

88410-2
No. 88411-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

MICHELE KRISTEN ANDERSON,

Defendant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JEFFREY RAMSDELL

Respondent

~~DEFENDANT~~ ANDERSON'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL STATEMENT OF THE CASE

In its January 31, 2013 Order Striking the Notice of Intent to Seek the Death Penalty (hereinafter January 31 Order), the trial court concluded that the “Prosecutor erred as a matter of law in considering the strength of the evidence on the issue of guilt against defendants McEnroe and Anderson when exercising his discretion under RCW 10.95.040(1) to file the notice of intent. To hold otherwise would be to interpret RCW 10.95.040(1) in a manner that violates equal protection.” January 31 Order at 13. (A copy is attached to the state’s notice of discretionary review.) On February 8, 2013, the trial court adhered to its January 31 decision in an order denying the state’s motion to stay the effective date of its order. (A copy is attached as Appendix E to the state’s emergency motion to stay.)

The trial court’s decision is based on the records and proceedings going back to the defendants’ 2010 motion to dismiss notice of intent to seek the death penalty based on Equal Protection and Due Process grounds. *See* January 31 Order at 2-4. As the court explains, in its 2010 ruling the court concluded that the prosecutor did not improperly apply RCW 10.95.040(1) by failing to consider the defense mitigation in total isolation from the facts and circumstances of the alleged crimes. *See* January 31 Order at 3.

Subsequent to the 2010 ruling, Mr. McEnroe learned that the King County Prosecuting Attorney had retained his own mitigation investigator in four aggravated first degree murder cases occurring after Mr. McEnroe's and Ms. Anderson's cases through a series of discovery motions.¹ See Copies of the Clerk's Minutes which are attached to Ms. Anderson's response brief, and copies of the motions attached to Mr. McEnroe's response brief and to the state's motion for discretionary review.

Thus, as the trial court explains in its January 31 order, the issue in 2010 is different from that presented in the current motion. The issue in 2010 was whether the prosecutor could consider the facts and circumstances of the crime when deciding whether to file a notice of special sentencing proceedings pursuant to RCW 10.95.040(1). The issue presented in the current motion is whether the prosecutor can rely on the strength of the evidence pursuant to RCW 10.95.040(1). Order at 3-4. As the court explains, these are two distinct concepts. The facts and circumstances of the crime are comprised of the allegations being made in the charge, while the strength of the evidence is the persuasiveness of the evidence in support of those allegations. *Id.*

¹ The cases are State v. Isaiah Kalebu, No. 09-1-04992-7 SEA, State v. Christopher Monfort, 09-1-07187-6 SEA, State v. Daniel Hicks, 09-1-07578-2 SEA, and State v. Louis Chen, 11-1-07404-4 SEA.

As the trial court found, “[d]uring the course of oral argument and in briefing in the cases at bar, the Prosecutor’s Office has provided some insight into the factors it considers when deciding whether or not to file the notice of special sentencing proceeding.” January 31 Order at 4. In response to the discovery motions and the motion to dismiss, the state repeatedly asserted that its reason to believe there are not sufficient mitigating circumstances to merit leniency here is based on the “overwhelming” strength of the evidence. *See, e.g.,* State’s Response to McEnroe’s Motion for Discovery re Prosecutor’s Process for Determining Which Defendants Will Face Death, filed on February 24, 2012, at 13 (discussing the number of victims, the “overwhelming evidence of planning and premeditation”). The pleadings are attached as Appendix C to McEnroe’s Response Brief to Plaintiff’s Motion for Discretionary Review, filed on February 6, 2013.

Similarly, in oral arguments the prosecutor was unable to separate the strength of the evidence from consideration of mitigating circumstances. RP (1-17-2013) at 74-83. (A copy of the transcript is attached as Appendix I to State’s Motion for Discretionary Review). As the trial court found “[i]n various arguments before this Court the State has repeatedly referenced the strength of the cases against Defendants Anderson and McEnroe.”

It is this failure to follow the statute and consider mitigating circumstances independent of the strength of the evidence that led the trial court to conclude that the King County Prosecuting Attorney violated Ms. Anderson's and Mr. McEnroe's constitutional rights to equal protection and due process of law. January 31 Order at 13; see also, February 8 Order at 9-10.

B. ARGUMENT

As argued in our answer to the state's motion for discretionary review, the state is unable to show that the trial court's January 31 Order constitutes obvious error that renders further proceedings useless, or that the order constitutes probable error and substantially alters the status quo or substantially limits the freedom of a party to act, or that the order is such a departure from the accepted and usual course of judicial proceedings as to call for review pursuant to RAP 2.3(b)(1)-(3).²

The January 31 Order falls into none of these categories. Instead, the Order recognizes that, in this case, the prosecutor failed to follow the dictates of RCW 10.95.040(1) and erred as a matter of law.

For the past thirty-seven years, the courts of our nation have struggled to create a capital punishment system that meets the stringent

restrictions imposed by the Fifth, Eighth and Fourteenth Amendments. In the years following *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), the United States Supreme Court and this Court have attempted to prevent the arbitrary application of the death penalty by narrowing the class of death-eligible offenders and structuring the discretion exercised by prosecutors and jurors. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 189-207, 96 S.Ct. 2909, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 302, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (*Bartholomew II*); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985).

To allow the prosecution this discretion in a death penalty case absent specific statutory guidance could also give an unconstitutional delegation of authority to the prosecutor. ... [T]he prosecutor must decide pursuant to the statute that sufficient mitigating circumstances to merit leniency do not exist. ... The prosecutor can *only* follow the statutory instructions.

State v. Bartholomew, 104 Wn.2d 844, 848-49, 710 P.2d 196 (1985)

(*Bartholomew III*) (emphasis added).

² Counsel for Mr. McEnroe have noted in their briefing that should Mr. McEnroe plead guilty, the state can appeal the sentence. Counsel for Ms. Anderson are not able at this time to address whether or not she would enter a plea as there is a pending competency motion.

Washington's statute is unique in that it follows these directives and guides prosecutorial discretion by requiring the prosecutor, prior to filing a notice of special sentencing proceeding, to consider in each individual case "whether there is reason to believe there are not sufficient mitigating circumstances to merit leniency." *Campbell, supra*, 103 Wn.2d at 24-25. The trial court's order simply requires the prosecutor to adhere to the statute and constitutional guidelines imposed by the legislature, this Court and the United States Supreme Court. *See* January 31 Order at 6; *Campbell, supra* at 25; *State v. Rupe*, 101 Wn.2d 664, 700, 683 P.2d 571 (1984), citing *Gregg v. Georgia*, 428 U.S. at 199.

In these two cases, the prosecuting attorney consistently maintained that he based his decision to seek the death penalty on the "overwhelming" evidence of guilt. And it is this failure to follow the statute that forms the basis of the trial court's order dismissing the death notices. As the trial court noted, "Filing a notice of intent to seek the death penalty despite the presence of compelling mitigation would be an abdication of the prosecutor's duty. It would also contravene the statute's requirement that a prosecutor have reason to believe the mitigating evidence is insufficient to file the notice." February 8 Order at 9.

Here the error is not the *statute* but the prosecutor's *application* of the statute to Ms. Anderson and Mr. McEnroe. The record clearly

supports the trial court's conclusion that the prosecutor failed to perform an individualized weighing of the mitigating factors and relied instead on the strength of the evidence. This case is therefore distinguishable from *Rupe, supra*, where the court presumed the prosecutor exercised discretion. This case is likewise distinguishable from the line of cases in which this Court held that Washington's death penalty statutes properly constrain prosecutorial discretion and therefore did not violate equal protection. *See, e.g., State v. Yates*, 161 Wn.2d 714, 791-92, 168 P.3d 359 (2007), *State v. Cross*, 156 Wn.2d 580, 625, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006), *State v. Campbell, supra*, 103 Wn.2d at 26.

The heart of the trial court's ruling, and which the state does not seem to grasp, is that while the strength of the evidence must be considered at the time of charging a person with aggravated first degree murder, it is not a factor to be considered at the time of making the decision to file a notice of special sentencing proceeding. Washington law requires that when making the determination to seek the death penalty, the prosecutor "determines whether sufficient evidence exists to take the issue of *mitigation* to the jury." *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (emphasis added), citing *State v. Dictado*, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984).

In its January 31 order, as well as in its February 8 Order, the trial

court highlights the problem of relying on the strength of the evidence using the hypothetical of identical defendants who are treated disparately. Two identical defendants commit separate but identical crimes of aggravated murder. The strength of the evidence against one defendant is strong because he confessed and his case was investigated by a thorough, competent police department. The case against the second defendant is weak because he did not confess and the police department lacked resources and was understaffed. The same prosecutor, relying on the strength of the evidence, would seek the death penalty against the first defendant but not the second. Thus, contrary to the constitution, as well as public policy, a person would face the death penalty not based on the facts and circumstances of the crime and his individual moral culpability but because the case against him is strong. Applying the hypothetical to the present case, what if only one codefendant arrived at the scene and confessed, while the other did not. Thus, under the prosecutor's theory, one would be facing the death penalty based on the strength of the evidence while the other would not.

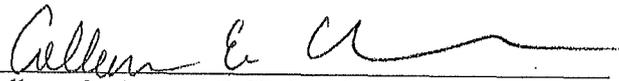
This Court has clearly stated that Washington's death penalty statute properly constrains the discretion afforded prosecutors in making the decision on whether to seek the death penalty. *See e.g., Bartholomew III, supra*, 104 Wn.2d at 849, citing *State v. Zornes*, 78 Wn.2d 9, 475 P.2d

109 (1970). By considering factors unrelated to the moral culpability of the defendants, the prosecutor here violated the statute.

C. CONCLUSION

For all of the foregoing reasons, this Court should deny the motion for discretionary review. In the event this Court accepts review, however, it should affirm the trial court's January 31, 2013 Order Striking the Notice of Intent to Seek the Death Penalty.

Respectfully Submitted this 19 Day of February, 2013.



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In the case of State v. Michele Anderson, no. 88411-1, please accept for filing Defendant Anderson's Supplemental brief. All counsel are copied on this email.

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