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SUPREME COURT FOR STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH THOMAS McENROE AND
MICHELE KRISTEN ANDERSON,

Defendants.

**STATE'S SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW**

CAPITAL CASE

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A. SUPPLEMENTAL ARGUMENTS IN SUPPORT OF REVIEW

1. THE NEED FOR REVIEW IS EVEN MORE APPARENT
IN LIGHT OF THE TRIAL COURT'S LATEST ORDER.

The trial court's "Order Striking the Notice of Intent to Seek the Death Penalty" was read from the bench on January 31, 2013. This was the first time the State heard that the court was contemplating striking the death penalty from this case on a basis never argued by any of the five defense lawyers over the course of the five years this case has been pending trial. The ruling is 13 pages long. *See* Appendix A.

Subsequently, in denying the State's request for a stay of proceedings pending discretionary review, the trial court offered nine pages of additional justification for its original ruling, based on its review of the State's appellate challenge to its ruling. *See* Appendix B, at 3-11. Although it is somewhat unusual for a trial court to bolster its decision based on pleadings subsequently filed in the appellate court, and although the State was again not invited to comment on the "merits" portion of the court's order denying a stay, the trial court's newest order does provide a clearer window into its thinking than did the original order.

Based on that new ruling, it is now apparent that the trial court's ruling depends on two distinct theories, one of which is patently flawed, the other of which is erroneous, but presents a broader constitutional issue.

The trial court's first theory is that the King County Prosecutor will always file a death penalty notice where the evidence of guilt is strong, no matter the quality of the mitigating circumstances. This theory is utterly false; the State always considers mitigating circumstances in light of the totality of the evidence. The court's mistake turns on a fundamentally flawed assumption stemming from ambiguity in a phrase -- "the strength of the case" -- repeatedly used by the trial court, but without recognition that the phrase was ambiguous, and without recognition that the State interpreted the phrase differently. What the court apparently meant by the phrase "the strength of the case" is: "the strength of the state's case as to the elements necessary to prove the crime charged." Under the trial court's theory, (i) "the strength of the case" as to guilt is distinct from the "strength of the case" as to moral culpability, and (ii) the State erroneously files a notice whenever it has strong evidence of guilt.

Unlike the trial court, however, the State does *not* divide the "strength of the case" into disparate categories, one limited to evidence proving guilt and the other limited to evidence establishing moral culpability. Rather, the State recognizes that evidence establishing guilt is also relevant to the moral culpability of the defendant. If the evidence as it relates to both guilt *and* moral culpability is not sufficiently high, the State does not file a notice of intention to seek the death penalty. On the

other hand, if the Prosecutor concludes that the evidence of guilt and moral culpability *are* sufficiently high, he compares that evidence to evidence of mitigating circumstances. If the mitigating circumstances are not sufficient to merit leniency, the State files a notice. If the evidence in mitigation is sufficient, the State does not file a notice. Thus, to the extent the trial court and the State were using the same ambiguous phrase in different ways, semantics appears to have misled the trial court into making an erroneous ruling. This error is perhaps understandable since the trial court's ruling occurred without input or briefing from either party, as detailed below.

The trial court's second theory, however, does not turn on ambiguity or on a misunderstanding of the Prosecutor's actual decision-making. Rather, this theory is predicated on a belief that prosecutors may not exercise their discretion to seek the death penalty only sparingly. This second theory posits that a prosecutor errs if he *refrains* from filing a notice of intent to seek the death penalty where only the bare minimum evidence required to prove guilt and aggravating circumstances has been met. Stated differently, the trial court has ruled that the Equal Protection Clause is violated if a prosecutor does not mechanically file a death notice against *every* defendant where the evidence establishes the elements of first degree premeditated murder with aggravating circumstances, and

against whom there is not sufficient evidence of mitigation to warrant leniency. In short, the court ruled that a prosecutor violates equal protection by not seeking death more often.

This second theory involves, in the State's judgment, a flawed interpretation of the Equal Protection Clause, and is an unwarranted intrusion into the discretion allocated to elected executive branch officials to decide which cases should be submitted to a jury for consideration of the death penalty. Discretion is given to reduce the spectrum of cases and defendants – only the worst of the worst – where the death penalty would be justified, and to reduce the overall numbers of people facing death. An exercise of discretion that limits application of the death penalty in this way is consistent with federal constitutional mandates and can hardly be said to violate Equal Protection Clause rights. The State respectfully believes that the trial court erred in this respect.

With this basic framework in mind, the State makes the following additional observations as to the need for immediate review in this case.

2. IMMEDIATE REVIEW IS WARRANTED EVEN
THOUGH THE TRIAL DATE HAS BEEN STRICKEN.

McEnroe suggests that review is not needed because his trial date has been stricken. *See* "McEnroe's Response to State's Emergency Motion for Stay of Superior Court's Order," at 2-3. That claim is flawed.

The State initially sought emergency and expedited review because a failure to quickly reverse the trial court's order would mean that the trial "already too long delayed"¹ would be delayed yet again. Unfortunately, further delay is now inevitable. It does not follow, however, that review has become unnecessary, or that further delay should be interminable. On the contrary, the trial court's ruling striking the death penalty turns on two flawed legal rulings that will thwart prosecution as required under existing law. The striking of the trial date does not alter this fundamental injustice.

3. THIS RULING IS ALREADY AFFECTING ANOTHER CAPITAL CASE.

McEnroe suggests that immediate review is unnecessary because he will plead guilty and the State can appeal. *See* "McEnroe's Response to State's Emergency Motion for Stay of Superior Court's Order," at 2-3. McEnroe is incorrect. The trial court's ruling dismissing the notices of intent to seek the death penalty against both defendants will affect the prosecution of at least one other capital murder defendant.

Christopher Monfort is charged with capital murder for assassinating Seattle Police Officer Timothy Brenton by shooting him in the head with an assault rifle on Halloween night in 2009. Monfort's trial is scheduled to begin in September. Monfort's defense team has now

¹ Appendix B, at 10.

requested public funding to bring a motion to dismiss the notice of intent to seek the death penalty based on Judge Ramsdell's ruling. *See* Appendix C (Declaration of John Castleton). The effect on these three cases – and perhaps others – is sufficient reason to grant review.

4. THE TRIAL COURT'S ERRORS MEET THE CRITERIA FOR REVIEW UNDER RAP 2.3(b)(1) AND (2).

The trial court's ruling constitutes obvious error because it intrudes in a wholly unprecedented way upon the Prosecutor's executive discretion in making the functional equivalent of a charging decision, *i.e.*, by dictating the manner in which the Prosecutor may consider evidence in deciding whether to seek the death penalty. Moreover, the trial court's ruling renders further proceedings useless because it has nullified the State's right to present the question of capital punishment to a jury as the legislature intends. Thus, this case satisfies RAP 2.3(b)(1).

Furthermore, the trial court's ruling constitutes probable error that has substantially altered the status quo and has substantially limited the freedom of a party to act. The trial court's ruling has transformed a capital case into a non-capital case, thereby depriving the State of the ability to prosecute these defendants in accordance with Washington law. Thus, this case also meets the criteria set forth in RAP 2.3(b)(2).

Nonetheless, McEnroe has suggested that the “status quo” is not really altered and this Court should deny review because, in his view, the State may simply appeal after McEnroe pleads guilty. See “McEnroe’s Response to State’s Emergency Motion for Stay of Superior Court’s Order,” at 3. Indeed, in McEnroe’s view, this would be better for the State. See *id.*, at 4. This argument is incorrect for at least three reasons.

First, whether the State would appeal if McEnroe pleaded guilty over the State’s objection is beside the point. The trial court’s ruling meets the RAP 2.3 criteria because the trial court, *sua sponte*, has deprived the State of the ability to fully prosecute both McEnroe and Anderson for six counts of aggravated murder on grounds that are not supported by any relevant authority.² McEnroe’s purported intent to plead guilty is irrelevant to those criteria. In addition, any State’s appeal after a guilty plea would add years to the already unconscionable five-plus years this case has been pending.³

Second, if McEnroe were allowed to plead guilty over the State’s objection, the fact of that guilty plea – which would require McEnroe’s admission in open court to brutally killing six people, including two small children – would certainly be made widely known among the general

² The trial court concedes that its ruling addresses “an issue that has heretofore effectively evaded review.” Appendix B, at 10.

³ Further, a guilty plea does not foreclose post-conviction attacks on criminal judgments, as this Court’s experience with personal restraint petitions amply illustrates.

public. Accordingly, if the State were to prevail on appeal, and the death penalty were to be reinstated and McEnroe's guilty plea vacated, McEnroe would doubtless claim ineffective assistance of counsel because his lawyer advised him to publically admit guilt while the status of the death penalty was uncertain, thus affecting his right to a fair trial and an unbiased jury.

Third, Michele Anderson has made no recent representations about pleading guilty and, in any event, she would not be bound by those representations. Thus, even if McEnroe were to plead guilty, the issue of what should happen with Anderson's pending trial would remain. If Anderson demanded a trial, as is her right, the State would still need to pursue discretionary review in Anderson's case in order to have the death penalty issue adjudicated before her trial. And, Anderson would certainly claim that her right to a fair trial was imperiled by McEnroe's very public admissions of guilt.

In sum, postponing appellate consideration of this admittedly novel ruling on a critical matter of public importance will harm the State, further delay this case, and complicate any trial(s) that ultimately must be held.

5. SINCE THE TRIAL COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, IMMEDIATE REVIEW IS NEEDED.

As explained above, the trial court ruled on grounds that were neither raised nor argued by the defendants, and did so just as jury

selection in McEnroe's trial was about to begin, after more than five years of delay. Subsequently, the trial court not only denied the State's motion to stay the effect of its ruling pending appellate review, but it also took the opportunity to shore up its original ruling. *See* Appendix B. Notably, the trial court has admitted that it formulated grounds to dismiss the death penalty *sua sponte*, based on a series of hypothetical questions posed three years ago to a deputy prosecutor in a completely different context, not based on any motion or argument of the defendants. Appendix B, at 5, 11. As noted above, in attempting to clarify its original ruling, the trial court's order denying the motion for stay clarified its misunderstanding of the process by which the Prosecuting Attorney exercised his discretion in deciding whether to file the notice of special sentencing proceeding. The trial court may have invested "over two years of reflection" in its decision, but it did not afford the State the opportunity to inform that reflection before ruling.

To deprive, *sua sponte*, Washington citizens of the ability to fully prosecute two people accused of murdering four adults and two children, without any briefing on the issue and without, at a minimum, alerting the parties before announcing its decision, on the eve of a trial five years in the coming, is a departure from "the accepted and usual course of judicial proceedings" calling for appellate review under RAP 2.3(b)(3).

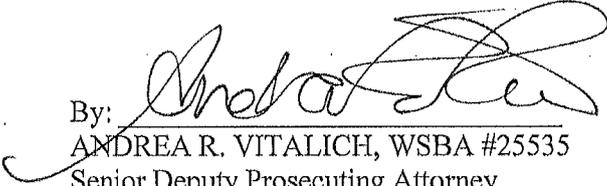
B. CONCLUSION

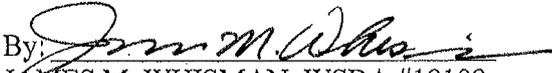
The trial court's ruling dismissing the notices of intent to seek the death penalty should be reviewed by this Court now, not later. If review is granted, the State respectfully urges this Court to accelerate the perfection and briefing schedules, and to set the case for argument in the Spring 2013 term. The trial court's ruling is already impacting other capital cases, and the trial court's unprecedented actions in this case meet the criteria set forth in RAP 2.3(b)(1), (2), and (3). For the reasons stated above and in the State's prior pleadings, this Court should grant discretionary review.

DATED this 19th day of February, 2013.

Respectfully submitted,

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Appendix A

Trial court's original ruling

FILED
KING COUNTY, WASHINGTON

JAN 31 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and
Michele K. Anderson,

Defendants.

No. 07-1-08716-4 SEA

No. 07-1-08717-2 SEA

**Order Striking the Notice of Intent to
Seek the Death Penalty**

Defendant McEnroe alleges that the King County Prosecutor violated both the Equal Protection and Due Process clauses of the Federal and State Constitutions by employing a different process in evaluating the mitigating circumstances in his case than was employed in subsequent death penalty eligible cases. He notes that in State v. Hicks, State v. Kalebu, State v. Chinn and State v. Monfort the State retained its own mitigation investigator prior to the prosecutor exercising his discretion under RCW 10.95.040(1). The State did not retain such an investigator in his or co-defendant Anderson's cases.

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Mr. McEnroe also reasserts that in his case the Prosecutor improperly "weighed" the evidence of the crime against the mitigation presented. Defendant McEnroe contends that in the subsequent cases the Prosecutor corrected this error and considered the mitigation presented by those defendants as an entirely separate inquiry. He argues that these differences in treatment mandate dismissal of the notice of intent in his case. Co-Defendant Anderson has joined in this motion as of January 4, 2013.

The State responds that these Equal Protection and Due Process arguments are essentially a "rehash" of previously denied motions. The State maintains that contrary to Defendant McEnroe's assertions, the Prosecutor did consider evidence of mitigation and simply found it inadequate to justify forgoing the filing of the notice of intent. Furthermore, the State contends that the Prosecutor's decisions in other cases have no bearing on the decision made in Defendant McEnroe's case and such a comparison would amount to an improper pretrial proportionality review.

In reply, Defendant McEnroe asserts that he is not arguing for a pretrial proportionality review, but is instead questioning "whether the Prosecutor followed the law equally for all the defendants." In short, he maintains that his focus is on "process" rather than "result."

Because the State contends that the defendants' arguments are merely a "rehash" of prior unsuccessful arguments, it may be helpful to review what has been decided thus far. In June 2010 this Court did consider defendants' challenges to the manner in which the Prosecutor applied RCW 10.95.040(1) in their cases. At the time the defendants contended that the Prosecutor failed to follow the directive of RCW

10.95.040(1) to consider only the mitigating factors when deciding whether to file the notice of special sentencing proceeding. They argued that the Prosecutor erred in "weighing" the evidence in mitigation against the heinousness of the crimes alleged, thereby inappropriately commingling the seriousness of the offense with the assessment of evidence mitigating the defendants' individual culpability.

This Court denied the defendants' motions for the reasons set forth in its memorandum decision and held that:

The prosecutor's role in exercising the discretion conferred by RCW 10.95.040(1) is to determine if there is reason to believe that the mitigating circumstances are insufficient to merit leniency. The scope of the information appropriate for the prosecutor's review is as broad as that which may be considered by the jury. The statute does not preclude the prosecutor from considering the facts and circumstances of the crime, but rather requires the prosecutor to anticipate and, in essence, preview the case as it will look to the jury at trial and through the special sentencing.

Order on Defendants' Motion to Strike, June 4th, 2010, at page 22.

Accordingly, this Court concluded that the Prosecutor did not improperly apply RCW 10.95.040(1) by failing to consider the defense mitigation in total isolation from the facts and circumstances of the alleged crimes. Like the jury, the Prosecutor need not put blinders on when considering the evidence in mitigation.

Although mentioned in passing in the State's Response Brief, this Court's ruling did not directly address the question of whether a prosecutor could consider the strength of the evidence when exercising discretion pursuant to RCW 10.95.040(1). The issue presented by the defense motion at the time was whether the prosecutor could consider the facts and circumstances of the crime when exercising discretion under the statute. The facts and circumstances of the crime is a concept distinct from the strength of the evidence of the crimes. The facts and circumstances of the crime

are comprised of the allegations being made in the charge. The strength of the evidence is the persuasiveness of the evidence in support of those allegations.

As this Court has previously recognized, RCW 10.95.040(1) is a statute unique to the State of Washington. Under the statute a prosecutor's decision whether to file the notice of intent to seek the death penalty is an exercise of discretion separate from his prior decision to file charges of aggravated murder in the first degree. Both decisions are given great deference by the court. Several Supreme Court cases have reiterated the principle that the prosecutor need not explain or justify the decision to file or not file the notice of intent. In order to file the notice of intent, the prosecutor need only state that he or she has a reason to believe that there is insufficient mitigation to merit leniency. The prosecutor need not state what that "reason to believe" is based upon.

Although the prosecutor's decision is potentially subject to review on an abuse of discretion standard, the absence of a record or other insight into the decision-making process renders the prospect of a meaningful review more theoretical than real. At least one federal court judge in Washington has expressed his belief that "the decision to seek the death penalty should be predicated on specific, articulated guidelines" yet in the context of the case before him was compelled to find no constitutional error. Harris By and Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1285 (WD WA. 1994), aff'd sub. nom. Harris By and Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995).

During the course of oral argument and in briefing in the cases at bar, the Prosecutor's Office has provided some insight into the factors it considers when deciding whether or not to file the notice of special sentencing proceeding. Counsel has repeatedly asserted, for example, that the elected Prosecutor considered the

mitigation material proffered by the defendants here. Counsel has also maintained that, consistent with this Court's earlier ruling, the Prosecutor appropriately considered the facts and circumstances of the crime.

Going further, however, counsel asserts that the Prosecutor also considers the strength of the evidence in a case when exercising discretion under RCW 10.95.040(1). Counsel maintains that such consideration is logical and appropriate. In prior briefing, the State specifically expressed disdain for the notion that a proper application of RCW 10.95.040(1) would preclude a Prosecutor from filing the notice of intent in a case where compelling evidence of mitigation exists but the evidence of the defendant's guilt is overwhelming. In various arguments before this Court the State has repeatedly referenced the strength of the cases against Defendants Anderson and McEnroe. Given the strategically crafted statements of experienced defense counsel both in open court and in the media, it appears that the strength of the State's case as to guilt is essentially not controverted and the salient issue at trial will be the appropriate sanction to impose.

It is well-known that prosecutors around this State make decisions on a daily basis that depend on an assessment of the strength of the evidence. It is a function that is familiar, routine and necessary. In fact, every case that comes to a prosecutor's office for a filing decision is subjected to that assessment. Weak cases may be declined for prosecution or sent back to a detective for additional investigation. Other cases bearing sufficient evidentiary support are filed pursuant to statutory authority (RCW 9.94.401, et. seq.) and internal standards and guidelines.

Depending on the strength of the evidence on each element of the potentially chargeable offenses, discretion is exercised as to the appropriate charge to file. If the State wishes to detain or impose conditions on the person charged, the charging decision must be submitted to the court to determine if probable cause supports the charging decision. CrR 3.2. This same transparent process is followed whether the crime is a relatively insignificant misdemeanor or the most grievous of offenses such as aggravated murder in the first degree.

This familiar weighing of the strength of the evidence undoubtedly occurred when the Prosecutor made the decision to file six counts of aggravated murder in the first degree against Defendants McEnroe and Anderson. RCW 9.94A.411(2)(a) provides that "[c]rimes against persons will be filed if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder." The basis for filing these most serious charges is reflected in the certificate for determination of probable cause supporting the charges.

The decision whether to file the notice of intent is far less transparent. While the decision is afforded great deference by the court, several Supreme Court cases have held the exercise of discretion is not unfettered. Although RCW 10.95.040(1) itself provides little guidance as to exactly what the prosecutor can and cannot consider when exercising this discretion in the death penalty context, case law has articulated the statute's purpose, as well as the parameters of its constitutional application.

In the face of a challenge to the breadth of discretion afforded to prosecutors under this State's death penalty statute, for example, our Supreme Court stated that a

prosecutor's discretion is constitutional when it functions to eliminate "only those cases in which juries could not have imposed the death penalty." State v. Rupe, 101 Wn.2d 664, 700, 683 P.2d 571 (1984). To meaningfully achieve this goal, this Court has previously held in the cases at bar that the scope of a prosecutor's assessment must be coextensive with that of the jury. Since the jury is instructed at the penalty phase that they should "have in mind" the crime of which the defendant has been convicted, a prosecutor is likewise permitted to consider the facts and circumstances of the alleged crime that he anticipates will be presented to the jury and then determine whether there is reason to believe that the evidence in mitigation will be insufficient to merit leniency.

If a prosecutor is permitted to consider the facts and circumstances of the crime when deciding whether to file the notice of intent, may he or she also consider the strength of the evidence supporting those facts and circumstances? Obviously, in the guilt phase the jury is not only permitted but required to consider the strength of the evidence. This stage of the proceeding is analogous to the prosecutor's filing decision. If the jury concludes that the State failed to prove the crime of aggravated murder in the first degree, the prospect of a death sentence evaporates and the jury is discharged. The case does not proceed to the penalty phase unless and until the jury unanimously finds the defendant guilty beyond a reasonable doubt.

The sufficiency or strength of the evidence regarding guilt is no longer the issue for consideration in the penalty phase. At this phase the jurors are instructed to "have in mind" the crime of which the defendant was convicted, but they are not instructed to reconsider the strength of the evidence in deciding the sufficiency of the evidence in mitigation. To illustrate this point, if a jury were to summarily discount evidence on

mitigation because they believed that the evidence had been so overwhelmingly strong in the guilt phase, it is undeniable that they would have failed to fulfill their duty as jurors in the penalty phase. Accordingly, if the factors that may be considered by a prosecutor under RCW 10.95.040(1) are circumscribed by what the jury may consider at the penalty phase, then the prosecutor may not consider the strength of the evidence of guilt when deciding to file the notice of intent.

There is another reason why the prosecutor should not consider the strength of the evidence in this analysis. It is a long standing principle of constitutional law that equal protection is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements. State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). In State v. Campbell, the Court disposed of an equal protection challenge to the discretion afforded prosecutors under RCW 10.95.040(1) by noting that in order to obtain a sentence of death, the prosecutor was required to prove the "additional factor" of the absence of mitigating circumstances. Campbell at 25. Notably, the State in its briefing had apparently referred to the absence of mitigating circumstances as an "element" consistent with prior equal protection analysis jurisprudence. Campbell at 24. Despite the State's asserted position on the question, the Supreme Court was unwilling to cloak the absence of mitigation with the status of an "element" and deemed that the term "additional factor" was sufficient for equal protection purposes. Campbell at 25.

Regardless of the holding in Campbell, it does not answer the narrow question presented here: May a prosecutor consider the strength of the evidence of guilt when exercising his discretion to seek the death penalty pursuant RCW 10.95.040(1)? In

State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), the Supreme Court considered another equal protection challenge to this discretion. The Court prefaced its remarks by noting that an equal protection issue does not arise when "the requirements of proof and the State's ability to meet them are the considerations guiding the prosecutor's discretion." Dictado at 297 (citing State v. Canady, 69 Wn.2d 886, 421 P.2d 347 (1966)). The Court concluded in Dictado that under RCW 10.95.040(1) a prosecutor's discretion does not violate equal protection because "[t]he prosecutor's discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances." Dictado at 297f.

Observing that a similar principle supports the State's exercise of discretion in its charging function as in its decision to file a notice of intent, the Dictado Court stated that in the latter decision the "prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury." Dictado at 297-98. In other words, the process of analysis is similar but the focus of the analysis shifts. At this second, separate stage in the statutory scheme the discrete additional "factor" that must be proven by the State at the penalty phase is the insufficiency of the mitigating circumstances. State v. Campbell at 25. It is the proof of insufficiency of the mitigating circumstances, therefore, and the State's ability to prove that factor that must guide a prosecutor's discretion in making the decision to file the notice of intent.

While the facts and circumstances of the offense are appropriate considerations for a jury to consider when assessing mitigation at the penalty phase, the strength of the State's case regarding the defendant's guilt is of no relevance. At the penalty phase guilt has already been found by the jury beyond a reasonable doubt. The purpose of

the mitigation phase is to determine the moral culpability of the defendant in light of the crime for which he now stands convicted. To hold otherwise would permit the following scenario to occur. Consider two defendants who separately commit identical offenses in King County, Washington. The first defendant commits his offense in a jurisdiction that has ample resources and an excellent investigation unit. As a result, the evidence in that case is substantial and the case against that defendant is strong on the merits. The second defendant, however, commits his offense in a jurisdiction that has fewer resources and an undertrained, overtaxed police force. The evidence in that case is comparatively sparse, and the case against that defendant is weak on the merits. Both defendants are subsequently charged with aggravated murder in the first degree. Both defendants submit identical evidence of mitigation to the prosecutor. The prosecutor declines to file the notice of intent as to the second defendant but does file the notice as to the first. The difference in the result has nothing whatsoever to do with the individual moral culpability of the respective defendants but hinges rather on the wholly unrelated factor of the strength of the evidence in the State's case as to guilt. In this hypothetical, insufficiency of proof of mitigation was clearly not the consideration guiding the prosecutor's discretion as required by State v. Dictado.

In fairness to the State, language can be found in Supreme Court cases such as State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), which would seem to permit a prosecutor's unbridled discretion as to what can be considered. For example, referring back to the United States Supreme Court decision in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976), the majority in Rupe stated that "[t]he courts may assume that prosecutors exercise their discretion in a manner which reflects their

judgment concerning the seriousness of the crime or the sufficiency of the evidence.”

Rupe at 700. The decision in Gregg v. Georgia, however, concerned a statutory scheme very different from the State of Washington’s statute that establishes a two-stage process in the exercise of prosecutorial discretion. Likewise, the Rupe court was not presented with an issue similar to the one presently at bar.

Most recently in State v. Davis, 175 Wn.2d 287, ___ P.2d ___ (2012), our Supreme Court considered, among other things, Davis’s proportionality challenges to his death sentence. In the context of addressing the dissent’s concerns regarding the failure of a prosecutor to file a notice of intent in another case, the majority opinion stated that “[m]itigating evidence is not the only reason a prosecutor might decide not to seek the death penalty. The strength of the State’s case often influences the decision.” Id. at 357.

While this statement may be factually accurate, the Court did not acknowledge or attempt to reconcile this statement with its prior pronouncement in State v. Dictado that “[t]he prosecutor’s discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances.” State v. Dictado at 297. Furthermore, to the extent that the Court’s statement condones consideration of the strength of the case in declining to file the notice of intent, the case is distinguishable because here the prosecutor did file the notice of intent.

Perhaps the most instructive and enlightening aspect of the Davis opinion appears two pages later. In response to the dissent’s conclusion that the death penalty statute suffers from constitutionally impermissible randomness in application, the majority writes, “[t]he dissent’s argument that the system is plagued by randomness

would have greater force if the same prosecutor looked at similar aggravated murders committed by similar defendants and decided to seek the death penalty on one but not the other." State v. Davis at 359. Ironically, interpreting RCW 10.95.040(1) as permitting a prosecutor to consider the strength of the evidence when exercising discretion under the statute increases the prospect of precisely this outcome as illustrated by this Court's earlier hypothetical.

In summary, if the State is correct in asserting that a prosecutor may consider the strength of the evidence when deciding to file the notice of intent, then two identically situated defendants presenting the same compelling mitigation could be treated differently by the same prosecutor. As argued by the State, the prosecutor could legitimately pursue the death penalty against one defendant solely because the evidence of guilt was extremely strong. To paraphrase the State's interpretation of the broad discretion afforded by the language of RCW 10.95.040(1): extremely strong evidence of guilt is a valid reason to believe that a defendant's compelling mitigation is insufficient to merit leniency. In a scenario suggestive of Camus, a defendant's early confession and cooperation could become his downfall.

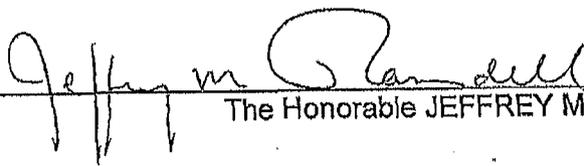
Unique to the State of Washington is the awesome authority conferred by statute upon prosecutors to decide as a separate matter whether to set in motion the powerful machinery of prosecution in pursuit of the death penalty after filing a charge of aggravated murder in the first degree. The filing of the Notice of Intent is a substantively different decision than the initial decision to file the charge. The decision relates solely to the potentially applicable punishment and the State's ability to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt.

After considerable deliberation and for the reasons set forth herein, this Court concludes that the Prosecutor erred as a matter of law in considering the strength of the evidence on the issue of guilt against Defendants McEnroe and Anderson when exercising his discretion under RCW 10.95.040(1) to file the Notice of Intent. To hold otherwise would be to interpret RCW 10.95.040(1) in a manner that violates equal protection.

The Court hereby strikes the notice of intent to seek the death penalty as to both defendants. The effective date of this order is stayed until February 12, 2013, to permit all counsel to review the content of this ruling and reflect on their next course of action.

Having reached this decision on the narrow basis set forth above, the Court declines to rule at this time on the remaining issues presented by the defense.

SIGNED this 31st day of January, 2013.


The Honorable JEFFREY M. RAMSDELL

Appendix B

Trial court's more recent ruling

FILED
KING COUNTY, WASHINGTON

FEB 8 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT,
DEPUTY

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and
Michele K. Anderson,

Defendants.

No. 07-1-08716-4 SEA

No. 07-1-08717-2 SEA

Order Denying Motion to Stay

The State has requested that this Court stay the effective date of its January 31, 2013, order striking the notice of intent "until five days after the State's pending motion for discretionary review is decided by the Washington Supreme Court."

At present, the effective date of this court's order striking the notice of intent is February 12, 2013. The State appears concerned that the Supreme Court may not intervene quickly enough to forestall the effective date of this court's order, thus affording Defendant McEnroe the opportunity to plead guilty on February 13, 2013, and

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receive a life sentence without the possibility of parole rather than face the prospect of a death sentence.

The State's request raises several practical issues for this Court to consider. First, if this Court extends its stay to five days after the Supreme Court rules on the State's motion for discretionary review, any sense of urgency in addressing the motion will evaporate. Secondly, given the fact that we are currently poised to start trial on February 25, 2013, the case would presumably have to proceed to trial as a death penalty case despite this Court's January 31, 2013, ruling striking the notice of intent. In effect, were this Court to grant the State's motion to stay, its prior ruling would be rendered a nullity. Following conviction, if the jury were to find that mitigating circumstances merited leniency, this Court's order would never be reviewed because it would no longer be of moment. If the jury did impose a death sentence, the issue ruled upon by this Court might be subsumed within a proportionality analysis rather than being addressed on its own merits.

In short, the relief requested in the State's motion would require this Court to conduct an "advisory" death penalty trial with all the attendant cost and consequences, despite this Court's entry of an order striking the notice of intent. The only reason this Court can think of that would warrant taking such an extraordinary step would be if the Court had lingering doubts as to the correctness of its order striking the notice of intent. Accordingly, this Court has viewed the State's motion as an opportunity to reflect upon its decision rendered on January 31, 2013. In so doing, the Court has had the benefit of the State's motion for discretionary review as well as the responses of the defendants

and the State's reply. The Court has also reviewed all of the past briefing of the parties pertaining to the issue and the available transcripts of oral arguments.

I.

Two primary principles of death penalty jurisprudence have emerged over the years since the United States Supreme Court addressed the constitutionality of states' new death penalty statutes following Furman v. Georgia in 1972.

The first principle is that a state's statute must meaningfully and narrowly channel imposition of the death penalty to avoid its random or arbitrary infliction. Shortly after its decision in Furman, the Supreme Court wrote that Furman required "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 188-189, 96 S.Ct. 2909, 2932 (1976).

Further, a statute's winnowing function must continually narrow its qualifying categories to select only those defendants who committed the "most serious crimes" and whose "extreme culpability makes them 'the most deserving of execution'." Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

Imbedded in the first principle is the second, that a death penalty statute must require the sentencing authority to engage in an individualized consideration of each eligible defendant to select only those most deserving of capital punishment. A mandatory death penalty statute, for example, would not be constitutional because it:

... excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (U.S.N.C. 1976).

These two principles remain guideposts in every state's death penalty statute. The State of Washington has been no exception. The principles are sometimes summarized as the constitutional requirement that death be imposed only on those who committed the very worst crimes and who are the very worst criminals. A statutory scheme must be constructed and applied to uphold these principles. It must function at each consecutive stage to narrow the categories of those against whom the death penalty will be imposed.

Washington's death penalty statute establishes two stages at which a prosecutor makes two separate, discretionary decisions. In the first decision a prosecutor decides whether to file charges of aggravated murder in the first degree. Having done so in a particular case, he or she next determines whether to seek the death penalty against that defendant. As this Court noted in its order of January 31, 2013, this statutory delegation of authority to a prosecutor does not violate equal protection because a prosecutor "merely determines whether sufficient evidence exists to take the issue of mitigating circumstances to the jury." State v. Dictado, 102 Wn.2d 277, 297f, 687 P.2d 172, 185 (1984).

Even though a statute on its face does not violate equal protection, the manner in which it is applied may. In its order of January 31, 2013, this Court ruled that RCW

10.95.040(1) does not permit a prosecutor to consider the strength of the State's evidence on guilt when deciding to seek the death penalty against a particular defendant. This Court concluded that the statute is rendered unconstitutional when a prosecutor considers the strength of evidence in the case as a "reason to believe" that a defendant's mitigating circumstances are insufficient to merit leniency. The Court can state candidly and without equivocation that its ruling of January 31, 2013, was the result of a lengthy evolution.

II.

In June of 2010, this Court ruled against the Defendants on their contention that the State must consider mitigation evidence in complete isolation from the facts of the case when deciding whether to file a notice of Intent under RCW 10.95.040(1). This Court narrowly ruled that a prosecutor may appropriately consider the facts and circumstances of the alleged crime when conducting an analysis under the statute. As crafted, the 2010 ruling was sufficient to dispose of the issue raised by the Defendants in their motion. It was intentionally narrow because the Court was significantly disquieted by assertions of the State that the strength of the evidence regarding guilt is an appropriate consideration when exercising discretion under RCW 10.95.040(1). The level of this Court's concern can be seen in the many pages of dialogue between State's counsel and the Court in the March 26, 2010, transcript of oral argument. The State has characterized the exchange as a "Socratic exercise" and indeed it was.

In the State's briefing in response to the Defendants' 2010 motions, the State included two hypothetical scenarios in a footnote, intended to illustrate the absurdity of the defense argument.

The footnote stated:

Based on the reading of the statute that the defendants propose, a prosecutor *would* seek the death penalty in a case where the available evidence proving premeditation, the defendant's identity, or some other necessary element is not especially strong, yet mitigation evidence is negligible. By the same token, that same prosecutor *would not* seek the death penalty in another case where the evidence of guilt is overwhelming, the defendant's criminal history is lengthy, the crime is undeniably heinous, yet the defendant succeeds in presenting a compelling mitigation packet. In other words, the most deserving of death would be spared by the prosecutor's initial decision, while marginal cases would proceed to verdict. For obvious reasons, this simply cannot be the law.

State's Response to Defendant's Motion to Strike Notice of Intent, at 8, n. 2.

In the first scenario, the State believes that when confronted with a particularly heinous aggravated murder and a defendant who offers nothing to mitigate his personal culpability, a prosecutor must be permitted to decline the death penalty because the case upon filing appears weak. At oral argument on March 26, 2010, the State went so far as to indicate that it only files a notice of intent to seek the death penalty "in cases where guilt is not even remotely a question." From this statement the State appears to interpret RCW 10.95.040(1) as requiring a prosecutor to engage in a consideration of a defendant's mitigating circumstances only in cases they deemed sufficiently strong on the issue of guilt.

In the second hypothetical the State worries that this same prosecutor would not seek the death penalty, even though the "evidence of guilt is overwhelming, the defendant's criminal history is lengthy, [and] the crime is undeniably heinous." In this

scenario, despite a strong case, the statute would require a prosecutor to forego filing a notice of intent because the defendant presents compelling mitigation evidence.

At the outset, as this Court observed in its ruling of June 2010, there is nothing illogical in a prosecutor declining to file a notice of intent when compelling mitigation is presented even though the crime is particularly heinous. The fact that the State would characterize the defendant in the second scenario as "the most deserving of death" despite the presence of compelling mitigation graphically illustrates the danger in conflating the concepts of a crime worthy of the death penalty with a defendant worthy of the death penalty.

As reviewed above, for a state's administration of the death penalty to be constitutional its statutory scheme must constantly channel discretion narrowly to avoid random imposition, and must provide for a separate and distinct analysis of the moral culpability of each defendant. These two separate inquiries are designed to result in a final imposition of death only upon the very worst criminals who have committed the very worst crimes.

A defendant may be one of the worst criminals by virtue of the crime he committed, but because of personal mitigating factors he may not be among those most deserving of death for whom the State's penalty of death is reserved. A defendant, therefore, such as the defendant in the second scenario above, is not summarily "the most deserving of death" merely by virtue of committing the very worst crime, as the State would have it. That inquiry qualifies the defendant for death by half. He becomes the most deserving of death only if he is determined also to be the worst of the worst criminals.

This ultimate determination results from an evaluation of the facts and circumstances of each case, along with the personal mitigating circumstances unique to each defendant. As this Court's June 2010 order ruled, analysis of both of these categories is constitutionally sound. Injecting into that analysis, however, a prosecutor's consideration of information as potentially random as the strength of the State's case at an early snapshot stage of the prosecution taints that constitutionality.

As helpful as a prosecutor may find the relative strength of the evidence to be, that measure of strength is still a circumstance wholly arbitrary from case to case, dependent as it is each time upon random circumstances arising from the collateral environment in which the crime occurred, or even the present state of investigative resources available. Requiring a rational "reason to believe" existing apart from the strength of the evidence of a case is the only way to ensure a prosecutor's constitutional administration of the statute.

In summary as to the two scenarios presented, if a prosecutor may in some cases consider the weakness of the evidence as a mitigating factor, the citizens of this State lose the benefit of the statute's requirement that the State seek the death penalty against all defendants charged with the very worst crime who appear also to be the very worst criminal. More importantly, if the State may consider the strength of the evidence in some cases as an aggravating factor against a defendant, despite compelling mitigating circumstances, that defendant may lose the statute's protection when the evidence of guilt is overwhelming.

Declining to file a notice of intent to seek the death penalty in a case where the strength of the evidence is overwhelmingly strong, but compelling mitigating

circumstances exist to merit leniency, is undeniably a difficult decision to make. Washington's unique statute, however, makes the prosecutor a participant in the sentencing process by affording the prosecutor the discretion to seek or not seek the death penalty. State v. Campbell, 103 W.2d 1, 26, 69 P.2d 929 (1984). Filing a notice of intent to seek death despite the presence of compelling mitigation would be an abdication of the prosecutor's duty. It would also contravene the statute's requirement that a prosecutor have reason to believe the mitigating evidence is insufficient to file the notice.

III.

Finally, at oral argument on March 26, 2010, counsel for the State concluded with comments speculating that the legislators, when drafting Washington's death penalty statute, "simply wanted to give the prosecutors a channeled discretion to consider any and all information available at the time that a decision is made." In order to satisfy equal protection, however, a prosecutor's discretion under the statute must not be unfettered. It cannot be the case that legislators, aware of what the federal and state Constitutions required of them, intended to channel a prosecutor's discretion under the statute ever more broadly rather than increasingly narrowly.

RCW 10.95.040(1) grants authority to the State's prosecuting attorneys to make a truly profound determination: to decide for which defendants it will seek the State's greatest punishment. The statute delegates this authority to the office of the prosecuting attorney, and the citizens rely upon that office to bring its very best to bear upon the responsibility – not only in the cases that are the easiest to decide but also in

those that are the most difficult, the cases requiring the greatest exercise of a measured, dispassionate restraint.

Notably, the State's Reply Brief in Support of Discretionary Review only heightens this Court's concern regarding the State's interpretation and application of RCW 10.95.040(1). On page 11 of the brief, the State asserts that a decision made under that statutory provision "focuses on the nature of the defendant's crime and whether that crime is heinous, awful, and revolting such that the defendant him- or herself is deserving of special approbation and the ultimate penalty." Reply Brief at 11. Whether by intention or oversight, the word "mitigation" is completely absent from the State's calculus.

IV.

This Court admits that it has labored hard to reconcile the somewhat discordant statements found in over 30 years of Washington Supreme Court jurisprudence. To the extent that the State has characterized this Court's ruling as "based on a wholly novel theory unsupported by law," this Court concedes that this case is uniquely postured to address an issue that has heretofore effectively evaded review. Although the circumstance presented is novel, the law applicable to the analysis is long standing.

On January 31, 2013, this Court was painfully aware of the potential ramifications of its ruling. Given the pending trial date, the Court understood that any attempt to obtain appellate review of the decision would likely adversely affect a trial date that has already been too long delayed. The Court also understood that given the particularly

heinous facts alleged including the senseless murder of two innocent children, the Court's decision would not likely be well-received by the public.

Most importantly, this Court understood that its order might further delay closure for the victims' families. As much as this Court would like to bring closure and peace to a family that has experienced so much tragedy, I cannot in good conscience rewrite an order that I think, after over two years of reflection, is correct. All the Court can do is once again ask for your patience and indulgence and express its sincere sympathy for your situation.

V.

In summary, this Court has painstakingly reviewed its decision striking the notice of intent. The fundamental precepts upon which the decision is based are longstanding and well-founded. Although the issue has never been directly addressed in an appellate opinion, this Court is confident that if the Supreme Court grants discretionary review, a majority of the justices will affirm the decision of this Court after due deliberation and reflection.

The passion and conviction expressed in the State's briefing undoubtedly reflects the sincerity with which counsel hold their position. Nothing in this Court's ruling should be construed or interpreted as impugning the integrity or good faith of the prosecutor's office, or that of The Honorable Daniel Satterberg. Even as an impartial participant in this process, this Court took over two years to appreciate and comprehend fully the reasons for its amorphous discomfort with its own ruling of June 2010. With conviction

and sincerity equal to the State's, the Court is confident in the correctness of its ruling of January 2013.

Accordingly, this Court hereby denies the State's motion to extend the stay beyond February 12, 2013.

SIGNED this 8th day of February, 2013.


The Honorable JEFFREY M. RAMSDELL

Appendix C

Declaration of John Castleton

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH T. McENROE and
MICHELE K. ANDERSON,

Defendants.

)
)
) No. 07-1-08716-4 SEA
) No. 07-1-08717-2 SEA

)
)
) DECLARATION OF JOHN B.
) CASTLETON, JR.

I, John B. Castleton, Jr., hereby declare as follows:

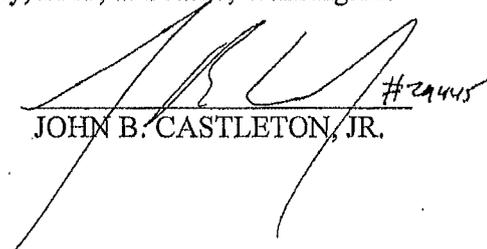
1. I am a Senior Deputy Prosecuting Attorney for King County and have been a deputy prosecutor since 1999.
2. I am one of the attorneys assigned to the case of State of Washington v. Christopher Monfort, King County Cause No. 09-1-07187-6 SEA.
3. Christopher Monfort is charged by information filed on November 12, 2009 with Arson in the First Degree, Attempted Murder in the First Degree (three counts), and Aggravated Murder in the First Degree for shooting and killing Seattle Police Officer Timothy Brenton on October 31, 2009. The State has alleged the aggravating circumstance that "the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing," pursuant to RCW 10.95.020(1).
4. On September 2, 2010, the King County Prosecuting Attorney filed a "Notice of Special Sentencing Proceeding to Determine Whether Death Penalty Should be Imposed," pursuant to RCW 10.95.040.

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

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5. Trial is currently scheduled to begin on September 13, 2013.
 6. On July 20, 2012, Monfort filed a "Defense Motion to Strike Notice of Intent to Seek the Death Penalty on Grounds that the State Failed to Comply with the Mandates of RCW 10.95.040."
 7. After the State filed a response and Monfort filed a reply, oral argument was held on the motion on October 26, 2012. The trial court has yet to issue a ruling.
 8. On February 8, 2013, Monfort filed a "Motion and Declaration for Order for Funding for Expert Services at Public Expense," in which he sought funds for the October 26, 2012 transcript.
 9. In support of this funding request, Monfort cites to Judge Jeffrey Ramsdell's January 31, 2013 ruling in which the death penalty notices were dismissed against Joseph McEnroe and Michele Anderson.
 10. Monfort's counsel's declaration states, "Defense seeks funding for a transcript of the October 26, 2012 hearing. This transcript will potentially allow us to create a new motion to dismiss the death notice based on Judge Ramsdell's reasoning in his [January 31, 2013] opinion depending on the specifics of the State's argument." (Emphasis added).

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

Signed and dated by me this 19th day of February, 2013, at Seattle, Washington.


JOHN B. CASTLETON, JR.

Certificate of Service by Electronic Mail

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

Attorney for Petitioner Michele K. Anderson Colleen E. O'Connor Society of Counsel 1401 E Jefferson St Ste 200 Seattle WA 98122-5570 colleen.oconnor@scraplaw.org	Attorney for Other Party: Joseph T McEnroe Leo J. Hamaji Attorney at Law 810 3rd Ave 8th Fl Seattle WA 98104-1655 leo@defender.org
Attorney for Petitioner Michele K. Anderson David P Sorenson SCRAP 1401 E Jefferson St Ste 200 Seattle WA 98122-5570 david.sorenson@scraplaw.org	Attorney for Other Party: Joseph T McEnroe William J Prestia The Defender Association 810 3rd Ave Ste 800 Seattle WA 98104-1695 prestia@defender.org
Attorney for Other Party: Joseph T McEnroe Kathryn Lund Ross WA State Death Penalty Assistance Center 810 3rd Ave Ste 800 Seattle WA 98104-1695 wdpac@aol.com	

containing a copy of the State's Supplemental Brief in Support of Motion for Discretionary Review, in STATE V. JOSEPH T. MCENROE & MICHELE K. ANDERSON, Cause No. 88410-2 and 88411-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

2/19/13
Date 2/19/13

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Subject: RE: State v. Joseph McEnroe & Michele Anderson, Supreme Court #88410-2 & 88411-1

Received 2-19-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Brame, Wynne [<mailto:Wynne.Brame@kingcounty.gov>]
Sent: Tuesday, February 19, 2013 11:49 AM
To: OFFICE RECEPTIONIST, CLERK; O'Connor, Colleen; Sorenson, David; wdpac@aol.com; leo@defender.org; prestia@defender.org
Cc: Whisman, Jim; Vitalich, Andrea; O'Toole, Scott
Subject: State v. Joseph McEnroe & Michele Anderson, Supreme Court #88410-2 & 88411-1

Please accept for filing the attached documents (State's Supplemental Brief in Support of Motion for Discretionary Review) in

State of Washington v. Joseph T. McEnroe, Supreme Court No. 88410-2

State of Washington v. Michele K. Anderson, Supreme Court No. 88411-1

Thank you.

Andrea Vitalich
Senior Deputy Prosecuting Attorney
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206-296-9655
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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Andrea Vitalich's direction.

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