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SUPREME COURT NO. 88410-2
(CONSOLIDATED WITH NO. 88411-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH THOMAS McENROE AND
MICHELE KRISTEN ANDERSON,

Respondents.

DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR
KING COUNTY, THE HONORABLE JEFFREY RAMSDELL

OPENING BRIEF OF PETITIONER

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A. ASSIGNMENT OF ERROR

1. The trial court erred in dismissing the notices of special sentencing proceedings on grounds that were not raised by either defendant, that were not briefed or argued by the parties, and that are unsupported by relevant authority and contrary to well-settled precedent.

B. ISSUES PRESENTED

1. Whether the trial court's inquiry into the Prosecuting Attorney's basis for filing notices of special sentencing proceedings and its subsequent ruling dismissing them impermissibly intruded upon the constitutional charging authority of the Prosecuting Attorney without any *prima facie* showing that the Prosecutor acted unlawfully.

2. Whether the trial court's ruling that the Prosecuting Attorney violated the Equal Protection Clause is erroneous because equal protection is not implicated by treating different defendants and different cases differently based on the available evidence.

3. Whether the trial court's ruling is contrary to this Court's jurisprudence establishing that an evaluation of the evidence is a proper consideration for prosecutors when deciding whether to seek the death penalty.

4. Whether the trial court's ruling is both legally and factually premature.

5. Whether the trial court's ruling is contrary to this Court's jurisprudence establishing that prosecutorial discretion in no way renders Washington's death penalty unconstitutionally arbitrary.

6. Whether the trial court's ruling is erroneous because the proper remedy, even assuming that prosecutors should not consider the evidence in potential death penalty cases, is to remand for the Prosecuting Attorney to consider the matter anew under the new standard.

C. STATEMENT OF THE CASE

Joseph McEnroe and Michele Anderson are charged with six counts of aggravated first-degree murder for killing six members of Anderson's family on December 24, 2007: Anderson's parents, Wayne and Judy Anderson (counts I and II); Anderson's brother, Scott Anderson (count III); Scott's wife, Erica Anderson (count IV); and Scott and Erica's children, Olivia (age 5) and Nathan (age 3) (counts V and VI). As to each count, the State has alleged the aggravating circumstance that there were multiple victims killed as part of a common scheme or plan under RCW 10.95.020(10). As to the counts involving Erica and the two children, the State has also alleged the aggravating circumstance that the murders were committed to conceal the commission of a crime or the identity of the perpetrators under RCW 10.95.020(9). CP 1-16. The State filed a notice of special sentencing proceeding as to each defendant. CP 674-75.

Throughout the more than five years that these cases have been pending, the trial court considered and rejected numerous motions to dismiss the notices of special sentencing proceedings. One of these motions, filed by McEnroe in late 2009,¹ argued that King County Prosecuting Attorney Daniel T. Satterberg violated RCW 10.95.040 because he considered information other than mitigation in making his decision to seek the death penalty in these cases.² More specifically, McEnroe argued that the Prosecutor is barred from considering the facts and circumstances of the case, and that the Prosecutor must make his decision based solely on the mitigating evidence. CP 17-61, 73-87, 170-85, 186-444. The State responded that the Prosecutor must consider *all* available information, including the facts of the case and the strength of the available evidence, and that mitigation cannot be viewed in a vacuum. CP 62-72, 88-169.

In March 2010, during oral argument on this motion, the trial court posed a series of questions to the deputy prosecutor in an attempt to ascertain the State's position as to what role the Prosecutor's assessment

¹ Anderson joined the motion. CP 666-67.

² RCW 10.95.040(1) provides as follows: "If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

of the evidence plays when the Prosecutor considers whether there are sufficient mitigating circumstances to merit leniency.³ The State declared repeatedly that the death penalty decision is a “holistic” decision that should be made based on *all* available information, including the facts of the case, the strength of the evidence, and the mitigating circumstances. RP (3/26/10) 45-75; *see also* Appendix A (excerpts of State’s arguments).

Ultimately, the trial court denied McEnroe’s motion. CP 445-67. McEnroe sought direct discretionary review, which this Court denied. CP 468-94.

On March 1, 2012, McEnroe again made a motion to force the Prosecutor to divulge his thought processes with regard to filing the notices of special sentencing proceedings. It would not be enough, according to defense counsel, that the Prosecutor considered mitigating materials submitted by the defense; rather, the assessment of the Prosecutor’s decision “would depend on the reasons [he was] not persuaded” to withhold filing of the notice. RP (3/1/12) 13.

In May 2012, McEnroe moved for a bill of particulars as to the basis for the Prosecutor’s decision. CP 746-60, 1248-92. He demanded to know: “What facts refute or show insubstantial the mitigating information Mr. McEnroe has submitted to the Prosecuting Attorney?” CP 1270. The

³ The trial court’s questions were based upon a hypothetical set out in a footnote in the State’s brief. *See* RP (3/26/10) 55.

State responded that it had provided counsel with all the facts underlying its decision, and that further explanation of the Prosecutor's reasoning about those facts was not required. CP 1248-69, 1280-92; *see also* RP (5/30/12) 36 ("It's not a request for facts. They have had the facts. It's a request for thought processes."). This motion was argued on May 30, 2012, and was denied by the trial court. RP (5/30/12); CP 1293-94.

On December 5, 2012, McEnroe asked the trial court to permit him to revive his motion – brought almost three years earlier – to the effect that the Prosecutor violated RCW 10.95.040 by considering facts in addition to mitigation. On December 7, 2012, the trial court denied that request for failure to state an adequate basis to revisit the issue. CP 670-73.

On November 26, 2012, McEnroe filed his most recent motion to dismiss the notices of special sentencing proceedings on grounds that the King County Prosecutor violated RCW 10.95.040, equal protection, and due process by allegedly disregarding the mitigating evidence that was provided to him by the defense, and by allegedly focusing solely on the facts and circumstances of the crimes, in deciding to seek the death penalty.⁴ CP 495-535. In essence, this motion argued a variation on the previous motion; instead of arguing that the Prosecutor must consider *only* mitigation, this subsequent motion argued that the Prosecutor did not

⁴ Anderson also joined this motion. CP 668-69.

consider mitigation *at all*. CP 495-540, 584-97. More specifically, McEnroe alleged that the State had hired an independent investigator to seek out background information on other defendants charged with aggravated murder, whereas it had not hired such a person in this case. From this allegation, McEnroe asked the trial court to infer that the State had not considered his mitigation material at all. The State responded that this motion simply expressed defense counsel's sincere, but misguided belief that the mitigation offered by these defendants was so compelling that the Prosecutor necessarily must have ignored it in deciding to seek the death penalty. CP 541-83.

On January 17, 2013, during oral argument on this motion, the trial court raised anew questions it had raised three years earlier regarding the role that evidence of guilt plays in the Prosecutor's decision to seek the death penalty. That issue was neither raised by the defendants nor briefed by the parties. RP (1/17/13) 71-74. During this questioning, it appeared that the trial court was attempting generally to distinguish the "facts and circumstances" of a case as a wholly separate concept from the evidence available to prove those "facts and circumstances." RP (1/17/13) 75-77. The State explained that those two concepts could not be artificially "uncoupled," because the facts and circumstances of a case could only be known on the basis of the evidence available to prove them. RP (1/17/13)

76, 78. The State also reiterated that a prosecutor's decision to seek the death penalty should be based on all available information, including mitigation. RP (1/17/13) 80-81. The trial court never asked for additional briefing on this point.

On January 31, 2013, the trial court announced its ruling dismissing the notices of special sentencing proceedings. RP (1/31/13); CP 598-610. As noted above, the trial court made its ruling on a basis that was not briefed or argued by either defendant: that the King County Prosecutor violated equal protection by considering the strength of the available evidence when deciding to seek the death penalty against McEnroe and Anderson. CP 598-610. The trial court also declared that it was improper for the Prosecutor to consider the facts shown by the defendants' lengthy, detailed confessions, and the court revealed its mistaken and unfounded belief that the State had argued it could seek the death penalty based *solely* on strong evidence of guilt. CP 609.

After the State filed a notice of discretionary review, it asked the trial court to stay the effective date of its ruling so that McEnroe's trial could begin as scheduled on February 25, 2013. CP 627-34, 646-51. In its order denying the State's motion to stay, the trial court augmented its

ruling dismissing the notices of special sentencing proceedings.⁵

CP 652-63. Again, the trial court repeated its mistaken belief that the State had somehow argued that the “strength of the case” was, in effect, a stand-alone aggravating circumstance, and reiterated its position that the “facts and circumstances” of the case (which the prosecutor *can* consider) are a wholly separate concept from the evidence available to prove those “facts and circumstances” (which, in the trial court’s view, the prosecutor *cannot* consider).⁶ CP 652-63.

This Court granted the State’s emergency motion to stay further proceedings in the trial court, and granted discretionary and direct review. Accordingly, McEnroe’s impending trial date was stricken, and the 3,000 jurors who were summonsed to appear for McEnroe’s trial were excused. CP 664-65.

D. ARGUMENT

The trial court has stricken notices of special sentencing proceedings filed by the elected Prosecutor pursuant to his constitutional

⁵ The trial court acknowledged that it had been “reflect[ing] upon its decision rendered on January 31, 2013” and had taken the unusual step of reviewing the State’s motion for discretionary review and the defendants’ responses. CP 653-54.

⁶ The trial court’s order denying the State’s motion to stay also reaffirmed that the lynchpin of its decision dismissing the notices was a footnote in the State’s written response to the defendants’ original motion to dismiss, filed and argued three years earlier. Furthermore, the trial court’s order denying the motion to stay tacitly acknowledged that the parties could not have foreseen its ruling, since that ruling was the product of the court’s two-year, undisclosed “evolution” in thinking on the issue – a process undertaken in the absence of a motion by either defendant and without input from any party. CP 656, 662.

and statutory duties. The court's ruling appears to have two parts: 1) a ruling that the Prosecutor should not have considered the "strength of the case" in making his decision; and 2) that considering the "strength of the case" constitutes a violation of the Equal Protection Clause. It is not clear whether these rulings were intended to be independent bases for the court's ruling. In any event, the State respectfully asks this Court to address the following points.

First, this Court should reaffirm the fundamental principle that charging decisions, including decisions whether to file a notice of special sentencing proceeding under RCW 10.95.040, are entrusted to the authority of the elected prosecutors, and are subject to limited review only after the defense has made a *prima facie* case of a constitutional violation. The defendants in these cases were permitted to launch attack after attack seeking to explore the basis for the Prosecutor's decision to file notices of special sentencing proceedings without the required *prima facie* showing. This was error; in the absence of evidence that a prosecutor has exercised discretion on a constitutionally impermissible basis, the charging decisions and thought processes of the prosecutor are confidential. The trial court should not have permitted the detailed inquiries that occurred in this case.

Second, the trial court's ruling that considering the strength of the evidence results in an equal protection violation must be reversed. Settled

principles of law establish that no equal protection violation occurs when a prosecutor charges a defendant based on the strength of the case or fails to charge based on the weakness of the case.

To the extent that the trial court's order presumes that the King County Prosecutor filed the notices of special sentencing proceedings simply because the evidence of *guilt* was strong, and to the extent that the court ruled that the Prosecutor ignored mitigating evidence, that ruling is wholly unsupported by the record and must be reversed. The deputy prosecutor repeatedly made clear that the Prosecutor considered *all available evidence*, including evidence of mitigation *and* aggravation.

To the extent that the trial court's order might be presumed to establish a rule forbidding a prosecutor from considering the "strength of the case" – where that phrase means the strength of the evidence showing both guilt *and* aggravating circumstances – the court's ruling should be reversed. A prosecutor must always, in the discharge of his or her duties, evaluate the strength of the case before making a filing decision or a death penalty decision. In this circumstance, that evidence is considered against evidence of mitigating circumstances. The inquiry should end there.

Additionally, a pretrial ruling striking the notices of special sentencing proceedings is premature because the facts and circumstances needed to fully assess the propriety of the charge and the appropriate

punishment have not yet been developed because no evidence has yet been presented.

Nor does it matter that the strength of the evidence sometimes depends on factors beyond human control which may influence the outcome of legal cases. Such matters are not a basis to find the death penalty statute unconstitutional or to find that the State may not seek the death penalty in these cases.

Finally, in the event this Court were to create a prohibition that does not currently exist in the statute or in this Court's many cases interpreting the statute – *i.e.*, that the Prosecutor cannot consider the strength of the evidence in making a decision under RCW 10.95.040 – good cause exists to permit the Prosecutor to reconsider the notice decision in light of a newly-created prohibition.

1. A DECISION TO SEEK THE DEATH PENALTY IS AN EXERCISE OF THE PROSECUTOR'S CONSTITUTIONAL CHARGING AUTHORITY, AND IS SUBJECT TO ONLY LIMITED JUDICIAL REVIEW.

In order to evaluate the propriety of the trial court's order, it is first necessary to examine the nature of the decision that the court overturned.

The relevant statute provides:

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing

proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

RCW 10.95.040. This notice requirement is statutory, not constitutional.

State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996). The statute does not demand that a prosecutor follow any predetermined procedure, nor does it require that a prosecutor consider a formal "mitigation packet."

The statute simply requires that the prosecutor file a notice if there is "reason to believe" that mitigating circumstances do not merit leniency.

In addition, the notice can be withdrawn if additional mitigation evidence becomes available at any time before the jury renders a verdict on guilt.

RCW 10.95.050(1).

This statute is like many other Washington statutes that direct a prosecutor to charge a crime or a sentencing enhancement. The prosecutor's general duty is to "[p]rosecute all criminal . . . actions in which the state or the county may be a party." RCW 36.27.020(4). "A prosecuting attorney's most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file." State v. Rice, 174 Wn.2d 884, 901, 279 P.3d 849 (2012). This authority extends to the filing of special sentencing allegations that increase a defendant's punishment. Rice, 174 Wn.2d at 906.⁷

When exercising this critical charging authority – whether as to the initial charge or as to a sentencing enhancement – a prosecutor must consider more than simply the sufficiency of the evidence and the likelihood of conviction. Rice, at 902. A prosecutor must also consider individual facts and circumstances with the goal of achieving individualized justice, prioritizing competing investigations and prosecutions, and balancing numerous criminal statutes. Id. The prosecutor's exercise of broad charging authority is central to his or her constitutional role as a locally elected public official who answers to local norms rather than to a centralized power. Id.

⁷ The language of the statutory sentencing enhancements at issue in Rice is quite similar to the language of RCW 10.95.040(2).

This Court has repeatedly held that a prosecutor's exercise of discretion to seek the death penalty under RCW 10.95.040 is "similar to his discretion in charging a crime: 'The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury.'" 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)). The United States Supreme Court has held that prosecutors need not explain their reasoning to either seek the death penalty or grant leniency:

Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case.

McCleskey v. Kemp, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986).

The separation of powers doctrine is a fundamental precept of our system of government. Rice, at 900. Although the different branches are partially intertwined as a practical matter, the separation of powers doctrine ensures that the core functions of each branch remain inviolate. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The doctrine requires that neither the legislative nor the judicial branch encroach on the

prosecutor's charging authority. Thus, the legislature may not compel a prosecutor to file charges. See Rice, *supra* at 899. Judicial review is likewise circumscribed; charging decisions are reviewed solely for compliance with limited rudimentary principles. State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984).

Accordingly, a court may insist that a prosecutor exercise discretion rather than rely on inflexible policies, it may insist that the prosecutor abide by constitutional principles like equal protection of the law, it must verify that any charge or enhancement is authorized by law, and it must ensure that any charge is supported by sufficient evidence. Judge, 100 Wn.2d at 713. A reviewing court may not, however, second-guess a prosecutor's charging decision or demand an explanation of the basis for that decision unless the defendant makes a *prima facie* case that the prosecutor has acted unlawfully.

The language and overall structure of the Washington death penalty scheme presumes that the death penalty filing decision is a charging decision. The relatively short 30-day period set by RCW 10.95.040 is consistent with the straightforward charging and notice purpose of the statute. Although additional time to file the notice may be requested by the prosecutor and granted for good cause under subsection (2), the legislature clearly believed that a 30-day baseline is presumptively

sufficient to review the case and decide whether there is reason to believe that leniency is merited. This statutory language and structure do not anticipate or permit a preliminary trial regarding the prosecutor's decision, and then a second trial to a jury. *See* CP 1288-89 (deputy prosecutor lists the practical difficulties of a pretrial challenge).⁸ Had the legislature intended to establish such a process for reviewing the prosecutor's decision whether to file a notice of special sentencing proceeding – a purpose completely at odds with preexisting law – it would have expressly provided an avenue and a procedure for such challenges.

Cases interpreting the Federal Death Penalty Act show that the federal system functions much like Washington's, and that both statutory schemes presume that the death penalty charging process is a confidential

⁸ An additional concern with the defendants' arguments is needless delay. As can be seen from the voluminous clerk's papers and from the transcripts, defense counsel has expended a great deal of time and energy urging the trial court to require the King County Prosecutor to explain the basis for his decision to seek the death penalty in these cases. Such needless litigation contributes substantially to the 5½ years of pretrial litigation in these cases. Other Washington courts have adjudicated *both* the capital trial and a full direct appeal in less time. *See e.g. State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984) (three years from crime to supreme court decision); *Campbell, supra* (two years from crime to supreme court decision); *Dictado, supra* (three years from crime to supreme court decision); *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993) (4½ years from charging to supreme court decision); *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) (six years from crime to supreme court decision); *State v. Davis*, 141 Wn.2d 647, 10 P.3d 977 (2000) (three years from crime to supreme court decision); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) (five years from crime to supreme court decision).

executive function.⁹ *See* 18 U.S.C. § 3591 *et seq.* These cases further illustrate why it is not appropriate to conduct a pre-trial judicial review of this process.

Under the Federal Death Penalty Act, as is true in Washington, the Attorney General must file a notice if he or she decides to pursue the death penalty. 18 U.S.C. § 3593(a). The United States Department of Justice has established a written protocol for making that decision. Like the defendants in this case, federal defendants have repeatedly argued that they are entitled to discovery to determine whether the Justice Department properly considered their cases under the protocol, and that deviation from the protocol requires striking of the notice. These arguments have been uniformly rejected. *See* Validity, Construction, and Operation of Department of Justice's "Death Penalty Protocol," 190 A.L.R. Fed. 133 (2003). As many federal courts have held,

It is well settled that the Department of Justice Death
Penalty Protocol does not create any substantive or

⁹ Defense counsel has repeatedly asserted that Washington's statute is "unique" because no other statute has identical language. *See, e.g.*, CP 788; RP (3/26/10) 16. The trial court has also repeatedly touted the statute's uniqueness. But neither the defense nor the trial court has explained why this alleged uniqueness changes the relevant legal analysis. Under *all* death penalty statutory schemes, the prosecutor must exercise discretion to either pursue the death penalty or not. Gregg v. Georgia, 428 U.S. 153, 195, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). In a state where the death penalty is narrowed by the filing of aggravating circumstances, surely the prosecutor exercises discretion to either file or not file an aggravator, and thus decides whether it is an ordinary murder case or a capital case. Whether under that scheme or the Washington scheme, the prosecutor's charging decision is not reviewable absent a *prima facie* showing that discretion has been exercised on a constitutionally impermissible basis.

procedural rights for defendants. *See U.S. v. Shakir*, 113 F. Supp. 2d 1182, 1186 (M.D.Tenn.2000); *Nichols v. Reno*, 931 F. Supp. 748, 751 (D. Colo.), *aff'd*, 124 F.3d 1376 (10th Cir.1997); *United States v. McVeigh*, 944 F. Supp. 1478, 1483-84 (D. Colo.1996). The decision to seek the death penalty and the issuance of the Notice of Intent pursuant to the protocol, are “essentially a prosecutor’s charging decision.” *Shakir*, 113 F. Supp.2d at 1187. Such prosecutorial discretion to make charging decisions “has repeatedly and consistently been held to be presumptively unreviewable by the courts.” *Id.*

United States v. Haynes, 242 F. Supp. 2d 540, 541 (W.D. Tenn. 2003).

Similarly, other federal courts have ruled that the death penalty evaluation forms and prosecution memoranda anticipated by the protocol are protected by the deliberative process and work product privileges. *See United States v. Fernandez*, 231 F.3d 1240, 1246-47 (9th Cir. 2000); *United States v. Edelin*, 128 F. Supp. 2d 23, 39-41 (D.D.C. 2001). Federal courts have also recognized that inquiry into the death penalty decision-making process would curtail full discussion within the Department of Justice. *See, e.g., United States v. Frank*, 8 F. Supp. 2d 253, 284 (S.D.N.Y. 1998) (“Discovery of the deliberative materials would have a chilling effect on the thorough evaluation of these issues and hinder the just, frank, and fair review of the decision for every individual defendant who faces the prospect of receiving a Notice of Intent to Seek the Death Penalty”).

These principles establish that, unless the defendant makes a *prima facie* showing of a constitutional violation, discovery and inquiry into a prosecutor's RCW 10.95.040 charging decision is improper. As argued below, the trial court plainly erred when it found an equal protection violation *sua sponte*, and when it criticized the King County Prosecutor's consideration of the "strength of the evidence" to make his decision. The trial court was ill-equipped to second-guess the Prosecutor's decision, since it had not heard any evidence as to guilt or as to aggravating or mitigating circumstances. *See* RP (5/30/12) 33 (trial court confirms it had not seen mitigation packet). In sum, the trial court's ruling impermissibly intrudes upon the executive charging authority of the Prosecutor without any tenable basis for doing so. As such, it should be reversed.

2. THE EQUAL PROTECTION CLAUSE IS NOT IMPLICATED BY TREATING DIFFERENT DEFENDANTS AND DIFFERENT CASES DIFFERENTLY.

The trial court concluded that the King County Prosecutor's consideration of the evidence in aggravated murder cases constitutes an equal protection violation. More specifically, the trial court posited a hypothetical wherein two defendants have committed "identical" aggravated murders in separate police jurisdictions, yet in one case the evidence is strong and in the other the evidence is weak as a result of the

quality of the respective law enforcement investigations. The trial court concluded based on that hypothetical that treating those “identical” cases differently with respect to seeking the death penalty violates equal protection. CP 607. This ruling is erroneous in several respects.

First, the trial court did not perform an equal protection analysis in reaching its conclusion that an equal protection violation had occurred. It is axiomatic that “[a] denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons.” Stone v. Chelan County Sheriff’s Dept., 110 Wn.2d 806, 811, 756 P.2d 736 (1988). “However, no equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons.” State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990) (citing Stone, 110 Wn.2d at 812). Thus, the very first step in any equal protection analysis is to require the defendants to identify the class of similarly situated persons of which they are members. Handley, 115 Wn.2d at 290.

In this case, the trial court did not require the defendants to identify a class of similarly situated persons for purposes of its analysis. In any event, the only “class” that could be relevant to the trial court’s analysis appears to be people who commit aggravated murders. However, as this Court has recognized in the capital sentencing context, “it is obvious that

every defendant who commits the same type of crime, or indeed the same crime, will not necessarily be given the same penalty.” State v. Mak, 105 Wn.2d 692, 724, 718 P.2d 407 (1986). Moreover, even co-defendants charged with the same crime are not “similarly situated” for sentencing purposes unless the evidence proves “near identical participation in the same set of criminal circumstances[.]” Handley, 115 Wn.2d at 290. And, even when two co-defendants participate in the same crime in the same manner, no equal protection violation occurs when they receive different sentences if there is a rational basis for treating them differently. Id.

In the charging context, no equal protection violation occurs when the State charges only one of multiple participants in a crime when that charging decision is “based on the prosecutor’s ability to prove the charge.” Judge, 100 Wn.2d at 713. In other words, there is no requirement that in order to charge *one* participant in a crime, the State must charge *all* participants. As this Court has explained, so long as prosecutorial discretion is exercised on a rational basis, a prosecutor’s charging discretion does not violate equal protection:

Exercise of this discretion involves consideration of factors such as the public interest *as well as the strength of the case which could be proven*. The exercise of a prosecutor’s discretion by charging some but not others guilty of the same crime does not violate the equal protection clause of U.S. Const. amend. 14 or Const. art. 1, § 12 so long as the selection was not deliberately based upon an unjustifiable

standard such as race, religion, or other arbitrary classification.

Judge, 100 Wn.2d at 713 (citations and internal quotation marks omitted) (emphasis supplied).

From the authorities cited above, three general principles may be distilled: 1) persons who commit crimes are not “similarly situated” unless the evidence proves that they participated in the same crime in the same way; 2) prosecutors may make different charging decisions based on the strength of the available evidence, even in cases involving co-participants, without violating equal protection; and 3) even co-defendants may be treated differently for either charging or sentencing purposes if there is a rational basis for doing so.

As this Court has held, a prosecutor’s exercise of discretion in deciding whether to seek the death penalty is similar to a prosecutor’s exercise of discretion in deciding whether to charge a crime. Campbell, at 26; Dictado, at 298. Accordingly, if a prosecutor exercises discretion on a rational basis in deciding to charge one person but not another with a crime based upon the available evidence, it simply makes no sense to find that an equal protection violation has occurred if a prosecutor considers the available evidence in deciding whether to file a notice of special sentencing proceeding. Indeed, because each crime and each defendant is

unique, it is the prosecutor's duty to make an individualized determination in each aggravated murder case. See State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995). The trial court's failure to conduct an equal protection analysis before finding an equal protection violation is error in itself.

But furthermore, the trial court cited no authority for the proposition that an equal protection violation may be found based only upon an hypothetical that has no bearing on the case at hand, and undersigned counsel have found no such authority. A purely hypothetical scenario is not a basis to dismiss notices of special sentencing proceedings in a case involving the murders of six people, where both defendants are fully culpable in the murders, and where the mitigating information as to each does not merit leniency.

Finally, to conclude, as the trial court did, that RCW 10.95.040 imposes a mandatory requirement that the notice of special sentencing proceeding be filed in cases where the State charges a defendant with aggravated first degree murder regardless of the available evidence, and that to do otherwise violates equal protection, is both contrary to established capital jurisprudence and bad public policy. Indeed, this Court has held that a prosecutor violates his or her duty under the statute if he or she *fails* to exercise discretion in deciding whether to seek the death

penalty (*i.e.*, if the prosecutor fails to make an individualized determination with regard to each defendant and each aggravated murder case). Pirtle, 127 Wn.2d at 642. To suggest that a prosecutor violates equal protection by carefully exercising discretion in light of the available evidence strains the equal protection doctrine beyond recognition.

In sum, the trial court erred in ruling that the King County Prosecutor violated equal protection principles in considering all of the available evidence when deciding whether to seek the death penalty. The trial court's ruling is based only upon an implausible hypothetical, identifies no class of similarly-situated persons, and disregards the fact that there is a rational basis to treat defendants differently for both charging and sentencing purposes when the evidence against them is different. The trial court's ruling is both factually and legally infirm, and this Court should reverse.

3. THIS COURT'S JURISPRUDENCE ESTABLISHES THAT AN EVALUATION OF THE AVAILABLE EVIDENCE IS A PROPER CONSIDERATION FOR PROSECUTORS WHEN DECIDING WHETHER TO SEEK THE DEATH PENALTY.

Other than equal protection, the legal basis for the trial court's decision is not entirely clear. However, there appear to be two erroneous aspects to the trial court's ruling regarding the "strength of the evidence." First, the trial court appears to have misinterpreted the deputy prosecutor's

comments regarding how the Prosecutor decided whether to file the notices of special sentencing proceedings. Second, the trial court seems to believe that the State may consider the “facts and circumstances” of the crime, but must entirely ignore the “strength of the evidence” in making a decision whether to file a notice of special sentencing proceeding. Both rulings are incorrect for the reasons set forth below and, whether intentionally or not, intrude upon the Prosecutor’s charging authority.

- a. The Prosecutor Considers The Strength Of All The Evidence Showing Guilt And Aggravating Circumstances As Compared To The Evidence Of Mitigating Circumstances; He Does Not Simply Weigh Evidence Of Guilt Against Evidence Of Mitigation.

The trial court appears to assume that the Prosecutor will file a notice of special sentencing proceeding in all cases where the evidence of guilt is strong, even if compelling mitigating circumstances are present. *See* CP 602 (Order Striking Notice of Intent to Seek the Death Penalty); CP 657 (Order Denying Stay). This assumption is unfounded.

The trial court’s original order (CP 602) does not explain the basis for this assumption, but the subsequent Order Denying Stay, drafted after the court had reviewed the State’s Motion for Discretionary Review, points to a footnote in a State’s brief filed three years earlier and addressed to a different motion. CP 657 (referring to a State’s brief, which can be

found at CP 69). The footnote in question begins with the word “Hypothetically,” but that word is not included in the court’s order. *Compare* CP 69 n.2 with CP 657. Clearly, the deputy prosecutor was not describing an actual practice; rather, she was simply positing a hypothetical to illustrate a wholly different point.

Moreover, neither of the trial court’s orders considers the *purpose* or *context* of the 2010 footnote. That footnote was intended to show the absurdity of the defendant’s argument that a prosecutor may consider *only* mitigation to the exclusion of any evidence about the facts and circumstances of the crime. The point of the footnote was to illustrate that the defendant’s reasoning would lead to notices of special sentencing proceedings where evidence of mitigation is weak, or no notices where the mitigation evidence is comparatively strong, regardless of the heinousness or moral blameworthiness of the defendant’s actual conduct as shown by the available evidence. In context, the meaning of the footnote is clear, as the prosecutor ends the footnote by saying that the defendant’s argument would mean that the defendants most deserving of the death penalty would escape that punishment while those who deserve it least would face the punishment, and “this simply cannot be the law.” CP 69 n.2. Moreover, immediately following this footnote, the deputy prosecutor described the

Prosecutor's decision as involving a "holistic" approach, wherein the Prosecutor considers *all* available evidence, including mitigation. CP 70.

The trial court, however, took the footnote wholly out of context and, three years later, simply assumed that the State would file a death notice on all strong cases even if there was "compelling" evidence of mitigation. This assumption cuts against numerous statements the deputy prosecutor had made in writing or in argument making clear that mitigation is considered. *See* Appendix A (listing quotations from the deputy prosecutor).

In sum, the trial court erred in taking a hypothetical posed in a footnote out of context and assuming it described the elected Prosecutor's decision-making process. It did not. When considering whether to file a notice under RCW 10.95.040, the Prosecutor evaluates the strength of all the evidence underlying the crime and its circumstances, and considers that evidence in light of the mitigating circumstances. If, in light of the crime and the evidence, there is "reason to believe that there are not sufficient circumstances to merit leniency," the notice is filed.

There is an additional ambiguity in the trial court's ruling that should be clarified. The trial court seems to believe that "the facts and circumstances of the crime" is a wholly separate concept from the "strength of the evidence." Although it may be possible to make such a

distinction in the abstract, in this context, the distinction is without a difference. The “facts and circumstances of the crime” are *shown* by the existing evidence. One can draw more and stronger inferences regarding the facts and circumstances of the crime from strong evidence than from weak evidence. Thus, a case with strong evidence of guilt *and* aggravation will generally provide a more compelling case for the death penalty.

Moreover, evidence may be simultaneously relevant to the elements of the crime and to the aggravating circumstances. For example, one defendant’s confession might establish only the minimum needed to prove the element of premeditation, but a different defendant’s confession may show that a crime was meticulously planned and coldly and cruelly executed. *See, e.g. State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In such a context, it makes little sense to distinguish evidence of guilt from evidence of blameworthiness. In the end, both must be considered in their totality and considered against the mitigating circumstances.

Thus, the trial court erred because it misconstrued the deputy prosecutor’s comments, and because it erroneously believed that evidence of guilt could be meaningfully separated from evidence of the defendant’s blameworthiness. Put another way, the “facts and circumstances” of the

crime are the same as the “evidence” of the crime, and the trial court erred in ruling otherwise.

b. The Strength Of The Evidence Must Be Considered In Deciding Whether To File A Notice Of Special Sentencing Proceeding.

The trial court’s ruling that an elected county prosecutor cannot consider the strength of the available evidence to be presented at trial is contrary to controlling authority from this Court. More specifically, this Court has stated consistently over the past 30 years that a prosecutor should consider any available information about the defendant *and* the crime, including the strength of the evidence, in deciding whether to seek the death penalty.

In State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), the defendant argued, *inter alia*, that Washington’s death penalty statute “is unconstitutional because it allows prosecutorial discretion in the decision to seek the death penalty.” Rupe, 101 Wn.2d at 699. In summarily rejecting this argument, this Court observed that “courts may assume that prosecutors exercise their discretion in a manner which reflects their judgment concerning *the seriousness of the crime or insufficiency of the evidence.*” Id. at 700 (emphasis supplied). This observation reflects the Court’s acknowledgment that the strength of the available evidence is a proper consideration in a prosecutor’s exercise of discretion in

determining whether seeking the death penalty may be appropriate in a given case.

And more recently, in State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012), in the course of performing its statutorily-mandated proportionality review, the Court stated:

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.* For example, the trial judge's report regarding Martin Sanders states, "The plea agreement to recommend life without possibility of parole was due to the fact that the State felt there was a reasonable possibility of acquittal due to the circumstantial evidence available in the case." [. . . .] Similarly, the report concerning Jack Spillman relates that "the prosecution's case did not include direct evidence of [the] defendant's involvement in the murders," although there was "strong circumstantial evidence," and that "members of the victims' family spoke at the sentencing hearing in support of the life sentence and resolution of the case."

Davis, 175 Wn.2d at 357-58 (emphasis supplied). Again, these pronouncements from the Court acknowledge the obvious fact that it is proper for the elected prosecutor to consider the strength of the available evidence when determining whether to allow a jury to consider imposing the death penalty in any given case.

Indeed, the trial court acknowledged the existence of these cases in its ruling. *See* CP 607-08 (citing Rupe and Davis). Nevertheless, the trial court reasoned that these cases were distinguishable because, "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." CP 608 (emphasis in original). This reasoning is illogical. If, as the trial court acknowledges, the strength of the evidence is a proper consideration in deciding *not to seek* the death penalty, there is no reason that the strength of the evidence cannot be considered at all in deciding *to seek* the death penalty.¹⁰ Moreover, although the trial court attempted to distinguish Rupe and Davis on these tenuous grounds, it provided no authority that actually supports its decision. This is because no such authority exists.

Furthermore, in reaching its decision, the trial court relied on the notion that a *jury* cannot consider the strength of the evidence during the penalty phase, and therefore, the *prosecutor* cannot consider it in determining whether a penalty phase will occur in the first instance. *See* CP 606 ("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

¹⁰ Of course, a rule based on the trial court's distinction would be impossible to follow; the prosecutor must either look at the evidence, or not. In other words, if the strength of the evidence is a proper consideration only in deciding *not* to seek the death penalty, how could a prosecutor ever engage in such an analysis without first deciding, in advance, that the case under consideration was not appropriate for the death penalty? Otherwise, according to the trial court, once the prosecutor considers the strength of the evidence, he or she would be precluded from seeking the death penalty. This failure of logic further demonstrates that the trial court's ruling is erroneous.

guilt is of no relevance.”). The trial court’s view that a *jury* cannot consider the strength of the evidence during the penalty phase is fundamentally incorrect. And, again, the trial court provided no authority that supports this view; indeed, available authority supports the opposite conclusion.

Jurors are specifically instructed at the beginning of the penalty phase that “[d]uring your deliberations, you should *consider anew the evidence* presented to you in the first phase of this case.” WPIC 31.02 (emphasis supplied). As noted in the commentary for this instruction, it is proper “to instruct the jury to consider *all the evidence* during the penalty phase, and not just whether there were insufficient mitigating circumstances.” Comment, WPIC 31.02 (2008) (citing Brown, 132 Wn.2d at 613-23) (emphasis supplied).

Additionally, this Court’s jurisprudence further establishes that it is entirely proper for jurors to consider the strength of the State’s case as presented in the guilt phase in determining whether there are insufficient mitigating circumstances to merit leniency in the penalty phase. *See, e.g., State v. Campbell*, 103 Wn.2d 1, 29, 691 P.2d 929 (1984) (holding that “the *overwhelming evidence* against Campbell during the guilt phase” supported the jury’s conclusion in the penalty phase that there were not sufficient mitigating circumstances to merit leniency) (emphasis supplied);

State v. Woods, 143 Wn.2d 561, 615, 23 P.3d 1046 (2001) (holding that the “*strong evidence* that convinced a jury that Woods was guilty of these crimes that were extremely ghastly and violently executed” was sufficient to support the jury’s verdict that the death penalty should be imposed) (emphasis supplied).¹¹

Not only is the trial court’s ruling contrary to precedent from this Court, but it is also fundamentally unsound as a matter of public policy. One of the primary arguments put forth in support of abolishing the death penalty is the possibility that an innocent person may be executed. *See Furman v. Georgia*, 408 U.S. 238, 290-91, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) (lamenting that the death penalty “must inevitably be inflicted upon innocent men”). Yet the trial court has ruled that the strength of the evidence that is available to prove a defendant’s guilt cannot be considered *as a matter of law* when an elected prosecutor is making the decision whether to seek the death penalty.

¹¹ Conversely, although McEnroe argued to the trial court that a capital defendant is not constitutionally entitled to a jury instruction on the concept of “residual doubt” in the penalty phase (*see* CP 597 and RP (1/17/13) at 85-86), this certainly does not mean that a capital defendant would be constitutionally *precluded* from arguing weaknesses in the evidence as a reason for the jury not to impose the death penalty. If the strength or weakness of the State’s case is a proper consideration for the jury in deciding whether to *impose* the death penalty, then it is certainly relevant to the prosecutor’s decision whether to *seek* the death penalty. A prosecutor who decides to proceed with the death penalty only in cases where there is no doubt of the defendant’s guilt does not violate equal protection of the laws.

The trial court's ruling is the antithesis of justice, as it would *require* prosecutors to seek the death penalty in cases where the evidence of the defendant's guilt is not unassailable. Put another way, the trial court has concluded that it is *error* for the elected prosecutor to inform him- or herself as thoroughly and completely as possible in making the decision whether to file the notices of special sentencing proceedings, and that the public is better served by a decision that disregards the nature and qualities of the evidence that will be presented to the jury.

Another pillar of opposition to the death penalty is the argument that death penalty cases take too long and are too expensive. By focusing public resources on the most deserving cases – *i.e.*, those with strong evidence of guilt – a prosecutor exercises sound discretion. The trial court's ruling constitutes poor public policy for this reason as well.

A prosecutor's role is to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). Surely, in carrying out his or her duty to seek justice, a prosecutor *should* consider the strength of the evidence in determining whether the death penalty may be considered by the jury. In so doing, the prosecutor ensures that only those defendants who are unquestionably guilty of the most heinous crimes will face the harshest punishment that the law allows. To suggest

otherwise, as the trial court has, is inconsistent with both justice and common sense.

Finally, it should go without saying that a stronger case is more likely to survive the arduous appellate process where the facts may be subject to reinterpretation by a reviewing court. Examples are legion, but a recent California case is particularly apt. A federal court of appeals twice overturned a death sentence, and was twice reversed by the Supreme Court. *See Wong v. Belmontes, Jr.*, 558 U.S. 15, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009). In rejecting the federal appellate court's treatment of the aggravating and mitigating evidence, the Supreme Court opinion stressed the strength of the state's case. *Wong v. Belmontes, Jr.*, 130 S. Ct. at 390 (quoting the state supreme court opinion stating that there was "extremely strong evidence that [Belmontes] committed an intentional murder of extraordinary brutality" and that "[t]he properly admitted evidence in this case – in particular, the circumstances of the crime – was simply overwhelming"). A case where the facts are not exceptionally brutal and the evidence is not overwhelming is simply more vulnerable to reversal on appellate or habeas review. A prudent prosecutor *must* anticipate this lengthy review process in deciding which cases to pursue as death penalty cases.

In sum, the trial court's decision is not only unsupported by authority, it is directly contrary to controlling authority from this Court and constitutes poor public policy. The trial court's ruling should be reversed.

4. THE TRIAL COURT'S RULING IS PREMATURE.

As argued in the Motion for Discretionary Review, the trial court erred in dismissing the notices of special sentencing proceedings at this juncture. The decision is both factually and legally premature. This error is related to, but distinct from, the separation of powers principles set forth above.

The Court of Appeals has previously held that it is not proper for a trial court to dismiss aggravating circumstances prior to trial because such a ruling is antithetical to society's interest in having a full opportunity to convict and punish those who have violated the law, "does not relieve the defendant of the burden of undergoing a trial" on the underlying charges, and forces the State to seek interlocutory review, which is "the antithesis of judicial efficiency and economy." State v. Brown, 64 Wn. App. 606, 615, 617, 825 P.2d 350, rev. denied, 119 Wn.2d 1009 (1992) (cited with approval in In re Personal Restraint of Woods, 154 Wn.2d 400, 424, 114 P.3d 607 (2005)); *see also* CrR 8.3(c)(3) (directing that trial courts "shall not dismiss a sentence enhancement or aggravating circumstance unless

the underlying charge is subject to dismissal under this section"). This reasoning should apply perforce to the trial court's ruling dismissing the notices of special sentencing proceedings against McEnroe and Anderson.

Neither an aggravating circumstance nor a notice of special sentencing proceeding should be dismissed pretrial where the ruling relies, at least in part, on an assessment of the factual basis for the charges. If the defendants are not sentenced to death, this issue will be moot. If they are sentenced to death, they will have a full opportunity to litigate whatever issues their attorneys may raise on appellate review. Therefore, the trial court's ruling is legally premature.

Furthermore, in making its ruling in the present case, the trial court did not familiarize itself with the available evidence; the trial court has not seen any of the physical evidence, has not reviewed any witness statements or the defendants' lengthy confessions, and has not seen the mitigation packets that were submitted to the Prosecutor. The trial court's unfamiliarity with the facts appears to have led the court to base its decision on an *assumption* that the Prosecutor simply filed notices against these defendants solely because the evidence of their guilt is strong. CP 609. Had the trial court allowed a full development of the facts before reaching its decision, it may have avoided its mistaken assumption.

Nonetheless, in support of the proposition that it is proper for the trial court to dismiss a notice of special sentencing proceedings pretrial, both defendants cited State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994), in their responses to the State's Motion for Discretionary Review. See McEnroe's Response, at 12; Anderson's Response, at 9. Dearbone bears no resemblance to what occurred in this case.

In Dearbone, the prosecutor did not serve defense counsel with a copy of the notice of intent to seek special proceeding until after the deadline had expired but the trial court allowed the notice. Dearbone, 125 Wn.2d at 175-78. This Court reversed the trial court on grounds that the language of RCW 10.95.040 is unambiguous that the notice must be filed *and served* by the deadline. Dearbone, 125 Wn.2d at 177. The Court further held that "good cause" to reopen the time for filing and serving the notice "requires a reason *external* to the prosecutor for his failure to serve notice." Id. at 179 (emphasis in original).

Based on Dearbone, both defendants have argued that a trial court may dismiss a notice of special sentencing proceeding for failure to comply with RCW 10.95.040. But Dearbone concerned the failure of the executive branch to take a purely procedural, nondiscretionary, and statutorily-mandated step in the process. Nothing in Dearbone authorizes

trial courts to dismiss notices of special sentencing proceedings on whatever grounds they wish.

The trial court in this case substituted its judgment for that of the Prosecutor based on its mistaken perception of how the Prosecutor considers the available evidence. That evidence should be adduced at *trial*, and based upon that evidence and whatever mitigation the defendants present, a *jury* should decide what penalty the defendants should receive. Should the jury fail to impose the death penalty, this entire issue is moot. Thus, the trial court's ruling is premature and should be reversed.

**5. PROSECUTORIAL DISCRETION DOES NOT
RENDER CAPITAL SENTENCING
UNCONSTITUTIONAL.**

There are a number of additional problematic aspects to the trial court's ruling. The trial court essentially has ruled that allowing prosecutors to exercise discretion by considering the strength of the evidence creates an unacceptable level of uncertainty in capital sentencing. *See* CP 609. It is not clear whether the trial court considers this to be a constitutional impediment and, if so, which constitutional provision it violates. Nevertheless, similar arguments that prosecutorial discretion violates the constitution have been repeatedly rejected by both this Court

and by the United States Supreme Court. This argument should be rejected again.

As this Court has stated,

Benn argues that RCW 10.95 represents an unconstitutional standardless delegation of authority to the prosecution. This court has repeatedly rejected the argument that through RCW 10.95 the Legislature has delegated authority without adequate standards to guide its exercise by the prosecution. See State v. Campbell, *supra* 103 Wn.2d at 26; *see also* State v. Lord, *supra* 117 Wn.2d at 916 (rejecting void for vagueness challenge); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984).

State v. Benn, 120 Wn.2d 631, 667, 845 P.2d 289 (1993); *see also* State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984). This Court was well aware when it rendered its prior decisions that prosecutors have broad charging authority that might include consideration of any number of factors, including an assessment of the strength of the case. *See, e.g.* Judge, at 713 (“exercise of [prosecutorial] discretion involves consideration of factors such as the public interest as well as the strength of the case which could be proven”). Thus, these prior decisions reject the “uncertainty” arguments that McEnroe and Anderson advance. Complaints of this nature about Washington’s death penalty must be directed to the legislature.

Finally, at its core, the trial court’s ruling seems to stem from its dissatisfaction that the particular circumstances of individual cases – *e.g.*,

whether a defendant's case was well-investigated or poorly investigated — may affect who is punished with death. This notion fails to appreciate that factors beyond human control affect many aspects of our everyday lives. Accordingly, serious legal consequences often turn on factors completely beyond the control of victims, defendants, police, prosecutors, defense attorneys, and judges. But this does not mean that society is without recourse to justice or that courts are powerless to proceed.

Numerous examples exist. If a person shoots a police officer in cold blood within blocks of Harborview Medical Center, and if the officer's life is saved by the talented trauma center staff, the perpetrator will face a single count of attempted murder. If, however, that same perpetrator shoots an officer in a remote location far from emergency medical care and the officer dies in the ambulance, and assuming there are insufficient mitigating circumstances, the perpetrator will likely be charged with capital murder. The difference in these hypothetical cases is dependent upon the particular circumstances of each individual case, completely outside the control of the investigating detectives, prosecutors, or the courts. One defendant may face the prospect of a death sentence, but it is certain that the other will not. Yet this is not a reason to preclude the State from seeking the death penalty against the perpetrator who succeeds in killing the victim.

As another example, a person might shoot and kill a police officer in plain view of a high-resolution video camera, thus making the perpetrator's identity easily determined and proven. Yet a person who commits the same crime out of the camera's view might wholly escape detection and prosecution, and the case will not be solved. Yet, although both perpetrators are equally deserving of the death penalty under the law, one will face the death penalty (again, assuming insufficient mitigating circumstances), and the other will face no justice at all. But the reality that society will be denied its right to justice based upon the particular circumstances of one crime does not mean that it is somehow unfair that justice is pursued in another. Furthermore, this reality applies to *all* cases, not just capital offenses.

This seemingly random distinction between cases does not render the death penalty arbitrary or irrational; it is simply a fact of life. Facts and circumstances beyond anyone's control often determine consequences in life and in law. As one commentator has explained,

The ancient Greeks and the ancient Hebrews - twin sources of Western culture - were torn by the problem, psychologically and jurisprudentially. No one has ever come up with a completely satisfactory solution. It is impossible to pay full attention to the criminal's act and attitude without also paying attention to the harm, even though a lesser harm may be morally divorced from the actor's intention. It is impossible to demand full

consistency - treating like cases alike - and at the same time respect the individuality of each unique human being.

. . . It may be impossible to demand state-wide consistency while respecting local autonomy. At best, we acknowledge the problem of moral luck, conduct proportionality reviews, and ask of each death sentence in isolation: was it deserved? If so, then although others too, in different places at different times, warranted but escaped society's ultimate sanction, we do what we ought, when we can.

Demanding regularity under the guise of rejecting arbitrariness - luck - ultimately undermines our ability to give play to non-rational, but real, incomparables that make up equity, real justice. Each case is different and a commitment to individual justice must respect that real differences are not always rational or discernible in advance.

Robert Blecker, But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply, 5 Rutgers J.L. & Pub. Pol'y 9, 56-57 (2007) (endnotes omitted).

This Court has consistently followed this conceptual approach and has rejected arguments that the death penalty cannot be imposed because some apparently deserving defendants are spared. *See State v. Davis*, 175 Wn.2d at 342-43, 347-62 (citing, *inter alia*, State v. Cross, 156 Wn.2d 580, 623-24, 132 P.3d 80 (2006), and State v. Yates, 161 Wn.2d 714, 792, 168 P.3d 359 (2007)).

These sentiments are even more apt as applied to the trial court's stated concern here, *i.e.*, that someone wholly deserving of the death

penalty might escape just punishment as a result of a deficient police investigation. CP 609. The trial court failed to recognize that a defendant may also be spared the death penalty due to mitigating factors that are similarly beyond anyone's control:

Juries will spare convicted killers whose murders otherwise qualify for death because the murderer's own tragic past cries out for mercy. Abused as children, deformed by a cruel environment, some killers' compelling personal circumstances rightly move a jury to spare them. Real proportionality demands individualized justice - somewhat erratic, unpredictable, not fully accountable by the crime's definition or description. Plato and Aristotle called this irregular, individuated justice "equity."

Today's penalty phase seeks an equitable, proportional justice, case by case, person by person.

A bit cheeky, then, of [death penalty opponents] who cannot imagine anyone deserving to die, to use the fact that we allow some terrible murderers to live as grounds to spare even those whom a jury, considering all personal circumstances, would still condemn.

Does it make sense to abandon completely any attempt at proportional, individual justice because we cannot always produce it? Confronted with the most egregious killings committed from the most despicable motives, should we not do what we can, although at other times in other cases, we failed to do what we should?

Blecker, But Did They Listen, *supra*, at 55.

As a solution this conundrum, the trial court implies that justice and equal protection principles are served by imposing the death penalty with *greater* frequency. CP 609-10. The trial court seems to suggest that

the Prosecutor should file a notice of special sentencing proceeding in every case where the evidentiary minimum proof of the crime and aggravators is present and mitigating circumstances are insufficient to merit leniency. *Id.* This would result in far more death penalty cases being pursued and is inconsistent with this Court's very recent pronouncements:

While it is easy to imagine a system in which the death penalty is routinely sought and routinely imposed, that would not be a system superior to that extant in Washington and it would be inconsistent with the present values of our citizenry.

Davis, at 361-62.¹²

For these reasons, the trial court erred in ruling that considering the "strength of the case" renders the system arbitrary and random.

6. THE REMEDY FOR AN IMPROPER EXERCISE OF CHARGING DISCRETION IS AN ORDER TO THE PROSECUTOR TO CONSIDER THE MATTER ANEW USING APPROPRIATE PROCEDURES.

As has been noted above, the trial court decided without warning to strike the notices of special sentencing proceedings in these cases. To

¹² Even more ironic, this ruling contrasts sharply with the decision of another King County Superior Court judge who ruled that the Prosecutor was required by law to refrain from filing the notice of special sentencing proceeding until the defense supplied a mitigation report (that was never forthcoming). *State v. Monfort*, No. 88522-2 (review pending). One judge's ruling would compel the Prosecutor to routinely file a death notice; the other judge's ruling would ensure that no notice could be ever filed. Both cannot be correct; in truth, neither is.

the extent that the court's decision creates a requirement that the Prosecutor refrain from considering the strength of the evidence of guilt and aggravating circumstances, this requirement is new, and the Prosecutor never had a chance to apply it. Simple fairness requires that a newly-announced procedural rule be applied only prospectively.

In the past, when this Court has clarified the manner in which a prosecutor must exercise charging authority, the case has been remanded for reconsideration of the charging decision in the proper manner. State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364 (1980) (prosecutor erred by failing to exercise discretion before filing habitual offender notice; proper remedy was remand for proper exercise of discretion).

This remedy would be consistent with general practice. In general, upon reversal by an appellate court for a new trial, "the whole case is open. Each of the parties is at liberty to retry the cause on all of the issues, those decided in his favor on the first hearing as well as those on which the determination was against him." Godefroy v. Reilly, 140 Wash. 650, 250 P. 59 (1926). Or, when a charging document is insufficient to provide notice, the matter is remanded for the Prosecutor to retry the defendant after proper notice has been provided. State v. Vangerpen, 125 Wn.2d 782, 794, 888 P.2d 1177 (1995). When it is unclear whether a lower court

has applied the correct standard for sealing a court record, the appropriate remedy is a remand for the court to apply the correct standard as articulated in the appellate decision. Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 951, 215 P.3d 977 (2009). Remand for entry of findings is the appropriate remedy when juvenile court findings are deficient. State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995).

If courts in these varied circumstances are permitted to reconsider their decisions following appellate review, it follows that the Prosecutor should not be barred from considering his decision anew in light of a new legal rule. For these reasons, the trial court's remedy was inappropriate, and should be reversed.

E. CONCLUSION

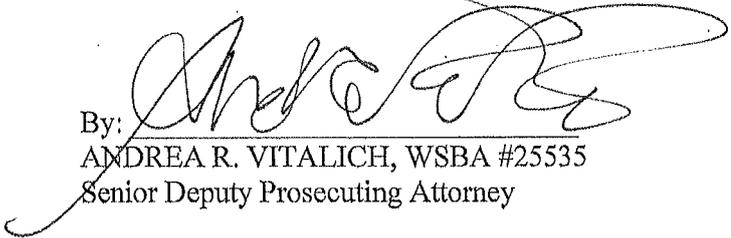
For the reasons stated above, the trial court's ruling should be reversed, the notices of special sentencing proceedings should be reinstated, and these cases should be remanded for trial. In the alternative, if this Court were to create a rule not found in the statute or case law that prosecutors are precluded from considering the strength of the available evidence when making decisions about the death penalty, these cases

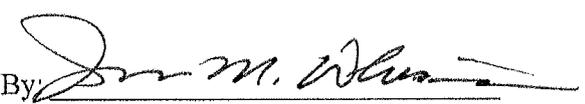
should be remanded for the King County Prosecutor to consider the death penalty decision under the new standard.

DATED this 29th day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANDREA R. VITALICH, WSBA #25535
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APPENDIX A

Excerpts from the State's briefs and oral arguments in the trial court

STATE'S RESPONSE TO DEFENDANTS' "MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS THAT IT WAS FILED IN VIOLATION OF RCW 10.95.040" (filed January 8, 2010)

- “[T]he prosecutor will engage in a weighing process by **considering any potential mitigation** along with any and **all other relevant information** including, most obviously, the facts of the crime and the strength of the available evidence.” CP 65.
- “[O]nly after **consideration of all the available information** would the prosecutor be able to come to a conclusion as to whether there is ‘reason to believe’ that the death penalty is warranted.” CP 65.
- “...it should go without saying that the elected prosecutor must consider **all relevant information** before deciding whether to seek the death penalty in any given case, and to suggest otherwise defies common sense.” CP 69-70.
- “...death-worthiness requires a **holistic assessment of crime, record, background, and mitigation.**” (quotation from “Death-Worthiness and Prosecutorial Discretion in Capital Case Charging,” Prof. Jules Epstein) CP 70.

Transcript of Oral Argument for "MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS THAT IT WAS FILED IN VIOLATION OF RCW 10.95.040" (March 26, 2010)

- “Mr. Satterberg has actually admitted in this case, as he should, that he considered **all relevant information at his disposal** in making this decision.” RP (3/26/10) 51.
- “The prosecutor is—does have a duty to consider whether there is **any mitigation** that—and I just don’t see how you can get around the fact that it has to be **weighed against any and all other relevant information**, which clearly would include the **strength of the evidence and the facts of the case.**” RP (3/26/10) 53.
- “...based on the language of the statute, **the prosecutor has a duty to, of course, consider all the information available about the crime** and also **any information that is available about the defendant.**” RP (3/26/10) 52.
- “[I]nherent in the framework of 10.95 is the necessary step that **the prosecutor must consider the facts of the crime and the strength of the available evidence as part of the holistic calculus** when deciding whether there is or there isn’t reason—sufficient mitigation to merit leniency.” RP (3/26/10) 59.

- “[W]hen we make this decision, we make the decision with every effort toward making it a decision based on all of the available information and the best information available at the time.” RP (3/26/10) 63.
- “I just don’t think it’s possible to consider these cases without considering all of the available information which must necessarily include the evidence and the facts of the case.” RP (3/26/10) 70.
- “[E]ach case must necessarily involve a holistic decision.” RP (3/26/10) 71.
- “[W]e have a lot of case law that says essentially carte blanche as long as the court finds [mitigation] relevant and it’s somehow admissible under some theory, it’s good to go, as far as presenting it in the penalty phase. So the defendant certainly isn’t limited in terms of what kind of mitigation he or she can present to the jury. So I would query why it is that the prosecutor in terms of mitigation can only consider what comes from the defendant’s lawyers or the public record...” RP (3/26/10) 72-73.
- “[The Legislature] wanted to give the prosecutors a channeled discretion to consider any and all information available at the time that a decision is made.” RP (3/26/10) 73.

STATE’S SUPPLEMENTAL RESPONSE TO DEFENDANTS’ “MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS THAT IT WAS FILED IN VIOLATION OF RCW 10.95.040” (filed April 19, 2010)

- “...death penalty ‘should not be imposed without the fullest and most careful consideration of the circumstances of the crime and the character of the individual.’” CP 92.
- (re: WPIC 31.07) “A mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability, which justifies a sentence of less than death, although it does not justify or excuse the offense.” CP 96.

Transcript of Oral Argument for Defendant McEnroe’s “MOTION FOR DISCOVERY OF MATERIALS REVEALING PROSECUTOR’S PROCESS FOR DETERMINING WHICH DEFENDANTS WILL FACE DEATH (March 1, 2012)

- “The one and perhaps only thing I agree with Ms. Ross about is that the statute does require the prosecutor to consider any evidence that could potentially be mitigating.” RP (3/01/12) 41.
- “It’s an executive, discretionary decision through which the prosecutor is supposed to consider all mitigation information that is available, any information at all that’s available about the defendant and the crime, and to use his or her best judgment as the representative of the people in the jurisdiction as to whether twelve citizens should have the option to consider the death penalty in a particular case.” RP (3/01/12) 63-64.

STATE'S RESPONSE TO DEFENDANTS' "MOTION TO DISMISS NOTICE OF INTENTION TO SEEK DEATH PENALTY BECAUSE IT WAS FILED IN VIOLATION OF MR. McENROE'S RIGHT TO EQUAL PROTECTION OF LAW AND DUE PROCESS" (filed January 4, 2013)

- “[I]t is apparent that McEnroe cannot accept the rather obvious alternative explanation for the prosecutor’s decision in this case: that **McEnroe’s mitigation evidence, no matter how “substantial” he may subjectively believe it to be, is simply not very compelling when viewed in light of the facts of this case and the strength of the evidence.**” CP 544.

Transcript of Oral Argument for “MOTION TO DISMISS NOTICE OF INTENTION TO SEEK DEATH PENALTY BECAUSE IT WAS FILED IN VIOLATION OF MR. McENROE’S RIGHT TO EQUAL PROTECTION OF LAW AND DUE PROCESS” (January 17, 2013)

- “I don’t believe the State has ever argued that the prosecutor doesn’t have to consider mitigation. That was something Ms. Ross stated.” RP (1/17/13) 65.
- “The public statements of the King County prosecutor’s office obviously are not the same thing as whatever process may be followed in each individual case, **the consideration of individual mitigation evidence versus the individual facts and evidence presented by each case.**” RP (1/17/13) 19-24.
- “I think it’s fair to say that **this office doesn’t consider the death penalty in cases where there is any question—there is any reason to doubt the guilt of the defendants. And that goes to the strength of the evidence.** But then from that point forward, as far as giving consideration to the mitigation and does it provide some reason to believe that leniency is merited, that necessarily has to be looked at in light of the facts of the case and the strength of the evidence, which, again, I don’t think can be uncoupled from one another in terms of that consideration.” RP (1/17/13) 78.
- “...the prosecutor can consider all of the information that’s available, and that includes the facts of the case and the strength of the evidence, and along with any mitigation that is presented in order to determine whether there’s reason to believe that there are not sufficient mitigating circumstances to merit leniency.” RP (1/17/13) 19-24.
- “[S]o necessarily having in mind the crime requires [the Prosecutor] to look at the mitigation through the lens of the crime, and that necessarily gets back to the facts of the case and the strength of the evidence.” RP (1/17/13) 82.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to William Prestia, Leo Hamaji, and Katherine Ross, the attorneys for Joseph McEnroe, at 810 Third Avenue, Suite 800, Seattle, WA 98104-1695, containing a copy of the Opening Brief of Petitioner, in STATE V. JOSEPH MCENROE & MICHELE ANDERSON, Cause No. 88410-2, 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.



Name
Done in Seattle, Washington

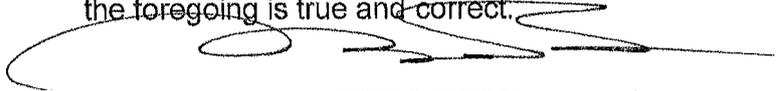
02/29/13

Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Colleen O'Connor and David Sorenson, the attorneys for Michele Anderson, at 1401 E. Jefferson Street, Suite 200, Seattle, WA 98122-5570, containing a copy of the Opening Brief of Petitioner, in STATE V. JOSEPH MCENROE & MICHELE ANDERSON, Cause No. 88410-2, 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.



Name
Done in Seattle, Washington

03/29/13

Date

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Cc: Vitalich, Andrea; Whisman, Jim; O'Toole, Scott; O'Connor, Colleen; 'leo@defender.org'; Sorenson, David; 'prestia@defender.org'; 'wdpac@aol.com'; 'pamloginsky@waprosecutors.org'
Subject: RE: State of Washington v. Joseph T. McEnroe/88410-2 & State of Washington v. Michele Kristen Anderson/88411-1

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Subject: State of Washington v. Joseph T. McEnroe/88410-2 & State of Washington v. Michele Kristen Anderson/88411-1

Dear Supreme Court Clerk:

Attached for filing in the above-referenced cases, please find the **Opening Brief of Petitioner**.

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

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For

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