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NO. 88410-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

vs.

JOSEPH T. McENROE and MICHELE KRISTEN ANDERSON,

Respondents.

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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 ORIGINAL

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## I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. They are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. *See* RCW 36.27.020(4). As such, they have a vital interest in any action that seeks to diminish their independence or that seeks to delay resolution of cases.

## II. ISSUES PRESENTED

1. What challenges may a defendant bring to the accusatorial decision?
2. What factors may a prosecutor consider in making a charging decision?

## III. STATEMENT OF THE CASES

The facts as presented in the briefs of the parties are adequate for resolution of these cases.

## IV. ARGUMENT

- A. A DEFENDANT'S RIGHT TO PARTICIPATE OR AFFECT THE ACCUSATORIAL PHASE OF A CRIMINAL MATTER IS EXTREMELY CIRCUMSCRIBED.

The Washington constitution divides governmental authority into three branches—legislative, executive, and judicial. Before a person can be punished for a crime, all three branches of government must act; the

legislature by defining crimes and sentences, the executive by collecting evidence and seeking an adjudication of guilt; and the judiciary by determining guilt and imposing an appropriate sentence. *State v. Rice*, 174 Wn.2d 884, 279 P.3d 849 (2012).

The instant appeal deals with repeated challenges to the executive branch's charging decision, and repeated invitations to the trial court to review that charging decision. These trespasses upon the executive branch's charging decision dramatically lengthened the pre-trial proceedings to the detriment of the public's right to "[j]ustice ...without unnecessary delay." Const. art. I, § 10. The arguments advanced by the defendants, as well as the legal theory self-identified and relied upon by the trial court, display a fundamental confusion about the different phases of a prosecution.

Every prosecution has two phases. The first is the accusatorial phase. The second is the adjudicatory phase. The character of each phase and the nature of the decisions being made in each phase determine the rights afforded the defendant.

The accusatory phase involves the prosecuting authority, exercising executive functions, to determine whom to charge with a public offense and what charges to bring. Decisions made in the accusatory phase largely occur

outside the courtroom.<sup>1</sup> These decisions routinely affect the sentence that the court may impose upon conviction. For example, if the prosecutor charges a defendant with first-degree murder, the court must impose a minimum sentence of twenty years<sup>2</sup> if the defendant is convicted. However, the prosecutor could choose to charge that same defendant with a lesser offense, in which case the court could impose a lower sentence upon conviction. The prosecutor could even choose not to charge the defendant with any crime whatsoever.

The prosecutor's decision is not without checks and balances, for the magistrate must determine that probable cause exists to believe that the defendant committed the charged offense, and the trier of fact must determine

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<sup>1</sup>The defendants appear to argue that any prosecutorial decision announced after court proceedings have begun is subject to court supervision or is an amendment of the original charge that requires court approval. *See* Defendant/Respondent's Joint Response, at 42-43. Their argument ignores the fact the State's decision to charge aggravated first degree murder, by itself, subjects the defendant to the possibility of a death sentence. That possibility continues, for all defendants who committed the murder on or after their eighteenth birthday and who does not suffer from an intellectual disability, until the prosecutor affirmatively announces that a notice of special sentencing proceeding will not be filed or the statutory time limit for filing such a notice expires. *See generally*, RCW 10.95.030 (penalties for aggravated first degree murder); RCW 10.95.040 (2) (guilty plea cannot be entered to a charge of aggravated first degree murder without the prosecutor's consent prior to the expiration of the period for filing a notice of special sentencing proceeding). The decision to file the notice is vested solely in the prosecutor, the notice need not be served in open court, and the court's permission or consent is not required prior to the filing of the notice. *See generally State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996) (notice of special sentencing served through designated public defender mail pick up box); RCW 10.95.040 (service of notice) This Court has, therefore, properly determined that the decision to file a notice of special sentencing proceeding is an executive charging decision, *State v. Campbell*, 103 Wn.2d 1, 26, 691 P.2d 929 (1984) (citing *State v. Dictado*, 102 Wn.2d 277, 298, 687 P.2d 172 (1984)). Similarly, the United States Supreme Court treats the decision to pursue a death sentence as the same as a decision to file a criminal charge. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986).

<sup>2</sup>*See* RCW 9.94A.540(1)(a).

at trial whether the defendant is guilty beyond a reasonable doubt of the charged offense. *See State v. Campbell*, 103 Wn.2d 1, 26, 691 P.2d 929 (1984), *cert. denied*, 417 U.S. 1094 (1985) (explaining why the prosecutor's charging decision does not violate separation of powers). The community, moreover, may remove the prosecuting attorney from office if it disagrees with how the prosecutor exercises his discretion. Const. art. XI, § 5 (prosecuting attorneys shall be elected); RCW 36.16.030 (same); *Hildebrand v. Padget*, 678 P.2d 870, 873-74 (Wyo. 1984) ("This is not to say that the citizens of our state are without recourse if they feel the prosecuting attorney is not exercising his discretion in their best interests. . . . One obvious remedy is that district and county attorneys hold elective office; if their constituents are unsatisfied, they are free to express their feelings at the voting polls.").

The adjudicatory phase occurs in the courtroom. During this phase, a criminal defendant is afforded all of the full panoply of due process, an attorney, the right to call witnesses, the right of confrontation, the right to seek suppression of illegally obtained evidence, the right to a judge who is both fair and who appears fair, the right to a jury, and many other rights. *See generally* Const. art. I, § 22; *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011) (explaining the scope of exclusionary rule in Washington); *State v. Gamble*, 168 Wn.2d 161, 187-188, 225 P.3d 973 (2010) (appearance of fairness doctrine).

The rights granted to a defendant in the adjudicatory phase, however, are not applicable in the accusatory phase. A defendant's ability to influence or challenge the decisions made in the accusatory phase are extremely limited.

The accusatory phase in Washington may take a variety of forms as the Washington Constitution specifically authorizes offenses to be prosecuted by information or indictment. Const. art. I, § 25. The choice of mechanism to be used rests with the prosecuting attorney, not with the defendant. *See generally State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971). The mechanism to be used does not vary according to the severity of the offense. *State v. Jeffries*, 105 Wn.2d 398, 423-24, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986) (capital crimes may be charged by information).

The defendant's inability to select the method of initiating the prosecution extends to other choices. The defendant is not entitled to a hearing by the prosecutor before the prosecutor makes his charging decision. *See United States v. Bland*, 472 F.2d 1329, 1337 (D.C. Cir. 1972) (due process does not require "an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom"); *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) ("prosecutor need not hold a public hearing before deciding whether to file charges"); *State v. Tracy M.*, 43 Wn. App. 888, 892, 720 P.2d 841 (1986) (due process not violated because the prosecutor makes

the decision to file charges without a hearing).

The defendant does not have the right to decide which of two applicable statutes he will be charged with or what penalty scheme he will be sentenced under. *United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (“a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.”). The defendant does not have a right to have the charging decision made by a neutral and detached prosecutor. *Finch*, 137 Wn.2d at 810 (“A prosecutor's determination to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in nature and therefore the [appearance of fairness] doctrine does not apply.”).<sup>3</sup> The defendant does not have a right to select when the prosecutor makes the charging decision. *State v. Pirtle*, 127 Wn.2d 628, 641-42, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996) (not error to deny the defendant's request to extend the thirty-day deadline for filing a notice of special sentencing proceeding).

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<sup>3</sup>A defendant is entitled to a conflict-free prosecuting attorney. *See, e.g., State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (prosecutor barred from deciding whether to seek the death penalty where the defendant was a former client of the prosecutor).

Cases addressing a defendant's rights before a grand jury are also relevant to a prosecutor's charging decision as the duties of the grand jury are "coterminous" with those of the prosecutor seeking an indictment or filing an information. *United States v. Williams*, 504 U.S. 36, 51, 53, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). The grand jury cases establish that the defendant is not entitled to demand that the authority making the charging decision consider exculpatory evidence. *See generally Williams*, 504 U.S. at 51 (the Fifth Amendment does not require the prosecutor to present exculpatory as well as inculpatory evidence to the grand jury and the grand jury is not required to consider exculpatory evidence prior to making a charging decision). The defendant does not have a constitutional right to testify before the grand jury. *Id.* at 52.

The defendant is not entitled to prevent the charging authority from considering illegally obtained evidence or incompetent evidence. *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (grand jury may consider incompetent evidence and evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination and Fourth Amendment privilege to be free from illegal searches). The defendant cannot preclude the charging authority from considering hearsay or otherwise incompetent evidence. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 261, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1989) ("the mere fact that evidence itself is unreliable is not sufficient

to require a dismissal of the indictment”, and an indictment that is valid on its face is not subject to a challenge to the reliability or competence of the evidence presented to the grand jury).

The courts have steadfastly refused to allow defendants to challenge an indictment returned by a legally constituted and unbiased grand jury or an information drawn by a prosecutor, if valid on its face on the ground that they are not supported by adequate or competent evidence. As noted by the United States Supreme Court many years ago and as demonstrated in the instant case,<sup>4</sup> a rule that allows defendants to challenge the nature of the information considered in making the charging decision “would result in interminable delay [and] add nothing to the assurance of a fair trial.” *Costello v. United States*, 350 U.S. 359, 364, 76 S. Ct. 406, 100 L. Ed. 2d 397 (1956). *Accord Calandra*, 414 U.S. at 350-52 (it is uncertain that any benefit may be obtained from extending various adjudicatory rights to the accusatorial process while it is clear that allowing litigation over the information considered would frustrate the public’s interest in the fair and expeditious administration of the criminal laws).

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<sup>4</sup>Defendants acknowledge that their challenges to the prosecutor’s charging decision in these cases resulted “in multiple hearings over two and a half years.” Defendants/Respondents’ Joint Response at 1.

While defendants cannot challenge the nature or the quality of the information considered by the charging authority or the weight given to the information that was considered, defendants may bring challenges based upon errors in the composition of the grand jury, the presence of an unauthorized person, and similar procedural irregularities. *See generally* RCW 10.40.070. When such a challenge is successful, the government may still pursue the prosecution. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 557, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) (discrimination in the selection of the grand jury foreman was a valid ground for setting aside a criminal conviction, but the government may reindict); *Ballard v. United States*, 329 U.S. 187, 196, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (indictment struck because women were excluded from the grand jury; government not barred from seeking a new indictment from a properly constituted grand jury); RCW 10.40.090 (an order to set aside the indictment or information on any of the grounds identified in Chapter 10.40 RCW does not bar a future prosecution for the same offense). A missed statutory deadline, however, can forever bar prosecution. *See, e.g., State v. Luvene*, 127 Wn.2d 690, 714-19, 903 P.2d 960 (1995) (state's failure to timely serve the notice of special sentencing proceeding barred the state from seeking the death penalty); *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994) (same).

A defendant may also challenge a charging decision on the grounds that he was selected for prosecution based upon an unjustifiable standard such as race, religion or other arbitrary classification or in retaliation for the exercise of a constitutional right. *See generally United States v. Goodwin*, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (constitutional due process principles prohibit prosecutorial vindictiveness); *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446(1962) (constitutional equal protection principles prohibit basing the decision whether to prosecute on “an unjustifiable standard such as race, religion, or other arbitrary classification”). A defendant, however, must satisfy an extremely high threshold to obtain discovery or a hearing on such a claim. *See generally United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Bonisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). The reluctance to entertain these motions absent a compelling initial showing arises from the same concerns that bar most other challenges to a charging decision – a concern that examining the basis of a prosecution delays the criminal proceeding, may chill effective law enforcement, and diverts prosecutor’s resources from other duties. *Armstrong*, 517 U.S. at 465, 468. The rule that a defendant may generally not require a prosecutor to explain his reasons for making a particular charging decision applies equally to capital cases. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262

(1986).

In the instant cases, probable cause exists for the filing of the notice of special sentencing proceeding. Probable cause for such a notice is satisfied by probable cause to proceed on a count of premeditated first degree murder with one or more aggravating circumstances, a defendant who was at least 18 years of age on the day of the murder, and probable cause to believe the defendant does not have an “intellectual disability” at the time of the crime. *See State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (Chapter 10.95 RCW does not apply to a defendant who committed murder while a juvenile); RCW 10.95.020 (aggravating circumstances); RCW 10.95.030 (exempting defendants who suffer from an “intellectual disability” from the death penalty). The existence of one or more “mitigating circumstances” does not defeat probable cause for a sentence of death, nor does the existence of one or more “mitigating circumstances” preclude the imposition of a death sentence. *See, e.g., State v. Brown*, 132 Wn.2d 529, 551-52, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998) (a difficult childhood, troubled family life, and various personality disorders insufficient to preclude a death sentence); *State v. Rupe*, 108 Wn.2d 734, 765-66, 743 P.2d 210 (1987) (lack of future danger and absence of prior criminal convictions insufficient to

preclude a death sentence).<sup>5</sup>

In the instant cases, the prosecution satisfied the statutory requirements for filing a notice of special sentencing proceeding. The prosecutor exercised his discretion based upon all the information known to him on the date he filed the notice of special sentencing proceeding, and he indicated a willingness to reconsider if new evidence was called to his attention. *See Pirtle*, 127 Wn.2d at 642-43 (“prosecutor must perform individualized weighing of the mitigating factors – an inflexible policy is not permitted”); RCW 10.95.040(1). The prosecution filed the notice within the statutory time limit, as extended at the defendants’ requests.

While the defendants claim that their due process rights and/or equal protection rights were violated because the prosecutor did not follow the exact same procedure in deciding whether to file a notice of special sentencing proceeding as in other cases,<sup>6</sup> they produced no evidence in the

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<sup>5</sup>Non-capital cases also establish that probable cause is not defeated by the existence of some exculpatory evidence or information. *See, e.g., City of College Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43, *review denied*, 147 Wn.2d 1024 (2002) (fact that a suspect performs well on one or more field sobriety tests will not vitiate the existence of probable cause to arrest for DUI based upon other factors or observations). *Accord Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011) (probable cause exists even when the evidence is not determinative of guilt and the facts do not exclude the possibility of innocence; standard is less than a preponderance of the evidence).

<sup>6</sup>Their main complaint, repeated in this Court, is that the prosecutor did not hire an investigator to identify potential mitigation evidence. *See* Defendants/Respondents’ Joint Response, at 7-10. Defendants, however, do not have a right to enforce a prosecutor’s internal charging policies or standards. *See generally* RCW 9.94A.401 (prosecutor charging standards “are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state”); King County Prosecuting Attorney’s Office, *Filing and Disposition Standards* at 10 (March 2012) (“These standards are intended solely for the guidance of King County deputy prosecutors.

trial court that the prosecutors' decision to file a notice of special sentencing proceeding in their case was based upon an improper classification.<sup>7</sup>

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They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the county or state.") Available at <http://www.kingcounty.gov/Prosecutor/criminaloverview/fads.aspx> (last visited April 14, 2013). See also Annot., *Validity, Construction, and Operation of Department of Justice's "Death Penalty Protocol,"* 190 A.L.R. Fed. 133 (2003) (collecting cases that have uniformly rejected defendant challenges to the decision to seek the death penalty due to alleged deviations from the protocol).

Separation of powers, moreover, prohibits a court or a defendant from requiring a prosecutor to seek out information that a prosecutor does not believe he needs in order to make a charging decision. *People v. District Court of Tenth Judicial District*, 632 P.2d 1022 (Colo. 1981) (separation of powers precludes granting the defendant's request that the rape victim submit to a polygraph examination as the prosecutor determined that he had sufficient information to make his charging decision without the test); *State v. Dedman*, 230 Kan. 793, 640 P.2d 1266, 1270 (1982) (same).

<sup>7</sup>The defendants' crime, which ended the lives of six individuals who represented three generations of one family, is without peer. No other defendant who has been prosecuted for aggravated first degree murder pursuant to Chapter 10.95 RCW has been convicted of an identical offense. See generally RCW 10.95.120 Report of Trial Judge Questionnaires Nos. 1-310. (These reports may be obtained from the Washington Supreme Court Clerk's Office.). Multi-generational killers, whose crimes resulted in the death of members of two generations of a single family, have generally faced special sentencing proceedings in King County. See generally *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006) (defendant who killed his wife and two step children was sentenced to death); *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 506 U.S. 958 (1992) (defendant who killed a mother, father, and their two children was sentenced to death); Timothy Blackwell, Judge's Report No. 174 (King) (defendant murdered three women, one of whom was the defendant's pregnant wife; jury unable to unanimously agree on a verdict in the special sentencing phase); Conner Michael Schierman, Judge's Report No. 303 (King) (defendant who murdered his neighbor, her sister, and her two young sons was sentenced to death). The King County Prosecutor, however, as required by statute, has exercised his discretion in each individual case based upon the available evidence. See, e.g., Minviluz Macas, Judge's Report No. 101 (King) (no special sentencing proceeding requested in case in which defendant murdered her husband and their two sons). A number of other defendants escaped a death sentence due to international treaties. See *State v. Rafay*, 168 Wn. App. 734, 747, 773-74, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013) (murder of the defendant's parents and sister; defendant's extradition from Canada could not be secured until assurances were given that the defendant would not face a sentence of death). The fact that some of these defendants did not face a special sentencing proceeding or that a jury did not impose a sentence of death does not render the sentence of those defendants who received a death sentence unconstitutional or illegal. See, e.g., *In re Personal Restraint of Yates*, No. 82101-1 at ¶ 108-109, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Mar. 14, 2013). Accord *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962)) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation"

In this Court, relying upon rudimentary statistics, the defendants appear to claim that the notice of special sentencing was tied to the race of the defendants' six victims. Defendants/Respondents' Joint Response, at 48-52. The defendants' superficial analysis of a limited number of cases is insufficient to warrant discovery, much less relief for selective prosecution. *See generally United States v. Armstrong, supra; McCleskey v. Kemp, supra* (a statistical pattern of differential treatment insufficient to demonstrate discriminatory intent with respect to the death penalty; defendant must establish evidence specific to his own case that would support an inference that racial considerations played a part in his sentence). Defendants in Washington have yet to establish either a statistical pattern of differential treatment based upon race or specific racial animus. *See State v. Davis*, 175 Wn.2d 287, 364, 290 P.3d 43 (2012) (situation in Washington has not deteriorated since 1995); *State v. Gentry*, 125 Wn.2d 570, 655, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995) ("there is no evidence that race was a motivating factor for the jury, and contrary to the Defendant's suggestion, a review of the first degree aggravated murder cases in Washington does not reveal a pattern of imposition of the death penalty based upon the race of the

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so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'").

defendant or the victim”).<sup>8</sup>

At its heart, the defendants’ position and the basis of the trial court’s decision striking the notices of special sentencing proceeding is a disagreement with the weight given by the prosecutor to the evidence and facts known to the prosecutor when the decision was made to file a notice of special sentencing proceeding. The defendants contend that insufficient weight was given to exculpatory evidence of mitigation, while the trial court believes that too much weight was given to the quality of the available evidence of guilt.<sup>9</sup> Neither of these challenges, however, may be made to an accusatory phase decision. Both of these concerns will be fully addressed by requiring the State to satisfy its burden of proof at trial. This Court should clearly reaffirm this principle in its opinion and should strongly state that the prolonged procedure followed by the trial court in this case, characterized by multiple challenges to the charging decision and inappropriate inquiries into the prosecutor’s thought process, is inappropriate.

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<sup>8</sup>The best statistical models developed to date do not support the claim that either the race of the defendant or the race of the victim is determinative of who will receive a sentence of death. *See generally* Kent Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. J. of Criminal Law 147 (2012).

<sup>9</sup>This ruling is inexplicable as this Court has previously stated that prosecutors may consider the strength of their case in deciding whether to file a notice of special sentencing proceeding. *See State v. Davis*, 175 Wn.2d 287, 357, 290 P.3d 43 (2012) (“Mitigating 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 that decision.”).

**B. A PROSECUTOR PROPERLY CONSIDERS MANY FACTORS IN DETERMINING WHAT CHARGES TO FILE AND WHICH PENALTIES TO SEEK**

It is a long-recognized principle that prosecutors are vested with wide discretion in determining how and when to file criminal charges, and that the exercise of their discretion involves consideration of numerous factors, including the strength of the case, pending conviction on another charge, the defendant's relative level of culpability, confinement on other charges, the prosecution's general deterrence value, the government's enforcement priorities, available resources, the victim's wishes, and the cost of prosecution. *Armstrong*, 517 U.S. at 464-66; *State v. Howard*, 106 Wn.2d 39, 44, 722 P.2d 783 (1985); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (984); RCW 9.94A.411; National District Attorney's Association, *National Prosecution Standards*, Std. 4-2.4 (3rd ed. 2012); American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.9 Discretion in the Charging Decision (3d ed. 1993). So long as the prosecutor has probable cause to proceed upon the charge, the legislature has sought to prevent judicial review of the prosecutor's charging decisions. See RCW 9.94A.401; D. Boerner, *Sentencing in Washington* § 12.24, at 12-47 (1985).

This legislative determination is consistent with a host of judicial pronouncements recognizing that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607, 105 S.

Ct. 1524, 84 L. Ed. 2d 547(1985).<sup>10</sup> It is also consistent with the principle that the decision of what charges to file and whether to engage in plea bargaining are executive branch, not judicial branch functions. *Finch*, 137 Wn.2d at 810 (“A prosecutor’s determination to file charges, to seek the death penalty, or to plea bargain are executive, not adjudicatory”).

While the Legislature<sup>11</sup> has provided standards to guide prosecutors in the exercise of their discretion, the standards do not create rights that are enforceable against the state. RCW 9.94A.401. The legislative guidelines, whether worded as suggested criteria or as mandatory exhortations, do not limit the charging discretion of prosecuting attorneys. *Rice*, 174 Wn.2d at 896. A deviation from the guidelines carries no legal repercussions. *Rice*, 174 Wn.2d at 896. *Accord State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899) (“The prosecuting attorney, in the faithful discharge of his duties, must exercise his independent judgment as to the prosecution or dismissal of an information or indictment, and it is in the interest of sound public policy that his discretion in the exercise of his duties should not be in any wise

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<sup>10</sup>Courts may review a prosecutor's charging discretion only to protect an individual from prosecutorial misconduct that is based upon an unconstitutional motive or carried out in bad faith. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process or otherwise prejudices the defendant. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (prosecution may be dismissed when prosecutor engages in vindictive prosecution, selective enforcement of a statute, or other prejudicial misconduct under CrR 8.3(b)). The defendants established neither bad faith nor misconduct in this case.

<sup>11</sup>The Constitution of this state authorized the Legislature to establish the powers and duties of the county prosecutor. Const. Art. XI § 5.

controlled by legal consequences unpleasant or unfavorable to himself.”).

In the instant case, there is no evidence that the King County Prosecuting Attorney did not faithfully discharge his duties in the selection of charges and the choice of penalty to be requested. Judicial second guessing, whether at the request of the defendants or by the judge, who *sua sponte* decided that the statute contained a mandatory prohibition against considering the strength of the evidence, was inappropriate. The order striking the notice of special sentencing proceeding must be reversed and this matter remanded for a prompt trial.

## V. CONCLUSION

The public is entitled to justice without unnecessary delay. Const. art. I, § 10. This constitutional provision recognizes that lengthy delays between the commission of a crime and the trial can increase the likelihood that key witnesses and evidence will no longer be available for presentation to the trier of fact. While the deterioration of memory and death or disability of witnesses can impact both parties in a criminal case, the prospect of trying a case without access to all of the evidence which was available originally is especially oppressive on the State, which bears the burden of proof.

The pretrial proceedings in this case have been unnecessarily prolonged by improper inquiries into and challenges to the executive branch's charging decision. This Court should issue a strongly worded condemnation of such delays, as

Justice requires that in each instance capital punishment be imposed with maximum assurance of scrupulous legality. But, justice equally demands an assurance that such punishment be imposed when the minds of men still retain memory of the crime committed. Otherwise, capital punishment becomes a sort of second, albeit legal, crime.

*Brogdon v. Butler*, 824 F.2d 338, 344 (5th Cir. 1987) (Clark, C.J., concurring).

Respectfully submitted this 15th day of April, 2013.

  
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PROOF OF SERVICE

Today, April 15, 2013, 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:

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I certify under penalty of perjury of the laws of the State of Washington that

the foregoing is true and correct.

Signed this 15th day of April, 2013, in Olympia, Washington.

  
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Dear Clerk and Counsel:

Attached for filing is the Washington Association of Prosecuting Attorney's amicus curiae brief. Please let me know if you should encounter any difficulty in opening the document.

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