as all of the other reasons discussed above, Numrich’s motion for discretionary review should be denied.

DATED this 18th day of October, 2018.

Respectfully submitted,

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By: _____


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State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix J

STATE'S ANSWER TO STATEMENT OF
GROUNDS FOR DIRECT REVIEW

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STATE OF WASHINGTON
10/18/2018 2:50 PM
BY SUSAN L. CARLSON
CLERK

NO. 96365-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP NUMRICH,

Petitioner.

**STATE'S ANSWER TO STATEMENT OF
GROUNDS FOR DIRECT REVIEW**

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A. IDENTITY OF RESPONDING PARTY

The State of Washington is the Respondent in this matter.

B. STATEMENT OF RELIEF SOUGHT

The State respectfully asks this Court to find that there are no grounds for direct review pursuant to RAP 4.2(a).

C. FACTS RELEVANT TO THE MOTION

On January 26, 2016, the defendant, Phillip Numrich, caused the death of his employee and long-time friend, Harold Felton. As a result of his actions, Numrich is currently charged 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). The State will be amending the Information to add a count of Manslaughter in the First Degree under RCW 9A.32.060.

Numrich moved the Superior Court to dismiss Count 1 based on the argument that Washington's "general-specific rule" prohibits the State from prosecuting him for second-degree manslaughter. This motion was denied and Numrich now seeks discretionary review of that decision and direct review in this Court.¹

¹ Numrich's Motion For Discretionary Review will hereinafter be referred to as "MDR" and his Statement of Grounds For Direct Review will hereinafter be referred to as "SOG."

The facts surrounding Numrich’s crimes are described in greater detail in the State’s Answer To Motion For Discretionary Review, which has been filed concurrently under separate cover. That factual recitation is incorporated by reference and will not be repeated here in the interest of avoiding needless duplication.

D. GROUNDS FOR RELIEF AND ARGUMENT

1. DIRECT REVIEW IS NOT WARRANTED

As discussed at length in the State’s concurrently filed Answer To Motion For Discretionary Review, this case does not meet the criteria set forth in RAP 2.3(b) for discretionary review. But even if it did, it does not meet the criteria for direct review of a Superior Court decision by this Court. Numrich argues that review should be granted pursuant to RAP 4.2(a)(4). SOG at 6-7. However, Numrich has failed to demonstrate that this case presents a “fundamental and urgent issue of broad public import that requires prompt and ultimate determination” as required by that subsection. Therefore, this Court should deny Numrich’s request for direct review.

The vast majority of Numrich’s Statement of Grounds For Direct Review consists of a pared down version of his argument in support of his motion for discretionary review—that Washington’s “general-specific rule” prohibits the State from prosecuting him for second-degree

manslaughter. Compare SOG at 7-13 with MDR at 7-18. The State has responded to this argument at length in its Answer to that motion. That response is incorporated by reference and will not be repeated here in the interest of avoiding needless duplication. But even if discretionary review was warranted, Numrich has failed to explain how either the nature of the legal issue or the merits (or lack thereof) of his claims establish a basis for this Court to take direct review under RAP 4.2(a)(4).

Numrich does present two additional argument as to why this Court should grant direct review. Neither is persuasive.

First, Numrich claims that direct review is appropriate because “this Court is in the best position to clarify *Gamble*’s² applicability to second degree manslaughter.” SOG at 12. As set out in more detail in the State’s Answer To Motion For Discretionary Review, one of the reasons that the “general-specific rule” does not bar the State from prosecuting Numrich for second-degree manslaughter is that the crimes of Violation of Labor Safety Regulation with Death Resulting and Manslaughter in the Second Degree have different *mens rea* elements. Under State v. Gamble, second-degree manslaughter requires proof both that the defendant had the mental state of “negligence” and that this mental state specifically related

² State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)

to the risk of death to the decedent. 154 Wn.2d at 468-69. The State is not required, however, to prove that the defendant willfully and knowingly violated a health or safety regulation. RCW 9A.32.070. RCW 49.17.190(3), in contrast, requires the opposite—the State must prove that the defendant willfully and knowingly violated a health or safety regulation, but need not prove that the defendant acted with criminal negligence vis-à-vis the risk of the decedent’s death. Because the statutes have different elements, the “general-specific rule” does not apply to them. See State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983).

Numrich’s sole response to this point is to argue that Gamble only applies to first-degree manslaughter and not to second-degree. MDR at 18; SOG at 6,12. Numrich, therefore, asserts that direct review is warranted so that this Court can “clarify” Gamble. SOG at 6,12. But Gamble does not require clarification. Aside from his bare assertion, Numrich presents no compelling argument as to why the *mens rea* for first-degree manslaughter would specifically relate to the risk of the decedent’s death but the *mens rea* for second-degree manslaughter would not. Nor is any logical basis for such a distinction apparent to the State.

Beyond that, the case law and legal authority overwhelmingly contradict Numrich's position.³ The language this Court used in Gamble itself implicitly established that its rationale and holding applied to both first- and second-degree manslaughter. In relevant part, this Court stated:

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

154 Wn.2d at 469 (emphasis in original). If this Court meant its holding to apply only to first-degree manslaughter, it would have said that in the above statement rather than using the general term "manslaughter" which applies equally to both degrees of the crime. Similarly, this Court would not have referred to both "recklessness" (the level of *mens rea* for first-degree manslaughter) and "criminal negligence" (the level of *mens rea* for second-degree manslaughter) in this passage unless it intended its holding to apply to both. Moreover, this Court's Committee on Jury Instructions has read the logic of Gamble as applying equally to second-degree

³ The only authority cited by Numrich as supporting his position is Justice Chambers's concurring opinion in Gamble itself. MDR at 19-20; SOG at 12. With all due respect to Justice Chambers, this concurrence is of limited utility and authority on the point as it consists of little more than a summary statement without any supporting analysis or citation to other authority and was—self-evidently—not the conclusion adopted by the majority of this Court. 154 Wn.2d at 476 (Chambers, J., concurring).

manslaughter. In its Comments on both WPIC 10.04⁴ and WPIC 28.06,⁵ the Committee indicated that, under Gamble, the definition of “criminal negligence” given to the jury in a second-degree manslaughter case must specify that the object of the defendant’s *mens rea* was the risk of death. 2016 Comment to WPIC 10.04; 2016 Comment to WPIC 28.06. Finally, cases subsequent to Gamble have assumed or explicitly held that Gamble applies to second-degree manslaughter and that the *mes rea* at issue in second-degree manslaughter is specifically negligence as to the risk of death. State v. Henderson, 180 Wn. App. 138, 149, 321 P.3d 298 (2014); State v. Latham, 183 Wn. App. 390, 405, P.3d 960 (2014).

Moreover, even if Gamble did require “clarification,” that is not in of itself a basis for direct review by this Court. In this context, Numrich’s sole argument for direct review appears to be the assertion that, because Gamble was decided by this Court, this Court—rather than the Court of Appeals—should be the one to clarify its holding. However, while there may be some surface appeal to this argument, it is not a basis for direct review under RAP 4.2(a). Under Washington’s hierarchical system of courts, the Courts of Appeal routinely handle appeals and address issues where they are called on to analyze and clarify prior holdings of this

⁴ “Criminal Negligence—Definition”

⁵ “Manslaughter—Second Degree—Criminal Negligence—Elements”

Court. The mere fact that the holding that Numrich argues needs clarification arises from a decision of this Court (rather than a decision of the Court of Appeals) does not establish that the case involves a “fundamental and urgent issue of broad public import that requires prompt and ultimate determination” warranting direct review under RAP 4.2(a)(4).

Given all of the above, Gamble clearly applies to second-degree manslaughter. And even if Gamble needed clarification on this point, that would not be a basis for direct review by this Court. As a result, Numrich’s request that this Court take direct review to “clarify” Gamble is unpersuasive.

Second, Numrich argues that direct review is warranted because “the potential liability of Washington employers for felony manslaughter as a result of workplace safety violations is an urgent issue warranting prompt and ultimate determination by this Court.” SOG at 13. Numrich’s argument should be rejected because, despite his claim to the contrary, what is really at issue in this case is actually a very narrow question that impacts a *very* small number of employers.

In making his argument, Numrich refers to the state of Washington’s economy and the need for a “predictable regulatory framework.” SOG at 13-14. In doing so, Numrich’s clear intent is to

paint himself as being a representative example of the hundreds of thousands of small businesses operating in Washington. But this does not hold up to even cursory scrutiny. The overwhelming majority of Washington employees are not killed on the job. Of those few who unfortunately are, even fewer are killed as a result of their employer's negligence or failure to follow safety regulations.⁶ When that does occur, it is unquestioned that the employer can be charged with a crime if he or she knowingly violated safety regulations and negligently caused the employee's death.

The only question presented by Numrich's motion for discretionary review is *which* crime or crimes that extraordinarily small number of potential defendants can be charged with. And Numrich has not presented any information demonstrating that a significant number of Washington state employers are being in any way impacted by uncertainty regarding the narrow question of whether they will be charged with a felony or with a gross misdemeanor if their actions lead to an employee's

⁶ As Numrich states, the Washington State Work Related Fatalities Report issued by the Washington Department of Labor and Industries for 2017 lists 75 traumatic work-related incidents that resulted in the worker's death during that year. SOG at 14. But while any such death is a tragedy, a closer look at the report is instructive because the vast majority of those 75 deaths occurred in situations in which there is no indication that the employer was (or could have been) negligent or in violation of a safety regulation. http://lni.wa.gov/Safety/Research/FACE/Files/2017_WorkRelatedFatalitiesInWaState_WAFACE.pdf

death. Rather, the vast majority of Washington employers simply follow required safety regulations and do not act negligently because it is the right thing to do, because they want to follow the rules, because they want to avoid hurting their workers, and/or because they do not want to be charged with *any* crime.

Here, the issue raised in Numrich’s motion for discretionary review—whether or not he can be prosecuted for manslaughter—is obviously of great concern to Numrich himself. But he has wholly failed to establish that it is an issue of “broad public import” to Washington employers as a whole, let alone one that “requires prompt and ultimate determination.” As a result, he has not met the requirements of RAP 4.2(a)(4).

E. CONCLUSION.

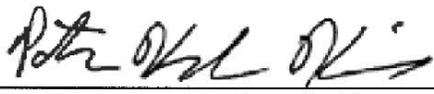
For all the above reasons, direct review is not warranted. The Superior Court’s denial of Numrich’s motion to dismiss is not fundamental, urgent, or of broad public import. The motion for direct review should be denied.

DATED this 18th day of October, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG

King County Prosecuting Attorney

By: 
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18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix K

Emails Between State and Defense (10/18/18)

Hinds, Patrick

From: Hinds, Patrick
Sent: Thursday, October 18, 2018 5:08 PM
To: Todd Maybrown; Cooper Offenbecher
Cc: Alexander, Eileen
Subject: RE: State v. Phillip Numrich - need to set a hearing
Attachments: Numrich - Hinds Declaration re Mot to Amend.pdf

Todd,

It would have been our preference to hold off on this motion. The reason that the State is bringing it now is because we cannot wait; if discretionary review is granted, the practical consequence will be to preclude the State from being able to amend. So we don't have a choice—we have to move to amend now or else the option will be lost to us. This is addressed in more detail in the attached declaration, which is also included in the appendix to the State's answer to the motion for discretionary review that was filed today.

Under Section 14 of the KC Superior Court Criminal Department Manual (which is the equivalent of a local rule on point per LCrR 1.1), motions to amend are properly set on the 8:30 Expedited Motions Calendar via an email to the court and are not subject to the time provisions that govern full criminal motions. Given the underlying concern re: timing that is the whole reason we're bringing this motion at this stage, it has to be addressed within the next two weeks (because, per the October 1 letter from the Supreme Court, the motion for discretionary review is going to be considered on the November 1st motion calendar). Having said that, we are also aware of the fact that you are in trial in Kent at the moment and we're willing to work with you to make it possible for you to appear. We are not trying to squeeze an advantage out of the fact that you're in trial down there. So...although this is a Seattle case, the State would be willing to agree to have the motion specially heard at the MRJC. Similarly, although expedited motions are usually only heard Monday-Thursday mornings, the State would be willing to agree to have the motion specially heard on a Friday or at a time other than 8:30 if the court agrees (subject to our availability). Finally, the State would be willing to agree that the amendment—if granted—would be granted without prejudice to the defense being able to renew its objection to the amendment and/or move to dismiss at a later time.

I'm happy to discuss this with you and/or Cooper in more detail in person or by phone if you wish. I'm using email simply to be as expeditious as possible because I know you're in trial in Kent. Given all of the above, what are the days/times in the next two weeks that would work for the defense to have the motion heard—particularly if the court would agree to have it heard at the MRJC and/or at a special time?

Finally, we are on notice that you will file a motion to dismiss and will ask for an evidentiary hearing if we move to amend. We have complied with our obligations under CrR 4.7 and Brady and will continue to do so. However, the materials you have asked for are not covered by either and we will not turn them over in response to your discovery request. At you have asked, I am treating your email as a request for public disclosure and will forward it ASAP to the KCPAO personnel who process and respond to such requests.

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: Thursday, October 18, 2018 11:56 AM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
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 Maybrow
Allen, Hansen, Maybrow & 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

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From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Thursday, October 18, 2018 11:07 AM
To: Todd Maybrow <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)

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix L

Emails Between State, Defense, and the Court (10/19/18 – 10/22/18)

Hinds, Patrick

From: Court, Ferguson
Sent: Monday, October 22, 2018 2:02 PM
To: Cooper Offenbecher; Hinds, Patrick; Todd Maybrow; SeaCriminalMotions
Cc: Alexander, Eileen
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

Good afternoon Counsel,

The Court will set the hearing for Wednesday, October 31, 2018 at 2:00 p.m. in E-713.

Thank you,

Kiese L. Wilburn

Bailiff to the Honorable Marshall Ferguson, Department 31
Assistant Chief Criminal Judge: October 1st – October 31st
King County Superior Court
Phone: 206-477-1513 | Email: Ferguson.Court@kingcounty.gov

From: Cooper Offenbecher <Cooper@ahmlawyers.com>
Sent: Monday, October 22, 2018 1:26 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Court, Ferguson <Ferguson.Court@kingcounty.gov>; Todd Maybrow <Todd@ahmlawyers.com>; SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

Good afternoon,

On October 30 I have a 1:00 case scheduling hearing in 1201 and could be available after that hearing is completed. However, should the Court have availability anytime on 10/31, the defense would request that the hearing be set on 10/31 instead of 10/30.

The defense will be filing a written objection to the State's Motion to Amend, but will not be able to have that completed until next week, given that Mr. Maybrow is in trial at the RJC and I am out of the office until 10/29. 10/30 is also the defense's deadline for filing Reply briefing regarding the pending Motion for Discretionary Review in the State Supreme Court.

Given the foregoing, if the Court has any availability on 10/31 the defense respectfully expresses its preference for that date given the briefing and scheduling obligations.

Thank you.

Cooper

Cooper Offenbecher
 Attorney at Law
 Allen, Hansen, Maybrow & Offenbecher, P.S.
 600 University Street, Suite 3020

Seattle, WA 98101
 Phone: 206-447-9681
 Fax: 206-447-0839
www.ahmlawyers.com

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From: [Hinds, Patrick](#)
Sent: Monday, October 22, 2018 10:23 AM
To: [Court, Ferguson](#); [Todd Maybrow](#); [SeaCriminalMotions](#); [Cooper Offenbecher](#)
Cc: [Alexander, Eileen](#)
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

The State is available at that date/time/location.

If the defense is not available, the State would note that (as discussed below), the defendant's motion for discretionary review in the Supreme Court (of his motion to dismiss Count 1 of the current Information) is set for oral argument at 2:30 p.m. on November 1st. I have been informed that the commissioner may very well issue a ruling on that motion later in the day. If discretionary review is granted, the practical effect would be to likely preclude the State from being able to amend the charges (as addressed in more detail in the attached motion and order). As a result, the State's motion needs to be addressed at some point prior to that hearing. As also previously mentioned, in order to accommodate that, the State would have no objection to having the motion heard at the MRJC if that is more convenient to the defense. The table below shows the dates/times the State could currently be available for a hearing at both courthouses.

<u>State's Availability</u>	<u>Seattle</u>	<u>MRJC</u>
10/23 (Tues)	8:30-4:30	8:30-4:30
10/24	8:30-4:30	8:30-4:30
10/25	8:30-4:30	8:30-4:30
10/26	11-3:30	11-2:30
10/29 (Mon)	8:30-4:30	8:30-4:30
10/30	8:30-4:30	8:30-4:30
10/31	8:30-4:30	8:30-4:30
11/1	8:30-1:30	8:30-1:30

Thank you,
 Patrick

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

(206) 477-1181 (office)

From: Court, Ferguson
Sent: Monday, October 22, 2018 9:33 AM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; Todd Maybrown <Todd@ahmlawyers.com>; SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>; Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

Good morning Counsel,

This matter shall be addressed on the record. Are parties available next Tuesday, October 30th at 1:00 p.m. in E-713?

Starting November 1st, Judge Spector will be the Assistant Chief Criminal Judge and you will work with her Court on scheduling.

Thank you,

Kiese L. Wilburn

*Bailiff to the Honorable Marshall Ferguson, Department 31
 King County Superior Court, Room E-713
 Phone: 206-477-1513 | Email: Ferguson.Court@kingcounty.gov*

CRIMINAL MATTERS

*Assistant Chief Criminal Judge Marshall Ferguson: October 1st – October 31st
 Assistant Chief Criminal Judge Julie Spector: November 1st – November 30th*

From: Hinds, Patrick
Sent: Friday, October 19, 2018 4:30 PM
To: Todd Maybrown <Todd@ahmlawyers.com>; SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>; Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>; Court, Ferguson <Ferguson.Court@kingcounty.gov>
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

Mr. Maybrown's points are all issues that he can assert as part the defense's opposition to the motion to amend and the State will not argue them via email. The State is following the rules and the court's procedures in noting and setting this motion. The defense cannot preclude the State from having an expedited motion heard in a timely manner by the simple expedient of claiming to be unavailable at any point over the next 8 court days. The State has offered to make itself available over a broad range of dates and times at multiple courthouses to allow the matter to be special set. However, if the defense refuses to agree to any date/time/location, the State would ask that this be set before Judge Ferguson for his next available hearing.

Sincerely,
 Patrick

Patrick Hinds

King County Prosecuting Attorney's Office

Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

From: Todd Maybrown <Todd@ahmlawyers.com>
Sent: Friday, October 19, 2018 3:55 PM
To: SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>; Hinds, Patrick <Patrick.Hinds@kingcounty.gov>;
 Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>; Court, Ferguson <Ferguson.Court@kingcounty.gov>
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

The defense is not available for a hearing on any of the proposed dates. There is no emergency circumstances in this case. In fact, the parties were before the motion court (Judge Ferguson) on October 1, 2018 and there was no mention of any need for an amendment. This is pure gamesmanship.

It is important to point out what is really motivating the State in this case. On August 23, 2018, after months of litigation, this Court certified a legal question for appellate review (see attached). The State is now hoping to use this 11th-hour amendment to block Mr. Numrich's efforts to obtain appellate review in this case. The State contends that this issue must be decided before November 1, 2018, simply because the Washington Supreme Court has recently scheduled oral argument on that date (see attached).

I cannot be expected to respond to this 11th-hour motion as I am in trial before Judge Bender at the MRJC. *See State v. Kime*, No. 15-1-04719-8 KNT. Moreover, the defense must be afforded a fair opportunity to file a written response to the State's motion. As I explained to Mr. Hinds yesterday, in light of the State's unfair tactics the defense is planning to file: (1) a motion for discovery relating to the issues before this court and (2) a motion to dismiss pursuant to CrR 8.3(b). All of these issues will need to be resolved BEFORE the court can rule upon the State's Motion to Amend.

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
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From: Court, O'Donnell <O'Donnell.Court@kingcounty.gov> **On Behalf Of** SeaCriminalMotions
Sent: Friday, October 19, 2018 3:46 PM
To: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>; SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>; Todd Maybrown <Todd@ahmlawyers.com>; Cooper Offenbecher <Cooper@ahmlawyers.com>
Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>; Court, Ferguson <Ferguson.Court@kingcounty.gov>
Subject: RE: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

Since this is a contested motion to amend, it will have to be heard before the motions court who is currently Judge Ferguson. His bailiff will respond Monday with a date that is available.

Thank you,

Rianne Rubright

Bailiff to the Honorable Sean P. O'Donnell

From: Hinds, Patrick

Sent: Friday, October 19, 2018 3:14 PM

To: SeaCriminalMotions <SeaCriminalMotions@kingcounty.gov>; Todd Maybrow <Todd@ahmlawyers.com>; 'Cooper Offenbecher (Cooper@ahmlawyers.com)' <Cooper@ahmlawyers.com>

Cc: Alexander, Eileen <Eileen.Alexander@kingcounty.gov>

Subject: State v. Numrich (18-1-00255-5 SEA) - need to schedule a motion to amend

The State needs to schedule this case for a motion to amend. A copy of the Amended Information is attached and has previously been provided to defense counsel Todd Maybrow and Cooper Offenbecher.

It's the State's understanding that the defense is objecting to the State's motion. It is also our understanding that Mr. Maybrow is currently in trial at the MRJC (and will be for some time) and that Mr. Offenbecher is on vacation from 10/22 – 10/26. In those circumstances, the State would usually just hold off on its motion to amend. However, this case is in an unusual procedural posture. As a result of that posture, the motion to amend needs to be heard prior to November 1st or there is a chance that the State will be precluded from amending. This is addressed in more detail in the declaration that is part of the attached Motion and Order to amend.

Based the unusual circumstances, the State is happy to do whatever can be done to minimize the inconvenience to the defense. In that context, the State would be willing to agree (if the defense would prefer and if the court is willing) to have the motion heard at the MRJC (even though it's a Seattle case) and/or to have it be special set at a time other than when motions to amend are usually heard.

Given all of the above, the State would ask that this motion either be set on 10/24 at the MRJC at 8:30 or on 10/30 in 1201 at 8:30. If, however, the defense would like to propose a different time or date, the table below shows when counsel for the State could be available at each location for the motion.

<u>State's Availability</u>	<u>Seattle</u>	<u>MRJC</u>
10/22 (Mon)	8:30-4:30	8:30-4:30
10/23	8:30-4:30	8:30-4:30
10/24	8:30-4:30	8:30-4:30
10/25	8:30-4:30	8:30-4:30
10/26	11-3:30	11-2:30
10/29 (Mon)	11-4:30	1-4:30
10/30	8:30-4:30	8:30-4:30
10/31	10-4:30	11-4:30

Thank you,
Patrick

Patrick Hinds

King County Prosecuting Attorney's Office

Senior Deputy Prosecuting Attorney
Economic Crimes Unit

(206) 477-1181 (office)

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix M

DEFENDANT'S OPPOSITION TO STATE'S BELATED
MOTION TO FILE AMENDED INFORMATION

FILED

18 OCT 30 AM 10:59

Honorable Jim Rogers
KING COUNTY
October 31, 2018 at 2:00 p.m.
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 18-1-00255-5 SEA

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.

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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

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

19
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.

1 **E. Defendant's Motion for Discretionary Review**

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

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

8 **F. Proceedings Before this Court on October 1, 2018**

9 Meanwhile, at the State's insistence, the parties appeared before this Court on October 1,
10 2018. During that hearing, the State argued for a modification of Mr. Numrich's conditions of
11 release. Recognizing that review might be granted in the appellate courts, the parties rescheduled
12 the date for Mr. Numrich's case scheduling hearing. Once again, the State never suggested that it
13 was intending to file any additional charges in this case.

14 **G. The State's Last-Minute Motion to Amend.**

15 On October 18, 2018, the same date that the State had been ordered to file its responsive
16 pleadings in the Washington Supreme Court, DPA Hinds sent defense counsel an email in which
17 he claimed that "the State needs to set a hearing to amend the Information in Mr. Numrich's case
18 now." Maybrown Dec. App. I. Defense counsel promptly responded to his email message and
19 explained:
20

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

25 If you file this motion to amend, we will file an opposition and a motion to
26 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 Maybrown 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.

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

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

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

17
18
19 **2. The State Should Be Estopped from Using this Strategy.**

20 During all prior proceedings in the superior court – including numerous proceedings
21 which discussed the propriety of the State's manslaughter charge – the State never once claimed
22 that it was intending to file a charge of manslaughter in the first degree. Thus, the defense
23 expended months (and countless attorney hours), litigating the question of whether the State's
24 felony charge was precluded by the general-specific rule. This litigation involved complex
25
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
11 judicial proceedings, and to avoid inconsistency, duplicity, and . . . waste of
12 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**
17 **Rights.**

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

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 *Maybrown 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. Bonisisio*, 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 misdemeanant on a felony charge
17 after the defendant invoked an appellate remedy).

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

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

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 Maybrow 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
27 sixty-four days, or by both.

28 RCW 49.17.190(3).

29 This is a unique, and unusual, criminal statute – and it allows for penalties that are not
30 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 WISIA 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
12 Since as early as 1970, Washington has applied its own, unique version of the “general-
13 specific rule” when interpreting criminal statutes. *See, e.g., State v. Zornes*, 78 Wn.2d 9 (1970).
14 This rule provides that “where a special statute punishes the same which is [also] punished
15 under a general statute, the special statute applies, and the accused can be charged only under
16 that statute.” *State v. Shriner*, 101 Wn.2d 576, 580 (1984) (quoting *State v. Cann*, 92 Wn.2d
17 193, 197 (1979)).

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

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

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:

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

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
 24 ⁶ WISHA does not define willful and knowing behavior. Its implementing regulations define willfulness
 25 as “an act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements
 26 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 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:

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
11 occur without intent to escape. It is easy to visualize situations where a work
12 release inmate failed to return because of a sudden illness, breakdown of a
13 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
15 demonstrates that the defendant "knew that his actions would result in leaving
16 confinement without permission." *State v. Descoteaux*, 94 Wn.2d 31, 35
17 (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
18 complete repeal of RCW 72.65.070. This result is an impermissible potential
19 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
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permitted to dilute or avert the mental element that the legislature had in mind when it enacted the specific WISHA statute.

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

Accordingly, the filing of the Manslaughter in the First Degree charge violates Washington’s “general-specific” rule because the legislature enacted a specific criminal statute to address these very types of workplace deaths resulting from safety violations.

IV. CONCLUSION

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

DATED this 30th day of October, 2018.


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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE’S MOTION TO RECONSIDER

Appendix N

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

FILED

18 OCT 30 AM 10:59

Honorable Jim Rogers
KING COUNTY
October 31, 2018 at 2:00 p.m.
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 18-1-00255-5 SEA

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

7 *Id.* (Certification at 3).

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

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

15 *Id.* (Certification at 4).

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

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

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

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

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

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

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

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

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

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

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

17 *Id.*

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

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

25
26 ² During earlier stages of the case, the State had notified the superior court that it was likely to seek
interlocutory review if the defense motion was to be granted. Nevertheless, the State objected to the
defendant's request for certification.

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

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

9 23. On October 18, 2018, the same date that the State had been ordered to file its
10 responsive pleadings in the Washington Supreme Court, DPA Hinds sent defense counsel an email
11 in which he claimed that "the State needs to set a hearing to amend the Information in Mr.
12 Numrich's case now." *Appendix I.* Defense counsel promptly responded to his email message
13 and explained:
14

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

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

24 We are now asking for you to produce all of your office's documents and
25 communications relating to this case (including all of your communications –
26 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.

Id.

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

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

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

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

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

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix O

DEFENDANT'S MOTION TO COMPEL DISCOVERY

FILED

18 OCT 30 AM 10:59

Honorable Jim Rogers
KING COUNTY
October 31, 2018 at 2:00 p.m.
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 18-1-00255-5 SEA

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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." Maybrown 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 Maybrow 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 (2d 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).

DEFENDANT'S MOTION TO COMPEL DISCOVERY – 4

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.” Maybrown 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).

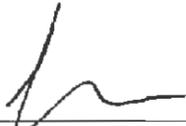
1 In *Dever*, the prosecutor charged defendant Dever with arson. The prosecutor prepared
2 various documents in anticipation of trial but dismissed the case before trial. Dever then sued
3 the investigating fire marshal (and the city that employed him) for malicious
4 prosecution. When Dever attempted 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.

16
17 
18 TODD MAYBROWN, WSBA #18557 #40690
19 COOPER OFFENBECHER, WSBA #40690
Attorneys for Defendant

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix P

STATE'S REPLY IN SUPPORT OF MOTION TO AMEND

FILED

18 OCT 31 AM 9:00

KING COUNTY

SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 18-1-00255-5 SEA

1 *The Honorable James E. Rogers*
Hearing Date: October 31, 2018 at 2:00 p.m.
2 *With Oral Argument*

6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7 THE STATE OF WASHINGTON,)
Plaintiff,)

8 v.)

No. 18-1-00255-5 SEA

9 PHILLIP NUMRICH,)
Defendant.)

STATE'S REPLY IN SUPPORT OF
MOTION TO AMEND

12 **I. INTRODUCTION**

13 The defendant, Phillip Numrich, is currently charged with Manslaughter in the Second
14 Degree under RCW 9A.32.070 (Count 1) and Violation of Labor Safety Regulation with Death
15 Resulting under RCW 49.17.190(3) (Count 2). The case is set for a case-setting hearing on
16 December 5, 2018.¹ The State has moved to amend the Information to add a count of
17 Manslaughter in the First Degree (Count 3) as a charge in the alternative. A copy of the proposed
18 Amended Information is attached as Appendix A. The State's two page Motion and Order to
19 Amend with an attached Declaration of Patrick Hinds in support was sent to Numrich's counsel on
20 October 18 and to the court on October 19.² A copy is attached as Appendix B.

22 ¹ The next hearing in this is oral argument before a Supreme Court Commissioner on Numrich's Motion for
Discretionary Review, which is scheduled for 2:00 p.m. on Thursday, November 1.

23 ² Because the State initially anticipated this motion being addressed as an expedited matter without significant
briefing, it did not electronically file a copy of these documents at the time, but instead intended to file them at the
time of the hearing if the motion was granted (in order to avoid confusing the record).

1 Numrich has now filed a DEFENDANT’S OPPOSITION TO STATE’S BELATED
 2 MOTION TO FILE AMENDED INFORMATION and a DECLARATION OF TODD
 3 MAYBROWN IN OPPOSITION TO STATE’S BELATED MOTION TO AMEND
 4 INFORMATION.³ For the reasons outlined below, this court should reject the arguments raised in
 5 those documents and grant the State’s motion to amend.⁴

6
 7 **II. FACTS**

8 **A. SUBSTANTIVE FACTS⁵**

9 Numrich is the owner and operator of Alki Construction LLC. On January 26, 2016,
 10 Numrich’s reckless disregard for the safety of his employees caused the death of Harold Felton,
 11 his employee and long-time friend.

12 On January 16, 2016, Numrich’s company started working to replace a sewer line at a
 13 residence in West Seattle. For this project, Numrich had his employees use a method by which a
 14 trench was dug down to either end of the pipe to be replaced and then a hydraulic machine was
 15 used to pull a new pipe through the old one, simultaneously bursting the old pipe and laying the
 16 new one into place. One of these trenches—dug where the sewer line connected to the house—
 17 was 21 inches wide, six feet long, and more than seven feet deep.

18
 19 ³ The State will hereinafter refer to Numrich’s response brief as “Def. Opp.,” to Mr. Maybrown’s Declaration as
 20 “Maybrown Decl.,” and the appendices attached thereto as “Maybrown Decl. App.”

21 ⁴ In addition to his responsive materials, Numrich also filed a DEFENDANT’S MOTION TO COMPEL
 22 DISCOVERY. However that motion is not properly before this court at this time and the State will not respond to it
 23 further unless directed to do so by this court. The State reserves the right to respond to this motion if and when it is
 properly noted and set for a hearing.

⁵ The substantive facts are drawn from the Certification for Determination of Probable Cause prepared by WSDLI
 Safety and Health Officer Mark Joseph and the memorandum regarding the Joint Investigation of Alki Construction
 prepared by Officer Joseph and Assistant Attorneys General Cody Costello and Martin Newman. Copies of these
 documents are attached as Appendix C and Appendix D, respectively.

1 With a trench of this depth, there is a substantial risk that the excavation could cave-in
 2 and kill a worker inside. A number of factors impact the risk of such a collapse. These include
 3 the soil condition and type, the depth of the trench, and whether the soil was previously
 4 disturbed. All of these factors increased the likelihood of collapse at the project in West Seattle.
 5 By January 26, a number of other factors increasing the likelihood of a collapse were also
 6 present: the trench had been “open” for approximately 10 days and the soil was heavily
 7 saturated from several days of rain.

8 Because of the danger posed to workers in trenches, Washington has regulations that
 9 apply to job site excavations. For a trench the size of the one at issue, these regulations required,
 10 *inter alia*, that the walls be shored to prevent a cave-in. While shores were placed in the trench,
 11 the shoring Numrich installed was wholly insufficient to safely stabilize it.

12 Also included in Washington regulations is the requirement that a “competent person”
 13 regularly inspect any trenches and the protective system installed in them. “Competent person”
 14 is a term defined by WAC 296-155-650 as someone “who can identify existing or predictable
 15 hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees.”
 16 Inspections by the “competent person” must be made daily prior to the start of any work in a
 17 trench and must be repeated after every rainstorm or other hazard-increasing occurrence. If the
 18 “competent person” sees any evidence of a situation that could result in a possible collapse, that
 19 person must remove all employees from the trench until precautions have been taken to ensure
 20 worker safety. Numrich was the only “competent person” at the job site during the project.

21 On January 26, 2016—10 days after the project started—Numrich, Felton, and
 22 Maximillion Henry (Numrich’s other employee) were at the job site. This was scheduled to be
 23 the last day of work on the project and Numrich was under pressure from the home owners to

1 complete it. Shortly after 10:00 a.m., the new pipe had been pulled into place and Felton was
2 working in the trench closest to the house. Felton began using a vibrating tool called a “Sawzall”
3 in the trench. It is well known that this tool can cause extensive vibrations in the ground, which
4 can disturb the soil and make a collapse more likely. Numrich noted and commented to Henry
5 on the dangerous nature of Felton’s use of the tool in the trench.

6 As noted above, Numrich was the “competent person” for the project and was aware of
7 all of the risk factors present at the site. In addition, Numrich was aware that Felton’s use of a
8 vibrating tool inside the trench was dangerous and further increased the risk of a collapse.
9 Numrich was also aware that the ground around the trench had already been recently vibrated
10 and disturbed by the process of pulling the new pipe through the old one. However, despite
11 being aware of all these risks and despite being the owner of the company, Felton’s friend, the
12 person in charge, and the “competent person” at the scene, Numrich made no effort to halt
13 Felton’s hazardous use of the tool and did not re-inspect the trench after Felton was done using
14 it. Instead, Numrich left the project site to buy lunch.

15 Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton under
16 approximately seven feet of wet dirt. While the Seattle Fire Department arrived at the scene
17 shortly thereafter, rescuers were unable to free Felton in time to save his life and he died of
18 compressional asphyxia. The collapse of the trench was so extensive and complete that—even
19 using industrial vacuum trucks—it ultimately took over three hours to free Felton’s body.

1 **B. PROCEDURAL FACTS⁶**

2 The Washington State Department of Labor and Industries (WSDLI) investigated the
 3 circumstances surrounding Felton’s death. During this process, investigators discovered that
 4 Numrich had violated numerous safety regulations at the job site. At the conclusion of this
 5 investigation, WSDLI cited Numrich for a number of violations and fined him.

6 The case was subsequently brought to the attention of the King County Prosecuting
 7 Attorney’s Office (KCPAO) as a possible criminal matter. KCPAO concluded that Numrich had
 8 potentially committed criminal violations of the law and asked that WSDLI reopen its investigation.
 9 KCPAO ultimately filed charges on January 5, 2018.

10 On April 30,⁷ Numrich filed a motion to dismiss Count 1, arguing that the State’s decision
 11 to prosecute him for Manslaughter in the Second Degree violated both Washington’s “general-
 12 specific rule” and the equal protection clause. The parties subsequently entered a briefing schedule
 13 and the State’s response was filed on June 13 and Numrich’s reply on June 20. On July 19, the
 14 Honorable Judge John Chun heard oral argument on the motion and took the matter under
 15 advisement, setting another hearing for August 23. On July 23, however, Judge Chun’s bailiff
 16 contacted the parties via email and indicated, in relevant part, that “[f]or the reasons argued by the
 17 State, the Court is denying the Defense’s motion to dismiss Count 1.”

18 On August 23, the parties reappeared before Judge Chun and argued: 1) what language the
 19 court should actually use in its written order denying Numrich’s motion; and 2) whether the court
 20 should “certify” the order within the meaning of RAP 2.3(b)(4). Later that day, Judge Chun issued
 21

22 ⁶ In his response brief and accompanying materials, Numrich unfairly characterizes many of the procedural facts of this
 23 case in manner that casts the State in an undeservedly negative light. However, the majority of these relate to matters
 that are not strictly relevant to the issues before this court. As a result, the State will not attempt to correct every such
 instance, but will instead confine itself to addressing only those relevant in the course of this brief reply.

⁷ All dates in this section are from 2018 unless otherwise noted.

1 a written order denying Numrich's motion to dismiss, but granted his motion for RAP 2.3(b)(4)
 2 certification.

3 Numrich subsequently sought discretionary review in the Washington Supreme Court. His
 4 motion for discretionary review and statement of grounds for direct review were both filed on
 5 September 28. Per the briefing schedule set by the Court, the State filed its answers on October 18.

6 Shortly before Numrich filed his materials in the Supreme Court, the State became aware
 7 that he had violated his conditions of release. As a result, the State set the matter for a motion to
 8 revoke his release on personal recognizance, impose bail, and amend the conditions of release. The
 9 parties appeared before the court on that motion on October 1. The Honorable Judge Marshall
 10 Ferguson found that Numrich has violated his conditions of release, but that his violation was not
 11 willful. The court, therefore, denied the State's motion. At the time, Numrich's next case-setting
 12 hearing was scheduled for October 23rd. Numrich asked to continue that hearing. The State did not
 13 object and the hearing was continued to December 5

14 Additional facts are included below as relevant.

15 **III. ARGUMENT**

16 Pursuant to CrR 2.1(d), the court may permit an information to be amended at any time
 17 before verdict so long as "substantial rights of the defendant are not prejudiced." A defendant
 18 opposing amendment bears the burden of "showing specific prejudice to a substantial right." State
 19 v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991).

20 Here, this matter is still on the case-setting calendar and no trial date has been set. The
 21 discovery process is ongoing and the defense—to the best of the State's knowledge—has not yet
 22 interviewed a single State's witness. As a result, it will be several months—if not significantly
 23 longer—before this matter goes to trial. Moreover, the sole change wrought by the amendment is

STATE'S REPLY IN SUPPORT
 OF MOTION TO AMEND - 6

State's Answer to Motion
 for Discretionary Review

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1 the addition of a charge in the alternative. This additional charge arises from the same nexus of
 2 facts as the original charges and is essentially identical to one of them except that it requires proof of
 3 a higher level of *mens rea*. The amendment does not change Numrich’s possible trial defenses.
 4 Nor does it require him to conduct any investigation or to call or interview any additional witnesses
 5 beyond that or those which he would already have to do for the current charges. Given all of that,
 6 there is no prejudice to Numrich in granting the State’s motion to amend. Indeed, it is hard to
 7 conceive of a situation in which a defendant is less able to meet the burden of establishing prejudice
 8 stemming from an amendment.

9 Despite that, Numrich argues that there are “at least six reasons to deny the State’s motion to
 10 amend.” Def. Opp. at 10. However, none of these arguments are persuasive.

11 First, Numrich argues that the State’s amendment is vindictive.⁸ Def. Opp. at 14-17. This
 12 argument must fail. “Prosecutorial vindictiveness is [the] intentional filing of a more serious crime
 13 in retaliation for a defendant’s lawful exercise of a procedural right.” State v. McKenzie, 31 Wn.
 14 App. 450, 452, 642 P.2d 760 (1981). However, it is well recognized that “an initial charging
 15 decision does not freeze prosecutorial discretion” and that prosecutorial vindictiveness must be
 16 distinguished from the “rough and tumble” of legitimate plea bargaining and other aspects of pre-
 17 trial practice. State v. Lee, 69 Wn. App. 31, 847 P.2d 25 (1993). In the pretrial context, a defendant
 18 asserting prosecutorial vindictiveness bears the burden of establishing either actual vindictiveness or
 19 “a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness.”
 20 State v. Bonisisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998) (quoting United States v. Wall, 37
 21 F.3d 1443, 1447 (10th Cir. 1994)). If—and only if—the defendant makes this preliminary showing,
 22 the State must justify its decision with “‘legitimate, articulable, objective reasons’ for its actions.”

23 _____
⁸ For reasons of clarity and brevity, the State will address Numrich’s arguments in a different order than they are presented in Numrich’s response brief.

1 Bonisisio, 92 Wn. App. at 791 (quoting Wall, 37 F.3d at 1447). In this context, if the only showing
 2 of vindictiveness “is the addition before trial of new charges for which the State believes there is
 3 sufficient evidence to support a conviction, constitutionally impermissible conduct has not been
 4 shown.” State v. Fryer, 36 Wn. App. 312, 317, 673 P.2d 881 (1983) (citing State v. Penn, 32 Wn.
 5 App. 911, 914, 650 P.2d 1111 (1982)).

6 Here, Numrich repeatedly claims in his brief that the State’s decision to amend could only
 7 be vindictive and his attorney has offered a similar personal opinion in his declaration. See, e.g.,
 8 Def. Opp. at 2, 16; Maybrown Decl. at 9. Aside from these mere assertions, however, Numrich has
 9 failed to present any evidence of actual or presumptive vindictiveness. As Numrich has failed to
 10 make even a preliminary showing of either, the State is not required to justify its decision.

11 Bonisisio, 92 Wn. App. at 791.

12 However, despite having no obligation to do so, the State has provided its legitimate,
 13 articulable, and objective reasons for seeking to amend the charges. As this court is well aware,
 14 KCPAO has a long standing “conservative filing policy.” Under this policy, which is part of
 15 KCPAO’s written Filing and Disposition Standards,⁹ the State’s standard practice is to initially file
 16 the lowest possible degree and number of charges that reflect the nature of the defendant’s criminal
 17 conduct. If the defendant elects to go to trial, however, KCPAO reserves the right to amend the
 18 charges and/or to add additional offenses, enhancements, and/or aggravators in order to ensure that
 19 the charges for trial accurately reflect the full nature and severity of the defendant’s conduct.

20 Here, as set forth in the Declaration of Patrick Hinds, the State has always held the belief
 21 that Numrich’s actions constituted first-degree manslaughter. Appendix B. Despite that, consistent
 22 with KCPAO’s policies, a charge of second-degree manslaughter was filed initially. Id. Similarly,

23 _____
⁹ KCPAO’s Filing Disposition Standards (FADS) are publicly available online, including, *inter alia*, at
<https://www.kingcounty.gov/depts/prosecutor/criminal-overview/fads.aspx>.

1 the State has always reserved the right to seek this amendment, but—consistent with its policies and
 2 common practice—has sought to wait to make the decision regarding what charges it would go to
 3 trial on until the matter was actually set for trial. Id. Indeed, if the State had its choice, it would
 4 continue to wait to make this decision while the usual pre-trial discovery, negotiation, and litigation
 5 process played out. Unfortunately, however, the State’s hand has been forced and it cannot wait any
 6 longer. Given the procedural posture of the case, if the State does not bring this motion now, there
 7 is the possibility that it will lose the ability to amend the charges due to the running of the statute of
 8 limitations. Id. That is the only reason the amendment is being sought now. Id. And seen in that
 9 context, it is clear that the State’s decision to seek the amendment is wholly lacking in
 10 vindictiveness.

11 Second, Numrich asserts that the motion to amend should be denied because it is the
 12 “product of gamesmanship.” Def. Opp. at 11-12. Nothing could be further from the truth.
 13 Numrich’s argument focuses on the timing of the State’s motion. Id. The reasons for the timing of
 14 the motion are discussed at length above and essentially boil down to the fact that the State must
 15 bring the motion now or risk having the statute of limitations run on the potential amended charges.
 16 Despite Numrich’s baseless accusations to the contrary, the State has not engaged in bad faith
 17 litigation tactics or gamesmanship and there is no basis for this court to conclude otherwise.

18 Third, Numrich asserts that the State should be estopped from amending the information.
 19 Def. Opp. at 12-13. But Numrich has failed to convincingly explain how the doctrine of estoppel
 20 even applies in this situation. As Numrich himself notes, estoppel is an equitable doctrine that
 21 applies when a party takes one position in a court proceeding and later seeks an advantage by taking
 22 “a clearly *inconsistent* position.” Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13
 23 (2007) (emphasis added). Here, the State is not taking any inconsistent or contradictory positions.

1 The State has previously taken the position that Numrich’s behavior violated RCW 9A.32.070 (and
 2 that he is, therefore, guilty of second-degree manslaughter). The State continues to take that
 3 position. The State also takes the position that Numrich’s behavior also violated RCW 9A.32.060
 4 (and that he is, therefore, also guilty of first-degree manslaughter). There is nothing about this latter
 5 position that is inconsistent with the former. In that context, the State has moved to amend to add a
 6 count of first-degree manslaughter as a charge in the alternative to the two existing counts. There is
 7 nothing about the State’s actions or current position that are contrary to the positions it has
 8 previously taken in this case.

9 Fourth, Numrich argues that the State’s motion violates Washington’s “general-specific
 10 rule.” Def. Opp. at 18-24. But this is the same argument that Numrich raised in his motion to
 11 dismiss the count of second-degree manslaughter. Numrich has failed to provide any explanation as
 12 to how or why the outcome should be different for first-degree manslaughter. This court—in the
 13 form of Judge Chun—has already rejected this argument in denying Numrich’s motion to dismiss.
 14 His current repackaging of that argument as being one in opposition to the motion to amend does
 15 not change the analysis or provide any compelling basis for this court to now deny the State’s
 16 motion to add a count of first-degree manslaughter.

17 Furthermore, Numrich’s argument on this point directly contradicts the argument he made
 18 to Judge Chun and that he is currently making to the Supreme Court in his motion for discretionary
 19 review. In the briefing before Judge Chun, the State argued, *inter alia*, that the *mens rea* of the
 20 crime of Manslaughter in the Second Degree was different than the *mens rea* of the crime of
 21 Violation of Labor Safety Regulation with Death Resulting based on State v. Gamble, 154
 22 Wn.2d 457, 114 P.3d 646 (2005).¹⁰ Numrich never substantively challenged the State’s analysis

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¹⁰ See, e.g., pages 9-14 of the STATE’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS COUNT 1.
 Maybrown Decl. App. C.

1 of the *mens rea* elements of the two crimes. Rather, his only real argument against this point was
 2 to assert that the State was incorrect because Gamble only applied to first-degree manslaughter.¹¹
 3 In doing so, he effectively conceded that his “general-specific rule” argument would not apply to
 4 such a charge. In this context, the argument he now attempts to make—that the “general-specific
 5 rule” does preclude the State from prosecuting him for first-degree manslaughter—is directly
 6 contrary to his previous implicit concession to the contrary.

7 Fifth, Numrich argues that the amendment will prejudice his substantial rights. Def. Opp. at
 8 13. As noted above, a defendant opposing the State’s motion to amend bears the burden of
 9 establishing such prejudice. Thompson, 60 Wn. App. at 666. Here, Numrich fails to meet that
 10 burden. As an initial matter, the majority of his claims of prejudice are simply reiterations of
 11 arguments raised elsewhere in his brief. For example, Numrich claims that the amendment “will
 12 serve to punish the defendant for exercising [his] rights.” Def. Opp. at 13. Similarly, he claims that
 13 the State “is essentially seeking to dissuade [him] from pursuing his appeal and to coerce [him] to
 14 enter a plea of guilty.” Def. Opp. at 13. But these claims are virtually indistinguishable from his
 15 arguments—addressed at length above—that the State is engaged in prosecutorial vindictiveness
 16 and/or improper gamesmanship. As the State is engaged in either, there is no basis to conclude that
 17 his substantial rights will be prejudiced due to either.

18 In addition, Numrich argues that the amendment will prejudice his substantial rights because
 19 it will delay the proceedings and, therefore, increase the costs of litigation. Def. Opp. at 13.
 20 However, Numrich fails to explain how this is so. Based on the entirety of his briefing, Numrich
 21 appears to be asserting that this is the case because granting the State’s motion to amend will
 22 essentially set this case back to square-one and require him to start his motion to dismiss all over

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¹¹ See e.g., page 4 DEFENDANT’S REPLY IN SUPPORT OF MOTION TO DISMISS COUNT 1
 (MANSLAUGHTER). Maybrown Dec. App. D.

1 again. See Def. Opp. at 11-12. But this assertion does not bear even cursory scrutiny. As
 2 discussed above, Numrich’s argument as to why the charge of first-degree manslaughter is improper
 3 is indistinguishable from his argument—that has already been rejected by this court—to dismiss the
 4 charge of second-degree manslaughter. As a result, despite Numrich’s assertion to the contrary,
 5 amending the charges will not substantially delay the proceedings or cause significant additional
 6 expense because there is no issue to “relitigate”—the one argument he has identified as a basis for
 7 dismissal has already been ruled on by this court in a decision that is as equally applicable to the
 8 amended charges as it is to the existing ones.

9 Finally, Numrich argues that the amendment is improper because there is not probable cause
 10 to conclude that he committed the crime of first-degree manslaughter. Def. Opp. at 17-18. This
 11 argument must fail. Under RCW 9A.32.060(1)(1), “a person is guilty of manslaughter in the first
 12 degree when [h]e or she recklessly causes the death of another person.” Thus, in relevant part, a
 13 violation of the statute requires proof that the defendant engaged in reckless conduct and that the
 14 decedent died as a result of the defendant’s reckless acts. Id.; WPIC 28.02. In this context, a
 15 person is reckless or acts recklessly when “he or she knows of and disregards a substantial risk
 16 that [death] may occur and this disregard is a gross deviation from the conduct that a reasonable
 17 person would exercise in the same situation.” RCW 9A.080.010 (1)(c); WPIC 10.03; 2016
 18 Comment to WPIC 10.03 (citing Gamble, 154 Wn.2d at 467-68).

19 Here, the Substantive Facts section above—which summarizes the facts from the
 20 Certification for Determination of Probable Cause and the Joint Investigation memorandum—
 21 clearly establishes probable cause for the charge of first-degree manslaughter. As the owner and
 22 operator of the company and the “competent person” for the project, Numrich was well aware of
 23 the general risk of death posed to workers in trenches like the one in question. He was further

1 aware that the risk was substantially elevated given all of the risk facts that were present at the
2 site on the date Felton was killed. He also knew that the substantial risk of a trench collapse—
3 which carried with it a substantial risk of death—was further increased by the disturbance to the
4 soil caused by Felton’s use of a vibrating tool and the pulling of the new pipe through the old
5 one. However, despite being aware of all these risks and despite being the owner of the
6 company, Felton’s friend, the person in charge, and the “competent person” at the scene,
7 Numrich made no effort to halt Felton’s hazardous use of the tool and did not re-inspect the
8 trench after Felton was done using it. Instead, Numrich left to buy lunch. Due to Numrich’s
9 recklessness, the trench collapsed with Felton inside and Felton died as a result.

10 Given all of the above, there is ample probable cause to conclude: (1) that Numrich knew
11 of a substantial risk that death might occur; (2) that Numrich disregarded that risk; (3) that his
12 disregard of this risk was a gross deviation from the conduct a reasonable person would exercise
13 in the situation; and (4) that Felton died as a result of his recklessness.

14 **IV. CONCLUSION**

15 For the reasons outlined above, this court should grant the State’s motion to amend.

16
17 DATED this 31st day of October, 2018.

18 DANIEL T. SATTERBERG
19 King County Prosecuting Attorney

20
21 By: 
22 Patrick Hinds, WSBA #34049
23 Eileen Alexander, WSBA # 45636
Deputy Prosecuting Attorneys
Attorneys for Plaintiff

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix Q

TRANSCRIPT OF HEARING (10/31/18)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 18-1-00255-5 SEA
)	
vs.)	
)	TRANSCRIPT OF HEARING
PHILLIP SCOTT NUMRICH,)	
)	
)	
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)	

Date: October 31, 2018
 Judge: Jim Rogers
 State: Patrick Hinds
 Defense: Cooper Offenbecher

JUDGE: Please be seated. You already (unintelligible). Good afternoon.

STATE: Good afternoon Your Honor. Uh this is State versus Phillip Numrich. It's cause number 181002555 SEA. Patrick Hinds and Eileen Alexander on behalf of the State of Washington. Mr. Numrich is present out of custody along with counsel, Mr. Offenbecher. Uh he is also represented by Mr. Maybrown, who is in trial at the RJC...

JUDGE: Right.

STATE: today.

1 JUDGE: I know. I know he is. Right. He's in front of Judge Bender.

2 STATE: Yes.

3 DEFENSE: Good afternoon Your Honor.

4 JUDGE: Good afternoon. So let me uh make sure I understand um a few things.

5 You have your argument in front of the Supreme Court Commissioner

6 tomorrow at two-thirty?

7 STATE: Two o'clock. But yes.

8 JUDGE: Okay. And the case is on case setting?

9 STATE: Correct.

10 JUDGE: Um. Alright. The two questions I have in mind that are not directly

11 addressed by briefing, uh 'cause you all did a very thorough job of

12 briefing, um is uh—well I know you were thinking about it. Why you

13 waited so long to bring forward the motion to amend? And I know you set

14 forward a number of reasons, but of course that's not really the question

15 I'm asking. And the second question is uh how would the arguments be

16 different on the general specific on uh—for a manslaughter—a man one

17 versus a man two, if they would be at all? Uh in other words um—and I—

18 and I'm not prejudging this 'cause I—I'm gonna have to think about this

19 after you all argue it. But uh if I was to grant the State's motion, uh

20 presumably I would be forced to cert—I mean I would as a practical

21 matter have to certify that decision to the Supreme Court. Um but one of

22 the things I'm thinking about is the prejudice it'd be—be to the defense.

23 So are the arguments different for general-specific man one than they are

24

1 man two. I don't—I haven't uh fully read your briefing or listened to your
2 argument in front of Judge Chun. So I'm interested to hear your
3 comments on that. So...um...you have a motion to amend and you have a
4 motion to compel. Uh why don't I hear the motion to amend. And the
5 way it kind of came about is you made a very short motion to amend and
6 there was a much longer response. So...

7 STATE: And did the Court receive the reply that was filed...

8 JUDGE: I did.

9 STATE: this morning? Okay.

10 JUDGE: It's right here.

11 STATE: Excellent. Um...

12 JUDGE: And this is Mr. Offenbecher's briefing.

13 STATE: Alright.

14 JUDGE: So I have—I have all of it.

15 STATE: Excellent Your Honor.

16 JUDGE: Yeah.

17 STATE: Um yeah I guess to—to—rather than—or trying to avoid rehashing in this
18 case, I—I—this case... As the Court is aware the—the State has a
19 conservative filing policy. We file the—a—a—the lowest degree and the
20 lowest number of charges that sort of encapsulate the defendant's
21 activities up front.

22 JUDGE: Mr. Hinds, as you well know, I know all of that.

23 STATE: I understand.

24

1 JUDGE: Really the question I'm asking is this: There's been a tremendous of
2 effort to be done in briefing, motion to dismiss, presumably during that
3 time you're thinking I may add man one. Why not give notice back then
4 so it could be incorporated into the arguments during the motion to
5 dismiss and be brought forward with all the rest of everything that was
6 going on? I mean you sort of see this whole train moving forward. And
7 so that's really my question.

8 STATE: And Your Honor, quite frankly because it is not until the defense files its
9 reply to the State's response to their motion to dismiss that, from the
10 State's perspective, it becomes even apparent that the defense is drawing a
11 distinction between man one and man two.

12 JUDGE: In the general and specific.

13 STATE: Correct. Because going to—to that point, and this sort of gets to, I think,
14 the two questions the Court has are sort of inextricably linked. The
15 defense motion was to dismiss manslaughter in the second degree on
16 general versus specific grounds.

17 JUDGE: Right.

18 STATE: This—an—and one of the—the heart of the defense's argument there was
19 that the—what I'm gonna call the Title 49 crime 'cause the name is so
20 long. The Title 49 crime has...

21 JUDGE: The L—...

22 STATE: a—...

23 JUDGE: the L&I crime.

24

1 STATE:

2 the L&I crime has a knowing requirement. And the defense makes the
3 argument that uh under the general versus specific statu—or test, if it—
4 committing the spe—that’s what they call the specific statute, necessarily
5 you commit the general statute. That’s the test. Their argument was if
6 you knowingly—because knowing is a higher mens rea element than
7 negligence—that necessarily proves negligence. The State’s response to
8 that was no, because it’s not just a matter of what the level of the mens rea
9 is, it’s what the—the object of the mens rea is. Theft and intentional
10 murder both have a mens rea of intent, but they’re not the same thing
11 because they go to different objects. The State made the argument and
12 continues to make the argument that the mens rea of these two crimes are
13 different because under State v. Gamble the mens rea for manslaughter in
14 the second degree is negligence as to the risk of the decedent’s death.
15 Whereas the mens rea for the L&I crime is a knowing violation of a safety
16 regulation. So they’re not the same. The defense’s argument, which was
17 not raised until its reply, and then only—I believe only in a footnote, is
18 that Gamble, which the State is sort of relying on in making that argument,
19 only applies to manslaughter in the first degree. So it’s not until that point
20 in time that it’s—up until that point in time the State has the—the—I
21 guess the thought or the—the—is sort of considering, as it always does,
22 what charges will we bring for trial. But the import or the difference that
23 this will have between a man one and man two isn’t really brought into
24 focus until that point in time. Again, as I noted, it is noted in a footnote in

1 the defense's reply at that point. It doesn't really become the sort of—the
2 crux that it has in many ways now become until they file their briefing, not
3 just their note for discretionary review, but their motion for discretionary
4 review in the Supreme Court and their um uh—excuse me—their
5 statement of uh grounds for direct review, where they for the first time
6 state that one of the reasons they argue that the Supreme Court should take
7 direct review is in order to, quote, unquote, clarify Gamble. It's at that
8 point in time that it becomes—an—and those were filed in late September
9 of this year. It's at that point in time that it be—it's not really until that
10 point in time that it—the—what a difference this makes between these two
11 charges becomes apparent. And so it didn't—there had not been a
12 conversation about additional charges or what we would add for trial or
13 what we wouldn't add for trial up un—...

14 JUDGE: (Unintelligible). Right. I...

15 STATE: up—...

16 JUDGE: understand that.

17 STATE: up until that point in time because we were still on case setting. And the
18 particular difference that the amendment to add a man one would make
19 did not really become apparent until this briefing got filed, uh particularly
20 in late September when this is filed in Supreme Court. Frankly, as I was
21 writing the State's response, I—I really fully noted—uh sorry—the
22 response or answer in the Supreme Court, noted what—from the State's
23 perspective what a concession the defense had essentially made and
24

1 started thinking about what that sort of meant. Um at that point in time,
2 frankly, I started looking at the statute of limitations because I was trying
3 to think of how this played out.

4 JUDGE: You said that in your brief.

5 STATE: An—and then...

6 JUDGE: Right.

7 STATE: determined that it was a three year statute of limitations...

8 JUDGE: Okay.

9 STATE: which—mea culpa. But that is—that's why it came up when it did and
10 how it came up when it did.

11 JUDGE: Okay. Alright. I wanted to hear it from you then. Uh that was the main I
12 had for him and he's—you've all been very thorough. I'm not asking you
13 to address whether or not you're making a concession. Uh really the
14 argument—the issue is notice as you well briefed and why they didn't
15 bring this up before. And that's why I asked the question. So why don't
16 you go ahead Mr. Offenbecher on your response to that, and you can argue
17 your motion to compel at the same time, if you wish, or you can rest on
18 your briefing papers on that. That's pretty straight forward.

19 DEFENSE: Thank you Your Honor. Well, as Your Honor has seen from the briefing
20 we have spent a substantial amount of time over the past six months
21 addressing this issue. Um over a hundred and fifty attorney hours from
22 our office based on this issue. A lot of briefing before Judge Chun. You
23 know the argument in front of Judge Chun was over an hour and fifteen
24

1 minutes. We had follow up hearings um on the certification issued. We
2 argued extensively about whether this issue be—should be certified to the
3 appellate courts. And not once did—throughout any of those proceedings
4 over the past six months did the State ever mention that it was thinking
5 about filing a manslaughter one charge. That it was a potential hold back.
6 I mean the whole gravamen—to use one of the words that the state has
7 used frequently in this litigation—the gravamen of these proceedings was
8 the propriety of a felony manslaughter charge. It's not like we were
9 arguing about a severance issue or a discovery issue or some collateral
10 issue. We were arguing about the propriety of a felony manslaughter
11 charge, which of course our position is it's an extraordinary charging
12 decision and there's a specific misdemeanor statute that applies more. But
13 the—but the whole um you know gravitas of this, the gravamen of this
14 was that you know what's the applicable charge and is it this much more
15 serious felony homicide charge. And the fact that the State did not bring it
16 up during any of those proceedings indicates that it was not—you know
17 there is overwhelming circumstantial evidence that this was not a
18 contemplated charge. And it sounds like Mr. Hinds is conceding today in
19 court that he really didn't contemplate it you know until later in the
20 process. And it was brought up at a time and in a manner that was
21 calculated to prejudice Mr. Numrich and to punish him for the lawful
22 exercise of a constitutional right by seeking redress in the Court of
23 Appeals. The State could have filed this motion to amend in this court as
24

1 a standalone motion. Right? But never mentioned it to the Supreme
2 Court. It's not part of the perfected appeal. I mean we have perfected
3 appeal, uh motion for—perfected motion for discretionary review in front
4 of the Supreme Court. Right? There's a finite set of trial court materials
5 that have been submitted. Right? It's everything that Judge Chun
6 considered. Everything up until the point when he issues the certification.
7 And I will tell you, I was shocked when I re—when I read the State's
8 answer in the Supreme Court and they throw in the fact that they're trying
9 to add manslaughter one. What they write in their—what the State writes
10 in its brief, moreover Numrich has failed to show the discretionary review
11 will materially advance the termination of this litigation. Even if this
12 Court were to accept review and rule that Numrich's favor, he will still
13 face felony manslaughter charges. The State goes on to say here; the State
14 intends to add a count of manslaughter in the first degree to the charges
15 against Numrich. So the State is saying, wait a second Supreme Court.
16 And whatever you're gonna do, it's gonna be moot because we're gonna
17 add manslaughter in the first degree. I mean that's an—that's an
18 extraordinary thing to do. Right? To signal to the Supreme Court
19 whatever you're gonna do, it's gonna be moot. And frankly the damage
20 may already be done because I mean I moved to strike this in the Supreme
21 Court, but this is—you know the Commissioner has this. She's gonna
22 read it. Here she's gonna read it. And I don't know what they're gonna
23 do. They may throw up their hands and say well why should we take the
24

1 case now. You know we have another—there's a whole 'nother different
2 manslaughter charge gonna be—that's gonna be added. Um why should
3 we accept the case. Let's let everything shake out in the trial court. You
4 know to not notify us of this potential new substantial charge which
5 increases the potential penalties from you know a couple of years to eight
6 years...

7 JUDGE: And I'm aware of that.

8 DEFENSE: for Mr....

9 JUDGE: Right.

10 DEFENSE: Numrich who has no criminal history with family home. Uh the first time
11 we get notified of this is the day that the State's briefs are due in the
12 Supreme Court. And the overwhelming circumstantial evidence is that
13 this was done for an improper purpose. We have established presumptive
14 vindictiveness, and the burden shifts to the state to rebut it. Frankly, on
15 our side, we're evaluating whether we have been ineffective. Uh should
16 we have advised Mr. Numrich of the possibility that he could file a first
17 degree—that they could file a first degree manslaughter charge against
18 him. Certainly there was nothing—we were not led believe that there was
19 'cause the State never told us about this. But if we had thought that
20 mans—if there was some indication that manslaughter in the first degree
21 was on the table for this um case, should we have had plea negotiations.
22 Should we have handled this case differently. Um you know the—the
23 consequences for him change significantly. So the consequences are
24

1 higher. His constitutional right to seek lawful redress may have been
2 already irreparably altered if the Supreme Court doesn't take the case
3 tomorrow. He has expended a substantial amount of financial resources
4 with our firm advancing this litigation. And if we had known that they
5 were gonna file a manslaughter in the first degree charge, would we have
6 proceeded differently. If the—the amendment is granted, will we press
7 forward with the appeal. I don't know. We're gonna have to evaluate
8 that. Um you know I don't believe that the State sat back this whole while
9 and let us file our briefs and filed their briefs. We all spent a ton of time on
10 this. And we went in front of Judge Chun multiple times. I mean I don't
11 believe that they did all of that all the while thinking well we'll get him in
12 the end. Right? We'll just file a manslaughter one. I don't believe that
13 they did that. But the circumstantial evidence is that they filed this at a
14 time and a manner to punish him and obtain an improper advantage in the
15 appellate court. And if the latter were not true, they never would have put
16 that in the brief to the Supreme Court. The only reason for putting that
17 statement in the Supreme Court is to prejudice him and to improperly
18 influence the Supreme Court from taking the case.

19 JUDGE:

20 I know that you um have addressed this in great length at Judge Chun and
21 I unfortunately didn't uh really read all those briefs. I reads his order and I
22 re—I quickly scanned them. But um I guess my—my—one of the
23 questions in my mind is uh will the Supreme Court if they take
24 discretionary review, if they take review of the case, will they have to

1 necessarily evaluate the entire manslaughter statute in deciding whether or
2 not uh 49.17.060 is the um general specific rule applies or is it just really a
3 s—specific degree in your view?

4 DEFENSE: I—I think it's just specific to manslaughter in the second degree. That's
5 the only issue we briefed up.

6 JUDGE: Okay.

7 DEFENSE: Um you know there—there's just—there was never any analysis about
8 manslaughter first degree. Judge Chun did not ish—he—he didn't
9 actually make oral—an oral ruling, and he didn't also do a written ruling
10 other than to sign our proposed order denying it and certifying it. Um so
11 we—you know there's—there was never any discussion about whether
12 manslaughter one—you know how this applied to manslaughter one. Um
13 and you know frankly if the amendment goes through, we're gonna file
14 the same motion. I mean we're gonna be back in front of somebody. It's
15 not—it's not gonna Your Honor I—I understand. I think it'll be the next
16 criminal motions judge. It won't be Judge Chun. He's gone. It won't be
17 Your Honor as I understand. It'll be the next criminal motions judge.
18 And we're gonna make the same argument. You know we're—we're
19 gonna have to reanalyze it under manslaughter one, but we—obviously we
20 don't concede, and—and I take uh exception to the State's argument or
21 suggestion that we somehow conceded manslaughter one you know would
22 not be violated by the general specific rule. We have never said that.
23 What we have said is that—an—and—and we're pretty deep in the weeds
24

1 here on—on the State v. Gamble case. But the State wants to—if we go to
2 the mens rea of the two statutes. Okay? One of them is willfully and
3 knowing. Okay that's the um WISHA homicide statute. And
4 manslaughter two is criminal negligence. Okay? And by statute in
5 Washington, if you've proved willful and knowing, you have also as a
6 matter of law proved criminal negligence. And you've also proved
7 recklessness. Uh it's a lower mens rea. It's subsumed in the higher
8 mental states. And the State has pointed to State v. Gamble. The State is
9 trying to differentiate it. Right? And to make um the criminal negligence
10 have some kind of other element. Right? An object of the mental state.
11 And so the State points to State v. Gamble and says, well in
12 manslaughter—and manslaughter is used very generally in the Gamble
13 case right? It's a first degree manslaughter case, but they use it very
14 generally. And the State points to State v. Gamble and says well there's
15 this other thing. You have to have an object of a mental state. And so in
16 response to the State's argument about Gamble, we have gone to Gamble
17 and said, wait a second, that's not what Gamble was considering.
18 Gambs—Gamble was considering you know is manslaughter first degree a
19 lesser included offense of second degree felony murder. And the second
20 degree felony murder ca—statute involved bodily harm. And first degree
21 manslaughter involved homicide. And therefore, it's not a lesser include.
22 So we've said Gamble doesn't apply here because it's just a first—that's a
23 first degree manslaughter case. The whole thing was not uh applicable to
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a second degree manslaughter case. So we have not conceded that first degree manslaughter you know is not violated.

JUDGE:

I only took that as a (unintelligible). But it sounds like you're actually saying that if the Supreme Court was to disagree with Mr. Hinds' analysis of what's the object of your mens rea then, in fact, the general specific argument you would prevail on both man one and man two based on the argument I'm hearing from you right now under 49.17.060. But uh I'm not deciding that right now. So I—um just to—it's interesting to hear it. Um but uh anyway, uh I only took his argument as to the answer to my question why—when did you think of it and why did it take the time it took. So but is there anything else you wanna be heard on? Uh why don't you finish your argument and um...

DEFENSE:

Sure, Your Honor. Well, you know we believe that we have met our burden of proving uh presumptive vindictiveness. If the State—as the State suggests, if this has always been a charge that they've contemplated, they—you know they're free to offer up a charging memo or some internal correspondence that backs that up, they haven't. If the court does not deny the State's motion to amend then we're asking for discovery. Okay? Are there you know internal blue notes that support the State's position. Um is you know an email between the State and the investigator saying well we're really gonna file manslaughter one or we can really file manslaughter one, but you know we're gonna file conservatively and just start with manslaughter two. I mean I—I understand the State's argument

1 about we have a conservative charging policy. You know we see that all
2 the time in cases. Right? There's a plenty of times when i—in a case I
3 think I've got an interesting legal argument. I go to the EPU prosecutor. I
4 say I think I've got a good motion to dismiss your charge. And you know
5 Miss Bohn or the DV negotiator says that's great. You can file your
6 motion, but if you do, we're gonna, you know, up the charge. That's—
7 that's normal. Right? That happens every day in this courthouse. But the
8 difference here is we're past that. Right? We—the State already assumed
9 the litigation risk and—and expended the resources. He and—uh Mr.
10 Maybrow and Mr. Hinds had that same meeting in February. They talked
11 about the general specific um you know rule and what the motion was that
12 Mr. Maybrow was gonna file. And the State never once said if you do
13 that, we're gonna file manslaughter one. Um and so if the court is going
14 to—you know if the court is not going to deny the motion, if the State's
15 position is we intended this all along then we should have the opportunity
16 to uh take discovery to support our vindictive claim. I mean we certainly
17 don't have you know an email from Mr. Hinds you know saying I'm
18 gonna file this you know additional charge just to be vindictive, but the
19 circumstantial evidence is in our favor. And if uh the court is not going to
20 deny the motion, we should have the opportunity to take discovery on it.
21 With respect to whether there is probable cause, um you know the
22 certification...

23 JUDGE: I don't know...

1 DEFENSE: d—...

2 JUDGE: that that's an argument that needs to be addressed. I don't—and I'm not
3 sure that probable cause leads to dismissal in a case. I think it leads to
4 likely a power of the court to impose any conditions on a defendant.

5 DEFENSE: 'kay.

6 JUDGE: Uh and you've got two other—you've got another charge on the 49.17.060
7 that have conditions. So I—I don't know that I need to address that. I
8 think obviously if the state can't prove a charge, they're—have other
9 issues.

10 DEFENSE: 'Kay. So, Your Honor, um the court should deny the amendment. You
11 know the state had ample opportunity over the past—the case wasn't even
12 charged for two years. Uh so the—the State had ample opportunity over
13 the past two years before charging and the past eight months up to this
14 point to file a manslaughter in the first degree charge, if that's the charge
15 that they thought was appropriate. There wasn't a whiff of it throughout
16 all of this litigation, which was specifically about the propriety of a
17 homicide charge. And criminal rule 2.1 uh gives the court discretion as to
18 whether or not to allow an amendment. It says the court may allow an
19 amendment as long as it doesn't substantially prejudice the rights of the
20 defendant. This amendment, not only because of the penalties and the
21 resources and the time expended fro—by the defense and the court, not
22 only prejudices him in those respects, but it may have already irreparably
23 effected his ability to lawfully petition for redress with the appellate court.
24

1 And for all of these reasons this Court should deny amendment—um the
2 amendment to add the manslaughter in the first degree charge.

3 JUDGE: Thank you.

4 STATE: And I guess I would start off by saying that I—I disagree with the
5 characterization of the meeting I had with Mr. Maybrown. I—I recognize
6 and have participated from the State's perspective in the type of meetings
7 Mr. Offenbecher describes where you have a—a discussion about what the
8 charges are going to be. If you do—you know if you do this, we'll do
9 that. The conversation I had with Mr. Maybrown essentially s—started
10 and stopped with the idea that if there was not going to be—if there—if
11 the State was going to insist on a felony, defense was gonna go forward
12 and litigate this. And we did not get into, is my memory of this meeting,
13 any further discussion of what the State would or would not do past that
14 point because that was sort the roadblock for any possible resolution. The
15 other thing I would note, along those lines, that is—that is being glossed
16 over in what—and I think it is perhaps in terms of the end result a
17 distinction without a difference. But it is relevant to the State's intent or in
18 bringing—and—and the timing of this motion and what the State is
19 seeking to do and why is that as I noted in my declaration and have noted
20 in the briefing, the State's preference at this point in time would be to
21 continue to wait to evaluate whether or not to amend this—amend these
22 charges. It's a—it—what the State is doing or would like to do is to have
23 the usual discussion of we're on the case setting calendar, when we get
24

1 closer to setting it for trial, omnibus, have the discussion of like, okay, is
2 this case going to resolve? Is it not going to resolve? What is the plea
3 going to be? This case is a little bit backwards to the way we often
4 negotiate those cases because there is this elephant in the room with this
5 general versus specific litigation which we chose to address first. The
6 State's motion to amend at this point is being brought because if we don't
7 bring it now, we lose the opportunity to. The State is not seeking this
8 motion, an—an I guess I—I don't know of any other way to say it; that if
9 it we're not for this issue of the running of the statute of limitations, the
10 State would not be seeking this motion now. It has to. It has no other
11 choice. If it were left up to me, I certainly would not wanna be standing
12 before the court having you know brought up what I knew was going to be
13 an issue when we contacted defense a—and said this. Because I—I—I
14 certainly expected that this would be the accusation that would be coming.
15 I would—I don't wanna be here. But I don't have a choice because
16 otherwise the State loses the opportunity to do this. With regard to a point
17 that was made by the defense as well under argument with regard to the
18 comment was made, well, the State could have noted the motion to amend
19 but just not told the Supreme Court. And I—I frankly think that's—that's
20 a—that would have been disingenuous. I—I struggled with how to
21 address that and whether to address that with the Supreme Court.
22 Consulted with other people and came to the conclusion that if—that
23 based on my analysis of the argument being made, this was a reason why
24

1 the Supreme Court should not grant discretionary review under RAP
2 2.3(b)(4). Or at the very least it was something the Supreme Court should
3 be aware of in conducting its analysis at that point. And felt that it would
4 disingenuous to—if we were doing it, if we were taking that step—to not
5 alert the Supreme Court to that effect. I certainly think that there is ample
6 opportunity for that to be addressed in a way that, despite the argument by
7 defense, doesn't poison the well for Mr. Numrich. Because the State's
8 whole argument, the whole scheduling of this motion was so that we could
9 have it argued and a decision made prior to the—the decision being made
10 in the Supreme Court. The State was asking that this motion be heard as
11 quickly as possible. It ended up being the day before the motion because
12 of scheduling. But if this court is to—were to deny this motion today then
13 we would go before the Commissioner tomorrow and tell the
14 Commissioner: the motion has been denied; this isn't an issue anymore;
15 so that what the state argued is a—is a moot point. If it's granted then the
16 Commissioner can be told that the—this court has considered all of these
17 arguments made by the defense and has still granted the motion to amend.
18 So there is no poisoning of the well because there—it's not as if just by
19 waiving this wand or raising this specter the Supreme Court is going to be
20 influenced. They will know hopefully what happens.

21 JUDGE: They will because after I write the order, I will send it to them.

22 STATE: Right.

1 JUDGE:

2 I'll do that. I uh am gonna take this under advisement, but I'm going on
3 vacation tomorrow. That means I'm gonna write something before I leave
4 today. And it'll be transmitted to both of you uh first thing tomorrow
5 morning. And I'll transmit it to the Supreme Court. If I grant the motion
6 to amend—and I'm really not sure what I'm gonna do, I have to be
7 perfectly honest with everybody here—I will certify that decision to the
8 Supreme Court if the parties wish. And if I deny it, I will inform the
9 Supreme Court um that uh—that I have denied the motion to amend,
10 and—and the Supreme can certainly move forward knowing that. Um
11 there is a—another course I could take, but I—I don't think it's available
12 in this case. I'm just sort of saying this for the record. I could deny
13 without prejudice to move to amend at a later time and wait for the
14 Supreme Court to rule on the general-specific argument, which may be
15 applicable to any man one decision or may not be depending on how they
16 rule. But while I would never impute the reputation of the Supreme Court
17 for its speed, I suspect that any uh—if you win your motion for
18 discretionary review tomorrow, Mr. Offenbecher, I suspect that your uh
19 arguments will be after any statute of limitations runs. So whether to grant
20 it and certify it or deny it and inform the Supreme Court and I'll do that at
21 the same time we send the order to you. Thank you for your very
22 complete briefing in this case.

23 [End of Hearing].
24

State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

Appendix R

ORDER ON MOTION TO AMEND

FILED
KING COUNTY, WASHINGTON

NOV 01 2018

SUPERIOR COURT CLERK
BY ALICIA OCHSNER
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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.

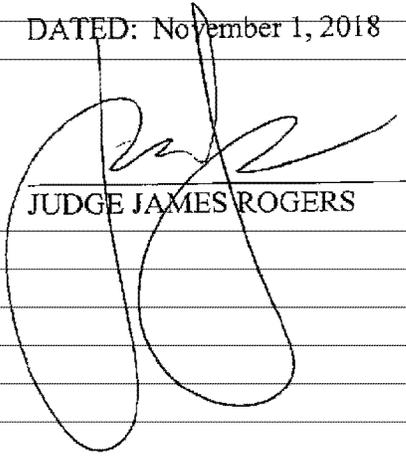
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DATED: November 1, 2018

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JUDGE JAMES ROGERS

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State v. Phillip Numrich
18-1-00255-5 SEA

DECLARATION OF PATRICK HINDS FOR
PURPOSES OF STATE'S MOTION TO RECONSIDER

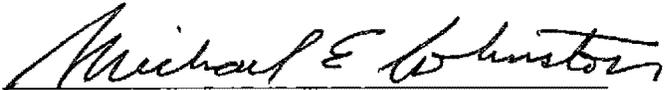
Appendix S

RULING [of Commissioner Johnston on
Defendant's Motion for Discretionary Review]

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

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

March 12, 2019

LETTER SENT BY E-MAIL ONLY

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

Eileen Alexander
Patrick Halpern Hinds
King County Prosecuting Attorney's Office
516 3rd Avenue, Suite W554
Seattle, WA 98104-2362

Re: Supreme Court No. 96566-8 - State of Washington v. Phillip Scott Numrich
King County Superior Court No. 18-1-00255-5 - SEA

Counsel:

On March 8, 2019, the Court received Mr. Numrich's "MOTION FOR DISCRETIONARY REVIEW", "STATEMENT OF GROUNDS FOR DIRECT REVIEW" and "PETITIONER'S MOTION TO CONSOLIDATE." The motion to consolidate seeks to consolidate this case with Supreme Court No. 96365-7.

Any answer to Mr. Numrich's motion for discretionary review, statement of grounds for direct review, and motion to consolidate should be served and filed by April 2, 2019. Any reply to any answer to the motion for discretionary review and motion to consolidate should be served and filed by April 12, 2019.

The motions will be set on the Commissioner's calendar once the State's motion for discretionary review and statement of grounds for direct review are filed. The State's filings are due on March 22, 2019.

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:bw



Presiding Judge James Rogers

FILED
KING COUNTY, WASHINGTON
JAN 28 2019
SEA
SUPERIOR COURT CLERK

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

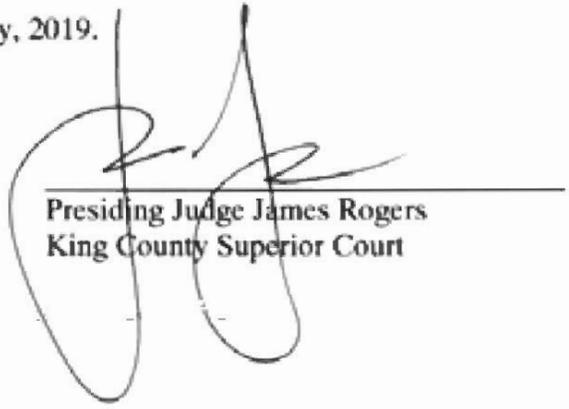


1 2. The billing rates of Mr. Numrich's attorneys – \$600 for Mr. Maybrown and \$400
2 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown
3 Seattle with commensurate experience, and in light of the novelty and difficulty of the questions
4 involved and the seriousness 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 _____
17 Presiding Judge James Rogers
18 King County Superior Court

19 Presented by:

20
21 _____
22 Cooper Offenbecher, WSBA #40690
23 Attorney for Defendant

24
25 *The Court reviewed all of*
26 *extensive pleadings, the*
 true billings in the
 case, and declines
 to re-review any of its
 earlier decisions.

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON



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January 15, 2019

LETTER SENT BY E-MAIL ONLY

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

Eileen Alexander
Patrick Halpern Hinds
King County Prosecuting Attorney's Office
516 3rd Avenue, Suite W554
Seattle, WA 98104-2362

Re: Supreme Court No. 96566-8 - State of Washington v. Phillip Scott Numrich
King County Superior Court No. 18-1-00255-5 SEA

Counsel:

The following notation ruling was entered on January 15, 2019, by the Supreme Court Clerk in the above referenced case:

MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR
DISCRETIONARY REVIEW AND STATEMENT OF GROUNDS FOR DIRECT
REVIEW

“Motion granted. The State's motion for discretionary review and statement of grounds for direct review should be served and filed by February 22, 2019. It is noted that if the State decides to seek review of another order filed by the trial court, a separate notice for discretionary review must be filed.”

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:bw



THE SUPREME COURT

STATE OF WASHINGTON

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY



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February 22, 2019

LETTER SENT BY E-MAIL ONLY

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

Eileen Alexander
Patrick Halpern Hinds
King County Prosecuting Attorney's Office
516 3rd Avenue, Suite W554
Seattle, WA 98104-2362

Re: Supreme Court No. 96566-8 - State of Washington v. Phillip Scott Numrich
Superior Court No. 18-1-00255-5 - SEA

Counsel:

On February 21, 2019, the Court received from the trial court clerk a copy of the State's "NOTICE OF DISCRETIONARY REVIEW TO SUPREME COURT OF WASHINGTON", which seeks review of the trial court's "ORDER ON DEFENDANT'S FEE PETITION" that was filed on January 28, 2019.

Review of the order indicates that the trial court's decision is related to the trial court's "ORDER ON MOTION TO AMEND" for which both the State and Mr. Numrich previously filed separate notices for discretionary review. As such, this notice has been filed in this existing case. If either party feels that this notice should not be included in this case, the party's objections may be served and filed in letter form directed to this Court.

In regard to this notice, the State should serve and file a motion for discretionary review and statement of grounds for direct review by March 22, 2019. Because the orders of which review is sought in this matter are related, the State may, if they wish, combine this motion for discretionary review with their motion for discretionary review of the trial court's order on motion to amend.



Page 2
No. 96566-8
February 22, 2019

Sincerely,

A handwritten signature in black ink, appearing to read "Susan L. Carlson". The signature is fluid and cursive, with a large initial "S" and a long horizontal stroke at the end.

Susan L. Carlson
Supreme Court Clerk

SLC:bw

FILED

18 JAN 05 PM 2:36

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 18-1-00255-5 SEA

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;

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

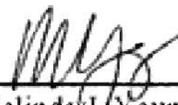
DANIEL T. SATTERBERG
Prosecuting Attorney

By:



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

By:



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

1 *The Honorable James E. Rogers*
2 *Hearing Date: TBD*
3 *Oral Argument Requested*

FILED
2018 NOV 13 02:35 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 THE STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
9 v.	)	No. 18-1-00255-5 SEA
)	
)	
10 PHILLIP NUMRICH,)	
	)	Defendant.
	)	STATE'S MOTION TO RECONSIDER
	)	THE IMPOSITION OF SANCTIONS
)	
)	

13 **I. INTRODUCTION**

14 On October 31, 2018, the parties appeared before this court for argument on the State's
15 motion to amend the charges against the defendant, Phillip Numrich. The following day, this court
16 issued a written ruling granting the State's motion and denying Numrich's motion for discovery.
17 This court also, however, *sua sponte* imposed sanctions against the State by ordering it to pay
18 Numrich's attorneys' fees for the defense work done on his interlocutory appeal.

19 Numrich never asked for sanctions in any of his written materials and sanctions were neither
20 requested by Numrich nor mentioned by this court at the oral argument. As a result, this motion for
21 reconsideration is the State's first opportunity to respond to this issue. For the reasons outlined
22 below, this court should reconsider the portion of its order imposing those terms.

1 **II. RELEVANT FACTS**

2 The procedural facts of this case are outlined in the DECLARATION OF PATRICK
3 HINDS FOR PURPOSES OF MOTION TO RECONSIDER. Both this Declaration and its
4 attached appendices were filed under separate cover, but are incorporated herein by reference.¹
5 Specific and/or additional facts are discussed below as relevant.

6 **III. ARGUMENT**

7 This court imposed terms because it concluded that the State should have given notice of its
8 intent to amend earlier and found that Numrich incurred costs for appellate litigation due to the
9 untimeliness of the State's motion. Appendix R. Under the analysis required by the caselaw,
10 however, this court will abuse its discretion if it orders the State to pay terms in this case. Even
11 were that not the case, this court's decision to order sanctions was based on an incomplete and
12 misleading record and on the incorrect premise that the State has an obligation to take affirmative
13 steps to assist a criminal defendant in litigating his case in the most cost-effective manner possible.
14 As a result, this court should reverse its *sua sponte* decision to impose terms. In the alternative, this
15 court should defer its decision on whether to impose terms until the Washington Supreme Court has
16 made a final decisions on whether to grant discretionary review in this matter.

17 **A. THIS COURT SHOULD REVERSE ITS DECISION TO IMPOSE**
18 **SANCTIONS**

19 For a number of reasons, this court should reconsider and reverse its decision to impose
20 sanctions against the State.

21
22
23

¹ The State will hereinafter cite to the Declaration as "Hinds Decl." and to any of the appendices attached to it
simply as "Appendix" followed by the relevant letter (e.g. "Appendix A").

1 First, this court will abuse its discretion if it orders the State to pay sanctions as
2 contemplated in the current order. As noted above, here the court's decision to impose terms was
3 based on the conclusion that the State's motion to amend was brought later than it should have been.
4 In State v. Gassman, the Washington Supreme Court addressed the power of a trial court to impose
5 sanctions in exactly that situation—when it concludes that a State's motion to amend does not
6 prejudice a defendant and should not be denied, but was brought in an untimely manner. 175
7 Wn.2d 208, 263 P.3d 113 (2012). Under Gassman, this court will abuse its discretion if it orders the
8 State to pay terms.

9 In Gassman, the State moved to amend the Information on the day of trial to change the date
10 that the crime was allegedly committed by the codefendants. 175 Wn.2d at 209-10. The defense
11 attorneys objected on the grounds that they had prepared their entire defense around having an alibi
12 for the date the State had initially alleged that the crime had taken place on. Id. at 210. The trial
13 court granted the motion to amend and continued the trial date to give the defendants time to
14 prepare their defense(s) based on the newly charged date of offense. Id. The trial court also found
15 that the State's conduct was "careless" (but not "purposeful") and ordered the State to pay
16 attorneys' fees to each defense counsel for the extra time they were required to spend dealing with
17 the alibi issue created by the State's amendment. Id. The trial court subsequently denied the State's
18 motion for reconsideration of the sanctions and the State appealed. Id.

19 In analyzing the case, the Court noted that there is no statute or rule that provides for the
20 imposition of sanctions in this situation, but that a court does have the authority to impose them—
21 including attorneys' fees—under its inherent equitable powers to manage its proceedings. Id. at
22 201-11 (citing In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)). The
23 Court also noted, however, that sanctions imposed under this inherent authority are subject to an

1 important limitation; they can only be imposed if the court finds that the State acted in “bad faith” or
 2 engaged in conduct “tantamount to bad faith.” Id. Such bad faith² consists of “willfully abusive,
 3 vexatious, or intransigent tactics designed to stall or harass.” Id. at 211 (citing Chambers v.
 4 NASCO, Inc., 502 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). The Court held that the
 5 trial court’s finding that the State’s conduct was careless but not purposeful did not constitute a
 6 finding of bad faith and that bad faith could not be inferred from the record. Id. at 212-13. The
 7 Court, therefore, ruled that the trial court had abused its discretion in ordering sanctions. Id.

8 Here, as in Gassman, the State did not act in bad faith in amending the charges how and
 9 when it did.³ This court has already essentially found as much. In arguing against the State’s
 10 motion to amend and for his motion to compel discovery, Numrich asserted that the State was
 11 engaged in “gamesmanship” and vindictive prosecution. Appendix M at 11-12,14-17; Appendix N
 12 at 8-10; Appendix Q 8-11,14-17. If the State was actually doing either of these things, then it would
 13 have been acting in bad faith *and* that would have been a basis for this court to deny the State’s
 14 motion and/or to grant Numrich’s. But this court (correctly) determined that the State was not doing
 15 either, granted the State’s motion, and denied Numrich’s. Appendix R. In doing so, this court
 16 explicitly found: (1) that the State’s counsel had been candid with the court in explaining how and
 17 why the motion to amend came about when it did; and (2) that there was no evidence that the
 18 motion to amend had been brought for an improper purpose. Id. Nor does the record provide even
 19

20 ² For purposes of brevity, the State will hereinafter simply use the phrase “bad faith” with the understanding that it
 21 also includes the concept of “conduct tantamount to bad faith.”

22 ³ While the cases are analogous and the analysis in Gassman applies here, it is worth noting that Gassman dealt with
 23 a motion to amend *on the day of trial* that entirely mooted the defendant’s trial defense. Here, in contrast, the case is
 in such a preliminary stage that no trial date has even been set and the State’s amendment does not moot or preclude
 any substantive argument of the defense. Rather, it—at most—potentially impacts whether an appellate court will
 accept interlocutory review of a claimed trial court error (which is already a legally disfavored extraordinary
 remedy) or whether the defendant will have to wait and seek direct review following a conviction.

1 a suggestion of bad faith. The accompanying Declaration sets out in detail the procedural history of
2 this case as it relates to the motion to amend and explains the circumstances surrounding the State's
3 decision to seek the amendment how and when it did. Hinds Decl. In this context, while this court
4 may believe that the State was careless,⁴ there is no basis to conclude that the State acted in bad
5 faith. As a result, as in Gassman, this court will abuse its discretion if it orders the State to pay
6 terms as contemplated in the current order.

7 Second, this court's imposition of sanctions in this case was based on an incomplete and
8 misleading record. Now that a more complete and accurate procedural history of the case is before
9 the court, even if sanctions could be imposed based on a finding of something less than bad faith,
10 this court should not find fault on the part of the State warranting sanctions.

11 Here, in support of its motion to amend, the State provided a declaration that addressed why
12 the State had brought the motion how and when it did. Appendix H. This Declaration was
13 extremely limited and general and was aimed purely at establishing that the State was not acting
14 vindictively. Id. In his responsive materials, Numrich provided a recitation of the procedural
15 posture of the case that unfairly characterized many of the procedural facts of the case in a way that
16 cast the State in a negative light. Hinds Decl. at ¶ 53. This was repeated in the oral argument on the
17 motion. Id. At that time, however, the State was entirely unaware that the court was considering
18 sanctioning the State based on the timing of its motion. Hinds Decl. at ¶¶ 50-53. As a result, the
19 State focused on correcting and setting forth the facts only to the extent necessary for the
20
21
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23 ⁴ As discussed below, the State would disagree that its actions were careless. Even if it was, any carelessness on the part of the State was compounded and exceeding by the carelessness of the defense. Regardless, however, the point is that the mere carelessness does not equate to bad faith. Gassman, 175 Wn. 2d at 213.

1 resolution of the issues it believed to be before the court.⁵ *Id.*; Appendix P; Appendix Q. The
 2 State did not set forth the more comprehensive procedural history of the case that it would have
 3 if Numrich had requested terms or if the State had been aware that the court was considering
 4 imposing such a sanction. Hinds Decl. at ¶ 53. The State has now done so in the accompanying
 5 declaration. Hinds Decl.

6 The version of the record before this court when it imposed terms was misleading in a
 7 number of ways. For example, taken as a whole it created the impression that the fact that the State
 8 had not previously provided notice of its intent to amend was completely inexplicable. Similarly, it
 9 wholly omitted the fact that the defense had never asked the State whether it was considering
 10 amending the charges for trial. In addition, it did not provide any of the context showing that the
 11 State's analysis of whether or not to seek amendment—and the timing of its motion—was
 12 inextricable linked to the argument made by Numrich in his Motion for Discretionary Review and
 13 his Statement of Grounds for Direct Review. Furthermore, it dramatically over-exaggerated the
 14 extent to which the State's opposition to discretionary review relies on the addition of charges via
 15 the amendment. In addition, it made it appear as if Numrich was on the verge of withdrawing his
 16 motion for discretionary review.

17 Now that a more complete and accurate procedural history of the case is before this court, it
 18 is hopefully more understandable why this case proceeded in the way that it has up to this point. In
 19 that context, the State's actions throughout the pendency of the case are neither inexplicable nor
 20 unreasonable. Once initial charges are filed, the State typically only addresses potential
 21 amendments to the charges if: (1) the State is extending a plea offer; (2) the case is actually being

22 _____
 23 ⁵ In its reply brief in support of its motion to amend, the State explicitly noted that Numrich was unfairly
 characterizing the facts in a way that cast the State in an undeservedly negative light, but indicated that the State
 would confine itself to correcting the record only on those matters that were relevant to the issues properly before
 court. Appendix P at 4 n.6.

1 set trial; (3) something happens that brings the issue up (i.e. new information is uncovered or the
2 defendant commits a new crime); or (4) the defendant's attorney raises the issue. Hinds Decl. at ¶
3 29. As of the time that Numrich filed his Motion for Discretionary Review and Statement of
4 Grounds for Direct Review (September 28), none of those things had happened. *Id.* Rather, it was
5 Numrich's arguments in those briefs that raised the issue of a possible amendment. Hinds Decl. at
6 ¶¶ 32-34.

7 Additionally, to the extent that the State bears any blame for the current situation, that blame
8 is shared—if not exceeded—by the defense. Here, it is true that the State never told the defense
9 prior to October 18 that it was considering amending the charges to add first-degree manslaughter.
10 But it also never misled the defense into believing that no amendments could be forthcoming. It
11 was simply never discussed. The defense never asked if the State was considering any
12 amendments, raised the issue of possible amendments, or engaged in any of the plea negotiations or
13 usual processes that would generally prompt a discussion of possible amendments. *See, e.g.,* Hinds
14 Decl. at ¶ 28. As a result, even if the State was somehow at fault for failing to affirmatively inform
15 the defense that it was considering amending the charges, the defense was equally—if not more—
16 responsible for the situation because it chose to pursue a litigation strategy without first fully
17 negotiating the case or considering the full scope of the legal jeopardy Numrich faced based on the
18 facts of the case.

19 Furthermore, the version of the record before this court when it imposed terms made it
20 appear as if Numrich was on the verge of withdrawing his motion for discretionary review based on
21 the amendment to the charges. Appendix M at 8-13; Appendix N at 7-10; Appendix O at 5;
22 Appendix Q at 10-11. But there is no indication that the defense actually intends to do so. Rather,
23 the defendant continues to pursue interlocutory appeal based on the argument that RCW

1 49.17.190(3) sets forth a crime that is more “specific” than the “general” crime of manslaughter and
2 that the State is, therefore, confined to only prosecuting the former.

3 Moreover, the version of the record before this court when it imposed terms made it appear
4 as if the amendment of the charges to add first-degree manslaughter was the backbone of the State’s
5 argument in opposition to Numrich’s motion for discretionary review. Appendix M at 2,8-10,13;
6 Appendix N at 7-10; Appendix O at 1-6; Appendix Q at 8-11,14-15. This is untrue. The State did
7 point out in its responsive briefing to the Supreme Court that it believed that the addition of first-
8 degree manslaughter would make discretionary review inappropriate under RAP 2.3(b)(4).
9 Appendix I at 18-19. However, this was merely a part of a much larger argument. The State argued
10 numerous reasons why discretionary review was inappropriate. Id. at 5-20. As part of this, the
11 State specifically and explicitly argued that review would still be inappropriate under RAP 2.3(b)(4)
12 even the charges were not amended to add first-degree manslaughter. Id. at 16-19.

13 Given all of the above, now that a more complete and accurate procedural history of the case
14 is before this court, even if sanctions could be imposed based on something less than bad faith, this
15 court should not find fault on the part of the State warranting the imposition of sanctions.

16 Third, even if the record before this court at the time it ordered sanctions was complete and
17 if the court could impose sanctions based on a finding of less than bad faith, this court should still
18 reconsider its order because it is based on sanctioning the State for failing to do something that it
19 had no obligation to do. As this court noted in its order, the real harms claimed by Numrich were
20 the “costs incurred in proceeding with the appellate process and a real frustration that the
21 Prosecutor...filed this amendment so late.” Appendix R at 1. In this context, the gravamen of
22 court’s reason for imposing terms was the following statement:

23 What is singular here is that the State did not give notice of an amendment in an
obvious situation that would have saved [Numrich] countless hours and fees for an

1 appeal, and where the State is using this amendment to obtain dismissal of the
2 discretionary review, and so announcing in the responsive appellate briefing, and
3 where the issues presented by the Amendment are obviously intertwined with the
4 issues on discretionary appeal, and where there are no additional facts or discovery
5 or new legal theory.

6 Appendix R at 2. But even assuming this statement is entirely correct, it is not a basis for this court
7 to impose sanctions.

8 It is axiomatic that due process requires the State to inform the defendant of the nature of the
9 accusations against him in a timely manner so that he may prepare his defense. But this court's
10 order went far beyond that. Here, a defendant lost a pre-trial motion to dismiss and was considering
11 whether to seek interlocutory appeal. In this context, the court essentially sanctioned the State for
12 not affirmatively reaching out to the defendant before a trial date was even set to make sure that he
13 was aware of a possible trial amendment—the potential for which was readily apparent from the
14 discovery—so that he could determine whether interlocutory appeal was the most cost-effective
15 litigation strategy. But the State is not required to assist the defendant in this way. Given that the
16 State is not obligated to do this, it should not be sanctioned for “failing” to do it.

17 For all of these reasons, this court should reconsider and reverse its decision to impose
18 sanctions against the State.

19 **B. IN THE ALTERNATIVE, THIS COURT SHOULD DEFER ITS DECISION
20 ON IMPOSING TERMS**

21 Even if this court is unwilling to reverse its decision at this time, it should still reconsider
22 and defer its decision on whether to impose terms until the Washington Supreme Court has decided
23 whether or not to grant discretionary review in this matter. Here, this court's decision to impose
sanctions appears to be based, in large part, on the premise that the State's amendment to the
charges will necessarily moot Numrich's motion for discretionary review and his attorneys' work

1 on that motion—implicating both hours of time and fees—will have, therefore, been wasted. But
2 that is not necessarily the case.

3 Here, it is entirely possible that the Supreme Court’s decision will establish that the State’s
4 motion to amend did not have any real impact on the motion for discretionary review. For example,
5 the Supreme Court could grant review on the question of whether the “general-specific rule”
6 precludes the State from prosecuting Numrich for *both* first- and second-degree manslaughter.⁶ On
7 the other hand, the Supreme Court could deny discretionary review for reasons entirely unrelated to
8 the amendment to the charges.⁷ Under the first example, Numrich would get exactly what he is
9 seeking—discretionary review of the substantive question of whether the “general-specific rule”
10 precludes the State from prosecuting him for manslaughter—despite the amendment to the charges.
11 Under the second example, the motion for discretionary review would be denied for reasons that
12 have absolutely nothing to do with the amendment to the charges.

13 As a result, even if this court is unwilling to reverse its decision to impose sanctions against
14 the State at this time, it should still reconsider and defer its decision until the Supreme Court has
15 decided whether or not to grant discretionary review. Here, the imposition of sanctions was based
16 on the premise that the amendment to the charges necessarily caused a “waste” of attorneys’ time
17

18 ⁶ This court certified its decision to grant the amendment for purposes of RAP 2.3(b)(4). Appendix R at 2-3. Numrich
19 has argued both to this court and to the Supreme Court Commissioner that—despite the State’s interpretation of his
20 argument to the contrary—the defense takes the position that the “general-specific rule” precludes the State from
21 prosecuting him for both first- and second-degree manslaughter. Appendix Q at 11-14; Hinds Decl. at ¶ 56. And the
Supreme Court Commissioner’s ruling effectively invites Numrich to seek discretionary review of this court’s ruling
(granting the amendment adding first-degree manslaughter), which could then be consolidated with his motion for
discretionary review of Judge Chun’s denial of his motion to dismiss the count of second-degree manslaughter.
Appendix S at 2.

22 ⁷ The State did argue in its answer to Numrich’s motion for discretionary review that the amendment to add first-degree
23 manslaughter would make discretionary review inappropriate under RAP 2.3(b)(4). Appendix I at 18-19. As discussed
above, however, this was merely a part of a much larger State’s argument as to why discretionary review was
inappropriate. *Id.* at 5-20. As part of this, the State specifically and explicitly argued that—even if the State did not
amend to add first-degree manslaughter charges—review would still be inappropriate under RAP 2.3(b)(4). *Id.* at 16-19.

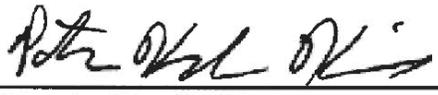
1 and fees. But, as the examples above illustrate, the actual decision of the Supreme Court—and the
 2 basis for it—may very well establish that the amendment did not actually have any such effect.
 3 And, if that were the case, there would be no basis to impose terms.

4 **IV. CONCLUSION**

5 For the reasons outlined above, this court should grant the State’s motion for
 6 reconsideration.

7
 8 DATED this 13th day of November, 2018.

9 DANIEL T. SATTERBERG
 10 King County Prosecuting Attorney

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

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1 FILED
 2 2018 NOV 15 04:23 PM
 3 KING COUNTY
 4 SUPERIOR COURT CLERK
 5 E-FILED
 6 CASE #: 18-1-00255-5 SEA

7 IN THE SUPERIOR COURT OF WASHINGTON
 8 FOR KING COUNTY

9 THE STATE OF WASHINGTON,

10 Plaintiff,

11 v.

12 PHILLIP NUMRICH,

Defendant.

CASE NO. 18-1-00255-5 SEA

DEFENDANT'S FEE PETITION

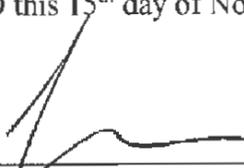
13 On November 1, 2018, after considering the parties' briefing and oral argument in this
 14 matter, the Court entered its Order on Motion to Amend. In that Order, the Court directed the
 15 State of Washington to pay terms to the defendant, Phillip Numrich, "measured in the attorneys'
 16 fees for the defense work on the discretionary appeal to this point." Order at 2. The Court also
 17 directed the defense to file a fee petition within 14 days of the entry of the Order.

18 On November 13, 2018, the State submitted a motion for reconsideration of the
 19 sanctions issue. The defense will not submit any response to the State's motion, unless directed
 20 to do so by this Court. *See* King County Local Civil Rule 59(b).¹

21
 22
 23
 24 ¹ As a general matter, the criminal rules do not allow for a motion for reconsideration. However, the
 25 defense assumes that the State may be relying upon the civil rules in this instance. *See generally* CrR
 26 8.2 (*citing* CR 7(b)). In any event, the State's motion should be denied. First, the defense has already
 demonstrated that the State's conduct during the litigation of these matters was extraordinary and has
 resulted in an incredible duplication of work. Second, the State has failed to demonstrate that
 reconsideration is warranted under CR 59(a). Third, due to the State's litigation tactics, a Commissioner
 of the Washington Supreme Court has deferred any ruling on the Defendant's pending Motion for
 Discretionary Review. In fact, given these recent developments, it is now clear that the Court should
 deny the State's belated motion to amend. This Court retains authority to deny the amendment even if

1 Accordingly, Defendant Numrich hereby submits this petition for attorneys' fees. This
2 Petition is supported by the proceedings previously had herein and the attached Declaration of
3 Cooper Offenbecher.
4

5 RESPECTFULLY SUBMITTED this 15th day of November, 2018.

6
7 
8 _____
9 TODD MAYBROWN, WSBA #18557
10 COOPER OFFENBECHER, WSBA #40690
11 Attorneys for Defendant
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26 _____
it might conclude that the Defendant was not "substantially prejudiced" within the meaning of CrR 2.1(d). *See, e.g., State v. Lamb*, 175 Wn.2d 121, 130-32 (2012) (trial court has wide discretion when considering a State's motion to amend – and the Court can deny the motion even if there is an absence of prejudice).

1 District Court for Montana, the United States District Court for the Southern District of New
 2 York, and the United States District Court for Idaho. Mr. Maybrown is a past president of the
 3 Washington Association of Criminal Defense Lawyers (“WACDL”) and a recipient of the
 4 William O. Douglas award, WACDL’s highest honor. Mr. Maybrown has been qualified as an
 5 expert witness to testify on criminal defense matters in numerous cases.
 6

7 4. My hourly rate for all work on this matter is \$400. I was admitted to the
 8 Washington State Bar in 2008 after graduating from the University of Washington School of
 9 Law. I am also admitted to practice in the United States District Court for the Western District
 10 of Washington and the United States Supreme Court. Between 2008 and 2010, I was a trial
 11 attorney with The Defender Association (“TDA”). In 2010, I joined Allen, Hansen &
 12 Maybrown as an associate attorney. I became a partner in the firm in 2015.
 13

14 5. It is my belief that the hourly rates that Mr. Maybrown and I have charged on
 15 this matter are fair and reasonable for litigation attorneys in Seattle with our experience and
 16 background. *See generally* RPC 1.5.

17 6. In reviewing our billing records, our firm has incurred the following fees and
 18 costs on the Motion for Discretionary Review in the Supreme Court through the end of the day
 19 on October 31, 2018²:
 20

<u>Date</u>	<u>Attorney</u>	<u>Time</u>	<u>Rate</u>	<u>Total</u>
9/6/2018	CO	0.9	\$400	\$360
9/20/2018	CO	0.2	\$400	\$80
9/21/2018	CO	0.2	\$400	\$80
9/25/2018	TM	4.0	\$600	\$2,400
9/26/2018	TM	7.1	\$600	\$4,260

26
² Narrative time entries constitute work product and are not being included given that this case is in the middle of active litigation.

1	9/27/2018	CO	7.5	\$400	\$3,000
2	9/27/2018	TM	.9	\$600	\$540
3	9/28/2018	CO	1.7	\$400	\$680
4	10/19/18	CO	.3	\$400	\$120
5	10/28/2018	CO	1.5	\$400	\$600
6	10/29/2018	CO	8.5	\$400	\$3,400
7	10/30/2018	CO	1.5	\$400	\$600
8	10/30/3018	TM	.8	\$600	\$480
9					
10	Total		35.1		\$16,600.00

11 These fees have been billed solely for work on the discretionary appeal to the Washington
12 Supreme Court before November 1, 2018 and for work on no other matters. As such, these are
13 the fees “for the defense for work on the discretionary appeal to [November 1, 2018].”

14 7. On November 1, 2018, the parties appeared by phone and argued to the Supreme
15 Court Commissioner regarding the Motion for Discretionary Review. The Commissioner had
16 reviewed this Court’s October 31 Order certifying the Order on Motion to Amend, and posed
17 numerous questions to the parties about the procedural status of this newly presented certified
18 Order.

19 8. Thereafter, the Commissioner entered an order on November 5. *See Appendix*
20 *A*. The Order recognized this Court’s certification of the Order on Motion to Amend. However,
21 the Commissioner noted:

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

1 *Id.* at 2. In light of the additional procedural steps outlined, the Commissioner deferred action
2 on the instant motion for discretionary review. *See id.*

3 9. Given the Commissioner's ruling, it is apparent that Mr. Numrich will literally
4 need to start all over again to perfect the newly certified issue of the Order to Amend. This will
5 include filing a Notice of Discretionary Review, payment of an additional filing fee, drafting
6 an additional motion for discretionary review, drafting an additional statement of grounds for
7 direct review, reply briefing, submitting relevant portions of the record, and appearing for
8 another oral argument on this matter. Only then can Mr. Numrich petition to have the two
9 matters considered – and perhaps consolidated for consideration – during the discretionary
10 review process.
11

12 10. Due to the State's litigation tactics, the discretionary review process will be
13 further delayed. In addition, Mr. Numrich and his attorneys will now be forced to complete an
14 incredible amount of duplicative work. And all of it was created because the State waited until
15 the 11th hour in the appellate process – months after Judge Chun had certified the issue for
16 interlocutory review, and after the defense had completed lengthy briefing in support of the
17 motion for discretionary review – to notify the defense and Court that it intended to add a charge
18 of Manslaughter in the First Degree. None of this duplication would have been necessary if the
19 State had provided timely notice of the amendment. And none of this will be necessary if the
20 Court exercises its discretion to deny the State's belated motion to amend.
21

22 11. In light of the Commissioner's ruling that this Court's Order to Amend cannot
23 simply be added to the existing Motion for Discretionary Review and that Mr. Numrich must
24 file a second Notice of Discretionary Review, the defense also petitions for the following: the
25
26

1 \$292.49 filing fee for initiating the first Motion for Discretionary review; and work on 11/1
2 related to the oral argument;³

<u>Date</u>	<u>Attorney</u>	<u>Time</u>	<u>Rate</u>	<u>Total</u>
11/1/18	CO	2.2	\$400	\$880
11/1/18	TM	.8	\$600	\$480
Total		3		\$1360.00

9 12. Accordingly, Mr. Numrich respectfully submits a fee petition for the total
10 amount of: \$18,252.49.

11 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
12 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF
13 MY KNOWLEDGE.

14 DATED at Seattle, Washington, this 15th day of November 15, 2018.

15
16 
17 _____
18 Cooper Offenbecher, WSBA #40690

19 I certify under penalty of perjury under the
20 laws of the State of Washington that on this
21 date I sent by mail /email/ messenger a copy
22 of the document to which this certificate is
affixed to (Ande Service)
Patrick Hinds + Eileen Alexander
23 Dated: 11/15/18
Sarah Conner

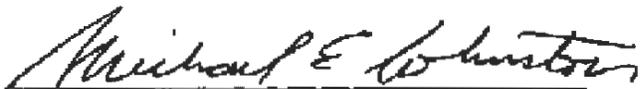
24 ³³ This Court's 11/1 Order contemplated that the newly certified issue could simply be added to the
25 existing Motion for Discretionary Review. During oral argument on 11/1, undersigned counsel argued
26 to the Commissioner that it was within his purview to do exactly that, so as to avoid an entire second set
of Motion for Discretionary Review procedures. However, in light of the Commissioner's ruling, it is
now apparent that Mr. Numrich will have to initiate, fully perfect and brief two separate Motions for
Direct Discretionary Review. Accordingly, Mr. Numrich should be entitled to recoup fees for the entire
initial process, which would include time spent on preparation and argument on November 1, 2018, and
the initial filing fee.

APPENDIX A

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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FILED
2018 NOV 30 02:17 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

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

DEFENDANT'S RESPONSE TO STATE'S
MOTION TO RECONSIDER
IMPOSITION OF SANCTIONS

ERRATA FILING

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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”).

- 1
- 2 • Although the Chief Criminal Presiding Judge declined to pre-assign the
- 3 case, the Court requested that the parties agree on a briefing schedule and
- 4 coordinate with the criminal motions department to schedule a hearing
- 5 on the motion to dismiss. *Id.*
- 6
- 7 • The Court then signed a detailed three-page Order Setting Briefing
- 8 Schedule that had been prepared by the State and agreed to by the
- 9 defense. *Id.* At this time, both the defense and the State acknowledged
- 10 that each party would seek discretionary review if that party lost the
- 11 Motion:

1. CURRENT & FORTHCOMING MOTIONS:

a. Known current and forthcoming motions:

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

b. Anticipated forthcoming motions:

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

16 *Id.* at 2.

- 17 • Thereafter, the State contacted the defense and requested an extension of
- 18 the due date within which to file its Response from June 6 to June 13.
- 19 The defense agreed and the Court signed an Order Amending Briefing
- 20 Schedule prepared by the State and agreed to by the defense. Sub. 28
- 21 (6/1/18 Order Amending Briefing Schedule).¹
- 22 • On June 13 the State filed a 33-page Response, plus appendices. Sub. 29.
- 23 • On June 20 the defense filed its Reply. Sub. 30.

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 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”
 given to the jury must specify that the object of the defendant’s *mens rea* was
 the risk that death would occur. 2016 Comment to WPIC 10.04; Comment to
 WPIC 28.06

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

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

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

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

18 **d. Defendant’s July 18 Surreply**

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

21 Citing *State v. Gamble*, 154 Wn.2d 457, 468-69 (2005) and *State v. Latham*, 183
 22 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. Surreponse at 10 (*quoting Latham*, 183 Wn.App. at 406). The State’s
 23 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 Surreponse 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. F)(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**
24 **instruction in a case.** I couldn’t find one. And I don’t think that I could in a
25 straight face say you have to be aware of something in this situation when it’s a
26 failure to be aware. I don’t understand how you would do that. And that’s why
27 the State gets so tied up in knots.

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

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

34 [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
apparently doesn't believe that *Gamble* applies to manslaughter in the second
6 degree, and Justice Chambers is obviously entitled to his opinion. But those
7 opinions don't trump the clear case law and other evidence to the contrary that
8 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
with the language of its holding. There would be no reason for the court to do
9 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
in the second degree that they interpret *Gamble* as holding that the *mens rea* is
not just about a generalized bad act or wrongful act. It has to be about the death
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
have to be about the death of the decedent, it could be about some other bad act.
Whereas in Washington, the *mens rea* for manslaughter in the second degree,
the negligence has to be about the risk of death to the decedent, and that is the
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
the law knowledge will prove negligence. Just like the intent for theft is the
same level as the intent for murder. They're about different things, that makes
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
 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.

8 *Id.* at 2, n.1.⁶

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

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

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

18
 19
 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

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III. CONCLUSION

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

DATED this 30th day of November, 2018.



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

I certify that on the 30th 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).


Sarah Conger, Legal Assistant

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FILED
2018 NOV 30 09:00 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

Judge 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

DEFENDANT'S MOTION TO DISMISS
PURSUANT TO CrR 8.3(b), OR
ALTERNATIVELY TO RECONSIDER
ORDER ON MOTION TO AMEND

I. INTRODUCTION

The State has materially misled the Court and the defense throughout these proceedings resulting in an enormous waste of time and resources, as well as prejudice to the substantial rights of Mr. Numrich.

According to the recent declaration by the State, the State believed from the outset of this litigation that there was a basis to charge Mr. Numrich with Manslaughter in the First Degree and it was prepared to charge Mr. Numrich with Manslaughter in the First Degree if Mr. Numrich pressed the case to trial. Despite this belief, the State remained silent through six months of complex litigation while this Court, Mr. Numrich, and his attorneys labored under the apparently false belief that a decision from this Court or a higher Court on the application of the general-

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. Maybrown 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).

1 6. State's July 23 Proposed Order Denying Defendant's Motion to Dismiss Count 1
 2 (proposing that the Court rule: "Numrich asserts that the analysis and conclusion
 3 of *Gamble* applies only to first-degree manslaughter and not second-degree. The
 4 State argues that it applies to both levels. This Court agrees with the State's
 5 analysis for the reasons set forth by the State in its briefing and at oral argument").
 6 *Id.* at 2, n. 1.

7 The State's pleadings omit any mention of the foregoing.¹ The claim that the State did not consider
 8 the *Gamble* issue until October is flatly contradicted by the evidence. It was central to this
 9 litigation and cannot be used as an excuse for the belated amendment.

10 The State's notification that it would move to amend to add Manslaughter in the First
 11 Degree - on the day its brief was due in the Supreme Court - has thrown this litigation into a
 12 tailspin. Despite this Court's best intentions in promptly certifying the Order on Motion to Amend
 13 for consolidation with the existing appeal, Mr. Numrich now has to completely perfect a new
 14 Motion for Direct Discretionary Review, thereby further delaying these matters, prejudicing his
 15 substantial rights, and incurring additional duplicative and unnecessary costs.

16 This Court should exercise its discretion to dismiss the whole case, dismiss individual
 17 charges, or alternatively reconsider its decision granting the Motion to Amend, as necessary to
 18 sanction the State for its mismanagement of this matter.

19 This Motion is Supported by (1) Declaration of Cooper Offenbecher in Support of
 20 Defendant's Response to State's Motion to Reconsider Imposition of Sanctions and Defendant's
 21 Motion to Dismiss Pursuant to CrR 8.3(b) and/or Reconsider Order on Motion to Amend; (2)
 22 Defendant's Response to the State's Motion to Reconsider Imposition of Sanctions, (3)
 23 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;
simple mismanagement is sufficient.”

5 *Blackwell*, 120 Wn.2d at 831, 845 P.2d 1017 (emphasis in original).

6 Washington Courts have not been shy to impose dismissal as a sanction when the
7 mismanagement impedes the defendant’s right to a fair trial. *See, e.g., Brooks, supra* (State’s
8 failure to provide timely discovery and dumping large amounts of discovery on defendant the day
9 of trial was mismanagement which satisfied the requirements of the rule for a dismissal in that it
10 affected the defendant’s right to a speedy trial (citing *State v. Michielli*, 132 Wn.2d 229)); *State v.*
11 *Dailey*, 93 Wn.2d 454, 457 (1980) (affirming dismissal of prosecution, the Court explaining: “we
12 have made it clear that ‘governmental misconduct’ need not be of an evil or dishonest nature,
13 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.

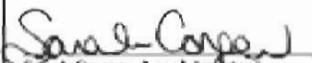
14 IV. CONCLUSION

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
23 this document to be served on DPA Patrick
Hinds by E-Service and Email (to be sent
by attorney Cooper Offenbecher).


Sarah Conger, Legal Assistant

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Honorable Jim Rogers

FILED
2018 NOV 29 04:09 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

PHILLIP SCOTT NUMRICH,

Defendant.

NO. 18-1-00255-5 SEA

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

I, Cooper Offenbecher, do hereby declare:

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

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

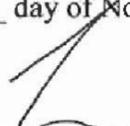
7 6. Attached hereto as Appendix E is a true and correct copy of the Defendant's
8 Surreply in Support of Defendant's Motion to Dismiss Count I filed on July 18, 2018 in this
9 matter.

10 7. Attached hereto as Appendix F is a true and correct copy of a transcript of the
11 July 19, 2018 hearing in front of Judge Chun on the Defendant's Motion to Dismiss Count I.
12

13 8. Attached hereto as Appendix G is the State's Proposed Order Denying
14 Defendant's Motion to Dismiss Count I, and related correspondence

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

23 I certify that on the 29th day of
24 November, 2018, I caused a true and
25 correct copy of this document to be served
26 on DPA Patrick Hinds by E-Service and
Email (to be sent by attorney Cooper
Offenbecher).

Sarah Conger, Legal Assistant

1 *The Honorable James E. Rogers*
2 *Hearing Date: TBD*
3 *Oral Argument: TBD*

FILED
2018 NOV 30 04:05 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7 THE STATE OF WASHINGTON,)
8) Plaintiff,)
9 v.) No. 18-1-00255-5 SEA
10)
11) STATE'S RESPONSE TO
12) DEFENDANT'S FEE PETITION
13)
14)
15)
16)
17)
18)
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23)

13 **I. INTRODUCTION**

14 The defendant, Phillip Numrich, has submitted a fee petition and supporting declaration
15 asking this court to order the State to pay his attorneys' fees and costs in the amount of \$18,252.49
16 for work ostensibly done on his motion for discretionary review between September 6 and
17 November 1.¹ For the reasons outlined below, this court should decline to impose any of the fees or
18 costs requested. As an initial matter, this court should reconsider its previous order imposing terms
19 against the State. Moreover, even if this court is unwilling to do that, it should still deny Numrich's
20 request for fees because he has failed to meet his burden of establishing that his requested fees are
21 reasonable.

22 _____
23 ¹ All dates referenced in this brief are in 2018 unless otherwise specified.

1 **II. RELEVANT PROCEDURAL FACTS**²

2 On October 31, the parties appeared for oral argument before this court on the State’s
 3 motion to amend. At that time, the court had received and reviewed the parties’ written briefing
 4 relating to that issue. The following morning (November 1), this court issued a written ruling
 5 granting the State’s motion. Appendix A. This court also, however, *sua sponte* imposed sanctions
 6 against the State by ordering it to pay Numrich’s attorneys’ fees for work done by his attorneys on
 7 his interlocutory appeal. Specifically, this court ordered that the terms imposed against the State
 8 were to consist of “the attorneys’ fees for the defense work on the discretionary appeal to this point.
 9 No fees are awarded for any work done in Superior Court.” Appendix A at 2.

10 Later in the afternoon of November 1, the parties appeared telephonically before Supreme
 11 Court Commissioner Michael Johnston for oral argument on Numrich’s motion for direct
 12 discretionary review. During the argument, Commissioner Johnston expressed uncertainty as to
 13 whether the Court could address this court’s ruling granting the motion to amend as part of the
 14 existing motion for discretionary review or whether Numrich would have to file a separate
 15 motion for discretionary review on that issue.

16 On November 5, Commissioner Johnston issued an order on Numrich’s motion.
 17 Appendix B. Commissioner Johnston found that this court’s ruling granting the motion to
 18 amend could not be addressed as part of Numrich’s existing motion for discretionary review, but
 19 would need to be raised via a separate motion for discretionary review if Numrich chose to bring
 20
 21

22 ² The State set forth a lengthy summary of the relevant procedural history of this case in the “DECLARATION OF
 23 PATRICK HINDS FOR PURPOSES OF STATE’S MOTION TO RECONSIDER,” which was filed on November
 13. That summary is incorporated by reference here, but will not be wholesale repeated in the interest of brevity.

1 one. Appendix B at 2. In this context, Commissioner Johnston deferred ruling on Numrich's
2 existing motion for discretionary review until matters were more settled. Appendix B at 2.

3 On November 13, the State filed its "MOTION TO RECONSIDER THE IMPOSITION
4 OF SANCTIONS"³ and the "DECLARATION OF PATRICK HINDS FOR PURPOSES OF
5 STATE'S MOTION TO RECONSIDER" asking this court to reconsider and reverse its
6 imposition of sanctions against the State.

7 On November 15, Numrich filed his combined "DEFENDANT'S FEE PETITION and
8 DECLARATION OF COOPER OFFENBECHER" in support thereof.⁴ In this document,
9 Numrich questioned the ability of the State to bring, and/or the authority of this court to consider,
10 a motion to reconsider. Fee Pet. at 1 n.1. Numrich also indicated that he would not respond to
11 the State's motion for reconsideration unless directed to do so by this court. Fee Pet. at 1. With
12 regard to the issue of fees, Numrich requested \$16,600 in attorneys' fees for 35.1 hours of work
13 done between September 6 and October 30 (prior to the date of this court's written order granting
14 the amendment). Fee Pet. at 4-5 ¶ 6. In addition, Numrich requested \$1,360 in attorneys' fees
15 for three hours of work done on November 1 (after entry of the written order) and \$292.49 in
16 costs relating to the filing of the motion for discretionary review. Fee Pet. at 6-7 ¶ 11.

17 On November 16, Numrich filed a "NOTICE OF DISCRETIONARY REVIEW" seeking
18 interlocutory appellate review of this court's granting of the State's motion to amend.
19
20
21

22 ³ The State will hereinafter cite to this brief as "State MTR".

23 ⁴ The fee petition and declaration are combined as one consecutively paginated document. As a result, except where there is a specific reason to do so, the State will not distinguish between them and will cite to these materials as a whole as "Fee Pet."

1 On November 19, this court’s bailiff sent the parties an email indicating that the court had
2 granted the State’s request to extend the time to file this response to November 30.⁵ On the same
3 day, this court also issued a written order indicating that it would hear the State’s motion to
4 reconsider and directed Numrich to file any responsive briefing within 10 days (i.e. by
5 November 29). Appendix C.

6 Numrich filed his “DEFENDANT’S RESPONSE TO STATE’S MOTION TO
7 RECONSIDER IMPOSITION OF SANCTIONS” on November 29. Later that same day,
8 Numrich filed his “DEFENDANT’S MOTION TO DISMISS PURSUANT TO CrR 8.3(b), OR
9 ALTERNATIVELY TO RECONSIDER ORDER ON MOTION TO AMEND” asking this court
10 to dismiss some or all of the counts against him or, in the alternative, to reconsider its order
11 allowing the amendment of the charges.⁶

12 This response brief is being timely filed on November 30. The State is also
13 contemporaneously filing a “NOTICE OF DISCRETIONARY REVIEW” seeking appellate
14 review of the portion of this court’s November 1 order imposing sanctions against the State.⁷

15 Specific and/or additional facts are discussed below as relevant.
16

17 ⁵ Under the schedule originally envisioned in this court’s order, the State’s response was due within seven days after
18 Numrich filed his fee petition. Appendix A at 2. However, because Numrich did not file his fee petition until
November 15, that would have made the State’s response due on Thanksgiving Day and counsel for the State was
out of the office on a previously scheduled vacation for much of the time in between.

19 ⁶ The State has only had a very short period of time to review and evaluate the briefing filed by Numrich on
20 November 29. Based on an initial reading, however, it appears that—as in many of his previous briefs—these
memoranda consist of arguments premised on recitations of the facts that distort the record and inaccurately cast the
21 State’s actions in a negative light. Based on this, the State anticipates that it will file a response to Numrich’s
request that this court dismiss charges or reconsider its granting of the State’s motion to amend and will likely need
to file a reply in support of its motion for reconsideration of the imposition of sanctions.

22 ⁷ The State does not have any doubt either that it has the ability to bring its previously filed motion to reconsider or
23 that this court has the authority to grant it and should do so. However, the State is filing its notice of discretionary
review now—within 30 days of the November 1 entry of the original order—in order to preserve its ability to seek
appellate review if necessary. Should this court grant the State’s motion to reconsider the imposition of sanctions,
the State will withdraw its notice as moot.

1 **III. ARGUMENT**

2 For the reasons discussed below, this court should decline to impose the fees and costs
 3 requested in Numrich's fee petition. As an initial matter, this court should decline to impose them
 4 because it should reconsider and reverse its order imposing sanctions. Moreover, even if this court
 5 is unwilling to reconsider that initial order, it should decline to impose the fees now requested
 6 because the fee petition submitted by Numrich is insufficient in a number of ways and Numrich
 7 cannot remedy these deficiencies in a reply or supplemental petition. In the alternative, this court
 8 should defer ordering fees until the various motions pending in multiple courts in this matter have
 9 been resolved. Finally, this court should reject Numrich's request that it reconsider and reverse its
 10 previous decision granting the State's motion to amend.

11 **A. THIS COURT SHOULD DECLINE TO IMPOSE THE FEES AND COSTS**
 12 **REQUESTED BY NUMRICH**

13 **1. This Court Should Decline To Impose The Requested Fees And Costs**
 14 **Based On Its Reconsideration Of The Order Imposing Sanctions In The**
 15 **First Place**

16 The only basis for the costs and fees requested by Numrich is the November 1 order of this
 17 court imposing sanctions against the State. If this court were to reconsider and reverse its decision
 18 to impose such sanctions, there would obviously not be any basis to order them. In its brief in
 19 support of its motion to reconsider, the State set forth a number of reasons why this court should
 20 reconsider and reverse its decision to impose sanctions against the State.⁸

21 First, under State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012), a court can only
 22 impose sanctions based on an untimely filing of a motion to amend if it finds that the State acted in

23 ⁸ The arguments are set forth in detail in the State's written brief in support of its motion to reconsider. State MTR at 2-9. The State incorporates these arguments by reference and, in the interest of brevity, will provide only a brief summary of the arguments rather than repeating them in their entirety here.

1 bad faith or engaged in conduct tantamount to bad faith. In this context, a finding of a carelessness
2 is not enough. Id. Absent a finding of bad faith or conduct tantamount to bad faith, a court abuses
3 its discretion in imposing sanctions. Id. Here, this court found that the amendment did not
4 prejudice Numrich and that the State's motion was not brought in bad faith or for any improper
5 purpose. Appendix A. This court imposed sanctions because it concluded that the State could or
6 should have brought the motion sooner. Id. In other words, this court essentially found that the
7 State had been careless. Given this conclusion, under Gassman, this court will abuse its discretion if
8 it orders the State to pay the fees and costs requested by Numrich.

9 Second, this court's imposition of sanctions in this case was based on an incomplete and
10 misleading record. Now that the more complete and accurate procedural history of the case—set
11 forth in the declaration in support of the State's motion to reconsider—is before the court, even if
12 sanctions could be imposed based on a finding of something less than bad faith, this court should
13 not find fault on the part of the State warranting sanctions.

14 Third, even if the record before this court at the time it ordered sanctions was complete and
15 even if the court could impose sanctions based on a finding of less than bad faith, this court should
16 still reconsider its order because it is based on sanctioning the State for failing to do something that
17 it had no obligation to do. Here, Numrich lost a pre-trial motion to dismiss and was considering
18 whether to seek interlocutory appeal. In that context, the State was not obligated to affirmatively
19 reach out to his attorneys (before a trial date was even set) to make sure that they was aware of a
20 possible trial amendment—the potential for which was readily apparent from the discovery—so that
21 they could determine whether interlocutory appeal was the most cost-effective litigation strategy.
22 Given that the State had no obligation to do this, it should not be sanctioned for “failing” to do so.

1 For all of these reasons, this court should reconsider and reverse its decision to impose
 2 sanctions against the State. As a result, it should also decline to impose the fees and costs requested
 3 by Numrich.

4 **2. This Court Should Decline To Impose The Requested Fees And Costs**
 5 **Because Numrich’s Fee Petition Is Insufficient**

6 Numrich bears the burden of establishing the reasonableness of the fees and costs he seeks.
 7 His fee petition fails to meet this burden. As a result, this court should decline to impose the fees
 8 and costs he requests. In addition, this court should preclude Numrich from attempting to fix these
 9 problems in a reply or supplemental petition.

10 **a. Numrich’s fee petition is insufficient**

11 It is a well-established rule in Washington that, even where a party is entitled to a fee
 12 award—be it under the authority of a contract provision, statute, court rule, court order, or
 13 recognized ground in equity—that party still bears the burden of establishing that the fees actually
 14 requested are reasonable. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 2d 141, 151, 859 P.2d 1210
 15 (1993); Berryman v. Metcalf, 177 Wn. App. 644, 657, 312 P.3d 745 (2013). Here, Numrich has
 16 failed to make this necessary demonstration for a number of reasons.

17 *i. Numrich’s fee petition is not supported by the*
 18 *evidence/documentation required by law*

19 To meet its burden of proving the reasonableness of fees, the party seeking them must
 20 provide more than a simple and unsupported declaration from its counsel. Mahler v. Szucs, 135
 21 Wn.2d 398, 434-35, 957 P.2d 632 (1998);⁹ SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d
 22 40 (2014). “In determining an award of attorney fees, the trial court may not rely solely on
 23 counsel’s fee affidavits.” SentinelC3, 181 Wn.2d at 144. Rather, the party must provide some

⁹ Mahler was implicitly overruling on other grounds, as recognized in Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 659, 272 P.3d 802 (2012).

1 evidence—beyond a self-serving declaration of counsel—to meet its burden of proof. The State is
2 aware of this court’s lengthy experience and presumes this court’s familiarity with the types of
3 documents and other evidence generally submitted in support of a request for fees. Common
4 examples of such evidence include: fee agreements; detailed time entries; billing invoices; publicly
5 available records compiling data regarding rates for services in a given area; prior court orders
6 finding attorneys’ rates reasonable; and declarations of other attorneys regarding such issues as their
7 familiarity with counsel’s expertise, their rates for similar services, and their opinions as to the
8 reasonableness of counsel’s rate and/or the amount of time expended.

9 Moreover, courts reviewing fee petitions show a strong preference for contemporaneous
10 records documenting the hours worked. Mahler, 135 Wn.2d at 434. In contrast, attempts to
11 reconstruct the hours worked after the fact are generally disfavored as being unreliable. Johnson v.
12 State Department of Transportation, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013). Such
13 “reconstructed hours ‘should be credited only if reasonable under the circumstances and supported
14 by other evidence such as testimony or secondary documentation.’” Id. (quoting Frank Music Corp.
15 v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1557 (9th Cir. 1989)).

16 Here, the only documentation submitted by Numrich in support of his fee petition is a
17 summary declaration from one of his attorneys. Fee Pet. at 3-7. Despite the clear authority that this
18 is insufficient, he has failed to provide *any* other evidence or documentation supporting his claim.
19 On that basis alone, his petition is insufficient to establish the reasonableness of the fees he seeks.

20 Even beyond that, however, the lack of supporting documentation is particularly
21 problematic in this case given that Numrich also fails to establish whether the fees in question were
22 based on contemporaneously kept records or were reconstructed after the fact for purposes of the fee
23 petition. As noted above, even beyond the general rule that a mere declaration is insufficient,

1 supporting evidence is particularly necessary when the fee petition is based on reconstructed hours.
 2 Here, the only information provided in the declaration regarding this point is the statement “in
 3 reviewing our billing records, our firm has incurred the following fees and costs....” Fee Pet. at
 4 ¶ 6. No information is provided as to what these billing records consist of, whether they are
 5 based on tracking hours worked, how they are kept, and/or whether they are kept
 6 contemporaneously. Nor can it simply be presumed that Numrich’s attorneys’ firm
 7 contemporaneously tracked the hours they worked on his case.¹⁰ Rather, as the party bearing the
 8 burden of proof, Numrich must establish either that the hours he claims are based on
 9 contemporaneously created billing records or he must provide an explanation of why reconstructed
 10 hours were used along with additional evidence supporting them. He has done neither. As a result,
 11 his fee petition is insufficiently documented.

12 *ii. Numrich’s fee petition fails to establish that the fees*
 13 *requested are reasonable*

14 As noted above, a party seeking fees bears the burden of establishing that the fees sought are
 15 reasonable. Fetzer, 122 Wn.2d at 151; McGreevy, 90 Wn. App. at 292; Berryman, 177 Wn. App. at
 16 657. Here, even if this court were to ignore the fact that Numrich has failed to provide supporting
 17 documentation and evidence required by law and was to evaluate his petition based purely on his
 18 attorney’s declaration, his request should still be denied because his petition fails to establish that
 19 the fees he seeks are reasonable. In a context such as this one, the party seeking to establish the
 20 reasonableness of requested fees must demonstrate both (1) that his attorneys’ rates are reasonable
 21 and (2) that the work they did was reasonable. Berryman, 177 Wn. App. at 661-64; Bowers v.

22
 23 ¹⁰ It is not uncommon, for example, for criminal defense work to be done based on flat-fee payment agreements that do not necessarily require the attorney to track or bill their time by the hour, let alone do so contemporaneously.

1 Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Numrich has failed to
2 convincingly establish either.

3 First, Numrich's fee petition fails to establish that his attorneys' rates are reasonable. As an
4 initial matter, a party seeking to establish that their attorneys' rates are reasonable must establish
5 what rates they are actually paying. Berryman, 177 Wn. App. at 664. Here, Numrich has failed to
6 do so. His attorney's declaration contains generalized statements that "Mr. Maybrown's hourly rate
7 for all work on this matter is \$600"¹¹ and that Mr. Offenbecher's "hourly rate for all work on this
8 matter is \$400."¹² However, the declaration wholly ignores the more relevant question of what
9 Numrich has *actually paid* for the work done on the case. Nor has Numrich provided a copy of his
10 fee agreement or any billing or payment records to establish this. In this context, the statement of an
11 attorney as to their general hourly rate for a case is insufficient to establish what the client is actually
12 paying per hour.

13 Moreover, even if Numrich has met his burden of proving his attorneys' rates, he has still
14 entirely failed to prove that those rates are reasonable. In this context, neither the fact that a lawyer
15 has actually charged a client a given hourly rate, nor the fact that the client has paid it, necessarily
16 makes that rate reasonable in the context of a fee petition. Bowers, 100 Wn.2d at 597. Rather, the
17 requesting party still bears the burden of establishing that the requested hourly rate is in line with the
18 fee customarily charged in the locality for similar legal services. Blum v. Stenson, 465 U.S. 886,
19 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In the same vein, "the hourly rates for which the
20 party seeks recovery must be the rates actually charged by professionals and must be reasonable for
21 professionals with similar experience and skills." Philip A. Talmadge & Thomas M. Fitzpatrick,

22
23 ¹¹ Fee Pet. at 3 ¶ 3.

¹² Fee Pet. at 4 ¶ 4.

1 The Lodestar Method for Calculating A Reasonable Attorney Fee in Washington, 52 Gonz. L.
2 Rev. 1, 7 (2017) (citing RPC 1.5(a)(7)).

3 Here, the only evidence presented by Numrich as to the reasonableness of his attorneys'
4 rates is the statement of one of those attorneys that "[i]t is my belief that the hourly
5 rates...charged on this matter are fair and reasonable for litigation attorneys in Seattle with our
6 experience and background." Fee. Pet. at 4 ¶ 5. Numrich has failed to provide any evidence
7 supporting this self-serving statement of opinion or any evidence establishing that the hourly
8 rates claimed are reasonable or in line with the fees customarily charged in the locality for
9 similar legal services performed by attorneys with similar experience and skill. In this context,
10 Numrich cannot meet his burden of showing that his attorneys' rates are reasonable by simply
11 having one of them state that he thinks that they are.

12 Second, Numrich's fee petition fails to demonstrate that the work his attorneys did was
13 reasonable. To establish this, "[t]he requesting attorney must provide reasonable documentation of
14 their work performed." Ewing v. Glogowski, 198 Wn. App. 515, 521, 394 P.3d 418 (2017) (citing
15 Bowers, 100 Wn.2d at 597. This includes documentation of both the time spent *and* what the time
16 was spent on. Bowers, 100 Wn.2d at 597. In addition, the party seeking fees must establish that the
17 work done by his attorneys—and the time they spent on it—was reasonable. Berryman, 177 Wn.
18 App. at 661. In this context, the amount of time actually spent is relevant, but not dispositive. Id.
19 This is because a court considering a fee request can and should exclude time spent on work that is
20 unproductive, excessive, duplicative, and/or done on an issue for which fees are not being awarded.
21 See, e.g., Mahler, 135 Wn.2d at 434 (courts exclude wasteful and duplicative hours from fees
22 awarded); Glogowski, 198 Wn. App. at 521 (courts limit fees to those hours reasonably expended);
23 Berryman, 177 Wn. App. at 663 (courts exclude time that was unproductive or excessive); Mayer v.

1 City of Seattle, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000) (courts must be able to segregate “time
2 spent on issue for which fees are authorized from time spent on other issues”).

3 Because of this, the party seeking fees is required to provide documentation that
4 establishes at least (1) the number of hours worked; (2) the type of work performed; and (3) the
5 category of attorney who performed the work. McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App.
6 283, 292, 951 P.2d 798 (1998) (citing Bowers, 100 Wn.2d at 597). Without information as to what
7 the fee petitioner’s attorney or attorneys were actually doing with their time, the court cannot hope
8 to possibly determine whether the time they spent—and the fees resulting—were reasonable. 224
9 Westlake, LLC v. Engstrom Properties, LLC., 169 Wn. App. 700, 740, 281 P.3d 693 (2012).

10 Similarly, the party opposing fees is entitled to such information so it can meaningfully evaluate and
11 argue against the hours claimed in the fee petition. Id.

12 In this case, Numrich has failed to establish either what work his attorneys did or that the
13 work—and the time they spent on it—was reasonable. As an initial matter, while the declaration in
14 support of Numrich’s fee petition contains a table listing the hours his attorneys claim to have
15 worked on his interlocutory appeal,¹³ he has not provided any information as to the type of work
16 they ostensible did during those hours. However, such information is not optional—it is necessary
17 for a court to evaluate the reasonableness of the hours claimed and *must* be provided. Bowers, 100
18 Wn.2d at 597; McGreevy, 90 Wn. App. at 292; 224 Westlake, 169 Wn. App. at 740. Despite this,
19 Numrich has explicitly declined to provide this information, claiming that it constitutes work
20 product. Fee Pet. at 4 n.2. But a party seeking fees cannot avoid the requirement of Bowers, et al.
21 by simply claiming that providing the required documentation would reveal work product or other
22 privileged information. 224 Westlake, 169 Wn. App. at 740. Rather, while the party may take steps
23

¹³ Fee Pet. at 4-5 ¶ 6.

1 to avoid revealing specific privileged information (e.g. by redacting certain details), it must still
2 provide documentation that identifies the type of work being performed during the hours claimed.

3 Id.

4 Here, Numrich's failure to provide this required information makes it entirely impossible for
5 this court (or the State) to evaluate whether the hours claimed by Numrich's attorneys are
6 reasonable or whether they contain work/time that should be excluded as unproductive, excessive,
7 duplicative, or spent on issues other than the interlocutory appeal.¹⁴ As Numrich bears the burden
8 of establishing that the hours his attorneys worked were reasonable, his request for fees must be
9 denied because he has failed to do so.

10 **b. Numrich's Cannot Attempt To Fix These Deficiencies In A Reply Or**
11 **Supplemental Petition**

12 As noted above, even where a party is entitled to a fee award under some authority, that
13 party still bears the burden of establishing that the fees actually requested are reasonable. Fetzer,
14 122 Wn.2d at 151; McGreevy, 90 Wn. App. at 292; Berryman, 177 Wn. App. at 657. The law
15 regarding both what the party seeking fees must prove and how they must prove it is long standing
16 and well settled in Washington. Against this backdrop, Numrich cannot claim that he was not
17 aware of these requirements. Despite this, Numrich's fee petition entirely fails to comply with
18 them. This includes failing to provide specific types of information that are explicitly required by
19 the caselaw.

20 As a result, this court can only conclude that Numrich was either unable or unwilling to
21 provide the evidence, documentation, and other information required in a fee petition. In this

22 _____
23 ¹⁴ The State anticipates that, in reply, Numrich may claim that the portion of his attorney's declaration stating that
"[t]hese fees have been billed solely for work on the discretionary appeal...and for work on no other matters" addresses
this issue. Fee Pet. at 5 ¶ 6. But, as discussed above, the caselaw is clear that the party seeking fees cannot meet their
burden simply by providing such an unsupported declaration from counsel. Mahler, 135 Wn.2d at 434-35; SentinelC3,
181 Wn.2d at 144.

1 context, this court should not allow Numrich to attempt to cure the deficiencies in his petition in his
 2 reply or in a supplemental petition. Allowing such an action would call into question the accuracy
 3 and reliability of any new information and would deprive the State of its right to respond.

4
 5 **B. IN THE ALTERNATIVE, THIS COURT SHOULD DEFER ITS DECISION**
 6 **REGARDING TERMS UNTIL AFTER THE VARIOUS OTHER MOTIONS**
 7 **PENDING HAVE BEEN RESOLVED**

8 This court's decision to impose sanctions was based on the premise that the State's
 9 amendment to the charges would necessarily moot Numrich's motion for discretionary review and
 10 his attorneys' work on that motion—implicating both hours of time and fees—would, therefore,
 11 have been wasted. But that is not necessarily the case given the other motions that are now pending
 12 in this matter.

13 As of November 29, Numrich has the following motions currently pending (at one stage or
 14 another) in this court and the Supreme Court:

- 15 • motion to dismiss some or all of the charges pursuant to CrR 8.3(b);
- 16 • motion to reconsider the amendment to add the charge of first-degree manslaughter;
- 17 • motion for discretionary review of the denial of his motion to dismiss the charge of second-
 18 degree manslaughter; and
- 19 • motion for discretionary review of the granting of the State's motion to amend to add the
 20 charge of first-degree manslaughter.

21 In its brief in support of its motion to reconsider, the State argued that the decisions of the
 22 Supreme Court on the pending motions for discretionary review could prove highly relevant vis-à-
 23 vis the question of sanctions. State MTR at 9-11. For example, the Supreme Court could grant
 review on the question of whether the “general-specific rule” precludes the State from prosecuting
 Numrich for *both* first- and second-degree manslaughter. On the other hand, the Supreme Court
 could deny discretionary review for reasons entirely unrelated to the amendment to the charges.

1 Under either scenario, it would establish that the State's motion to amend did not have any impact
2 on Numrich's motion for discretionary review. The State incorporates these arguments by reference
3 and will not further repeat them here.

4 Similarly, this court's rulings—and the rationales for them—on Numrich's newly filed
5 motion to dismiss and motion to reconsider could also prove highly relevant vis-à-vis the question
6 of sanctions. For example, if this court were to grant either Numrich's motion to dismiss the charge
7 of first-degree manslaughter or to reconsider its order granting the amendment that added that count,
8 it would remove the entire basis upon which the sanctions were ordered in the first place. On the
9 other hand, if this court were to deny Numrich's CrR 8.3(b) motion based on a finding that there
10 was no governmental mismanagement, that ruling would be relevant to the issue of whether
11 sanctions could properly be imposed under Gassman.

12 As a result, even if this court is unwilling to deny Numrich's fee request for the reasons set
13 forth by the State above, it should still defer its decision on the issue until the various motions
14 pending in this case have been resolved.

15
16 **C. THIS COURT SHOULD DENY NUMRICH'S REQUEST THAT IT
RECONSIDER AND REVERSE ITS RULING ON THE STATE'S MOTION
TO AMEND**

17
18 Numrich's fee petition contains a number of statements suggesting that this court should
19 deny the State's motion to amend. See, e.g., Fee Pet. at 1 n.1, 6 ¶ 10. As that motion had already
20 been granted, the State previously interpreted these statements as being an implicit request that this
21 court reconsider and reverse its prior ruling allowing that amendment. Now—as of the late
22 afternoon of November 29—Numrich has filed a separate motion explicitly asking this court, *inter*
23 *alia*, to reconsider that ruling. Numrich's motion is not supported by the facts or the law and should
be denied by this court. However, given the current procedural posture, the State will address this

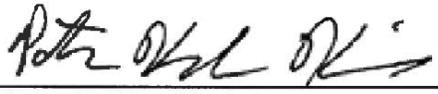
1 motion in a separate response to Numrich’s newly filed briefing rather than responding to it further
2 here.

3
4 **IV. CONCLUSION**

5 For the reasons outlined above, the State respectfully requests that this court deny
6 Numrich’s fee petition. In the alternative, if this court is unwilling to do so at this point, it should
7 defer its decision until the other motions pending in this matter have been resolved.

8 DATED this 30th day of November, 2018.

9 DANIEL T. SATTERBERG
10 King County Prosecuting Attorney

11
12 By: 
13 Patrick Hinds, WSBA #34049
14 Eileen Alexander, WSBA # 45636
15 Deputy Prosecuting Attorneys
16 Attorneys for Plaintiff
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FILED
2018 DEC 05 11:59 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

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

DECLARATION OF COOPER
OFFENBECHER IN REPLY TO STATE'S
RESPONSE TO DEFENDANT'S FEE
PETITION

I, Cooper Offenbecher, do hereby declare:

1. Our firm's fee arrangement with Mr. Numrich is not a flat fee arrangement. Rather, it is a traditional hourly billing arrangement. Our firm has actually billed Mr. Numrich for work we performed on his case at the following hourly rates: \$600 for Todd Maybrown; \$400 for Cooper Offenbecher; \$300 for associate Danielle Smith.¹ Mr. Numrich has actually paid our firm fees based on these hourly rates.

2. The Defendant's fee petition requests reimbursement for \$17,960 in fees related to the Motion for Direct Discretionary Review in the Washington Supreme Court.

¹ The fee petition did not include any billed time for Ms. Smith, as she did not perform any billed work on the Motion for Direct Discretionary Review. However, her time for work in Superior Court has been billed to the client at \$300 per hour.

1 3. In early October 2018, our firm actually billed Mr. Numrich for more than
2 \$10,000 based on work performed on the Supreme Court matter to that point.² Thereafter, Mr.
3 Numrich actually paid our firm for those fees through funds that were transferred from our
4 firm's IOLTA trust account.

5
6 4. In response to this Court's November 1 Order to prepare a fee petition for all
7 work done on the Supreme Court to that point, our firm prepared a billing statement for work
8 on the Supreme Court matter that had not yet been billed to the client. On November 15, we
9 prepared a second invoice for \$7,100.00 of additional legal fees for work solely related to the
10 Supreme Court matter that had not yet been billed to the client. The November 15 bill remained
11 in draft form on our firm's billing software. On December 4, the draft bill was approved and
12 sent to Mr. Numrich.

13
14 5. Accordingly, Mr. Numrich has actually been billed for the entirety of the
15 \$17,960 in legal fees that are requested in the petition.

16 6. Our firm's work in the Supreme Court related to the first Motion for Direct
17 Discretionary Review including completing and filing the following pleadings: Notice of Direct
18 Discretionary Review to Supreme Court of Washington; Motion for Discretionary Review (20
19 pages); Statement of Grounds for Direct Review (15 pages); Reply in Support of Motion for
20 Direct Discretionary Review (10 pages). The defense was also required to review, analyze, and
21 respond to the State's Answer to the Motion for Discretionary Review (20 pages) and Answer
22 to Statement of Grounds for Direct Review (10 pages). These filings required attending to
23 certain procedural and formatting requirements (such as Tables of Contents and Authorities)
24
25
26

² The bill also include significant additional legal fees billed on an hourly basis for work performed in Superior Court since January 2018.

1 and the defense and State filings together included hundreds of pages of appendices from the
2 Superior Court record. Further, counsel was required to prepare for and conduct oral argument
3 to the Washington Supreme Court Commissioner.

4 7. This appellate project was no small undertaking. The hours included in the fee
5 petition – a total of 38.1 – are imminently reasonable given the scope of the project.³ Finally,
6 the State has offered no evidence to rebut the reasonableness of the hourly rates charged by our
7 firm’s attorneys. These are the hourly rates that our firm has actually charged Mr. Numrich on
8 this matter (and many other of the firm’s clients in other matters) and are reasonable rates for
9 litigation attorneys practicing in downtown Seattle with commensurate experience.
10

11
12 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
13 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF
14 MY KNOWLEDGE.

15 DATED at Seattle, Washington this 5th day of December, 2018.

16
17 _____
COOPER OFFENBECHER, WSBA #40690
Attorney for Defendant

18 I certify that on the 5th day of
19 December, 2018, I caused a true and
correct copy of this document to be served
20 on DPA Patrick Hinds by E-Service and
Email (to be sent by attorney Cooper
Offenbecher).

21
Sarah Conger, Legal Assistant

22
23
24
25 ³ Notably, the State has not argued that the hours requested by the defense are unreasonable.
26 See State’s Response to Fee Petition at 11-13. Indeed, the State’s Supreme Court pleadings are just as
complex and involved as those of the defense. The defense would be shocked if the State had not
spent an equal or greater amount of time itself on the Supreme Court matter. There is a more than
sufficient record for this Court to conclude – given this Court’s experience presiding over both
criminal and civil matters – that the hours requested are reasonable for this type of litigation project.

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FILED
2018 DEC 10 11:11 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

The Honorable James E. Rogers
Hearing Date: TBD
Oral Argument Requested

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
)	
v.	)	No. 18-1-00255-5 SEA
)	
)	
PHILLIP NUMRICH,	)	STATE'S REPLY IN SUPPORT OF
	)	MOTION TO RECONSIDER THE
	)	IMPOSITION OF SANCTIONS
)	
)	

I. INTRODUCTION

The State filed a motion asking this court to reconsider its imposition of sanctions against the State. The defendant, Phillip Numrich, has now filed his response to the State's motion.¹ As with many of his prior briefs in this matter, Numrich's response consists primarily of arguments premised on assertions that are either incorrect or that misinterpret and mischaracterize the record in a manner that casts the State's actions in an unfair and inaccurate light. In addition, Numrich's fails to explain how or why the State should be sanctioned for having failed to do something it was under no obligation to do. For those reasons, and for the reasons outlined in the State's previously filed brief, this court should reject the arguments raised in Numrich's response and grant the State's motion to reconsider.

¹ Numrich filed his "DEFENDANT'S RESPONSE TO STATE'S MOTION TO RECONSIDER IMPOSITION OF SANCTIONS" on November 29, 2018 and his "DEFENDANT'S RESPONSE TO STATE'S MOTION TO RECONSIDER IMPOSITION OF SANCTIONS - **ERRATA FILING**" on November 30, 2018. The State will hereinafter cite to the latter version of the response as "Def. Resp."

1 **II. RELEVANT FACTS**

2 The State has outlined the procedural facts of this case—in different levels of
 3 thoroughness and detail—in numerous filings with this court, including the “STATE’S REPLY
 4 IN SUPPORT OF MOTION TO AMEND,”² the “STATE’S MOTION TO RECONSIDER THE
 5 IMPOSITION OF SANCTIONS,”³ and the “DECLARATION OF PATRICK HINDS FOR
 6 PURPOSES OF MOTION TO RECONSIDER.”⁴ All of these documents (and attached
 7 appendices) have been previously filed under separate cover and are incorporated herein by
 8 reference. Specific and/or additional facts are discussed below as relevant.

9 **III. ARGUMENT**

10 Numrich has advanced a number of arguments in response to the State’s motion to
 11 reconsider. These responsive arguments should be rejected. In addition, Numrich has wholly
 12 failed to make any convincing response to at least one of the State’s arguments in support of
 13 reconsideration.

14 **A. NUMRICH’S ARGUMENTS RESPONDING TO THE STATE’S
 15 EXPLANATION OF EVENTS RELY ON FAULTY ASSERTIONS AND
 16 SHOULD BE REJECTED**

17 In the State’s materials in support of its motion to reconsider the imposition of sanctions, the
 18 State provided a recitation of the procedural history of this case that explained why the case has
 19

20 ² Filed October 31, 2018. Hereinafter cited to as “State Reply.” Appendices to the document cited as “State Reply
 21 App.” followed by the letter of the relevant appendix (e.g. “State Reply App. B”). Where possible or relevant, the
 22 State will provide a pinpoint cite within the appendix.

23 ³ Filed November 13, 2018. Hereinafter cited to as “State MTR.”

⁴ Filed November 13, 2018. Hereinafter cited to as “Hinds Decl.” Appendices to the document cited as “Hinds
 Decl.” followed by the letter of the relevant appendix (e.g. “Hinds Dec. App. B”). Where possible or relevant, the
 State will provide a pinpoint cite within the appendix.

1 proceeded in the way it has up to this point and, more specifically, why and how the State's motion
 2 to amend came about when it did. State MTR at 5-8; Hinds Decl. In his response, Numrich argues
 3 against the State's explanation on a number of grounds. However, Numrich's arguments are all
 4 based on faulty assertions regarding the State's explanations, actions, or arguments. These
 5 assertions are simply incorrect, miss the point, or misinterpret or mischaracterize the State's
 6 arguments and actions in a manner that casts the State in an undeservedly negative light that is
 7 unfair and inaccurate.⁵ When those faulty assertions are exposed and corrected, Numrich's
 8 arguments are left entirely unsupported and should be rejected.

9
 10 **1. Despite Numrich's Argument To The Contrary, The State's Conduct
 Was Not Tantamount To Bad Faith**

11 Numrich argues that this court should deny the State's motion for reconsideration because
 12 the State's conduct was tantamount to bad faith. Def. Resp. at 5-8. However, Numrich's entire
 13 argument on this point is premised on two assertions that are wholly unsupported by the record.

14 First, Numrich asserts that this court's order on the State's motion to amend was based on
 15 the conclusion that counsel for the State was candid with the court during oral argument and that the
 16 court should rethink this conclusion because it is "at odds with the State's recent declaration." Def.
 17 Resp. at 5. Put another way, Numrich is claiming that the State has somehow changed its
 18 explanation of how and why the motion to amend was brought when it was since oral argument on
 19 the motion. Def. Resp. at 5-8. But this is simply incorrect. The State's explanation on this point
 20

21 _____
 22 ⁵ Some of these faulty assertions are relevant because Numrich's responsive arguments are premised upon them.
 23 Others, however, relate to matters that are not particularly germane to the issues currently before this court. The
 State is certain that this court will review and consider the State's previously filed materials in a fair and reasonable
 manner. In this context, the State will not attempt to correct every faulty assertion contained in Numrich's response,
 but will instead confine itself to addressing those that appear particularly egregious and/or relevant to the current
 motion.

1 has remained the same throughout this matter. Compare State Reply at 5-6, 8-9; State Reply App.
2 B; State MTR at 5-9; Hinds Decl. at ¶¶ 1-57; Hinds Decl. App. H; Hinds Decl. App. Q at 2-7, 17-
3 19. As a result, despite Numrich's assertion to the contrary, there has been no change in the State's
4 explanation of the circumstances surrounding how and why the motion to amend was brought when
5 it was. Nor is there any other basis for this court to reassess its conclusion that counsel for the State
6 was credible and has always been entirely truthful with court.

7 In this context, the State noted in its materials in support of its motion to reconsider that it
8 has always believed there was probable cause to charge Numrich with first-degree manslaughter
9 based on the discovery, but that it decided not to file that charge initially and to reserve the decision
10 on whether to add it later. Hinds Decl. at ¶¶ 6-8; Hinds Decl. App. Q at 5-7. Numrich appears to
11 misinterpret this as being a statement that the State always intended to *actually* amend the charges
12 and consciously withheld that information from the defense and the court. Def. Resp. at 5-8. But
13 that is not what the State said, nor is it a reasonable interpretation of the State's explanation. Here,
14 the State was not intentionally or consciously withholding information. Rather, the State itself
15 simply did not think of or consider the potential amendment of charges between early 2018 (the
16 time of the filing of the initial charges) and October of 2018 (the time that counsel for the State was
17 drafting the response to Numrich's briefing in the Supreme Court). Hinds Decl. at ¶¶ 27-29, 32-34;
18 Hinds Decl. App. Q at 5-7. Even then, the decision to move to amend was not a foregone
19 conclusion. Indeed, the reason that the State actually brought the motion to amend at that time was
20 out of concerns that it could lose the option of amending due to the running of the Statute of
21 Limitations if it did not. Hinds Decl. at ¶¶ 7, 35-37. Nor is this explanation anything new. The
22 State made the same point in its briefing and oral argument on the motion to amend. State Reply at
23 8-9; Hinds Decl. App. Q at 5-7, 17-19.

1 Second, Numrich accuses the State of having “misled” the court and the defense. Def. Resp.
 2 at 8. This is untrue. As an initial matter, the State asserts that it has never knowingly misled either
 3 the court or the defense or intentionally misrepresented its position in this matter. Nor is there any
 4 basis in the record to conclude otherwise. As noted above, the State has previously (and repeatedly)
 5 outlined the procedural facts of this case and explained how and why the motion to amend was
 6 brought when it was. Given that procedural history, while this court may prefer that the State have
 7 acted differently—and while the State likely would have done so with the benefit of hindsight—the
 8 State’s actions throughout the pendency of the case are neither inexplicable nor unreasonable. Nor
 9 is there any basis to conclude that the State misled either the court or the defense.

10 More specifically, Numrich accuses the State of misleading the court and defense into
 11 believing that the decision on his motion to dismiss the second-degree manslaughter charge “would
 12 be the dispositive decision regarding the felony homicide charge under the general specific-rule
 13 [sic].” Def. Resp. at 8. But the State did no such thing. Here, Numrich brought a motion to dismiss
 14 one of the counts charged in the original Information. The State opposed that motion and it was
 15 briefed and litigated. Nowhere in that process did the State offer any assurance—either explicit or
 16 implicit—that the court’s ruling would be dispositive of any issues beyond those specifically raised
 17 by Numrich’s motion or necessarily resolved by the court’s decision.

18 Nor was Numrich ever “misled” as to the possibility of an amendment to the charges.
 19 Rather, his defense apparently simply failed to consider the possibility that the State would seek
 20 such an amendment. Def. Resp. at 18. But the blame for this can hardly be laid at the State’s feet.
 21 Here, the specific issue of possible amendments to the charges was never discussed by the parties
 22 one way or the other.⁶ However, the State certainly never did anything to indicate that it was

23 _____
⁶ As described in the State’s materials, counsel for the State and counsel for Numrich had a single discussion of the possibility of a plea resolution (as part of larger conversation). Hinds Decl. at ¶10. This portion of the discussion ended
 Dan Satterberg, Prosecuting Attorney

1 foreclosing the possibility that it might—consistent with its long standing policy and practice—
 2 move to amend the charges at a later date. And the facts giving rise to the additional charge added
 3 by the amendment are all readily apparent in the discovery that was provided to Numrich. (Indeed,
 4 the additional charge arises from the same nexus of facts as the original charges and is essentially
 5 identical to one of them except that it requires proof of a higher level of *mens rea*.) By their own
 6 claims, Numrich’s attorneys are seasoned criminal defense lawyers with experience working in this
 7 jurisdiction.⁷ As a result, the State’s long standing general policy and practice of charging
 8 conservatively and then amending up for trial is presumably well known to them and the facts
 9 suggesting that such an amendment was a possibility in this case should have been obvious to them.
 10 Against this backdrop, the defense apparently made an (incorrect) assumption about what the State
 11 might do and pursued a litigation strategy based on it. In that context, the fact that the State acted
 12 differently than the defense expected based on its faulty and unfounded assumption does not mean
 13 that the defense was misled by the State.

14
 15 **2. Despite Numrich’s Argument To The Contrary, The State’s
 Explanation Of Events Is Reasonable And Consistent With The Record**

16 Numrich argues that this court should deny the State’s motion for reconsideration because
 17 the State’s explanation for how and why the motion to amend came about when it did is
 18 “inexplicable and inconsistent with the overwhelming evidence” and “confounding.” Def. Resp. at
 19

20 quickly once it became clear that the State would be unwilling to offer a plea deal that allowed Numrich to avoid a
 21 felony conviction. Hinds Dec. at ¶ 10. After that point, the defense never appeared interested in addressing either a
 possible resolution or trial issues, which are two of the main topics that would generally spark a discussion of possible
 amendments of the charges for trial. Hinds Decl. at ¶ 10, 28-29.

22 ⁷ One of Numrich’s attorneys discusses his counsels’ qualifications at length in the “DECLARATION OF COOPER
 23 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 [sic] MOTION TO AMEND” (hereinafter “Offenbecher Decl.”). Numrich also
 indicates that his counsel have had “scores of cases with the King County Prosecutor’s Office.” Def. Resp. at 16.

1 8, 16. However, all of Numrich’s arguments on this point are premised on faulty assertions
 2 regarding the State’s explanations, actions, or arguments. When those faulty assertions are exposed
 3 and corrected, Numrich’s arguments are left entirely unsupported and should be rejected.

4
 5 **a. Numrich’s argument regarding Gamble⁸ depends on**
 6 **characterizations of the State’s position that are incorrect,**
 7 **misleading, and irrelevant**

8 Numrich characterizes the State’s argument in support of reconsideration as being based on
 9 the claim that “the defense advanced arguments about State v. Gamble, 154 Wn.2d 475 (2005), for
 10 the first time in the Washington Supreme Court pleadings.” Having so characterized the State’s
 11 argument, Numrich argues that it should be rejected because “[t]he State omits any mention of the
 12 significant treatment of these issues through the course of this case[.]” Def. Resp. at 9. In support
 13 of this argument, Numrich recites at length the parties’ arguments regarding Gamble at various
 14 stages of the proceedings in this case. Def. Resp. at 9-15. As part of this, Numrich also claims that
 15 the State’s current motion to reconsider and the materials filed in support omit having
 16 acknowledged an understanding of his Gamble argument during oral argument on the motion to
 17 amend. Def. Resp. at 10 n.4. But Numrich’s assertions are incorrect, misleading, and ultimately
 18 irrelevant to the State’s point regarding Gamble.

19 As an initial matter, Numrich’s assertions are simply incorrect. Despite Numrich’s claim to
 20 the contrary, the State has never claimed that arguments about Gamble were not raised until the
 21 Supreme Court pleadings. Indeed, the State has always acknowledged that Gamble was raised and
 22 argued during the course of Numrich’s substantive motion to dismiss the charge of second-degree
 23 manslaughter. Hinds Decl. at ¶¶ 16-19; Hinds Decl. App. B at 10-14; Hinds Decl. App. C. at 4;

⁸ State v. Gamble, 154 Wn.2d 475, 114 P.3d 646 (2005)

1 Hinds Decl. App. Q at 5-7. Similarly, the State's materials do not omit the language identified by
 2 Numrich from the oral argument on the motion to amend. Rather, the State included the transcript
 3 *of the entire hearing* in its materials. Hinds Decl. App. Q.

4 In addition, Numrich's assertion about the State's "concession" at the oral argument on the
 5 motion to amend is entirely misleading. Numrich cites the State's comments as proof that the State
 6 "understood the defense argument regarding the inapplicability of Gamble to second degree
 7 manslaughter as early as when the defense filed its Reply brief in Superior Court on June 20." Def.
 8 Resp. at 10 n.4. To make this argument, however, Numrich takes two sentences from the State's
 9 arguments *and then ignores the next 10 sentences in which the State qualifies and limits the first*
 10 *two*. Read as a whole, what was actually said in court during this portion of the oral argument was:

11 STATE: The defense's argument, which was not raised until its reply, and
 12 then only—I believe only in a footnote, is that Gamble, which the
 13 State is sort of relying on in making that argument, only applies to
 14 manslaughter in the first degree. So it's not until that point in time
 15 that it's—up until that point in time the State has the—the—I
 16 guess the thought or the—the—is sort of considering, as it always
 17 does, what charges will we bring for trial. But the import or the
 18 difference that this will have between a man one and man two isn't
 19 really brought into focus until that point in time. Again, as I noted,
 20 it is noted in a footnote in the defense's reply at that point. It
 21 doesn't really become the sort of—the crux that it has in many
 22 ways now become until they file their briefing, not just their note
 23 for discretionary review, but their motion for discretionary review
 in the Supreme Court and their um uh—excuse me—their
 statement of uh grounds for direct review, where they for the first
 time state that one of the reasons they argue that the Supreme
 Court should take direct review is in order to, quote, unquote,
 clarify Gamble. It's at that point in time that it becomes—an—and
 those were filed in late September of this year. It's at that point in
 time that it be—it's not really until that point in time that it—the—
 what a difference this makes between these two charges becomes
 apparent. And so it didn't—there had not been a conversation
 about additional charges or what we would add for trial or what we
 wouldn't add for trial up un—...

JUDGE: (Unintelligible). Right. I...

1 STATE: up—...

2

3 JUDGE: understand that.

4 STATE: up until that point in time because we were still on case setting.
5 And the particular difference that the amendment to add a man one
6 would make did not really become apparent until this briefing got
7 filed, uh particularly in late September when this is filed in
8 Supreme Court. Frankly, as I was writing the State's response, I—
9 I really fully noted—uh sorry—the response or answer in the
10 Supreme Court, noted what—from the State's perspective what a
11 concession the defense had essentially made and started thinking
12 about what that sort of meant. Um at that point in time, frankly, I
13 started looking at the statute of limitations because I was trying to
14 think of how this played out.

15 JUDGE: You said that in your brief.

16 STATE: An—and then...

17 JUDGE: Right.

18 STATE: determined that it was a three year statute of limitations...

19 JUDGE: Okay.

20 STATE: which—mea culpa. But that is—that's why it came up when it did
21 and how it came up when it did.

22 Hinds Decl. App. Q at 5-7 (underlining added). In the lines quoted by Numrich (underlined in the
23 transcript cited above), the State acknowledged that Numrich's reply brief in the Superior Court
raised the argument that Gamble does not apply to second-degree manslaughter. In the following
lines, though, the State made clear that the idea leading to the chain of thought that culminated in
the motion to amend did not arise until counsel for the State read the materials Numrich filed in the
Supreme Court. Despite the fact that those subsequent lines are entirely necessary to understanding
the State's overall point, Numrich omitted them. Def. Resp. at 10 n.4.

1 Finally, even if Numrich's assertions on this point were not incorrect and misleading, they
2 are still ultimately irrelevant to the State's point regarding Gamble. Here, Numrich is correct that
3 Gamble was at issue throughout the litigation before Judge Chun. Def. Resp. at 9-15. But the
4 State's has never asserted to the contrary. Rather, the State's point is that not all of the
5 consequences that potentially follow from Numrich's argument regarding Gamble occurred to the
6 State until State's counsel had read the version of Numrich's argument contained in his briefing to
7 the Supreme Court. State MTR at 6-7; Hinds Decl. ¶¶ 32-34; Hinds Decl. App. Q at 5-7.

8 Nor was this inexplicable or unreasonable. During the argument before Judge Chun: (1) the
9 relevant issue regarding Gamble was whether or not the Supreme Court's holding in the case
10 regarding the *mens rea* for manslaughter applied to the crime of second-degree manslaughter; and
11 (2) the issue was being raised and litigated in the context of a motion to dismiss an existing count of
12 second-degree manslaughter. Def. Resp. at 9-15; Hinds Decl. at ¶ 16-19; Hinds Decl. App. B at 10-
13 14; Hinds Decl. App. C. at 4; Hinds Decl. App. Q at 5-7. In contrast, once Numrich petitioned for
14 review and filed his "MOTION FOR DISCRETIONARY REVIEW" and his "STATEMENT OF
15 GROUNDS FOR DIRECT REVIEW," both the relevant issue and the applicable context shifted
16 and expanded. At that point: (1) it appeared to State's counsel that Numrich's argument regarding
17 Gamble was such that he had effectively conceded that his "general-specific rule" argument would
18 not apply if he was charged with first-degree manslaughter; and (2) the issue was being raised in the
19 context of the larger issue of whether discretionary review was appropriate under RAP 2.3(b)(4).
20 Hinds Decl. at ¶¶ 32-33. Throughout the litigation in this case, the State has naturally focused on
21 addressing the specific issue in the specific context that was before it at the time. And, as outlined
22 in the State's previously filed materials, the litigation regarding Numrich's motion for discretionary
23 review triggered a consideration of a possible amendment to the charges in a way that the litigation

1 regarding his motion to dismiss did not. State MTR at 6-7; Hinds Decl. at ¶¶ 27-29, 32-34; Hinds
 2 Decl. App. Q at 5-7.

3
 4 **b. Numrich’s response regarding RAP 2.3(b)(4) misinterprets the State’s point**

5 In the declaration in support of the State’s motion to reconsider, counsel for the State
 6 indicated that, upon reviewing Numrich’s Supreme Court filings, “it appeared to me that the
 7 defendant’s argument that discretionary review was appropriate under RAP 2.3(b)(4) largely
 8 depended on the assertion that, if he prevailed on interlocutory appeal, he would not be facing trial
 9 on a felony charge.” Hinds Decl. at ¶ 32. Numrich argues that the State’s explanation of events
 10 regarding this point cannot be believed because it was always obvious that if he prevailed he would
 11 not be facing a felony charge. Def. Resp. at 15. But this assertion—and the argument based on
 12 it—misinterprets the State’s point. Numrich treats this statement from the State as if it was being
 13 offered as a separate and independent explanation for how and why the State brought the motion to
 14 amend when it did. But that is not the case. Whether or not Numrich’s RAP 2.3(b)(4) argument
 15 was “obvious,”⁹ the State’s point about was not made in a vacuum. Rather, as the State’s materials
 16 make clear, it was the State’s belief that Numrich’s argument had reached the point of in implicit
 17 concession (that his “general-specific rule” argument did not apply to first-degree manslaughter)

18
 19 ⁹ In point of fact, the State does not agree with this assertion. The State would agree that—during the time that
 20 Numrich was charged with one felony and one non-felony—if he prevailed on his motion to dismiss the felony, he
 21 obviously would not be facing a felony charge. That does not mean, however, that this made Numrich’s RAP
 22 2.3(b)(4) argument “obvious.” Under RAP 2.3(b)(4), discretionary review is only warranted if it will “materially
 23 advance the ultimate termination of the litigation.” The State has taken—and continues to take—the position that
 discretionary review is not appropriate in this case because, even if an appellate court were to agree with Numrich
 and dismiss the felony charge(s), it would not materially advance the ultimate termination of the litigation due to the
 complexity of the non-felony charge and the high likelihood that that charge will go to trial regardless. The State
 made this exact argument in its answer to Numrich’s motion for discretionary review. Hinds Decl. App. I at 16-17,
 19. Given that, the State believes that Numrich’s argument that discretionary review is appropriate under RAP
 2.3(b)(4) is patently and obviously contrary to the language of the rule. In this context, while Numrich made this
 argument to Judge Chun in the heat of Superior Court litigation, the State does not believe it can reasonably be said
 that it should have been “obvious” that he would go on to repeat it to the Supreme Court.

1 coupled with his RAP 2.3(b)(4) argument that led the State to begin considering the amendment in
2 question. Hinds Decl. at ¶¶ 32-34.

3
4 **c. Numrich's argument that the State's explanation of events is**
5 **"confounding" is based on assertions that miss the point or that**
6 **misinterpret or mischaracterize the State's statements and**
7 **actions**

8 As noted above, in support of its motion for reconsideration, the State explained how and
9 why the motion to amend came about when it did. State MTR at 5-8; Hinds Decl. Numrich's
10 argues that this explanation of events is "confounding." Def. Resp. at 16-18. However, Numrich's
11 argument on this point is based on a recitation of his counsels' beliefs regarding how prosecutors
12 usually handle and negotiate cases and his opinion that the State's actions in this case are not
13 consistent with that. Def. Resp. at 16-18. In this section of his response, Numrich makes a number
14 of assertions that miss the point of the State's explanation or that misinterpret or mischaracterize
15 the State's statements and actions.

16 First, in the declaration in support of the State's motion to reconsider, counsel for the State
17 described the various events that generally cause counsel for the State to consider the possibility of
18 amending charges and/or to address them with a defendant's attorney. Hinds Decl. at ¶ 29.
19 Referring to this point, Numrich claims that "[t]he State's clear suggestion is that discussing
20 potential amendments is somehow a rare occurrence." Def. Resp. at 16. But that was not the
21 State's suggestion at all. The State has never claimed or implied that the discussion of possible
22 amendments is rare; nor is that a reasonable interpretation of the State's statement. Rather, the
23 State's point was simply that counsel for the State does not typically spontaneously raise the issue of
possible amendments, but that such conversations are generally prompted by *something* and that
none of the things that usually prompt such a discussion had occurred in this case. Hinds Decl. at ¶

1 29. Indeed, the State’s perspective is almost precisely the opposite of how Numrich characterized
2 it—the things that prompt consideration or discussion of possible amendments are *common*. In that
3 context, one of the things that made this case unusual was the fact that none of them had occurred as
4 of September.

5 Second, Numrich’s argument is premised on a number of assertions regarding both his
6 opinions as to why prosecutors generally tell defense attorneys about potential amendments and
7 about why he believes it would have made sense for the State to mention the potential amendment
8 earlier in the process in this case. Def. Resp. at 16-17. Numrich’s assertions and argument on this
9 point are based on the implicit—and incorrect—assumption that the State made a conscious
10 decision to refrain from telling the defense about the potential amendment. Def. Resp. at 16-17. But
11 that was not the case. Here, as described above, the State was not intentionally or consciously
12 withholding information. Rather, the State itself simply did not think of or consider the potential
13 amendment of charges between early 2018 (the time of the filing of the initial charges) and October
14 of 2018 (the time that counsel for the State was drafting the response to Numrich’s briefing in the
15 Supreme Court). Hinds Decl. at ¶¶ 27-29, 32-34; Hinds Decl. App. Q at 5-7. Even then, the
16 decision to move to amend was not a foregone conclusion and was triggered by the fact that the
17 State could not delay the decision any longer. Hinds Decl. at ¶¶ 7, 34-37.

18 Third, the State’s explanation of events includes the fact that the State and the defense never
19 had any conversations about any issues related to trial—including what amendments to the charges
20 the State might make if/when the case was set for trial—prior to Numrich filing his motion for
21 discretionary review. State MTR at 6-7; Hinds Decl. at ¶¶ 10, 28-29. Numrich argues that the
22 State’s explanation “misses the forest for the trees” because, he asserts, the conversation between
23 the State and defense counsel in February of 2018 and/or the defense motion to dismiss “obviously”

1 involved an implicit question as to whether the State was considering an upward amendment to the
2 charges. Def. Resp. at 17-18. But neither this argument nor this assertion are persuasive.

3 As an initial matter, Numrich's argument and assertion essentially concedes the State's point
4 that the defense never engaged in any direct conversation with the State regarding trial issues or
5 possible trial amendments.¹⁰ Instead, Numrich attempts to retrospectively characterize his counsel's
6 conversation with the State and/or the litigation of his motion to dismiss as implicit requests for
7 information regarding whether the charges would be amended. This assertion is unbelievable on its
8 face. There was nothing about either the conversation nor Numrich's position nor his attorneys'
9 briefing or argument that can fairly be characterized as seeking such information. Hinds Decl. at ¶¶
10 10, 28-29, 34; Hinds Decl. App. A, B, C; Offenbecher Decl. App. D, E, G.

11 Moreover, despite his claim to the contrary, it is actually Numrich who misses the forest for
12 the trees, because even if Numrich's assertion on this point was true, it still does not either
13 contradict or call into question the State's version of events. Numrich's assertion establishes only
14 what his attorney's intent was. But regardless of the defense's intent, the State did not interpret any
15 of this as an implicit question regarding whether it would amend the charges for trial. Hinds Decl.
16 at ¶¶ 10, 28-29, 34; Hinds Decl. App. Q at 5-7. Here, Numrich essentially argues that his attorneys
17 selected his litigation strategy based on the assumption that the State would not seek to amend the
18 charges *and that this assumption was based solely on his attorneys' interpretation of the State's*
19 *"response" to an implicit question.* His attorneys, however, were aware that the specific issue of
20 possible amendments to the charges had never been directly or explicitly discussed by the parties
21 one way or the other and that the State had never done anything to explicitly indicate that it would
22 not amend the charges at a later date. Additionally, the facts giving rise to the additional charge

23 _____
¹⁰ Certainly Numrich has offered no assertion of fact from any of his attorneys that any such conversations took place.

1 added by the amendment are all readily apparent in the discovery that was provided to Numrich and
2 Numrich's attorneys are familiar with State's long standing general policy and practice of charging
3 conservatively and then amending up for trial. In this context, the fact that the State acted
4 differently than the defense assumed does not mean that the State's actions were inexplicable or
5 unreasonable.

6
7 **B. NUMRICH'S ARGUMENT REGARDING GASSMAN¹¹ IS
UNPERSUASIVE AND SHOULD BE REJECTED**

8 In its motion to reconsider the imposition of sanctions, the State pointed out that the issue of
9 a trial court's ability to impose sanctions against the State for bringing an "untimely" motion to
10 amend is controlled by State v. Gassman. State MTR at 3-5. The State further pointed out that,
11 under Gassman, this court will abuse its discretion if it orders the State to pay sanctions. State MTR
12 at 3-5. In his response, Numrich argues that the imposition of sanctions would not constitute an
13 abuse of discretion under Gassman. Def. Resp. at 19-20. Numrich's argument, however, must be
14 rejected.

15 The Supreme Court's holding in Gassman and the rationale for it are straightforward. A
16 trial court can only impose sanctions against the State for the "untimely" filing of a motion to
17 amend if it finds that the State acted in "bad faith" or engaged in conduct "tantamount to bad faith."
18 175 Wn.2d at 201-11. Such bad faith or conduct tantamount to bad faith consists of "willfully
19 abusive, vexatious, or intransigent tactics designed to stall or harass." Id. at 211 (citing Chambers v.
20 NASCO, Inc., 502 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). In this context, conduct
21 that is merely careless is not tantamount to bad faith. Id. at 212-13.

22
23 _____
¹¹ State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012)

1 In Gassman, the State moved to amend the Information on the day of trial to change the date
2 that the crime was allegedly committed by the codefendants. Id. at 209-10. The defense attorneys
3 objected on the grounds that they had prepared their entire defense around having an alibi for the
4 date the State had initially alleged that the crime had taken place on. Id. at 210. The trial court
5 granted the motion to amend and continued the trial date to give the defendants time to prepare their
6 defense(s) based on the newly charged date of offense. Id. The trial court also found that the
7 State's conduct was careless and ordered the State to pay attorneys' fees to each defense counsel for
8 the extra time they were required to spend because of the State's amendment. Id. On appeal, the
9 Supreme Court held that the trial court's finding that the State's conduct was careless did not
10 constitute a finding of bad faith and that State conduct tantamount to bad faith could not be inferred
11 from the record. Id. at 212-13. The Court, therefore, ruled that the trial court abused its discretion
12 in ordering sanctions. Id.

13 Numrich does not appear to disagree with any of the above.¹² Rather, his entire argument
14 that sanctions can and should be imposed against the State under Gassman in this case is based on
15 simply repeating the same faulty assertions regarding the State's explanations and actions that he
16 makes elsewhere in his brief. For example, Numrich simply reiterates—without any additional
17
18
19
20

21 ¹² Numrich does cite at length to a portion of the Gassman opinion wherein the Supreme Court discussed various
22 concessions made by the defense attorney in that case in the course of reaching its conclusion that the record did not
23 support a finding of conduct tantamount to bad faith. Def. Resp. at 19-20 (quoting Gassman, 175 Wn.2d at 212-13).
It appears that Numrich is attempting to draw a distinction between his position and the position of that attorney.
Even if true, however, this is irrelevant. The concessions made by the attorney in Gassman were a necessary part of
the court's analysis given the specific procedural posture of that case and the lack of clarity in the record on appeal.
175 Wn.2d at 212-13. Nothing in this discussion alters the basic rule of Gassman, which focuses simply on whether
the State acted in bad faith or engaged in conduct tantamount to bad faith.

1 analysis or argument—the accusations that the State misled the defense and the court,¹³ that the
 2 State’s explanation of events cannot be believed, and that the State’s conduct was tantamount to bad
 3 faith. Def. Resp. at 20. As discussed at length above, these accusations are based on assertions that
 4 are either incorrect or that misinterpret and mischaracterize the record. For the same reasons
 5 discussed above, they are also not a basis to conclude that sanctions are permissible under
 6 Gassman.

7 Here, this court found: (1) that the State’s counsel had been candid with the court in
 8 explaining how and why the motion to amend came about when it did; and (2) that there was no
 9 evidence that the motion to amend had been brought for an improper purpose. Hinds Decl. App. R;
 10 State MTR at 4-5. Despite Numrich’s arguments to the contrary, the record does not provide even a
 11 suggestion that the State acted in bad faith or engaged in conduct tantamount to bad faith. As a
 12 result, even if this court believes that the State was careless, the imposition of sanctions against the
 13 State would constitute an abuse of discretion under Gassman.

14
 15 **C. NUMRICH HAS FAILED TO PROVIDE ANY RESPONSE TO THE**
 16 **STATE’S ARGUMENT THAT IT SHOULD NOT BE SANCTIONED FOR**
 17 **HAVING FAILED TO DO SOMETHING THAT IT HAD NO OBLIGATION**
 18 **TO DO**

19 When a court imposes sanctions against a party, it necessarily presupposes that the party has
 20 done something wrong—i.e. it has done something that is not allowed to or has failed to do
 21 something that is required. In the State’s motion for reconsideration, the State pointed out that—

21 ¹³ Oddly, however, in this portion of his brief Numrich slightly changes the language of his accusation that the State
 22 misled the court and asserts that “the State misled the defense and the Court into believing that this extensive
 23 litigation would resolve the issues regarding the applicability of the general-specific statute [sic] to the Manslaughter
 in the Second Degree charge.” Def. Resp. at 20. But this assertion is nonsensical. The State would concur that the
 litigation in question—which entirely revolves around whether the general-specific rule bars the State from
 prosecuting Numrich for second-degree manslaughter—*will* resolve that issue. Given that the State and the defense
 appear to be in agreement as to this, even if one accepted the remainder of Numrich’s argument, it is unclear how
 the State can be said to have misled the defense and the court on this point.

1 even if the record before this court at the time it ordered sanctions had been complete and even if
2 this court could impose sanctions based on a finding of less than bad faith, this court should still
3 reconsider its order because it was based on sanctioning the State for failing to do something it did
4 not actually have an obligation to do.¹⁴ State MTR at 8-9.

5 Numrich’s response entirely fails to address this point. Numrich has not identified any error
6 in the State’s argument. Nor has Numrich provided any authority setting forth any legal
7 obligation—whether constitutional, statutory, or rule-based—that the State failed to comply with in
8 this case. As a result, the State’s motion for reconsideration should be granted on this basis alone.

9 **IV. CONCLUSION**

10 For the reasons discussed above and in the State’s previously filed brief, this court should
11 grant the State’s motion to reconsider the imposition of sanctions.
12

13 DATED this 10th day of December, 2018.

14 DANIEL T. SATTERBERG
15 King County Prosecuting Attorney

16 By: 
17 _____
18 Patrick Hinds, WSBA #34049
19 Eileen Alexander, WSBA # 45636
20 Deputy Prosecuting Attorneys
21 Attorneys for Plaintiff

22 ¹⁴ Here, the State was essentially sanctioned for not affirmatively reaching out to the defense before a trial date was even
23 set to make sure that the defense was aware of a possible trial amendment—the potential for which was readily apparent
in the discovery—so that the defense could determine whether filing an interlocutory appeal would be the most cost-
effective litigation strategy after the defendant’s motion to dismiss was denied. But the State is not required to assist the
defense in this way. Given that the State is not obligated to do this, it should not be sanctioned for “failing” to do so.

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CASE #: 18-1-00255-5 SEA

The Honorable James E. Rogers
Hearing Date: TBD
Oral Argument: TBD

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
	)	No. 18-1-00255-5 SEA
)	
	)	STATE'S MOTION TO STRIKE
	)	REPLY DECLARATION OF COOPER
	)	OFFENBECHER OR ALLOW STATE
	)	TO FILE SUPPLEMENTAL
	)	RESPONSE
)	

I. INTRODUCTION

The defendant, Phillip Numrich, filed a fee petition supported only by a declaration from one of his attorneys.¹ In its response, the State pointed out, *inter alia*, that this court should deny Numrich's request for fees because his fee petition was inadequate and failed to comply with numerous long-standing legal requirements. The State also noted its objection if Numrich attempted to cure or address these deficiencies in a reply or a supplemental petition. Numrich has now filed additional documentation—in the form of another declaration from the same attorney—that attempts to provide new information to fix some of the deficiencies with his previously filed materials. For the reasons outlined below, this court should strike this most recent declaration. In the alternative, the State should be granted leave to file a supplemental response to Numrich's fee petition.

¹ Hereinafter cited to as "Fee Pet."

1 **II. RELEVANT FACTS**

2 The procedural facts leading up to the filing of the “STATE’S RESPONSE TO
3 DEFENDANT’S FEE PETITION” on November 30² are set forth in that document.³ This
4 document (and attached appendices) has been previously filed under separate cover and is
5 incorporated herein by reference. On December 5, Numrich filed a “DECLARATION OF
6 COOPER OFFENBECHER IN REPLY TO STATE’S RESPONSE TO DEFENDANT’S FEE
7 PETITION.”⁴ Specific and/or additional facts are discussed below as relevant.

8 **III. ARGUMENT**

9 A court has the inherent authority to strike part or all of a declaration that has been
10 improperly filed or that contains improper or irrelevant materials. See Oltman v. Holland Am. Line
11 USA, Inc., 163 Wn.2d 236, 247, 178 P.3d 981 (2008). Here, this court should strike the all or parts
12 of the reply declaration for a number of reasons. In the alternative, the State should be given leave
13 to file a supplemental response to Numrich’s fee petition in light of the new information in the reply
14 declaration.

15
16 **A. THIS COURT SHOULD STRIKE PART OR ALL OF THE REPLY
17 DECLARATION**

18 It its response to Numrich’s fee petition, the State argued that this court should not impose
19 any fees because Numrich’s petition and supporting materials were insufficient. State Resp. at 7-14.

20
21 ² All dates referenced in this brief are in 2018 unless otherwise noted.

22 ³ Hereinafter cited to as “State Resp.” Appendices to that document hereinafter cited as “State Resp App.” followed
23 by the letter of the relevant appendix (e.g. “State Resp. App. A”). Where possible or relevant, the State will provide
a pinpoint cite within the appendix.

⁴ This document will hereinafter be referred to as “the reply declaration” and cited to as “Reply Decl.”

1 Numrich now attempts to correct the deficiencies in his initial fee petition by filing a reply
2 declaration that consists almost entirely of new information that was not previously provided. For a
3 number of reasons, this is wholly improper and all or part of this declaration should be struck.

4 First, the reply declaration should be struck because it improperly attempts to submit new
5 evidence/information for the first time in reply. As a general rule, materials being submitted in
6 reply cannot raise new issues or submit new evidence for the first time. Documents submitted in
7 reply are generally limited to those which "explain, disprove, or contradict the adverse party's
8 evidence." See Molloy v. City of Bellevue, 71 Wn. App. 382, 385, 859 P.2d 613 (1993). The
9 moving party is generally not allowed to raise new issues or submit new evidence as part of its reply
10 materials because it improperly deprives the nonmoving party of the opportunity to respond. See
11 White v. Kent Medical Center, Inc., P.S., 61 Wn. App. 163, 168, 810 P.2d 4 (1991).

12 Here, the reply declaration consist almost entirely of new information/evidence being
13 submitted for the first time in reply. In its response brief, the State pointed out a number of ways in
14 which Numrich's fee petition failed to provide documentation, information, or evidence regarding
15 relevant points, including some that are legally required. This included, among other things:

- 16 • Failing to provide information, evidence, or documentation as to whether Numrich was
17 actually paying his attorneys on an hourly basis (versus a flat-fee arrangement) and as to
18 whether the hourly rates being claimed were the hourly rates actually being paid by
19 Numrich;⁵
- 20 • Failing to provide information, evidence, or documentation as to whether Numrich had
21 actually been billed for the hours claimed by his attorneys;⁶ and
- Failing to provide information, evidence, or documentation of what the time claimed by his
attorneys was actually spent doing.⁷

22 ⁵ State Resp. at 9-10

23 ⁶ State Resp. at 9-10

⁷ State Resp. at 11-13

1 These were not just areas where the State was arguing that the information, evidence, or
2 documentation provided by Numrich was insufficient. Rather, they were areas where Numrich had
3 not provided *any* information, evidence, or documentation.

4 In this context, Numrich's reply declaration is a clear attempt to provide the very
5 information, evidence, and/or documentation that the State pointed out was missing. To-wit:

- 6 • The first paragraph of the reply declaration claims, *inter alia*, that Numrich is paying his
7 attorneys hourly, that he has been billed for the work of his attorneys at the rates listed in the
8 initial declaration, and that he has actually paid fees based on these hourly rates. Reply Dec.
9 at ¶ 1. None of this information was previously provided.
- 10 • The third, fourth, and fifth paragraph of the reply declaration claim, *inter alia*, that Numrich
11 was billed for all of the hours claimed in his fee petition and that he has actually paid fees
12 for a little more than half of them. Reply Decl. at ¶¶ 3-5. None of this information was
13 previously provided.
- 14 • The sixth paragraph of the reply declaration ostensibly sets forth the type of work that his
15 attorneys were doing during the hours claimed in the fee petition. Reply Decl. at ¶ 6. None
16 of this information was previously provided.

17 All of this constitutes new evidence/information being improperly submitted for the first time in
18 reply. Some of this is information that is required to be provided in a fee petition by long standing
19 Washington law. State Resp. at 11-13. All of this information could and should have been
20 provided as part of Numrich's initial fee petition. In this context, Numrich has not provided any
21 reasonable explanation or justification for his failure to provide this information in his initial
22 petition. Nor is any apparent in the record. And by failing to provide this information until his
23 reply materials, Numrich has improperly deprived the State of the ability to respond to it. As a
24 result, the court should strike at least the above referenced paragraphs of the reply declaration.

25 Second, all or part of the reply declaration should be struck as ultimately irrelevant. As an
26 initial matter, to meet its burden of proving the reasonableness of fees in general, the party seeking
27 them must provide more than a simple and unsupported declaration from its counsel. Mahler v.

1 Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998); SentinelC3, Inc. v Hunt, 181 Wn.2d 127, 144,
2 331 P.3d 40 (2014). Numrich provided no evidence in support of his initial fee petition beyond an
3 unsupported declaration from one of his attorneys. Fee Pet. at 3-7. In its response, the State argued
4 that the fee petition was insufficient because Numrich had failed to provide any evidence supporting
5 his attorney's declaration. State Resp. at 7-9. Numrich now attempts to address some of the
6 deficiencies in his petition by filing another declaration from the same attorney that is again
7 unsupported by any evidence or documentation. Reply Decl. Given that one of the reasons that his
8 initial petition was insufficient was precisely because it was not supported by anything beyond a
9 declaration of counsel, that deficiency cannot be remedied simply by filing another unsupported
10 declaration of counsel. In that context, the reply declaration is irrelevant as a whole. As a result, it
11 should be struck in its entirety.

12 Even if the reply declaration was not irrelevant in its entirety, Paragraph 6 in particular still
13 is. To meet its burden of proving the reasonableness of the work done by its attorneys for purposes
14 of a fee petition, the party seeking fees must establish at least: (1) the number of hours worked; (2)
15 the type of work performed; and (3) the category of attorneys who performed the work. McGreevy
16 v. Oregon Mutual Insurance Co., 90 Wn. App. 283, 292, 951 P.2d 798 (1998) (citing Bowers v.
17 Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). This information must be
18 provided so that the party opposing fees can meaningfully evaluate and argue against the hours
19 claimed in the fee petition and so the court can consider whether the time requested is reasonable
20 and can exclude time that is unproductive, excessive, and duplicative. 224 Westlake, LLC v.
21 Engstrom Properties, LLC., 169 Wn. App. 700, 740, 281 P.3d 693 (2012); Berryman v. Metcalf, 177
22 Wn. App. 644, 661-63, 312 P.3d 745 (2013); Mahler, 135 Wn.2d at 434. In its response, the State
23 argued that Numrich's fee petition was insufficient because he had provided information only

1 regarding the hours he claimed each of his attorneys had worked and had not provided any
2 information about what they ostensibly did during those hours. State Resp. at 11-13.

3 Numrich now attempts to address this deficiency by including *some* information in the reply
4 declaration regarding the work done by his attorneys. Reply Decl. at ¶ 6. But this consists only of a
5 list of the general types of work performed by his attorneys over the course of the 38.1 hours he
6 claims in the fee petition. Reply Decl. at ¶ 6. He provides no information that indicates how much
7 time was actually spent on specific work by each of his attorneys. Reply Decl. at ¶ 6. Without this
8 information, it is impossible for the State or this court to evaluate, for example, whether the time his
9 attorneys spent on particular tasks was excessive or duplicative. As a result, Paragraph 6 of the
10 reply declaration is meaningless because, while it ostensibly sets forth the type of work done by his
11 attorneys, it does not provide the actual information that is the point of the legal requirement. As it
12 is therefore irrelevant, Paragraph 6 should be struck.

13
14 **B. IN THE ALTERNATIVE, THIS COURT SHOULD ALLOW THE STATE
15 TO FILE A SUPPLEMENTAL RESPONSE TO NUMRICH'S FEE
16 PETITION**

17 If this court is unwilling to strike some or all of the reply declaration, the State should be
18 allowed to file a supplemental response to Numrich's fee petition. When a party requesting fees
19 submits a reply declaration that contains new information/evidence in support of its fee request after
20 the other party has filed its response, the party opposing fees should be granted a reasonable
21 opportunity to review and respond to that evidence. That is particularly the case where, as here, it
22 appears beyond question that the reply declaration and the new information contained therein is
23 being submitted in an attempt to supplement precisely those areas where the State pointed out that
the initial fee petition was legally and factually insufficient.

1 Here, the State potentially has additional or slightly different arguments against Numrich's
 2 fee petition if this court allows it to be supplemented by the reply declaration. For example, the
 3 State will argue that the fee petition—even as supplemented—is still insufficient to establish
 4 reasonable fees. Similarly, the State may now potentially affirmatively argue that the hourly rate
 5 charged by Numrich's attorneys and/or that the hours requested by the defense are unreasonable.⁸
 6 As a result, even if this court does not strike some or all of the reply declaration, the State should
 7 still be allowed to file a supplemental response.

8
 9 **IV. CONCLUSION**

10 For the reasons outlined above, this court should grant the State's motion to strike the reply
 11 declaration or, in the alternative, should give the State the opportunity to file a supplemental
 12 response within a reasonable period of time.

13 DATED this 11th day of December, 2018.

14 DANIEL T. SATTERBERG
 15 King County Prosecuting Attorney

16
 17 By: 
 18 Patrick Hinds, WSBA #34049
 19 Eileen Alexander, WSBA # 45636
 20 Deputy Prosecuting Attorneys
 Attorneys for Plaintiff

21 ⁸ In the reply declaration, Numrich's attorney asserts that the State "has offered no evidence to rebut the
 22 reasonableness of the hourly rates charged by our firm's attorneys" and that "the State has not argued that the hours
 23 requested by the defense are unreasonable." Reply Decl. at 3, 3 n.3. But this ignores the fact that it is Numrich who
 bears the burden of establishing that the hourly rates and hours worked were reasonable, not the State's burden to
 prove that they were unreasonable. Given that Numrich's initial fee petition was insufficient simply by virtue of its
 failure to include required information, the State chose to focus its response on the fact that Numrich had failed to
 meet his burden. This neither conceded reasonableness nor waived the point. Should this court allow the reply
 declaration to stand, the State may choose to expand its response to include affirmative arguments that the hourly
 rates and/or the hours claimed are unreasonable in response to the new materials contained in the reply declaration.

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CASE #: 18-1-00255-5 SEA

The Honorable James E. Rogers
Hearing Date: TBD
Oral Argument: TBD

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
	)	No. 18-1-00255-5 SEA
)	
)	
	)	STATE'S RESPONSE TO
	)	DEFENDANT'S MOTION TO
PHILLIP NUMRICH,	)	DISMISS PURSUANT TO CrR 8.3 OR
	)	TO RECONSIDER AMENDMENT
)	

I. INTRODUCTION

The defendant, Phillip Numrich, has filed a motion asking this court to dismiss some or all of the charges against him or, in the alternative, to reconsider and reverse its November 1¹ order granting the State's motion to amend.² As with many of his prior briefs in this matter, Numrich's motion consists primarily of arguments premised on assertions that are either incorrect or that misinterpret and mischaracterize the record in a manner that casts the State's actions in an unfair and inaccurate light. In addition, Numrich's analysis of the case law interpreting CrR 8.3(b) is flawed and he has failed to identify anything relevant that is new or

¹ All dates referenced in this brief are in 2018 unless otherwise noted.

² Numrich filed his "DEFENDANT'S MOTION TO DISMISS PURSUANT TO CrR 8.3(b), OR ALTERNATIVELY TO RECONSIDER ORDER ON MOTION TO AMEND" on November 30. The State will hereinafter cite to this brief as "Def. 8.3 Mot."

1 different since this court issued its November 1 order. When the law is correctly interpreted and
 2 applied to the actual record in this case, it is apparent that Numrich’s motions should be denied
 3 because there is no basis for this court to either dismiss pursuant to CrR 8.3(b) or reconsider its
 4 prior ruling granting the State’s motion to amend.

5 **II. RELEVANT FACTS**

6 The State has outlined the procedural facts of this case—in differing levels of
 7 thoroughness and detail—in numerous filings with this court, including the “STATE’S REPLY
 8 IN SUPPORT OF MOTION TO AMEND,”³ the “STATE’S MOTION TO RECONSIDER THE
 9 IMPOSITION OF SANCTIONS,”⁴ and the “DECLARATION OF PATRICK HINDS FOR
 10 PURPOSES OF MOTION TO RECONSIDER.”⁵ All of these documents (and attached
 11 appendices) have been previously filed under separate cover and are incorporated herein by
 12 reference. Specific and/or additional facts are discussed below as relevant.

13 **III. ARGUMENT**

14 Numrich argues that this court should dismiss some or all of the counts against him pursuant
 15 to CrR 8.3(b) or, in the alternative, reconsider its prior order granting the State’s motion to amend to
 16 add a count of first-degree manslaughter. For a number of reasons, these motions should be denied.
 17

18
 19
 20 ³ Filed October 31, 2018. Hereinafter cited to as “State Amend. Reply.” Appendices to the document cited as
 “State Amend. Reply App.” followed by the letter of the relevant appendix (e.g. “State Amend. Reply App. B”).
 Where possible or relevant, the State will provide a pinpoint cite within the appendix.

21 ⁴ Filed November 13, 2018. Hereinafter cited to as “State Sanction Mot.”

22 ⁵ Filed November 13, 2018. Hereinafter cited to as “Hinds Decl.” Appendices to the document cited as “Hinds
 Decl.” followed by the letter of the relevant appendix (e.g. “Hinds Dec. App. B”). Where possible or relevant, the
 23 State will provide a pinpoint cite within the appendix.

1 **A. BOTH OF NUMRICH’S MOTIONS SHOULD BE DENIED BECAUSE**
 2 **THEY DEPEND ON ACCUSATIONS OF STATE WRONGDOING THAT**
 3 **ARE BASED ON FAULTY ASSERTIONS THAT ARE UNSUPPORTED BY**
 4 **THE RECORD**

5 Both Numrich’s motion to dismiss and his motion for reconsideration are fundamentally
 6 based on accusations of wrongdoing on the part of the State. These accusations, in turn, rely on
 7 numerous assertions regarding the State’s explanations, actions, and arguments in this matter.
 8 These assertions, however, are faulty—they are simply incorrect, miss the point, and/or
 9 misinterpret or mischaracterize the State’s arguments and actions in a matter that casts the State
 10 in an undeservedly negative light that is unfair and inaccurate. When those faulty assertions are
 11 exposed and corrected, Numrich’s accusations of wrongdoing are left entirely unsupported.
 12 Because Numrich’s motions depend on accusations for which there is no support, they must be
 13 denied.

14 In this context, the faulty assertions at issue in Numrich’s current motion to dismiss and
 15 motion to reconsider are identical to those he made in his response to the State’s motion asking
 16 this court to reconsider the imposition of sanctions.⁶ The State pointed out, analyzed, and
 17 corrected Numrich’s numerous errors, misinterpretations, and/or mischaracterizations of the
 18 record and the State’s explanations, actions, and arguments in its “STATE’S REPLY IN
 19 SUPPORT OF MOTION TO RECONSIDER THE IMPOSITION OF SANCTIONS.”⁷ The
 20 State incorporates this briefing by reference. In the interest of brevity, however, the State will

21 _____
 22 ⁶ Compare Def. 8.3 Mot. at 1-8 with Numrich’s “DEFENDANT’S RESPONSE TO STATE’S MOTION TO
 23 RECONSIDER IMPOSITION OF SANCTIONS – *ERRATA FILING*” at 3-20, both filed on November 30.
 Indeed, Numrich’s briefing in support of his motions to dismiss/reconsider references and incorporates by reference
 the factual assertions made in his briefing in response to the State’s motion to reconsider the imposition of sanctions.
 Def. 8.3 Mot. at 3 n.1, 3-4.

⁷ Filed December 10. Hereinafter cited to as “State Sanction Reply.”

1 provide only a brief summary of the main points rather than repeating the analysis in its entirety
2 here.

3 First, Numrich asserts that the State “misled” the defense and the court. Def. 8.3 Mot. at 1,
4 7. However, this is incorrect. The State never knowingly misled either the court or the defense or
5 intentionally misrepresented its position in this matter. State Sanction Reply at 5. More
6 specifically, the State never misled the court or the defense into believing that the motion to dismiss
7 the second-degree manslaughter charge would be the dispositive motion regarding any and all
8 felony charges in this matter. State Sanction Reply at 5-6, 16-17. Nor was Numrich ever misled as
9 to the possibility of an amendment to the charges. Id.

10 Second, the State noted in its materials in support of its motion to reconsider sanctions that it
11 has always believed that there was probable cause to charge Numrich with first-degree
12 manslaughter, but that it decided to file second-degree manslaughter initially and reserve the
13 decision as to whether to amend to or add first-degree manslaughter until a later time. Hinds Decl.
14 at ¶¶ 6-8; Hinds Decl App. Q at 5-7. Numrich now characterizes this statement as proof that the
15 State always intended to *actually* amend the charges and consciously withheld this information from
16 the defense and the court. Def. 8.3 Mot at 1-2, 7. But that is not what the State said, nor is it a
17 reasonable interpretation of the State’s explanation of events. Rather, the State itself simply did not
18 think of or consider the potential amendment of charges between the time of the initial filing (early
19 2018) and the time that counsel for the State was drafting the response to Numrich’s Supreme Court
20 briefing (October of 2018). State Sanction Reply at 4, 13. Even then, the decision to amend was
21 not a foregone conclusion and was ultimately made because the State would otherwise lose the
22 option of amending. Id.

1 Third, Numrich asserts that the State’s “recent declaration claims that it did not recognize
2 the defendant’s argument regarding the inapplicability of State v. Gamble, 154 Wn.2d 457 (2005)
3 until mid-October when it read the defendant’s opening briefs to the Supreme Court.” Def. 8.3 Mot.
4 at 2. Having so characterized the State’s explanation of events, Numrich argues that this claim is
5 “false” and that “the State continues to mislead the Court” by making it. Def. 8.3 Mot. at 2-3, 7-8.
6 But Numrich’s assertion is incorrect, misleading, and misses the State’s point regarding Gamble.
7 Despite his claim to the contrary, the State has never claimed that arguments regarding the
8 applicability of Gamble were not raised until the Supreme Court pleadings or that Gamble was not
9 at issue during the litigation before Judge Chun. State Sanction Reply at 7-9. Rather, the State’s
10 point was that not all of the consequences that followed from Numrich’s argument regarding
11 Gamble occurred to the State until State’s counsel had a chance to read the version of Numrich’s
12 argument containing in his initial briefing to the Supreme Court. State Sanction Reply at 10-11.
13 Nor was this inexplicable or unreasonable given the circumstances of the case. Id.

14 Fourth, Numrich asserts that the State’s “subsequent efforts to explain its untimely motion
15 [to amend] are unavailing and totally contradicted by the record.” Def. 8.3 Mot. at 7. But this
16 assertion—and the argument based on it—consist of little more than reiterations of the same claims
17 addressed above. Def. 8.3 Mot. at 7-8. They should be rejected for the same reasons.

18 In the State’s materials in support of its motion to reconsider the imposition of sanctions, the
19 State provided a recitation of the procedural history of this case that summarized how the case
20 proceeded up to the point that the State brought its motion to amend and, more specifically,
21 explained why and how that motion came about when it did. State Sanction Mot.; Hinds Decl.
22 Despite multiple efforts, Numrich has failed to convincingly challenge either the State’s explanation
23 of events or the propriety of the State’s actions. His attempts to do so have relied on assertions that

1 are simply incorrect, that miss the point, or that misinterpret or mischaracterize the State's
2 arguments and actions in a matter that casts the State in an undeservedly negative light that is
3 unfair and inaccurate. In contrast, the State's explanation of events is credible and believable and
4 establishes that, while the current posture of this case is obviously not ideal, the State's actions over
5 time were neither inexplicable nor unreasonable given the unique nature of the case and the way in
6 which procedural events have unfolded. State Sanction Mot.; Hinds Decl.; State Sanction Reply.
7 Given that both Numrich's motion to dismiss and his motion for reconsideration are based on
8 accusations of wrongdoing on the part of the State and that there is no support for these accusations,
9 his motion should be denied.

10
11 **B. NUMRICH'S MOTION TO DISMISS PURSUANT TO CrR 8.3(b)
SHOULD BE DENIED**

12 **1. Applicable Law**

13 Under CrR 8.3(b), a court "may dismiss any criminal prosecution due to arbitrary action
14 or governmental misconduct when there has been prejudice to the rights of the accused which
15 materially affect the accused's rights to a fair trial." To obtain dismissal under CrR 8.3(b), the
16 burden is on the defendant to establish both: (1) arbitrary action or governmental misconduct;
17 and (2) prejudice affecting his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d
18 638 (2003); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Because the
19 defendant bears the burden of demonstrating both, a court must deny a CrR 8.3(b) motion if the
20 defendant fails to establish either. Rohrich, 149 Wn.2d at 654-55. In addition, a court
21 considering a CrR 8.3(b) motion to dismiss must keep in mind that "dismissal is an extraordinary
22 remedy to which the court should resort only in 'truly egregious cases of mismanagement or
23 misconduct.'" State v. Wilson, 149 Wn.2d 1, 9, 965 P.3d 657 (2003) (quoting State v. Duggins,

1 68 Wn. App. 396, 401, 844 P.2d 441 (1993)). Here, Numrich has failed to establish either
 2 arbitrary action/governmental misconduct or prejudice to his right to a fair trial. As a result, his
 3 motion to dismiss pursuant to CrR 8.3(b) must be denied.

4 **2. Numrich Has Failed To Establish Egregious Mismanagement Or**
 5 **Misconduct**

6 As noted above, for dismissal under CrR 8.3(b) to be warranted, a defendant must
 7 establish “arbitrary action or governmental misconduct.” In this context, governmental
 8 misconduct “need not be of an evil or dishonest nature; simple mismanagement is sufficient.”
 9 State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, although simple
 10 mismanagement can constitute governmental misconduct for CrR 8.3(b) purposes, courts have
 11 repeatedly held that dismissal under the rule is still an extraordinary remedy that is to be used
 12 sparingly and only in situations of truly egregious State conduct.⁸ Wilson, 149 Wn.2d at 9; See,
 13 also, State v. Flinn, 119 Wn. App. 232, 347-48, 80 P.3d 171 (2003); State v. Hoffman, 115 Wn.
 14 App. 91, 103, 60 P.3d 1261 (2003) (reversed on other grounds, 150 Wn.2d 536, 78 P.3d 1289
 15 (2003)). As a result, while “simple mismanagement” may appear to set a low bar, courts have
 16 continued to set a very high standard in practice and have limited dismissals under CrR 8.3(b) to
 17 truly egregious cases of prosecutorial mismanagement.

18 In State v. Smith, for example, the order on omnibus hearing directed the State to provide
 19 all police follow-up reports at least two weeks prior to trial. 67 Wn. App. 847, 850, 841 P.2d 65
 20 (1992). On the day of trial, however, the State provided the defense with an additional lab report

21 _____
 22 ⁸ In this context, Numrich’s claim that “Washington Courts have not been shy to impose dismissal as a sanction in
 23 cases involving mismanagement” (Def. 8.3 Mot. at 5) runs directly contrary to what Washington court have
 themselves said on the issue. In point of fact, Washington courts are *extremely* hesitant to use dismissal as a
 sanction. See, e.g., Flinn, 119 Wn. App. at 347 (“Although mismanagement is sufficient to establish governmental
 misconduct, dismissal under CrR 8.3(b) is an extraordinary remedy used only in truly egregious cases.”)

1 and a follow-up report from a detective identifying an additional suspect and an additional lab
2 report. Id. The defense moved for dismissal, claiming that the new information destroyed the
3 defense theory of the case as embodied in its trial memorandum. Id. The trial court denied the
4 motion to dismiss. Id. at 851. The Court of Appeals affirmed, reiterating the long-standing rule
5 that the dismissal is an extraordinary remedy that was not appropriate under the circumstances.
6 Id. at 852.⁹

7 The decision in Smith was far from an anomaly; a review of the case law reveals
8 numerous cases where appellate courts have reached consistent results. See, e.g., State v.
9 Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981) (dismissal not warranted where State disclosed
10 a witness represented by defense counsel four days prior to trial that resulted in counsel's forced
11 withdrawal from case); State v. Greene, 49 Wn. App. 49, 742 P.2d 152 (1987) (dismissal not
12 warranted even though State did not produce exculpatory written statement of defendant until the
13 day of trial); Flinn, 119 Wn. App. 232 (dismissal not warranted when State sought and obtained
14 a five week continuance of the trial date of an in-custody defendant in order to obtain a second
15 evaluation and then determined that a second evaluation was not needed).

16 In this context, the remedy of dismissal is limited to only those cases that involve
17 extraordinary prosecutorial mismanagement, often coupled with actual misconduct. A review of
18 some of the cases where such mismanagement/misconduct has been found is instructive as to
19 how truly egregious the prosecutorial actions must be before dismissal pursuant to CrR 8.3(b) is
20 warranted.

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22 ⁹ At both the trial court and on appeal, the issue was characterized as a motion to dismiss for a discovery violation
23 under CrR 4.7(h)(7)(i). 67 Wn. App. at 850-51. On appeal, however, both the majority and the dissent relied
heavily on cases interpreting dismissal pursuant to CrR 8.3(b). 67 Wn. App. at 851-51, 60-62. Something similar
occurred in the Bradfield and Greene cases cited below.

1 In State v. Sulgrove, for example, trial had actually begun (on the second-to-last-day
2 before the time for trial expired). 19 Wn. App. 860, 861, 578 P.2d 74 (1978). After the jury was
3 empaneled, the defendant moved to dismiss, arguing that he had been improperly charged. Id.
4 The State conceded the point and moved to amend the Information. Id. The court granted the
5 amendment. Id. When the defendant then moved to discover the evidence being relied on by the
6 State, the State asked to recess trial for a day to obtain the necessary documentation for the court
7 and the defense. Id. at 862. The following day, the State could produce only an inadmissible
8 copy of a document. Id. When the defense objected to the document, the State requested
9 another recess to obtain admissible documentation. Id. At that point, the court dismissed under
10 CrR 8.3(b). Id. The Court of Appeals held that the State's actions constituted sufficient
11 mismanagement to warrant dismissal under the rule. Id.

12 Similarly, in State v. Brooks, 149 Wn. App. 373, 203 P.3d 397 (2009), the State's
13 mismanagement of the case was truly egregious. The State, among other things: failed to provide
14 a 60-page victim's statement until the day before trial; failed to provide two taped statements of
15 one defendant to a law enforcement officer from the night of the incident; failed to provide the
16 lead detective's report, which likely would have revealed other witnesses that the defendants
17 would have needed to interview to prepare for trial; and failed to subpoena the victim for trial.
18 Id. at 373-83. Despite the State's repeated acts of mismanagement, the trial court attempted to
19 manage the discovery issues with continuances and direction, but the State still neglected to
20 follow through on its requirements or to provide reasonable explanations for delays. Id. at 376.
21 In that context, the court noted that the dismissal under CrR 8.3(b) was warranted because the
22 "governmental mismanagement...materially destroyed [the defendants'] ability to obtain a fair
23 trial." Id.

1 Along those lines, in State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987), the State
2 combined mismanagement with actual misconduct. In that case, the State failed to provide a
3 witness list to the defense despite being ordered to do so. Id. at 601. In addition, the State failed
4 to comply with various other orders of the court despite numerous hearings in which the court
5 threatened dismissal. Id. at 602. Finally, counsel for the State actually advised the parents of a
6 victim/witness that they did not have to comply with an order of the court. Id. at 602-03. Given
7 all of this, the trial court dismissed the case pursuant to CrR 8.3(b). Id. at 603. On appeal, the
8 Court of Appeals noted that it would have found that dismissal was too drastic a remedy based
9 on the State's mismanagement, but that it was appropriate given that the State also engaged in
10 actual "egregious misconduct" in encouraging the parents to disobey a court order. Id. at 604.

11 In all of the above cases, the State's actions clearly constituted egregious mismanagement
12 or mismanagement combined with actual egregious misconduct. Other cases where courts have
13 found dismissal pursuant to CrR 8.3(b) appropriate have presented similar fact patterns. See,
14 e.g., State v. Michielli, 132 Wn. 2d 229, 937 P.2d 587 (1997) (the State amended the
15 Information—adding four additional charges—only five days before trial was scheduled to
16 begin, without any justifiable explanation for the delay, and under circumstances that suggested
17 the amendment was done to harass the defendant); State v. Sherman, 59 Wn. App. 763, 801 P.2d
18 274 (1990) (the State, after explicitly promising and being ordered to obtain copies of records,
19 failed to exercise due diligence to attempt to obtain them and failed to make a motion to
20 reconsider the order until the day after trial was scheduled to begin); State v. Dailey, 93 Wn.2d
21 454, 610 P.3d 357 (1980) (the State, among other things: violated the court rules and explicit
22 orders of the trial court throughout the proceedings; was late in providing an ordered bill of
23

1 particulars; and filed a supplemental witness list the Friday before a Monday trial that increased
2 the number of State's witnesses from five to sixteen).

3 Here, Numrich has failed to meet his burden of establishing any government misconduct,
4 let alone "truly egregious" misconduct warranting the extraordinary remedy of dismissal. As an
5 initial matter, as discussed at length above, all of Numrich's allegations of misconduct on the
6 part of the State are based on accusations of wrongdoing that are faulty and are entirely
7 unsupported by the record.

8 Moreover, even were that not the case, Numrich has failed to establish actual government
9 mismanagement within the meaning of CrR 8.3(b) jurisprudence. Here, the State moved to
10 amend to add a charge in the alternative prior to the case being set for trial and months prior to
11 the earliest point in time that the case realistically could have gone to trial. While Numrich's
12 briefing is full of numerous accusations of prosecutorial mismanagement and misconduct, it is
13 notably scant on legal authority establishing the duty that the State supposedly violated through
14 its actions in this case. Stripped to its core, Numrich's argument assumes that his decision(s) to
15 file a motion to dismiss and/or a motion for discretionary review—well before a trial date had
16 been set—somehow triggered an obligation on the part of the State to immediately inform him of
17 the potential amendments to the charges that it might seek later for trial. Numrich has failed to
18 point to any legal authority—be it a constitutional provision, statute, court rule, or court order—
19 that imposes such an obligation on the State in this or any other case. Nor is the State aware of
20 any such authority. Given that the State did not violate any legal duty, it did not mismanage the
21 case within the meaning of CrR 8.3(b).

22 Finally, even if this court were to find that the State did mismanage the case, dismissal
23 under CrR 8.3(b) is still not warranted. Although simple mismanagement can constitute

1 governmental misconduct for CrR 8.3(b) purposes, courts have repeatedly held that dismissal
2 under CrR 8.3(b) is still an extraordinary remedy that is to be used sparingly and only in
3 situations of “truly egregious State conduct.” Wilson, 149 Wn.2d at 9; State v. Flinn, 119 Wn.
4 App. at 347-48; State v. Hoffman, 115 Wn. App. at 103. Here, the State has repeatedly
5 explained how and why the motion to amend came about when it did. Given the specific
6 procedural history of this case, the State’s actions were neither inexplicable nor unreasonable. In
7 that context, while this court may prefer that the State have acted differently—and while the State
8 likely would have done so with the benefit of hindsight—the State’s actions are qualitatively
9 different than the egregious prosecutorial mismanagement at issue in Sulgrove, Brooks, Daily, and
10 other cases in which courts have found dismissal warranted under CrR 8.3(b).

11 Because Numrich has failed to establish that the State’s actions constituted egregious
12 mismanagement, he has not met his burden of showing that the extraordinary remedy of dismissal is
13 appropriate. As a result, his motion to dismiss should be denied on that basis alone.

14
15 **3. Numrich Has Failed To Establish Prejudice Affecting His Right To A Fair Trial**

16 As noted above, for dismissal under CrR 8.3(b) to be warranted, a defendant must
17 establish “prejudice to the rights of the accused which materially affect his or her right to a fair
18 trial.” Blackwell, 120 Wn.2d at 830. In doing so, the defendant cannot rely on speculative or
19 hypothetical prejudice. Rohrich, 149 Wn.2d 655-58. Rather, the defendant must show *actual*
20 prejudice that has *actually* affected his right to a fair trial. Id. at 657-58. In this context, “[t]he
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1 mere *possibility* of prejudice is not sufficient to meet the burden of showing actual prejudice.”

2 State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993).¹⁰

3 Here, Numrich has failed to show actual prejudice that has materially affected his right to
 4 a fair trial.¹¹ As an initial matter, it is highly relevant to consider both the point in the legal
 5 process that the State brought the motion to amend and what the amendment did. As noted
 6 above, the State moved to amend prior to the case being set for trial and months prior to the
 7 earliest point in time that the case realistically could have gone to trial. The amendment added a
 8 charge in the alternative that arises from the same nexus of facts as the original charges and is
 9 essentially identical to one of them except that it requires proof of a higher level of *mens rea*. The
 10 facts supporting the additional charge are all set forth in the same discovery supporting the initial
 11 charges. The amendment does not change Numrich’s possible trial defenses. It does not require
 12 him to conduct any further investigation beyond that which he would need to do to prepare for trial
 13 on the original charges. It will not result in the State calling any additional witnesses that Numrich
 14 will need to interview beyond that those the State would call for trial on the original charges. Given
 15 all of that, it cannot be said that the amendment has or will cause any actual prejudice that has or
 16 will materially affect Numrich’s right to a fair trial. Indeed, it is hard to conceive of a situation in
 17 which a defendant would be less able to meet the burden of establishing such prejudice.

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 19
 20 ¹⁰ In Norby, the Court addressed the propriety of the trial court’s dismissal of charges based on a finding that
 21 preaccusatorial delay violated the defendants’ rights to due process. 122 Wn.2d 258. While the Norby Court did
 not explicitly address CrR 8.3(b), subsequent courts have relied on its decision in their analyses of the prejudice
 prong of the rule. See Rohrich, 149 Wn.2d at 657.

22 ¹¹ Numrich cites State v. Rapozo, 114 Wn. App. 321, 58 P.3d 290 (2002) for the proposition that a court has the
 23 discretion to deny a motion to amend even if the amendment would not cause prejudice to the defendant. Def. 8.3
 Mot. at 5. While this is correct, Rapozo dealt purely with the issue of the discretion of a court in ruling on a motion
 to amend. 114 Wn. App. 321. It did not address—and does not alter—the basic rule that a defendant seeking
 dismissal pursuant to CrR 8.3(b) must establish prejudice.

1 Despite this, Numrich argues that his rights have been prejudiced because the amendment:
 2 (1) has increased his and his attorneys' costs; (2) has prejudiced his right to seek timely appellate
 3 review; and (3) will "inevitably" cause him to "have to waive his speedy trial rights further out" in
 4 order for his attorneys to prepare a defense. Def. 8.3 Mot. at 8. These arguments must fail.

5 As an initial matter, Numrich's burden of establishing prejudice vis-à-vis his CrR 8.3(b)
 6 motion is virtually identical to the burden he bore—and failed to meet—in opposing the State's
 7 motion to amend in the first place.¹² Here, Numrich objected to the State's motion to amend. In
 8 both his written brief in opposition to the State's motion to amend,¹³ and at oral argument on that
 9 motion, Numrich claimed that the amendment would prejudice him for essentially the same reasons
 10 he now asserts in support of his motion to dismiss pursuant to CrR 8.3(b). Def. Amend. Resp. at
 11 10, 13-17; Hinds Decl. App. Q at 8, 10-11, 16-7. This court considered and rejected those
 12 arguments and found no prejudice to Numrich stemming from the amendment. In this context,
 13 Numrich has not presented anything new that should cause this court to change that conclusion.

14 Even were that not the case, Numrich has failed to establish actual prejudice materially
 15 affecting his right to a fair trial. First, Numrich has cited no authority for the proposition that an
 16 increase in the costs of litigation constitutes "prejudice to the rights of the accused" within the
 17 meaning of CrR 8.3(b). Nor is the State aware of any such authority. Nor does this proposition
 18 flow from any of the existing case law—the costs or expenditure of time associated with
 19 additional briefing or argument has no logical connection to whether Numrich will receive a fair
 20

21 _____
 22 ¹² Under CrR 2.1(d), the court may permit an information to be amended at any time before verdict so long as
 "substantial rights of the defendant are not prejudiced." A defendant opposing amendment bears the burden of "showing
 specific prejudice to a substantial right." State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991).

23 ¹³ The "DEFENDANT'S OPPOSITION TO STATE'S BELATED MOTION TO FILE AMENDED
 INFORMATION" was filed on October 30. Hereinafter cited as "Def. Amend. Resp."

1 trial. And the State is under no obligation to adapt its handling of a case to ensure that the
2 defense is able to carry out its preferred litigation strategy in the most cost-effective manner
3 possible. As a result, despite Numrich's assertion to the contrary, an increase in the cost of
4 litigation does not constitute "prejudice to the rights of the accused" within the meaning of CrR
5 8.3(b).

6 Second, Numrich has failed to establish either that the State's actions have impacted his
7 "right to seek timely [appellate] review" or that this would constitute a prejudice that materially
8 affects his right to a fair trial. Here, the State has certainly argued against Numrich's motion for
9 discretionary review and has taken actions in the trial court that may cause the Supreme Court to
10 decide that discretionary review is not appropriate. In addition, Numrich will have to file a
11 second motion for discretionary review in order to get both issues he now wants reviewed before
12 the Supreme Court. But Numrich continues to enjoy access to the full panoply of appellate
13 rights enjoyed by any criminal defendant. In that context, any delay is: (1) modest at most; and
14 (2) impacts the Supreme Court's decision whether to *grant* review, not Numrich's right to *seek*
15 it. Moreover, a defendant's right to a fair trial is obviously not prejudiced when the State
16 successfully argues against discretionary review. Given that, Numrich has failed to establish that
17 prejudice has occurred when the State's argument against discretionary review instead simply
18 leads the court to defer its ruling for a short period of time.

19 Finally, Numrich has failed to establish prejudice based on the "inevitable" need for him to
20 waive his speedy trial rights in order to have prepared counsel. Courts have found prejudice warrant
21 dismissal pursuant to CrR 8.3(b) when a defendant was put in the position of being forced to choose
22 between his right to a speedy trial and his right to prepared counsel. See Michielli, 132 Wn. 229;
23 State v. Sherman, 59 Wn. App. 763. However, Numrich has failed to establish that he is actually in

1 that position. As an initial matter, Numrich does not even allege—let alone establish—that he is
 2 actually in that position now. Def. 8.3 Mot. at 8. Instead, he asserts that it is “inevitable.” Id. But
 3 he fails to explain how that is the case. As a result, his assertion is exactly the sort of claim of
 4 speculative, hypothetical, or possible prejudice that is insufficient to warrant dismissal under CrR
 5 8.3(b). Rohrich, 149 Wn.2d 655-58; Norby, 122 Wn.2d at 264.

6 Nor does a fair reading of the record suggest that it is likely, let alone inevitable, that
 7 Numrich will ever be in this situation. On the day the State gave notice of its motion to amend, a
 8 trial date had not been set and Numrich—who was actively pursuing a motion for discretionary
 9 review in the Supreme Court at the time—could only have expected that his trial was, at least,
 10 *months* away.¹⁴ As described in detail above, the amendment in this matter arises from the same
 11 nexus of facts and involves the same prosecutorial theory of guilt. It does not involve any new
 12 discovery, implicate any additional witnesses, require any additional investigation, or raise any
 13 different trial defenses. In this context, there is no basis to conclude that the new charge added
 14 by the amendment will *ever* require Numrich to continue his trial date so that his attorneys can
 15 be prepared *for trial*.¹⁵ As a result, Numrich has failed to establish that he has been put in the
 16 position of being forced to choose between his right to a speedy trial and his right to prepared
 17 counsel.

18
 19 ¹⁴ In virtually every case where dismissal pursuant to CrR 8.3(b) has been upheld, a trial date had been set and it was
 20 the last-minute nature of the State’s actions *in relation to the date of trial* that established both mismanagement and
 21 prejudice. See Sulgrove, 19 Wn. App. 860; Brooks, 149 Wn. App. 373; Michaelli, 132 Wn.2d 229; Sherman, 59
 22 Wn. App. 763; Dailey, 93 Wn.2d 454.

23 ¹⁵ Numrich may argue in reply that he has been forced to continue his trial date so that he can seek discretionary
 review of the order granting the amendment. But he has not provided any authority for the proposition that this
 constitutes prejudice to his right to a fair trial within the meaning of CrR 8.3(b). Nor would this make sense. As a
 practical matter, a defendant seeking discretionary review will always have to continue his trial date while he
 pursues such an interlocutory remedy. If doing so in and of itself established prejudice, it would swallow the entire
 prejudice prong since a defendant seeking dismissal under CrR 8.3(b) would always be able to establish prejudice by
 the mere expedient of moving to continue his trial date and filing a notice of discretionary review.

1 **C. NUMRICH’S MOTION FOR RECONSIDERATION SHOULD BE**
2 **DENIED**

3 In his briefing, Numrich does not provide any specific argument in support of his motion
4 for reconsideration of this court’s order granting the amendment. Def. 8.3 Mot. Rather, he
5 appears to assert it merely as an alternative method by which this court could sanction the State
6 for its “mismanagement” of this case. *Id.* at 3, 8. This motion should be denied.

7 First, Numrich’s motion to reconsider is based on the same accusations of State
8 misconduct asserted in support of his motion to dismiss. As discussed at length above, all of
9 Numrich’s allegations of misconduct on the part of the State rely on accusations of wrongdoing
10 that are faulty and are entirely unsupported by the record.

11 Second, Numrich’s arguments in support of his motion to reconsider essentially consist
12 of the same arguments he made in opposition to the motion to amend in the first place. Def.
13 Amend. Resp. at 10, 13-17; Hinds Decl. App. Q at 8, 10-11, 16-7. This court has already
14 considered and rejected those arguments. Numrich has not presented anything new that should
15 cause this court to change its analysis or reach a different conclusion.

16 Finally, at the time of the motion to amend, the State provided a declaration that addressed
17 why the State had brought the motion how and when it did. Hinds Decl. App. H. Based on that
18 declaration and State’s counsel’s statements and candor at oral argument, this court granted the
19 State’s motion to amend, finding that there was no prejudice to Numrich and no indication that the
20 State had acted in bad faith. Numrich has failed to present any basis for this court to reconsider or
21 reverse those findings or that ruling. There has been no change in the State’s explanation of the
22 circumstances—aside from the addition of more information relevant to the issue of sanctions—
23 surrounding how and why the motion to amend was brought when it was. Compare State Reply at

1 5-6, 8-9; State Reply App. B; State MTR at 5-9; Hinds Decl. at ¶¶ 1-57; Hinds Decl. App. H; Hinds
 2 Decl. App. Q at 2-7, 17-19.

3 Nor is there any other basis for this court to reassess its conclusion that counsel for the State was
 4 credible and has always been entirely truthful with this court. Nor has Numrich provided any new
 5 compelling information, argument, or authority that should lead this court to reconsider its
 6 previous ruling granting the State's motion to amend.

7
 8 **IV. CONCLUSION**

9 For the reasons outlined above, the State respectfully requests that this court deny the
 10 defendant's motions.

11 DATED this 17th day of January, 2018.

12 DANIEL T. SATTERBERG
 13 King County Prosecuting Attorney

14
 15 By:  _____

16 Patrick Hinds, WSBA #34049
 17 Eileen Alexander, WSBA # 45636
 18 Deputy Prosecuting Attorneys
 19 Attorneys for Plaintiff
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FILED
2018 DEC 20 09:00 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 18-1-00255-5 SEA

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 REPLY TO STATE'S
RESPONSE TO DEFENDANT'S MOTION
TO DISMISS PURSUANT TO CrR 8.3 OR
TO RECONSIDER AMENDMENT

I. INTRODUCTION

The State knew of and considered the potential amendment to Manslaughter in the First Degree at the time of charging in January 2018. Thereafter, according to the State, it failed to "think of or consider" the amendment again until October 2018, when its brief was due in the Supreme Court.

Given the specific circumstances of this case, the State's failure is mismanagement warranting sanctions under CrR 8.3(b).

II. DISCUSSION

The State offers the following explanation for its delay in notifying the Court and the defense about the Manslaughter in the First-Degree Amendment:

1 the State itself simply did not think of or consider the potential amendment of
2 charges between the time of the initial filing (early 2018) and the time that counsel
3 for the State was drafting the response to Numrich’s Supreme Court briefing
4 (October 2018).

5 State’s Response to Defendant’s Motion to Dismiss Pursuant to CrR 8.3 or to Reconsider
6 Amendment (hereafter “State’s Response”) at 4.

7 The State’s failure to “not think of or consider” the Amendment constitutes
8 mismanagement in this particular case because:

- 9 • The State believed at the time of charging in early January 2018 that there was a
10 basis to charge Manslaughter in the First Degree, but the State simply elected to
11 delay a decision on whether to add the more serious charge. *See* Declaration of
12 Patrick Hinds for Purposes of State’s Motion to Reconsider ¶¶ 6-7;
- 13 • The parties spent months litigating the specific issue of the propriety of the felony
14 homicide charge;
- 15 • The intervening litigation was managed by the Court through a detailed briefing
16 schedule proposed and amended by the State with recognition that this was a
17 dispositive legal issue where the losing party would seek interlocutory review;
- 18 • The ensuing litigation involved extensive analysis of the elements of Manslaughter
19 in the Second Degree *as compared to Manslaughter in the First Degree*. In
20 briefing, and oral argument to Judge Chun, the parties repeatedly dissected the two
21 statutes and analyzed the respective *mens rea* in light of *State v. Gamble*, 154 Wn.
22 457 (2005).

23 The foregoing circumstances make this case so different.¹ If the parties had spent eight
months litigating discovery or suppression issues, the State’s delay would have an entirely different
character. But the time and resources spent litigating the propriety of the Manslaughter in the
Second Degree charge – which involved extensive consideration of Manslaughter in the First

¹ In a different case, with a different procedural posture, this delay may not constitute mismanagement. For
example, consider a sexual assault case where the case spent eight months on the case setting calendar because the
defendant was obtaining a psychosexual evaluation, before ultimately being set for trial because the parties could
not reach a plea bargain. In that case, notice of an amendment at the time of trial setting would not constitute
mismanagement.

1 Degree – make the State’s failure to notify the defense and the Court of this amendment egregious.
 2 Either the State intentionally withheld notice of the amendment, or it was grossly negligent in
 3 failing to “think of or consider” the amendment despite all that occurred between January and
 4 October 2018. Either way, the State mismanaged the case.

5 The State’s explanation about its failure to recognize the import of the defense argument
 6 about *Gamble* remains confounding. The State argues that

7 the State has never claimed that arguments regarding the applicability of *Gamble*
 8 were not raised until the Supreme Court pleadings or that *Gamble* was not at issue
 9 during the litigation before Judge Chun. Rather, the State’s point was that not all
 10 of the consequences that followed from Numrich’s argument regarding *Gamble*
 11 occurred to the State until State’s counsel had a chance to read the version of
 12 Numrich’s argument containing [sic] in his initial briefing to the Supreme Court.

13 State’s Response at 5 (internal citations omitted).

14 The defense has exhaustively detailed all of the attention that *Gamble* received in the
 15 litigation before Judge Chun. *See* Defendant’s Response to State’s Motion to Reconsider
 16 Imposition of Sanctions at 9-15. The extensive record citations and quotations were submitted to
 17 demonstrate the extent to which this issue was addressed. At the hearing on July 19, the State
 18 argued: “Let’s talk about *Gamble*. *Gamble* analyzed manslaughter in the first degree...Mr.
 19 Maybrown doesn’t believe that *Gamble* applies to manslaughter in the second degree, and he’s
 20 entitled to his opinion.” *See* Defendant’s Response to State’s Motion to Reconsider Imposition of
 21 Sanctions at 13-14 (noting State’s counsel spent more than two transcript pages addressing the
 22 defense argument about the inapplicability of *Gamble* to Manslaughter in the Second Degree).

23 The State has failed to explain *what* “consequences” about the defense’s *Gamble* argument
 it failed to realize until October 18, and *why* those consequences were not realized during the many
 preceding months of litigation. These issues were obviously heavily litigated, and it was plainly

1 obvious that the defense was distinguishing Manslaughter in the Second Degree from
 2 Manslaughter in the First Degree and that a ruling in the defense's favor would result in the
 3 dismissal of the felony homicide charge.

4 The State points to *State v. Sulgrove*, 19 Wn. App. 860 (1978) and *State v. Brooks*, 149
 5 Wn.App. 373 (2009) suggesting that dismissal under CrR 8.3(b) involves some heightened level
 6 of misconduct. State's Response at 9.

7 In *Sulgrove* the Court relied upon the trial court's conclusions about the State's
 8 "unpreparedness" at trial. *Sulgrove*, 19 Wn. App. at 862 In *Brooks* the State repeatedly failed to
 9 provide discovery items. But the essence of the mismanagement in both cases was a repeated lack
 10 of diligence by the State over a period of time, which is precisely what occurred in Mr. Numrich's
 11 case. Rather than a repeated failure to provide discovery, the State repeatedly failed to provide
 12 notice of a material amendment to the charges despite circumstances under which the State would
 13 been expected by all parties and the Court to disclose such amendment. The State's failure is
 14 significant because of all that occurred between January 2018 and October 2018.

15 The State cites to *State v. Stephans*, 47 Wn.App. 600 (1987). State's Response at 10. In
 16 *Stephans*, the State failed to provide a witness list and then gave "bad advice" to the parents of the
 17 alleged victims regarding their obligations with respect to a court order. *Stephans*, 47 Wn.App. at
 18 603. But at its core, *Stephans* hinged on a real frustration of the legal process by the State. *See id*
 19 at 604 ("[t]he effect was to frustrate the defense in its attempt to evaluate the credibility of the
 20 victims").

21 In Mr. Numrich's case, the State's tactics constitute a similar frustration of the legal
 22 process. Here, the State provided notice of the amendment on October 18 and trumpeted its
 23 amendment to the Supreme Court in a way that was obviously intended to dissuade the Court from

1 accepting review and intended to deprive Mr. Numrich of his lawful right to seek interlocutory
 2 review as certified by Judge Chun:

3 Moreover, Numrich has failed to show that discretionary review will materially
 4 advance the termination of the litigation. Even if this Court were to accept review
 5 and rule in Numrich's favor, he will still face felony manslaughter charges.
 6 Numrich's entire argument to this Court is that the State is precluded from
 7 prosecuting him for *second-degree* manslaughter. By its own terms Numrich's
 8 argument does not apply to *first-degree* manslaughter. 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. As a result, despite
 Numrich's assumption/assertion to the contrary, regardless of this Court's ruling
 on the substantive issue, he will still face a felony manslaughter charge.

9 State's Answer to Motion for Discretionary Review at 18 (October 18, 2018; filed the same day
 10 the State gave notice to the defense of the amendment)(emphasis in original; footnote omitted).

11 Further, the State repeatedly mislead this Court. First, the State led this Court and the
 12 defense to believe – through litigation involving significant resources – that resolution of the
 13 pending motion would resolve the issues of the propriety of the Manslaughter charge, when in
 14 reality the State was prepared all along to amend to add a different, more serious Manslaughter
 15 charge. Second, in order to justify its delayed amendment, the State materially mislead this Court
 16 – which did not preside over the litigation during the summer of 2018 – by arguing that the defense
 17 raised novel issues about the applicability of *Gamble* for the first time in its briefing to the Supreme
 18 Court. The State failed to disclose that this issue was at the core of the litigation in front of Judge
 19 Chun, as demonstrated by the extensive record citations and quotations in Defendant's Response
 20 to State's Motion to Reconsider Imposition of Sanctions at 9-15.

21 The State's conduct has frustrated the legal process and was clearly intended to prejudice
 22 Mr. Numrich's lawful right to seek appellate review as intended by this Court. The State's attempts
 23 to minimize the effect of its amendment on this litigation and Mr. Numrich's right to a speedy trial

1 are unavailing. The originally-anticipated Motion for Direct Discretionary Review was fully
 2 briefed and argued on November 1, 2018. But now, as a result of the State's tactics, ruling on that
 3 motion has been deferred. Mr. Numrich has to fully perfect a second Motion for Direct
 4 Discretionary Review to obtain review as intended in this Court's November 1 Order. The State
 5 has filed a third Notice of Discretionary Review to seek review of this Court's imposition of
 6 sanctions. Mr. Numrich appeared in King County Superior Court on December 5, 2018 and
 7 continued his case scheduling hearing again to February 13, 2019, which required waiving his
 8 speedy trial rights into May 2019.

9 Our Supreme Court has recognized that forcing a defendant "to waive his speedy trial is
 10 not a trivial event" and is sufficient prejudice under CrR 8.3(b). *State v. Michielli*, 132 Wn.2d 229,
 11 245 (1997)("[d]efendant was prejudiced in that he was forced to waive his speedy trial right and
 12 ask for a continuance"). The State's belated amendment has significantly delayed the ultimate
 13 resolution of this case, prejudiced his right to seek timely appellate review, and has forced Mr.
 14 Numrich to waive his speedy trial rights. Mr. Numrich's substantial rights have been prejudiced.

15 III. CONCLUSION

16 For the foregoing reasons, and in the interests of justice, this Court should exercise its
 17 discretion to dismiss the entire case, dismiss individual charges, or reconsider the Order on
 18 Motion to Amend.

19 DATED this 20th day of December, 2018.



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 21
 22 COOPER OFFENBECHER, WSBA #40690
 TODD MAYBROWN, WSBA #18557
 Attorneys for Defendant
 23

Honorable James Rogers

FILED
KING COUNTY WASHINGTON

DEC 21 2018

SUPERIOR COURT CLERK
BY David Roberts
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

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

*State Mtn to Reconsider,
Defendant 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

21

1 State v. Numrich

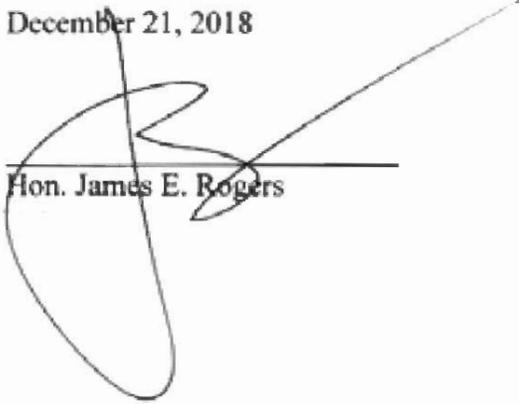
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3 The State's Motion to Reconsider is properly brought as the Court imposed terms, not
4 sanctions, *sua sponte*. The Court has reviewed the pleadings and the Motion is Denied based
5 upon the reasons listed in the original Order. The Defense Motion 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

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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

FILED
2018 DEC 31 10:57 AM
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SUPERIOR COURT CLERK
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CASE #: 18-1-00255-5 SEA

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

SUPPLEMENTAL DECLARATION OF
COOPER OFFENBECHER IN SUPPORT
OF DEFENDANT'S FEE PETITION

I, Cooper Offenbecher, do hereby declare:

1. This declaration is submitted in response to this Court's December 21, 2018 Order requesting additional information in support of Mr. Numrich's Fee Petition, which was originally filed on November 15, 2018. This Court's December 21 Order requested the defense list the number of hours for each lawyer and the subject matter they worked on. This Declaration and its attachments provide the requested information and supplement the Defendant's original Fee Petition and the Declaration of Cooper Offenbecher in Reply to State's Response to Defendant's Fee Petition ("Reply Declaration").

2. Attached to this declaration are the October 9, 2018 and November 15, 2018 billing statements that form the basis for the Fee Petition and that were referenced in the Reply

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

1 Declaration.¹ These billing statements contain the specific hours and subject matter for the
2 work performed by each attorney on the Supreme Court matter.

3 3. In summary, I spent 24.5 hours on the Supreme Court matter through November
4 1, 2018. I researched the applicable court rules and procedural requirements, edited and
5 finalized for filing the Notice for Direct Discretionary Review and attachments. I also worked
6 on drafting the Motion for Discretionary Review and Statement of Grounds for Direct Review
7 by adding substantive briefing and revising briefing that had been prepared by Mr. Maybrow,
8 conducting legal research for those briefs, and finalizing those documents for filing. I also dealt
9 with procedural issues on September 28, 2018, when the King County Superior Court Clerk's
10 office had erroneously routed the Notice of Discretionary Review to the Court of Appeals,
11 rather than the Supreme Court. This required reviewing applicable court rules and
12 correspondence and drafting a letter to the involved courts to ensure that the notice was properly
13 routed to and docketed with the Supreme Court. In addition, I reviewed and analyzed the State's
14 two responsive briefs (Answer to Motion for Discretionary Review and Statement of Grounds
15 for Direct Review), conducted necessary research and drafted the Reply brief. I also
16 coordinated attachments to the various defense pleadings, drafted a Motion for Extension of
17 Time, and prepared for and conducted oral argument to the Supreme Court Commissioner. The
18 attached statements contain the specific time and subject matter entries of my work.
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24 ¹ The October 9 billing statement was prepared weeks before the State provided notice of its
25 Motion to Amend and also contained many billing entries that were related to work in Superior Court –
26 those entries have all been completely redacted. However, the entries related to work on the Supreme
Court Motion for Direct Discretionary Review – which begin on Page 6 – are unredacted. The
November 15 billing statement contains only time entries related to the Supreme Court matter. The
October 9 billing statement includes a total of \$10,860 in fees on the Supreme Court matter, and the
November 15 billing statement includes a total of \$7,100 in fees on the Supreme Court matter.

1 4. In summary, Mr. Maybrow spent 13.6 hours on the Supreme Court matter
2 through November 1, 2018. Mr. Maybrow also worked on drafting the Motion for
3 Discretionary Review and Statement of Grounds for Direct Review, reviewed final drafts of
4 those two documents following revisions and additions that I provided, reviewed and
5 commented on the Reply brief that I drafted, and conferenced with me regarding aspects of the
6 oral argument in front of the Supreme Court Commissioner. The attached statements contain
7 the specific time and subject matter entries of Mr. Maybrow's work.

9 5. As set forth in the Reply Declaration, the substantive briefs were lengthy. The
10 Motion for Discretionary Review was 20 pages, the Statement of Grounds for Direct Review
11 was 15 pages, and the Reply in Support of Motion for Direct Discretionary Review was 10
12 pages. The defense was also required to review, analyze, and research authority cited in the
13 State's 20 page Answer to the Motion for Discretionary Review and 10 page Answer to
14 Statement of Grounds for Direct Review. The defense and State filings together included
15 hundreds of pages of appendices from the Superior Court record.

17 6. The total fee request is for \$17,960, which reflects 38.1 hours of attorney time.
18 We are also requesting reimbursement of our first filing fee payment of \$292.49, since we have
19 subsequently been required to pay a second filing fee. Accordingly, the total request for fees
20 and costs is \$18,252.49.

22 7. Mr. Numrich has actually paid our firm all of these fees and costs through funds
23 that were transferred from our firm's IOLTA account.

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

DATED at Big Sky, Montana this 31st day of December, 2018.



COOPER OFFENBECHER, WSBA #40690
Attorney for Defendant

Allen, Hansen Maybrow & Offenbecher, P.S. INVOICE

600 University Street, Suite 3020
Seattle, WA 98101

Invoice # 568
Date: 10/09/2018
Due Upon Receipt

Phillip Numrich

00268-Numrich, Phillip

Attorney	Type	Date	Description	Quantity	Rate	Discount	Total
█	█	█	█	█	\$300.00	-	█
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					\$400.00	-	
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					\$400.00	-	
CO	Service	09/06/2018	Reviewing RAPs and Direct/ Discretionary Review procedure; Reviewing pleadings/notices and other materials from prior direct/ discretionary review filings; Coordinate and analyze with Danielle on timeline, procedural and substantive issues related to Motion for Direct/ Discretionary Review; Email to Todd and Danielle regarding same	0.90	\$400.00	-	\$360.00
					\$400.00	-	
					\$600.00	-	
					\$292.49	-	
					\$400.00	-	

CO	Service	09/20/2018	Review RAPs relevant to submitting portions of the record; Conference with Danielle regarding same	0.20	\$400.00	-	\$80.00
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CO	Service	09/21/2018	Confirming appellate procedure, filing fee, and other logistics; Edit Notice; Finalize and sign Notice of Discretionary Review	0.20	\$400.00	-	\$80.00
█	█	█	█	█	\$400.00	-	█
█	█	█	█	█	\$600.00	-	█
TM	Service	09/25/2018	Draft Statement of grounds and motion	4.00	\$600.00	-	\$2,400.00
TM	Service	09/26/2018	Draft Statement of grounds and motion; near final; send to CO	7.10	\$600.00	-	\$4,260.00
CO	Service	09/27/2018	Revising Motion for Discretionary Review and shortening; Drafting Statement of Grounds for Review; Relevant legal research; Conference with Todd regarding same; Review letter from COA; Checking rules; Draft and send letter to correct routing to Supreme Court	7.50	\$400.00	-	\$3,000.00
█	█	█	█	█	\$400.00	-	█
CO	Service	09/28/2018	Revising and final editing of briefs; Coordinate filing	1.70	\$400.00	-	\$680.00
█	█	█	█	█	█	-	█

[REDACTED]						
[REDACTED]						
[REDACTED]						
[REDACTED]						
					[REDACTED]	[REDACTED]

Time Keeper	Position	Quantity	Rate	Discount	Total
Todd Maybrown	Attorney	[REDACTED]	\$600.00	-	[REDACTED]
Cooper Offerbecher	Attorney	[REDACTED]	\$400.00	[REDACTED]	[REDACTED]
Danielle Smith	Attorney	[REDACTED]	\$300.00	-	[REDACTED]
				Total	[REDACTED]
				Payment (10/23/2018)	[REDACTED]
				Balance Owing	[REDACTED]

Statement of Account

Outstanding Balance New Charges Amount in Trust Payments Received Total Credit
 ([REDACTED] + [REDACTED]) - ([REDACTED] + [REDACTED]) = [REDACTED]

Please make all amounts payable to: Allen, Hansen & Maybrown

Total re Supreme Court matter: \$10,860

Allen, Hansen Maybrown & Offenbecher, P.S. INVOICE

600 University Street, Suite 3020
Seattle, WA 98101

Invoice # 594
Date: 11/15/2018
Due Upon Receipt

Phillip Numrich

00268-Numrich, Phillip

Attorney	Type	Date	Description	Quantity	Rate	Total
TM	Service	09/27/2018	Conference and emails with CO regarding MDR docs; Final review of CO's drafts of MDR docs for filing	0.90	\$600.00	\$540.00
CO	Service	10/19/2018	Draft Motion to Continue Reply deadline on Motion for Direct Discretionary Review; Review letter granting oral argument	0.30	\$400.00	\$120.00
CO	Service	10/28/2018	Review and analyze State's Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Review; Begin drafting Reply	1.50	\$400.00	\$600.00
CO	Service	10/29/2018	Continued review and analysis of State's Answer to Motion for Discretionary Review and Answer to Statement of Grounds for Review; Reading cases cited by State in Answer pleadings; Continued drafting of Reply pleading; Review record to determine if supplemental pleadings need to be submitted as relevant to argument (Reply brief from Superior Court needed to be included); Reviewing Supreme Court correspondence and RAPs relevant to Reply brief; Editing and cutting brief to fit within page limit	8.50	\$400.00	\$3,400.00
CO	Service	10/30/2018	Conference with Todd regarding comments on Reply brief drafts; Final edits and review of Reply brief; Finalize and approve for Table of Contents and Table of Authority; Coordinate and approve filing	1.50	\$400.00	\$600.00
TM	Service	10/30/2018	Reviewing CO's Reply brief drafts; Additional review and research re issues to be addressed in Reply briefing; conf with CO re: reply briefing suggestions and	0.80	\$600.00	\$480.00

			strategy, and argument and procedural issues before Commissioner			
CO	Service	11/01/2018	Preparation, review, and outlining for Motion for Discretionary Review; Multiple conferences with Todd regarding strategy for Supreme Court argument, including discussion of how to address in light of newly received Order	1.50	\$400.00	\$600.00
CO	Service	11/01/2018	Conference call with State and Supreme Court for oral argument on phone with Commissioner	0.70	\$400.00	\$280.00
TM	Service	11/01/2018	Conf with CO prior to argument in SC given Order and certification; Research on related issues	0.80	\$600.00	\$480.00

Time Keeper	Position	Quantity	Rate	Total
Todd Maybrow	Attorney	2.5	\$600.00	\$1,500.00
Cooper Offenbecher	Attorney	14.0	\$400.00	\$5,600.00
Total				\$7,100.00
Payment (12/13/2018)				-\$7,100.00
Balance Owing				\$0.00

Statement of Account

Outstanding Balance	New Charges	Amount in Trust	Payments Received	Total Credit
(	+ \$7,100.00	)-(	+ \$7,100.00)=

Please make all amounts payable to: Allen, Hansen & Maybrow

re Supreme Court work for fee petition

1 court is unwilling to do either of these, it should still substantially reduce the fees awarded since the
 2 amount Numrich requests includes time that was, *inter alia*, unreasonable, unproductive, excessive,
 3 and duplicative. Finally, if this court does award fees in some amount, it should stay execution of
 4 the judgment pending resolution of the State's motion for discretionary review of the court's order
 5 awarding fees.

6 **II. RELEVANT PROCEDURAL FACTS**

7 On November 15, Numrich filed his combined "DEFENDANT'S FEE PETITION" and
 8 "DECLARATION OF COOPER OFFENBECHER" in support thereof.² On November 30, the
 9 State filed its "STATE'S RESPONSE TO DEFENDANT'S FEE PETITION."³ This latter
 10 document sets forth in detail the procedural facts up to that point. This documents (and attached
 11 appendices) has been previously filed under separate cover and is incorporated herein by
 12 reference.

13 On December 5, Numrich filed a "DECLARATION OF COOPER OFFENBECHER IN
 14 REPLY TO STATE'S RESPONSE TO DEFENDANT'S FEE PETITION."⁴ Since then, the
 15 parties have briefed numerous cross-motions related to this case. On December 21, this court
 16 entered a written order that:

- 17 • Denied the State's motion to reconsider the imposition of sanctions/terms;
- 18 • Denied the State's motion to strike the defense's reply declaration;
- 19 • Denied Numrich's motion to dismiss some or all of the counts;

20
 21 ² The fee petition and declaration are combined as one consecutively paginated document. As a result, except where
 22 there is a specific reason to do so, the State will not distinguish between them and will to cite to those materials as a
 whole as "Fee Pet."

23 ³ Hereinafter cited to as "State Fee Resp."

⁴ This document will hereinafter be referred to as the "reply declaration" and cited to as "Def. Reply Decl."

- 1 • Denied Numrich’s motion to reconsider the order granting the State’s motion to amend the Information;
- 2
- 3 • Ordered the defense to file an additional declaration within 10 days; and
- 4 • Ordered the State to respond within 7 days of receipt of the additional defense declaration.

5 On December 31, in accordance with the above referenced order, Numrich filed a
6 “SUPPLEMENTAL DECLARATION OF COOPER OFFENBECHER IN SUPPORT OF
7 DEFENDANT’S FEE PETITION.”⁵

8 At this point, there are three motions for discretionary review pending before the
9 Supreme Court in this matter:

- 10 1) Under 96365-7, Numrich is seeking discretionary review of Judge Chun’s August 23
11 order denying his motion to dismiss the count of second-degree manslaughter. Briefing
12 has been completed in that matter and the motion has been argued to the Court’s
13 commissioner, who has stayed the matter pending further clarity regarding the below.
- 14 2) Under 96566-8, Numrich is seeking discretionary review of this court’s November 1
15 order granting the State’s motion to amend the Information. Numrich’s motion for
16 discretionary review and statement of grounds for direct review are both currently due on
17 January 18, 2019.
- 18 3) Also under 96566-8, the State is seeking discretionary review of this court’s November 1
19 order imposing sanctions/fees based on untimely notice of its intent to seek amendment
20 of the Information. The State’s motion for discretionary review and statement of grounds
21 for direct review are both currently due on January 18, 2019.⁶

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

23 ⁵ This document will hereinafter be referred to as the “supplemental declaration” and cited to as “Def. Suppl. Decl.”
The documents attached to this declaration will be cited to as “Invoice # 568” and “Invoice # 594” based on the
number that appears near the upper right side of the first page of each.

⁶ The State’s materials were initially due in mid-December. The State, however, moved for an extension of time to
file due, in large part, to the fact that the motions that were before this court at the time could have rendered the
State’s need for interlocutory appeal moot, caused the State to voluntarily withdraw its motion for discretionary
review, or provided additional relevant information to the motion. The State’s request for an extension was granted.
In all candor, should this court not rule on the remaining motion—the fee petition—by January 14, 2019, the State
will likely seek a second extension of its filing deadline in the Supreme Court.

1 **III. ARGUMENT**

2 For the reasons discussed below, this court should decline to impose any of the fees and
 3 costs requested in Numrich’s fee petition. In the alternative, this court should defer its decision on
 4 the imposition of fees until the various motions for discretionary review pending in the Supreme
 5 Court have been resolved. If this court is unwilling to do either of these, it should award fees in an
 6 amount significantly lower than those requested by Numrich and should stay execution of the
 7 judgment until the State’s motion for discretionary review of the court’s order awarding
 8 sanctions/fees is resolved.

9
 10 **A. THE STATE ADOPTS AND INCORPORATES BY REFERENCE THE
 11 AUTHORITY CITED AND ARGUMENTS MADE IN ITS PREVIOUS
 12 BRIEFING TO THIS COURT**

12 As this court is well aware, the State has previously submitted lengthy briefing—containing
 13 both considerable citations to authority and extensive argument—either in support of, or in response
 14 to, numerous motions brought before this court. This includes:

- 15 • the “STATE’S MOTION TO RECONSIDER THE IMPOSITION OF SANCTIONS,”⁷
- 16 • the “DECLARATION OF PATRICK HINDS FOR PURPOSES OF MOTION TO
 RECONSIDER,”⁸
- 17 • the “STATE’S RESPONSE TO DEFENDANT’S FEE PETITION,”⁹
- 18 • the “STATES’ REPLY IN SUPPORT OF MOTION TO RECONSIDER THE
 19 IMPOSITION OF SANCTIONS,”¹⁰ and

20
 21 ⁷ Filed November 13. Hereinafter cited to as “State MTR.”

22 ⁸ Filed November 13.

23 ⁹ Filed November 30. As noted above, hereinafter cited to as “State Fee Resp.”

¹⁰ Filed December 10. Hereinafter cited to as “State MTR Reply.”

- 1 • the “STATE’S MOTION TO STRIKE REPLY DECLARATION OF COOPER
2 OFFENBECHER OR ALLOW STATE TO FILE SUPPLEMENTAL RESPONSE.”¹¹

3 All of these documents (and attached appendices) have been previously filed under separate
4 cover. The State incorporates the arguments and citations to authority in these memoranda by
5 reference. In the interest of brevity, however, the State will not restate them wholesale here and
6 will, instead, only provide them in summary form where necessary to make or expand upon a
7 point.

8 **B. THIS COURT SHOULD DECLINE TO IMPOSE ANY OF THE FEES AND
9 COSTS REQUESTED BY NUMRICH**

10 **1. This Court Should Reconsider Its Decision To Impose Sanctions/Terms
11 And Decline To Impose The Requested Fees And Costs On That Basis**

12 The only basis for the costs and fees requested by Numrich is the November 1 order of this
13 court. Whether this court’s order imposed “sanctions” or “terms,”¹² if this court were to reconsider
14 and reverse its decision to impose them, there obviously would not be any basis to order the fees
15 and costs addressed in Numrich’s fee petition. In the briefing referenced above, the State set forth
16 a number of reasons why this court should reconsider and reverse its decision to impose these
17 sanctions/terms against the State. State MTR at 1-9; State Fee Resp. at 5-7; State MTR Reply at 1-
18 18. For all of these reasons, this court should reconsider and reverse its decision. As a result, it
19 should also decline to impose the fees and costs requested by Numrich.¹³

20 _____
21 ¹¹ Filed December 11.

¹² The State cannot find any authority articulating a difference in the relevant legal analysis if the court’s order is
22 characterized as imposing “sanctions” versus “terms.”

¹³ While the State believes that this court should reconsider its previous order and should deny fees and costs as a
23 result, the State also understands that this court has denied the State’s motion to reconsider on these grounds in its
December 21 order. The State is not asserting any new argument on this point and is not seeking to relitigate the
issues that this court has already ruled on. The State has included this short summary simply to make clear that it
has not waived or abandoned the argument.

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2. This Court Should Decline To Impose The Requested Fees And Costs Because Numrich's Fee Petition Is Still Insufficient

As noted in the State's previously filed briefing, it is a well-established rule in Washington that, even where a party is entitled to a fee award—be it under the authority of a contract provision, statute, court rule, court order, or recognized ground in equity—that party still bears the burden of establishing that the fees actually requested are reasonable. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 2d 141, 151, 859 P.2d 1210 (1993); Berryman v. Metcalf, 177 Wn. App. 644, 657, 312 P.3d 745 (2013). In a context such as this one, the party seeking to establish the reasonableness of requested fees must demonstrate both (1) that his attorneys' rates are reasonable and (2) that the work they did was reasonable. Berryman, 177 Wn. App. at 661-64; Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Here, despite being given three opportunities to provide proper support for his fee petition, Numrich has failed to convincingly establish either.

First, Numrich has failed to establish that his attorneys' rates are reasonable. In this context, neither the fact that a lawyer has actually charged a client a given hourly rate, nor the fact that the client has paid it, necessarily makes that rate reasonable in the context of a fee petition. Bowers, 100 Wn.2d at 597. Rather, the requesting party still bears the burden of establishing that the requested hourly rate is in line with the fee customarily charged in the locality for similar legal services. Blum v. Stenson, 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). This must consist of something beyond the mere unsupported declaration of the counsel whose hourly rate is in question. Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998); SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

Here, the only evidence presented by Numrich that his attorneys' rates are reasonable is the repeated—but unsupported—statement of one of those attorneys that they are. Fee Pet. at 4 ¶

1 5; Def. Reply Decl. at 3 ¶ 7. Numrich has failed to provide any evidence supporting this self-
2 serving statement of opinion or any evidence establishing that the hourly rates claimed are
3 reasonable or in line with the fees customarily charged in the locality for similar legal services
4 performed by attorneys with similar experience and skill. In this context, Numrich cannot meet
5 his burden of showing that his attorneys' rates are reasonable by simply having one of them state
6 that he thinks that they are.

7 Second, Numrich has still failed to establish whether the documents he has provided listing
8 the hours worked are based on contemporaneously kept records. This is of more than academic
9 concern. Courts reviewing fee petitions have shown a strong preference for contemporaneous
10 records documenting the hours worked because attempts to reconstruct hours after the fact are
11 generally considered unreliable for purposes of imposition of attorneys' fees. Mahler, 135 Wn.2d at
12 434; Johnson v. State Department of Transportation, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013).
13 As a result, such "reconstructed hours 'should be credited only if reasonable under the
14 circumstances and supported by other evidence such as testimony or secondary documentation.'" Id.
15 (quoting Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1557 (9th Cir.
16 1989)).

17 Here, Numrich has finally submitted billing statements that contain information regarding
18 both the time his attorneys spent and what they spent that time on as required by Bowers, et al. But
19 as the party bearing the burden of proof, Numrich must also establish either that the hours he seeks
20 fees for are based on billing records that were contemporaneously created or he must provide an
21 explanation as to why reconstructed hours were used along with additional evidence supporting
22 them. And Numrich has still failed to provide any information as to either how his attorneys kept
23 track of their hours worked or as to whether the billing records he has submitted are based on hours

1 tracked contemporaneously or reconstructed later. As a result, his fee petition is insufficiently
2 documented.

3 Despite having been given three opportunities to submit materials in support of his fee
4 petition, Numrich has still not provided documentation that is legally sufficient to establish the
5 reasonableness of the fees he is requesting. As Numrich bears the burden of establishing this, his
6 request for fees should be denied because he has failed to do so.

7
8 **C. IN THE ALTERNATIVE, THIS COURT SHOULD DEFER THE
9 IMPOSITION OF TERMS UNTIL THE SUPREME COURT HAS RULED
10 ON THE PENDING MOTIONS FOR DISCRETIONARY REVIEW**

11 Even if this court is unwilling to outright deny Numrich's fee petition, it should still defer its
12 decision on the amount of terms to impose until the Washington Supreme Court has decided
13 whether or not to grant discretionary review in this matter. First, the State's motion for
14 discretionary review is based, in large part, on the assertion that this court erred in imposing any
15 terms at all.¹⁴ If the Supreme Court were to grant review on that issue, its decision could ultimately
16 render moot the question of the amount of terms appropriate. Conversely, if the Supreme Court
17 denies review, then the issue of the amount of terms appropriate would be unquestionably ripe.

18 Second, this court's decision to impose terms appears to be based, in large part, on the
19 premise that the State's amendment to the charges will necessarily moot Numrich's motion for
20 discretionary review and his attorneys' work on that motion—implicating both hours of time and
21 fees—will have, therefore, been wasted. But that is not necessarily the case. Given Numrich's
22 pending motions for discretionary review, it is entirely possible that the Supreme Court's decision

23 ¹⁴ As noted in prior briefing, given the procedural posture of this case, the State was compelling to file its notice of discretionary review within 30 days of the November 1 entry of this court's original order imposing terms—despite the fact that the amount of terms had not yet been determined—or else it risked waiving the ability to seek appellate review of the issue.

1 will establish that the State’s motion to amend did not have any real impact on the motion for
 2 discretionary review. For example, the Supreme Court could grant review on the question of
 3 whether the “general-specific rule” precludes the State from prosecuting Numrich for *both* first- and
 4 second-degree manslaughter. On the other hand, the Supreme Court could deny discretionary
 5 review for reasons entirely unrelated to the amendment to the charges.¹⁵ Under the former
 6 example, Numrich would get exactly what he is seeking—discretionary review of the substantive
 7 question of whether the “general-specific rule” precludes the State from prosecuting him for
 8 manslaughter—despite the amendment to the charges. Under the latter example, the motion for
 9 discretionary review would be denied for reasons that have absolutely nothing to do with the
 10 amendment to the charges.

11 As a result, even if this court is unwilling to outright deny Numrich’s fee petition, it should
 12 still defer its decision as to the amount of terms until the Supreme Court has ruled on the pending
 13 motions for discretionary review.¹⁶ Those rulings may very well render the amount of terms a moot
 14 issue. Furthermore, even if that were not the case, here the imposition of sanctions was based on the
 15 premise that the amendment to the charges necessarily caused a “waste” of attorneys’ time and fees.
 16 But, as the examples above illustrate, the actual decision of the Supreme Court—and the basis for
 17
 18

19 ¹⁵ The State did argue in its answer to Numrich’s motion for discretionary review that the amendment to add first-degree
 20 manslaughter would make discretionary review inappropriate under RAP 2.3(b)(4). As discussed in previous briefing,
 21 however, this was merely a part of a much larger State’s argument as to why discretionary review was inappropriate. As
 part of this, the State specifically and explicitly argued that—even if the State did not amend to add first-degree
 manslaughter charges—review would still be inappropriate under RAP 2.3(b)(4).

22 ¹⁶ Should this court decide to defer its decision as to the amount of terms until the Supreme Court has ruled on the
 23 pending motions for discretionary review, the State would ask that the court explicitly order that it is doing so. The
 State has previously moved for an extension of time to file its motion for discretionary review in the Supreme Court
 in part because the amount of terms were still to be determined. In this context, either an order fixing the amount of
 terms or an order deferring that decision until the Supreme Court has ruled on the pending motion would sufficiently
 determine the issue such that the State’s motion for discretionary review could proceed.

1 it—may very well establish that the amendment did not actually have any such effect. And, if that
 2 were the case, there would be no basis to impose terms.

3
 4 **D. IF THIS COURT AWARDS TERMS, IT SHOULD SUBSTANTIALLY
 REDUCE THE AMOUNT AWARDED FROM THAT REQUESTED BY
 5 NUMRICH**

6 If this court is unwilling to either outright deny Numrich’s fee petition or to defer its
 7 decision on the amount of terms, it must still review the fees requested by Numrich to determine
 8 whether he has met his burden of demonstrating that his specific requests are reasonable. Here, this
 9 court should substantially reduce any amount awarded because Numrich has failed to meet that
 10 burden.

11 As noted above, the party seeking fees must establish that the work done by his attorneys—
 12 and the time they spent on it—was reasonable. Berryman, 177 Wn. App. at 661. In this context,
 13 the amount of time actually spent and billed to a client is relevant, but not dispositive. Id. This is
 14 because a court considering a fee request can and should exclude time spent on work that is
 15 unproductive, excessive, and/or duplicative. Bowers, 100 Wn.2d at 597. See, also, Mahler, 135
 16 Wn.2d at 434 (courts exclude wasteful and duplicative hours from fees awarded); Ewing v.
 17 Glogowski, 198 Wn. App. 515, 521, 394 P.3d 418 (2017 (courts limit fees to those hours reasonably
 18 expended); Berryman, 177 Wn. App. at 663 (courts exclude time that was unproductive or
 19 excessive). Furthermore, work properly characterized as clerical, secretarial, or ministerial is not
 20 compensable as attorneys’ fees. See Absher Construction Company v. Kent School District No.
 21 415, 79 Wn. App. 841, 917 P.2d 1086 (1995); Matter of Estate of Mathwig, 68 Wn. App. 472, 476,
 22 843 P.2d 1112 (1993). Tasks such as reviewing court-generated notices, filing documents with the
 23 court, communicating with court staff, scheduling, and corresponding regarding deadlines are
 clerical in nature.

1 In addition, a court considering a fee petition can and should reject fees set forth in “block-
 2 billed” entries. “‘Block billing’ is the process of incorporating all sorts of undifferentiated activities
 3 in a single block of time.” Philip A. Talmadge & Thomas M. Fitzpatrick, The Lodestar Method
 4 for Calculating A Reasonable Attorney Fee in Washington, 52 Gonz. L. Rev. 1, 6 (2017). Courts
 5 have noted that block billed entries make it difficult, if not impossible, to determine how much
 6 time was spent on particular activities and, therefore, make it impossible to evaluate the
 7 reasonableness of the time claimed. Berryman, 177 Wn. App. a 663; Welch v. Metro Life
 8 Insurance Co., 480 F.3d 942, 948 (9th Cir. 2007). As a result, courts routinely reduce fees when
 9 they are based on block billed entries. Welch, 480 F.3d 942; Hensley v. Fischer v. SJB-P.D. Inc.
 10 214 F.3d 115, 1121 (9th Cir. 2000).

11 Here, this court should substantially reduce any fees awarded below that requested by
 12 Numrich based on a number of the above grounds.

13 First, as noted above, this court can and should reject or—at the very least reduce—
 14 requested fees that are set forth in block billed entries. Here, virtually all of the entries in the
 15 billings invoices provided by Numrich fall into this category. For example, the billing entry for
 16 September 27 indicates that Mr. Offenbecher spent 7.50 hours:

17 Revising Motion for Discretionary Review and shortening; Drafting Statement of
 18 Grounds for Review; Relevant legal research; Conference with Todd regarding
 19 same; Review letter from COA; Checking rules; Draft and send letter to correct
 routing to Supreme Court

20 Invoice # 568 at 7. No additional information is provided as to how much of the 7.5 hours was
 21 spent on each of the different items listed. Id. Similarly, the billing entry for October 29 indicates
 22 that Mr. Offenbecher:

23 Continued review and analysis of State’s Answer to Motion for Discretionary
 Review and Answer to Statement of Grounds for Review; Reading cases cited by
 State in Answer pleadings; Continued drafting of Reply pleading; Review record to

1 determine if supplemental pleadings need to be submitted as relevant to argument
2 (Reply brief from Superior Court needed to be included); Reviewing Supreme Court
3 correspondence and RAPs relevant to Reply brief; Editing and cutting brief to fit
4 within page limit

5 Invoice # 594 at 1. Aside from the information that Mr. Offenbecher spent 8.5 hours total that day,
6 no information was provided as to how much time was spent on each of the different items listed.

7 Id.

8 While the two cited examples are particularly egregious, virtually all of the entries in the
9 billing invoices provided by Numrich are vague and/or block-billed to the point that it is impossible
10 to evaluate the reasonableness of the time claimed. As a result, Numrich cannot meet his burden of
11 establishing that his attorneys' fees set forth in block billed entries are reasonable and these fees
12 should be reduced or rejected outright.

13 Second, as noted above this court can and should reject or reduce requested fees that are
14 duplicative. In this context, duplicative work includes work that has been "overstaffed." Berryman,
15 177 Wn. App. at 662. While counsel for a party may appreciate or prefer the camaraderie, security,
16 or assistance of having multiple attorneys work on a project, that does not make such staffing
17 reasonable in the context of a fee petition. Id. See, also, Democratic Party of Washington State v.
18 Reed, 388 F.3d 1281, 1286 (9th Cir. 2004) ("[C]ourts ought to examine with skepticism claims that
19 several lawyers were needed to perform a task, and should deny compensation for...needless
20 duplication...")

21 Here, the billing invoices provided by Numrich shows much work that appears needlessly
22 duplicative and overstuffed. For example, the records indicate that on September 25, Mr.
23 Maybrown billed for 4.0 hours spent drafting the statement of grounds for direct review and motion
for discretionary review. Invoice # 568 at 7. The following day (September 26), he billed for
another 7.1 hours on the same tasks and apparently had the two briefs in a "near final" condition.

STATE'S RESPONSE TO SUPPLEMENTAL
DECLARATION IN SUPPORT OF DEFENDANT'S
FEE PETITION - 12

State's Answer to Motion
for Discretionary Review

Appendix - 430

Dan Satterberg, Prosecuting Attorney
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Seattle, Washington 98104
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1 Id. Despite this “near final” condition, however, the next day (September 27) Mr. Offenbecher
 2 billed for 7.5 hours spent “revising” the motion for discretionary review,” “drafting” the statement
 3 of grounds for direct review,” conducting legal research, and conferencing with Mr. Maybrown. Id.
 4 That same day, Mr. Maybrown also billed for 0.9 hours spent conferencing and emailing with Mr.
 5 Offenbecher regarding these same documents and *reviewing Mr. Offenbecher’s drafts of them.*
 6 Invoice # 594 at 1. Then, the next day (September 28), Mr. Offenbecher spent another 1.7 hours
 7 revising and editing them again. Invoice # 568 at 7.

8 While the above example (involving 21.2 hours of work over four days and \$10,800 in
 9 claimed fees) is particularly egregious, many of the entries in the billing invoices provided by
 10 Numrich involve hours wherein his attorneys appear to have duplicated work, had multiple
 11 attorneys work on the same task, and billed for time they spent conferring with each other.¹⁷
 12 Particularly given the vague and block billed nature of the invoices, Numrich cannot establish that
 13 these hours are anything other than duplicative and overstaffed. As a result, the fees based on them
 14 should be reduced or rejected outright.

15 Third, as noted above, this court can and should reject or reduce requested fees stemming
 16 from tasks that are clerical, secretarial, or ministerial in nature. Tasks such as reviewing court-
 17 generated notices, filing documents with the court, communicating with court staff, scheduling, and
 18 corresponding regarding deadlines are clerical in nature.

19 Here, the invoices provided by Numrich shows billing for much work performed by Mr.
 20 Offenbecher (and billed at his claimed \$400 per hour attorney rate) that appears to fall into these
 21 categories. For example, numerous billing entries reference time spent “coordinat[ing] filing.”

22 _____
 23 ¹⁷ On the following days, Mr. Offenbecher billed for time he spent conferring or communicating with other attorneys
 in his firm: September 6 and September 20. Invoice # 568. On the following days, Mr. Offenbecher and Mr.
 Maybrown each billed for time they spent conferring with the other: September 27, October 30, November 1.
 Invoice # 568; Invoice # 594.

1 Invoice # 568; Invoice # 594. Again, given the vague and block billed nature of the invoices
2 provided, it is impossible to tell how much time was spent on such clerical and ministerial tasks. As
3 the party bearing the burden, however, that ultimately falls on Numrich. As a result, the fees based
4 on hours involving such work should be reduced or rejected outright.

5 Fourth, this court can and should reject or, at the very least reduce, the fees requested by
6 Numrich because—when viewed in light of the actual work product produced—they are based on
7 hours that were unreasonable, unproductive, and excessive. As an initial matter, the billing
8 invoices submitted by Numrich reflect 1.3 hours of work (and involve \$520 in claimed fees) that
9 appear to be directly related to the drafting and filing of Numrich’s notice for discretionary review.
10 That document, however, is extremely short and consists entirely of a one page notice—made up
11 almost entirely of standard language—along with attachments. A copy is attached as Appendix A.
12 In that context, attorneys’ fees in the amount of \$520 to file a one-page, boiler-plate document
13 seems unreasonable and excessive.

14 Similarly, the billing invoices submitted reflect 21.2 hours of work between September 25
15 and September 28 (and involving \$10,800 in claimed fees) that appear to be directly related to the
16 drafting and filing of Numrich’s motion for discretionary review and statement of grounds for direct
17 review on September 28. Invoice # 568; Invoice # 594. In this case, however, the briefing filed in
18 the Supreme Court consists of materials that are virtually identical to materials contained in briefing
19 that was previously filed in the Superior Court as part of the litigation of Numrich’s motion to
20 dismiss before Judge Chun. More specifically, both Numrich’s “MOTION FOR
21 DISCRETIONARY REVIEW”¹⁸ and “STATEMENT OF GROUNDS FOR DIRECT REVIEW”¹⁹

22 _____
23 ¹⁸ Appendix B. In the interest of brevity, the State is attaching only the substance of Numrich’s motion and omitting
the attached appendices.

¹⁹ Appendix C

1 appear to be made up of briefing that was either directly “cut-and-pasted” or very closely
 2 paraphrased from his “DEFENDANT’S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER)
 3 AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF,”²⁰ “REPLY IN
 4 SUPPORT OF DEFENDANT’S MOTION TO DISMISS COUNT 1 (MANSLAUGHTER),”²¹
 5 “DEFENDANT’S SURREPLY IN SUPPORT OF MOTON TO DISMISS COUNT 1,”²² and
 6 “OBJECTION TO STATE’S PROPOSED ORDER AND MOTION FOR CERTIFICATION FOR
 7 REVIEW PURSUANT TO RAP 2.3(b)(4).”²³ Given that virtually all of the briefing filed in the
 8 Supreme Court on September 28 was previously filed in essentially the same form in another court,
 9 the 21.2 hours (and \$10,800 in fees) claimed necessary to turn it into Supreme Court briefing is
 10 unreasonable, unproductive, and excessive.

11 While the above are particularly egregious examples, many of the entries in the billing
 12 invoices provided by Numrich involve the expenditure of hours and fees that appear unreasonable,
 13 unproductive, and excessive when compared to the work product that was actually produced. As a
 14 result, the fees based on them should be reduced or rejected outright.

15 Finally, this court should deny the fees requested by Numrich for work done after the court
 16 granted the State’s motion to amend. In its November 1 order, this court ordered that it was
 17 imposed terms “measured in the attorneys’ fees for the defense work on the discretionary appeal to
 18 this point.” Despite this, Numrich seeks fees in the amount of \$1,360 for 3.0 hours of work done on
 19 November 1 *after* the court’s order was entered. Invoice # 594. Numrich has not provided any
 20

21 _____
²⁰ Appendix D

22 ²¹ Appendix E

23 ²² Appendix F

²³ Appendix G

1 compelling reason for this court to expand the time frame of the attorneys' fees included in the
 2 terms, nor has the court done so. In this context, those fees should be excluded.

3
 4 **E. IF THIS COURT DOES AWARD FEES IN SOME AMOUNT, IT SHOULD
 STAY EXECUTION OF THE JUDGMENT PENDING RESOLUTION OF
 5 THE STATE'S MOTION FOR DISCRETIONARY REVIEW**

6 Here, as noted above, the State is seeking discretionary review of this court's decision to
 7 impose terms. As a result, if this court does determine the amount of fees to award at this time, it
 8 should stay execution of the judgment until the State's motion for discretionary review has been
 9 resolved.²⁴ If the State prevails in its motion in whole or in part, then the judgment will never be
 10 executed or will have to be modified. (In that event, if the judgment has already been executed, it
 11 would require the defense to repay the State.) In contrast, if the State does not prevail, the judgment
 12 can simply be executed at that time. (Given its status and practical realities, there are obviously not
 13 the concerns that the State will flee, attempt to secrete assets, fail to respond to process, or do any of
 14 the other acts that might normally cause a court concern in staying the execution of a judgment
 15 pending appellate review.) In this context, executing any judgment at this time runs the very real
 16 risk of needlessly further complicating matters in this case. In contrast, staying execution poses no
 17 such risk and does not prejudice Numrich in any way.

18 **IV. CONCLUSION**

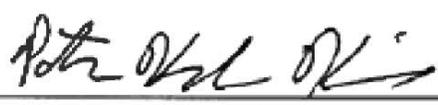
19 For the reasons outlined above, the State respectfully requests that this court deny
 20 Numrich's fee petition. In the alternative, this court should defer its decision on the imposition of
 21 terms until the various motions for discretionary review pending in the Supreme Court have been
 22

23 ²⁴ The State would note that there is also the possibility that the amount of fees actually imposed may be such that
 the State would opt to simply pay them rather than to incur the expense of further litigation of the matter. In that
 event, the motion would be resolved via the State simply moving to withdraw it.

1 resolved. If this court is unwilling to do either of these, it should award fees in an amount
2 significantly lower than those requested by Numrich and should stay execution of the judgment
3 until the State's motion for discretionary review of the court's order awarding sanctions/fees is
4 resolved.

5 DATED this 7th day of January, 2019.

6 DANIEL T. SATTERBERG
7 King County Prosecuting Attorney

8
9 By: 
10 Patrick Hinds, WSBA #34049
11 Eileen Alexander, WSBA # 45636
12 Deputy Prosecuting Attorneys
13 Attorneys for Plaintiff
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Honorable James E. 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

DEFENDANT'S REPLY TO STATE'S
RESPONSE TO SUPPLEMENTAL
DECLARATION IN SUPPORT OF
DEFENDANT'S FEE PETITION

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

This Court's December 21, 2018 Order requested that Numrich refile "listing the number of hours for each lawyer and the subject matter they worked upon." Order at 2. Mr. Numrich has done exactly what the Court requested. In the interest of transparency, efficiency, and to avoid further procedures or litigation (as the parties have significant litigation remaining in the Supreme Court), counsel elected to simply submit fully unredacted billing entries for all work done on the

1 Supreme Court matter.¹ Accordingly, the Court should not engage in the “detailed analysis of
2 each expense” (*Steele, supra*) as requested by the State.

3 Notably, although the State repeatedly asserts that the defense has failed to meet his
4 “burden” (*see generally* State’s Response at 10-16), the State never affirmatively argues that 38.1
5 hours of attorney time *is actually unreasonable* given the scope and nature of the litigation project.
6 To the contrary, 38.1 hours – the equivalent of approximately one work week of attorney time – is
7 a reasonable amount of time considering the amount of briefing produced (20 page Motion for
8 Discretionary Review; 15 page Statement of Grounds for Direct Review; 10 page Reply Brief);
9 the amount of supplemental materials (hundreds of pages of appendices); the amount of briefing
10 produced by the State (20 page Answer to Motion for Discretionary Review and 10 page Statement
11 of Grounds for Direct Review); the complexity of the litigation; and the importance of the
12 consequences to the client (Mr. Numrich has no prior criminal history and faces a felony
13 manslaughter charge).

14 The defense is requesting fees for 3.0 hours of work done on November 1 related to the
15 oral argument in front of the Supreme Court Commissioner after this Court’s order was entered.
16 Contrary to the State’s claim, the defendant’s original Fee Petition highlighted this and
17 acknowledged that it was beyond the scope of the Court’s original Order. Fee Petition at 6-7. As
18 indicated in the Fee Petition, this Court originally assumed that the second certification could
19

20 ¹ The Court’s decision to award fees was *neo sponte*. Although the defense has not requested fees related to the
21 preparation of its fee request, Washington law provides for the recoupment of such fees. “The general rule is that
22 time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the
23 fee shifts to the opponent under fee shifting statutes.” *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d
361, 378, 798 P.2d 799, 807 (1990) (party entitled to attorney fees on remand for time spent establishing fees on
claim for which attorneys’ fees were awarded). *See also Costanich v. Washington State Dep’t of Soc. & Health
Servs.*, 164 Wn.2d 925, 933, 194 P.3d 988, 992-93 (2008) (where Department challenged fee award on appeal,
claimant was entitled to fees for defending fee award on appeal); *United States v. \$60,201.06 U.S. Currency*, 291
F.Supp.2d 1126, 1131 (C.D. Cal. 2003) (“[t]he time attorneys spend in establishing they are entitled to a fee award
is generally compensable”).

1 simply he added to the original pending Motion for Direct Discretionary Review. Accordingly,
2 the defense respectfully requested fees for the work related to the oral argument, because in light
3 of the Commissioner's subsequent Order, a second oral argument will need to be completed on
4 the new Motion for Direct Discretionary Review.

5 Contrary to the State's suggestion, there is no prohibition on "block billing." See, e.g.
6 *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007)(vacating "the district court's 20
7 percent across-the-board reduction for block billing" and remanding for an explanation for "how
8 or why ... the reduction ... fairly balance[s] those hours that were actually billed in block format")
9 quoting *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001)). The State cites to a law review
10 article written by two attorneys in support of the State's objection to its characterization of
11 counsel's billing entries as "block billing." State's Response at 11 (citing Philip A. Talmadge &
12 Thomas M. Fitzpatrick, The Lodestar Method for Calculating A Reasonable Attorney Fee in
13 Washington, 52 Gonz. L. Rev. 1, 6 n.25 (2017)). The State's selective quotation significantly fails
14 to include the subsequent sentences, which clarify that

15 In the authors' view, *a certain amount of block billing may be a practical*
16 *necessity* because keeping timesheets that constitute a running log could be
17 impractical. However, block billing must be sufficiently detailed to satisfy the
18 applicant's "burden of documenting the appropriate hours expended in the
19 litigation."

20 *Id.* (quoting *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007)) (emphasis supplied).

21 The State's analysis of the billing entries is resulting in a fee review that is "overly
22 burdensome" and inconsistent with Washington law.² The defense is not required to produce

23 ² For example, the State has seized on a note in Mr. Maybrown's 9/26/18 billing entry that the drafts were "near
final." Undersigned counsel has recently reviewed the internal correspondence between Mr. Offenbecker and Mr.
Maybrown on September 26 and the corresponding drafts exchanged, and assures the Court that there was
significant subsequent necessary work completed by Mr. Offenbecker on September 27, 2018, including
completing the "Issues Presented for Review," adding necessary sections to the briefs, cutting material to fit the

1 historical drafts of documents to demonstrate how much briefing counsel completed on a given
2 day, nor is the defense required to list out every case that counsel read on Westlaw when
3 conducting relevant "legal research." Rather, the defense has submitted bills that provide a
4 reasonable basis to assess the work performed in this complex case. 38.1 hours is a reasonable
5 amount of attorney time given the nature and scope of this litigation project.

6 The defense respectfully requests the Court issue the requested fees and costs.

7 Respectfully submitted this 9th day of January, 2019.

8
9 

10 COOPER OFFENBECHER, WSBA #40690
11 TODD MAYBROWN, WSBA #18557
12 Attorneys for Defendant

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page limit, and including substantial changes and revisions to the Statement of Grounds for Direct Review. In addition to the other procedural issues listed for September 27, 7.5 hours approximately one business day is a reasonable amount of time to complete briefing, research and the other attendant tasks with filing complex and lengthy documents in the Washington Supreme Court.

Presiding Judge James Rogers

FILED
KING COUNTY, WASHINGTON
JAN 28 2019
SEA
SUPERIOR COURT CLERK

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

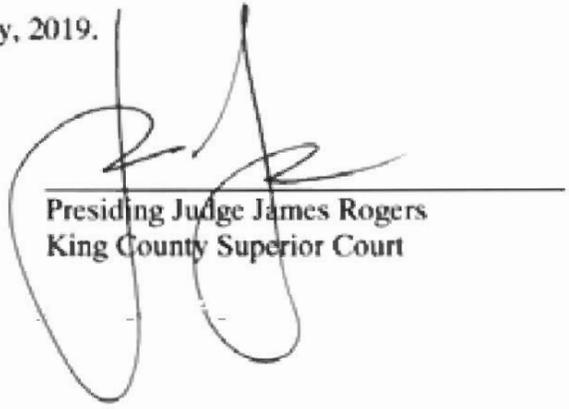


1 2. The billing rates of Mr. Numrich's attorneys – \$600 for Mr. Maybrown and \$400
2 for Mr. Offenbecher – are reasonable rates for litigation attorneys practicing in downtown
3 Seattle with commensurate experience, and in light of the novelty and difficulty of the questions
4 involved and the seriousness 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
24
25 *The Court reviewed all of*
extensive pleadings, the
true billings in the
case, and declines
to re-review any of its
earlier decisions.

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 Aiki/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"). Aiki 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 attaching 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.

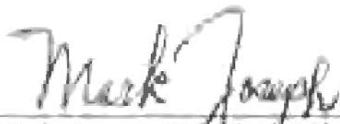
In the course of my investigation, I reviewed the analysis of Erich Smith, trenching technical expert for WSDOT. Smith stated, based upon his experience, the SpeedShore Tab Data and WSDOT regulations, the soil type and conditions at the Subject Premise, and the trench dimensions, that a minimum of four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

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

April 16, 2019 - 3:37 PM

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Appellate Court Case Title: State of Washington v. Phillip Scott Numrich
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