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

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH THOMAS McENROE & MICHELE KRISTIN ANDERSON,

Respondents.

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**REPLY BRIEF OF PETITIONER**

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A. **ISSUE PRESENTED FOR REPLY**

Whether the defendants have provided any basis, whether relied upon by the trial court or not, to affirm the trial court's ruling that a prosecutor is precluded from considering the evidence that will be used to prove guilt, aggravating circumstances, and moral culpability when deciding whether to file a notice of a special sentencing proceeding.

B. **ARGUMENT IN REPLY**

1. **MOST OF THE DEFENDANTS' ARGUMENTS DO NOT ADDRESS THE TRIAL COURT'S RULING OR THE STATE'S ARGUMENTS CHALLENGING THAT RULING.**

The defendants have filed a 57-page joint response brief. The vast majority of the arguments in that brief do not address the actual bases for the trial court's ruling or the State's arguments in the opening brief challenging that ruling.

To the extent that each argument section and subsection in the defendants' response brief raises a separate cognizable issue, the State will reply to those issues in the order presented. The issues raised in the State's opening brief to which the defendants have not responded will not be addressed further in this reply.

**2. THE "HISTORY OF MOTIONS PRACTICE IN THIS CASE" PROVES THAT REPEATED ATTACKS ON THE PROSECUTOR'S CHARGING DECISIONS ARE IMPROPER AND HAVE CAUSED UNREASONABLE DELAY.**

Although the State's opening brief explains the procedural history of the pretrial motions in these cases in some detail, the defendants have explained that procedural history from their distinctive perspective in even greater detail in the apparent belief that it will assist this Court's analysis. Joint Response, at 5-14.

A point-by-point refutation of the defendants' version of these events would be fruitless; the pleadings and transcripts have been provided to this Court and speak for themselves. But the defendants' version of this procedural history further proves one of the State's main points: that the trial court erred in entertaining repeated attacks upon the Prosecutor's executive decision to file notices of special sentencing proceedings in these cases without requiring the defendants to first make the necessary *prima facie* showing that the Prosecutor acted unlawfully.

As explained in the State's opening brief and in WAPA's *amicus curiae* brief, it is well-settled that a prosecutor is not required to explain his or her reasons for making a charging decision absent a *prima facie* showing that the prosecutor has made that decision vindictively, unlawfully, or based on an arbitrary classification such as race or religion.

*See, e.g., McClesky v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986); *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984). No such showing has ever been made in this case.

Nevertheless, the trial court has entertained extensive briefing and lengthy oral arguments on motion after motion seeking review of the Prosecutor's decision-making process, until finally concluding that the Prosecutor committed legal error by considering the nature and quality of the evidence in these cases. CP 598-610. This was, and is, legally improper. Moreover, these repeated forays into the Prosecutor's executive decision-making and thought processes have directly contributed to more than five years of delay in bringing these defendants to trial. Such delay is unconscionable. This Court should reverse and remand for trial.

**3. THE DEFENDANTS' "HISTORY OF THE DEATH PENALTY" DOES NOT ASSIST THIS COURT'S ANALYSIS.**

The next section of the defendants' brief provides what purports to be a "History of Washington's Death Penalty Laws." Joint Response, at 15-24. This section of the defendants' brief is nothing more than an advocate's biased exegesis of selected case law and legislative actions

rather than a true legislative history.<sup>1</sup> It contains a large measure of conjecture and argument more suited to the political arena than a court of law.

Again, a point-by-point refutation of the defendants' description of the history of the death penalty in Washington would be fruitless, as this information has little if any relevance to the issue at hand. That issue, which receives very little attention in the defendants' brief, is whether the trial court erred in ruling that a prosecutor must disregard the evidence that will be presented to the jury when making the decision whether that jury will be given the option to consider the death penalty. The trial court's decision, and the defendants' response, is not supported by any relevant authority regarding the death penalty, whether past or present, legislative or judicial. Therefore, the trial court's ruling should be reversed.

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<sup>1</sup> Washington has had capital punishment for longer than it has been a state, beginning in 1854 when the first capital punishment statute was passed by the territorial legislature. Leonie G. Hellwig, The Death Penalty in Washington: An Historical Perspective, 57 Wash. L. Rev. 525, 526 (1982). Contrary to what the defendants seem to suggest, the history of the death penalty in Washington is not solely a product of attempted legislative strong-arming by prosecutors. For example, almost immediately after Washington's capital punishment scheme was abolished (along with those in virtually every other state) in the wake of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), Washington voters overwhelmingly passed Initiative Measure No. 316, which promptly reinstated capital punishment in first-degree murder cases with certain aggravating circumstances. Laws of 1975, 2d Ex. Sess., ch. 9. In any event, the defendants' version of the "history" of the death penalty is not helpful to this Court's analysis of the issue presented.

**4. THE DEFENDANT'S ARGUMENT THAT RCW 10.95.040 SHOULD BE "STRICTLY CONSTRUED" DOES NOT ANSWER THE QUESTION BEFORE THIS COURT.**

The defendants cite several decisions from this Court for the proposition that Washington's death penalty statutes must be "strictly construed." Joint Response, at 24-29. But this argument does not answer the question before the Court, *i.e.*, whether a prosecutor must disregard the evidence that will be presented to the jury when deciding whether to file a notice of a special sentencing proceeding. To the extent that the defendants are arguing that a "strict construction" of RCW 10.95.040(1) dictates this result, they are mistaken.

It is axiomatic that in construing any statute, a court's primary objective is to ascertain and carry out the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the meaning of the statute in question is clear from its plain language, legislative intent is derived from the plain meaning of that statutory language alone; no further interpretation is necessary. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, but not viewed in isolation; rather, the court must consider the context of the statute in which

that provision is found, related provisions, and the statutory scheme as a whole. Jacobs, 154 Wn.2d at 600-01. A court should not adopt an interpretation of a statute that renders any portion of the statute meaningless. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

There is one rule of statutory construction that “trumps every other rule”: the court must not construe the statutory language in a way that results in absurd consequences. Davis v. Dep’t of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999); *see also* State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (holding that “[s]tatutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided”).

In accordance with RCW 10.95.040(1), a prosecutor “shall file written notice of a special sentencing proceeding . . . when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” Mitigation is meaningless unless there is something to mitigate, and the question of whether something is “sufficient” or “not sufficient” is a relative concept that necessarily requires a comparison with something else. In the present context, the statute dictates that a prosecutor shall file notice of a special sentencing proceeding in an aggravated murder case if there is reason to believe that the evidence in mitigation is “not sufficient” to merit leniency. The determination of

whether mitigation is “sufficient” or “not sufficient” can only be made in the context of the facts and circumstances of the crimes committed as shown by the evidence that will be used to prove those crimes. Nonetheless, the defendants argue that the statute that compels a prosecutor to undertake a comparative analysis of the sufficiency of mitigating evidence would, at the same time, prohibit that same prosecutor from utilizing any frame of reference for analyzing that evidence. This construction of the statute would constitute precisely the absurd and strained consequences forbidden by law.

Put another way, the plain language of the statute dictates that a prosecutor must have “reason to believe” that leniency is not merited. This “reason to believe” must necessarily come from somewhere, and, in accordance with a prosecutor’s fundamental executive charging function, that “reason” must necessarily be based on the facts of the case as shown by the evidence that will be presented to the jury, and all reasonable inferences that may be drawn from that evidence with respect to both guilt and moral culpability. See State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984) (noting that a prosecutor’s charging discretion should be exercised based on factors including the evidence available to prove the charge); State v. Davis, 175 Wn.2d 287, 357, 290 P.3d 43 (2012) (recognizing that “[t]he strength of the State’s case often influences” the

prosecutor's decision whether to seek the death penalty). In other words, it is possible for a prosecutor to determine whether mitigating circumstances merit leniency only when those mitigating circumstances are viewed in light of what the evidence shows the defendant actually did, and how culpable the defendant was when he or she did it.

There is nothing in the statute that requires a prosecutor to ignore the strength of the evidence of both guilt and blameworthiness that will be presented to the jury when deciding whether to file a notice of a special sentencing proceeding. To the contrary, the plain language of the statute dictates otherwise.

In sum, the defendants' argument that RCW 10.95.040(1) should be "strictly construed" does not lead to the conclusion that the trial court's ruling is correct. Indeed, as discussed in detail in the State's opening brief, the defendants' suggested construction of the statute could lead to the filing of notices in cases where most people would agree that a notice should not be filed. The trial court's ruling is not supported by the plain language of the statute, and this bizarre interpretation of the statute would lead to absurd results that the legislature did not intend.

**5. THIS COURT SHOULD REJECT ANY INVITATION TO RE-LITIGATE MOTIONS THAT THE TRIAL COURT HAS ALREADY CONSIDERED AND REJECTED.**

The defendants argue that the trial court may be affirmed “on any grounds presented below.” Joint Response, at 30-32. To the extent that this argument implies that this Court should allow the defendants to re-litigate the many prior motions concerning the death penalty that the trial court has already considered and rejected, this Court should decline any such invitation.

As a general principle, the trial court may be affirmed on direct appeal on “any theory established by the pleadings and supported by the proof.” LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1987). But this general principle, which exists to prevent needless reversals and retrials and to further the interests of judicial economy, should not be used on interlocutory review as a basis to revisit several years’ worth of unnecessary litigation regarding the King County Prosecutor’s executive charging decisions and thought processes. This Court should reject the defendants’ invitation to do so, especially since the defendants did not seek cross-review of any other issues. And, to the extent that the defendants’ argument may be construed as a concession that the trial court’s ruling is erroneous as written, this Court should consider it as such.

**6. THE STATE DID NOT ORIGINATE, BRIEF, OR ARGUE THE BASIS FOR THE TRIAL COURT'S RULING.**

Next, the defendants argue that the trial court's ruling was "originated, briefed and extensively argued" by the State, and thus, the trial court's ruling was not made *sua sponte*. Joint Response, at 32-37. It is unclear what purpose this six-page section serves. The State has established that the trial court's ruling was unsolicited because this fact supports the conclusion that the ruling is truly novel. But, in the end, this Court's analysis of the trial court's ruling turns on the legal principles at issue, not on whether the basis for that ruling was ever raised by the defendants. Still, the defendants' retort is unsupported by the record, which shows that trial court's ruling is solely a product of its own making.

As the State explained in its opening brief, the trial court's two-year "evolution"<sup>2</sup> in thinking began with a misunderstanding of a hypothetical posed in a footnote in a State's brief addressed to a wholly different issue raised by the defendants. *See* Petitioner's Opening Brief, at 25-27. That issue, which the defendants have apparently conceded at this point,<sup>3</sup> was the notion that a prosecutor cannot consider anything other

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<sup>2</sup> *See* CP 662.

<sup>3</sup> The defendants now take the position that a prosecutor "may consider the nature of the crime" in deciding whether to seek the death penalty. Joint Response, at 38 (emphasis in original).

than mitigation in deciding whether to file notice of a special sentencing proceeding. In other words, the defendants contended that a prosecutor must entirely ignore the facts of the crime, and consider mitigation in a vacuum. In response, the State argued *inter alia* that ignoring the facts of the case that will be established by the evidence would lead to absurd results. CP 17-87.

To suggest, as the defendants do, that the State “originated, briefed, and extensively argued” the trial court’s ruling is simply absurd. The trial court focused its attention on a hypothetical footnote addressed to a different issue, and over the course of more than two years, the trial court transformed that hypothetical footnote into the lynchpin of its unprecedented ruling that prosecutors are precluded from examining the evidence that will be presented to the jury when deciding whether to seek the death penalty.

Moreover, the defendants’ suggestion that the State should “have asked for supplemental briefing”<sup>4</sup> is not well-taken. When an appellate court decides that it is necessary to address an issue that has not been raised and briefed by the parties, the court directs the parties to file supplemental briefs *before* it decides the issue. *See* RAP 10.1(h). Parties should be able to expect nothing less from a trial court, particularly when

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<sup>4</sup> Joint Response, at 37.

that trial court is contemplating dismissing notices of special sentencing proceedings against two defendants who are charged with murdering six human beings.

In any event, the defendants' argument is, again, largely beside the point. Even if the trial court had followed proper procedures, invited the parties to brief and argue the issue it had been contemplating, and had then dismissed the notices of special sentencing proceedings, the trial court's ruling would still be erroneous for the reasons set forth in the State's opening brief. The defendants' argument that the trial court's ruling is somehow the State's fault ultimately adds nothing to this Court's consideration of whether that ruling is erroneous.

**7. THE STATUTE REGARDING THE PROSECUTOR'S DECISION IS NOT "MANDATORY," BUT EVEN IF IT WERE, IT WOULD REQUIRE THE PROSECUTOR TO SEEK THE DEATH PENALTY IN THESE CASES.**

The defendants argue that a prosecutor's decision whether to file a notice of special sentencing proceeding under RCW 10.95.040(1) is "mandatory." Joint Response, at 38-44. More specifically, the defendants contend that the statute *mandates* the filing of a notice of a special sentencing proceeding without regard to the strength or weakness of the evidence that will be presented to the jury to prove guilt, aggravating circumstances, and moral culpability. *See* Joint Response, at 38 ("While a

prosecutor may consider the nature of the crime itself when it considers the sufficiency of a defendant's mitigating information, the strength of the evidence the prosecutor has to prove the crime does not bear on either the nature of the crime or the mitigating factors.” (emphasis in original).

As explained in the State's opening brief, the legislature cannot mandate the filing of a criminal charge or a sentencing enhancement; to do so would violate the separation of powers doctrine by encroaching on the executive charging function of the prosecutor. State v. Rice, 174 Wn.2d 884, 857-58, 279 P.3d 849 (2012). Thus, the defendants' proposed “mandatory” construction of the statute (which is not supported by its plain language in any event) would render the statute unconstitutional. Courts must interpret statutes in a manner that renders them constitutional whenever possible. State v. Reyes, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). Moreover, the legislature is presumed to intend to enact laws that are constitutional. Rice, 174 Wn.2d at 899-90. The defendants' claim must be rejected based on these well-settled principles.

Also, the defendants' proposed “mandatory” application of RCW 10.95.040(1) would result in more cases proceeding as death penalty cases. Prosecutors would be *required* to file notices of special sentencing proceedings without regard to the strength of the evidence that will be presented to the jury, and they would be *barred* from exercising their

discretion more carefully by seeking the death penalty only in cases where there is no question as to the defendant's guilt and blameworthiness.<sup>5</sup>

"Our constitution affords prosecuting attorneys much more independent authority than that, including the authority to be merciful and to seek individualized justice." Rice, 174 Wn.2d at 902-03. The defendants' proposed statutory construction is inconsistent with the plain language of the statute, violates constitutional separation of powers principles, and would lead to absurd results that the legislature did not intend.

But furthermore, the defendants' proposed "mandatory" construction of the statute still would not lead to the dismissal of the notices of special sentencing proceedings in these particular cases. As the defendants concede, the prosecutor must consider "the nature of the crime"<sup>6</sup> in conjunction with any mitigating circumstances in deciding whether to seek the death penalty. Joint Response, at 38 (emphasis in original). The "nature" of the crimes that these defendants committed is the planned and premeditated killings of six people, including two young children, on Christmas Eve 2007. In addition to the sheer number of victims, the defendants killed Erica Anderson and her two children

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<sup>5</sup> The trial court's ruling would lead to the same result. *See* Opening Brief of Petitioner, at 44-45.

<sup>6</sup> It is still inconceivable that the "nature" of the crime can be determined without reference to the evidence that will be used to prove that crime and the aggravating circumstances. In any event, even as an abstract notion, the "nature" of the crimes committed by these defendants is especially heinous by any standard.

specifically to eliminate them as witnesses. CP 1-16. And, despite defense counsel's repeated assertions to the contrary, the mitigating information in these cases is not sufficient to merit leniency. *See* CP 544.

Accordingly, even if RCW 10.95.040(1) were "mandatory," meaning that it mandates filing a notice of special sentencing proceeding without regard to the strength of the evidence, it would require the Prosecutor to file notices in these cases. Put another way, if the statute were "mandatory," it would require prosecutors to file notices in cases where they might otherwise not file them; it would *not* require the dismissal of notices in cases where a notice is obviously merited.

In sum, the defendants' proposed "mandatory" construction of the statute would be unconstitutional, does not comport with the statute's plain language, and would require filing the notices of special sentencing proceedings in these cases in any event. Their argument is without merit and should be rejected.

**8. EVEN IF RCW 10.95.040(1) IS UNIQUE, IT DOES NOT PRECLUDE THE PROSECUTOR FROM CONSIDERING THE EVIDENCE IN POTENTIAL DEATH PENALTY CASES.**

The defendants next argue that RCW 10.95.040(1) "is *sui generis* among death penalty statutes," and that this purported uniqueness supports the trial court's conclusion that prosecutors are precluded from

considering the evidence that will be presented to the jury in potential death penalty cases. Joint Response, at 44-49. But even assuming for the sake of argument that the statute is unique, it does not follow that this uniqueness means that prosecutors are barred from considering the evidence in potential death penalty cases. In other words, the defendants' conclusion does not follow from its starting premise, and thus, the argument is without merit.

As explained above, statutes must be interpreted in a manner that gives effect to the legislature's intent and avoids strained or absurd results. State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Even assuming that RCW 10.95.040(1) is unique among all death penalty statutes in the United States, there is nothing in that statute that precludes a prosecutor from considering the strength of the evidence of both guilt and blameworthiness before deciding whether to seek the death penalty. In other words, even if the statute is "*sui generis*" as the defendants contend, there is nothing in the statute that alters a prosecutor's charging discretion in such an unprecedented way. Indeed, if the legislature had intended this bizarre result, it stands to reason that the legislature would have been clear about that intent in drafting the statute.

Nonetheless, the State does agree with the defendants on one point: that RCW 10.95.040(1) directs the prosecutor to consider mitigating

circumstances before deciding to seek the death penalty. The King County Prosecutor complied with that directive in this case. Accordingly, the Prosecutor complied with the statute as written, the statute's uniqueness or lack thereof notwithstanding.

In sum, the defendants' argument that the statute is unique does not lead to the conclusion that it precludes the prosecutor from considering the evidence that will be used to prove both guilt and moral culpability. In other words, even assuming the truth of the defendants' starting premise, it does not logically or legally lead to the conclusion that they suggest.

**9. THE DEFENDANTS' CLAIM THAT PROSECUTORS MAKE DECISIONS IN DEATH PENALTY CASES BASED ON RACE, ETHNICITY, SEXUAL ORIENTATION, OR ECONOMIC STATUS IS BOTH UNFOUNDED AND OFFENSIVE.**

The defendants' most inflammatory allegations are also, perhaps not surprisingly, their most spurious. They allege that the King County Prosecutor chose not to file a notice of a special sentencing proceeding against defendants Louis Chen and Isaiah Kalebu because their adult victims were gay, and because Chen's child victim was Asian, and that the Prosecutor did not file a notice against defendant Daniel Hicks because the child victim in that case was of mixed race. Joint Response, at 51-52. They also contend that the King County Prosecutor filed a notice against defendant Christopher Monfort, and that the Snohomish County

Prosecutor filed a notice against defendant Byron Scherf, because the victims in those cases were white. Joint Response, at 51-52. They make the same allegation regarding their own cases. *See* Joint Response, at 51 (describing the defendants' six victims generically as "mainstream white people"). From such allegations they invite this Court to conclude that allowing prosecutors to exercise discretion causes discrimination based on minority status. Joint Response, at 50-53. These allegations should be rejected outright.

First, these issues are not properly before this Court. The defendants collectively have a team of five attorneys, plus investigators and other support staff, at their disposal, yet they have not made any *prima facie* showing of discrimination in any motion to the trial court. Although counsel assert that the defense lacks the "expertise, resources and time"<sup>7</sup> to make this required showing of racial animus or discrimination based on minority status, that claim strains credulity. The defense teams in these cases have expended millions of dollars in defense of their clients over the last five-plus years,<sup>8</sup> yet they have chosen not to marshal any evidence or reasoned analysis in support of this claim. This Court should reject such

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<sup>7</sup> Joint Response, at 53.

<sup>8</sup> *See* Jennifer Sullivan, [Trial-prep Costs for Carnation Killings Hit \\$4.9 Million](http://seattletimes.com/html/localnews/2018336399_defensecosts02m.html), Seattle Times, June 1, 2012, available at [http://seattletimes.com/html/localnews/2018336399\\_defensecosts02m.html](http://seattletimes.com/html/localnews/2018336399_defensecosts02m.html) (last visited 4/18/13).

eleventh-hour attempts to influence these proceedings with politically-charged and specious allegations.

Second, the examples of purported discrimination set forth in the defendants' brief are facially deficient to prove animus toward minorities. Chen, Kalebu, and Hicks<sup>9</sup> all presented evidence of mitigating circumstances – including documented instances of mental illness predating their crimes – that would give an objective observer reason to believe that leniency was merited.<sup>10</sup> Monfort's defense team presented no mitigating information at all.<sup>11</sup> And Byron Scherf, who was already serving a sentence of life in prison without parole, would receive no additional punishment for killing his most recent victim if a notice of special sentencing proceeding had not been filed.<sup>12</sup> Thus, even a relatively uninformed and unsophisticated observer can see that minority status did not drive prosecutors to file or not file notices of special sentencing proceedings in these cases.

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<sup>9</sup> Chen is Asian, Kalebu is African-American, and Hicks is of mixed race. If the King County Prosecutor had decided to seek the death penalty against these defendants, McEnroe and Anderson would doubtlessly accuse the Prosecutor of racism on this basis.

<sup>10</sup> The defendants' brief also suggests that Kalebu should have faced the death penalty because he "was also known to be the only suspect in the arson deaths of his aunt and a friend of hers." Joint Response, at 52. This argument displays a peculiar enthusiasm for pursuing the death penalty (against defendants other than McEnroe and Anderson) even if it means reliance on uncharged and unproven allegations.

<sup>11</sup> See State v. Monfort, No. 88522-2 (discretionary review granted 4/8/13).

<sup>12</sup> Our only information about Scherf's case is that publically available in press reports; we do not speak for the Snohomish County Prosecutor on this point.

Third, there are high standards for proving animus against minorities in the charging and prosecution of crimes. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 463-65, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) (the standard for such claims is “demanding” and requires “clear evidence”); *State v. Woods*, 143 Wn.2d 561, 619, 23 P.3d 1046 (2001) (“exceptionally clear proof” is required) (quoting *McClesky v. Kemp*, 481 U.S. at 297). These standards exist to ensure that statistical evidence is used to find, not to obscure, the truth. The defendants have not even attempted to meet those standards. There is simply no basis upon which to conclude that the exercise of prosecutorial discretion under RCW 10.95.040 has anything to do with animus against certain classes of defendants or victims. The defendants’ selective, biased, and decidedly brief summary of a few particular cases diminishes “statistical analysis” to the level decried by Samuel Clemmons.<sup>13</sup> Moreover, the most recent and comprehensive studies show that neither defendant nor victim bias plays a role in death penalty decisions nationally. *See Kent Scheidegger, Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. J. of Criminal Law 147 (2012). No evidence or statistical analysis has been presented to suggest that Washington is an anomaly in this regard.

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<sup>13</sup> “There are three kinds of lies: lies, damned lies, and statistics.” Mark Twain, *Chapters from My Autobiography*, published in the North American Review (1906).

Attorneys have a duty to zealously represent their clients. Bohn v. Cody, 119 Wn.2d 357, 367, 832 P.2d 71 (1990). That duty is surely great when a client is charged with a capital crime. Still, the bounds of professional and human decency still apply. To accuse prosecutors of minority animus on the paltry offerings in the defendants' response brief is to exceed those bounds. The defendants must hope that politically-charged allegations based on race (of children!) or sexual orientation will influence this Court, even if wholly unsupported by any evidence. Such litigation tactics should be actively discouraged, if not condemned outright.

In sum, the defendants' argument that RCW 10.95.040 fosters racism and other forms of discrimination should be soundly rejected.

**10. EVEN IF THIS COURT WERE TO AFFIRM THE TRIAL COURT'S RULING, DISMISSAL IS NOT THE APPROPRIATE REMEDY.**

Lastly, the defendants argue that dismissal is the proper remedy based on an alleged violation of RCW 10.95.040(1). Joint Response, at 52-55. The defendants reach this conclusion based on RCW 10.95.040(3), which they contend requires dismissal of notices of special sentencing proceedings in cases where a prosecutor has considered the evidence. Nothing in the statute dictates this result. To the contrary, the plain language of the statute suggests otherwise.

The statute provides in its entirety:

(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 (emphasis supplied).

Notably, subsections (2) and (3) specifically address "filing and service" of the notice, whereas there is no reference to "service" in subsection (1). Therefore, although this Court has held that the State's failure to strictly comply with the "filing and service" requirements under subsection (2) precludes the State from seeking the death penalty in

accordance with subsection (3),<sup>14</sup> there are no such decisions from this Court regarding subsection (1). This is not surprising, given that subsection (1) concerns the exercise of a prosecutor's executive charging function, and, as explained at length in the State's opening brief and in WAPA's *amicus curiae* brief, judicial scrutiny of a prosecutor's charging decisions should not be undertaken without a *prima facie* showing of unlawfulness. Thus, even if this Court were to affirm the trial court's ruling that prosecutors cannot consider the evidence when deciding whether to seek the death penalty, it does not follow from the plain language of the statute that dismissal is the appropriate remedy.

Rather, if this Court were to adopt a new rule that precludes prosecutors from considering the strength of the evidence that will be used to prove guilt and aggravating circumstances when deciding whether to seek the death penalty, this Court should remand for the King County Prosecutor to consider these cases anew under that new standard. *See* Opening Brief of Petitioner, at 45-47.

### C. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Opening Brief of Petitioner, the State asks this Court to reverse the trial

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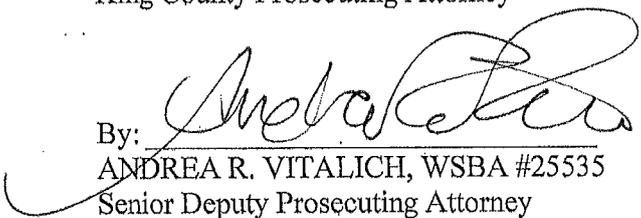
<sup>14</sup> *See, e.g., State v. Luyene*, 127 Wn.2d 690, 714-19, 903 P.2d 960 (1995); *State v. Dearbone*, 125 Wn.2d 173, 833 P.2d 303 (1994).

court, to reinstate the notices of special sentencing proceedings, and to remand these cases for trial. In the alternative, if this Court were to adopt a new rule that prosecutors are precluded from considering the evidence in death penalty cases, this Court should remand for the King County Prosecutor to consider his decision anew in light of the new rule.

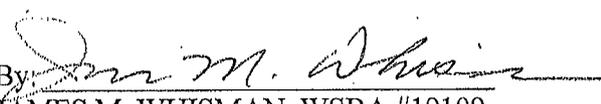
DATED this 22<sup>nd</sup> day of April, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535  
Senior Deputy Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
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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 Kathryn Ross, William Prestia, and Leo Hamaji, the attorneys for Joseph McEnroe, at 810 Third Avenue, Suite 800, Seattle, WA 98104-1965, containing a copy of the Reply 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.

W Brame

Name

Done in Seattle, Washington

9/22/13

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 Reply 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.

U Brame  
Name  
Done in Seattle, Washington

4/22/13  
Date

**OFFICE RECEPTIONIST, CLERK**

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**To:** Vitalich, Andrea  
**Cc:** Whisman, Jim; O'Toole, Scott; 'wdpac@aol.com'; Prestia, Bill; Hamaji, Leo; O'Connor, Colleen; Sorenson, David  
**Subject:** RE: Reply Brief, State v. McEnroe & Anderson, No. 88410-2

Rec'd 4-22-13

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

-----Original Message-----

From: Vitalich, Andrea [<mailto:Andrea.Vitalich@kingcounty.gov>]  
Sent: Monday, April 22, 2013 11:04 AM  
To: OFFICE RECEPTIONIST, CLERK  
Cc: Whisman, Jim; O'Toole, Scott; 'wdpac@aol.com'; Prestia, Bill; Hamaji, Leo; O'Connor, Colleen; Sorenson, David  
Subject: Reply Brief, State v. McEnroe & Anderson, No. 88410-2

Dear Supreme Court Clerk

Attached please find for filing via email the Reply Brief of Petitioner, with accompanying certificates of service, in State v. Joseph McEnroe & Michele Anderson, No. 88410-2.

Thank you,

Andrea Vitalich  
WSBA #25535

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