

SUPREME COURT NO. 88522-2

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

APPENDIX TO MONFORT'S CROSS-MOTION FOR
DISCRETIONARY REVIEW

VOLUME I

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Supreme Court No. 88522-2

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

APPENDIX TO
CROSS-MOTION FOR DISCRETIONARY REVIEW

By:

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HONORABLE JUDGE KESSLER
HRG: AUGUST 20, 2010 10:30 am

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
Plaintiff,)	
	)	No. 09-1-07187-6 SEA
CHRISTOPHER MONFORT)	
Defendant.	)	DEFENSE MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDINGS

MOTION

Defendant, Christopher Monfort, by and through his attorneys of record Julie A. Lawry and Carl F. Luer, moves this Court pursuant to RCW 10.95.141 for a finding of good cause to extend the time period for the filing of the Notice to Proceed With Special Sentencing Proceedings from the current date of September 2, 2010 to December 1, 2010, set a status conference approximately two weeks before that date and to direct the State not to announce its filing decision before that date. The State originally set the due date for submission of defense mitigation materials for May 17, 2010. After meeting with the Defense team and being appraised of the fact that the Defense team was not able to have a mitigation expert appointed

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APP000001

1 and available to begin work until March 31, 2010, the State extended its deadline to August 2,
2
3 2010. The Defense informed the State that while it would work diligently to prepare the
4
5 mitigation materials, that it was unlikely that the August 2nd deadline would be sufficient. On
6
7 July 26, 2010, the Defense informed the State by letter that in fact we were unable to provide the
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9 State with a mitigation package and meet our duties under the *ABA Guidelines for Appointment*
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11 *and Performance of Defense Counsel in Death Penalty Cases*. On August 3rd, the State informed
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13 the Defense that it would proceed in making its decision without benefit of the Defense
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15 mitigation package. Shortly afterward, the State served a large volume of new discovery on the
16
17 Defense. On Aug 11th, the State informed the Defense that is had additional discovery in its
18
19 possession since November 2009, which it had neglected to provide. This was in response to
20
21 notice to the State of a Defense subpoena *duces tecum*. Given the new discovery, the Defense
22
23 again asked the State to reconsider its deadline. The State responded by asking the Court to set a
24
25 formal hearing on September 2, 2010 at which time it will formally announce its decision on
26
27 filing of the death notice.

28
29 The Defense seeks additional time in order to complete a thorough mitigation
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31 investigation as required by the *ABA Guidelines* and general ethical duties as presented in *ex*
32
33 *parte* filings to this Court. While we have been able to accomplish many of our preliminary
34
35 goals with regard to the investigation, new information has come to light that requires further
36
37 investigation. The initial list of mitigation witnesses has grown significantly and the number of
38
39 States where witnesses reside has nearly doubled. Given the expanded investigation and the
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41 large volume of new discovery recently received by our office, we believe that it is not realistic
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43

44 DEFENSE MOTION FOR FINDING GOOD
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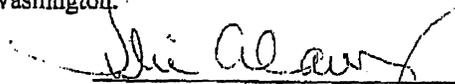
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1 to have a completed mitigation package before December 1, 2010. We would request a status
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3 conference be set at least two weeks before the new deadline.
4

5 Given the importance of the death penalty decision; the recognition by case law that input
6
7 from the Defense at this stage is critical; the past practice of the Prosecutor in carefully
8
9 considering defense input; the scope and complexity of the mitigation investigation in this case;
10
11 and the fact that a decision to file a death penalty notice may be "irrevocable", it is vital that the
12
13 defendant be given an adequate opportunity to assemble compelling and accurate evidence in
14
15 order for the prosecuting attorney to make a fully informed decision on whether it should seek
16
17 the death penalty in this case .

18
19 This motion is based on RCW 10.95.040; the Fifth, Sixth, Eighth and Fourteenth
20
21 Amendments to the U.S. Constitution; Washington Const. Article I, §§ 13, 22, attached
22
23 memorandum of authority and Third Status Report to be filed *ex parte* and under seal.
24

25
26
27 DATED: This 16th day of August 2010 in Seattle Washington.
28

29 
30 Julie A. Lawry, WSBA 17685
31 Carl F. Luer, WSBA 16365
32 Attorneys for Mr. Monfort
33
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MEMORANDUM OF LAW

When a person is charged with Aggravated Murder in the First Degree, the prosecuting attorney must perform an individualized weighing of mitigating factors against the facts and circumstances of the crime. State v. Pirtle, 127 Wn. 2nd 628, 904 P.2nd 245 (1995). Although a prosecutor has broad discretion in this matter, his discretion is not unfettered. Id. In order to file a death penalty notice, a prosecutor must have reason to believe that there are not sufficient mitigating circumstances to merit lenience. RCW 10.95.040 (1); In re Personal Restraint Petition of Lord, 123 Wn. 2d 296, 868 P.2d 835(1994). The accepted and “normally desirable” practice in these cases involves input from the defendant regarding mitigating factors before the prosecutor makes his decision whether to file the notice. Pirtle, supra, at 642. “Input from the defendant as to mitigating factors is normally desirable, because the subjective facts are better known to the defendant, while other factors, such as age and lack of prior record can be readily ascertained by the prosecutor.” In re Harris, 11 Wn.2d 691, 694, 763 P.2d 823(1988). In this case, the prosecutor has expressly invited the defendant’s input and the defendant fully intends to provide the prosecutor with materials reflecting the mitigation that we believe exists in this case.

Time To Prepare Mitigation Package

The King County Prosecutor’s Office has never in the past adopted a fixed, “one sized fits all” time table for receipt of mitigation information. Indeed, such a practice is specifically prohibited:

We have held a prosecutor’s discretion to seek the death penalty is not unfettered. Before the death penalty can be sought, there must be “reason to believe that there are not sufficient mitigating circumstances to merit leniency.” The prosecutor must perform individualized weighing of the mitigating factors-an inflexible police is not permitted.

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APP000004

1
2 State v. Pirtle, supra, at 642.

3
4 In most previous cases in King County, the prosecutor's death penalty decision was made
5
6 within six months of arraignment. This policy was in part in recognition that death penalty law
7
8 was evolved since the enactment of the death penalty in Washington in 1981, and defense
9
10 counsel are expected, both as a result of court decisions and ABA standards to perform complete
11
12 mitigation investigations for clients facing a possible death sentence. Reversals of capital cases
13
14 are predominately due to inadequate mitigation investigation. See, e.g., Williams v. Taylor, 592
15
16 U.S. 362 (2000)(defense counsel's failure to investigate defendant's mental health background
17
18 found ineffective); Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000)(failure of defense counsel
19
20 to investigate educational, occupational and criminal records for penalty phase constituted
21
22 ineffective assistance where defendant has history of drug abuse, child abuse and mitigating
23
24 behavior in prison.); In re Brett, 142 Wn.2d 868 (2002)(failure to present a mitigation package,
25
26 promptly investigate relevant mental health issues, and retain experts as to relevant mitigation
27
28 evidence may lead to ineffective assistance of counsel); Jennings v. Woodford, 290 F.3d 1006
29
30 (9th Cir. 2002)(failure to investigate mental health and drug abuse issues related to innocence
31
32 and penalty phase was ineffective). See also *ABA Guidelines for the Appointment and*
33
34 *Performance of Defense Counsel in Death Penalty Cases*, which have been repeatedly cited by
35
36 appellate courts, including the Washington State Supreme Court and United States Supreme
37
38 Court, as establishing the minimal standards for performance in a capital case.

39 A partial list of King County aggravated murder cases reflects the prosecutor's previous
40
41 policy with regard to length of time allowed from arraignment to filing decision:
42

43
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APP000005

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Champion: 189 days
Ridgeway: 119 days
Carneh: 365 days
Johnson: 30 days
Lakey: 339 days
Matthews: 294 days
Morimoto: 372 days
Roberts: 125 days
Riggins: 220 days
Saintcalle: 182 days
Haq 120 days¹
Anderson 270 days (due to competency issues)
McEnroy 270 days (tracked Anderson)
Kalsbu 270 days²

The average length of time from arraignment to the Prosecutor's filing decision in these cases was 226 days.

However, in several recent cases, and in this one, Mark Larson chief criminal deputy, has stated that the Prosecutor's Office has adopted a new policy setting a fixed deadline of 90-120 days for mitigation work for capital cases, regardless of the individual circumstances of the case. This policy was adopted in both the recent Haq and Schierman cases. In Schierman, the court extended the time for mitigation investigation (and ultimately the State's filing decision) over the objection of the State. In Mr. Monfort's case, Mr. Larson has made it clear that he does not

¹ In State v. Haq, the defendant has a prior diagnosed mental illness with a ten-year treatment history. The State allowed the Defense to file a supplemental mitigation package to provide information supporting long history of mental illness.

² Declaration of counsel in State v. Kalsbu, 09-1-04992-7 Attachment A.

DEFENSE MOTION FOR FINDING GOOD
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1 intend to allow more than four months for mitigation investigation and preparation of a package
2
3 even with his understanding that the Defense was unable to begin the mitigation investigation
4
5 until March 31st when the mitigation expert was actually available to begin work. The State's
6
7 refusal to extend the deadline for the Defense to submit mitigation materials and for announcing
8
9 its decision on the death penalty was conveyed to defense counsel in Mr. Larson's letter dated
10
11 August 3, 2010 (Attachment B) and in the State's request to the Court to set a hearing for formal
12
13 announcement of the filing decision on September 2, 2010.

14
15 Clearly, contrary to its previous policy, the Prosecutor's Office has now, in fact, adopted
16
17 an inflexible if not a fixed, "one size fits all" timetable to receive death penalty mitigation
18
19 information in violation of RCW 10.95.040 and the Court's pronouncement in Pirtle.

20
21
22
23 **The Prosecutor's New Policy Violates the Requirement that the**
24 **State Conduct an Individualized Weighing of Mitigation Evidence**
25 **To Satisfy the Requirement of RCW 10.95.040 and the Eighth and**
26 **Fourteenth Amendments**
27

28
29 A prosecutor meets his statutory and constitutional obligations under RCW 10.95.040 by
30
31 carefully considering the facts of the individual case in light of the individualized mitigation
32
33 evidence. The prosecutor's failure to consider individualized mitigation evidence before
34
35 exercising his discretion to file a death notice violates the Eighth Amendment. The U.S.
36
37 Supreme Court had clearly held that consideration of individualized mitigating evidence is
38
39 required under the Eighth Amendment.

40
41 The sentencing process must permit consideration of the "character and record of the
42
43 individual offender and the circumstances of the particular offense as a constitutionally
44
45 indispensable part of the process of inflicting the death penalty", in order to ensure the

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APP000007

1 reliability, under the Eighth Amendment standards, of the determination that "death is the
2 appropriate punishment in a specific case."
3

4 Lockett v. Ohio, 438 U.S. 586, 601, 98 S.Ct. 2954, 57 L.Ed2d 973 (1978). The Washington
5 State Supreme Court recognized that to satisfy the Eighth Amendment, the prosecutor must
6 consider mitigating circumstances to narrow the class of persons eligible for the death penalty.
7
8 State v. Campbell, 103 Wn.2d 1, 40, 691 P.2d 929 (1984)(J. Rosellini, concurring): Accord,
9
10 State v. Pirtle, *supra*, at 642 ("The prosecutor must perform individualized weighing of the
11
12 mitigating factors.")
13
14

15 The Pirtle court also said that an inflexible police is not permitted. The State's current
16 inflexible policy that mitigation work must be completed with 90-120 days without consideration
17 of the individual circumstances and the State's position that review of mitigation evidence will
18 be limited to whatever evidence is adduced in that arbitrary period of time, is contrary to the
19 holding in Pirtle.
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21
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25 The prosecutor is empowered to file a death notice "when there is reason to believe that
26 there are not sufficient mitigating circumstances to merit leniency." To satisfy this statutory
27 duty, and to exercise his charging discretion in conformance with the Eighth and Fourteenth
28 Amendments and Article I, § 12 and 14 of the Washington Constitution, the prosecutor must
29 conduct an individualized weighing of mitigation evidence before he files the notice. These
30 constraints on the prosecutor's exercise of discretion cannot be satisfied by consideration of the
31 mitigating evidence after a death notice had been filed. Pirtle, *supra*, at 642.
32
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39 The prosecutor's decision whether to seek death is an important part of Washington's
40 statutory sentencing procedure. The requirement that the prosecutor review individualized
41 mitigation evidence serves to narrow the class of persons subject to death, and channels his
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DEFENSE MOTION FOR FINDING GOOD
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1 discretion in seeking the death penalty. In Godfrey v. Georgia, 446 U.S. 420, 27-28, 100 S. Ct.
2
3 1759, 64 L.Ed.2d 398 (1980), the Court noted that:

4
5 In Furman v. Georgia, the Court held that the penalty of death may not be imposed under
6 sentencing procedures that create substantial risk that the punishment will be inflicted in
7 an arbitrary and capricious manner. Gregg v. Georgia reaffirmed this holding; "Where
8 discretion is afforded a sentencing body on a matter so grave as the determination of
9 whether a human life should be taken or spared, that discretion must be suitably directed
10 and limited so as to minimize the risk of wholly arbitrary and capricious action." A
11 capital sentencing scheme must, in short provide a "meaningful basis for distinguishing
12 the few cases in which [the penalty] is imposed from the many cases in which it is not."
13 This means that if a State wishes to authorize capital punishment it has a constitutional
14 responsibility to tailor and apply its law in a manner that avoids the arbitrary and
15 capricious infliction of the death penalty. Part of a State's responsibility in this regard is
16 to define the crimes for which death may be the sentence in a way that obviates
17 "standardless" [sentencing] discretion. It must channel the sentencer's discretion by
18 "clear and objective standards that provide specific and detailed guidance..."

19
20 In State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984) the Court found the death penalty
21 sentencing scheme in Washington did not violate the prohibition against cruel and unusual
22 punishment because Washington's statutory scheme narrows the class of persons eligible for
23 death at 4 points, including review of mitigation circumstances by the prosecutor. The
24 prosecutor should not be allowed to avoid consideration of mitigating evidence in Mr. Monfort's
25 case by forcing an arbitrary and insufficient amount of time for the collection and presentation of
26 mitigating evidence. Without a complete mitigation package from the Defense, the prosecutor
27 will be unable to properly perform the "individualized weighing" of mitigating circumstances
28 required under RCW 10.95.040.
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37 It should be noted that the State has retained an independent investigator to provide the
38 State with "mitigation evidence", however, this person is not a trained mitigation expert but a
39 general investigator. To date, the information gathered by this investigator is approximately 80
40 pages and includes a handful of preliminary interviews with mostly witnesses on the periphery of
41 DEFENSE MOTION FOR FINDING GOOD Associated Counsel for the Accused 9
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APP000009

1 Mr. Monfort's life i.e. acquaintances and co-workers. The information gathered for
2
3 consideration on the important issue of life or death by the State would be per se ineffective
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5 assistance of counsel if it were submitted by the Defense on Mr. Monfort's behalf. Surely, the
6
7 State, with its considerable experience in reviewing mitigation packages in potential death
8
9 penalty cases over the years, does not believe it has gathered the type and quality of mitigating
10
11 evidence that it is charged with considering before announcing a filing decision.

12
13 In reality, unless the Court gives the Defense adequate time to present a complete
14
15 mitigation package to the prosecutor, the decision whether to file the death penalty notice will be
16
17 undertaken without any consideration of individualized mitigating circumstances because the
18
19 State has clearly made only a superficial attempt to investigate such mitigation on its own.

20
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22
23 **Good Cause**

24
25 RCW 10.95.040(2) provides that the "notice of special proceeding" shall be filed and
26
27 served within thirty days after arraignment unless "the court, for good cause shown, extends or
28
29 reopens the period for filing and service of notice."

30
31 Thus, upon a showing of "good cause" this Court has the express authority to extend the
32
33 time for the prosecutor to decide whether insufficient mitigating circumstances exist such that
34
35 filing the death notice is appropriate.

36
37 There are no reported cases that address when a defense request to extend time to conduct
38
39 further mitigation investigation is supported by "good cause." However, several cases address
40
41 "good cause" in the context of the State's failure to comply with the portion of the statute
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43 requiring service of the notice on the defendant or his counsel. While not directly on point the

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1 cases are helpful. See State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995); State v. Dearbone,
2
3 125 Wn.2d 173, 883 P.2d 303 (1994).

4
5 Both Luvene and Dearbone defined "good cause" as an "external impediment" which
6
7 prevented compliance with the statute. In Dearbone, the Court distinguished between "self-
8
9 created hardship" (which does not constitute "good cause") and an "external objective
10
11 impediment" (which does).

12
13 There is good cause in this case to extend the filing deadline. The remaining Defense
14
15 investigation tasks clearly constitute "external impediments" that have not been the result of self-
16
17 created hardship that would prevent a party from complying with the statutory requirements.

18
19 The Court's authority to extend the period for filing the death notice does not rest upon
20
21 agreement of either party. "The court is a part of the proceeding and is not a potted-palm
22
23 functionary, with only the attorneys having a defined purpose." Luvene, supra (Justice Durham,
24
25 dissenting), quoting State v. Ford, 125 Wn. 2d 919, 924-25 (1995).

26
27 Neither the statute nor case law require the consent of the prosecuting attorney to grant an
28
29 extension. The prosecutor's consent is only required for entry of a guilty plea during the notice
30
31 period. RCW 10.95.040 (2). The statute expressly requires the consent of the prosecutor for a
32
33 guilty plea, but is silent regarding the need for consent by the State to extend the notice period.
34
35 Under the statutory construction principle of *expressio unius est exclusio alterius* ("express
36
37 mention of one thing in a statute implies the exclusion of another"), it must be implied that the
38
39 State's consent is not otherwise required.

40
41 The State has previously argued in other cases in which extensions of the mitigation
42
43 deadline were being sought from the superior court, that the court can only find "good cause" to

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APP000011

1 extend the filing period if the Prosecutor, in his sole discretion, determines that he needs
2
3 additional time to make his decision. Under such a viewpoint, the court's only function would
4
5 be to approve any extension the State might desire, thereby rendering the plain language of RCW
6
7 10.95.040 meaningless. There are two parties to the action pending before the Court who are
8
9 entitled to petition the court for an extension. Nothing in the statutory language suggests that the
10
11 State is the only intended beneficiary.

12
13 Further, in State v. Finch, 137 Wn.2d 792, 807, 975 P.2d 967 (1999), the Court compared
14
15 a defendant's right to notice under RCW 10.95.040 with the right to a speedy trial, "which can be
16
17 waived by defense counsel over the defendant's objection, to ensure effective representation and
18
19 a fair trial." The court's authority to grant an extension at the request of the defense is consistent
20
21 with ensuring effective representation. The Court in Finch also said that defense counsel may
22
23 waive the time limit of RCW 10.95.040 for "tactical reasons." This holding indicates the Court
24
25 recognized that the defense is entitled to the benefits of the statute.

26
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28
29 **The Court has Authority to Preclude the State from Filing**
30 **a Death Notice During an Extension of the Filing Period**

31
32 RCW 10.95.040, while providing that the court may extend the period for filing a death
33
34 notice it does not specifically address whether the State may file a death notice during the period
35
36 of extension without permission of the court. In point of fact, the King County Prosecutor has
37
38 never sought to file a death notice after a superior court has granted an extension during the
39
40 mitigation period.

41
42 If the State were permitted to file a death notice during such a period of extension, the
43
44 legislative grant of discretion to the court to extend the filing period would be rendered
45 DEFENSE MOTION FOR FINDING GOOD
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APP000012

1 meaningless, and the court would be powerless to effectuate its statutory authority. In Aylonitis
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3 v. Seattle Dist. Court, 97 Wn.2d 131, 138, 641 P.2d 169 (1982), the Court stated, "Statutes
4
5 should not be interpreted in such a manner as to render any portion meaningless, superfluous, or
6
7 questionable."

8
9 In State v. Zornes, 78 Wn.2d 9,13 475 P.2d 109 (1970), the Court stated "In construing a
10
11 statute, the court seeks to find the legislative intent, and to give effect to the legislative purpose.
12
13 Courts will not ascribe to the legislature a vain act, and a statute should, if possible, be so
14
15 construed that no clause, sentence, or word shall be superfluous, void, or insignificant."

16
17 The Court has implied power to effectuate the exercise of its discretion under the statute.
18
19 "Even though a power may not expressly be given in specific words, if its existence is
20
21 reasonably necessary in order to effectuate the purposes intended, such power may be implied."
22
23 State ex rel. Hunter v. Superior Court of Snohomish County, 34 Wn.2d 214, 217, 208 P.2d 866
24
25 (1949); Accord, Pac. County v. Sherwood Pac., 17 Wn.App. 790, 567 P.2d 642 (1977).

26
27
28
29 **The Separation of Powers Doctrine Does Not Prevent**
30 **the Court from Extending the Notice Period**

31
32 The decision to seek the death penalty is an executive function that has been delegated to
33
34 the prosecuting attorney by the Legislature, which gave procedural control over the timing of the
35
36 notice to the court. RCW 10.95.040 (2). This is similar to the court's control of the timing of an
37
38 amendment to an Information. While the prosecutor is granted charging discretion, the State
39
40 may not amend an Information to add charges without permission of the court. CrR 2.1(d).

41
42 Unless the court grants its permission under CrR 2.1(d), the State cannot amend a current
43
44 Information to charge additional felony counts; to charge sentencing enhancements or even to
45
46 DEFENSE MOTION FOR FINDING GOOD
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48 DEADLINE AND PERIOD FOR FILING OF
49 NOTICE TO PROCEED WITH SPECIAL
50 SENTENCING PROCEEDINGS

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APP000013

1 charge misdemeanor offenses. There is no authority to suggest that the discretion of the court
2
3 under CrR 2.1 (d) violates the separation of powers doctrine. Similarly, there is no authority for
4
5 the proposition that the legislative grant of discretion to the court under RCW 10.95.040 violates
6
7 the separation of powers doctrine.

8
9 The State may argue that an analogy to CrR2 is misplaced because under the Rule a court
10
11 may refuse an amended Information only if "substantial rights of the defendant
12
13 are...prejudiced." However, the court's authority under CrR 2.1 is similar to its power under
14
15 RCW 10.95.040 because the court may properly place preconditions on the filing of a death
16
17 notice where the rights of a defendant would be prejudiced by the failure of the State to comply
18
19 with the statutory and constitutional requirement to consider individualized mitigating evidence.

20
21 The State could argue that there would be no prejudice to Mr. Monfort from the filing of
22
23 a death notice because he would be able to present mitigation evidence at a penalty trial. On the
24
25 contrary, Mr. Monfort will be prejudiced because he will be deprived of a full opportunity to
26
27 avoid the death penalty by convincing the Prosecuting Attorney that he should not seek death.
28
29 He will be prejudiced because he will not be accorded his right to effective assistance of counsel
30
31 at all stages of the proceeding. He will be prejudiced because allowing the State to file a death
32
33 notice without considering individualized mitigation evidence violates his right to have the
34
35 Prosecutor make his decision in accordance with the Eighth and Fourteenth Amendments and
36
37 statutory requirements.

38
39 On the other hand, the State will not be prejudiced if the Court extends the notice period.
40
41 Once the Prosecutor has fulfilled his statutory and constitutional duties, he will be free to either
42
43 file or not file a death notice at the end of the extension period.

44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP000014

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The Court Must Ensure that the Prosecutor Acts in Accordance with Statutory Dictates and Does Not Violate Constitutional Guarantees in the Exercise of Its Discretion

It is the duty of the Court to require the State to comply with its statutory obligations under RCW 10.95.040, and to ensure that the State does not violate Mr. Monfort's constitutional rights in the exercise of its discretion. The Court in Luveng wrote:

As the United States Supreme Court has repeatedly noted, 'the penalty of death is qualitatively different from a sentence of imprisonment, however long.' Because of this difference, we should strive to ensure that the procedures and safeguards enacted by the Legislature are properly followed by the Sate. The determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedure establish by the Legislature.

Luveng, at 719 n.8.

Violation of Right to Due Process of Law If Mr. Monfort is Not Given Time to Prepare a Mitigation Package

State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) said "The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness..."

The application of the State's newly adopted policy to set a one-size fits all deadline for every potential death penalty case is fundamentally unfair:

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessary delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can he gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

DEFENSE MOTION FOR FINDING GOOD
CAUSE TO EXTEND MITIGATION
DEADLINE AND PERIOD FOR FILING OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS

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1 Letter from Mark Larson for Dan Satterberg dated December 14, 2009 (day of arraignment).
2
3 Attached as exhibit. This language is contained in boilerplate form in all letters sent from the
4
5 State regarding the original time for filing deadline. Mr. Monfort is being provided with
6
7 substantially less time than past capital defendants to collect and present mitigation evidence that
8
9 might save him from death. Such disparate treatment is not consistent with the principles of due
10
11 process, especially in a capital case. "Where life itself hangs in the balance, a fine precision in
12
13 the process must be insisted upon." Lockett v. Ohio, supra.

14
15 In Washington...in the charging decision, "the prosecutor merely determines
16 whether sufficient evidence exists to take the issue of mitigation to the jury. This
17 type of discretion does not violate equal protection." State v. Dictado, 102 Wn.2d
18 277, 297-8, 687 P.2d 172 (1984). Thus, pursuant to RCW 10.95.040(1) the filing
19 of a notice of intent to seek the death penalty is a **prosecutorial statement that**
20 **he does not know of sufficient mitigating circumstances to merit leniency.**

21
22 Harris By and Through Ramseyer v. Blodgett, 853 F. Supp. 1239, 1284 (1994)(emphasis added).

23
24
25
26 **Mr. Monfort Will Be Denied Effective Assistance of Counsel if the Filing**
27 **Period is Not Extended to Permit Counsel to Conduct a Reasonable**
28 **Investigation**

29
30
31 "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a
32 reasonable investigation enabling [counsel] to make informed decisions about how best to
33 represent the client." In re Brett, supra.

34
35
36 In Brett, defense counsel failed to fully investigate Brett's medical and mental problems
37 and failed to present a mitigation package to the State prior to filing of the death notice. His
38 sentence of death was vacated and the Court found that he had been denied his right to effective
39 assistance of counsel:
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41
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43

44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP00001

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When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed, and, if necessary retain qualified experts to testify accordingly.

Id. at 880 (Emphasis added). The Court noted that Brett's attorney did not present a formal or written mitigation package. Two legal experts testified that failure to present a mitigation package to the prosecutor before filing of the death notice constituted ineffective assistance of counsel. In Harris By and Through Ramseyer v. Blodgett, *supra*, the court said, "Counsel's failure to attempt mitigation with the prosecutor before the death penalty was sought fell below the objective standard of reasonableness and amounted to a deficient performance."

Mr. Monfort will be deprived of the effective assistance of counsel if the defense is not afforded the opportunity to present a comprehensive mitigation package to the Prosecutor. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland v. Washington, *supra* (emphasis added). "Prevailing professional norm" means the professional norms in existence at the time of the case. Wiggins v. Smith, 539 U.S. 510 (2003); Harris, 853 F. Supp. at 1254.

The "professional norms" in this case are dictated by case law and the ABA standards for death penalty defense lawyers.³ Mr. Monfort's attorneys have been unable to meet those standards in the short and arbitrary period of time that has been allotted for mitigation.

By instituting an inflexible standard, the State seeks to roll back the clock to limit defense counsel to a mitigation time frame that was typically permitted ten years ago or more. The State

³ See Declaration of Todd Maybrown, Attachment C.
DEFENSE MOTION FOR FINDING GOOD
CAUSE TO EXTEND MITIGATION
DEADLINE AND PERIOD FOR FILING OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS

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1 fails to realize that to meet prevailing professional norms in capital defense, and to avoid costly
2
3 and needless litigation that would ultimately result in appellate reversal for ineffective assistance,
4
5 more time for mitigation is needed than previously the case. Given the particulars of Mr.
6
7 Monfort's case (his age, lack of prior incarceration and the large number of states where
8
9 mitigation witnesses reside and documents are located) this case deserves more than just an one-
10
11 size fits all treatment. It can hardly be contested that the nature and quality of mitigation work
12
13 has evolved over the 27 years since the Washington death penalty statute was enacted in 1981.

14
15 In fact, the Washington Supreme Court raised its expectation of capital counsel in 1997
16
17 when it adopted SPRC 2 to address the problem of ineffective assistance of counsel. The rule
18
19 requires appointment of counsel qualified to render "quality representation which is appropriate
20
21 to a capital case." The mitigation work that has been completed to date in Mr. Monfort's case is
22
23 incomplete and so cannot constitute the "quality representation" envisioned by the rule.

24
25 Case Law also reflects this evolving standard of practice. See Wiggins, supra,
26
27 (ineffective assistance to fail to investigate and present mitigating evidence of dysfunctional
28
29 background at trial); In re Brett, supra (ineffective assistance to fail to investigate mental health
30
31 issues and present mitigation package prior to filing of death notice).

32
33 Because of the State's new and arbitrary policy of providing an essentially inflexible
34
35 amount of time to prepare and present mitigation evidence in every capital case (without regard
36
37 to individualized circumstances based on the nature of the case), Mr. Monfort will be denied
38
39 effective assistance of counsel in violation of the Sixth Amendment and Article I, §22 of the
40
41 Washington Constitution if an extension of the mitigation period is not granted.

42
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44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP000018

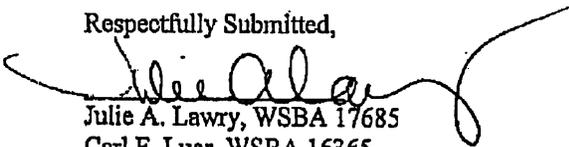
1
2
3 **Conclusion**
4

5 The State's new inflexible policy is arbitrary; provides patently insufficient time to gather
6
7 and present a complete mitigation package; is not individualized according to the facts and the
8
9 circumstances of each individual case; violates the requirements of RCW 10.95.040 and case law
10
11 and allows the Prosecutor to make a death penalty decision without meaningful consideration of
12
13 "individualized mitigating circumstances" because the truth of the matter is that the State has
14
15 essentially done nothing to fulfill its empty promise of conducting its own investigation of
16
17 mitigating factors. The State's policy is neither rational nor fair, and creates an inconsistency in
18
19 the treatment of capital defendants. In this case, the State is aware of the fact that while Mr.
20
21 Monfort was arraigned in December of 2009, the Defense did not have a mitigation expert on
22
23 board and in the field until the 31st of March 2010. Allowing four months for a full and
24
25 comprehensive mitigation investigation and presentation that effectuates the duties, obligations
26
27 and principles of RCW 10.95.040, the state and federal constitutions and the ABA Guidelines is
28
29 absurd. Given the breadth of Mr. Monfort's life experiences it invites, if not compels a finding
30
31 of ineffective assistance of counsel.

32
33 The Court should grant the Defense motion to extend the period for filing a death notice
34
35 and should preclude the State from filing a death notice during the extension period.

36 DATED August 16, 2010
37

38
39 Respectfully Submitted,

40
41 
42 Julie A. Lawry, WSBA 17685
43 Carl F. Luer, WSBA 16365
44 Attorneys for Mr. Monfort

45 DEFENSE MOTION FOR FINDING GOOD
46 CAUSE TO EXTEND MITIGATION
47 DEADLINE AND PERIOD FOR FILING OF
48 NOTICE TO PROCEED WITH SPECIAL
49 SENTENCING PROCEEDINGS
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19

APP000019

ATTACHMENT
A

APP000020

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	CAUSE NO. 09-1-07187-6 SEA
)	
<i>Plaintiff,</i>	)	Declaration of Ramona Brandes
)	
v.)	
)	
Christopher Monfort,)	
)	
<i>Defendant</i>)	

I, Ramona C. Brandes, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct based upon information and belief:

1. I was court-appointed to represent defendant Isaiah Kalebu on King County Superior Court Cause 09-1-04992-7 SEA on charges of Aggravated First Degree Murder, Attempted Murder in the First Degree, Rape First Degree, and Burglary First Degree;
2. That the date of the alleged offenses in the Kalebu case is July 19, 2009;
3. I was assigned to represent Mr. Kalebu on July 29, 2009, along with later assigned counsel Michael Schwartz;

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4. In preparing a mitigation packet for the King County Prosecutor's Office as to mitigating factors that weighed against seeking a special sentencing proceeding, extensive investigation, research, and writing was required which extended for a period of approximately nine months.
5. Our mitigation investigation uncovered nearly 200 mitigation witnesses and over 3000 pages of mitigation documents, all in addition to the discovery provided by the prosecutor.
6. Discovery of mitigation evidence occurred sequentially, meaning, that receipt of one set of documents or interview would then refer to or open leads to other pertinent documents and witnesses. This sequential discovery often created unexpected time delay due to the need to accumulate these records, and due to the reality that certain assessments and evaluations can not take place until all the related records have been unearthed and received.
7. Defense was under pressure from the King County Prosecutor's Office to rapidly conduct the mitigation investigation, as Mark Larson, Chief Criminal Deputy Prosecutor, had specifically voiced his determination to the defense that he wanted to take back control "of this" from the defense and due to his claim, despite abundant case law to the contrary, that a rapidly done mitigation was no better than one that was more thorough.
8. Initially the King County Prosecutor's Office was insistent that any mitigation packet be submitted no later than January 12, 2010, which was less than six months from the date of the incident.
9. Further negotiation with the prosecutors resulted in an extended agreed date for submission of the defense mitigation packet no later than April 1, 2010, which the

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defense complied with even though the defense had not completed the investigation of the mitigation witnesses and highly relevant mitigating records are still incoming nearly a month after the submission of the packet.

10. It was our assessment that an adequate investigation of mitigation actually would have taken until August 2010 to complete. Fortunately, the state determined not to seek to a special sentencing proceeding on the Kalebu matter.

11. Defense believes that had the state determined to proceed to a special sentencing proceeding their failure to allow adequate time to for defense to properly investigate and present mitigating circumstances would have raised a colorable appellate issue that could have resulted in long-standing litigation that would take much longer to resolve than just permitting the adequate time for the investigation initially.

12. As it stands, due to the insufficient time for preparation, following submission of the main mitigation packet on April 1, 2010, defense continued to work on a necessary but incomplete portion of the mitigation packet relating to proportionality. This section was submitted to the prosecutor's office in abbreviated form on April 12, 2010, bringing the total preparation time to nine months.

Signed in Seattle, WA on the 12th day of May 2010.



Ramona C. Brandes, WSBA #27113
Attorney for the Defendant

ATTACHMENT
B

APP000024

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

August 3, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

Thank you for your letter dated July 26, 2010. We understand from your correspondence that you have chosen not to provide the State with any evidence of mitigation by the August 2, 2010 deadline, the extension that we provided to you on May 20, 2010.

As you know, eight months have now passed since Mr. Monfort was arraigned on the current charges and nine months have passed since he was charged with these crimes. Our office has provided you with extensive discovery regarding the crimes with which he is charged and the evidence implicating him in those crimes. We have also provided you with all the reports generated by a private investigator we retained to look into your client's background.

After careful consideration, we have decided not to extend the date by which our elected prosecutor will make the decision contemplated by RCW 10.95.040. That decision will be made by September 3, 2010.

As is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution. We look forward to your previously scheduled meeting with Mr. Satterberg on August 26, 2010, at 11 a.m. at the King County Prosecutor's Office. We strongly encourage you to provide him with any evidence of mitigation you may have at that time. Mr. Satterberg will announce his decision on or before September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Erin Ehlert for

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000025

ATTACHMENT
C

APP000026

1 United States District Court for the Eastern District of Michigan, the United States District
2 Court for the Southern District of New York, the United States District Court for the Eastern
3 District of Washington, the United States District Court for the Western District of
4 Washington, the United States District Court for Idaho, the Sixth Circuit Court of Appeals,
5 the Ninth Circuit Court of Appeals, and the United States Supreme Court.
6

7 3. From 1990 to the present, I have handled all types of litigation matters, and
8 have represented numerous clients faced with serious felony charges, including several
9 homicide cases. I have handled many trials and appeals in state and federal courts.

10 4. I have been appointed to represent several defendants charged with aggravated
11 first-degree murder in the State of Washington. Since 1997, I have represented six defendants
12 charged with aggravated first-degree murder in the State of Washington. *See, e.g., State v.*
13 *Martin Francisco*, King County Cause No. 97-C-08624-4 SEA; *State v. Corey Belto*, King
14 County Cause No. 89-1-00243-0 KNT; *State v. Michael Thornton*, Kennewick Superior Court
15 No. 98-1-00493-6; *State v. Michael Roberts*, King County Cause No. 94-C-03249-2 (after
16 reversal by Washington Supreme Court); *State v. Rosendo Delgado, Jr.*, Yakima County
17 Cause No. 99-1-00736-6; *State v. Blake Pirile*, Spokane County Cause No. 92-1-00955-3
18 (after reversal by Ninth Circuit Court of Appeals). Each of these cases was ultimately
19 resolved without the imposition of a death sentence.
20

21 5. More recently, during 2006, I was appointed as "learned counsel" to represent
22 a defendant charged with murder and racketeering charges in the United States District Court
23 for the Western District of Washington. *See United States v. Rollness*, Cause No. CR06-
24 4IRSL (W.D.Wash.). After reviewing the defense mitigation package, the Attorney General
25 declined to file a death notice in that case.
26

DECLARATION OF TODD MAYBROWN - 2

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APP000021

1 6. In addition to my work at the trial court level, the Washington Supreme Court
2 has appointed me to represent several capital defendants during appeals and/or personal
3 restraint proceedings: Dayva Cross (71267-1); James Brett (No. 63835-7), and Blake Pirtle
4 (No. 64300-8).

5
6 7. In 1997, the State of Washington enacted a court rule that requires a panel
7 created by the Supreme Court to create a list of attorneys who "meet the requirements of
8 proficiency and experience, and who have demonstrated that they are learned in the law of
9 capital punishment by virtue of training or experience, and thus are qualified for appointment
10 in death penalty trials and for appeals." Superior Court Special Proceeding Rule 2. That
11 panel has concluded, since its formation, that I am among the attorneys qualified to represent
12 capital defendants at all phases of the litigation.

13
14 8. Also, I have litigated several capital habeas corpus actions under 28 U.S.C.
15 Sec. 2254. See, e.g., *Rupe v. Wood*, 863 F.Supp. 1307 (W.D. Wash. 1994); *Rupe v. Wood*,
16 863 F.Supp. 1313 (W.D.Wash. 1994); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996); *Pirtle v.*
17 *Morgan*, 313 F.3d 1160 (9th Cir. 2002); *Stvak v. Klauser*, Cause No. 96-0056-S-FLW; and
18 *Wood v. Paskett*, Idaho Cause No. CV-99-0198-S-EJL.

19 9. I have been a member of the National Association of Criminal Defense
20 Lawyers and the Washington Association of Criminal Defense Lawyers ("WACDL") since
21 1990. From 1997 to 2008, I was a co-chair of WACDL's death penalty committee. In that
22 capacity, I have consulted with many attorneys on numerous homicide and death penalty
23 cases. I served as the president of WACDL from June 2009 to June 2010. Since 2006, I have
24 assisted as an Adjunct Professor for the Trial Advocacy Program at the University of
25 Washington Law School.
26

DECLARATION OF TODD MAYBROWN - 3

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APP00002

1 10. In addition to my general training, I have attended seven CLEs that focused
2 exclusively on the law of capital punishment: (1) a national conference in Washington, D.C.
3 during June 1996 (which lasted three days); (2) a WACDL CLE during 1995 (which lasted
4 two full days); (3) the Northwest Regional Death Penalty Training Conference during
5 November 1998 (which lasted three days); (4) a national conference in Virginia during June
6 2000 (which lasted three days); (5) a WACDL CLE during September 2001 (which lasted one
7 full day); (6) a WACDL CLE during 2003 (which lasted two full days); (7) a national
8 conference in Virginia during 2006 (which lasted three days); and (8) a Washington death
9 penalty training program in Spokane during July 2007 (which lasted for two full days). I have
10 attended many other CLEs, and lectured at no less than ten CLEs, that covered issues relating
11 to homicide cases and scientific evidence. During 2000 and 2001, I presented several lectures
12 at the Northwest Regional Death Penalty Training Conference and the WACDL CLE (which I
13 co-chaired). Finally, since 2001, I have presented many lectures regarding capital litigation
14 and post-conviction proceedings.
15

16
17 11. As noted above, I have handled numerous habeas corpus actions in the federal
18 courts. I am familiar with the provisions of the Anti-Terrorism and Effective Death Penalty
19 Act of 1996. In fact, I have filed a civil rights case in the United States District Court for the
20 Western District of Washington that addressed certain issues relating to the new habeas
21 corpus rules in capital cases. See *Benn v. Gregoire*, No. C96-5689FDB (granting preliminary
22 injunction in favor of capital defendants). Moreover, during 1998, a Magistrate Judge of the
23 United States District Court for the Western District of Washington appointed me to brief, and
24 to argue, a case certified from the United States District Court to the Washington Supreme
25
26

DECLARATION OF TODD MAYBROWN - 4

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APP000030

1 Court regarding the relationship between Washington practice and federal habeas corpus law.
2 *See Shumway v. Payne*, 136 Wn.2d 383 (1998).

3 12. I am familiar with Washington's death penalty statutes, and the several state
4 and federal court decisions that have interpreted and discussed those same statutes. There is
5 no mandatory death penalty in Washington – or any other jurisdiction in the United States.
6 Rather, in light of Washington's statutes and court precedents, the prosecutor is charged with
7 the discretion to make an initial determination whether or not to seek the death penalty in any
8 potential capital case. Consistent with the Sixth Amendment, it is expected that the
9 defendant's counsel will use the initial stages of any aggravated murder case to prepare a
10 "mitigation package" in an effort to convince the prosecuting attorney not to seek the death
11 penalty.
12

13
14 13. I am familiar with the United States Supreme Court's jurisprudence in capital
15 cases, including the several recent cases that discuss the significance of "mitigation evidence"
16 in capital proceedings. *See, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978); *Wiggins v. Smith*, 439
17 U.S. 510 (2003). Also, I am familiar with the 2003 ABA Guidelines for the Appointment
18 and Performance of Defense Counsel in Death Penalty Cases. All of these resources make
19 clear that a complete mitigation investigation is absolutely essential to effective representation
20 of a client facing a possible death sentence.
21

22 14. I have been asked by defense counsel in the above-captioned case to provide
23 an opinion in regards to the amount of time that is generally necessary to prepare a mitigation
24 package in a case of this sort; what is necessary to provide effective assistance of counsel in
25 the preparation of a mitigation package. It is my understanding that the named defendant,
26 Christopher Monfort, is currently charged with one count of Aggravated First Degree Murder

DECLARATION OF TODD MAYBROWN – 5

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APP00003

1 as well as four other class A felonies and three distinct crime scenes. It is my understanding
2 that the Defense was unable to begin its mitigation investigation in earnest until April 2010.
3 The State extended its original deadline from May 17, 2010 to August 2, 2010; giving the
4 Defense four months to complete its mitigation investigation and submit its material. It is my
5 further understanding that the Defense informed the State that it would not have a thorough
6 and completed mitigation package for the State on the August 2 deadline. Apparently, the
7 State is now intending to schedule a hearing on September 2, 2010 for formal announcement
8 of its filing decision without benefit of a Defense mitigation package.
9

10 15. I have also been told that Mr. Monfort is 41 years of age, with no history of
11 incarceration, and with prior residency in at least six states. Thus, the defense has determined
12 that there are potential mitigation witnesses spread over at least eleven states. With such a
13 background, the defense would need considerable time to complete a thorough evaluation of
14 Mr. Monfort's life history and to prepare a comprehensive mitigation package.
15

16 16. I have represented several defendants who were charged with capital offenses
17 and I have supervised the preparation of mitigation packages in each of those cases. Also, I
18 have consulted with numerous other attorneys as they worked to assemble a mitigation
19 package for their own clients. I do not believe that I have ever been involved in any case
20 where an attorney has been expected to prepare a mitigation package in a time period as short
21 as 120 days.
22

23 17. I seriously question the wisdom and the appropriateness of setting a strict time
24 limit for the completion of a mitigation package in a case of this sort. I believe that the
25 preparation of a mitigation package is a critical stage in any aggravated murder case and I
26 know from personal experience that the preparation of a comprehensive mitigation package

DECLARATION OF TODD MAYBROWN - 6

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1 may have a dramatic impact on the prosecutor's view of a potential capital case. The
2 presentation of this package is important insofar as it may help to demonstrate that a
3 reasonable juror would answer "no" to the question posed in RCW 10.95.060(4). Under such
4 circumstances, the prosecutor should never file a death notice and the case should proceed as
5 a traditional murder case. At the very least, the information contained in the mitigation
6 package should help the prosecution to make a reasoned determination with respect to the
7 appropriate punishment in the case.
8

9 18. When preparing any mitigation presentation, an attorney must complete a
10 comprehensive review of the defendant's background and history. This process must include,
11 at a minimum, a thorough review of the defendant's family and social history (including a
12 multigenerational history), medical and mental health history, educational background,
13 employment history, criminal history, and any other significant information relating to the
14 defendant's development and life history. At the same time, the attorneys must complete a
15 thorough evaluation of the facts and circumstances surrounding the offense conduct that gives
16 rise to the current charges. The attorneys may seek to develop evidence that would call into
17 question the strength of the government's case as to the charged offense conduct. However,
18 in order to assemble a most-effective mitigation presentation, the attorneys must attempt to
19 establish some associations between the mitigating evidence (e.g., the defendant's background
20 and history) and the alleged offense conduct that is at issue in the case.
21

22 19. It is something of a truism to state that each aggravated murder case is unique,
23 but the Court should recognize that it would seem unreasonable to create a "one size fits all"
24 rule for these cases. In some cases, mitigation information is easy to obtain (e.g., the client is
25 healthy and lucid, records and historical data are easy to locate, local experts are available to
26

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1 complete all necessary work on the case, factual information relating to the crime is readily
2 available, all witnesses are cooperative, etc.). In most cases, however, it is my experience that
3 some of the information necessary to prepare a comprehensive mitigation package is difficult
4 to obtain and not readily available within a very short period of time.¹ I have prepared many
5 mitigation packages in my career, and I do not believe that I have ever completed such a
6 presentation in a period as short as 120 days.
7

8 20. The media accounts regarding Mr. Montfort and this case seem to suggest that
9 defense counsel will need to conduct a thorough evaluation of their client's mental health
10 condition at the time of the offense (and thereafter). To do so, the attorneys must complete a
11 comprehensive evaluation of Mr. Montfort's historical mental condition and any history of
12 mental health treatment and counseling. This is certain to be a time consuming process and I
13 would expect that most experienced attorneys would request at least six months to complete
14 such a review.² In rendering this opinion, I do want to acknowledge that six months may well
15 be insufficient to prepare and present a comprehensive mitigation assessment of Mr.
16 Montfort's personal circumstances and the facts surrounding the case. Nevertheless, at a bare
17 minimum, the State and the Court should afford counsel more than 120 days to complete the
18 process.
19

20 21. I have handled several capital cases during appeal, post-conviction and federal
21 habeas corpus proceedings. One of the primary reasons for reversals of death sentences in the
22

23 _____
24 ¹ For example, the experts needed to address the individual circumstances of the defendant oftentimes
25 must be brought in from out of state, and the machinations of funding those experts is also subject to
understandable limitations and time constraints.

26 ² This Court should recognize that this review process is necessarily dependent upon the scheduling
constraints of mental health experts and other persons who are not within defense counsel's control.

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1 State of Washington – and the country as a whole – has been the fact that trial counsel
2 provided ineffective assistance during the preparation and presentation of mitigation evidence.
3 *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Jennings v. Woodford*, 290 F.3d 1006 (9th
4 Cir. 2002); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000); *In re Brett*, 142 Wn.2d 868
5 (2001). By imposing a short deadline for the time to prepare the initial mitigation package in
6 a case of this sort, the State may unwittingly increase the risks of such a reversal.³ Moreover,
7 I do not believe that a short deadline will serve the interests of justice in the long run.
8

9
10 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
11 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF
12 MY KNOWLEDGE.

13 Dated at Seattle, Washington this 16th day of August, 2010.

14
15 
16 TODD MAYBROWN, WSBA #18557
17
18
19
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23

24 ³ However, notwithstanding the limit imposed prior to the filing of the notice under RCW 10.95.040,
25 counsel is obliged to continue to seek out evidence that may be relevant to mitigation. If such
26 evidence is discovered after the prosecutor has filed a death notice, I believe that the prosecutor would
be obliged to withdraw the improvidently filed notice.

FILED
KING COUNTY, WASHINGTON
AUG 28 2010
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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8 STATE OF WASHINGTON,)
9)
10) Plaintiff,) No. 09-1-07187-6 SEA
11)
12) vs.) RESPONSE TO DEFENSE MOTION
13) FOR FINDING GOOD CAUSE TO
14) EXTEND MITIGATION DEADLINE
15) FOR FILING AND SERVICE OF
16) NOTICE TO PROCEED WITH
17) SPECIAL SENTENCING
18) PROCEEDINGS
19)
20)
21)
22)
23)
24)

I. INTRODUCTION

The defendant has filed a motion to extend the deadline by which the King County Prosecutor must decide whether to seek the death penalty in this case.¹ The title of this pleading is misleading. It suggests that the defendant seeks merely to extend the time during which he may submit mitigating evidence to the King County Prosecutor, and during which the Prosecutor may make his decision. But the prosecution will consider mitigating evidence at any time, and the Prosecutor has not asked for additional time to make his decision. The actual relief sought

¹ DEFENSE MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDING [hereinafter, RESPONSE TO DEFENSE MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDINGS - 1

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APP00003

1 by the defendant is not articulated until the final words of the 19-page pleading that accompanies
2 his motion:

3 **The Court should grant the Defense motion to extend the period**
4 **for filing a death penalty notice and should preclude the State**
5 **from filing a death notice during the extension period.²**

6 The defendant is seeking injunctive relief -- an order precluding the Prosecutor from
7 making a decision that is entrusted solely to the Prosecutor. There is simply no authority in
8 statute, court rule or case law for this court to forbid the Prosecutor from making his statutorily-
9 required decision until such time as the defendant chooses -- in this case, over a year after the
10 defendant was charged. In fact, the defendant's motion would require this court to intrude upon
11 the executive functions of the prosecuting authority, in violation of the separation of powers
12 doctrine. The defendant's motion should be denied.

13 **IL FACTS**

14
15 On October 31, 2009, the defendant murdered Seattle Police Officer Timothy Brenton by
16 shooting him multiple times with a high-powered assault rifle. The defendant also attempted to
17 kill Seattle Police Officer Britt Sweeney, who was seated next to Officer Brenton in their patrol
18 vehicle. It was quickly discovered that the defendant was also the same person who set fire to
19 several Seattle Police vehicles on October 22, 2009. On November 7, 2009, the defendant
20 attempted to murder Seattle Police Sergeant Gary Nelson by attempting to fire a pistol at Sgt.
21 Nelson's head at close range.

22 "Defense Motion"]

23 ² Defense Motion at 19 (emphasis added).

24 **RESPONSE TO DEFENSE MOTION FOR FINDING
GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 2**

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APP000037

1 On November 12, 2009, the defendant was charged with one count of Aggravated
2 Murder in the First Degree, three counts of Attempted Murder in the First Degree, and one count
3 of Arson in the First Degree. The defendant was arraigned on these charges on December 14,
4 2009. All told, more than nine months have passed since the defendant murdered Officer
5 Brenton, and more than eight months have passed since the defendant was arraigned on these
6 charges.

7 To date, despite numerous requests over the past nine months by the prosecution to the
8 defendant's attorneys to provide any evidence of mitigation they may have developed, the
9 attorneys have refused to provide even a scintilla of information. Moreover, unlike other defense
10 attorneys representing individuals charged by our office with Aggravated Murder in the First
11 Degree, the defendant's attorneys have been completely unwilling in private discussions with the
12 Chief Criminal Deputy Prosecuting Attorney to provide any information about their efforts to
13 discover mitigating evidence, their plans to do so in the future, or their ability to provide
14 evidence of mitigation at any time.³ In fact, even their motion to this court is unaccompanied by
15 any declaration providing any factual basis for their claims.

16 The Prosecutor has twice agreed to postpone his decision regarding the death penalty,
17 effectively expanding 9-fold the legislatively prescribed 30-day period for making such a
18 decision.⁴ As it currently stands, the State's deadline to provide the defendant with notice of its
19 intent to seek the death penalty is September 3, 2010. The prosecution is reluctant to extend the
20 deadline a third time, especially

22 ³ See Declaration of Mark Larson, hereinafter "Larson Declaration", attached hereto, at 1-6 for an account.

23 ⁴ See Larson Declaration for timeline of extensions.
24 **RESPONSE TO DEFENSE MOTION FOR FINDING
GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
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1 because the defendant's attorneys have refused to divulge any evidence of mitigation whatsoever.
2 Unless the defendant provides compelling reasons to wait, the Prosecutor intends to make his
3 decision regarding the death penalty by September 1, 2010, and proceed with preparations for
4 trial.

5 III. ARGUMENT

6 A. The King County Prosecutor Has Always Conducted an Individualized 7 Weighing of any Mitigating Evidence Before Deciding Whether or Not to 8 Seek the Death Penalty.

9 In his motion, the defendant repeatedly asserts that the prosecution has adopted a "one
10 size fits all"⁵ timetable for receipt of mitigation information. He claims that the Prosecutor has
11 adopted a "fixed deadline of 90-120 days" for the mitigation investigation in this case.⁶ This is
12 simply not true. In this case, as in other recent potential capital cases, the Prosecutor has been
13 willing to extend the period for making his decision where defense counsel negotiate in candor
14 and good faith for such an extension. Such candid discussions require sharing some information
15 about the progress of the defense mitigation investigation and the prospects for a fruitful end to
16 that process. In the recent and more distant past, numerous cases have been handled successfully
17 in this way. There is no fixed 90-120 day rule.⁷

18 Moreover, the defendant's assertions are irrelevant to his current motion. To date, the
19 defendant has been granted more than 36 weeks (250 days) – more than double the claimed
20 "fixed deadline" of 90-120 days – to provide the State with any mitigation evidence.⁸ The

21 ⁵ Defendant's Memorandum at 7.

22 ⁶ Defendant's Memorandum at 6.

23 ⁷ See Larson Declaration at 1.

24 ⁸ Even the defendant concedes that 250 days is well more than the average allowed in the last dozen-plus aggravated
murder cases filed by the King County Prosecutor's Office. Defendant's Memorandum at 6.

RESPONSE TO DEFENSE MOTION FOR FINDING
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APP00003

1 defendant has refused to provide anything. Instead, the defendant complains that his mitigation
2 work could not be started until March 31, 2010⁹ -- almost four months after he was arraigned.
3 The prosecution has been provided with no explanation as to why three defense attorneys -- at
4 least two of whom have no professional responsibility except to represent the defendant -- were
5 not able to even begin a mitigation investigation in the time between the defendant's December
6 14, 2009 arraignment and March 31, 2010. Even if no "mitigation expert" was available during
7 that time, and even if the defendant was unwilling or unable to participate in the process of
8 searching for evidence of mitigation, it is simply not credible that his attorneys were unable to
9 proceed.

10 Nevertheless, in May, 2010, the State agreed to give the defendant additional time to
11 provide *any* mitigation. None was provided. The Prosecutor has extended the notice deadline
12 twice. This can hardly be classified as an inflexible and fixed "one size fits all" timetable.

13 Further, defense counsel's timetable appears to be arbitrary. By their own projections of
14 the time necessary to interview witnesses, they would actually need years to complete a
15 mitigation packet. This is wholly unreasonable, and certainly contrary to what the legislature
16 intended when it directed the prosecutor to file a notice within 30 days.

17 It is possible that the defendant's lawyers have decided (perhaps as a result of any search
18 for mitigating evidence that they have conducted) that the Prosecutor will seek the death penalty
19 in this case. If so, they would have no incentive to divulge any evidence purporting to show e.g.,
20 the defendant's mental health and would, on the contrary, benefit by withholding that evidence
21 from the prosecution until the last possible moment and seeking, in the meantime, as many

22
23 ⁹ Defendant's Memorandum at 7.
24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 extensions of the notice period as possible. This possible strategy is not one the prosecution or
2 the court must indulge -- particularly when the prospects for receiving any meaningful mitigating
3 evidence from the defense have never been articulated.¹⁰

4 **B The Prosecutor will Conduct an Individualized Weighing of Any Evidence of**
5 **Mitigation in this case**

6 RCW 10.95.070 sets forth seven mitigating factors that the jury, and hence the
7 prosecutor, should consider in deciding whether lenience is merited:

8 (1) Whether the defendant has or does not have a significant history, either as a
9 juvenile or an adult, of prior criminal activity;

10 (2) Whether the murder was committed while the defendant was under the
11 influence of extreme mental disturbance;

12 (3) Whether the victim consented to the act of murder;

13 (4) Whether the defendant was an accomplice to a murder committed by another
14 person where the defendant's participation in the murder was relatively minor;

15 (5) Whether the defendant acted under duress or dominion of another person;

16 (6) Whether, at the time of the murder, the capacity of the defendant to appreciate
17 the wrongfulness of his or her conduct or to conform his or her conduct to the
18 requirements of law was substantially impaired as a result of mental disease or
19 defect. However, a person found to be mentally retarded under RCW
20 10.95.030(2) may in no case be sentenced to death;

21 (7) Whether the age of the defendant at the time of the crime calls for leniency;
22 and

23 (8) Whether there is a likelihood that the defendant will pose a danger to others in
24 the future.

¹⁰ If the defense or the court believes that prospects for mitigation evidence have been communicated in ex parte proceedings, and that those prospects are sufficient to justify extension of time, then this information needs to be communicated directly to a representative of the prosecutor's office. The existence of such communications may also call into serious question the scope, extent, and propriety of such ex parte discussions.

RESPONSE TO DEFENSE MOTION FOR FINDING
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APP00004

1 . In the present case, the Prosecutor will consider all of these circumstances and determine
2 whether any of them warrants leniency. Some of these factors clearly require no investigation,
3 and need not be the subject of a "mitigation package." The defendant has no significant criminal
4 history. Officer Brenton did not consent to being murdered. The defendant is no one's
5 accomplice, and there is no evidence of duress. The defendant is 41 years of age.

6 It seems apparent that the most fruitful subject of any mitigation investigation would be
7 the defendant's mental state -- whether or not the defendant was under the influence of any
8 extreme mental disturbance immediately before, during, or after the crimes, and whether he was
9 insane or suffering from diminished capacity at the time of the crimes.

10 The State's investigation into the crimes of October 22, October 31, and November 6,
11 2009, has yielded a great quantity of evidence relevant to any determination of the defendant's
12 mental state at the time. This evidence includes interviews with dozens of his associates, family
13 members, fellow employees and students, teachers, and others. Many of these interviews are
14 directly relevant to any inquiry concerning the defendant's mental health. All of this evidence
15 has been provided to the defense. They have never cited any of it to us, formally or informally,
16 as evidence of mitigation.

17 Other evidence relevant to the defendant's mental health and mental state at the time of
18 these crimes consists of physical evidence seized during the investigation -- particularly,
19 evidence seized from the defendant's residence. The defendant's attorneys have been aware for
20 months that this physical evidence includes many documents, including the defendant's own
21 writings (some of which are explicitly related to the crimes with which he is charged). In
22 addition to knowing through the discovery process that this evidence exists, the defense knows

23 RESPONSE TO DEFENSE MOTION FOR FINDING
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APP000042

1 of it because some of it was taken into evidence in their presence, at their request, in the
2 defendant's residence. They have never examined this evidence.¹¹

3 Mental health and mental state can, of course, be assessed by trained mental health
4 experts. The prosecution does not have the ability to initiate a mental health examination of the
5 defendant, and the prosecution is unaware of any mental health examination that the defendant
6 has ever undergone. The defendant's attorneys have asserted repeatedly in court and in pleadings
7 that the defendant has mental problems, but have refused to proffer the slightest evidence to the
8 prosecution that would support this claim. Perhaps, like a "mitigation expert," a qualified
9 mental health expert has proved difficult for the defendant's attorneys to retain. But the attorneys
10 have not even provided the prosecution with the defendant's medical records from the King
11 County Jail -- something that they could easily and quickly do, and something that would,
12 presumably, support their frequent references to the defendant's pain, his medication, and his
13 mental condition.

14 **C. The Prosecutor is not required to wait for the Defendant to present him with**
15 **a "Mitigation Package" before Making His Decision.**

16 RCW 10.95.040 authorizes the State to file a Notice of Special Sentencing Proceeding in
17 cases of Aggravated Murder in the First Degree to determine whether the death penalty should
18 be imposed. The statute provides:

19 The notice of special sentencing proceeding shall be filed and served on
20 the defendant or the defendant's attorney within thirty days after the
21 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.

22 ¹¹ See Declaration of Jeff Baird Re: Defendant's Claims of New Discovery, attached hereto, hereinafter "Baird
23 Declaration," at 2-5.

24 **RESPONSE TO DEFENSE MOTION FOR FINDING
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APP000043

1 RCW 10.95.040(2). The statute was drafted to ensure that defendants would have early notice of
2 the State's intent to seek a death sentence.

3 The prosecuting attorney is required to consider mitigation before deciding whether to
4 file a notice of special sentencing proceeding. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245
5 (1995); RCW 10.95.040(1). However, there is no provision in RCW 10.95.040 that confers on a
6 defendant the right to present the prosecutor with what he considers a completed "mitigation
7 package," including all the mitigating evidence he suspects might exist somewhere, before the
8 prosecutor may make his decision. In Pirtle, the prosecutor made a decision to seek the death
9 penalty thirty days after the defendant's arraignment, without any input from the defense. On
10 appeal, the defendant claimed that the prosecutor failed to consider mitigating evidence, thereby
11 abusing the discretion afforded him by RCW 10.95.040(1). The Washington Supreme Court
12 made short work of this argument. The court noted:

13 Because of Pirtle's [criminal] history, the prosecutor had some
14 information about each of the statutory mitigating factors, with the possible
exception of the Defendant's mental state at the time of the crime.

15 Given what the prosecutor already knew and his willingness to wait
16 thirty days to see if the defense could develop additional information, we
find the prosecutor did not abuse his discretion.¹²

17 The statute requires the Prosecutor consider evidence of mitigation; it does not mandate
18 that the defendant must be the source of that evidence. The reason it does not is obvious: if the
19 statute required the Prosecutor to depend on the defendant to supply mitigation evidence, the
20 defendant could hold the prosecutor's decision hostage indefinitely. In a potential capital case --
21 especially a case with strong evidence of guilt and aggravating circumstances, and little apparent

22
23 ¹² Pirtle, 127 Wn.2d at 643.

24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 evidence of mitigating circumstances -- this power to forestall judicial proceedings is simply not
2 vested in the only person who might benefit by delay.

3
4 As noted by the defendant, "[I]nput from the defendant as to mitigating factors is
5 normally desirable¹³." Pirtle, 127 Wn.2d at 642. Indeed, it is the long-standing practice of the
6 King County Prosecutor to solicit and carefully consider such input from defense attorneys, a
7 practice that the Prosecutor would agree is "normally desirable." However, this practice, which
8 has worked well in other cases, does not confer a strategic advantage on a defendant who wishes
9 to delay that decision as long as possible. Prior to making the decision to seek the death penalty,
10 a prosecutor simply "must perform individualized weighing of the mitigating factors-an
11 inflexible policy is not permitted." Id., citing In re Harris, 111 Wn.2d 691, 693, 763 P.2d 823,
12 (1988), cert. denied, 490 U.S. 1075 (1989). RCW 10.95.040 is completely silent regarding
13 defense-provided mitigation, yet the defendant argues that "[w]ithout a complete mitigation
14 package from the Defense, the prosecutor will be unable to properly perform the 'individualized
15 weighing' of mitigating circumstances required under RCW 10.95.040."¹⁴ This is simply wrong.
16 If the "complete mitigation package" desired by this defendant were statutorily required, the
17 legislatively-directed 30 days would *never* be sufficient.

18 The Prosecutor will, with or without any input from the defendant's attorneys, carefully
19 weigh all the evidence of mitigation available to him and make his decision.
20
21

22 ¹³ Pirtle, 127 Wn.2d at 642.

23 ¹⁴ Defense Motion at 9.

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1 **D. The Prosecuting Attorney Will Consider Any And All Mitigation Evidence**
2 **Whenever It Is Presented**

3 The defendant claims that he will be denied effective assistance of counsel if this court
4 does not extend the filing period for the notice of the special sentencing proceeding.
5 Specifically, he appears to argue that, once the Prosecutor has made his decision, any mitigation
6 that is provided to the State will be ignored. This claim is without foundation. In fact,
7 Attachment B to the defendant's brief included a letter from Erin Bhlert on behalf of the
8 prosecutor, Daniel T. Satterberg. As noted in that letter, even though the Prosecutor intends to
9 make the decision contemplated in RCW 10.95.040 by September, 3, 2010, the defendant is told
10 that, "[a]s is our practice, our office will always consider any evidence of mitigation presented to
11 us at any stage of a criminal prosecution." Should the Prosecutor conclude that the death penalty
12 is not something that should be considered in this case, then the issue is moot. However, should
13 the Prosecutor decide to seek the death penalty, then the State has every belief that defendant's
14 counsel will do everything in their power to ensure that his mitigation materials, witnesses, and
15 evidence are thorough and complete in anticipation of the sentencing phase of the trial. As such,
16 the defendant should be able to provide this mitigation to the State at some later date and any
17 such mitigation will certainly be considered.

18 The defense cites State v. Brett as an example of a case in which a defendant's death
19 sentence was overturned because the defense attorney was ineffective at the pretrial mitigation
20 phase. 142 Wn.2d 868, 16 P.3d 601 (2001). However, the defendant misstates the breadth of the
21 holding in Brett. The defendant neglects to point out that, in addition to the defense attorney's
22 failure to provide the State with a mitigation package prior to the prosecutor filing the notice of
23 special sentencing proceeding, the court found five additional defects in the attorney's

24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 performance. After noting all six areas of concern, the court concluded, "While the failure to
2 perform one of these actions alone is insufficient to establish ineffective assistance of counsel,
3 *the failure to perform the combination of these actions* establishes that defense counsel's actions
4 in Brett's trial were not reasonable under the circumstances of the case." *Id.* at 882-83 (emphasis
5 in original). The court specifically found that the failure of the attorney to provide mitigation to
6 the State prior to the decision to file the notice of special sentencing proceedings did not in and
7 of itself constitute ineffective assistance of counsel.

8 **E. An Order Of This Court Precluding the King County Prosecutor from**
9 **Making a Decision re: Whether or Not to Seek the Death Penalty Until A**
10 **Specific Date Would Violate The Separation Of Powers Doctrine**

11 Washington law confers on the Prosecuting Attorney the exclusive discretion to decide
12 whether to seek the death penalty in a prosecution for Aggravated Murder in the First Degree.
13 RCW 10.95.040(2). "[T]he prosecutor's decision whether to file charges or to plea bargain is an
14 executive, not adjudicatory, decision. This court has never recognized a prosecutor's discretion to
15 file charges or to seek the death penalty as a judicial function. . . . A prosecutor's determination
16 to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in
17 nature[.]" *State v. Finch*, 137 Wn.2d 792, 809-10, 975 P.2d 967 (1999) (discussing applicability
18 of the appearance-of-fairness doctrine to the decision to seek the death penalty).

19 In *Pirtle*, 127 Wn.2d 628, the defendant claimed that the Prosecuting Attorney had abused
20 his discretion by, among other things, refusing to extend the 30-day deadline for filing the notice
21 of the special sentencing proceeding in order to permit the defense to present mitigation
22 evidence. The Washington Supreme Court held that so long as the Prosecuting Attorney fulfills

23 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 his statutory duty to consider evidence in mitigation, there is no error in his refusal to extend the
2 30-day deadline for filing the notice.

3 The defendant nevertheless argues that RCW 10.95.040(2) merely gives the prosecutor
4 "procedural control" over the timing of the notice to the court. Def. Brief at 13. He contends
5 that this statute is similar to the "court's control of the timing of an amendment to an
6 Information" as set forth in CrR 2.1(d). Unlike RCW 10.95.040(2), CrR 2.1 specifically
7 provides that "[t]he court may permit any information or bill of particulars to be amended at any
8 time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR
9 2.1(d) (emphasis added). Obviously, CrR 2.1(d) requires the court, prior to allowing an
10 amendment, to consider whether the amendment would affect a substantial right of the
11 defendant. If the court finds that the defendant's rights would be violated, then it will not allow
12 the amendment.

13 RCW 10.95.040(2), on the other hand, does not require the court to make any assessment
14 of the defendant's rights. It is the State, not the defendant, that must show good cause to extend
15 the deadline. Moreover, even if the defendant were correct in that the court could extend the
16 *deadline* over the State's objection, the court has no authority to prohibit the prosecutor from
17 *filing the notice*. The filing of a notice requires no judicial approval, review, or input. In fact,
18 the case law is replete with example of what constitutes proper notice under RCW 10.95.040(2),
19 and none of them involves any judicial intervention. See State v. Cronin, 130 Wn.2d 392, 923
20 P.2d 694 (1996) (delivery of notice of intent to seek death penalty to defense counsel's
21 receptionist adequate service under the statute); State v. Lord, 123 Wn.2d 296, 868 P.2d 835
22 (1994) (filing of notice of intent to seek death penalty at time of filing of charges was valid).

23 RESPONSE TO DEFENSE MOTION FOR FINDING
24 GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 13

Daniel T. Satterberg, Prosecuting Attorney
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APP000048

1 That is because the filing of the notice is a purely executive function and a court's order
2 forbidding the prosecutor from making a decision would clearly be a violation of the separation
3 of powers doctrine.

4 Finally, the defendant claims that "the court may properly place preconditions on the
5 filing of a death notice where the rights of a defendant would be prejudiced by the failure of the
6 State to comply with the statutory and constitutional requirement to consider individualized
7 mitigating evidence." Def. Brief at 14. Not surprisingly, the defendant provides no authority for
8 this assertion. None exists. As noted above, the Prosecuting Attorney has already gathered an
9 abundance of information about the defendant, his background, his education, and the facts of
10 the crimes.

11 The defendant argues that the State will suffer no prejudice from an extension of the time
12 to file the notice of special sentencing proceedings. This is incorrect. Delay in any case, but
13 particularly in one as serious as this, acts to undermine public confidence in the criminal justice
14 system. Courts have long recognized that a right as basic as speedy trial serves two ends: "The
15 establishment of speedy trial limits by rule was designed to insure the prompt disposition of
16 criminal cases in the interest of both the public and the defendant." State v. Duggins, 68
17 Wn.App. 396, 400, 844 P.2d 441 (1993) (quoting Federated Publications, Inc., v. Swedberg, 96
18 Wn.2d 13,17, 633 P.2d 74, cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982):
19 The speedy trial rule "is designed to protect not only the right of the accused to a speedy trial but
20 the interest of the public in seeing that the administration of justice is expedited.")

21 This principle has application beyond speedy trial considerations:

22 In addition to the defendant's interest in exoneration, the public also has significant
23 interests in expeditious processing of criminal complaints. These public interests are also

24 RESPONSE TO DEFENSE MOTION FOR FINDING
GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 14

Daniel T. Satterberg, Prosecuting Attorney
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APP000049

1 part of the basis for both constitutional and statutory speedy trial protections. For
2 example, the public depends upon the efficient disposition of criminal charges so that it
3 can be assured that a defendant who is guilty of a crime will face relatively immediate
4 sanctions. As noted by the Supreme Court, a large backlog of cases may enable
5 defendants to "negotiate more effectively for pleas of guilty to lesser offenses and
6 otherwise manipulate the system."

7 3 N. Hollander, B. Bergman, M. Stephenson, T. Duncan, Wharton's Criminal Procedure, ¶14:2
8 (14th ed. 2006).

9 IV. CONCLUSION

10 In potential capital cases, the King County Prosecutor has always made an individualized
11 weighing of mitigating evidence against the facts of the crime before making a decision whether
12 or not to seek the death penalty. This case will be no exception.

13 In this case, the Prosecutor has repeatedly extended the period during which he will defer
14 his decision to afford the defendant's attorneys the opportunity to present him with evidence of
15 mitigation. He has deferred his decision for some 259 days since arraignment. The defendant's
16 attorneys have provided him with no mitigating evidence whatsoever during this time, claiming
17 that their investigation is incomplete. Efforts to obtain mitigating evidence from the attorneys
18 have been summarily rebuffed.

19 The prosecution has developed considerable evidence, from a variety of sources, relevant
20 to all of the mitigating factors, including those that pertain to the defendant's mental health
21 history and his mental state at the time of the crimes. This evidence includes numerous
22 documents from the defendant's apartment (many of which contain the defendant's own
23 handwriting), physical evidence, results of laboratory examinations, and interviews with
24 numerous associates, family members, teachers, and co-workers of the defendant.

25 RESPONSE TO DEFENSE MOTION FOR FINDING
26 GOOD CAUSE TO EXTEND MITIGATION
27 DEADLINE FOR FILING AND SERVICE OF
28 NOTICE TO PROCEED WITH SPECIAL
29 SENTENCING PROCEEDINGS - 15

Daniel T. Satterberg, Prosecuting Attorney
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APP000050

1 All of the evidence in the possession of the prosecution has been provided to the
2 defendant's attorneys. In addition to providing the prosecution with no evidence from their own
3 investigation, they have pointed to no mitigating evidence that may arise from the evidence
4 provided to them by the prosecution. It is possible the defendant's attorneys, having sought
5 mitigating evidence and found little or none, are merely delaying the legal process in this case
6 for tactical or strategic advantage.

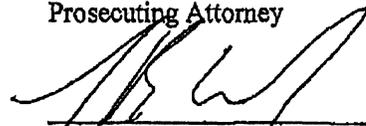
7 The Prosecutor will always consider mitigating evidence, from any source, at any time,
8 and he is not obliged, particularly under these circumstances, to delay his decision on the
9 appropriate penalty in this case until a time of the defendant's choosing.

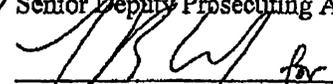
10 The defendant's motion for an order enjoining the Prosecutor from making his decision
11 until December of 2010 is unsupported by authority, violates the Separation of Powers Doctrine,
12 and is contrary to general principles of sound jurisprudence.

13 His motion should be denied.

14
15 RESPECTFULLY SUBMITTED this 23rd day of August 2010.

16 DANIEL T. SATTERBERG
17 Prosecuting Attorney

18 
19 John B. Castleton, Jr., WSBA #29445
Senior Deputy Prosecuting Attorney

20 
21 Jeff Baird, WABA #11731
Senior Deputy Prosecuting Attorney

22
23 RESPONSE TO DEFENSE MOTION FOR FINDING
24 GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 16

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APP000051

ATTACHMENT A
Declaration of Mark Larson

APP000052

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

DECLARATION OF MARK LARSON

I am the Chief Criminal Deputy of the King County Prosecutor's Office, in and for King County, Washington. I am familiar with the records and files in the above-entitled case, and declare that:

1. Despite defense counsel's repeated assertions to the contrary, at no time has the King County Prosecuting Attorney, Daniel Satterberg, instituted a "one size fits all" approach to aggravated first degree murder cases under RCW 10.95. Moreover, I have never stated, either in writing or otherwise, that the Prosecutor has a "new policy" of setting a fixed deadline of 90-120 days for mitigation work in capital cases, nor does such a policy exist. As noted below, the first agreed extension of time in the present case was for six months, or 180 days. The second

DECLARATION OF MARK LARSON - 1

Daniel T. Satterberg, Prosecuting Attorney
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APP000053

1 extension of time brought the total amount of time for defense to provide the State with
2 mitigation information to approximately 250 days.

3 2. The King County Prosecutor's Office has a long-standing history of working
4 closely with defense counsel during their efforts to present us with evidence of mitigation in
5 cases governed by RCW 10.95. In my experience, this frequently involves a give and take in
6 which the defense shares preliminary information, including reports from experts, as a basis to
7 persuade the Prosecutor to delay the decision required by RCW 10.95. Rarely have these
8 negotiations resulted in all of the time requested by the defense. Still, our decision making
9 process has frequently been informed by input from the defense.

10 3. In this case, as detailed below, the defense has refused to provide any information
11 as a part of the discussion about the extension of time. Moreover, they have, from an early point,
12 declared that they cannot provide *any* mitigation until their investigative process is entirely
13 completed (a process which they have consistently estimated to take almost a year from the
14 defendant's arraignment). The correspondence between the parties in this case is outlined below.

15 4. On December 14, 2009 I provided a letter to the defense counsel setting forth the
16 Prosecutor's expectations regarding the mitigation process in the present case. In that letter, I
17 informed counsel that the Prosecutor would make his decision whether to file a notice to seek a
18 special sentencing proceeding by June 15, 2010. I further informed defense counsel that any
19 defense mitigation materials to be considered by the Prosecutor before his decision must be
20 submitted to my office no later than May 15, 2010. (See Appendix 1). June 15, 2010 is six
21 months after charges were filed and five months after the defendant was arraigned.

22 5. On December 29, 2009, a hearing was held before Judge Kessler, at which time
23 the court signed an AGREED ORDER EXTENDING THE PERIOD FOR FILING AND
24

DECLARATION OF MARK LARSON - 2

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APP000054

1 SERVICE OF THE NOTICE OF SPECIAL SENTENCING PROCEEDING PURSUANT TO
2 RCW 10.95.040(2) establishing the June 15, 2010 date set forth above. (See Appendix 2).

3 6. On January 26, 2010, I provided defense counsel with a letter correcting the date
4 by which time they were to provide any mitigation materials from May 15 to May 17, 2010 (the
5 15th was a Saturday). (See Appendix 3).

6 7. On February 24, 2010, defense counsel, in response to my letter of January 26,
7 2010, sent the prosecution a letter indicating that they felt that it was unlikely that they would be
8 able to meet the May 14, 2010 deadline for submission of mitigation information. (See
9 Appendix 4).

10 8. On May 5, 2010 John Castleton and I met with defense counsel to discuss the
11 upcoming mitigation deadline. During that meeting, defense counsel stated that they were
12 unwilling to provide the State with any information about the mitigation information that they
13 were collecting. Moreover, defense counsel stated that they had had some difficulty with their
14 mitigation expert's availability to work on this case and that they also were having funding issues
15 with the Office of Public Defense (OPD). Defense also indicated that they believed they would
16 not be able to provide any mitigation information until December 1, 2010, at the earliest.

17 9. On May 6, 2010, defense counsel provided the State with a letter, reiterating their
18 belief that December 1, 2010 was the earliest possible time by which they could submit any
19 mitigation materials. (See Appendix 5).

20 10. On May 10, 2010, I sent the defense a letter stating that, due to the difficulties
21 they expressed during the May 5 meeting, the Prosecuting Attorney was willing to extend the
22 deadline for the submission of mitigation materials to August 2, 2010 -- but only if defense
23 counsel was willing to commit to providing the State with mitigation by that date. I further
24

DECLARATION OF MARK LARSON - 3

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APP000055

1 informed defense counsel that the Prosecutor would then make his decision on whether to file a
2 notice to seek a special sentencing proceeding on September 3, 2010. August 2 is nine months
3 from the date of the crime and eight months from arraignment. (See Appendix 6).

4 11. On May 11, 2010, Mr. Castleton and I again met with defense counsel to discuss
5 mitigation. During that meeting, defense counsel reiterated their belief that they would be unable
6 to provide the State with any mitigation materials until December 1, 2010.

7 12. On May 17, 2010, defense counsel sent the Prosecutor a letter indicating that they
8 would likely not be able to provide a "competent mitigation package" to the State by the August
9 2, 2010 deadline and would not commit to doing so. (See Appendix 7).

10 13. On May 20, 2010, I provided defense counsel with a letter indicating that the
11 Prosecutor had agreed to extend the date by which any mitigation information was to be
12 provided to the State to August 2, 2010. I further advised defense counsel that the prosecutor
13 looked forward to reviewing any and all information they had developed by that date, regardless
14 of whether it was in completely finished format. I further advised defense counsel that the new
15 deadline for the prosecutor to decide on whether to file a notice to seek a special sentencing
16 proceeding would be September 3, 2010. (See Appendix 8).

17 14. On May 24, 2010, defense counsel provided me with a letter expressing thanks
18 for the extension of the deadlines. Defense counsel indicated that they continued to work
19 diligently on developing mitigation information. (See Appendix 9).

20 15. On June 4, 2010, a hearing was held before this court, at which time the court
21 signed a SECOND AGREED ORDER EXTENDING THE PERIOD FOR FILING AND
22 SERVICE OF THE NOTICE OF SPECIAL SENTENCING PROCEEDING PURSUANT TO
23
24

DECLARATION OF MARK LARSON - 4

Daniel T. Satterberg, Prosecuting Attorney
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APP000056

1 RCW 10.95.040(2) establishing the new September 3, 2010 date noted above. (See Appendix
2 10).

3 16. On July 26, 2010, defense counsel provided the Prosecutor with a letter stating
4 that they would be unable to provide the State with any mitigation information by the August 2
5 date due "to the fact that we were not far enough in the process to offer more than our opinions
6 without the data to support them. This continues to be the case." (See Appendix 11). Defense
7 counsel again stated that December 1, 2010 was a "more realistic" deadline for presentation of
8 the mitigation materials.

9 17. On August 3, 2010, I provided defense counsel with a letter indicating that I was
10 in receipt of their July 26 letter. I stated that, given that nine months had passed since the date of
11 the crime and eight months had passed since arraignment, the Prosecutor was unwilling to extend
12 the date by which he would make his decision contemplated by RCW 10.95.040. I further noted
13 that, although the Prosecutor would make his decision by September 3, 2010, the Prosecutor
14 would consider any evidence of mitigation presented to him at any stage of the prosecution. (See
15 Appendix 12).

16 18. On August 10, 2010, defense counsel provided the Prosecutor with a letter
17 explaining the various difficulties they have encountered in developing a "complete mitigation
18 package." (See Appendix 13). Defense counsel stated that they will not be providing any
19 mitigation materials to the State prior to the September 3, 2010 deadline. However, they go on
20 to state:

21 In light of the fact that Mr. Larson's letter indicates that you will consider
22 mitigation evidence at any stage of the proceedings, we will continue to work
23 toward preparing a mitigation package detailing our investigation into Mr.
24 Monfort's life history, mental state and other factors relevant to your
determination on whether to seek the death penalty in this case. However, we
strongly believe that there will be a greater potential for a future resolution of this

DECLARATION OF MARK LARSON - 5

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APP000057

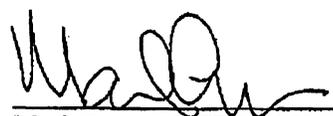
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case if you defer making and announcing that decision until we have had adequate time to complete our work and present it to you.

Appendix 13.

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

Signed and dated by me this 23rd day of August, 2010, at Seattle, Washington.


Mark Larson, WSBA #15328
Chief Deputy, Criminal Division

APPENDIX 1

APP000059

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

December 14, 2009

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

Dear Julie and Paige:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than June 15, 2010, six months from today's arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than May 15, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of June 1 -5, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

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APPENDIX 2

APP000061

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PHOTOCOPY

FILED
KING COUNTY, WASHINGTON
DEC 29 2009
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-1-07187-6 SEA

vs.

CHRISTOPHER J. MONFORT

Defendant.

AGREED ORDER EXTENDING THE
PERIOD FOR FILING AND SERVICE
OF THE NOTICE OF SPECIAL
SENTENCING PROCEEDING
PURSUANT TO RCW 10.95.040(2)

THIS MATTER having come on regularly before the above-entitled court upon the motion of the defendant for an order in the above-entitled matter to extend the statutory period under RCW 10.95.040(2) for filing and serving the notice of a special sentencing proceeding, the court being advised in the premises, having heard the representations of defense counsel as to why an extension of the statutory period is necessary, having heard the defendant's verbal agreement to the requested extension of the statutory period in open court and in the presence of counsel, and being advised that the State consents to the requested extension of the statutory period; now, therefore, finds that good cause has been shown and demonstrated in that additional time is necessary for review of the discovery to date and for investigation into the matter, and for

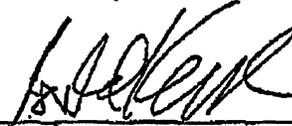
Daniel T. Satterberg, Prosecuting Attorney
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APP00006

1 review of issues relating to potential mitigation, in addition to reasons proffered in open court
2 and herein included by reference; it is hereby

3 ORDERED, ADJUDGED and DECREED that the defendant's motion is granted; the
4 court therefore extends the statutory period under RCW 10.95.040(2) for the filing and service of
5 the notice of a special sentencing proceeding. Any such notice shall be filed and served,
6 therefore, by June 15, 2010.

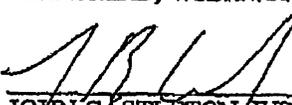
7 DONE IN OPEN COURT this 29 day of December, 2009.

8
9 
10 HONORABLE PALMER ROBINSON
11 *Ronald Kessler*

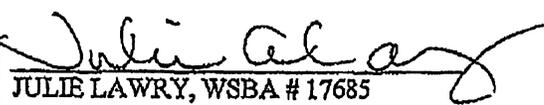
12 Order presented by:

13 For DANIEL T. SATTERBERG, King County Prosecuting Attorney,

14 _____
15 JEFF BAIRD, WSBA #11731

16 
17 _____
18 JOHN CASTLETON, WSBA #29445
19 Senior Deputy Prosecuting Attorneys
20 Attorneys for the Plaintiff

21 Motion brought by and order approved by: *as to form*

22 
23 _____
24 JULIE LAWRY, WSBA # 17685

25 _____
26 PAIGE GARBERDING, WSBA #11825
27 Attorneys for Defendant

Daniel T. Satterberg, Prosecuting Attorney
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APPENDIX 3

APP000064

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
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Seattle, Washington 98104
(206) 296-9000

January 26, 2010

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

Dear Julie and Paige:

It was recently brought to my attention that our initial letter to you regarding the mitigation process in this case had an incorrect date listed for the deadline of the mitigation materials. Rather than have materials submitted on a Saturday, any defense mitigation materials must be submitted to our office no later than Monday, May 17, 2010. All other dates remain as we set out on our letter of December 14, 2009.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

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APPENDIX 4

APP000066



Associated Counsel for the Accused

110 Prefontaine Place S, Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

February 24, 2010

Mark Larson, Chief Deputy, Criminal Division
Office of the Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Monfort, No. 09-1-07187-6 SEA

Dear Mark:

We just wanted to respond briefly to your January 26th letter. First, thank you for updating us on the due date for our mitigation package. It looks like nobody caught the fact that the original due date was on a Saturday.

Secondly, we want to reiterate that while we are working diligently to compile all of the necessary mitigation materials in time to submit them by May 17th, that deadline is looking increasingly unrealistic given the complexities of the case and Mr. Monfort's life history. As you know, case law and the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* mandate that we investigate every aspect of Mr. Monfort's life in determining what information and evidence to present as mitigation. *See also Wiggins and Rompilla*. Although we have been striving to accomplish that goal, we are just beginning the process of interviewing potential mitigation witnesses and obtaining records from Mr. Monfort's background. It is clear that, projecting forward, the current deadline will likely be unworkable and ultimately preclude us from providing your office with a mitigation package that is sufficiently comprehensive to enable Mr. Satterberg to make an informed decision on whether to seek the death penalty in this case. It now appears increasingly likely that more time will be needed for us to provide your office with a mitigation package that satisfies our legal obligations.

One reason that complicates our ability to compile and present mitigation materials is that Mr. Monfort is forty years old and has never been incarcerated. As a result, he has lived a longer period of time out of custody than most capital defendants and there are substantially more records that will need to be gathered and witnesses to be interviewed than would be present in most aggravated murder cases. In addition, Mr. Monfort has moved around a great deal in his life and it appears that we will need to gather records and other information in at least six different states. Moreover, Mr. Monfort's relatives

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are spread around the United States in at least seven different states. We will need to locate, contact and interview these individuals before compiling our mitigation materials.

We understand that these issues will need to be addressed in court at future hearings as the deadline for presentation of mitigation materials approaches. However, we did not want your office to infer that we acquiesce in the May 17th deadline. Our constitutional duty to Mr. Monfort requires a comprehensive investigation, and it now appears increasingly unlikely that we will be able to discharge that duty under the current deadline.

Sincerely,



Julie Lawry
Carl Luer
Stacey MacDonald

Attorneys for Christopher Monfort

cc: Jeff Baird, John Castleton and Ian Goodhew

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APPENDIX 5

APP000069



Associated Counsel for the Accused

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(206) 624-8195 FAX (206) 624-9339

Mark Larson
John Castleton
Office of the Prosecuting Attorney
Criminal Division
West 544 King County Courthouse
516 Third Avenue
Seattle, WA 98104

May 6, 2010

RE: State v. Christopher Monfort

Dear Mark and John,

Thank you for inviting us to your office to discuss our progress in preparing the mitigation materials on behalf of Mr. Monfort. We are sorry that Mr. Satterberg and Mr. Baird were unable to join us but do appreciate the fact that your office is equally invested in ensuring that the mitigation investigation is both properly done but also that your office has an opportunity to review a complete and thorough package.

We appreciate your office's commitment to abide by its legal mandate to consider fully whether there are sufficient mitigating circumstances to merit leniency in each case before deciding whether to seek the death penalty for an aggravated murder charge. As we explained yesterday, we have encountered circumstances that will clearly prevent us from providing you with the information necessary to make that determination by the current deadline. Because of the work remaining to be done, the December 1st date we have requested is the earliest time by which we can submit adequate mitigation materials to you in order to enable your office to satisfy that legal obligation. We appreciate your willingness to meet with us and give serious consideration to this request.

Sincerely,

Julie A. Lawry
Carl Luer
Stacey MacDonald

APP000070

APPENDIX 6

APP000071

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

May 10, 2010

Julie A. Lawry
Carl Luer
Stacey McDonald
Associated Counsel for the Accused
110 Prafontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Cause No. 09-1-07187-6 SEA

Dear Ms. Lawry, Mr. Luer, and Ms. McDonald:

First, I wanted to again thank you for taking the time to meet with John and me last week. Second, I wanted to respond to the letter you emailed on May 6, 2010. As we promised, the information that you provided to us regarding the difficulties you were encountering with the gathering and preparation of your mitigation materials has been conveyed to Mr. Satterberg:

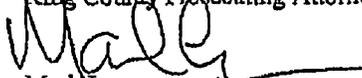
Appreciating these difficulties, Mr. Satterberg has agreed to extend the deadline for you to submit any mitigation materials you would like him to consider to August 2, 2010. Mr. Satterberg will then make his decision on whether to file a notice to seek a special sentencing proceeding on September 3, 2010. You may also meet with Mr. Satterberg during the week of August 16-20.

This extension is contingent, however, upon your commitment to providing us with mitigation materials by August 2, 2010. If you do not intend to present us with any mitigation on that date, or do not reasonably believe you can meet this deadline, then Mr. Satterberg will make his decision by the current deadline of June 15, 2010.

Thank you again for your letter and I hope to hear from you soon.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney


Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000076

APPENDIX 7

APP000073



Associated Council for the Accused
110 Prefontaine Place S. Ste. 200, Seattle, WA. 98104-2677
Ph. (206) 624-8105 Fax (206) 624-9339

May 17, 2010

Mark Larson, Chief Deputy Criminal Division
Jeff Baird, Senior Deputy Prosecuting Attorney
John Castleton, Senior Deputy Prosecuting Attorney
Office of the King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA. 98103

Re: State of Washington v. Christopher Monfort
Cause No. 09-1-07187-6 SEA

Dear Mr. Larson:

First, we would like to thank you for meeting with us on May 5th and again on May 11th to discuss the status of the mitigation deadline on Mr. Monfort's case.

At these meetings we shared as much as we could with you consistent with the attorney-client privilege, the *ABA Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases* and the ethical rules governing our conduct. In an attempt to assure you that we are diligently working and at the same time exercising our duties to Mr. Monfort, we have filed Status Reports *ex parte* and under seal with Judge Kessler in order to provide you with an independent assessment of the efforts we are making in gather the mitigation. Judge Kessler stated in open court that the Defense was working diligently and aggressively in light of a number of delays that were out of our control. Mr. Larson indicated that he accepted our assertions of the efforts and complications that have arisen in this endeavor.

We reiterated our concern that we cannot discharge our constitutional duty to our client in the time frame that you have set. This is the same concern we notified your office of in our February 24, 2010 letter. You told us that you could not agree to a continuance because of your concern for wasting valuable time. You also told us that if we did not agree to the deadline you picked of August 2, 2010, that Mr. Satterberg would make his decision regarding the filing of the death notice, without any defense input, on June 15, 2010.

We do not believe that is consistent with his duty under RCW 10.95.020(1) and, depending upon his decision, will make that argument to the appropriate tribunal. The duty imposed on the Prosecuting Attorney under RCW 10.95.020 (1) requires the prosecutor to ask whether there is a reason to believe that there are no sufficient mitigating circumstances to merit leniency. The term "mitigation" is all encompassing and incorporates "any aspect of a defendant's character or record and any of the circumstances of the offences that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed.2d 973 (1978).

AIR rv 01/2004

- 1 -

APP000074

While we have tried diligently to gather mitigation information to present to your office, the deadline given by your office is not realistic under the circumstances of Mr. Monfort's case and our ongoing obligations under the *ABA Guidelines* and the Rules of Professional Conduct. Should Mr. Satterberg make a decision with out defense input, we believe that he will violated his obligation to fully and fairly consider mitigation in this case.

"Without presentation of mitigation evidence at this critical stage, a prosecutor has no ability to sufficiently and objectively distinguish among aggravated first-degree murder defendants. A death sentence may be pursued not for the "worst of the worst" but rather for those who present no mitigation evidence. Therefore, the death penalty is sought in situations where it may not, in fact, be warranted, and proportionality between crimes and punishment is lost." *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 Seattle Univ. L. R. 241, 246-248(2002).

We note that in State v. Anderson 07-1-08717-2 SEA, State v. McBroe 07-1-08716-4 SEA and State v. Kalabu 09-1-04992-7 SEA, your office allowed the defense 10 months, 10 months and 9 months respectively to complete their mitigation. Your office also respected the trial judge's order continuing the date in a number of cases.

We fail to see how our situation differs from those.

Regrettably, we are unable to promise you that a competent mitigation package could be submitted to you by August 2, 2010.

Sincerely,



Attorneys for Mr. Monfort
Julie A. Lawry, WSBA # 17685
Carl Luer, WSBA #16365
Stacey L. MacDonald, WSBA #35394

Cc: The Honorable Ronald Kessler

APPENDIX 8

APP000076

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

May 20, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

I was pleased to read in your letter of May 17, 2010, that you have been diligently working to gather evidence of mitigation in this case and that you have submitted ex parte reports to Judge Kessler documenting these efforts. I understand that at the last hearing Judge Kessler confirmed the extent of your endeavors.

Accordingly, we have agreed to extend the date by which any mitigating information must be delivered to August 2, 2010. This date is nearly nine months after your client was charged in this case and almost eight months after his arraignment.

Your letter closed by noting that you cannot promise at this time that you will be able to submit a "competent mitigation package" to the elected prosecutor by August 2, but we look forward to reviewing all the information you have developed at that time, and considering it before making a decision on September 3, 2010. I hope you will accept our invitation to schedule an appointment either during the week of August 9th or 16th when you can discuss the mitigation you have developed with Dan Satterberg.

I assume that at the next hearing in this case, on June 4, 2010, your client will agree to extend the time by which the elected prosecutor must make the decision contemplated by RCW 10.95.040 until September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

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APPENDIX 9

APP000078



Associated Counsel for the Accused

110 Prefontaine Place S. Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

May 24, 2010

Mark Larson, Chief Deputy Criminal Division
Jeff Baird, Senior Deputy Prosecuting Attorney
John Castleton, Senior Deputy Prosecuting Attorney
Office of the King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA. 98103

Re: State of Washington v. Christopher Monfort
Cause No. 09-1-07187-6 SEA

Dear Mr. Larson:

Thank you for your letter dated May 20, 2010. We appreciate the willingness of your office to extend the mitigation deadline to August 2, 2010 without requiring a promise from the defense that we can meet that deadline. Of course, we will continue to work diligently towards having a competent mitigation package to your office as soon as possible and accept your invitation to meet with you again as the August 2nd deadline nears.

You are correct in calculating that the new deadline is eight months from the date of arraignment but to be clear, as we stated in one of the meetings with you at your office, because of complications in obtaining funding and securing the availability of experts, we were not able to start the mitigation investigation in earnest until the very end of March (essentially April 1st). As you expressed surprise at this delay, I am sure that you appreciate the difficulty of doing a thorough investigation of Mr. Monfort's forty-one years of life in seven states in just 4 months (April-August). It is important to realize that this is actual amount of time you are allowing for this process and not the artificial time frame starting from arraignment.

Thank you again for reconsidering your position. I believe that Judge Kessler would like to be informed as to this change and am willing to draft a letter to the court to that effect if that is acceptable to you.

Sincerely,

Julie A. Lawry
Carl Luer
Stacey MacDonald
Attorneys for Mr. Monfort

APP000079

APPENDIX 10

APP000080

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FILED
KING COUNTY WASHINGTON

JUN 04 2010

SUPERIOR COURT CLERK
BY Susan Bone
DEPUTY

PHOTOCOPY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 09-1-07187-6 SEA
Plaintiff,)	
)	
vs.)	
	)	SECOND AGREED ORDER
	)	EXTENDING THE PERIOD FOR
CHRISTOPHER J. MONFORT	)	FILING AND SERVICE OF THE
	)	NOTICE OF SPECIAL SENTENCING
Defendant.	)	PROCEEDING PURSUANT TO RCW
	)	10.95.040(2)

THIS MATTER having come on regularly before the above-entitled court upon the motion of the defendant for an order in the above-entitled matter to extend the statutory period under RCW 10.95.040(2) for filing and serving the notice of a special sentencing proceeding, the court being advised in the premises, having heard the representations of defense counsel as to why an extension of the statutory period is necessary, having heard the defendant's verbal agreement to the requested extension of the statutory period in open court and in the presence of counsel, and being advised that the State consents to the requested extension of the statutory period; now, therefore, finds that good cause has been shown and demonstrated in that additional time is necessary for review of the discovery to date and for investigation into the matter, and for

Daniel T. Satterberg, Prosecuting Attorney
 W354 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0955

AP000081

1 review of issues relating to potential mitigation, in addition to reasons proffered in open court
2 and herein included by reference; it is hereby

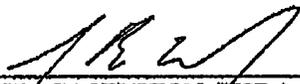
3 ORDERED, ADJUDGED and DECREED that the defendant's motion is granted; the
4 court therefore extends the statutory period under RCW 10.95.040(2) for the filing and service of
5 the notice of a special sentencing proceeding. Any such notice shall be filed and served,
6 therefore, by September 3, 2010.

7 DONE IN OPEN COURT this 4th day of June, 2010.

8 
9
10 HONORABLE RONALD KESSLER

11 Order presented by:

12 For DANIEL T. SATTERBERG, King County Prosecuting Attorney,

13 
14 JOHN CASTLETON, WSBA #29445
15 Senior Deputy Prosecuting Attorneys
Attorneys for the Plaintiff

16 Motion brought by and order approved by:

17 
18 JULIE LAWRY, WSBA # 17686

19
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21
22
23
24

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

APP000082

APPENDIX 11

APP000083



Associated Counsel for the Accused

110 Prefontaine Place S, Suite 200, Seattle, Washington 98104-2677
(206) 624-8109 FAX (206) 624-9339

July 26, 2010

Mark Larson, Chief Deputy, Criminal Division
Jeff Baird
John Castleton
Office of the Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Monfort, No. 09-1-07187-6 SEA

Dear Mark, Jeff and John,

As your deadline for submission of the mitigation package in this case approaches, we wanted to give you an update of our efforts to comply with your deadline and our continued belief that we are unable to provide you with a completed package by that date.

As we have consistently indicated, December 1, 2010 is a more realistic deadline for completion of our package. Without going into details, we have continued to have difficulty in having experts in to meet our client due to conflicts beyond our control. We give you our word that we have diligently and aggressively attempted to meet your expectations. However, we are again in the position of notifying you that we will not be able to meet the August 1, 2010 deadline as set by your office.

We hope that you will consider extending the deadline again and are willing to meet to discuss this possibility.

Sincerely,

Julie A. Lawry
Carl F. Luer

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APPENDIX 12

APP000085

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

August 3, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

Thank you for your letter dated July 26, 2010. We understand from your correspondence that you have chosen not to provide the State with any evidence of mitigation by the August 2, 2010 deadline, the extension that we provided to you on May 20, 2010.

As you know, eight months have now passed since Mr. Monfort was arraigned on the current charges and nine months have passed since he was charged with these crimes. Our office has provided you with extensive discovery regarding the crimes with which he is charged and the evidence implicating him in those crimes. We have also provided you with all the reports generated by a private investigator we retained to look into your client's background.

After careful consideration, we have decided not to extend the date by which our elected prosecutor will make the decision contemplated by RCW 10.95.040. That decision will be made by September 3, 2010.

As is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution. We look forward to your previously scheduled meeting with Mr. Satterberg on August 26, 2010, at 11 a.m. at the King County Prosecutor's Office. We strongly encourage you to provide him with any evidence of mitigation you may have at that time. Mr. Satterberg will announce his decision on or before September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000086

APPENDIX 13

APP000087

Associated Counsel for the Accused

420 West Harrison, Suite 201, Kent, Washington 98032
(253) 520-6509 FAX (253) 520-6635

August 10, 2010

Daniel T. Satterberg, Prosecuting Attorney
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Christopher Monfort, King Co. No. 09-1-07187-6 SEA

Dear Mr. Satterberg:

We have received Mark Larson's letter of August 3rd informing us that you will not be extending the time period for deciding whether to seek the death penalty against Mr. Monfort. While we appreciate the fact that you are willing to consider mitigation evidence at any time it is both disappointing and troubling that you have chosen not to give Mr. Monfort's defense team adequate time to research, investigate and prepare a thorough and complete mitigation package as required by the ABA Guidelines and U.S. Supreme Court.

As we have explained to Mr. Larson, Mr. Monfort's case has posed some significant hurdles in collecting mitigation evidence and preparing a mitigation package to present to your office. At the time of the charged offenses, Mr. Monfort was 41 years old and had never been incarcerated. As a result of his relatively advanced age (for a capital defendant) and his clean record, Mr. Monfort lived in at least seven states and held numerous jobs throughout the country prior to his arrest. There are friends, relatives and former teachers with important information about Mr. Monfort's life and upbringing currently living in at least sixteen different states. In addition, Mr. Monfort attended school or worked in at least seven states and we have had to gather records from various institutions in each of those states. That effort is ongoing.

In addition to the considerable barriers posed by Mr. Monfort's history we have also encountered a series of obstacles over the course of this case that have delayed our collection of mitigation materials. Once charges were filed against Mr. Monfort we began the process of identifying and hiring a mitigation specialist capable of handling a case of this magnitude. Unfortunately our original mitigation specialist withdrew from the case in February due to funding issues with OPD and we were forced to start that part of the process over again from square one. We obtained funding for our current mitigation specialist in late February, however, he could not begin work on the case until

the end of March due to a death in his immediate family. Since then he has worked diligently and accomplished a great deal in a relatively short time period. He has interviewed approximately fourteen friends, former teachers and family members of Mr. Monfort's in three different states and compiled records from five different states. Unfortunately, the vast majority of work in these areas remains to be done. At this point we anticipate needing to interview forty or more additional witnesses residing in approximately fifteen different states ranging from Alaska to Florida before we are able to complete an adequate chronology and presentation of Mr. Monfort's social history.

In addition to the obstacles we have encountered with compiling the social history, we have also experienced considerable delays due to additional funding disputes with OPD, bureaucratic problems with the jail, Mr. Monfort's ongoing medical issues and issues that have arisen over the course of the case such as the Seattle Times' Public Records Act request. For example, a number of our expert funding requests have been denied by OPD and we have had to pursue the appeals process in order to obtain funding for experts necessary to complete the mitigation package. In addition, Mr. Monfort's medical issues have at times precluded him from participating in interviews with defense counsel and providing us necessary input. Dealing with his various medical issues has occupied considerable time and effort over the past several months.

Mr. Larson's letter states that your office has provided us extensive discovery implicating Mr. Monfort in the charged crimes and all reports generated by a private investigator retained to look into his background. The current issue, however, is not whether there is substantial evidence of guilt, but whether there are *no* mitigating circumstances. With all due respect, your private investigator's efforts in this case are at best superficial and random. Her interviews barely scratched the surface of Mr. Monfort's life and background, and do not in any way present a complete picture of his history and how that relates to mitigation considerations in this case.

We have just received a large volume of additional discovery early this week. At this point it is a little difficult to ascertain exactly what we have been provided but at a minimum it includes police reports from the maintenance yard arson charges and a large number of documents and other items seized from Mr. Monfort's apartment following his arrest. With respect to the seized items, it is difficult to determine how much discovery we have just received since in many cases only the first page of a document has been Bates stamped. It appears, however, that these materials include approximately 2000 pages of documents such as personal letters, address books, travel documents, a high school yearbook, job applications (including one to the Los Angeles Police Department), books, magazines, articles (including some on police brutality), research materials, a last will and testament, and personal stories that appear to have been written by Mr. Monfort detailing important life experiences. These are all items we have not seen previously and clearly are highly relevant to our mitigation investigation. In addition, the 90 or so pages of discovery we recently received on the maintenance yard incident contain a great deal of relevant information that we did not previously have relating to three of the charges against Mr. Monfort.

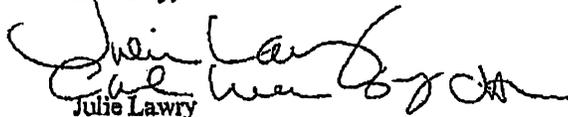
At present we are just beginning the process of cataloguing and assessing these newly provided materials. While we understand that compiling this discovery was a time

consuming process for your office, we are surprised and disappointed by the fact that you have chosen to supply us these materials now, and simultaneously deny us more time to prepare and submit Mr. Monfort's mitigation package.

We look forward to meeting with you on August 26th to discuss Mr. Monfort's case, however, we do not anticipate having any materials to present you at that time. In light of the fact that Mr. Larson's letter indicates that you will consider mitigation evidence at any stage of the proceedings, we will continue to work toward preparing a mitigation package detailing our investigation into Mr. Monfort's life history, mental state and other factors relevant to your determination on whether to seek the death penalty in this case. However, we strongly believe that there will be a greater potential for a future resolution of this case if you defer making and announcing that decision until we have had adequate time to complete our work and present it to you. At our initial meeting with Mr. Larson we indicated that December is a realistic date for completion of our mitigation materials and we continue to believe that is the case. In light of that, we hope that you will reconsider your decision not to extend the deadline for submission of our mitigation materials.

Finally, we want to assure you that our request for additional time to submit the mitigation package is based on the need to prepare the materials adequately and not simply an effort to delay these proceedings. We are diligently attempting to comply with our ethical duties as outlined in the ABA Guidelines and relevant case law. We are all painfully aware of the fact that a frequent basis for reversal of capital convictions is the failure of defense counsel to thoroughly investigate every avenue of mitigation. We are making every effort to avoid falling into that trap. As explained above, Mr. Monfort's case presents a number of complicating factors that are not present in most aggravated murder cases and necessitates more work and time for the mitigation investigation. We hope you will take these into consideration in deciding whether to make your decision by September 3rd as currently planned.

Sincerely,



Julie Lawry

Carl Luer

Attorneys for Christopher Monfort

Co'd: Mark Larson, Jeff Baird, John Castleton

ATTACHMENT B
Declaration of Jeff Baird

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY

I am a Senior Deputy Prosecuting Attorney in and for King County, Washington. I am familiar with the records and files in the above-entitled case, and declare that:

1. On August 16, 2010, I received a copy of DEFENDANT'S MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDINGS [hereinafter, "Motion to Extend Deadline"] in this case. In that pleading are references to what is described as "a large volume of new discovery"¹ recently provided to the defense by the

¹ Motion to Extend Deadline at 2.
DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 1

1 prosecution².

2 2. Presumably, this is the "large volume of additional discovery" mentioned by the
3 defendant's attorneys Carl Luer and Julie Lawry in a letter they wrote to King County Prosecutor
4 Dan Satterberg on August 10, 2010. That letter recited a number of reasons why the defense will
5 not present Mr. Satterberg with any evidence of mitigation before the date on which the
6 Prosecutor has said he will decide whether or not to seek the death penalty in this case. The
7 letter included the following language:

8 We have just received a large volume of additional discovery early
9 this week. At this point it is a little difficult to ascertain exactly
10 what we have been provided but it includes...a large number of
11 documents and other items seized from Mr. Monfort's apartment
12 following his arrest. With respect to the seized items, it is difficult
13 to determine how much discovery we have just received since in
14 many cases only the first page of a document has been Bates
15 stamped. It appears, however, that these materials include
16 approximately 2000 pages of documents such as personal letters,
17 address books, travel documents, a high school yearbook job
18 applications (including one to the Los Angeles Police Department),
19 books, magazines, articles (including some on police brutality),
20 research materials, a last will and testament, and personal stories
21 that appear to have been written by Mr. Monfort detailing important
22 life experiences. These are all items we have not seen previously
23 and clearly are highly relevant to our mitigation investigation.

24 3. The defense has known for months that many documents were
seized from the defendant's apartment after his arrest on November 6, 2010.

Each page of discovery we have provided the defense in this case is marked with a
unique number following the initials "CJM." On December 12, 2009, the prosecution provided
the defense with the first installment of discovery in this case, pages CJM00001 through

² The defense pleading also states that "[o]n August 11th, the State informed the Defense that is [sic] had additional discovery in its possession since November 2009, which it had neglected to provide." Motion to Extend Deadline at 2. An e-mail sent to the defense on August 11, 2010 is attached to this declaration as Appendix One. The discovery consists of some of the defendant's telephone records, obtained shortly after the defendant's arrest, via search warrant (the warrant was provided to the defense months ago). The prosecutor realized that the records had inadvertently not been provided to the defense he noticed that the defense had subpoenaed the records.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 2

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

APP00093

1 CJM000157. This discovery includes 30 pages of "Seattle Police Department Property Report
2 Hardcopy" that document the evidence seized from 13725 56th Avenue South, #D402, in
3 Tukwila -- the defendant's residence at the time of his arrest.³ These pages document over 90
4 numbered items of evidence. Many of these are obviously documents -- they are identified
5 variously as: books, magazines, newspapers, notebooks, fliers, miscellaneous papers, court
6 papers, miscellaneous notes, pamphlets, citations, registrations, receipts, manuals, business
7 cards, mail, badges, and portfolio binders. Elsewhere in discovery provided to the defense on
8 December 12, 2009 is a list of items recovered from one of the defendant's automobiles. The list
9 includes a number of receipts and "handwritten papers."⁴

10 On December 28, 2009, the prosecution presented the defense with nearly 100 pages of
11 images⁵ that are photocopies of documents obtained from the defendant's apartment. These
12 included receipts, handwritten notes in the margins of books, handwritten lists, court documents,
13 recipes for mixtures, travel plans, calculations, names and contact information, printed fliers, and
14 other documents.

15 4. Other discovery provided to the defense months ago includes a 49-page CSI
16 report documenting the search of the defendant's apartment.⁶ This report includes photographs,
17 diagrams, and a narrative description of the apartment and the evidence seized. Photographs of
18 some of the documents, including a number of handwritten ones, are included in the report. Also
19 included are detailed descriptions of some of the documents. The report leaves no doubt that
20 numerous other documents -- not including those described and/or photographed -- were taken
21 from the defendant's apartment:

22 We collected four boxes of all the remaining miscellaneous
23 papers, books, writings and mail from inside S/Monfort's
24 apartment (Evidence Items #181587-07 thru 10).⁷

³ CJM000029-54; 145-48.

⁴ CJM000114-116.

⁵ CJM000868-966.

⁶ CJM001825-73.

⁷ CJM001861.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 3

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

APP00 94

1 5. In addition to discovery provided to them, the defense has another reason to know
2 that many documents were taken from the defendant's residence and placed in evidence. On
3 January 25, 2010, Ms. Lawry and other members of the defense team were present in the
4 defendant's apartment with Seattle Police Department [SPD] detectives. At their request, the
5 detectives collected a number of notebooks and other documentary items of evidence. A
6 detective's follow-up entry describes this:

7 The defense examined the apartment, and collected various books
8 and papers that they thought would assist in their case, requesting
9 that we seize those items for them.⁸

10 6. At 1:43 pm on June 15, 2010 -- two months ago -- Ms. Lawry sent my co-counsel
11 John Castleton and me an e-mail⁹, which consisted of the following:

12 Hey guys,
13 Carl and I would like to visit the evidence room to assess the
14 goodies collected for possible mitigation evidence. We would
15 only be looking at the stuff taken from Mr. Monfort's apartment
16 on this trip and would need to see the rest (ie evidence from
17 sources other than the apt or not otherwise mitigation related like
18 the guns from the apt) at another time. Would you mind asking
19 the detectives for a couple of options for times?
20 Thanks
21 Julie

22 7. At 4:43 pm that same day, June 15, 2010, I responded to Ms. Lawry with an e-
23 mail¹⁰ consisting of the following:

24 Julie,
25 Do I understand from your post that you would like to see
26 all the items taken from Mr. Monfort's apartment? That can, of
27 course, be arranged, but a complete review will take a number of
28 days -- if you let us know by evidence number which items you
29 would like to review first, we can start with them.
30 Thanks
31 Jeff

⁸ CJM001800; Steiger follow-up 1/25/10.

⁹ Attached hereto in Appendix Two.

¹⁰ Attached hereto in Appendix Two.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 4

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

APP00C95

1
2 8. Neither Ms. Lawry nor anyone from the defense team in this case ever replied to
3 my e-mail. Since then, neither Ms. Lawry nor anyone from the defense team have ever
4 expressed any interest in viewing any evidence taken from the defendant's apartment -- including
5 the documents they expressly asked the police to collect for them, and which Ms. Lawry had
6 characterized in her e-mail as "possible mitigation evidence."

7 9. When I did not hear back from Ms. Lawry, I became concerned that the defense
8 was declining to examine evidence that, in part, fell under the mandatory discovery provisions
9 pertaining to prosecutors -- in particular, CrR 4.7(a) (1) (ii) and (v), which pertain to

10 any written or recorded statements...made by
11 the defendant;

12

13 any books, papers, documents, photographs, or tangible
14 objects, which the prosecuting attorney intends to use in the
15 hearing or trial which were obtained from the defendant...

16 The defense knew these documents were in evidence, and they knew that they could
17 examine them if they chose. Initially, they expressed a desire to do so; but when we agreed to
18 arrange the examination, they seemed uninterested. I wondered whether the defendant's
19 attorneys might never examine this evidence, and later claim that it was inadmissible (or that a
20 continuance of the trial was needed) because the contents of the actual documents had not been
21 brought specifically to their attention.

22 10. Hoping to avoid any unnecessary litigation or delay that might later arise
23 concerning this evidence, we began inventorying and numbering documents recovered from
24 the defendant's apartment. We did not endeavor to number every document or copy every
page -- they are voluminous, and many of them are textbooks, books assigned as reading for
coursework, and notebooks containing handwritten notes taken during class or lectures.
However, we did attempt to make electronic images (by scanning or digital photography) of
evidence that might be described as a statement by the defendant, that might be offered at trial,
or that might be considered relevant to a determination of the defendant's mental state at the

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 5

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APP00096

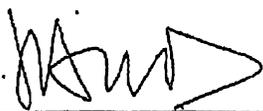
1 time of the crimes -- including, for example, his capacity, or his motive. It was a time-
2 consuming process. When we were done, we had numbered some 125 separate documents for
3 discovery. These numbered documents were organized in an electronic log. In the log, each
4 document is identified by the "CJM" number we gave it, by its SPD evidence number,¹¹ and by
5 description. In the log, each document is linked electronically to any images obtained from it.

6 11. When we completed this project, we provided a copy of the electronic log --
7 including all the images taken from the documents -- to the defense. This is the "new
8 discovery" alluded to in the defendant's Motion to Extend Deadline.

9 12. We do not ordinarily make digital images of evidence held by the police
10 department; it is identified in discovery and available for inspection by the defense. We do not
11 normally consider physical evidence "discovery." We took extra steps in this case to
12 electronically reproduce and catalogue items of physical evidence in this case and provide this
13 to the defense in an abundance of caution, because the defense was apparently disinclined to
14 inspect the evidence itself.

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

17 Signed and dated by me this 20th day of August, at Seattle, Washington.

18
19
20 

21 Jeff Baird, WSBA #11731

22
23
24 ¹¹ SPD detectives assigned numbers to evidence removed from the defendant's residence. Physical evidence is
identified by these numbers throughout the discovery in this case.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 6

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APP000097

Appendix One

Baird, Jeff

From: Castleton, John
Sent: Wednesday, August 11, 2010 4:02 PM
To: Lawry, Julie-acapd.org; Luer, Carl-acapd.org
Cc: Baird, Jeff; MacMillan, Lisa; Rosa, Kelly
Subject: Monfort

Julie and Carl:

We just received your subpoena duces tecum for the Sprint cell records. Thanks. After receiving this, I went back to review the cell records that are in discovery already and realized that the records we received via the November 17, 2009 search warrant never made it into the discovery. Those records are for the same number you're requesting, but only cover October 6, 2009 through November 6, 2009. Just wanted to let you know that you'd be receiving those shortly. Thanks.

John

John B. Castleton, Jr.
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office
john.castleton@kingcounty.gov
(206) 296-9535

APP0000 99

Appendix Two

Baird, Jeff

From: Baird, Jeff
Sent: Tuesday, June 15, 2010 4:43 PM
To: Lawry, Julie-acapd.org; Castleton, John
Cc: Luer, Carl-acapd.org; Collins, Risa-acapd.org
Subject: RE: Monfort

Julie,

Do I understand from your post that you would like to see all the items taken from Mr. Monfort's apartment? That can, of course, be arranged, but a complete review will take a number of days -- If you let us know by evidence number which items you would like to review first, we can start with them.

Thanks
Jeff

From: Julie Lawry (ACA) [mailto:Julie.Lawry@acapd.org]
Sent: Tuesday, June 15, 2010 1:44 PM
To: Baird, Jeff; Castleton, John
Cc: Luer, Carl-acapd.org; Collins, Risa-acapd.org
Subject: Monfort
Importance: High

Hey guys,

Carl and I would like to visit the evidence room to assess the goodies collected for possible mitigation evidence. We would only be looking at the stuff taken from Mr. Monfort's apartment on this trip and would need to see the rest (ie evidence from sources other than the apt or not otherwise mitigation related like the guns from the apt) at another time. Would you mind asking the detectives for a couple of options for times?

Thanks,
Julie

NEW EMAIL ADDRESS: Julie.Lawry@acapd.org

Julie A. Lawry
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Associated Counsel for the Accused
110 Prefontaine Place So., Ste 200
Seattle, WA 98104
206.624.8105
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APP000101

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HONORABLE RONALD KESSLER

FILED
KING COUNTY, WASHINGTON
AUG 24 2010
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 09-1-07187-6 SEA
Plaintiff,)	
	)	DEFENSE REPLY TO STATE'S
	)	RESPONSE TO DEFENSE MOTION
CHRISTOPHER MONFORT	)	FOR FINDING GOOD CAUSE TO
	)	EXTEND MITIGATION DEADLINE
Defendant.	)	AND SERVICE OF NOTICE TO
	)	PROCEED WITH SPECIAL
	)	SENTENCING PROCEEDING

I. INTRODUCTION

The State served the Defense with its response to the noted motion on August 23, 2010.
This pleading is filed in reply.

II. CHARGES

Mr. Monfort is charged as follows:

- Count 1: Arson in the First Degree;
- Count 2: Attempted Murder in the First Degree;
- Count 3: Attempted Murder in the First Degree;

DEFENSE REPLY TO STATE'S RESPONSE TO 1
DEFENSE MOTION TO FIND GOOD CAUSE
TO EXTEND MITIGATION DEADLINE AND
SERVICE OF NOTICE TO PROCEED WITH
SPECIAL SENTENCING PROCEEDINGS

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APP000152

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Count 4: Aggravated Murder in the First Degree; and

Count 5: Attempted Murder in the First Degree.

This is a potential capital case.

III. ARGUMENTS IN REPLY

In the *State's Response* and Declaration of Mark Larson, it asserts that there is no "one-sized fits all" or "fixed deadline," however, letters sent out to defense counsel in recent potential death penalty cases contain boilerplate language that is suggestive of just that:

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Letters from Mark Larson dated August 2, 2006 (State v. Haq-60 day), January 25, 2010 (State v. Hicks-5 months) and December 14, 2009 (State v. Monfort-4 ½ months); September 1, 2009 (State v. Kalebu-4 months). Attached as exhibit A.

Despite the fact that these cases are factually very different and involve different individuals with different backgrounds and mitigation, the State assumes that they all can be investigated within approximately the same time frame, even before hearing from the Defense. These letters include language supporting the change in the State's policy i.e. the letters state that the shortened time frame departs from the earlier practice of the State with regard to mitigation deadlines.

The Court will notice in the letters attached that the period for mitigation appears to be longer than it actually is because the time allotted includes the one-month that the State has set aside to consider the mitigation. In Mr. Monfort's case, we were originally allotted 4 ½ months

DEFENSE REPLY TO STATE'S RESPONSE TO 2
DEFENSE MOTION TO FIND GOOD CAUSE
TO EXTEND MITIGATION DEADLINE AND
SERVICE OF NOTICE TO PROCEED WITH
SPECIAL SENTENCING PROCEEDINGS

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APP000103

1 but again we were not able to begin a professional mitigation investigation until the beginning of
2
3 April 2010. In reality the extension to August 2, 2010 allowed only 4 ½ months (not nine as
4
5 continually repeated by the State) because the investigation was not begun until April.
6

7 The State complains that even without an expert mitigation investigator, the Defense
8
9 could have and should have started and completed a significant portion of the mitigation
10
11 investigation. From this statement it is clear that the State has no real concept of what it takes to
12
13 competently do mitigation work and why an expert is needed at all.¹ Furthermore, this comment
14
15 ignores the fact that Defense has provided this Court with regular status reports documenting the
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17 work that was done prior to appointment of the mitigation expert and that this Court made it
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19 clear in court that the Defense was diligently working on the mitigation phase. It also ignores the
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21 fact that assigned counsel has been diligently fulfilling its duty to review the large amounts of
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23 discovery that continue to come in and have been preparing for and arguing many other legal
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25 issues that have arisen. If fulfilling the duties of trial counsel were such that the attorneys had
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27 time to do the mitigation investigation as well, one would wonder why the State's counsel hired
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29 its own mitigation person instead of simply doing the work themselves. The State points out that
30
31 the Defense has two full time attorneys and the Defense points out that the prosecutor's office
32
33 has all the resources of the State. Also, this Court denied the Defense request for a third attorney
34
35 to work on the case.
36

37 The State also complains that the Defense has not shared its mitigation work product in
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39 sort of a tit for tat game where we share information and they give up time in return. This has
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41

42 ¹ See Detrich v. Ryan, *infra* at 12451-2 (The Court in Detrich reiterated the requirement that the Defense meet at
43 minimum the "prevailing norms" as required but the *ABA Guidelines*. Citing Bobby v. Van Hook, 130 S. Ct. 13, 17
44 (2009) and Strickland, *infra*).

1 been the practice of some defense teams and a way of doing business in King County in the past.
2
3 However, this is not the practice recommended or recognized by the *ABA Guidelines* and the
4
5 Defense here is not going to be coerced into violating its ethical duties in order to allow the State
6
7 to use preliminary information to rubber stamp its decision in this case. Mr. Monfort clearly
8
9 faces extreme prejudice if this team provides mitigation evidence that is piecemeal and
10
11 incomplete at this juncture and the State claims that it relied on this information and found it
12
13 insufficient to grant mercy. This Court is aware of the status of the mitigation investigation and
14
15 can assure the State that the Defense is not participating in gamesmanship in this extremely
16
17 serious case. Furthermore, the Defense laid out in detail in a lengthy three-page letter dated
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19 August 10, 2010, attached to the State's response, the efforts that the Defense has made to meet
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21 its obligations to Mr. Monfort including some of the obstacles we have faced. The State has
22
23 asked us to verbally share preliminary mitigation evidence. We do not view any conversations
24
25 with the State as informal. We do not believe that either party is served by providing incomplete
26
27 information to anyone. We believe that a comprehensive written presentation is the proper way
28
29 to proceed. However, it is simply incorrect to suggest that the Defense has been unwilling to
30
31 cooperate at all. As detailed in the *State's Response*, we have met with the State each time it has
32
33 asked us to and have sent numerous letters explaining the current status of our mitigation
34
35 investigation.

36
37 The State continues to tout the 30-day deadline as contained in RCW 10.95.040. The
38
39 statute was enacted in 1981 well before the standard of practice in death penalty cases was
40
41 developed in case law and the *ABA Guidelines* (1989 & 2008); Wiggins v. Smith, 539 U.S. 510
42
43 (2003); Rompilla v. Beard, 545 U.S. 374 (2005). The fact is that a 30-day deadline is in reality

45 DEFENSE REPLY TO STATE'S RESPONSE TO 4
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000105

1 treated by all parties as an anachronism. Trying to use this deadline as some sort of measuring
2
3 stick to show the reasonableness of the State's position and to ask the Court to endorse it is to
4
5 ignore all the current authorities as cited in the voluminous briefing that has been done in this
6
7 case by the Defense. The King County Prosecutor's Office suggests that this Court adopt its
8
9 notion of how and when mitigation investigations should be completed in contravention of the
10
11 dictates of the United States Supreme Court.

12
13 In footnote 10 of page 6 of the *State's Response*, the State implies that the Defense and
14
15 the Court have been operating inappropriately by the *ex parte* filing and acceptance of status
16
17 reports in this case. To date the Defense has filed three status reports *ex parte* without a word of
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19 objection by the State. The State has been aware of the reports and they have been referred to in
20
21 open court. The purpose of these reports has always been to inform the Court of the progress of
22
23 the mitigation investigation in order to allow the Court to have an informed basis to hear motions
24
25 to continue.

26
27 The State also states that the discovery includes interviews of a number of witnesses that
28
29 are relevant to Mr. Monfort's mental state. (*State's Response* p. 7). Apparently, the State
30
31 believes that it is sufficient for the Defense to rely on interviews done by the State to prove or
32
33 disprove mental state or mental illness. Again, as this Court is aware, the *ABA Guidelines* require
34
35 the Defense to not only read the discovery but to do an independent investigation, including re-
36
37 interviewing these witnesses. In reviewing the discovery and "mitigation" materials developed
38
39 by the State, the Defense has yet to see any real attempt of the State to uncover evidence of
40
41 mental illness.

42
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45 DEFENSE REPLY TO STATE'S RESPONSE TO 5
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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(206) 624-8105

APP00010b

1 The State also complains that the Defense was aware of some mitigation evidence that
2
3 was put into evidence at the time the family was allowed to remove Mr. Monfort's property from
4
5 his apartment. As the State is aware, since Mr. Baird was present for much of this effort, Mr.
6
7 Monfort's family was allowed approximately two hours on two different occasions to remove his
8
9 personal property. Defense counsel was present primarily to assist the family. The Defense did
10
11 ask the State to place some items into evidence but was not provided evidence numbers for these
12
13 items until just recently. In addition, given the time constraints given for access to the property,
14
15 the Defense had only a cursory opportunity to identify the property as possible mitigation
16
17 evidence. Furthermore, the items collected by case detectives while defense counsel were
18
19 present are only a small fraction of the total materials in evidence seized in the days immediately
20
21 following Mr. Monfort's arrest. The Defense never saw this large volume of materials until the
22
23 State provided them in discovery early this month.

24
25 The State asserts that it is in possession of evidence that the Defense has made no real
26
27 attempt to view and that the Defense might be trying to gain strategic advantage by not doing so
28
29 (*State's Response* p. 7). This is simply paranoia on the part of the State. The CDs that were
30
31 recently provided in "discovery" by the State contain the volumes of information that was taken
32
33 by the police under a warrant for the apartment. That large volume was identified simply as
34
35 "books, magazines, newspapers, notebooks, files, miscellaneous papers, court papers,
36
37 miscellaneous notes, pamphlets, citations, registrations, receipts, fliers, manuals, business cards,
38
39 mail, badges, and portfolio binders." (*Baird's Declaration* p. 3, attached to *State's Response*).
40
41 This summary in no way indicates the volume of materials and hand written notes contained in
42
43 an undisclosed number of books. Moreover, it does not reflect the contents of these materials,
44

1 much of which is directly relevant to our mitigation investigation and which our mitigation
2 specialist did not see until after the State provided us these materials. With regard to efforts
3 made by the Defense to see this evidence, the Court will notice that emails attached to the *State's*
4 *Response* contain the State's statement that the volume is large and that the Defense should
5 identify specific items it wished to see. In an attempt to do so, the Defense determined that this
6 was very difficult in that there were no evidence numbers or Bates numbers supplied. The
7 Defense assumed that the State would do as it eventually did, and provide a mechanism to
8 review this evidence. In addition, the Defense had no way of knowing the volume of the
9 evidence or that books etc. contained notations on numerous pages. The State asserts that it was
10 under no obligation to provide this information as discovery. Obviously the content of the
11 writing is relevant to the State's case ("State of Mind" as stated in *State's Response*) or it would
12 not have been seized. Lastly, the State again ignores the enormous amount of work the Defense
13 has had to do to prepare this case for a mitigation package. *The ABA Guidelines* require that we
14 review and investigate all the evidence. The evidence that the State has in storage is but a part of
15 it. The Defense has made it clear that it has not had sufficient time to review everything.

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31 The State asserts that it has satisfied its statutory and constitutional obligation to consider
32 whether there are sufficient mitigating circumstances to merit leniency in part because the State
33 has conducted its own investigation into the charged crimes and into Mr. Monfort's mental state
34 and background. *State's Response*, p. 7. That assertion is apparently based on an investigation
35 done by a private investigator hired by the State to conduct that investigation. The State's
36 investigator, however, is not a trained mitigation specialist and her investigation does not come
37 close to satisfying the legal requirements for a complete mitigation investigation in a capital
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45 DEFENSE REPLY TO STATE'S RESPONSE TO 7
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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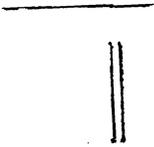
APP000108

1 case.² The State's investigation lacks any meaningful information about Mr. Monfort's
2
3 childhood, family background, and other factors relating to his mental health and life history. It
4
5 is not a sufficient basis for the State to make the required showing that it has satisfied its
6
7 statutory obligations in determining whether to seek Mr. Monfort's death.
8

9 To date, the State's "mitigation" investigation consists of nineteen witness interview
10
11 summaries. The vast majority of people interviewed were acquaintances of Monfort's over the
12
13 past ten years while he lived in Seattle. Of the nineteen people interviewed, seven were fellow-
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15 students of Mr. Monfort's at Highline Community College or Highline faculty members, three
16
17 were co-workers of Mr. Monfort's at a local trucking company where Mr. Monfort worked until
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19 shortly before his arrest, two were co-workers at a law office where Mr. Monfort worked briefly
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21 in 2005 and 2006, one was from a co-worker at the King County Juvenile Detention Center
22
23 where Mr. Monfort volunteered as an intern in 2007, and one was a co-worker at a security firm
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25 where Mr. Monfort worked in 2004. In all, fourteen of the nineteen people interviewed knew
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27 Mr. Monfort from either Highline Community College or jobs he held in the past five or six
28
29 years in Seattle. Of the remaining five interviews, three were with distant or estranged family
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31 members, including Mr. Monfort's former stepfather who he knew for only several years, the
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33 husband of a second cousin, and Mr. Monfort's wife, a woman he has been estranged from for
34
35 many years.
36

37 All of these interviews were conducted over the phone and in no case did the private
38
39 investigator conduct a follow-up interview. Little if any information was elicited regarding Mr.
40
41 Monfort's early years before moving to Hartford City, Indiana at age six and virtually nothing
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43

44 ² See Detrich v. Ryan, *infra* at 12453, Attached a exhibit B (Defense hired an "investigator" who was not qualified
45 DEFENSE REPLY TO STATE'S RESPONSE TO 8 Associated Counsel for the Accused
46 DEFENSE MOTION TO FIND GOOD CAUSE 110 Prefontaine Pl. S. St. 200
47 TO EXTEND MITIGATION DEADLINE AND Seattle, Washington 98104
48 SERVICE OF NOTICE TO PROCEED WITH (206) 624-8105
49 SPECIAL SENTENCING PROCEEDINGS
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1 about the years he lived in Hartford City, which were critical in his upbringing and development.
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3 Moreover, the State's investigator has made no effort to construct any type of coherent or
4
5 comprehensive history of Mr. Monfort's life and has apparently chosen witnesses based on a
6
7 series of Internet searches and telephone availability. If defense counsel were to rely on that type
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9 of investigation to develop mitigation evidence in a capital case, it would be automatic
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11 ineffective assistance.³ The State cannot rely on this investigation as proof that it has met its
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13 legal obligations to determine whether there are not sufficient mitigating circumstances to merit
14
15 leniency.

16
17 The State relies on State v. Pirtle, 127 Wn.2nd 628, 642, 904 P.2d 245 (1995), for support
18
19 that it can make a decision without input from the Defense. However, in Pirtle, the State relied
20
21 on information that was already in its possession, namely, Pirtle's significant criminal history.
22
23 Mr. Monfort has none.

24
25 The State also cites Pirtle, as if it is the latest case law or represents the current standard
26
27 of practice with regard to consideration of mitigation. While there is no dispute that it is still
28
29 good law, the Defense's original motion more fully discusses the current standards as outlined by
30
31 the U.S. Supreme Court as well as the *ABA Guidelines*. Just this past week, the Ninth Circuit
32
33 reiterated the standards for a competent mitigation investigation in Detrich v. Ryan, --- F.3d ---,
34
35 2010 WL 3274500 (9th Cir. 2010)(Attached as exhibit B). The Court found the trial court in
36
37 error for accepting conclusory findings provided by the State to support the court's finding of
38
39 aggravating circumstances supporting the death penalty. *Id.* at 12446. The Court found error in
40
41 the mitigation evidence submitted by the Defense. This case stands for the proposition that the
42

43
44 to develop a life history, found ineffective.

45 DEFENSE REPLY TO STATE'S RESPONSE TO 9
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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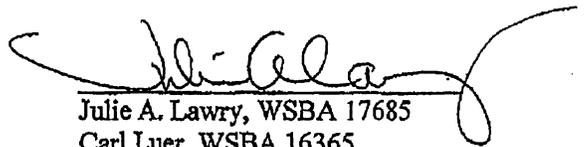
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APP000111

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Defense, the State and the Court are all on notice that death penalty cases require the utmost care and diligence, not a generic rush to judgment and execution as the State advocates here.

DATED: August 24, 2010.



Julie A. Lawry, WSBA 17685
Carl Luer, WSBA 16365
Attorneys for Mr. Monfort

³ See Detrich, *infra* at 12453.
DEFENSE REPLY TO STATE'S RESPONSE TO 10
DEFENSE MOTION TO FIND GOOD CAUSE
TO EXTEND MITIGATION DEADLINE AND
SERVICE OF NOTICE TO PROCEED WITH
SPECIAL SENTENCING PROCEEDINGS

Associated Counsel for the Accused
110 Prefontaine Pl. S. St. 200
Seattle, Washington 98104
(206) 624-8105

APP000112

FILED

SEP 02 2010

SUPERIOR COURT OF WASHINGTON
BY Susan Bone
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	No. 09-1-07187-6 SEA
	)	Plaintiff,
	)	NOTICE OF SPECIAL SENTENCING
vs.	)	PROCEEDING TO DETERMINE
	)	WHETHER DEATH PENALTY
CHRISTOPHER JOHN MONFORT,	)	SHOULD BE IMPOSED
)	
	)	Defendant.

COMES NOW Daniel T. Satterberg, King County Prosecuting Attorney, and gives notice pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether the death penalty should be imposed, there being reason to believe that there are not sufficient mitigating circumstances to merit leniency.

DATED this 2nd day of September, 2010.

By: 
 DANIEL T. SATTERBERG
 King County Prosecuting Attorney
 Office WSBA #91002

NOTICE OF SPECIAL SENTENCING PROCEEDING
TO DETERMINE WHETHER DEATH PENALTY
SHOULD BE IMPOSED - 1 -

0810-002

APP000113

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FILED
KING COUNTY

OCT 26 2010

SUPERIOR COURT CLERK
BY Susan Bone
DEPUTY

ORIGINAL

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

STATE OF WASHINGTON,
Plaintiff,

vs.

CHRISTOPHER MONFORT,
Defendant.

No: 09-1-07187-6 SEA

**ORDER DENYING DEFENSE MOTION TO
EXTEND TIME FOR MITIGATION AND
PRECLUDE THE STATE FROM
ANNOUNCING ITS DECISION ON
SEEKING THE DEATH PENALTY**

This matter came before the court on August 25, 2010 on the motion of the defendant requesting an order to extend the time period to prepare mitigation materials to present to the State and directing the State not to make a decision on whether it intends to seek the death penalty in this case until the defense has had an opportunity to adequately prepare those materials. The court considered the defense motion, the state's response and the defense reply brief as well as the arguments of counsel for both parties. The court, believing that it lacks the ability and authority to order the state when it may decide whether or not to seek the death penalty beyond the statutory period, now, therefore it is hereby

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ORDERED that the motion to order that the state delay making a decision whether or not it will seek the death penalty is denied.

DATED this 26th day of October, 2010.



RONALD KESSLER, Judge

HONORABLE RONALD KESSLER

FILED
KING COUNTY, WASHINGTON
AUG 24 2010
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 09-1-07187-6 SEA
Plaintiff,)	
	)	DEFENSE REPLY TO STATE'S
	)	RESPONSE TO DEFENSE MOTION
CHRISTOPHER MONFORT	)	FOR FINDING GOOD CAUSE TO
	)	EXTEND MITIGATION DEADLINE
Defendant.	)	AND SERVICE OF NOTICE TO
	)	PROCEED WITH SPECIAL
	)	SENTENCING PROCEEDING

I. INTRODUCTION

The State served the Defense with its response to the noted motion on August 23, 2010.

This pleading is filed in reply.

II. CHARGES

Mr. Monfort is charged as follows:

Count 1: Arson in the First Degree;

Count 2: Attempted Murder in the First Degree;

Count 3: Attempted Murder in the First Degree;

DEFENSE REPLY TO STATE'S RESPONSE TO 1
DEFENSE MOTION TO FIND GOOD CAUSE
TO EXTEND MITIGATION DEADLINE AND
SERVICE OF NOTICE TO PROCEED WITH
SPECIAL SENTENCING PROCEEDINGS

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APP000116

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1 Count 4: Aggravated Murder in the First Degree; and

2
3 Count 5: Attempted Murder in the First Degree.

4
5 This is a potential capital case.

6
7
8 **III. ARGUMENTS IN REPLY**

9
10 In the *State's Response* and Declaration of Mark Larson, it asserts that there is no "one-
11 sized fits all" or "fixed deadline," however, letters sent out to defense counsel in recent potential
12 death penalty cases contain boilerplate language that is suggestive of just that:
13
14

15
16 I understand that this time frame may be shorter than in some previous cases, but it has
17 been our experience that taking more time does not result in any appreciable difference in
18 the mitigation materials, and the longer period unnecessarily delays the 10.95.040
19 decision and, accordingly, the trial. It is our view that adequate information can be
20 gathered within the period described in this letter, and that the public interest is better
21 served by an interval after arraignment closer to that contemplated in the statute.
22

23 Letters from Mark Larson dated August 2, 2006 (State v. Haq-60 day), January 25, 2010 (State
24 v. Hicks-5 months) and December 14, 2009 (State v. Monfort-4 ½ months); September 1, 2009
25 (State v. Kalebu-4 months). Attached as exhibit A.
26

27
28 Despite the fact that these cases are factually very different and involve different
29 individuals with different backgrounds and mitigation, the State assumes that they all can be
30 investigated within approximately the same time frame, even before hearing from the Defense.
31
32 These letters include language supporting the change in the State's policy i.e. the letters state that
33 the shortened time frame departs from the earlier practice of the State with regard to mitigation
34 deadlines.
35
36
37

38
39 The Court will notice in the letters attached that the period for mitigation appears to be
40 longer than it actually is because the time allotted includes the one-month that the State has set
41 aside to consider the mitigation. In Mr. Monfort's case, we were originally allotted 4 ½ months
42
43

44 DEFENSE REPLY TO STATE'S RESPONSE TO 2
45 DEFENSE MOTION TO FIND GOOD CAUSE
46 TO EXTEND MITIGATION DEADLINE AND
47 SERVICE OF NOTICE TO PROCEED WITH
48 SPECIAL SENTENCING PROCEEDINGS
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APP000117

1 but again we were not able to begin a professional mitigation investigation until the beginning of
2
3 April 2010. In reality the extension to August 2, 2010 allowed only 4 ½ months (not nine as
4
5 continually repeated by the State) because the investigation was not begun until April.
6

7 The State complains that even without an expert mitigation investigator, the Defense
8
9 could have and should have started and completed a significant portion of the mitigation
10
11 investigation. From this statement it is clear that the State has no real concept of what it takes to
12
13 competently do mitigation work and why an expert is needed at all.¹ Furthermore, this comment
14
15 ignores the fact that Defense has provided this Court with regular status reports documenting the
16
17 work that was done prior to appointment of the mitigation expert and that this Court made it
18
19 clear in court that the Defense was diligently working on the mitigation phase. It also ignores the
20
21 fact that assigned counsel has been diligently fulfilling its duty to review the large amounts of
22
23 discovery that continue to come in and have been preparing for and arguing many other legal
24
25 issues that have arisen. If fulfilling the duties of trial counsel were such that the attorneys had
26
27 time to do the mitigation investigation as well, one would wonder why the State's counsel hired
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29 its own mitigation person instead of simply doing the work themselves. The State points out that
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31 the Defense has two full time attorneys and the Defense points out that the prosecutor's office
32
33 has all the resources of the State. Also, this Court denied the Defense request for a third attorney
34
35 to work on the case.
36

37 The State also complains that the Defense has not shared its mitigation work product in
38
39 sort of a tit for tat game where we share information and they give up time in return. This has
40
41

42 ¹ See Detrich v. Ryan, *infra* at 12451-2 (The Court in Detrich reiterated the requirement that the Defense meet at
43 minimum the "prevailing norms" as required but the *ABA Guidelines*. Citing Bobby v. Van Hook, 130 S. Ct. 13, 17
44 (2009) and Strickland, *infra*).

1 been the practice of some defense teams and a way of doing business in King County in the past.
2
3 However, this is not the practice recommended or recognized by the *ABA Guidelines* and the
4
5 Defense here is not going to be coerced into violating its ethical duties in order to allow the State
6
7 to use preliminary information to rubber stamp its decision in this case. Mr. Monfort clearly
8
9 faces extreme prejudice if this team provides mitigation evidence that is piecemeal and
10
11 incomplete at this juncture and the State claims that it relied on this information and found it
12
13 insufficient to grant mercy. This Court is aware of the status of the mitigation investigation and
14
15 can assure the State that the Defense is not participating in gamesmanship in this extremely
16
17 serious case. Furthermore, the Defense laid out in detail in a lengthy three-page letter dated
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19 August 10, 2010, attached to the State's response, the efforts that the Defense has made to meet
20
21 its obligations to Mr. Monfort including some of the obstacles we have faced. The State has
22
23 asked us to verbally share preliminary mitigation evidence. We do not view any conversations
24
25 with the State as informal. We do not believe that either party is served by providing incomplete
26
27 information to anyone. We believe that a comprehensive written presentation is the proper way
28
29 to proceed. However, it is simply incorrect to suggest that the Defense has been unwilling to
30
31 cooperate at all. As detailed in the *State's Response*, we have met with the State each time it has
32
33 asked us to and have sent numerous letters explaining the current status of our mitigation
34
35 investigation.

36
37 The State continues to tout the 30-day deadline as contained in RCW 10.95.040. The
38
39 statute was enacted in 1981 well before the standard of practice in death penalty cases was
40
41 developed in case law and the *ABA Guidelines* (1989 & 2008); Wiggins v. Smith, 539 U.S. 510
42
43 (2003); Rompilla v. Beard, 545 U.S. 374 (2005). The fact is that a 30-day deadline is in reality

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45 DEFENSE REPLY TO STATE'S RESPONSE TO 4
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000119

1 treated by all parties as an anachronism. Trying to use this deadline as some sort of measuring
2
3 stick to show the reasonableness of the State's position and to ask the Court to endorse it is to
4
5 ignore all the current authorities as cited in the voluminous briefing that has been done in this
6
7 case by the Defense. The King County Prosecutor's Office suggests that this Court adopt its
8
9 notion of how and when mitigation investigations should be completed in contravention of the
10
11 dictates of the United States Supreme Court.

12
13 In footnote 10 of page 6 of the *State's Response*, the State implies that the Defense and
14
15 the Court have been operating inappropriately by the *ex parte* filing and acceptance of status
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17 reports in this case. To date the Defense has filed three status reports *ex parte* without a word of
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19 objection by the State. The State has been aware of the reports and they have been referred to in
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21 open court. The purpose of these reports has always been to inform the Court of the progress of
22
23 the mitigation investigation in order to allow the Court to have an informed basis to hear motions
24
25 to continue.

26
27 The State also states that the discovery includes interviews of a number of witnesses that
28
29 are relevant to Mr. Monfort's mental state. (*State's Response* p. 7). Apparently, the State
30
31 believes that it is sufficient for the Defense to rely on interviews done by the State to prove or
32
33 disprove mental state or mental illness. Again, as this Court is aware, the *ABA Guidelines* require
34
35 the Defense to not only read the discovery but to do an independent investigation, including re-
36
37 interviewing these witnesses. In reviewing the discovery and "mitigation" materials developed
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39 by the State, the Defense has yet to see any real attempt of the State to uncover evidence of
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41 mental illness.

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45 DEFENSE REPLY TO STATE'S RESPONSE TO 5
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000120

1 The State also complains that the Defense was aware of some mitigation evidence that
2 was put into evidence at the time the family was allowed to remove Mr. Monfort's property from
3 his apartment. As the State is aware, since Mr. Baird was present for much of this effort, Mr.
4
5 Monfort's family was allowed approximately two hours on two different occasions to remove his
6
7 personal property. Defense counsel was present primarily to assist the family. The Defense did
8
9 ask the State to place some items into evidence but was not provided evidence numbers for these
10
11 items until just recently. In addition, given the time constraints given for access to the property,
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13 the Defense had only a cursory opportunity to identify the property as possible mitigation
14
15 evidence. Furthermore, the items collected by case detectives while defense counsel were
16
17 present are only a small fraction of the total materials in evidence seized in the days immediately
18
19 following Mr. Monfort's arrest. The Defense never saw this large volume of materials until the
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21 State provided them in discovery early this month.
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23

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25 The State asserts that it is in possession of evidence that the Defense has made no real
26
27 attempt to view and that the Defense might be trying to gain strategic advantage by not doing so
28
29 (*State's Response* p. 7). This is simply paranoia on the part of the State. The CDs that were
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31 recently provided in "discovery" by the State contain the volumes of information that was taken
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33 by the police under a warrant for the apartment. That large volume was identified simply as
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35 "books, magazines, newspapers, notebooks, filers, miscellaneous papers, court papers,
36
37 miscellaneous notes, pamphlets, citations, registrations, receipts, fliers, manuals, business cards,
38
39 mail, badges, and portfolio binders." (Baird's Declaration p. 3, attached to *State's Response*).
40
41 This summary in no way indicates the volume of materials and hand written notes contained in
42
43 an undisclosed number of books. Moreover, it does not reflect the contents of these materials,
44

45 DEFENSE REPLY TO STATE'S RESPONSE TO 6
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000121

1 much of which is directly relevant to our mitigation investigation and which our mitigation
2 specialist did not see until after the State provided us these materials. With regard to efforts
3 made by the Defense to see this evidence, the Court will notice that emails attached to the *State's*
4 *Response* contain the State's statement that the volume is large and that the Defense should
5 identify specific items it wished to see. In an attempt to do so, the Defense determined that this
6 was very difficult in that there were no evidence numbers or Bates numbers supplied. The
7 Defense assumed that the State would do as it eventually did, and provide a mechanism to
8 review this evidence. In addition, the Defense had no way of knowing the volume of the
9 evidence or that books etc. contained notations on numerous pages. The State asserts that it was
10 under no obligation to provide this information as discovery. Obviously the content of the
11 writing is relevant to the State's case ("State of Mind" as stated in *State's Response*) or it would
12 not have been seized. Lastly, the State again ignores the enormous amount of work the Defense
13 has had to do to prepare this case for a mitigation package. *The ABA Guidelines* require that we
14 review and investigate all the evidence. The evidence that the State has in storage is but a part of
15 it. The Defense has made it clear that it has not had sufficient time to review everything.

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31 The State asserts that it has satisfied its statutory and constitutional obligation to consider
32 whether there are sufficient mitigating circumstances to merit leniency in part because the State
33 has conducted its own investigation into the charged crimes and into Mr. Monfort's mental state
34 and background. *State's Response*, p. 7. That assertion is apparently based on an investigation
35 done by a private investigator hired by the State to conduct that investigation. The State's
36 investigator, however, is not a trained mitigation specialist and her investigation does not come
37 close to satisfying the legal requirements for a complete mitigation investigation in a capital

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45 DEFENSE REPLY TO STATE'S RESPONSE TO 7
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000122

1 case.² The State's investigation lacks any meaningful information about Mr. Monfort's
2
3 childhood, family background, and other factors relating to his mental health and life history. It
4
5 is not a sufficient basis for the State to make the required showing that it has satisfied its
6
7 statutory obligations in determining whether to seek Mr. Monfort's death.
8

9 To date, the State's "mitigation" investigation consists of nineteen witness interview
10
11 summaries. The vast majority of people interviewed were acquaintances of Monfort's over the
12
13 past ten years while he lived in Seattle. Of the nineteen people interviewed, seven were fellow-
14
15 students of Mr. Monfort's at Highline Community College or Highline faculty members, three
16
17 were co-workers of Mr. Monfort's at a local trucking company where Mr. Monfort worked until
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19 shortly before his arrest, two were co-workers at a law office where Mr. Monfort worked briefly
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21 in 2005 and 2006, one was from a co-worker at the King County Juvenile Detention Center
22
23 where Mr. Monfort volunteered as an intern in 2007, and one was a co-worker at a security firm
24
25 where Mr. Monfort worked in 2004. In all, fourteen of the nineteen people interviewed knew
26
27 Mr. Monfort from either Highline Community College or jobs he held in the past five or six
28
29 years in Seattle. Of the remaining five interviews, three were with distant or estranged family
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31 members, including Mr. Monfort's former stepfather who he knew for only several years, the
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33 husband of a second cousin, and Mr. Monfort's wife, a woman he has been estranged from for
34
35 many years.
36

37 All of these interviews were conducted over the phone and in no case did the private
38
39 investigator conduct a follow-up interview. Little if any information was elicited regarding Mr.
40
41 Monfort's early years before moving to Hartford City, Indiana at age six and virtually nothing
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44 ² See *Detrich v. Ryan*, *infra* at 12453, Attached a exhibit B (Defense hired an "investigator" who was not qualified
45 DEFENSE REPLY TO STATE'S RESPONSE TO 8
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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1 about the years he lived in Hartford City, which were critical in his upbringing and development.
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3 Moreover, the State's investigator has made no effort to construct any type of coherent or
4
5 comprehensive history of Mr. Monfort's life and has apparently chosen witnesses based on a
6
7 series of Internet searches and telephone availability. If defense counsel were to rely on that type
8
9 of investigation to develop mitigation evidence in a capital case, it would be automatic
10
11 ineffective assistance.³ The State cannot rely on this investigation as proof that it has met its
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13 legal obligations to determine whether there are not sufficient mitigating circumstances to merit
14
15 leniency.

16
17 The State relies on State v. Pirtle, 127 Wn.2nd 628, 642, 904 P.2d 245 (1995), for support
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19 that it can make a decision without input from the Defense. However, in Pirtle, the State relied
20
21 on information that was already in its possession, namely, Pirtle's significant criminal history.
22
23 Mr. Monfort has none.

24
25 The State also cites Pirtle, as if it is the latest case law or represents the current standard
26
27 of practice with regard to consideration of mitigation. While there is no dispute that it is still
28
29 good law, the Defense's original motion more fully discusses the current standards as outlined by
30
31 the U.S. Supreme Court as well as the *ABA Guidelines*. Just this past week, the Ninth Circuit
32
33 reiterated the standards for a competent mitigation investigation in Detrich v. Ryan, --- F.3d ----,
34
35 2010 WL 3274500 (9th Cir. 2010)(Attached as exhibit B). The Court found the trial court in
36
37 error for accepting conclusory findings provided by the State to support the court's finding of
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39 aggravating circumstances supporting the death penalty. *Id.* at 12446. The Court found error in
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41 the mitigation evidence submitted by the Defense. This case stands for the proposition that the
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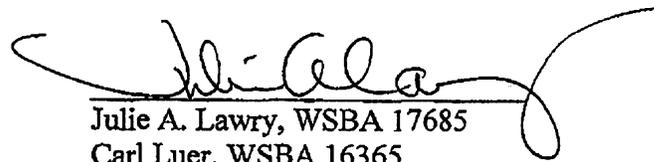
43
44 to develop a life history, found ineffective.
45 DEFENSE REPLY TO STATE'S RESPONSE TO 9
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000124

1 Defense, the State and the Court are all on notice that death penalty cases require the utmost care
2
3 and diligence, not a generic rush to judgment and execution as the State advocates here.
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8

9 DATED: August 24, 2010.


Julie A. Lawry, WSBA 17685
Carl Luer, WSBA 16365
Attorneys for Mr. Monfort

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44 ³ See Detrich, *infra* at 12453.

45 DEFENSE REPLY TO STATE'S RESPONSE TO 10
46 DEFENSE MOTION TO FIND GOOD CAUSE
47 TO EXTEND MITIGATION DEADLINE AND
48 SERVICE OF NOTICE TO PROCEED WITH
49 SPECIAL SENTENCING PROCEEDINGS
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APP000125

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON

Norm Maleng
Prosecuting Attorney

WSS& King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9800

August 2, 2006

Wes Richards
The Defender Association
810 3rd Ave. #800
Seattle, WA 98104

Re: State v. Naved Haq, KCSC Cause # 06-1-06658-4 SEA.

Dear Wes,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Haq, 06-1-06658-4 SEA. As you know, RCW 10.95.040 sets out a 30 day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame is meant to allow time for the consideration of mitigating circumstances to merit leniency.

In this case, the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issues and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses. We anticipate that this process will be completed and a decision to file a notice made no later than November 8, 2006 (90 days after arraignment).

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than October 30, 2006. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of October 30 - November 3, 2006. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by some cases in the past, but it has been our experience that the longer time period does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For NORM MALENG,
King County Prosecuting Attorney



Mark R. Larson
Chief Deputy, Criminal Division

APP000126

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

January 25, 2010

Gary Davis
Kevin Dolan
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Daniel Thomas Hicks, #09-1-07578-2 SEA

Dear Gary and Kevin:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than July 19, 2010, six months from his January 19, 2010, arraignment.

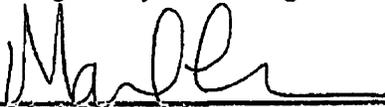
We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than June 18, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of July 6-9, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Kristin Richardson and David Martin, Senior Deputy Prosecuting Attorneys, King County

APP000127

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
CRIMINAL DIVISION
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(206) 296-9000

December 14, 2009

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

Dear Julie and Paige:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than June 15, 2010, six months from today's arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than May 15, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of June 1 -5, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

APP000128

DANIEL T. SATTERBERG
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RECEIVED

2009 SEP -2 AM 11:04

NORTHWEST DEFENDERS



King County

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September 1, 2009

Ramona Brandes
Northwest Defenders Association
1111 3rd Ave, Ste. 200
Seattle, WA 98101-3292

Michael Schwartz
Law Offices of Michael Schwartz
524 Tacoma Ave S
Tacoma, WA 98402-5416

Re: State v. Isaiah Kalebu, # 09-1-04992-7 SEA

Dear Ramona and Michael,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Kalebu, # 09-1-04992-7 SEA. As you know, RCW 10.95.040 sets out a 30-day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame allows for the consideration of mitigating circumstances to merit leniency.

In this case, we anticipate that this process will take us longer than 30 days, provided your client is willing to waive his right to a more speedy decision. Should he be willing to waive, it is our intention to complete our review and make a decision no later than February 12, 2010, which is six months from the date of arraignment.

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials be submitted no later than January 12, 2010. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of February 1-5, 2010. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by other cases in the past, but it has been our experience that the longer time frame does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark R. Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
James Konat, Senior Deputy Prosecuting Attorney

APP000129

FILED
KING COUNTY, WASHINGTON
AUG 23 2010
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

No. 09-1-07187-6 SEA

vs.)

CHRISTOPHER J. MONFORT,)

Defendant.)

RESPONSE TO DEFENSE MOTION
FOR FINDING GOOD CAUSE TO
EXTEND MITIGATION DEADLINE
FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH
SPECIAL SENTENCING
PROCEEDINGS

I. INTRODUCTION

The defendant has filed a motion to extend the deadline by which the King County Prosecutor must decide whether to seek the death penalty in this case.¹ The title of this pleading is misleading. It suggests that the defendant seeks merely to extend the time during which he may submit mitigating evidence to the King County Prosecutor, and during which the Prosecutor may make his decision. But the prosecution will consider mitigating evidence at any time, and the Prosecutor has not asked for additional time to make his decision. The actual relief sought

¹ DEFENSE MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDING [hereinafter,

RESPONSE TO DEFENSE MOTION FOR FINDING
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NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 1

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1 by the defendant is not articulated until the final words of the 19-page pleading that accompanies
2 his motion:

3 **The Court should grant the Defense motion to extend the period**
4 **for filing a death penalty notice and should preclude the State**
5 **from filing a death notice during the extension period.²**

6 The defendant is seeking injunctive relief -- an order precluding the Prosecutor from
7 making a decision that is entrusted solely to the Prosecutor. There is simply no authority in
8 statute, court rule or case law for this court to forbid the Prosecutor from making his statutorily-
9 required decision until such time as the defendant chooses -- in this case, over a year after the
10 defendant was charged. In fact, the defendant's motion would require this court to intrude upon
11 the executive functions of the prosecuting authority, in violation of the separation of powers
12 doctrine. The defendant's motion should be denied.

13 II. FACTS

14
15 On October 31, 2009, the defendant murdered Seattle Police Officer Timothy Brenton by
16 shooting him multiple times with a high-powered assault rifle. The defendant also attempted to
17 kill Seattle Police Officer Britt Sweeney, who was seated next to Officer Brenton in their patrol
18 vehicle. It was quickly discovered that the defendant was also the same person who set fire to
19 several Seattle Police vehicles on October 22, 2009. On November 7, 2009, the defendant
20 attempted to murder Seattle Police Sergeant Gary Nelson by attempting to fire a pistol at Sgt.
21 Nelson's head at close range.

22 "Defense Motion"]

23 ² Defense Motion at 19 (emphasis added).

24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 On November 12, 2009, the defendant was charged with one count of Aggravated
2 Murder in the First Degree, three counts of Attempted Murder in the First Degree, and one count
3 of Arson in the First Degree. The defendant was arraigned on these charges on December 14,
4 2009. All told, more than nine months have passed since the defendant murdered Officer
5 Brenton, and more than eight months have passed since the defendant was arraigned on these
6 charges.

7 To date, despite numerous requests over the past nine months by the prosecution to the
8 defendant's attorneys to provide any evidence of mitigation they may have developed, the
9 attorneys have refused to provide even a scintilla of information. Moreover, unlike other defense
10 attorneys representing individuals charged by our office with Aggravated Murder in the First
11 Degree, the defendant's attorneys have been completely unwilling in private discussions with the
12 Chief Criminal Deputy Prosecuting Attorney to provide any information about their efforts to
13 discover mitigating evidence, their plans to do so in the future, or their ability to provide
14 evidence of mitigation at any time.³ In fact, even their motion to this court is unaccompanied by
15 any declaration providing any factual basis for their claims.

16 The Prosecutor has twice agreed to postpone his decision regarding the death penalty,
17 effectively expanding 9-fold the legislatively prescribed 30-day period for making such a
18 decision.⁴ As it currently stands, the State's deadline to provide the defendant with notice of its
19 intent to seek the death penalty is September 3, 2010. The prosecution is reluctant to extend the
20 deadline a third time, especially

22 ³ See Declaration of Mark Larson, hereinafter "Larson Declaration", attached hereto, at 1-6 for an account.

23 ⁴ See Larson Declaration for timeline of extensions.

24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 because the defendant's attorneys have refused to divulge any evidence of mitigation whatsoever.
2 Unless the defendant provides compelling reasons to wait, the Prosecutor intends to make his
3 decision regarding the death penalty by September 1, 2010, and proceed with preparations for
4 trial.

5 III. ARGUMENT

6 A. The King County Prosecutor Has Always Conducted an Individualized 7 Weighing of any Mitigating Evidence Before Deciding Whether or Not to 8 Seek the Death Penalty.

9 In his motion, the defendant repeatedly asserts that the prosecution has adopted a "one
10 size fits all"⁵ timetable for receipt of mitigation information. He claims that the Prosecutor has
11 adopted a "fixed deadline of 90-120 days" for the mitigation investigation in this case.⁶ This is
12 simply not true. In this case, as in other recent potential capital cases, the Prosecutor has been
13 willing to extend the period for making his decision where defense counsel negotiate in candor
14 and good faith for such an extension. Such candid discussions require sharing some information
15 about the progress of the defense mitigation investigation and the prospects for a fruitful end to
16 that process. In the recent and more distant past, numerous cases have been handled successfully
17 in this way. There is no fixed 90-120 day rule.⁷

18 Moreover, the defendant's assertions are irrelevant to his current motion. To date, the
19 defendant has been granted more than 36 weeks (250 days) – more than double the claimed
20 "fixed deadline" of 90-120 days – to provide the State with any mitigation evidence.⁸ The

21 ⁵ Defendant's Memorandum at 7.

22 ⁶ Defendant's Memorandum at 6.

23 ⁷ See Larson Declaration at 1.

24 ⁸ Even the defendant concedes that 250 days is well more than the average allowed in the last dozen-plus aggravated murder cases filed by the King County Prosecutor's Office. Defendant's Memorandum at 6.

RESPONSE TO DEFENSE MOTION FOR FINDING
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1 defendant has refused to provide anything. Instead, the defendant complains that his mitigation
2 work could not be started until March 31, 2010⁹ -- almost four months after he was arraigned.
3 The prosecution has been provided with no explanation as to why three defense attorneys -- at
4 least two of whom have no professional responsibility except to represent the defendant -- were
5 not able to even begin a mitigation investigation in the time between the defendant's December
6 14, 2009 arraignment and March 31, 2010. Even if no "mitigation expert" was available during
7 that time, and even if the defendant was unwilling or unable to participate in the process of
8 searching for evidence of mitigation, it is simply not credible that his attorneys were unable to
9 proceed.

10 Nevertheless, in May, 2010, the State agreed to give the defendant additional time to
11 provide *any* mitigation. None was provided. The Prosecutor has extended the notice deadline
12 twice. This can hardly be classified as an inflexible and fixed "one size fits all" timetable.

13 Further, defense counsel's timetable appears to be arbitrary. By their own projections of
14 the time necessary to interview witnesses, they would actually need years to complete a
15 mitigation packet. This is wholly unreasonable, and certainly contrary to what the legislature
16 intended when it directed the prosecutor to file a notice within 30 days.

17 It is possible that the defendant's lawyers have decided (perhaps as a result of any search
18 for mitigating evidence that they have conducted) that the Prosecutor will seek the death penalty
19 in this case. If so, they would have no incentive to divulge any evidence purporting to show e.g.,
20 the defendant's mental health and would, on the contrary, benefit by withholding that evidence
21 from the prosecution until the last possible moment and seeking, in the meantime, as many
22

23 ⁹ Defendant's Memorandum at 7.
24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 extensions of the notice period as possible. This possible strategy is not one the prosecution or
2 the court must indulge -- particularly when the prospects for receiving any meaningful mitigating
3 evidence from the defense have never been articulated.¹⁰

4 **B The Prosecutor will Conduct an Individualized Weighing of Any Evidence of**
5 **Mitigation in this case**

6 RCW 10.95.070 sets forth seven mitigating factors that the jury, and hence the
7 prosecutor, should consider in deciding whether lenience is merited:

8 (1) Whether the defendant has or does not have a significant history, either as a
9 juvenile or an adult, of prior criminal activity;

10 (2) Whether the murder was committed while the defendant was under the
11 influence of extreme mental disturbance;

12 (3) Whether the victim consented to the act of murder;

13 (4) Whether the defendant was an accomplice to a murder committed by another
14 person where the defendant's participation in the murder was relatively minor;

15 (5) Whether the defendant acted under duress or dominion of another person;

16 (6) Whether, at the time of the murder, the capacity of the defendant to appreciate
17 the wrongfulness of his or her conduct or to conform his or her conduct to the
18 requirements of law was substantially impaired as a result of mental disease or
19 defect. However, a person found to be mentally retarded under RCW
20 10.95.030(2) may in no case be sentenced to death;

21 (7) Whether the age of the defendant at the time of the crime calls for leniency;
22 and

23 (8) Whether there is a likelihood that the defendant will pose a danger to others in
24 the future.

¹⁰ If the defense or the court believes that prospects for mitigation evidence have been communicated in ex parte proceedings, and that those prospects are sufficient to justify extension of time, then this information needs to be communicated directly to a representative of the prosecutor's office. The existence of such communications may also call into serious question the scope, extent, and propriety of such ex parte discussions.

RESPONSE TO DEFENSE MOTION FOR FINDING
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1 In the present case, the Prosecutor will consider all of these circumstances and determine
2 whether any of them warrants leniency. Some of these factors clearly require no investigation,
3 and need not be the subject of a "mitigation package." The defendant has no significant criminal
4 history. Officer Brenton did not consent to being murdered. The defendant is no one's
5 accomplice, and there is no evidence of duress. The defendant is 41 years of age.

6 It seems apparent that the most fruitful subject of any mitigation investigation would be
7 the defendant's mental state -- whether or not the defendant was under the influence of any
8 extreme mental disturbance immediately before, during, or after the crimes, and whether he was
9 insane or suffering from diminished capacity at the time of the crimes.

10 The State's investigation into the crimes of October 22, October 31, and November 6,
11 2009, has yielded a great quantity of evidence relevant to any determination of the defendant's
12 mental state at the time. This evidence includes interviews with dozens of his associates, family
13 members, fellow employees and students, teachers, and others. Many of these interviews are
14 directly relevant to any inquiry concerning the defendant's mental health. All of this evidence
15 has been provided to the defense. They have never cited any of it to us, formally or informally,
16 as evidence of mitigation.

17 Other evidence relevant to the defendant's mental health and mental state at the time of
18 these crimes consists of physical evidence seized during the investigation -- particularly,
19 evidence seized from the defendant's residence. The defendant's attorneys have been aware for
20 months that this physical evidence includes many documents, including the defendant's own
21 writings (some of which are explicitly related to the crimes with which he is charged). In
22 addition to knowing through the discovery process that this evidence exists, the defense knows

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1 of it because some of it was taken into evidence in their presence, at their request, in the
2 defendant's residence. They have never examined this evidence.¹¹

3 Mental health and mental state can, of course, be assessed by trained mental health
4 experts. The prosecution does not have the ability to initiate a mental health examination of the
5 defendant, and the prosecution is unaware of any mental health examination that the defendant
6 has ever undergone. The defendant's attorneys have asserted repeatedly in court and in pleadings
7 that the defendant has mental problems, but have refused to proffer the slightest evidence to the
8 prosecution that would support this claim. Perhaps, like a "mitigation expert," a qualified
9 mental health expert has proved difficult for the defendant's attorneys to retain. But the attorneys
10 have not even provided the prosecution with the defendant's medical records from the King
11 County Jail -- something that they could easily and quickly do, and something that would,
12 presumably, support their frequent references to the defendant's pain, his medication, and his
13 mental condition.

14 **C. The Prosecutor is not required to wait for the Defendant to present him with**
15 **a "Mitigation Package" before Making His Decision.**

16 RCW 10.95.040 authorizes the State to file a Notice of Special Sentencing Proceeding in
17 cases of Aggravated Murder in the First Degree to determine whether the death penalty should
18 be imposed. The statute provides:

19 The notice of special sentencing proceeding shall be filed and served on
20 the defendant or the defendant's attorney within thirty days after the
21 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.

22 _____
23 ¹¹ See Declaration of Jeff Baird Re: Defendant's Claims of New Discovery, attached hereto, hereinafter "Baird
Declaration," at 2-5.

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1 RCW 10.95.040(2). The statute was drafted to ensure that defendants would have early notice of
2 the State's intent to seek a death sentence.

3 The prosecuting attorney is required to consider mitigation before deciding whether to
4 file a notice of special sentencing proceeding. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245
5 (1995); RCW 10.95.040(1). However, there is no provision in RCW 10.95.040 that confers on a
6 defendant the right to present the prosecutor with what he considers a completed "mitigation
7 package," including all the mitigating evidence he suspects might exist somewhere, before the
8 prosecutor may make his decision. In Pirtle, the prosecutor made a decision to seek the death
9 penalty thirty days after the defendant's arraignment, without any input from the defense. On
10 appeal, the defendant claimed that the prosecutor failed to consider mitigating evidence, thereby
11 abusing the discretion afforded him by RCW 10.95.040(1). The Washington Supreme Court
12 made short work of this argument. The court noted:

13 Because of Pirtle's [criminal] history, the prosecutor had some
14 information about each of the statutory mitigating factors, with the possible
exception of the Defendant's mental state at the time of the crime.

15 Given what the prosecutor already knew and his willingness to wait
16 thirty days to see if the defense could develop additional information, we
find the prosecutor did not abuse his discretion.¹²

17 The statute requires the Prosecutor consider evidence of mitigation; it does not mandate
18 that the defendant must be the source of that evidence. The reason it does not is obvious: if the
19 statute required the Prosecutor to depend on the defendant to supply mitigation evidence, the
20 defendant could hold the prosecutor's decision hostage indefinitely. In a potential capital case --
21 especially a case with strong evidence of guilt and aggravating circumstances, and little apparent

22
23 ¹² Pirtle, 127 Wn.2d at 643.

24 RESPONSE TO DEFENSE MOTION FOR FINDING
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1 evidence of mitigating circumstances -- this power to forestall judicial proceedings is simply not
2 vested in the only person who might benefit by delay.

3
4 As noted by the defendant, "[i]nput from the defendant as to mitigating factors is
5 normally desirable¹³." Pirtle, 127 Wn.2d at 642. Indeed, it is the long-standing practice of the
6 King County Prosecutor to solicit and carefully consider such input from defense attorneys, a
7 practice that the Prosecutor would agree is "normally desirable." However, this practice, which
8 has worked well in other cases, does not confer a strategic advantage on a defendant who wishes
9 to delay that decision as long as possible. Prior to making the decision to seek the death penalty,
10 a prosecutor simply "must perform individualized weighing of the mitigating factors-an
11 inflexible policy is not permitted." Id., *citing In re Harris*, 111 Wn.2d 691, 693, 763 P.2d 823,
12 (1988), *cert. denied*, 490 U.S. 1075 (1989). RCW 10.95.040 is completely silent regarding
13 defense-provided mitigation, yet the defendant argues that "[w]ithout a complete mitigation
14 package from the Defense, the prosecutor will be unable to properly perform the 'individualized
15 weighing' of mitigating circumstances required under RCW 10.95.040."¹⁴ This is simply wrong.
16 If the "complete mitigation package" desired by this defendant were statutorily required, the
17 legislatively-directed 30 days would *never* be sufficient .

18 The Prosecutor will, with or without any input from the defendant's attorneys, carefully
19 weigh all the evidence of mitigation available to him and make his decision.
20
21

22 ¹³ Pirtle, 127 Wn.2d at 642.

23 ¹⁴ Defense Motion at 9.

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1 **D. The Prosecuting Attorney Will Consider Any And All Mitigation Evidence**
2 **Whenever It Is Presented**

3 The defendant claims that he will be denied effective assistance of counsel if this court
4 does not extend the filing period for the notice of the special sentencing proceeding.
5 Specifically, he appears to argue that, once the Prosecutor has made his decision, any mitigation
6 that is provided to the State will be ignored. This claim is without foundation. In fact,
7 Attachment B to the defendant's brief included a letter from Erin Ehlert on behalf of the
8 prosecutor, Daniel T. Satterberg. As noted in that letter, even though the Prosecutor intends to
9 make the decision contemplated in RCW 10.95.040 by September, 3, 2010, the defendant is told
10 that, "[a]s is our practice, our office will always consider any evidence of mitigation presented to
11 us at any stage of a criminal prosecution." Should the Prosecutor conclude that the death penalty
12 is not something that should be considered in this case, then the issue is moot. However, should
13 the Prosecutor decide to seek the death penalty, then the State has every belief that defendant's
14 counsel will do everything in their power to ensure that his mitigation materials, witnesses, and
15 evidence are thorough and complete in anticipation of the sentencing phase of the trial. As such,
16 the defendant should be able to provide this mitigation to the State at some later date and any
17 such mitigation will certainly be considered.

18 The defense cites State v. Brett as an example of a case in which a defendant's death
19 sentence was overturned because the defense attorney was ineffective at the pretrial mitigation
20 phase. 142 Wn.2d 868, 16 P.3d 601 (2001). However, the defendant misstates the breadth of the
21 holding in Brett. The defendant neglects to point out that, in addition to the defense attorney's
22 failure to provide the State with a mitigation package prior to the prosecutor filing the notice of
23 special sentencing proceeding, the court found five additional defects in the attorney's

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1 performance. After noting all six areas of concern, the court concluded, "While the failure to
2 perform one of these actions alone is insufficient to establish ineffective assistance of counsel,
3 *the failure to perform the combination of these actions* establishes that defense counsel's actions
4 in Brett's trial were not reasonable under the circumstances of the case." *Id.* at 882-83 (emphasis
5 in original). The court specifically found that the failure of the attorney to provide mitigation to
6 the State prior to the decision to file the notice of special sentencing proceedings did not in and
7 of itself constitute ineffective assistance of counsel.

8 **E. An Order Of This Court Precluding the King County Prosecutor from**
9 **Making a Decision re: Whether or Not to Seek the Death Penalty Until A**
10 **Specific Date Would Violate The Separation Of Powers Doctrine**

11 Washington law confers on the Prosecuting Attorney the exclusive discretion to decide
12 whether to seek the death penalty in a prosecution for Aggravated Murder in the First Degree.
13 RCW 10.95.040(2). "[T]he prosecutor's decision whether to file charges or to plea bargain is an
14 executive, not adjudicatory, decision. This court has never recognized a prosecutor's discretion to
15 file charges or to seek the death penalty as a judicial function. . . . A prosecutor's determination
16 to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in
17 nature[.]" *State v. Finch*, 137 Wn.2d 792, 809-10, 975 P.2d 967 (1999) (discussing applicability
18 of the appearance-of-fairness doctrine to the decision to seek the death penalty).

19 In *Pirtle*, 127 Wn.2d 628, the defendant claimed that the Prosecuting Attorney had abused
20 his discretion by, among other things, refusing to extend the 30-day deadline for filing the notice
21 of the special sentencing proceeding in order to permit the defense to present mitigation
22 evidence. The Washington Supreme Court held that so long as the Prosecuting Attorney fulfills

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1 his statutory duty to consider evidence in mitigation, there is no error in his refusal to extend the
2 30-day deadline for filing the notice.

3 The defendant nevertheless argues that RCW 10.95.040(2) merely gives the prosecutor
4 "procedural control" over the timing of the notice to the court. Def. Brief at 13. He contends
5 that this statute is similar to the "court's control of the timing of an amendment to an
6 Information" as set forth in CrR 2.1(d). Unlike RCW 10.95.040(2), CrR 2.1 specifically
7 provides that "[t]he court may permit any information or bill of particulars to be amended at any
8 time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR
9 2.1(d) (emphasis added). Obviously, CrR 2.1(d) requires the court, prior to allowing an
10 amendment, to consider whether the amendment would affect a substantial right of the
11 defendant. If the court finds that the defendant's rights would be violated, then it will not allow
12 the amendment.

13 RCW 10.95.040(2), on the other hand, does not require the court to make any assessment
14 of the defendant's rights. It is the State, not the defendant, that must show good cause to extend
15 the deadline. Moreover, even if the defendant were correct in that the court could extend the
16 *deadline* over the State's objection, the court has no authority to prohibit the prosecutor from
17 *filing the notice*. The filing of a notice requires no judicial approval, review, or input. In fact,
18 the case law is replete with example of what constitutes proper notice under RCW 10.95.040(2),
19 and none of them involves any judicial intervention. See State v. Cronin, 130 Wn.2d 392, 923
20 P.2d 694 (1996) (delivery of notice of intent to seek death penalty to defense counsel's
21 receptionist adequate service under the statute); State v. Lord, 123 Wn.2d 296, 868 P.2d 835
22 (1994) (filing of notice of intent to seek death penalty at time of filing of charges was valid).

23 RESPONSE TO DEFENSE MOTION FOR FINDING
24 GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 13

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
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1 That is because the filing of the notice is a purely executive function and a court's order
2 forbidding the prosecutor from making a decision would clearly be a violation of the separation
3 of powers doctrine.

4 Finally, the defendant claims that "the court may properly place preconditions on the
5 filing of a death notice where the rights of a defendant would be prejudiced by the failure of the
6 State to comply with the statutory and constitutional requirement to consider individualized
7 mitigating evidence." Def. Brief at 14. Not surprisingly, the defendant provides no authority for
8 this assertion. None exists. As noted above, the Prosecuting Attorney has already gathered an
9 abundance of information about the defendant, his background, his education, and the facts of
10 the crimes.

11 The defendant argues that the State will suffer no prejudice from an extension of the time
12 to file the notice of special sentencing proceedings. This is incorrect. Delay in any case, but
13 particularly in one as serious as this, acts to undermine public confidence in the criminal justice
14 system. Courts have long recognized that a right as basic as speedy trial serves two ends: "The
15 establishment of speedy trial limits by rule was designed to insure the prompt disposition of
16 criminal cases in the interest of both the public and the defendant." State v. Duggins, 68
17 Wn.App. 396, 400, 844 P.2d 441 (1993) (quoting Federated Publications, Inc., v. Swedberg, 96
18 Wn.2d 13,17, 633 P.2d 74, cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982):
19 The speedy trial rule "is designed to protect not only the right of the accused to a speedy trial but
20 the interest of the public in seeing that the administration of justice is expedited.")

21 This principle has application beyond speedy trial considerations:

22 In addition to the defendant's interest in exoneration, the public also has significant
23 interests in expeditious processing of criminal complaints. These public interests are also

24 RESPONSE TO DEFENSE MOTION FOR FINDING
GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 14

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1 part of the basis for both constitutional and statutory speedy trial protections. For
2 example, the public depends upon the efficient disposition of criminal charges so that it
3 can be assured that a defendant who is guilty of a crime will face relatively immediate
4 sanctions. As noted by the Supreme Court, a large backlog of cases may enable
5 defendants to "negotiate more effectively for pleas of guilty to lesser offenses and
6 otherwise manipulate the system."

7 3 N. Hollander, B. Bergman, M. Stephenson, T. Duncan, Wharton's Criminal Procedure, ¶14:2
8 (14th ed. 2006).

9 IV. CONCLUSION

10 In potential capital cases, the King County Prosecutor has always made an individualized
11 weighing of mitigating evidence against the facts of the crime before making a decision whether
12 or not to seek the death penalty. This case will be no exception.

13 In this case, the Prosecutor has repeatedly extended the period during which he will defer
14 his decision to afford the defendant's attorneys the opportunity to present him with evidence of
15 mitigation. He has deferred his decision for some 259 days since arraignment. The defendant's
16 attorneys have provided him with no mitigating evidence whatsoever during this time, claiming
17 that their investigation is incomplete. Efforts to obtain mitigating evidence from the attorneys
18 have been summarily rebuffed.

19 The prosecution has developed considerable evidence, from a variety of sources, relevant
20 to all of the mitigating factors, including those that pertain to the defendant's mental health
21 history and his mental state at the time of the crimes. This evidence includes numerous
22 documents from the defendant's apartment (many of which contain the defendant's own
23 handwriting), physical evidence, results of laboratory examinations, and interviews with
24 numerous associates, family members, teachers, and co-workers of the defendant.

25 RESPONSE TO DEFENSE MOTION FOR FINDING
26 GOOD CAUSE TO EXTEND MITIGATION
27 DEADLINE FOR FILING AND SERVICE OF
28 NOTICE TO PROCEED WITH SPECIAL
29 SENTENCING PROCEEDINGS - 15

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1 All of the evidence in the possession of the prosecution has been provided to the
2 defendant's attorneys. In addition to providing the prosecution with no evidence from their own
3 investigation, they have pointed to no mitigating evidence that may arise from the evidence
4 provided to them by the prosecution. It is possible the defendant's attorneys, having sought
5 mitigating evidence and found little or none, are merely delaying the legal process in this case
6 for tactical or strategic advantage.

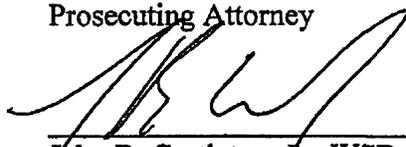
7 The Prosecutor will always consider mitigating evidence, from any source, at any time,
8 and he is not obliged, particularly under these circumstances, to delay his decision on the
9 appropriate penalty in this case until a time of the defendant's choosing.

10 The defendant's motion for an order enjoining the Prosecutor from making his decision
11 until December of 2010 is unsupported by authority, violates the Separation of Powers Doctrine,
12 and is contrary to general principles of sound jurisprudence.

13 His motion should be denied.

14
15 RESPECTFULLY SUBMITTED this 23rd day of August 2010.

16 DANIEL T. SATTERBERG
17 Prosecuting Attorney

18 
19 John B. Castleton, Jr., WSBA #29445
Senior Deputy Prosecuting Attorney

20 
21 Jeff Baird, WABA #11731
Senior Deputy Prosecuting Attorney

22
23 RESPONSE TO DEFENSE MOTION FOR FINDING
24 GOOD CAUSE TO EXTEND MITIGATION
DEADLINE FOR FILING AND SERVICE OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS - 16

Daniel T. Satterberg, Prosecuting Attorney APP000145
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ATTACHMENT A
Declaration of Mark Larson

APP000146

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

DECLARATION OF MARK LARSON

I am the Chief Criminal Deputy of the King County Prosecutor's Office, in and for King County, Washington. I am familiar with the records and files in the above-entitled case, and declare that:

1. Despite defense counsel's repeated assertions to the contrary, at no time has the King County Prosecuting Attorney, Daniel Satterberg, instituted a "one size fits all" approach to aggravated first degree murder cases under RCW 10.95. Moreover, I have never stated, either in writing or otherwise, that the Prosecutor has a "new policy" of setting a fixed deadline of 90-120 days for mitigation work in capital cases, nor does such a policy exist. As noted below, the first agreed extension of time in the present case was for six months, or 180 days. The second

1 extension of time brought the total amount of time for defense to provide the State with
2 mitigation information to approximately 250 days.

3 2. The King County Prosecutor's Office has a long-standing history of working
4 closely with defense counsel during their efforts to present us with evidence of mitigation in
5 cases governed by RCW 10.95. In my experience, this frequently involves a give and take in
6 which the defense shares preliminary information, including reports from experts, as a basis to
7 persuade the Prosecutor to delay the decision required by RCW 10.95. Rarely have these
8 negotiations resulted in all of the time requested by the defense. Still, our decision making
9 process has frequently been informed by input from the defense.

10 3. In this case, as detailed below, the defense has refused to provide any information
11 as a part of the discussion about the extension of time. Moreover, they have, from an early point,
12 declared that they cannot provide *any* mitigation until their investigative process is entirely
13 completed (a process which they have consistently estimated to take almost a year from the
14 defendant's arraignment). The correspondence between the parties in this case is outlined below.

15 4. On December 14, 2009 I provided a letter to the defense counsel setting forth the
16 Prosecutor's expectations regarding the mitigation process in the present case. In that letter, I
17 informed counsel that the Prosecutor would make his decision whether to file a notice to seek a
18 special sentencing proceeding by June 15, 2010. I further informed defense counsel that any
19 defense mitigation materials to be considered by the Prosecutor before his decision must be
20 submitted to my office no later than May 15, 2010. (See Appendix 1). June 15, 2010 is six
21 months after charges were filed and five months after the defendant was arraigned.

22 5. On December 29, 2009, a hearing was held before Judge Kessler, at which time
23 the court signed an AGREED ORDER EXTENDING THE PERIOD FOR FILING AND
24

1 SERVICE OF THE NOTICE OF SPECIAL SENTENCING PROCEEDING PURSUANT TO
2 RCW 10.95.040(2) establishing the June 15, 2010 date set forth above. (See Appendix 2).

3 6. On January 26, 2010, I provided defense counsel with a letter correcting the date
4 by which time they were to provide any mitigation materials from May 15 to May 17, 2010 (the
5 15th was a Saturday). (See Appendix 3).

6 7. On February 24, 2010, defense counsel, in response to my letter of January 26,
7 2010, sent the prosecution a letter indicating that they felt that it was unlikely that they would be
8 able to meet the May 14, 2010 deadline for submission of mitigation information. (See
9 Appendix 4).

10 8. On May 5, 2010 John Castleton and I met with defense counsel to discuss the
11 upcoming mitigation deadline. During that meeting, defense counsel stated that they were
12 unwilling to provide the State with any information about the mitigation information that they
13 were collecting. Moreover, defense counsel stated that they had had some difficulty with their
14 mitigation expert's availability to work on this case and that they also were having funding issues
15 with the Office of Public Defense (OPD). Defense also indicated that they believed they would
16 not be able to provide any mitigation information until December 1, 2010, at the earliest.

17 9. On May 6, 2010, defense counsel provided the State with a letter, reiterating their
18 belief that December 1, 2010 was the earliest possible time by which they could submit any
19 mitigation materials. (See Appendix 5).

20 10. On May 10, 2010, I sent the defense a letter stating that, due to the difficulties
21 they expressed during the May 5 meeting, the Prosecuting Attorney was willing to extend the
22 deadline for the submission of mitigation materials to August 2, 2010 -- but only if defense
23 counsel was willing to commit to providing the State with mitigation by that date. I further
24

1 informed defense counsel that the Prosecutor would then make his decision on whether to file a
2 notice to seek a special sentencing proceeding on September 3, 2010. August 2 is nine months
3 from the date of the crime and eight months from arraignment. (See Appendix 6).

4 11. On May 11, 2010, Mr. Castleton and I again met with defense counsel to discuss
5 mitigation. During that meeting, defense counsel reiterated their belief that they would be unable
6 to provide the State with any mitigation materials until December 1, 2010.

7 12. On May 17, 2010, defense counsel sent the Prosecutor a letter indicating that they
8 would likely not be able to provide a "competent mitigation package" to the State by the August
9 2, 2010 deadline and would not commit to doing so. (See Appendix 7).

10 13. On May 20, 2010, I provided defense counsel with a letter indicating that the
11 Prosecutor had agreed to extend the date by which any mitigation information was to be
12 provided to the State to August 2, 2010. I further advised defense counsel that the prosecutor
13 looked forward to reviewing any and all information they had developed by that date, regardless
14 of whether it was in completely finished format. I further advised defense counsel that the new
15 deadline for the prosecutor to decide on whether to file a notice to seek a special sentencing
16 proceeding would be September 3, 2010. (See Appendix 8).

17 14. On May 24, 2010, defense counsel provided me with a letter expressing thanks
18 for the extension of the deadlines. Defense counsel indicated that they continued to work
19 diligently on developing mitigation information. (See Appendix 9).

20 15. On June 4, 2010, a hearing was held before this court, at which time the court
21 signed a SECOND AGREED ORDER EXTENDING THE PERIOD FOR FILING AND
22 SERVICE OF THE NOTICE OF SPECIAL SENTENCING PROCEEDING PURSUANT TO
23
24

1 RCW 10.95.040(2) establishing the new September 3, 2010 date noted above. (See Appendix
2 10).

3 16. On July 26, 2010, defense counsel provided the Prosecutor with a letter stating
4 that they would be unable to provide the State with any mitigation information by the August 2
5 date due "to the fact that we were not far enough in the process to offer more than our opinions
6 without the data to support them. This continues to be the case." (See Appendix 11). Defense
7 counsel again stated that December 1, 2010 was a "more realistic" deadline for presentation of
8 the mitigation materials.

9 17. On August 3, 2010, I provided defense counsel with a letter indicating that I was
10 in receipt of their July 26 letter. I stated that, given that nine months had passed since the date of
11 the crime and eight months had passed since arraignment, the Prosecutor was unwilling to extend
12 the date by which he would make his decision contemplated by RCW 10.95.040. I further noted
13 that, although the Prosecutor would make his decision by September 3, 2010, the Prosecutor
14 would consider any evidence of mitigation presented to him at any stage of the prosecution. (See
15 Appendix 12).

16 18. On August 10, 2010, defense counsel provided the Prosecutor with a letter
17 explaining the various difficulties they have encountered in developing a "complete mitigation
18 package." (See Appendix 13). Defense counsel stated that they will not be providing any
19 mitigation materials to the State prior to the September 3, 2010 deadline. However, they go on
20 to state:

21 In light of the fact that Mr. Larson's letter indicates that you will consider
22 mitigation evidence at any stage of the proceedings, we will continue to work
23 toward preparing a mitigation package detailing our investigation into Mr.
24 Monfort's life history, mental state and other factors relevant to your
determination on whether to seek the death penalty in this case. However, we
strongly believe that there will be a greater potential for a future resolution of this

1 case if you defer making and announcing that decision until we have had adequate
2 time to complete our work and present it to you.

3 Appendix 13.

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

6
7 Signed and dated by me this 23rd day of August, 2010, at Seattle, Washington.

8 

9 Mark Larson, WSBA #15328
10 Chief Deputy, Criminal Division

APPENDIX 1

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

December 14, 2009

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

Dear Julie and Paige:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than June 15, 2010, six months from today's arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than May 15, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of June 1 -5, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

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APPENDIX 2

APP000155

PHOTOCOPY

FILED
KING COUNTY, WASHINGTON
DEC 29 2009
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-1-07187-6 SEA

vs.

CHRISTOPHER J. MONFORT

Defendant.

AGREED ORDER EXTENDING THE
PERIOD FOR FILING AND SERVICE
OF THE NOTICE OF SPECIAL
SENTENCING PROCEEDING
PURSUANT TO RCW 10.95.040(2)

THIS MATTER having come on regularly before the above-entitled court upon the motion of the defendant for an order in the above-entitled matter to extend the statutory period under RCW 10.95.040(2) for filing and serving the notice of a special sentencing proceeding, the court being advised in the premises, having heard the representations of defense counsel as to why an extension of the statutory period is necessary, having heard the defendant's verbal agreement to the requested extension of the statutory period in open court and in the presence of counsel, and being advised that the State consents to the requested extension of the statutory period; now, therefore, finds that good cause has been shown and demonstrated in that additional time is necessary for review of the discovery to date and for investigation into the matter, and for

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955
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1 review of issues relating to potential mitigation, in addition to reasons proffered in open court
 2 and herein included by reference; it is hereby

3 ORDERED, ADJUDGED and DECREED that the defendant's motion is granted; the
 4 court therefore extends the statutory period under RCW 10.95.040(2) for the filing and service of
 5 the notice of a special sentencing proceeding. Any such notice shall be filed and served,
 6 therefore, by June 15, 2010.

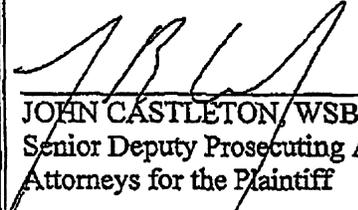
7 DONE IN OPEN COURT this 29th day of December, 2009.

8
 9
 10 
 HONORABLE PALMER ROBINSON
Ronald Kessler

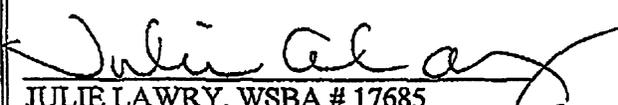
11 Order presented by:

12 For DANIEL T. SATTERBERG, King County Prosecuting Attorney,

13
 14 _____
 JEFF BAIRD, WSBA #11731

15 
 16 _____
 JOHN CASTLETON, WSBA #29445
 Senior Deputy Prosecuting Attorneys
 Attorneys for the Plaintiff

17
 18 Motion brought by and order approved by: *as to form*

19 
 20 _____
 JULIE LAWRY, WSBA # 17685

21
 22 _____
 PAIGE GARBERDING, WSBA #11825
 Attorneys for Defendant

23
 24
 Daniel T. Satterberg, Prosecuting Attorney
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 APP000 57

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney
CRIMINAL DIVISION
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(206) 296-9000

January 26, 2010

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

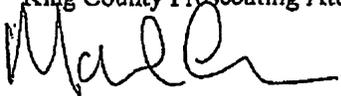
Dear Julie and Paige:

It was recently brought to my attention that our initial letter to you regarding the mitigation process in this case had an incorrect date listed for the deadline of the mitigation materials. Rather than have materials submitted on a Saturday, any defense mitigation materials must be submitted to our office no later than Monday, May 17, 2010. All other dates remain as we set out on our letter of December 14, 2009.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney



Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

APP000158



Associated Counsel for the Accused

310 Prefontaine Place S. Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

February 24, 2010

Mark Larson, Chief Deputy, Criminal Division
Office of the Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Monfort, No. 09-1-07187-6 SEA

Dear Mark:

We just wanted to respond briefly to your January 26th letter. First, thank you for updating us on the due date for our mitigation package. It looks like nobody caught the fact that the original due date was on a Saturday.

Secondly, we want to reiterate that while we are working diligently to compile all of the necessary mitigation materials in time to submit them by May 17th, that deadline is looking increasingly unrealistic given the complexities of the case and Mr. Monfort's life history. As you know, case law and the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* mandate that we investigate every aspect of Mr. Monfort's life in determining what information and evidence to present as mitigation. *See also Wiggins and Rompilla*. Although we have been striving to accomplish that goal, we are just beginning the process of interviewing potential mitigation witnesses and obtaining records from Mr. Monfort's background. It is clear that, projecting forward, the current deadline will likely be unworkable and ultimately preclude us from providing your office with a mitigation package that is sufficiently comprehensive to enable Mr. Satterberg to make an informed decision on whether to seek the death penalty in this case. It now appears increasingly likely that more time will be needed for us to provide your office with a mitigation package that satisfies our legal obligations.

One reason that complicates our ability to compile and present mitigation materials is that Mr. Monfort is forty years old and has never been incarcerated. As a result, he has lived a longer period of time out of custody than most capital defendants and there are substantially more records that will need to be gathered and witnesses to be interviewed than would be present in most aggravated murder cases. In addition, Mr. Monfort has moved around a great deal in his life and it appears that we will need to gather records and other information in at least six different states. Moreover, Mr. Monfort's relatives

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are spread around the United States in at least seven different states. We will need to locate, contact and interview these individuals before compiling our mitigation materials.

We understand that these issues will need to be addressed in court at future hearings as the deadline for presentation of mitigation materials approaches. However, we did not want your office to infer that we acquiesce in the May 17th deadline. Our constitutional duty to Mr. Monfort requires a comprehensive investigation, and it now appears increasingly unlikely that we will be able to discharge that duty under the current deadline.

Sincerely,



Julie Lawry
Carl Luer
Stacey MacDonald

Attorneys for Christopher Monfort

cc: Jeff Baird, John Castleton and Ian Goodhew

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APPENDIX 5

APP000161



Associated Counsel for the Accused

110 Prefontaine Place S, Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

Mark Larson
John Castleton
Office of the Prosecuting Attorney
Criminal Division
West 544 King County Courthouse
516 Third Avenue
Seattle, WA 98104

May 6, 2010

RE: State v. Christopher Monfort

Dear Mark and John,

Thank you for inviting us to your office to discuss our progress in preparing the mitigation materials on behalf of Mr. Monfort. We are sorry that Mr. Satterberg and Mr. Baird were unable to join us but do appreciate the fact that your office is equally invested in ensuring that the mitigation investigation is both properly done but also that your office has an opportunity to review a complete and thorough package.

We appreciate your office's commitment to abide by its legal mandate to consider fully whether there are sufficient mitigating circumstances to merit leniency in each case before deciding whether to seek the death penalty for an aggravated murder charge. As we explained yesterday, we have encountered circumstances that will clearly prevent us from providing you with the information necessary to make that determination by the current deadline. Because of the work remaining to be done, the December 1st date we have requested is the earliest time by which we can submit adequate mitigation materials to you in order to enable your office to satisfy that legal obligation. We appreciate your willingness to meet with us and give serious consideration to this request.

Sincerely,

Julie A. Lawry
Carl Luer
Stacey MacDonald

APP000162

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

May 10, 2010

Julie A. Lawry
Carl Luer
Stacey McDonald
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Cause No. 09-1-07187-6 SEA

Dear Ms. Lawry, Mr. Luer, and Ms. McDonald:

First, I wanted to again thank you for taking the time to meet with John and me last week. Second, I wanted to respond to the letter you emailed on May 6, 2010. As we promised, the information that you provided to us regarding the difficulties you were encountering with the gathering and preparation of your mitigation materials has been conveyed to Mr. Satterberg.

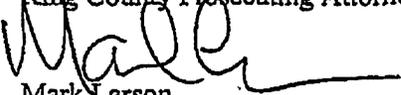
Appreciating these difficulties, Mr. Satterberg has agreed to extend the deadline for you to submit any mitigation materials you would like him to consider to August 2, 2010. Mr. Satterberg will then make his decision on whether to file a notice to seek a special sentencing proceeding on September 3, 2010. You may also meet with Mr. Satterberg during the week of August 16-20.

This extension is contingent, however, upon your commitment to providing us with mitigation materials by August 2, 2010. If you do not intend to present us with any mitigation on that date, or do not reasonably believe you can meet this deadline, then Mr. Satterberg will make his decision by the current deadline of June 15, 2010.

Thank you again for your letter and I hope to hear from you soon.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney


Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000163



Associated Counsel for the Accused
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Ph. (206) 624-8105 Fax (206) 624-9339

May 17, 2010

Mark Larson, Chief Deputy Criminal Division
Jeff Baird, Senior Deputy Prosecuting Attorney
John Castleton, Senior Deputy Prosecuting Attorney
Office of the King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA. 98103

Re: State of Washington v. Christopher Monfort
Cause No. 09-1-07187-6 SEA

Dear Mr. Larson:

First, we would like to thank you for meeting with us on May 5th and again on May 11th to discuss the status of the mitigation deadline on Mr. Monfort's case.

At these meetings we shared as much as we could with you consistent with the attorney-client privilege, the *ABA Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases* and the ethical rules governing our conduct. In an attempt to assure you that we are diligently working and at the same time exercising our duties to Mr. Monfort, we have filed Status Reports *ex parte* and under seal with Judge Kessler in order to provide you with an independent assessment of the efforts we are making in gather the mitigation. Judge Kessler stated in open court that the Defense was working diligently and aggressively in light of a number of delays that were out of our control. Mr. Larson indicated that he accepted our assertions of the efforts and complications that have arisen in this endeavor.

We reiterated our concern that we cannot discharge our constitutional duty to our client in the time frame that you have set. This is the same concern we notified your office of in our February 24, 2010 letter. You told us that you could not agree to a continuance because of your concern for wasting valuable time. You also told us that if we did not agree to the deadline you picked of August 2, 2010, that Mr. Satterberg would make his decision regarding the filing of the death notice, without any defense input, on June 15, 2010.

We do not believe that is consistent with his duty under RCW 10.95.020(1) and, depending upon his decision, will make that argument to the appropriate tribunal. The duty imposed on the Prosecuting Attorney under RCW 10.95.020 (1) requires the prosecutor to ask whether there is a reason to believe that there are no sufficient mitigating circumstances to merit leniency. The term "mitigation" is all encompassing and incorporates "any aspect of a defendant's character or record and any of the circumstances of the offences that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed.2d 973 (1978).

While we have tried diligently to gather mitigation information to present to your office, the deadline given by your office is not realistic under the circumstances of Mr. Monfort's case and our ongoing obligations under the *ABA Guidelines* and the Rules of Professional Conduct. Should Mr. Satterberg make a decision with out defense input, we believe that he will violated his obligation to fully and fairly consider mitigation in this case.

"Without presentation of mitigation evidence at this critical stage, a prosecutor has no ability to sufficiently and objectively distinguish among aggravated first-degree murder defendants. A death sentence may be pursued not for the "worst of the worst" but rather for those who present no mitigation evidence. Therefore, the death penalty is sought in situations where it may not, in fact, be warranted, and proportionality between crimes and punishment is lost." *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 Seattle Univ. L. R. 241, 246-248(2002).

We note that in State v. Anderson 07-1-08717-2 SEA, State v. McEnroe 07-1-08716-4 SEA and State v. Kalebu 09-1-04992-7 SEA, your office allowed the defense 10 months, 10 months and 9 months respectively to complete their mitigation. Your office also respected the trial judge's order continuing the date in a number of cases.

We fail to see how our situation differs from those.

Regrettably, we are unable to promise you that a competent mitigation package could be submitted to you by August 2, 2010.

Sincerely,



Attorneys for Mr. Monfort
Julie A. Lawry, WSBA # 17685
Carl Luer, WSBA #16365
Stacey L. MacDonald, WSBA #35394

Cc: The Honorable Ronald Kessler

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

May 20, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

I was pleased to read in your letter of May 17, 2010, that you have been diligently working to gather evidence of mitigation in this case and that you have submitted ex parte reports to Judge Kessler documenting these efforts. I understand that at the last hearing Judge Kessler confirmed the extent of your endeavors.

Accordingly, we have agreed to extend the date by which any mitigating information must be delivered to August 2, 2010. This date is nearly nine months after your client was charged in this case and almost eight months after his arraignment.

Your letter closed by noting that you cannot promise at this time that you will be able to submit a "competent mitigation package" to the elected prosecutor by August 2, but we look forward to reviewing all the information you have developed at that time, and considering it before making a decision on September 3, 2010. I hope you will accept our invitation to schedule an appointment either during the week of August 9th or 16th when you can discuss the mitigation you have developed with Dan Satterberg.

I assume that at the next hearing in this case, on June 4, 2010, your client will agree to extend the time by which the elected prosecutor must make the decision contemplated by RCW 10.95.040 until September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000166



Associated Counsel for the Accused

110 Prefontaine Place S. Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

May 24, 2010

Mark Larson, Chief Deputy Criminal Division
Jeff Baird, Senior Deputy Prosecuting Attorney
John Castleton, Senior Deputy Prosecuting Attorney
Office of the King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA. 98103

Re: State of Washington v. Christopher Monfort
Cause No. 09-1-07187-6 SEA

Dear Mr. Larson:

Thank you for your letter dated May 20, 2010. We appreciate the willingness of your office to extend the mitigation deadline to August 2, 2010 without requiring a promise from the defense that we can meet that deadline. Of course, we will continue to work diligently towards having a competent mitigation package to your office as soon as possible and accept your invitation to meet with you again as the August 2nd deadline nears.

You are correct in calculating that the new deadline is eight months from the date of arraignment but to be clear, as we stated in one of the meetings with you at your office, because of complications in obtaining funding and securing the availability of experts, we were not able to start the mitigation investigation in earnest until the very end of March (essentially April 1st). As you expressed surprise at this delay, I am sure that you appreciate the difficulty of doing a thorough investigation of Mr. Monfort's forty-one years of life in seven states in just 4 month (April-August). It is important to realize that this is actual amount of time you are allowing for this process and not the artificial time frame starting from arraignment.

Thank you again for reconsidering your position. I believe that Judge Kessler would like to be informed as to this change and am willing to draft a letter to the court to that effect if that is acceptable to you.

Sincerely,

Julie A. Lawry
Carl Luer
Stacey MacDonald
Attorneys for Mr. Monfort

APP000167

1 review of issues relating to potential mitigation, in addition to reasons proffered in open court
2 and herein included by reference; it is hereby

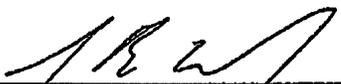
3 ORDERED, ADJUDGED and DECREED that the defendant's motion is granted; the
4 court therefore extends the statutory period under RCW 10.95.040(2) for the filing and service of
5 the notice of a special sentencing proceeding. Any such notice shall be filed and served,
6 therefore, by September 3, 2010.

7 DONE IN OPEN COURT this 4th day of June, 2010.

8 
9
10 HONORABLE RONALD KESSLER

11 Order presented by:

12 For DANIEL T. SATTERBERG, King County Prosecuting Attorney,

13 
14 JOHN CASTLETON, WSBA #29445
15 Senior Deputy Prosecuting Attorneys
Attorneys for the Plaintiff

16 Motion brought by and order approved by:

17 
18 JULIE LAWRY, WSBA # 17686

19
20
21
22
23
24



Associated Counsel for the Accused
110 Prefontaine Place S. Suite 200, Seattle, Washington 98104-2677
(206) 624-8105 FAX (206) 624-9339

July 26, 2010

Mark Larson, Chief Deputy, Criminal Division
Jeff Baird
John Castleton
Office of the Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Monfort, No. 09-1-07187-6 SEA

Dear Mark, Jeff and John,

As your deadline for submission of the mitigation package in this case approaches, we wanted to give you an update of our efforts to comply with your deadline and our continued belief that we are unable to provide you with a completed package by that date.

As we have consistently indicated, December 1, 2010 is a more realistic deadline for completion of our package. Without going into details, we have continued to have difficulty in having experts in to meet our client due to conflicts beyond our control. We give you our word that we have diligently and aggressively attempted to meet your expectations. However, we are again in the position of notifying you that we will not be able to meet the August 1, 2010 deadline as set by your office.

We hope that you will consider extending the deadline again and are willing to meet to discuss this possibility.

Sincerely,


Julie A. Lawry
Carl F. Luer

APP000170

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

August 3, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

Thank you for your letter dated July 26, 2010. We understand from your correspondence that you have chosen not to provide the State with any evidence of mitigation by the August 2, 2010 deadline, the extension that we provided to you on May 20, 2010.

As you know, eight months have now passed since Mr. Monfort was arraigned on the current charges and nine months have passed since he was charged with these crimes. Our office has provided you with extensive discovery regarding the crimes with which he is charged and the evidence implicating him in those crimes. We have also provided you with all the reports generated by a private investigator we retained to look into your client's background.

After careful consideration, we have decided not to extend the date by which our elected prosecutor will make the decision contemplated by RCW 10.95.040. That decision will be made by September 3, 2010.

As is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution. We look forward to your previously scheduled meeting with Mr. Satterberg on August 26, 2010, at 11 a.m. at the King County Prosecutor's Office. We strongly encourage you to provide him with any evidence of mitigation you may have at that time. Mr. Satterberg will announce his decision on or before September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Erin Ehlert for

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000171

Associated Counsel for the Accused

420 West Harrison, Suite 201, Kent, Washington 98032
(253) 520-6509 FAX (253) 520-6635

August 10, 2010

Daniel T. Satterberg, Prosecuting Attorney
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: State v. Christopher Monfort, King Co. No. 09-1-07187-6 SEA

Dear Mr. Satterberg:

We have received Mark Larson's letter of August 3rd informing us that you will not be extending the time period for deciding whether to seek the death penalty against Mr. Monfort. While we appreciate the fact that you are willing to consider mitigation evidence at any time it is both disappointing and troubling that you have chosen not to give Mr. Monfort's defense team adequate time to research, investigate and prepare a thorough and complete mitigation package as required by the ABA Guidelines and U.S. Supreme Court.

As we have explained to Mr. Larson, Mr. Monfort's case has posed some significant hurdles in collecting mitigation evidence and preparing a mitigation package to present to your office. At the time of the charged offenses, Mr. Monfort was 41 years old and had never been incarcerated. As a result of his relatively advanced age (for a capital defendant) and his clean record, Mr. Monfort lived in at least seven states and held numerous jobs throughout the country prior to his arrest. There are friends, relatives and former teachers with important information about Mr. Monfort's life and upbringing currently living in at least sixteen different states. In addition, Mr. Monfort attended school or worked in at least seven states and we have had to gather records from various institutions in each of those states. That effort is ongoing.

In addition to the considerable barriers posed by Mr. Monfort's history we have also encountered a series of obstacles over the course of this case that have delayed our collection of mitigation materials. Once charges were filed against Mr. Monfort we began the process of identifying and hiring a mitigation specialist capable of handling a case of this magnitude. Unfortunately our original mitigation specialist withdrew from the case in February due to funding issues with OPD and we were forced to start that part of the process over again from square one. We obtained funding for our current mitigation specialist in late February, however, he could not begin work on the case until

the end of March due to a death in his immediate family. Since then he has worked diligently and accomplished a great deal in a relatively short time period. He has interviewed approximately fourteen friends, former teachers and family members of Mr. Monfort's in three different states and compiled records from five different states. Unfortunately, the vast majority of work in these areas remains to be done. At this point we anticipate needing to interview forty or more additional witnesses residing in approximately fifteen different states ranging from Alaska to Florida before we are able to complete an adequate chronology and presentation of Mr. Monfort's social history.

In addition to the obstacles we have encountered with compiling the social history, we have also experienced considerable delays due to additional funding disputes with OPD, bureaucratic problems with the jail, Mr. Monfort's ongoing medical issues and issues that have arisen over the course of the case such as the Seattle Times' Public Records Act request. For example, a number of our expert funding requests have been denied by OPD and we have had to pursue the appeals process in order to obtain funding for experts necessary to complete the mitigation package. In addition, Mr. Monfort's medical issues have at times precluded him from participating in interviews with defense counsel and providing us necessary input. Dealing with his various medical issues has occupied considerable time and effort over the past several months.

Mr. Larson's letter states that your office has provided us extensive discovery implicating Mr. Monfort in the charged crimes and all reports generated by a private investigator retained to look into his background. The current issue, however, is not whether there is substantial evidence of guilt, but whether there are *no* mitigating circumstances. With all due respect, your private investigator's efforts in this case are at best superficial and random. Her interviews barely scratched the surface of Mr. Monfort's life and background, and do not in any way present a complete picture of his history and how that relates to mitigation considerations in this case.

We have just received a large volume of additional discovery early this week. At this point it is a little difficult to ascertain exactly what we have been provided but at a minimum it includes police reports from the maintenance yard arson charges and a large number of documents and other items seized from Mr. Monfort's apartment following his arrest. With respect to the seized items, it is difficult to determine how much discovery we have just received since in many cases only the first page of a document has been Bates stamped. It appears, however, that these materials include approximately 2000 pages of documents such as personal letters, address books, travel documents, a high school yearbook, job applications (including one to the Los Angeles Police Department), books, magazines, articles (including some on police brutality), research materials, a last will and testament, and personal stories that appear to have been written by Mr. Monfort detailing important life experiences. These are all items we have not seen previously and clearly are highly relevant to our mitigation investigation. In addition, the 90 or so pages of discovery we recently received on the maintenance yard incident contain a great deal of relevant information that we did not previously have relating to three of the charges against Mr. Monfort.

At present we are just beginning the process of cataloguing and assessing these newly provided materials. While we understand that compiling this discovery was a time

consuming process for your office, we are surprised and disappointed by the fact that you have chosen to supply us these materials now, and simultaneously deny us more time to prepare and submit Mr. Monfort's mitigation package.

We look forward to meeting with you on August 26th to discuss Mr. Monfort's case, however, we do not anticipate having any materials to present you at that time. In light of the fact that Mr. Larson's letter indicates that you will consider mitigation evidence at any stage of the proceedings, we will continue to work toward preparing a mitigation package detailing our investigation into Mr. Monfort's life history, mental state and other factors relevant to your determination on whether to seek the death penalty in this case. However, we strongly believe that there will be a greater potential for a future resolution of this case if you defer making and announcing that decision until we have had adequate time to complete our work and present it to you. At our initial meeting with Mr. Larson we indicated that December is a realistic date for completion of our mitigation materials and we continue to believe that is the case. In light of that, we hope that you will reconsider your decision not to extend the deadline for submission of our mitigation materials.

Finally, we want to assure you that our request for additional time to submit the mitigation package is based on the need to prepare the materials adequately and not simply an effort to delay these proceedings. We are diligently attempting to comply with our ethical duties as outlined in the ABA Guidelines and relevant case law. We are all painfully aware of the fact that a frequent basis for reversal of capital convictions is the failure of defense counsel to thoroughly investigate every avenue of mitigation. We are making every effort to avoid falling into that trap. As explained above, Mr. Monfort's case presents a number of complicating factors that are not present in most aggravated murder cases and necessitates more work and time for the mitigation investigation. We hope you will take these into consideration in deciding whether to make your decision by September 3rd as currently planned.

Sincerely,



Julie Lawry

Carl Luer

Attorneys for Christopher Monfort

Cc'd: Mark Larson, Jeff Baird, John Castleton

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY

I am a Senior Deputy Prosecuting Attorney in and for King County, Washington. I am familiar with the records and files in the above-entitled case, and declare that:

1. On August 16, 2010, I received a copy of DEFENDANT'S MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDINGS [hereinafter, "Motion to Extend Deadline"] in this case. In that pleading are references to what is described as "a large volume of new discovery"¹ recently provided to the defense by the

¹ Motion to Extend Deadline at 2.
DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 1

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

ARR000175

1 prosecution².

2 2. Presumably, this is the "large volume of additional discovery" mentioned by the
3 defendant's attorneys Carl Luer and Julie Lawry in a letter they wrote to King County Prosecutor
4 Dan Satterberg on August 10, 2010. That letter recited a number of reasons why the defense will
5 not present Mr. Satterberg with any evidence of mitigation before the date on which the
6 Prosecutor has said he will decide whether or not to seek the death penalty in this case. The
7 letter included the following language:

8 We have just received a large volume of additional discovery early
9 this week. At this point it is a little difficult to ascertain exactly
10 what we have been provided but it includes...a large number of
11 documents and other items seized from Mr. Monfort's apartment
12 following his arrest. With respect to the seized items, it is difficult
13 to determine how much discovery we have just received since in
14 many cases only the first page of a document has been Bates
15 stamped. It appears, however, that these materials include
16 approximately 2000 pages of documents such as personal letters,
17 address books, travel documents, a high school yearbook job
18 applications (including one to the Los Angeles Police Department),
19 books, magazines, articles (including some on police brutality),
20 research materials, a last will and testament, and personal stories
21 that appear to have been written by Mr. Monfort detailing important
22 life experiences. These are all items we have not seen previously
23 and clearly are highly relevant to our mitigation investigation.

24 3. The defense has known for months that many documents were
seized from the defendant's apartment after his arrest on November 6, 2010.

Each page of discovery we have provided the defense in this case is marked with a
unique number following the initials "CJM." On December 12, 2009, the prosecution provided
the defense with the first installment of discovery in this case, pages CJM00001 through

² The defense pleading also states that "[o]n August 11th, the State informed the Defense that is [sic] had additional discovery in its possession since November 2009, which it had neglected to provide." Motion to Extend Deadline at 2. An e-mail sent to the defense on August 11, 2010 is attached to this declaration as Appendix One. The discovery consists of some of the defendant's telephone records, obtained shortly after the defendant's arrest, via search warrant (the warrant was provided to the defense months ago). The prosecutor realized that the records had inadvertently not been provided to the defense he noticed that the defense had subpoenaed the records.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 2

Daniel T. Satterberg, Prosecuting Attorney
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ARR000176

1 CJM000157. This discovery includes 30 pages of "Seattle Police Department Property Report
2 Hardcopy" that document the evidence seized from 13725 56th Avenue South, #D402, in
3 Tukwila -- the defendant's residence at the time of his arrest.³ These pages document over 90
4 numbered items of evidence. Many of these are obviously documents -- they are identified
5 variously as: books, magazines, newspapers, notebooks, fliers, miscellaneous papers, court
6 papers, miscellaneous notes, pamphlets, citations, registrations, receipts, manuals, business
7 cards, mail, badges, and portfolio binders. Elsewhere in discovery provided to the defense on
8 December 12, 2009 is a list of items recovered from one of the defendant's automobiles. The list
9 includes a number of receipts and "handwritten papers."⁴

10 On December 28, 2009, the prosecution presented the defense with nearly 100 pages of
11 images⁵ that are photocopies of documents obtained from the defendant's apartment. These
12 included receipts, handwritten notes in the margins of books, handwritten lists, court documents,
13 recipes for mixtures, travel plans, calculations, names and contact information, printed fliers, and
14 other documents.

15 4. Other discovery provided to the defense months ago includes a 49-page CSI
16 report documenting the search of the defendant's apartment.⁶ This report includes photographs,
17 diagrams, and a narrative description of the apartment and the evidence seized. Photographs of
18 some of the documents, including a number of handwritten ones, are included in the report. Also
19 included are detailed descriptions of some of the documents. The report leaves no doubt that
20 numerous other documents -- not including those described and/or photographed -- were taken
21 from the defendant's apartment:

22 We collected four boxes of all the remaining miscellaneous
23 papers, books, writings and mail from inside S/Monfort's
24 apartment (Evidence Items #181587-07 thru 10).⁷

³ CJM000029-54; 145-48.

⁴ CJM000114-116.

⁵ CJM000868-966.

⁶ CJM001825-73.

⁷ CJM001861.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 3

Daniel T. Satterberg, Prosecuting Attorney
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ARR000177

1 5. In addition to discovery provided to them, the defense has another reason to know
2 that many documents were taken from the defendant's residence and placed in evidence. On
3 January 25, 2010, Ms. Lawry and other members of the defense team were present in the
4 defendant's apartment with Seattle Police Department [SPD] detectives. At their request, the
5 detectives collected a number of notebooks and other documentary items of evidence. A
6 detective's follow-up entry describes this:

7 The defense examined the apartment, and collected various books
8 and papers that they thought would assist in their case, requesting
9 that we seize those items for them.⁸

10 6. At 1:43 pm on June 15, 2010 -- two months ago -- Ms. Lawry sent my co-counsel
11 John Castleton and me an e-mail⁹, which consisted of the following:

12 Hey guys,
13 Carl and I would like to visit the evidence room to assess the
14 goodies collected for possible mitigation evidence. We would
15 only be looking at the stuff taken from Mr. Monfort's apartment
16 on this trip and would need to see the rest (ie evidence from
17 sources other than the apt or not otherwise mitigation related like
18 the guns from the apt) at another time. Would you mind asking
19 the detectives for a couple of options for times?

20 Thanks
21 Julie

22 7. At 4:43 pm that same day, June 15, 2010, I responded to Ms. Lawry with an e-
23 mail¹⁰ consisting of the following:

24 Julie,
25 Do I understand from your post that you would like to see
26 all the items taken from Mr. Monfort's apartment? That can, of
27 course, be arranged, but a complete review will take a number of
28 days -- if you let us know by evidence number which items you
29 would like to review first, we can start with them.

30 Thanks
31 Jeff

32 ⁸ CJM001800; Steiger follow-up 1/25/10.

33 ⁹ Attached hereto in Appendix Two.

34 ¹⁰ Attached hereto in Appendix Two.

1
2 8. Neither Ms. Lawry nor anyone from the defense team in this case ever replied to
3 my e-mail. Since then, neither Ms. Lawry nor anyone from the defense team have ever
4 expressed any interest in viewing any evidence taken from the defendant's apartment -- including
5 the documents they expressly asked the police to collect for them, and which Ms. Lawry had
6 characterized in her e-mail as "possible mitigation evidence."

7 9. When I did not hear back from Ms. Lawry, I became concerned that the defense
8 was declining to examine evidence that, in part, fell under the mandatory discovery provisions
9 pertaining to prosecutors -- in particular, CrR 4.7(a) (1) (ii) and (v), which pertain to

10 any written or recorded statements...made by
11 the defendant;

12
13 any books, papers, documents, photographs, or tangible
14 objects, which the prosecuting attorney intends to use in the
15 hearing or trial which were obtained from the defendant..

16 The defense knew these documents were in evidence, and they knew that they could
17 examine them if they chose. Initially, they expressed a desire to do so; but when we agreed to
18 arrange the examination, they seemed uninterested. I wondered whether the defendant's
19 attorneys might never examine this evidence, and later claim that it was inadmissible (or that a
20 continuance of the trial was needed) because the contents of the actual documents had not been
21 brought specifically to their attention.

22 10. Hoping to avoid any unnecessary litigation or delay that might later arise
23 concerning this evidence, we began inventorying and numbering documents recovered from
24 the defendant's apartment. We did not endeavor to number every document or copy every
page -- they are voluminous, and many of them are textbooks, books assigned as reading for
coursework, and notebooks containing handwritten notes taken during class or lectures.
However, we did attempt to make electronic images (by scanning or digital photography) of
evidence that might be described as a statement by the defendant, that might be offered at trial,
or that might be considered relevant to a determination of the defendant's mental state at the

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 5

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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APP000179

1 time of the crimes -- including, for example, his capacity, or his motive. It was a time-
2 consuming process. When we were done, we had numbered some 125 separate documents for
3 discovery. These numbered documents were organized in an electronic log. In the log, each
4 document is identified by the "CJM" number we gave it, by its SPD evidence number,¹¹ and by
5 description. In the log, each document is linked electronically to any images obtained from it.

6 11. When we completed this project, we provided a copy of the electronic log --
7 including all the images taken from the documents -- to the defense. This is the "new
8 discovery" alluded to in the defendant's Motion to Extend Deadline.

9 12. We do not ordinarily make digital images of evidence held by the police
10 department; it is identified in discovery and available for inspection by the defense. We do not
11 normally consider physical evidence "discovery." We took extra steps in this case to
12 electronically reproduce and catalogue items of physical evidence in this case and provide this
13 to the defense in an abundance of caution, because the defense was apparently disinclined to
14 inspect the evidence itself.

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

17 Signed and dated by me this 20th day of August, at Seattle, Washington.

18
19 

20
21 Jeff Baird, WSBA #11731

22
23 ¹¹ SPD detectives assigned numbers to evidence removed from the defendant's residence. Physical evidence is
24 identified by these numbers throughout the discovery in this case.

DECLARATION OF JEFF BAIRD RE:
DEFENDANT'S CLAIMS OF NEW
DISCOVERY - 6

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955
APR000180

Baird, Jeff

From: Castleton, John
Sent: Wednesday, August 11, 2010 4:02 PM
To: Lawry, Julie-acapd.org; Luer, Carl-acapd.org
Cc: Baird, Jeff; MacMillan, Lisa; Rosa, Kelly
Subject: Monfort

Julie and Carl:

We just received your subpoena duces tecum for the Sprint cell records. Thanks. After receiving this, I went back to review the cell records that are in discovery already and realized that the records we received via the November 17, 2009 search warrant never made it into the discovery. Those records are for the same number you're requesting, but only cover October 6, 2009 through November 6, 2009. Just wanted to let you know that you'd be receiving those shortly. Thanks.

John

John B. Castleton, Jr.
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office
john.castleton@kingcounty.gov
(206) 296-9535

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Baird, Jeff

From: Baird, Jeff
Sent: Tuesday, June 15, 2010 4:43 PM
To: Lawry, Julie-acapd.org; Castleton, John
Cc: Luer, Carl-acapd.org; Collins, Risa-acapd.org
Subject: RE: Monfort

Julie,

Do I understand from your post that you would like to see all the items taken from Mr. Monfort's apartment? That can, of course, be arranged, but a complete review will take a number of days -- if you let us know by evidence number which items you would like to review first, we can start with them.

Thanks
Jeff

From: Julie Lawry (ACA) [<mailto:Julie.Lawry@acapd.org>]
Sent: Tuesday, June 15, 2010 1:44 PM
To: Baird, Jeff; Castleton, John
Cc: Luer, Carl-acapd.org; Collins, Risa-acapd.org
Subject: Monfort
Importance: High

Hey guys,

Carl and I would like to visit the evidence room to assess the goodies collected for possible mitigation evidence. We would only be looking at the stuff taken from Mr. Monfort's apartment on this trip and would need to see the rest (ie evidence from sources other than the apt or not otherwise mitigation related like the guns from the apt) at another time. Would you mind asking the detectives for a couple of options for times?

Thanks,
Julie

NEW EMAIL ADDRESS: Julie.Lawry@acapd.org

Julie A. Lawry
Senior Felony Attorney
Associated Counsel for the Accused
110 Prefontaine Place So., Ste 200
Seattle, WA 98104
206.624.8105
206.624.9339 (Fax)

APP000182

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
CHRISTOPHER MONFORT,
Defendant.

NO. 85109-3
RULING DENYING
DISCRETIONARY REVIEW

FILED
201 FEB -1 P. H. W.
B. J. NOLAN

Christopher Monfort seeks discretionary review of a superior court decision denying his motion to extend the time for filing a notice of special sentencing proceeding in his prosecution for aggravated first degree murder and to preclude the State from filing the notice in the interim.

Mr. Monfort has been charged by the King County Prosecuting Attorney with first degree arson, three counts of attempted first degree murder, and aggravated first degree murder. In cases involving a charge of aggravated first degree murder, the State has 30 days from the charging date to file and serve a notice of special sentencing proceeding to determine whether the death penalty should be imposed, "unless the court, for good cause shown, extends or reopens the period for filing and service of the notice." RCW 10.95.040(2). If no such notice is filed and served, the State may not seek the death penalty. RCW 10.95.040(3). In this case the State filed the charges on November 13, 2009. It advised the defense early on that it would agree to postpone the notice decision until June 15, 2010, and the court entered an agreed

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order to that effect. The State later agreed to extend the period to September 3, 2010, and the court entered a second agreed order. But when the defense sought a further extension, the State would not agree. On August 16, 2010, the defense filed a motion asking the court to extend the "mitigation deadline" to December 1, 2010, asking the court not only to extend the deadline for the State's notice, but also to preclude the State from filing the notice during the extension period. On August 25, 2010, the court denied the motion, essentially ruling that it was beyond the court's authority to preclude the State from filing the notice.¹ On September 3, 2010, the State filed its notice of special sentence proceeding. Mr. Monfort now seeks this court's direct discretionary review of the superior court's decision denying his motion to extend the deadline and precluding filing in the interim.

Mr. Monfort argues that the superior court misinterpreted RCW 10.95.040(2), because the statute does not limit who can seek a continuance for good cause. He urges that the court committed probable error that substantially altered the status quo, thus justifying discretionary review under RAP 2.3(b)(2). But the statute merely sets a time limit for the filing of a notice of intent, and provides that the time limit can be extended for good cause. Whether such a notice should be filed is an executive, not a judicial, decision. *State v. Finch*, 137 Wn.2d 792, 809-10, 975 P.2d 967 (1999). It follows that the court may exercise judicial authority to extend the time period for good cause, *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995), but it cannot otherwise control the executive decision of whether or when to file the notice. Thus, the court cannot stop the State from filing on the grounds that, in the view of the court or opposing counsel, it would be better to wait for the development of more or better mitigation evidence. Mr. Monfort cites no authority supporting his reading of the statute, and none has been found.

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¹ The court entered a written decision to the same effect on October 26, 2010.

This does not mean that a prosecutor's discretion to seek the death penalty is completely unfettered. *See State v. Campbell*, 103 Wn.2d 1, 24-25, 691 P.2d 929 (1984). This court has held that the decision to seek the death penalty must be based on a reason to believe that there are not sufficient circumstances to merit leniency. *Id.*, at 25. There must be some individualized weighting of mitigating factors: an inflexible policy is not permitted. *In re Pers. Restraint of Harris*, 111 Wn.2d 691, 693, 763 P.2d 823 (1988). Input from the defendant is normally desirable, because subjective factors are better known by the defendant. *Id.* at 694.

This court's decision in *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), illustrates the point. According to defense counsel's affidavit in that case, the prosecutor conveyed the decision to seek the death penalty on the day that charges were filed, May 20, 1992, though he said he would consider mitigation evidence. On June 1, 1992, the prosecutor refused to extend the deadline for the defense to gather mitigation evidence, though he offered to wait until the end of the 30-day period before filing the notice. And in fact, the prosecutor did not file the notice until June 19, the end of the period.

The defendant in *Pirtle* argued on appeal that the prosecutor decided to seek the death penalty prior to any consideration of the evidence in mitigation and refused to extend the 30-day deadline to permit the defense to present mitigation evidence, and therefore abused his discretion. But this court disagreed. Had the prosecutor announced the decision on May 20 and then refused to accept any additional evidence, doing so would have indicated an unwillingness to engage in the individualized weighing required by *Harris*. But while the prosecutor announced a tentative decision, he said he would look at mitigating evidence developed by the defense, and then waited the full 30 days. And even without input from the defense, the prosecutor had a substantial amount of information about Pirtle, including his extensive contacts with

law enforcement, and thus some information about each of the statutory mitigation factors. Given what the prosecutor already knew and his willingness to wait 30 days to see if the defense could develop additional information, this court held that the prosecutor did not abuse his decision. *Pirtle*, 127 Wn.2d at 643.

Mr. Monfort mentions the abuse of discretion standard applicable to this situation, and also discusses defense counsel's obligation to effectively represent a client facing the death penalty. But I do not read this discussion to argue either that the State abused its discretion by filing the notice or that Mr. Monfort's trial counsel represented him ineffectively by failing to provide the State with mitigation evidence before the filing deadline.² And indeed, it would be impossible to address either of those questions based on the record provided by Mr. Monfort, which does not even include the documentation relied upon by the State, reportedly including information gathered by an investigator hired by the State to provide an alternative source of mitigation evidence.

Under the circumstances, including the act lack of any authority supporting Mr. Monfort's position, it cannot be said that the superior court committed probable error that substantially alters the status quo. RAP 2.3(b)(2). Accordingly, the motion for discretionary review is denied.


COMMISSIONER

February 1, 2011

² Mr. Monfort suggests that the defense was not given enough time to marshal its mitigation evidence, while the State suggests that defense counsel made a tactical decision not to provide information to the State.

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FILED
KING COUNTY, WASHINGTON
JUL 20 2012
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

Cause No: 09-1-07187-6 SEA

DEFENSE MOTION TO STRIKE NOTICE OF
INTENT TO SEEK THE DEATH PENALTY
ON GROUNDS THAT THE STATE FAILED
TO COMPLY WITH THE MANDATES OF
RCW 10.95.040

MOTION

The defendant, Christopher Monfort, through his attorneys, Carl Luer, Todd Gruenhagen and Stacey MacDonald asks this court to dismiss the Notice of Intent to Seek the Death Penalty filed on September 2, 2010 and preclude the state from seeking the death penalty in the event Mr. Monfort is convicted of aggravated first degree murder as charged in Count IV.

This motion is based upon the King County Prosecutor's failure to follow the requirements of RCW 10.95.040 when filing the notice of intent to seek the death penalty against Mr. Monfort. Specifically, the prosecutor improperly based his decision to seek death on the facts underlying the charged offenses and did not make the requisite determination that there are not sufficient mitigating circumstances to merit leniency because he lacked a factual basis to make that determination. This failure to comply with the statutory procedures that govern when the state may

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1 seek the death penalty violated Mr. Monfort's rights under the Fifth and Fourteenth Amendments to
2 the United States Constitution and Article I, Section 14 of the Washington State Constitution. This
3 motion is based on these constitutional provisions, RCW 10.95, the appendices to this motion and
4 other authorities cited.
5

6
7 Dated this _____ day of _____, 2012.
8

9
10 _____
11 Carl Luer WSBA #16365
12 Todd Gruenhagen WSBA #12340
13 Stacey MacDonald WSBA # 35394
14 Attorneys for Christopher Monfort

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FACTS AND PROCEDURAL BACKGROUND

On November 12, 2009 the State charged Mr. Monfort with five separate crimes arising out of a series of three separate incidents on October 22, 2009, October 31, 2009, and November 6, 2009. The first two counts allege that Mr. Monfort committed the crimes of arson in the first degree and attempted first degree murder at the City of Seattle' Charles Street vehicle maintenance facility on October 22, 2009. The third and fourth counts allege that, with premeditated intent, Mr. Monfort killed SPD Officer Timothy Brenton and attempted to kill SPD Officer Britt Sweeney on October 31, 2009. The fifth count alleges that with premeditated intent, Mr. Monfort attempted to kill SPD Sergeant Gary Nelson on November 6, 2009.

When announcing the charges, King County Prosecuting Attorney Dan Satterberg asserted that Mr. Monfort "waged a one man war" against the Seattle Police Department and stated that: "We've never seen anything like this. When discussing the possibility that he would seek Mr.

1 Monfort's execution, Satterberg commented that: "The death penalty is reserved in the State of
2 Washington for the worst of the worst. We're going to take our time, but there is no greater crime
3 in my view than the murder of a police officer." Copies of news articles from seattlepi.com and
4 mynorthwest.com quoting Mr. Satterberg are attached as Appendix A and Appendix B.
5

6 On December 14, 2009, the King County Prosecutor's Chief Criminal Deputy Mark Larson
7 sent defense counsel a letter regarding the timing for submitting a mitigation package. The letter
8 informed counsel that the state was setting a deadline of May 15th for submission of mitigation
9 materials and that Mr. Satterberg would issue his decision on the death penalty on June 15th. Mr.
10 Larson's letter also explained his general policy on the timing for submitting mitigation materials:
11

12 I understand that this time frame may be shorter than in some previous cases, but it has been
13 our experience that taking more time does not result in any appreciable difference in the
14 mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and,
15 accordingly, the trial. It is our view that adequate information can be gathered within the
16 period described in this letter, and that the public interest is better served by an interval
17 after arraignment closer to that contemplated in the statute.

18 A copy of the December 14, 2009 letter from Mr. Satterberg is attached as Appendix C. Also
19 attached as Appendix D through F are letters sent to counsel representing Naveed Haq (King Co.
20 No. 06-1-06658-4 SEA), Isaiah Kalebu (King Co. No. 09-1-04992-7) and Daniel Hicks (No. 09-1-
21 07578-2). As is readily apparent, Mr. Satterberg's December 14, 2009 letter regarding this case is
22 remarkably similar if not identical to the letters sent in other aggravated murder cases during the
23 same time period. Each letter contained identical language regarding the perceived benefits of
24 maintaining a short time period for submitting mitigation.

25 On June 4 2010, the parties agreed to extend the deadline for filing the death notice to
26 September 3, 2010. As the September 3, 2010, deadline approached, the defense again asked Mr.
27 Satterberg for additional time to complete and submit a mitigation package so that he would have
28 an adequate factual basis to determine whether there were mitigating circumstances that would

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1 preclude seeking the death penalty against Mr. Monfort. The State refused the defense request for
2 additional time and indicated that it would proceed with its announcement on the death penalty by
3 September 3, 2010. In August, 2010, the defense filed a motion asking the court to preclude the
4 state from announcing its decision on seeking the death penalty until the defense had adequate time
5 to submit a mitigation package. The Court heard argument on that motion on August 25, 2010. In
6 denying the defense motion, the court concluded that it lacked the authority to order the State to
7 delay announcing its decision on seeking the death penalty but also noted that the State was
8 “needlessly rushing to judgment” and that if in fact the court did have the authority to direct the
9 state to delay announcing its decision, it would exercise that authority and do so.
10
11

12 At a subsequent hearing on September 2, 2010, the State announced its intention to seek Mr.
13 Monfort’s execution. During subsequent press conferences and media interviews, Mr. Satterberg
14 made it clear that his focus in electing to seek Mr. Monfort’s death was the facts of the charged
15 crimes and not any possible mitigating factors in Mr. Monfort’s background:
16

17 This morning, I filed a notice of intent to seek the death penalty in the case of State v.
18 Christopher Monfort, who is charged with the aggravated first degree murder for the slaying
19 of Seattle Police Officer Timothy Brenton.

20 Monfort is also charged with the attempted first degree murder of Seattle Police Officer
21 Britt Sweeney, Officer Brenton’s partner, the attempted first degree murder of Seattle Police
22 Sergeant Gary Nelson, arising from Monfort’s conduct when apprehended and the arson and
23 attempted murder of additional law enforcement personnel stemming from bombs that were
24 planted at the Charles Street Vehicle Services Facility used by the Seattle Police
25 Department.

26 The intentional, premeditated and random slaying of a police officer is deserving of the full
27 measure of punishment under the law. The magnitude of the crimes with which the
28 defendant is charged, and the absence of significant mitigating factors, convinced me that
we should submit this case to the jury with the full range of applicable punishments,
including the possibility of the death penalty.

Q13 Fox News Report dated September 2, 2010. (Copy attached as Appendix G.) A copy of the
death notice filed that day is attached as Appendix H. Although Mr. Satterberg’s afterthought

1 regarding "the absence of significant mitigating factors" pays lip service to his statutory obligations,
2 it is clear from the entirety of his statement that the decision to seek the death penalty was based
3 upon the facts of the charged crimes and not an absence of mitigating factors. In other interviews
4 Mr. Satterberg apparently made no reference to the absence of mitigating circumstances and
5 focused entirely on the alleged facts of the crimes:
6

7 At the end of the day this is an extremely serious case. It's about as
8 serious as it gets when you ambush police and try to kill multiple police
9 officers. So this is a case a jury needs to hear. And it's a case that a jury
 needs to have all options on.

10 KUOW News Report dated 9/2/2010 (attached as Appendix I).

11 In a subsequent interview on September 2nd 2010, Mr. Satterberg went further in explaining
12 his decision to seek Mr. Monfort's execution. In an interview with Northwest Public Radio on
13 September 2nd 2010, Mr. Monfort's previous attorney raised questions about the adequacy of a
14 purported mitigation investigation conducted by a private investigator retained by the prosecutor's
15 office. In response to that criticism, Mr. Satterberg described the work done by that investigator in
16 expansive terms:
17

18 We hired our own investigator who spent months *talking to everybody*
19 *who Monfort came into contact with throughout his life and I think we*
20 *have a pretty good picture of who this individual is.*

21 A copy of the Northwest Public Radio report describing that interview is attached as Appendix J.

22 Mr. Satterberg was apparently referring to an investigation conducted by Aimee Rachunok,
23 a private investigator hired by the King County Prosecutor's Office. If Mr. Satterberg actually
24 believes that Ms. Rachunok interviewed everyone who ever met Mr. Monfort, then he is sadly
25 mistaken and his factual basis for asserting an absence of mitigating factors is completely
26 undermined. Ms. Rachunok interviewed a total of 25 individuals who knew Mr. Monfort. Her
27 selection of people to interview can best be described as random and superficial. Of the 25 people
28

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1 Ms. Rachunok spoke with, 16 knew Mr. Monfort from his time at Highline Community College,
2 either directly through the school or through jobs he did while at Highline. Of the remaining nine
3 witnesses, four were co-workers of Mr. Monfort's either at the King County Juvenile Detention
4 Center where he volunteered during his time at the University of Washington or at Pilot Freight
5 Services where he worked in 2009. Three of the remaining witnesses can be described as family
6 members though none was particularly close to Mr. Monfort for any period of time. One is his
7 former step-father who was married to Mr. Monfort's mother Suzan for several years while Mr.
8 Monfort was in junior high school. The second is married to one of Mr. Monfort's second cousins
9 and the third is Mr. Monfort's estranged wife, Toi Limolansuk. Mr. Monfort and Ms. Limolansuk
10 married in 1995 and never divorced, however, they only lived together for approximately one
11 month and maintained very infrequent contact over the ensuing years. The remaining two
12 witnesses hardly knew Mr. Monfort at all. One was a co-worker at American Freightways in
13 Shreveport Louisiana who indicated he had "very few memories related to Monfort" and that in his
14 brief contact with Mr. Monfort he had no recollection of them discussing anything personal. The
15 final witness met Mr. Monfort briefly on May 25, 1991 when the two were involved in a traffic
16 accident.¹

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19
20 Of the 25 interviews that Ms. Rachunok conducted, 24 were done over the phone and one
21 was a brief email correspondence. None were conducted face-to-face and she did not do any
22 follow-up interviews.
23

24 LAW AND ARGUMENT

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26
27
28 ¹ It is unclear whether Mr. Satterberg was aware of the contents of several of these interviews when he made the decision to seek death. Two of them occurred after the State filed the death notice and another took place the day before.

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1 **A. The Prosecuting Attorney improperly based his decision to seek the death penalty**
2 **on the facts of the charged offenses and not on a reasoned determination that there**
3 **are not sufficient mitigating circumstances to merit leniency as required by RCW**
4 **10.95.040.**

5 RCW 10.95.040 sets out the procedures that prosecuting attorneys must follow when
6 electing to seek death for a charge of first degree aggravated murder. It provides as follows:

7 (1) If a person is charged with aggravated first degree murder as defined
8 by RCW 10.95.020, the prosecuting attorney shall file written notice of a
9 special sentencing proceeding to determine whether or not the death
10 penalty should be imposed when there is reason to believe that there are
11 not sufficient mitigating circumstances to merit leniency. [Emphasis
12 added.]

13 (2) The notice of special sentencing proceeding shall be filed and served
14 on the defendant or the defendant's attorney within thirty days after the
15 defendant's arraignment upon the charge of aggravated first degree
16 murder unless the court, for good cause shown, extends or reopens the
17 period for filing and service of the notice. Except with the consent of the
18 prosecuting attorney, during the period in which the prosecuting attorney
19 may file the notice of special sentencing proceeding, the defendant may
20 not tender a plea of guilty to the charge of aggravated first degree murder
21 not may the court accept a plea of guilty to the charge of aggravated first
22 degree murder or any lesser included offense.

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

26 The statute provides several safeguards for defendants facing aggravated murder charges. First, the
27 prosecutor must personally file the death notice upon the defendant or the defendant's attorney
28 within 30 days of arraignment or at such later date if the court finds good cause to extend or reopen
the filing period. RCW 10.95.040(2). The statute provides additional safeguards by requiring that
the prosecuting attorney can only elect to seek the death penalty when there is reason to believe that
there are no sufficient mitigating circumstances to merit leniency. RCW 10.95.040

The presumptive sentence for aggravated murder in Washington is life imprisonment
without the possibility of parole. RCW 10.95.030. Washington courts require strict compliance

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1 with RCW 10.95.040 before the state can seek to overcome that presumption. In *State v. Dearbone*,
2 125 Wn.2d 173, 883 P.2d 303 (1994), the state filed notice of its intent to seek the death penalty the
3 morning of the agreed upon filing date. The deputy prosecutor assigned to the case left a voicemail
4 message with defense counsel that same morning and met briefly with the defense attorney in the
5 courthouse on the way to file the death notice. The prosecutor failed, however, to provide written
6 notice of the State's intent to seek the death penalty until four days after the deadline. 125 Wn.2d at
7 175-76. At a subsequent hearing the defense moved to preclude the State from requesting the death
8 penalty based on the fact that the written copy of the notice was served after the statutory time for
9 service had expired. The trial court granted the State's request to reopen the time for serving the
10 notice, finding that there was good cause under RCW 10.95.040(1).
11

12
13 The Supreme Court reversed and emphasized that the procedures outlined in 10.95.040 are
14 mandatory:

15 Given the unique qualities of the death penalty, the Legislature has
16 tailored pretrial procedures to govern the use of a special sentencing
17 proceeding. Second, filing and service of notice is mandatory -- no notice,
18 no death penalty.

19 *Dearbone*, 125 Wn.2d at 177. See also, *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995)

20 (Recognizing that death penalty cases require heightened scrutiny by the courts to ensure that the
21 procedures and safeguards enacted by the Legislature are properly followed by the State.)

22 *Dearbone* went on to reject the State's contention that it has substantially complied with the statute,
23 noting that: "We decline to graft the doctrine of substantial compliance onto RCW 10.95.040." 125
24 Wn.2d at 182.
25

26 In addition to the procedural notice requirement, RCW 10.95.040 restricts the prosecutor
27 from seeking the death penalty to cases where "there is reason to believe that there are not sufficient
28 mitigating circumstances to merit leniency." The standard established by the legislature in

1 determining whether the State may file a death notice is the sufficiency of the mitigating evidence.
2 A prosecutor must affirmatively have reason to believe there is an absence of adequate mitigating
3 evidence in the case before he can seek to file a death notice. In such a case, the decision is
4 mandatory – the prosecutor “shall file” the notice if there are not sufficient mitigating
5 circumstances.
6

7 There is nothing in RCW 10.95.040, however, that suggests the prosecutor should consider
8 the particular circumstances of the charged offenses and then weigh those circumstances against the
9 mitigating evidence in deciding whether to seek death. In the absence of such language the
10 prosecutor is precluded from inferring the circumstances of the charged crime into the statutory
11 standard established for filing a death notice. If the legislature intended the prosecutor to weight
12 mitigating evidence against the underlying facts of the case, it would have included that language in
13 the statute.
14

15 The legislature did in fact direct that capital juries consider the underlying facts of the
16 charged crime in making the life or death decision:
17

18 Upon conclusion of the evidence and argument at the special sentencing
19 proceeding, the jury shall retire to deliberate upon the following question:
20 “Having in mind the crime of which the defendant has been found guilty,
21 are you convinced beyond a reasonable doubt that there are not sufficient
22 mitigating circumstances to merit leniency?”

23 RCW 10.95.060(4). It is significant that the legislature specifically instructed the jury to consider
24 the crime for which the defendant has been found guilty in determining the appropriate sentence but
25 did not instruct the prosecutor to consider the facts of the charged crimes when deciding whether to
26 file a death notice. By expressly including that consideration in one part of the statute, the
27 legislature impliedly provided that it is not included in other parts of the statute. *State v. Delgado*,
28 148 Wn.2d 723, 729, 63 P.2d 792 (2003); *State v. Meacham*, 154 Wn.App. 467, 472, 225 P.3d 472

1 (2010). As the Washington Supreme Court noted in *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694

2 (1996):

3 . . . We think, rather, that it is more significant that the Legislature did not
4 include the word "personally" in RCW 10.95.040 as it did in RCW
5 4.28.080. Where the Legislature uses certain statutory language in one
6 instance, and different language in another, there is a difference in
legislative intent.

7 Here, the legislature provided language instructing juries to consider the facts of the crime, and
8 omitted that language in the provisions directing when prosecutors may file the death notice. There
9 is a different legislative intent in the two provisions and, as a result, the prosecutor may not
10 consider the facts of the charges in deciding whether to seek death.
11

12 Requiring the prosecutor to focus on the mitigating evidence regarding a defendant in
13 determining whether to seek death is consistent with the Washington death penalty scheme as a
14 whole. RCW 10.95 strongly disfavors death as the sentence for aggravated murder. Initially, the
15 statute requires a conviction for premeditated murder plus proof of at least one aggravating factor
16 for a defendant to be sentenced to life without the possibility of parole. A person convicted of any
17 other offense in Washington has at least the possibility of being released. The only crime that
18 carries a sentence without any possibility of release is aggravated first degree murder, which is
19 punishable by life without the possibility of parole or death.
20

21 RCW 10.95 establishes an exacting process the State must satisfy before it can seek death.
22 First, the state must determine that it can prove the elements of a premeditated murder. Second, if
23 the prosecutor believes that the facts of a premeditated murder warrant more punishment than that
24 carried by a charge of first degree murder it may consider whether one of the 14 aggravating factors
25 set out in RCW 10.95.020 applies. It is at that stage of the process where the prosecutor must
26 consider the underlying facts of the charged crime. This is when the prosecutor identifies and
27
28

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1 selects the small subset of the “worst of the worst” premeditated murders in determining which will
2 be charged as aggravated. In making that decision, a prosecutor must focus on the circumstances of
3 the murder when deciding whether or not to charge aggravating factors under RCW 10.95.020.
4 Even if an aggravating factor exists in a given case, there is nothing in the statute that obligates the
5 prosecutor to charge aggravated murder.
6

7 RCW 10.95.040 operates differently. Once the prosecutor has considered the facts of the
8 crime and elected to charge aggravated murder, the eligibility stage of Washington’s capital
9 sentencing process is over and the underlying facts of the crime are not relevant to the next part of
10 the decision making process, which is the prosecutor’s selection of which punishment to seek. By
11 statute there are two options: life without parole or death. If the prosecutor makes an informed
12 decision that there is reason to believe there are not sufficient mitigating circumstances to merit
13 leniency, he must file a death notice. The “reason to believe” language establishes a reasonableness
14 standard for assessing mitigating factors applicable to the defendant. RCW 10.95.040 clearly limits
15 prosecutorial subjectivity and requires that the focus at this stage of the decision making process be
16 on mitigating circumstances. If the prosecutor fails to scrupulously follow the mandates of RCW
17 10.94.050, even with respect to the technical requirements of serving the notice, he may not request
18 the death penalty. *Dearbone*, 125 Wn.2d at 177. The Washington Supreme Court explained the
19 underlying reasons for requiring strict adherence to the mandates of RCW 10.95.040 as follows:
20
21
22

23 As the United States Supreme Court has repeatedly noted, “the penalty of
24 death is qualitatively different from a sentence of imprisonment, however
25 long.” Citing *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct.
26 2978, 2991, 49 L.Ed.2d 944 (1976). Because of this difference, we should
27 strive to ensure that the procedures and safeguards enacted by the
28 Legislature are properly followed by the State. The determination of
whether a defendant will live or die must be made in a particularly careful
and reliable manner in accordance with the procedures established by the
Legislature.

1 *State v. Luvene*, 127 Wn.2d 690, 719, 903 P.2d 960 (1995) *f.n.* 8.

2 It is clear in this case, however, that Mr. Satterberg's focus when deciding to seek Mr.
3 Monfort's execution was not the absence of mitigating circumstances or any other circumstances of
4 Mr. Monfort's life, but rather on the facts of the charged crimes. When explaining his reasons for
5 seeking the death penalty, Mr. Satterberg emphasized the underlying facts of the charges and made
6 only passing reference to his view that there was a lack of mitigating circumstances:
7

8 This morning, I filed a notice of intent to seek the death penalty in the
9 case of *State v. Christopher Monfort*, who is charged with the aggravated
10 first degree murder for the slaying of Seattle Police Officer Timothy
11 Brenton.

12 Monfort is also charged with the attempted first degree murder of Seattle
13 Police Officer Britt Sweeney, Officer Brenton's partner, the attempted
14 first degree murder of Seattle Police Sergeant Gary Nelson, arising from
15 Monfort's conduct when apprehended and the arson and attempted murder
16 of additional law enforcement personnel stemming from bombs that were
17 planted at the Charles Street Vehicle Services Facility used by the Seattle
18 Police Department.

19 The intentional, premeditated and random slaying of a police officer is
20 deserving of the full measure of punishment under the law. The
21 magnitude of the crimes with which the defendant is charged, and the
22 absence of significant mitigating factors, convinced me that we should
23 submit this case to the jury with the full range of applicable punishments,
24 including the possibility of the death penalty.

25 In another interview the day he announced his intention to seek death, Mr. Satterberg stated that:

26 At the end of the day this is an extremely serious case. It's about as
27 serious as it gets when you ambush police and try to kill multiple police
28 officers. So this is a case the jury needs to hear. And it's a case that a
jury should have all options on.

Appendix I. These statements were entirely consistent with Mr. Satterberg's comments when he
filed charges against Mr. Monfort and stated that in his opinion there is no greater crime than the
murder of a police officer.

APP000198

1 The State here has violated RCW 10.95.040 in a manner that is far more harmful than the
2 procedural defect in *Dearbone, supra*. In this case the prosecutor based his decision to seek the
3 death penalty on impermissible considerations and failed to make an informed determination that
4 there are not sufficient mitigating circumstances to merit leniency. As a result, the State has
5 violated the substantive provisions of the statute. Because the state failed to adhere to the statutory
6 requirements for filing a death notice, it should be precluded from seeking the death penalty.
7

8 **B. Even if RCW 10.95.040 permits a prosecutor to factor in the circumstances of the**
9 **charged crime in deciding whether to seek death, the primary focus must be on**
10 **mitigating factors and the prosecutor here lacked a reasonable factual basis to**
11 **conclude that leniency is not warranted.**

12 Based on Mr. Satterberg's public statements in announcing his decision to seek the death
13 penalty, there is no question that his primary reasons for doing so are the facts underlying the
14 charged crimes. Even if those are not completely impermissible considerations, it is clear from the
15 plain language of RCW 10.05.040 that the primary consideration must be the absence of mitigating
16 circumstances. Although Mr. Satterberg did mention in passing that in his view there is an absence
17 of mitigating factors, the fact that he lacked a reasonable factual basis for that assertion and his
18 heavy emphasis on the facts underlying the charges violates the mandates of RCW 10.95.040.
19

20 When attempting to explain his claim that there is an absence of mitigating circumstances in
21 this case, Mr. Satterberg referenced an investigator hired by the state who conducted what purports
22 to be a mitigation investigation into Mr. Monfort's background. According to Mr. Satterberg, that
23 investigator "spent months talking to everybody Monfort came into contact with throughout his life.
24 . . . " The state did hire a private investigator named Aimee Rachunok who conducted phone
25 interviews with 24 people who had at least some minimal contact with Mr. Monfort during his life,
26 and had one brief e-mail exchange with a 25th individual. Apparently because of the work Ms.
27
28

APP000199

1 Rachunok did on the case, Mr. Satterberg believed he could go ahead with seeking the death
2 penalty without the benefit of a mitigation package by the defense.

3 A prosecutor's discretion to seek the death penalty is not unfettered. *State v. Pirtle*, 127
4 Wn.2d 628, 642, 904 P.2d 245 (1995); *State v. Campbell*, 103 Wn.2d 1, 24-25, 691 P.2d 929 (1984)
5 *cert. denied*, 471 U.S. 1094 (1985). Before a prosecutor can seek the death penalty there must be
6 "reason to believe there are not sufficient circumstances to merit leniency. *Pirtle*, 127 Wn2d at 642.
7 Input from the defendant as to mitigating factors is normally desirable, because the subjective
8 factors are better known to the defendant. *Id.* While the prosecutor need not delay his decision
9 until the defense provides mitigation materials, he must still base his decision to seek death on some
10 reasoned factual basis supporting the absence of mitigating factors.

11 At first blush, *Pirtle* might appear to support the state's position that there is a minimal
12 threshold for the state to satisfy the substantive provisions of RCW 10.95.040. While the
13 prosecutor there announced his decision to seek the death penalty only 30 days following
14 arraignment and without the benefit of defense mitigation materials, the state had access to a
15 substantial information about the defendant as a result of his extensive arrest and conviction history.
16 127 Wn.2d at 642. *Pirtle* had 10 juvenile convictions and five adult convictions for a variety of
17 felonies and misdemeanors including an adult conviction for felony assault. Here Mr. Monfort has
18 no criminal history that would provide the state with any information about his background or life
19 history. As a result, the prosecutor's decision to seek death without the benefit of a defense
20 mitigation package rests upon the mitigation investigation conducted by Ms. Rachunok.

21 That investigation was deficient in every conceivable way. Ms. Rachunok's investigation
22 focused heavily on people who knew Mr. Monfort during a relatively brief period of his life while
23 at Highline Community College or the period immediately following those years. All of her
24

1 interviews were by telephone – she never met a single witness face-to-face. Moreover, Ms.
2 Rachunok did no follow-up interviews and gleaned virtually no significant information about major
3 periods of Mr. Monfort’s life including his childhood, his schooling and the twelve years he lived in
4 Las Vegas and the Los Angeles area after graduating high school.
5

6 The American Bar Association (ABA) has established exacting standards for conducting an
7 adequate mitigation investigation. *Guidelines for the Appointment and Performance of Defense*
8 *Counsel in Death Penalty Cases* (2003) and *Supplementary Guidelines for the Mitigation Function*
9 *of Defense Teams in Death Penalty Case* (2008). The U.S. Supreme Court and other federal courts
10 have determined that these Guidelines establish the prevailing professional norms for competent
11 mitigation investigations. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed. 2d 471
12 (2003); *Rompilla v. Beard*, 545 U.S. 375, 125 S.Ct. 2456, 162 L.Ed. 2d 360 (2005); *Detrich v.*
13 *Smith*, 677 F.3d 958 (9th Cir. 2012); *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008). While these
14 cases dealt with claims of ineffective assistance of counsel, they establish that the adequacy of
15 mitigation investigations are to be judged by the standards set out in the *ABA Guidelines* and
16 *Supplementary Guidelines*. Even assuming that investigations conducted by agents of the state are
17 subject to less exacting standards, it is clear that Ms. Rachunok’s efforts fall short of any reasonable
18 mitigation investigation and that Mr. Satterberg’s reliance on that investigation as justification for
19 seeking the death penalty is badly misplaced.
20
21
22

23 The *Guidelines* set out the qualifications for mitigation investigators:

24 Mitigation specialists possess clinical and information-gathering skills and
25 training that most lawyers simply do not have. They have the time and
26 ability to elicit sensitive, embarrassing and often humiliating evidence
27 (e.g. family sexual abuse) that the defendant may never have disclosed.
28 They have the clinical skills to recognize such things as congenital, mental
or neurological conditions, to understand how these conditions may have
affected the defendant’s development and behavior, and to identify the
most appropriate experts to examine the defendant or testify on his behalf.

1 . . . The mitigation specialist compiles a comprehensive and well-
2 documented psychosocial history of the client based on an exhaustive
3 investigation; analyzes the significance of the information in terms of
4 impact on development, including effect on personality and behavior;
5 finds mitigating themes in the client's life history. . .

6 *Guideline 4.1A.1.* The *Guidelines* also establish a very broad scope for the required mitigation
7 investigation. The Comments to *Guideline 10.7* provide specific guidance into the extensive
8 requirements for a competent mitigation investigation:

9 Because the sentence in a capital case must consider in mitigation
10 "anything in the life of the defendant which might militate against the
11 appropriateness of the death penalty for the defendant," "penalty phase
12 preparation requires extensive and generally unparalleled investigation
13 into personal and family history. In the case of the client this begins with
14 the moment of conception. Counsel needs to explore:

- 15 (1) Medical history . . .
- 16 (2) Family and social history (including physical, sexual or emotional
17 abuse; family history of mental illness, cognitive impairments, substance
18 abuse, or domestic violence; poverty, familial instability, neighborhood
19 environment and peer influence); other traumatic events such as exposure
20 to criminal violence, the loss of a loved one or natural disaster;
21 experiences of racism or other social or ethnic bias; cultural or religious
22 influences; failures of government or social intervention (e.g. failure to
23 intervene or provide necessary services, placement in poor quality foster
24 care or juvenile detention facilities);
- 25 (3) Educational history . . .
- 26 (4) Military service . . .
- 27 (5) Employment and training history. . .
- 28 (6) Prior juvenile and adult correctional experience. . .

Moreover, the *Guidelines* expressly acknowledge that the process of completing an adequate
mitigation is arduous and time consuming. As described further in the comments to *Guideline 10.7*:

It is necessary to locate and interview the client's family members (who
may suffer from some of the same impairments as the client), and
virtually everyone else who knew the client and his family, including
neighbors, teachers, clergy, case workers, doctors, correctional,
probation or parole officers and others. Records – from courts,
government agencies, the military, employers, etc., -- can contain a wealth
of mitigating evidence, documenting or providing clues to childhood
abuse, retardation, brain damage, and/or mental illness, and corroborating
witnesses' recollections. Records should be requested concerning not

1 only the client, but also his parents, grandparents, siblings and children. A
2 multi-generational investigation frequently discloses significant patterns
3 of family dysfunction and may help establish or strengthen a diagnosis or
4 underscore a hereditary nature of a particular impairment. The collection
5 of corroborating information from multiple sources – a time-consuming
6 task – is important wherever possible to ensure the reliability and thus the
7 persuasiveness of the evidence. [Emphasis added.]

8 The *Supplementary Guidelines* promulgated by the ABA in 2008 also set out the extensive
9 nature of a competent mitigation investigation including conducting a multi-generational family
10 history. *Supplementary Guideline 10.11B*. *Supplementary Guideline 10.11B* also lists an extensive
11 variety of sources that mitigation investigators must review during the course of their investigation.
12 The *Supplementary Guidelines* expressly mandate multiple in-person face-to-face interviews with
13 potential mitigation witnesses:

14 Team members must conduct in-person, face-to-face, one-on-one
15 interviews with the client, the client's family, and other witnesses who are
16 familiar with the client's life, history, or family history or who would
17 support a sentence less than death. Multiple interviews will be necessary
18 to establish trust, elicit sensitive information and conduct a thorough and
19 reliable life-history investigation. Team members must endeavor to
20 establish the rapport with the client and witnesses that will be necessary to
21 provide the client with a defense in accordance with constitutional
22 guarantees relevant to a capital sentencing proceeding.

23 *Supplementary Guideline 10.11C*. The wide range of witnesses that a mitigation specialist is
24 expected to locate, contact and interview is set out in greater detail in *Supplementary Guideline*
25 *10.11E.2*

26 The investigation that Mr. Satterberg admits he relied upon in concluding that there are not
27 sufficient mitigating circumstances fails on all points to satisfy the requirements set out in the *ABA*
28 *Guidelines* and *Supplementary Guidelines*. *Guideline 10.7* sets out the requirement that a
competent mitigation investigator conduct a multi-generational investigation of the defendant's
family history from multiple sources. Ms. Rachunok merely compiled a list of possible family

1 members with virtually no information about their background or life histories. Much of the
2 information contained in her report appears to have been gathered from collateral sources such as
3 news reports about Mr. Monfort following his arrest. *Guideline 10.7* also requires that a mitigation
4 investigator locate and interview “virtually everyone else who knew the client and his family,
5 including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole
6 officers and others.” Ms. Rachunok interviewed only one person who knew Mr. Monfort during his
7 childhood. Dan Fruits was married to Mr. Monfort’s mother Suzan for approximately four years
8 when Mr. Monfort was roughly ages 11 through 15.² Mr. Fruits provided some facts about the time
9 Mr. Monfort spent in Bethel, Alaska but very little about his first 11 years in Las Vegas and Indiana
10 or his subsequent time growing up in Indiana and Denver. Mr. Fruits did tell Ms. Rachunok that
11 Suzan Monfort’s sister “Kam” might have helpful information, however there is no indication that
12 Ms. Rachunok attempted to contact her.

13
14
15 Aside from Mr. Fruits, the only relative of Mr. Monfort that Ms. Rachunok spoke with is
16 Tony Scott, who is married to Mr. Monfort’s second cousin Brenda Hanning. Mr. Scott has been
17 married to Brenda Hanning for fifteen years and there is no indication he knew Mr. Monfort before
18 that time. Mr. Scott was unable to provide any substantive information about Mr. Monfort’s
19 childhood and only a few sparse details about his family background. Mr. Scott did provide the
20 names of Mr. Monfort’s aunt Nancy Hanning and cousins Brenda Hanning and David Hanning but
21 there is no indication that Ms. Rachunok attempted to interview these individuals who clearly
22 would have more information about Mr. Monfort’s background and family history. Even assuming
23 some of Mr. Monfort’s family members would have been unwilling to speak with Ms. Rachunok,
24
25
26

27
28 ² Mr. Fruits and Suzan Monfort were legally married until 1998 but they separated in 1982 and had no substantive contact after that date.

1 there is no indication she attempted to interview other potential witnesses from his childhood such
2 as teachers, neighbors, friends or other people living in the towns where Mr. Monfort grew up.
3 Moreover, Ms. Rachunok neither interviewed nor apparently attempted to interview any members
4 of Mr. Monfort's paternal family to learn about that side of his background. Those gaping holes in
5 Ms. Rachunok's investigation render it virtually useless as a source of information about any
6 potential mitigating circumstances in this case.
7

8 The *Guidelines* and *Supplementary Guidelines* also require mitigation investigators to
9 conduct multiple in-person interviews with people familiar with the defendant's life. The reasons
10 are that multiple face-to-face interviews are necessary to establish trust, elicit sensitive information
11 and conduct a thorough and reliable life-history investigation. *Supplementary Guideline 10.11C*.
12 None of Ms. Rachunok's interviews satisfy these criteria. All were over the phone and she did not
13 conduct a single follow-up interview. As a result, the information she obtained about Mr. Monfort
14 was random and superficial. Her investigation fell short of even the most rudimentary background
15 investigation.
16
17

18 While mitigation input from the defense is desirable, Washington courts have not concluded
19 that it is a prerequisite for filing a death notice under RCW 10.95.040. However, the statute
20 requires that the prosecutor base his decision on whether to seek death on having reason to believe
21 that there are not sufficient mitigating circumstances to merit leniency. Here, Mr. Satterberg lacked
22 a factual basis to make that determination because the investigation he relied upon did not provide
23 sufficient information about Mr. Monfort life history and family background.
24

25 It is clear that from the outset of this case the prosecutor intended to rush the pace of his
26 decision to seek the death penalty and that his decision to seek death is based upon the underlying
27 facts of the crimes and not on an absence of mitigation. Ms. Rachunok's purported mitigation
28

1 investigation is an obvious attempt to provide some cover for that decision and not a genuine effort
2 at uncovering mitigating evidence. The state's decision to seek the death penalty failed to adhere to
3 the requirements of RCW 10.95.040 and as a result, the death notice should be dismissed.

4
5 **C. The State's Decision to File the Death Notice in Violation of RCW 10.95.040**
6 **Violated Mr. Monfort's Due Process Rights under the Fifth and Fourteenth**
7 **Amendments to the U.S. Constitution and under Article 1 Section 14 of the**
8 **Washington State Constitution.**

9 When a state provides criminal defendants with procedural safeguards, even when not
10 required by the federal constitution, a defendant has a protected liberty interest in the exercise of
11 that state procedure in his case and that liberty interest is protected by the Fourteenth Amendment.
12 *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d (1980). In this case, the state did not
13 satisfy safeguards set forth in RCW 10.95.040 that protect Mr. Monfort's due process interest in life
14 and liberty. As a result, his due process rights under the Fifth and Fourteenth Amendments to the
15 United States Constitution have been violated and the death notice should be dismissed. *Hicks*,
16 *supra*.

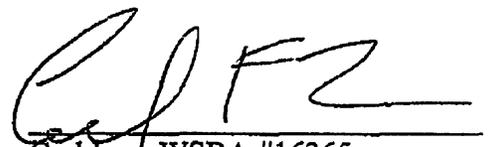
17 **CONCLUSION**

18 In Washington, a prosecutor may seek the death penalty only through scrupulous
19 compliance with RCW 10.95.040. Under that statute, the prosecutor may seek death only when
20 there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.
21 The statute focuses on mitigating factors and not the underlying facts of the charged crimes. Unlike
22 a capital sentencing jury, a prosecutor is not directed by statute to "have in mind the crime" when
23 determining whether there are sufficient mitigating circumstances to merit leniency. The King
24 County Prosecuting Attorney filed the notice of intent to seek the death penalty against Mr. Monfort
25 based upon the facts of the charged crimes and lacked a reasonable factual basis to conclude there
26 are insufficient mitigating circumstances to merit leniency. Denial of a statutorily created liberty
27
28

APP000206

1 interest in state sentencing procedures is a denial of due process under the Fourteenth Amendment,
2 particularly in a capital case. For these reasons, this court should dismiss the death notice filed by
3 the state on September 2, 2010.
4

5
6 Respectfully submitted this 20th day of July, 2012.

7 

8
9 Carl Luet WSBA #16365
10 Todd Gruenhagen WSBA #12340
11 Stacey MacDonald WSBA #35394
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SUPREME COURT NO. 88522-2

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

***SEE VOLUME II FOR APPENDICES A-J TO MONFORT'S
CROSS-MOTION FOR DISCRETIONARY REVIEW**

SUPREME COURT NO. 88522-2

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

APPENDICES A-J TO MONFORT'S CROSS-MOTION FOR
DISCRETIONARY REVIEW

VOLUME II

APPENDIX A



Murder charge filed in Seattle officer's shooting

By LEVI PULKKINEN, SEATTLEPI.COM STAFF
Updated 10:00 p.m., Wednesday, November 11, 2009

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Accusing the alleged cop killer of waging a "one-man war against police," King County Prosecutor Dan Satterberg announced charges that could see Christopher J. Monfort executed.

Monfort, 41, has been charged with aggravated first-degree murder in the Oct. 31 slaying of Seattle Police Officer Tim Brenton, Satterberg announced Thursday. Prosecutors also charged Monfort with three counts of attempted first-degree murder and one count of arson, asserting that the man rigged several bombs at a City of Seattle garage hoping to kill officers and firefighters.

Like Monfort's other intended victims, Brenton and partner Officer Britt Sweeney were "targeted solely because of the badge they wore," Satterberg claimed.

"He had a plan to wage a personal war against the Seattle Police Department," the elected prosecutor said.

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APP000209

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Described as a "domestic terrorist" by police, Monfort is accused of ambushing Brenton and Sweeney as they sat in a patrol car in Seattle's Leschi neighborhood. Sweeney, who suffered a grazing wound in the shooting, told investigators Monfort pulled up next to the patrol car in a light-colored coupe and opened fire; Brenton was struck by multiple rounds and died at the scene.

Following a tip, Seattle and Tukwila detectives went to Monfort's Tukwila home on Friday hoping to contact the 41-year-old. As a memorial service for Brenton concluded in Seattle, Seattle homicide detectives spotted Monfort in the parking lot of the Terrace Apartments. Police contend Monfort drew a pistol, and was shot in the face and stomach by three Seattle detectives.

Describing the incident, Satterberg said Monfort pointed a pistol at one Seattle homicide detective and pulled the trigger. The gun failed to fire because Monfort hadn't chambered a round, Satterberg said.

As Monfort tried to run to his fourth-floor apartment, the three homicide detectives fired on him, according to court documents. Each fired two shots, though investigators have yet to determine which bullets struck Monfort.

Revealing more of the case against Monfort, Satterberg claimed Seattle homicide detectives arriving at the accused's Tukwila apartment denied Monfort the final battle for which he was stockpiling guns and bombs.

Monfort, Satterberg said, had a large incendiary device rigged to destroy his apartment. Investigators also found several homemade grenades loaded with nails and wire, as well as a large number of tires apparently procured to create a barricade.

Prosecutors allege that detectives searching Monfort's apartment found bomb-making equipment and the .223-caliber assault rifle that ballistics tests matched to bullets recovered at the Brenton's slaying. Two other rifles and a shotgun were found, as were explicit photos believed to be child pornography, Satterberg said.

APP000210

In court documents, police detectives describe the bombs found at Monfort's home as similar to those used to destroy several cars at City of Seattle maintenance garage at 714 S. Charles St. on Oct. 22.

Satterberg alleged that Monfort rigged explosives under three police cruisers, then started a fire inside a RV-style mobile command center. Monfort, Satterberg said, had hoped to draw firefighters and police to the burning command center before the bombs under the police cruisers detonated.

In court documents, prosecutors allege that several notes left at the scene described the incident as though several police officers had been killed in the attack. One note referred to an incident involving King County Sheriff's Deputy Paul Schene, who is currently facing charges on allegations that he kicked and beat a teenage girl who was in custody.

"OCTOBER 22nd is the 14th National day of protest to stop Police Brutality," the note read, according to police reports. "These deaths are dedicated to (King County Sheriff's) Deputy Travis Bruner, he stood by and did nothing, as Deputy Paul Schene Brutally beat and Unarmed 14 year old Girl in their care.

"You Swear a Solemn Oath to Protect US From All Harm, That includes You ! Start policing each other or get ready to attend a lot of police funerals. We Pay your bills. You Work for US."

Police go on to note that a large hunting knife was found stabbed through the hood of one cruiser. An American flag had been fixed to its handle.

Prosecutors allege that DNA found at the Charles Street bombings and the site of Brenton's slaying match Monfort.

In announcing the decision Thursday morning, Satterberg has left open the possibility that he will seek a death sentence against Monfort in the shooting death of Brenton. Under state law, an aggravated murder conviction carries one of two sentences -- life in prison without the possibility of parole, or death.

"The death penalty is reserved in the State of Washington for the worst of the worst," Satterberg said. "We're going to take our time, but there is no greater crime in my view than the murder of a police officer."

Authorities have previously been reluctant to comment on any possible motive for the attacks. University of Washington records and other documents show that Monfort had long-standing complaints about the administration of justice, though no specific event has been offered to explain what might have prompted the slaying.

APP000211

Under law, Satterberg has 30 days from Monfort's arraignment to decide whether to seek a death sentence. In practice, that deadline is usually extended to allow defense attorneys time to gather mitigating or exculpatory evidence that might sway the prosecutor away from seeking execution.

In addition to the aggravated murder and attempted murder charges in the attack on Brenton and Sweeney, prosecutors charged Monfort with first-degree arson and one count of attempted first-degree murder in the Charles Street bombing. Monfort was also charged with one count of attempted first-degree murder on allegations that he attempted to kill one of the detectives near his apartment.

On Thursday, Monfort remained at Harborview Medical Center in Seattle where he was being treated for his wounds. He is expected to be arraigned as soon as the hospital approves his release.

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APP000212

APPENDIX B

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Updated Nov 12, 2009 - 6:34 pm

King County Prosecutor: We've never seen anything like this

MyNorthwest.com staff

King County prosecutor Dan Satterberg called a suspect in the murder of police officer Timothy Brenton a "brazen and calculated" murderer at a news conference on Thursday morning before charging Christopher Monfort with five counts, including aggravated first degree murder which could carry the death penalty.

Satterberg claimed that 41 year-old Monfort waged a "one man war" against the Seattle Police Department, adding that, "We've never seen anything like this."

Satterberg gave a point by point presentation of the case against Monfort beginning with igniting homemade bombs that destroyed several police vehicles at a city maintenance yard in October. Satterberg said Monfort's next crime was the assassination-style killing of Brenton and wounding another officer as they sat in a parked patrol car on Halloween. He also detailed how Monfort tried to fire a gun at homicide detectives who approached him outside his Tukwila apartment complex on Friday.

In addition to the aggravated first degree murder charge, Monfort has been charged with three counts of attempted first degree murder and first degree arson.

Prosecutors say they have ample evidence for their case including a ballistics match between a rifle of Monforts and the bullets that killed Officer Brenton, and a DNA profile match linking Monfort to the killings as well as the arson at the city maintenance yard.

The head of the Seattle Police Guild, Sergeant Rich O'Neill said he was pleased with the charges, "I think the charges are very very appropriate. We're very pleased with the decision of King County Prosecutor Dan Satterberg."

Seattle attorney and legal analyst Anne Bremner believes that the evidence points toward the death penalty for Monfort, "We have premeditation, the torching of police cars, the leaving of notes (saying) that there would be police funerals, the potential detonation of explosive devices to kill first responders."

Satterberg has 30 days to decide whether to seek the death penalty, though such decisions often are delayed to give defense attorneys more time to prepare.

Monfort remains at Harborview Medical Center in satisfactory condition. However, the shooting left him paralyzed, The Seattle Times reported Tuesday evening, citing a statement issued by Monfort's mother, Suzan Monfort.

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APP000214

APPENDIX C

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

December 14, 2009

Julie Lawry and Paige Garberding
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA

Dear Julie and Paige:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than June 15, 2010, six months from today's arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than May 15, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of June 1-5, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

APP000216

APPENDIX D

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON

Norm Maleng
Prosecuting Attorney

WSSA King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9900

August 2, 2006

Wes Richards
The Defender Association
810 3rd Ave. #800
Seattle, WA 98104

Re: State v. Naved Hui, KCSC Cause # 06-1-06658-4 SEA.

Dear Wes,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Hui, 06-1-06658-4 SEA. As you know, RCW 10.95.040 sets out a 30 day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame is meant to allow time for the consideration of mitigating circumstances to merit leniency.

In this case, the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issues and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses. We anticipate that this process will be completed and a decision to file a notice made no later than November 8, 2006 (90 days after arraignment).

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than October 30, 2006. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of October 30 - November 3, 2006. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by some cases in the past, but it has been our experience that the longer time period does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For NORM MALENG,
King County Prosecuting Attorney



Mark R. Larson
Chief Deputy, Criminal Division

APP000218

APPENDIX E

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

RECEIVED

2009 SEP -2 AM 11:04
NORTHWEST DEFENDERS ASSOCIATION



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

September 1, 2009

Ramona Brandes
Northwest Defenders Association
1111 3rd Ave, Ste. 200
Seattle, WA 98101-3292

Michael Schwartz
Law Offices of Michael Schwartz
524 Tacoma Ave S
Tacoma, WA 98402-5416

Re: State v. Isaiah Kalebu, # 09-1-04992-7 SEA

Dear Ramona and Michael,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Kalebu, # 09-1-04992-7 SEA. As you know, RCW 10.95.040 sets out a 30-day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame allows for the consideration of mitigating circumstances to merit leniency.

In this case, we anticipate that this process will take us longer than 30 days, provided your client is willing to waive his right to a more speedy decision. Should he be willing to waive, it is our intention to complete our review and make a decision no later than February 12, 2010, which is six months from the date of arraignment.

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials be submitted no later than January 12, 2010. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of February 1-5, 2010. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by other cases in the past, but it has been our experience that the longer time frame does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark R. Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
James Konat, Senior Deputy Prosecuting Attorney

APP000220

APPENDIX F

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

January 25, 2010

Gary Davis
Kevin Dolan
Associated Counsel for the Accused
200 110 Prefontaine Place South
Seattle, WA 98104-2674

Re: State v. Daniel Thomas Hicks, #09-1-07578-2 SEA

Dear Gary and Kevin:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than July 19, 2010, six months from his January 19, 2010, arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than June 18, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of July 6-9, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney
Kristin Richardson and David Martin, Senior Deputy Prosecuting Attorneys, King County

APP000222

APPENDIX G

q13fox.com/news/kcpq-080210-monfort-death-penalty,0,5193624.story

KCPQ

King County Prosecutor Will Seek Death Penalty For Christopher Monfort

Accused Killer Is Charged With Officer Timothy Brenton's Murder

Q13 FOX News Online

Web Reporter

9:03 AM PDT, September 2, 2010

SEATTLE

King County Prosecuting Attorney Dan Satterberg has decided to seek the death penalty in the case against Christopher Monfort, the man accused of murdering Seattle Police Officer Timothy Brenton on Halloween in 2009.

advertisement



Below is a statement from Satterburg regarding the death penalty option in the case of State v. Christopher Monfort:

"This morning, I filed a notice of intent to seek the death penalty in the case of State v. Christopher Monfort, who is charged with aggravated first degree murder for the slaying of Seattle Police Officer Timothy Brenton."

"Monfort is also charged with the attempted first degree murder of Seattle Police Officer Britt Sweeney, Officer Brenton's partner, the attempted first degree murder of Seattle Police Sergeant Gary Nelson, arising from Monfort's conduct when apprehended and the arson and attempted murder of additional law enforcement personnel stemming from bombs that were planted at the Charles Street Vehicle Services Facility used by the Seattle Police Department."

"The intentional, premeditated and random slaying of a police officer is deserving of the full measure of punishment under the law. The magnitude of the crimes with which the defendant is charged, and the absence of significant mitigating factors, convinced me that we should submit this case to the jury with

the full range of applicable punishments, including the possibility of the death penalty."

Monfort is charged with aggravated murder in the shooting of Officer Timothy Brenton as he sat in a patrol car on Halloween. Monfort has pleaded not guilty.

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APP000225

APPENDIX H

APP000226

FILED

SEP 02 2010

SUPERIOR COURT
BY Susan Bone
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER JOHN MONFORT,

Defendant.

)
) No. 09-1-07187-6 SEA
)
) NOTICE OF SPECIAL SENTENCING
) PROCEEDING TO DETERMINE
) WHETHER DEATH PENALTY
) SHOULD BE IMPOSED
)
)

COMES NOW Daniel T. Satterberg, King County Prosecuting Attorney, and gives notice pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether the death penalty should be imposed, there being reason to believe that there are not sufficient mitigating circumstances to merit leniency.

DATED this 2nd day of September, 2010.

By: 
DANIEL T. SATTERBERG
King County Prosecuting Attorney
Office WSBA #91002

NOTICE OF SPECIAL SENTENCING PROCEEDING
TO DETERMINE WHETHER DEATH PENALTY
SHOULD BE IMPOSED - 1 -

0810-002

APP000227

APPENDIX I

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KUOW NEWS

Monfort's Attorney Says Guilty Plea Rejected

Patricia Murphy

09/02/2010

King County Prosecutor Dan Satterberg says he'll seek the death penalty for Christopher Monfort. Monfort is charged in the shooting death of Seattle police officer Timothy Brenton on Halloween. But Monfort has offered to plead guilty in exchange for a life sentence. KUOW's Patricia Murphy reports.

TRANSCRIPT

Now that King County Prosecutor Dan Satterberg has decided to seek the death penalty, a lengthy trial is almost certain. But Monfort's attorney Julie Lawry says she recently offered prosecutors a streamlined approach to the case: Monfort's guilty plea in exchange for a sentence of life in prison.

Lawry: "We had a conversation with Mr. Satterberg discussing that as an option and he wasn't interested in discussing it."

When asked about the offer, Satterberg said his office doesn't discuss plea negotiations.

Satterberg: "At the end of the day this is an extremely serious case. It's about as serious as it gets when you ambush police and try to kill multiple police officers. So this is a case a jury needs to hear. And it's a case that a jury should have all options on."

In addition to aggravated murder, the 41-year-old is charged with attempted murder of Seattle Police Officer Britt Sweeney, who was in the car alongside Brenton. Monfort also faces charges in connection with an alleged firebombing of police vehicles.

I'm Patricia Murphy, KUOW News.

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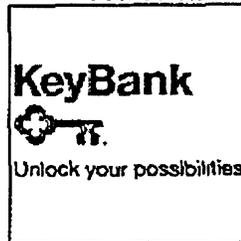
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KUOW NEWS FEATURES

Civilian Observer Says Seattle Police Review Board Puts Her On Sidelines

A Seattle Police review board is looking into the fatal shooting of John T. Williams. The board includes a civilian observer, but the observer has few opportunities for input. [More »](#)

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APP000229

APPENDIX J

APP000230



Wednesday, September 22, 2010, 12:36 PM

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King County Prosecutor: No Plea Deal for Monfort

Posted: Thursday, September 2, 2010

The King County prosecutor says he'll seek the death penalty against Christopher Monfort if he's convicted of killing a Seattle police officer. Monfort is charged with aggravated murder in the shooting of Officer Timothy Brenton as he sat in a patrol car on Halloween. KUOW's Patricia Murphy reports.

Prosecutor Dan Satterberg says Monfort's intentional, premeditated and random slaying of a police officer is deserving of the full measure of punishment under the law. But Monfort's defense attorney says Satterberg's decision is not in the best interest of the state or the tax payer. Julie Lawry says her client has offered to plead guilty in exchange for a life sentence.

She says that offer was turned down.

Julie Lawry: "There's a political agenda here about killing this man. And it's different than just having him take responsibility for what he did or didn't do."

Satterberg says his office doesn't discuss plea negotiations. Last week King County Superior Court Judge Ronald Kessler denied a defense motion requesting that Satterberg delay announcing his decision on the death penalty until Lawry's team could complete its investigation.

Lawry says there's a great deal of information about her client and his background that merit leniency and weigh heavily against this severe a punishment. Julie Lawry: "We have an expert who is doing our mitigation work which is time consuming and detailed and requires more than an internet search. What Mr. Satterberg has is a regular investigator who did something akin to you know that any ten year old child could do."

Dan Satterberg disagrees.

Dan Satterberg: "We hired our own investigator who spent months talking to everybody who Monfort came into contact with throughout his life and I think we have a pretty good picture of who this individual is."

In addition to aggravated murder Monfort is charged with attempted murder of Seattle Police Officer Britt Sweeney, who was in the car alongside officer Brenton. He also faces charges in connection with an alleged firebombing of police vehicles.

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APP000231

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12 SEP -6 AM 10:07

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

STATE'S RESPONSE TO DEFENSE
MOTION TO STRIKE NOTICE OF
INTENT TO SEEK THE DEATH
PENALTY ON GROUNDS THAT
STATE FAILED TO COMPLY WITH
RCW 10.95.040.

Christopher Monfort is charged with arson in the first degree, three counts of attempted murder in the first degree and aggravated murder in the first degree. In regard to the aggravated murder charge, the State has alleged the following aggravating circumstance: the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing. In this motion, Monfort argues that the State violated RCW 10.95.040 because the prosecuting attorney considered the facts of the crime in deciding whether to seek the death penalty. Monfort also apparently argues that the State violated RCW 10.95.040

1 because the State did not retain a "mitigation specialist" before deciding whether to seek the
2 death penalty. Both of these claims are without merit, and should be rejected. Monfort's motion
3 to strike the death penalty notice on these bases should be denied.

- 4 1. UNDER WASHINGTON LAW, THE PROSECUTING ATTORNEY MUST
5 CONSIDER THE FACTS OF THE CRIME IN DETERMINING WHETHER
6 THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT
7 LENIENCY.

8 Monfort argues that the King County Prosecuting Attorney violated RCW 10.95.040 by
9 considering the facts of the charged crime in making a determination whether to seek the death
10 penalty in this case. This claim must be rejected. Viewed within the context of the
11 constitutional requirements imposed by the United States Supreme Court, the plain language of
12 the relevant Washington statutes demonstrates that the presence or absence of mitigating
13 circumstances must be considered in relation to the circumstances of the crime. The State has
14 fully complied with the constitutional and statutory requirements in this case.

15 Current death penalty jurisprudence began, to a large extent, with the United States
16 Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346
17 (1972) (*per curiam*). In Furman, the Court struck down the discretionary death penalty statutes
18 of Georgia and Texas, which left imposition of the death penalty wholly to the jury's discretion
19 once the jury found the defendant guilty of a capital crime. Each justice of the five-person
20 majority wrote a separate opinion in Furman, and none of those opinions were signed by more
21 than one justice. Thus, as Chief Justice Burger, writing for the four-person dissent, noted, "The
22 actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is
23 not entirely clear." 408 U.S. at 397 (C.J. Burger, dissenting).

1 In response to Furman, Georgia enacted a new death penalty scheme that the Court held
 2 to be constitutional just four years later in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49
 3 L.Ed.2d 859 (1976). Georgia's new statutory scheme narrowed the class of persons eligible to
 4 receive the death penalty to those convicted of murder and found guilty of one of ten aggravating
 5 circumstances, including that the victim was a police officer engaged in official duties at the time
 6 of the murder. Id. at 196. The jury was also allowed to consider any appropriate mitigating
 7 circumstances in deciding whether to make a recommendation of mercy to the court. Id. The
 8 Court found that Georgia's scheme sufficiently guided the jury's discretion to render it
 9 constitutional. Id. As the Court subsequently explained in Kansas v. Marsh, 548 U.S. 163,
 10 173-74, 126 S. Ct. 2516, 2524-25, 165 L. Ed. 2d 429 (2006) (emphasis added):

11 Together, our decisions in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d
 12 346 (1972) (*per curiam*), and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d
 13 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), establish that a state
 14 capital sentencing system must: 1) rationally narrow the class of death-eligible
 15 defendants; and (2) permit a jury to render a reasoned, individualized sentencing
 16 determination based on a death-eligible defendant's record, personal characteristics, and
 17 the circumstances of his crime. See *id.*, at 189, 96 S.Ct. 2909. So long as a state system
 18 satisfies these requirements, our precedents establish that a State enjoys a range of
 19 discretion in imposing the death penalty, including the manner in which aggravating and
 20 mitigating circumstances are to be weighed. See Franklin v. Lynaugh, 487 U.S. 164, 179,
 21 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) (citing Zant v. Stephens, 462
 22 U.S. 862, 875-876, n. 13, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

23 Thus, in order for a death penalty scheme to be constitutional it must be both narrowing and
 24 individualized. A scheme is individualized if it allows the decision maker to decide punishment
 based on both the facts of the crime and the defendant's personal characteristics. Id. As the
 Court explained in Gregg v. Georgia, "[w]e have long recognized that '[f]or the determination of
 sentences, justice generally requires . . . that there be taken into account the circumstances of the
 offense together with the character and propensities of the offender.'" Gregg, 428 U.S. at 189

1 (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43
2 (1937)) (emphasis added).

3
4 RCW 10.95 et seq. establishes a constitutional death penalty procedure because it both
5 narrows the class of persons eligible for the death penalty and requires an individualized
6 determination of whether the death penalty is appropriate in a particular case. State v. Rupe, 101
7 Wn.2d 664, 699, 603 P.2d 571 (1984); Campbell v. Wood, 18 F.3d 662, 674-75 (9th Cir. 1994),
8 cert. denied, 511 U.S. 1119 (1994). Individualization occurs twice under Washington's statutes:
9 when the prosecuting attorney decides whether to seek the death penalty, and when the jury
10 decides whether to impose the death penalty. As to the first step, RCW 10.95.040(1) provides
11 that:

12 If a person is charged with aggravated first degree murder as defined by RCW 10.95.020,
13 the prosecuting attorney shall file written notice of a special sentencing proceeding to
14 determine whether or not the death penalty should be imposed when there is reason to
15 believe that there are not sufficient mitigating circumstances to merit leniency.

16 As to the second step, RCW 10.95.060(4) provides that:

17 Upon conclusion of the evidence and argument at the special sentencing proceeding, the
18 jury shall retire to deliberate upon the following question: "Having in mind the crime of
19 which the defendant has been found guilty, are you convinced beyond a reasonable doubt
20 that there are not sufficient mitigating circumstances to merit leniency?"

21 In construing a statute, a court's primary objective is to ascertain and carry out the
22 legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); State v. J.P., 149
23 Wn.2d 444, 450, 69 P.3d 318 (2003). If the meaning of the statute in question is clear from its
24 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

State's Response to Defense Motion to Strike Notice of
Intent to Seek the Death Penalty on Grounds that State
Failed to Comply with RCW 10.95.040. - 4

Daniel T. Satterberg, Prosecuting Attorney
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Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

APP000235

1 of the language at issue, but not viewed in isolation; rather, the court must consider the context
 2 of the statute in which that provision is found, related provisions, and the statutory scheme as a
 3 whole. Jacobs, 154 Wn.2d at 600-01. Moreover, a court should not adopt an interpretation of a
 4 statute that renders any portion of the statute meaningless. State v. Keller, 143 Wn.2d 267, 277,
 5 19 P.3d 1030 (2001). Again, a court must be mindful that its purpose in construing a statute is to
 6 "determine and enforce the intent of the legislature"; thus, it must not interpret a statute in a
 7 manner that thwarts legislative intent. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345
 8 (2008).

9 Monfort argues that in regard to the first step of individualization contained in RCW
 10 10.95.040(1)—the prosecuting attorney’s decision to seek the death penalty—the prosecuting
 11 attorney may not consider the facts of the crime. The claim is contradicted by the plain language
 12 of the relevant statutes, and it defies common sense. RCW 10.95.040 requires the prosecuting
 13 attorney to consider “whether there is reason to believe that there are not sufficient mitigating
 14 circumstances to merit leniency.” RCW 10.95.070 sets forth a non-exclusive list of “relevant
 15 factors” that the trier of fact may consider in deciding whether there are sufficient mitigating
 16 circumstances to merit leniency. These relevant factors include:

- 17 (2) Whether the murder was committed while the defendant was under the influence of
 extreme mental disturbance;
- 18 (3) Whether the victim consented to the act of murder;
- 19 (4) Whether the defendant was an accomplice to a murder committed by another person
 where the defendant’s participation in the murder was relatively minor;
- 20 (5) Whether the defendant acted under duress or domination of another person;
- 21 (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the
 wrongfulness of his or her conduct or to conform his or her conduct to the requirements
 of law was substantially impaired as a result of mental disease or defect.
- 22 ...
- 23 (8) Whether there is a likelihood that the defendant will pose a danger to others in the
 future.

1 This list of non-exclusive mitigating circumstances conclusively demonstrates that the facts of
2 the crime must be considered in determining whether "there are not sufficient mitigating
3 circumstances to merit leniency," as required by both RCW 10.95.040(1) and 10.95.060(4). For
4 example, the facts of the crime must be considered in determining whether the murder was
5 committed while the defendant was under an extreme mental disturbance. The facts of the crime
6 must be considered in determining whether the victim consented to the act of murder. The facts
7 of the crime must be considered in determining whether the defendant was an accomplice to a
8 murder committed by another person and the defendant's participation was relatively minor. The
9 facts of the crime must be considered in determining whether the defendant acted under duress.
10 The facts of the crime must be considered in determining whether the defendant's capacity to
11 appreciate the wrongfulness of his conduct was substantially impaired at the time of the murder.
12 And finally, the facts of the crime, and particularly the defendant's relationship with or the lack
13 of any relationship with the victim, must be considered in determining whether there is any
14 likelihood that the defendant will pose a danger to others in the future.

15 Although the Washington Supreme Court has not addressed the precise argument
16 Monfort is making here, the court's cases impliedly recognize what is obvious from a sensible
17 reading of the plain language of the statutory scheme: that consideration of the facts of the crime
18 is a crucial aspect of a prosecutor's decision to seek the death penalty. See Rupe, 101 Wn.2d at
19 700 (noting that "prosecutors exercise their discretion in a manner which reflects their judgment
20 concerning *the seriousness of the crime or insufficiency of the evidence*" in determining whether
21 to seek the death penalty) (emphasis supplied); State v. Campbell, 103 Wn.2d 1, 26-27, 691 P.2d
22 929 (1984) (same, quoting Rupe, 101 Wn.2d at 700).

23
24 State's Response to Defense Motion to Strike Notice of
Intent to Seek the Death Penalty on Grounds that State
Failed to Comply with RCW 10.95.040. - 6

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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APP000237

1 When a court interprets a statute, the court must avoid reading the statute in a manner that
2 produces absurd results. J.P., 149 Wn.2d at 450. The legislature is presumed to intend that its
3 enactments should not result in absurdity. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185
4 (1983).

5 Monfort's proposed interpretation of RCW 10.95.040(1) would lead to absurd results and
6 in all likelihood render Washington's death penalty scheme unconstitutional. How could a
7 prosecuting attorney make a rational decision as to whether to seek the death penalty without
8 considering the facts of the crime? Indeed, a rule requiring a prosecutor to disregard everything
9 but potentially mitigating evidence would likely lead to arbitrary application of the death penalty.
10 Monfort's proposed construction would also be impossible to implement. How could the
11 prosecuting attorney shield himself or herself from the facts of the crime so as to consider only
12 potentially mitigating evidence?

13 In short, the prosecuting attorney must consider the circumstances of the crime in
14 deciding whether to seek the death penalty. The prosecuting attorney did not violate RCW
15 10.95.040(1) in this case.

16 2. THERE IS NO CONSTITUTIONAL OR STATUTORY REQUIREMENT THAT
17 THE PROSECUTING ATTORNEY HIRE A MITIGATION SPECIALIST.

18 Although this Court's records reflect that it has authorized the expenditure of
19 \$367,950.00 for "mitigation services" on behalf of Monfort as of July 23, 2012, the defense has
20 chosen not to provide evidence of mitigating circumstances to the State. See Sub 540. In the
21 present motion, Monfort has conceded that "the prosecutor need not delay his decision [to seek
22 the death penalty] until the defense provides mitigation material."

23 Nonetheless, Monfort suggests that when the defense chooses not to provide evidence of
24 mitigating circumstances, the prosecuting attorney may not decide to seek the death penalty

1 pursuant to RCW 10.95.040(1) unless the prosecuting attorney hires his or her own mitigation
2 specialist whose investigation meets the Supplementary Guidelines for the Mitigation Function
3 of Defense Teams in Death Penalty Cases promulgated by the American Bar Association in
4 2008. There is simply no authority for this proposition whatsoever, and it should be rejected out
5 of hand.

6 The defense argues that the background information gathered by the prosecuting attorney
7 in this case was insufficient and attempts to rely on State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d
8 245 (1995). This reliance is misplaced. In Pirtle, the prosecuting attorney made a decision to
9 seek the death penalty thirty days after the defendant's arraignment, having received no input
10 from the defense. The state supreme court held that the prosecuting attorney had complied with
11 the requirements of RCW 10.95.040(1) by considering the information it had, which consisted
12 primarily of Pirtle's criminal history. Pirtle, 127 Wn.2d at 642-43. The court stated,

13 Even without input from the defense, the prosecutor had a substantial amount of
14 information about Pirtle. Pirtle was born in Spokane and lived most of his life there. His
15 contact with law enforcement officers had been extensive. He had ten juvenile
16 convictions, including three for second degree burglary. He had five adult convictions,
17 including one for first degree theft and another for felony assault. Because of Pirtle's
18 history, the prosecutor had some information about each of the statutory mitigating
19 factors, with the possible exception of the Defendant's mental state at the time of the
20 crime.

21 Given what the prosecutor already knew and his willingness to wait thirty days to
22 see if the defense could develop additional information, we find the prosecutor did not
23 abuse his discretion.

24 Id.

In the present case, the prosecuting attorney gathered background information about
Monfort prior to deciding to seek the death penalty.. As previously noted in filings before this
court, the State's investigation into Monfort's background included dozens of interviews with
Monfort's associates, family members, fellow employees, fellow students, former teachers and

State's Response to Defense Motion to Strike Notice of
Intent to Seek the Death Penalty on Grounds that State
Failed to Comply with RCW 10.95.040. - 8

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1 others. The State also considered Monfort's lack of any significant criminal history. The
 2 prosecuting attorney's decision in the present case was based on more information than that
 3 known to the prosecuting attorney in Pirtle. As in Pirtle, the prosecuting attorney did not abuse
 4 his discretion or fail to comply with the statutory requirements.¹

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¹ Monfort also briefly argues that his right to due process was violated by the State's failure to comply with RCW 10.95.040. As argued above, the State has complied with the requirements of RCW 10.95.040, and Monfort's due process claim need not be further addressed.

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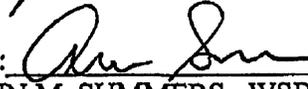
3. CONCLUSION.

For the foregoing reasons, the motion to strike the notice of intent to seek the death penalty should be denied.

Respectfully submitted this 6th day of September, 2012.

DANIEL SATTERBERG
King County Prosecuting Attorney

By: 
JOHN B. CASTLETON, JR. WSBA # 29445
Senior Deputy Prosecuting Attorney

By: 
ANN M. SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

Cause No: 09-1-07187-6 SEA

DEFENSE REPLY TO STATE'S RESPONSE
TO MOTION TO STRIKE NOTICE OF
INTENT TO SEEK THE DEATH PENALTY
ON GROUNDS THAT THE STATE FAILED
TO COMPLY WITH THE MANDATES OF
RCW 10.95.040

ARGUMENTS IN REPLY

A. The State Incorrectly Asserts that the United States Constitution and RCW 10.95.040 Require a Prosecutor to Consider the Facts of the Crime in Determining Whether to Seek the Death Penalty.

The State incorrectly asserts that Washington law requires prosecutors to consider the facts of the crime in deciding whether to seek the death penalty in aggravated murder cases. The State initially cites to federal Eighth Amendment law for that proposition and quotes the following language from *Kansas v. Marsh*, 548 U.S. 163, 173-74, 126 S.Ct. 2516, 2524-25, 165 L.Ed.2d 429 (2006):

Together, our decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), (*per curiam*), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell and Stevens, JJ), establish that a state capital system must: 1) permit a jury to render a reasoned, individualized sentencing determination and based on a death-eligible defendant's record, personal characteristics, and the circumstances

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ORIGINAL

Associated Counsel for the
Accused

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1 of his crime. See *id.*, at 189. 96 S.Ct. 2909. So long as a state system satisfies these
 2 requirements, our precedents establish that a State enjoys a range of discretion in imposing
 3 the death penalty, including the manner in which aggravating and mitigating circumstances
 4 are to be weighed. See *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101
 L.Ed.2d (1988) (plurality opinion) (citing *Zant v. Stephens*, 462 U.S. 862, 875-76, n. 13, 103
 S.Ct. 2733, 77 L.Ed. 235 (1983)).

5 While the State emphasizes the “circumstances of the crime” language in *Marsh*, the
 6 operative term in the quoted passage is “jury.” Federal law requires that capital punishment statutes
 7 narrow the class of death eligible defendants and permit the *jury* to make an individualized
 8 sentencing determination based on the defendant’s history, personal characteristics and the
 9 circumstances of the crime. RCW 10.95 complies with the latter constitutional mandate. RCW
 10 10.95.060(4) requires capital jurors to consider the facts of the crime in rendering their verdict by
 11 providing that they deliberate on the following question:
 12

14 Having in mind the crime of which the defendant has been found guilty, are you convinced
 15 beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit
 leniency?

16 The statute does not, however, require that prosecutors consider the crime of which the
 17 defendant has been charged when making the determination to seek death in the first place. That
 18 decision is governed by RCW 10.95.040, which requires the prosecutor to seek the death penalty
 19 “when there is reason to believe that there are not sufficient mitigating circumstances to merit
 20 leniency.” Unlike RCW 10.95.060(4), RCW 10.95.040(1) makes no mention of the charged crime
 21 being a consideration in the prosecutor’s determination on whether to seek death. Under *expressio*
 22 *unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute
 23 implies the exclusion of the other, *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). In
 24 *Delgado*, the court presumed that the absence of language relating to “comparable offenses” in
 25 Washington’s two-strikes law meant that the list of strike offenses in that statute is exclusive, unlike
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1 the three-strikes law, which includes comparable offenses. *Id.* The same analysis applies here.
 2 RCW 10.95.060(4) expressly requires the jury to consider the “crime of which the defendant has
 3 been convicted” while RCW 10.95.040(1) omits that language. As in *Delgado*, the State here asks
 4 the court to graft the omitted language onto 10.95.040(1). This court should reject that invitation as
 5 did the Supreme Court in *Delgado*. See also *State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694
 6 (1996) (“Where the Legislature uses certain statutory language in one instance, and different
 7 language in another, there is a difference in legislative intent.”)

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 10 The State does not deny that Mr. Satterberg placed heavy emphasis on the facts of the
 11 charged crimes in electing to seek Mr. Monfort’s death. Instead, it argues that the statute authorizes
 12 him to do so because RCW 10.95.070 lists a series of non-exclusive relevant actors that the trier of
 13 fact may consider in deciding whether there are not sufficient mitigating circumstances to merit
 14 leniency. The State again glosses over the specific language of the statute. RCW 10.95.070
 15 expressly applies only to juries and the court in cases where a jury trial is waived:
 16

17 In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is
 18 waived, may consider any relevant factors, including, but not limited to the following. . .

19 RCW 10.95.040(1) is unique among capital punishment schemes in this country – there is no
 20 other jurisdiction with a similar provision requiring the prosecutor to determine whether there is not
 21 sufficient mitigation to merit leniency before seeking the death penalty. The court should not
 22 assume, as the State does, that the Legislature intended something other than the plain language it
 23 used in crafting that provision. The prosecutor’s decision to seek death is limited to consideration
 24 of mitigating circumstances and does not include the facts of the crime. That consideration is
 25 reserved for the jury when making the ultimate determination following trial. The State’s proposed
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1 interpretation of the statute ignores the clear differences between its various provisions and should
2 be rejected.

3
4 Even if RCW 10.95.070 does somehow apply to the prosecutor's decision making process
5 under 10.95.040, it does not authorize wholesale consideration of the underlying charges that the
6 State proposes. The factors listed in RCW 10.95.070 describe circumstances that are specific to the
7 defendant himself and therefore fairly characterized as mitigation. For example, RCW 10.95.070(2)
8 and (6) are concerned with a defendant's mental state at the time of the offense and potential mental
9 illnesses. RCW 10.95.070(3) and (4) focus on whether the victim consented to the murder and
10 whether the defendant was a relatively minor actor in the killing. RCW 10.95.070(5) looks to
11 whether the defendant acted under duress from another person and 10.95.070(7) concerns the
12 defendant's age at the time of the offense. Finally, RCW 10.95.070(8) looks to whether the
13 defendant poses a future danger to others. These are all factors that focus on characteristics of the
14 defendant himself, some of which overlap into considerations dealing with the facts of the charged
15 offense.
16
17 offense.

18 It is clear from Mr. Satterberg's grand pronouncements regarding this case and his decision
19 to seek death that the prosecutor in this case went far beyond any of the factors detailed in RCW
20 10.95.070. When announcing his decision, Mr. Satterberg proclaimed that:
21

22 The intentional, premeditated and random slaying of a police officer is deserving of the full
23 measure of punishment under the law. The magnitude of the crimes with which the
24 defendant is charged, and the absence of significant mitigating factors, convinced me that we
25 should submit this case to the jury with the full range of applicable punishments, including
26 the possibility of the death penalty."

27 Appendix G, *Defense Motion to Strike Notice of Intent to Seek the Death Penalty ("Defense*
Motion"). In a subsequent interview further explaining that decision Mr. Satterberg elaborated on
28 his reasons for seeking death:

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1 At the end of the day, this is an extremely serious case. It's about as serious as it gets when
2 you ambush police and try to kill multiple officers. So this is a case a jury needs to hear.
3 And it's a case that a jury should have all options on.

4 *Defense Motion, Appendix I.*

5 Mr. Satterberg's focus in seeking Mr. Monfort's execution was the fact that the victim in this
6 case was a Seattle police officer. That fact is certainly one of the circumstances that elevates a
7 premeditated first degree murder to an aggravated murder. RCW 10.95.020(1). It is therefore a
8 proper consideration for the prosecutor to take into account when deciding what crime to charge.
9 However, once the prosecutor has elected to charge an aggravating circumstance under RCW
10 10.95.020, the statute requires him to focus entirely on mitigating circumstances, or the lack of them
11 in determining whether to seek the death penalty. Mr. Satterberg's public statements make clear
12 that he did not limit himself to the considerations required by 10.95.040(1) and instead views the
13 aggravating circumstance outlined in RCW 10.95.020(1) as sufficient in itself to warrant seeking the
14 death penalty. It is clear from Mr. Satterberg's announcement that he did not follow the mandates
15 of RCW 10.95.040 and that he did not have a reasoned basis to conclude that there are not sufficient
16 mitigating circumstances to merit leniency in this case. As a result, the death notice should be
17 dismissed.
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21 The State also contends that the defense's interpretation of RCW 10.95.040(1) would lead to
22 absurd results, render the entire death penalty scheme unconstitutional and be impossible to
23 implement. The State fails to explain however, why any of these outcomes would flow from
24 applying the statute as written and as urged here, and instead frames its response in terms of
25 unanswered questions. In fact, the correct interpretation of RCW 10.95.040(1) would not produce
26 absurd results. If there is virtually no mitigation in a given case, there is nothing absurd in
27 requiring the State to file a death notice consistent with the mandate of RCW 10.95.040(1).
28

1 Conversely, even if the aggravated murder at issue is exceptionally egregious, there is nothing
2 inherently absurd in declining to seek the death penalty if there is compelling mitigation evidence.
3
4 In fact other prosecutors in Washington State have been able to apply the statute properly. The most
5 recent and comparable example is *State v. Zamora* in Skagit County. Zamora killed six people
6 including a Skagit County police officer. Despite that, the Skagit County prosecutor determined
7 that Zamora's mental illness was a sufficient mitigating circumstance to merit leniency and sought
8 life in prison without the possibility of parole rather than the death penalty. The State's mere
9 assertion, without any explanation as to how this interpretation of the statute would produce absurd
10 results, is without merit.

12 **B. The State Mischaracterizes the Basis for this Motion to Dismiss the Death**
13 **Notice. The Defense does not Contend that the State is Required to Retain the**
14 **Services of a Mitigation Specialist. This Motion is Based on the Fact that the**
15 **Prosecutor in this Case Lacked a Factual Basis for Concluding that there are**
16 **not Sufficient Mitigating Circumstances to Merit Leniency.**

17 In its response brief at page 7, the State deliberately misrepresents the defendant's position.
18 The defense does not argue that a prosecutor must hire his or her own mitigation specialist who
19 meets the requirements of the ABA's *Supplementary Guidelines for the Mitigation Function of*
20 *Defense Teams in Death Penalty Cases*. The defense Motion to Dismiss the Death Notice is instead
21 based upon the fact that the prosecutor in this case lacked a factual basis for determining that there
22 were not sufficient mitigating circumstances to merit leniency.

23 Shortly before the State announced its decision to seek death, the defense requested
24 additional time to submit mitigation materials. The State denied that request and the court denied
25 the defense's Motion to Extend the Time of the State to Decide Whether to File Death Penalty
26 Notice, concluding that it lacked the authority to order the State to delay announcing its decision. In
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1 justifying his decision to proceed with filing the death notice, Mr. Satterberg specifically referenced
 2 the work done by Aimee Rachunok:

3 We hired our own investigator who spent months talking to everybody who Monfort came
 4 into contact with throughout his life¹ and I think we have a pretty good picture of who this
 5 individual is.

6 *Defense Motion*, Appendix J. Since the prosecutor himself has represented that he relied upon this
 7 investigation to satisfy the mandates of RCW 10.95.040(1), it is necessary for this court to
 8 determine whether that investigation was in fact adequate to meet the statutory standard. The
 9 numerous shortcomings and superficial nature of Ms. Rachunok's investigation are detailed in the
 10 *Defense Motion* and will not be repeated here. It is significant, however, that the State's Response
 11 does not address in any way the inadequacies of that investigation and instead simply
 12 mischaracterizes the basis for the defense's motion.

13 The State also asserts that it considered Mr. Monfort's lack of any significant criminal
 14 history in its determination. This is the first time that the State has made that claim. It appears in
 15 none of the public statements Mr. Satterberg made prior to or contemporaneously with his decision
 16 to seek death and is nothing more than an after-the-fact rationalization in response to the defense's
 17 Motion to Dismiss. Unlike in *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), where the
 18 prosecutor had detailed documentation of the defendant's background through police reports and
 19 other records pertaining to his extensive criminal history, there are no such records in Mr. Monfort's
 20 case because he has no criminal past. Thus the State is left with relying upon a woefully inadequate
 21 investigation to provide cover for its decision to seek death. That investigation does not provide an
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27 ¹ The State has apparently backed off of Mr. Satterberg's astounding assertion that Ms. Rachunok talked to everyone
 28 who Mr. Monfort came into contact with throughout his life. Instead, the State now maintains that its investigation into
 Mr. Monfort's background included "dozens of interviews with Mr. Monfort's associates, family members, fellow
 employees, fellow students, former teachers and others." As detailed in the *Defense Motion*, Ms. Rachunok conducted

1 adequate factual basis for determining that there are not sufficient mitigating circumstances to merit
2 leniency and, as a result, the death notice should be dismissed.

3 Respectfully submitted this 17th day of September, 2012.
4

5 *Carl Luer by Gruenhagen*

6 Carl Luer WSBA #16365 ¹²³⁴⁰
7 Todd Gruenhagen WSBA #12340
8 Stacey MacDonald WSBA #35394
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28 phone interviews with 24 people who had met Mr. Monfort at some point during his 41 years. As a result, the State's
characterization of its investigation as encompassing "dozens" of interviews is technically correct.

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The Honorable Ronald Kessler
October 26, 2012 at 1:00 pm

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
CHRISTOPHER MONFORT,)
)
)
)
)

NO. 09-1-07187-6 SEA

DEFENDANT'S MOTION TO STRIKE THE
DEATH NOTICE OF SPECIAL SENTENCING
PROCEEDING, OR IN THE ALTERNATIVE TO
CONVENE SEPARATE JURIES AND REQUEST
FOR AN EVIDENTIARY HEARING

I. MOTION¹

COMES NOW, the defendant, Christopher Monfort, by and through his attorneys of record, Carl Luer, Todd Gruenhagen and Stacey MacDonald, and moves this Court to strike the Notice of Special Sentencing Proceedings and to conduct an evidentiary hearing on this motion. This Court should declare that Washington's death penalty scheme, RCW 10.95, is unconstitutional as it is arbitrary and discriminatory in violation of the Eighth Amendment and the Fourteenth Amendment Equal Protection and Due Process Clauses of the United States Constitution, and Article 1, sect. 3, 14 and 22 (Amend 10) of the Washington State Constitution, as well as statutory and caselaw cited within this motion.

¹ Portions of this briefing were taken from State of Washington v. Michele Anderson, Defendant's Motion to Strike the Notice of Special Sentencing Proceedings, or in the Alternative to Convene Separate Juries, And Request for Evidentiary Hearing.

DEFENANT'S MOTION TO STRIKE THE NOTICE
OF SPECIAL PROCEEDINGS, OR IN THE ALTERNATIVE
TO CONVENE A SEPARATE JURIES - 1

APP000250
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1 In the alternative, Mr. Monfort moves this Court to convene separate juries for the guilt and
2 penalty phases of his capital trial because Washington's death penalty scheme is unconstitutional
3 under Post-*Furman* death penalty caselaw.

4 II. SUMMARY OF ARGUMENT

5 "The penalty of death differs from all other forms of criminal punishment, not in degree but
6 in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the
7 convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation
8 of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.
9 Ct. 2726, 33 L. Ed. 2d 346 (1972)(Stewart, J., concurring)

10 June 29, 2012 marked the fortieth anniversary of *Furman v. Georgia*, where the United
11 States Supreme Court struck down then existing state death penalty statutes as violative of the
12 eighth and twelfth amendment prohibitions against cruel and unusual punishment. Justice Douglas
13 wrote "It is also settled that the proscription of cruel and unusual punishments forbids the judicial
14 imposition of them as well as their imposition by the legislature." 408 U.S. at 241. citing *Weems v.*
15 *United States*, 217 U.S. 349, 30 S. Ct. 544 (1910). "It is also said in our opinions that the
16 proscription of cruel and unusual punishments 'is not fastened to the obsolete, but may acquire new
17 meaning as public opinion becomes enlightened by a humane justice.'" *Id* at 242.

18 After *Furman*, the United States Supreme Court upheld three statutory death penalty
19 schemes which the Court believed would sufficiently limit the risk of arbitrary application. Those
20 schemes included provisions for a bifurcated trial in capital cases, a rational mechanism for
21 narrowing the class of death-eligible offenders, an instructional scheme that channels juror
22 discretion with clear and objective standards, and a rationally reviewable appellate process. *Gregg*
23 *v. Georgia*, 428 U.S. 153, 189-207, 96 S. Ct. 2909, 49 L.Ed. 2d 859 (1976).

Despite the reforms inspired by *Furman* and approved by *Gregg*, extensive research has now
demonstrated that jurors are not deciding who deserves the death penalty in the way the United
States Supreme Court has held the constitution requires.

The Capital Jury Project (CJP) is a national research endeavor funded by the National
Science Foundation. It is operated by law professors, psychologists, criminologists, and other social

1 scientists. The CJP interviewed over 1,200 former jurors from 354 capital trials in fourteen states².
2 These states were chosen for geographical diversity and for coverage of the different types of capital
3 statutes now in effect³. The CJP thoroughly analyzed how capital jurors go about making capital
4 sentencing decisions, and compared their findings with the Supreme Court's proclamations.

5 Constitutional defects with the capital punishment process were found in every state in this
6 study. This consistency establishes that there are **fundamental problems** with existing capital
7 punishment statutes structuring for jurors death penalty decision making, not just problems specific
8 to the laws or procedures of any particular state. Bowers and Foglia, *Still Singularly Agonizing:*
9 *Law's Failure to Purge Arbitrariness from Capital Sentencing*, at 55. Since 1993, the CJP has
10 published their findings from these interviews in a series of 35 scholarly papers. (Articles attached
11 exhibit C-EE, HH-LL) The results of the CJP studies establish that death penalty statutes across the
12 nation are not effectively guiding juror discretion as required by Gregg v. Georgia and the United
13 States constitution.

14 The CJP's substantial body of uncontroverted research shows there are seven critical failings
15 in the application of death penalty schemes across the nation. These failings establish that the death
16 penalty is incapable of being applied in a manner that comports with federal and state constitutional
17 precedents. The seven fatal flaws in the application of the death penalty in real life are:

- 18 1. Premature decision making;
- 19 2. Failure of jury selection to remove large numbers of death biased jurors
20 ("Morgan excludables"), as well as the overall biasing effect of the selection
21 process itself;
- 22 3. Pervasive failure by jurors to comprehend and/or follow penalty instructions;
- 23 4. Widespread erroneous beliefs among jurors that a death sentence is required;

24 ² Juror interviews were conducted in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri,
25 North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and Virginia. Copies of the Guidelines and
26 Interviewers introduction used in the CJP study are attached as exhibits FF and GG.

27 ³ The sample includes states with "threshold," "balancing," and "directed" statutory guidelines for sentencing discretion.
28 It also includes states with "traditional" and "narrowing" definitions of capital murder and states in which the jury
29 decisions are binding and those in which the judge can currently override the jury recommendations.

- 1 5. Wholesale evasion of responsibility for the punishment decision -- believing that
- 2 responsibility lies elsewhere;
- 3 6. Racism; and
- 4 7. Widespread erroneous beliefs amongst jurors that life sentences will not result in
- 5 lengthy incarcerations.

6 **The CJP research show that actual capital jurors are not following the constitutional**
 7 **guidelines established by the Supreme Court's post- Furman jurisprudence.** Although the CJP
 8 did not conduct a study in Washington, the CJP research is still applicable and relevant to
 9 Washington. Dr. Wanda Foglia will testify how these fundamental problems are and have been
 10 found in other states that were not part of the CJP. She will testify that she has found these same
 11 problems among mock capital jurors in Washington State. Dr. Foglia scored mock capital juror's
 12 questionnaires that were completed by students in a paralegal program at Highline Community
 13 College and Dr. Foglia found the same 7 flaws that are addressed in the CJP study in these mock
 14 jurors' answers. (Copies of all questionnaires, exhibit PP)

15 Washington may have fewer capital cases than many of the states that continue to utilize
 16 capital punishment. Of the 32 men sent to death row in Washington since the statute was reenacted,
 17 to date, 19 of these cases have been reversed on appeal, 7 men⁴ are currently on death row in
 18 various stages of appellate proceeding and 5 men have been executed, 3 of whom were
 19 "volunteers". These statistics, the CJP research and recent studies conducted in Washington clearly
 20 establish that Washington's capital sentencing scheme creates a system of unfettered discretion,
 21 resulting in a jury decision-making system that is freakishly wanton, arbitrary, capricious, and
 22 unreviewable on appeal, that it violates Article 1, section 14 of our state constitution and the Eight
 23 and Fourteenth Amendments to the United States Constitution.

24 This Court should find that Washington's death penalty statute is unconstitutional and
 25 dismiss the notice of special sentencing, or in the alternative grant the request for separate jury
 26 panels.

27 ⁴ Dwayne Woods (1997); Jonathan Gentry (1991); Clark Richard Elmore (1995); Cecil Emile Davis (1998); Dayva
 28 Michael Cross (2001); Robert Lee Yates, Jr (2002); Connor Schierman (2010)

III. LEGAL AUTHORITY

THE DEATH PENALTY SCHEME IS UNCONSTITUTIONAL DUE TO ITS FAILURE TO MEET THE MINIMUM CONSTITUTIONAL REQUIREMENTS OF FURMAN, GREGG AND THEIR PROGENY. IN PRACTICE, CAPITAL JURIES DO NOT FOLLOW THE COURT'S GUIDELINES SET FORTH IN FURMAN, GREGG AND THEIR PROGENY.

The United States Supreme Court has devoted an extraordinary amount of its time granting *certiorari* in state death penalty cases so as to articulate precisely what the Constitution requires for a lawful death sentence verdict. The Court has ruled on an a large number of procedural and substantive constitutional questions under various provisions of the Fifth, Sixth, Eighth and Fourteenth Amendments. The Court has articulated firmly established constitutional imperatives which must be met for a lawful jury-determined death sentence.

The first section of the Defendant's legal authority sets forth the established constitutional standards as they currently exists. The second section examines the questions of whether in actuality capital juries are meeting these standards as required by the Court in Gregg v. Georgia, 428 U.S. 153, 189, 206, 207, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The third section discusses how the guarantees of the Washington Constitution are specifically violated by the present structure of Washington's death penalty scheme. The fourth section addresses why an evidentiary hearing is critical to defense's ability to support our argument and present a clear and complete record for appellate review.

Mr. Monfort is challenging Washington's death penalty scheme as it applies to him and has standing to do so. New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113(1982). Mr. Monfort is currently facing a possible death sentence under Washington's unconstitutional death penalty statute.

1 Beginning with Gregg v. Georgia, the United States Supreme Court has established rules and
 2 procedures, in accord with the federal constitution, to reduce the arbitrariness of the process so that
 3 the death penalty can be administered in a constitutional manner. 428 U.S. 153, 189-207, 96 S. Ct.
 4 2909, 49 L. Ed. 2d 859 (1979). There is no need to show that the problems discovered by the CJP
 5 caused a death sentence in Mr. Monfort's case.

6 The United States Supreme Court has already determined that when a jury fails to follow its
 7 mandates a death sentence is unconstitutionally arbitrary. *See e.g. Woodson v. North Carolina*, 428
 8 U.S. 280, 302, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) ("vesting of standardless sentencing power
 9 in the jury violates the Eighth and Fourteenth Amendments"); Godfrey v. Georgia, 446 U.S. 420,
 10 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)(capital jury's sentencing discretion must be channeled by
 11 clear and objective standards which provide specific and detailed guidance for the jury and render
 12 the capital sentencing process one that can be rationally reviewed). Washington State adopted these
 13 United States Supreme Court holdings in State v. Bartholomew, 101 Wn. 2d 631, 638 P. 2d 1079
 14 (1984); State v. Rupe, 101 Wn. 2d 664, 709-710, 683 P. 2d 571 (1984); State v. Campbell, 103 Wn.
 15 2d 1, 691 P.2d 929 (1984).

16 **A. CONSTITUTIONAL PRINCIPLES ESTABLISHED BY THE COURT SINCE**
 17 **FURMAN V. GEORGIA.**

18 1. Jury's Discretion Must Not Be Arbitrary

19 The modern death penalty era began when Furman v. Georgia, 408 U.S. 238, 33 L.Ed. 2d
 20 346, 92 S. Ct. 2726 (1972), struck down capital sentencing as it had been historically applied by the
 21 States. The Furman Court concluded that capital punishment was being applied in an
 22 unconstitutional manner as it risked arbitrary and capricious results. The system of unfettered
 23 discretion to sentence capital defendants to death had resulted in a jury decision-making system that

1 was so freakishly wanton, arbitrary and capricious, and unreviewable on appeal, that it violated the
2 Eighth Amendment's Prohibition against Cruel and Unusual Punishment.

3 In the four decades since Furman the Court has made it clear that "vesting of standardless
4 sentencing power in the jury violates the Eighth and Fourteenth Amendments to the United States
5 Constitution." Woodson v. North Carolina, 428 U.S. 280, 302, 96 S.Ct. 2978, 49 L.Ed.2d 944
6 (1976). A capital jury's sentencing discretion must be channeled by clear and objective standards
7 which provide specific and detailed guidance for the jury and render the capital sentencing process
8 one that can be rationally reviewed on appeal. Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759,
9 64 L.Ed. 2d 398 (1980). Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L. Ed. 2d 372
10 (1988).

11 Three statutory capital sentencing schemes which, on their face, appear to address the
12 concerns expressed in Furman were upheld by the Court in 1976. See, Gregg v. Georgia, 428 U.S.
13 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.
14 Ed. 2d 913 (1976), and Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).
15 These statutory schemes used three different approaches: Georgia's threshold approach, Florida's
16 weighing approach, and Texas' directed approach. However, all three approaches have four
17 essential features in common that, the Court held, met the constitutional concerns expressed in
18 Furman. Those features are:

- 19 1) A rational mechanism for narrowing the class of death-eligible offenders;
- 20 2) Bifurcated sentencing proceedings separate from the guilt determination;
- 21 3) An instructional scheme that channels the sentencing jury's discretion with clear and
22 objective standards which purportedly provide guidance for the jurors that is
23 understandable and that makes rationally reviewable the process by which the jury
imposes a death sentence; and
- 4) Appellate review that is adequate to ensure the sentencing decision was arrived at by
means that comport with what the Constitution requires.

1 Washington re-enacted its death penalty scheme in 1983, and the Washington Legislature
 2 and the Supreme Court have adopted these features as well. *See e.g.*, RCW 10.59 *et seq.*; State v.
 3 Bartholomew, 101 Wn. 2d 631, 683 P.2d 1079 (1984); State v. Rupe, 101 Wn. 2d 664, 709-10, 683
 4 P. 2d 571 (1984); State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984).

5 2. Standards Must Be Clear and Objective

6 The requirement of clear and objective standards to guide capital jurors has led the United
 7 States Supreme Court to strike down vague statutory criteria which cannot be reviewed objectively
 8 on appeal. In Godfrey v. Georgia, *supra*, 446 U.S. 420, Georgia's "outrageously or wantonly vile,
 9 horrible and inhuman" aggravator was invalidated. The Court concluded it was so vague that it
 10 failed to provide any meaningful guidance to the jury. A capital jury making a sentencing decision
 11 on such a factor was unconstrained in its sentencing choice, and jurors were acting under the very
 12 schemes invalidated by Furman, *supra*.

13 Similarly, Oklahoma's "especially heinous, atrocious, or cruel" standard was struck down on
 14 this same basis in Maynard v. Cartwright, *supra*, 486 U.S. 356. The Maynard Court reaffirmed that
 15 its Eighth Amendment jurisprudence since Furman "insists that the channeling and limiting of the
 16 sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for
 17 sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id* at 362.

18 In Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L.Ed. 2d 367 (1992), the Court
 19 concluded that the presence of a vague aggravator in the weighing process created a greater risk of
 20 arbitrariness:

21 A vague aggravating factor employed for the purpose of determining whether a
 22 defendant is eligible for the death penalty fails to channel the sentencer's
 23 discretion. A vague aggravating factor used in the weighing process is in a sense
 worse, for it creates the risk that the jury will treat the defendant as more
 deserving of the death penalty than he might otherwise be by relying upon the

1 existence of an illusory circumstance... [T]he use of a vague aggravating factor
2 in the weighing process creates the possibility not only of randomness but also of
bias in favor of the death penalty.

3 Id. at 235-36.

4 Thus, the United States Supreme Court's jurisprudence has made it clear that capital
5 sentencing decisions must be made according to criteria that are sufficiently clear to permit ordinary
6 citizens to understand and apply them.

7 **3. The Decision Must Not Be the Result of False or Misleading Information**

8 A capital sentencing decision must not be based on false, inaccurate, or misleading
9 information. In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133
10 (1994), the Court held that the Due Process Clause of the Fifth and Fourteenth Amendment is
11 violated where the capital sentencing decision is made on the basis of false, inaccurate, or
12 misleading information. The jury that sentenced Mr. Simmons to death reasonably may have
13 believed that he could be released on parole if he was not sentenced to death. The Court concluded
14 that such a misunderstanding "had the effect of creating a false choice between sentencing petitioner
15 to death and sentencing him to a limited period of incarceration." Id. at 161-62.

16 The United States Supreme Court relied on data collected and analyzed by the Capital
17 Jury Project researchers in reaching this decision. Id. at 169-70, n.9. In Shafer v. South
18 Carolina, 532 U.S. 36, 121 S. Ct. 1263, 149 L.Ed. 2d 178 (2001), the Court reaffirmed the principles
19 established in Simmons. A capital jury's choice to sentence someone to death should never be
20 premised upon false, misleading, or inaccurate beliefs about parole eligibility precisely because such
21 erroneous beliefs have the effect of forcing the jury to choose death to make sure the defendant is
22 never released. *Id.* at 51, 54-55.

23 **4. Race Can Play No Part in the Penalty Decision**

DEFENANT'S MOTION TO STRIKE THE NOTICE
OF SPECIAL PROCEEDINGS, OR IN THE ALTERNATIVE
TO CONVENE A SEPARATE JURIES - 9

APP000258
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1 Race cannot play any role in the capital jury's decision-making. "In a capital sentencing
 2 proceeding before a jury, the jury is called upon to make a highly subjective, unique, individualized
 3 judgment regarding the punishment that a particular person deserves." Turner v. Murray, 476 U.S.
 4 28, 33, 106 S. Ct. 1683, 90 L.Ed.2d 27 (1986)(further citation omitted)

5 Because of the range of discretion entrusted to a jury in a capital sentencing
 6 hearing, there is a unique opportunity for racial prejudice to operate but
 7 remain undetected. On the facts of this case, a juror who believes that blacks
 8 are violence prone or morally inferior might well be influenced by that belief in
 9 deciding whether the petitioner's crime involved the aggravating factors specified
 10 under Virginia law. Such a juror might also be less favorably inclined toward
 11 petitioner's evidence of mental disturbance as a mitigating circumstance. More
 subtle, less consciously held racial prejudice infecting a capital sentencing proceeding
 is especially serious in light of the complete finality of the death sentence. "The Court,
 as well as the separate opinions of a majority of the individual Justices, has recognized
 that the qualitative difference of death from all other punishments requires a
 correspondingly greater degree of scrutiny of the capital sentencing determination."
 (citation omitted)

12 Turner, 476 U.S. at 34-35.

13 Safeguards must be followed to minimize the risk of race infecting the capital sentencing
 14 decision. For this reason, a capital defendant accused of an interracial crime is entitled to have
 15 prospective jurors informed of the race of the victim and questioned on the issue of racial bias.
 16 Turner v. Murray, *supra*. State v. Davis, 141 Wn. 2d 798, 824-25, 10. P.3d 977 (2000)(the state
 17 and federal constitutional rights to due process and a fair trial guarantee the right to question
 18 prospective jurors about racial bias or prejudice.)

19 5. Death Can Never Be the Only Appropriate Penalty

20 Since Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the United
 21 States Supreme Court has repeatedly made it clear that capital jurors must be permitted to consider a
 22 wide range of mitigating circumstances in deciding whether death is the appropriate sentence. This
 23 principle flows from earlier holdings rejecting capital sentencing schemes that made death

1 mandatory for certain types of murders in response to Furman. For example, in Roberts v.
2 Louisiana, 431 U.S. 633, 97 S. Ct. 1993, 52 L.Ed.2d 637 (1977), the Court made it clear that death
3 can never be the only appropriate penalty, even where a law enforcement officer is the victim:

4 To be sure, the fact that the murder victim was a peace officer performing his
5 regular duties may be regarded as an aggravating circumstance. There is a special
6 interest in affording protection to these public servants who regularly risk their
7 lives in order to guard the safety of other persons and property. But it is incorrect
8 to suppose that no mitigating circumstance can exist when the victim is a police
9 officer. Circumstances such as youth of the offender, the absence of any prior
conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and
even the existence of circumstances which the offender reasonably believed
provided moral justification for his conduct are all examples of mitigating
facts which might attend the killing of a peace officer and which are considered
relevant in other jurisdictions.

10 As we emphasized repeatedly in *Stanislaus Roberts* [⁵] and its companion
11 cases decided last Term, it is essential that the capital sentencing decision
12 allow for consideration of whatever mitigation circumstances may be relevant
to either the particular offender or the particular offense. Because Louisiana statute
does not allow for consideration of particularized mitigating factors, it is unconstitutional.

13 Id. at 636-37

14 6. Jurors Must Be Able to Consider and To Give Effect to Mitigation

15 The Eighth and Fourteenth Amendments dictate that there needs to be an individualized
16 determination of the appropriate sentence. Lockett, Supra. Just as the statutory scheme cannot
17 preclude consideration of mitigating evidence, so too "the sentencer [may not] refuse to consider as
18 a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.
19 Ct. 869, 71 L. Ed. 2d 1 (1982); In re Rupe, 115 Wn. 2d 379, 383-84, 798 P. 2d 780 (1990). Simply
20 allowing the mitigating evidence to be admitted is not enough. Jurors imposing a sentence must be
21 able to consider and to give effect to mitigation evidence. See Skipper v. South Carolina, 476 U.S.

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⁵ Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976)

1 1, 8-9, 106 S. Ct. 1669, 90 L. Ed. 21 (1986)(evidentiary ruling excluding relevant mitigating
 2 evidence of defendant’s adjustment to prison setting violates Eddings); Mills v. Maryland, 486 U.S.
 3 367, 108 S. Ct. 1860, 100 L. Ed. 2d (1988) (requirement of unanimous jury finding on mitigating
 4 factors created an unconstitutional barrier to consideration of relevant mitigation information.)
 5 There has been an individualized sentencing determination only when a capital juror is free to
 6 consider and give effect to all mitigating evidence. Lockett, *supra*.

7 7. Jurors Must Understand Their Ultimate Responsibility

8 Capital Jurors must not be misled so as to diminish their sense of responsibility for any death
 9 sentence imposed. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985);
 10 State v. Pirtle, 127 Wn. 2d 628, 663-64, 904 P.2d 245 (1995); In re Petition of Jeffries, 110 Wn.2d
 11 326, 342-43, 752 P. 2d 1338 (1988). Each juror must understand that he or she alone, is responsible
 12 for his or her sentencing decision. Uncorrected beliefs that “responsibility for any ultimate
 13 determination of death will rest with others” creates a possible bias toward a death sentence.
 14 Caldwell, 472 U.S. at 333. A jury unconvinced that death is the appropriate punishment, “might
 15 nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts” and vote for
 16 death on the assumption that the ultimate sentencer will correct any error. Id. at 332.

17 It is essential that jurors recognize “the truly awesome responsibility of decreeing death for a
 18 fellow human [so that they] will act with due regard for the consequences of their decision.”
 19 Caldwell, at 329-30, quoting McGautha v. California, 402 U.S. 183, 208, 91 S. Ct. 1454, 1467, 28
 20 L. Ed. 2d 711 (1971); and citing Woodson v. North Carolina, *supra*; Eddings v. Oklahoma, *supra*.
 21 Accord, State v. Clark, 143 Wn. 2d 731, 24 P. 3d 1006 (2001).

22 8. Death Scrupled Jurors Are Not Automatically Disqualified

23 Potential jurors who have scruples about the death penalty are not automatically disqualified

1 from serving on a capital jury. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d
 2 776 (1968); State v. Gentry, 125 Wn. 2d 570, 633-34, 888 P.2d 1105 (1995). The Witherspoon
 3 Court held that a sentence of death returned by a jury biased towards death violates the Constitution:

4 [A] State may not entrust the determination of whether a man should live
 5 or die to a tribunal organized to return a verdict of death. Specifically, we
 6 hold that a sentence of death cannot be carried out if the jury that imposed or
 7 recommended it was chosen by excluding veniremen for cause simply because
 8 they voiced general objections to the death penalty or expressed conscientious
 or religious scruples against its infliction. No defendant can constitutionally be
 put to death at the hands of a tribunal so selected... Whatever else might be
 said of capital punishment, it is at least clear that its imposition by a hanging
 jury cannot be squared with the Constitution.

9 Id. at 522-23

10 Only potential jurors whose scruples about the death penalty would prevent or substantially
 11 impair the performance of [their] duties as a juror in accordance with [their] instructions and [their]
 12 oath "can be disqualified under federal law." Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct.
 13 844, 83 L. Ed. 2d 841 (1985); State v. Hughes, 106 Wn. 2d 176, 181, 721 P.2d 902 (1986).

14 9. Jurors Unwilling to Meaningfully Consider Mitigation Are Disqualified

15 Witherspoon's prohibition against a capital jury biased toward death was extended in
 16 Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992), to require the
 17 disqualification of death-biased jurors. The Morgan Court held that potential jurors who would
 18 automatically impose a sentence of death without regard to mitigating circumstances are
 19 disqualified from serving as capital jurors. Leaving such jurors on a capital jury violates the capital
 20 defendant's constitutional right to an impartial jury.

21 A juror who will automatically vote for the death penalty will fail in good faith
 22 to consider the evidence of aggravating and mitigating circumstances as the
 23 instructions require him to do. Indeed, because such a juror has already formed
 an opinion on the merits, the presence or absence of either aggravating or
 mitigating circumstance is entirely irrelevant to such a juror. Therefore, based

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on the requirement of impartiality embodied in the Due Process Clause of the fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.

...
Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Id. at 729.

Morgan is significant because the Court made it clear that attorneys shall be allowed to examine potential jurors about their ability to consider the mitigating evidence likely to be presented. Adequate *voir dire* on these subjects "plays a critical function" of ensuring that the jury is not skewed toward a verdict of death. *Id.* at 730, *accord*, State v. Gentry, *supra*, 125 Wn. 2d at 635. The capital defendant has a constitutional right to an individualized determination of the appropriate sentence, no matter how bad the crime.

In addition, the Morgan Court defined what the term "impartial" means in a capital case:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co Litt. 155b. his verdict must be based upon the evidence developed at the trial. This is true, *regardless of the heinousness of the crime* charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 *Burr's Trial* 416 (1807). The theory of the law is that a juror who has formed an opinion cannot be impartial. *Reynolds v. United States*, 98 U.S. 145, 155 (1879).

...
Thus it is that our decision dealing with capital sentencing juries and presenting issues most analogous to that which we decide here today, [citation omitted], have relied on the strictures dictated by the Sixth and Fourteenth Amendments to ensure the impartiality of any jury that will undertake capital sentencing.

Id. 504 U.S. at 727-728 (emphasis added)

1 The holdings in Witt and Morgan teach us that potential capital jurors must be indifferent on
2 the question of the appropriate penalty in the case before the juror. The real question for potential
3 jurors regarding their views about capital punishment is whether those views would prevent or
4 impair the juror's ability to return a verdict of life without the possibility of parole, or death in the
5 case before the juror. If a fact or circumstance specific to the case before them would cause the
6 potential juror to invariably vote for death regardless of the strength of the mitigating evidence the
7 defense might present, then the juror's partiality is impaired and he should be excused for cause.
8 For these reasons, the parties in a capital case must be permitted to probe into juror attitudes about
9 the significant facts in the specific case.

10 B. SOCIAL SCIENCE AND THE LAW: THE CAPITAL JURY PROJECT

11 Social scientists have been conducting scientific, method based research into the two
12 questions of how juries go about making their decisions and what impact the capital *voir dire*
13 process has on the capital jury group's decision making dynamic for the last forty years. Since
14 Witherspoon, the United States Supreme Court has periodically been presented with studies by
15 litigants who hoped to shed light on the particular legal issue before the court based on this research.
16 In the past, the Court has rejected these studies. Initially this evidence was rejected because the
17 field of study was too new and there was insufficient data to support the relief being sought. *See*,
18 Witherspoon v. Illinois, supra, 391 U.S. at 517 (the three studies offered to support the claim that
19 death qualified juries were guilt prone juries is rejected as "too tentative and fragmentary" to
20 support *per se* constitutional ruling).

21 However, as the scientific research in the field has gained acceptance it started to get rejected
22 by the Court because it did not address the question of how "actual jurors sworn under oath apply
23 the law to the facts of an actual case involving the fate of an actual capital defendant." Lockhart v.

1 McCree, 476 U.S. 162, 171, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). In essence, the Court said
2 data from artificial jurors in artificial settings, is unpersuasive even when drawn from scientifically
3 sound and statistically valid mathematical equations. See McCleskey v. Kemp, 481 U.S. 279, 107
4 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (studies showing race influences capital decision making does
5 not answer the question of how jurors eligible for service in McCleskey's case were influenced by
6 racial considerations when they were sworn under oath). Similarly, in State v. Brown, 132 Wn. 2d
7 529, 940 P. 2d 546 (1997) *cert denied*, 523 U.S. 1007 (1998), the Washington State Supreme Court
8 declined to revisit the issue, choosing to rely on its earlier decision in State v. Hughes, 106 Wn. 2d
9 176, 721 P.2d 902 (1986), which in turn relied upon Lockhart v. McCree. Brown, at 599-600.

10 In response, social scientists have conducted extensive research involving interviews with
11 *actual jurors from actual cases*. The CJP researched the decision-making of actual capital jurors.
12 Their interviews chronicle the juror's experiences and decision making over the course of the actual
13 trial, identify at which points various influences come into play, and reveal the ways in which jurors
14 reach their final sentencing decisions. These studies show that capital jurors are not following the
15 constitutional guidelines established by the United States Supreme Court post-*Furman*
16 jurisprudence.

17 The CJP study was conducted in fourteen states. Although Washington is not one of those
18 states, the principles and conclusions drawn from the CJP are universal in that they show how a
19 juror thinks and makes decisions. States were chosen for the CJP research to reflect the principal
20 variations in guided discretion capital statutes, i.e. the three variations that were approved by the
21 Supreme Court post-*Furman*. Within each state, 20-30 capital trials were picked to represent both
22 life and death sentencing outcomes. From each trial, a target sample of four jurors was
23 systematically selected for in-depth three to four hour personal interviews. Interviewing began in

1 the summer of 1991. The present CJP working sample includes 1,201 jurors from 354 capital trials
 2 in fourteen states. These states are responsible for 76.1% of the 3,718 persons on death row as of
 3 June 1, 2002, and for 79% of the 795 persons who were executed between 1977 and September 1,
 4 2002. Since 1993, some 35 articles presenting and discussing the findings of the CJP have been
 5 published in scholarly journals. The majority of these scholarly articles are attached to this motion
 6 for the courts review. (See Exhibits C-EE, HH-LL).

7 In the years following the CJP's findings, the United Supreme Court has cited the CJP
 8 findings in its opinions. For example in Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187,
 9 129 L. Ed. 2d 133 (1994), the Court held that jurors must be told there is no parole in a life without
 10 parole sentence when the prosecution argues future dangerousness. *Id.* At 169-70, n.9 (citing the
 11 1994 CJP study by Eisenberg and Wells⁶ when it stated that "juror surveys support the
 12 commonsense understanding that there is a reasonable likelihood of juror confusion about the
 13 meaning of the term 'life imprisonment'") see also, Schriro v. Summerlin, 542 U.S. 348, 356, 124
 14 S. Ct. 2519, 159 L. Ed. 2d 442 (2204) (Justice Scalia citing to Eisenberg & Wells, *supra*; Garvey,
 15 *The Emotional Economy of Capital Sentencing*, 75 N.Y.U.L. Rev 26 (2000); and Bowers, Sandys,
 16 & Steiner, *Foreclosed Impartiality in Capital Sentencings: Jurors' Predispositions, Guilt-Trial*
 17 *Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1467 (1998)(Exhibit D); see also
 18 Florida v. Nixon, 543 U.S. 175, 192, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)(quoting from S.
 19 Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the*
 20 *Death Penalty*, 83 Cornell L. Review. 1557, 1587-1591 (1998)); *Ramdass v. Angelone*, 530 U.S.

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⁶ Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993). A copy is attached as exhibit Q.

1 156, 198, 120 S. Ct. 2133, 147 L.Ed. 2d 125 (2000)(Stevens, J., dissenting)(citing to Eisenberg &
 2 Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 7 (1993);
 3 Strickler v. Greene, 527 U.S. 263, 305, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)(Souter, J.,
 4 concurring in part and dissenting in part)("common experience, supported by at least one empirical
 5 study, see Bowers, Sandys & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors'*
 6 *Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476,
 7 1486-1496 (1998) (exhibit D); and O'Dell v. Netherland, 521 U.S. 151, 117 S. Ct. 1969, 138 L. Ed.
 8 2d 351 (1997)(Stevens, J., dissenting)(citing to Eisenberg & Wells, *Deadly Confusion: Juror*
 9 *Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 7 (1993)(exhibit Q)

10 C. HOW CAPITAL JURORS ACTUALLY MAKE THEIR SENTENCING DECISIONS

11 The CJP data revealed profound discrepancies between what the federal and state
 12 constitutions require and how actual capital jurors are actually making their decision. Moreover, this
 13 data reveals that these discrepancies exist in every area in which the federal and Washington
 14 constitutions impose rules both in terms of what jurors are required to do, and in terms of what
 15 jurors are prohibited from doing. Dr. Foglia drafted a questionnaire based on the CJP questionnaire
 16 with questions that covered the areas relating to the flaws found by the CJP which was then given to
 17 students in a paralegal program at Highline Community College. The questionnaire utilized a recent
 18 death penalty case fact pattern and included the guilt and penalty instructions that the jury was given
 19 in that case. (See Questionnaires, exhibit PP) Dr. Foglia scored these questionnaires and determined
 20 that they showed the same problems that were found in the CJP data. The CJP data summarized in
 21 this section of the motion establishes the following fatal flaws:

- 22 1. Rampant premature decision-making which renders the penalty phase meaningless;

- 1 2. The failure of jury selection to remove large numbers of death-biased jurors, and the
- 2 overall biasing effect of the selection process itself;
- 3 3. The pervasive failure of death qualified jurors in actual cases to comprehend and/or
- 4 follow penalty instructions;
- 5 4. The wide-spread belief among jurors that sat on capital trials that death is required;
- 6 5. Wholesale evasion of responsibility for the punishment decisions;
- 7 6. The continuing influence of race discrimination on juror decision-making; and
- 8 7. Significant underestimation of the alternative to death.

9 1. Premature Decision Making

10 The CJP data shows 50.8 % of all capital jurors make their sentencing decision before the

11 penalty phase begins. (See exhibit B, pg 8) These jurors feel strongly about their decision. And they

12 do not waiver from it over the course of the trial.⁷ 97.4% of those who had taken a premature stance

13 for death indicated they felt strongly about their early pro-death stance, including 70.4% who

14 indicated that they were “absolutely convinced” and 27% who were pretty sure. Bowers & Foglia,

15 at 57 (exhibit C) (*see also* exhibit B, pg 8). In the Washington mock capital jurors’ survey, the

16 percentage saying that they thought the defendant should be given a death sentence before they

17 heard any evidence or testimony about what the punishment should be was almost identical in

18 Washington (32%) as it was in the nationwide CJP sample (30.3%). A significantly higher

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20 ⁷ See articles attached as Exhibit – Geimer, Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten

21 Florida Death Penalty Cases, 15 Am. J. Crim. Law 1 (1998); Haney, Sontag, Costanzo, Deciding to Take a Life: Capital

22 Juries, Sentencing Instructions, and the Jurisprudence of Death, 50 Journal of Social Sciences Issues 149 (1994);

23 Bowers, Fluery-Steiner, Antonio, The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or

 Legal Fiction (Chapter 14 from Acker, Bohm, Laniejr, AMERICA’S EXPERIMENT WITH CAPITAL

 PUNISHMENT, (2nd ed., 2003); Bowers, Foglia, Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from

 Capital Sentencing, 39 Crim. Law Bulletin 51 (2003); Bowers, Sandys, Steiner, Foreclosed Impartiality in Capital

 Sentencing: Jurors’ Predispositions, Guilt- Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476.

 and Haney, Hurtado, Vega, “Modern” Death Qualification: New Data On It’s Biasing Effects, 18 Law & Human

 Behavior 619 (1994).

1 percentage of the college students said the defendant should be given a life sentence: 48%. This left
2 only 20% in Washington who were undecided about sentence as they legally should be before the
3 sentencing phase had begun. (See exhibit B, pg 8-9)

4 Like the nationwide sample, the Washington mock jurors who prematurely decided the
5 sentence also felt very strongly about their position. In Washington 70% said they were "absolutely
6 convinced" and 25% said they were pretty sure about their premature decision. Those choosing
7 death were significantly more sure of their positions with 87.5% saying they were absolutely
8 convinced (compared to 70.4% nationwide), and all of the remaining 12.5% saying they were
9 "pretty sure" (compared to 27% nationwide). Among the Washington mock jurors prematurely
10 choosing life these numbers were 60% and 40% respectively. (See exhibit B, pg 9)

11 "Presenting mitigating evidence during the penalty phase cannot be effective when so many
12 jurors declare that they were already "absolutely convinced" that the defendant deserved death
13 before they heard any mitigating evidence. Given the human proclivity to interpret information in a
14 way that is consistent with what one already believes it is not surprising that most jurors never
15 waiver from their premature stance." Bowers, Foglia, at 57 (Exhibit C). Jurors that prematurely
16 decide that the appropriate sentence is death are deciding the sentence inconsistently with the
17 constitutional requirements set out in Lockett, Eddings, and Skipper. Inherently these jurors are
18 biased against meaningful consideration of mitigation.

19 **Premature decision-making occurs in every state** studied by the CJP and was also
20 observed in the Washington mock capital jurors. Thus, bifurcation and instructions have little effect
21 in guiding capital jurors on their sentencing decision:

22 Requirements such as bifurcating the trial, allowing presentation of mitigation
23 evidence during the sentencing phase, and the use of jury instructions aimed at
guiding sentencing discretion are of little use if jurors have already decided what

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the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

Bowers, Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law. Bulletin 51, 56 (2003), (See Exhibit C).

As shown by the following chart, approximately 30% of all capital jurors, nationwide, made the decision that the defendant should receive the death penalty while evidence was still being introduced at the guilt-phase of the trial. By doing so they are deciding the sentence of the defendant arbitrarily and capriciously. The Supreme Court's mandate under Gregg is to minimize the risks of arbitrariness. When 30% of the jurors who served on a capital case decided the case in a constitutionally deficient manner it is unreasonable to conclude that the administration of the death penalty scheme is being accomplished consistent with the Eighth and Fourteenth Amendments of the United States Constitution. There is nothing minimal about 30%. In capital cases where more care and caution not less is the express requirement, 30% cannot be said to be insignificant.

Table 1 ⁸ Percentage of Capital Jurors Taking Each Stand on Punishment Before the Sentencing State of Trial in 13 States.				
States	Death	Life	Undecided	No. of Jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108

⁸ This table is taken from Bowers, Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law. Bulletin 51 (2003), attached as exhibit C.

1	Missouri	28.8	16.9	54.2	59
2	N. Carolina	29.2	13.9	56.9	72
3	Pennsylvania	33.8	18.9	47.3	74
4	S. Carolina	33.3	14.4	52.3	111
5	Tennessee	34.8	13.0	52.2	46
6	Texas	37.5	10.8	51.7	120
7	Virginia	17.8	31.1	51.1	45
8	All States	30.3%	18.9%	50.8%	1135

8 This evidence establishes that most early pro-death jurors do not even wait for guilt-phase
9 deliberations to begin deciding on the penalty. Pro-death jurors prejudge the penalty decision
10 during the guilt phase, long before they have even had the opportunity to discuss it with any of their
11 fellow jurors or heard any of the mitigation evidence. Bowers, Fleury-Steiner, Antonio, "The
12 *Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction*", at
13 429 (Chapter 14 from Acker, Bohm, Lanierj, AMERICA'S EXPERIMENT WITH CAPITAL
14 PUNISHMENT (2nd ed., 2003). (See Exhibit F) Many of these early pro-death jurors cite proof of
15 guilt as the reason for their early pro-death stands:

16 FL: When I was convinced he was guilty – when we were going through the hard
17 evidence.

18 NC: After the pathologist report, after I was convinced he was the one who did it.

19 FL: When I knew in my heart that he was guilty...This was after hearing the forensic
20 evidence from the prosecution.

21 TX: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I
22 was absolutely sure, because I truly believe in what the Bible says and I think I told
23 them this when they chose me.

FL: When I knew in my heart that he was guilty...as I knew he was guilty, I knew he
should get death. This was after hearing the forensic evidence from the prosecution.

1 Bowers, Fleury-Steiner, Antonio, *supra* at 429. (See Exhibit F)

2 According to Costanzo and Costanzo, 26% of Oregon jurors interviewed said that they did
3 not need to hear the evidence at the penalty phase because after hearing about the crime they had
4 already decided the defendant deserved to die. Sally Costanzo and Mark Costanzo, *Life or Death*
5 *Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing*
6 *Framework*, 18 Law & Hum Behav. 151 (1994).

7 For some jurors, it was the grotesque or gruesome nature of the crime that convinced them
8 that death should be the punishment or the role of physical evidence, especially photographs or
9 video tapes as critical in their punishment decision. *Id* at 430. In a few instances they gave vivid
10 accounts of how photographs or video evidence had affected them:

11 NC: During the trial. I can tell you...when we saw pictures of this woman's body,
12 burned...Where her feet were burned off...Horrible, horrible pictures of this. That
13 convinced me.

14 CA: Just sitting there watching (a video tape of the killing from a store monitoring
15 system). I've seen a lot (of) stuff, but I never...Even Arnold Schwarzenegger movies
16 didn't affect me like that, you know? This wasn't make believe, watching that video
17 tape. The video tape was very powerful.

18 Bowers and Foglia, *supra* at 430. (Exhibit C)

19 Thus, many jurors attribute their early votes for death to unquestionable proof of guilt,
20 heinous aspects of the crime, and physical evidence, especially photographs and audio or video
21 tapes. Early pro-death jurors found the fact of guilt and the nature of the crime compelling. They
22 believed death was called for when the crime was egregious, the evidence explicit, or the defendant
23 unrepentant. Although heinousness of the crime and the dangerousness of the defendant may be
relevant to the punishment decision, *Lockett* and its progeny mandate that a decision should not be

1 made before jurors hear the mitigation evidence. Lockett v. Ohio, 438 U.S. at 602-04; State v.
2 Roberts, 142 Wn. 2d 471, 502, 14 P.2d 713 (2000).

3 2. The Failure of Jury Selection to Remove Large Numbers of Death-Biased
4 Jurors and the Overall Biasing Effect of the Selection Process

5 To understand why so many jurors prematurely decide to impose the death penalty, the CJP
6 researchers investigated the possibility that jury selection procedures, even when conducted
7 pursuant to Witt or Morgan standards, fail to identify jurors for whom death is the only appropriate
8 penalty for the cases on which they served. The jurors were presented with the following
9 question/matrix:

10 Do you feel that the death penalty is the only acceptable punishment,
11 an unacceptable punishment, or sometimes acceptable as punishment for the
12 following crimes:

- 13 - murder by someone previously convicted of murder;
- 14 - a planned, premeditated murder;
- 15 - murders in which more than one victim is killed;
- 16 - killing of a police officer or prison guard;
- 17 - murder by a drug dealer; and,
- 18 - a killing that occurs during another crime.

19 Bowers, Foglia, *supra*, at 62, fn. 60. (Exhibit C) The following chart lists their responses.

20
21

Table 2 ⁹	Percentage of Jurors Considering Death the Only Acceptable Punishment
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23 ⁹ Exhibit C at 63
DEFENANT'S MOTION TO STRIKE THE NOTICE
OF SPECIAL PROCEEDINGS, OR IN THE ALTERNATIVE
TO CONVENE A SEPARATE JURIES - 24

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for Six Types of Murders by State							
State	Prior Murder Conviction	Planned Pre-Meditated	Murder w/Multiple Victims	Killing Police/Prison Guard	Murder By drug dealer	Murder During Another crime	Number Of Jurors
AL	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
CA	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
FL	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
GA	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
IN	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
KY	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
MS	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
NC	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
PN	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
SC	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
TENN	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
TX	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
VA	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
ALL STATES	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

As the national data from this table indicates, the CJP survey results in documented profound deviations between what the capital jurisprudence requires and actual capital jurors believe. Many jurors who had been screened as capital jurors under Morgan standards, and who decided an actual capital case, approached this task believing the death penalty was the only appropriate penalty for many of the kinds of murders. In effect, mandatory death penalty laws while banned by the federal and state Supreme Courts under Woodson v. North Carolina 428 U.S. 280

DEFENANT'S MOTION TO STRIKE THE NOTICE
OF SPECIAL PROCEEDINGS, OR IN THE ALTERNATIVE
TO CONVENE A SEPARATE JURIES - 25

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1 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977) and State v. Bartholomew, 101 Wash 2d. 631
2 (1984) are applied by jurors despite the procedural safeguards of Morgan and discretionary statutory
3 schemes on which jurors are instructed.

4 Many of the jurors in the study even expressed that the penalty phase was nothing but a
5 complete waste of time: "I thought it [the penalty trial] was kind of silly, to be perfectly honest. A
6 rotten childhood is not the question we had to answer."..."Character witnesses didn't really seem
7 relevant to the issue... Everything went back to what he had done and I think everyone had their
8 mind made up before the penalty phase started." Haney, Sontag, Costanzo, *Deciding To Take a*
9 *Life: Capital Juries, Sentencing Instructions, and The Jurisprudence of Death*, 50 Journal of Social
10 Science Issues 149, 166 (1994). (See Exhibit K)

11 A juror who believes that death is the only acceptable punishment for certain categories of
12 murder can hardly give meaningful consideration to mitigation evidence. Such a juror will fail in
13 good faith to consider the evidence of aggravation and mitigating circumstances as the instructions
14 require him to do. Indeed, because such a juror has already formed an opinion on the merits, the
15 presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a
16 juror. Morgan, 504 U.S. at 729. It is for that reason that the Morgan Court went on to say that "[i]f
17 even one such juror is empanelled and the death sentence is imposed, the State is disentitled to
18 execute the sentence." *Id.*

19 The process of capital jury selection itself produces the worst possible group of jurors
20 precisely when a criminal defendant should have a right to the most qualified jurors. The faulty
21 application of jury selection standards yields a disproportionately guilt-prone and death-prone jury
22 in two ways: 1) it "over-excludes" by barring jurors who would be able to impose the death penalty
23 under appropriate circumstances despite reservations and (2) it "under-excludes" by failing to

1 dismiss "automatic death penalty" jurors who would not give effect to mitigation in making their
2 sentencing decisions. Bowers and Foglia at 61. (Exhibit C)

3 Furthermore, these studies demonstrate that the death qualification *voir dire* process
4 negatively impacts the guilt/innocence phase of the capital trial in several ways. By questioning
5 potential jurors extensively about their attitudes towards the death penalty, substantial numbers of
6 jurors believe both that the defendant must be guilty and that apparently they are going to be asked
7 to sentence him to death. After all, if the judge and the lawyers were not operating on the
8 assumption he was guilty and that death was the likely sentence, then why are they spending so
9 much time talking about what his punishment should be? Only in capital punishment do we talk
10 about the sentence first and then get to the guilt/innocence trial.

11 Many jurors believe that the sub-text of a capital trial *voir dire* is not about whether the
12 defendant committed the murder; it is about what punishment he should receive. Moreover, many
13 jurors, after seeing which jurors stay and which leave, believe that if selected, it is understood that
14 they will find the defendant guilty, and that they will sentence him or her to death. See attached
15 articles Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?* 1995 Utah L.
16 Rev. 1 (1995) (Exhibit P); Bowers, Steiner, Sandys, *Death Sentencing in Black and White: An*
17 *Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, U. Pa. J. Const. L.
18 171 (2001) (Exhibit I); Bowers, Steiner, *Death by Default: An Empirical Demonstration of False*
19 *And Forced Choices in Capital Sentencing*, 77 Texas L. Rev. 605 (1999) (Exhibit H)

20 In addition to the bias towards guilty verdicts and death sentences, death qualifying *voir dire*
21 results in the least representative jury criminal defendants face. Early studies which have been
22 validated by the CJP established this rather obvious phenomena. People's attitudes towards capital
23 punishment do not exist in a vacuum. One's attitudes about this very controversial topic, over

1 which Americans have very divergent views, are strongly associated with a whole constellation of
 2 attitudes about the criminal justice system. These studies establish, for instance, that people who
 3 hold strong views supporting the death penalty and can voice those views also hold other views
 4 about the criminal justice system which work strongly against the capital defendant. In short, death
 5 qualified jurors are the jurors least representative of the community as a whole and are the jurors
 6 least likely to give a criminal defendant the benefit of the doubt. *See* attached articles – Eisenberg,
 7 Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993) (Exhibit
 8 Q); Sandys, McClelland, *Stacking the Deck For Guilt and Death: The Failure of Death*
 9 *Qualification to Ensure Impartiality* (2003)(Chapter 13 from Acker, Bohm, Lanier, AMERICA'S
 10 EXPERIMENT WITH CAPITAL PUNISHMENT, (2nd ed., 2003) (Exhibit W)

11 Furthermore, the data demonstrates that these jurors, much more strongly than non-death-
 12 qualified jurors, believe that if a defendant does not testify in his or her own defense, the failure to
 13 do so is an affirmative proof of guilt. Death-qualified jurors are much less likely to believe in the
 14 presumption of innocence. They believe much more strongly that “where there is smoke, there is
 15 fire.” They are extremely distrustful of defense lawyers and view everything they have to say with a
 16 great deal of skepticism. They are highly suspicious of experts called by the defense. On the other
 17 hand, they are extremely receptive to the prosecution and its witnesses – especially police officers –
 18 and believe them. *See* Eisenberg, Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79
 19 Cornell L. Rev. 1 (1993) (Exhibit Q); Sandys, McClelland, *Stacking the Deck For Guilt and Death:*
 20 *The Failure of Death Qualification to Ensure Impartiality* (2003)(Chapter 13 from Acker, Bohm,
 21 Lanier, AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, (2nd ed., 2003) (Exhibit
 22 W) Finally, Death-qualified jurors are far less likely to believe in Due Process guarantees, such as
 23 requiring the prosecution to bear the burden of proof beyond a reasonable doubt. *See Id.*

1 3. Capital Jurors Fail to Comprehend and/or Follow Penalty Instructions

2 The CJP research demonstrates that capital jurors fail to understand and/or follow the
3 instructions given in capital trials. This is consistent with pre-CJP and non-CJP data and
4 conclusions that significant numbers of capital jurors fail to understand the concept and role of
5 mitigation in capital cases. *See* Haney, Lynch, *Comprehending Life and Death Matters*, 18 *Law &*
6 *Human Behavior* 411 (1994) (Exhibit M); Fitzgerald, Ellsworth, *Due Process vs. Crime Control:*
7 *Death Qualification and Jury Attitudes*, 8 *Law & Human Behavior* 32 (1984) (Exhibit V); Cowan,
8 Thompson, Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition To Convict and*
9 *On The Quality of Deliberation*, 8 *Law & Human Behavior* 53(1984) (Exhibit U); Haney, Lynch,
10 *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension And Penalty Phase*
11 *Closing Arguments*, 21 *Law & Human Behavior* 575 (1997) (Exhibit N); Lynch, Haney,
12 *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias and the Death*
13 *Penalty*, 24 *Law & Human Behavior* 337 (2004) (Exhibit O).

14 The CJP data shows that close to half of those who served as capital jurors failed to realize
15 that they were allowed to consider mitigating factors that were not listed in the statute. Overall, an
16 astonishing 44.6% failed to understand that they were allowed to consider any mitigating evidence.
17 Bowers and Foglia at 67. (Exhibit C). 66.5% of jurors in all 14 states failed to realize that
18 unanimity was not required for findings of mitigation. *Id* at 68. While no jurisdiction requires the
19 defendant to prove mitigation beyond a reasonable doubt, the CJP data reveal that almost half of all
20 CJP jurors (49.2%) erroneously assumed that this heightened standard of proof was applicable. *Id* at
21 69. Conversely, even when the statutes of most states explicitly required proof beyond a reasonable
22 doubt for findings of aggravation, over one quarter (29.9%) of the jurors failed to realize the higher
23 standard of proof applied. *Id* at 71. And if the evidence proves that the defendant will be dangerous

1 in the future, 30% of jurors in both life and death cases believe, incorrectly, that the law requires
2 them to impose a death sentence. Eisenberg and Wells at 8. (exhibit Q)

3 The mock jurors in Washington had similar problems interpreting the Washington jury
4 instructions. They actually did worse when it came to understanding how to handle mitigating
5 evidence, despite the fact that they were college students. These students are presumably more
6 educated than many jurors are, actually in a paralegal program and therefore should have more
7 interest in understanding the law, and could be expected to be biased towards the defendant as
8 nearly half of them (48.0%) expressed a predisposition for a life sentence at the end of the guilt
9 evidence (compared to only 18.9% of the national CJP jurors prematurely choosing life). Despite
10 all that, nearly three quarters of the Washington sampled failed to realize they could consider any
11 mitigating factor which made the crime not as bad, which was substantially higher than the
12 percentage getting this wrong nationwide (73.1% vs. 44.6%). (See Exhibit B, pg 17-18)

13 Washington mock jurors also were more likely than the nationwide average to choose the
14 incorrect burden of proof standard at 61.5% vs. 49.2%. Washington mock jurors were more likely
15 to fail to understand that they did not have to agree unanimously regarding mitigation (79.2% vs
16 66.5%). An additional question asked of the Washington sample confirms this lack of
17 understanding as 61.5% did not realize that one juror's belief in a mitigating factor could be the
18 basis for a life sentence. (See Exhibit B, pg 17)

19 Capital jurors fail to understand that they are not only allowed to consider mitigation, but
20 they are required to do so even if it does not excuse or lessen the capital defendant's culpability for
21 the murder. The commands of Lockett are being ignored. Over half of the capital jurors (56.4%)
22 studied in California failed to understand that the jury did not have to be unanimous about
23 individual mitigating factors before they were allowed to consider them. Moreover, a third (37.6%)

1 believed mitigating factors had to have been proven to them beyond a reasonable doubt before they
2 could be considered. Bowers, Foglia, *supra* at 66-71, (Exhibit C).

3 The totality of the data suggests that the sentencing phase of a capital trial commences with a
4 substantial bias in favor of death. The tilt towards death suggests that a defendant with a jury biased
5 toward death which is then confused by the instructions, may receive a death sentence by default.
6 The defendant would not likely even have a chance to benefit from legal standards designed to give
7 him a chance for life. Eisenberg and Wells at 12. (Exhibit Q)

8 The reasons for this massive misunderstanding of the rules which are supposed to guide and
9 channel capital jury decision-making is the lack of familiarity with the capital sentencing process,
10 *i.e.*, the total absence of any culturally normative experience with the unique kind of decision capital
11 jurors are called upon to make. Americans are very familiar with the jury's role as a fact-finder.
12 This role is a longstanding part of our culture. On the other hand, Americans are not familiar with
13 the role a capital jury has in making the decision as to whether a capital defendant should live or die.
14 See Cowan, Thompson, Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition To*
15 *Convict and On The Quality of Deliberation*, 8 Law & Human Behavior 53 (1984) (Exhibit U);
16 Fitzgerald, Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8
17 Law & Human Behavior 32 (1984) (Exhibit V); Haney, Lynch, *Comprehending Life and Death*
18 *Matters*, 18 Law & Human Behavior 411 (1994) (Exhibit M)

19 American jurors are accustomed to finding facts such as whether a weapon was used or a
20 harmful touching occurred. They are not accustomed to determining what weight to give a capital
21 defendant's dysfunctional childhood, mental health history or acts of kindness in a sentencing
22 hearing. Capital jurors have to resort to their own rules because terms like mitigation and
23 aggravation have no meaning to them in the legal context that they are used:

DEFENANT'S MOTION TO STRIKE THE NOTICE
OF SPECIAL PROCEEDINGS, OR IN THE ALTERNATIVE
TO CONVENE A SEPARATE JURIES - 31

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1 [CA Juror:] The first thing WE asked for after the instruction was, could the judge
 2 define mitigating and aggravating circumstances. Because the different verdicts
 3 that we could come up with depended on if mitigating outweighed aggravating, or
 4 if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I
 5 said: "I don't know that I exactly understand what it means." And then everybody else
 6 said, "No, neither do I" or "I can't give you a definition." So we decided we should
 7 ask the judge. Well, the judge wrote back and said, "You have to glean it from the
 8 instructions." (Emphasis added)

9 [CA Juror:] I don't think anybody liked using those terms because when we did use
 10 them, we got confused... They were just confusing and I had never really used them
 11 before in anything. So, yeah, they sit there and throw these stupid words at you and I'm
 12 like, "Well, what do they mean?" I get so confused "cause they sound the same." I'm
 13 thinking, "Now which one was that again?" You know. And it totally confuses me.

14 Haney, Sontag, Costanzo, *Deciding To Take a Life, supra* at 168-169. (Exhibit K)

15 In fact, in ordinary usage "aggravate" is roughly equivalent to "annoy" or "irritate". There
 16 are many things about a defendant or the circumstances of a crime that a jury could consider
 17 "aggravating" in the sense of annoying. The ordinary meaning of an "aggravating" circumstance is
 18 thus quite different from the legal definition. Tiersma, *Dictionaries and Death: Do Capital Jurors*
 19 *Understand Mitigation*, 1995 Utah L. Rev. 1, 14 (1995) (Exhibit P). The net effect of these
 20 misunderstandings is that capital jurors are skewed toward a death sentence.

21 The misunderstanding reflected in these incorrect responses on the questions
 22 regarding how to handle mitigating and aggravating evidence all make a death
 23 sentence more likely. It is more difficult to find mitigating evidence than the law
 contemplates when jurors think they are limited to enumerated factors, must be unanimous,
 and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half
 (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to
 consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to
 be unanimous on finding of mitigation. Nearly half (49.2%) of the jurors incorrectly thought
 they had to be convinced beyond a reasonable doubt on findings of mitigation... The
 constitutional mandate of Gregg and companion cases to guide jurors' exercise of
 sentencing discretion is not being satisfied when jurors do not understand the guidance.

1 Bowers, Foglia, *Still Singularly Agonizing*, supra, at 71. (Exhibit C) The following chart depicts the
 2 percentages of jurors who fail to understand guidelines for consideration of aggravating and
 3 mitigating circumstances.

4 **Table 3¹⁰ Percentage of Jurors Failing to Understand Guidelines for Considering**
Aggravating and Mitigating Evidence

5 **JURORS WHO FAILED TO UNDERSTAND THA THEY....**

6 State	7 Could consider any mitigating evidence	8 Need not be unanimous on mitigating evidence	9 Need not find mitigating evidence BRD ¹¹	10 Must find aggravation BRD	11 N*
12 Alabama	54.7%	55.8%	53.8%	40.0%	52
13 California	24.2%	56.4%	37.6%	41.7%	149
14 Florida	49.6%	36.8%	48.7%	27.4%	117
15 Georgia	40.5%	89.0%	62.2%	21.6%	73
16 Indiana	52.6%	71.4%	58.2%	26.8%	97
17 Kentucky	45.9%	83.5%	61.8%	15.6%	109
18 Missouri	36.8%	65.5%	34.5%	48.3%	57
19 N.Carolina	38.7%	51.2%	43.0%	30.0%	79
20 Pennsy.	58.7%	68.0%	32.0%	41.9%	74
21 S.Carolina	51.8%	78.9%	48.7%	21.9%	113
22 Tenn.	41.3%	71.7%	46.7%	20.5%	44
23 Texas	39.6%	72.9%	66.0%	18.7%	47**
Virginia	53.3%	77.3%	51.2%	40.0%	43
All States	44.6%	66.5%	49.2%	29.9%	1185

24 *The number of subjects answering each question varied slightly, and the number
 (N) for each state is the lowest number of subjects answering any of the questions.
 25 ** The number of Texas jurors is reduced in this table because these two questions
 were replaced by others while the interviewing in Texas was underway

18 **4. Jurors Believe They Are Required To Return a Death Verdict**

19 In no state are jurors free from the misconception that the law requires the death penalty if

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21
22 ¹⁰ Exhibit C at 68

23 ¹¹ Beyond A Reasonable Doubt

1 the evidence established that the murder was "heinous, vile or depraved" or the defendant would be
 2 "dangerous in the future". In the Washington sample the jurors also had the misconception that the
 3 law required the death penalty if the evidence established the murder was "heinous, vile or
 4 depraved" or if the defendant would be "dangerous in the future."¹² (See exhibit B, pg 18-19). CJP
 5 data shows that substantial percentages of jurors "erroneously believe that death is required if
 6 certain aggravators are proved beyond a reasonable doubt." See exhibit C, at 72. Nearly half of the
 7 jurors interviewed erroneously believed that they were required by law to impose death as a
 8 sentence if the conduct of the defendant was "heinous, vile or depraved." Id. At 72-73.
 9 Furthermore, 68.4% of Texas jurors and 36.9% of all other jurors interviewed believed that they
 10 were required by law to vote in favor of a death sentence if the evidence proved that the defendant
 11 would be dangerous in the future. Id.

12

13

Table 4 ¹³	Percentages of Jurors Thinking Law Requires Death if Defendant's Conduct was "Heinous, Vile or Depraved," or Defendant "Would Be Dangerous in the Future" by each State.		
	Death Required If Defendant's Conduct Is Heinous, Vile or Depraved	Death Required If Defendant Would Be Dangerous in Future	Number of Jurors*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	25.2%	111
Georgia	51.4%	30.1%	72
Indiana	34.4%	36.6%	93
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58
N. Carolina	67.1%	47.4%	76
Pennsyl.	56.9%	37.0%	73
S. Carolina	31.8%	28.2%	110
Tenn.	58.3%	39.6%	48

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¹² Neither of these are aggravating factors in Washington State.

¹³ Exhibit C at 72-73

1	Texas	44.9%	68.4%	117
2	Virginia	53.5%	40.9%	43
3				
4				
5	All States	43.9%	36.9%	1136
6	* The number of subjects answering each question varied slightly, and the number for each state is the lowest number of subjects answering any of the questions.			
7				

8 5. Jurors Evade Responsibility for the Punishment Decision

9 As the Court explained in Caldwell v. Mississippi, supra, “[b]elief in the truth of the
10 assumption that sentencers treat their power to determine the appropriateness of death as an
11 ‘awesome responsibility’ has allowed this Court to view sentencer discretion as consistent with---
12 and indeed indispensable to – the Eighth Amendment’s ‘need for reliability in the determination that
13 death is appropriate punishment in a specific case’” 472 U.S. at 330. The CJP data demonstrates
14 that this assumption is false.

15 The Caldwell Court further reasoned that a sentence is unreliable if it is imposed by a jury
16 that believes “that the responsibility for any ultimate determination of death will rest with others.”
17 472 U.S.320, 333 (1985). The CJP data demonstrates that almost no capital jurors view themselves
18 as most responsible for the decision they make. They place primary responsibility elsewhere:

19 The vast majority of jurors did not see themselves as most responsible for the
20 sentence. Over 80% assigned primary responsibility to the defendant or the law,
21 with 49.3% indicating the defendant and 32.85% indicating the law was most
22 responsible. In contrast, only 5.5% thought the individual juror was most
23 responsible[.]

1 Bowers, Foglia, supra, at 74-75. (Exhibit C) In the Washington sample, the relative rankings of
 2 which of the five choices was most responsible was nearly identical to the nationwide percentages,
 3 except jury and individual juror tied. In Washington, primary responsibility was assigned to the
 4 defendant by 61.5%, the law by 40.9%, the jury by 18.2%, the individual juror by 18.2% and the
 5 judge by 8.7%.¹⁴ The answer to the direct question about relative responsibility which asked how
 6 responsibility was allocated among the jury, trial judge and appellate judges revealed that the
 7 understanding in Washington was nearly identical to the understanding throughout the nation. Less
 8 than a third (26.9% in Washington and 29.8% nationwide) believed the sentence was strictly the
 9 jury's responsibility, and about one in five (23.1% in Washington and 17% nationwide) thought the
 10 decision was mostly the responsibility of the judge and appellate court. (See exhibit B, pg 19)

11 Death penalty statutes are not effectively guiding discretion when jurors misunderstand the
 12 instructions, mistakenly believe death is required by law, and do not appreciate their responsibility
 13 for the sentence they are imposing.

14 6. The Continuing Influence of Race on Juror Decision-Making

15 The responses of the CJP jurors adds to the existing evidence of how race still influences
 16 who gets the death penalty in this country. The United States General Accounting Office (GAO)
 17 review of prior research showed that 82% of the studies indicate that defendants were more likely to
 18 get the death penalty if the victim was white.¹⁵ The GAO review, as well as other research, has
 19
 20
 21

22 ¹⁴ The percentages do not add up to 100 because some of the mock jurors marked multiple answers as most important or
 23 only chose one item as most important.

¹⁵ U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities (1990).
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1 found that the death penalty is also more likely when the defendant is black, and especially when the
2 defendant is black and the victim is white.¹⁶

3 The more recent research done by the CJP also demonstrates that the process of capital jury
4 decision-making is influenced, not only by the race of the defendant and the race of the victim, but
5 by both the racial composition of the jury and the race of the individual jurors. CJP data
6 demonstrates that along gender lines, the outcome of a capital jury's verdict is greatly dependent on
7 how many white males make it on the jury, and whether any African American males serve as
8 jurors.

9 The data demonstrates, for instance, that white male capital jurors (generally speaking) do
10 not experience lingering doubt about the defendant's guilt. They see the defendant as remorseless
11 and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe
12 that the defendant will be dangerous in the future unless executed. Bowers, Steiner, Sandys, *Death*
13 *Sentencing in Black and white: An Empirical Analysis of the Role of Jurors' Race and Jury Racial*
14 *Composition*, 3 U. Pa. J. Const. L. 171, 207-208 (February 2001). (Exhibit I)

15 On the other hand, African American male capital jurors (generally speaking) frequently
16 have at least some doubts about the evidence of guilt. They are able to see the defendant as
17 someone who is sorry for what he has done. They are able to put themselves in the defendant's
18 situation and understand what it must be like for the defendant's family. And, they do not see the
19 defendant as someone who will hurt other people in the future. *Id.* (See Exhibit B, Pg 23, Table 6)

20 It would be difficult to image a more arbitrary circumstance than having to depend on the
21 racial composition of the jury for a life sentence. Nevertheless, the CJP data demonstrates that the
22

23 ¹⁶ *Id.*; David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990); and Samuel R. Gross and Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* (1989).

1 outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall
2 racial composition of the jury as a whole. Id. Furthermore, Mr. Monfort is a black male and Officer
3 Timothy Brenton was white. Race is an issue in this capital case. The data informs us that in the
4 context of this case, race will contribute to a greater likelihood of imposition of a death sentence.

5 7. Jurors Significantly Underestimate the Alternative to Death

6 Capital jurors must not be misled so as to diminish their sense of responsibility for any death
7 sentence imposed. Caldwell v. Mississippi, supra. In spite of this admonition, the CJP found that
8 jurors tend to “grossly underestimate how long capital murderers not sentenced to death usually stay
9 in prison.” See e.g. Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and*
10 *Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 648 (1999)(Exhibit H) This
11 misunderstanding leads to a bias toward a death sentence. The study concluded that the “sooner
12 jurors think a defendant will be released from prison, the more likely they are to vote for death and
13 the more likely to see the defendant as dangerous.” Id. Indeed, most jurors’ estimates of the time
14 served by defendants given life sentences fell several years short of the actual mandatory minimum
15 terms required for parole eligibility. Id. at 648-49. Astonishingly, even in states where the only
16 alternative to the death penalty was life without parole, a large number of jurors believed that
17 defendants could be released in twenty years or less. Id. at 647, 670.

18 In Washington the mock jurors were asked how long they believe a defendant convicted of
19 capital murder would remain in prison. The median was 42.5 years, but 3.5% said 5 years, another
20 3.85% said 10 years, and 15.4% said 20 years. (See Exhibit B, Pg 25)

21 Perhaps most troublesome was the CJP data that discovered some jurors do not even believe
22 judges when they are told there is no parole for a life without parole sentence. In Interviews with
23

1 California jurors who were told that a life sentence meant there would be no parole, some jurors
2 claimed that they did not believe the judge.¹⁷ Bowers and Foglia at 83. (Exhibit C)

3 Jury studies in Georgia and Mississippi have shown that jurors would be more likely to
4 impose a life sentence if assured that "life" meant that the defendant would spend at least 20 or 25
5 years in prison. Bowers and Steiner, *supra* at 634-37, citing Paduano and Smith, *Deathly Errors:
6 Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum.
7 Rts. L. Rev 211, 221-24 (1987). The empirical evidence from the CJP demonstrates that the
8 likelihood and timing of the defendant's release was discussed "a great deal" in more than half of
9 the cases examined, and "the jurors who most underestimate the death penalty alternative – those
10 would believe release would usually come in less than ten years – are the ones most likely to take a
11 pro-death stand at each stage of the trial." Bowers & Steiner at 656, 672.

12 A South Carolina study also found that jurors who served in capital cases "confirm[ed] that
13 jurors' deliberation emphasized dangerousness and that misguided fears of early release generate
14 death sentences." Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79
15 Cornell L. rev. 1, 4 (1993) (Exhibit Q) Clearly, juror perceptions or misperceptions about
16 sentencing taint their decision to impose a death sentence.

17
18 D. HOW WASHINGTON'S DEATH PENALTY SCHEME, RCW 10.95, VIOLATES
ARITL 1, SECTION 14 OF THE STATE CONSTITUTION.

19 The Washington Supreme Court has interpreted Const. Article I, sect 14 to provide broader
20

21 ¹⁷ Bowers and Steiner maintain that getting jurors to understand and believe what they are told about parole, would, at a
22 minimum require: (1) presentation to the jury of an official state report on the parole of murders that indicate how long
23 capital murders not sentenced to death, as compared to first degree, and second (or lesser) degree murderers usually
spend in prison before being paroled; (2) the appearance before the jury of an expert on the parole report who can
clearly explain both the substance of the report and the meaning of the language or terms used to describe its content;
and (3) the opportunity for jurors to question the expert about parole practices, the meaning of statistics, and the terms

1 protection than the Supreme Court's interpretation of the Eighth Amendment. State v.
 2 Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984)(Bartholomew II), citing State v. Fain, 94
 3 Wn. 2d 387, 617 P.2d 720 (1980). In addition, the Court has interpreted the Due Process Clause of
 4 the state constitution more broadly than the Supreme Court's interpretation of the Fourteenth
 5 Amendment, holding that United States Supreme Court cases do "not control our interpretation of
 6 the state constitution's Due Process Clause." Id at 639-40 (citations omitted)

7 Since the death penalty is the ultimate punishment, due process under this state's
 8 constitution requires stringent procedural safeguards so that a fundamentally fair
 9 proceeding is provided. Where the trial which results in imposition of the death
 10 penalty lacks fundamental fairness, the punishment violates article 1, section 14 of
 11 the state constitution. We deem particularly offensive to the concept of fairness a
 12 proceeding in which evidence is allowed which lacks reliability.

13 Bartholomew II at 640.

14 1. The CJP Research Shows Actual Capital Jury Trial Practices Violate the State
 15 Constitution.

16 Actual capital jury trials (1) permit jurors to engage in premature decision making; (2) create
 17 a jury selection process that fails to remove large numbers of death biased jurors, as well as the
 18 overall biasing effect of the selection process itself; (3) creates a system wherein the jurors fail to
 19 comprehend and/or follow penalty instructions, (4) permit jurors to erroneously believe a death
 20 sentence is required, (5) permits jurors to evade responsibility for the punishment decision and/or to
 21 believe that the responsibility of issuing a death sentence lies elsewhere, (6) creates a system that is
 22 fraught with racism in every aspect of the proceedings, and (7) permits jurors to believe that life
 23 sentences will not result in life incarcerations. This is not the type of capital jury trial that the Gregg
 Court could have envisioned in their decision. It is however, how capital jury trials are being

used to present the information in order to clarify any misunderstandings and to dispel any remaining misconceptions they may have.

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1 conducted today. These same flaws are seen in the Washington mock capital juror sample that was
2 studied and scored by Dr. Foglia.

3 Such a death penalty scheme clearly offends our state constitution. Washington courts have
4 found constitutional errors in the following flawed schemes. In State v. Fain, supra, the court held a
5 sentence violates Article I, section 14 when it is grossly disproportionate to the crime for which it is
6 imposed. In In re Brett, 142 Wn. 2d 868, 16 P.3d 601 (2001), the court reversed a death sentence
7 where defense counsel failed to adequately investigate Mr. Brett’s mental and physical impairments
8 and for failing to present competent expert testimony at trial. In State v. Roberts, 142 Wn. 2d 471,
9 505-06, 14 P. 3d 713 (2000), the court held “[m]erely satisfying the minimal requirements of the
10 accomplice liability statute is insufficient to impose the death penalty under RCW 10.95.020, the
11 Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State
12 Constitution. In State v. Davis, supra, 141 Wn.2d at 824-25, the court held every defendant “is
13 entitled to a fair trial before 12 unprejudiced and unbiased jurors, [n]ot only should there be a fair
14 trial, but there should be no lingering doubt about it.” In State v. Walden, 131 Wn.2d 469, 473, 932
15 P.ed 1237 (1997), the court held that jury instructions which misstate the law amount to an error of
16 constitutional magnitude. In State v. Rhodes, 82 Wn. App. 192, 195-96, 917 P.2d 149 (1996), the
17 court held that race-based peremptory challenges violate the rights of defendants to have members
18 of their own race in their jury panels. In State v. Burch, 65 Wn. App. 828, 834, 830 P.2d 357
19 (1992), the court held the taint of racial or gender bias is no less offensive if both the prosecutor and
20 defense counsel were to practice discrimination during jury selection.

21 “Since the death penalty is the ultimate punishment, due process under this state’s
22 constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is
23 provided. Where the trial which results in imposition of the death penalty lacks fundamental

1 fairness, the punishment violates Article 1, Section 14 of the state constitution.” State v. Clark, 143
2 Wn. 2d 731, 779-80, 24 P. 3d 1006 (2001), quoting Bartholomew II, at 640.

3 Defense anticipates that the State will argue that since Washington was not part of the CJP
4 study the findings are not applicable to Washington State. However, this assertion is false. Dr.
5 Foglia will testify as to how the fatal flaws addressed in the CJP are fundamental flaws applicable to
6 all States and how she found the same problems in the Washington mock capital juror responses.

7 In fact, Drs. Foglia and Bowers testified in a evidentiary hearing on the CJP data in New
8 Mexico, which was not part of the CJP study, leading that court to grant a defense motion to have
9 two separate juries – one to determine guilt or innocence and the other to determine whether to
10 impose the death penalty. “The premature determination of the death penalty during the evidentiary
11 (guilt) phase of trial is contrary to the clear and objective standards established by the New Mexico
12 Capital Felony Sentencing Act and constitutes an arbitrary and capricious violation of the United
13 States Constitution and the New Mexico Constitution”, the Court stated. (See Exhibit QQ)
14 Prosecutors then withdrew their notice of intent to seek the death penalty. On March 18, 2009, New
15 Mexico abolished its death penalty laws.

16 In 2004, New York’s highest court declared that state’s death penalty was unconstitutional.
17 People v. LaValle, 3 N.Y.3d 88, 817 N.E.2d 341 (N.Y. 2004), with reliance on the CJP studies in
18 issuing its ruling. The Court held that the jury deadlock instructions were unconstitutional under the
19 state constitution and that the constitutional defect in the existing statute could only be cured by
20 passage of a new law by the legislature. The Court vacated the death sentence of Stephen LaValle,
21 concluding that the jurors might impose the death penalty on a defendant whom they believed did
22 not deserve it simply because they feared that the defendant might someday be released. The Court
23 remanded the case to the Supreme Court of Suffolk County and instructed the trial court to impose a

1 sentence of life without parole or a sentence of 20 to 25 years to life. Id. 3 N.Y. 3d at 131-32;
 2 accord, People v. Taylor, 9 N.Y. 3d 129, 878 N.E. 2d 969(N.Y. 2007)(under the doctrine of stare
 3 decisis, defendant's death sentence must be vacated and the matter remitted to Supreme Court for
 4 resentencing)¹⁸

5 In reaching its decision, the LaValle court considered several scientific studies of jury
 6 behavior, including Bowers and Steiner, *Death by Default*, supra, noting that "these studies
 7 provide the best available insight into jury behavior." 3 N.Y.3d at 117. (Emphasis added) The
 8 court relied on Bowers' and Steiners' findings that the "sooner jurors think a defendant will be
 9 released from prison, the more likely they are to vote for death and the more likely they are to see
 10 the defendant as dangerous." 3 N.Y.3d at 117. The court also relied on a South Carolina study that
 11 found that jurors who served in capital cases confirmed that their "deliberations emphasize
 12 dangerousness" and "that misguided fears of early release generate death sentences." 3 N.Y. 3d at
 13 17-18, citing Eisenberg & Wells, *Deadly Confusion*, supra. Accordingly, the LaValle court held
 14 that whether a juror chooses death or life without the possibility of parole, where the choice is
 15 driven by an underestimation of the alternative to death, the application of the death penalty is
 16 arbitrary and unreliable and, therefore unconstitutional. Id at 120.

17 In just the past few years the states of New Mexico (2009), Illinois (2011) and Connecticut
 18 (2012) have abolished the death penalty. Oregon currently has a moratorium on the death penalty
 19 and the Arkansas death penalty scheme was declared invalid by their Supreme Court this year. In
 20 California an initiative to repeal the death penalty was signed by 800,000 people to place it on the
 21

22
 23 ¹⁸ To date, the State of New York has not reinstated its death penalty statute, and attempts by some of its state legislators
 to do so has failed to garner sufficient support.

1 ballot for November 2012. And in Washington HB2468 (SB6283) is before the legislature to
2 abolish the death penalty and replace it with life without parole.

3 The Washington Pattern Jury Instructions for capital cases are similarly flawed. Contrary to
4 RCW 10.95.030(1), the instructions suggest that a verdict for life must be unanimous. WPIC 31.08
5 reads, in relevant part:

6 You must answer one question. All twelve of you must agree before you answer a
7 question "yes" or "no". When all of you have agreed, fill in the answer to the
8 question in the verdict form to express the decision. If all twelve of you are unable
to unanimously agree, fill in the answer to the question in the appropriate place on
the verdict form.

9 This is substantially similar to the instruction that the Ninth Circuit found unconstitutional in
10 Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert denied, 507 U.S. 951 (1993). In that case, the
11 instructions read, in part:

12 You must answer one question. All twelve of you must agree before you
13 answer a question 'yes' or 'no'. when all of you have agreed, fill in the answer
to the question in the verdict form to express your decision.

14 Mak, 970 F.2d at 624.

15 In Washington, jurors are presumed to follow the law. State v. Davenport, 100 Wn. 2d 757,
16 763-64, 675 P. 2d 1213 (1984). However, in light of the CJP research and Washington's flawed
17 jury instructions, any presumption that jurors honor these instructions must be discarded. This court
18 should not place theoretical conjecture above a proven pattern of actual juror conduct.

19 Dr. Gail Stygall has reviewed all the jury instructions given in the 14 States that were part of
20 the CJP study and compared those instructions to Washington State's Instructions. Dr. Stygall
21 determined that Washington's Jury Pattern Instructions for capital cases are extremely flawed and
22 poorly written. She found that Washington's instructions have the typically identified linguistic
23 features that interfere with juror comprehension and therefore do not convey the information that

1 jurors need to make non-arbitrary or non-capricious decisions. (See Exhibit A). Furthermore, she
 2 found that Washington's death penalty instructions are similar to the death penalty instructions from
 3 the States that were part of the Capital Jury Project in almost all ways. This similarity continues to
 4 be true even after several of the CJP's states revised their instructions. (See Exhibit A)

5 Dr. Stygall discusses in her declaration the most common types of linguistic features in jury
 6 instructions that complicate jury comprehension. These include:

- 7 1. **Ordering Effects** (e.g., repetition of terms across instructions close together or
 separated widely);
- 8 2. **Conceptual Complexity** (e.g., terms that require greater education or
 specialization);
- 9 3. **Sentence Length** (e.g., literal number of words in sentences, often found at the
 center of reading formulae; rejected as important factor in this study)
- 10 4. **"WHIZ" and Complement Deletion** (e.g., a relative clause such as "that" or a
 relative clause plus verb is missing);
- 11 5. **Technical Vocabulary of the Law;**
- 12 6. **Negatives;** and
- 13 7. **Embeddings** (e.g., sentences including subordinate clauses)

14 Dr. Stygall reviewed the following WPICs:

15	WPIC 31.01	Advanced Oral Instruction
16	WPIC 31.02.01	Allocution
17	WPIC 31.03	Introductory Instruction (Capital Cases)
18	WPIC 31.04	Jurors' Duty to Consult with One Another (Capital Cases)
19	WPIC 31.05	Burden of Proof /Presumption of Leniency/Reasonable Doubt
20	WPIC 31.06	Question for Jury/Life Without Parole/Definition
21	WPIC 31.07	Mitigating Circumstance/ Definition
22	WPIC 31.08	Concluding Instruction (Capital Case)
23	WPIC 31.09	Special Verdict Form – Sentencing (Capital Case)

20 Upon review of Washington's pattern jury instructions for capital cases she found that
 21 several of the flaws listed above are in Washington's instructions. For example, WPIC 31.03 shows
 22 problems with **ordering effects**. WPIC 31.05 shows problems with **conceptual complexity**. The
 23 conceptual complexity here deals with reasonable doubt and the concept of "that there are not

1 sufficient mitigating circumstances to merit leniency,” a clause that repeats several times in the
 2 instructions. In this WPIC there is also ordering effects and conceptual complexity. She found in
 3 Washington’s instructions the issue of **deletion of a relative pronoun** and/or **WHIZ deletions**.
 4 There are also problems with the **technical vocabulary, negatives and embedding** in these
 5 instructions. A concerning negative problem occurs in WPIC 31.09 which states:

6 “Having in mind the crime of which the defendant has been found guilty, are you
 7 convinced beyond a reasonable doubt that there are **not** sufficient mitigating
 8 circumstances to merit leniency?”

8 Per Dr. Stygall, “When a concept is already complicated, jurors would find it difficult to
 9 process the rest of the sentence after the **not**.” There is much to sort out here. The jurors have to
 10 know that reasonable doubt applies to the States burden of proof that the presumption is life without
 11 parole unless the State proves beyond a reasonable doubt that there are insufficient mitigating
 12 circumstances. Who has the burden of proof is unclear in this instruction. (See Exhibit A) In fact,
 13 having examined the capital trial instructions for the Capital Jury Project states, it is Dr.
 14 Stygall’s opinion that Washington’s question about mitigation is among the worst possible
 15 presentations of the juror’s duty. (See exhibit A, pg 12). Where the jurors misinterpret and/or
 16 misapply the law, such error is presumptively prejudicial and the death sentence must be reversed.
 17 Mak v. Blodgett, supra.

18 We’ve even seen a strikingly clear example that Washington jurors return death sentences
 19 not because they believe death to be an appropriate punishment for the defendant’s crimes, but
 20 because they wrongly believe that a life sentence would allow the defendant to go free after a period
 21 of time. Recently, in the capital case of State of Washington vs. Conner Schierman, the jurors sent
 22 out the following questions during the penalty phase of the trial:

23

- 1 1. Is it possible, in the case of a penalty of life imprisonment without the possibility
2 or release or parole, for there to be release due to clemency or pardon or other
3 reason?
4 2. If so, has it happened in this State?

5 State v. Conner Michael Schierman, King County No. 06-1-06563-4 SEA, Clerk's Papers sub. No
6 989B, dated May 4, 2010. (See Exhibit RR)

7 This confusion with Washington's jury instructions is not a recent occurrence. In 1990,
8 Judge John Schultheis wrote in his trial report on State of Washington vs. Charles Curtis Tate, "In
9 addition, the question asked of the jury, 'having in mind the crime of which the defendant has been
10 found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating
11 circumstances to merit leniency?' is asked in the negative, and the jurors had difficulty
12 understanding the concept, as well as the question, and the application thereof. It is
13 confusing!" (See Exhibit NN)(Emphasis added). At least one judge has gone so far as to rewrite
14 capital jury instructions in an attempt to make them more understandable to the jurors. In State of
15 Washington v. Barbara Opel, the jury instruction was rewritten to state, "Having in mind the crime
16 of which the defendant has been found guilty, has the state proven beyond a reasonable doubt that
17 there are not sufficient mitigating circumstances to merit leniency." (See Exhibit OO).

18 Like the instructions found unconstitutional in New York, Washington's penalty phase
19 instructions violate federal and state Due Process and Cruel and Unusual Punishment Clauses.
20 Moreover, the social science has clearly established that, as applied in the real world of capital trials,
21 actual capital jurors are not making sentencing decisions consistent with state and federal
22 constitutional mandates. Bowers and Steiner, supra; Eisenberg and Wells, supra. As in New York,
23 jurors in Washington tend to grossly underestimate the alternative to death.

1 Each one of the problems revealed by the CJP research reflects a fundamental flaw in the
2 system; viewed altogether the evidence of system failure is simply overwhelming. We've seen by
3 Dr. Foglia's scoring of a Washington mock capital juror sample that these same fundamental flaws
4 are occurring in Washington as well.

5 2. Several Recent Studies Reveal That Washington's Death Penalty Scheme is
6 Flawed.

7 In 2000, the American Civil Liberties Union of Washington (ACLU) analyzed "all reported
8 capital cases in Washington under the current statutes and the publicly available data regarding
9 Washington's death penalty to evaluate how well our state does at guaranteeing constitutional
10 fairness in trials to persons accused of capital crimes." Based on this analysis, the ACLU concluded
11 that "Washington's capital punishment system – particularly the Washington Supreme Court's
12 mandatory review of death sentences – also is fraught with error." American Civil Liberties Union –
13 Washington, SENTENCED TO DEATH: A REPORT ON WASHINGTON SUPREME COURT
14 RULINGS IN CAPITAL CASES, August 2000 (revised February 2001)(See Exhibit SS)¹⁹

15 Also in 2000, the Washington Supreme Court published a status report on Washington's
16 death penalty scheme. The report noted: "The U.S. Constitution, Washington Constitution, and
17 federal and state statutes require scrupulous review of capital cases due to their considerable
18 potential for error and the irreversible nature of the death sentence. From the beginning of a death
19 penalty case to its final resolution years later, specialized, supplementary death penalty procedures
20 are required by law. Courts at all levels make every effort to prevent wrongful convictions and
21 guarantee fairness." Justice Richard P. Guy, WASHINGTON SUPREME COURT STATUS
22 REPORT ON THE DEATH PENALTY, March 2000. (Exhibit VV)

1 The Washington State Bar Association subsequently convened a committee and conducted a
2 study of how the death penalty is carried out in Washington. The committee found that at the time
3 of its report, there had been 79 death penalty cases brought in Washington since the statute was
4 reenacted. The jury imposed the death sentence in 30 of those cases. At that time, there had been
5 reversals on appeal in 19 of those death sentences, and appeals were still pending in seven cases.
6 Four cases had resulted in execution, including three "volunteers" who waived their appeal rights
7 and allowed themselves to be executed. The "practical wisdom of continuing the death penalty in
8 light of [this] experience", the Committee concluded, "involves value judgments best left to the
9 readers of this study. Voters and their elected representatives may decide to discontinue the death
10 penalty for this or other reasons." *See* WSBA, FINAL REPORT OF THE DEATH PENALTY
11 SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE, December 2006, at 32. (See
12 Exhibit TT)

13 The WSBA's report also noted that it costs "significantly more to try a capital case to final
14 verdict than to try the same case as an aggravated murder case where the penalty sought is life
15 without the possibility of parole." *Id.* at 31. These costs often affect a prosecutor's decision on
16 whether to pursue the death penalty, which then leads to "the uneven application of the death
17 penalty across the state." *Id.* at 33. The subcommittee, in analyzing the racial disparities in capital
18 cases, included a statistic that shows that since 1981, 18 % of the defendants in death penalty cases
19 in Washington have been black, yet blacks only comprise 3.2% of the state population. *Id.* at 3.
20 Finally, the subcommittee reviewed several reports, publications and studies on the death penalty,
21
22

23
¹⁹ This report is also available online at http://www.aclu-wa.org/library_files/Senteced%20to%20Death.pdf APP000298
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1 including those referenced above, and agreed there are issues concerning the quality of
2 representation and fairness in capital litigation.

3 All of these reports reveal significant flaws in Washington's death penalty scheme, resulting
4 in imposition of the death penalty processes which are lacking in fundamental fairness. Thus,
5 Washington's death penalty statute violates Article I, Section 14 of the Washington State
6 constitution.

7 3. The Death Penalty Scheme Violates Washington Citizen's Evolving Standards
8 Of Decency

9 The United States Supreme Court interprets the Eighth Amendment's prohibition against
10 cruel and unusual punishment in light of "evolving standards of decency that mark the progress of a
11 maturing society." Atkins v. Virginia, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335,
12 (2002), quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). The basic
13 concept underlying the Eighth Amendment is "nothing less than dignity of man." Trop v. Dulles,
14 356 U.S. at 100-101.

15 In this respect, not only has Washington recognized and adopted the interpretation in light of
16 evolving standards of decency, *see e.g.*, In re Davis, 152 Wn. 2d 647, 751, 101 P.3d 1 (2004),
17 Washington's standards are far more progressive than those analyzed under the Eighth Amendment.
18 For example, Washington prohibited the execution of the mentally retarded in 1981, see RCW
19 10.95.030 (2), some 21 years before the United States Supreme Court decision in Atkins, supra.
20 Washington also banned the execution of juvenile offenders in 1993, *see* State v. Furman, 122 Wn.
21 2d 440, P.2d 1092 (1993), some 12 years before the United States Supreme Court decision in Roper
22 v. Simmons, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
23

1 In June of 2007, the Death Penalty Information Center issued a report about the decrease in
 2 confidence among the American public toward the death penalty. According to the results of the
 3 polling, the American public is losing confidence in the death penalty as doubts about innocence
 4 and the purpose of capital punishment increases. *See* A CRISIS OF CONFIDENCE:
 5 AMERICANS' DOUBTS ABOUT THE DEATH PENALTY, BY Richard C. Dieter, Executive
 6 Direction (June 2007), (See Exhibit UU).

7 In just the last few years three states have abolished the death penalty. California may be the
 8 next state to do so come this November. Washington also has a bill before the house to replace the
 9 death penalty with life without parole. Clearly, public sentiment is turning against the death penalty.
 10 Interpreting Article 1, Section 14 in light of citizen's evolving standards of decency reveals that the
 11 death penalty is cruel and unusual punishment in violation of the Eighth Amendment and our state
 12 constitution.

13 4. A SEPARATE JURY TRIAL SHOULD BE HELD FOR EACH PHASE
 14 OF THE CAPITAL TRIAL

15 The Court has the authority to hold a separate jury trial for the guilt and the penalty phase in
 16 a capital trial. The CJP evidence is the functional equivalent of the "unforeseen circumstances"
 17 identified in RCW 10.95.050 (3) as grounds for convening a second jury. In the context of a capital
 18 case, the evidence of constitutional violations rises to a much higher standard than being merely
 19 "impractical". The federal constitution requires courts to determine whether the procedures used
 20 meet the standard of increased reliability as required in capital cases since Furman. The United
 21 States Supreme Court has routinely treated capital defendants differently from noncapital defendants
 22 in its attempt to insure reliability of sentencing determinations. *See e.g.* Beck v. Alabama, 447 U.S.
 23 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (holding that the constitution required the jury be able

1 to consider lesser included offense in capital cases); Lockett v. Ohio, 428 U.S. 586, 604-05, 98 S.
 2 Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978)(holding that capital defendants must be allowed to
 3 present all mitigating evidence, while acknowledging legislation may limit evidence in noncapital
 4 case).

5 To comport with the United States Supreme Court, the Washington Supreme Court has held
 6 that procedural rules are more liberally construed in capital cases. State v. Lord, 117 Wn. 2d 829,
 7 822 P. 2d 177 (1991), *cert denied*, 506 U.S. 856 (1992), citing State v. Jeffries, 105 Wn. 2d 398,
 8 418, 717 P.2d 722, *cert denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986). Like the
 9 Court in New Mexico, this court should find that separate jury panels are necessary for each phase
 10 to provide for a fair and constitutional trial as required by the post-Furman case law.

11 IV. REQUEST FOR EVIDENTIARY HEARING

12 The Capital Jury Project's findings are being offered as evidence, not as case law or
 13 precedent, on how Washington's death penalty scheme is flawed and unconstitutional. Defense is
 14 not seeking to impeach any existing jury verdict. Defense however, is offering evidence based on
 15 the CJP's findings to rebut any assertion that capital jurors follow instructions. As the CJP did not
 16 conduct its study in Washington state, expert testimony from one of the professionals, Dr. Wanda
 17 Foglia, who participated in the project can demonstrate for this Court how the CJP's findings apply
 18 to Washington's death penalty scheme. Dr. Foliga should be allowed to testify as an expert at a
 19 evidentiary hearing for defense counsel to make a clear and correct record on how Washington's
 20 death penalty scheme, RCW 10.95 is unconstitutional. Expert testimony is essential for counsel to
 21 challenge Washington's death penalty statutory scheme under the Eighth and Fourteenth
 22 Amendments to the United States Constitution, as well as Washington's constitution. Dr. Foglia's
 23 testimony is crucial. Her testimony is based on over 35 scholarly articles that she has written along

1 with other CJP researchers, and other researchers **not** associated with the CJP who have found
2 similar problems with the way jurors make decisions in death penalty cases.

3 Professor Foglia will testify that the CJP found the same problem in every state, regardless
4 of what type of instructions the court used and how this correlates to Washington's scheme. In fact
5 she has been called to testify in other states that were not part of the CJP study including Colorado,
6 Kansas, New Hampshire and twice in New Mexico. (See Exhibit B)

7 Defense has attached thousands of pages of social science articles to this pleading and went
8 into length in discussing them. This Court, as have other courts in considering similar motions, will
9 find it helpful to have expert testimony. Without expert testimony this court can be left with
10 unanswered questions.

11 For example, Judge Ramsdell recently decided this motion without expert testimony and was
12 left with numerous questions for counsel that could only be answered by the experts that he did not
13 allow to testify. (See Exhibits MM (hearing transcript) and Exhibit B, Declaration of Wanda
14 Foglia)

15 On page 13, after defense counsel explains that half the jurors decided the sentencing during
16 the guilt phase and that most of those choosing death did not change their mind, the Court points out
17 that some jurors did change their mind. However, based on Morgan if even one ADP juror "is
18 empanelled and the death sentence is imposed, the State is disentitled to execute the sentence."
19 *Supra.*

20 Had Professor Foglia testified she could have explained that from the interviews, many who
21 changed their votes did not really change their opinions; rather they just changed their votes to avoid
22 a hung jury. Additionally she would have been able to point out that there is additional evidence
23 from the CJP showing that those who prematurely decide death are significantly less receptive to

1 mitigation evidence compared to other jurors. In addition to discussing the numbers of jurors in the
2 study who make premature decisions, she could have also addressed the research on cognitive
3 dissonance which demonstrates that once a person forms an opinion they tend to ignore evidence
4 that contradicts that opinion.

5 Review of Dr. Foglia's Declaration (exhibit B, paragraph 14a to l) illustrates further
6 examples of judicial questions or misstatements of the CJP evidence from both defense and state
7 that could have been answered correctly had Dr. Foglia been allowed to testify in an evidentiary
8 hearing. Mr. Monfort should be provided a full opportunity to develop a complete record. In doing
9 so, with the assistance of Dr. Foglia's testimony, it is likely that Dr. Foglia can answer any questions
10 that the court may have concerning the scientific basis for the conclusion that Washington's death
11 penalty statute is constitutionally flawed as it has and would be applied in this case.

12 Counsel did not participate in the CJP research project nor is counsel a social scientist or
13 allowed to be a witness in her own case. As is seen in the transcripts of the oral argument in State of
14 Washington v. Michele Anderson, by denying an evidentiary hearing counsel for both sides ended
15 up testifying in their own cases. Ms. Vytalich had no qualms about testifying as if she was a
16 linguistic expert. Information that Ms. Vytalich provided to the court that was false based on what
17 Dr. Stygall, a linguist, found after reviewing the jury instructions from all the states in the CJP and
18 Washington State.

19 While Dr. Foglia can testify as to the results of these scholarly articles, these articles do not
20 contain some of the information about the methodology about which she will testify and the
21 relevance of the results to specific legal issues is not explicit in these articles as they are written
22 largely for social scientists. In prior evidentiary hearings, Dr. Foglia's experience has been that the
23 prosecution feels the need to cross examine her regarding the research results, and often judges ask

1 for recommendations on how some of the constitutional problems can be minimized. An
2 evidentiary hearing in this case would allow Dr. Foglia to explain how the results of the CJP study
3 apply to Washington's death penalty scheme, which is not discussed in the articles, and answer any
4 and all questions the court may have regarding this issue and possible ways to attempt to fix any
5 errors.

6 Dr. Foglia can also address ways the process can be made less arbitrary based on the CJP's
7 research evidence. Her expert testimony in a pre-trial motion can assist the Court in attempting to
8 make the trial comply more closely to constitutional mandates by showing the necessity of
9 conducting more probing voir dire and providing expanded jury instructions. Live testimony would
10 also help to avoid misunderstanding of evidence.

11 Dr. Gail Stygall's testimony at an evidentiary hearing would address how Washington's
12 pattern jury instructions are no better than any of the instructions given by the States that were part
13 of the CJP study. She will address the flaws of Washington's instructions and why jurors will not be
14 able to follow them in Mr. Monfort's case.

15 The issues presented in this motion have merit and an evidentiary hearing is critical to the
16 defense's ability to make a clear and complete record. Evidentiary hearings have been held in other
17 states that were not part of the CJP: Colorado, Kansas, New Hampshire and New Mexico²⁰ and
18 should be held here.

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²⁰ See Exhibit B

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IV. CONCLUSION

Thirty-five years after the Supreme Court attempted to bring objective criteria to capital sentencing in Gregg v. Georgia, the death penalty is still as unpredictable as being “struck by lightning”. The imposition of the death penalty continues to represent “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes[.]” Baze v. Rees, 553 U.S. 35, 86, 128 S. Ct. at 1551 (2008)(Stevens, J., concurring in judgment)(quoting Furman v. Georgia, 408 U.S. 238, 312, 92 S. Ct. 2726, 33 L.Ed. 2d 346 (1972)(White, J., concurring); see also Furman, 408 U.S. at 309 (Stewart, J., concurring).

Taken together, this motion, the exhibits, testimony to be given in support of this motion by Dr. Wanda Foglia and Dr. Gail Stygall, and the lack of scientific evidence contrary to the findings reached by the Capital Jury Project, show conclusively that the dictates of the United States Supreme Court in Furman and Gregg, as well as the dictates set forth in State v. Bartholomew, are not being followed. The death penalty is wantonly, arbitrarily and capriciously applied, and death verdicts are issued with unfettered discretion. Capital juries operate in a standardless manner. Attempts to channel sentencing discretion by clear and objective standards have not worked. Racial discrimination takes place to the point that one’s life or death depends on the lottery system of who is called for jury service.

Despite over thirty years of attempts, courts in this country have failed to execute our citizens in a manner that complies with Furman and Gregg. Courts are slow to change, but in the face of such certainty, they must change, because the research shows that the law is not being followed. For all the foregoing reasons, Mr. Monfort respectfully asks this Court to declare Washington’s death penalty scheme unconstitutional and preclude the prosecution from seeking the

1 death penalty in this case. In the alternative, he asks this Court to convene separate phase juries for
2 both the trial and the penalty phases of this case.

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4 Respectfully submitted this 4th day of September, 2012

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Attorneys for the Defendant

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
CHRISTOPHER MONFORT,)
Defendant.)

NO. 09-1-07187-6 SEA
DECLARATION OF GAIL STYGALL

DECLARATION

Pursuant to RCW 9A.72.085, Dr. Gail Stygall, certifies as follows:

1. I am over the age of eighteen and competent to testify to the matters contained in this Declaration.

INTRODUCTION

2. I am a Professor, an English language linguist, employed by the University of Washington, Department of English.. I have been employed at the University of Washington for 22 years, where I conduct research on how ordinary people and professionals understand complex language, such as financial documents or legal documents. I teach both undergraduate and graduate classes in English language linguistics, from introductory courses in English linguistics and language policy to specialized courses in methods of research in linguistics such as discourse analysis. I have published numerous articles and books, and given many papers at

professional conferences which are specifically related to understandings of complex language, including jury instructions. My c.v. is attached as Appendix A.

3. I have been asked by counsel for the Defendant to examine and to analyze the language of the Washington Criminal Jury Instructions for capital cases in order to assess their likely comprehensibility for possible jurors. I have also been asked by counsel for the Defendant to compare the Washington Criminal Jury Instructions for capital cases with the jury instructions of the states in which the Capital Jury Project conducted research. These states are as follows: Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

4. The Washington Criminal Jury Instructions for capital juries are characteristic of the typically other U.S. jury instructions which are identified by linguistic features that interfere with juror comprehension found in the research literature. Collectively, these features, which will be explained and illustrated below, do not convey the information jurors need in ordinary language to make non-arbitrary or non-capricious decisions. Moreover, the long-term studies of the scholars involved in the multistate Capital Jury Project have affirmed that actual jurors in death penalty trials did not understand the instructions, misapplied the instructions, and didn't apply the instructions appropriately. The Washington Criminal Jury Instructions for capital juries are similar to the Capital Jury Project states' instructions in almost all ways. This similarity continues to be true even after several of the Capital Jury Project states revised their instructions, and Washington appeared to have shortened the sentence length of their criminal capital instructions. The characteristics of the instructions in the Capital Jury Project states will be explained and illustrated below.

RESEARCH BACKGROUND ON JURY INSTRUCTIONS

5. The means by which human beings make sense of the language they hear and read is not simply the piling up of separate word definitions, taken from a dictionary one by one and added together. Although lexical information is a part of making meaning, it is only a part. The order in which a word appears may make a significant difference. The word next to another word may revise or change the meaning. Use of the negative clearly changes meaning. The number of clauses in a sentence—that is, sentences within sentences—makes a difference for the hearer or reader. Changing the position of the agent of the sentence, as when a sentence is passivized, may spotlight one aspect of the sentence at the time that another part is backlighted. Some sentences contain words that are rarely part of a non-specialists' vocabulary and the hearer/reader has no reference for those words. Sometimes sentences are simply too long for normal cognitive processing. As far back as the past mid-century, psychologist George Miller made his observation that humans can “hold” approximately 7 chunks of information plus or minus two in mind. ¹When language is familiar, people are able to hold many chunks in mind; when material is not familiar, the cognitive process slows down considerably or halts. In the case of jury instructions in general, people are not familiar with the topics, they attempt to use common definitions for legal meanings, they may be confused by contradictory clauses within the same sentence, passivizations, multiple negations, and several other aspects. Both capacity and complexity combine to decrease comprehension.

6. Early work on the comprehension of jury instructions is usually attributed to one of two working groups. The first group, Robert P. Charrow, a psychologist, and Veda R.

¹ George A. Miller, “The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information,” *The Psychological Review* 63 (1956): 81-97.

Charrow a psycholinguist, published the article “Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,” in the *Columbia Law Review* in 1979. This comprehensive study of 14 selected civil jury instructions from California had two phases. In the first phase, the participants, 35 in number, paraphrased the instructions they were given. These participants were actual called jurors who were not selected for trial. With those paraphrases, the researchers were able to identify problematic features and revise the instructions. In the second phase, the new participants were given the modified instructions and their performance improved. Through these experiments, the researchers were able to identify a number of features in the instructions that complicated jury comprehension. Some of these included the following:

Ordering Effects (e.g., repetition of terms across instructions close together or separated widely);

Conceptual Complexity (e.g., terms required greater education or specialization);

Sentence Length (e.g., literal number of words in sentences, often found at the center of reading formulae; rejected at important factor in this study)²;

“WHIZ” and Complement Deletion (e.g., a relative clause such as “that” or a relative clause plus verb is missing);

Technical Vocabulary of the Law;

Negatives;

Embeddings (e.g. sentences including subordinate clauses).

Other Features: (passivization, nominalizations, use of unusual preposition “as to”

Many subsequent studies affirmed the problems of these features of jury instructions (See Appendix B for a partial list of studies by linguists, psycholinguists, psychologists, and

² But see also Carol Lord’s “Are Subordinate Clauses More Difficult?” in *Complex Sentences in Grammar and Discourse: Essays in Honor of Sandra A. Thompson* (Amsterdam and Philadelphia: Benjamins, 2001): 223-33, in which length and complexity interacted. Length effects must be teased out.

attorneys). While the Charrows were able to improve their participants' scores after revising the jury instructions, the scores remained quite low, at about 54% correct. Particular linguistic constructions with low performance scores included nominalizations (0.286), "as to" phrases (0.282), misplaced phrases (0.240), WHIZ deletion (0.245), multiple negatives (0.262), and full passive sentences (0.268).³ These mean fractions were scores from before the Charrows' revision of the instructions. Although jury instructions have changed some since the time of the Charrows' study, most changes have been statutory rather than directed at improving jury comprehension.

7. The second group working in the late 1970s and early 1980s was that of lawyer-psychologist Bruce Sales, lawyer James J. Alfini, and psychologist Amiran Elwork. In their studies jurors were drawn both from actual called jurors and from people on voting lists who displayed the typical demographic characteristics of seated jurors. In addition to the types of features mentioned about, the Sales-Alfini-Elwork team found that both cohesion and coherence presented considerable problems to prospective jurors. Cohesion is typically in word form, linking one sentence to another explicitly. It helps listeners and readers with the connections between one sentence and another. Coherence is a mental sense of the document as a whole: does it have all its parts?. The working group also tried to address what adequate understanding would be for a jury. In one treatment, the experimenters received answers to 10 questions that received on .14 correct. Upon second rewrite, the jurors were able to achieve .84 correct. The improvements in the scores is excellent, but very little has happened to improve jury instructions along the lines suggested by either of these two major study groups.

³ Charrows, pp.1361-72.

8.. The community of scholars and researchers in linguistics, psycholinguistics, and psychology agree that jury instructions in general are poorly understood by jurors, with comprehension scores on many instructions well below 50%. Without active and sustained change within the legal community, there has been little change in state pattern jury instructions directed toward better comprehension, with a few notable exceptions. Among the group of academic scholars in the area, there is no and was no dispute about whether jurors understood instructions: they didn't. In the period that followed, work on jury comprehension expanded into the instructions used for jury instructions in capital cases, which, as it turns out present an even more difficult challenge to jurors, adding new problems to the existing list of features likely to cause problems.

9. Instructions related to death penalty cases are even more difficult. Lawyer-linguist Peter Tiersma notes that the instructions associated with mitigation in capital cases show major difficulty for jury comprehension, even of defining the word *mitigation* itself. Tiersma indicates that there are "Disturbing indications that jurors do not adequately understand instructions on mitigation in death penalty cases."⁴ Some of the evidence for his indications is drawn from the texts of appellate cases in which jurors request further information from the trial court judge on mitigation, who often leave juries on their own in figuring out a definition, after simply re-reading the original instruction again to the jury. Because mitigation is a critical legal term for death penalty

⁴ Peter Meijes Tiersma, "Dictionaries and Death: Do Capital Juries Understand Mitigation?" 1995 *Utah L. Rev.* 1.

cases, this finding that jurors are not adequately understanding it is important. Mitigation is often paired with and weighed with aggravation, circumstances that heighten the crime. Mitigating is a relatively rare word in English, as the *Collins-CoBuild* count indicates. *Mitigates* is less rare and less associated with legal cases. As an absolute number, *mitigating* appears in the *Corpus of Contemporary American English*, 641 times in a total corpus of 450 million.⁵ So as noted above with the general characteristics of the problems with jury instruction, the legal term mitigating or mitigating circumstances are also not likely to be in the common vocabulary of jurors.

10. If Tiersma's discussion focuses on the critical use of certain words in death penalty instructions, Judith Levi focused in on a number of other very important factors. The first factor she identified as important, and was confirmed by earlier research by Hans Ziesel, was the strong presumption of death.⁶ Her research indicated that "the syntax, semantics, pragmatics, and discourse organization of the instructions all contributed to suggest that a sentence of death was in some way NORMAL or "default" decision.⁷ One way of thinking about how there is a "death default" in instructions is to think of the casual and common life phrase, "life and death." Life comes first. A check in the COCA database finds that "life and death" is commonly associated with words such as "between," "matter of," and "difference of." Entries for "death and life" were almost

⁵ COCA is the widely-used, free 450 million word corpus developed by Mark Davies, Professor At Brigham Young University.

⁶ Judith Levi. "Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions." *American Speech* 68.1 (1993): 20-46.

⁷ Levi, 26.

exclusively associated with Jane Jacobs' book, *The Death and Life of Great American Cities* or some sort of imitation of that title. Thus, when a juror hears or reads "death or life imprisonment," he or she is being told that death is emphasized. In a rough count on the Washington capital instructions, the "death penalty" was mentioned 11 times, always first when paired with life imprisonment. Additionally, two other expressions emphasize death first: "other than death" and "sentence less than death."

A second way in which the way instructions were written interfered with comprehension was with the use of negatives. As mentioned above in the discussion of the Charrows' study, when there was multiple negation, comprehension fell to 0.262. Jury instructions not only have a problem with straightforward negatives, such as no or not, but also with words that are not overtly negative, with additional subtle negatives such as *preclude* in the instructions Judith Levi was addressing. There is a similar problem with Washington's capital jury trial instructions with the words *sufficient* as well as even *mitigating*. Levi also found that some of the generally understood vocabulary was quite vague for the circumstances of making a decision about the death penalty. She also found, as did several of the earlier researchers that the organization of the instructions was not helpful.

WASHINGTON STATE'S DEATH PENALTY INSTRUCTIONS

11. I was given by Defendant's attorneys the following instructions from the online source of the Washington Criminal Jury Instructions:

WPIC 31.01	Advance Oral Instruction
WPIC 31.02.01	Allocution
WPIC 31.03	Introductory Instruction (Capital Cases)
WPIC 31.04	Jurors' Duty To Consult with One Another (Capital Cases)
WPIC 31.05	Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases)
WPIC 31.06 Cases)	Question for Jury—Life Without Parole—Definition (Capital
WPIC 31.07	Mitigating Circumstances—Definition (Capital Cases)
WPIC 31.08	Concluding Instruction (Capital Cases)
WPIC 31.09	Special Verdict Form—Sentencing (Capital Cases).

I examined and analyzed each of these instructions with special attention to WPIC 31.05, WPIC 31.06, WPIC 31.07, and WPIC 31.09. The instructions contained the same problematic features identified in earlier work on jury instruction. In addition, there are particular problems associated with how mitigation is presented and the way in which the final question is phrased, especially the phrase “not sufficient mitigating circumstances to merit leniency.”

12. WPIC 31.03 shows the problems with ordering effects. Throughout this introductory instruction to the jurors about evidence, what evidence consists of, what is excluded from evidence and judgments about witnesses, the listening/reading jurors jumps from what the court considers evidence and law and that the jurors must follow the court's rules. Then there is a discussion of excluded evidence and then what credibility is. Lawyers' remarks and objections are addressed. Also noted is that the order makes no difference. An instruction without ordering effects would begin with a general statement

about this instruction being about evidence and the various types of evidence that are included or excluded. Jurors need a structure to follow so that they can organize the material that they are hearing/reading for the first time. The statement made in the instructions that the order does not matter is simply impossible cognitively. Order matters in every sort of thinking and “ordering” order away does not change the need for order.

13. WPIC 31.05 provides good examples of the problems of **conceptual complexity**. First, there is the question of reasonable doubt, about which judges and juries have struggled for a considerable period of time. Added the conceptual complexity of reasonable doubt is the next concept of “that there are not sufficient mitigating circumstances to merit leniency,” a clause that repeats several times in these instructions. The instruction attempts to inform the jurors that the burden of proof is different for mitigating circumstances. But it does not say so in terms of a burden of proof. Instead, the instruction says that the “defendant is presumed to merit leniency.” Here again, we also find the problem of **ordering effects**. Jurors have been given a definition of reasonable doubt in the Advance Oral Instruction (WPIC 31.01), yet this second definition is different from the first. Moreover, it offers the concept of mitigation as something which can be merited, which most people understand to be “earned,” an odd association for a defendant facing sentencing for a capital offense.

14. As I discussed briefly earlier, **sentence length** is not a factor here in interfering with juror comprehension. Most of the instructions average between 18 and 20 words per sentence, the level of a high-end public newspaper. Notwithstanding the lack

of direct sentence length effects, the reading level of most U.S. newspapers tends toward the 8th grade, while the *New York Times* and the *Washington Post* tend toward the jury instruction averages.

15. The issue of **deletion of a relative pronoun**, such as *that*, is common in spoken language. So, too, is the deletion of a “which is” or “WHIZ” deletion. The problem with these deletions in jury instructions is that for lay reader, the pronoun markers are very important to understanding the coming structure. Professionals, by and large, do not notice when those items are missing. An example of a relative pronoun deletion comes in WPIC 31.07 in an optional final statement on mercy: “The appropriateness if the exercise of mercy is itself a mitigating factor [THAT] you may consider in determining whether the state has provide beyond a reasonable doubt that the death penalty is warranted. The emphasis lost for the lay reader in the missing *that* may make the mercy factor less important.

16. **Technical vocabulary** of the law includes a broad territory. Not only do jurors contend with words that have a specific meaning within the law, such as *burden of proof*, they must also contend with words that they know in other ordinary ways but that have special meanings in a legal setting. *Elements* is one of those words with many ordinary meanings but specific, statutorily listed parts necessary to prove a particular crime. Both of these terms are found in WPIC 31.01, the Advance Oral Instruction.

17. **Negatives** create many problems for jurors processing jury instructions. Worse, as indicated in the Judith Levi study under #9 above, are the words that have

subtle negative effects. The question asked of jurors in Washington's Criminal Jury Instructions for Capital Cases is one that illustrates the enormous problems with negatives. It states:

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

When a concept is already complicated, jurors would find it difficult to process the rest of the sentence after the **not**. The jurors have first been asked to "keep in mind" the defendant's crime and then asked if they are convinced "beyond a reasonable doubt" that something about "sufficient mitigating circumstances" to "merit leniency." But they aren't being asked if there are "sufficient mitigating circumstances" to "merit leniency." Instead, they must consider the question as a negative, NOT sufficient circumstances to merit leniency. The juror must contend with 5 concepts: the crime, being convinced, reasonable doubt, sufficient mitigating circumstances and meriting leniency and then turn the whole process into a negative. Having examined the capital trial instructions for the Capital Jury Project states, I think I can say that Washington's question about mitigation is among the worst possible presentation of the juror's duty. Moreover, it sounds as if one might somehow earn leniency and given the circumstances that phrase is quite odd. Even worse, the phrase is just plain unusual. In the 450 million word COCA corpus, there is not a single appearance of the phrase "merit leniency."

18. **Embeddings**, or sentences within sentences, also complicate understanding of this same sentence. I list the clauses below.

- 1) Having in mind the crime
- 2) of which the defendant has been found guilty
- 3) are you convinced beyond a reasonable doubt
- 4) that there are not sufficient mitigating circumstances
- 5) to merit leniency?

Embeddings, or sentences within sentences, make processing new information more difficult. Some of the reason seems to relate to George Miller's original insight that there are limits to our cognitive capacities; some of the reason may relate to changing topics within the full sentence. In this sentence hearer/readers are asked first to think about the crime of which the defendant has been found guilty. That is one topic. But the "real" topic here is mitigation, and the topic of the fourth clause of the sentence, "sufficient mitigating circumstances" to "merit leniency." First the juror needs to keep the crime in mind, also remembering that the defendant has been found guilty, then drawing in the concept of reasonable doubt, decide if there are "sufficient" mitigating circumstances, not to sentence the defendant to the death penalty, which is not even mentioned in the sentence. Given George Miller's research and the subsequent research that has confirmed the limitations of cognitive capacity, this sentence is not a reasonable presentation to ordinary jurors. Whatever the reason, readers have more difficult understanding multiply embedded sentences than they do short, simple sentences.

19. Thus, the most critical sentence for jurors in a capital case are presented with serious psycholinguistic barriers: the negative, the semantics of *sufficient*, the five multiple embeddings of the full sentence and it ends with a phrase that cannot be found in

the largest corpus of American English. It is difficult to see the basis on which jurors would make a decision.

CAPITAL JURY PROJECT STATES' INSTRUCTIONS

20. The Capital Jury Project research was initiated in 1990 under a National Science Foundation Grant through the Law and Sciences Program. These university-based investigators from a variety of disciplines, used a variety of data sources from trial transcripts to interviews with judges and participating attorneys. Researchers were also able to gather random samples of jurors who had served on death penalty juries. A state must have had a certain number of death penalty juries in order to generate the numbers of possible jury interviewees. It is this factor that kept the State of Washington from participating in this project—not enough death panels.

21. The results raised considerable returns in the Capital Jury Project and beyond about juror understanding of their roles and their understanding of their instructions given by the judge. Some of these findings include jurors making their punishment decisions well before the punishment phase, and that many jurors understood the instructions as guiding them to a death penalty decision. Additionally, Capital Jury Project findings saw jurors misunderstand mitigation again and again and its relationship to aggravation and to a death vote. Jurors also believed that all jurors had to agree on a mitigating factor.

22. Because the State of Washington does not have the necessary number of jurors who have been seated on a death penalty panel, the same methodology cannot be applied to the Washington instructions. Instead, as suggested within some of the Capital Jury Project reports proposes turning to linguistic analysis to identify the same problem. In the James Luginbuhl and Julie Howe report on interviews with 83 jurors in North Carolina, the point to the linguistic report and analysis complete by Judith Levi, "Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions."⁸

23. Using linguistic identification drawn from the numerous studies of the problems causing comprehension with jury instructions, I have developed a state-by-state analysis below that identifies which features appear in each state's instructions. It should be noted that many of the states have subsequently revised their instructions, either for reasons of change in statute or through a deliberate mission to improve the comprehensibility of the instructions.

24. ALABAMA. Alabama's available instruction date from 2007. The instructions include a large number of complex sentences with long clauses and subtle negation, such as the following, which addresses mitigation:

- 1) If the factual existence of any evidence offered by the Defendant in mitigation is in dispute

⁸ James Luginbuhl and Julie Howe's "Discretion in Capital Sentencing Instructions: Guided or Misguided?" *Indiana Law Journal* 70.4 (1995):1161-81.

- 2) [then] the State shall have the burden of disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence.

The jury instruction here, although only two clauses, creates a difficult and complex proposition. Instead of indicating the Prosecution would be the ones challenging the mitigating evidence, instead the lead clause ties the evidence "in dispute" to the Defendant. The legal term "burden" enters the second clause with the introduction of the "preponderance of evidence" standard and not the criminal standard of beyond a reasonable doubt. It is unlikely that jurors could follow the law. The rest of the instructions contain every impediment listed by other scholars examining jury instructions, from the odd use of the preposition phrase "as to," to nominalizations, to embedded sentences missing relative pronouns (that, which,,,) or "which is,"

25. CALIFORNIA. The State of California actually has two sets of Criminal Instructions at this point. One is called CALJIC and the other is called CALCRIM. The second set of instructions has undergone revision in hopes of making the instructions more comprehensible to jurors. As I understand it, a judge in a criminal case may choose which set of instructions to use. The CALJIC instructions are traditional instructions with all of the problematic features for lay comprehension. Let me illustrate with one sentence from the mitigation instruction:

- 1) Any other circumstance which extenuates the gravity of the crime
- 2) even though it is not a legal excuse for the crime

3) [and any sympathetic or other aspect of the defendant's character or record

4) that the defendant offers

5) as a basis for a sentence less than death,

6) whether or not related to the offense for

7) which he is on trial.]

This single sentence comprised of seven clauses instructs the jurors on mitigation, yet it seems very unlikely that a juror would understand mitigation from this instruction. Even the beginning the clause, which contains the phrase "extenuates the gravity" is likely to produce the opposite understanding for lay jurors. It sounds as if the "gravity" of the crime must be what is being extended and that could only mean, given the jurors' circumstances, aggravation, not mitigation.

The CALCRIM instructions are markedly better. Throughout the instructions, there are references to items that will be repeated in the instructions and organized sections. A contrast to CALJIC may be seen in the following definition of mitigating:

A mitigating circumstance or factor is any fact, condition, or even that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime.

Here is a much clearer statement and includes the phrase "makes the death penalty less appropriate as a punishment," a clear signal that mitigation does not equate with aggravation.

26. FLORIDA. The Florida instructions contain all of the linguistic roadblocks to juror understanding. Apart from the complex and multiply embedded sentences part of these

instructions, this set of instructions has a definite tilt toward death in that in the pairings of death penalty and life imprisonment, the death penalty almost always comes first giving it prominence.

27. GEORGIA. Like the other Capital Jury Project states, Georgia's capital jury instructions exhibit the same linguistic characteristics of the others. Of special note here is lengthy list of possible conditions under which jurors would be able to find the defendant guilty of aggravating circumstances, including if the murder "was also outrageously or wantonly vile, horrible or inhuman" (GA 2.15.30). The lengthy descriptions of possible factors of aggravation also contribute to a death orientation, as the mitigating factors are not sure thoroughly developed. Georgia does, however, have an instruction (GA2.15.50) that directs jurors to consider life imprisonment.

28. INDIANA. Indiana is one of the state that has revised its jury instructions with an eye toward Plain English since the original research on the Capital Jury Project. Hence, some of the worst violations of obstructing comprehension are not present. There is, for example, a separate instruction explaining the relationship between a mitigating factor and preponderance of the evidence (IN 15.05). The sentences are shorter throughout and one instruction indicates that the law allows for the jurors can find a mitigating factor in spite of agreeing on aggravating factors and recommend a term of years to the judge (IN 15.13).

29. KENTUCKY. Although the Kentucky capital case instructions are relatively short and much of it appears in list-like form, the kind of problem described in the initial

section is still present. Here is the lead sentence for the mitigating circumstances' instruction (KY 12.05):

1) In fixing a sentence for the Defendant for the offense of [murder or kidnapping]

2) you shall consider such mitigating and extenuating facts and circumstances

3) as they have been presented to you in the evidence

4) and you believe to be true,

5) including but not limited to such of the following

6) as you believe from the evidence

7) to be true.

So before the jurors even receive the list of possibly qualifying conditions for mitigation, they have had to read through a seven clause sentence that pairs mitigating and extenuating, ties the jurors back to the evidence, but not limited to the evidence that you believe to be true. One might react to that presentation with aren't these the same concepts? In any event, this type of sentence is extremely difficult for any adult proficient reader. The sentence also makes use of an odd legal use of the pronoun *such*.

30. LOUISIANA. Louisiana requires that the jury find unanimously for a sentence of death or to life imprisonment. If the jury is unable to agree, then life imprisonment is the punishment. For Louisiana jurors, there is also another version of the death preference. The list of possible aggravating factors is lengthy while the mitigating factors list is quite short. It doesn't matter than one can say that the list can be extended. The example has shown which is preferred.

31. MISSOURI. Missouri has those same linguistic characteristics found in other states' capital jury instructions. Jurors are asked to weigh whether at least one mitigating circumstance outweighs an already determined aggravating circumstance. As with other sets of instructions, the aggravating circumstances are numerous and the mitigating circumstances fewer. Additionally, Missouri requires the name of the victim to be include at various points in the instructions.

32. NORTH CAROLINA. North Carolina's instructions also have the same linguistic characteristics as those of the other states, but in the mitigation sections, these instructions contain more explanation of the mitigation factor being discussed. Though these explanations are still expressed in the typical language of jury instructions, there is slightly more information available. Jurors are also required to go through all of the mitigating factors listed, but does mention that other factors may be raised by the jury.

33. PENNSYLVANIA. As with the other states, Pennsylvania uses the linguistic characteristics of the other states' instructions. One early paragraph gives a sense of what ordering effects may take place when hearing/reading and entire set of instruction.

Pennsylvania uses the following paragraph in the "Instruction Before Hearing,"

15.2502E. Item 2 reads as follows:

The sentence you impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Aggravating circumstances must be proven by the Commonwealth beyond a reasonable doubt while mitigating must be proven by the defendant by a preponderance of the evidence, that is by the greater weight of the evidence.

So jurors are hearing, before they ever have to apply these ideas about beyond a reasonable doubt and a preponderance of the evidence. One assumes that "reasonable doubt" has been a part of the guilt or innocence phase of the trial, but there is little reason why "preponderance" would have arisen. So the disconnection between when jurors initially hear of "preponderance" is a long time before the issue becomes relevant to their decision. Pennsylvania also requires that jurors consider victim impact information if they have found at least one aggravating factor and one mitigating factor.

34. SOUTH CAROLINA. The South Carolina instructions appear to have had considerable work done on them to make them more accessible to jurors. There are a number of places in which explicit connections are made between one part of the instructions and another. An additional improvement is the framing that takes place among the instructions, such statements like "I will now summarize what I have just told you." The difficult language of most instructions is not completely eliminated but this is a representative of how jury instructions may be improved.

35. TENNESSEE. The Tennessee instructions use much of the traditional language of jury instructions, "the jury is the sole judge of the facts," and "the law makes you the sole and

exclusive judges of the credibility of the witnesses and the weight to be given to the evidence. As with most of the other instruction sets, the death penalty weighs more heavily in couplets with life imprisonment. Likewise, the list of aggravating circumstances is much longer than the list of mitigating circumstances.

36. TEXAS. The Texas instructions are not particularly prolific, but instead are reduced to two Special Issues. Special Issue 1 relates to the possibility of this defendant committing further acts of violence that would be a “continuing threat to society, (§4:460). After the jurors who must agree unanimously on a “yes” to Special Issue 1. Special Issue 2 is directed at “sufficient mitigating circumstances.” Jurors may not answer the second issue “no” unless they are unanimous. The instruction does contain a kind of procedural list, but, like the other instructions, uses the typical language of jury instructions.

37. VIRGINIA. This is a single, short instruction, giving jurors brief instructions. Under A, jurors are told to impose the death penalty if the defendant is likely to be a serious threat of violence to society or that the defendant’s conduct in this case was “outrageously or wantonly vile, horrible or inhuman” (§76.4 Capital murder—penalty instruction). The jurors are told that if the Commonwealth failed to prove 1 or 2, or that mitigating circumstances do not warrant a death penalty, they may assign the sentence of life imprisonment. A B section then follows explaining what mitigating circumstances might be, Only the “shall not be limited to” in this B section indicates that the jurors could

consider other possible mitigating circumstances. The two sentences of B are both multi-clause embedded sentences.

38. CAPITAL JURY PROJECT STATES AND CONCLUSION. Although the Capital Jury Project researchers did not conduct linguistic analysis, their findings about how the jurors they interviewed understood the instructions is validated by the linguistic analysis. The capital case instructions are difficult, confusing, lead jurors to confuse aggravation with mitigation and vice versa, believe that if they find aggravation must assign a death sentence and several other misapprehensions about the task they were to perform as jurors. Given the similarities between the jury instructions of the Capital Jury Project States and those of the State of Washington, it is my opinion that Washington's capital jury instructions are just as confusing, difficult, and problematic as those of the Capital Jury Project States. As such, these instructions should undergo a significant revision before they are used in a Washington capital case.

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

9-4-12; Seattle WA
Date and Place

Gail Stygall
GAIL STYGALL

APPENDIX A

GAIL STYGALL'S C.V.

Vita
GAIL STYGALL

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EDUCATION:

BA, Indiana University, Indianapolis, 1981.
Qualifying examinations August 1986.
Composition, Phonology, Language Variation/Sociolinguistics
Oral examination, August 1987.
Language, Interpretation and the Law
Ph.D., Indiana University, Bloomington, 1989.

DISSERTATION: "Trial Language: Contrasts in the Discourse Processing of Lawyers and Jurors in an Indiana Court."

Citation: Levi, Judith. *ABA Bibliography on Legal Language*, 1993. 9.

EMPLOYMENT:

Associate Instructor, Indiana University-Purdue University at Indianapolis, 1981-1984.
Lecturer, Indiana University-Purdue University at Indianapolis, 1985-1988.
Assistant-to-the-Director of the Writing Program, Indiana University-Purdue University at Indianapolis, 1985-86.
Coordinator, Freshman Writing, Indiana University-Purdue University at Indianapolis, 1986-1987.
Coordinator, English Placement, Indiana University-Purdue University at Indianapolis, 1986-1988.
Assistant Professor, Linguistics and Composition/Rhetoric, Miami University, 1988-1990.
Assistant Professor, University of Washington, 1990-96.
Adjunct Assistant Professor, Women Studies, University of Washington, 1990-1996.
Adjunct Associate Professor, Speech Communications, University of Washington, 1998-2001.
Director, Expository Writing Program, University of Washington, 1997-2003.
Adjunct Associate Professor, Women Studies, University of Washington, 1996-2006.
Associate Professor, University of Washington, 1996-2006.
Adjunct Professor, Women Studies, University of Washington, 2006—.
Adjunct Professor, Linguistics, University of Washington, 2010—.
Professor, University of Washington, 2006—.

GRANTS AND AWARDS:

Director, "Writing Portfolio Assessment Program," Center for the Study of Writing, with Donald Daiker, Jeffrey Sommers, and Laurel Black, (all Co-Directors, no

- Principal Investigator), Spring, 1990. [\$500].
- "Acceptable Misunderstandings," Summer Research Appointment, Miami University, Summer, 1990 (Principal Investigator). [\$3,500, declined].
- Director, "Writing Portfolio Assessment Program." Writing Program Administrators, with Donald Daiker, Jeffrey Sommers, and Laurel Black, (all Co-Directors, no Principal Investigator), Summer 1990. [\$500].
- "Acceptable Misunderstandings." Graduate School Research Fund, Summer, 1991 (Principal Investigator). [\$3,711].
- Director, "Writing Portfolio Assessment," Fund for the Improvement of Post-Secondary Education, U.S. Department of Education, PR Award #P116B00918. With Donald Daiker, Jeffrey Sommers, and Laurel Black, (all Co-Directors, no Principal Investigator), held at Miami University, 1990-1992. [\$167,000].
- Director, "The Discourse of Divorce," Royalty Research Fund. University of Washington, 1994-96. [\$22,806].

PUBLICATIONS:

Books:

- Trial Language*, John Benjamins, Amsterdam, 1994; 226 pp. [Refereed]
- New Directions in Portfolio Assessment*, with Donald Daiker, Jeffrey Sommers, and Laurel Black. Co-Editor. Boynton/Cook Publishers, Portsmouth, NH, 1994; 346 pgs. (2nd printing, 1998) [Refereed] .
- CCCC Bibliography of Composition and Rhetoric, 1995*. Editor; with Kathleen Murphy; Carbondale, IL: Southern Illinois University Press. (1999); 251 pgs.
- Discourse Studies and Composition*. Editor, with Ellen Barton. Cresskill, NJ: Hampton Press, 2002; 416 pgs.
- Academic Discourse: Readings for Argument and Analysis*, 3rd Edition; Thomson Publishing, 2003; 740 pgs.
- Reading Context*. Boston, MA: Wadsworth/Thomson Learning, 2004; 742 pgs.
- Instructor's Manual for Reading Context*. Boston, MA: Wadsworth/Thomson Learning. June 2005.

Contributions to Books:

- "Texts in Oral Contexts: The 'Transmission' of Jury Instructions in an Indiana Trial," *Textual Dynamics in the Professions*, Eds. Charles Bazerman and James Paradis, Madison, WI: University of Wisconsin Press, 1991, pp.234-253. [Refereed]
- "Introduction." *New Directions in Portfolio Assessment*. Principal Author with Donald Daiker, Jeffrey Sommers, and Laurel Black. Boynton/Cook Publishers, 1994, pp. 1-9. [Invited]
- "Gendered Textuality: Assigning Gender to Portfolios." In *New Directions in Portfolio Assessment*. Principal author. With Donald Daiker, Jeffrey Sommers, and Laurel Black. Boynton/Cook, 1994, pp. 248-262. [Refereed]
- "The Pedagogical Implications of a College Placement Portfolio." With Donald Daiker, Jeffrey Sommers. In *Assessment of Writing: Politics, Policies, Practices*. Eds. Edward M. White, William Lutz, and Sandra Kamusikiri. New York: MLA, 1996, 257-270. [Refereed]
- "Women and Language in the Collaborative Classroom." In *Feminism and*

- Composition Studies: In Other Words*. Eds. Susan Jarratt and Lynn Worsham. New York: MLA, 1998, 318-341 [Refereed]
- "Discourse Studies." *Coming of Age: The Advanced Writing Curriculum*. Eds. Linda K. Shamoon, Rebecca Moore Howard, Sandra Jamieson and Robert Schwegler. Portsmouth, NH: Boynton/Cook, 2000, 66-70. [Invited]
- "Introduction: Composition and Linguistics, A Complicated History," In *Discourse Studies in Composition*, with editors Ellen Barton and Gail Stygall. Cresskill, NJ: Hampton Press, 2002. 1-18. (see book)
- "Legal Texts and Narrative Discourse Analysis." In *Discourse Studies and Composition*. Eds. Ellen Barton and Gail Stygall. Cresskill, NJ: Hampton Press, 2002. 257-82. (see book)
- "Certifying the Knowledge of WPAs," *The Writing Program Administrator's Resource: A Guide to Reflective Institutional Practice*. Eds. Stuart C. Brown and Theresa Enos. Mahwah, NJ: Erlbaum, 2002, 71-87.
- "Bridging Levels: Composition Theory and Practice for Preservice Teachers and TAs." In *Teaching of High School English and First Year Writing Teachers*. Eds. Robert Tremmel and William Broz. Portsmouth, NH: Boynton/Cook, 2002. 40-49. [Invited]
- "Textual Barriers to United States Immigration," *Language in the Legal Process*. Ed. Janet Cotterill. Houndmills, England and New York: Palgrave, 2002. 35-53. [Invited]
- "Complex Documents/Average Readers and Not-So-Average Readers." *Routledge Handbook of Forensic Linguistics*. Eds. R. Malcolm Coulthard and Alison Johnson. New York and London: Routledge, 2010. 51-64. [Invited]

Essays and Articles:

- "Interview with Dan Wakefield," *Arts Insight*, Indianapolis, June, 1986. [Invited]
- "Ethics and Writing: From Fields of Battle to Toulmin's Argument Fields," *Journal of Teaching Writing*, 6.1, 1987, pp. 93-107 [Refereed]
- "Preface to the Instructor's Manual," *Elements of Argument. Instructor's Manual*, 2nd ed., 3rd ed., 4th ed., 5th ed. Boston: Bedford Books, 1987-1998. [Invited]
- "Politics and Proof in Basic Writing," *Journal of Basic Writing* 7 (1988): pp. 28-41 [Refereed]
- "Teaching Freire in North America: A Review-Essay of Ira Shor's *Freire for the Classroom: A Sourcebook of Liberatory Teaching*," *Journal of Teaching Writing*, 8 (1989), pp. 113-125. [Invited]
- "The Best of Miami's Portfolios," Oxford, OH: Miami University, 1990. ERIC Document No. ED 326571. With Donald A. Daiker, Jeffrey Sommers and Laurel Black. Co-author. [Refereed]
- "The Challenges of Rating Portfolios: What WPAs Can Expect." *WPA: Writing Program Administration* 17 (Fall 1993), pp. 7-29. With Jeffrey Sommers, Laurel Black, and Donald Daiker. Co-Author. [Refereed]
- "Resisting Privilege: Basic Writing and Foucault's Author Function," *College Composition and Communication* 45.3 (October 1994), pp. 320-341.

- [Refereed]
 Reprint: *Landmark Essays on Basic Writing*, Hermagoras Press,
 Mahwah, NJ, 2001: 185-203.
- "A Room for Review," *Journal of Teaching Writing* 14.1-2 (1995): 146-50.
 [Invited]
- "Evaluating the Intellectual Work of Writing Program Administrators: A Draft."
 With Charles Schuster and Judy Pearce. *WPA: Writing Program
 Administration* 20.1-2 (1997): 92-103. [Invited]
- "Unraveling at Both Ends: Anti-Undergraduate Education and Anti-Affirmative
 Action, and Basic Writing at Research Schools." *Journal of Basic
 Writing* 18.2 (Fall 1999): 4-22. [Refereed]
- At Century's End: The Job Market in Rhetoric and Composition." *Rhetoric
 Review* 18.2 (Spring 2000): 375-89. [Invited]
- "A Different Class Of Witnesses: Experts In The Courtroom," *Discourse Studies*:
 3.1, (2001). pp. 327-49. [Refereed]
- "A Report from a Writing Program Director in the Trenches: TAs and
 Unionization." *Pedagogy: Critical Approaches to Teaching Literature,
 Language, Composition and Culture* 3.1 (2002). 7-19. [Invited]
- "English Departments and the Circulation of Higher Education Policyspeak."
ADE 143 (Fall 2007): 26-31. [Invited].
- "Did They Really Say That? The Women of Wenatchee: Vulnerability,
 Confessions, and Linguistic Analysis." *Journal of English Linguistics*
 36.3 (September 2008): 220-38 [Refereed]
- "Guiding Principles: Forensic Linguistics and Codes of Ethics in Other
 Fields and Professions." *International Journal of Speech,
 Language and the Law* 16.2 (2009): 253-66. [Refereed]

Reviews:

- Dennis K. Mumby (Ed.), *Narrative and Social Control: Critical Perspectives*,
 Sage Annual Reviews of Communication Research, Vol. 21, Newbury
 Park, CA: Sage Publication, 1993, in *Discourse and Society*, 6.1, January
 1995, pp. 138-40.
- Catherine Kohler Riessman, *Narrative Analysis*, Vol. 30. Qualitative Research
 Methods. Newbury Park, CA, London, and New Delhi: Sage
 Publications, 1993 in *Discourse and Society*, 6.1, January 1995, pp. 138-
 40.
- "Miriam Brody's *Manly Writing: Gender, Rhetoric, and the Rise of Composition*."
Modern Language Quarterly, (June 1995). pp. 238-241.
- John Gibbons, ed. *Language and the Law*. London: Longman, 1994, in *Discourse
 and Society*, 7:1 (January 1996). pp. 145-46.
- Dennis Kurzon, *A Tale of Two Remedies: Equity, Verb Aspect and the Whorfian
 Hypothesis*, in *Forensic Linguistics*, 7.1 (2000). pp. 137-140.
- Sandra L. Ragan, Dianne G. Bystrom, Lynda Lee Kaid and Christina Beck (eds.)
 (1996), *The Lynching of Language: Gender, Politics, and Power in the
 Hill-Thomas Hearings*, in *Forensic Linguistics*, 7.1 (2000). pp. 129-130.
- Shelley Angéllil-Carter. *Stolen Language: Plagiarism in Writing*, London: Pearson
 Education, 2000. *Journal of Sociolinguistics* 6.3 (August 2002): 472-4.

Laura Gray-Rosendale and Gil Harootunian, eds. *Fractured Feminisms: Rhetoric, Context, and Contestation*, Albany, NY: SUNY Press, 2003. *Rhetoric Review* 23.3 (2004): 269-73.

Journal, Special Issue:

Guest Editor, Special Issue on Artifacts in the Teaching of Writing. *Journal of Teaching Writing*. (1999). "Artifacts in the Teaching of Writing: Curriculum Guides, Textbooks, and Handbooks," 203-212. [Invited]

Electronic Work:

CCCC Bibliography of Composition and Rhetoric, 1996. Editor with Todd Taylor. (1999). <<http://www.ibiblio.org/cccc/>>

CCCC Bibliography of Composition and Rhetoric, 1997. Editor with Todd Taylor. (2000). <<http://www.ibiblio.org/cccc/>>

WORK ACCEPTED OR IN PRODUCTION:

Book:

Complex Documents/Ordinary Readers: Forensic Linguistics and the Analysis of Lay and Legal Understanding
Under review with Oxford University Press; accepted by editor of Law and Language Series
Draft completion date: February 28, 2012

Book Chapter:

"Discourse in the U.S. Courtroom." In *The Oxford Handbook of Law and Language*. Eds. Lawrence Solan and Peter Tiersma. Oxford: OUP (2012): 369-380.

PROFESSIONAL ACTIVITIES:

Conferences, Lectures, Readings:

- Paper, "Response Theory in the Writing Classroom, or Is There A Reader in This Class?" Indiana Teachers of Writing, Indianapolis, IN. September, 1984. [Refereed]
- Workshop, "Rhetorical Strategies for CPAs," presented to the Indiana Society of Certified Professional Accountants, Indianapolis, IN. August, 1985. [Invited]
- Paper and workshop, "The Ethics of Teaching Writing," Indiana Teachers of Writing, Indianapolis, IN. September, 1985. [Refereed]
- Paper, "From Perfunctory to Engaged: The Reader in the Writing Classroom," Indiana University Language Arts Conference, Bloomington, IN., November, 1985. [Invited]
- Paper, "Ethics and Writing: From Fields of Battle to Toulmin's Argument Fields," Conference on College Composition and Communication, New Orleans, March, 1986. [Refereed]
- Paper, "Reader Response Theory and Composition." Literacy Conference. University of San Francisco, San Francisco, June 1986. [Invited]
- Paper, "Getting the Most Professionally out of Part-Time Status: Three Case

- Studies," Conference on College Composition and Communication, Atlanta, March 1987. [Refereed]
- Paper, "Competency for Freshman Composition: What Abilities Do Freshman Writers *Really* Need?" Indiana Teachers of Writing, Indianapolis, IN. September, 1987. [Refereed]
- Paper, "Three Case Studies of Part-Time Professionals," Midwest Modern Language Association, Columbus, OH, with Barbara Cambridge, November, 1987. [Refereed]
- Response paper, "Completing the Paradigm Shift," response to session on "Writing about Literature," Midwest Modern Language Association, St. Louis, November, 1988. [Invited]
- Paper, "'Reduced to Writing' and 'This Case': Two Genres of Legal Texts," Midwest Modern Language Association, St. Louis, November, 1988. [Refereed]
- Paper, "Storytelling: The Regulation of Rhetoric in a Legal Community," Central States Anthropology, South Bend, IN., March, 1989. [Refereed]
- Paper, "Discourse Analysis, Conferencing and Writing Groups: When Listening and Content Analysis Aren't Enough," Penn State Conference on Rhetoric and Composition, University Park, PA., July, 1989. [Refereed]
- Paper, "Gendering the Plaintiff's Attorney: Storytelling As Rhetorical Regulation in a Legal Community," American Anthropological Association, Washington, D.C., November, 1989. [Refereed]
- Paper, "Resisting Privilege: Learning the Lives of Basic Writers," Conference on College Composition and Communication, Chicago, March, 1990. [Refereed]
- Paper, "Basic Level Concepts and Scripts: Contrasts in Discourse Processing of Legal Events," International Pragmatics Association, Barcelona, Spain, July 1990. [Refereed]
- Paper, "Discourse in the Disciplines." Puget Sound Writing Project Summer Seminar, August, 1990. [Invited]
- Paper, "Deconstruction and the Law," University of Washington Law School Interdisciplinary Colloquium, August, 1990. [Invited]
- Paper, "Assessment Alternatives: Portfolios and Minorities," Puget Sound Educational Consortium-Phi Delta Kappa Spring Quarter, Bellevue, WA., March, 1991. [Invited]
- Paper, "Play It Again Sam: What Discourse Analysis Can Tell Us about Writing Classrooms." Director, Pre-Convention Workshop, Conference on College Composition and Communication, Boston, MA., March, 1991. [Refereed]
- Paper, "Validity in Portfolio Assessment," Conference on College Composition and Communication, Boston, MA., March, 1991. [Refereed]
- Paper, "Writing Portfolio Assessment." WPA Session, National Council of Teachers of English, Seattle, WA., November 1991. [Invited]
- Paper, "On Fiction vs. True Crime: Constructing a Case in *Fatal Vision*," Third Annual Professional Responsibility Institute, Continuing Legal Education, Seattle, WA., November 1991. [Invited]
- Paper, "Law, Literature, and Television: Fact or Fiction?" Roundtable panel

- discussant. Third Annual Professional Responsibility Institute, Continuing Legal Education, Seattle, WA., November 1991. [Invited]
- Paper and workshop, "Portfolio Assessment in College: Possibilities for ESL Classrooms," ESL Faculty Workshop, University of Washington, February, 1992. [Invited]
- Paper, "Scenes from the Civil Courtroom: Rhetoric, Expertise and Commonsense Narratives," Conference on College Composition and Communication, Cincinnati, OH, March 1992. [Refereed]
- Paper and workshop, "Portfolios in College Assessment," American Association for Higher Education, Miami Beach, June, 1992, presented by Laurel Black. [Invited]
- Paper and workshop, "Administrative Research: Lessons from the *FIPSE* Portfolio Project at Miami University," Writing Program Administrators, Breckenridge, CO., July 1992, presented by Laurel Black. [Invited]
- Paper, "Gendered Textuality," Fourth Miami University Conference on the Teaching of Writing, Oxford, OH., October 1992. [Invited]
- Paper and Workshop, "Using the Internet to Teach Upper and Lower Division Courses," UWired Project, September 1994. [Invited]
- Paper and Workshop, "Using E-Talk in the Classroom." UWired Faculty Series, November 1994. [Invited]
- Paper, "The Use and Abuse of the Internet Discussion Group." Virtually Yours Faculty Symposium, University of Washington, March, 1995. [Invited]
- Paper, "Crossing the Chasm: A Personal Conversation between Two-Year and Four-Year Schools." With Judy Ann Pearce. National Council of Writing Program Administrators. Summer Conference. Bellingham, WA, July 1995. [Invited]
- Paper, "Inclusive Language or Censorship? Speech Codes, Feminism, and the Classroom." NCTE; American Dialect Society session. San Diego, CA. November, 1995. [Invited]
- Paper, "Divorce and Narratives of Domestic Violence." Conference of the Society for the Study of Narrative. Columbus, OH, April 1996.
- Paper, "Class, Codes, and the Rhetoric of Reflectivity," NCTE Conference on Reflectivity, Albuquerque, NM, June 1996 (Invited, Featured Speaker).
- Paper, "Narrative, Law, and Domestic Violence: Telling 'My Side' of the Story," Narrative and Metaphor in the Disciplines, Conference of the South Pacific Comparative Literature Association, Auckland, NZ, July, 1996. [Refereed]
- Paper and Workshop, "Discourse Studies and Composition: A Workshop in Multiple Methods." With Ellen Barton. Conference on College Composition and Communication. Phoenix, AZ. March, 1997. [Refereed]
- Paper, "Tabletop Mountains and Narrow Valleys: The Topography of the MLA and CCCC Bibliographies," Conference on College Composition and Communication. Phoenix, AZ, March, 1997. [Refereed]
- Paper, "Certifying Knowledge: Options for WPAs." National Council of Writing Program Administrators. Summer Conference, Houghton, MI. July 1997. [Refereed]

- Paper, "Contemporary Scholarship in Composition and Rhetoric: The View from the *CCCC Bibliography*." The Research Network. Plenary Speaker. Conference on College Composition and Communication. Chicago, IL., April 1998. [Invited]
- Paper, "Rhetorical Education in English." Rhetorical Education Conference. University of Washington. January 1999. [Invited]
- Paper, "Unraveling at Both Ends: Anti-Undergraduate Education, Anti-Affirmative Action, and Basic Writing at Research Schools." Conference on College Composition and Communication. Atlanta, GA. March 1999. [Refereed]
- Paper, "Specialization in Rhetoric and Composition: A Report on the Job Market." Preconvention Meeting of the Doctoral Consortium of Programs in Rhetoric and Composition. Conference on College Composition and Communication. Atlanta, GA. March 1999. [Invited]
- Paper and workshop, "Assessing the Disciplinary-Based Writing of Washington Seniors: What We Did, What We Learned, and What We Will Do Next." With Gerald Gillmore and Donna Qualley. Higher Education Assessment Conference. Spokane, WA. May 1999. [Refereed]
- Paper, "The (Mis)Construction of Expertise in the OJ Trial: Robin Cotton and DNA Testing." International Association of Forensic Linguistics. Birmingham, England, UK. June 1999. [Refereed]
- Paper, "The WPA and Writing Assessment." With Donna Qualley. National Council of Writing Program Administrators. Summer Conference. West Lafayette, IN. July 1999. [Refereed]
- Paper, "What Did They *Really* Say? The Wenatchee Confessions." Continuing Legal Education Program. Seattle, WA. April 2000. [Invited]
- Paper, "The Discourse of Expert Witnessing in the Courtroom." Georgetown University Roundtable on Linguistics. Washington, D.C. May 2000. [Refereed]
- Paper, "Planning for Writing/Evaluating Writing." CIDR Quarterly Forum on Teaching and Learning, University of Washington, January 2001. [Invited]
- Paper and Workshop, "Discourse Studies and Composition: Narrative." CCCC. Denver, CO. March 2001. [Refereed]
- Paper, "Learning to Negotiate the Rhetorics of Professionalism and Management." CCCC. Denver, CO. March 2001. [Refereed]
- Paper, "The Non-Articulation Articulation Meeting: Resolving Differences between Two- and Four-Year Composition Programs." CCCC. New York. March 2003. [Refereed]
- Paper, "The View from the Top: Higher Education Policy." CCCC. March 2005. San Francisco. [Refereed]
- Paper, "The Women of Wenatchee." The Evergreen State College. January 2006.
- Paper, "Where Do These Ideas Come From? Higher Education Policy." ADE West. June 2006. Blaine, Washington. [Invited]
- Paper, "Divorce Narratives: Litigants, Human Scientists and Governmentality." Law and Society Association. May 2008. Montréal, Quebec. [Refereed].
- Paper, "The Biggest Debt, The Least Understood: Reader Comprehension of U.S.

- Mortgages." International Association of Forensic Linguists. July 2009. Amsterdam. [Refereed]
- Paper, "Professional Ethics in Other Disciplines and Contexts." Symposium. "Ethics and Forensic Linguistics." LSA. San Francisco. January 2009. [Refereed]
- Paper, "Credit Card Agreements." West Coast Law and Language. Missoula, MT. July 2010. [Invited]
- Paper, "Virtual Contracts: EULAs and TOSAs." International Association of Forensic Linguistics. July 2011. Birmingham, UK. [Refereed]

Services to Other Educational Institutions:

Indiana University-Purdue University at Indianapolis:

School of Education Testing Committee, 1986-88.

School of Liberal Arts, Technology and Computers, 1987-88

Indiana University-Purdue English Department:

Associate Faculty Rights Committee, 1982-84.

Associate Faculty Promotions and Priorities Committee, 1982-84.

Standing Committee on W132, 1982-84.

Acting Coach, IUPUI Debate Team, 1982.

Guest Lecturer, Women's Studies Colloquium, 1985-88.

Lecturers' Review Committee, 1985-86.

Writing in the English Department Committee, 1986-87.

Scheduling Committee, 1986-87.

Graduate Studies Committee, 1986-87 (MA proposal for Indianapolis campus).

Writing Coordinating Committee, 1986-87.

Director, Freshman Composition, 1986-87.

Director, Placement, 1986-87

Miami University:

Honors Program Advisory Committee, 1989-90.

Small Grants Committee, 1989-90.

Linguistics Program Advisor, 1988-90.

Miami University: English Department:

Search Committee, 1989-90.

Teaching Evaluation, 1989-90.

Graduate Admissions, 1989-90.

Committee on Expository Writing, 1989-90.

Chair's Advisory Committee (elected), 1989-90.

Assistant Chief Rater, Writing Proficiency Exam, 1989.

Chief Rater, Writing Proficiency Exam, 1990.

Tenure and Promotion Reviews:

Steve Fox, Indiana University-Purdue University at Indianapolis, 1997.

Mark Gellner, Kettering University, 1999.

Richard Miller, University of Michigan, 2000

Patrick Bruch, University of Minnesota, 2005.

Derek Soles, Drexel University, 2005.

Eli Goldblatt, Temple University, 2007.

Anne Beaufort, University of Washington Tacoma, 2008.

Christiane Donahue, Dartmouth College, 2008.

Susan Berk-Seligson, Vanderbilt University, 2010.

Carrie Wastal, UCSD, 2011.

Service to the University of Washington:

English Department

English Education Committee, 1990-91.

Expository Writing Committee, 1990-91, 1997-2003.

Graduate Studies Committee, 1991-93; Chair 1992-93, 1997-2003; 2010-11.

Faculty Mentor, Intermediate Expository Writing, 1991-94.

Composition Administrators Coordinating Committee, 1991-1994.

Heilman Dissertation Prize Committee, 1991.

Executive Committee, 1993-94, 1994-95; 2011-13, Chair, 2011-12.

Search Committee, Senior Americanist, 1993-94.

Johnson Master's Essay Prize Committee, 1993.

Faculty Mentor, Educational Opportunity Program, 1994-96.

Placement Committee, 1995-96. Chair, 1996-97.

Search Committee, Language and Rhetoric Positions, 1997-98; 1998-99.

M.A. Advisor, Language and Rhetoric, 1997-2003.

Tenure Committee, Heidi Riggenbach, 1997-98.

Tenure Committee, Gregg Crane, 2000.

Tenure Committee, Anis Bawarshi, 2003.

College and University

Faculty Speaker, Spring Orientation for Entering Students, March 1994, March 1995, Summer Orientation August 1995.

Autumn and Spring Meetings, WA State Universities' Composition Directors, 1997-98.

Speaker, "Writing Assessment," Fall Honors Retreat, 1998.

Representative, Office of the Superintendent of Public Instruction's Secondary Certification Standards Committee, Secondary English, April, 1998.

Representative, Higher Education Coordinating Board Academic Standards Meetings, May, 1996-2001.

Provost's Task Force on Graduate Student Roles and Responsibilities, 2000-2002.

Provost's Task Force on Admissions, 2001.

Director, Faculty Retreat on Writing in the Discipline, February 2001.

Faculty Counterpart, Simpson Center Cross Disciplinary Research Initiative for Associate Professors, Steve Herbert, Geography, 2005-2006.

Representative, Higher Education Coordinating Board, English Standards, 2005-2006.

Faculty Governance

Faculty Senate, 1993-95; 1995-97, 2001-2003; 2003-2008.

Faculty Senate Executive Committee Group 1 Representative, 1995-96, 2001-2002.

Representative, Higher Education Coordinating Board, Senior Writing Assessment Project/Baccalaureate Institutions, 1998-2001.

Faculty Senate Adjudication Panel, 1999-2005.

Task Force on Distance Learning, 2000-2001.

Faculty Council on Academic Standards, 2000-2005.

Subcommittee on Admissions and Graduation, 2002-2005.

Chair, 2003-2005.

Subcommittee on Distance Learning, 2002-2004.

Deputy Faculty Legislative Representative, 2002-2003.

Senate Committee on Planning and Budgeting, 2002-2008; 2010—.

Faculty Legislative Representative, 2003-2005.

Co-Chair, Washington State Council of Faculty Representatives, 2003-2005.

Vice-Chair, Faculty Senate, 2005-2006.

Chair, Faculty Senate, 2006-2007.

Chair, Senate Committee on Planning and Budgeting, 2007-2008; 2011-2012.

Search Committee Member, Vice Provost for Planning and Budgeting, 2007-2008.

Member, University of Washington Performance Agreement Working Group, 2008.

Service to Professional Organizations:

Scholarly Journals

Reader, *Forum in Reading and Language Education*, 1985.

Reader, *Journal of Teaching Writing*, Editorial Board, 1985-86; 1991-99;

Reviews Editor, 1995-2004.

Reader, *Journal of Advanced Composition*, 1992—.

Reader, *College Composition and Communication*, 1993—.

Reader, *College English*, 1995—.

Reader, *Written Communication*, 1999—.

Reader, *Rhetoric Review*, 2000—.

Editorial Board Member, *Pedagogy*, 2000-2006.

Reader, *Language*, 2000—.

Contributing Editor, *The Writing Instructor*, 2000—.

Reader, *Southwest Journal of Linguistics*, 2002—.

Reader, *Text and Talk*, 2006—.

Other Organizations

Prelude Awards Judge (Indianapolis area scholarship), 1985.

Consortium on Inter-University Cooperation (Big 10 Schools and affiliates)

Composition Directors' Meetings 1985, 1986.

NCTE Regional Writing Awards Judge, 1985, 1986, 1987.

Executive Board Member, Center for the Study of Writing, Miami University, 1989-90.

Occasional Reviewer, Bedford Books/St. Martin's, Houghton Mifflin, Harcourt, Macmillan, Routledge, Georgetown University Press, 1989—.

Candidate, CCCC Executive Committee, 1991.

Contributing Bibliographer, *CCCC Bibliography*, 1989, 1990, 1993, 1994.

Supervisor, Graduate Student Bibliographers at UW, 1993, 1994.

Executive Committee Member, National Council of Writing Program Administrators, 1995-98.

Representative, Doctoral Consortium in Rhetoric and Composition.

Contributing Bibliographer, *The Bedford Bibliography for Teachers of Basic Writing*. Eds. Linda Adler-Kassner and Gregory R. Glau for The

Conference on Basic Writing. Boston: Bedford's/St. Martin's, 2002.

AILA (Association Internationale de Linguistique Appliqué) Convenor, Rhetoric

and Stylistics, 2004-2005.

Professional Organizations:

National Council of Teachers of English, 1983-.

Conference on College Composition and Communication, 1983-.

Sections: Conference on Basic Writing and Association of Teachers of Advanced Composition.

Linguistic Society of America, 1984-.

International Linguistics Association, 1987-1997.

American Association for Applied Linguistics, 1988-.

International Pragmatics Association, 1988-.

International Association of Forensic Linguistics, 1994-.

Host, International Association of Forensic Linguists, University of Washington, July 12-15, 2007.

National Council of Writing Program Administrators, 1990-; Executive Committee, 1995-1998.

LEGAL CONSULTING:

(An extended description of the linguistic issues related to these cases is available upon request.)

Monaghan and Metz, Attorneys-at-Law, San Diego, CA., 1987. (employment discrimination) [report/declaration]

Schreiber and Sevenish, Attorneys-at-Law, Indianapolis, IN., 1988. (confession evidence, police interrogations) [consultation]

Seed & Berry, Attorneys-at-Law, Seattle, WA., 1993. (trademark) [report/declaration]

John Nance, Attorney-at-Law, Tacoma, WA., 1994. (QDRO) [testimony]

Brock and Hitchcock, Attorneys-at-Law, Charleston, S.C., 1994. (employment discrimination) [report/declaration]

John Caldbick, Attorney-at-Law, Seattle, WA 1997. (insurance policy language) [report/declaration]

Jay Stansell, Seattle WA, 1999. (INS) [report/declaration]

Townsend & Townsend & Crew, Seattle, WA and San Francisco, CA, 1999. (patent) [report/declaration, deposition]

Innocence Project Northwest, Seattle and Wenatchee, WA, 1999. (confession evidence, 5 different cases) [report to Master Judge]

Jaqueline Tacher, Seattle, 2000 (employment discrimination) [report]

Cogdill Nichols Rein, Everett, 2000. (analysis of personal letters) [report]

Robins, Kaplan, Miller & Ciresi, Los Angeles, 2001. (insurance policy language) [consultation]

Seed IP/Preston, Gates and Ellis, Seattle 2002 (trademark) [report/declaration, deposition]

Spokane Public Defender Association, Spokane 2003 (confession evidence; police

- interrogations) [report/declaration, testimony]
 Driskell and Gordon, Glendora, CA, 2007 (analysis of emails and letters)
 [report/declaration, deposition, testimony]
 Fuki America, Inc. v. Amalie Oil
 Los Angeles Superior Court
- Keller Rohrback, Seattle 2008- (analysis of pension documents)
 Schiffrin, Barroway, Topaz & Kessler, Philadelphia, PA, 2008-
 Kirby McInerney & Squire, New York, 2008-
 [report/declaration, deposition]
 In Re JPMorgan Chase Cash Balance Plan, 06-CV-0732 (HB)
 U.S. District Court, 2nd Circuit, Southern District of New York
- Keller Rohrback, Seattle 2008- (analysis of pension documents)
 [report/declaration, deposition]
 Buus, et al. v. WAMU Pension Plan, 07-CV-903MJP
 U.S. District Court, 9th Circuit, Western District of Washington
- Ron Dean, Pacific Palisades, CA, 2008 (analysis of pension documents) .
 [report/declaration]
 Goldiner et al. v. Instrumentarium/Datex-Ohmeda
 CV 07-2081 RAJ
 U.S. District Court, 9th Circuit, Western District of
 Washington
- Keller Rohrback, Seattle, 2009-10. (analysis of Terms of Service
 Agreement and email subject lines)
 In Re Classmates
 CV09-45RAJ
 U.S. District Court, 9th Circuit, Western District of
 Washington
- Kabatek Brown Kellner, Los Angeles, 2010 (analysis of membership documents)
 Hirschman, et al. v. Abercrombie & Kent, Inc., et al.
 Consolidated Case No. BC 374913
 Los Angeles Superior Court
- Sandals and Associates, Philadelphia, 2010- (analysis of benefit documents)
 Fulghum, et al. v. Embarq Corporation, et al.
 07-CV-2602 (EJM/JPO)
 U.S. District Court, 10th Circuit, District of Kansas

PUBLIC SERVICE:

- Interview, David Powell, "Slang Draws the Ever-Changing Line Between Us and
 Them," *Indianapolis Star*, February 10, 1985.
- Interview, Tom Cochran, "Literacy," WTHR, Indianapolis, April 21, 1986.
- Background Interview, Ben Stroud, "The Class of 2000," WTHR, Indianapolis,
 September 15, 1987.
- Panel Discussion, "On the English Language," Dick Wolfsie, Host, "AM Indiana,"
 WTHR, Indianapolis, September 29, 1987.
- Cultural Enrichment Committee, Beacon Hill School, Seattle, 1991-92.
- Panel Discussion, "Getting Your First Job after Graduate School," Northwest
 Center for Women, May 4, 1993.

- Lecture, "Men, Women, and Language." Hopper Society, Microsoft Corporation, Redmond, November 1993.
- Workshop, "Language and Gender." Hopper Society, Microsoft Corporation, Redmond, December 1993.
- Interview, Dave Beck. "Slang." KUOW, May 12, 1998.
- "Contemporary Slang," Shoreline Rotary, January 6, 1999.
- "Covering the WTO," Free Speech and the WTO Panel, University of Washington, April 2000.
- Workshop, "First Year English at Washington's Four-Year Schools, Kennewick School District, August, 2006.
- Coordinator and Report Co-Author, "Media Analysis of Home Encampment 'Sweeps'." With Anis Bawarshi, George Dillon, Megan Kelly, Candice Rai, Sandra Silberstein, and Amoshaun Toft. Presented November, 2008.

GRADUATE STUDENT SUPERVISION:

Dissertation Supervisor:

- Laura Thomas, Ph.D., Summer 1991, "'Reading' Content Area Classrooms: Writing and Reading Across-the-Curriculum as Survival," Miami University.
- Laurel Black, Ph.D., Summer 1993, "Language, Power, and Gender in Student-Teacher Conferences," Miami University. Co-Supervisor with Donald Daiker.
- Wendy Swyt, Ph.D., Autumn 1995, "Discursive Pedagogies: A Post-Process Analysis of the College Writing Course."
- Kirk Branch, Ph.D., Spring 1997, "Telling Stories: Language and Lives in Adult Literacy Narrative."
- Linda Young, Ph.D., Summer 1997, "House of Mirrors: Reflection and Composition."
- Laurie Stephan, Autumn 1999, "Political Correctness vs. Freedom of Speech: Language Ideologies and Their Social Uses." Co-Supervisor with Juan Guerra.
- Arlene Plevin, Ph.D., Autumn 2000, "Writing, Self, and Community: The Ethical Rhetoric of Place."
- Kim Emmons, Ph.D., Spring 2003, "More Than Blue: Discourses of/on Women and Depression."
Winner: Heilman Dissertation Prize, 2004.
- Maureen Phillips, Ph.D., Spring 2006, "Birthing a Third Gender: The Discourse of Women in the American Military."
- Jason Ens, Ph.D., Spring 2006, "Making Engagement: Education Reform Discourse and Organizational Change."
- Juan Li, Ph.D., Spring 2006, "Discursive Construction of Nationalist Ideologies in Times of Crisis: A Comparative Approach to the News Media in the United States and China."
- Amy Vidali, Ph.D., Spring 2006, "'Disabling Discourses': Disability Identity in Institutional Texts."
- Teagan Decker, Ph.D., Spring 2007, "From Social Justice to Diversity: Tracing

the Discourses of Affirmative Action."

Krisda Chaemsathong, Ph.D., Spring 2007, "Linguistic and Stylistic Construction of Witchcraft and Witches: A Case of Witchcraft Pamphlets in Early Modern England."

Michelle LaFrance, Ph.D., Spring 2009, [Co-Chair with John Webster] "The Trouble with Intros to English Studies: A Case Study of Negotiating Disciplinary Writing in a Linked Gateway Course for Undergraduate English Majors."

Darlene Rompogren, Ph.D., Spring 2010, "Language Diversity in College Composition Courses: Multilingual Students in English Composition at Tacoma Community College."

Rebecca Castner, Women Studies, Ph.D., Autumn 2011, [Co-Chair with Angela Ginorio] "Producing Poverty, Manufacturing Identities: The Construction of Poor Women as Criminals."

Vincent Oliveri (current).

Dissertation Reading Committee Chair:

Vivyan Adair, Ph.D., Autumn 1996, "From 'Good Ma' to Welfare Queen": A 'Genealogy' of the Poor Women in 20th Century American Literature, Photography and Culture."

Kari Tupper, Ph.D., Spring 1997, "Desire, Transgression and Confession: Women and Crime in American Law and Literature."

Bradley Paul Benz, Ph.D., Spring 2001, "ESL Trouble Spots: Composition Handbooks, Ideology and the Politics of ESL Writing and English as a Global Language."

Dissertation Reading Committee Member:

June West, Ph.D., Spring 1993, "The Communicative Dimensions of Team Building in a Non-Traditional Instructional Setting," (Speech Communication).

Laura Brenner, Ph.D., Spring 1994, "'The Performing Cure': Power and Pleasure and How To Claim Them in Narrative Fiction and Film."

Brenda Weikel, Ph.D., Spring 1994, "Discussion in Social Studies: Community and Public Discourse in the Middle School," (College of Education).

Pamela Dawson, Ph.D., Autumn 1994, "The Communication of Social Support," (Speech Communication).

Rebecca Merrens, Ph.D., Autumn 1994, "Troping Tragedy: Women, Nature, and Theories of Order in Early Modern England."

Marcia Taylor, Ph.D., Spring 1996, "Literate Choices: Toward Defining a Literate Culture in the Middle School."

Karen E. Zedicker, Ph.D., Spring 1996, "Weaving a Learning Dialogue: The Theory and Practice of Martin Buber's Dialogic Communication in Two Classrooms." (Speech Communication)

Susan Jeanette Balter, Ph.D., Spring 1997, "Interpreting the Collective: How the Supreme Court Justifies the Rule of Law." (Speech Communications)

Julie Schrader-Villegas, Ph.D., Spring 1997, "The Racial Shadow in 20th Century American Literature."

Jennifer Holberg, Ph.D., Spring 1997, "Searching for Mary Groth: The Figure of the Writing Woman in Charlotte Bronte, Elizabeth Barrett Browning,

- E.M. Delafield, Barbara Pyn and Anita Brookner."
- Susan Rhodes, Ph.D., Autumn 1997, "Active and Passive Voice Are Equally Comprehensible Writing." (Psychology)
- Philip Gaines, Ph.D., Spring 1998, "Cross Purposes: A Critical Analysis of the Representational Force of Questions in Adversarial Legal Examination."
- John Eckman, Ph.D., Autumn 1998, "Confronting Modernity: Urbanization and American Fiction, 1880-1930."
- Carl Grove, Ph.D., "The Official English Debate in the United States: A Critical Analysis," Spring 1999.
- Sean Williams, Ph.D., Summer 1999, "Theorizing a Perspective on World Wide Web Argumentation."
- Billy Woodall, College of Education. Ph.D., "Language Switching: Evidence for a New Model of Second Language Writing," Spring 2000.
- Steve Browning, Ph.D., Winter 2002, "Webwriting 281: Coding, Compromise and Considerations for the World Wide Web."
- Bettina J. Woodford, Speech Communication, Ph.D., Spring 2002. "With Forked Tongues: Linguistic Ideologies and Language Choices among Castilian Speakers in Barcelona."
- Gail Kluepfel, Ph.D., Spring 2002. "Reading Textual Differences: Grammars, Epistemologies, and Their Subjects in Composition."
- Judith M.S. Pine, Anthropology, Ph.D., Summer 2002. "Lahu Writing and Writing Lahu: An Inquiry into the Value of Literacy."
- Sandra A. Youngquist, College of Education, Ph.D., Autumn 2003. "The Impact of Electronic Writing Proficiency on Student Writing Performance."
- Steven Mentor, Ph.D., Autumn 2004. "A Dissertation for Cyborgs."
- Amy Dunham Strand, Ph.D., Spring 2005. "Language, Gender, and Citizenship in American Literature, 1789-1919."
- Spencer Schaffner, Ph.D., Spring 2005. "Texturation in Everyday Life: American Field Guides to Birds and Their Use."
- Alison Tracy, Ph.D., Summer 2005. "Pedagogical Gothic: Education and National Identity in Early American Sensational Fiction, 1790-1830."
- Teresa Thonney, Ph.D., Autumn 2005. "Teaching Students about Writing in the Disciplines and Beyond."
- Catherine McDonald, Ph.D., Spring 2006. "The Question of Transferability: What Students Take Away from Writing Instruction."
- Meredith Lee, Ph.D., Summer 2007. "Writing as Cultural Action: Student Writing at a Bicultural School."
- Riki Thompson, Ph.D., Summer 2007. "Virtual Recovery: Governing Mental Health and Self-Improvement Online."
- Melanie Kill, Ph.D., Spring 2008. "Challenging Communication: A Genre Theory of Innovative Uptake."
- Lisa Trigg, Nursing, Ph.D., Spring 2008, "Reproducing Social Inequality in the National Health Information Infrastructure: A Discourse Analysis."
- Oknam Park, Information School, Ph.D., Summer 2008, "Current Practice in Classification System Design: An Empirical Investigation of Classification System Design."
- Lisa Thornhill, Ph.D., Spring 2009, "Racial Literacy as an Antidote to Color-

Blind Racism: Counter-Hegemonic Response and Critical Community Engagement.”

Deborah Bassett, Communications, Ph.D., Spring 2009, “Talk about Nano: Ways of Speaking about Science, Society and Ethics among Scientists and Engineers.”

Rachel Goldberg, Ph.D., Spring 2009, “Counterpublics and Media Policing: Atheism and the Challenge to Public Sphere Boundaries.”

Raymond Oenbring, Ph.D., Spring 2009, “Scientific Rhetoric and Disciplinary Identity: A Critical History of Generative Grammar.”

Ellen Strickland Kaje, Education, Ph.D., Spring 2009, “More Than Just Good Teaching: Teachers Engaging Culturally and Linguistically Diverse Learners with Content and Language in Mainstream Classrooms.”

Sue B. Feldman, Ph.D., Education, Spring 2010, “Inquiry-Focused Reform: How Teachers Learn New Practices from Their Current Practice.”

Amoshaun P. Toft, Ph.D., Communication, Spring 2010, “Social Movement Communication: Language, Technology and Social Organization in an Urban Homeless Movement.”

Kristine Unsworth, Information School, Ph.D., Summer 2010. “Identifying the Enemy: Social Categorization and National Security Policy.”

Angela Rounsaville, Ph.D., Summer 2010, “Figuring Transnational Literacies: Rhetorical Negotiations in a Global Paradigm.”

Allison Gross, Ph.D., Spring 2011. “Responding to Students: Uptake and First-Year Composition.”

Sergio Casillas (current).

Megan Kelly (current).

Shannon Mondor (current).

Mary L. Veden, Communication (current).

Ph.D. Exam Committee Chair:

Kirk Branch, Ph.C., Autumn 1994.

Maureen Phillips, Ph.C., Winter 1995.

Gwen Mathewson, Ph.C., Spring 1996.

Linda Meyers, Ph.C., Autumn 1996.

Gail Kluepfel, Ph.C., Spring 1997.

Suzanne Lepeintre, Ph.C., Spring 1997.

Arlene Plevin, Ph.C., Summer 1997.

Kim Emmons, Ph.C., Winter 2001.

Jason Ens, Ph.C., Winter 2002.

Darlene Rompogren, Ph.C., Spring 2002.

Elizabeth Fischel, Ph.C., Spring 2003.

Amy Vidali, Ph.C., Spring 2003.

Stacy Grooters, Ph.C., Fall 2004.

Spencer Schaffner, Ph.C., Winter 2004.

Meredith Lee, Ph.C., Spring 2004.

Juan Li, Ph.C., Spring 2004.

Krisda Chaemsaitong, Ph.C., Autumn 2005.

Teagan Decker, Ph.C., Autumn 2005.

Michelle LaFrance, Ph.C., Autumn 2006.
 Rebecca Castner, Ph.C., Autumn 2006. (Co-Chair with Angela Ginorio)
 Jason Jones, Ph.C., Spring 2008.
 Sarah Read, Ph.C., Spring 2008.
 Vinnie Oliveri, Ph.C. Winter, 2009.
 Leticia Lopez (current).
 Terri Major (current).
 Nancy Fox (current).
 Jeff Lawshe (current).
 Joyce Walton (current).

Ph.D. Exam Committee Member:

Kari Tupper, Ph.C., Spring 1992.
 Wendy Swyt, Ph.C., Winter 1993.
 Steve Mentor, Ph.C., Winter 1994.
 Marcia Taylor, Ph.C., Spring 1994.
 David Edwards, Ph.C., Spring 1994.
 Julie Schrader Villegas, Ph.C., Autumn 1994.
 Vivyan Adair, Ph.C., Spring 1995.
 John Eckman, Ph.C., Winter 1996.
 Phillip Gaines, Ph.C., Spring 1996.
 Sue Balter, Ph.C., Speech Communications, Spring 1996.
 Carl Grove, Ph.C., Autumn 1996.
 Laurie Stephan, Ph.C., Winter 1997
 Sean Williams, Ph.C. Spring 1998.
 Kathleen Harrington, Ph.C. Spring 1998.
 Steve Browning, Ph.C., Spring 1999.
 Alison Tracy, Ph.C., Spring 1999.
 Bettina J. Woodford, Speech Communications, Ph.C., Winter 2000.
 Sandra Youngquist, College of Education, Ph.C., Winter 2000.
 Brad Benz, Ph.C., Spring 2000.
 Heather Easterling, Ph.C., Spring 2000.
 Amy Dunham Strand, Ph.C., Spring 2001.
 Gary Ettari, Ph.C., Spring 2001.
 Catherine McDonald, Ph.C., Spring 2003.
 Teresa Thonney, Ph.C., Autumn 2004.
 Lisa Thornhill, Ph.C., Winter 2005.
 Melanie Kill, Ph.C., Winter 2005.
 Victoria Browning, Ph.C., Autumn 2005.
 Lei Lani Michel, Ph.C., Winter 2006.
 Deborah Bassett, Ph.C., Communication, Spring 2006.
 Kristine Unsworth, Information School, Autumn 2006.
 Oknam Park, Information School, Ph.C., Spring 2007.
 Raymond Oenbring, Ph.C., Spring 2007.
 Angela Rounsaville, Ph.C., Spring 2007.
 Rachel Goldberg, Ph.C., Spring 2007.
 Shannon Mondor, Ph.C., Autumn 2007.

Ellen Kaje, Ph.C., Autumn 2007.
 Lisa Trigg, Nursing. Ph.C., Autumn 2007.
 Christopher Featherman, Ph.C., Autumn 2010.
 Allison Gross, Ph.C., Spring 2010.
 Sheryl Day, Information School, Ph.C., Spring 2011.
 Teresa Dunleavy, Education, Ph.C., Spring 2011.
 Jennifer LeMesurier, Ph.C., Autumn 2011.
 Jesse Roach (current).
 Sergio Casillas (current).
 Megan Kelly (current).
 Gavin Tierney, Education (current).
 Amanda Hobmeier (current).

M.F.A. Thesis Committee Member:

Kevin Craft, M.F.A., Spring 1995.
 Lodi McClelland, M.F.A., Spring 1995 (Dance).

M.A. Essay Director:

Diane Rawlings, M.A., Winter 1990, Miami University.
 Kim Emmons, Spring 1999.
 Amy Strand, Winter 1999.
 Amy Vidali, M.A., Spring 2001.
 Jennifer LeMesurier, Winter 2010.
 Mary Little (current)

M.A. Exam Committee Member:

Fredericke Ulmer, M.A., Winter 1996, Comparative Literature.
 Lana Dalley, M.A., Winter 2001.
 Riki Thompson, M.A., Spring 2002.

M.A. Essay Second Reader:

Elizabeth French, M.A., Summer 1990.
 Julia Leyda, M.A., Spring 1995.
 Janet Stegemeyer, M.A., Summer 1995.
 John Derek Little, M.A., Spring 2000.
 Meredith Lee, M.A., Spring 2002.
 Heather Hill, M.A., Winter 2009.

M.A.T. Essay Director

David Cho, M.A.T., Spring 2005.

TEACHING:

ENGL courses are University of Washington;
 ENG courses are Miami University;
 W,G, and L courses are Indiana University system courses.

LINGUISTICS COURSES:

ENGL 270, Cultural and Historical Background of English, an introductory course in topics in English language linguistics, ranging from history of English to contemporary sociocultural status.
 ENGL 370, English Language Study, an introductory course in linguistics, with a focus on the English language.

- ENGL 372 Language Variation in Current English, an examination of geographical, social, and occupational varieties of American English. Relationship between societal attitudes and language use.
- ENGL 374 The Language of Literature, addresses the roles of explicitly describable language features in the understanding and appreciation of various verbal forms. Emphasis on literature, but attention also may be given to nonliterary prose and oral forms.
- ENGL 473, Language and Gender, a senior seminar/beginning graduate overview of the research and theory in language and gender.
- ENGL 478, Language and Social Policy, a course examining the public policies regarding language, including immigration policy, citizenship, AAVE and HIE in the schools, languages of instruction and bilingualism, U.S. English; balance between U.S. and other countries' policies.
- ENGL 479, Language Variation in North America, a sociolinguistic course on the range of language and dialect in North America;
- ENGL 560, The Nature of Language, a survey of linguistic theories, especially those valuable in applied approaches to language.
- ENGL 561, Stylistics, a graduate seminar in linguistic analysis of literary texts, including major critical figures; as well as analysis of reading communities, literary and popular genres.
- ENGL 562, Discourse Analysis, a seminar examining current theory and practice in discourse analysis, from Anglo-American sociolinguistics to European and Australian Critical Discourse Analysis;
- ENGL 569, Legal Discourse, a seminar in theory and analysis of legal discourse, including legal documents, courtroom discourse, confessions, and appellate decisions;
- ENGL 569, Legal, Legislative and Forensic Discourse, a seminar in various contexts in which legal language and discourse is used.
- ENG 303, Introduction to Linguistics, a course fulfilling a formal reasoning requirement for Arts & Sciences majors, focusing on theoretical linguistics;
- ENG 404/504, Phonology, a course for linguistics majors, introducing structuralist, generative, and post-generative theories and analysis of phonological units;
- ENG 601, Introduction to Languages and Linguistics, a graduate course introducing students to linguistic analysis, with particular focus on discourse analysis;
- G104, Language Awareness, a course for non-majors, introducing concepts of discourse analysis, applied to everyday settings;
- G206, Introduction to English Linguistics, a course primarily for students preparing to teach, providing an overview of current linguistic theory;
- G310, Social Patterns in Speech, an upper level, undergraduate introduction to sociolinguistics, emphasizing language variation within the English-speaking community.

WRITING COURSES:

- ENGL 104, EOP Composition, the first of a two quarter composition

- sequence for EOP and SSS students, emphasizing academic Writing.
- ENGL 111, Writing about Literature, a one-quarter course in writing about literature, satisfies composition requirement; have used Wharton novels as readings.
 - ENGL 121, Composition: Writing and Social Issues, a regular composition course, emphasizing writing about a variety of texts.
 - ENGL 131, Composition, a regular composition course emphasizing writing, argumentation, and analysis of complex, intellectually demanding texts.
 - ENGL 281, Intermediate Expository Writing, an intermediate course in Writing for different discourse communities; taught with theme-based approach; have used education, aging, free speech, divorce, and contemporary music as themes.
 - ENGL 381, Advanced Expository Writing, an advanced course in writing; focused on in-depth examination of writing in a particular discourse community.
 - ENG 111, College Composition, a regular composition course for entering freshmen, emphasizing writing process.
 - ENG 225, Advanced Composition, a writing course focused on reader response theory and modern forms of nonfiction;
 - W001, Fundamentals of English, a developmental course in writing, stressing generation and drafting;
 - W131, Elementary Composition I, a required course for all majors, emphasizing collaboration and revision;
 - W132, Elementary Composition II, a required course for Arts and Science majors, in academic argument and research;
 - W205, Vocabulary Acquisition, an optional course using both traditional and contextual methods to expand vocabulary;
 - W231, Professional Writing Skills, a required course for Public Affairs and Business students, focused on gathering and reporting primary research;
 - W350, Advanced Expository Writing, a course for majors, using literary response theory to gain sophistication in critical reading and revision;
 - W370, Creativity and Problem Solving, an optional course for writing majors, examining cognitive theories associated with invention and revision practice in composition;
 - W411, Directed Writing, a course supervising individual majors working in the area of nonfiction prose;

COMPOSITION AND RHETORIC COURSES:

- ENGL 471, Theories of Composing, an introduction to modern theories of composing and writing, primarily for prospective teachers.
- ENGL 564, Contemporary Theories of Rhetoric, a seminar examining the intersection of post-modern theories of subjectivity and text, feminism, and neo-Marxist thought with modern interpretations in

- the field of composition and rhetoric.
- ENGL 564, Contemporary Theories of Rhetoric: Rhetorics of the Disciplines, a seminar examining the rhetoric of academic disciplines.
- ENGL 567, Approaches to Teaching Composition, a course introducing composition theory, rhetorical theory, the discipline, and practical applications to teaching.
- ENGL 567, Approaches to Teaching Composition for TAs, a course in composition theory and practice, organized around the teaching of ENGL 131.
- ENGL 569, Contemporary Research in Rhetoric and Composition, a seminar examining recent book-length studies in rhetoric and composition, including work in rhetoric of science, corpus linguistics, basic writing, Habermasian and Lacanian rhetoric, and historical rhetoric.
- ENGL 569, Basic Writing, a seminar on historical and contemporary approaches to the education of less traditionally prepared or expected students in college-level writing courses
- W590, Theory and Practice of Composition (team taught), a course introducing modern rhetorical theories and practice;
- ENG 734, Issues in Composition: Basic Writing, a doctoral seminar examining the theory and practice in basic writing, from a critical, postmodernist perspective.

LITERATURE COURSES:

- ENGL 242, Introduction to Fiction, an introductory course for non-majors in fiction, its characteristics, based primarily on the novel.
- ENGL 397, Literature and Other Professions, an advanced undergraduate course in American fiction and legal texts from a post-modern perspective.
- ENGL 498, Senior Seminar: Law and American Literature, a small, Advanced undergraduate seminar concentrating on theoretical positions, research methods, and a close examination of major works of American fiction connected with legal events.
- ENGL 559, Law and American Literature, a graduate seminar in related legal and literary texts.
- L206, Introduction to Non-Fiction: an introductory genre course, focusing on the essay, the extended essay, and the novel length non-fiction work.
- L380, Literacy, an advanced undergraduate honors seminar on theories of literacy, from psychological, linguistic, sociological, and literary perspectives.

ADMINISTRATIVE APPOINTMENTS AND ELECTED POSITIONS:

2003-2008; 2011-12 **Elected Officer**
Chair, Vice-Chair, Legislative Representative
Deputy Legislative Representative,
Chair, Senate Committee on Planning
and Budgeting
University of Washington Faculty Senate

Initially in the elected position of Deputy Faculty Legislative Representative. Elected and moved into the position of Faculty Legislative Representative. Acted as liaison between the Faculty Senate and the Washington State Legislature. Next elected to the position of Vice-Chair/Chair of the UW Faculty Senate. Organized the work of the Faculty Senate, brought forward legislation on the UW Senate's Faculty Code, the employment contract for the faculty and represented the 4000+ voting faculty of the university to the University's central administration. Served as the chair of the Senate Committee on Planning and Budgeting, the primary venue for the faculty in addressing all planning and budgeting issues for the three campuses of the University. Asked to return to Chair the Budget Committee when incoming officer took a position elsewhere.

1997— 2003 **Director, Expository Writing Program**
Department of English

Responsible for all 100-level curriculum and the training, assigning, mentoring, and supervision of 100+ TAs, teaching approximately 4000 students at the 100-level and approximately 2300 students at the 200-level over the course of the academic year. Provide two weeks of orientation for new TAs before each Autumn Quarter and teach a 5-credit hour graduate seminar in the theory and practice of teaching writing during the first quarter. Train and coordinate all 100-level TAs in portfolio assessment. Recommend TAs for 200-level courses. Introduce and administer program-wide portfolio scoring session each Autumn Quarter. Supervise 4 Assistant Directors, three for the regular program of ENGL 131 and 111, and one who works on ENGL 121, our experiential/ community based learning project, as well as the graduate student Director of the Educational Opportunity Program writing program. Also act as faculty mentor to the Educational Opportunity Program instructors for EOP writing. Schedule approximately half of all undergraduate courses taught in the department. Coordinate with two other faculty mentors for computer-integrated classrooms and writing-about-literature. Sit as *ex-officio* member of the Graduate Studies Committee and the Expository Writing Committee. Supervise and train high school teachers for our Educational Outreach ENGL 131 and 111 in the high schools, including portfolio scoring sessions each February, with our 100-level instructors participating. Work with other administrative units including Undergraduate Education, Office of Minority Affairs, Admissions, Educational Outreach, and the Office of Educational Assessment.

1994-1996 **Faculty Mentor and Coordinator**

**Educational Opportunity Program
Writing Courses**

Coordinate and train Teaching Assistants for multiple sections of ENGL 104-105 in conjunction with graduate student program director. Provide current research and scholarship in area for affected programs, units, and Teaching Assistants, including support for the revision of the curriculum toward an introduction to writing in the disciplines.

1991-1994 **Faculty Mentor and Coordinator
Intermediate Composition**

Coordinate and train Teaching Assistants for the multiple sections of ENGL 271, Intermediate Expository Writing. Training focus on designing thematically oriented course, issues of political/social rhetoric, designing assignments, anticipating the diverse student population of the course.

1986-1988 **Coordinator, English Placement
Lecturer, Department of English
Indiana University-Purdue
University at Indianapolis**

Coordinate, train and supervise the holistic scoring of more than 5000 English placement essays each year, with similar responsibilities for the written portion of the entrance examination for the School of Education in Indianapolis. Developed test questions and procedures for both examinations.

1986-1988 **Coordinator, Freshman Writing
Lecturer, Department of English
Indiana University-Purdue University at
Indianapolis**

Full curricular, staffing and training responsibility for four 100-level courses, serving 6000+ students each year; supervised 65 part-time instructors and coordinated the activities of the full-time faculty choosing to teach writing at the 100-level; scheduled and projected budget for freshman level component; participated with two other coordinators, one for Advanced Writing and one for ESL, in managing the full writing component of the English Department.

REFERENCES

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12/15/11

APPENDIX B: PARTIAL LIST OF LINGUISTIC ARTICLES AND CHAPTERS ON JURY INSTRUCTIONS

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SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,)	
)	
<i>Plaintiff,</i>	)	NO. 09-1-07187-6 SEA
)	
v. .	)	DECLARATION OF WANDA FOGLIA
)	
CRISTOPHER MONFORT,)	
)	
<i>Defendant</i>)	

DECLARATION

Pursuant to RCW 9A.72.085, Dr. Wanda Foglia, certifies as follows:

- 1) I am over the age of eighteen and competent to testify to the matters contained in this Declaration.
- 2) I am a Professor of Law and Justice Studies and the Coordinator of the Master of Arts in Criminal Justice Program at Rowan University. I am a former prosecutor and police academy instructor, and I currently conduct social science research in the area of criminology and teach students who plan to work in the criminal justice system. I earned a Ph.D. in Criminology from The Wharton School of the University of Pennsylvania, a J.D. from the University of Pennsylvania Law School, and a B.A. in Psychology from Rutgers College.

1 3) I also am one of the participants in the Capital Jury Project (CJP). The CJP is a
2 national research endeavor funded by the National Science Foundation, an independent
3 federal agency and one of the most prestigious and selective funding sources for basic
4 social science research conducted at America's colleges and universities. Social
5 scientists with expertise in this type of research approved the CJP methodology when the
6 research was initially funded, and then again when additional funds were awarded to
7 expand the project. The CJP uses accepted scientific methods, procedures, and analyses
8 that test legal and behavioral models of decision-making to determine the bases upon
9 which capital jurors make their decisions about the imposition of the death penalty, and
10 whether the decision-making process conforms to statutory and constitutionally defined
11 criteria.
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14 4) Investigators directing the CJP in 14 states include psychologists, criminologists,
15 sociologists, and law professors. Findings of this research have been presented at annual
16 meetings of the American Society of Criminology, Academy of Criminal Justice
17 Sciences, and the Law and Society Association, and published in peer reviewed and law
18 review journals such as Law and Society Review, Law and Human Behavior, Cornell
19 Law Review, Indiana Law Journal (symposium issue devoted to the Capital Jury Project),
20 Texas Law Review, DePaul Law Review, Brooklyn Law Review, University of
21 Pennsylvania Journal of Constitutional Law, Justice Quarterly, Criminal Law Bulletin,
22 and Judicature, among other outlets. A partial inventory of publications based on the
23 research of the CJP can be found at <http://www.albany.edu/scj/13194.php> and lists over
24 40 publications. This website also cites nine different doctoral dissertations that were
25 based on CJP data. When CJP research is published or utilized in doctoral dissertations,
26 the methodology is reviewed by experts in the field with no affiliation with the project to
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1 ensure that it meets scientific standards. The findings also have been cited by the U.S.
2 Supreme Court in *Schiro v. Summerlin*, 542 U.S., 348, 356 (2004) and *Simmons v. South*
3 *Carolina*, 512 U.S. 154, 169-170, n. 9 (1994) on the limited issues being decided in
4 those cases.

5
6 5) I coordinated the data collection in Pennsylvania, co-authored the article that
7 summarizes the seven legal problems revealed by interviews with nearly 1200 jurors
8 nationwide, and am the CJP researcher who most regularly testifies as an expert witness
9 regarding the CJP results. I personally trained interviewers for Pennsylvania, conducted
10 some of the interviews myself, and have been analyzing the national data and giving
11 presentations, testifying, and publishing articles on the CJP findings since 1996. Before
12 1996, I had nine publications based on my social science research in other areas. Since
13 being asked to join the CJP I have eleven additional publications relating to death penalty
14 research, including a report detailing CJP results in Pennsylvania that I was asked to
15 write for the Pennsylvania Supreme Court Committee on Gender and Racial Bias. I have
16 complied with a request to be a Reviewer for the National Institute of Justice on jury
17 research, have presented invited testimony before the New Jersey Death Penalty Study
18 Commission, have made 20 presentations at professional meetings, have written two
19 invited reviews of recent books on the death penalty, and have been interviewed by PBS
20 news based on my expertise on capital juror decision-making.

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23 6) I also prepared an abbreviated questionnaire that included only the questions
24 relating to the legal problems revealed by the CJP data. This questionnaire was
25 distributed to a legal class in a paralegal program at a Washington community college,
26 along with the facts of a murder and the guilt and penalty phase instructions from an
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1 actual murder case in Washington State. I analyzed these results in August of 2012 and
2 will include the results in the discussion below.

3 7) I have testified as an expert witness in 24 death penalty cases in 14 different states.
4 I have been qualified and testified as an expert in every case in which I have been called
5 to the stand, which includes states that were part of the CJP sample [California, Georgia
6 (three times), Indiana (three times), Louisiana, Missouri, North Carolina, Oregon (three
7 times), Pennsylvania (three times), Tennessee, Texas], as well as states that were not part
8 of the sample [Colorado (twice), Kansas, New Hampshire, and New Mexico (twice)].
9

10 8) I testify about evidence of constitutional problems revealed by the CJP and
11 numerous other studies done by independent researchers that find similar shortcomings.
12 My training as a social scientist allows me to explain the methodology, why it is valid
13 and reliable, and how it applies to the statute in question. I also am able to testify about
14 additional analysis that has not appeared in any published articles, but has been
15 conducted to respond to challenges raised by the prosecution. Contrary to what has been
16 asserted, the CJP is not offered as law or precedent. The consistent, uncontroverted
17 results of the CJP and numerous other studies are offered as evidence that the
18 constitutional mandates established by the United States Supreme Court are not being
19 followed in practice.
20

21
22 9) I have read the Washington Death Penalty statute and the relevant portions of the
23 Washington Pattern Jury Instructions-Criminal (WPIC) and I see no reason to believe that
24 Washington's death penalty scheme will reduce or eliminate the prevalence of juror
25 misunderstandings and inability to decide the sentence in the manner prescribed by
26 United States Supreme Court case law. The analysis of data from Washington college
27 students between the ages of 18 and 63 reveal many of the same problems with the
28

1 Washington instructions as was found with every other set of instructions in the 14 states
2 that were part of the CJP.

3 10) The evidence provided by my testimony was used in *State of New Mexico v. Jesus*
4 *Aviles Dominquez*, No.D-0101-CR-200400521, and *State of New Mexico v. Daniel Good*,
5 No. D-0101-CR-200400522, as the basis for Judge Garcia's ruling that portions of the
6 New Mexico death penalty statute were unconstitutional. The prosecution decided not to
7 pursue those cases as capital cases after the ruling thus there is no published appellate
8 opinion, but my understanding is that defense counsel has supplied the Court with Judge
9 Garcia's opinion. My testimony has been used in many other cases by judges who
10 indicate that they want to know how to improve the process to minimize the problems
11 revealed in the research; and has led to expanded voir dire, use of the Colorado method,
12 and modified jury instructions. Defense attorneys also have used my testimony to
13 establish a record for appeal but, as most of these cases have resulted in life sentences,
14 the majority of cases in which I testified were not appealed and I am not aware of any
15 death sentences in those cases that were upheld on appeal.

16 11) The opinions in *State v. Conner Schierman*, no. 06-1-06563-4 SEA and *United*
17 *States v. Steven Dale Green*, Criminal Action No. 5:06CR-19-R illustrate the dangers of
18 not having an evidentiary hearing. Those opinions indicate that no court has adopted the
19 CJP findings as precedent (sic), but, in actuality, numerous courts, including the United
20 States Supreme Court, have relied on evidence from the CJP to decide specific issues
21 before them at the time (for example *Schiro v. Summerlin*, 542 U.S., 348, 356 (2004),
22 *Simmons v. South Carolina*, 512 U.S. 154, 169-170, n. 9 (1994). Without testimony, the
23 courts focus solely on the CJP and do not address the fact that numerous other
24 independent studies find similar problems with the death penalty process. In all areas of
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1 scientific inquiry, this kind of replication or convergent validity provides important
 2 grounds for confidence in the validity of the results. The opinions also were not informed
 3 by a 2010 article that includes further analysis buttressing the results and reveals that
 4 every single one of the close to 1200 jurors made mistakes in at least one of the six areas
 5 reflecting constitutional shortcomings, that the average number of mistakes was four, and
 6 that the probability of getting 12 jurors in any case that followed all the rules was zero.¹
 7 One of the criticisms in the court opinions is that the defendant did not show how the CJP
 8 results related to the case or statute before the court. It is true that the published articles
 9 usually do not discuss details relating to a specific case or statute, but an evidentiary
 10 hearing would allow the defense to make that connection.
 11

12
 13 12) The articles describing the research results are written for social scientists, and
 14 include a lot of technical language and often do not explicitly describe how the results
 15 relate to specific legal issues. My testimony includes references to over 35 articles, and it
 16 allows me to explain which articles relate to which issues, how the research relates to the
 17 legal issues, and how convergent validity buttresses the credibility of the findings. An
 18 evidentiary hearing would provide an opportunity to explain the findings and their
 19 relevance.
 20

21 13) I have been consulted by Christopher Monfort's attorneys to assist in a challenge to
 22 Washington's death penalty scheme. I have been asked to review Washington's statutes,
 23 caselaw and jury instructions pertaining to capital cases and assist counsel in
 24 demonstrating for the Court how the CJP findings apply to Washington's death penalty
 25 scheme. My testimony will assist counsel in challenging the scheme not only under the
 26

27
 28 ¹ W. Bowers, W. Foglia, S. Ehrhard-Dietzel, and C. Kelly, *Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence*, 46 *Crim. Law Bull.*, 1147, at 1208-09

1 8th and 14th Amendments to the United States Constitution, but under the Washington
2 Constitution as well.

3 14) Bowers and Foglia (2003) identify “seven different problems with the capital jury
4 decision making process” which would apply to the Washington death penalty scheme.²

5 I will summarize the problems below, but would be able to explain in much more detail if
6 there is an evidentiary hearing.

7
8 Based on the logic of probability sampling, with the CJP sample size of 1198, the
9 95% confidence interval for the percentage of jurors making each of the errors described
10 below is plus or minus 3 percentage points or less³, and the 99.9% confidence interval is
11 plus or minus 4.5 percentage points or less. This means that when we find, for example,
12 49.2% of the jurors decide the sentence during the guilt phase, there is only a 1 in 20
13 chance that the percentage would be less than 46.2% or more than 52.2%, and a 1 in 1000
14 chance that it would be less than 44.7% or more than 53.7%, respectively.

15
16 I present the percentage of jurors exhibiting these seven different problems
17 below.⁴ The remarkable consistency in the problems found in every state, regardless of
18 geographic location or statutory scheme, makes the results from all fourteen states
19 relevant to death penalty cases throughout the country. For any given item, statistics are
20 presented for valid responses, meaning all answers except those with missing data.

21 a) Premature Decision-Making: All jurors were asked the following question:
22 “After the jury found [defendant’s name] guilty of capital murder but before you heard
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25 (2010).

26 ² Bowers and Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39
Criminal Law Bulletin 51, at 54 (2003).

27 ³ The highest sampling error would be for percentages close to 50% as in the example that follows in the text. The
further the percentage gets from 50%, either higher or lower, the lower the sampling error and thus the smaller the
confidence interval.

28 ⁴ Louisiana is not listed separately in the Tables because sampling goals were not met in that state.

1 any evidence or testimony about what the punishment should be, did you then think
 2 [defendant's name] should be given a death sentence, a sentence of life without the
 3 possibility of parole (or the alternative in that state), [or were you] undecided? The
 4 responses of the jurors are included below in Table 1 from Bowers and Foglia (2003).

5 Table 1: Percentage of Capital Jurors Taking Each Stand on Punishment Before
 6 Sentencing Stage Trial in 13 States

7 States	Death	Life	Undecided	No. of jurors
8 Alabama	21.2	32.7	46.2	52
9 California	26.1	16.2	57.7	142
10 Florida	24.8	23.1	52.1	117
11 Georgia	31.8	28.8	39.4	66
12 Indiana	31.3	17.7	51.0	96
13 Kentucky	34.3	23.1	42.6	108
14 Missouri	28.8	16.9	54.2	59
15 North Carolina	29.2	13.9	56.9	72
16 Pennsylvania	33.8	18.9	47.3	74
17 South Carolina	33.3	14.4	52.3	111
18 Tennessee	34.8	13.0	52.2	46
19 Texas	37.5	10.8	51.7	120
20 Virginia	17.8	31.1	51.1	45
21 All States	30.3%	18.9%	50.8%	1135

22 Nationwide, the percentage of jurors who were undecided before the sentencing
 23 phase began was 50.8%. Regardless of jurisdiction, at the end of the guilt phase only
 24 approximately half of these jurors maintain that they were undecided, or still had an open
 25 mind as required by law, on what sentence to impose. Nearly one-third nationwide have
 26 decided on death (30.3%), and 18.9% nationwide have decided on life prior to hearing
 27 evidence and instructions that are supposed to guide their sentencing decision.

28 Nationwide, most of the jurors who chose death said they were absolutely convinced
 (70.4%) about the punishment and nearly all the rest said pretty sure (another 27%).

The Washington college students had read and were given copies of the complete
 guilt and sentencing portions of the Washington Pattern Jury Instructions – Criminal, and

1 answered this identical question. The percentage saying that they thought the defendant
2 should be given a death sentence before they heard any evidence or testimony about what
3 the punishment should be was almost identical in Washington (32%) as it was in the
4 nationwide sample (30.3%). A significantly higher percentage of the college students
5 said the defendant should be given a life sentence: 48%. This left only 20% in
6 Washington who were undecided about sentence as they legally should be before the
7 sentencing phase had begun. Like the nationwide sample, college students who had
8 decided the sentence felt very strongly about their position. In Washington 70% said
9 they were "absolutely convinced" and 25% said they were pretty sure about their
10 premature decision. Those choosing death were significantly more sure of their positions
11 with 87.5% saying they were absolutely convinced (compared to 70.4% nationwide), and
12 all of the remaining 12.5% saying they were "pretty sure" (compared to 27%
13 nationwide). Among the Washington mock jurors prematurely choosing life these
14 numbers were 60% and 40%, respectively. In the interest of saving time, the remaining
15 questions discussed in this section and asked of the CJP jurors were not included in the
16 abbreviated questionnaire given to the Washington mock jurors, but the problem of
17 premature decision-making was very much evident among the Washington mock jurors.

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21 We asked our CJP jurors if they thought they knew what the punishment should be
22 at four different points in the process:

- 23 1) after the guilt phase but before the sentencing phase
24 2) after the sentencing instructions but before deliberations
25 3) at first vote
26 4) at final vote
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1 Bowers, Sandys, and Steiner⁵ present evidence showing that most of the early pro-death
 2 jurors never wavered from this position and maintained that the punishment should be
 3 death at all four points about which we inquired. Jurors who prematurely decided the
 4 sentence should be death were more likely to say they made their guilt and punishment
 5 decisions "together, on the basis of similar considerations." They also were most likely
 6 to say they first knew what the punishment should be during the guilt evidence. Those
 7 taking a premature death stance were more likely to see death as the only acceptable
 8 punishment for more types of murder, expressed stronger support for the death penalty,
 9 and were more likely to find the defendant guilty of capital murder. These jurors reported
 10 that during guilt deliberations, they were less likely to discuss issues such as burden of
 11 proof and degree of guilt and more likely to report that they discussed the impermissible
 12 topic of the sentence.
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15 These patterns confirm what social psychology research and common experience
 16 tells us: that once people form an opinion they tend to interpret subsequent information to
 17 support their position. Nearly half the jurors are deciding the sentence, and nearly one
 18 out of three jurors are deciding the sentence should be death, before the sentencing phase
 19 even begins so the statutes are not guiding their discretion and they cannot be giving
 20 meaningful consideration to the mitigating evidence presented during the sentencing
 21 phase.
 22

23 b) Bias in Jury Selection: According to Bowers and Foglia (2003), many of the
 24 jurors who served on the cases represented by the Capital Jury Project were in fact
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27 ⁵ Bowers, Sandys and Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial*
 28 *Experience, And Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998).

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Automatic Death Penalty jurors -- jurors who would vote for a sentence of death in every case in which they found the defendant guilty of a capital offense -- and thus should have been excused for cause.

All jurors were asked: "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes? Murder by someone previously convicted of murder; A planned premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer, and; A killing that occurs during another crime." As can be seen in Table 2 from Bowers and Foglia (2003), nearly three-quarters of the jurors, regardless of jurisdiction, felt that the death penalty is the only acceptable punishment for murder by someone previously convicted of murder.

Similarly, over half of the jurors felt that death is the only acceptable punishment for persons convicted of a planned premeditated murder or a murder with multiple victims.

Close to half thought death was the only acceptable punishment for killing a police officer or prison guard or a killing by a drug dealer. And nearly one-quarter of these jurors viewed death as the only acceptable punishment for a killing that occurs during another crime. Nationwide, the percentage saying death was unacceptable for any of these murders was under 4%. Jurors cannot give meaningful consideration to mitigating evidence if they believe death is the only acceptable punishment.

1 Table 2: Percentages of Jurors Considering Death the Only Acceptable Punishment
for Six Types of Murder by State

2	3	4	5	6	7	8	9
States	By defend- ant with prior murder conviction	Planned premed- itated murder	Murder with multiple victims	Killing police/ prison guard	Murder by drug dealer	Murder during another crime	N
Alabama	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
California	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
Florida	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
Georgia	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
Indiana	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
Kentucky	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
Missouri	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
North Carolina	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
Pennsylvania	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
South Carolina	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
Tennessee	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
Texas	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
Virginia	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

12 * The number of subjects answering each question varied slightly, and the number (N) for each
13 state is the lowest number of subjects answering any of the questions.

14 Although the above demonstrates that voir dire is not very effective at disqualifying
15 the ADP jurors, numerous studies show that it is so efficient at eliminating those with
16 reservations about the death penalty that it results in a jury that is more conviction and
17 punishment prone than a representative group of citizens. Prior studies comparing people
18 who would make it through death qualification (includables) with those who would be
19 struck from the jury (excludables) find that includables are significantly more conviction
20 and punishment prone than those who would be excluded.⁶ For example, compared to
21 those who would be excluded by the death qualification process, jurors who would be
22 death qualified are less likely to believe in criminal justice attitudes supporting due
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26 ⁶ See: Haney, Hurtado, and Vega, "Modern" Death Qualification: New Data On Its Biasing Effects, 18 Law &
27 Human Behavior 619 (1994); Cowan, Thompson, and Ellsworth, *The Effects Of Death Qualification On Jurors'*
28 *Predisposition To Convict And On The Quality Of Deliberation*, 8 Law & Human Behavior 53 (1984); Fitzgerald
and Ellsworth, *Due Process vs. Crime Control: Death Qualification And Jury Attitudes*, 8 Law & Human Behavior
31 (1984); Sandys and McClelland, "Stacking The Deck For Guilt And Death: The Failure Of Death Qualification
To Ensure Impartiality" (Chapter 13 in Acker, et al's "America's Experiment With Capital Punishment" 2d ed.),

1 process such as it is better to risk the guilty going free rather than to convict the innocent,
 2 are less likely to find evidence mitigating, and are more likely to find evidence
 3 aggravating. The percentages for CJP jurors, who obviously all made it through death
 4 qualification, are more similar to those for the includables as opposed to the excludables
 5 on the three questions we asked that are analogous to those asked in the earlier study by
 6 Haney, Hurtado, and Vega (1994). Most of these differences found by Haney et al.,
 7 between includable and excludable jurors remained significant, even after additional
 8 questions were asked to eliminate ADP jurors. A review conducted by Allen, Mabry, and
 9 McKelton (1998) of 14 different studies of how attitudes towards the death penalty relate
 10 to favoring conviction found an average correlation of .174 or a 44% increase in the
 11 probability of convicting among those who favored the death penalty.⁷

14 In addition, the death qualification process itself creates a bias against the defendant
 15 because all those questions about the death penalty at the outset of the process makes
 16 jurors think that the authority figures in the courtroom, the judge, prosecutor and defense
 17 attorney, must think the defendant is guilty and deserves death.⁸ Haney (1984a) shows
 18 that when two groups of people watch the same videotape of voir dire, except that one
 19 group also views a segment on death qualification, the people who viewed the death
 20 qualification are significantly more likely to vote for death. The Allen et al. (1998)
 21 review found that the studies that included some form of death qualifying voir dire found

24 (2003); Blume and Johnson, Threlkeld, "Probing Life Qualification Through Expanded Voir Dire," 29 Hofstra L.
 25 Rev. 1209 (2001); and articles cited therein.

26 ⁷ Allen, Mabry, and McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and
 Punishment: A Meta-Analysis*, 22 Law & Human Behavior 715 (1998).

27 ⁸ Haney, *On The Selection Of Capital Juries: The Biasing Effects Of The Death-Qualification Process*, 8 Law &
 28 Human Behavior 121 (1984a); Haney, *Examining Death Qualification: Further Analysis Of The Process Effect*, 8
 Law & Human Behavior 133 (1984b); and articles cited therein.

1 larger effects on the propensity to convict than studies that simply surveyed attitudes.
2 The stronger impact observed when voir dire was included is further evidence of the
3 process effect. The CJP interviews confirm results from prior studies that show that all
4 the questions about the death penalty at the beginning of the jurors' experience have a
5 biasing effect. We asked jurors whether these questions made them think the defendant
6 was guilty and should be sentenced to death. In response to both questions,
7 approximately 1 in 10 jurors were conscious of and willing to admit that all those
8 questions about the death penalty had an influence on them. When asked about the
9 impact of these questions, 11.3% of the jurors said the questions made them think the
10 defendant "must be" or "probably was" guilty, and almost as many, 9.2%, said the
11 questions made them think the appropriate sentence "must be" or "probably was" the
12 death penalty.
13
14

15 Again in the interests of saving time, the Washington mock jurors were not asked
16 the questions relating to the problems with jury selection. They were asked a question
17 about the choice of punishment based on the specific fact pattern they read: "Do you
18 believe that once you had convicted Mr. Johnson of this particular kind of murder, the
19 law of this state made the death penalty...." They could choose one of three options: (1)
20 "the only acceptable punishment," (2) "the most appropriate punishment," or (3) "just
21 one available punishment." The percentages giving each of these three responses were
22 3.8%, 42.3%, and 53.8%, respectively. The question the mock jurors answered is
23 substantially different than the questions about choice of punishment asked of the CJP
24 jurors because in Washington it was tied to an atypical fact pattern involving murders by
25 someone with no criminal record who claimed that he committed the murders in an
26 alcohol induced black out.
27
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1 The combined influence of each of the above findings from prior research creates a
2 profoundly pro-conviction/pro-death bias which permeates the guilt and penalty phases of
3 a capital defendant's trial.

4 c) Failure to Understand Instructions: One of the major tenets of guided
5 discretion statutes is that instructions would serve to channel discretion so as to remedy
6 arbitrariness in capital sentencing. Results from the Capital Jury Project suggest that
7 jurors do not understand the sentencing instructions; this is especially true of instructions
8 that are designed to guide jurors in their consideration of mitigating circumstances. The
9 CJP interviews confirm results from prior studies that show that many jurors do not
10 understand the guidance they are supposed to be following.⁹ As can be seen from Table
11 3 from Bowers and Foglia (2003), this is a significant problem in every state, regardless
12 of statutory scheme.
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15 Some of the guidelines will differ under various state statutes, but in every state
16 jurors have to be able to consider any relevant mitigating evidence because of the United
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19 ⁹ Bowers and Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing*,
20 39 *Crim. Law Bulletin* 51 (2003); Garvey and Marcus, *Virginia's Capital Jurors*, 44 *Wm. and Mary L. Rev.* 2063
21 (2003); Bentele and Bowers, *How Jurors Decide On Death: Guilt Is Overwhelming; Aggravation Requires Death;
22 And Mitigation Is No Excuse*, 66 *Brooklyn L. Rev.* 1011 (2001); Bowers, Fleury-Steiner, and Antonio, *The Capital
23 Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction* (chapter 14 from Acker,
24 Bohm, and Lanier, *America's Experiment With Capital Punishment*, (2d ed., 2003)); Bowers and Steiner, *Choosing
25 Life Or Death: Sentencing Dynamics In Capital Cases* (chapter 12 from Acker, Bohm, and Lanier, *America's
26 Experiment With Capital Punishment*, (1st ed., 1998)); Geimer and Amsterdam, *Why Jurors Vote Life Or Death:
27 Operative Factors In Ten Florida Death Penalty Cases*, 15 *Am. J. Crim. Law* 1 (1988); Haney, Sontag, and
28 Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death*, 50
Journal of Social Science Issues 149 (1994); Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of
Early Findings*, 70 *Ind. L. J.* 1043 (1995); Haney and Lynch, *Comprehending Life And Death Matters*, 18 *Law &
Human Behavior* 411 (1994); Haney and Lynch, *Clarifying Life And Death Matters: An Analysis Of Instructional
Comprehension And Penalty Phase Closing Arguments*, 21 *Law & Human Behavior* 575 (1997); Lynch and Haney,
Discrimination And Instructional Comprehension: Guided Discretion, Racial Bias, And The Death Penalty, 24 *Law
& Human Behavior* 337 (2000); Tiersma, *Dictionaries And Death: Do Capital Jurors Understand Mitigation?* 1995
Utah L. Rev. 1 (1995); Eisenberg and Wells, *Deadly Confusion: Juror Instructions In Capital Cases*, 79 *Cornell L.
Rev.* 1 (1993); and articles cited therein.

1 States Supreme Court case *Locket v. Ohio*, 438 U.S. 586 (1978). Nearly half of the CJP
 2 jurors nationwide (44.6%) failed to understand this. There also is United State Supreme
 3 Court case law that says jurors do not need be unanimous on findings of mitigation, but
 4 over 2 out of 3 jurors nationwide (66.5%) failed to understand they did not need to agree
 5 on whether evidence was mitigating (*McKoy v. North Carolina*, 494 U.S. 433 (1990) and
 6 *Mills v. Maryland*, 486 U.S. 367 (1988)). No state requires that mitigation be found
 7 beyond a reasonable doubt, but nearly half the jurors nationwide (49.2%) thought they
 8 had to apply that standard of proof to mitigating evidence. On the other hand,
 9 aggravating evidence does have to be proven beyond a reasonable doubt, and close to a
 10 third (29.9%) of the jurors failed to understand that part of the instructions. The statutes
 11 cannot be effectively guiding juror discretion when substantial portions of the jurors do
 12 not understand the jury instructions.
 13
 14

15 Table 3: Percentages of Jurors Failing to Understand Guidelines for Considering
 16 Aggravating and Mitigating Evidence

JURORS WHO FAILED TO UNDERSTAND THAT THEY...

	Could con- sider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitiga- tion beyond reas. doubt	Must find aggrava- tion beyond reas. doubt	N*
17 States					
18 Alabama	54.7%	55.8%	53.8%	40.0%	52
19 California	24.2%	56.4%	37.6%	41.7%	149
20 Florida	49.6%	36.8%	48.7%	27.4%	117
21 Georgia	40.5%	89.0%	62.2%	21.6%	73
22 Indiana	52.6%	71.4%	58.2%	26.8%	97
23 Kentucky	45.9%	83.5%	61.8%	15.6%	109
24 Missouri	36.8%	65.5%	34.5%	48.3%	57
25 North Carolina	38.7%	51.2%	43.0%	30.0%	79
26 Pennsylvania	58.7%	68.0%	32.0%	41.9%	74
27 South Carolina	51.8%	78.9%	48.7%	21.9%	113
28 Tennessee	41.3%	71.7%	46.7%	20.5%	44
Texas	39.6%	72.9%	66.0%	18.7%	47
Virginia	53.3%	77.3%	51.2%	40.0%	43
All States	44.6%	66.5%	49.2%	29.9%	1185

1 * The number of subjects answering each question varied slightly, and the number (N) for each
2 state is the lowest number of subjects answering any of the questions.

3 The mock jurors in Washington had similar problems interpreting the Washington
4 jury instructions. They actually did worse when it came to understanding how to handle
5 mitigating evidence, despite the facts that they were college students and thus more
6 educated than many jurors, actually in a paralegal program so should have more interest
7 in and understanding of the law, and could be expected to be biased towards the
8 defendant as nearly half of them (48.0%) expressed a predisposition for a life sentence at
9 the end of the guilt evidence (compared to only 18.9% of the national CJP jurors
10 prematurely choosing life). Nearly three quarters of the Washington sample failed to
11 realize they were able to consider any mitigating factor which made the crime not as bad,
12 which was substantially higher than the percentage getting this wrong nationwide
13 ((73.1% vs. 44.6%). As with the nationwide sample, we only considered them wrong
14 about the burden of proof for mitigation if they actually said it had to be proven beyond a
15 reasonable doubt, and again the Washington mock jurors were more likely to choose this
16 incorrect standard (61.5% vs. 49.2%). Similarly, Washington mock jurors were more
17 likely to fail to understand that they did not have to agree unanimously regarding
18 mitigation (79.2% vs. 66.5%). An additional question asked of the Washington sample
19 confirms this lack of understanding as 61.5% did not realize that one juror's belief in a
20 mitigating factor could be the basis for a life sentence. On the other hand, perhaps due to
21 their legal training, the Washington mock jurors were less likely to get the burden of
22 proof for aggravation wrong (15.4% vs. 29.9%). The better understanding of jurors in
23 general, and Washington mock jurors in particular, regarding applying this standard
24 probably is explained by the fact that aggravation and the beyond a reasonable doubt
25 standard are widely known concepts. On the other hand, the worse understanding with
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1 how to handle mitigation probably is due to the fact that mitigation is a less familiar
 2 concept, and it is less common in the criminal context not to require unanimity and proof
 3 beyond a reasonable doubt. The especially poor performance of the Washington mock
 4 jurors is not surprising because the standard in Washington is especially confusing by
 5 asking jurors to determine whether a negative event has occurred (“that there are not
 6 sufficient mitigating circumstances to merit leniency”), and including a reference to the
 7 beyond a reasonable doubt standard.
 8

9 d) Erroneous Beliefs that Death is Required: Beyond the issue of jurors failing to
 10 understand instructions, evidence from the Capital Jury Project reveals that sizeable
 11 percentages of jurors erroneously believe that death is required if certain aggravators are
 12 proved beyond a reasonable doubt. In particular, 43.9% of the jurors nationwide falsely
 13 believed that the law required them to impose death if the defendant’s conduct was
 14 “heinous, vile, or depraved.” In addition, 36.9% of jurors nationwide believed that the
 15 law required them to vote for death if the evidence proved that the defendant would be
 16 dangerous in the future. As Table 4 from Bowers and Foglia (2003) indicates, these
 17 misunderstandings were seen in every state, including states that did not even list these
 18 factors as aggravating circumstances.
 19
 20

21 Table 4: Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was
 22 Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*	
25	Alabama	56.3%	52.1%	48
26	California	29.5%	20.4%	146
27	Florida	36.3%	25.2%	111
28	Georgia	51.4%	30.1%	72
	Indiana	34.4%	36.6%	93
	Kentucky	42.7%	42.2%	109
	Missouri	48.3%	29.3%	58

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1	North Carolina	67.1%	47.4%	76
	Pennsylvania	56.9%	37.0%	73
2	South Carolina	31.8%	28.2%	110
	Tennessee	58.3%	39.6%	48
3	Texas	44.9%	68.4%	117
4	Virginia	53.5%	40.9%	43
5	All States	43.9%	36.9%	1136

6 * The number of subjects answering each question varied slightly, and the number (N) for each
7 state is the lowest number of subjects answering any of the questions.

8
9 Again, the Washington mock jurors were more likely to erroneously think the law
10 required death, despite the reasons mentioned above for expecting better understanding
11 from college students in a paralegal program, nearly half of whom prematurely chose a
12 life sentence for the defendant. If the defendant's conduct was heinous, vile or depraved,
13 57.7% of the Washington sample thought the law required death compared to 43.9% of
14 the national sample. For a defendant who would be dangerous in the future, the numbers
15 were 46.2% and 36.9%. Washington mock jurors were slightly more likely to think the
16 evidence they were given proved the defendant's conduct was heinous vile or depraved
17 (90.0% vs. 81.5%), and about equally likely to think the defendant would be dangerous in
18 the future (75.0% vs. 78.2%).

20 e) Evading Responsibility for the Punishment Decision: Yet another indication
21 that many jurors did not understand the sentencing process is their failure to understand
22 their responsibility for the defendant's punishment. The United States Supreme Court
23 warned in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) that jurors would be reluctant to
24 accept responsibility and that the sentence would be unreliable if jurors believed the
25 ultimate responsibility rested with others. The CJP interview instrument asked the jurors
26 to rank the defendant, the law, the juror, the jury and the judge in terms of how
27
28

1 responsible they were for the defendant's sentence. Table 5 from Bowers and Foglia
2 (2003) shows the responses to this question.

3 TABLE 5: Percent Ranking Five Sources or Agents of Responsibility for the
4 Defendant's Punishment from Most "1" to Least "5" Responsible

	MOST RESPONSIBLE>			<RESPONSIBLE	
	1	2	3	4	5
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					

16 * Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).
17

18 Over 80% of the jurors interviewed said the defendant (49.2%) or the law (32.8%)
19 was primarily responsible for the defendant's punishment. In contrast, only 5.6% said the
20 individual juror and only 8.9% said the jury as a whole were most responsible. Another
21 question in the national sample asked about how responsibility was allocated among the
22 jury, trial judge, and appellate judges and in the 10 states where the jury decision was
23 binding on the judges, only 29.8% believed the jury was strictly responsible. Nearly one
24 in five (17%) thought the responsibility was mostly in the hands of the judges.
25

26 Again, the percentages in Washington showed similar problems. The relative
27 ranking of which of the five choices was most responsible was nearly identical, except
28 jury and individual juror were tied. In Washington, primary responsibility was assigned

1 to the defendant by 61.5%, the law by 40.9%, the jury by 18.2%, the individual juror by
 2 18.2% and the judge by 8.7%. The percentages do not add up to 100 because some of the
 3 mock jurors marked multiple answers as most important or only chose one item as most
 4 important. The answer to the direct question about relative responsibility which asked
 5 how responsibility was allocated among the jury, trial judge, and appellate judges
 6 revealed that the understanding in Washington was nearly identical to the understanding
 7 throughout the nation. Less than a third (26.9% in Washington and 29.8% nationwide)
 8 believed the sentence was strictly the jury's responsibility, and about one in five (23.1%
 9 in Washington and 17% nationwide) thought the decision was mostly the responsibility
 10 of the judge and appeals court.
 11

12
 13 f) Racial Influence in Juror Decision Making: The responses of the CJP jurors
 14 adds to the existing evidence of how race still influences who gets the death penalty in
 15 this country. The United States General Accounting Office (GAO) review of prior
 16 research showed that 82% of the studies indicated that defendants were more likely to get
 17 the death penalty if the victim was white.¹⁰ The GAO review, as well as other research,
 18 has found that the death penalty also is more likely when the defendant is black, and
 19 especially likely when the defendant is black and the victim is white.¹¹ More recent
 20 research done by Baldus, as well as the CJP research, has found that the racial
 21 composition of the jury and the race of individual jurors influence capital sentencing
 22 decisions.¹² The CJP research has found that regardless of the race of the defendant and
 23
 24
 25

26 ¹⁰ U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities*
 (1990).

27 ¹¹ *Id.*; David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990); and
 Samuel R. Gross and Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* (1989).

28 ¹² David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical
 Analysis*, 3 U. Pa. J. Const. L. 3, 101, Table 10 (2001); William J. Bowers et al. *Death Sentencing in Black and*

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the victim, black jurors are more likely than white jurors to have lingering doubt and to think the defendant was sorry.

Some of the CJP most troubling results were found in cases involving black defendants and white victims. The CJP results revealed that when the defendant was black and the victim was white, the presence of five or more white males dramatically increased and the presence of at least one black male dramatically decreased the chance of a death sentence. Again in black defendant/white victim cases, black and white jurors sitting on the same cases interpreted the same evidence in very different ways. As shown by comparing the results for white male jurors with black male jurors in Table 6, the black male jurors were seven times more likely to have lingering doubt, six times more likely to think the defendant was not most responsible, five times more likely to think the defendant was sorry, two times as likely to identify with defendant or the defendant's family, half as likely to say "dangerous" described the defendant very well, and one-third as likely to give extremely low estimates of early release. These numbers show that the statutory guidance has not eliminated the impact of race on the death penalty process.

In the interest of saving time, the mock jurors in Washington were not asked any of the questions discussed in this subsection.

White: An Empirical Analysis of the Role of Jurors' Race and Jury Composition, 3 U. Pa. J. Constit. L. 171 (2001); Bowers and Foglia (2003)

Table 6: Elements of (a) Lingering Doubts (b) the Defendant's Remorse and Identification, and (c) Dangerousness and Early Release by Jurors' Race and Gender in Black Defendant-White Victim Cases

JURORS' RACE AND GENDER				
	White Males	White Females	Black Males	Black Females
LINGERING DOUBTS				
Importance of lingering doubts about the defendant's guilt for you in deciding on punishment				
VERY	0%	12.5%	26.7%	21.1%
FAIRLY	6.9%	0%	26.7%	15.8%
NOT VERY	6.9%	8.3%	0%	15.8%
NOT AT ALL	86.2%	79.2%	46.7%	47.4%
(No. of jurors)	(29)	(24)	(15)	(19)
When considering punishment, did you think the defendant might not be the one most responsible of the killing?				
YES	10.3%	4.0%	60.0%	36.8%
NO	86.2%	96.0%	40.0%	52.6%
NOT SURE	3.4%	0%	0%	10.5%
(No. of jurors)	(29)	(25)	(15)	(19)
REMORSE AND IDENTIFICATION				
1. How well does "Sorry for what s/he did" describe the defendant?				
VERY WELL	7.4%	20.0%	46.7%	31.6%
FAIRLY WELL	7.4%	0%	33.3%	21.1%
NOT SO WELL	33.3%	40.0%	6.7%	15.8%
NOT AT ALL	51.9%	40.0%	13.3%	31.6%
(No. of jurors)	(27)	(25)	(15)	(19)
Did you imagine yourself in the defendant's situation?				
YES	26.7%	28.0%	53.3%	31.6%
NO	73.3%	72.0%	46.7%	68.4%
(No. of jurors)	(30)	(25)	(15)	(19)
Did you imagine yourself in the defendant's family's situation?				
YES	30.0%	48.0%	80.0%	47.4%
NO	60.0%	48.0%	13.3%	47.4%
NOT SURE	10.0%	4.0%	6.7%	5.3%
(No. of jurors)	(30)	(25)	(15)	(19)
DANGEROUSNESS AND EARLY RELEASE				
"Dangerous to other people" describes the defendant				
VERY WELL	63.3%	52.0%	26.7%	42.1%
FAIRLY WELL	30.0%	32.0%	53.3%	36.8%
NOT SO WELL	3.3%	8.0%	0%	10.5%
NOT AT ALL	3.3%	8.0%	20.0%	10.5%
(No. of jurors)	(30)	(25)	(15)	(19)
How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?				
0-9 YEARS	30.0%	17.6%	7.7%	7.1%
10-19 YEARS	30.0%	52.9%	30.8%	57.1%
20+ YEARS	40.0%	29.4%	61.5%	35.7%
(No. of jurors)	(20)	(17)	(13)	(14)

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1 g) Underestimating the Death Penalty Alternative: There is an abundance of
 2 research, including CJP data, showing that most capital jurors grossly underestimate how
 3 long someone not sentenced to death usually spends in prison, and the lower their wrong
 4 estimates, the more likely they are to vote for death.¹³ A review of Gallup Polls done by
 5 Gross (1998)¹⁴ shows that between 1991 and 1998, when support for the death penalty
 6 was between 70 an 80%, support dropped 15-20% when LWOP was offered as an
 7 alternative. Polls from 2006 show that this pattern persists. While support for the death
 8 penalty was between 65 and 67% in the 2006 polls, when LWOP is offered as an option,
 9 support falls to 47% (most recent Gallup Polls do not ask about LWOP, but 2011 overall
 10 support was not much different at 61% in 2011 compared to 65-67% IN 2006). Like the
 11 general public, jurors are more likely to support the death penalty when they think
 12 defendants not sentenced to death will be released from prison.

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 14
 15 Table 7 from Bowers and Foglia (2003) shows that in every state, most of the CJP
 16 jurors believed most defendants would be released before they were even eligible for
 17 parole, even in the states that had Life Without Parole (LWOP) at the time of the
 18 interviews. The median estimate for when most defendants get released was 15 years.
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 21 ¹³ Bowers and Foglia (2003); Bowers and Steiner, *Death By Default: An Empirical Demonstration Of False And*
 22 *Forced Choices In Capital Sentencing*, 77 Texas L. Rev. 605 (1999); Bowers, *The Capital Jury Project: Rationale,*
 23 *Design, And Preview Of Early Findings*, 70 Ind. L. J. 1043 (1995); Bowers and Steiner, *Death By Default: An*
 24 *Empirical Demonstration Of False And Forced Choices In Capital Sentencing*, 77 Texas L. Rev. 605 (1999);
 25 Steiner, Bowers, and Sarat, *Folk Knowledge As Legal Action: Death Penalty Judgments And The Tenet Of Early*
 26 *Release In A Culture Of Mistrust And Punitiveness*, 33 Law & Society Rev. 461 (1999); Foglia, *They Know Not*
 27 *What They Do: Unguided And Misguided Discretion In Pennsylvania Capital Cases*, 20 Justice Quarterly 187
 28 (2003); Haney, *Violence And The Capital Jury: Mechanisms Of Moral Disengagement And The Impulse To*
Condemn To Death, 49 Stan. L. Rev. 1447 (1997); Blume, Garvey, and Johnson, *Future Dangerousness In Capital*
Cases: Always 'At Issue,' 86 Cornell L. Rev. 397 (2001); and Bowers and Steiner, *Choosing Life Or Death:*
Sentencing Dynamics In Capital Cases (chapter 12 from Acker, Bohm, Lanier, *America's Experiment With Capital*
Punishment, (1st ed., 1998))

¹⁴ Gross, *Update: American Public Opinion on the Death Penalty-Its Getting Personal*. 83 Cornell Law Review
 1448 (1998); see also William J. Bowers, Margaret Vandiver and Patricia H. Dugan, *A New Look at Public Opinion*
on Capital Punishment: What Citizens and Legislators prefer, 22 American Journal of Criminal law 77 (1994).

The median for Washington mock jurors was considerably higher at 42.5 years, but 3.8% said 5 years, another 3.85 said 10 years, and 15.4% said 20 years.

The higher median for the Washington mock jurors might be because they were college students, and generally younger (the median age was 29.5). Because they were younger they might have had less exposure to stories about people sentenced under prior laws that allowed early release. Older jurors often remember hearing about people with prior murders killing again, and do not realize that those defendants probably were sentenced under older laws or originally convicted of a lesser degree of murder. Memories of such news stories makes many jurors distrust the system, as will be seen in the discussion below of California jurors who were told that life meant no parole, but "still don't trust anybody about it."

TABLE 7: Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

YEARS IN PRISON IF NOT GIVEN DEATH

State	Median estimate*	(N)	Mandatory minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	20.0	(75)	30
Kentucky	10.0	(74)	12, 25***
Missouri	20.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania	15.0	(63)	LWOP
South Carolina	17.0	(99)	30
Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All states	15.0	(943)	---

*Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."

**These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.

1 ***Kentucky gives capital jurors different sentencing options with 12 years and 25 years before
2 parole eligibility as the principal alternatives (See Bowers and Steiner 1999, supra at 646 n.198).

3 Bowers and Steiner (1999) show that jurors who espouse extremely low estimates
4 are more likely than those giving the more realistic estimate of 20+ years to choose death
5 at all four points about which we inquired. The difference in the percentage choosing
6 death between those with low and high estimates actually gets more pronounced as the
7 trial progresses, which is consistent with jurors narrative reports that the dangerousness
8 of the defendant if released is a dominant topic in deliberations. The more jurors
9 underestimate when defendants usually get released, the more likely they are to
10 consistently take a stand for death and ultimately vote for death.
11

12 The United States Supreme Court cited some of the earlier CJP research in
13 *Simmons v. South Carolina*, 512 U.S. 54 (1994) where it held that if the alternative to
14 death was LWOP and the prosecution argued the defendant would be dangerous in the
15 future, then the jury must be informed that the defendant could not be paroled. Now all
16 but one state provide LWOP for at least some capital offenses, and all but one require
17 that the jury be told when parole is not an option. However, the early CJP data show that
18 it is difficult to convince jurors that the defendant really will not be released on parole.
19

20 In interviews with California jurors who were told that a life sentence meant the
21 defendant would not be paroled, some jurors said they simply did not believe what the
22 judge told them. One typical juror in a death case said he believed defendants usually get
23 released in fifteen years even though he observed that officially they say the sentence is:
24

25 Life imprisonment, but even though now it says without possibility of parole, we
26 were still concerned that someday he'd get out on parole. We didn't want him out
27 again at all.

28 Another juror who ultimately voted for death said:

1 I was undecided. I had a personal problem with the life sentence, but then the judge
2 explained to me that if he gets a life sentence there was absolutely no chance that he
3 would get out. I thought he might get out. I still don't trust anybody about it.

4 In California, 32.9% of the jurors who actually voted for death said they would
5 have preferred life without parole if it had been an alternative, as indeed it was in the
6 cases they decided. As previously mentioned, jurors are influenced by memories of
7 media accounts of murderers who have been released from prison, and do not realize that
8 these may have been people sentenced under prior laws or people who had not been
9 convicted of capital murder. It is very difficult to convince jurors that life really means
10 life because of the widespread distrust of the criminal justice system. As Bowers and
11 Foglia note "[b]oth statistical analyses and jurors' narrative accounts of the decision
12 process demonstrate that these unrealistically low estimates made jurors more likely to
13 vote for death," (2003 at 82).

14
15 15) The transcript of *State of Washington v. Joseph McEnroe and Michelle K.*
16 *Anderson*, King County, WA, No. 07-C-08717-4 SEA and No. 07-C-08717-2 SEA, dated
17 January 25, 2012, provides additional evidence of why live testimony is needed.

18 a) On page 13, after defense counsel has explained that half the jurors decide the
19 sentence during the guilt phase and that most of those choosing death do not change their
20 mind, the Court points out that some jurors did change their minds. While this is true, it
21 is not really the issue. First I would have been able to reference evidence from our
22 interviews that many who changed their vote indicated that they did not really change
23 their opinions; rather they just changed their votes to avoid a hung jury. I also would have
24 been able to point out that there is additional evidence from the CJP showing that those
25 who prematurely decide death are significantly less receptive to mitigation evidence
26 compared to other jurors.¹⁵ Even though some are capable of being convinced to change
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28 ¹⁵ Thomas W. Brewer, *The attorney-client relationship in capital cases and its impact on juror receptivity to mitigation evidence*. 22(3) Just. Quarterly. 340 (2005).

1 their votes to life, it will be more difficult to change their opinions than it would be if
2 they were as open minded as the United States Supreme Court requires. I also would
3 have been able to discuss a study done by Costanzo and Costanzo¹⁶ that found that 26%
4 of Oregon jurors said they did not even need to hear evidence at the penalty phase
5 because after hearing about the crime they had already decided the defendant deserved to
6 die. I could have discussed the research on cognitive dissonance¹⁷ which demonstrates
7 that once a person forms an opinion they tend to ignore evidence that contradicts that
8 opinion. This research, along with other studies, shows that the United States Supreme
9 Court's fear that "a juror who has formed an opinion cannot be impartial," was well
10 founded.¹⁸

11 b) The discussion in the transcript of the problems with the jury selection process
12 also demonstrates that live testimony would have added relevant information. Live
13 testimony would have included evidence that jurors said that death was the only
14 acceptable punishment for the very crimes they were judging. I also would be able to
15 discuss evidence that jurors who said death is the only acceptable punishment are
16 significantly less likely to find specific types of mitigating evidence actually mitigating. I
17 would have been able to discuss other studies that find the composition and process
18 effects, and how these effects not only make the jury more likely to impose death, but
19 also more likely to find a defendant guilty. Live testimony would include more
20 information about why we are better at "death qualifying" than "life qualifying," why the
21 composition and process effects occur, and what can be done to at least partially
22 ameliorate their impacts.

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26 ¹⁶ Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151 (1994).

27 ¹⁷ Leon Festinger, *A theory of Cognitive Dissonance* (1957).

28 ¹⁸ Reynolds v. United States, 98 U.S. 145, 155 (1879), cited in Morgan v. Illinois, 504 U.S. 719, 727 (1992).

1 c) Regarding the third issue, relating to understanding of sentencing instructions,
2 live testimony would have included more details than what was discussed in the
3 transcript. Live testimony would have been able to show that the problems with how to
4 treat mitigation occurred in every state, regardless of what type of sentencing instructions
5 they use, and would have also included the fact that almost a third of the jurors failed to
6 realize that aggravating evidence needed to be proven beyond a reasonable doubt. It also
7 would have been able to discuss the numerous other studies, done with both actual capital
8 jurors and mock jurors, that consistently find significant proportions of jurors failing to
9 understand the instructions that the United States Supreme Court assumes is guiding their
10 discretion.

11 d) The discussion of jurors' erroneous views on when the law required the death
12 penalty also would have benefited from live testimony. The defense attorney did an
13 impressive job of explaining a lot of complex evidence, but the reference to 36% of the
14 "other" jurors is not correct. Both percentages are based on the total sample. It also
15 would have been helpful to know that large percentages of jurors thought that the
16 evidence proved the defendant's conduct was heinous, vile, or depraved and/or the
17 defendant would be dangerous in the future so that they would actually be applying their
18 erroneous assumptions. It also would have been helpful to know things such as over half
19 the jurors thought death was required in at least one of these two situations.

20 e) The discussion in the transcript regarding jurors' failure to take responsibility
21 for the sentence provides especially strong evidence for why live testimony is needed.
22 The Court and the defense attorney got into a debate over the use of the word punishment
23 versus sentence and, as the defense attorney pointed out, if I was testifying I could have
24 explained the choice of language. Furthermore, the Court points out on page 20 that
25 there is another question about relative responsibility that provides more direct evidence
26 regarding jurors' views of their responsibility for the punishment. I agree that this
27 question provides better insight and include the results from that question in my
28 testimony.

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f) The debate over how to handle jurors' assumptions that defendants sentenced to life without parole may get released also would have benefited from live testimony. I could have emphasized that our question asked how long defendants "usually" spend in prison, not whether they ever got released. I also could have discussed quotes from our jurors that demonstrated that even when the judge tells them there is no parole, they don't believe it (e.g., "I thought he might get out. I still don't trust anybody about it.").

g) The defense attorney in Anderson does a good job of summarizing the extent of the constitutional violations, but I would have been able to add the finding that every single one of the 1198 jurors we interviewed made mistakes in one of the six areas involving constitutional failures. I would have been able to present the average, median and modal number of mistakes as well as explain why the probability of getting a jury of 12 people who follow the United States Supreme Court requirements is zero. The importance of this issue is reflected in the emphasis the prosecution placed on what is a constitutionally acceptable level of risk. In my testimony I discuss *Boyd v. California*, 494 U.S. 370, at 380 (1990) where the Court establishes a reasonable likelihood standard: "...the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the *Eighth Amendment* if there is only a possibility of such an inhibition." Although the Court explicitly states that the defense need not prove mistakes are more likely than not, the CJP percentages demonstrate that the probability of mistakes actually is more likely than not and clearly meets the reasonable likelihood standard.

h) In the Anderson transcript, the Court compares the difficulties jurors have following jury instructions in non-capital cases to the difficulties in capital cases. I would have been able to discuss the psychological differences between making a factual determination, as is done in non-capital cases, as opposed to the value laden judgment of

1 the relative merit of aggravating and mitigating evidence involved in determining
2 whether another human being deserves to live or die.

3 i) In the transcript on page 52, the prosecution asserts that the questions about
4 whether the death penalty is required are irrelevant because "(t)hose questions are taken
5 from statutes in other states where jurors actually have to answer questions regarding
6 whether the crime was vile, heinous, depraved, or whether the defendant presents a future
7 danger." If I had been able to testify, I would have been able to point out that this
8 statement simply is not true. Those issues are aggravating factors in some of the states
9 where we conducted interviews, but they are NOT mentioned in some of the other states
10 (for example they are not mentioned in Pennsylvania) and the percentages are substantial
11 regardless of whether they are mentioned in the statute.

12 j) Live testimony also would have been able to clarify why the CJP evidence is
13 not barred by *McClesky v. Kemp*, 478 U.S. 1019 (1986), and why the sort of weighting
14 done there was not appropriate in the CJP context, as the prosecution alleges. *McCleskey*
15 *v. Kemp* involved archival research from which inferences were drawn. This is very
16 different from actual statements from actual jurors. Furthermore, I would have been able
17 to demonstrate that the United States Supreme Court has conclusively answered the
18 question of whether CJP evidence can be considered by citing it themselves in *Schiro v.*
19 *Summerlin*, 542 U.S. 348, 356 (2004) and *Simmons v. South Carolina*, 512 U.S. 154,
20 169-170, n. 9 (1994).

21 k) Live testimony would also have been able to explain why the prosecution's
22 reference to what the Court said in *McClesky v. Kemp* was inapplicable here. The state's
23 obligation to narrow the class of defendants eligible for the death penalty is different
24 from guiding the juror's discretion to decide who deserves the death penalty among those
25 death eligible. *Gregg v. Georgia*, 428 U.S. 153 (1976), and companion cases clearly held
26 that the death penalty is only constitutional if juror discretion is guided. When over half
27 the jurors do not understand the guidance, and when this happens in every state studied,
28 regardless of the type of statute used in the state, the statutes are failing to guide juror

1 discretion. The CJP did not find isolated examples of mistakes. It found overwhelming
2 percentages in every state not following the law.

3 1) If I had been allowed to testify I would have been able to answer the Court's
4 question about whether any of the cases from which CJP jurors were drawn were
5 challenged or reversed based on the CJP findings. The answer is no, even though some
6 jurors indicated that they wished that was possible. The research methodology that was
7 approved by the National Science Foundation and numerous Institutional Review Boards
8 required that all jurors be anonymous, that the cases not be identified individually, that all
9 results be reported as aggregate totals, and that nothing be used to disturb existing
10 verdicts.

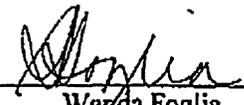
11 16) The prevalence of the problems revealed by the research needs to be emphasized.
12 For the six issues reflecting direct evidence of violations of constitutional standards,
13 nearly half the jurors or more were at odds with the law in our national sample: 49.1%
14 decided the punishment decision during the guilt phase, 80.0% saw death as the "only
15 acceptable" punishment for at least one of the types of murder most often death-eligible,
16 83.1% misunderstood at least some of the sentencing instructions, 50.2% erroneously
17 believed that death is required when certain aggravators exist, 82.0% saw others as more
18 responsible for the punishment decision than themselves, and 58.5% underestimated the
19 length of time served for persons not sentenced to death. Every one of the 1198 jurors
20 interviewed was wrong about at least one of these constitutional requirements. The mean
21 (average), modal (most common number jurors got wrong) and median (number at least
22 half got wrong) were four. Without even counting the jurors who could not answer all
23 the questions, we see that 34.4% got questions wrong in four of these areas and 70.9%
24 were wrong in four or more areas.
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17) I believe that an evidentiary hearing on this issue is crucial because my testimony is based on over 35 scholarly articles written by myself, other CJP researchers, and other researchers not associated with the CJP who have found similar problems with the way jurors make decisions in death penalty cases. Different articles relate to one or more of the seven problem areas about which I testify, and contain summaries of the results. However, the articles do not contain some of the information about methodology about which I testify, and sometimes the relevance of the results to specific legal issues is not explicit in these articles which are largely written for social scientists. The articles also include information that is not relevant to legal problems with juror decision-making, and it is helpful to use the testimony to focus on what is relevant. My experience has been that the prosecution feels the need to cross examine me regarding the research results, and often the judge asks for recommendations for how some of the constitutional problems can be minimized. An evidentiary hearing also would allow me to explain how the results apply to Washington's death penalty procedure, which of course is not discussed in the articles.

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

8-29-12 Bala Lynwood, PA
Date and Place signed


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EDUCATION

Ph.D. Criminology, The Wharton School of the University of Pennsylvania, Phila., PA 1996
 Dissertation: *Exploring the Interaction of Cognitive and Social Learning Influences to Enhance Understanding of Self-Reported Delinquency Among Inner-City Youth*
 Dissertation Advisor: Professor Marvin E. Wolfgang

J.D. University of Pennsylvania Law School, Phila., PA 1982

M.S. Criminology, The Wharton School of the University of Pennsylvania, Phila., PA 1990

B.A. Psychology/Certificate in Criminal Justice, Rutgers College, New Brunswick, NJ 1979
Honors: Graduated with Highest Honors, Henry Rutgers Scholar, Awarded High Distinction in Psychology for Honors Thesis, Member of Psi Chi (Psychology Honor Society), Dean's List Each Semester, Ranked 11th out of 1500

EMPLOYMENT

Professor of Law & Justice Studies, Rowan University
 Coordinator for the Master of Arts in Criminal Justice Program
 Research Interests: Capital Juror Decision-Making and Cognition and Crime
 Former Department Chair and Advisement Coordinator; Member of Advisory Board for Women's Studies; Founding Member of Advisory Board for *Faculty Center for Excellence in Teaching and Learning*; Elected to *Who's Who Among America's Teachers*; and various other department and college committees listed below; Teaching Graduate courses (Contemporary Developments in Theory, Law and Society, Race, Ethnicity, Class and Crime) and Undergraduate courses (Theories of Crime & Criminality, Treatment of the Offender, Corrections, Research Methods, Survey of Criminal Justice and Policing), including writing intensive and Rowan Seminar courses, 1994 to present

Teaching Fellow, Department of Legal Studies, The Wharton School
 Taught Criminology, 1988 to 1994; Coordinated filming of instructional videotapes on business ethics, 1993

Research Assistant to Professor Thomas W. Dunfee, The Wharton School
 Researched and edited articles and books on social contracts, societal norms, and legal and business ethics, 1991 to 1994

Administered Project to Integrate Ethics into the Undergraduate Curriculum, The Wharton School - Coordinated faculty and teaching materials, and edited and wrote portions of report on project, 1991 to 1993

Instructor, Municipal Police Training Program, Montgomery County Community College Municipal Police Training Program, Blue Bell, PA - Taught Antisocial Behavior and Law courses, 1987 to 1991

Adjunct Faculty

Saint Joseph's University, Philadelphia, PA, 1994

West Chester University, West Chester, PA, 1988

Montgomery County Community College, Blue Bell, PA, 1987

Paralegal Program, Career Institute, Philadelphia, PA, 1987

Taught Criminology, Criminal Justice, Criminal Procedure, Law Enforcement, and Law courses

Assistant District Attorney

Philadelphia District Attorney's Office, Philadelphia, PA

Prepared and tried misdemeanor and felony cases, 1984 to 1986

Associate, Litigation Department

Saul, Ewing, Remick & Saul, Philadelphia, PA

Handled civil and criminal caseload from inception to settlement or adjudication, 1982 to 1984

PUBLICATIONS

"Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence." *Criminal Law Bulletin* 46 (6): 1147-1229 (2010), with William J. Bowers, Susan Ehrhard, and Christopher E. Kelly.

Invited "Book Review of *The Death Penalty: A Worldwide Perspective*, by Roger Hood and Carolyn Hoyle," *International Criminal Justice Review* 20 (2): 214-5 (2010).

"They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases," *Justice Quarterly* 20(1):187-211 (2003), Reprinted in the 27th Annual Criminal Law Symposium of the Pennsylvania Bar Institute (2010).

"Failure to Follow the Law: Problems with Capital Juror Decision-Making," Invited article for *Section Connection: Civil Rights* 15 (1): 1-5, Winter (2008), Publication of the American Association for Justice.

Invited "Book Review of *Death by Design: Capital Punishment as a Social Psychological System*, by Craig Haney" *The Justice System Journal*, 29(3):443-446 (2008).

"The Decision-Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making," *Washington and Lee Law Review* 63(3):931-1010 (2006), with William J. Bowers, Jean Giles, and Michael E. Antonio,

"Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making," *Criminal Law Bulletin* 42(6):663-686 (2006), with William J. Bowers.

"Constitutional Problems with Capital Jurors' Decision-Making," *Pennsylvania Bar Institute's 22nd Annual Criminal Law Symposium 2*: DD1-DD13 (2005).

"They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases," *Justice Quarterly* 20(1):187-211 (2003).

"Still Singularly Agonizing: Failure of the Law to Guide Punishment Decisions of Capital Jurors," *Criminal Law Bulletin*, Invited Article for Symposium Issue 39(1):51-86, with William J. Bowers, (2003).

"Report on Bias in Capital Juror Decision-Making in Pennsylvania," Submitted in response to request by the *Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System* (2001).

Arbitrary and Capricious After All These Years: Constitutional Problems With Capital Jurors' Decision Making," *The Champion* Vol. XXV(6):26-31, with Nathan M. Schenker (2001).

"Sigmund Freud: Writings and Theories on Sexual Behavior," in *Encyclopedia of Criminology and Deviant Behavior*, Blacksburg, VA: Taylor & Francis (2000).

"Adding an Explicit Focus on Cognition to Criminological Theory," in *The Science, Treatment and Prevention of Antisocial Behaviors: Applications to the Criminal Justice System*, Boston, MA: Allyn & Bacon (2000).

"Perceptual Deterrence and the Mediating Effect of Internalized Norms Among Inner-City Teenagers," *Journal of Research in Crime and Delinquency*, 34(4): 414-42 (1997).

"Two-Way Communication Enhances Teaching & Learning," *The Communique*, Vol. 1(2): 2-3 (1996).

"Ethical Aspects of Japanese Leadership Style," *Journal of Business Ethics*, 13: 135-48 (1994), with Iwao Taka.

Integrating Ethics into Wharton Undergraduate Curriculum, Edited Report on Project and wrote Overview, Student Perspectives, Guidelines, and Conclusion sections. Philadelphia, PA: Wharton Reprographics (1992).

Letter to Congressional Subcommittee on Crime, Terrorism, and Homeland Security on Death Penalty's Lack of Deterrence which was requested by ACJS Liaison to Congress, made part of the Congressional Record, and reportedly resulted in bill to expand use of death penalty being allowed to die in committee, April 28, 2004.

"Responsibility for Deciding Who Dies," Presentation at 2003 Annual Meeting of the American Society of Criminology in Denver, CO with William J. Bowers.

"Capital Sentencing in Judge-Override States," Presentation at 2003 Annual Meeting of the Academy of Criminal Justice Sciences in Boston, MA with William J. Bowers.

"An Empirical Analysis of Capital Sentencing in Judge-Override States: Denying Responsibility, Rushing to Judgment, and Failing to Understand the Law," Invited Presentation at 2003 Annual Meeting of Eastern Sociological Society in Philadelphia, PA with William J. Bowers.

Expert Witness on Capital Jury Decision-Making in *California v. Scott Thomas Erskine*, No. SCD 161640, San Diego, CA, 2003.

Expert Witness on Capital Jury Decision-Making in *Commonwealth of Pennsylvania v. Mark Macomber*, No. 2414-02, West Chester, PA, 2003.

"Compelled by Law to Choose Death," Invited and funded presentation at a Conference sponsored by the Wayne Morse Center for Law and Politics entitled *The Law and Politics of the Death Penalty: Abolition, Moratorium or Reform* at University of Oregon, Eugene, OR (2002).

"Influence of Race on Capital Juror Decision-Making in Pennsylvania," Presentation at 2002 Annual Meeting of the Academy of Criminal Justice Sciences in Anaheim, CA.

"The Myth of Mitigation: Jurors' Failure to Understand and Apply the Law in Capital Cases," Presentation at 2002 Annual Meeting of the American Society of Criminology in Chicago, IL.

Expert Witness on Capital Jury Decision-Making in *State of Kansas v. Reginald Dexter Carr, Jr.* No.00CR2978, a death penalty case in Sedgwick County, KA, 2002.

Expert Witness on Death Qualified Jurors in *U.S. v. Cacerez*, 98CR000362013, U.S. District Court, Philadelphia, PA, 2002.

Expert Witness on Statistics on Age of Sex Offenders in *Commonwealth of Pennsylvania v. Arthur Hagen*, No. 2010-93, West Chester, PA, 2002.

Consultant for National Institute of Justice asked to peer review final report on NIJ funded research on jury decision-making, 2002.

"Mandatory Language in Pennsylvania Capital Statute Exacerbates Problems with Juror Decision-Making Process," Paper presented at 2001 Annual Meeting of American Society of Criminology in Atlanta, GA.

Invited Presentation at New Lisbon Boot Camp's Career and Transitional Fair, New Lisbon, NJ, 2001.

Invited Presentation at University of Pennsylvania's Faculty Conversation on the Academic Job Search and Academic Life, Philadelphia, PA, 2001.

"Constitutional Problems with Jury Decision-Making in Capital Cases," Paper presented at 2000 Annual Meeting of the Academy of Criminal Justice Sciences in New Orleans, LA and 2000 Rowan University Professional Conference.

Expert Witness on Juror Decision Making in *Commonwealth of Pennsylvania v. Charles Linton*, 1328-99, a death penalty case in West Chester, PA 1999.

Facilitator, Diversity Workshops, for staff of Philadelphia office of federal Department of Health and Human Services, 1999.

Interviewed about challenges facing NJ State Police Superintendent Carson Dunbar, for *Point of View*, cable news broadcast by Tri State Media, New Castle, DE, about, November 1, 1999.

Roundtable: Capital Jury Project Investigator's Review of State Variations in Decision Making, Invited participation in Roundtable at 1999 Annual Meeting of the American Society of Criminology in Toronto, CA.

"Capital Juror's Views on Relevance of Defendant's Background," Paper presented at 1999 Annual Meeting of the Academy of Criminal Justice Sciences in Orlando, FL.

Moderated Panel on Reconciling Rehabilitation and Retribution, Rowan University, Glassboro, NJ 1999.

"Adding an Explicit Focus on Cognition to Criminological Theory," Invited presentation on a Featured Panel at the 1998 Annual Meeting of the Academy of Criminal Justice Sciences in Albuquerque, NM.

"What is Excellence in Teaching?" Invited presentation for New Faculty Orientation sponsored by the Faculty Center for Excellence in Teaching and Learning at Rowan University, 1998.

Interviewed for "Youth Violence," by K. Lombardi, *Worcester News*, Worcester, MA 1998.

"Evaluating and Enhancing Law-Related Education's Impact on Prosocial Cognitions," invited presentation at 1997 Conference of the New Jersey Council for the Social Studies in Flemington, NJ.

The Extent Capital Jurors Consider the "Abuse Excuse," Paper presented at 1997 Annual Meeting of the American Society of Criminology in San Diego, CA.

Evaluation of Law-Related Education in Inner City High Schools Invited presentation at 1997 Annual Meeting of Northeastern Association of Criminal Justice Sciences in Bristol, RI, and presented at 1997 Rowan University Professional Conference.

Participated in Summer Institute, sponsored by the *New Jersey Project on Inclusive Scholarship, Curriculum, and Teaching*, and making presentation at Rowan University on strategies that include diverse student body, 1997.

How to Get Students Actively Engaged Invited presentation on panel on Active Teaching and Learning sponsored by the Faculty Center for Excellence in Teaching and Learning at Rowan College, 1997.

Roundtable: Capital Punishment-The Dynamics of Capital Sentencing Decisions: Influences and Arguments Invited participation in Roundtable at 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Roundtable: Capital Punishment-The Dynamics of Capital Sentencing Decisions: Cases in Point Invited participation in Roundtable at 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Life at Rowan College Invited presentation on what it is like to teach at a state school on a Panel on Life in Academia at the 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Principal Investigator coordinating Pennsylvania portion of Capital Jury Project, funded by the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

The Case for Law-Related Education Paper presented at 1996 Annual Meeting of Northeastern Association of Criminal Justice Sciences in Bristol, RI.

Scorekeeping Judge for the Philadelphia Moot Court Competition 1995 and 1996.

"Guest Scholar" on *American Alternatives: The National Conversation* broadcast on 3/22/95 entitled *Violence: Other Options*, sponsored by the New Jersey Council for the Humanities.

Moderator of Panel on Community Policing and Problem Solving Strategies at the 1996 Symposium sponsored by the New Jersey Criminal Justice Educators.

The Relation of Perceived Deterrents to Delinquent Behavior Among Inner-City Youth Paper presented at 1996 Annual Meeting of Academy of Criminal Justice Sciences in Las Vegas, NV.

Thinking & Experiencing: Adding Cognition to a Social Learning Model to Enhance Understanding of Self-Reported Delinquency Among Urban Youth, Paper presented at 1995 Annual Meeting of the American Society of Criminology, Boston, MA.

Interviewed about community reaction to violent events on *Good Day New York*, , April 4, 1995.

Exploring the Role of Internalized Norms in Deterring Crime, Paper presented at 1993 Annual Meeting of The American Society of Criminology, Phoenix, AZ.

Police Workshops on Managing Diversity, Co-facilitated two-day workshops for Lower Merion Police Department with Professor Louis H. Carter , 1993.

Advanced Ethnic Sensitivity Training, Co-facilitated two-day workshop for Philadelphia's Juvenile Probation Officers with Professor Louis H. Carter, 1993.

Relative Importance of Perceived Deterrents Among Incarcerated Juveniles, Paper presented at 1992 Annual Meeting of The American Society of Criminology, New Orleans, LA.

Police Workshops on Managing Diversity, Co-facilitated two-day workshops for University of Pennsylvania Police Department with Professor Louis H. Carter, 1992.

Law Related Education and Delinquency: Going Beyond Moral Reasoning, Paper presented at 1991 Annual Meeting of The American Society of Criminology, San Francisco, CA, with Jane Siegel.

Interviewed for "Unstable backgrounds often lurk behind violent events." By M. Friedman, *Jewish Exponent*, April 25, 1991, p. 8.

UNIVERSITY SERVICE

Coordinator, Master of Arts in Criminal Justice Program, 2007 to present

Chair, Masters Program Committee, 1998 to present

Promotion Committee, 1995-6, 2001 to present; Chair, 1995-1996

Tenure and Recontracting Committee, 2001 to present

Curriculum Committee, 2004 to present

Strategic Planning Committee, 2009 to present

Member of Advisory Panel for Women's Studies, 1998 to present

In-Person Registration, Open Houses, and/or Graduate Program Information Sessions, 1994 to present

Coordinator, Economics Department, 2008-2009

College of Liberal Arts and Sciences Representative to Graduate Executive Council, 2007-2008

College of Liberal Arts and Sciences Promotion Committee, 2000, 2004

College of Liberal Arts and Sciences Academic Dismissal Committee, 1998, 1999, 2002

Mentoring Program, 2000-2002

Imagine, 2002
 Assessment Committee, 1998-2002, 2010
 Founding Member of Faculty Center for Excellence in Teaching and Learning, 1995-2001
 Search Committee for Dean, College of Liberal Arts and Sciences, 1999
 Sabbatical Leave Committee, 1999
 Graduation Application Task Force, 1998
 Participated in NJ Project Summer Institute, 1997
 College Recruitment, Admissions, and Retention Committee, 1996-1998
 Professional Ethics/Welfare Standing Committee, 1998
 Chair, Law and Justice Studies Department, 1998-2001
 Advisement Coordinator, Law and Justice Studies Department, 1997-1999
 Re-establishing and Advising the Law and Justice Club and Honor Society, 1995-1998
 Co-Chair, Search Committee 1997-1999
 Senate Representative, 1998
 Department Webpage Committee, 1998-2009
 Organized Panel on "Reconciling Rehabilitation and Retribution, 1998-1999
 Departmental Representative to the College Curriculum Committee, 1996-1997
 Chair of Library Committee, 1995-1996
 Write to Learn Committee, 1994-1995

PROFESSIONAL AFFILIATIONS AND CERTIFICATIONS

Editorial Advisory Board for Journal of Criminal Justice Education Academy of Criminal Justice Sciences 2001-2003.
 Member of 2000-2001 Student Affairs Committee for the Academy of Criminal Justice Sciences
 Chair for 1999-2000 Publications Committee for the Academy of Criminal Justice Sciences
 Section Chair for 1998 Annual Meeting of the American Society of Criminology for section on Capital Punishment.
 Deputy Chair for 1998-99 Publications Committee for the Academy of Criminal Justice Sciences
 Reviewer for *Criminology: Theories, Patterns, and Typologies* at request of Thomson/Wadsworth, 2005
 Reviewer for *Criminology and Public Policy*, 2002
 Reviewer for *Journal of Criminal Justice Education*, 2001, 2002
 Reviewer for *Justice Quarterly*, 2002, 2003, 2004, 2005
 Reviewer for *Invitation to Corrections* at request of Allyn and Bacon Publishers 2000
 Reviewer for *Journal of Research in Crime and Delinquency*, 1999, 2002, 2004
 Chair of Committee on Constitution and By-Laws for the Northeastern Association of Criminal Justice Sciences 1996 to 1998.
 American Society of Criminology (1988 to present)
 Academy of Criminal Justice Sciences (1996 to present)
 Northeastern Association of Criminal Justice Sciences (1995 to present)
 New Jersey Association of Criminal Justice Educators (1996 to present)
 Member of Institutional Review Board for Joseph J. Peters Institute (1994 to present)

Admitted to Pennsylvania and Federal Bars in 1982

Certified by Municipal Police Officers' Education and Training Commission in 1987

Member of Juvenile Justice Committee, Phila. Citizens for Children and Youth (1987 to 1992)

Member of Board of Directors, Philadelphia Citizens for Children and Youth (1989 to 1992)

Chief Associate and Coordinating Editor, Journal of Criminal Law and Criminology (1989 to 1990)

Consulting Editor, Advances in Criminological Theory (1990 to 1994)

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

Case No: 09-1-077187-6 SEA

DR. WANDA FOGLIA'S POWERPOINT
PRESENTATION FOR DIRECT
EXAMINATION IN SUPPORT OF MOTION
TO DISMISS NOTICE OF SPECIAL
SENTENCING OR CONVENE SEPARATE
JURIES

Wanda Foglia, J.D., Ph.D.
Professor of Law & Justice Studies
Rowan University
Capital Jury Project Investigator
1996 to present

1

**Interviews with Capital Jurors Nationwide
Confirm
Previous Research Demonstrating:**

1. Premature punishment decision making
2. Jury selection fails to remove Automatic Death Penalty (ADP) jurors & creates bias
3. Failure to comprehend jury instructions
4. Erroneous beliefs regarding mandatory death sentences
5. Failure to recognize primary responsibility for sentencing decision
6. Influence of race
7. Underestimation of non-death sentencing alternatives

2

Prior Use of Social Science Research by the United States Supreme Court

- *Brown v. Board Of Education Of Topeka*, 347 U.S. 483 (1954)
- FN 11: K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

3

The CJP and the Supreme Court

- Lockhart v. McCree, 476 U.S. 162, 171 (1986)
 - All three of the [Post-Witherspoon death qualification] studies were based on the responses of individuals randomly selected from some segment of the population, but who were *not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant*. We have serious doubts about the value of these studies in predicting the behavior of actual jurors. (footnote omitted)

4

The CJP and the Supreme Court

- **Schriro v. Summerlin, 542 U.S. 348, 356 (2004)**
- "[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate." Citing, *inter alia*, Bowers, Sandys & Steiner, *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1495 (1998)
- **Simmons v. South Carolina, 512 U.S. 154, 169-170, n. 9 (1994)**
 n9 Public opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term "life imprisonment." Citing, *inter alia*, Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993); Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Society 157, 169-170 (1993).

5

Capital Jury Project Phase I Research Team

A consortium of eminent professionals in various fields organized for the purpose of determining whether the post-*Furman* reforms could constitutionally guide the decision-making of capital jurors

6

The Capital Jury Project

- The CJP is a continuing program of research on the decision-making of capital jurors.
- It was initiated in 1991 by a consortium of university-based researchers with support from the National Science Foundation (NSF).
- The findings of the CJP are based on 3-4 hour in-depth interviews with persons who have served as jurors in capital trials.
- The interviews chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

<http://www.albany.edu/scj/13194.php>

7

National Science Foundation

The National Science Foundation (NSF) is an independent federal agency created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense..." With an annual budget of about \$5.91 billion, we are the funding source for approximately 20 percent of all federally supported basic research conducted by America's colleges and universities. In many fields such as mathematics, computer science and the social sciences, NSF is the major source of federal backing.

Source: <http://www.nsf.gov/about/>

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Capital Jury Project Sample

- 14 States
 - Type of Statute (Narrowing, Balancing, Special Questions)
 - Region (Mid-Atlantic, Midwest, Southwest, and South)
- 353 Capital Murder Trials
 - 208 (58.8%) Death, 146 (41.2%) Life
- 1,198 Jurors
 - Randomly Selected Within Trials

9

Interviews with Capital Jurors Reveal:

1. Premature punishment decision making
2. Jury selection fails to remove Automatic Death Penalty (ADP) jurors & creates bias
3. Failure to comprehend jury instructions
4. Erroneous beliefs regarding mandatory death sentences
5. Failure to recognize primary responsibility for sentencing decision
6. Influence of race
7. Underestimation of non-death sentencing alternatives

10

Premature Punishment Decision Making

- *Gregg v. Georgia*, 428 U.S. 153 (1976) and its companion cases, mandate the sentencing decision be made at a separate penalty trial after the guilt determination

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Instrument Question

After the jury found (DEF) _____ guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think (DEF) _____ should be given . . .

- ___ a death sentence
- ___ a life (OR THE ALTERNATIVE) sentence
- ___ undecided

(IF A DEATH OR A LIFE SENTENCE,)

- a. How strongly did you think so?
 - ___ absolutely convinced
 - ___ pretty sure
 - ___ not too sure

Source: Capital Jury Project Survey Instrument, IIIB-12

12

Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage of the Trial in 13 States

States	Death	Life	Undecided	No. of Jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120
Virginia	17.8	31.1	51.1	45
All States	30.3%	18.9%	50.8%	1,135

Source: Bowers, William J. and Wanda D. Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." *Criminal Law Bulletin* 39:51-86. Table 1

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Jurors felt strongly about their pre-mature positions

- Of those who said Death:
- 70% "absolutely convinced" &
- +27% "pretty sure"
- 97%
- Only 3% said "not too sure"

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Study with Washington Pattern Instructions reveal similar results

- Survey of 26 paralegal students
 - aged 18-63
 - given facts of murder &
 - guilt and penalty WPIC
 - Premature Death = 32% (vs. 30.3%)
 - Premature Life = 48% (vs. 18.9%)
 - Undecided = 20% (vs. 50.8%)
 - 70% absolutely convinced &
 - +25% pretty sure
 - 95%

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153 interviews in CJP follow up study from trials between 1999-2009

- Study in progress of jurors in CA, DE, IN, LA, OK, PA, & TX
- Premature Death = 35% (vs. 30.3%)
- Premature Life = 16% (vs. 18.9%)
- Undecided = 49% (vs. 50.8%)
- 64% absolutely convinced &
- +32% pretty sure
- 96%

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TABLE 3
PUNISHMENT DECISION PATHWAYS OF JURORS WITH DIFFERENT STANDS
ON PUNISHMENT AT THE GUILT STAGE OF THE TRIAL

Death stand at guilt (n = 241)		Life stand at guilt (n = 169)		Undecided at guilt (n = 440)	
Pathways	Percent	Pathways	Percent	Pathways	Percent
DDDD	59.3	LLLL	60.4	UDDD	22.3
DDDL	19.3	LULL	9.6	UUDD	18.6
DUDD	5.8	LLLD	7.7	UULL	15.5
		LDDD	5.3	ULLL	10.5
				UUUD	10.0
				UUUL	6.6

Note: The four step pathways are represented by four character strings of the following letters: "D" for death, "L" for Life, and "U" for undecided, at the four successive points in the decision process.

Source: Bowers, William J., Marla Sandys, Benjamin Steiner (1998).
 "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making." *Cornell Law Review* 83:1476. 17

Table 4
Percent Saying Its Guilt And Punishment Decisions Were Made
On The Basis Of The Same Or Different Considerations

Basis of guilt and punishment decisions	Death (n = 244) (%)	Undecided (n = 443) (%)	Life (n = 170) (%)
Together, on the basis of similar considerations	43.9	17.6	31.8
Separately, on the basis of different considerations	48.4	73.1	58.2
Not sure, can't choose	7.8	9.3	10.0

Source: *Jurors Foreclosed Impartiality* (1998), pg. 1493

Source: Bowers, William J., Marla Sandys, Benjamin Steiner (1998). "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making." *Cornell Law Review* 83:1476. ¹⁸

Table 5
When Jurors First Thought They Knew What The Punishment Should
Be Among Those Who Took A Death Or Life Stand On Punishment At
The Guilt Stage Of The Trial

	Death (n = 227) (%)	Life (n = 146) (%)
Prior to opening statements	1.8	6.2
Guilt evidence	51.6	39.0
Closing arguments	6.6	2.1
Judge's instructions	5.3	3.4
Jury deliberations	10.1	28.1
After guilt verdict	14.5	15.1
Indeterminate	7.0	6.2

NOTE: Some 20 early pro-death and 25 early pro-life jurors who gave no response are excluded from the percentages.

Source: Jurors Foreclosed Impartiality (1998), pg. 1495

Source: Bowers, William J., Marla Sandys, Benjamin Steiner (1998). "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making." Cornell Law Review 83:1476. ¹⁹

TABLE 7
INDEX OF DEATH AS THE ONLY ACCEPTABLE PUNISHMENT ["DOAP"] BY STAND ON
PUNISHMENT AT GUILT STAGE OF TRIAL

Score on DOAP index (number of "only acceptable")	Death (n=235) (%)	Undecided (n=428) (%)	Life (n=166) (%)
0-1	14.9	38.1	48.2
2-3	22.6	21.3	19.9
4-5	28.0	22.0	23.5
6-7	36.6	18.7	8.4

Source: Bowers, William J., Marla Sandys, Benjamin Steiner (1998). "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making." Cornell Law Review 83:1476. ²⁰

TABLE 8
JURORS AGREEMENT WITH DEATH PENALTY BELIEF STATEMENTS BY
STAND ON PUNISHMENT AT GUILTY STAGE OF TRIAL

Belief statements	Death (%)	Undecided (%)	Life (%)
* You wish we had a better way than the death penalty of stopping murders			
Strongly agree	51.9	60.1	60.9
Agree moderately or slightly	23.5	22.9	22.2
Do not agree	24.7	17.0	17.4
The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes			
Strongly agree	52.5	44.7	53.8
Agree moderately or slightly	31.0	36.9	33.1
Do not agree	16.5	18.3	13.3
If the death penalty were enforced more often there would be fewer murders in this country			
Strongly agree	30.5	30.3	31.7
Agree moderately or slightly	25.8	30.5	27.7
Do not agree	20.6	39.2	38.6
Defendants who can afford good lawyers almost never get a death sentence			
Strongly agree	25.5	18.2	28.9
Agree moderately or slightly	33.3	35.7	33.5
Do not agree	41.2	46.1	36.6
The death penalty should be required when one is convicted of a serious intentional murder			
Strongly agree	53.3	37.0	32.9
Agree moderately or slightly	25.5	28.0	25.1
Do not agree	16.2	34.9	41.9
You have recent doubts about death as punishment			
Strongly agree	6.2	12.6	21.6
Agree moderately or slightly	17.3	28.0	22.8
Do not agree	76.5	51.4	55.7

NOTE: The percentages are based on numbers within the following ranges: death, 347 to 348; undecided, 438 to 442; life, 170 to 171 (Cornell L. Rev., 1995)

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TABLE 10
JURORS' STANDS ON GUILT AT SEVERAL POINTS DURING THE GUILTY
TRIAL BY THEIR EARLY STANDS ON PUNISHMENT

	Stand on punishment prior to penalty trial (%)		
	Death (n=243)	Undecided (n=431)	Life (n=167)
After you heard the judge's instructions to the jury for deciding guilt, but before you began deliberating with the other jurors, did you then think the defendant was . . .			
Guilty of capital murder	81.1	60.3	44.9
Guilty, but not of capital murder	3.3	10.2	28.7
Not guilty	.4	.5	3.0
Undecided	8.2	28.9	23.4
When the first jury vote was taken (during guilt deliberations) how did you vote?			
Guilty of capital murder	94.6	84.6	61.8
Guilty of a lesser crime	1.7	6.0	16.4
Not guilty	.8	2.3	9.7
Undecided	2.5	7.1	12.1
Were any jurors reluctant to go along with the majority on the defendant's guilt? If so, were you at all reluctant?			
No, none were reluctant	57.3	58.1	38.6
Yes, some were reluctant, but I was not	35.8	29.0	35.5
Yes, I was reluctant	6.9	12.9	25.9

(Cornell L. Rev., 1995)

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TABLE 11
ASPECTS OF GUILTY DELIBERATIONS BY JURORS' STANDS ON PUNISHMENT
AT THE GUILTY STAGE OF THE TRIAL

	Stand on punishment at guilt stage of trial (%)		
	Death (n=228)	Undecided (n=394)	Life (n=151)
Was there any discussion among the jurors about the meaning of "proof beyond a reasonable doubt"?			
Yes	66.2	72.1	70.9
No	33.8	27.9	29.1
During your guilt deliberations, did the jury stop to ask the judge any questions?			
Yes	83.9	66.7	56.7
No	36.1	33.3	40.3
Was there any discussion of whether the defendant was guilty of murder, but not of capital murder?			
Yes	36.1	46.9	63.3
No	63.9	52.8	46.1
In deciding guilt, did jurors talk about whether or not [defendant's name] would, or should, get the death penalty?			
Yes	44.2	33.6	45.7
No	55.8	66.4	53.7
In deciding guilt, was there any discussion of what the punishment might be if the defendant was found guilty of less than capital murder?			
Yes	34.5	30.4	38.6
No	65.5	69.6	61.4

(Cohen & L. Rev., 1988)

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Qualitative Responses Regarding Premature Decision-Making

- When the D.A. handed us the pictures (AL)
- Once I was convinced that he did it, I was convinced that he was kind of cold-blooded and didn't have any feelings, basically (CA)
- I can't explain to you how he looked but I guess that's when I knew...the way he sat there (KY)
- During the evidence— when [I] saw the pictures of the victim (FL)
- Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times (MO)
- When I knew in my heart that he was guilty...this was after hearing the forensic evidence from the prosecution (FL)

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Interviews with capital jurors who were not part of CJP confirm premature decision making a pervasive problem

- 26% of **jurors** interviewed said they did not need to hear evidence at penalty phase because after hearing about the crime they had already decided the defendant deserved to die.
 - Costanzo, Sally & Mark Costanzo, "Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework," 18 Law & Hum. Behavior 18:151 (1994) (Still Singularly Agonizing), p. 59, n. 47.)

25

Premature decision-making replicated in numerous studies

- Using CJP data:
 - Bowers & Foglia (2003)
 - Bowers, Sandys, & Steiner (1998)
 - Bentle & Bowers (2001)
 - Bowers, Fleury-Steiner, & Antonio (2003)
 - Bowers & Steiner (1998)
 - Foglia (2003)
- Studies using real jurors who were not part of CJP:
 - Geimer & Amsterdam (1998)
 - Costanzo & Costanzo (1994)

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Implications

- Almost half of all capital jurors decide punishment before the end of the guilt phase of trial.
- Jurors who make a premature decision in favor of a death sentence are significantly* less receptive to mitigation evidence during penalty-phase deliberations
 - Brewer, Thomas W. (2005). "The attorney-client relationship in capital cases and its impact on juror receptivity to mitigation evidence." *Justice Quarterly*, 22(3): 340-363.

*p < .001

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Percent of Premature Death and Undecided Jurors Saying Mitigators Made Them Less Likely to Vote for Death by Punishment Stand at Guilt

MITIGATOR – Defendant...	PMD	Und.
had no previous record	20%(55)	43%(95)
was mentally retarded	11%(9)	60%(25)
under 18 at time of crime	33%(6)	72%(25)
had a history of mental illness	33%(15)	60%(47)
seriously abused as child	24%(46)	63%(99)
institutionalized but not helped	22%(37)	51%(86)
extreme disturbance during crime	35%(29)	46%(83)
drugs during crime	6% (48)	24%(86)
drug addict	12%(57)	14%(84)

In Sum

- Nearly half the jurors nationwide and over half in WA said they decided the defendant's punishment before the punishment phase had even begun
- Over two thirds (70.4%) of the jurors prematurely choosing death were "absolutely convinced," and 27% more were "pretty sure" so that 97.4% said they felt strongly about their premature stance
- Over half (59.5%) never changed their position

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- Jurors who took a premature stance for death were most likely to say they made guilt and punishment decisions together on the basis of similar considerations and most likely to decide sentence during guilt evidence
- Jurors who took a premature stance for death were more likely
 - to think death was the only acceptable punishment,
 - to express stronger support for the death penalty,
 - to believe the defendant was guilty, and
 - to have inappropriate discussions during guilt deliberations.

30

Interviews with Capital Jurors Reveal:

1. Premature punishment decision making
2. **Jury selection fails to remove Automatic Death Penalty (ADP) jurors & creates bias**
3. Failure to comprehend jury instructions
4. Erroneous beliefs regarding mandatory death sentences
5. Failure to recognize primary responsibility for sentencing decision
6. Influence of race
7. Underestimation of non-death sentencing alternatives

31

Failure of Jury Selection to Remove ADP Jurors

- *Morgan v. Illinois*, 504 U.S. 719 (1992) at 729 held that: “[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do”.
- The court continued: “[i]f even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence”

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Instrument Question

Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following specific kinds of murder and other crimes?

1 only acceptable 2 unacceptable 3 sometimes acceptable

- ___ a planned, premeditated murder
- ___ a killing that occurs during another crime
- ___ murders in which more than one victim is killed
- ___ murder by someone previously convicted of murder
- ___ murder by a drug dealer
- ___ killing of a police officer or prison guard

Source: Capital Jury Project Survey Instrument, VIII-4

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Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

States	By defendant with prior murder conviction	Planned premeditated murder	Murder with multiple victims	Killing police/prison guard	Murder by drug dealer	Murder during another crime	N
Alabama	66.7	54.4	57.9	37.5	46.4	36.8	56
California	58.6	41.4	41.1	41.4	33.6	17.8	151
Florida	77.6	64.1	62.1	51.3	52.6	19.7	115
Georgia	70.8	54.8	46.6	51.4	47.2	23.6	72
Indiana	74.7	54.5	55.6	44.4	52.5	23.2	99
Kentucky	71.2	56.7	50.5	46.6	48.5	18.1	103
Missouri	75.4	54.1	52.5	45.9	38.3	19.7	61
North Carolina	73.8	68.8	55.0	58.8	45.0	21.5	79
Pennsylvania	71.8	65.4	62.8	55.1	47.4	28.2	78
South Carolina	76.3	61.4	54.4	43.0	49.1	26.5	113
Tennessee	78.3	67.4	58.7	54.3	43.5	30.4	46
Texas	76.9	57.3	59.5	58.6	48.7	35.3	116
Virginia	55.6	46.7	40.0	48.9	42.2	15.6	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1,164

Source: Bowers, William J. and Wanda D. Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." *Criminal Law Bulletin* 39:51-86. Table 2

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Percentage of Jurors Considering Death the Only Acceptable Punishment

Type of Murder	Original G.P.	New Sample
Def. w/prior murder conviction	72%	72%
Planned, premeditated murder	57%	51%
Murder w/multiple victims	52%	46%
Killing police/prison guard	49%	49%
Murder by a drug dealer	46%	30%
Murder during another crime	24%	18%

TABLE 7
PERCENT OF CAPITAL JURORS WHO FEEL THE DEATH PENALTY IS ONLY
ACCEPTABLE, SOMETIMES ACCEPTABLE, OR UNACCEPTABLE AS
PUNISHMENT FOR VARIOUS CRIMES

Various crimes	Only acceptable	Sometimes acceptable	Unacceptable	(No. of Jurors)
Murder by someone previously convicted of murder	70.4	27.4	2.2	(892)
A planned, premeditated murder	57.0	40.5	2.5	(888)
Murders in which more than one victim is killed	52.0	45.2	2.8	(892)
Killing of a police officer or prison guard	47.9	48.8	3.5	(888)
Murder by drug dealer	45.5	50.8	3.7	(890)
When an outsider to the community kills an admired and respected member of the community	21.5	73.4	5.1	(883)
A killing that occurs during another crime	23.1	69.2	7.6	(891)
A rape with permanent injury to the victim	24.4	55.0	20.7	(886)
A planned murder, when the victim survives	15.7	52.5	31.9	(888)

(Cornell L. Rev., 1998)

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**Pro Death Predispositions of Jurors on
Killings of Police Officers/Guards compared
to Rest of Sample**

Death Only Acceptable Punishment for	Off.	Rest
-killing of police officer or prison guard	45%	49%
-someone previously convicted for murder	69%	72%
-a planned, premeditated murder	50%	57%
-multiple victims	60%	53%
-murder by a drug dealer	48%	46%
-killing during another crime	30%	23%
Feelings about DP have not changed	79%	80%

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**Pro Death Predispositions of Jurors on
Cases with Multiple Victims compared to
Rest of Sample**

Death Only Acceptable Punishment for	Mult. Vics.	Rest
-multiple victims	52%	54%
-someone previously convicted for murder	71%	72%
-a planned, premeditated murder	59%	57%
-killing of police officer or prison guard	50%	48%
-murder by a drug dealer	47%	46%
-killing during another crime	25%	23%
Feelings about DP have not changed	79%	80%

Pro Death Predispositions of Jurors on Killings During Another Crime Compared to Rest of Sample

Death Only Acceptable Punishment for	CFM	Rest
-killing during another crime	26%	22%
-someone previously convicted for murder	73%	71%
-a planned, premeditated murder	53%	59%
-multiple victims	51%	55%
-murder by a drug dealer	43%	48%
-killing of police officer or prison guard	47%	50%
Feelings about DP have not changed	80%	80%

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Many jurors are mitigation impaired even though they say they can follow law

- CJP jurors saying that common mitigators had "no effect" or made them "more likely to vote for death":

- lingering doubt 19%
- mental retardation 19%
- severely abused as child 56%
- crime NOT premeditated, but during another crime 65%

(27% said it made them more likely to vote for death)^o

Many jurors don't consider anything mitigating even though they say they can consider sentence other than death

- 21% of CJP jurors in KY said they could not consider a sentence other than death = Traditional ADPs
- 19% of those who said they could did not consider any evidence mitigating = Latent ADPs

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Failure to exclude ADP jurors replicated in numerous studies

- Using CJP data:
 - Sandys & Trahan (2008)
 - Bowers & Foglia (2003)
 - Sandys & McClelland (2003)
 - Bowers, Fleury-Steiner, & Antonio (2003)
 - Foglia (2003)
 - Eisenberg, Garvey, & Wells (2001)
 - Bowers, Sandys, & Steiner (1998)
 - Bowers & Steiner (1998)
- Mock jury studies:
 - Neises & Dillehay (1987) (missed 81% of ADPs)
 - Dillehay & Sandys (1996) (missed 95% of ADPs)⁴²

Implications

- Many jurors who would automatically vote for death once the defendant was found guilty are surviving jury selection and deciding capital cases.
- Jurors with a predisposition to see death as the only acceptable punishment makes them more likely to take a premature pro-death stance.
 - Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Additional Problems with Death Qualification

- DQ results in a jury composed of people who are more conviction prone and more punishment prone compared to the general population (composition effect)
 - Haney, Hurtado, & Vega (1994)
 - Cowan, Thompson, & Ellsworth (1984); Fitzgerald & Ellsworth (1984); Sandys & McClelland (2003); Blume & Threlkeld (2001)
- DQ process makes jurors more likely to think defendant is guilty and deserves the death penalty (process effect)
 - Haney (1984a)
 - Haney (1984b)

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Table 2. Effects of Exclusions for Death Penalty Opposition Under *Witherspoon* and *Witt* Standards

	<i>Witherspoon</i> excludable (n = 29)	<i>Witherspoon</i> includable (n = 469)	<i>Witt</i> excludable (n = 39)	<i>Witt</i> includable (n = 439)
[Criminal justice attitudes]				
Risk guilty going free to protect innocent	65.5%	38.8%*	64.1%	38.3%*
Even worst criminal deserves mercy	62.1%	30.6%***	53.8%	30.3%***
Harsher punishment not a solution to crime	75.8%	41.8%***	69.2%	41.6%***
Punish criminals harshly for victims	58.6%	84.3%***	64.1%	84.5%***
Prisons should punish more than rehabilitate	6.8%	37.1%***	13.2%	37.2%***
[Concepts about death penalty]				
Death penalty more expensive	44.8%	24.3%*	41%	24.4%*
Innocent too often executed	62.1%	19.6%***	59%	19%***
Death penalty unfair to minorities	72.4%	39%***	74.4%	38.1%***
LWOP means LWOP	38.6%	24.1%***	61.5%	23.1%***
Death penalty deters murder	6.9%	76.5%***	20.5%	76.9%***
Religious opinion supports death penalty	3.4%	41.2%***	12.8%	41.2%***
Focus only on crime, ignore background	10.3%	54.2%***	12.8%	54.9%***
Retribution alone justifies death penalty	0%	38.6%***	7.7%	38.8%***
[Finds mitigating]				
Felony murder not premeditated	72.4%	38.8%***	76.9%	37.7%***
Under influence of drugs or alcohol	62.1%	33.5%***	63.8%	33.6%***
No prior felonies	69%	45.6%***	74.4%	44.7%***
Convicted person over age 30	38.6%	15.6%***	56.4%	14.8%***
Convicted person from background of poverty	38.6%	18.1%***	53.8%	17.6%***
Convicted person abused as a child	48.3%	36.5%*	52.8%	35.7%*
Would adjust well and contribute in prison	63.6%	37.1%***	61.5%	36.8%***
Never received treatment	58.6%	38.8%*	66.7%	37.7%***
[Finds aggravating]				
Especially brutal murder	13.8%	89.3%***	33.3%	89.3%***
More than one murder victim	3.4%	73.6%***	20.5%	73.6%***
Murder during sexual assault	3.4%	69.3%***	15.4%	69.7%***
Prior violent felony	0%	36%***	7.7%	36.2%***
Defendant expressed no remorse	10.3%	72.5%***	20.5%	73%***

* $p < .05$. ** $p < .01$. *** $p < .001$.

Haney, Hurtado, & Vega (1994)

- Numerous studies replicate finding that
Death Qualified are more
Conviction/Punishment Prone
- More likely to find evidence aggravating
 - Less likely to find evidence mitigating
 - Luginbuhl & Mittendorf (1998)
 - Butler & Moran (2002)
 - More likely to infer criminal intent
 - Goodman-Delahunty, Green, & Hsiao (1998)
 - Review of 14 studies shows on average increases chances of conviction 44%
 - Allen, Mabry, & McKelton (1998)

(1 of 2)	Experimental condition with death qualification	Control condition without death qualification	<i>t</i>	<i>p</i>
Likelihood defendant guilty of first-degree murder	46.7	36.2	2.12	.038
Likelihood defendant will be convicted of first-degree murder and sentenced to death	39.6	24.5	3.00	.004
Likelihood defendant will be convicted of something	65.3	51.6	2.53	.014
Estimate of prosecutor's belief that defendant is guilty of first-degree murder ^b	26.0	35.8	-2.09	.041
Estimate of defense attorney's belief that defendant is guilty of first-degree murder ^b	58.5	69.2	-2.38	.019
Estimate of judge's belief that defendant is guilty of first-degree murder ^b	42.1	51.6	-3.77	.0001
Estimate of prosecutor's personal attitude toward the death penalty	69.1	57.7	2.59	.012

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Haney (1984a)

(2 of 2)	Experimental condition with death qualification	Control condition without death qualification	<i>t</i>	<i>p</i>
Estimate of defense attorney's personal attitude toward the death penalty	41.9	41.7	0.03	n.s.
Estimate of judge's personal attitude toward the death penalty	63.9	51.8	3.29	.002
Law's disapproval of people who are opposed to death penalty	52.4	30.8	3.48	.001
Estimated percent of murder trials by jury in which defendants are convicted	54.4	45.4	1.82	.074
Estimated percent of first-degree murder convictions in which defendants are given death sentences	23.5	17.9	1.32	n.s.
Estimated percent of death sentences that result in actual executions	17.4	17.5	-0.03	n.s.
Regret if defendant was convicted of first-degree murder and sentenced to death	45.7	45.1	0.09	n.s.

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^aAll means are derived from a 100-point scale. Reported significance levels are two-tailed probabilities.
^bLower numbers indicates greater belief in guilt.

Table 2. Frequency of Penalty Choice in Experimental and Control Conditions, and χ^2 Test of Differences*

	Experimental condition <i>with</i> death qualification	Control condition <i>without</i> death qualifications
Life imprisonment	15	25
Death penalty	20	7

* $\chi^2 = 8.95, p < .005$.

Source: The Selection of Capital Juries, Haney, pg. 128

Haney (1984)

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Implications Confirmed by Some Capital Jurors

- The jury selection process itself tends to convey the impression that the defendant is guilty and that death is the appropriate punishment.
- Some CJP jurors were aware that jury selection questions made them think
 - Defendant "must be" or "probably was" guilty (11.3%)
 - Most appropriate punishment "must be" or "probably was" death (9.2%)
 - Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51,65-66.

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In Sum

- **Fails to Exclude Automatic Death Penalty (ADP) Jurors**
 - Many jurors considered Death the Only Acceptable Punishment for 6 types of murder that would include nearly every capital case (over 50% for 3 types in national sample)
- **Results in Jury Composed of Conviction/Punishment Prone People**
 - Individuals who would be death qualified are significantly different than excludables as they are
 - More punitive
 - See fewer problems with death penalty
 - Less likely to see evidence as mitigating
 - More likely to see evidence as aggravating
 - CJP jurors were more punitive than excludables

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- **Process Creates a Bias for Death**
 - Individuals who went through death qualification process were significantly more likely to think
 - defendant was guilty
 - Judge, prosecutor, and defense attorney thought defendant was guilty
 - judge and prosecutor supported death penalty
 - law disapproves of those who oppose death penalty
 - percentage of first degree murder cases resulting in conviction was higher
 - Individuals who went through death qualification process were over twice as likely to vote for death
 - Approximately 10% of the CJP jurors who actually served in capital cases consciously admitted that the voir dire questions made them think the defendant must be or probably was guilty and the appropriate punishment must be or probably was death

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Interviews with Capital Jurors Reveal:

1. Premature punishment decision making
2. Jury selection fails to remove Automatic Death Penalty (ADP) jurors & creates bias
3. **Failure to comprehend jury instructions**
4. Erroneous beliefs regarding mandatory death sentences
5. Failure to recognize primary responsibility for sentencing decision
6. Influence of race
7. Underestimation of non-death sentencing alternatives

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Failure to Comprehend Jury Instructions

- In order for *guided discretion* statutes to meet their constitutional burden, jurors must understand and be able to correctly apply the law
- *McKoy v. North Carolina*, 494 U.S. 433 (1990) & *Mills v. Maryland*, 486 U.S. 367 (1988) hold that individual jurors are free to consider mitigation evidence to their own personal satisfaction; i.e., they need not be unanimous on findings of mitigation
- The "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. *Tennard v. Dretke*, 124 S.Ct. 2562, 2570 (2004)

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Instrument Question

Among factors in favor of a life or lesser sentence, could the jury consider . . .

- any mitigating factor that made the crime not as bad
- only a specific list of mitigating factors mentioned by the judge
- (DON'T KNOW)

Source: Capital Jury Project Survey Instrument, V-6

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Instrument Question

For a factor in favor of a life or lesser sentence to be considered, did . . .

- all jurors have to agree on that factor
- jurors did not have to agree unanimously on that factor
- (DON'T KNOW)

Source: Capital Jury Project Survey Instrument, V-8

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Instrument Question

For a factor in favor of a life or lesser sentence to be considered, did it have to be . . .

- proved beyond a reasonable doubt
- proved by a preponderance of the evidence
- proved only to a juror's personal satisfaction
- (DON'T KNOW)

Source: Capital Jury Project Survey Instrument, V-7

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Instrument Question

For a factor in favor of a death sentence to be considered, did it have to be . . .

- proved beyond a reasonable doubt
- proved by a preponderance of the evidence
- proved only to a juror's personal satisfaction
- (DON'T KNOW)

Source: Capital Jury Project Survey Instrument, V-3

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Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

State	Could consider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitigation beyond a reasonable doubt	Must find aggravation beyond a reasonable doubt	N*
Alabama	54.7	55.8	53.8	40.0	52
California	24.2	56.4	37.6	41.7	149
Florida	49.6	36.8	48.7	27.4	117
Georgia	40.5	89.0	62.2	21.6	73
Indiana	52.6	71.4	58.2	26.8	97
Kentucky	45.9	83.5	61.8	15.6	109
Missouri	36.8	65.5	34.5	48.3	57
North Carolina	38.7	51.2	43.0	30.0	79
Pennsylvania	58.7	68.0	32.0	41.9	74
South Carolina	51.8	78.9	48.7	21.9	113
Tennessee	41.3	71.7	46.7	20.5	44
Texas	39.6	72.9	66.0	18.7	47
Virginia	53.3	77.3	51.2	40.0	43
All States	44.6%	66.5%	49.2%	29.9%	1,185

*The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

**The number of Texas jurors is reduced in this table because those two questions were replaced with others while the interviewing in Texas was underway.

Source: Bowers, William J. and Woods D. Foglia (2003). "Still Singularly Aggravating: Law's Failure to Purge Arbitrariness from Capital Sentencing." Bulletin 39:51-86. Table 3

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Failure to Understand Jury Instructions Replicated in Numerous Studies

Bowers (1995). "The Capital Jury Project: Rationale, Design, and Preview of Early Findings." *Indiana Law Journal* 70:1043.

Eisenberg & Wells (1993). "Deadly Confusion: Juror Instructions in Capital Cases." *79 Cornell Law Review* 79:1.

Foglia (2003). "They Know Not What They Do: Unguided and Misguided Discretion In Pennsylvania Capital Cases." *Justice Quarterly* 20:187.

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Examples of Other Studies Finding Same Problems

- Studies Using Mock Jurors
 - Haney & Lynch (1994). "Comprehending Life and Death Matters, 18 *Law & Human Behavior*." 18:411.
 - Haney & Lynch (1997). "Clarifying Life and Death Matters: An Analysis of Instructional Comprehension And Penalty Phase Closing Arguments." *Law & Human Behavior* 21:575.
 - Lynch & Haney (2004). "Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and The Death Penalty," *Law & Human Behavior* 24:337.
 - Tiersma (1995). "Dictionaries And Death: Do Capital Jurors Understand Mitigation ?" *Utah Law Review* 1995:1
- Studies Involving Real Jurors (Non-CJP)
 - Geimer & Amsterdam (1998) "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases." *American Journal of Criminal Law* 15:1.
 - Haney, Sontag, & Costanzo (1994). "Deciding To Take a Life: Capital Juries, Sentencing Instructions, and The Jurisprudence Of Death." *Journal of Social Science Issues* 50:149.

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OR jurors had problems with sentencing phase
 Overwhelming majority saw clear differences between
 guilt and penalty phase, describing penalty phase as
 "more difficult," "more emotional," "less clear cut," "more
 a moral decision," and " a decision based upon
 predictions rather than facts."

"I thought it (the penalty trial) was kind of silly, to be
 perfectly honest...A rotten childhood was not the
 question we had to answer."

"Everything went back to what he had done and I think
 everyone had their mind made up before the penalty
 phase started."

Haney, Sontag & Costanzo (1994)

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Substantial Misunderstanding in New CJP & WA Samples

Percentage Failing to Understand...	Original CJP	New CJP Sample	WA Sample
Could consider any mitigating evidence	45%	64%	73%
Need not be unanimous on mit.	67%	68%	79%
Need not find mit. BRD	49%	57%	62%
Must find agg. BRD	30%	23%	15%

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In Sum

- **Nearly half or more jurors nationwide, more than half in WA, failed to understand**
 - that they could consider any relevant mitigating evidence
 - that they did not have to be unanimous on findings of mitigation
 - that they did not have to find mitigation beyond a reasonable doubt
- **Over a quarter of the jurors nationwide and 15% in WA failed to understand that aggravation had to be proved beyond a reasonable doubt**

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Implications

- The constitutional mandate of *Gregg* and companion cases designed to guide jurors' exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.
- The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely.
 - Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Erroneous Beliefs Regarding Mandatory Death Sentences

- *Woodson v. North Carolina*, 428 U.S. 280 (1976) holds that no state can require the death penalty solely on the grounds that specific aggravating circumstances have been established

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Instrument Question

After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that . . .

___ (DEF) ___'s conduct was heinous, vile or depraved

___ (DEF) ___ would be dangerous in the future

Source: Capital Jury Project Survey Instrument, IJIC-17

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Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was "Heinous, Vile or Depraved", or Defendant "Would be Dangerous" in Future by State

States	Death Required if Defendant's Conduct is Heinous, Vile, or Depraved	Death Required if Defendant Would be Dangerous in the Future	N
Alabama	56.3	52.1	48
California	29.5	20.4	146
Florida	36.3	25.2	111
Georgia	51.4	30.1	72
Indiana	34.4	36.6	93
Kentucky	42.7	42.2	109
Missouri	48.3	29.3	58
North Carolina	67.1	47.4	76
Pennsylvania	56.9	37.0	73
South Carolina	31.8	28.2	110
Tennessee	58.3	39.6	48
Texas	44.9	68.4	117
Virginia	53.5	40.9	43
All States	43.9%	36.9%	1,136

Source: Bowers, William J. and Wanda D. Foglia (2003). "S&P Singularity Agonizing: Law's Failure to Purg from Capital Sentencing." *Criminal Law Bulletin* 39:51-86. Table 4

Consistently High Percentages Erroneously think Death is Required

Once it is proven that	Original CJP	New CJP Sample	WA Sample
defendant's conduct was heinous, vile, or depraved	44%	42%	58%
Defendant will be dangerous in the future	37%	45%	46%

In Sum

Approaching half (44%) the jurors nationwide, and over half in WA, thought that the law required the death penalty if the defendant's conduct was "heinous, vile, or depraved."

Over a third nationwide, and nearly half in WA thought the law required the death penalty if the defendant would be "dangerous in the future."

Nationwide, over half (50.3%) thought death was required under at least one of these circumstances.

Approaching half (44.6%) thought at least one of these circumstances was proven and required death.

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Failure to recognize primary responsibility for Sentencing Decision

- *Caldwell v. Mississippi*, 472 U.S. 320 at 333 (1985) held that a sentence of death is unreliable if it is imposed by a jury that believes "that the ultimate responsibility for any ultimate determination of death will rest with others."

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Instrument Question

Rank the following from "most" through "least" responsible for (DEF) _____'s punishment.

Give 1 for most through 5 for least responsible

- ___ the law that states what punishment applies
- ___ the judge who imposes the sentence
- ___ the jury that votes for the sentence
- ___ the individual juror since the jury's decision depends on the vote of each juror
- ___ (DEF) _____ because his/her conduct is what actually determined the punishment

Source: Capital Jury Project Survey Instrument, IV-13

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TABLE 5: Percent Ranking Five Sources or Agents of Responsibility for the Defendant's Punishment from Most "1" to Least "5" Responsible

	MOST RESPONSIBLE			LEAST RESPONSIBLE	
	1	2	3	4	5
the defendant because his/her conduct is what actually determined the punishment	49.2	10.7	6.0	7.7	26.3
the law that states what punishment applies	32.8	40.0	8.6	12.5	6.2
the jury that votes for the sentence	8.9	23.6	38.3	25.4	3.8
the individual juror since the jury's decision depends on the vote of each juror	5.6	14.2	27.1	28.4	24.7
the judge who imposes the sentence	3.5	11.3	20.4	25.8	38.9

* Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).

Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Percentages of Jurors Considering Themselves Primarily Responsible for the Sentence by State

States	The jury that votes for the sentence	The individual juror since the jury's decision depends on the vote of each juror	N*
Alabama	11.1	6.4	45
California	10.6	8.8	132
Florida	5.4	2.6	111
Georgia	7.7	20.3	65
Indiana	8.3	9.0	84
Kentucky	13.7	9.2	102
Missouri	11.9	6.7	59
North Carolina	11.6	10.1	69
Pennsylvania	9.5	11.1	63
South Carolina	4.5	10.6	111
Tennessee	8.7	4.3	46
Texas	5.2	5.8	116**
Virginia	15.0	9.1	40
All States	8.9	5.6	1071

*The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

** The number of Texas jurors is reduced in this table because these two questions were replaced with others while the interviewing in Texas was underway.
Adapted from: Bowers, William J. and Wade D. Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51-86, Table 3

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Consistent Reluctance to see Jury or Juror as Primarily Responsible

Percentage saying primarily responsible is	Original CJP	New CJP Sample	WA Sample
Jury	9%	5%	18%
Individual Juror	6%	1%	18%

Instrument Question

When you were considering the punishment, did you think that whether (DEF)___ lived or died was...

___ strictly the jury's responsibility and no one else's (29.8%)

___ mostly the jury's responsibility...

___ partly the jury's responsibility...

___ mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision (17%)

Source: Capital Jury Project Survey Instrument, IV-12

Consistent Misunderstanding Regarding Jury's Responsibility

When considering punishment did you think sentence was	Original CJP	New CJP Sample	WA Sample
Strictly the jury's responsibility and nobody else's	30%	27%	27%
Mostly the responsibility of the judge & the appeals court	17%	33%	23%

Implications

The law is not effectively guiding discretion when jurors fail to understand the instructions, mistakenly think the death penalty is required by law, and do not appreciate their responsibility for the sentence.

Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Influence of Race

- The risk that racial prejudice may have infected petitioner's capital sentencing is unacceptable. *Turner v. Murray*, 476 U.S. 28 (1986).

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Race influences process

- Defendant is more likely to get the death penalty if victim is white (found in 82% of studies by GAO review), and chances are highest when victim is white and defendant is black
- Black defendant is more likely than white defendant to be convicted with identical hypotheticals (90% v. 70%) when race is not salient - mock jurors self police when case is racially charged (Somers & Ellsworth, 2001)
- Racial prejudice is correlated with being death qualified, supporting death penalty, and being conviction prone (Young 2004)

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(1/3) TABLE 3: Black and white jurors (a) feelings of lingering doubts about the defendant's guilt, (b) doubts about the capital murder verdict, and (c) thoughts about guilt when considering punishment for selected defendant/victim racial combinations

Defendant/Victim Racial Combinations

	W/W Jurors' Race		B/W Jurors' Race		B/B Jurors' Race		All Cases
	White	Black	White	Black	White	Black	
A. Feelings of Lingering Doubts about the Defendant's Guilt							
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punishment.							
Very	4.7	12.8	3.7	23.5	0.0	16.7	8.9
Fairly	38.5	12.8	3.8	20.6	0.0	0.0	6.6
Not very	12.9	15.4	7.5	3.8	17.2	11.1	12.0
Not at all	78.8	59.0	83.0	47.1	82.8	72.2	72.5
(No. of jurors)	(85)	(59)	(83)	(34)	(29)	(18)	(258)
2. Importance of doubt that the defendant was the actual killer for you in deciding on punishment.							
Very important	2.4	1.7	5.9	24.2	3.7	5.6	7.1
Fairly important	5.6	2.6	0.0	15.2	0.0	0.0	3.6
Not important	0.0	2.6	0.0	6.1	0.0	5.6	1.6
Not a factor	94.0	87.2	94.1	54.5	96.3	88.9	87.7
(No. of jurors)	(84)	(59)	(51)	(33)	(27)	(18)	(252)
B. Doubts about the Capital Murder Verdict at the Guilt Trial and Deliberations							
1. After the judge's guilt instructions, but before deliberations did you think (the defendant) was ...							
Guilty/ Capital Murder	67.9	65.8	81.8	50.0	59.3	42.1	65.3
Guilty/ Lesser Charge	9.0	13.2	1.8	14.7	14.8	26.3	10.8
Not guilty	0.0	2.6	0.0	5.9	3.7	0.0	1.6
Undecided	23.1	18.4	16.4	29.4	22.2	31.6	22.3
(No. of jurors)	(78)	(58)	(53)	(34)	(27)	(19)	(251)

(3/3) TABLE 3: Black and white jurors' (a) feelings of lingering doubts about the defendant's guilt; (b) doubts about the capital murder verdict, and (c) thoughts about guilt when considering punishment, for selected defendant/victim racial combinations

	Defendant/Victim Racial Combinations						All Cases
	W/W Jurors' Race		B/W Jurors' Race		B/B Jurors' Race		
2. When considering punishment, did you think the defendant definitely had planned or intended to kill the victim but might not be the one who did so?							
Yes	11.6	10.0	5.6	23.5	16.9	16.7	11.5
No	88.4	90.0	94.4	76.5	83.1	83.3	88.5
Not sure	0.0	10.0	0.0	8.8	10.0	0.0	2.7
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)
3. When considering punishment, did you think the defendant definitely killed the victim, but might not have planned, intended, or wanted to do so?							
Yes	48.8	25.5	16.5	41.2	41.4	61.1	52.1
No	51.0	74.5	83.5	58.8	58.6	38.9	47.9
Not sure	0.0	0.0	0.0	0.0	0.0	0.0	2.7
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)
4. When considering punishment, did you think the defendant might not be the one most responsible for the killing?							
Yes	8.1	22.5	17.2	17.2	6.9	11.1	15.3
No	91.9	77.5	82.8	82.8	93.1	88.9	84.7
Not sure	0.0	0.0	0.0	0.0	0.0	0.0	1.5
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)

(1/3) TABLE 4: Black and white jurors' (a) impressions of the defendant's remorsefulness; (b) identification with the defendant; (c) grounds for mercy, for selected defendant/victim racial combinations

	Defendant/Victim Racial Combinations						All Cases
	W/W Jurors' Race		B/W Jurors' Race		B/B Jurors' Race		
A. Impressions of the Defendant's Remorsefulness							
1. How well does "Sorry for what he did" describe the defendant?							
Very well	11.9	23.6	13.5	38.7	3.8	31.6	18.4
Fairly well	21.4	12.8	3.8	26.5	7.2	15.9	14.5
Not so well	38.0	23.1	36.5	18.8	30.8	5.3	26.3
Not at all	35.7	38.5	46.2	32.2	57.7	57.9	40.4
(No. of jurors)	(84)	(39)	(52)	(34)	(26)	(19)	(255)
2. Did the defendant appear sorry for what he had done during the trial?							
Yes	27.5	44.4	18.1	52.9	7.1	26.3	23.4
No	72.4	55.6	81.9	47.1	92.6	73.7	76.6
(No. of jurors)	(87)	(40)	(54)	(34)	(27)	(19)	(252)
3. When you were considering the punishment, did you believe that [the defendant] was truly sorry for the crime?							
Yes, sure def. was sorry	8.4	17.5	3.9	14.7	3.6	13.1	9.4
Yes, think def. was sorry	13.3	15.0	3.9	29.4	3.6	5.6	12.2
Not sure, def. acted sorry, but may have been show	18.1	7.5	17.6	14.7	0.0	0.0	12.6
No, def. acted sorry, but was a show	3.4	12.5	13.7	5.9	7.1	16.7	10.2
No, def. didn't even pretend to be sorry	51.8	47.5	60.8	35.3	85.7	66.7	55.5
(No. of jurors)	(83)	(40)	(51)	(34)	(28)	(18)	(254)

(2/3) TABLE 4: Black and white jurors' (a) impressions of the defendant's remorsefulness, (b) identification with the defendant, (c) grounds for mercy, for selected defendant/victim racial combinations

Defendant/Victim Racial Combinations

	W/W Jurors' Race		B/W Jurors' Race		B/B Jurors' Race		All Cases
	White	Black	White	Black	White	Black	
B. Identification with the Defendant							
1. Did the defendant remind you of someone or make you think about anyone?							
Yes	17.4	22.5	27.3	29.4	6.9	15.8	16.7
No	82.6	77.5	72.7	70.6	93.1	84.2	83.3
Not Sure	0.0	0.0	0.0	0.0	0.0	0.0	0.0
(No. of jurors)	(87)	(40)	(55)	(34)	(29)	(19)	(264)
2. Did you imagine being like the defendant?							
Yes	6.8	10.8	1.8	29.4	6.9	10.5	11.8
No	93.2	89.2	98.2	70.6	93.1	89.5	88.2
(No. of jurors)	(86)	(39)	(55)	(34)	(29)	(19)	(262)
3. Did you imagine yourself in the defendant's situation?							
Yes	23.8	20.0	27.3	31.2	24.1	26.2	26.2
No	76.2	80.0	72.7	68.8	75.9	73.7	73.8
(No. of jurors)	(86)	(40)	(55)	(34)	(29)	(19)	(263)
C. Remorse and Other Grounds for Mercy							
1. The defendant deserved mercy because he was sorry							
Very true	2.2	3.1	11.9	15.0	0.0	2.2	3.3
Fairly true	22.4	12.3	1.9	15.6	0.0	0.0	5.3
Not very true	11.1	23.1	10.1	28.1	41.4	6.3	18.0
Not true	77.8	61.5	76.0	41.3	58.6	87.5	72.4
(No. of jurors)	(81)	(39)	(54)	(34)	(28)	(16)	(260)

(3/3) TABLE 4: Black and white jurors' (a) impressions of the defendant's remorsefulness, (b) identification with the defendant, (c) grounds for mercy, for selected defendant/victim racial combinations

Defendant/Victim Racial Combinations

	W/W Jurors' Race		B/W Jurors' Race		B/B Jurors' Race		All Cases
	White	Black	White	Black	White	Black	
2. The defendant deserved mercy because you felt he would try to make up for what he did							
Very true	3.6	5.0	1.9	6.1	0.0	11.8	3.9
Fairly true	9.3	10.0	8.8	24.2	3.6	0.0	9.4
Not very true	15.5	15.0	11.1	18.2	10.7	0.0	13.2
Not true	71.4	70.0	78.2	51.5	75.7	88.2	73.4
(No. of jurors)	(84)	(40)	(54)	(33)	(28)	(17)	(256)
3. The defendant deserved mercy because other people wanted to see him/her live another chance							
Very true	1.2	2.3	0.0	6.1	0.0	11.8	2.4
Fairly true	14.3	17.5	9.4	27.3	21.4	0.0	15.3
Not very true	19.0	25.0	20.8	15.2	17.9	17.6	19.6
Not true	65.5	55.0	69.8	51.5	60.7	70.6	62.7
(No. of jurors)	(84)	(40)	(54)	(33)	(28)	(17)	(255)
4. Did you imagine yourself in the defendant's family's situation?							
Yes	57.5	52.5	58.2	61.8	48.3	42.1	51.1
No	41.4	47.5	39.8	32.4	51.7	57.9	46.2
Not sure	1.1	0.0	1.9	5.9	0.0	0.0	2.7
(No. of jurors)	(87)	(40)	(55)	(34)	(29)	(19)	(264)

**Elements of Lingering Doubts by Jurors' Race and Gender
in Black Defendant-White Victim Cases**

**Importance of lingering doubt about the
defendant's guilt for you in deciding punishment**

Response	White Males	White Females	Black Males	Black Females
Very	0.0	12.5	26.7	21.1
Fairly	6.9	0.0	26.7	15.8
Not Very	6.9	8.3	0.0	15.8
Not at All	86.2	79.2	46.7	47.4
No. of jurors	29	24	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly
Agonizing: Law's Failure to Purge Arbitrariness From Capital
Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

**Elements of Lingering Doubts by Jurors' Race and Gender
in Black Defendant-White Victim Cases**

**When considering punishment, did you think the
defendant might not be the one most responsible
for the killing?**

Response	White Males	White Females	Black Males	Black Females
Yes	10.3	4.0	60.0	36.8
No	86.2	96.0	40.0	52.6
Not sure	3.4	0.0	0.0	10.5
No. of jurors	29	25	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly
Agonizing: Law's Failure to Purge Arbitrariness From Capital
Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

**Effect of Defendant's Remorse and Identification by Jurors'
Race and Gender in Black Defendant-White Victim Cases**

How well does "Sorry for what he did" describe the
defendant?

Response	White Males	White Females	Black Males	Black Females
Very well	7.4	20.0	46.7	31.6
Fairly well	7.4	0.0	6.7	15.8
Not so well	33.3	40.0	6.7	15.8
Not at all	51.9	40.0	13.3	31.6
No. of jurors	27	25	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51, Table 6 91

**Effect of Defendant's Remorse and Identification by Jurors'
Race and Gender in Black Defendant-White Victim Cases**

Did you imagine yourself in the defendant's
situation?

Response	White Males	White Females	Black Males	Black Females
Yes	26.7	28.0	53.3	31.6
No	73.3	72.0	46.7	68.4
No. of jurors	30	25	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

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Effect of Defendant's Remorse and Identification by Jurors' Race and Gender in Black Defendant-White Victim Cases

Did you imagine yourself in the defendant's family's situation?

Response	White Males	White Females	Black Males	Black Females
Yes	30.0	48.0	80.0	47.4
No	60.0	48.0	13.3	47.4
Not Sure	10.0	4.0	6.7	5.3
No. of jurors	30	25	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

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Effect of Defendant's Dangerousness and Early Release by Jurors' Race and Gender in Black Defendant-White Victim Cases

"Dangerous to other people" describes the defendant

Response	White Males	White Females	Black Males	Black Females
Very well	63.3	52.0	26.7	42.1
Fairly well	30.0	32.0	53.3	36.8
Not so well	3.3	8.0	0.0	10.5
Not at all	3.3	8.0	20.0	10.5
No. of jurors	30	25	15	19

Adapted from Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

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Effect of Defendant's Dangerousness and Early Release by Jurors' Race and Gender in Black Defendant-White Victim Cases

How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?

Response	White Males	White Females	Black Males	Black Females
0-9 Years	30.0	17.6	7.7	7.1
10-19 Years	30.0	52.9	30.8	57.1
20+ Years	40.0	29.4	61.5	35.7
No. of jurors	20	17	13	14

Adapted from Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51, Table 6.

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Racial composition of jury affects sentence in B/W cases

- Black male presence effect:
 - with no black males – 72% death
 - with at least one black male – 36% death
- White male dominance effect:
 - with 4 or fewer white males – 23% death
 - with 5 or more white males – 63% death

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Report for PA Supreme Court Committee

- Analysis of ALL PA cases found
- white male dominance effect with 6 or more jurors – percentage of death verdicts went from 47.4% to 100%
- Black defendants were more likely than non-black defendants to get death penalty (65.5% v. 50%)
- Jurors were more likely to pre-maturely decide defendant deserved death with non-white defendants compared to white defendants (37% v. 8%)

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Anything more that was important in understanding the jury's guilt decision?

- Probably the fact that there is always racial overtones. Because he's black, it was "automatic," You got six whites, six blacks and you got six whites out there and somebody in authority already told you what the black man has done, so automatically, he's done it. I don't think blacks think that way until they hear. White folks have a tendency, that once the charges are read - "he did it."

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Anything more that was important in understanding
the jury's punishment decision?

- They say you should pick peers - I don't know what that word means when they say "pick your peers," because you got people from all walks of life in there. People got their opinion before the trial actually starts. And it is a shame to say that but they have their opinions because everyone is from different walks of life. Like this guy, I told of earlier from North Philly, had a total different perspective on what happens in the inner city compared to the guy out in the suburbs who thinks anything about blacks, if it's a black thing, automatic guilty. ... The white woman from center city. She gets on the elevator with me, she got a problem. If something went down, the first thing that's gonna come out of her mouth, it was a black, it's an automatic thing. And it's a shame to think that way and when these jurors hooked up, they were so disinterested, they were more concerned about what we're gonna have for lunch, ... Not very understanding, and a hint of racism ... most of the whites that were there never was exposed to black folks, probably not even on their jobs, and they felt very uncomfortable, but I guess, when it came down to taking care of business, a lot of them made their decision before the trial started.

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58 yr. Old white male was only one
of four jurors who mentioned race

- And this guy was big, you know. And these big deputies are jumping all over him and he's just dragging them along, just like a gorilla, like Rodney King, you know the same situation.
- It just illustrates what's going on in this country, right now. I'm not going to be racial about it, but you have to state the facts. The blacks are killing the blacks. And you don't do it gently, it's just brutal.

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Numerous studies replicate evidence of racial discrimination

- Using CJP data:
 - Bowers, Sandys, & Brewer (2004)
 - Bowers, Sandys, & Steiner (2001)
- Non-CJP studies:
 - Young (2004)
 - Bowers & Pierce (1980)
 - Baldus et al. (1990, 1998, 2001)
 - Gross & Mauro (1989)
 - Studies reviewed by GAO

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In Sum

GAO review: 82% of studies show defendant is more likely to get the death penalty if victim is white

Blacks are more likely to be convicted in interracial cases under identical hypothetical scenarios when race is not made salient (90 v 70%)

Racial Prejudice associated with being Death Qualified

Regardless of race of Defendant and Victim

- Black jurors are
 - More likely to have lingering doubt
 - More likely to think defendant was sorry

When Defendant is Black and Victim is White:

- 5 or more white male jurors dramatically increased chances of death sentence (63.2 v. 23.1%)
- 1 or more black male jurors reduced chances of death penalty (42.9 v. 71.9%)
- Black male jurors saw same case very differently than white males – Black males were
 - 7x more likely to have lingering doubt
 - 6x more likely to think def. was not most responsible
 - 5x more likely to think def. was sorry
 - 2x as likely to identify with def. or family
 - ½ as likely to say dangerous described def. very well
 - 1/3 as likely to give extremely low estimates of early release

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Interviews with Capital Jurors Reveal:

1. Premature punishment decision making
2. Jury selection fails to remove Automatic Death Penalty (ADP) jurors & creates bias
3. Failure to comprehend jury instructions
4. Erroneous beliefs regarding mandatory death sentences
5. Failure to recognize primary responsibility for sentencing decision
6. Influence of race
7. **Underestimation of non-death sentencing alternatives**

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Underestimation of Non-Death Sentencing Alternatives

- *Simmons v. South Carolina*, 512 U.S. 154 (1994) held that jurors should not be forced to make a "false choice" between death and an incorrect or false understanding of the alternative

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Instrument Question

How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?

_____ # of years

Source: Capital Jury Project Survey Instrument, IV-7

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Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

State	Median Estimate*	(N)	Mandatory Minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	20.0	(75)	30
Kentucky	10.0	(74)	12, 25***
Missouri	20.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania	15.0	(63)	LWOP
South Carolina	17.0	(99)	30
Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All States	15.0	(943)	—

* Median estimates exclude "no answers" and unqualified "life" responses indicating "life without parole" or "rest of life in prison"

** These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state

*** Kentucky gave capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principle alternatives

Source: Bowers, William J. and Wanda D. Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." *Criminal Law Bulletin* 39:51-86, Table 7

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Median estimates of alternative sentences have gotten longer

How long do you think someone, usually, spends in prison	Original CJP	New CJP Sample	WA Sample
Median estimate in years	15	25	43

- WA sample was younger (median age = 29.5) so may not have heard old stories of early release
- 23% in WA said 20 years or less

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JURORS STANDS ON PUNISHMENT AT FOUR POINTS IN TRIAL
BY THEIR ESTIMATES OF THE DEATH PENALTY ALTERNATIVE

Stands on Punishment	Estimate of years served by capital murderers not given death		
At least some capital	0%	10/19	20%
Death	39%	75/9	28%
Life	40%	8/4	22%
Undecided	20%	36/8	49%
(N of Cases)	(120)	(229)	(235)
Final sentencing instructions			
Death	30%	44/3	39%
Life	15%	16/9	23%
Undecided	55%	58/8	37%
(N of Cases)	(126)	(237)	(246)

32. After hearing all the evidence and the judge's instructions to the jury for deciding on the punishment, did you begin deliberating with the other jurors: did you then discuss the sentence, death, should be given . . . [a death sentence; a life sentence; or were you undecided]

33. When the first jury vote was taken on the punishment to be imposed, did you vote for . . . [a death sentence; a life sentence; or were you undecided]; and

34. Was your final vote the same as your first vote . . . [yes, no]

Juror Instructions, supra note 19, 270, at 21.

Note that for jurors who were undecided at the first vote on punishment, a final response in the final question does not indicate whether their final vote was life or death. The sample of trials was restricted to cases in which the jury affirmatively made a life or death recommendation, with the exception of one California jury hung on punishment and excluded from the analysis. Because such recommendations must be unanimous in all states except Florida and Alabama, wherever the final punishment votes of undecided first vote jurors are by necessity the same as the jury's punishment recommendation, except in Florida. In Florida, the jury may recommend death or life with a 10-2 majority. Fla. Stat. §32.50, 2d 785, 791-92 (Fla., 1985) holding that in Florida a 10-2 majority may impose the death penalty on the basis of a nonunanimous jury recommendation. In Alabama, there must be a 10-2 majority to recommend death, but only a 7-5 majority for life. See ALA. CODE § 13A-5-46(f), (1994) (declaring that a jury must have a 10-2 majority in order to recommend the death sentence). Indeed, there are 14 Florida (7 death and 7 life) and 7 Alabama (7 life) cases in which one sample juror's final vote differed from the majority. Revising the final vote of the juror in such cases (those of the juror jurors resolved this differently in the actual case).

PAGE 1 OF 2

Table 3 (2 of 2)
JURORS STANDS ON PUNISHMENT AT FOUR POINTS IN THE TRIAL BY THEIR ESTIMATES OF THE DEATH PENALTY ALTERNATIVE

1999] **Death by Default** 655

	0-9	10-19	20+
1st vote on punishment			
Death	86.7	60.8	45.8
Life	21.4	24.0	40.2
Undecided	11.9	15.2	14.3
(N. of cases)	(126)	(237)	(244)
Final punishment vote			
Death	68.5	65.1	43.1
Life	31.5	34.9	56.9
(N. of cases)	(127)	(238)	(248)

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Table 5
Most Common Four-Stage Punishment Pathways* Followed By Capital Jurors Grouped By Their Estimates Of The Death Penalty Alternatives

Estimates of years usually served by capital murderers not given death

8 - 9 years (n = 118)			10 - 19 years (n = 229)			20+ years (n = 235)		
1234	%	Cum %	1234	%	Cum %	1234	%	Cum %
DDDD	24.6	24.6	DDDD	17.5	17.5	DDDD	16.2	16.2
UDDD	12.7	37.3	UUDD	15.3	32.8	LLLL	14.9	31.1
UUDD	11.8	49.3	UUDD	14.8	45.9	UUUL	10.6	41.7
LLLL	5.9	54.2	LLLL	7.4	53.3	UUDD	9.5	51.5
DDDL	5.1	59.3	DDDL	6.1	59.4	DDDL	6.4	57.9
UUUD	5.1	64.4	UUUD	4.1	63.5	ULLL	5.1	63.0
DUDD	3.1	69.5						

* Includes all pathways followed by at least five percent of jurors in each category of release estimates. The percentages do not add up to one hundred percent due to the exclusion of all pathways followed by fewer than five percent of the jurors.

Source: Death by Default (1999), pg. 661

(Texas L. Rev., 1999)

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CA jurors didn't believe what judge told them

- Juror in a death case believed defendants usually released in 15 years even though he observed that officially they say sentence is:

"Life imprisonment, but even though now it says without possibility of parole, we were still concerned that some day he'd get out on parole. We didn't want him out again at all."

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Another juror who ultimately voted for death said:

"I was undecided. I had a personal problem with the life sentence, but then the judge explained to me that if he gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I still don't trust anybody about it."

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TABLE 1
SUPPORT FOR DEATH PENALTY WHEN LIFE WITHOUT PAROLE
IS THE ALTERNATIVE

"What do you think should be the penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?"

	Death Penalty (%)	Life Without Parole (%)	
June 1991	53	35	
Apr. 1992 ^a	50	37	
Oct. 1993	59	29	(Gross
June 1994 ^b	50	32	in
Aug. 1994 ^c	59	30	Cornell
Aug. 1997	61	29	L. Rev.,
Jan. 1998			1998)
"For a man"	54	36	
"For a woman"	50	38	

Source: All data come from Gallup Org., available in LEXIS, News Library, Rpoll File, unless otherwise noted.

^a For this survey, the question began, "Which would you prefer as a penalty for murder . . ." rather than "What do you think should be the penalty for murder, . . ."

^b For this survey, the question began, "In your view what . . ." rather than "What do you think . . ."

^c Data for this question come from CBS News, available in LEXIS, News Library, Rpoll File.

2006 Gallup Poll

- Overall support for the death penalty 65%
- When given a choice between the sentencing options of life without parole and the death penalty, **only 47% of respondents chose capital punishment.**

– (Gallup News Service, June 1, 2006).

In Sum

In every state, including those with LWOP, jurors underestimated how long a person not given death would spend in prison.

Both statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death.

Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Implications

Widespread distrust of the CJS and how readily subjects dismiss evidence that contradicts their assumptions regarding early release of offenders points to the formidable difficulties of convincing juror who have misgivings about the CJS that those sentenced to life really will not be paroled.

Bowers & Foglia (2003). "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing." *Criminal Law Bulletin* 39:51.

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Half or more jurors are not following constitution in six areas discussed

- 49.2% are making premature punishment decisions
- 50.2% believe death penalty is mandatory
- 58.5% underestimate death penalty alternative
- 80.8% express predisposition for death penalty
- 82% don't feel responsible for sentence
- 83.1% misunderstand death penalty instructions (NOT including "Don't Know" or no answer)

NOT ONE juror understood law on all six issues

Number of errors	% of Jurors making that many errors
0	0%
1	1.9%
2	7.1%
3	20.1%
4	34.4% (median and modal number of mistakes is 4)
5	28.6%
6	7.9%

No chance of having 12 jurors who ... follow constitutional mandates

- None of 1198 followed all the mandates
- Probability of one juror who only makes one mistake is .019
- Probability of having 12 who make only one mistake is .019 raised to 12th power or 2.213 out of 1,000,000,000,000,000,000,000 (21 zeros)
- Probability of having all 12 follow all the mandates is nil

119

The evidence demonstrates that in every capital case you are likely to have jurors who...

1. ...decide the sentence during the guilt phase
2. ...will not consider mitigation because they think death is the only acceptable punishment, who are more conviction & punishment prone than the norm, and who have been biased by the focus on the penalty during jury selection.
3. ...do not understand the sentencing guidelines.
4. ...believe the death penalty is mandatory.
5. ...do not see themselves as primarily responsible for the sentence.
6. ...are influenced by assumptions about race.
7. ...vote for death because they erroneously assume early release of capital defendants.

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FILED

10 NOV 15 PM 2:19

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HONORABLE JUDGE KESSLER
HRG: AUGUST 20, 2010 10:30 am

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
Plaintiff,)	
	)	No. 09-1-07187-6 SEA
CHRISTOPHER MONFORT)	
Defendant.	)	DEFENSE MOTION FOR FINDING GOOD CAUSE TO EXTEND MITIGATION DEADLINE FOR FILING AND SERVICE OF NOTICE TO PROCEED WITH SPECIAL SENTENCING PROCEEDINGS

MOTION

Defendant, Christopher Monfort, by and through his attorneys of record Julie A. Lawry and Carl F. Luer, moves this Court pursuant to RCW 10.95.141 for a finding of good cause to extend the time period for the filing of the Notice to Proceed With Special Sentencing Proceedings from the current date of September 2, 2010 to December 1, 2010, set a status conference approximately two weeks before that date and to direct the State not to announce its filing decision before that date. The State originally set the due date for submission of defense mitigation materials for May 17, 2010. After meeting with the Defense team and being appraised of the fact that the Defense team was not able to have a mitigation expert appointed

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APP000462

ORIGINAL

1 and available to begin work until March 31, 2010, the State extended its deadline to August 2,
2
3 2010. The Defense informed the State that while it would work diligently to prepare the
4
5 mitigation materials, that it was unlikely that the August 2nd deadline would be sufficient. On
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7 July 26, 2010, the Defense informed the State by letter that in fact we were unable to provide the
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9 State with a mitigation package and meet our duties under the *ABA Guidelines for Appointment*
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11 *and Performance of Defense Counsel in Death Penalty Cases*. On August 3rd, the State informed
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13 the Defense that it would proceed in making its decision without benefit of the Defense
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15 mitigation package. Shortly afterward, the State served a large volume of new discovery on the
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17 Defense. On Aug 11th, the State informed the Defense that is had additional discovery in its
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19 possession since November 2009, which it had neglected to provide. This was in response to
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21 notice to the State of a Defense subpoena *duces tecum*. Given the new discovery, the Defense
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23 again asked the State to reconsider its deadline. The State responded by asking the Court to set a
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25 formal hearing on September 2, 2010 at which time it will formally announce its decision on
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27 filing of the death notice.

28
29 The Defense seeks additional time in order to complete a thorough mitigation
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31 investigation as required by the *ABA Guidelines* and general ethical duties as presented in *ex*
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33 *parte* filings to this Court. While we have been able to accomplish many of our preliminary
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35 goals with regard to the investigation, new information has come to light that requires further
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37 investigation. The initial list of mitigation witnesses has grown significantly and the number of
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39 States where witnesses reside has nearly doubled. Given the expanded investigation and the
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41 large volume of new discovery recently received by our office, we believe that it is not realistic
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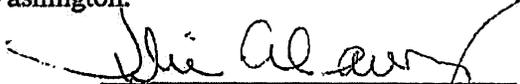
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to have a completed mitigation package before December 1, 2010. We would request a status conference be set at least two weeks before the new deadline.

Given the importance of the death penalty decision; the recognition by case law that input from the Defense at this stage is critical; the past practice of the Prosecutor in carefully considering defense input; the scope and complexity of the mitigation investigation in this case; and the fact that a decision to file a death penalty notice may be "irrevocable", it is vital that the defendant be given an adequate opportunity to assemble compelling and accurate evidence in order for the prosecuting attorney to make a fully informed decision on whether it should seek the death penalty in this case .

This motion is based on RCW 10.95.040; the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution; Washington Const. Article I, §§ 13, 22, attached memorandum of authority and Third Status Report to be filed *ex parte* and under seal.

DATED: This 16th day of August 2010 in Seattle Washington.


Julie A. Lawry, WSBA 17685
Carl F. Luer, WSBA 16365
Attorneys for Mr. Monfort

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MEMORANDUM OF LAW

When a person is charged with Aggravated Murder in the First Degree, the prosecuting attorney must perform an individualized weighing of mitigating factors against the facts and circumstances of the crime. State v. Pirtle, 127 Wn. 2nd 628, 904 P.2nd 245 (1995). Although a prosecutor has broad discretion in this matter, his discretion is not unfettered. Id. In order to file a death penalty notice, a prosecutor must have reason to believe that there are not sufficient mitigating circumstances to merit lenience. RCW 10.95. 040 (1); In re Personal Restraint Petition of Lord, 123 Wn. 2d 296, 868 P.2d 835(1994). The accepted and “normally desirable” practice in these cases involves input from the defendant regarding mitigating factors before the prosecutor makes his decision whether to file the notice. Pirtle, supra, at 642. “Input from the defendant as to mitigating factors is normally desirable, because the subjective facts are better known to the defendant, while other factors, such as age and lack of prior record can be readily ascertained by the prosecutor.” In re Harris, 11 Wn.2d 691, 694, 763 P.2d 823(1988). In this case, the prosecutor has expressly invited the defendant’s input and the defendant fully intends to provide the prosecutor with materials reflecting the mitigation that we believe exists in this case.

Time To Prepare Mitigation Package

The King County Prosecutor’s Office has never in the past adopted a fixed, “one sized fits all” time table for receipt of mitigation information. Indeed, such a practice is specifically prohibited:

We have held a prosecutor’s discretion to seek the death penalty is not unfettered. Before the death penalty can be sought, there must be “reason to believe that there are not sufficient mitigating circumstances to merit leniency.” The prosecutor must perform individualized weighing of the mitigating factors-an inflexible police is not permitted.

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1
2 State v. Pirtle, *supra*, at 642.

3
4 In most previous cases in King County, the prosecutor's death penalty decision was made
5
6 within six months of arraignment. This policy was in part in recognition that death penalty law
7
8 was evolved since the enactment of the death penalty in Washington in 1981, and defense
9
10 counsel are expected, both as a result of court decisions and ABA standards to perform complete
11
12 mitigation investigations for clients facing a possible death sentence. Reversals of capital cases
13
14 are predominately due to inadequate mitigation investigation. *See, e.g., Williams v. Taylor*, 592
15
16 U.S. 362 (2000)(defense counsel's failure to investigate defendant's mental health background
17
18 found ineffective); Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000)(failure of defense counsel
19
20 to investigate educational, occupational and criminal records for penalty phase constituted
21
22 ineffective assistance where defendant has history of drug abuse, child abuse and mitigating
23
24 behavior in prison.); In re Brett, 142 Wn.2d 868 (2002)(failure to present a mitigation package,
25
26 promptly investigate relevant mental health issues, and retain experts as to relevant mitigation
27
28 evidence may lead to ineffective assistance of counsel); Jennings v. Woodford, 290 F.3d 1006
29
30 (9th Cir. 2002)(failure to investigate mental health and drug abuse issues related to innocence
31
32 and penalty phase was ineffective). See also *ABA Guidelines* for the Appointment and
33
34 Performance of Defense Counsel in Death Penalty Cases, which have been repeatedly cited by
35
36 appellate courts, including the Washington State Supreme Court and United States Supreme
37
38 Court, as establishing the minimal standards for performance in a capital case.

39 A partial list of King County aggravated murder cases reflects the prosecutor's **previous**
40
41 policy with regard to length of time allowed from arraignment to filing decision:
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APP000466

1	Champion:	189 days
2	Ridgeway:	119 days
3		
4	Carneh:	365 days
5	Johnson:	30 days
6		
7	Lakey:	339 days
8	Matthews:	294 days
9		
10	Morimoto:	372 days
11	Roberts:	125 days
12		
13	Riggins:	220 days
14	Saintcalle:	182 days
15		
16	Haq	120 days ¹
17	Anderson	270 days (due to competency issues)
18	McEnroy	270 days (tracked Anderson)
19		
20	Kalebu	270 days ²
21		

22
23 The average length of time from arraignment to the Prosecutor's filing decision in these
24 cases was 226 days.
25

26
27 However, in several recent cases, and in this one, Mark Larson chief criminal deputy, has
28 stated that the Prosecutor's Office has adopted a new policy setting a fixed deadline of 90-120
29 days for mitigation work for capital cases, regardless of the individual circumstances of the case.
30
31 This policy was adopted in both the recent Haq and Schierman cases. In Schierman, the court
32 extended the time for mitigation investigation (and ultimately the State's filing decision) over the
33 objection of the State. In Mr. Monfort's case, Mr. Larson has made it clear that he does not
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40 ¹ In State v. Haq, the defendant has a prior diagnosed mental illness with a ten-year treatment history. The State
41 allowed the Defense to file a supplemental mitigation package to provide information supporting long history of
42 mental illness.

43 ² Declaration of counsel in State v. Kalebu, 09-1-04992-7 Attachment A.

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1 intend to allow more than four months for mitigation investigation and preparation of a package
2
3 even with his understanding that the Defense was unable to begin the mitigation investigation
4
5 until March 31st when the mitigation expert was actually available to begin work. The State's
6
7 refusal to extend the deadline for the Defense to submit mitigation materials and for announcing
8
9 its decision on the death penalty was conveyed to defense counsel in Mr. Larson's letter dated
10
11 August 3, 2010 (Attachment B) and in the State's request to the Court to set a hearing for formal
12
13 announcement of the filing decision on September 2, 2010.

14
15 Clearly, contrary to its previous policy, the Prosecutor's Office has now, in fact, adopted
16
17 an inflexible if not a fixed, "one size fits all" timetable to receive death penalty mitigation
18
19 information in violation of RCW 10.95.040 and the Court's pronouncement in Pirtle.

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22
23 **The Prosecutor's New Policy Violates the Requirement that the**
24 **State Conduct an Individualized Weighing of Mitigation Evidence**
25 **To Satisfy the Requirement of RCW 10.95.040 and the Eighth and**
26 **Fourteenth Amendments**
27

28
29 A prosecutor meets his statutory and constitutional obligations under RCW 10.95.040 by
30
31 carefully considering the facts of the individual case in light of the individualized mitigation
32
33 evidence. The prosecutor's failure to consider individualized mitigation evidence before
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35 exercising his discretion to file a death notice violates the Eighth Amendment. The U.S.
36
37 Supreme Court had clearly held that consideration of individualized mitigating evidence is
38
39 required under the Eighth Amendment.

40
41 The sentencing process must permit consideration of the "character and record of the
42
43 individual offender and the circumstances of the particular offense as a constitutionally
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45 indispensable part of the process of inflicting the death penalty", in order to ensure the

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reliability, under the Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case."

Lockett v. Ohio, 438 U.S. 586, 601, 98 S.Ct. 2954, 57 L.Ed2d 973 (1978). The Washington State Supreme Court recognized that to satisfy the Eighth Amendment, the prosecutor must consider mitigating circumstances to narrow the class of persons eligible for the death penalty. State v. Campbell, 103 Wn.2d 1, 40, 691 P.2d 929 (1984)(J. Rosellini, concurring): Accord, State v. Pirtle, *supra*, at 642 ("The prosecutor must perform individualized weighing of the mitigating factors.")

The Pirtle court also said that an inflexible police is not permitted. The State's current inflexible policy that mitigation work must be completed with 90-120 days without consideration of the individual circumstances and the State's position that review of mitigation evidence will be limited to whatever evidence is adduced in that arbitrary period of time, is contrary to the holding in Pirtle.

The prosecutor is empowered to file a death notice "when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." To satisfy this statutory duty, and to exercise his charging discretion in conformance with the Eighth and Fourteenth Amendments and Article I, § 12 and 14 of the Washington Constitution, the prosecutor must conduct an individualized weighing of mitigation evidence before he files the notice. These constraints on the prosecutor's exercise of discretion cannot be satisfied by consideration of the mitigating evidence after a death notice had been filed. Pirtle, *supra*, at 642.

The prosecutor's decision whether to seek death is an important part of Washington's statutory sentencing procedure. The requirement that the prosecutor review individualized mitigation evidence serves to narrow the class of persons subject to death, and channels his

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1 discretion in seeking the death penalty. In Godfrey v. Georgia, 446 U.S. 420, 27-28, 100 S. Ct.
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3 1759, 64 L.Ed.2d 398 (1980), the Court noted that:

4
5 In Furman v. Georgia, the Court held that the penalty of death may not be imposed under
6 sentencing procedures that create substantial risk that the punishment will be inflicted in
7 an arbitrary and capricious manner. Gregg v. Georgia reaffirmed this holding; "Where
8 discretion is afforded a sentencing body on a matter so grave as the determination of
9 whether a human life should be taken or spared, that discretion must be suitably directed
10 and limited so as to minimize the risk of wholly arbitrary and capricious action." A
11 capital sentencing scheme must, in short provide a "meaningful basis for distinguishing
12 the few cases in which [the penalty] is imposed from the many cases in which it is not."
13 This means that if a State wishes to authorize capital punishment it has a constitutional
14 responsibility to tailor and apply its law in a manner that avoids the arbitrary and
15 capricious infliction of the death penalty. Part of a State's responsibility in this regard is
16 to define the crimes for which death may be the sentence in a way that obviates
17 "standardless" [sentencing] discretion. It must channel the sentencer's discretion by
18 "clear and objective standards that provide specific and detailed guidance..."

19
20 In State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984) the Court found the death penalty
21 sentencing scheme in Washington did not violate the prohibition against cruel and unusual
22 punishment because Washington's statutory scheme narrows the class of persons eligible for
23 death at 4 points, including review of mitigation circumstances by the prosecutor. The
24 prosecutor should not be allowed to avoid consideration of mitigating evidence in Mr. Monfort's
25 case by forcing an arbitrary and insufficient amount of time for the collection and presentation of
26 mitigating evidence. Without a complete mitigation package from the Defense, the prosecutor
27 will be unable to properly perform the "individualized weighing" of mitigating circumstances
28 required under RCW 10.95.040.
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37 It should be noted that the State has retained an independent investigator to provide the
38 State with "mitigation evidence", however, this person is not a trained mitigation expert but a
39 general investigator. To date, the information gathered by this investigator is approximately 80
40 pages and includes a handful of preliminary interviews with mostly witnesses on the periphery of
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Mr. Monfort's life i.e. acquaintances and co-workers. The information gathered for consideration on the important issue of life or death by the State would be per se ineffective assistance of counsel if it were submitted by the Defense on Mr. Monfort's behalf. Surely, the State, with its considerable experience in reviewing mitigation packages in potential death penalty cases over the years, does not believe it has gathered the type and quality of mitigating evidence that it is charged with considering before announcing a filing decision.

In reality, unless the Court gives the Defense adequate time to present a complete mitigation package to the prosecutor, the decision whether to file the death penalty notice will be undertaken without any consideration of individualized mitigating circumstances because the State has clearly made only a superficial attempt to investigate such mitigation on its own.

Good Cause

RCW 10.95.040(2) provides that the "notice of special proceeding" shall be filed and served within thirty days after arraignment unless "the court, for good cause shown, extends or reopens the period for filing and service of notice."

Thus, upon a showing of "good cause" this Court has the express authority to extend the time for the prosecutor to decide whether insufficient mitigating circumstances exist such that filing the death notice is appropriate.

There are no reported cases that address when a defense request to extend time to conduct further mitigation investigation is supported by "good cause." However, several cases address "good cause" in the context of the State's failure to comply with the portion of the statute requiring service of the notice on the defendant or his counsel. While not directly on point the

1 cases are helpful. See State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995); State v. Dearbone,
2
3 125 Wn.2d 173, 883 P.2d 303 (1994).

4
5 Both Luvene and Dearbone defined "good cause" as an "external impediment" which
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7 prevented compliance with the statute. In Dearbone, the Court distinguished between "self-
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9 created hardship" (which does not constitute "good cause") and an "external objective
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11 impediment" (which does).

12
13 There is good cause in this case to extend the filing deadline. The remaining Defense
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15 investigation tasks clearly constitute "external impediments" that have not been the result of self-
16
17 created hardship that would prevent a party from complying with the statutory requirements.

18
19 The Court's authority to extend the period for filing the death notice does not rest upon
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21 agreement of either party. "The court is a part of the proceeding and is not a potted-palm
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23 functionary, with only the attorneys having a defined purpose." Luvene, *supra* (Justice Durham,
24
25 dissenting), quoting State v. Ford, 125 Wn. 2d 919, 924-25 (1995).

26
27 Neither the statute nor case law require the consent of the prosecuting attorney to grant an
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29 extension. The prosecutor's consent is only required for entry of a guilty plea during the notice
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31 period. RCW 10.95.040 (2). The statute expressly requires the consent of the prosecutor for a
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33 guilty plea, but is silent regarding the need for consent by the State to extend the notice period.

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35 Under the statutory construction principle of *expressio unius est exclusio alterius* ("express
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37 mention of one thing in a statute implies the exclusion of another"), it must be implied that the
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39 State's consent is not otherwise required.

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41 The State has previously argued in other cases in which extensions of the mitigation
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43 deadline were being sought from the superior court, that the court can only find "good cause" to

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APP000472

1 extend the filing period if the Prosecutor, in his sole discretion, determines that he needs
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3 additional time to make his decision. Under such a viewpoint, the court's only function would
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5 be to approve any extension the State might desire, thereby rendering the plain language of RCW
6
7 10.95.040 meaningless. There are two parties to the action pending before the Court who are
8
9 entitled to petition the court for an extension. Nothing in the statutory language suggests that the
10
11 State is the only intended beneficiary.

12
13 Further, in State v. Finch, 137 Wn.2d 792, 807, 975 P.2d 967 (1999), the Court compared
14
15 a defendant's right to notice under RCW 10.95.040 with the right to a speedy trial, "which can be
16
17 waived by defense counsel over the defendant's objection, to ensure effective representation and
18
19 a fair trial." The court's authority to grant an extension at the request of the defense is consistent
20
21 with ensuring effective representation. The Court in Finch also said that defense counsel may
22
23 waive the time limit of RCW 10.95.040 for "tactical reasons." This holding indicates the Court
24
25 recognized that the defense is entitled to the benefits of the statute.

26
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28 **The Court has Authority to Preclude the State from Filing**
29 **a Death Notice During an Extension of the Filing Period**

30
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32 RCW 10.95.040, while providing that the court may extend the period for filing a death
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34 notice it does not specifically address whether the State may file a death notice during the period
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36 of extension without permission of the court. In point of fact, the King County Prosecutor has
37
38 never sought to file a death notice after a superior court has granted an extension during the
39
40 mitigation period.

41
42 If the State were permitted to file a death notice during such a period of extension, the
43
44 legislative grant of discretion to the court to extend the filing period would be rendered
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46 DEFENSE MOTION FOR FINDING GOOD
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APP000473

1 meaningless, and the court would be powerless to effectuate its statutory authority. In Aylonitis
2
3 v. Seattle Dist. Court, 97 Wn.2d 131, 138, 641 P.2d 169 (1982), the Court stated, "Statutes
4
5 should not be interpreted in such a manner as to render any portion meaningless, superfluous, or
6
7 questionable."

8
9 In State v. Zornes, 78 Wn.2d 9,13 475 P.2d 109 (1970), the Court stated "In construing a
10
11 statute, the court seeks to find the legislative intent, and to give effect to the legislative purpose.
12
13 Courts will not ascribe to the legislature a vain act, and a statute should, if possible, be so
14
15 construed that no clause, sentence, or word shall be superfluous, void, or insignificant."

16
17 The Court has implied power to effectuate the exercise of its discretion under the statute.
18
19 "Even though a power may not expressly be given in specific words, if its existence is
20
21 reasonably necessary in order to effectuate the purposes intended, such power may be implied."

22
23 State ex rel. Hunter v. Superior Court of Snohomish County, 34 Wn.2d 214, 217, 208 P.2d 866
24
25 (1949); Accord, Pac. County v. Sherwood Pac., 17 Wn.App. 790, 567 P.2d 642 (1977).

26
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28
29 **The Separation of Powers Doctrine Does Not Prevent**
30 **the Court from Extending the Notice Period**

31
32 The decision to seek the death penalty is an executive function that has been delegated to
33
34 the prosecuting attorney by the Legislature, which gave procedural control over the timing of the
35
36 notice to the court. RCW 10.95.040 (2). This is similar to the court's control of the timing of an
37
38 amendment to an Information. While the prosecutor is granted charging discretion, the State
39
40 may not amend an Information to add charges without permission of the court. CrR 2.1(d).

41
42 Unless the court grants its permission under CrR 2.1(d), the State cannot amend a current
43
44 Information to charge additional felony counts; to charge sentencing enhancements or even to
45
46 DEFENSE MOTION FOR FINDING GOOD
47 CAUSE TO EXTEND MITIGATION
48 DEADLINE AND PERIOD FOR FILING OF
49 NOTICE TO PROCEED WITH SPECIAL
50 SENTENCING PROCEEDINGS

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APP000474

1 charge misdemeanor offenses. There is no authority to suggest that the discretion of the court
2
3 under CrR 2.1 (d) violates the separation of powers doctrine. Similarly, there is no authority for
4
5 the proposition that the legislative grant of discretion to the court under RCW 10.95.040 violates
6
7 the separation of powers doctrine.

8
9 The State may argue that an analogy to CrR2 is misplaced because under the Rule a court
10
11 may refuse an amended Information only if "substantial rights of the defendant
12
13 are...prejudiced." However, the court's authority under CrR 2.1 is similar to its power under
14
15 RCW 10.95.040 because the court may properly place preconditions on the filing of a death
16
17 notice where the rights of a defendant would be prejudiced by the failure of the State to comply
18
19 with the statutory and constitutional requirement to consider individualized mitigating evidence.

20
21 The State could argue that there would be no prejudice to Mr. Monfort from the filing of
22
23 a death notice because he would be able to present mitigation evidence at a penalty trial. On the
24
25 contrary, Mr. Monfort **will** be prejudiced because he will be deprived of a full opportunity to
26
27 avoid the death penalty by convincing the Prosecuting Attorney that he should not seek death.
28
29 He will be prejudiced because he will not be accorded his right to effective assistance of counsel
30
31 at all stages of the proceeding. He will be prejudiced because allowing the State to file a death
32
33 notice without considering individualized mitigation evidence violates his right to have the
34
35 Prosecutor make his decision in accordance with the Eighth and Fourteenth Amendments and
36
37 statutory requirements.

38
39 On the other hand, the State will not be prejudiced if the Court extends the notice period.
40
41 Once the Prosecutor has fulfilled his statutory and constitutional duties, he will be free to either
42
43 file or not file a death notice at the end of the extension period.

44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP000475

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The Court Must Ensure that the Prosecutor Acts in Accordance with Statutory Dictates and Does Not Violate Constitutional Guarantees in the Exercise of Its Discretion

It is the duty of the Court to require the State to comply with its statutory obligations under RCW 10.95.040, and to ensure that the State does not violate Mr. Monfort's constitutional rights in the exercise of its discretion. The Court in Luvene wrote:

As the United States Supreme Court has repeatedly noted, 'the penalty of death is qualitatively different from a sentence of imprisonment, however long.' Because of this difference, we should strive to ensure that the procedures and safeguards enacted by the Legislature are properly followed by the Sate. The determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedure establish by the Legislature.

Luvene, at 719 n.8.

Violation of Right to Due Process of Law If Mr. Monfort is Not Given Time to Prepare a Mitigation Package

State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) said "The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness..."

The application of the State's newly adopted policy to set a one-size fits all deadline for every potential death penalty case is fundamentally unfair:

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessary delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can he gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

DEFENSE MOTION FOR FINDING GOOD
CAUSE TO EXTEND MITIGATION
DEADLINE AND PERIOD FOR FILING OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS

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APP000476

1 Letter from Mark Larson for Dan Satterberg dated December 14, 2009 (day of arraignment).
2
3 Attached as exhibit. This language is contained in boilerplate form in all letters sent from the
4
5 State regarding the original time for filing deadline. Mr. Monfort is being provided with
6
7 substantially less time than past capital defendants to collect and present mitigation evidence that
8
9 might save him from death. Such disparate treatment is not consistent with the principles of due
10
11 process, especially in a capital case. "Where life itself hangs in the balance, a fine precision in
12
13 the process must be insisted upon." Lockett v. Ohio, *supra*.

14
15 In Washington...in the charging decision, "the prosecutor merely determines
16 whether sufficient evidence exists to take the issue of mitigation to the jury. This
17 type of discretion does not violate equal protection." State v. Dictado, 102 Wn.2d
18 277, 297-8, 687 P.2d 172 (1984). Thus, pursuant to RCW 10.95.040(1) the filing
19 of a notice of intent to seek the death penalty is a **prosecutorial statement that**
20 **he does not know of sufficient mitigating circumstances to merit leniency.**

21
22 Harris By and Through Ramseyer v. Blodgett, 853 F. Supp. 1239, 1284 (1994)(emphasis added).
23
24

25
26 **Mr. Monfort Will Be Denied Effective Assistance of Counsel if the Filing**
27 **Period is Not Extended to Permit Counsel to Conduct a Reasonable**
28 **Investigation**
29

30
31 "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a
32 reasonable investigation enabling [counsel] to make informed decisions about how best to
33 represent the client.'" In re Brett, *supra*.
34

35
36 In Brett, defense counsel failed to fully investigate Brett's medical and mental problems
37 and failed to present a mitigation package to the State prior to filing of the death notice. His
38 sentence of death was vacated and the Court found that he had been denied his right to effective
39 assistance of counsel:
40
41
42
43

44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP000477

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When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed, and, if necessary retain qualified experts to testify accordingly.

Id. at 880 (Emphasis added). The Court noted that Brett's attorney did not present a formal or written mitigation package. Two legal experts testified that failure to present a mitigation package to the prosecutor before filing of the death notice constituted ineffective assistance of counsel. In Harris By and Through Ramseyer v. Blodgett, *supra*, the court said, "Counsel's failure to attempt mitigation with the prosecutor before the death penalty was sought fell below the objective standard of reasonableness and amounted to a deficient performance."

Mr. Monfort will be deprived of the effective assistance of counsel if the defense is not afforded the opportunity to present a comprehensive mitigation package to the Prosecutor. "The proper measure of attorney performance remains simply reasonableness under **prevailing professional norms.**" Strickland v. Washington, *supra* (emphasis added). "Prevailing professional norm" means the professional norms in existence at the time of the case. Wiggins v. Smith, 539 U.S. 510 (2003); Harris, 853 F. Supp. at 1254.

The "professional norms" in this case are dictated by case law and the ABA standards for death penalty defense lawyers.³ Mr. Monfort's attorneys have been unable to meet those standards in the short and arbitrary period of time that has been allotted for mitigation.

By instituting an inflexible standard, the State seeks to roll back the clock to limit defense counsel to a mitigation time frame that was typically permitted ten years ago or more. The State

³ See Declaration of Todd Maybrown, Attachment C.

1 fails to realize that to meet prevailing professional norms in capital defense, and to avoid costly
2
3 and needless litigation that would ultimately result in appellate reversal for ineffective assistance,
4
5 more time for mitigation is needed than previously the case. Given the particulars of Mr.
6
7 Monfort's case (his age, lack of prior incarceration and the large number of states where
8
9 mitigation witnesses reside and documents are located) this case deserves more than just an one-
10
11 size fits all treatment. It can hardly be contested that the nature and quality of mitigation work
12
13 has evolved over the 27 years since the Washington death penalty statute was enacted in 1981.

14
15 In fact, the Washington Supreme Court raised its expectation of capital counsel in 1997
16
17 when it adopted SPRC 2 to address the problem of ineffective assistance of counsel. The rule
18
19 requires appointment of counsel qualified to render "quality representation which is appropriate
20
21 to a capital case." The mitigation work that has been completed to date in Mr. Monfort's case is
22
23 incomplete and so cannot constitute the "quality representation" envisioned by the rule.

24
25 Case Law also reflects this evolving standard of practice. See Wiggins, supra,
26
27 (ineffective assistance to fail to investigate and present mitigating evidence of dysfunctional
28
29 background at trial); In re Brett, supra (ineffective assistance to fail to investigate mental health
30
31 issues and present mitigation package prior to filing of death notice).

32
33 Because of the State's new and arbitrary policy of providing an essentially inflexible
34
35 amount of time to prepare and present mitigation evidence in every capital case (without regard
36
37 to individualized circumstances based on the nature of the case), Mr. Monfort will be denied
38
39 effective assistance of counsel in violation of the Sixth Amendment and Article I, §22 of the
40
41 Washington Constitution if an extension of the mitigation period is not granted.

42
43
44 DEFENSE MOTION FOR FINDING GOOD
45 CAUSE TO EXTEND MITIGATION
46 DEADLINE AND PERIOD FOR FILING OF
47 NOTICE TO PROCEED WITH SPECIAL
48 SENTENCING PROCEEDINGS
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APP000479

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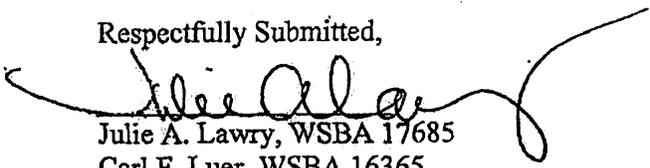
Conclusion

The State's new inflexible policy is arbitrary; provides patently insufficient time to gather and present a complete mitigation package; is not individualized according to the facts and the circumstances of each individual case; violates the requirements of RCW 10.95.040 and case law and allows the Prosecutor to make a death penalty decision without meaningful consideration of "individualized mitigating circumstances" because the truth of the matter is that the State has essentially done nothing to fulfill its empty promise of conducting its own investigation of mitigating factors. The State's policy is neither rational nor fair, and creates an inconsistency in the treatment of capital defendants. In this case, the State is aware of the fact that while Mr. Monfort was arraigned in December of 2009, the Defense did not have a mitigation expert on board and in the field until the 31st of March 2010. Allowing four months for a full and comprehensive mitigation investigation and presentation that effectuates the duties, obligations and principles of RCW 10.95.040, the state and federal constitutions and the ABA Guidelines is absurd. Given the breadth of Mr. Monfort's life experiences it invites, if not compels a finding of ineffective assistance of counsel.

The Court should grant the Defense motion to extend the period for filing a death notice and should preclude the State from filing a death notice during the extension period.

DATED August 16, 2010

Respectfully Submitted,



Julie A. Lawry, WSBA 17685
Carl F. Luer, WSBA 16365
Attorneys for Mr. Monfort

DEFENSE MOTION FOR FINDING GOOD
CAUSE TO EXTEND MITIGATION
DEADLINE AND PERIOD FOR FILING OF
NOTICE TO PROCEED WITH SPECIAL
SENTENCING PROCEEDINGS

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ATTACHMENT
A

APP000481

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	CAUSE NO. 09-1-07187-6 SEA
)	
<i>Plaintiff,</i>	)	Declaration of Ramona Brandes
)	
v.)	
)	
Christopher Monfort,)	
)	
<i>Defendant</i>)	

I, Ramona C. Brandes, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct based upon information and belief:

1. I was court-appointed to represent defendant Isaiah Kalebu on King County Superior Court Cause 09-1-04992-7 SEA on charges of Aggravated First Degree Murder, Attempted Murder in the First Degree, Rape First Degree, and Burglary First Degree;
2. That the date of the alleged offenses in the Kalebu case is July 19, 2009;
3. I was assigned to represent Mr. Kalebu on July 29, 2009, along with later assigned counsel Michael Schwartz;

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4. In preparing a mitigation packet for the King County Prosecutor's Office as to mitigating factors that weighed against seeking a special sentencing proceeding, extensive investigation, research, and writing was required which extended for a period of approximately nine months.
5. Our mitigation investigation uncovered nearly 200 mitigation witnesses and over 3000 pages of mitigation documents, all in addition to the discovery provided by the prosecutor.
6. Discovery of mitigation evidence occurred sequentially, meaning, that receipt of one set of documents or interview would then refer to or open leads to other pertinent documents and witnesses. This sequential discovery often created unexpected time delay due to the need to accumulate these records, and due to the reality that certain assessments and evaluations can not take place until all the related records have been unearthed and received.
7. Defense was under pressure from the King County Prosecutor's Office to rapidly conduct the mitigation investigation, as Mark Larson, Chief Criminal Deputy Prosecutor, had specifically voiced his determination to the defense that he wanted to take back control "of this" from the defense and due to his claim, despite abundant case law to the contrary, that a rapidly done mitigation was no better than one that was more thorough.
8. Initially the King County Prosecutor's Office was insistent that any mitigation packet be submitted no later than January 12, 2010, which was less than six months from the date of the incident.
9. Further negotiation with the prosecutors resulted in an extended agreed date for submission of the defense mitigation packet no later than April 1, 2010, which the

1 defense complied with even though the defense had not completed the investigation of
2 the mitigation witnesses and highly relevant mitigating records are still incoming nearly a
3 month after the submission of the packet.

4
5 10. It was our assessment that an adequate investigation of mitigation actually would have
6 taken until August 2010 to complete. Fortunately, the state determined not to seek to a
7 special sentencing proceeding on the Kalebu matter.

8 11. Defense believes that had the state determined to proceed to a special sentencing
9 proceeding their failure to allow adequate time to for defense to properly investigate and
10 present mitigating circumstances would have raised a colorable appellate issue that could
11 have resulted in long-standing litigation that would take much longer to resolve than just
12 permitting the adequate time for the investigation initially.

13
14 12. As it stands, due to the insufficient time for preparation, following submission of the
15 main mitigation packet on April 1, 2010, defense continued to work on a necessary but
16 incomplete portion of the mitigation packet relating to proportionality. This section was
17 submitted to the prosecutor's office in abbreviated form on April 12, 2010, bringing the
18 total preparation time to nine months.

19
20
21 Signed in Seattle, WA on the 12th day of May 2010.

22
23 

24 Ramona C. Brandes, WSBA #27113
25 Attorney for the Defendant

ATTACHMENT
B

APP000485

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

August 3, 2010

Julie A. Lawry
Carl Luer
Associated Counsel for the Accused
110 Prefontaine Place So., Ste. 200
Seattle, WA 98104

Re: State of Washington v. Christopher Monfort
King County Superior Court Cause No. 09-1-07187-6 SEA

Dear Counsel,

Thank you for your letter dated July 26, 2010. We understand from your correspondence that you have chosen not to provide the State with any evidence of mitigation by the August 2, 2010 deadline, the extension that we provided to you on May 20, 2010.

As you know, eight months have now passed since Mr. Monfort was arraigned on the current charges and nine months have passed since he was charged with these crimes. Our office has provided you with extensive discovery regarding the crimes with which he is charged and the evidence implicating him in those crimes. We have also provided you with all the reports generated by a private investigator we retained to look into your client's background.

After careful consideration, we have decided not to extend the date by which our elected prosecutor will make the decision contemplated by RCW 10.95.040. That decision will be made by September 3, 2010.

As is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution. We look forward to your previously scheduled meeting with Mr. Satterberg on August 26, 2010, at 11 a.m. at the King County Prosecutor's Office. We strongly encourage you to provide him with any evidence of mitigation you may have at that time. Mr. Satterberg will announce his decision on or before September 3, 2010.

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney

Erin Ehlert for

Mark Larson
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney
Ian Goodhew, Deputy Chief of Staff
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys

APP000486

ATTACHMENT
C

APP000487

1 United States District Court for the Eastern District of Michigan, the United States District
2 Court for the Southern District of New York, the United States District Court for the Eastern
3 District of Washington, the United States District Court for the Western District of
4 Washington, the United States District Court for Idaho, the Sixth Circuit Court of Appeals,
5 the Ninth Circuit Court of Appeals, and the United States Supreme Court.
6

7 3. From 1990 to the present, I have handled all types of litigation matters, and
8 have represented numerous clients faced with serious felony charges, including several
9 homicide cases. I have handled many trials and appeals in state and federal courts.

10 4. I have been appointed to represent several defendants charged with aggravated
11 first-degree murder in the State of Washington. Since 1997, I have represented six defendants
12 charged with aggravated first-degree murder in the State of Washington. *See, e.g., State v.*
13 *Martin Francisco*, King County Cause No. 97-C-08624-4 SEA; *State v. Corey Beito*, King
14 County Cause No. 89-1-00243-0 KNT; *State v. Michael Thornton*, Kennewick Superior Court
15 No. 98-1-00493-6; *State v. Michael Roberts*, King County Cause No. 94-C-03249-2 (after
16 reversal by Washington Supreme Court); *State v. Rosendo Delgado, Jr.*, Yakima County
17 Cause No. 99-1-00736-6; *State v. Blake Pirtle*, Spokane County Cause No. 92-1-00955-3
18 (after reversal by Ninth Circuit Court of Appeals). Each of these cases was ultimately
19 resolved without the imposition of a death sentence.
20
21

22 5. More recently, during 2006, I was appointed as "learned counsel" to represent
23 a defendant charged with murder and racketeering charges in the United States District Court
24 for the Western District of Washington. *See United States v. Rollness*, Cause No. CR06-
25 41RSL (W.D.Wash.). After reviewing the defense mitigation package, the Attorney General
26 declined to file a death notice in that case.

DECLARATION OF TODD MAYBROWN - 2

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AF P000489

1 6. In addition to my work at the trial court level, the Washington Supreme Court
2 has appointed me to represent several capital defendants during appeals and/or personal
3 restraint proceedings: Dayva Cross (71267-1); James Brett (No. 63835-7), and Blake Pirtle
4 (No. 64300-8).

5
6 7. In 1997, the State of Washington enacted a court rule that requires a panel
7 created by the Supreme Court to create a list of attorneys who "meet the requirements of
8 proficiency and experience, and who have demonstrated that they are learned in the law of
9 capital punishment by virtue of training or experience, and thus are qualified for appointment
10 in death penalty trials and for appeals." Superior Court Special Proceeding Rule 2. That
11 panel has concluded, since its formation, that I am among the attorneys qualified to represent
12 capital defendants at all phases of the litigation.

13
14 8. Also, I have litigated several capital habeas corpus actions under 28 U.S.C.
15 Sec. 2254. *See, e.g., Rupe v. Wood*, 863 F.Supp. 1307 (W.D. Wash. 1994); *Rupe v. Wood*,
16 863 F.Supp. 1313 (W.D.Wash. 1994); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996); *Pirtle v.*
17 *Morgan*, 313 F.3d 1160 (9th Cir. 2002); *Sivak v. Klauser*, Cause No. 96-0056-S-FLW; and
18 *Wood v. Paskett*, Idaho Cause No. CV-99-0198-S-EJL.

19
20 9. I have been a member of the National Association of Criminal Defense
21 Lawyers and the Washington Association of Criminal Defense Lawyers ("WACDL") since
22 1990. From 1997 to 2008, I was a co-chair of WACDL's death penalty committee. In that
23 capacity, I have consulted with many attorneys on numerous homicide and death penalty
24 cases. I served as the president of WACDL from June 2009 to June 2010. Since 2006, I have
25 assisted as an Adjunct Professor for the Trial Advocacy Program at the University of
26 Washington Law School.

DECLARATION OF TODD MAYBROWN - 3

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1 10. In addition to my general training, I have attended seven CLEs that focused
2 exclusively on the law of capital punishment: (1) a national conference in Washington, D.C.
3 during June 1996 (which lasted three days); (2) a WACDL CLE during 1995 (which lasted
4 two full days); (3) the Northwest Regional Death Penalty Training Conference during
5 November 1998 (which lasted three days); (4) a national conference in Virginia during June
6 2000 (which lasted three days); (5) a WACDL CLE during September 2001 (which lasted one
7 full day); (6) a WACDL CLE during 2003 (which lasted two full days); (7) a national
8 conference in Virginia during 2006 (which lasted three days); and (8) a Washington death
9 penalty training program in Spokane during July 2007 (which lasted for two full days). I have
10 attended many other CLEs, and lectured at no less than ten CLEs, that covered issues relating
11 to homicide cases and scientific evidence. During 2000 and 2001, I presented several lectures
12 at the Northwest Regional Death Penalty Training Conference and the WACDL CLE (which I
13 co-chaired). Finally, since 2001, I have presented many lectures regarding capital litigation
14 and post-conviction proceedings.
15

17 11. As noted above, I have handled numerous habeas corpus actions in the federal
18 courts. I am familiar with the provisions of the Anti-Terrorism and Effective Death Penalty
19 Act of 1996. In fact, I have filed a civil rights case in the United States District Court for the
20 Western District of Washington that addressed certain issues relating to the new habeas
21 corpus rules in capital cases. *See Benn v. Gregoire*, No. C96-5689FDB (granting preliminary
22 injunction in favor of capital defendants). Moreover, during 1998, a Magistrate Judge of the
23 United States District Court for the Western District of Washington appointed me to brief, and
24 to argue, a case certified from the United States District Court to the Washington Supreme
25
26

DECLARATION OF TODD MAYBROWN - 4

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1 Court regarding the relationship between Washington practice and federal habeas corpus law.
2 *See Shumway v. Payne*, 136 Wn.2d 383 (1998).

3 12. I am familiar with Washington's death penalty statutes, and the several state
4 and federal court decisions that have interpreted and discussed those same statutes. There is
5 no mandatory death penalty in Washington – or any other jurisdiction in the United States.
6 Rather, in light of Washington's statutes and court precedents, the prosecutor is charged with
7 the discretion to make an initial determination whether or not to seek the death penalty in any
8 potential capital case. Consistent with the Sixth Amendment, it is expected that the
9 defendant's counsel will use the initial stages of any aggravated murder case to prepare a
10 "mitigation package" in an effort to convince the prosecuting attorney not to seek the death
11 penalty.
12

13 13. I am familiar with the United States Supreme Court's jurisprudence in capital
14 cases, including the several recent cases that discuss the significance of "mitigation evidence"
15 in capital proceedings. *See, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978); *Wiggins v. Smith*, 439
16 U.S. 510 (2003). Also, I am familiar with the 2003 ABA Guidelines for the Appointment
17 and Performance of Defense Counsel in Death Penalty Cases. All of these resources make
18 clear that a complete mitigation investigation is absolutely essential to effective representation
19 of a client facing a possible death sentence.
20

21 14. I have been asked by defense counsel in the above-captioned case to provide
22 an opinion in regards to the amount of time that is generally necessary to prepare a mitigation
23 package in a case of this sort; what is necessary to provide effective assistance of counsel in
24 the preparation of a mitigation package. It is my understanding that the named defendant,
25 Christopher Monfort, is currently charged with one count of Aggravated First Degree Murder
26

DECLARATION OF TODD MAYBROWN – 5

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APF000492

1 as well as four other class A felonies and three distinct crime scenes. It is my understanding
2 that the Defense was unable to begin its mitigation investigation in earnest until April 2010.
3 The State extended its original deadline from May 17, 2010 to August 2, 2010; giving the
4 Defense four months to complete its mitigation investigation and submit its material. It is my
5 further understanding that the Defense informed the State that it would not have a thorough
6 and completed mitigation package for the State on the August 2 deadline. Apparently, the
7 State is now intending to schedule a hearing on September 2, 2010 for formal announcement
8 of its filing decision without benefit of a Defense mitigation package.
9

10 15. I have also been told that Mr. Monfort is 41 years of age, with no history of
11 incarceration, and with prior residency in at least six states. Thus, the defense has determined
12 that there are potential mitigation witnesses spread over at least eleven states. With such a
13 background, the defense would need considerable time to complete a thorough evaluation of
14 Mr. Monfort's life history and to prepare a comprehensive mitigation package.
15

16 16. I have represented several defendants who were charged with capital offenses
17 and I have supervised the preparation of mitigation packages in each of those cases. Also, I
18 have consulted with numerous other attorneys as they worked to assemble a mitigation
19 package for their own clients. I do not believe that I have ever been involved in any case
20 where an attorney has been expected to prepare a mitigation package in a time period as short
21 as 120 days.
22

23 17. I seriously question the wisdom and the appropriateness of setting a strict time
24 limit for the completion of a mitigation package in a case of this sort. I believe that the
25 preparation of a mitigation package is a critical stage in any aggravated murder case and I
26 know from personal experience that the preparation of a comprehensive mitigation package

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PP000493

1 may have a dramatic impact on the prosecutor's view of a potential capital case. The
2 presentation of this package is important insofar as it may help to demonstrate that a
3 reasonable juror would answer "no" to the question posed in RCW 10.95.060(4). Under such
4 circumstances, the prosecutor should never file a death notice and the case should proceed as
5 a traditional murder case. At the very least, the information contained in the mitigation
6 package should help the prosecution to make a reasoned determination with respect to the
7 appropriate punishment in the case.
8

9 18. When preparing any mitigation presentation, an attorney must complete a
10 comprehensive review of the defendant's background and history. This process must include,
11 at a minimum, a thorough review of the defendant's family and social history (including a
12 multigenerational history), medical and mental health history, educational background,
13 employment history, criminal history, and any other significant information relating to the
14 defendant's development and life history. At the same time, the attorneys must complete a
15 thorough evaluation of the facts and circumstances surrounding the offense conduct that gives
16 rise to the current charges. The attorneys may seek to develop evidence that would call into
17 question the strength of the government's case as to the charged offense conduct. However,
18 in order to assemble a most-effective mitigation presentation, the attorneys must attempt to
19 establish some associations between the mitigating evidence (e.g., the defendant's background
20 and history) and the alleged offense conduct that is at issue in the case.
21
22

23 19. It is something of a truism to state that each aggravated murder case is unique,
24 but the Court should recognize that it would seem unreasonable to create a "one size fits all"
25 rule for these cases. In some cases, mitigation information is easy to obtain (e.g., the client is
26 healthy and lucid, records and historical data are easy to locate, local experts are available to

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APP000494

1 complete all necessary work on the case, factual information relating to the crime is readily
2 available, all witnesses are cooperative, etc.). In most cases, however, it is my experience that
3 some of the information necessary to prepare a comprehensive mitigation package is difficult
4 to obtain and not readily available within a very short period of time.¹ I have prepared many
5 mitigation packages in my career, and I do not believe that I have ever completed such a
6 presentation in a period as short as 120 days.
7

8 20. The media accounts regarding Mr. Montfort and this case seem to suggest that
9 defense counsel will need to conduct a thorough evaluation of their client's mental health
10 condition at the time of the offense (and thereafter). To do so, the attorneys must complete a
11 comprehensive evaluation of Mr. Monfort's historical mental condition and any history of
12 mental health treatment and counseling. This is certain to be a time consuming process and I
13 would expect that most experienced attorneys would request at least six months to complete
14 such a review.² In rendering this opinion, I do want to acknowledge that six months may well
15 be insufficient to prepare and present a comprehensive mitigation assessment of Mr.
16 Monfort's personal circumstances and the facts surrounding the case. Nevertheless, at a bare
17 minimum, the State and the Court should afford counsel more than 120 days to complete the
18 process.
19

20
21 21. I have handled several capital cases during appeal, post-conviction and federal
22 habeas corpus proceedings. One of the primary reasons for reversals of death sentences in the
23

24 ¹ For example, the experts needed to address the individual circumstances of the defendant oftentimes
25 must be brought in from out of state, and the machinations of funding those experts is also subject to
understandable limitations and time constraints.

26 ² This Court should recognize that this review process is necessarily dependent upon the scheduling
constraints of mental health experts and other persons who are not within defense counsel's control.

DECLARATION OF TODD MAYBROWN - 8

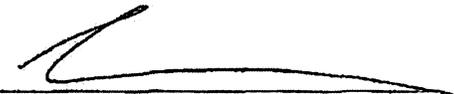
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PP000495

1 State of Washington – and the country as a whole – has been the fact that trial counsel
2 provided ineffective assistance during the preparation and presentation of mitigation evidence.
3 See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Jennings v. Woodford*, 290 F.3d 1006 (9th
4 Cir. 2002); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000); *In re Brett*, 142 Wn.2d 868
5 (2001). By imposing a short deadline for the time to prepare the initial mitigation package in
6 a case of this sort, the State may unwittingly increase the risks of such a reversal.³ Moreover,
7 I do not believe that a short deadline will serve the interests of justice in the long run.
8

9
10 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
11 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF
12 MY KNOWLEDGE.

13 Dated at Seattle, Washington this ¹²16 day of August, 2010.

14
15 
16 TODD MAYBROWN, WSBA #18557

17
18
19
20
21
22
23
24 ³ However, notwithstanding the limit imposed prior to the filing of the notice under RCW 10.95.040,
25 counsel is obliged to continue to seek out evidence that may be relevant to mitigation. If such
26 evidence is discovered after the prosecutor has filed a death notice, I believe that the prosecutor would
be obliged to withdraw the improvidently filed notice.

FILED

The Honorable Ronald Kessler
December 7, 2012 at 1:00 pm

12 NOV -9 PM 2:35
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
CHRISTOPHER MONFORT,)
)
Defendant.)

NO. 09-1-07187-6 SEA

DEFENDANT'S REPLY TO
PROSECUTION'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE THE
SPECIAL SENTENCING PROCEEDING,
CONVENE SEPARATE JURIES, AND
REQUEST EVIDENTIARY HEARING

The State is seeking to kill Mr. Monfort. Mr. Monfort is clearly a person who will be "harmfully affected by" Washington's death penalty statute. Mr. Monfort's rights and liberty will certainly be infringed upon should he receive a sentence of death and he therefore, has an "interest particular and personal" to himself, "as distinguished from a cause of dissatisfaction with the general framework of the statute." Mr. Monfort can challenge Washington's death penalty statute as applied to himself. New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L.Ed. 2d 1113 (1982). The defense's motion to strike the special sentencing proceeding or in the alternative convene separate juries based on the findings of the Capital Jury Project (CJP) has merit and is properly before this court. Mr. Monfort does not need to show that the flaws uncovered by the CJP

DEFENANT'S REPLY TO PROSECUTION'S RESPONSE TO
DEFENSE MOTION TO STRIKE THE SPECIAL SENTENCING
PROCEEDINGS OR IN THE ALTERNATIVE CONVENE
SEPARATE JURIES, AND REQUEST EVIDENTIARY HEARING - 1

APP000497

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1 caused a death sentence in his case as the United Supreme Court has already determined that when a
 2 jury fails to follow its mandates a death sentence is unconstitutionally arbitrary. *See e.g. Woodson*
 3 *v. North Carolina*, 428 U.S. 280, 302, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976); *Godfrey v. Georgia*,
 4 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398(1980); *Stringer v. Black*, 503 U.S. 222, 112 S. Ct.
 5 1130, 117 L. Ed.2d 367(1992).

6 I. The State's heavy reliance on *McCleskey vs. Kemp* is misplaced

7 The State relies heavily on *McCleskey vs. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed.
 8 2d 262 (1987) in asserting that based on that case, this court should deny the defense motion to
 9 strike the special sentencing proceedings, as a sociological study is not a sufficient basis for
 10 challenging a death penalty statute. But similar to *Korematsu v. United States*, courts can reach a
 11 lamentable decision. In fact, Justice Powell came to regret his ruling in *McCleskey*. When Justice
 12 Lewis Powell, the author of the majority opinion, was asked by his biographer whether he would
 13 like to change his vote in any case he said, "Yes, *McCleskey v. Kemp*."¹ *McCleskey* was a 5-4
 14 decision.

15 The State's reliance on *McCleskey* is misplaced as the findings of the Capital Jury Project
 16 (CJP) are not the same as those addressed in *McCleskey*. The Baldus study in *McCleskey* was an
 17 abstract statistical study. The CJP is a study based on the reasoning of actual jurors in the broadest
 18 survey of death penalty cases. The Capital Jury Project study was **conducted in response to**
 19 *McCleskey*. The Baldus study and the CJP study are completely different types of studies and the
 20 state is simply attempting to conflate the two by asserting they are similar and ignoring the main
 21

22 ¹ See John C. Jeffries Jr., *JUSTICE LEWIS F. POWELL: A BIOGRAPHY*(1994); "Justice Powell's New Wisdom, The
 23 New York Times Opinion Page, June 11, 1994 available online at <http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html?scp=1&sq=John+Jeffries&st=nyt> (viewed Nov 7, 2012)

1 difference, that the CJP does not rely on inferences but real capital jurors' voluntary descriptions of
2 the motives and influences that led to their verdicts.

3 In McCleskey, the court was asked to draw inferences from statistical patterns found in the
4 records of sentences in Georgia's capital cases rather than examine evidence from actual capital
5 jurors. In rejecting the Baldus study, the McCleskey court found that "despite such imperfections,
6 constitutional guarantees are met when the mode for determining guilt or punishment has been
7 surrounded with safeguards to make it as fair as possible." Id., at 1775-1776. Unlike the Baldus
8 study the CJP based their scientific research on direct evidence gathered from actual capital jurors.
9 The CJP's research shows that actual jurors were voluntarily explaining that they were not
10 following the law as required by the United States Supreme Court. The CJP studies demonstrate
11 that the safeguards put in place in capital sentencing post Furman, and Gregg and as relied upon by
12 the McCleskey court are not being followed by the jurors in actual capital cases, who are making the
13 life or death decision.

14 The McCleskey court found that "the Baldus approach...would take the cases with different
15 results on what are contended to be duplicate facts, where the differences could not be otherwise
16 explained, and conclude that the different results was based on race alone...This approach ignores
17 the realities...there are, in fact, no exact duplicates in capital crimes and capital defendants."
18 McCleskey, supra. The CJP by interviewing jurors from real capital trials from multiple states with
19 multiple types of aggravating facts and multiple variations of instructions, is able to account for the
20 realities of the uniqueness of capital cases and defendants.

21 By examining multiple states and multiple sentencing schemes, the CJP has proven that
22 jurors routinely fail to follow the safeguards put in place in all of the sentencing schemes. Even
23

1 where the safeguards are imposed by the State, it is the jurors who are the ultimate decision makers.
2 If they disregard, as they have assured us they do, or fail to implement safeguards put in place by the
3 State, the effect is that the death penalty is still imposed in an arbitrary and standardless manner and
4 is therefore an Eighth Amendment violation per Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726,
5 33 L.Ed. 2d 346 (1972).

6 The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel
7 and unusual punishment." Furman struck down the death penalty and concluded that the death
8 penalty was so irrationally imposed that any particular death sentence could be presumed excessive
9 in violation of the Eighth Amendment prohibition. Furman v. Georgia, 408 US. 238, 92 S. Ct.
10 2726, 33 L. Ed. 2d 346 (1972). A few years later in Gregg, the court addressed under what
11 circumstances the death penalty would not be "cruel and unusual" in violation of the Eighth and
12 Fourteenth Amendments of the United States Constitution. In Gregg, the Court adopted safeguards
13 and requirements that would protect against arbitrary sentencing decisions when they are applied.

14 "Where discretion is afforded a sentencing body on a matter so grave as the determination of
15 whether a human life should be taken or spared, that discretion must be suitably directed and limited
16 so as to minimize the risk of wholly arbitrary and capricious action." Furman, 428 U.S at 189, 96 S.
17 Ct. at 2932. "Thus, 'while some jury discretion still exists, the discretion to be exercised is
18 controlled by clear and objective standards so as to produce non-discriminatory application.'" Id.,
19 428 U.S. at 198, 96 S. Ct. at 2936. When challenging the application of a death penalty scheme,
20 the question is "at what point does that risk become constitutionally unacceptable." Turner v.
21 Murray, 476 U.S. 28, 36, n. 8, 106 S.Ct. 1683, 1688, n. 8, 90 L. Ed. 2d 27 (1986).

22

23

1 What the CJP findings show us is that the death penalty schemes across the United States
2 have reached the level where the risk is constitutionally unacceptable because in practice jurors are
3 not following the dictates and safeguards which ensure against arbitrary and capricious decisions.

4 While Washington State was not part of the CJP study, Dr. Foglia will testify as to how those
5 findings apply to Washington and why Washington's death penalty scheme is as flawed as those
6 States that were part of the CJP study.

7 The McCleskey Court relies heavily on the "rule [that has been] that constitutional
8 guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded
9 with safeguards to make it as fair as possible." McCleskey 481 U.S. at 313, 107 S. Ct. at 1179,
10 citing Singer v. United States, 380 U.S. at 35, 85 S. Ct. at 790. They continue on to state that "where
11 the discretion that is fundamental to our criminal process is involved, we decline to assume that
12 what is unexplained is invidious." Id. However, here with the findings of the CJP, it is not
13 unexplained. In fact, the scientific research proves the fact that the safeguards are being ignored and
14 are not protecting against arbitrary and capricious decisions.

15 Since Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) the Court
16 has been concerned with the **risk of the imposition of an arbitrary sentence, rather than the**
17 **proven fact of one.** Furman held that the death penalty may not be imposed under sentencing
18 procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and
19 capricious manner. Godfrey v. Georgia, 446 U.S. at 427, 100 S. Ct. at 1764. See also Caldwell v.
20 Mississippi, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647 (1985)("a death sentence must be struck
21 down when the circumstances under which it has been imposed 'creat[e] an unacceptable risk that

22

23

1 the death penalty[may have been] meted out “arbitrarily or capriciously” or through “whim or
2 mistake.”)

3 As Justice Brennan stated in his dissent in McCleskey:

4 The Court’s “emphasis on risk acknowledges the difficulty of divining the
5 jury’s motivation in an individual case. In addition, it reflects the fact that
6 concern for arbitrariness focuses on the rationality of the system as a whole,
and that a system that features a significant probability that sentencing decisions
are influenced by impermissible considerations cannot be regarded as rational.

7 As we said in Gregg v. Georgia, 428 U.S. at 200, 96 S. Ct. at 2937, ‘the petitioner
8 looks to the sentencing system as a whole (as the Court did in Furman and we do today)’,
a constitutional violation is established if a plaintiff demonstrates a ‘pattern of arbitrary
and capricious sentencings.’ Id at 195 n. 46, 96 S. Ct. at 2935 n 46.’”

9 McCleskey, 481 U.S. at 323, 107 S. Ct. at 1783-1784.

10 We see clearly in other cases that have come before the Supreme Court that it is the risk
11 associated with an arbitrary and capricious sentencing decision which has invalidated a State’s death
12 penalty sentencing scheme. See Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d
13 944(1976)(The Court struck down the petitioner’s sentence because the vagueness of the statutory
14 definition of heinous crimes created a risk that prejudice or other impermissible influences **might**
15 **have infected** the sentence decision.)(emphasis added); Roberts v. Louisiana, 428 U.S. 325, 96 S.
16 Ct. 3001 (1976) and Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978(1976)(The Court
17 struck down the death sentences in part because mandatory impositions of the death penalty created
18 the risk that a jury **might rely on** arbitrary consideration in deciding which persons should be
19 convicted of capital crimes.)(emphasis added); Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130,
20 117 L. Ed. 2d 367 (1992)(the presence of a vague aggravator in the weighing process **created a**
21 **greater risk** of arbitrariness)(emphasis added); Shafer v. South Carolina, 532 U.S. 36, 54-55, 121 S.
22 Ct. 1263, 149 L. Ed. 2d 178(2001)(a capital jury’s choice to sentence someone to death should
23

1 never be premised upon false, misleading, or inaccurate beliefs because such erroneous beliefs have
 2 the effect of forcing the jury to choose death); accord State v. Bartholomew, 101 Wn. 2d 631, 683
 3 P.2d 1079 (1984); State v. Rupe, 101 Wn. 2d 664, 709-10, 683 P. 2d 571 (1984); State v. Campbell,
 4 103 Wn. 2d 1, 691 P. ed 929 (1984)(adopting the United States Supreme Court's holdings).

5 Where there is a risk within a sentencing scheme for the possibility of arbitrary and
 6 capricious sentencing decisions it is a violation of the Eighth Amendment's prohibition against cruel
 7 and unusual punishment. As the Furman Court found, "the generality of a law inflicting capital
 8 punishment is one thing. What may be said of the validity of a law on the books, and what
 9 may be done with the law in its application do, or may, lead to quite difference conclusions."
 10 Furman, 408 U.S. 238, 242. (Emphasis added)

11 Unlike the Baldus study which was a deductive study, the CJP interviewed real capital jurors
 12 from real capital cases and determined that there were 7 fatal flaws. These flaws show that the
 13 safeguards which have been put in place post Furman, are in real life being ignored by the jurors.
 14 Now the state asserts in its response brief that the issue of the CJP's findings have been dealt with
 15 by the Washington State Supreme Court and the United States Supreme Court and have been
 16 rejected. This assertion is false. The State cites to case decided by either of these courts which
 17 rejects the CJP findings and arguments as have been brought forth in this case.

18 Instead the state attaches copies of unpublished federal circuit cases that did not apply the
 19 CJP to the federal death penalty system. The CJP did not interview jurors on federal cases but on
 20 state cases. In fact the specific issues addressed in defense's motion to strike the special sentencing
 21 proceedings has not been decided by the Washington State Supreme Court or the United States
 22 Supreme Court. However, the United States Supreme Court has cited the CJP findings in published
 23

1 decisions as support of its decision. The CJP was cited in support of Simmons v. South Carolina,
2 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) and Schriro v. Summerlin, 542 U.S. 348,
3 356, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)

4 The state also relies heavily on the legal presumption that jurors follow the law. The state
5 asserts that the CJP is ignoring this presumption and has also not been conducted on Washington
6 capital jurors and thus should be disregarded by this court. Essentially the position they want this
7 court to adopt is that the "presumption" outweighs reality, even when the presumption is proven
8 false. To accept that position would mean that we would believe the world is flat and the sun
9 revolves around the earth. We know this is false. Science has a historical precedent of rebutting
10 popular but erroneous presumptions.

11 Unsupportable presumptions can be rebutted and that is exactly what the CJP research does.
12 It is a presumption, subject to contrary evidence, not an irrebuttable conclusion. The CJP starts with
13 no presumptions and instead conducts a scientific study to determine how real life jurors are making
14 capital sentencing decisions and thus whether or not the safeguards that have been imposed post
15 Furman are working in application in real capital cases. The CJP does not ignore the presumption
16 that jurors follow the law. Rather it disproves that presumption in the context of death penalty
17 deliberations based on exhaustive historical evidence. The CJP shows this presumption is a
18 pretense. In contrast, the Baldus study was based on statistical information on aggravators and not
19 on individual juror deliberation and decision making. The CJP does **not establish that there is a**
20 **"risk"** (like Baldus did) **it establishes the fact** that jurors sentencing decisions in death penalty
21 cases don't conform to the law.

1 The CJP research shows that the probability of getting a jury that does not follow the law is
2 virtually 100%. Not one out of the nearly 1200 jurors followed the law in all seven areas that were
3 examined by the CJP. It is impossible to even calculate the probability of getting 12 jurors who all
4 will follow the law when the CJP research shows that not one single juror was able to follow the law
5 in all areas. The CJP found the same problems in different samples in 14 different states and that
6 other researchers found similar problems in their samples of former capital jurors. Dr. Foglia will
7 testify that the CJP found the **same problems in every state**, regardless of what type of instructions
8 the court used. She will explain how in all scientific research, including the CJP, the researchers
9 choose a sample that represents the entire population, and then they generalize to the entire
10 population. She will be able to explain to this court how these findings are applicable to
11 Washington's death penalty scheme.

12 The state's assertion to this court that "the fact that the CJP relies on statements by jurors
13 that the law and public policy dictates should not be considered as grounds for impeaching a jury
14 verdict invalidates the use of the CJP as grounds for finding Chapter 10.95 RCW unconstitutional"
15 (State's brief, pg 13) is essentially saying the law requires the court to willfully ignore reality.

16 However, defense is not seeking to impeach an existing jury verdict. Defense is asking this
17 court to look at the current scientific data in determining whether the application of RCW 10.95 can
18 ever meet the constitutional requirement set out by the United States Supreme Court in Furman and
19 Gregg. It cannot. Furthermore, if the United States Supreme Court has been willing to look to the
20 scientific data compiled by the CJP findings as it has done in past cases, then this court clearly
21 should as well. See Simmons v. South Carolina, supra, Schriro v. Summerlin, supra.

1 The state asserts that under McCleskey it is not enough for the defendant to provide statistics
 2 that show that juror's perceptions of their decision-making are inconsistent with Supreme Court
 3 mandates but rather that defendant must establish that the jurors' perceptions would cause their
 4 death sentences. (State's brief, pg 11-12). The state's assertion calls to mind the arguments of 17th
 5 century theologians who sought to refute the conclusions of Copernicus and Galileo that the earth
 6 revolves around the sun. Despite the fact that both astronomers employed the most advanced
 7 telescopes then in existence, their detractors refused to accept that the Aristotelian theory of
 8 geocentrism had been disproven. Indeed, many even refused Galileo's offer to look at the heavens
 9 through his telescope and see for themselves.² Over 300 years later, the Catholic Church continued
 10 to question his findings. This court should reject the state's plea that it refuse to look through the
 11 sociological telescope constructed from the CJP's findings. Clinging to antiquated and disproven
 12 notions about how capital juries actually function does violence to the constitutional prohibition
 13 against cruel and unusual punishment.

14 Contrary to the state's assertion that Mr. Monfort needs to show that no King County jury
 15 would impose the death penalty but for the juror misconceptions identified by the CJP, here the
 16 defense only needs to establish that the death penalty scheme is incapable, in actual practice, of
 17 being applied in a manner that comports with federal and state constitutional precedent as required
 18 by the United States Supreme Court.

19

20 ² As Galileo himself lamented to a fellow astronomer: "My dear Kepler, I wish that we might laugh at the remarkable
 21 stupidity of the common herd. What do you have to say about the principal philosophers of this academy who are filled
 22 with the stubbornness of an asp and do not want to look at either the planets, the moon or the telescope, even though I
 23 have freely and deliberately offered them the opportunity a thousand times? Truly, just as the asp stops its ears, so do
 these philosophers shut their eyes to the light of truth."

Galileo was found to be a heretic and was imprisoned in house arrest until his death. Galileo, at 68 years old and sick,
 publically confessed under threats of torture, that he had been wrong to have said that the earth moved around the sun.
 After his confession, Galileo quietly whispered, "And yet, it moves."

DEFENDANT'S REPLY TO PROSECUTION'S RESPONSE TO
 DEFENSE MOTION TO STRIKE THE SPECIAL SENTENCING
 PROCEEDINGS OR IN THE ALTERNATIVE CONVENE
 SEPARATE JURIES, AND REQUEST EVIDENTIARY HEARING - 10

APP000506

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1 II. The State's Argument that the United States Supreme Court Standards and Safeguards
2 Apply to the States and not to the Jurors, who are the ultimate decision makers is flawed.

3 "Death, in its finality, differs from life imprisonment more than a 100-year prison term
4 differs from one of only a year or two. Because of that qualitative difference, there is a
5 corresponding difference in the need for reliability in the determination that death is the appropriate
6 punishment." Woodson, 428 U.S. at 305, 96 S. Ct. at 2991. The Supreme Court has instructed
7 states to enact laws that comport with due process, including the means of ensuring that jurors do
8 not act in an arbitrary and capricious manner. The state's assertion that these laws only relate to the
9 various states and not the jurors who are the ultimate decision makers is erroneous. The Court's
10 holdings are directed to the jurors who will sit on a capital case. For example, in Morgan v. Illinois,
11 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed. 2d 492 (1992), the Court is discussing the requirement of
12 jurors. Jurors who would automatically vote for death, and jurors who disregard mitigation should
13 be disqualified for cause pursuant to the Due Process Clause of the Fourteenth Amendment. Id at
14 729.

15 If we were to accept the state's assertion that the standards mandated by the Supreme Court
16 only apply to the States and not the jury, then we are advocating for form over substance. As long as
17 the appearance of safeguards are in place, jurors can freely disregard following those mandates
18 when making their decision and we are left with no recourse. So Mr. Monfort pays the ultimate
19 penalty and constitutional due process is offended without remedy. It simply does not stand to
20 reason that as long as we have the illusion of safeguards and standards because they are imposed on
21 the State, we would accept allowing jurors to make life or death decisions based on anything they
22 choose to consider and in any manner they choose to do so. This is exactly what Furman prohibits.

1 The CJP research establishes that the states cannot satisfy the standards, and the procedures
2 they have set forth clearly do not work in application. The state's objection that the CJP includes 14
3 different states with different instructions and not Washington misses the point that the CJP found
4 **the same problems in every state**, regardless of what type of instructions the court used. In fact, in
5 surveying mock jurors in Washington State, Dr. Foglia found that Washington has the same
6 problems that are articulated in the CJP. Further, even without the mock juror questionnaires, she
7 can testify as to how the CJP findings still apply to Washington state.

8 Mr. Monfort is not asking to have a perfect jury. He is demanding that the jury he has,
9 which will decide whether he lives or dies, meets the requirements imposed by the Washington
10 State Constitution and by the United States Constitution.

11
12 **III. The State's Assertion that finding the Washington's death penalty scheme is**
13 **unconstitutional will ultimately eviscerate jury trials all together is flawed.**

14 The state also asserts the position that to grant the defense motion in this instance
15 will invalidate jury trials in all criminal cases. Essentially their argument is based on the fear of a
16 slippery slope wherein the entire criminal justice system crumbles in on itself. This argument is
17 pointless hyperbole. First, the degree of scrutiny in capital cases is vastly higher than any other case
18 because it is ultimately about life and death. What may be cruel and unusual punishment for a
19 capital cases may not be cruel and unusual punishment for a lesser penalty. Additionally, there is no
20 basis to assert that the CJP findings will render all criminal trials meaningless. There are no
21 scientific studies showing jurors routinely disregard instructions in non-capital cases. One reason is
22 that jurors are more familiar with deciding facts and issues applying the law to a given set of facts. It
23

1 is only in the sentencing phase of a capital case that jurors are placed in a position to have to make
2 moral judgments about punishment.

3 IV. The State's assertion that the CJP's findings should influence the Legislature and not
4 this court is erroneous as this Court has a duty to uphold the Bill of Rights, the
5 Eighth and Fourteenth Amendments.

6 The state also argues that the findings of the CJP are best left to the legislature. That "the
7 findings of the CJP should be evaluated and considered by the people of the State of Washington,
8 through its elected politicians and judges. But it is one thing to suggest improvements to instructions
9 or voir dire, and another to suggest that no jury should be allowed to deliberate in the penalty phase
10 of a capital case because the institution itself is so fundamentally flawed." (State's brief, pg 30).

11 But this is exactly what Furman did and what Furman stands for, namely that a penalty phase
12 of a capital case shall not be allowed when the institution itself is so fundamentally flawed. 408
13 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Furthermore, the fact that capital punishment is a
14 law in Washington state, "does not diminish the fact that capital punishment is the most awesome
15 act that a State can perform. The judiciary's role in this society counts for little if the use of
16 governmental power to extinguish life does not elicit close scrutiny." McCleskey, 481 U.S. at 342,
17 107 S. Ct. at 1793(J. Brennan, dissenting) It is well established that the proscription of cruel and
18 unusual punishments forbids the judicial imposition of them as well as their imposition by the
19 legislature. Weems v. United States, 217, U.S. 349, 378-382, 30 S. Ct. 544, 553-555; Furman v.
20 Georgia, supra.

21 By seeking the death penalty, the state has announced its intention to kill Mr. Monfort. This
22 Court has the responsibility to determine whether or not Mr. Monfort can be provided a trial that
23

1 comports with the standards set forth by the Constitutions of the State of Washington and the United
2 States of America.

3 V. This Court does have the authority to convene separate juries

4 The CJP evidence is the functional equivalent of the “unforeseen circumstances” identified
5 in RCW 10.95.050(3) as grounds for convening a second jury. The United States Supreme Court
6 has routinely treated capital defendants differently from noncapital defendants in its attempt to
7 ensure reliability of sentencing determinations. *See e.g. Beck v. Alabama*, 447 U.S. 625, 100 S. Ct.
8 2382, 65 L. Ed. 2d 392 (1980)(holding that constitutional required that jury to be able to consider
9 lesser included offenses in capital cases); *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S. Ct. 2954,
10 2964-65, 57 L. Ed. 2d 973 (1978)(holding that capital defendants must be allowed to present all
11 mitigating evidence, while acknowledging legislation may limit evidence in a noncapital case).
12 Thus the federal constitution requires courts to determine whether the procedures used meet the
13 standards of increased reliability required in capital cases. The Washington State Supreme Court
14 has also held that procedural rules are more liberally construed in capital cases. *State v. Lord*, 117
15 Wn. 2d 829, 822 P.2d 177 (1991), cert denied, 506 U.S. 856 (1992), citing *State v. Jeffries*, 105 Wn.
16 2d 398, 418, 717 P.2d 722, cert denied, 479 U.S. 922, 107 S.Ct. 328, 93 L. Ed. 2d 301(1986)

17 The State relies on *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled on*
18 *other grounds*, *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006),
19 *State v. Pillatos*, 159 Wn. 2d 459, 150 P. Ed 1130 (2007), *State v. Martin*, 94 Wn. 2d 1, 614 P. 2d
20 164 (1980) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), in
21 arguing this Court lacks statutory authority to convene separate jury trials for the guilt and penalty
22 phase of trial. In *Hughes*, the Court held, “Where the legislature has not created a procedure for
23

1 juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse
 2 to imply such a procedure on remand.” Here, the Legislature has created a procedure for a jury to
 3 make a finding. In the event this court declines to dismiss the death notice, defense is asking this
 4 Court is to allow separate juries to make the findings with respect to guilt and punishment. Hughes
 5 and Pillatos are not death penalty cases, and Martin predates the current version of RCW 10.95.
 6 More importantly, the CJP evidence was not considered in any of these cases relied on by the state.

7 As this is a capital case, the procedural rules are more liberally construed. As Justice Harlan
 8 wrote many years ago:

9 So far as capital cases are concerned, I think they stand on quite a different
 10 footing than other offenses. In such cases the law is especially sensitive
 11 to demands for the procedural fairness... I do not concede that whatever
 12 process is “due” an offender faced with a fine or a prison sentence necessarily
 13 satisfies the requirement of the Constitution in a capital case. The distinction
 14 is by no means novel,...nor is it negligible, being literally that between
 15 life and death.”

16 Reid v. Covert, 354 U.S. 1, 77, 77 S.Ct 1222, 1261-62, 1 L. Ed. 2d 1148 (1957)

17 VI. An Evidentiary Hearing is Necessary and Appropriate

18 The State's response makes numerous assertions about the Baldus study and the CJP
 19 findings. Their multiple dubious assertions demonstrate why an evidentiary hearing and testimony
 20 by Dr. Wanda Foglia are necessary. For example, the State asserts that “the defendant may suggest
 21 that the CJP study is too different from the Baldus study for McCleskey to apply to this claim. In
 22 fact, the differences in the CJP study suggest that it is less capable of establishing the reasons behind
 23 any given sentencing decision than the Baldus study.” (State’s brief, pg.12). This assertion by the
 State is a prime example of why Dr. Foglia needs to testify at an evidentiary hearing. In another
 example, the state discusses how Dr. Foglia’s declaration discusses its high “confidence interval” in

1 the CJP study but does not report a "confidence interval" for her Washington study but that this
2 does not prevent her from reporting the results of her Washington study to three decimal places (e.g.
3 87.5%) Again, this argument by the state illustrates why an evidentiary hearing is necessary.

4 The state also talks about the slippery slope the CJP findings present in that it would render
5 "every other criminal trial – meaningless as well." (State's brief, pg 24). Dr. Foglia can testify as to
6 the distinction of the CJP findings in capital cases verses every other criminal trial and the state's
7 concern of a slippery slope. Furthermore, it should be noted that the state is relying heavily on
8 McCleskey, a case in which the court did allow for an evidentiary hearing.

9 Regarding the capital instructions in Washington, the state asserts that "Washington courts
10 minimize the risk that jurors will reach premature conclusions about a case by informing them from
11 the outset exactly what will be expected of them in terms of their decision-making. The CJP does
12 not account for this, and its conclusions are thus inapplicable." (State's brief, pg 33-34) This is
13 another area where Dr. Foglia could address in an evidentiary hearing.

14 The state also talks about how "there is no reason to believe that a King County jury will
15 make its determination in the guilt or penalty phase of a defendant's trial on the basis of race; to
16 suggest otherwise is unsupported by any relevant statistical evidence, and gratuitously offensive to
17 the people of King County." (State's brief, pg 45). There is nothing gratuitous about it. It is a
18 statistically sound assertion and another point where expert testimony is needed to explain how this
19 phenomenon crosses state boundaries and infects all capital cases.

20 There are numerous other factual assertions in the state's brief that can be addressed by
21 expert testimony. What is clear is that this court needs to hold an evidentiary hearing. Defense is
22
23

1 entitled to make a clear and through record and counsel should not be in a placed in a position
2 where they are testifying before the court.³

3 Defense has spoken with Dr. Wanda Foglia. The normal length of her direct examination is
4 3.5 hours. Defense also anticipates that the direct examination of Dr. Gail Stygall will be one hour
5 or less. Defense has no objection to taking in testimony on the December 7th hearing date and
6 returning on a separate day for oral argument if that pleases the court.

7 CONCLUSION

8 “[T]he methods we employ in the enforcement of our criminal law have aptly been called the
9 measures by which the quality of our civilization may be judged. Those whom we would banish
10 from society or from the human community itself often speak in too faint a voice to be heard above
11 society’s demand for punishment. It is the particular role of courts to hear these voices, for the
12 Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.
13 The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely
14 scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of
15 ‘sober second thought’” McCleskey, 481 U.S. at 343, 107 S.Ct. at 1793-1794 (J. Brennan,
16 dissenting) citing, Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936).

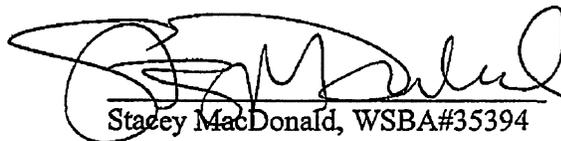
17 Jurors are not following the laws set forth post Furman and Gregg and thus are returning
18 arbitrary and capricious sentencing decisions. Based on the scientific research of the CJP, the
19 anticipated testimony of Drs. Wanda Foglia and Gail Stygall, defense respectfully asks this court to
20 find Washington’s death penalty scheme, RCW 10.95 is unconstitutional in application in violation

21
22 ³ Counsel for both defense and the state ended up testifying in oral argument on this issue before Judge Ramsdell where
23 an evidentiary hearing was denied. Defense provided in the original motion to strike, a copy of the transcript of that
hearing and in Dr. Wanda Foglia’s declaration all the areas in the hearing and the court’s questions where her testimony

1 of the defendant's rights under the Eighth and Fourteenth Amendments of the United States
2 Constitution and Article 1, sect. 3, 14 and 22 (Amend 10) of the Washington State Constitution. In
3 the alternative this court should convene separate juries for each phase of this capital trial.

4 "In determining the guilt of a defendant, a State must prove its case beyond a reasonable
5 doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we
6 should not be willing to take a person's life if the chance that his death sentence was irrationally
7 imposed is more likely than not." McCleskey, 481 U.S. at 328, 107 S. Ct. at 1786 (J. Brennan,
8 dissenting)

9
10 Respectfully submitted this 9th day of November, 2012

11 

12 Stacey MacDonald, WSBA#35394
13 Carl Luer, WSBA #16365
14 Todd Gruenhagen, WSBA #12340
15 Attorneys for the Defendant

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23 was needed. Defense refers this court back to the original motion and those exhibits in evaluating whether to grant an evidentiary hearing.

DEFENDANT'S REPLY TO PROSECUTION'S RESPONSE TO
DEFENSE MOTION TO STRIKE THE SPECIAL SENTENCING
PROCEEDINGS OR IN THE ALTERNATIVE CONVENE
SEPARATE JURIES, AND REQUEST EVIDENTIARY HEARING - 18

APP000514

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)	
PLAINTIFF,	)	CASE NO.
)	
VERSUS	)	09-1-07187-6SEA
)	
CHRISTOPHER MONFORT,)	
DEFENDANT.)	

Proceedings Before Honorable RONALD KESSLER

KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON

DATED: OCTOBER 26, 2012

A P P E A R A N C E S:

FOR THE PLAINTIFF:

BY: JEFF BAIRD, ESQ.,
JOHN CASTLETON, ESQ.,
DEBORAH DWYER, ESQ.

FOR THE DEFENDANT:

BY: CARL LUER, ESQ.,
TODD GRUENHAGEN, ESQ.,
STACEY MacDONALD, ESQ.

P R O C E E D I N G S

(Afternoon session. Open court.)

13:23:02 4 THE BAILIFF: All rise, court is in session.
13:23:03 5 The Honorable Ronald Kessler presiding in the Superior
13:23:08 6 Court in the State of Washington in and for King
13:23:11 7 County.

13:34:38 8 THE COURT: Thank you. Please be seated.

13:34:40 9 MR. CASTLETON: Good afternoon.

13:34:41 10 We are here for the State of Washington
13:34:43 11 versus Christopher Monfort, cause number

13:34:45 12 09-1-07187-6SEA. John Castleton and Jeff Baird on
13:34:48 13 behalf of the State. The defendant is present with
13:34:51 14 counsel, Mr. Laur, Mr. Gruenhagen and Ms. McDonald.

13:34:55 15 We are here on the defense motion to
13:34:58 16 dismiss the notice of seeking the death penalty
13:35:01 17 pursuant to the RCW 107.95040. I will defer to
13:35:05 18 Mr. Laur at this time.

13:35:10 19 MR. LAUR: Good afternoon, Your Honor.
13:35:12 20 Your Honor, this afternoon we, basically, present two
13:35:15 21 questions to this court.

13:35:16 22 The first, does RCW 107.95.040 permit the
13:35:24 23 prosecutor to consider the specific underlying facts
13:35:27 24 of the crime charged, when deciding when to seek the
13:35:31 25 death penalty?

APP000516

13:35:31 1 The second question: Whether in this case,
13:35:34 2 the prosecutor had an adequate factual basis for
13:35:37 3 concluding that there are not sufficient mitigating
13:35:39 4 circumstances to merit leniency.

13:35:42 5 The answer to both those questions is no.

13:35:47 6 The first question really raises the issue
13:35:49 7 of statutory consumption. Let's take a look at the
13:35:52 8 statute. The specific provision at issue here is RCW
13:35:56 9 10.95.040 (1), which provides that "if a person is
13:36:02 10 charged with aggravated murder, the prosecuting
13:36:05 11 attorney shall file notice in the special sentencing
13:36:09 12 proceeding to determine whether or not the death
13:36:11 13 penalty should be imposed, when there is reason to
13:36:13 14 believe that there are not sufficient mitigating
13:36:16 15 circumstances to merit leniency."

13:36:18 16 But that is part of a broader statute that
13:36:20 17 defines the crime of aggravated murder and sets out
13:36:23 18 the requirements for the imposition of the capital
13:36:26 19 punishment in Washington.

13:36:27 20 Those requirements serve essentially as a
13:36:30 21 filter, to kind of segregate which defendants and
13:36:35 22 which crimes are eligible for the imposition of death.

13:36:37 23 The first stage of that is RCW 10.95.020,
13:36:42 24 which defines aggravated first degree murder. First,
13:36:46 25 it limits to the aggravated murder case charges to the

APP000517

13:36:50 1 premeditated murder. The issue is then when the
13:36:55 2 prosecutor has to determine whether 1 or 4, or more,
13:37:01 3 determine the aggravating stages, that is the stage in
13:37:04 4 the statute where the prosecutor has to consider the
13:37:06 5 facts of the crime where the prosecutor exercises his
13:37:10 6 or her charges discretion.

13:37:12 7 Only after the prosecutor makes that
13:37:14 8 charging decision do we get to the statute that is at
13:37:17 9 issue here today. 10.95.040, which basically consists
13:37:21 10 of two parts, subpart 1, is what I refer to as the
13:37:25 11 substantive provision, the provision that I read
13:37:29 12 earlier and subpart 2, which is the procedural
13:37:32 13 provision.

13:37:33 14 The substantive provision of 10.59.040
13:37:37 15 requires the prosecutor to base the decision on
13:37:39 16 whether to seek the death penalty on the issue of
13:37:42 17 whether there are sufficient mitigating circumstances
13:37:44 18 to merit leniency.

13:37:46 19 The plain language of that statute requires
13:37:49 20 that that determination be based on mitigating
13:37:52 21 circumstances and mitigating circumstances alone.

13:37:56 22 That becomes more clear, when you look at
13:37:59 23 other sections of the statute, particularly the
13:38:03 24 section that lays out what the jury is required to
13:38:05 25 decide during a sentencing proceeding in a capital

APP000518

13:38:09 1 punishment case that is 10.95.060(4), which says:

13:38:15 2 "Upon the conclusion of the evidence and
13:38:17 3 the argument of the special sentencing procedure,
13:38:19 4 the jury shall retire to deliberate on the following
13:38:23 5 question, having in mind the crime of which the
13:38:25 6 defendant has been found guilty, are you convinced
13:38:27 7 beyond a reasonable doubt that they are not
13:38:29 8 sufficient mitigating circumstances to merit
13:38:31 9 leniency."

13:38:32 10 That phrase "having in mind the crime of
13:38:34 11 which the defendant has been found guilty," does not
13:38:37 12 appear in 040(1). The clear implication based on the
13:38:42 13 differences in the language between the two provisions
13:38:44 14 is while the jury is required to consider the facts of
13:38:47 15 the crime in deciding whether to impose the death
13:38:51 16 penalty the prosecutor may not consider them in
13:38:53 17 deciding whether to seek death.

13:38:55 18 THE COURT: Doesn't this get close to the
13:38:58 19 situation that we talked about some months ago, in
13:39:00 20 which defense was asking the court to tell the
13:39:04 21 prosecutor, "don't decide yet." Right? Essentially,
13:39:08 22 that is what you were asking?

13:39:10 23 MR. LAUR: Yes.

13:39:11 24 THE COURT: I mean, the court's position
13:39:13 25 was "well, how do I stop the prosecutor from

APP000519

13:39:17 1 thinking?"

13:39:19 2 I mean, the prosecutor has already made the
13:39:21 3 decision on the facts of the case. Then what? Scrub?
13:39:26 4 How --

13:39:28 5 MR. LAUR: If there is evidence in the
13:39:29 6 record, and there is in this case, that the prosecutor
13:39:33 7 considered the underlying facts of the crime and, in
13:39:36 8 fact, based the decision largely on that, then the
13:39:40 9 prosecutor has violated the substantive provisions of
13:39:43 10 40(1). They have gone beyond what they are permitted
13:39:47 11 to consider in seeking the death penalty.

13:39:49 12 It is not a question of the court telling
13:39:52 13 the prosecutor what to think. It is a question of the
13:39:55 14 court evaluating the prosecutor's decision-making
13:39:57 15 process, as the prosecutor himself laid out and as the
13:40:01 16 State concedes.

13:40:02 17 The State doesn't contend that
13:40:04 18 Mr. Satterberg did not consider the underlying facts
13:40:07 19 of the crime in making his decision.

13:40:09 20 There is really no factual dispute here.
13:40:12 21 Did he take that into account? The answer is yes.

13:40:14 22 So, what the court needs to do today, which
13:40:18 23 is different than what we were asking the court to do
13:40:21 24 some time ago, is given what we know, the record in
13:40:24 25 this case, did the prosecutor comply with the

APP000520

13:40:28 1 requirements of 10.95.040 (1)? The answer is that he
13:40:31 2 didn't, because he clearly considered the underlying
13:40:35 3 facts of the crime. He is not permitted to do so by
13:40:38 4 statute.

13:40:39 5 I say that for a couple of reasons.
13:40:41 6 Several reasons -- actually three.

13:40:42 7 First, we don't have any cases,
13:40:46 8 unfortunately, that address the issue that we are
13:40:47 9 presenting here, either of two issues. We believe
13:40:51 10 that when the courts have interpreted the procedural
13:40:55 11 section of 10.95.040 subpart 2, that they have
13:40:59 12 required absolute strict compliance with the
13:41:03 13 provisions of that statute.

13:41:04 14 I mentioned a couple of cases in my brief
13:41:07 15 ear borne, where the prosecutor filed the death notice
13:41:10 16 in a timely manner, left the voice mail with the
13:41:13 17 defense attorney, but didn't serve written notice on
13:41:16 18 the defense attorney or the defendant.

13:41:17 19 The court said in that case, "the State
13:41:19 20 can't seek the death penalty. Strict compliance with
13:41:22 21 the statute is required. Substantial compliance isn't
13:41:25 22 enough. The court specifically noted that the unique
13:41:29 23 qualities of the death penalty was a primary basis for
13:41:32 24 requiring strict compliance.

13:41:34 25 The State versus Laveen, the court reversed

APP000521

13:41:37 1 the death sentence where there was some confusion on
13:41:39 2 the part of the prosecutor as to what the deadline was
13:41:42 3 and he served the notice and filed it four days after
13:41:46 4 the deadline. The trial court found that there was
13:41:50 5 good cause for the late filing. The Supreme Court
13:41:53 6 disagreed.

13:41:53 7 They held that the determination of whether
13:41:55 8 the defendant will ever die must be made in
13:41:58 9 particularly careful and reliable manner and in
13:42:01 10 accordance with the procedures established by the
13:42:03 11 legislature.

13:42:04 12 Well, the substantive decision stacked by
13:42:09 13 the legislature that a prosecutor needs to make in
13:42:11 14 desaiding whether to seek the death penalty is simply
13:42:14 15 whether or not there are sufficient mitigating
13:42:16 16 circumstances to merit leniency. Again, focus is
13:42:19 17 mitigating circumstances not the facts of the crime.
13:42:22 18 By going beyond that, there is not strict compliance
13:42:24 19 with the substantive provisions of 10905040 (1).

13:42:29 20 THE COURT: Whether hypothetical a
13:42:31 21 defendant killed one or a hundred or a thousand
13:42:33 22 people.

13:42:34 23 MR. LAUR: Yes.

13:42:35 24 THE COURT: Doesn't matter.

13:42:36 25 All right. Go

APP000522

13:42:37 1 ahead.

13:42:37 2 MR. LAUR: The second reason, I maintain
13:42:39 3 that the prosecutor is precluded from considering the
13:42:42 4 facts of the crime in deciding whether, to back up a
13:42:45 5 second in response to the court's question, I don't
13:42:47 6 think that, if the legislature were to have decided
13:42:53 7 prosecutor can consider the fact of the crime, they
13:42:55 8 can take other things, other mitigation into
13:42:58 9 consideration, they don't have to simply limit the
13:43:00 10 decision to the presence or the absence of the
13:43:03 11 mitigating circumstances, I think that had a would
13:43:05 12 comply with the constitution. There would be nothing
13:43:08 13 unconstitutional about that. But that is not the
13:43:10 14 decision that the legislature made and that's not the
13:43:16 15 procedure and the substantive requirement that the
13:43:18 16 legislature in this state has set forth.

13:43:21 17 This issue, that the issue that we are
13:43:24 18 presenting here is one of interpreting the statute as
13:43:27 19 written.

13:43:28 20 In that brings plea to the second reason
13:43:32 21 why I maintain that the prosector is precluded from
13:43:35 22 considering the facts of the crime.

13:43:36 23 It really comes down to the basic rules of
13:43:38 24 statutory construction, the rules that we have heard
13:43:41 25 for 20 years, 30 years, in chrome known the court

APP000523

13:43:46 1 notes where the legislature uses statutory language in
13:43:49 2 one instance and different in another, there is a
13:43:51 3 difference in the legislative intent.

13:43:53 4 Here the legislature used the language,
13:43:56 5 "having in mind of which the defendant has been found
13:43:58 6 guilty in 0604 and not in 40(1), really what the State
13:44:03 7 is asking this court to do is rewrite 40(1), to take
13:44:07 8 the language that was in 0604 and to gravity it on
13:44:12 9 40(1), what we are asking the court to do is apply the
13:44:16 10 statute as the legislature wrote it.

13:44:18 11 The third reason that it is clear that the
13:44:21 12 prosecutor is precluded from considering the fact of
13:44:24 13 the crime in deciding whether to seek death is really
13:44:27 14 contained in the State's response itself.

13:44:29 15 They make no effort whatsoever to reconcile
13:44:33 16 the language differences in 109540(1) and 10950604.
13:44:41 17 And instead what the State's brief does is on a number
13:44:43 18 of occasions, confuse or mix up the roles of the jury
13:44:47 19 P and the proxecutr as laid out in the case law and
13:44:49 20 the statute.

13:44:50 21 They first site Greg versus Georgia for the
13:44:53 22 proposition that the prosecutor must consider
13:44:56 23 mitigating circumstances in relation to the
13:44:59 24 circumstances of the crime. That is required by the
13:45:02 25 constitution. Unfortunately Greg doesn't say that.

APP000524

13:45:04 1 What Greg says is that a capital jury must be
13:45:07 2 permitted to render a reasoned individual sentencing
13:45:10 3 determination, based on death eligible defendant's
13:45:15 4 record, personal characteristics and circumstances of
13:45:17 5 the crime. It is the jury, not the prosecutor, that
13:45:20 6 needs to make that determination.

13:45:23 7 That's what the Washington legislature
13:45:25 8 provided for in 10.95.060(4), they next site scans SS
13:45:31 9 versus marsh for the proposition that the death
13:45:34 10 penalty scheme is individualized if it allows the
13:45:37 11 decision maker to decide punishment based on the facts
13:45:40 12 of the crime and the defendant's personal
13:45:42 13 characteristics.

13:45:43 14 Well, that is a clever little use of the
13:45:47 15 terminology of the decision maker, because that is not
13:45:49 16 the language in Marsh. What Marsh says, is that the
13:45:53 17 law cannot preclude a sentencer from considering any
13:45:57 18 aspect of the defendant's character or record and any
13:45:59 19 of the circumstances of the offense. They don't use
13:46:02 20 the term decision maker because in some instances the
13:46:05 21 prosecutor can be a decision maker. The prosecutor is
13:46:09 22 not the sentencing -- in citing Marsh for the
13:46:11 23 proposition that the prosecutor is required to
13:46:13 24 consider the fact of the crime in deciding whether to
13:46:16 25 seek the death, has no support.

APP000525

13:46:18 1 The case doesn't say that the State
13:46:25 2 contends that is statute requires the prosecutor to
13:46:29 3 require -- consider the facts of the crime is not
13:46:31 4 unsupported by the case that they cite. The State
13:46:35 5 cites a list of mitigating circumstances in 10.97.070;
13:46:41 6 that is, prove that the prosecutor can base the
13:46:43 7 decision on whether to seek death on the underlying
13:46:47 8 facts of the crime.

13:46:48 9 But 10.95.070 applies just to the jury or
13:46:52 10 the court, if the jury is waived. The fact is in no
13:46:56 11 point in the State's brief do they attempt to
13:46:58 12 reconcile the fact that 0604 expressly requires
13:47:04 13 consideration of the underlying facts of the crime,
13:47:06 14 while 401 does not. That difference makes clear that
13:47:11 15 juries have to consider the facts of the crime in
13:47:13 16 deciding the sentence, but that the prosecutor cannot
13:47:15 17 do so when deciding whether to seek death.

13:47:18 18 There is no question, as I said earlier,
13:47:20 19 that the prosecutor here did base the decision
13:47:22 20 primarily, if not almost exclusively, on the
13:47:25 21 underlying facts of the crime. Mr. Satterberg's
13:47:28 22 pronouncements at the time that he announced the death
13:47:31 23 penalty established that that reliance on the fact of
13:47:35 24 the crime violated the substance and the mandates of
13:47:38 25 0.95.401. Therefore, this court --

APP000526

13:47:42 1 THE COURT: He did say, he did refer to his
13:47:45 2 own mitigation specialists; correct? It wasn't
13:47:51 3 exclusively.

13:47:53 4 MR. LAUR: He did one interview.

13:47:54 5 He talked mostly about the fact that the
13:48:00 6 focus was on the victim in the case, the facts of the
13:48:03 7 crime.

13:48:06 8 I have some of the quotes in my brief, I
13:48:08 9 will refer the court to that. But there was statement
13:48:10 10 after statement about how "the killings were
13:48:13 11 deliberate killings of the police officers, the most
13:48:15 12 serious crime that I can think of." That was his
13:48:18 13 focus.

13:48:18 14 He does reference an investigation done by
13:48:23 15 an investigator hired by their office and that brings
13:48:26 16 me to the second issue here. That raises the issue of
13:48:33 17 whether, assuming that the prosecutor may give some
13:48:36 18 consideration to the facts of the crime, in this case
13:48:38 19 did he have an adequate factual basis for concluding
13:48:41 20 that there were not sufficient mitigating
13:48:43 21 circumstances to merit leniency.

13:48:45 22 As the court has already pointed out,
13:48:49 23 clearly, there was reliance on the investigation done
13:48:52 24 by the outside investigator.

13:48:55 25 We are dealing what the courts have not

APP000527

13:49:00 1 really addressed. We know that the standard is not
13:49:02 2 particularly high.

13:49:03 3 The standard is abuse of discretion. But
13:49:06 4 we also know from Curdle and Campbell that the
13:49:10 5 prosecutor's discretion is not completely unfettered.
13:49:14 6 Curdle says: "Before the death must be sought there
13:49:19 7 must not be circumstances that operates. It
13:49:23 8 operates as a limit or a check to the prosecutor's
13:49:27 9 limit in seeking death."

13:49:28 10 It is also clear that the law considering
13:49:33 11 mitigating facts in weighing. The ruling in Curdle
13:49:36 12 upheld the mitigating circumstance factors to seek
13:49:39 13 death, despite that he didn't allow defense to
13:49:44 14 mitigating materials, because in that case there were
13:49:46 15 extensive records resulting from Curdle's fairly
13:49:50 16 lengthy criminal history, he had 10 prior juvenile
13:49:54 17 convictions, five prior felon conviction, including a
13:49:57 18 felony assault conviction.

13:49:59 19 The court doesn't elaborate on what all of
13:50:01 20 the records would have been available for that. We
13:50:03 21 know that there is police reports, court records,
13:50:05 22 probation records, which would have provided a fairly
13:50:09 23 extensive factual basis, dating back to the time when
13:50:12 24 the defendant was a juvenile.

13:50:14 25 Here, we don't have any of that.

APP000528

13:50:17 1 Mr. Monfort has no criminal history whatsoever.

13:50:20 2 So in order to, I think, that given him
13:50:24 3 some cover, the State retained the private
13:50:27 4 investigator, in order to do what was termed at one
13:50:32 5 time, I think, the mitigation investigation.

13:50:34 6 Mr. Satterberg said: "We hired our own
13:50:37 7 investigator who spent months talking to everybody
13:50:39 8 who Mr. Monfort came into contact with throughout
13:50:42 9 his life."

13:50:43 10 That is a fairly grand pronouncement and
13:50:45 11 also not true. If it were he certainly would have a
13:50:49 12 reasonable factual basis for seeking the death
13:50:51 13 penalty.

13:50:51 14 THE COURT: How many months was it between
13:50:54 15 filing and his announcement?

13:50:57 16 MR. LAUR: Filing was in December of 2009,
13:51:10 17 September 2010.

13:51:11 18 THE COURT: About nine months is that what
13:51:12 19 you are saying?

13:51:13 20 MR. LAUR: About nine months.

13:51:15 21 THE COURT: Defense can choose not to
13:51:17 22 present mitigating information that, of course, would
13:51:24 23 be challenged later. So that the defense can make
13:51:26 24 that decision then the prosecutor goes ahead.

13:51:30 25 At what point does the prosecutor decide it

APP000529

13:51:32 1 is not going to come?

13:51:35 2 I mean, we are talking about a long time,
13:51:37 3 nine months.

13:51:38 4 MR. LAUR: Right.

13:51:39 5 THE COURT: The defense has maintained all
13:51:42 6 along: "We are working on it. We are working on it.
13:51:45 7 We are working on"; correct?

13:51:46 8 MR. LAUR: Yes.

13:51:47 9 THE COURT: "We are working on the
13:51:48 10 mitigation package."

13:51:50 11 Is it your position that the prosecutor has
13:51:51 12 to wait until it happens?

13:51:53 13 MR. LAUR: No.

13:51:54 14 THE COURT: What is the cutoff? I don't
13:51:56 15 know.

13:51:57 16 MR. LAUR: I don't know that there is a
13:51:59 17 specific cutoff. I mean, in this case, we provided
13:52:02 18 reasons why, although the case was filed in November
13:52:06 19 of 2009. As the court is aware and the State is
13:52:12 20 aware, there were a series of circumstances that
13:52:14 21 prevented our mitigation specialist from getting going
13:52:17 22 on the case until April of 2010. We didn't have a --

13:52:21 23 THE COURT: Those being the client's
13:52:23 24 physical condition and mental condition.

13:52:24 25 MR. LAUR: Also some circumstances with

APP000530

13:52:27 1 respect to the mitigation specialist's family and
13:52:30 2 situations that, as I say, we notified the court and
13:52:34 3 the State at that time.

13:52:34 4 He was not able to really get going on the
13:52:39 5 case until some months after it was filed. But I
13:52:44 6 think that the issue is not so much.

13:52:46 7 What's the cutoff as what is the State
13:52:50 8 required to do?

13:52:51 9 The State is required to have an adequate
13:52:54 10 factual basis for determining that there are not
13:52:57 11 sufficient mitigating circumstances. So they can
13:52:59 12 extend adequate time to the defense, which, quite
13:53:03 13 frankly, I maintain we did not get in this case.

13:53:06 14 Or, they can make sure that they have
13:53:08 15 developed an adequate factual basis on their own,
13:53:12 16 which brings us to the investigation done in this
13:53:14 17 case.

13:53:16 18 That's the reason why I cited some of the
13:53:19 19 AVA standards for mitigation investigations. It is
13:53:22 20 not that I maintain that they are required to follow
13:53:25 21 each and every one of those. But I think that they do
13:53:28 22 provide guidelines as to what is considered adequate
13:53:32 23 for mitigation investigation. Here, the investigation
13:53:36 24 fell, was nowhere near satisfying those requirements
13:53:39 25 or satisfying any reasonable requirements.

APP000531

13:53:42 1 The mitigation investigator, as far as I
13:53:44 2 can tell, based on the materials that we have been
13:53:46 3 provided, did some internet searches, pulled up some
13:53:50 4 newspaper articles, interviewed a full 25 people, 20
13:53:55 5 of them were from a relatively narrow period in
13:54:00 6 Mr. Monfort's life.

13:54:01 7 THE COURT: Did you get discovery on this?

13:54:03 8 MR. LAUR: We did.

13:54:06 9 Each of the interviews was a one-time shot
13:54:10 10 over the phone. The guidelines required follow-up
13:54:13 11 interviews, require in-person interviews. We are
13:54:16 12 talking a series of phone interviews here.

13:54:19 13 I don't even do phone investigators, when I
13:54:23 14 am investigating a PSP 2 case. I bet that the State
13:54:26 15 doesn't either, at least not when they are trying to
13:54:29 16 generate useful information about the case.

13:54:31 17 But, that is not what they were doing here.
13:54:34 18 What they were trying to do is provide a fig leaf for
13:54:38 19 the prosecutor to justify or claim that he had a
13:54:40 20 reasonable factual basis for seeking the death penalty
13:54:42 21 in this case.

13:54:43 22 The investigation relied on by the State, I
13:54:45 23 think, was woefully inadequate. It was far too
13:54:51 24 superficial for the prosecutor to claim that he had
13:54:53 25 sufficient factual basis to seek death.

APP000532

13:54:55 1 For that reason and the fact that he
13:54:57 2 clearly considered the underlying facts of the crime
13:55:00 3 in making this decision, this court should dismiss the
13:55:02 4 death penalty.

13:55:03 5 THE COURT: So it is like in the AVA
13:55:06 6 standards are essentially addressing effective
13:55:09 7 assistance? Would you agree?

13:55:11 8 MR. LAUR: I would agree.

13:55:21 9 THE COURT: Curdle establishes that the
13:55:23 10 prosecutor, under those circumstances, could
13:55:25 11 substitute for defense counsel's assistance. Is that
13:55:30 12 right?

13:55:30 13 MR. LAUR: I think that is a fair
13:55:32 14 assessment.

13:55:32 15 THE COURT: If the facts are sufficient.

13:55:33 16 MR. LAUR: Yes.

13:55:34 17 THE COURT: The Supreme Court said that
13:55:36 18 they were. So I go back to the other question then.
13:55:45 19 I recognize that you can't give me a number, how long
13:55:47 20 do they wait?

13:55:52 21 I know that this wasn't happening in this
13:55:54 22 case, because I got your status report. But there
13:55:58 23 could be circumstances in which the defense attorney
13:56:00 24 just says, "we have to wait until I get around to it.
13:56:03 25 That's going to be -- I am not doing anything, judge.

APP000533

13:56:07 1 Doesn't require the status report."

13:56:10 2 MR. LAUR: I guess there could be.

13:56:13 3 THE COURT: It would be an obstructionist
13:56:15 4 way of trying the case, but it could happen.

13:56:17 5 MR. LAUR: I would say we did not say that
13:56:19 6 in this instance.

13:56:20 7 THE COURT: I know. You addressed that
13:56:22 8 through your status reports.

13:56:23 9 MR. LAUR: It is difficult for me to pull a
13:56:25 10 number out of the air.

13:56:26 11 THE COURT: You can't and I am not asking
13:56:28 12 for a number.

13:56:29 13 But where is -- how does any one decide
13:56:33 14 where the cutoff is?

13:56:36 15 MR. LAUR: I guess I can't offer any -- I
13:56:40 16 hadn't thought of that specific question. I can't
13:56:42 17 offer anything other than a reasonableness standard.

13:56:46 18 Under all of the circumstances of the case,
13:56:47 19 is it reasonable to say that this is too much time and
13:56:52 20 we should cut it off here? We certainly didn't reach
13:56:55 21 that point.

13:56:56 22 THE COURT: It comes down to whatever I say
13:56:58 23 for the time being, any way.

13:57:00 24 MR. LAUR: I think if you reach that point
13:57:02 25 then the court has authority to supervise the process,

APP000534

13:57:07 1 Potentially set the cut-offs. But that wasn't done in
13:57:11 2 this case. They simply made the decision.

13:57:14 3 THE COURT: Thank you.

13:57:16 4 The State.

13:57:16 5 MR. CASTLETON: Thank you, Your Honor.

13:57:18 6 Your Honor, in five days it will be three
13:57:21 7 years since Officer Brenton was murdered by the
13:57:24 8 defendant and the State has received nothing from the
13:57:28 9 defenses as it relates to the mitigation in this case.

13:57:31 10 What they consider to be mitigation, what
13:57:32 11 they think we consider to be mitigation, they have
13:57:35 12 given us nothing. They have gone on the record in
13:57:37 13 this courtroom telling the court that they will be
13:57:39 14 doing that. Yet we have received nothing.

13:57:41 15 We have received not even an indication
13:57:44 16 that there is something that we should be hopeful for,
13:57:48 17 or wait for. They were given numerous opportunities
13:57:51 18 for 10 months.

13:57:52 19 THE COURT: But you have announced that you
13:57:54 20 are going to the death penalty, now. Now, we are
13:57:58 21 talking about the discovery for the penalty phase;
13:58:00 22 aren't we?

13:58:01 23 MR. CASTLETON: The court said in the
13:58:02 24 Curdle, the court found that the prosecutor's filing
13:58:05 25 was in 30 days, based on the defendant's criminal

APP000535

13:58:08 1 history and the fact that he left the possibility and
13:58:11 2 the fact that the prosecutor would consider
13:58:13 3 mitigation, he left that open, was sufficient.

13:58:16 4 We have said numerous times, both on the
13:58:18 5 record and in writing to the defense counsel,
13:58:20 6 Mr. Satterberg will always consider mitigation in this
13:58:23 7 case.

13:58:23 8 Yet, three years later, we have received
13:58:26 9 nothing. The court's question, I think, is a good
13:58:33 10 one, regarding how long do we wait.

13:58:35 11 Really, what the defense counsel is saying,
13:58:37 12 unless the State spends its \$367,000 on the mitigation
13:58:41 13 like the defense counsel has in this case, we can't
13:58:45 14 ever seek the death penalty. We have to wait for
13:58:47 15 them.

13:58:47 16 If it were the case here, we wouldn't even
13:58:50 17 have a trial date. We wouldn't even know if the State
13:58:52 18 was seeking the death penalty in this case, because we
13:58:54 19 have received nothing.

13:58:55 20 Now, I want to go back to the first issue
13:58:58 21 that was brought in the briefing regarding considering
13:59:00 22 the facts of the case. I would point out that we do,
13:59:07 23 in fact, address this issue between what the
13:59:09 24 prosecutor is instructed to consider versus what the
13:59:11 25 jury is instructed to consider.

APP000536

13:59:12 1 When we talk in our briefing about
13:59:13 2 statutory construction, you can't look at the statute
13:59:16 3 in a vacuum. Obviously, if the jury is instructed to
13:59:20 4 look at the facts and consider mitigation, certainly
13:59:24 5 the prosecutor, in making a decision as to whether or
13:59:27 6 not to seek the death penalty, has to make a decision,
13:59:29 7 would a jury in this case find the facts in this case
13:59:34 8 sufficient to impose the death penalty, or are there
13:59:38 9 mitigating factors as we listed that would keep a jury
13:59:41 10 from doing that. That is a calculus that has made
13:59:44 11 every time that this issue comes up.

13:59:46 12 As we point out in our briefing, those
13:59:48 13 factors that are set forth all are factually based,
13:59:54 14 whether the murder was committed while the --

13:59:57 15 THE COURT: Is that really the same
13:59:58 16 decision?

13:59:59 17 MR. CASTLETON: I am sorry.

13:59:59 18 THE COURT: Is that the same decision that
14:00:02 19 the prosecutor is make something -- the prosecutor is
14:00:03 20 making a decision on the mitigation to file. But
14:00:07 21 isn't the prosecutor also making the decision -- I
14:00:11 22 mean, a prosecutor is saying, "I would really likely
14:00:14 23 to impose the death penalty in this case, but there
14:00:17 24 is no chance a jury is going to, based upon the
14:00:21 25 factors that we have got."

APP000537

14:00:22 1 Why waste the \$367,000? That is happening
14:00:28 2 throughout the United States, actually. But in some
14:00:35 3 jurisdictions, are they the same decision? They are
14:00:39 4 not, are they?

14:00:40 5 MR. CASTLETON: They are not the same
14:00:41 6 decision. The decision made by the prosecutor is
14:00:44 7 whether the jury gets to make the decision, what the
14:00:46 8 ultimate punishment is.

14:00:48 9 However, if the State is filing charges and
14:00:50 10 deciding whether or not to seek the death penalty, it
14:00:52 11 cannot be. The prosecutor can't be blind how the jury
14:00:56 12 would interpret the case.

14:00:57 13 Would they look at the facts of the case,
14:00:58 14 would they look at the mitigation and decide whether
14:01:01 15 or not there are those mitigating factors that would
14:01:03 16 make it unlikely that they would seek the death
14:01:05 17 penalty.

14:01:06 18 I think that Your Honor is right. We
14:01:08 19 aren't just going to file a notice to seek the death
14:01:10 20 penalty just because we want to.

14:01:12 21 We have to look at what those mitigating
14:01:14 22 factors are, in fact, I think that the court has seen
14:01:17 23 over the last five or six years, several cases that
14:01:20 24 were egregious, extremely egregious, aggravated murder
14:01:24 25 cases, where the State did not seek the death penalty

APP000538

14:01:27 1 because the State was provided with evidence regarding
14:01:30 2 the defendant's mental state and other factors that
14:01:34 3 goes into whether or not we believe that a jury would
14:01:36 4 consider those mitigating.

14:01:37 5 A defendant's mental state at the time of
14:01:40 6 the crime cannot be assessed without looking at the
14:01:42 7 crime, looking at the facts. Yet defense counsel's
14:01:46 8 argument is when making the decision as to whether to
14:01:49 9 seek the death penalty, all Mr. Satterberg, or any
14:01:53 10 prosecutor can look at is the mitigation.

14:01:55 11 How was the prosecutor to decide whether
14:01:57 12 the victim consents to the fact of the murder?
14:02:00 13 Obviously, it is not appropriate here.

14:02:02 14 How does he decide that if he is just
14:02:05 15 looking at the mitigation?

14:02:06 16 Do they take defense counsel word for it?

14:02:08 17 Do they take the word of the witness who
14:02:11 18 has been talked to solely for the mitigation?

14:02:13 19 How do they know that the defendant
14:02:14 20 continues to have premeditated the crime, without the
14:02:19 21 mental defects or disease without looking at facts to
14:02:22 22 show of this case?

14:02:23 23 Mr. Monfort, this wasn't a one time thing.
14:02:27 24 This was a series of things over nine days. He sets
14:02:30 25 the bombs and left notes indicating that other officer

APP000539

14:02:34 1 are going to be killed. He kills an officer and also
14:02:37 2 kills another one, upon his arrest he almost kills
14:02:39 3 another officer.

14:02:40 4 Are those to be ignored in deciding whether
14:02:43 5 he had the ability to premeditate the crime? Of
14:02:46 6 course not. It is absurd to think that the court or
14:02:49 7 the prosecutor can't look at the facts.

14:02:50 8 I would point to two cases that I provided
14:02:54 9 to the court today that were both decided by the
14:02:57 10 Washington Supreme Court. After the case was filed in
14:03:03 11 this case, the first was State of Washington versus
14:03:05 12 Davis, which was September 20th, 2012. I have tabbed
14:03:09 13 the area of interest. It was a death penalty case.
14:03:12 14 The issue had to do with whether or not -- there were
14:03:16 15 a variety of issues but one of them had to do with the
14:03:18 16 prosecutor's decision to seek the death penalty. As
14:03:21 17 the Supreme Court stated:

14:03:22 18 "Mitigating evidence is not the only reason
14:03:25 19 that a prosecutor might decide not to seek the death
14:03:27 20 penalty. The strength of the State's case often
14:03:30 21 influences that decision."

14:03:33 22 Apparently, our Supreme Court doesn't have
14:03:34 23 a problem with the prosector considering the fact. In
14:03:37 24 fact, it is something that they always consider.

14:03:40 25 Conant versus Thurston County was filed

APP000540

14:03:44 1 seven or eight days after that, after the State
14:03:47 2 Supreme Court indicated to make the decision of
14:03:49 3 whether to seek the death penalty, the prosecutor must
14:03:51 4 be free to investigate the defendant's background,
14:03:54 5 family and the evidence in the case without being
14:03:56 6 influenced by public opinion or scrutiny.

14:03:59 7 Again, the facts of the case. The defense
14:04:02 8 counsel is saying that, no, they can't do that. But
14:04:05 9 the Supreme Court has said, within a week of each
14:04:07 10 other, less than a month ago, "yes, they can" and in
14:04:10 11 fact, they do.

14:04:11 12 Mr. Laur brought up a good point as well,
14:04:14 13 saying that the reason that the State can look at the
14:04:16 14 facts in the charging decision, whether to seek
14:04:18 15 aggravation is because it is a charging decision.
14:04:21 16 That is our function.

14:04:21 17 The very next line in Campbell, the Supreme
14:04:25 18 Court says that the decision to seek the death penalty
14:04:28 19 is properly considered a charging decision.

14:04:31 20 So, there is simply no basis to state that
14:04:42 21 the State can't consider the elements of the crime.
14:04:44 22 It is absurd.

14:04:45 23 THE COURT: I made it clear from the
14:04:46 24 questions that I was asking the defense, logically, it
14:04:49 25 is absurd. But, it is not the first time we have seen

APP000541

14:04:53 1 absurd statutes.

14:04:55 2 MR. CASTLETON: The statute isn't absurd.
14:04:57 3 That is the point that we have made in our brief. You
14:05:00 4 have to read them in conjunction with one other. The
14:05:03 5 legislature didn't feel that it was important to
14:05:05 6 explicitly say that the prosecutor "after considering
14:05:08 7 the facts of the case," because obviously the
14:05:11 8 prosecutor considers the facts of the case. It is
14:05:13 9 absurd to think that they would have to put that in
14:05:16 10 there.

14:05:16 11 They have to put in there that the thinking
14:05:19 12 and believing that there is no reason to believe that
14:05:21 13 there is any mitigation, because that is something
14:05:23 14 that they want the prosecutor to look at, which gets
14:05:25 15 to the second point, which is the defense counsel
14:05:27 16 argument that the mitigation considered here was not
14:05:32 17 up to snuff, as far as the defense counsel's briefing
14:05:40 18 indicates.

14:05:41 19 The thing that I indicated, this is similar
14:05:43 20 to the issue that was brought months ago, the
14:05:46 21 separation of powers. This is where the separation of
14:05:49 22 powers issue becomes more apt in trying to get into
14:05:52 23 the head of the prosecutor and what he considered and
14:05:54 24 what he didn't consider, that's an executive function.
14:05:58 25 Just as Your Honor said "I can't change his mind," you

APP000542

14:06:01 1 can't know what he considered, what Mr. Satterberg
14:06:04 2 considers to be sufficient or insufficient mitigation.
14:06:08 3 What we have here is the defense counsel --
14:06:11 4 THE COURT: Is there a test here?
14:06:12 5 Is there an abuse of discretion test or a
14:06:15 6 failure to exercise discretion test?
14:06:19 7 MR. CASTLETON: I think that there is
14:06:20 8 evidence indicating that mitigation was provided or
14:06:22 9 mitigation was available and the prosecutor explicitly
14:06:25 10 chose not to look at it.
14:06:27 11 Then I think that you might have an
14:06:28 12 argument there. But that is not what we have.
14:06:31 13 THE COURT: That raises the question that
14:06:33 14 we have discussed before, which is, as you know, the
14:06:39 15 court ordered the defense to provide the court with
14:06:42 16 periodic ex parte status reports.
14:06:46 17 Without disclosing the substance, the court
14:06:48 18 has made clear on numerous hearings with the
14:06:52 19 prosecutor that they are moving ahead on both
14:06:55 20 mitigation and the fact finding phase.
14:07:00 21 Yet, the State said, "well, too bad."
14:07:04 22 MR. CASTLETON: Because they have to move
14:07:06 23 forward on the mitigation regardless. If the
14:07:08 24 defendant is found guilty, there is a penalty phase in
14:07:12 25 which they are required -- actually what the AVA

APP000543

14:07:15 1 standards apply to is the mitigation factors at
14:07:18 2 sentencing. It has nothing to do with the mitigation
14:07:20 3 prior to the filing. I think that the term that was
14:07:22 4 used was what was required for mitigation
14:07:25 5 investigation.

14:07:25 6 There is no such thing as a prefiling
14:07:27 7 mitigation investigation.

14:07:28 8 THE COURT: If the defense -- if the
14:07:32 9 defense had presented a mitigation package to the
14:07:37 10 prosecutor that consisted entirely of what the
14:07:41 11 prosecutor's office obtained from its own hire, what
14:07:46 12 is the chance of that getting affirmed on appeal?
14:07:48 13 Wouldn't that be ineffective assistance?

14:07:51 14 MR. CASTLETON: Yes.

14:07:51 15 THE COURT: It would be; right.

14:07:52 16 MR. CASTLETON: Right. Because they did no
14:07:54 17 work. Bus that is only -- you are talking about
14:07:57 18 prefiling the death penalty notice?

14:07:58 19 THE COURT: Yes.

14:07:59 20 MR. CASTLETON: No.

14:08:00 21 There is nothing that requires it. In
14:08:01 22 fact, the case law specifically says that it is
14:08:04 23 desirable to have input from the defense counsel. But
14:08:06 24 we didn't get that here.

14:08:07 25 We did the best that we could in talking to

APP000544

14:08:10 1 people who knew Mr. Monfort. We don't have access to
14:08:13 2 his medical records. We don't have access to any
14:08:15 3 psychological records that may be out there. Those
14:08:19 4 are all in his possession. That is what we have been
14:08:21 5 waiting for this whole time.

14:08:23 6 What is the mitigations?

14:08:24 7 There is really only two ways to look at
14:08:26 8 it. Either it is a tactical decision by the defense
14:08:29 9 counsel to not tip their hand at what their mitigation
14:08:31 10 is until we go to the trial, or there is none.

14:08:34 11 I can tell you from our investigation,
14:08:37 12 there is nothing out there indicating anything other
14:08:39 13 than his lack of criminal history that mitigates the
14:08:43 14 crime here.

14:08:43 15 Yes, I am taking into consideration the
14:08:45 16 facts of this crime, because, you have to. So, it is
14:08:50 17 one or the other. It either doesn't exist or it is
14:08:53 18 tactical.

14:08:53 19 THE COURT: How do you know that? How
14:08:55 20 would you know that?

14:08:56 21 MR. CASTLETON: How would I know that it
14:08:59 22 doesn't exist or it is tactical?

14:09:01 23 THE COURT: The tactical is an argument. I
14:09:03 24 recognize that. How you would you know that it
14:09:06 25 doesn't exist? You don't know.

APP000545

14:09:07 1 MR. CASTLETON: What we were able to glean,
14:09:09 2 there is nothing in there that fits under what is
14:09:11 3 considered mitigation.

14:09:12 4 Now, the defense counsel may have
14:09:16 5 something, as Mr. Satterberg has said for the last
14:09:18 6 three years. He is ready and able and willing to look
14:09:21 7 at it. They haven't given us.

14:09:22 8 THE COURT: Not quite the same as it
14:09:24 9 doesn't exist, but go ahead.

14:09:26 10 MR. CASTLETON: It doesn't exist because we
14:09:28 11 haven't seen it.

14:09:28 12 THE COURT: You don't have it.

14:09:30 13 MR. CASTLETON: Correct.

14:09:33 14 We can't consider it, if we don't have it.
14:09:37 15 The other thing that the hiring of the investigator
14:09:40 16 was a fig leaf to cover up an over-all decision to
14:09:43 17 file the death penalty that is not it at all.

14:09:45 18 In fact, if the court looks at the letters
14:09:47 19 that counsel submitted for Mr. Larson, and what not,
14:09:50 20 this is a process that is not unfamiliar to the State
14:09:53 21 and the State knows how long this process is.

14:09:56 22 Getting a jump on who are the people that
14:09:58 23 are going to be talked to, who are the friends of the
14:10:00 24 defendant, who are the people who know him best to
14:10:04 25 give us an opinion, that is of value to us, not only

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14:10:08 1 of whether or not to seek the death penalty, but the
14:10:10 2 case itself.

14:10:11 3 To say what I am getting is some sort of
14:10:14 4 ruse, we are not really seeking mitigation, because
14:10:16 5 frankly, there wasn't a mitigation expert. This was
14:10:19 6 an investigator who talked to people who we thought
14:10:22 7 would have an insight into who the defendant is.

14:10:25 8 Since the defense didn't do that for us, we
14:10:28 9 did it ourselves, based on the investigation. It was
14:10:31 10 nothing that showed reasons to show mitigation to
14:10:35 11 support leniency.

14:10:36 12 THE COURT: Except from my telling you that
14:10:39 13 they were proceeding on it.

14:10:41 14 MR. CASTLETON: They have to proceed on it,
14:10:43 15 regardless.

14:10:44 16 THE COURT: Right. They have to proceed on
14:10:47 17 it for the penalty phase. But it may very well be
14:10:51 18 that it is the same, might be the same stuff, it might
14:10:54 19 not be. But you did have my statement. You didn't
14:11:05 20 have the substance of it, of course.

14:11:07 21 MR. CASTLETON: Right. Your Honor, the
14:11:08 22 standard as counsel has indicated is not high. The
14:11:11 23 question is whether there is reasons to believe that
14:11:13 24 there are not sufficient mitigating circumstances to
14:11:16 25 merit leniency. It is not that there is any

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14:11:18 1 mitigation.

14:11:19 2 It is that there are sufficient mitigating
14:11:22 3 circumstances to merit leniency. I would include in
14:11:24 4 there, considering the facts of the case and
14:11:26 5 considering who the defendant is, as known to the
14:11:29 6 State.

14:11:29 7 He has no criminal history, clearly
14:11:31 8 mitigating factor. That is all we have. There is not
14:11:34 9 a single person, who was talked to either by the
14:11:37 10 police or by the investigator that shed any light or
14:11:40 11 gave us any mitigation into this situation.

14:11:44 12 It is for those reasons Mr. Satterberg
14:11:47 13 chose, after 10 months of waiting, to indicate his
14:11:51 14 desire to have the jury make this decision.

14:11:55 15 THE COURT: Did the State give the defense
14:11:57 16 a deadline?

14:11:59 17 MR. CASTLETON: We gave them several
14:12:01 18 deadlines, Your Honor. We kept continuing them.

14:12:03 19 THE COURT: Kept continuing the hearings.

14:12:06 20 MR. CASTLETON: Yes. We gave them
14:12:07 21 deadlines and they would come back and say, "we need
14:12:09 22 more time."

14:12:11 23 What happens in most case is that they say,
14:12:13 24 "This is what we have and this is what we have." They
14:12:16 25 told us nothing. We have asked numerous times before

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14:12:19 1 and after the decision was made, "are we going to get
14:12:22 2 something?"

14:12:22 3 Your Honor has asked that question and been
14:12:25 4 told yes. But we have been told nothing, not a
14:12:28 5 scintilla of information.

14:12:29 6 THE COURT: Rebuttal.

14:12:30 7 MR. LAUR: A few points in rebuttal, Your
14:12:33 8 Honor. First trying to take them in chronological
14:12:35 9 order in which they were raised.

14:12:38 10 The State makes repeated points of the fact
14:12:42 11 that we have not provided a mitigation package yet. I
14:12:46 12 think the court points out once they make the
14:12:48 13 determination to seek the death penalty, that
14:12:51 14 dramatically changed the dynamics of the
14:12:54 15 circumstances.

14:12:55 16 THE COURT: If you have a -- again, I am
14:12:58 17 not trying to telegraph anything here. But if you
14:13:01 18 have a compelling case, might not a prosecutor,
14:13:07 19 indeed, change his mind?

14:13:09 20 MR. LAUR: I don't know of any instance
14:13:12 21 when they have. Although I am sure that it has
14:13:15 22 happened. But, yes, they might. But at this point,
14:13:22 23 the burden -- there is no legal change in the burden.

14:13:26 24 But we all know that it is going to be much
14:13:28 25 more difficult to persuade the prosecutor, once he has

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14:13:31 1 publicly announced the decision in a high profile case
14:13:34 2 to seek the death penalty to change that position.

14:13:37 3 THE COURT: So why did you make a tactical
14:13:39 4 decision not to provide what you got up to some point
14:13:45 5 before he made the decision.

14:13:47 6 MR. LAUR: Before he made the decision.

14:13:48 7 THE COURT: Before he made the decision,
14:13:50 8 did you make a decision -- you must have made, decided
14:13:54 9 that you not going to present what you already have.

14:13:56 10 MR. LAUR: I guess it would depend upon --
14:13:58 11 we did make that decision.

14:14:00 12 THE COURT: Right.

14:14:00 13 MR. LAUR: But I don't know if I would
14:14:02 14 characterize it as a tactical decision. We based that
14:14:06 15 decision on the fact that the mitigation investigation
14:14:09 16 was still in a relatively early phase, that there were
14:14:14 17 a -- the vast number of witnesses that we have
14:14:17 18 identified as potential mitigation witnesses, we
14:14:20 19 hadn't spoken to yet, that there were a number of
14:14:24 20 records that we hadn't done. There was other work,
14:14:27 21 other assessments.

14:14:29 22 So we were not at a point at that point in
14:14:32 23 September of 2010 where we felt that simply throwing
14:14:37 24 together what we had at that point would have been
14:14:39 25 beneficial.

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14:14:40 1 So I guess in that sense --

14:14:42 2 THE COURT: "Here is what we have. Give me
14:14:45 3 more time and we will develop it."

14:14:47 4 MR. LAUR: We said that --

14:14:48 5 THE COURT: You didn't say, "this is what
14:14:51 6 we have." You definitely said "give us more time."

14:14:54 7 MR. LAUR: We definitely said "give us more
14:14:56 8 time." We felt in presenting an inadequate incomplete
14:15:01 9 mitigation investigation would have been detrimental
14:15:04 10 to Mr. Monfort in this case.

14:15:06 11 THE COURT: To the decision-making with the
14:15:10 12 prosecutor?

14:15:11 13 MR. LAUR: And to the decision-making of
14:15:13 14 the prosecutor.

14:15:13 15 THE COURT: That is what I mean.

14:15:15 16 MR. LAUR: We didn't think that it would be
14:15:16 17 helpful. We didn't think that it would have been
14:15:19 18 helpful in the form that we had would have done us any
14:15:23 19 good.

14:15:24 20 We are still working on mitigation. We
14:15:26 21 still are interviewing witnesses, some for the first
14:15:28 22 time.

14:15:28 23 As I indicated, we argued this, laid this
14:15:32 24 out back in September 2010 or August of 2010, when we
14:15:37 25 had the hearing.

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14:15:37 1 Mr. Monfort was 40 years old at the time
14:15:42 2 that he was arrested. He had lived in approximately
14:15:44 3 seven states. He had worked numerous jobs. There
14:15:49 4 were witnesses, literally, spread all over the country
14:15:53 5 in something like 25, 26 states, that we had
14:15:57 6 identified.

14:15:57 7 This was, I mean, I have worked on and read
14:16:01 8 other mitigation investigations, other mitigation
14:16:04 9 packages. The universe of information available in
14:16:09 10 those cases was much more, much smaller than here.

14:16:14 11 This case presented a particularly
14:16:17 12 difficult mitigation investigation, because of the
14:16:19 13 broad scope of the information out there. It was our
14:16:22 14 determination -- I think a reasoned one, that rather
14:16:26 15 than -- again, Your Honor, they are talking about nine
14:16:29 16 or 10 months. That is just not accurate.

14:16:31 17 Our mitigation investigation for all
14:16:33 18 intents and purposes began in April. We, essentially,
14:16:36 19 had, what is that, five months. At the time that they
14:16:42 20 made the decision, we had been five months in, in
14:16:45 21 terms of actually doing the mitigation investigation.
14:16:48 22 That is simply not an adequate enough time to pull
14:16:51 23 together a sufficient information that we thought
14:16:54 24 would be beneficial to Mr. Monfort or their
14:16:58 25 decision-making process. We asked for more time. We

APP000552

14:17:00 1 didn't get it.

14:17:02 2 The State went forward and at that point
14:17:05 3 they maintained that they had an adequate factual
14:17:08 4 basis for making the determination to seek death. I
14:17:11 5 don't think that the record supports that.

14:17:15 6 The second point that I would like to
14:17:17 7 address is the State's reliance on 10.95.070, which
14:17:24 8 lists the mitigating circumstances that the jury can
14:17:27 9 consider in making the decision at the conclusion of
14:17:29 10 the capital trial.

14:17:30 11 Again, the statute, we got to assume that
14:17:33 12 the legislature knows what they are talking about,
14:17:36 13 that the legislature knows the intend of the import of
14:17:41 14 their words.

14:17:41 15 If they use the words jury, they used jury.
14:17:45 16 They didn't say "these are the decision that is the
14:17:48 17 prosecutor should employ." Those circumstances that
14:17:50 18 are listed are all circumstances that are fairly
14:17:52 19 particularized individual circumstances relating to
14:17:56 20 the defendant, him or herself.

14:17:57 21 In this case, it is clear that
14:17:59 22 Mr. Satterberg's focus in deciding the death penalty
14:18:03 23 was on the circumstances and the nature of the victim,
14:18:06 24 not the defendant.

14:18:08 25 Then the prosecutor, Mr. Castleton talked

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14:18:14 1 about, "well, he has to consider the facts of the case
14:18:17 2 in determining, for example, whether there is
14:18:20 3 premeditation, prior alleged incidents would go to the
14:18:23 4 premeditation."

14:18:24 5 I would agree with that, but premeditation
14:18:26 6 is not the issue that the prosecutor needs to
14:18:28 7 determine in deciding whether to seek death under 401.

14:18:33 8 Premeditation is a threshold issue that
14:18:36 9 needs to be determined, if the case can be charged as
14:18:39 10 aggravated murder in the first place. That comes
14:18:41 11 under a different provision of the statute.

14:18:44 12 They cite a couple of new cases in support
14:18:48 13 of their proposition. The first is State versus
14:18:53 14 Davis. Again, in Davis the court doesn't address the
14:18:57 15 issue representing here. It was a completely -- they
14:19:01 16 are kind of reading that passage out of context.

14:19:04 17 The situation where the package came up was
14:19:10 18 in response -- in Davis, wrote a fairly lengthy
14:19:17 19 decision on the number of issues including the issue
14:19:20 20 of proportionality review.

14:19:22 21 Then in the body of that opinion the court
14:19:23 22 was addressing points raised by the dissent. The
14:19:28 23 dissent in Davis cited a trial case from a trial
14:19:34 24 report where the prosecutor and the defense reached a
14:19:40 25 plea agreement to the life without parole, Martin

APP000554

14:19:44 1 Sanders case.

14:19:44 2 The dissent in Davis said, "well, this is
14:19:48 3 facts similar to ours. They didn't go death on that
14:19:51 4 case, therefore no proportionality --
14:19:54 5 disproportionality."

14:19:55 6 The majority was attempting to address that
14:19:58 7 assertion, when they said that the mitigation evidence
14:20:00 8 is not the only reason that the prosecutor might not
14:20:03 9 decide to seek the death penalty. They can also --
14:20:06 10 they also considered -- often considered the strength
14:20:11 11 of the State's case.

14:20:12 12 It is completely different issue. They
14:20:14 13 were not interpreting the statute. The issue we are
14:20:18 14 presenting here wasn't raised.

14:20:21 15 Koenig is really even further afield.
14:20:26 16 Koenig, I reviewed it together -- Mr. Castleton
14:20:30 17 provided it for me. It was a Public Records Act case
14:20:34 18 in which the court was distinguishing between the
14:20:36 19 mitigation package and a victim impact statement.

14:20:41 20 Again, it does not address the issues here,
14:20:51 21 I don't think, that without any analysis of the
14:20:54 22 statute whatsoever is in any indicative of the statute
14:21:00 23 whatsoever.

14:21:01 24 The language in Koenig, in the prosecutor's
.14:21:03 25 decision under 401, being akin to the charging

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14:21:06 1 decision, is actually contrary to the court's own
14:21:10 2 precedent. In particular, in the Campbell, where the
14:21:15 3 court was addressing the equal protection challenge
14:21:18 4 and said:

14:21:18 5 "There is no equal protection challenge,
14:21:20 6 because a sentence of death requires consideration
14:21:22 7 of an additional factor beyond that for a sentence
14:21:25 8 for life imprisonment, namely an absence of
14:21:30 9 mitigating circumstances. In Campbell the court
14:21:32 10 used absence of mitigating circumstances as an
14:21:35 11 additional factor required for the death penalty,
14:21:38 12 not a charging factor. There is inconsistencies
14:21:43 13 when the court was not thinking through when it
14:21:46 14 addressed Koenig. Koenig was not interpreting
14:21:51 15 10.95.040."

14:21:51 16 Finally, a question to address that the
14:21:56 17 court raised, is there a standard, an abuse of
14:22:00 18 aggressive standard, in reviewing the prosecutor's
14:22:03 19 decision to reviewing the case in seeking the death
14:22:08 20 statute? And the answer is yes.

14:22:09 21 THE COURT: I M going to reserve ruling on
14:22:11 22 this issue until I have heard the arguments on the
14:22:15 23 other motions to challenge death notice.

14:22:23 24 With that, let's talk about the scheduling.

14:22:25 25 MS. MacDONALD: Your Honor, we have the

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14:22:27 1 agreed order to reschedule the motion.

14:22:30 2 THE COURT: Did you work this out with the
14:22:32 3 bailiff?

14:22:33 4 MS. MacDONALD: It was the same date that I
14:22:34 5 e-mailed Salina about that she said was fine. The
14:22:38 6 other dates are regarding the briefing schedule.

14:22:40 7 THE COURT: All right. I guess I need some
14:23:19 8 help here in terms of --

14:23:22 9 MS. MacDONALD: Yes, Your Honor.

14:23:22 10 THE COURT: The next hearing would be --

14:23:24 11 MS. MacDONALD: The next hearing for actual
14:23:27 12 argument would be on December 7th. That is based on
14:23:29 13 expert's availability and the holidays.

14:23:32 14 THE COURT: Let's discuss whether we will
14:23:34 15 get an evidentiary hearing or not. Does the State
14:23:43 16 intend to offer evidence?

14:23:46 17 MR. CASTLETON: No. In fact, Your Honor,
14:23:48 18 we filed our response to that motion today. We are
14:23:53 19 actually objecting to an evidentiary hearing.

14:23:55 20 THE COURT: Is the State --

14:23:57 21 MS. MacDONALD: The defense has experts
14:23:58 22 that the defense would intend to offer testimony from.
14:24:00 23 One is the expert on the capital jury project, who
14:24:04 24 also scored mock jurors' surveys regarding Washington
14:24:08 25 State death penalty instructions on a capital case.

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14:24:10 1 THE COURT: I get that, but what am I going
14:24:14 2 to get from this witness live that I have not already
14:24:18 3 received?

14:24:18 4 MS. MacDONALD: There would be something --
14:24:20 5 that the court will have the questions of, that I may
14:24:22 6 not be able to -- I am not the expert -- to be able to
14:24:25 7 answer that the expert would have more information for
14:24:27 8 the court.

14:24:27 9 That is the reason that we attached the
14:24:29 10 transcript from the Judge Ramsdel, who heard a similar
14:24:34 11 motion with the declaration from a Professor Foglia to
14:24:39 12 show all of the areas that the court had
14:24:41 13 misinformation, not enough information.

14:24:43 14 Had she be been allowed to testify, the
14:24:46 15 court would have more information, with making its
14:24:49 16 decision.

14:24:49 17 The State did just file their brief this
14:24:52 18 afternoon. I haven't read it yet. I would ask that
14:24:54 19 the court reserve ruling as to whether or not to have
14:24:58 20 an evidentiary hearing until we have had a chance to
14:25:00 21 respond to the motion.

14:25:02 22 THE COURT: Just to help me, you wouldn't
14:25:04 23 present -- if we had an evidentiary hearing, you don't
14:25:06 24 anticipate presenting evidence?

14:25:13 25 MR. CASTLETON: No, we don't. Our

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14:25:15 1 understanding is the defense is going to.

14:25:17 2 THE COURT: The prosecutor, I understand.
14:25:19 3 I see the difference.

14:25:24 4 MS. MacDONALD: Your Honor, I don't
14:25:26 5 anticipate that it would take that much of the court's
14:25:28 6 time, just two witnesses, that we would ask to be
14:25:31 7 allowed to testify for the court.

14:25:34 8 THE COURT: Does the State intend to
14:25:42 9 challenge -- part of this evidence would be
14:25:52 10 effectively legal argument. I realize that. But does
14:25:55 11 the State intend to dispute the factual basis that the
14:26:00 12 defense witnesses intend to offer, based upon what you
14:26:05 13 know already by now?

14:26:06 14 MR. BAIRD: Your Honor, may I?

14:26:07 15 THE COURT: Yes.

14:26:08 16 MR. BAIRD: Yes, we replied to some of the
14:26:11 17 court's questions, I think that you raised just now in
14:26:14 18 the brief that we filed today. The court may want to
14:26:16 19 consider it.

14:26:17 20 I think strictly if the court does, we
14:26:22 21 don't believe that the evidentiary hearing is
14:26:24 22 necessary.

14:26:25 23 I can explain that or try to explain that
14:26:27 24 further, if the court wishes. If the court does
14:26:30 25 conduct an evidentiary hearing then, of course, we

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14:26:33 1 will have some questions for the experts.

14:26:38 2 I believe that the experts retained in this
14:26:45 3 case, one is Wanda Foglia, who distributed a little
14:26:51 4 over two dozen of Highline Community students. I
14:26:56 5 don't think that it is fair to be called mock jurors.
14:26:58 6 But they filled out a questionnaire.

14:26:59 7 To say that she scored the results, is to
14:27:01 8 say that she counted up the actual percentages of the
14:27:07 9 answers that they answered one way or the other. The
14:27:10 10 defense has appended to their brief in this matter all
14:27:13 11 of the questionnaires, so that the raw data is
14:27:15 12 available for the court as is the declaration of
14:27:19 13 Ms. Foglia.

14:27:21 14 The defense also retained someone who
14:27:23 15 describes herself as an English language linguist, who
14:27:29 16 wrote a declaration in which she urges the court to
14:27:33 17 find that, in fact, the WPICs are unintelligible and
14:27:38 18 unfathomable work. We don't intend to respond to that
14:27:47 19 by presenting a declaration of any one.

14:27:49 20 We discussed that declaration in the brief
14:27:52 21 that we submitted today. We don't believe that the
14:27:57 22 testimony of any of these people would help the court
14:28:01 23 decide the issues raised by the defense. But, again,
14:28:09 24 perhaps the court wants to read our brief and the
14:28:12 25 materials submitted with the defense and their brief

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14:28:15 1 before reaching a decision.

14:28:18 2 THE COURT: I don't know. I would think
14:28:21 3 that the defense might think that it is better off not
14:28:23 4 having the prosecutor question these witnesses.

14:28:27 5 MS. MacDONALD: No, Your Honor.

14:28:28 6 I think that as we have seen just within
14:28:30 7 the last few months, when a court had a hearing on
14:28:33 8 this motion in the McEnroe and Anderson case, not
14:28:36 9 having the experts testify to the court in the court
14:28:39 10 hearing, did not give the court all of the
14:28:42 11 information, because the court had questions that
14:28:44 12 counsel were not able to answer, or, I don't think
14:28:47 13 this this was intentional put both sides -- both
14:28:50 14 counsel for the State and the defense -- gave the
14:28:55 15 court information that was inaccurate, that is going
14:28:57 16 to view how the court makes its decision. We are
14:29:00 17 asking for the court to allow for the evidentiary
14:29:03 18 hearing.

14:29:03 19 We would ask the court, if it is not
14:29:05 20 considering not allowing it, to wait to review the
14:29:09 21 State's brief.

14:29:10 22 THE COURT: I am not going to rule on this
14:29:11 23 now since I just got the brief.

14:29:17 24 MS. MacDONALD: The court asked me are we
14:29:20 25 also making a record. We have to make sure that we

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14:29:23 1 make --

14:29:23 2 THE COURT: I believe that I have four
14:29:25 3 binders.

14:29:28 4 MR. BAIRD: I believe that it is five, Your
14:29:31 5 Honor.

14:29:31 6 MS. MacDONALD: I don't know if the court
14:29:32 7 will have questions, it is a lot of information. I
14:29:35 8 can't anticipate every question that you will have.
14:29:38 9 We will want to have the evidentiary hearing. That
14:29:40 10 way that the court has all of the information that it
14:29:42 11 needs.

14:29:51 12 THE COURT: Are you prepared to suggest how
14:29:53 13 long your direct will take?

14:29:54 14 MS. MacDONALD: Not at this point, but I
14:29:56 15 can to the court. I will go back and think it over.
14:30:00 16 We only had -- we are anticipating just being one day.
14:30:03 17 I am not saying a whole day, but we have asked, when
14:30:06 18 we looked at the scheduling for one day for the
14:30:08 19 experts. I will go back and talk with them and give
14:30:10 20 the court an idea how long the direct of each will
14:30:15 21 take.

14:30:16 22 MR. BAIRD: If the court reads that portion
14:30:17 23 of the brief that we submitted today discussing, for
14:30:20 24 example, the declaration of the self described English
14:30:23 25 language linguist, the court may get a sense of just

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14:30:27 1 how long cross examination might last.

14:30:31 2 THE COURT: Having watched jurors' eyes
14:30:34 3 when we read to them some of the Washington Pattern
14:30:37 4 Instructions, particularly the ones on mens rea, we
14:30:43 5 might all agree there is an English problem.

14:30:45 6 MR. BAIRD: I think that we can all agree
14:30:48 7 that the instructions in the WPIC -- I certainly mean
14:30:51 8 no offense to the Supreme Court.

14:30:53 9 THE COURT: They didn't write it, actually.

14:30:55 10 MR. BAIRD: The committee did.

14:30:56 11 I think that everyone would agree that they
14:31:01 12 can be improved.

14:31:02 13 Before the court conducts an evidentiary
14:31:05 14 hearing, I would recommend against reading the
14:31:07 15 declaration of the linguist to see whether or not that
14:31:09 16 you think that that individual is going to shed light
14:31:12 17 on comprehensiveness.

14:31:15 18 THE COURT: There is also a question, why,
14:31:16 19 indeed, if the WPIC is muddled -- the WPIC is not law.
14:31:28 20 Then doesn't that come down to writing some decent
14:31:32 21 English language instructions.

14:31:33 22 MR. BAIRD: Exactly.

14:31:34 23 MS. MacDONALD: The court may want to hear
14:31:36 24 from the expert as to what would constitute something
14:31:40 25 that is --

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14:31:41 1 THE COURT: That is something that I don't
14:31:43 2 need to hear yet. We are a ways from there.

14:31:46 3 All right. Thank you. The court is
14:31:48 4 adjourned.

14:31:49 5 THE BAILIFF: Please rise. Court is
14:31:50 6 adjourned for the day.

14:31:51 7

14:31:51 8

14:31:51 9 (Court was recessed.)

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APP000564

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 STATE OF WASHINGTON,)
 PLAINTIFF,) CASE NO.
 4)
 VERSUS) 09-1-07187-6SEA
 5)
 CHRISTOPHER MONFORT,)
 6 DEFENDANT.)

7 Proceedings Before Honorable RONALD KESSLER

8 KING COUNTY COURTHOUSE
9 SEATTLE, WASHINGTON

10 DATED: DECEMBER 7, 2012

11
12 A P P E A R A N C E S:

13 FOR THE PLAINTIFF:

14
15 BY: JEFF BAIRD, ESQ.,
JOHN CASTLETON, ESQ.

16 FOR THE DEFENDANT:

17 BY: CARL LUER, ESQ.,
18 TODD GRUENHAGEN, ESQ.,
STACEY MacDONALD, ESQ.

08:57:50

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24
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P R O C E E D I N G S

(Open court.)

08:57:54 THE BAILIFF: All rise. Court is in
08:57:55 session, The Honorable than Ronald Kessler presiding
08:58:05 in the Superior Court in the State of Washington in
08:58:12 and for King County.

09:07:52 THE COURT: Thank you. Please be seated.
09:09:35 Good morning.

09:09:36 MR. CASTLETON: Good morning, Your Honor.

09:09:38 We are here in the matter of State of
09:09:39 Washington versus Christopher Monfort, cause number
09:09:41 09-1-07187-6 SEA, John Castleton and Jeff Baird on
09:09:49 behalf of the State. The defendant is present in
09:09:51 custody with Mr. Laur, Mr. Gruenhagen, and
09:09:55 Ms. MacDonald.

09:09:56 We are here for the defense motion.
09:09:58 However, the defense counsel has an issue regarding
09:10:00 Mr. Monfort that they would like to address.

09:10:03 THE COURT: All right.

09:10:04 MR. GRUENHAGEN: At Mr. Monfort's arrival
09:10:06 here at the courtroom I requested that the corrections
09:10:10 officer unmangled his right arm to write notes as
09:10:14 appropriate.

09:10:15 There is an existing order that provides

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09:10:17 1 that he would be unmangled, when we have our
09:10:19 2 conferences in the jail. Apparently, that doesn't
09:10:23 3 address the issues with regard to the courtroom.
09:10:25 4 THE COURT: Is he right-handed?
09:10:28 5 MR. GRUENHAGEN: He is right-handed.
09:10:30 6 THE COURT: All right. Does the State have
09:10:33 7 any position on that?
09:10:34 8 MR. CASTLETON: The only position that I
09:10:37 9 would take is that Ms. Balin would have to deal with
09:10:40 10 this issue, because she is the representative for the
09:10:42 11 jail.
09:10:42 12 THE COURT: No, actually I do. I will
09:10:44 13 order that the defendant's right arm would be
09:10:48 14 unshackled.
09:10:49 15 MR. GRUENHAGEN: Thank you, Your Honor.
09:10:50 16 THE OFFICER: I will have to bump this up to
09:10:53 17 the supervisor.
09:10:54 18 THE COURT: I am ordering that his right
09:10:55 19 arm being unshackled.
09:10:57 20 THE OFFICER: I will have to refuse that
09:10:59 21 order and wait for my supervisor to respond.
09:11:03 22 THE COURT: The DAJD is in danger of being
09:11:08 23 in contempt of the court.
09:12:50 24 THE OFFICER: Sorry, at this time, Your
09:12:53 25 Honor, we need to return to the base.

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09:12:58 1 THE COURT: I will leave it to the defense
09:13:01 2 as to whether you want to proceed now or not.

09:13:11 3 MR. GRUENHAGEN: Your Honor, we will
09:13:13 4 proceed and address it as it goes forward at a later
09:13:17 5 time. Thank you.

09:13:18 6 MS. MacDONALD: We will note the ongoing
09:13:20 7 objection.

09:13:21 8 THE COURT: The objection is sustained, but
09:13:22 9 it doesn't seem like I can do anything about it.

09:13:25 10 MS. MacDONALD: Perhaps we can have, when we
09:13:27 11 break and come back this afternoon, someone from the
09:13:30 12 Department in the jail is present and we can address.

09:13:33 13 THE COURT: That is fine, if the defense
09:13:35 14 wishes, it may prepare an order to show cause.

09:13:38 15 MR. GRUENHAGEN: Thank you.

09:13:38 16 MS. MacDONALD: At this time the defense
09:13:40 17 would be calling Dr. Wanda Foglia to the stand.

09:13:48 18 THE COURT: Please come forward and raise
09:13:50 19 your right hand.

09:13:53 20 MS. MacDONALD: Did the court receive the
09:13:56 21 copy of the presentation of the power-point?

09:13:58 22 THE COURT: I did.

09:13:58 23

09:13:58 24

09:13:59 25 WANDA FOGLIA,

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09:13:59 1 Having been first duly sworn,
09:13:59 2 Testified as follows:
09:14:00 3
09:14:00 4 THE COURT: Thank you, please be seated.
09:14:05 5 State your name and spell your last name, please.
09:14:07 6 THE WITNESS: Wanda Foglia, F-o-g-l-i-a.
09:14:11 7 THE COURT: Business address.
09:14:13 8 THE WITNESS: Rowan University in
09:14:16 9 Glassboro, New Jersey.
09:14:18 10 THE COURT: Address.
09:14:18 11 THE WITNESS: 201 Mullica Hill Road.
09:14:22 12 THE COURT: Thank you.
09:14:23 13 Counsel, the timing on this will be 90
09:14:27 14 minutes for the direct, 90 minutes for cross, 20
09:14:31 15 minutes for redirect, 20 minutes for recross. That
09:14:34 16 will be it.
09:14:35 17 Since the rules of evidence are
09:14:38 18 inapplicable, I expect we will hear few objections
09:14:43 19 during the testimony, since they would be pointless.
09:14:50 20 MS. MacDONALD: Your Honor, if the court
09:14:51 21 could, perhaps, give us a warning when we are getting
09:14:54 22 close to the ends of the 90 minutes on the direct.
09:14:56 23 THE COURT: Sure.
09:14:56 24 DIRECT EXAMINATION
09:14:58 25

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09:14:58 1 BY MS. MacDONALD:

09:14:59 2 Q. Can you briefly give us your background,
09:15:01 3 Dr. Wanda Foglia?

09:15:02 4 A. I majored in psychology as an undergraduate.
09:15:05 5 Then I went on to Law School. I practiced law for
09:15:08 6 about five years, including two years as an assistant
09:15:11 7 district attorney in the Philadelphia DA's office.
09:15:14 8 Then decided I was more interested in teaching.

09:15:17 9 So I went back and got a Ph.D. in criminology and I
09:15:20 10 had been teaching at Rowan University since 1994. I
09:15:27 11 am now a tenured full professor at Rowan University.
09:15:30 12 I am also the coordinator of our graduate program.

09:15:33 13 Q. Thank you. How did you get involved with the
09:15:35 14 Capital Jury Project?

09:15:36 15 A. While I was working on my dissertation, which
09:15:38 16 was on cognition and crime, that is really my main
09:15:42 17 area of interest -- how -- the way that people think,
09:15:44 18 influenced whether they commit crime or not. One of
09:15:46 19 the people on my dissertation committee told me about
09:15:49 20 this opportunity to get involved in a multistate study
09:15:52 21 that was being run by someone who is very respected in
09:15:55 22 the field and funded by the National Science
09:15:58 23 Foundation. It was a very good research opportunity.

09:16:01 24 It related loosely to my area of interest. I
09:16:04 25 was looking at how defendants' think and how that

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09:16:08 1 relates to behavior. So this was looking at how
09:16:11 2 jurors think and how it relates to their
09:16:13 3 decision-making. That is how I first got involved in
09:16:15 4 1996.

09:16:16 5 Q. When did the CJP, the Capital Jury Project,
09:16:20 6 actually start?

09:16:22 7 A. The National Science Foundation approved the
09:16:25 8 proposal in 1991. I noticed somewhere it said that
09:16:32 9 the jurors were interviewed 10 years after the trials.
09:16:36 10 That is not true at all.

09:16:37 11 The data collection took place at different
09:16:42 12 times in different states. So it spanned a --
09:16:48 13 actually, a seven-year period. But in some of the
09:16:52 14 states the interviews were done during the first
09:16:55 15 couple years and the other states it was done during
09:16:57 16 the later years. It took a while to get it all
09:17:00 17 entered into the computer and have people write
09:17:02 18 articles on it.

09:17:03 19 Q. I note that you have a power-point presentation
09:17:05 20 that you have brought referring to that now. Can you
09:17:08 21 give us an overview or a road map of what the findings
09:17:11 22 were for the CJP?

09:17:14 23 A. The CJP replicated findings of the many other
09:17:20 24 studies of seven different issues. I will talk about
(09:17:22 25 each one in turn.

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09:17:23 1 The first one is premature decision-making.
09:17:26 2 About half of the jurors decide the penalty before
09:17:29 3 they heard the sentencing guideline or the sentencing
09:17:32 4 evidence.

09:17:32 5 The second refers to the jury selection and
09:17:35 6 actually relates to three different problems. One is
09:17:37 7 it doesn't work very well. It allows a lot of
09:17:39 8 automatic death penalties jurors on to the jury. The
09:17:43 9 second is it results in a jury that is composed of
09:17:50 10 conditioned prone and punishment prone people. The
09:17:53 11 third is a process effect, which shows that the
09:17:56 12 process of being asked all of the questions of the
09:17:58 13 death penalty making the jurors think that the
09:18:01 14 defendant is probably guilty and deserved the death
09:18:04 15 penalty.

09:18:04 16 The third is that the jurors don't understand
09:18:07 17 the sentencing structure that is supposed to be
09:18:09 18 guiding their discretion.

09:18:10 19 Another indication is the fourth issue, many
09:18:14 20 jurors erroneously think that the death penalty is
09:18:17 21 required, if certain factors are shown.

09:18:20 22 Fifth, jurors fail to realize that they are
09:18:23 23 primarily responsible for the sentencing decision.

09:18:25 24 The sixth issue is the race is still influencing
09:18:29 25 the process.

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09:18:30 1 And the seventh issue is many jurors under-
09:18:33 2 estimating how long somebody will spend in prison, if
09:18:35 3 they don't get the death penalty.

09:18:37 4 Q. If you could, give us the background on the
09:18:39 5 Capital Jury Project.

09:18:42 6 A. I may skip through some of the slides pretty
09:18:48 7 quickly. I just have a slide here, slide number 3,
09:18:52 8 that indicates that the Supreme Court has expressed a
09:18:54 9 willingness to rely on social science evidence.

09:18:57 10 Probably the most famous case is the Brown versus
09:19:03 11 Board of Education case, where they relied on social
09:19:05 12 science evidence of the impact of the discrimination.

09:19:08 13 A death penalty case where they relied on social
09:19:11 14 science evidence was the Lockhart case. In that case,
09:19:15 15 they said that they wanted to know how actual jurors
09:19:17 16 decided cases.

09:19:18 17 So that really was the reason that Dr. Bowers
09:19:23 18 designed the study the way that he did, in response to
09:19:26 19 the Supreme Court's expressed interests in knowing how
09:19:28 20 actual jurors decided death penalty cases.

09:19:32 21 The Supreme Court actually relied on Capital
09:19:37 22 Jury Project research in two different cases, and in
09:19:42 23 Schriro versus Summerlin, and Justice Scalia, cited a
09:19:48 24 couple of articles from the Capital Jury Project, one
09:19:53 25 of which I will be talking about today, has been

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09:20:01 1 introduced as Exhibit D.

09:20:05 2 In Simmons versus South Carolina, where the
09:20:09 3 Supreme Court said that jurors have to be told about
09:20:11 4 the -- have been told that life without parole means
09:20:16 5 that there is no parole, whenever a prosecutor argues
09:20:20 6 future dangerousness also relied on a couple of
09:20:23 7 articles. One was written by Dr. Bowers, who is the
09:20:27 8 principal investigator for the Capital Jury Project
09:20:31 9 and the other by Eisenberg & Wells has been introduced
09:20:34 10 as Exhibit Q.

09:20:35 11 So, Dr. Bowers got together some very well-known
09:20:40 12 lawyers and Ph.D.s with expertise in capital
09:20:46 13 punishment. I was not involved in the beginning of
09:20:50 14 the development of the Capital Jury Project. I am not
09:20:53 15 referring to myself, when I say eminent professionals.
09:20:55 16 But these were very well regarded people in the field.

09:20:58 17 Dr. Bowers was awarded the August Vollmer Award
09:21:04 18 for lifetime contribution to the field of criminology
09:21:07 19 by the American Society of Criminology has a
09:21:10 20 national -- actually international reputation.
09:21:13 21 Another person who was involved with the Capital Jury
09:21:16 22 Project is Dr. Hoffman, who is currently teaching at
09:21:21 23 Indiana Law School, and, actually, wrote the model
09:21:26 24 death penalty statute for then Governor Romney to try
09:21:30 25 to address some of the issues that we found.

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09:21:32 1 So there were a lot of different lawyers and
09:21:35 2 doctors involved in this study, some of whom supported
09:21:38 3 the death penalty, others who did not support the
09:21:41 4 death penalty. But it was a social science study,
09:21:44 5 where the personal opinions really were not relevant.

09:21:47 6 Q. What was the -- how was the Capital Jury
09:21:54 7 Project sample made up of?

09:21:58 8 A. The Capital Jury Project was funded by the
09:22:01 9 National Science Foundation and they reviewed our
09:22:04 10 sampling process, both when they initially granted the
09:22:07 11 funding and then when they approved additional funding
09:22:10 12 to expand the project.

09:22:12 13 It was -- the sampling took place in multiple
09:22:17 14 stages. First, we had to choose 14 states where there
09:22:20 15 were a substantial number of death penalty cases. And
09:22:22 16 the states were chosen to represent states that had
09:22:28 17 the three different types of death penalty statutes.

09:22:31 18 The first type was the narrowing or sometimes
09:22:34 19 called the threshold statute, like you have here in
09:22:36 20 Washington. Four of our states have that kind of
09:22:39 21 statute.

09:22:40 22 The second type are the balancing statutes,
09:22:42 23 which is what most states have. And then the third is
09:22:45 24 the special questions statute, which Texas and Oregon
09:22:48 25 have. We were also trying to get states from

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09:22:51 1 different regions of the country.

09:22:53 2 We chose 353 capital murder trials. We were
09:23:00 3 trying to get roughly an even mix of death penalty
09:23:02 4 cases and life cases so we could compare the decision
09:23:06 5 making in the death and the life cases -- compare the
09:23:09 6 decision-making in different states, regardless of
09:23:12 7 what percentage actually resulted in the death
09:23:14 8 sentence. We are a little heavy on the death cases,
09:23:17 9 because it was easier to find jurors in death cases,
09:23:20 10 but it is roughly an even mix in most states.

09:23:22 11 We ended up with 1198 jurors that were randomly
09:23:30 12 selected from each of the cases. The goal was to get
09:23:33 13 four jurors from each case.

09:23:35 14 Q. Thank you. Why was Washington not part of that
09:23:38 15 study?

09:23:39 16 A. They didn't have a -- Washington didn't have a
09:23:42 17 significant number of death penalty cases that would
09:23:45 18 make the sampling process easier.

09:23:48 19 Also, to some extent it depended upon where
09:23:51 20 there were people who were willing to get involved in
09:23:53 21 the project.

09:23:55 22 Q. So you testified that there was seven flaws
09:23:57 23 that were found. Can we turn to the first flaw that
09:24:01 24 made your decision-making --

09:24:02 25 A. Yes.

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09:24:03 1 We call this premature decision-making. Because
09:24:06 2 it shows that about half of the jurors are deciding
09:24:08 3 the sentence before the sentencing phase has even
09:24:11 4 begun. They haven't heard the guidelines that are
09:24:14 5 supposed to guide their discretion. They haven't
09:24:16 6 heard the sentencing evidence that they are supposed
09:24:17 7 to consider.

09:24:18 8 We ask them what they thought the sentence
09:24:21 9 should be at four different points in the process.
09:24:24 10 The first time that we asked was how did they feel
09:24:26 11 about the sentence after the guilt phase but before
09:24:29 12 sentencing phase had begun.

09:24:31 13 The second time was after the sentencing
09:24:33 14 evidence, but before the deliberations.

09:24:35 15 The third time was first vote.

09:24:36 16 The fourth time was the final vote. I am going
09:24:40 17 to be focusing initially to the response to the first
09:24:43 18 question.

09:24:44 19 THE COURT: Excuse me, the sample was not
09:24:50 20 only from death penalty cases in which the jury voted
09:24:55 21 death; is that correct?

09:24:56 22 THE WITNESS: No, that is correct.

09:24:58 23 THE COURT: Not only those cases.

09:25:01 24 THE WITNESS: No, over 40 percent were
09:25:02 25 from cases where the jury voted for life.

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09:25:06 1 THE COURT: All right.

09:25:07 2 Selection of the jurors was purely random.

09:25:12 3 So whether or not -- however they voted, was

09:25:16 4 irrelevant to the sample?

09:25:18 5 THE WITNESS: First we chose, we went into

09:25:20 6 each state and tried to get a rough mix of 50/50 death

09:25:24 7 and life. We ended up with about, I believe, 58

09:25:29 8 percent -- 59 percent death, 41 percent life.

09:25:34 9 THE COURT: Self-reporting.

09:25:36 10 THE WITNESS: No. We had court records

09:25:38 11 that showed whether the jury imposed the death

09:25:44 12 sentence or a life sentence, or whatever the

09:25:46 13 alternative was in that state.

09:25:47 14 We knew upfront which ones were our death

09:25:51 15 cases and which ones were the life cases. Then we had

09:25:54 16 to get the list of the jurors. It just so happened

09:25:56 17 that it was easier to get the list from the death

09:25:58 18 cases, because they were on automatic appeal and the

09:26:01 19 file was very complete. That is why we ended up with

09:26:04 20 a few more death cases than life cases. Once we got

09:26:07 21 the list we randomly selected jurors from each of

09:26:09 22 those cases.

09:26:11 23 THE COURT: All right. Thank you.

09:26:12 24 BY MS. MacDONALD:

09:26:13 25 Q. Thank you.

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09:26:14 1 A. I have a cite here to Gregg, which I am sure
09:26:17 2 that everybody is familiar with, that mandates that
09:26:21 3 you have a guilt phase and a second sentencing phase.

09:26:26 4 This is the first question which is:

09:26:28 5 "After the jury found the defendant guilty of
09:26:30 6 capital murder, but before you heard any evidence or
09:26:32 7 testimony about what the punishment should be, did
09:26:35 8 you then think that the defendant should be
09:26:37 9 given" --

09:26:37 10 They can choose a death sentence or a life
09:26:40 11 sentence, or an alternative that was provided or
09:26:43 12 undecided. Under the law they are supposed to be
09:26:45 13 undecided at this point.

09:26:46 14 Then if they said death or life, then we asked
09:26:49 15 them:

09:26:49 16 "How strongly did you think so they could answer
09:26:52 17 absolutely convinced, pretty sure, or not too sure?"

09:26:55 18 The interview instrument has been entered as an
09:26:58 19 exhibit.

09:27:00 20 The Supreme Court has recognized how important
09:27:02 21 it is that they keep an open mind, especially in the
09:27:07 22 case of Morgan where they said, "a juror who has
09:27:10 23 formed an opinion cannot be impartial."

09:27:12 24 So we are trying to figure out how many have
09:27:15 25 actually formed an opinion.

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09:27:16 1 Q. What was your finding?

09:27:17 2 A. We found that, this is a table from an article
09:27:23 3 that Dr. Bowers and I wrote that summarized all seven
09:27:27 4 of these issues. It has been entered as an exhibit --
09:27:32 5 Exhibit Number C.

09:27:33 6 A lot of what I am going to be testifying about
09:27:37 7 is from that article, still singularly agonizing. The
09:27:41 8 first column lists the states. If you -- you may
09:27:45 9 notice that it only lists 13 states, because Louisiana
09:27:49 10 was not listed separately.

09:27:51 11 Our sampling goals weren't met there. We had
09:27:53 12 most death cases -- the overwhelming majority was
09:27:57 13 death cases in Louisiana. We didn't think that that
09:28:00 14 was directly comparable to other states where it is a
09:28:03 15 roughly even mix. They are not listed separately,
09:28:05 16 though. They are included in the grand totals.

09:28:07 17 As can you see from the first slide, I am sorry,
09:28:10 18 from the first column of numbers, the over-all
09:28:17 19 percentage of jurors, who prematurely decided that the
09:28:30 20 penalty should be death, was 30 percent.

09:28:32 21 If you go down the column numbers, you can see
09:28:34 22 it is a significant percentage in every state. That
09:28:36 23 is what we find over and over again. It doesn't
09:28:39 24 matter what kind of statute that the State has, it
09:28:41 25 doesn't matter where they are in the country,

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09:28:44 1 significant percentages in every state are making
09:28:46 2 these mistakes.

09:28:47 3 About 19 percent of the jurors prematurely
09:28:50 4 decided that the defendant deserved life. Which might
09:28:53 5 not be troubling from a defense perspective, but it is
09:28:57 6 arbitrary. It is not the way that the decision is
09:28:59 7 supposed to be made according to the Supreme Court.
09:29:01 8 They are not supposed to have made a decision at this
09:29:03 9 point.

09:29:03 10 Only about half are undecided, which is what
09:29:07 11 these are supposed to be at this point.

09:29:08 12 THE COURT: But if the burden is on the
09:29:09 13 State to persuade the jury death, then what is the
09:29:20 14 error where 19 percent presumed life?

09:29:23 15 Isn't that what they are supposed to do?

09:29:26 16 THE WITNESS: They are supposed to be
09:29:28 17 undecided, according to my reading of the law. They
09:29:32 18 are supposed to be undecided about the penalty,
09:29:33 19 because they haven't even heard the guidance that they
09:29:36 20 are supposed to be following.

09:29:37 21 If they have already arbitrarily decided
09:29:40 22 that this person deserves life, they could be doing it
09:29:45 23 on grounds that they are not supposed to be
09:29:47 24 considering. Because the Supreme Court has said "the
09:29:50 25 only way that the death penalty can be constitutional

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09:29:53 1 is if juror discretion is guided." They haven't been
09:29:56 2 guided yet.

09:29:57 3 THE COURT: I don't understand the
09:29:59 4 difference between that and the presumption of
09:30:01 5 innocence. The jurors are to presume the defendant is
09:30:04 6 innocent in the fact finding stage.

09:30:08 7 THE WITNESS: I think that when they are
09:30:13 8 given a choice of undecided and they haven't heard how
09:30:15 9 they are supposed to make the decision yet, that they
09:30:18 10 should be saying undecided.

09:30:24 11 THE COURT: Thank you.

09:30:27 12 BY MS. MacDONALD:

09:30:28 13 Q. Dr. Wanda Foglia, of those 30 percent that had
09:30:30 14 made the decision for death, do they ever change their
09:30:35 15 opinion?

09:30:38 16 A. Most of them do not change their opinion. I
09:30:41 17 have some slides here that just show that 97 percent
09:30:46 18 of the jurors who prematurely chose death said that
09:30:50 19 they were absolutely convinced or pretty sure. It
09:30:52 20 wasn't just a hunch, they really felt strongly about
09:30:55 21 this.

09:30:58 22 When we asked paralegals here in Washington, who
09:31:00 23 looked at the instructions from the Washington Pattern
09:31:07 24 Instructions, the percentages were very similarly for
09:31:08 25 prematurely choosing death. 32 percent versus the 30

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09:31:12 1 percent that we found nationwide said that they had
09:31:15 2 already decided that the defendant deserved death.

09:31:18 3 Actually, a higher percentage, 48 percent, had
09:31:21 4 already decided that the defendant deserved life. And
09:31:23 5 that was probably based on the facts of the case they
09:31:27 6 were given, because it was based -- the facts were
09:31:30 7 based on the Schierman case. When you are just
09:31:34 8 reading the cold record and not seeing the victims,
09:31:39 9 the fact that the defendant was under the influence
09:31:41 10 and wasn't even sure what he had done, probably
09:31:44 11 convinced many of the mock jurors that he should
09:31:48 12 deserve life.

09:31:50 13 But, their positions were similarly firm in the
09:31:54 14 sense that here 95 percent were absolutely convinced
09:31:58 15 or pretty sure. Some of the people from the Capital
09:32:02 16 Jury Project are now doing a follow-up study, where
09:32:04 17 they looked at trials that took place between 1999 and
09:32:08 18 2009. This study involves jurors in seven states that
09:32:14 19 are listed here in the slides. Most of the interviews
09:32:17 20 that have been completed so far have been completed in
09:32:19 21 Texas, Indiana and Delaware.

09:32:24 22 Even though that it is only 153 interviews, it
09:32:31 23 is already coming up with percentages that are very
09:32:34 24 similar to what we found in the larger study. Here 35
09:32:37 25 percent prematurely chose death, 16 percent

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09:32:40 1 prematurely chose life and about half, again, were
09:32:43 2 undecided.

09:32:44 3 Again, 96 percent were either absolutely
09:32:47 4 convinced or pretty sure, felt very strongly about
09:32:50 5 their positions.

09:32:50 6 Q. Dr. Wanda Foglia, in a more recent interview,
09:32:53 7 the 153 interviews, it was done after the first
09:32:57 8 finding of Capital Jury Project had been published?

09:33:01 9 A. Yes. This part of the study is still going on.

09:33:04 10 You can do more different types of analysis, if
09:33:09 11 you have a larger sample in the social sciences. 30
09:33:13 12 is considered a sufficient size to be able to draw
09:33:15 13 conclusions.

09:33:16 14 But if you want to start breaking the sample
09:33:18 15 down in subgroups and comparing them you need a bigger
09:33:21 16 sample. So far they have 153, but the goal is to get
09:33:24 17 a much larger sample. Again, it is proceeding more
09:33:27 18 quickly in most states and most of the states so far
09:33:33 19 are the states I have mentioned.

09:33:33 20 Q. Talking about the sample size from the
09:33:36 21 Washington is 26?

09:33:38 22 A. Yes, which is very close. Obviously, a few
09:33:40 23 people short. That is why it is even more remarkable
09:33:43 24 that the statistics are so consistent even with
09:33:45 25 smaller sample that we are seeing similar percentages

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09:33:48 1 on many of these questions.

09:33:50 2 Q. Thank you.

09:33:51 3 THE COURT: Did you compare, or take into
09:33:54 4 as a factor -- kind of a cultural question -- in which
09:34:02 5 some states, Texas, for example, Virginia, another
09:34:05 6 one -- in which capital jurors are selected in a day
09:34:08 7 and a half, or two days and in other states in which
09:34:13 8 capital jurors are selected and voir dire can take
09:34:18 9 three weeks?

09:34:19 10 THE WITNESS: That is a very good point.
09:34:21 11 That is why we wanted to be able to compare different
09:34:24 12 states.

09:34:24 13 The initial idea was to do a lot of
09:34:26 14 different types of comparisons. But when we saw the
09:34:30 15 results were so consistent across the states, it
09:34:32 16 didn't seem to make that much difference.

09:34:34 17 THE COURT: All right.

09:34:37 18

09:34:38 19 A. This slide -- on the next few slides that I
09:34:41 20 will probably go through quickly shows that the jurors
09:34:46 21 were very consistent.

09:34:48 22 This slide comes from an article that has been
09:34:52 23 introduced into evidence and goes into this premature
09:34:58 24 decision-making issue in a lot more detail.

09:35:01 25 What we did here is we broke the sample down by

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09:35:05 1 what pathway that the jurors took or what position
09:35:08 2 they had at the four different points that we asked
09:35:11 3 about.

09:35:11 4 So, in that first panel where it says DDDD, that
09:35:15 5 means that the jurors thought that the sentence should
09:35:19 6 be death at all four points that we asked about.

09:35:22 7 The first panel looks at the premature death
09:35:26 8 jurors. Then the second panel looks at the premature
09:35:36 9 life jurors. Then the third panel looks at the
09:35:39 10 undecided jurors.

09:35:41 11 If you just look at the premature death jurors,
09:35:43 12 you can see that most of them, 59 percent, never
09:35:47 13 changed their position.

09:35:48 14 Another 19 percent didn't change their position
09:35:53 15 until final vote.

09:35:54 16 So, close to 80 percent were consistent up to
09:35:59 17 the final vote. Many of those who changed their
09:36:02 18 position at final vote told us: "I still thought that
09:36:04 19 he deserved death, but I didn't want a hung jury."

09:36:08 20 So that the, it was significant that at first
09:36:10 21 vote they still voted for the death.

09:36:12 22 Another indication of how strongly they felt,
09:36:18 23 and, also, of internal validity, which is something
09:36:21 24 that we look for. That means that the questions
09:36:23 25 within the instrument or internally hanged together

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09:36:27 1 logically make sense.

09:36:28 2 We asked them "how did you make your guilt and
09:36:31 3 punishment decisions?"

09:36:32 4 Again, the jurors are broken down by premature
09:36:37 5 death, undecided and premature life. You can see that
09:36:41 6 the premature death jurors were over twice as likely
09:36:43 7 to say they made their guilt and their punishment
09:36:46 8 decisions together on the basis of similar
09:36:49 9 considerations. 44 percent versus only about 18
09:36:52 10 percent of the undecided jurors. This, again, is
09:36:55 11 from the article that goes into the issue in more
09:36:59 12 details.

09:36:59 13 Another indication of internal consistency and a
09:37:06 14 question that gives us more of an understanding of how
09:37:09 15 they decided the sentence is a question about when
09:37:12 16 they made their punishment decision.

09:37:15 17 If you compare the first panel of numbers, which
09:37:17 18 is the premature death jurors, with the second panel
09:37:20 19 of numbers, which is the premature life jurors, you
09:37:24 20 can say that you can see that almost two percent made
09:37:28 21 their sentencing decision prior to opening statements.

09:37:31 22 But most of them, 55 percent, made their
09:37:33 23 decisions during the guilt evidence.

09:37:36 24

9:37:37 25 BY MS. MacDONALD:

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09:37:37 1 Q. (Continuing) So this is before the opening
09:37:38 2 statements in the first phase?

09:37:40 3 A. Yes.

09:37:40 4 Q. During voir dire and the introduction of the
09:37:42 5 case they had made a decision?

09:37:44 6 A. Yes, some of them had.

09:37:46 7 This next slide shows how premature
09:37:49 8 decision-making is related to another issue, which is
09:37:52 9 the issue of thinking that death is the only
09:37:54 10 acceptable punishment.

09:37:55 11 I notice somewhere that it talks about death
09:37:58 12 being the only appropriate punishment in some of the
09:38:01 13 pleadings. But the wording of this question was
09:38:03 14 actually whether death was the only acceptable
09:38:06 15 punishment, which is a stronger statement.

09:38:08 16 They could -- we gave them seven different
09:38:12 17 murders. They could say that the death -- we asked
09:38:14 18 them, "what do you think that the punishment should
09:38:18 19 be?" They could say death is never acceptable, death
09:38:20 20 is the only acceptable punishment or it is sometimes
09:38:23 21 acceptable, which is if the jury was really death
09:38:26 22 qualified and life qualified that is what they should
09:38:29 23 have said.

09:38:29 24 We looked at how many said death was the only
09:38:33 25 acceptable punishment for none of them or one of them,

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09:38:36 1 up to 6 or 7 of them. If you look across the bottom
09:38:40 2 row of numbers, you can see that the premature death
09:38:43 3 jurors, who are listed in the second column, were much
09:38:47 4 more likely to think that death was the only
09:38:49 5 acceptable punishment for six or all seven of the
09:38:51 6 murders.

09:38:52 7 There is a relationship between thinking that
09:38:54 8 death is the only acceptable punishment and
09:38:57 9 prematurely deciding that the sentence should be
09:38:59 10 death. Which makes sense, if they think that death is
09:39:02 11 the only acceptable punishment for a certain type of
09:39:04 12 murder once they know that it is that kind of murder,
09:39:07 13 then they know that the sentence should be death. I
09:39:09 14 will talk about the death is the only acceptable
09:39:11 15 punishment more, when I get to the second issue.

09:39:14 16 I should mention that the first and the second
09:39:16 17 issues are the longest issues. I have fewer details
09:39:22 18 about the remaining issues.

09:39:24 19 This slide, which is a little difficult to read,
09:39:29 20 shows that the premature death jurors are really
09:39:33 21 different types of jurors. They have different
09:39:34 22 attitudes towards the death penalty.

09:39:37 23 So if you look at the third question, we asked
09:39:39 24 them:

09:39:40 25 "If the death penalty was enforced more often,

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09:39:42 1 would we have fewer murders."

09:39:46 2 Again, breaking it down between premature death
09:39:49 3 jurors in the first column versus undecided jurors in
09:39:53 4 the second and life jurors in the third column, we see
09:39:56 5 that the premature death jurors are much more likely
09:39:59 6 to strongly agree with that statement.

09:40:01 7 51 percent strongly agree that the death penalty
09:40:03 8 should be enforced more often versus 30 percent and 34
09:40:08 9 percent of undecided and the life jurors respectively.

09:40:12 10 Skipping down to the fifth question we ask if
09:40:16 11 the death penalty should be required for someone
09:40:18 12 convicted after serious murder.

09:40:20 13 Premature death jurors are much more likely to
09:40:25 14 strongly agree with that, 59 percent versus 37 percent
09:40:28 15 or 33 percent.

09:40:29 16 Then skipping down to the sixth question, we
09:40:32 17 asked them about whether they had moral doubts about
09:40:35 18 the death penalty. If you look at the last row of
09:40:37 19 numbers, you can see the premature death jurors were
09:40:40 20 much more likely to not agree with that. To say that,
09:40:43 21 no, they didn't have moral doubt: 77 percent versus
09:40:47 22 61 or 56 percent.

09:40:50 23 Q. So --

09:40:51 24 THE COURT: I presume that you didn't --
9:40:54 25 this is almost obvious, but you didn't look at the

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09:40:56 1 voir dire questions that were put to these jurors?

09:40:59 2 THE WITNESS: Not in the individual cases.

09:41:01 3 THE COURT: All right.

09:41:04 4 THE WITNESS: That is probably part of what
09:41:06 5 they are doing for the third phase, though, is looking
09:41:08 6 at the transcripts and trying to relate responses to
09:41:11 7 what they actually heard.

09:41:13 8 We also found that the jurors took a
09:41:18 9 different approach to deciding guilt. We asked a
09:41:23 10 question about guilt that was similar to the question
09:41:25 11 we asked about the sentence, that is:

09:41:28 12 "After you heard the judge's instructions
09:41:30 13 to the jury for deciding the guilt, but before you
09:41:33 14 begin deliberating with the jurors, did you think
09:41:39 15 that the defendant was" and they could answer,
09:41:39 16 guilty of the capital murder, guilty but not of
09:41:42 17 capital murder, not guilty, and undecided.

09:41:45 18 The first column shows the responses of the
09:41:47 19 premature death jurors they were much more likely to
09:41:50 20 say guilty of capital murder, 81 percent versus 60 and
09:41:56 21 44 percent.

09:41:58 22 They were also more likely to vote for
09:42:00 23 capital murder at first vote, 95 percent versus 85
09:42:04 24 and 62 percent. They were much less likely to be
09:42:09 25 reluctant to go along with the jury. The rest of the

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09:42:13 1 jury, 7 percent versus 13 percent and 26 percent.

09:42:16 2 So this is just to show that they took a
09:42:18 3 different approach towards guilt. This next slide,
09:42:24 4 again, from that article that goes into this issuing
09:42:28 5 more in detail shows that they discussed different
09:42:32 6 things during the guilt deliberations.

09:42:35 7 The first question here asks if there was
09:42:42 8 any discussion of proof beyond a reasonable doubt,
09:42:45 9 which you would think would be something that would be
09:42:47 10 discussed during the guilt deliberations.

09:42:49 11 The premature death jurors were more likely
09:42:53 12 to say no. 34 percent said that they did not discuss
09:42:57 13 proof beyond a reasonable doubt compared to 28 percent
09:43:00 14 and 29 percent of the undecided and life jurors,
09:43:03 15 respectively.

09:43:04 16 Skipping down to the third question, we
09:43:06 17 asked them if there was any discussion of the degree
09:43:11 18 of guilt, or what degree of murder that the defendant
09:43:14 19 was guilty of. Again, the premature death jurors were
09:43:17 20 more likely to say no, they didn't discuss that, 64
09:43:20 21 percent versus 53 percent and 46 percent, among
09:43:25 22 undecided and live, respectively.

09:43:27 23 The last question was:

09:43:29 24 "Did you discuss the punishment during the
9:43:32 25 guilt deliberations?" Of course, they are not

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09:43:33 1 really supposed to be discussing the punishment in the
09:43:38 2 guilt deliberation. The premature death jurors were
09:43:41 3 more likely to say, "yes, we discussed the
09:43:44 4 punishment." 35 percent versus 30 percent among the
09:43:49 5 undecided jurors.

09:43:50 6 The premature life jurors were also more
09:43:52 7 likely to discuss punishment.

09:43:55 8 Q. Were there any studies that were not part of
09:43:58 9 the CJP that confirmed the findings of a premature
09:44:02 10 death decisions studies?

09:44:03 11 A. Yes, there were many other studies.

09:44:05 12 This next slide, which I won't go through, but
09:44:09 13 it just shows some of the comments jurors made to us
09:44:11 14 that indicate that they were deciding the sentence
09:44:13 15 during the guilt evidence.

09:44:15 16 There was a study done by the Costanzo and
09:44:20 17 Costanzo of Oregon jurors. 26 percent of their jurors
09:44:23 18 said that they didn't need to hear the evidence during
09:44:25 19 the sentencing phase, because they had already decided
09:44:28 20 that the defendant deserved the death penalty. So
09:44:30 21 that 26 percent is pretty similar to our 30 percent.

09:44:34 22 That was also a study that involved former
09:44:37 23 capital jurors. So people who actually sat on the
09:44:41 24 death penalty cases, but it was not part of the
09:44:43 25 Capital Jury Project.

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09:44:44 1 That is what we call convergent validity, when
09:44:48 2 different people doing different studies come up with
09:44:51 3 the -- similar results -- the results converge, that
09:44:54 4 is also called external validity. It shows that our
09:44:59 5 results are valid, when compared to studies that are
09:45:03 6 external to our work.

09:45:04 7 This slide, number 26, shows six different
09:45:11 8 articles that have been introduced as exhibits, that
09:45:17 9 used Capital Jury Project data and found evidence of
09:45:20 10 premature decision-making and two additional studies
09:45:23 11 that also used real jurors, although they were not
09:45:27 12 part of the Capital Jury Project. They also found
09:45:29 13 evidence of premature decision-making.

09:45:32 14 It is significant that so many different studies
09:45:34 15 published in so many different venues are finding the
09:45:38 16 same results, because every time that an article is
09:45:41 17 published, it goes through a review process and the
09:45:44 18 reviewers decide whether the results are valid and
09:45:47 19 whether the methodology is valid. And over and over
09:45:51 20 again, these results have been approved.

09:45:53 21 One thing that I didn't mention, I think that I
09:45:55 22 should just mention, earlier -- one of the earlier
09:45:58 23 slides -- there is a website that lists about 40
09:46:02 24 different articles and doctoral dissertations that
09:46:05 25 have been written and published using Capital Jury

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09:46:08 1 Project data.

09:46:08 2 Every time that they get published they are
09:46:11 3 being reviewed and approved by external reviewers, who
09:46:15 4 have nothing to do with the Capital Jury Project.

09:46:17 5 Q. What are the implications of the findings, if
09:46:21 6 you believe them?

09:46:22 7 A. As I have said numerous times now, half of the
09:46:24 8 jurors are making the sentence prematurely, before
09:46:26 9 they have heard the guidance they are supposed to be
09:46:28 10 following or the evidence that they are supposed to be
09:46:31 11 considering.

09:46:32 12 The Supreme Court assumes that makes them
09:46:38 13 partial. It implies that they wouldn't give as much
09:46:43 14 consideration to mitigating evidence. That is exactly
09:46:45 15 what the results show.

09:46:47 16 Dr. Brewer compared at that time premature death
09:46:52 17 jurors and the rest of the jurors found that the
09:46:54 18 premature death jurors were significantly less likely
09:46:58 19 to consider evidence mitigating, compared to the
09:47:01 20 jurors who did keep an open mind.

09:47:03 21 The P level listed at the very bottom of the
09:47:07 22 slide is the probability of getting a result by
09:47:10 23 chance. I would refer to P levels again later. That
09:47:13 24 is something that we use in the social sciences to
09:47:18 25 determine whether it is a real result or just chance

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09:47:21 1 variation.

09:47:22 2 In the social sciences, if the P level is less
09:47:25 3 than .05, or five percent, we consider it a real
09:47:29 4 result. There is less than a five percent chance of
09:47:31 5 getting that result just by chance variation.

09:47:34 6 Here the P level is less than point 001, which
09:47:38 7 means that there is a one in a thousand chance of
09:47:40 8 getting this difference or one thousandths of a
09:47:44 9 probability of getting this difference by chance.

09:47:46 10 So it is a highly significant difference.

09:47:49 11 Q. Dr. Wanda Foglia, looking at your slide -- your
09:47:52 12 chart on slide number 28, under the mitigation, it
09:47:54 13 looks like you have listed mentally retarded, which is
09:47:57 14 actually a bar for a death penalty. It appears that
09:48:01 15 even though that still doesn't consider mitigation; is
09:48:05 16 that correct?

09:48:05 17 A. Yes. This slide illustrates what I am talking
09:48:08 18 about with actual numbers.

09:48:10 19 So that the first column lists some very common
09:48:13 20 mitigators and then the second column lists the
09:48:17 21 percentage of premature death jurors, PMD, premature
09:48:22 22 death, jurors who said that these mitigators made them
09:48:25 23 less likely to vote for death.

09:48:27 24 Then the last column is the percentage of
09:48:29 25 undecided jurors who said, "these mitigators made us

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09:48:33 1 less likely to vote for death."

09:48:35 2 This is limited to jurors who said, the
09:48:39 3 mitigator was present. Then we asked the follow up
09:48:41 4 question, "well, did it make you less likely to vote
09:48:46 5 for death, or no effect, or more likely to vote for
09:48:49 6 death?"

09:48:49 7 For each one of them, the premature death jurors
09:48:52 8 are significantly less likely to say that the
09:48:54 9 mitigator made them less likely to vote for death.
09:48:57 10 You pointed out mental retardation, which is now
09:48:59 11 actual bar. Only 11 percent of the premature death
09:49:03 12 jurors said that that made them less likely to vote
09:49:05 13 for death, where 60 of the undecided jurors said that
09:49:09 14 that would make them less likely to vote for death.
09:49:12 15 These numbers illustrate that the premature death
09:49:15 16 jurors are less likely to find evidence mitigating,
09:49:18 17 which is why the Supreme Court felt that it was
09:49:20 18 important that the jurors keep an open mind.

09:49:22 19 Q. Thank you.

09:49:22 20 Before you move on to the second, can you sum
09:49:28 21 your findings?

09:49:28 22 A. Yes. Nearly half of the jurors nationwide and
09:49:31 23 over half in Washington are making the punishment
09:49:34 24 decision before the punishment phase begins.

09:49:37 25 THE COURT: Washington being mock jurors?

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09:49:39 1 THE WITNESS: Yes.

09:49:40 2 A. (Continued.) The overwhelming majority, over
09:49:43 3 97 percent, of those who premature chose death say
09:49:47 4 that they are -- they feel strongly about their
09:49:50 5 position. Most of these jurors never changed their
09:49:52 6 minds.

09:49:54 7 They are more likely to decide the sentence
09:49:57 8 during the guilt evidence. They are more likely to
09:49:59 9 think that death is the only acceptable punishment.
09:50:02 10 They are more likely to express strong support for the
09:50:05 11 death penalty. They are more likely to think that the
09:50:07 12 defendant is guilty. They are more likely to have
09:50:09 13 inappropriate discussions during the guilt
09:50:12 14 deliberations.

09:50:13 15 Q. Is there anything that we could do, do you
09:50:15 16 think, to mitigate the concern of that not occurring
09:50:19 17 in the capital case?

09:50:20 18 A. Very early on in the process -- the earlier the
09:50:22 19 better. Because once they make a decision, it is hard
09:50:25 20 to change their minds. So very early in the process
09:50:29 21 it needs to be emphasized to them that they have a
09:50:32 22 legal obligation to consider mitigating evidence.

09:50:35 23 If they are not willing to consider mitigating
09:50:37 24 evidence, they are not life qualified. That is just
09:50:40 25 as important as being death qualified.

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09:50:42 1 They also need to understand that there is a
09:50:48 2 two-phase process for a reason, because they can be
09:50:51 3 considering completely different evidence during the
09:50:53 4 sentencing -- strike that. I shouldn't say completely
09:50:56 5 different evidence. But considering additional
09:50:58 6 evidence during the sentencing phase, that they have a
09:51:00 7 legal obligation to consider before deciding the
09:51:03 8 sentence.

09:51:03 9 There is a lot of research and psychology and
09:51:07 10 there is also common lay understanding once people
09:51:11 11 make up their mind, it is hard to change their minds.

09:51:14 12 In psychology we call it cognitive dissonants.
09:51:18 13 Once they decide something, they don't want to hear
09:51:20 14 anything that contradicts what they have already
09:51:25 15 decided and discount anything that they have already
09:51:26 16 decided. Lay people call it the power of first
09:51:28 17 impression. That is why it is so important to let
09:51:30 18 them know right upfront that it is legally required
09:51:34 19 that they keep an open mind and be willing to consider
09:51:38 20 mitigation.

09:51:39 21 There is also a lot of evidence that people
09:51:41 22 remember what they hear at the beginning and they hear
09:51:43 23 at the end more effectively. One of the problems with
09:51:47 24 jury instructions is that they hear so much, a lot of
09:51:50 25 what comes in the middle gets lost.

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09:51:52 1 Q. Dr. Wanda Foglia, I would assume that some of
09:51:55 2 these states that they addressed in voir dire the
09:51:57 3 possibility of a punishment.

09:51:59 4 I mean, based on what you are describing isn't
09:52:02 5 there still the concern that the process itself leads
09:52:05 6 to your second flaw, where there is this bias that is
09:52:08 7 imposed in the jury towards that?

09:52:11 8 A. Yes.

09:52:11 9 Every one of these cases, I am sure, was
09:52:19 10 zealously defended and defense attorneys made sure
09:52:22 11 that the jurors were questioned about their positions.

09:52:24 12 THE COURT: Why are you so sure about that,
09:52:27 13 relaying of the IAC reversals?

09:52:30 14 THE WITNESS: That is a very good point.
09:52:32 15 But they are all involved in the -- they all involved
09:52:36 16 defense attorneys.

09:52:37 17 THE COURT: Warm bodies with bar cards in
09:52:41 18 some cases.

09:52:42 19 THE WITNESS: That is a good point.

09:52:43 20 MS. MacDONALD: Assuming that you are not
09:52:45 21 referring to us.

09:52:46 22 THE COURT: Present company excepted.

09:52:51 23 A. Because of the Capital Jury Project results,
09:52:53 24 there is a lot of activity in the bar and also because
09:52:56 25 of the results that you just mentioned, there is a lot

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09:52:58 1 of efforts to improve the quality of the capital
09:53:02 2 defense and a lot of places are using the Colorado
09:53:07 3 Method to try to unearth the death penalty jurors.
09:53:13 4 That is why it is so significant that even the more
09:53:15 5 recent interviews from the 153 jurors, who sat on
09:53:19 6 cases between 1999 and 2009, are exhibiting the same
09:53:24 7 problems. So it is an indication of how hard it is to
09:53:27 8 solve these problems.

09:53:29 9 Q. Thank you.

09:53:31 10 A. So with respect to jury selection, there are
09:53:33 11 actually three different issues. The first issue is,
09:53:37 12 it doesn't work very well. Because a lot of what
09:53:39 13 Morgan calls automatic death penalty jurors are
09:53:42 14 getting on to juries.

09:53:44 15 Morgan has said if even one juror who won't
09:53:48 16 consider mitigation makes it on to a jury, the State
09:53:52 17 is not entitled to impose a death sentence.

09:53:56 18 So we asked our jurors the question that is
09:54:00 19 shown here in slide number 33. This is the one that I
09:54:02 20 referred to earlier.

09:54:03 21 We listed six different types of murders. We
09:54:06 22 actually had seven, but the seventh was referred to a
09:54:10 23 respected member of the community. There was so much
09:54:13 24 controversy over what that really meant, we decided
09:54:16 25 that we wouldn't deal with that. We look at the six

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09:54:18 1 different types of murders that would include most
09:54:21 2 capital murders.

09:54:22 3 We asked them "is death the only acceptable
09:54:26 4 punishment, unacceptable or sometimes acceptable?"

09:54:29 5 This next slide is, again, from that summary
09:54:33 6 article that is introduced as Exhibit C. It shows a
09:54:37 7 huge percentage of these people, who actually sat on
09:54:40 8 capital juries, said that death was the only
09:54:43 9 acceptable punishment for many of these different
09:54:45 10 types of killing.

09:54:46 11 So, for the first three, a defendant with a
09:54:48 12 prior murder, a planned, premeditated murder, or a
09:54:53 13 murder with multiple victims, over half of these
09:54:55 14 jurors said that the death was the only acceptable
09:54:59 15 punishment.

09:54:59 16 When you get to the killing of a police officer
09:55:01 17 or a prison guard, it is almost half, 49 percent
09:55:04 18 murder by a drug dealer drops down to 46 percent, but
09:55:08 19 still a huge percentage. Murder during another crime
09:55:11 20 drops down to 24 percent.

09:55:12 21 Q. Dr. Wanda Foglia, the percentage of the jurors
09:55:15 22 that -- 49 say that the death is only appropriate
09:55:18 23 punishment for the killing of the police officer --
09:55:20 24 these are then jurors, who sat through voir dire and
09:55:24 25 sat on case?

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09:55:25 1 A. That's right. These are all former capital
09:55:27 2 jurors.

09:55:27 3 Q. Were any of these jurors that were interviewed,
09:55:33 4 were these the types of cases that they sat on?

09:55:35 5 A. Yes. That's a good question. That's in this
09:55:41 6 slide here.

09:55:44 7 First of all, nine percent of these jurors said
09:55:48 8 death was the only acceptable punishment for any one
09:55:51 9 convicted of murder, didn't even have to be a capital
09:55:54 10 murder in their eyes. We asked them convicted of
09:55:57 11 murder one out of 10 -- nearly one out of 10 said
09:56:01 12 death was the only acceptable punishment for any
09:56:04 13 capital murder.

09:56:04 14 THE COURT: You presumed then that they
09:56:06 15 lied during the voir dire?

09:56:11 16 THE WITNESS: I am really reluctant to
09:56:12 17 presume that someone lied. I think that they didn't
09:56:15 18 really understand their legal obligation during the
09:56:17 19 voir dire. When they were asked, "will you follow the
09:56:19 20 law? " They thought, "yes, I will follow the law."

09:56:22 21 THE COURT: Then we go back to IAC. Go
09:56:25 22 ahead.

09:56:27 23 A. (Continued.) For three different types of
09:56:29 24 murder we know what kind of case that they sat on.

09:56:32 25 We know which jurors sat on a case involved the

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09:56:35 1 killing of a police officer or a prison guard. This
09:56:38 2 slide number 37 compares the answers of those who sat
09:56:44 3 on a case involving a police officer or a prison guard
09:56:48 4 and that's under the column that is headed with OFF
09:56:51 5 period for officer. Then we compared them to the rest
09:56:54 6 of the sample.

09:56:55 7 It is obvious from these percentages that voir
09:56:58 8 dire did not eliminate people, who thought that the
09:57:02 9 death was the only acceptable punishment in this
09:57:04 10 particular type of case when it was, in fact, this
09:57:08 11 particular type of case. Because when it was a police
09:57:10 12 officer or a guard killing, 45 percent of those jurors
09:57:13 13 said death was the only acceptable punishment compared
09:57:16 14 to 49 percent of the rest. It is not really that big
09:57:19 15 of a percentage difference. If you go down the
09:57:22 16 column, the percentages are similar for all of the
09:57:25 17 different types of murder.

09:57:26 18 Another question that could be raised is, "well,
09:57:28 19 maybe this is how they felt after sitting through a
09:57:31 20 capital case. But maybe that is not how they felt
09:57:35 21 when they went into the case."

09:57:36 22 But we asked them right after this question, we
09:57:40 23 asked them, "did your feelings change after being a
09:57:43 24 capital juror?"

09:57:44 25 80 percent of them said, no, their feelings

APP000604

09:57:48 1 didn't change. These are predispositions that they
09:57:50 2 walked in with, and either they lied about them and/or
09:57:52 3 they didn't get asked the right questions, or
09:57:55 4 understand the questions that they were asked.

09:57:57 5 Q. Thank you.

09:57:58 6 A. Similarly, when there were multiple victims,
09:58:01 7 you see the percentages are very similar. And when it
09:58:09 8 was killing during another crime, actually, they have
09:58:12 9 a slightly higher percentage feeling that the death
09:58:16 10 was the only punishment compared to the rest of the
09:58:18 11 sample.

09:58:18 12 Something that I wanted to focus on, when I
09:58:21 13 jumped over a little bit here is this slide, number
09:58:25 14 35, compares the percentages we got in the original
09:58:28 15 CJP with the percentages that we got with the new
09:58:31 16 sample. These are people who sat on the juries
09:58:34 17 during -- from 1999 to 2009, and the percentages are
09:58:39 18 remarkably similar, sometimes they are exactly the
09:58:41 19 same.

09:58:42 20 For instance, with killing of the police
09:58:43 21 officers or a prison guard, it is exactly the same in
09:58:46 22 the old sample as it is in the new sample.

09:58:48 23 Q. Dr. Wanda Foglia, we are about halfway through
09:58:50 24 our lifetime for direct, I will gauge what you think
09:58:53 25 is necessary for the court and what you believe that

APP000605

09:58:56 1 you leave out as we go forward.

09:58:58 2 A. I appreciate the warning.

09:59:01 3 But I did want to mention this slide as well.

09:59:05 4 Slide number 36 is from an earlier article that goes

09:59:09 5 into this issue in more detail, which is also

09:59:13 6 introduced as an exhibit. The first column are the

09:59:18 7 jurors who said death was the only acceptable

09:59:21 8 punishment. They are really not life qualified. But

09:59:23 9 huge percentages are getting on to the jury.

09:59:26 10 The third column of numbers are the jurors who

09:59:28 11 said death was unacceptable. Those percentages are

09:59:31 12 tiny.

09:59:31 13 So we are much better -- those are the people

09:59:34 14 who aren't particularly death qualified. We are much

09:59:38 15 better at death qualifying than the life qualifying.

09:59:41 16 The two don't cancel each other out.

09:59:44 17 I believe, based on my expert opinion from

09:59:47 18 studying this, that is because it is so much easier to

09:59:51 19 death qualify than life qualify. People know if they

09:59:54 20 don't believe in the death penalty. Many of them are

09:59:56 21 proud to say that they don't believe in the death

09:59:58 22 penalty. People don't understand that the law

10:00:00 23 requires them to consider mitigation.

10:00:02 24 They don't understand that after they have been

0:00:04 25 through the whole process, much less during the jury

APP000606

10:00:07 1 selection phase.

10:00:08 2 When they are asked, "will you follow the law?"
10:00:10 3 They say, "yes, I will follow the law." They don't
10:00:13 4 realize that because of their strong position, they
10:00:15 5 really aren't able to follow the law.

10:00:17 6 Also, the socially desirable answer is to say,
10:00:20 7 "yes, I will follow the law," especially when a judge
10:00:22 8 is asking you that question.

10:00:23 9 There is -- there have been a lot of studies on
10:00:32 10 this issue. Another -- the results of another study
10:00:37 11 that look at whether jurors are really willing to
10:00:40 12 consider mitigation is shown here in slide 40.

10:00:45 13 They say that they can follow the law, but then
10:00:49 14 when you ask them "would lingering doubt make you less
10:00:53 15 likely to vote for the death penalty?" 19 percent say
10:00:56 16 no. They either say it has no effect or make them
10:00:59 17 more likely to vote for the death penalty, which is
10:01:01 18 more relevant for one of the other mitigators.

10:01:04 19 But even though that they say that they can
10:01:08 20 follow the law, many of them don't find very strong
10:01:13 21 mitigators mitigating. Lingering doubt is one of the
10:01:18 22 strongest mitigators.

10:01:19 23 19 percent say that they won't make them less
10:01:22 24 likely to vote for the death penalty. Mental
0:01:24 25 retardation we referred to, 19 percent said that

APP000607

10:01:28 1 won't be mitigating. 56 percent say severe abuse
10:01:34 2 would not be mitigating. 65 percent say crime not
10:01:37 3 premeditated, but during another crime would not be
10:01:38 4 mitigating. That included 27 percent that said that
10:01:42 5 it would make them more likely to vote for death.

10:01:44 6 Another study looked at the Kentucky jurors and
10:01:51 7 21 percent of these jurors, who actually made it on to
10:01:54 8 a capital case, said that they couldn't consider
10:01:56 9 anything less than death. So they really are clearly
10:02:01 10 ADP jurors. We call them the traditional ADP jurors.

10:02:05 11 But 19 percent of those who said that they would
10:02:08 12 consider mitigating evidence didn't find anything
10:02:10 13 mitigating. When we asked them about all of the
10:02:12 14 mitigators for every one they said, "no, that would
10:02:13 15 make me less likely to vote for" -- when we asked
10:02:23 16 them about common mitigators, for each one of them,
10:02:27 17 they said that it would not make them less likely to
10:02:29 18 vote for death. We call them latent ADPs.

10:02:33 19 Q. Were there any other studies that were not part
10:02:35 20 of the CJP that have the same findings about the voir
10:02:39 21 dire process not eliminating automatic death penalty
10:02:42 22 jurors?

10:02:43 23 A. Yes.

10:02:43 24 Slide 42 lists multiple articles involving CJP
10:02:51 25 results. The article by Sandys & McClelland reviews a

APP000608

10:02:55 1 lot of other research that has found the same problem.

10:02:58 2 The two studies listed at the bottom of the

10:03:01 3 slide were not part of the CJP. And they found that

10:03:07 4 standard voir dire questions missed an overwhelming

10:03:10 5 majority of ADP jurors.

10:03:12 6 Q. It looks like one of those was 95 percent?

10:03:15 7 A. Yes.

10:03:18 8 So that the implication is that we are letting a

10:03:21 9 lot of ADP jurors on to the jury. And as I mentioned

10:03:25 10 earlier, that helps explain why many of them are

10:03:28 11 prematurely choosing death.

10:03:30 12 The additional problems with the jury selection

10:03:37 13 process are what we call the composition effect and

10:03:41 14 the process effect.

10:03:42 15 The composition effect is because we are so much

10:03:44 16 better at death qualifying than life qualifying. We

10:03:48 17 end up with a jury that's more conviction prone and

10:03:52 18 punishment prone. There are multiple articles that

10:03:54 19 have been introduced as exhibits that provide evidence

10:03:58 20 of that.

10:03:59 21 Then the third problem with jury selection is

10:04:02 22 the process effect, which is the process itself makes

10:04:07 23 jurors more likely to vote for the death penalty.

10:04:09 24 I will just quickly go through this -- in this

0:04:15 25 slide we see the results of the study done by Haney,
APP000609

10:04:19 1 Hurtado and Vega, which is, again, submitted as an
10:04:23 2 exhibit.

10:04:23 3 What it does is it asks people the standard jury
10:04:28 4 selection questions and actually uses Witherspoon
10:04:34 5 questions and Witt questions and divides the sample
10:04:39 6 into whether they would be excluded under Witherspoon.
10:04:42 7 That is the first percentage of the number -- whether
10:04:44 8 they would be included on a jury under Witherspoon and
10:04:47 9 then does the same thing in the last two columns of
10:04:49 10 the numbers using the Witt standard.

10:04:51 11 Then they asked them a bunch of questions about
10:04:54 12 the criminal justice attitudes, what they think about
10:04:57 13 the death penalty, what they would find mitigating and
10:04:59 14 aggravating.

10:05:00 15 Those stars show that there is a significant
10:05:03 16 difference between excludable and includable. If you
10:05:07 17 look at each one of the questions, you can see each
10:05:10 18 one of them shows that the excludable are much more
10:05:16 19 defense prone, much less supportive of the death
10:05:19 20 penalty, more likely to find evidence mitigating and
10:05:21 21 less likely to find evidence aggravating, compared to
10:05:24 22 the people who are includable, or who would actually
10:05:27 23 make it on to a jury.

10:05:29 24 We asked three of these questions of our CJP
0:05:36 25 jurors. They also are more punitive than the

APP000610

10:05:39 1 excludables would be.

10:05:41 2 A lot of studies on this issue, some of them
10:05:46 3 were the studies that were introduced in Lockhart, but
10:05:49 4 there is a lot of research including the one that I
10:05:51 5 just mentioned in 1994 that find the same problem.

10:05:57 6 They find that people, who are death qualified
10:06:00 7 are more likely to find evidence aggravating, less
10:06:03 8 likely to find evidence mitigating.

10:06:05 9 Two of those studies are cited on slide number
10:06:09 10 46. They are more likely to infer criminal intent. A
10:06:12 11 review of 14 different studies that look at this
10:06:17 12 issue -- which was done by Allen, Mabry and McKelton
10:06:23 13 and published in 1998 -- shows that people, who would
10:06:26 14 be death qualified, are much more likely to convict a
10:06:29 15 defendant by reviewing 14 different studies they found
10:06:32 16 that on average being death qualified increases the
10:06:36 17 chances of a conviction 44 percent.

10:06:40 18 The third issue with jury selection is what we
10:06:43 19 call the process effect. And this was a study done by
10:06:48 20 Haney, which also has been introduced as an exhibit.
10:06:52 21 And what he did was he took people who would be
10:06:54 22 qualified for jury duty and divided them into two
10:06:58 23 groups. One was the experimental group and the other
10:07:01 24 was what he calls the control or the comparison group.
10:07:05 25 Both of them watched a video of a capital trial. They

APP000611

10:07:09 1 watched the exact same video.

10:07:11 2 The only difference was that the experimental
10:07:14 3 group watched a half-hour of death qualifications. So
10:07:19 4 they didn't actually go through the death
10:07:20 5 qualifications themselves. They just watched it.

10:07:23 6 Then he asked a bunch of questions, like, "what
10:07:26 7 is the first one here? What is the likelihood that
10:07:28 8 the defendant would be guilty of first degree
10:07:30 9 murder?"

10:07:31 10 Based on the exact same evidence, the
10:07:35 11 experimental group was much more likely to say that
10:07:38 12 the defendant was guilty. 47 percent of them said
10:07:41 13 that the defendant was guilty compared to only 36
10:07:43 14 percent of the others.

10:07:45 15 The only difference being that they had watched
10:07:47 16 the death qualifications. Again, there are two levels
10:07:50 17 in the last column that indicate the probability of
10:07:52 18 getting that kind of a difference by chance.

10:07:55 19 For everything on this first slide they were all
10:07:57 20 statistically significant. They are all less than
10:08:01 21 .05. I would note that several of them are reverse
10:08:04 22 coded so that lower percentages actually indicate
10:08:07 23 greater degree of guilt. But in every case, watching
10:08:12 24 the death qualification for a half hour create d a
10:08:17 25 significant difference among these mock jurors.

APP000612

10:08:19 1 On the second slide from the same table, you can
10:08:24 2 see a couple of them. For instance, the first one has
10:08:27 3 an "N.S." in the last column that means that it was
10:08:29 4 not significant.

10:08:30 5 There are a few differences that are not
10:08:32 6 significant, but the overwhelming majority are
10:08:35 7 significant.

10:08:36 8 Haney also asked them what their sentence would
10:08:43 9 be and of the 35 that saw the death qualifications, 57
10:08:51 10 percent, 20 out of 35 is 57 percent, said that they
10:08:55 11 would impose the death penalty.

10:08:56 12 Looking at the control group, which involves the
10:09:02 13 total of 32 only 7 of the 32 or 22 percent said that
10:09:07 14 they would impose the death penalty. There are over
10:09:09 15 twice as likely to impose the death penalty, just from
10:09:12 16 watching the death qualifications process.

10:09:17 17 Haney has written a lot about this. He points
10:09:26 18 out that sitting as a capital juror is a novel
10:09:30 19 situation. Jurors come in very impressionable and
10:09:34 20 very impressed by what the authorities in the room are
10:09:36 21 saying, primarily the judge and secondarily the
10:09:39 22 attorneys.

10:09:39 23 So if the judge and the attorneys are talking so
10:09:41 24 much about the death penalty, that makes them think,
0:09:43 25 "oh, these authorities think that this guy is guilty

APP000613

10:09:47 1 that he probably deserves the death penalty."

10:09:49 2 We, actually, asked our jurors, "did all of
10:09:56 3 those questions during voir dire make you think that
10:10:00 4 the defendant must be or probably was guilty?" Then
10:10:03 5 we also asked them, "did those questions make you
10:10:05 6 think that the appropriate penalty must be or probably
10:10:09 7 was death?"

10:10:10 8 In both cases about 10 percent -- in one case it
10:10:13 9 was a little over 10 percent, in one case under 10
10:10:17 10 percent -- but both cases had 10 percent of the jurors
10:10:20 11 that were conscious that they were being biased and
10:10:23 12 willing to admit that they were being biased by the
10:10:26 13 jury selection process.

10:10:27 14 So to sum it all up, jury selection is failing
10:10:32 15 to exclude the ADP jurors, because huge percentages
10:10:36 16 are getting on to the jury, even though that they
10:10:38 17 think that the death is the only acceptable
10:10:41 18 punishment.

10:10:41 19 Because we are better at death qualifying, we
10:10:44 20 end up with a jury that is more punitive, sees fewer
10:10:48 21 problems with the death penalty, less likely to find
10:10:50 22 evidence mitigating and more likely to consider
10:10:54 23 evidence aggregate. The CJP jurors are more punitive
10:10:57 24 than the excludables.

10:11:01 25 We also find the process effect that I just

APP000614

10:11:04 1 described, the charts that I went through relatively
10:11:06 2 quickly, show that those who experienced death
10:11:10 3 qualifications are more likely to think that the
10:11:12 4 defendant is guilty.

10:11:13 5 They are more likely to think that the judge,
10:11:15 6 the prosector and even the defense attorney thought
10:11:17 7 that the defendant was guilty.

10:11:18 8 They are more likely to think that the judge and
10:11:20 9 the prosecutor supports the death penalty.

10:11:22 10 They are more likely to think that the law
10:11:24 11 disapproves of people, who oppose the death penalty.
10:11:27 12 The percentage of jurors who would vote for a capital
10:11:34 13 conviction is higher.

10:11:36 14 Q. I am sorry --

10:11:37 15 A. There are also twice as likely to vote for
10:11:40 16 death. As I just mentioned, our CJP jurors confirmed
10:11:45 17 this process.

10:11:45 18 Q. Is there anything to be done to improve the
10:11:47 19 situation?

10:11:49 20 A. The Bloom articles that was introduced as an
10:11:51 21 Exhibit X provides some good suggestions for how to
10:11:55 22 minimize this problem.

10:11:56 23 I, actually, don't think that it could be solved
10:11:59 24 entirely, but I think that it can be minimized. One
10:12:01 25 is don't use the three questions: "Would you always

APP000615

10:12:04 1 vote for the death penalty? Would you never vote for
10:12:06 2 the death penalty or does it depends?"

10:12:08 3 Because, the socially desirable answer is
10:12:11 4 obviously to say it depends. Because we are all told
10:12:14 5 never say never, which also applies to never say
10:12:17 6 always.

10:12:18 7 Also, individuals sequestered voir dire helps,
10:12:23 8 because then they don't see people getting grilled
10:12:25 9 over and over again, getting dismissed, when they say
10:12:28 10 they don't approve of the death penalty.

10:12:30 11 Try to refer to the life alternative as often as
10:12:36 12 the death alternative is referred to. We commonly
10:12:40 13 think of it as death qualification. It needs to be
10:12:43 14 presented as death and life qualifications. Life has
10:12:46 15 to be emphasized as much as death as a viable
10:12:49 16 alternative. No pun intended.

10:12:55 17 Don't make the prosecution the second authority
10:12:58 18 in the room. Often the way that the voir dire goes,
10:13:00 19 it suggests that the prosecution is the second
10:13:03 20 authority in the room.

10:13:04 21 Be careful about trying to rehabilitate people
10:13:08 22 who say, they would always impose death. Often, the
10:13:15 23 judge or the attorneys will try to say -- to make the
10:13:18 24 juror back down on the always and get them to say,
10:13:22 25 "well, I won't always imply I am opposed to death."

APP000616

10:13:26 1 That makes them look rehabilitated.

10:13:28 2 The research shows that there are less likely to
10:13:36 3 be attempts to rehabilitate somebody, who says that
10:13:38 4 they will never impose death. They are more likely to
10:13:40 5 get dismissed. But if they say they are always going
10:13:43 6 to impose the death, they are more likely to be
10:13:46 7 rehabilitated. But actually, when they say that, they
10:13:49 8 mean that and they should be taken at their word.

10:13:52 9 THE COURT: Did you find -- I don't know, I
10:13:54 10 may have missed this -- a percentage of jurors who
10:13:58 11 started out being ADP and the percentage of jurors who
10:14:04 12 said never?

10:14:06 13 THE WITNESS: Yes. That was in the
10:14:07 14 earlier slide. Would you like me to go back to the
10:14:10 15 slide?

10:14:11 16 THE COURT: Do you know the answer?

10:14:12 17 THE WITNESS: Yes.

10:14:13 18 THE COURT: Just tell me.

10:14:14 19 THE WITNESS: From each specific type of
10:14:16 20 murder it was slightly different, for each type of
10:14:18 21 murder.

10:14:19 22 For the first one, murder with the prior --
10:14:21 23 a defendant with a prior murder conviction, it was
10:14:24 24 about 70 some percent said death was the only
10:14:28 25 acceptable punishment versus 2 percent who would say

APP000617

10:14:31 1 that it was never acceptable. In each case the
10:14:34 2 percentages were hugely different.

10:14:35 3 THE COURT: All right.

10:14:37 4 A. (Continued.) The other thing --

10:14:40 5 Q. Dr. Wanda Foglia --

10:14:42 6 A. -- that Bloom recommends in this article is
10:14:45 7 trying to educate the jurors right from the beginning
10:14:48 8 that they have a legal obligation to consider
10:14:50 9 mitigating evidence, give meaningful weight to the
10:14:58 10 meaningful evidence, don't rely on the will you follow
10:15:05 11 the law question, because they don't really say that
10:15:07 12 they won't follow the law and they don't understand
10:15:09 13 what the law requires them to do.

10:15:11 14 MS. MacDONALD: If you are going to move, I
10:15:12 15 will ask the court to take a break now. I had
10:15:15 16 e-mailed the court that Mr. Monfort needs his
10:15:18 17 medication.

10:15:19 18 THE COURT: Which can't be done here.

10:15:22 19 MS. MacDONALD: If the jail can bring it
10:15:23 20 over, that is fine. I know that he needs to have it.

10:15:26 21 THE COURT: We will be in recess.

10:15:28 22 THE BAILIFF: Please rise.

10:15:28 23 (Court was recessed.)

10:39:34 24 (Open court.)

0:39:36 25 THE BAILIFF: All rise. Court is in

APP000618

10:39:37 1 session.

10:39:37 2 THE COURT: Thank you. Please, be seated.

10:39:40 3 The record should reflect Mr. Monfort has
10:39:42 4 not been brought back yet, but the court will deal
10:39:45 5 with the security question in his absence.

10:39:47 6 The Court Ordered that the Department --

10:39:53 7 MR. BAIRD: May I interrupt, I beg your
10:39:55 8 pardon. I am just asking a question, I apologize.
10:39:57 9 That is, should the defendant be present for this part
10:39:59 10 of the proceeding?

10:40:00 11 I suspect that he should be.

10:40:02 12 THE COURT: If there is a doubt, we will
10:40:04 13 recess until that time.

10:40:06 14 MR. BAIRD: Thank you, Your Honor.

10:40:08 15 THE BAILIFF: Please rise.

10:40:09 16 MS. MacDONALD: I believe that he is being
10:40:11 17 brought over.

10:40:12 18 THE BAILIFF: Please rise.

10:40:12 19 (Court was recessed.)

11:01:01 20 (Open court.)

11:01:05 21 THE BAILIFF: Please rise. Court is again
11:01:07 22 in session.

11:01:08 23 THE COURT: Thank you. Be seated, please.

11:01:11 24 The parties are present and Mr. Monfort ~~is~~

1:01:15 25 present. We will deal with the security issue. The
APP000619

11:01:17 1 Court Ordered the Department of Adult and Juvenile
11:01:19 2 Detention to remove Mr. Monfort's right handcuff. The
11:01:24 3 Department refused.

11:01:28 4 I will ask Ms. Balin, who is the attorney for
11:01:31 5 the Department, why, in light of the fact that
11:01:33 6 Mr. Monfort was previously unshackled in numerous
11:01:40 7 hearings, that this shouldn't occur.

11:01:43 8 Ms. Balin.

11:01:44 9 MS. BALIN: Your Honor, have you been said
11:01:46 10 he was unshackled for previous hearings?

11:01:48 11 THE COURT: Absolutely. Absolutely.

11:01:52 12 MS. BALIN: All right, that is the third
11:01:54 13 story I have heard. I wasn't here this morning to
11:01:57 14 hear what the reason for the request was.

11:01:58 15 What I was told was that it was so he could
11:02:01 16 write. I was also told that it was because he had one
11:02:02 17 hand free, when he was in jail with his attorney.

11:02:02 18 THE COURT: That's right.

11:02:04 19 MS. BALIN: Because he had one hand free
11:02:06 20 when he assisted the lawyer in jail. I could use some
11:02:09 21 background why we are here before I say something, or
11:02:12 22 ask the captain to say anything. What was the reason?

11:02:15 23 THE COURT: So he could write.

11:02:16 24 I want some, you know, the Department's
11:02:18 25 required to provide the court with some individualized

APP000620

11:02:21 1 health, safety or security questions concerns that
11:02:27 2 would justify his continued shackling and what has
11:02:32 3 changed since all of the other hearings.

11:02:34 4 MS. BALIN: With due respect, Your Honor,
11:02:36 5 actually, the jail is not required to tell the court
11:02:39 6 why it has a particular protocol for this particular
11:02:42 7 inmate.

11:02:43 8 Captain Lollie is prepared to tell the
11:02:45 9 court that. But what we needed to know, was it
11:02:49 10 because he couldn't write, or as I heard, because in
11:02:51 11 the jail he gets to have a hand free, so that it
11:02:53 12 should be the same thing here?

11:02:59 13 THE COURT: It wasn't an example as to why
11:03:00 14 it made no sense. That wasn't the reason why he
11:03:03 15 shouldn't be unshackled.

11:03:05 16 MS. BALIN: Let me explain that to Your
11:03:05 17 Honor. The reason that he is allowed one hand free in
11:03:08 18 jail, is when he is visiting with the lawyers he's in
11:03:09 19 a secured facility without the public there.

11:03:11 20 This courtroom has nothing to do with the
11:03:13 21 security protocol inside of the jail. That is for us
11:03:16 22 a reason for -- not a reason for changing anything.

11:03:20 23 THE COURT: What is new that he has, he
11:03:22 24 needs to be shackled now and wasn't shackled in
11:03:24 25 previous hearings?

APP000621

11:03:25 1 MS. BALIN: I am going to ask Captain
11:03:28 2 Lollie to address that. I was not aware that he was
11:03:30 3 unshackled ever.

11:03:32 4 THE COURT: Captain Lollie, can you come
11:03:35 5 forward?

11:03:35 6 CAPTAIN LOLLIE: Good morning, Your Honor.
11:03:38 7 If I may be brief, prior to answering your
11:03:42 8 question, the protocol that the officers following
11:03:47 9 regarding the removal of the restraints, they are
11:03:49 10 following my directive. So that the officers can be
11:03:53 11 disciplined, if they followed the court's order.

11:03:58 12 My position is that the restraints are not
11:04:02 13 removed. However, with this new information, that the
11:04:07 14 restraints have been removed in the courtroom, court
11:04:12 15 detail is wrong.

11:04:13 16 If the restraints were taken off in the
11:04:15 17 courtroom, they should not have been taken off. That
11:04:17 18 is my position.

11:04:18 19 THE COURT: You mean previously?

11:04:20 20 CAPTAIN LOLLIE: Previously in this
11:04:21 21 courtroom, the restraints should not have been
11:04:23 22 removed.

11:04:23 23 If the restraints were taken off, they
11:04:25 24 should not have been. That is not my directive to the
1:04:28 25 officers.

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11:04:30 1 With that being my position, I have
11:04:32 2 discussed the matter with my superior. Her position
11:04:36 3 is that the restraints do not come off as well,
11:04:39 4 because we have security concerns.

11:04:41 5 What I will now like to do now, with this
11:04:44 6 new information, is brief my superior. Because the
11:04:47 7 escorting officers, if that occurred, they were wrong.
11:04:50 8 Those restraints should not have been removed in the
11:04:52 9 courtroom.

11:04:55 10 THE COURT: Are you going to provide the
11:04:57 11 court with some reason why he needs to be restrained
11:05:02 12 with both wrists?

11:05:03 13 CAPTAIN LOLLIE: Yes, Your Honor. I will
11:05:05 14 be more than happy to do that in chambers. I will not
11:05:07 15 discuss the security issues in front of the defendant.

11:05:10 16 THE COURT: We are not doing anything in
11:05:12 17 the chambers. All right. Under the law anything and
11:05:16 18 the prosecutor is not going to be happy with any
11:05:18 19 hearings in the chambers. I don't blame them.

11:05:33 20 MR. BAIRD: Your Honor, if I may --

11:05:34 21 THE COURT: All right.

11:05:35 22 MR. BAIRD: Just in -- you know, we don't
11:05:39 23 have a dog in this fight, so to speak.

11:05:41 24 THE COURT: You do, if I go to chambers.

11:05:44 25 MR. BAIRD: Yes, I would.

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11:05:46 1 Unless the court made some kind of a Bone
11:05:48 2 Club findings suggesting that, and made a complete
11:05:52 3 record of what transpired, I don't know what Captain
11:05:57 4 Lollie's reasons for wanting not to disclose this in
11:06:02 5 the open court are. I can imagine a number of
11:06:04 6 reasons, some of which might affect Mr. Monfort's
11:06:06 7 right to a fair trial.

11:06:07 8 So, perhaps, I am not being very useful to
11:06:11 9 the court, but is is an option to make some Bone Club
11:06:14 10 findings about this.

11:06:23 11 THE COURT: Does defense want to say
11:06:24 12 anything?

11:06:26 13 MR. GRUENHAGEN: Your Honor, we are really
11:06:28 14 interested -- our priority today is our witness from
11:06:30 15 out-of-state completing this hearing.

11:06:32 16 So the court, certainly -- that is our
11:06:36 17 priority at this time. Addressing these other issues
11:06:39 18 that are going to have to be addressed going forward,
11:06:42 19 I know that the court is aware of State versus Finch
11:06:46 20 and Chapman.

11:06:46 21 THE COURT: Those were jury issues. That
11:06:49 22 is clearly different. But --

11:06:51 23 MR. GRUENHAGEN: I understand that. But
11:06:53 24 going forward, we are going to be addressing that
11:06:55 25 issue in the same security considerations, I suspect,

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11:06:59 1 may relate whether there is a jury or not.

11:07:01 2 Certainly, they wouldn't be expected to be
11:07:04 3 less of a concern, I wouldn't gather. But we would
11:07:07 4 like to get the hearing done and then address that.

11:07:09 5 THE COURT: All right, let's go. We will
11:07:11 6 deal with it at the next hearing.

11:07:12 7 CAPTAIN LOLLIE: Excuse me, Your Honor. If
11:07:14 8 I may, if the court detail has been removing the
11:07:16 9 restraints in the courtroom, I would direct my
11:07:19 10 officers to remove his right hand shackle.

11:07:22 11 THE COURT: That is all I asked for.

11:07:24 12 CAPTAIN LOLLIE: This is new information to
11:07:25 13 me, Your Honor. It should not have occurred. But if
11:07:28 14 that has been occurring --

11:07:29 15 THE COURT: Am I not correct, that he was
11:07:30 16 unrestrained in the prior hearings?

11:07:33 17 MR. GRUENHAGEN: I know that I think that
11:07:34 18 at the last hearing he was shackled. I do remember
11:07:37 19 that.

11:07:37 20 THE COURT: In the prior one he was not. I
11:07:39 21 know it. I saw it.

11:07:41 22 MS. BALIN: Your Honor, these two officers,
11:07:42 23 who have done other hearings before, have said they
11:07:45 24 have never seen him unrestrained. I am not
11:07:47 25 questioning the court's memory. I asked them and that

APP000625

11:07:49 1 is their recollection.

11:07:51 2 MR. BAIRD: It doesn't seem like the
11:07:52 3 defense is venturing --

11:07:54 4 THE COURT: My recollection is that he was
11:07:55 5 unshackled. Let's go with the hearing.

11:08:02 6 MS. MacDONALD: Your Honor, so we are clear,
11:08:03 7 when we recessed I calculated, roughly, an hour,
11:08:09 8 59:45, I want to make sure that it is not taken up.

11:08:12 9 THE COURT: It is not taking up your time,
11:08:14 10 but we will adjourn at 4 o'clock. I don't know what
11:08:17 11 else we will be able to do.

11:08:19 12 MS. MacDONALD: Defense will recall
11:08:20 13 Dr. Foglia.

11:08:30 14 Does the court need to reswear the witness?

11:08:36 15 THE COURT: Reswear? No.

11:08:36 16

11:08:36 17 BY MS. MacDONALD:

11:08:31 18 Q. (Continued.) I believe we left off on the
11:08:41 19 next flaw regarding the jury instructions and jurors'
11:08:45 20 ability to understand and follow those instructions.

11:08:47 21 A. Yes.

11:08:47 22 There is a lot of evidence that the jury is not
11:08:50 23 understanding the guidance that is supposed to be
11:08:52 24 guiding their discretion. The slide 54 just refers to
11:08:57 25 several cases that talk about the importance and the

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11:08:59 1 standards.

11:09:01 2 We asked the jurors four different questions
11:09:03 3 about how they were supposed to treat mitigating and
11:09:06 4 aggravating evidence. This first question on slide 55
11:09:10 5 is what are they allowed to consider as mitigating
11:09:15 6 evidence. The correct answer is the first one, any
11:09:18 7 mitigating factor that made the crime not as bad.

11:09:21 8 The second question was whether they had to be
11:09:24 9 unanimous or not. The correct answer here, obviously,
11:09:28 10 the second one, for mitigation jurors don't have not
11:09:32 11 to agree on the unanimous based on the Supreme Court
11:09:36 12 ruling on McMills and McKoy.

11:09:38 13 The third question is the standard of proof. A
11:09:41 14 lot of the statutes is silent what the standard of
11:09:46 15 proof is for this mitigation. We only counted them
11:09:48 16 wrong here, if they said required proved beyond a
11:09:51 17 reasonable doubt. No state has a requirement of
11:09:54 18 mitigation proved beyond a reasonable doubt. If they
11:09:55 19 said don't know, we corrected it.

11:09:57 20 Then there is one question on the aggravation
11:10:00 21 for the factor of the favor in death, what is the
11:10:02 22 standard. Obviously, the standard is proven beyond a
11:10:05 23 reasonable doubt.

11:10:05 24 What they are allowed to consider and whether
1:10:07 25 they have to be unanimous or not on aggravation varies

APP000627

11:10:11 1 from state to state.

11:10:13 2 So this slide is, again, from that summary
11:10:16 3 article that is introduced as Exhibit C. It shows the
11:10:19 4 percentage of jurors, who failed to answer each of
11:10:22 5 those four questions correctly.

11:10:24 6 The first column of numbers is the percentage
11:10:27 7 that failed to realize that they could consider any
11:10:36 8 relevant mitigating evidence. About 45 percent failed
11:10:40 9 to understand that nationwide.

11:10:43 10 Again, you can see the percentages are similar
11:10:46 11 and significant in every single state. So it didn't
11:10:48 12 matter what kind of a statute that they had. We saw
11:10:52 13 the same failure of what they were able to realize in
11:10:56 14 favor of the mitigation. Almost 2/3rds, 66.5 percent,
11:11:00 15 failed to realize that they didn't have to be
11:11:01 16 unanimous.

11:11:02 17 Almost half of them thought that they needed to
11:11:05 18 find mitigation beyond a reasonable doubt.

11:11:07 19 They do better with aggravation because -- which
11:11:13 20 is not surprising -- because beyond a reasonable doubt
11:11:17 21 standard is a more familiar standard.

11:11:19 22 So, only about 30 percent failed to realize that
11:11:23 23 they were supposed to find aggravation beyond a
11:11:27 24 reasonable doubt.

11:11:27 25 This finding has been found with numerous

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11:11:32 1 different studies using CJP research with a smaller
11:11:38 2 version of the sample, or with just single states.
11:11:42 3 The same problem is found over and over again.

11:11:45 4 The problem has been found in mock juries --
11:11:48 5 excuse me, some mock juries studies that are listed
11:11:52 6 here in slides 61 and have been introduced as
11:11:57 7 exhibits.

11:11:57 8 There are also two studies that used actual
11:12:01 9 capital jurors that were not part of the CJP, who also
11:12:08 10 found the huge percentages making these mistakes. Two
11:12:11 11 of the articles that had been introduced as exhibits
11:12:15 12 are Exhibits II and KK.

11:12:17 13 They both involved rewording the instructions to
11:12:21 14 try to make them more comprehensible. What they found
11:12:26 15 is you can improve comprehension, if you explicitly
11:12:30 16 address some of the common misconceptions, stress the
11:12:34 17 difference between aggravation and mitigation.

11:12:36 18 You can improve comprehension, but you are still
11:12:39 19 going to get substantial percentages getting things
11:12:42 20 wrong. None of the research has been able to come up
11:12:46 21 with instructions that all of the jurors understand,
11:12:52 22 even when they use linguists to help with the
11:12:55 23 rephrasing. They improve comprehension, but there are
11:12:58 24 still substantial misunderstandings.

11:13:00 25 A study of Oregon jurors that was done by Haney,

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11:13:08 1 et al., and introduced an exhibit, points out that
11:13:11 2 some of the problems that the Oregon jurors had with
11:13:14 3 the instructions. Overwhelming majority of the jurors
11:13:20 4 in Oregon saw a difference between the guilt phase and
11:13:23 5 the sentencing phase.

11:13:24 6 They thought that the sentencing phase was a lot
11:13:28 7 more difficult, more emotional, less clear-cut, based
11:13:32 8 on the predictions rather than the facts.

11:13:35 9 That is an important issue because what I am
11:13:37 10 testifying about here is not an indictment of the
11:13:40 11 entire jury system.

11:13:42 12 The determination they make at sentencing is
11:13:45 13 very different from what juries usually do in criminal
11:13:49 14 cases or civil cases. Usually a jury is asked to
11:13:52 15 decide factual questions.

11:13:53 16 We have all had experience deciding whether
11:13:55 17 someone is telling the truth or not, when we are
11:13:58 18 trying to discern what the facts are. But in a
11:14:00 19 penalty phase, they are actually trying to determine
11:14:03 20 whether a person deserves to live or die, which is a
11:14:06 21 very different kind of determination and a much more
11:14:10 22 difficult determination. The evidence that I am
11:14:12 23 presenting here is really limited to that issue.

11:14:15 24 Another Oregon juror said, "I thought that the
11:14:18 25 penalty phase was kind of silly. A rotten childhood

APP000630

11:14:21 1 was not the question that we had to answer."

11:14:23 2 Which is another indication that they don't
11:14:25 3 realize that, yes, they are supposed to be considering
11:14:28 4 mitigating factors.

11:14:30 5 Then the third quote is very similar. All they
11:14:33 6 cared about what was what the defendant had done and
11:14:37 7 don't really understand that legally they are required
11:14:39 8 to consider mitigation.

11:14:41 9 Q. With the Washington jurors, the survey that you
11:14:44 10 scored, did you find any information regarding the
11:14:45 11 ability to understand the instructions in Washington?

11:14:48 12 A. Yes.

11:14:50 13 Slide 63 compares the percentages that we found
11:14:53 14 with the original sample with what we found with the
11:14:56 15 new CJP sample. Then finally, the last column what we
11:15:00 16 found in the Washington sample.

11:15:02 17 They actually did worse, when it came to
11:15:05 18 understanding what they were allowed to consider in
11:15:08 19 mitigation and whether they needed to be unanimous or
11:15:11 20 whether they needed to find mitigation beyond a
11:15:14 21 reasonable doubt.

11:15:14 22 They did do better on finding aggravation beyond
11:15:18 23 a reasonable doubt. Only 15 percent of them got that
11:15:20 24 wrong, which might have been attributable to the fact
11:15:22 25 that they're paralegal students. So they are very

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11:15:26 1 familiar with the beyond a reasonable doubt standard.

11:15:29 2 But they tended to apply that to mitigation as well.

11:15:32 3 The wording of the Washington statute is
11:15:36 4 especially confusing, because of the requirement that
11:15:40 5 you find a negative. At one point they even used a
11:15:44 6 double negative that the prosecution has failed to
11:15:46 7 show insufficient mitigation.

11:15:48 8 So it is especially awkward finding what they
11:15:53 9 are supposed to make. So it is really not surprising
11:15:55 10 that the percentages of misunderstanding are higher in
11:15:58 11 Washington.

11:15:59 12 So nearly half -- just to sum up what I said,
11:16:04 13 nearly half of the jurors and more than half in
11:16:06 14 Washington failed to understand how to handle
11:16:08 15 mitigation, and a substantial percentage failed to
11:16:12 16 understand the burden of proof for aggravation.

11:16:15 17 Q. Dr. Foglia, you have looked at your
11:16:17 18 instructions in the other states that you have
11:16:19 19 testified in; correct?

11:16:20 20 A. Yes, I did.

11:16:21 21 Q. Have you seen anywhere that they dealt better
11:16:24 22 with describing aggravation versus mitigation and the
11:16:28 23 burdens of proof and whether or not those better
11:16:30 24 instructions improve or were there still problems that
11:16:35 25 were found even with clearer instructions?

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11:16:38 1 A. Some statutes -- excuse me, some instructions
11:16:42 2 are better than others. They each seem to have their
11:16:44 3 strengths and their weaknesses.

11:16:48 4 With all due respect, I think that the
11:16:50 5 Washington standard is especially difficult. For one
11:16:55 6 thing it tells them to think about the crime. That's
11:17:00 7 one of the problems with jurors understanding
11:17:03 8 mitigation. They think that mitigation has to have
11:17:05 9 some nexus to the crime, which it doesn't under the
11:17:07 10 law.

11:17:08 11 But the statement "keeping in mind the crime of
11:17:13 12 which the defendant has been convicted" calls their
11:17:16 13 attention to the crime.

11:17:17 14 THE COURT: These mock jurors, you are
11:17:18 15 talking about using the pattern instructions,
11:17:21 16 Washington Pattern Instructions?

11:17:23 17 THE WITNESS: Yes.

11:17:25 18 The mock jury study in Washington involved
11:17:28 19 giving the jurors a packet -- excuse me, giving the
11:17:30 20 paralegal students a packet of the model instructions
11:17:36 21 and a description of the facts from the Schierman
11:17:40 22 case. Then they were asked the very same questions
11:17:43 23 that I am referring to that we used with the Capital
11:17:48 24 Jury Project jurors.

11:17:49 25 So they read all of the instructions. They
APP000633

11:17:53 1 had the instructions in front of them then were asked
11:17:55 2 specific questions.

11:17:56 3 Huge percentages were misunderstanding what
11:17:59 4 they were supposed to do, even though that they were
11:18:01 5 paralegal students, who you would think would have
11:18:05 6 more familiarity with the law than your average
11:18:08 7 citizens, who would make it on to the jury.

11:18:10 8 THE COURT: With the law, all right. But
11:18:12 9 the pattern instructions are simply the instruction.
11:18:17 10 You know that, right? They are not law.

11:18:19 11 THE WITNESS: Yes. Yes. But they
11:18:21 12 describe the law.

11:18:22 13 THE COURT: They try to.

11:18:24 14 THE WITNESS: Yes.

11:18:24 15 THE COURT: Right. All right.

11:18:27 16 A. (Continued.) In different states, they address
11:18:31 17 these issues differently. For instance, Pennsylvania
11:18:33 18 has a balancing statute.

11:18:35 19 Pennsylvania explicitly says in their pattern
11:18:38 20 instructions now, "mitigation is treated differently
11:18:42 21 than aggravation." Aggravation you had to find
11:18:45 22 aggravating factors beyond a reasonable doubt. But
11:18:47 23 with mitigation it only has to be to your
11:18:50 24 satisfaction. With aggravation you weren't -- you
11:18:52 25 were limited to what you were allowed to consider,

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11:18:54 1 with mitigation you are not limited.

11:18:56 2 Pennsylvania really explicitly describes the
11:19:02 3 difference between aggravation and mitigation. And
11:19:04 4 you can see from the summary slide that I showed
11:19:06 5 earlier that there are still a substantial percentage
11:19:09 6 who are getting it wrong. It is just a lot of
11:19:11 7 information for jurors to take in in a very
11:19:16 8 emotionally charged situation.

11:19:17 9 That is another difference between real jurors
11:19:21 10 and the mock jurors in Washington that would suggest
11:19:25 11 the mock jurors should have done a better job. They
11:19:28 12 were not in an emotionally charged situation of having
11:19:30 13 to see the details of the gruesome murder. They just
11:19:35 14 read a summary of the murder. So they weren't as
11:19:38 15 distracted as a capital juror might be, but they still
11:19:41 16 got a lot wrong.

11:19:44 17 But in every state, no matter how good the
11:19:48 18 instructions, there was substantial percentages who
11:19:51 19 were getting these things wrong.

11:19:56 20 So that the implications of this is the Greg
11:20:00 21 mandate that juror discretion be guided is not being
11:20:03 22 met, if the jurors don't understand the guidance.

11:20:05 23 Every one of the misunderstandings that I
11:20:08 24 discussed make a death penalty more likely, because
1:20:11 25 they make it harder to find mitigation and easier to

APP000635

11:20:14 1 find aggravation.

11:20:16 2 The fourth issue that also reflects a
11:20:20 3 misunderstanding of the instructions as a substantial
11:20:23 4 percentage of jurors think that the law requires death
11:20:28 5 once certain facts are proven.

11:20:30 6 So, we know from Woodson, and other cases, that
11:20:33 7 the Supreme Court has said that the death penalty can
11:20:37 8 never be required, when certain facts are proven. The
11:20:40 9 jury always has to be allowed to consider mitigating
11:20:45 10 evidence.

11:20:46 11 THE COURT: Do you have at hand the
11:20:48 12 percentage of death penalty cases in the United States
11:20:54 13 that do result in a finding by the jury of death as
11:20:59 14 opposed to life?

11:21:02 15 THE WITNESS: It varies a lot from
11:21:03 16 jurisdiction to jurisdiction.

11:21:05 17 THE COURT: I am talking about the United
11:21:06 18 States. You are talking about the United States, so
11:21:08 19 am I.

11:21:08 20 THE WITNESS: Right. I saw something that
11:21:10 21 was submitted here that it is about a third, a third
11:21:13 22 of the cases result in death in Washington.

11:21:16 23 I have seen studies of the -- I believe
11:21:20 24 that it was six different states where it was about
11:21:25 25 half, half resulted in the death.

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11:21:27 1 I have -- I don't think that there was a
11:21:30 2 study that exists that looks at all of the states
11:21:33 3 together. It varies a lot from state-to-state.

11:21:37 4 In -- on slide 68 we show the question that
11:21:45 5 we asked the jurors. We asked them if they think that
11:21:50 6 "the law required death, if the defendant's conduct
11:21:53 7 was heinous, vial or depraved or if the defendant
11:21:55 8 would be dangerous in the future."

11:21:58 9 These are two important issues, because 82
11:22:00 10 percent of our jurors thought that the defendant's
11:22:02 11 conduct was heinous, vial or depraved and 78 percent
11:22:07 12 thought that the defendant would be dangerous in the
11:22:09 13 future. They are very likely to find these facts have
11:22:11 14 been proven.

11:22:13 15 This summary slide again from the summary
11:22:16 16 article that has been introduced as Exhibit C shows
11:22:20 17 the percentages in each state. In some of these
11:22:23 18 states these two factors are actually aggravating
11:22:27 19 factors and in other states they are not enlisted as
11:22:30 20 aggravating factors, like is the case in Washington.

11:22:34 21 But it didn't matter. In every single
11:22:36 22 state, huge percentages thought that the factors made
11:22:41 23 death required.

11:22:42 24 So overall 44 percent of our jurors thought
11:22:47 25 that the law required death, if the defendant's

APP000637

11:22:49 1 conduct was heinous, vial or depraved and 37 percent
11:22:53 2 thought that the law required death if the defendant's
11:22:56 3 conduct was -- if the defendant would be dangerous in
11:23:00 4 the future.

11:23:01 5 You can see the percentages are large in
11:23:04 6 every state. On the dangerousness in the future
11:23:08 7 question it is a little higher in the Texas, because
11:23:11 8 that is one of the special questions that they asked
11:23:13 9 in Texas. It actually goes up to 68 percent. But
11:23:16 10 even in a State like Pennsylvania that had LWOP and
11:23:20 11 did not list future dangerous as the aggravating
11:23:24 12 factor you still saw 37 percent thinking that that
11:23:28 13 fact required death.

11:23:29 14 This slide 70 compares the original sample
11:23:34 15 with the new CJP sample. The percentages are very
11:23:38 16 similar. Then it shows the mock jurors in Washington
11:23:43 17 where 58 percent thought that the law required death,
11:23:47 18 if the defendant's conduct was heinous, vial or
11:23:50 19 depraved.

11:23:51 20 91 percent of them thought that the
11:23:54 21 defendant's conduct was heinous, vial or depraved on
11:23:59 22 the Schierman fact.

11:24:00 23 46 percent of the Washington juror thought
11:24:03 24 that the law would require, if the defendant was
11:24:06 25 dangerous in the future. 75 percent of these

APP000638

11:24:09 1 Washington mock jurors thought that the evidence had
11:24:11 2 proven that fact.

11:24:11 3 BY MS. MacDONALD:

11:24:13 4 Q. Dr. Foglia, do you know whether or not that the
11:24:17 5 new CJP sample -- any of the states require that
11:24:20 6 sample had made modifications or changes to their
11:24:23 7 instructions after the findings of the first CJP?

11:24:27 8 It appears that the numbers are the same. Does
11:24:30 9 this give you any information as to whether these can
11:24:35 10 take away the problems or they are still there?

11:24:39 11 A. I don't know specifically whether states have
11:24:40 12 improved their instructions. I know that the defense
11:24:43 13 bar has been using CJP evidence to try to improve jury
11:24:52 14 selection and get more leeway with explaining things
11:24:57 15 to the jury. But I don't know if the specific
11:24:59 16 instructions were changed.

11:25:00 17 Q. Your findings are still consistent with the
11:25:03 18 first CJP?

11:25:04 19 A. Yes.

11:25:06 20 So, this just sums up what I have said. Huge
11:25:13 21 percentages thought that the law requires death. Over
11:25:18 22 half our jurors thought that the law required death in
11:25:23 23 at least one of those two circumstances. About 45
11:25:28 24 percent thought that the factor had been proven and
1:25:31 25 the law required death.

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11:25:34 1 The fifth issue is the jurors failed to
11:25:38 2 recognize that they are primarily responsible for the
11:25:41 3 defendant's sentence.

11:25:43 4 Caldwell versus Mississippi said that you can't
11:25:46 5 rely on a sentence that is imposed by a jury that
11:25:50 6 doesn't feel like they are primarily responsible.

11:25:53 7 We asked the question shown here in slide 74,
11:25:58 8 which asked the jurors to "rank five different sources
11:26:02 9 of responsibility from 1 to 5." Slide 75 shows the
11:26:09 10 table from that summary article that shows very small
11:26:14 11 percentage of the jurors rank either the jury or the
11:26:18 12 individual juror as primarily responsible.

11:26:21 13 The next slide shows the breakdown for each
11:26:25 14 individual state. You can see that the percentages
11:26:30 15 are fairly similar with about 9 percent nationwide
11:26:35 16 saying that the jury is primarily responsible and only
11:26:39 17 5.6 percent nationwide saying that the individual
11:26:43 18 juror is primary responsible.

11:26:44 19 When we compared that to the new CJP sample and
11:26:48 20 the Washington sample, we see consistently low
11:26:52 21 percentages thinking that the jury or the jurors are
11:26:55 22 primarily responsible.

11:26:58 23 In the new CJP sample, the percentages are
11:27:06 24 actually lower, which is probably because a
11:27:08 25 substantial portion of those jurors are from Delaware,

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11:27:12 1 where the jury sentencing decision is only a
11:27:16 2 recommendation. That may explain why the percentages
11:27:20 3 are lower.

11:27:21 4 Washington, actually, shows that among the mock
11:27:25 5 jurors here, there were 18 percent thought that the
11:27:28 6 jury or the individual juror was primarily
11:27:31 7 responsible, which again may reflect the fact that
11:27:34 8 these questions were being answered by paralegals who
11:27:37 9 may be more familiar with the jury process, but,
11:27:41 10 still, a relatively small percentage thinking that the
11:27:43 11 jury is primarily responsible.

11:27:46 12 Another question we asked that gets more
11:27:49 13 directly at the Caldwell issue was, "when considering
11:27:54 14 the punishment, did you think whether the defendant
11:27:56 15 lived or died was" -- they could answer four different
11:27:59 16 ways. One response was strictly "the jury's
11:28:04 17 responsibility and no one else's?" Only 30 percent of
11:28:08 18 the national sample focusing only on states that did
11:28:14 19 not allow judicial override found that the -- felt
11:28:22 20 that the jury was responsible for the sentence.

11:28:27 21 I don't give the percentages for mostly the
11:28:30 22 jury's responsibility or partially the jury
11:28:33 23 responsibility. But the last option was exactly what
11:28:36 24 the Caldwell court was concerned about.

11:28:38 25 Mostly, the responsibility that the judge and

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11:28:40 1 the appeals court, "we make the first decision, but
11:28:43 2 they make the final decision."

11:28:44 3 17 percent of the jurors in states where there
11:28:49 4 was no judicial override still thought that the judge
11:28:53 5 or the appeals court were primarily responsible.

11:28:56 6 When you compare that to the new CJP sample and
11:29:00 7 the Washington sample, you see similar percentages for
11:29:05 8 the first response. They are all between 27 percent
11:29:09 9 and 30 percent saying that the punishment was strictly
11:29:13 10 the jury's responsibility.

11:29:16 11 With respect to the percentage saying that
11:29:18 12 mostly the responsibility of the judge and the appeals
11:29:20 13 court, it goes up in the new CJP sample. Again, that
11:29:25 14 is probably because there are a lot of Delaware jurors
11:29:28 15 in this mix.

11:29:29 16 But it is pretty similar in the Washington mock
11:29:32 17 jury study at 23 percent.

11:29:36 18 Q. Dr. Foglia, we have 10 minutes, perhaps you can
11:29:37 19 turn to the issue of racism.

11:29:39 20 THE COURT: Pardon.

11:29:41 21 MS. MacDONALD: I believe we have 10
11:29:42 22 minutes left in our direct. I wanted to ask her if
11:29:45 23 she wanted to turn to the issue of racism.

11:29:48 24 THE COURT: All right.

11:29:50 25 A. The Turner court, of course, says that the

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11:29:53 1 racism is -- in the imposition of the death penalty is
11:29:56 2 intolerable. It is especially a problem, when it is a
11:30:00 3 black defendant and a white victim.

11:30:03 4 There was a general accounting office review of
11:30:07 5 studies on discrimination, the imposition of the death
11:30:09 6 penalty. And 82 percent of the studies found that a
11:30:15 7 defendant is more likely to get the death penalty, if
11:30:18 8 the victim is white. That the chances are highest
11:30:20 9 when the defendant is black and the victim is white.

11:30:23 10 There are also some mock jury studies that show
11:30:26 11 that there is a discrimination in the imposition of
11:30:28 12 the death penalty. We also found that the race of
11:30:34 13 the juror can make a difference.

11:30:35 14 I have several slides from an article that has
11:30:38 15 also been introduced as an exhibit by Bowers, et al.,
11:30:42 16 that breakdown the cases depending upon whether it is
11:30:48 17 a white defendant, white victim that would be the
11:30:50 18 first two columns of numbers -- a black defendant,
11:30:53 19 white victim, that would be the second two columns of
11:30:56 20 numbers or a black defendant, black victim, that would
11:30:59 21 be the last -- the third and second to the last two
11:31:05 22 columns of numbers.

11:31:06 23 I won't go through each of these questions, but
11:31:10 24 we then compared white jurors and black jurors.

1:31:13 25 We find that regardless of the race of the

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11:31:16 1 defendant and victim, the black jurors are
11:31:20 2 consistently more likely to have lingering doubt.

11:31:22 3 For instance, if you just compare the first two
11:31:26 4 numbers on this slide, we asked about the importance
11:31:29 5 of lingering doubt in the punishment decision. Five
11:31:35 6 percent of the white jurors said it was very important
11:31:37 7 compared to 13 percent of the black jurors. Over and
11:31:40 8 over again you see a big difference with the black
11:31:42 9 jurors more likely to have lingering doubt. You can
11:31:46 10 see that in this set of numbers and here on this next
11:31:49 11 slide.

11:31:49 12 We also found that regardless of the defendant
11:31:54 13 victim racial combination, the black jurors were more
11:31:58 14 likely to think that the defendant was sorry. You can
11:32:01 15 see that over and over again in these next several
11:32:03 16 slides. You also see that the differences are most
11:32:08 17 dramatic, when it is a black defendant white victim.

11:32:12 18 This just breaks down a table that was included
11:32:16 19 in the summary article that Dr. Bowers and I wrote.
11:32:20 20 We see that the biggest difference is between the
11:32:22 21 black males and the white male jurors.

11:32:25 22 So, for instance, on the lingering doubt
11:32:27 23 question, the white males -- strike that.

11:32:32 24 None of the white males thought that lingering
1:32:35 25 doubt was very important, where 27 percent of the

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11:32:38 1 black males thought that lingering doubt was very
11:32:40 2 important.

11:32:41 3 All of these next few slides are limited to
11:32:44 4 cases where there black jurors and white jurors on the
11:32:47 5 same case. So these are jurors who were seeing the
11:32:50 6 exact same case, but getting very different
11:32:53 7 impressions. I won't go through each one of them
11:32:55 8 individually, but over and over again there are huge
11:32:57 9 differences between the black males and the white
11:32:59 10 males and how they view the very same cases.

11:33:01 11 Q. The make-up of the jury, the case is very
11:33:06 12 dependent upon the make-up of the jury, the outcome of
11:33:09 13 the case?

11:33:10 14 A. Yes, it is. What we have found is the black
11:33:13 15 male presence effects. If you have no black males on
11:33:15 16 a jury, 72 percent of the cases result in death.

11:33:20 17 If you have just one black male on a jury, it
11:33:23 18 drops down to 36 percent. So it drops in half.

11:33:25 19 There is also what we call the white male
11:33:28 20 dominance affect, if you have four or fewer white
11:33:32 21 males, only 23 percent of the cases result in death.
11:33:34 22 If you have five or more, you get 63 percent resulting
11:33:37 23 in the death.

11:33:39 24 I was asked to do a report for a Pennsylvania
11:33:42 25 Supreme Court subcommittee. I just looked at

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11:33:45 1 Pennsylvania cases and found similar things. But in
11:33:48 2 the interest of time, I won't go into the details,
11:33:50 3 though it is described here in slide number 97.

11:33:53 4 I also picked out some quotes from different
11:33:59 5 jurors in Pennsylvania cases that suggests that race
11:34:03 6 was influencing the decision-making process. They
11:34:07 7 are detailed in slides 98 to 100.

11:34:11 8 In slide 101, I list cites of other studies that
11:34:16 9 have found evidence of racial discrimination in the
11:34:19 10 imposition of the death penalty. Then, slide 102
11:34:23 11 summarizes the problems with the race affecting the
11:34:29 12 process that I have already mentioned.

11:34:31 13 Q. Why is it a concern that depending upon the
11:34:34 14 racial make-up of the jury that you have these
11:34:36 15 different outcomes for the purposes of the CJP
11:34:39 16 findings?

11:34:40 17 A. Because the whole idea of guiding discretion
11:34:42 18 was to make sure that things like racism or race don't
11:34:45 19 affect the outcome. The fact that it does shows that
11:34:49 20 race is still infecting the process.

11:34:52 21 Then the last issue is under-estimating of the
11:34:55 22 death penalty alternative.

11:34:56 23 So, jurors consistently think that defendants
11:35:00 24 who don't get the death penalty will be released
1:35:05 25 sooner than they would be released in reality.

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11:35:08 1 The Simmons case that I already mentioned
11:35:11 2 focuses on the problem and actually using CJP evidence
11:35:14 3 to -- as a basis for their result.

11:35:16 4 So, we asked them the question that is detailed
11:35:18 5 in 105, about how long they think that somebody
11:35:22 6 usually spends in prison, if they don't get the death
11:35:25 7 penalty.

11:35:25 8 Then this table in slide 106 is again from the
11:35:31 9 summary article and lists each state and the median
11:35:37 10 estimate, which would be the midpoint. Half of the
11:35:39 11 jurors gave estimates lower than the numbers, half of
11:35:42 12 the jurors gave numbers higher than these numbers.

11:35:46 13 THE COURT: We don't know what these jurors
11:35:48 14 were instructed regarding the possibility of release.

11:35:51 15 THE WITNESS: We do for some of them. In
11:35:52 16 California they were explicitly told at the time that
11:35:55 17 life means that there is no parole.

11:35:57 18 I actually have some quotes on some
11:35:59 19 subsequent slides that showed that the jurors don't
11:36:01 20 believe it, even when they are told there is no
11:36:05 21 parole.

11:36:05 22 THE COURT: All right.

11:36:07 23 A. (Continuing) In four of our states, that were
11:36:10 24 part of the sample, the statute already provided for
11:36:13 25 life without parole. Even in those states that you

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11:36:15 1 can see the median estimates is 15, 17, 20, 15 again.

11:36:20 2 The overall median was 15. So half of the
11:36:23 3 jurors thought that the defendant would be out in 15
11:36:25 4 years or less, even though in some of these states the
11:36:31 5 statute provided for life without parole. In all of
11:36:34 6 them, the mandatory minimum was above 15.

11:36:37 7 When we compare the original CJP with the new
11:36:44 8 CJP sample, we see the biggest change on an issue.

11:36:50 9 The median estimate has gone up nationwide,
11:36:54 10 which is probably because life without parole has
11:36:56 11 become a more common sentence and more widely known.

11:36:59 12 It is actually 43 years in the Washington sample
11:37:05 13 of mock jurors, which is probably attributable to the
11:37:10 14 fact that there are paralegals and might know a little
11:37:13 15 bit more about the legal system. Also, the median age
11:37:16 16 was 29. They would be younger and less likely to be
11:37:19 17 familiar with old stories about people being up for
11:37:22 18 parole after seven years. So even in the Washington
11:37:27 19 mock jury study 23 percent of them said 20 years or
11:37:32 20 less.

11:37:33 21 The next two slides here just show that the
11:37:37 22 jurors who gave lowest estimates -- that would be the
11:37:40 23 first column of numbers -- who estimated zero to nine
11:37:43 24 years, were more likely to choose death at the four
11:37:46 25 stages that we asked about compared to those who gave

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11:37:49 1 the longer estimates of 20 plus.

11:37:51 2 The difference between those with low estimates
11:37:53 3 and those with high estimates gets larger as you go
11:37:57 4 through the process.

11:37:58 5 So, at the premature decision-making stage it is
11:38:02 6 39 percent versus 28 percent. By the time that you
11:38:05 7 get to the final vote, it is 68 percent versus 43
11:38:10 8 percent. The question of the early release becomes a
11:38:13 9 more important issue as the process goes on.

11:38:15 10 This is another table from an article that was
11:38:21 11 published in Texas Law Review and has been submitted
11:38:25 12 as an exhibit.

11:38:27 13 It goes into this issue in more detail. And it
11:38:30 14 shows that jurors who give low estimates -- and that
11:38:34 15 would be the first panel entitled zero to nine
11:38:37 16 years -- they are more likely to be death all the way
11:38:39 17 through, 25 percent, were death all of the way
11:38:44 18 through. They were more likely to ultimately impose
11:38:47 19 death than the jurors described in the last panel who
11:38:51 20 assumed the defendant will spend at least 20 years in
11:38:56 21 prison.

11:38:58 22 We did know, as you asked, what they were
11:39:01 23 instructed in California. In California they were
11:39:07 24 told there would be no early release, but we have this
1:39:10 25 one juror who said, "we were told life imprisonment

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11:39:13 1 but didn't even know that it says even without
11:39:16 2 possibility of parole. We were still concerned that
11:39:19 3 some day he would get out on parole. We didn't want
11:39:21 4 him out at all."

11:39:23 5 Then there was another quote. "I was
11:39:25 6 undecided." And then says, "the judge explained to
11:39:26 7 me, if he gets a life sentence, there was absolutely
11:39:29 8 no chance that he would get out. I thought that he
11:39:31 9 might get out. I still don't trust anybody about it."

11:39:34 10 When they are told there is no parole, some of
11:39:38 11 them don't trust the system. They remember stories
11:39:40 12 that they have heard about people convicted of murder
11:39:42 13 and get released and murder again.

11:39:44 14 They don't realize that that person probably was
11:39:46 15 convicted of something less than capital murder -- or
11:39:49 16 maybe they were convicted under old statutes that
11:39:52 17 didn't impose life without parole. They remember what
11:39:54 18 they hear. They just don't trust what they are being
11:39:58 19 told.

11:39:59 20 This table shows that support for the death
11:40:03 21 penalty drops, when people believe life without parole
11:40:08 22 is an option.

11:40:09 23 During this period from 1991 to 1998 support for
11:40:15 24 the death penalty was about 80 percent. And these are
1:40:22 25 Gallup Poll results that shows when they ask the

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11:40:25 1 questions, "what do you think that the penalty should
11:40:27 2 be, if life without parole is an option?" It drops
11:40:30 3 down to 53 percent, 50 percent, 59 percent. It drops
11:40:34 4 15 to 20 percentage points among people in a poll,
11:40:40 5 when they think life without parole was the option.

11:40:43 6 So this is just to show that people in general
11:40:45 7 are less supportive of the death penalty, if they
11:40:48 8 truly believe that the defendants are not going to be
11:40:51 9 paroled.

11:40:51 10 THE COURT: You presume that the word
11:40:54 11 parole, throw out the word parole without defining it?
11:40:57 12 I mean, we don't know if it would include computation,
11:41:07 13 pardons?

11:41:08 14 THE WITNESS: That is true, in the Gallup
11:41:10 15 Poll question they just asked.

11:41:11 16 THE COURT: They just use the word parole?

11:41:14 17 THE WITNESS: Correct.

11:41:14 18 A. (Continuing) This slide 114 just tries to
11:41:17 19 update that portion. The Gallup Poll doesn't ask the
11:41:21 20 question any more. The last time that they asked the
11:41:23 21 question was in 2006. At that point, support for the
11:41:27 22 death penalty had dropped to 56 percent. When you
11:41:30 23 offered them life without parole as an option. It
11:41:32 24 drops down to 47 percent.

11:41:34 25 It is just, again, showing that the support for

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11:41:38 1 the death penalty drops, when they think that the life
11:41:40 2 without parole is an option.

11:41:42 3 This is just summing up what I said, that jurors
11:41:45 4 under-estimate how long somebody will spend in prison.
11:41:48 5 If they don't get the death penalty. It makes them
11:41:50 6 more likely to vote for death.

11:41:52 7 A lot of their narrative accounts talk about how
11:41:55 8 concerned they are about defendants getting released
11:41:57 9 earlier.

11:41:58 10 Q. Was there any analysis on the percentage within
11:42:02 11 the juries that you studied or each of these different
11:42:05 12 flaws that you found whether you can have a jury that
11:42:07 13 wouldn't have any of these flaws?

11:42:11 14 A. Yes.

11:42:12 15 We went back and looked at the percentages that
11:42:14 16 were making these mistakes. We found that if you just
11:42:17 17 look at the six areas that involve legal issues -- in
11:42:22 18 other words, I am not including the race issue,
11:42:24 19 because that is really a different type of issue. It
11:42:27 20 is showing that race is infecting the process, but it
11:42:29 21 is not showing that jurors are literally making
11:42:33 22 constitutional errors.

11:42:34 23 So, we find that 49 percent are prematurely
11:42:39 24 deciding the punishment. 50 percent believe that the
11:42:42 25 death penalty is mandatory. 58 percent under-estimate

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11:42:45 1 the death penalty alternative. 80 percent express
11:42:51 2 predispositions for the death penalty.

11:42:53 3 They think that the death is the only acceptable
11:42:55 4 punishment for at least one of the murders we asked
11:42:58 5 about. 82 percent don't think that they are
11:43:00 6 responsible. 83 percent misunderstand the
11:43:03 7 instructions. That is not even counting the don't
11:43:05 8 knows.

11:43:06 9 Just counting the people who said something that
11:43:08 10 was blatantly wrong, it is 83 percent.

11:43:11 11 Q. It could be higher, if you include the one that
11:43:13 12 is don't know?

11:43:14 13 A. Yes, if you include the don't knows, it is
11:43:16 14 actually 94 percent. It is an extremely widespread
11:43:22 15 misunderstanding.

11:43:23 16 Q. Were there any jurors that were able to
11:43:27 17 understand the law in all six of those issues?

11:43:36 18 A. No, actually, there were not.

11:43:39 19 The Boyd case established the reasonable
11:43:42 20 likelihood standard, that said that, "the U.S. Supreme
11:43:49 21 Court is not going to find a statute unconstitutional
11:43:53 22 unless there is a reasonable likelihood that the juror
11:43:56 23 misunderstood."

11:43:58 24 In the Boyd case, they didn't submit any
1:44:00 25 evidence at all. They just argued on the wording of

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11:44:04 1 the statute and the instructions and said "these
11:44:07 2 instructions could have been misunderstood."

11:44:10 3 The U.S. Supreme Court said, "the mere
11:44:12 4 possibility that they can be misunderstood is not
11:44:15 5 enough. You have to show a reasonable likelihood that
11:44:19 6 the jury would misunderstand the instructions."

11:44:22 7 They went on to say, "you don't have to show
11:44:24 8 that it is more probable than not. You just have to
11:44:27 9 show a reasonable likelihood." These percentages show
11:44:30 10 that it is more probable than not, because all of them
11:44:32 11 but one are over 50 percent.

11:44:34 12 We then went back and looked to see if it is
11:44:39 13 certain jurors making lots of mistakes or are some
11:44:44 14 jurors getting some things right. We were even
11:44:46 15 surprised to find that not one of our 1198 jurors got
11:44:52 16 everything right. We found a little less than two
11:44:56 17 percent, 1.9 percent, only made a mistake in one of
11:44:59 18 the six areas.

11:45:01 19 Then can you see from this chart in slide 118
11:45:06 20 that the average number of mistakes and also the
11:45:08 21 median and modal number of mistakes was four.

11:45:12 22 So about half of the jurors, or the average
11:45:15 23 juror was making mistakes in four of the areas that I
11:45:22 24 talked about.

1:45:24 25 The Supreme Court has said that you are entitled
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11:45:29 1 to 12 jurors, who are impartial, not nine or not 10.

11:45:36 2 That is what they said in the Parker case.

11:45:38 3 So it is not permissible to have even one juror
11:45:45 4 who is doing things incorrectly. But we couldn't
11:45:49 5 calculate the probability of having 12 jurors, who do
11:45:53 6 everything right. Because according to our statistics
11:45:56 7 the probability is zero of having even one juror do
11:45:58 8 everything right.

11:45:59 9 Just for argument sake, we calculated the
11:46:02 10 probability of getting 12 jurors, who only make one
11:46:05 11 mistake each. Because -- even though that the Supreme
11:46:08 12 Court has made it clear that that's not acceptable, we
11:46:12 13 calculated that probability. So that the probability
11:46:14 14 of one juror, who makes only one mistake is a little
11:46:17 15 less than two percent.

11:46:18 16 So that the way that you do that mathematically
11:46:20 17 is raise that to the power of 12 and what you get is a
11:46:25 18 little over two out of -- not a million, not a
11:46:29 19 billion, not a trillion, but a one with 21 zeros.

11:46:33 20 So that would be the probability of getting 12
11:46:36 21 people who only make one mistake each. So that the
11:46:40 22 probability of having all 12 who don't make any
11:46:43 23 mistakes, is nil.

11:46:45 24 So in every case you will have people, who
11:46:50 25 prematurely decide the sentence, who won't consider

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11:46:53 1 mitigation, who don't understand the guidelines, who
11:46:56 2 think that the death penalty is mandatory, who don't
11:46:59 3 see themselves as responsible, who are influenced
11:47:01 4 about the assumption about race and who vote for death
11:47:04 5 because they erroneously assume early release.

11:47:07 6 Q. Dr. Foglia, my last question -- you talked and
11:47:12 7 have given some ideas or ways, maybe, to improve in
11:47:17 8 these areas where there is constitutional problems.

11:47:19 9 Based upon your expertise and your study and
11:47:22 10 your review of all of this, do you believe that it is
11:47:25 11 possible that you can get to the point where you would
11:47:26 12 take away all of these flaws to have a constitutional
11:47:29 13 death penalty?

11:47:30 14 Or even with improvements are we still going to
11:47:33 15 have flaws?

11:47:35 16 A. I think no matter how you improve it, you will
11:47:38 17 still have flaws.

11:47:39 18 The problems are just too widespread. You may
11:47:45 19 be able to lower the percentages by addressing some of
11:47:48 20 these problems. But the problems are just too
11:47:51 21 widespread. And the way people make decisions is just
11:47:56 22 not the way that the Supreme Court mandates they are
11:48:00 23 supposed to be making decisions in death penalty
11:48:03 24 cases. They just don't reserve judgment. They are
11:48:06 25 influenced by the emotionally charged situation.

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11:48:08 1 They can't comprehend all of these details and
11:48:11 2 keep all of these details straight. They just can't
11:48:15 3 do it in the way that the Supreme Court says that they
11:48:19 4 are supposed to be doing it.

11:48:20 5 MS. MacDONALD: Thank you.

11:48:21 6 THE COURT: Thank you, the State.

11:48:23 7 MR. CASTLETON: Thank you. Excuse me.

11:48:33 8

11:48:33 9 CROSS EXAMINATION

11:48:33 10 BY MR. CASTLETON:

11:48:34 11 Q. Dr. Foglia, essentially, every death penalty
11:48:37 12 conviction we have had in the country has been
11:48:40 13 unconstitutional; is what you are saying?

11:48:42 14 A. Yes.

11:48:43 15 Q. That is your position, based upon your
11:48:45 16 interpretation of the law?

11:48:49 17 A. It is not just my opinion, or my
11:48:51 18 interpretation. There are numerous scholars who have
11:48:55 19 come up with the same interpretation.

11:48:59 20 Q. Yet the death penalty is still considered
11:49:03 21 constitutional by the U.S. Supreme Court; correct?

11:49:06 22 A. The evidence that I have talked about today has
11:49:08 23 not made it up to the U.S. Supreme Court. They
11:49:11 24 haven't seen all of this.

11:49:12 25 They have relied on it for the limited questions

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11:49:14 1 that were before them in the cases that I mentioned
11:49:17 2 earlier. But they have never seen all of this.

11:49:19 3 Q. Right.

11:49:19 4 In fact, Justice Skalia used it as a counter-
11:49:23 5 point when he said, "for every opinion about whether a
11:49:25 6 jury is better, there is another opinion that juries
11:49:28 7 aren't better in deciding these questions"; correct?

11:49:33 8 A. I don't know what you mean by a counter-point.
11:49:35 9 He was making the point that Eng was not retroactive
11:49:43 10 because it was not a watershed rule because juries are
11:49:46 11 not clearly superior and he came to that conclusion
11:49:50 12 relying on our evidence -- not all of this, but a
11:49:54 13 couple of the studies that I mentioned.

11:49:56 14 So, he is actually supporting what I have been
11:50:01 15 saying all morning, that juries have problems with the
11:50:05 16 way that they decide these cases.

11:50:09 17 Q. So it is your understanding of the Schriro V.
11:50:14 18 Summerlin opinion -- that is the one that you were
11:50:15 19 referring to --

11:50:16 20 A. Yes.

11:50:16 21 Q. -- that the U.S. Supreme Court finds the
11:50:18 22 statistics that you have found, they would rely on
11:50:21 23 those in the future cases for the specific issue in
11:50:26 24 that case; correct?

11:50:27 25 A. They did rely on some of what I presented. But
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11:50:30 1 to find that Eng was not retroactive, because jurors
11:50:36 2 make mistakes too.

11:50:40 3 Q. In fact, Justice Scalia -- the only time that
11:50:43 4 he referenced this study that you referred to -- said
11:50:47 5 first, "for every argument why juries are more
11:50:51 6 accurate fact finders, there is another why they are
11:50:54 7 less accurate."

11:50:56 8 In other words he is saying, "we don't know
11:50:57 9 which is more or less accurate"; correct?

11:51:02 10 Before you answer that, I will read you the
11:51:04 11 sentence just before that. He says, "the evidence is
11:51:06 12 simply too equivocal."

11:51:08 13 Correct?

11:51:11 14 A. He is saying that the evidence that judges are
11:51:14 15 superior is too equivocal, because you have arguments
11:51:20 16 that judges are superior. But you have evidence --
11:51:23 17 and he cited a small portion of the evidence that I
11:51:26 18 discussed this morning. You have evidence that showed
11:51:30 19 that juries make mistakes, too.

11:51:33 20 Q. But the Supreme Court isn't saying that is
11:51:35 21 accurate.

11:51:36 22 They were simply making a point that for
11:51:38 23 everybody who says that the judge is better, there are
11:51:40 24 others who say that the jury is better, or vice versa;
1:51:44 25 correct?

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11:51:45 1 He is pointing out that there are studies out
11:51:47 2 there that say these things. He is not saying that it
11:51:49 3 is right or wrong. He is just saying that "the
11:51:51 4 opinions differ."

11:51:54 5 A. He relied on the evidence to determine that
11:52:00 6 jurors were not clearly superior.

11:52:03 7 Q. He relied on the opinion in the article of the
11:52:07 8 jurors are not clearly superior?

11:52:10 9 A. That opinion was based on evidence.

11:52:12 10 Q. Now, I want to go back to what you were talking
11:52:17 11 about just before we took our break. You had
11:52:19 12 mentioned several possible improvements to the voir
11:52:23 13 dire process that could be employed.

11:52:25 14 I was wondering if you could go over those again
11:52:28 15 in detail, because we are always trying to improve the
11:52:32 16 process. I was wondering if you would tell us what
11:52:34 17 were those improvements that could be done to improve
11:52:37 18 voir dire?

11:52:40 19 A. First of all, the jurors have to be educated
11:52:44 20 from the very beginning that they have a legal
11:52:46 21 obligation to consider some mitigation.

11:52:49 22 So when they are asked to follow the law that
11:52:52 23 means that they have to be willing to consider
11:52:55 24 mitigation.

11:52:56 25 They should be -- they should not be simply
APP000660

11:53:05 1 asked the question: "Are you willing to follow the
11:53:07 2 law?" Because the answer there just can't be relied
11:53:10 3 upon. The socially desirable inclination is to say,
11:53:13 4 "yes, I can follow the law," especially when a judge
11:53:16 5 is asking that question.

11:53:17 6 As I have pointed out, they don't really
11:53:20 7 understand what the law is requiring even after they
11:53:22 8 have gone through the entire process.

11:53:24 9 They have to understand that this process is
11:53:30 10 equally about life qualifying and death qualifying;
11:53:34 11 that both are legitimate sentences. In fact, life is
11:53:40 12 the presumed sentence, unless the State meets their
11:53:45 13 burden of proof. So that has to be presented as a
11:53:49 14 legitimate option.

11:53:51 15 They should not be asked, "would you always
11:53:58 16 impose the death penalty? Would you never impose the
11:54:01 17 death penalty, or does it depend."

11:54:03 18 Obviously they should say, "it depends." People
11:54:07 19 know that you are not supposed to say never. You are
11:54:10 20 not supposed to say always.

11:54:12 21 If they do say that they always impose the death
11:54:14 22 penalty, there should not be attempts to rehabilitate
11:54:17 23 them. If they say that they will always going to
11:54:18 24 impose the death penalty, they mean it.

11:54:20 25 You might get them to backtrack a little bit, so
APP000661

11:54:23 1 they don't sound so authoritarian, especially when you
11:54:28 2 make it clear that you don't want them saying always.
11:54:31 3 But if they say they are always going to impose the
11:54:33 4 death penalty, they mean that. They should be
11:54:36 5 excused, because they are really not life qualified.

11:54:38 6 They should be asked questions about how they
11:54:41 7 feel about race, which actually -- I didn't mentioned
11:54:47 8 earlier. But the data that I discussed shows that
11:54:50 9 that is an important issue.

11:54:54 10 Again, they have to be asked a lot of questions
11:54:57 11 on the subject. And it has to be recognized that
11:55:02 12 social desirability is going to be a problem, because
11:55:06 13 most people are not going to say "I am a racist."
11:55:10 14 They need to be asked questions about their attitudes
11:55:13 15 that might reveal true racisms even if it is
11:55:17 16 subconscious racisms. So they have to be asked
11:55:20 17 questions about their assumptions about the system,
11:55:22 18 their assumptions about people to really get at how
11:55:26 19 they view things to try to determine who among them
11:55:28 20 are going to end up being automatic death penalty
11:55:31 21 jurors.

11:55:32 22 THE COURT: On the ADP question would you
11:55:35 23 simply ask the question without the independent
11:55:38 24 qualifications?

1:55:39 25 THE WITNESS: No.

APP000662

11:55:43 1 I would ask them "if you found a defendant
11:55:47 2 guilty of this type of crime, is there anything that
11:55:50 3 you would find mitigating or what would you find
11:55:53 4 mitigating, or what would you find" -- not even is
11:55:55 5 there anything. Because they will say, "yes, there
11:55:58 6 is." But then in truth, nothing really is mitigating.

11:56:01 7 So you ask them, "what would make you less
11:56:04 8 likely to give this person the death penalty?" If
11:56:07 9 they say nothing, then they are not willing to
11:56:10 10 consider mitigation.

11:56:12 11 So I just -- the always and never question,
11:56:17 12 I just don't think it really reveals how the jurors is
11:56:20 13 going to react. I also --

11:56:24 14 BY MR. CASTLETON:

11:56:25 15 Q. Continue.

11:56:26 16 A. I also think that you need individual
11:56:28 17 sequestered voir dire. So they don't hear people
11:56:32 18 getting hammered, if they don't approve of the death
11:56:35 19 penalty, or getting excused, if they don't approve of
11:56:37 20 the death penalty, try to avoid making the prosecution
11:56:43 21 the second authority in the room.

11:56:46 22 I believe I covered all of the suggestions.

11:56:55 23 Just one thing that I would mention is the
11:57:01 24 misunderstandings have to be clarified sooner rather
11:57:05 25 than later. Because they make their decisions very

APP000663

11:57:09 1 quickly and once they do, it is hard to change their
11:57:11 2 minds.

11:57:11 3 Q. Now you provided a questionnaire to some
11:57:15 4 Washingtonians, as you termed it, mock jurors;
11:57:18 5 correct?

11:57:18 6 A. Correct.

11:57:19 7 Q. Did you put that entire packet of information
11:57:21 8 together?

11:57:21 9 A. No, I did not.

11:57:23 10 Q. What of that did you actually put together?

11:57:26 11 A. The questions, I sent the questions that
11:57:29 12 referred to the seven issues that I discussed. We
11:57:34 13 went through this fairly quickly.

11:57:36 14 But if you looked at the instrument that was
11:57:38 15 introduced as an exhibit, it is very long structured
11:57:41 16 interview instrument, where the interviewers who were
11:57:45 17 trained read those questions word-for-word and took
11:57:48 18 three or four hours and explored lots of different
11:57:52 19 issues.

11:57:52 20 I just limited the questions to the ones that
11:57:54 21 relate to the legal issues.

11:57:56 22 Q. Were you the one who provided the direction on
11:57:58 23 how the questions were to be answered, or how it was
11:58:06 24 to be disbursed to the mock jurors?

11:58:09 25 A. I discussed this with the defense attorneys.

APP000664

11:58:11 1 We went back and forth. I sent them the questions.
11:58:14 2 They sent me what they were planning. They put in the
11:58:17 3 Washington instructions and the facts of the case and
11:58:21 4 the order that they thought made sense. We went back
11:58:24 5 and forth on that.

11:58:25 6 Q. So you, ultimately, safe to say, approved of
11:58:31 7 the instrument that was used for the mock jurors in
11:58:33 8 Washington?

11:58:34 9 A. Yes.

11:58:37 10 Q. Are you aware that the Washington -- let me ask
11:58:42 11 you, are you aware of what the Washington jury
11:58:45 12 instructions are for death penalty cases?

11:58:48 13 A. Yes.

11:58:48 14 Q. Are you aware that the very first instruction
11:58:54 15 contains almost all of the recommendations you said
11:58:57 16 should be told to the juries very early on?

11:59:01 17 Are you aware of that?

11:59:02 18 A. I read them. They do not.

11:59:05 19 Q. You don't believe that before the jury is even
11:59:07 20 gone through voir dire, they are told that they are
11:59:09 21 going to be asked to consider mitigation?

11:59:13 22 A. They are told they are going to be presented
11:59:16 23 with mitigation. They are not told that they have a
11:59:20 24 legal obligation to consider mitigation.

11:59:22 25 They are not told that they have to be willing

APP000665

11:59:25 1 to impose a sentence less than life. They are not
11:59:28 2 even told that they should not consider sentencing
11:59:31 3 until the sentencing phase.

11:59:33 4 All they are told is "there are two phases."
11:59:36 5 There is nothing in there telling them that "you are
11:59:38 6 not allowed to consider sentencing until the
11:59:40 7 sentencing phase."

11:59:41 8 Q. That all can be addressed again by the judge,
11:59:46 9 when he is speaking with the jurors; correct?

11:59:48 10 A. I certainly think that those instructions can
11:59:50 11 be improved. Again, I don't think that you are going
11:59:53 12 to get jurors, who do everything right. Because we
11:59:56 13 have had linguists who have tried to improve the
11:59:59 14 instructions. It is just too much information and too
12:00:03 15 much unfamiliar information in a very stressful
12:00:06 16 information.

12:00:06 17 THE COURT: I will have to recess at this
12:00:08 18 point. I have a question.

12:00:09 19 When you were an ADA, did you work on any
12:00:12 20 capital cases?

12:00:13 21 THE WITNESS: No. I wasn't a district
12:00:14 22 attorney long enough to get into the Capital Unit.

12:00:17 23 THE COURT: It wasn't your decision.

12:00:19 24 It was that you were just not assigned to
12:00:23 25 it?

APP000666

12:00:24

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THE WITNESS: Yes, I was only there for a

12:00:25

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few years.

12:00:26

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THE COURT: We will recess until 1:30.

12:00:26

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THE BAILIFF: Please rise.

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(Court was recessed.)

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P R O C E E D I N G S

(Afternoon session. Open court.)

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THE BAILIFF: All rise, court is in session again.

THE COURT: Thank you, be seated, please. Dr. Foglia, you may resume the stand.

WANDA FOGLIA,
Having been previously sworn,
Testified as follows:

CROSS EXAMINATION

BY MR. CASTLETON:

Q. (Continued.) Good afternoon, doctor.

A. Good afternoon.

Q. I wanted to start off where Judge Kessler actually left off and talk about a little bit about your own personal experience.

You indicated that you were an Assistant District Attorney for two years; correct?

A. Yes.

Q. That was after two years of civil practice?

A. Yes. I worked at a large firm in Philadelphia for my first two years out of law school.

Q. That was mainly civil practice, non-criminal

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13:35:35 1 matters; correct?

13:35:37 2 A. Yes.

13:35:37 3 Q. When you went to the District Attorney's
13:35:39 4 office, I think that you already told Judge Kessler
13:35:41 5 you didn't try any capital case. Is that correct?

13:35:44 6 A. That is correct.

13:35:44 7 Q. You didn't try any homicide cases; is that
13:35:47 8 correct?

13:35:48 9 A. That's correct.

13:35:48 10 Q. You didn't try any sexual assault cases;
13:35:51 11 correct?

13:35:51 12 A. Not rape. I was in the Felony Unit. I did try
13:35:55 13 some lesser sexual felonies.

13:35:59 14 Q. You are currently a law professor?

13:36:02 15 A. I am a professor in the Law and Justice Studies
13:36:05 16 Department, which is an under-graduate and graduate --
13:36:08 17 we have an under-graduate and graduate program in Law
13:36:10 18 and Justice Studies.

13:36:12 19 Q. Where is Rowan, in New Jersey?

13:36:15 20 A. Yes.

13:36:15 21 Q. Does Rowan have a law school?

13:36:18 22 A. No, it does not.

13:36:20 23 Q. I wanted to talk to you a little bit about the
13:36:23 24 Capital Jury Project. It is easier to refer to it as
13:36:27 25 CJP, as far as I am concerned.

APP000669

13:36:29 1 The jurors that you spoke with are not -- let me
13:36:33 2 rephrase that. You didn't create the study that was
13:36:36 3 part of the CJP; correct?

13:36:38 4 A. I didn't create the interview instrument. When
13:36:41 5 I took over for the Pennsylvania portion of the study,
13:36:43 6 I added some questions, based on the Pennsylvania
13:36:46 7 statute.

13:36:46 8 Q. So you kind of got into it after it had already
13:36:50 9 begun?

13:36:51 10 A. That's correct.

13:36:51 11 Q. The jurors, who were interviewed, had served on
13:36:57 12 their particular capital case anywhere from one to
13:37:00 13 five years prior to being interviewed; correct?

13:37:02 14 A. Some were within one year.

13:37:06 15 Q. All right.

13:37:08 16 A. Some were longer. There may have been some
13:37:12 17 where there was five years of time but -- between the
13:37:16 18 trial and the interview.

13:37:17 19 Q. The average was two, just about two and a
13:37:21 20 quarter years for each juror who was interviewed?

13:37:24 21 A. That's correct.

13:37:24 22 Q. That is from the time of verdict or sentence to
13:37:28 23 the time of the interview?

13:37:30 24 A. Yes. I don't know if you -- it sounds like you
13:37:33 25 have the article that went back and reanalyzed the

APP000670

13:37:38 1 Capital Jury Project data. I don't know whether that
13:37:41 2 was submitted as an exhibit or not.

13:37:43 3 But we actually went back and we compared the
13:37:46 4 people who were interviewed within a year with the
13:37:48 5 people who were interviewed after more than a year had
13:37:53 6 elapsed since the trial.

13:37:55 7 For most of the problems that we found, we found
13:37:57 8 no significant differences at all. There were a
13:37:59 9 couple problems where the ones who were interviewed
13:38:04 10 earlier were actually worse. There were a couple
13:38:07 11 others where they were actually a little bit better.

13:38:09 12 So that caused us to revise a couple of
13:38:12 13 estimates just on the side of caution. That article
13:38:16 14 also reviews a lot of research that talks about when
13:38:19 15 you have an unusual highly salient event, you can
13:38:24 16 remember indefinitely when you worked with standards
13:38:29 17 as opposed to just hear them.

13:38:32 18 You remember them longer. So you when you go
13:38:36 19 through the deliberation process and work with the
13:38:38 20 standards, you should remember them longer.

13:38:40 21 Some of our questions had nothing to do with
13:38:44 22 their memory of the trial. It had to do with what
13:38:47 23 they thought was an acceptable punishment or how long
13:38:52 24 they thought that somebody would spend in prison.
13:38:54 25 Those wouldn't involve memory issues at all. The gist

APP000671

13:38:58 1 of that whole article was that memory was not a
13:39:00 2 problem.

13:39:01 3 Q. So, the answer to my question is, yes, the
13:39:04 4 average was 2.2 years?

13:39:08 5 A. That sounds right.

13:39:10 6 Q. When you interviewed, and when these jurors
13:39:12 7 were interviewed, they weren't provided with the jury
13:39:15 8 instructions that had the law that they were
13:39:18 9 instructed on for either the guilt or the penalty
13:39:28 10 phases of the cases that they served on?

13:39:34 11 A. Not when we interviewed them.

13:39:36 12 Q. They were provided with those, when they were
13:39:39 13 deliberating on both guilt and the penalty phase
13:39:43 14 during the trial?

13:39:44 15 A. They were provided with the sentencing
13:39:45 16 instructions.

13:39:46 17 Q. Correct; which contains the law --

13:39:48 18 A. Yes.

13:39:48 19 Q. -- or the instructions from the court?

13:39:50 20 A. Yes.

13:39:51 21 Q. So when you spoke with the jurors, whether it
13:39:57 22 would be within a year or five years later. You were,
13:40:00 23 essentially, asking them what they remembered they
13:40:01 24 were instructed; correct?

13:40:04 25 A. Correct.

APP000672

13:40:04 1 Q. When the jurors were deliberating, they were
13:40:12 2 not asked to simply remember what the judge read to
13:40:15 3 them in court, but were provided with copies of the
13:40:17 4 actual instructions; correct?

13:40:20 5 A. I am sorry. Could you repeat the question.

13:40:21 6 Q. When the jurors were deliberating, either on
13:40:23 7 the guilt or the penalty phase, they weren't asked to
13:40:26 8 simply recall what the judge instructed them on, but
13:40:29 9 actually had copies of the instructions; correct?

13:40:32 10 A. Some states allowed them to bring in copies,
13:40:34 11 some states don't.

13:40:35 12 Q. Are you aware in Washington that we allow the
13:40:37 13 jury to have a copy?

13:40:38 14 A. Yes.

13:40:39 15 Q. You would agree that the CJP Study applies to
13:40:43 16 both federal and state death penalty procedures?

13:40:49 17 A. It applies more directly to State procedures,
13:40:52 18 because all of our cases were cases that were tried in
13:40:58 19 the State court.

13:41:00 20 Q. But you would -- go ahead.

13:41:01 21 A. I would argue that you have a lot of the same
13:41:03 22 issues. But there are some differences between
13:41:08 23 federal capital cases and state capital cases. So
13:41:14 24 there is --

13:41:14 25 Q. You would agree --

APP000673

13:41:15 1 A. The CJP applies more directly to the state
13:41:18 2 case.

13:41:18 3 Q. You would agree that the 14th Amendment applies
13:41:21 4 equally to the State as to the federal government?

13:41:24 5 A. Yes.

13:41:24 6 Q. Again, none of the CJP jurors or cases hailed
13:41:30 7 from our State of Washington?

13:41:33 8 A. That's correct.

13:41:34 9 Q. I wanted to talk to you a little bit about the
13:41:37 10 questions that the jurors were asked about during the
13:41:39 11 voir dire process. When I say the jurors, I am
13:41:42 12 referring to the CJP jurors.

13:41:44 13 None of the jurors were asked about what they
13:41:48 14 were asked during voir dire; correct?

13:41:53 15 A. No, they were not.

13:41:55 16 Q. They were not asked whether or not any one
13:41:58 17 inquired of their position on the death penalty;
13:42:01 18 correct?

13:42:05 19 A. No.

13:42:06 20 I am hesitating because we asked a lot of
13:42:08 21 questions. I am trying to remember if any of them
13:42:11 22 related to what you are alluding to. No.

13:42:18 23 Q. None of them were asked about whether they were
13:42:21 24 instructed on aggravating or mitigating factors during
13:42:29 25 the process; correct?

APP000674

13:42:31 1 A. They weren't asked if they were instructed on
13:42:34 2 aggravating or mitigating factors. They were asked
13:42:39 3 about what they were allowed to consider.

13:42:41 4 Q. My question is during the proper voir dire
13:42:44 5 process they were not asked whether or not the issues
13:42:47 6 of aggravating or mitigating factors were even brought
13:42:51 7 up?

13:42:51 8 A. No. We were not asked. No, we didn't ask
13:42:54 9 that.

13:42:54 10 Q. You could have found this all out; correct?

13:42:58 11 A. We could have tracked down the transcripts for
13:43:02 12 each and every one of the trials. In fact, that is
13:43:09 13 what the follow-up study is doing. But we did not do
13:43:12 14 it for the original CJP Study.

13:43:16 15 Q. You mentioned a lot in the testimony in the
13:43:19 16 slides about the automatic death penalty jurors; is
13:43:24 17 that correct, the ADP jurors?

13:43:27 18 A. Yes.

13:43:27 19 Q. You would have been able to see whether or not
13:43:29 20 those jurors, in fact, were asked any specific
13:43:33 21 questions about their positions on the death penalty
13:43:35 22 prior to being seated as a juror in their cases;
13:43:38 23 correct?

13:43:42 24 A. I am sorry, could you repeat the question?

13:43:45 25 Q. Sure.

APP000675

13:43:45 1 In other words if you had a copy of the
13:43:47 2 transcript of the voir dire of the specific jurors
13:43:52 3 that were interviewed in your project, you could have
13:43:55 4 easily have seen what they were and weren't inquired
13:43:57 5 of during their qualifications process of voir dire?

13:44:00 6 A. Yes.

13:44:05 7 Q. Now, with regard to the questions that you
13:44:07 8 asked the jurors about the deliberations, how many of
13:44:10 9 the jurors told you that they refused to discuss the
13:44:13 10 issue of mitigation during the deliberations?

13:44:20 11 A. We didn't ask them if they refused to discuss
13:44:23 12 the issue of mitigation.

13:44:26 13 Q. All right.

13:44:27 14 How many of them said that they had already made
13:44:30 15 up their mind about the sentence so they refused to
13:44:33 16 deliberate?

13:44:37 17 A. We didn't ask that question.

13:44:39 18 Q. I wanted to talk to you a little bit about the
13:44:42 19 mock jury study that you did with the paralegal
13:44:47 20 students.

13:44:47 21 Can you tell us why that was done?

13:44:51 22 A. Because the attorneys here were trying to be
13:44:53 23 very thorough. I have testified in five other states
13:44:57 24 that were not part of the CJP. It was never an issue,
13:45:01 25 because the problems were found in 14 different states

APP000676

13:45:05 1 with different types of statutes from different parts
13:45:08 2 of the country.

13:45:09 3 So, with social science evidence you take a
13:45:13 4 sample and as long as that sample is not skewed in any
13:45:18 5 way, you are able to generalize to a larger
13:45:21 6 population. Since we found that it didn't matter what
13:45:24 7 state that you were in, there was no reason to believe
13:45:28 8 any particular state would be different.

13:45:30 9 It is like when they do research on smoking
13:45:33 10 causing cancer. They don't have to do it in every
13:45:35 11 state to know that smoking is going to cause cancer in
13:45:38 12 every State.

13:45:39 13 When we found that the problems were in all 14
13:45:44 14 states that we studied, there was no reason to believe
13:45:46 15 that they wouldn't be in other states that were not
13:45:50 16 part of the project.

13:45:51 17 But the attorneys in this case wanted to get
13:45:54 18 more direct evidence of how people in Washington would
13:45:58 19 interpret the Washington statute. So they were trying
13:46:01 20 to be more thorough and distributed this
13:46:04 21 questionnaire.

13:46:05 22 Q. You had said in the beginning of your answer
13:46:07 23 that it had never been an issue before in any of the
13:46:11 24 other states that you testified in.

13:46:15 25 A. If I said it has never been an issue then that

APP000677

13:46:18 1 might have been some with what misleading. Some
13:46:21 2 prosecutors have brought it up.

13:46:23 3 But nobody else thought that it was necessary to
13:46:28 4 gather evidence in any other state and numerous
13:46:35 5 judges, including the judge in New Mexico who found
13:46:38 6 the death penalty unconstitutional, went ahead and
13:46:43 7 made changes based on the testimony, including going
13:46:48 8 as far as holding the death penalty unconstitutional
13:46:52 9 without regard for the fact that their state was not
13:46:57 10 included in our sample.

13:46:58 11 Q. Do you know how the schools, Highline Community
13:47:06 12 College, how that was picked as the place where this
13:47:08 13 study would be employed?

13:47:09 14 A. The defense attorneys picked that school.

13:47:15 15 Q. What input did you have in this mock jury
13:47:21 16 study?

13:47:22 17 A. As I mentioned earlier, we went back and forth
13:47:25 18 with the questionnaire. They asked me if I thought
13:47:27 19 that it would be useful. I drafted the abbreviated
13:47:33 20 version of the questionnaire. I sent it to them.
13:47:37 21 They put in the Washington instructions from the
13:47:42 22 Schierman case. They put in a summary of the
13:47:45 23 Schierman case. Then they contacted people at
13:47:48 24 Highline Community College and had it distributed in a
13:47:53 25 classroom.

APP000678

13:47:54 1 Q. They asked you if you thought that it would be
13:47:55 2 useful. Did you think that it would be useful?

13:48:00 3 A. I didn't think that it would hurt. If they
13:48:02 4 were able to do it, I didn't think that it would hurt.
13:48:05 5 I didn't think that it was necessary. But I didn't
13:48:07 6 think that it would hurt.

13:48:09 7 Q. There were -- my understanding is that there
13:48:13 8 are 26 total mock jurors as part of the study; is that
13:48:17 9 correct?

13:48:18 10 A. Correct.

13:48:18 11 Q. Were they -- what instruction they were given
13:48:22 12 regarding how to do this?

13:48:25 13 A. They were -- they were not required to do it.
13:48:30 14 They were told that they had an option to do it, to
13:48:33 15 earn extra credit. It was distributed in the
13:48:36 16 classroom. They used class time to complete the
13:48:40 17 questionnaire. I am assuming that you have seen a
13:48:43 18 copy of it.

13:48:44 19 So many -- they are instructed to read the
13:48:47 20 synopsis, read the instructions. Then, first, they
13:48:53 21 answered questions relating to the guilt phase and
13:48:56 22 then they read more instructions on sentencing and
13:48:59 23 they answered questions relating to the sentencing
13:49:02 24 phase.

13:49:03 25 These were people who volunteered to do it. As

APP000679

13:49:06 1 I said earlier, they are all part of the legal
13:49:10 2 students. They are likely to have some interests in
13:49:13 3 the legal issues.

13:49:15 4 Q. Was there any, to your knowledge -- I know that
13:49:18 5 you didn't administered this yourself; correct?

13:49:21 6 A. Not in Washington, no.

13:49:22 7 Q. To your knowledge, was there any further
13:49:25 8 guidance given to the mock jurors outside of what was
13:49:28 9 provided to them in the packet of information that
13:49:31 10 they had?

13:49:33 11 A. Not to my knowledge.

13:49:35 12 Q. Unlike in the CJP, I believe, not only is there
13:49:38 13 a fairly lengthy instruction booklet for those
13:49:41 14 administering the test, but they also go to the
13:49:43 15 classes to learn how to administer the test; correct?

13:49:46 16 A. Yes, they are all -- when you say test, you
13:49:48 17 mean the survey.

13:49:49 18 Q. I am sorry, the survey, yes.

13:49:51 19 A. They all go through the training. They are
13:49:54 20 instructed to read the questions verbatim and not to
13:49:58 21 deviate from the script. But there was no one doing
13:50:02 22 interviews in this Washington study. The students
13:50:08 23 were reading the pamphlets and filling them out on
13:50:11 24 their own.

13:50:12 25 Q. So on the first page of the study -- I am

APP000680

13:50:16 1 sorry, the questionnaire, that you gave to the
13:50:20 2 paralegal students, it first says, "please read the
13:50:23 3 attached jury instructions before completing this
13:50:26 4 questionnaire." Correct?

13:50:29 5 A. I am just looking for my copy.

13:50:31 6 Q. Sure. I can show you mine, if you want.

13:50:42 7 A. Yes, I have it.

13:50:43 8 Q. Is that accurate?

13:50:44 9 A. Yes.

13:50:46 10 Q. Beyond that one line, were there any other
13:50:48 11 instructions given to them about how to take this
13:50:52 12 assignment?

13:50:57 13 A. No, not to my knowledge.

13:51:02 14 Q. Do you know how these -- you said that it was
13:51:04 15 voluntary; correct?

13:51:06 16 A. Correct.

13:51:06 17 Q. Am I to assume that there were more than 26
13:51:10 18 students, who volunteered to do it, but they had been
13:51:12 19 chosen, or whittled down through some sort of process
13:51:16 20 to 26?

13:51:17 21 A. No, 26 volunteered.

13:51:18 22 Q. So there was no sort of life or death
13:51:22 23 qualifying of these students?

13:51:24 24 A. No.

13:51:33 25 Q. You would agree that this is not a valid study?

APP000681

13:51:38 1 A. No, I don't agree with that.

13:51:43 2 Q. Earlier you testified that you need at least 30
13:51:46 3 people to get a valid statistical analysis; correct?

13:51:52 4 A. Ideally, you are supposed to have 30 subjects.
13:51:57 5 I would agree that this study, like any study, has
13:52:01 6 limitations.

13:52:02 7 It was just offered to show that substantial
13:52:07 8 percentages in Washington have similar problems to
13:52:11 9 what we find.

13:52:12 10 Q. You would agree that anything less than 30 can
13:52:16 11 really skew the results?

13:52:18 12 A. I wouldn't say it would really skew the
13:52:20 13 results. It is only, we are only talking about four
13:52:25 14 fewer than 30. We are pretty close to 30 with 26. It
13:52:29 15 is not ideal. But I don't think that four plus or
13:52:31 16 minus makes a huge difference.

13:52:34 17 Q. But that is the exact reason why the studies or
13:52:37 18 the questionnaires from Louisiana were not included in
13:52:42 19 the CJP; correct?

13:52:42 20 A. There were two problems with the questionnaires
13:52:44 21 from Louisiana. One, we were just shy of 30. And
13:52:49 22 two, nearly all of them came from death penalty cases.
13:52:53 23 So they weren't directly comparable to the other
13:52:56 24 states that included a mix of death and life cases.

13:52:59 25 Q. I will read you a statement and see if you

APP000682

13:53:01 1 agree with this:

13:53:02 2 "You have to have at least 30 subjects to get
13:53:05 3 enough variation to do statistical analysis that
13:53:08 4 will give you valid results.

13:53:09 5 "If you have fewer than 30 subjects, then a
13:53:12 6 couple of people could really throw off the
13:53:14 7 results."

13:53:14 8 Do you agree with that?

13:53:16 9 A. Yes. That definitely a possibility. That is
13:53:20 10 certainly a limitation of only having 26.

13:53:23 11 Q. In fact, that is what you testified to in San
13:53:26 12 Diego in 2004?

13:53:28 13 A. I have to see what you are looking at, but it
13:53:30 14 sounds like that that would be possible.

13:53:32 15 Q. You would agree with that statement; don't you?

13:53:35 16 A. I agree with the statement.

13:53:36 17 Q. You would also agree with the statement:

13:53:38 18 "That is actually why Louisiana isn't included
13:53:41 19 here, because we only had 29 jurors from the
13:53:43 20 Louisiana. So we didn't include them because
13:53:45 21 technically they didn't reach that magic number of
13:53:48 22 30."

13:53:49 23 Do you agree with that statement?

13:53:51 24 A. I agree with that statement.

13:53:54 25 Q. That was testimony that you gave under oath in

APP000683

13:53:57 1 San Diego County in 2004. Do you remember the case of
13:54:01 2 the people of the State of California V. Jack Henry
13:54:05 3 Lewis, Junior?

13:54:06 4 A. I remember the case. I would have to look at
13:54:08 5 that to swear that that is what I actually said. But
13:54:11 6 it sounds like something that I could have said.

13:54:13 7 Q. All right.

13:54:24 8 THE CLERK: State's Exhibit Number 1 marked
13:54:25 9 for identification.

13:54:25 10 (Exhibit No. 1 marked for identification .)

13:54:27 11

13:54:27 12 MS. MacDONALD: What is the page?

13:54:30 13 MR. CASTLETON: Page 567.

13:54:36 14 BY MR. CASTLETON:

13:54:37 15 Q. Dr. Foglia, I am going to show you what has
13:54:39 16 been marked as State's Exhibit Number 1. I am going
13:54:41 17 to ask you to look at that and see if that is, in
13:54:44 18 fact, the case that you testified to in San Diego
13:54:46 19 County?

13:54:50 20 A. I did testify in this case, yes.

13:54:51 21 Q. I will have you turn to page 567. Just review
13:55:04 22 the first question and answer that is listed on page
13:55:09 23 567 and tell me if that is, in fact, your testimony.

13:55:35 24 A. Yes.

13:55:35 25 As I said, when you first mentioned it, it

APP000684

13:55:38 1 sounds like something that I would have said. Now
13:55:40 2 that I have reviewed the transcript I can say, yes, I
13:55:42 3 did say this. I was pointing out that 142 was more
13:55:46 4 than enough to get enough variation. The problem with
13:55:49 5 the smaller sample is it is harder to get valid
13:55:52 6 results. So it is to the researcher's benefit to have
13:55:56 7 a larger sample, especially if you are doing
13:55:59 8 sophisticated analysis. All we are doing here -- all
13:56:02 9 I presented today were just raw percentages.

13:56:06 10 I would certainly agree that if we had a larger
13:56:09 11 sample, the percentage that got something wrong in
13:56:14 12 Washington might be three or four points higher and/or
13:56:19 13 three or four points lower. But I still thought that
13:56:21 14 this was useful information, even though that it is 26
13:56:24 15 people, because it shows -- there is a substantial
13:56:27 16 percentage here. It may be a couple points higher in
13:56:31 17 reality or a couple points lower, but it is not going
13:56:33 18 to be zero.

13:56:34 19 Q. Now Your Honor said --

13:56:36 20 A. A small sample doesn't create results. It
13:56:42 21 means that your results are not just as precise if you
13:56:44 22 are trying to get an article published. That is what
13:56:47 23 I was talking about, when I talked about why we didn't
13:56:50 24 list Louisiana. I am talking about doing something
13:56:52 25 with the level of precision that you can get it

APP000685

13:56:54 1 published.

13:56:55 2 Q. So then you wouldn't publish the results from
13:56:57 3 this mock jury study with the paralegals?

13:56:59 4 A. No.

13:56:59 5 Q. Now, you indicated previously that you were
13:57:03 6 familiar with the Washington jury instructions as it
13:57:07 7 pertains to the capital cases.

13:57:09 8 I presume that you are aware that Washington
13:57:12 9 instructs jurors -- it is the law in Washington that
13:57:14 10 the defendant is presumed to merit leniency?

13:57:18 11 A. Yes.

13:57:19 12 Q. That is a presumption that the jurors are told
13:57:22 13 about numerous times throughout the course of their
13:57:24 14 service. Are you aware of that?

13:57:27 15 A. I didn't count how many times that they were
13:57:30 16 told it, but I did see that they were told it. I also
13:57:33 17 saw at other points that they were told not to be
13:57:35 18 swayed by emotion or sympathy. It seemed to me that
13:57:38 19 they were getting mixed messages.

13:57:41 20 Q. When you say that you weren't aware how many
13:57:44 21 times that they were told, what were you looking at?

13:57:46 22 A. I was looking at the pattern jury instructions.

13:57:48 23 Q. Are you aware of how long --

13:57:52 24 A. Actually, may I --

13:57:53 25 Q. Sure.

APP000686

13:57:53 1 A. I just realized, to be complete, I looked at
13:57:55 2 the instructions that were given in the Schierman case
13:57:58 3 and then I also looked at the pattern jury
13:58:01 4 instructions, which were similar but not exactly the
13:58:03 5 same.

13:58:03 6 Q. Now, we previously talked about some
13:58:06 7 improvements that could be made to the voir dire. Are
13:58:09 8 you aware of how long the voir dire took in Schierman,
13:58:14 9 State V. Schierman?

13:58:14 10 A. No, I am not.

13:58:15 11 Q. Are you aware in that case the jury selection
13:58:18 12 started mid-November of 2009 and didn't conclude until
13:58:21 13 the end of January of 2010?

13:58:23 14 A. No.

13:58:24 15 Q. Are you aware that all of the jurors that were
13:58:27 16 responded to their summons were first given a lengthy
13:58:30 17 questionnaire and from that then individually
13:58:34 18 questioned between 30 to 45 minutes on the sole topics
13:58:37 19 of the death penalty and meaning for the case?

13:58:43 20 A. No.

13:58:43 21 Q. Are you aware that after that, the jurors were
13:58:45 22 excluded or included as the case may be. There were
13:58:48 23 then additional days of general voir dire with all of
13:58:51 24 the remaining jurors before a jury was finally seated?

13:58:55 25 A. I don't know the specifics of what were done in

APP000687

13:58:57 1 Schierman. I know what you are describing to a
13:59:01 2 greater or a lesser extent is done in every capital
13:59:04 3 case.

13:59:05 4 Q. You testified earlier that you had no idea how
13:59:08 5 long jury selection took in these various cases and
13:59:12 6 the CJP. I believe that is a question directly from
13:59:15 7 Judge Kessler. Isn't that true?

13:59:16 8 A. I didn't say that I have no idea. I said I
13:59:19 9 didn't know exactly how long jury selection took or
13:59:21 10 how it proceeded in each of these individual cases.

13:59:24 11 Q. Are you aware of death penalty cases where
13:59:27 12 jurors are seated within a couple of days after
13:59:30 13 showing up; correct?

13:59:33 14 A. I am not personally aware of that. I am pretty
13:59:38 15 confident from what I have seen of the system that
13:59:41 16 that was not the case in the 350 some trials where we
13:59:46 17 interviewed jurors.

13:59:47 18 Q. You are aware of that, because you looked at
13:59:49 19 the voir dire?

13:59:51 20 A. No.

13:59:52 21 I -- I am aware of that, because I have worked
13:59:57 22 with a lot of different defense attorneys. I have
13:59:59 23 done a lot of research. These cases were randomly
14:00:03 24 selected.

14:00:04 25 So, I know that, yes, there is some

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14:00:09 1 incompetence. But I know that there is also some very
14:00:12 2 competent defense attorneys, who would have done their
14:00:16 3 job.

14:00:17 4 Q. I don't have any further --

14:00:19 5 A. There is no way, statistically, that we would
14:00:21 6 have just chosen 350 cases where it wasn't done
14:00:27 7 properly.

14:00:28 8 MR. CASTLETON: No further questions, Your
14:00:29 9 Honor.

14:00:29 10 THE COURT: Redirect.

14:00:32 11 MS. MacDONALD: Your Honor, briefly before I
14:00:43 12 get into the questions that the State brought up, I
14:00:45 13 realize while I put in the direct examination I went
14:00:48 14 over Dr. Foglia's background. She has testified as an
14:00:55 15 expert. I never formally endorsed her as an expert.
14:00:58 16 So I am doing that now.

14:01:00 17 THE COURT: All right. You can say what
14:01:02 18 you want. We don't do that in Washington. Go ahead.

14:01:06 19 REDIRECT EXAMINATION

14:01:07 20

14:01:07 21 BY MS. MacDONALD:

14:01:08 22 Q. Dr. Foglia, the State was talking about the --
14:01:17 23 they went over briefly the voir dire process that was
14:01:20 24 done in Schierman and talked about how it had taken
14:01:24 25 two months.

APP000689

14:01:24 1 You testified in direct examination of the
14:01:26 2 study that was done in a controlled sample and an
14:01:29 3 experimental sample with the qualification of 30
14:01:34 4 minutes. Do you recall that?

14:01:35 5 A. Yes. They didn't actually experience 30
14:01:38 6 minutes of death qualifications. They just watched 30
14:01:42 7 minutes of death qualification.

14:01:43 8 Q. Based upon your review and study, what would
14:01:46 9 your belief be as to the effect of two months' of voir
14:01:50 10 dire in the death qualifications to jurors?

14:01:52 11 A. Well, if 30 minutes had the impact we saw in
14:01:56 12 that mock jury study, the longer process would
14:01:58 13 probably have a more prejudicial effect, because it
14:02:01 14 would be more time that the judge and the lawyers were
14:02:06 15 focused on the death penalty issue.

14:02:11 16 Q. The state also is talking with you about the
14:02:14 17 sample number of 26 jurors that were done in the
14:02:17 18 Washington survey versus the CJP Study.

14:02:21 19 A. Yes.

14:02:22 20 Q. Do you believe that the number of 26 in any way
14:02:25 21 lessens the information that was, that you found from
14:02:28 22 reviewing the Washington study?

14:02:31 23 A. I think that it shows what it was intended to
14:02:33 24 show, is that there are a substantial percentage that
14:02:38 25 have problems with the Washington statute.

APP000690

14:02:40 1 It is especially important when you consider
14:02:44 2 these are paralegals who have legal training and
14:02:47 3 people who are not going to be emotionally upset by
14:02:50 4 seeing details of a gruesome crime, they still had a
14:02:53 5 lot of problems.

14:02:54 6 As I just said, you wouldn't be able to punish
14:03:00 7 something like that, because you can't do very
14:03:02 8 sophisticated analysis with only 26 people. But for
14:03:06 9 showing raw percentages, they showed what they were
14:03:09 10 intended to show.

14:03:10 11 Q. Even if you were to take a Washington sample
14:03:13 12 out of the equation in this case, what is your
14:03:16 13 understanding of how the CJP findings would apply to
14:03:19 14 Washington?

14:03:20 15 A. They would apply, because they applied in every
14:03:22 16 other state. There is no reason to think that they
14:03:24 17 wouldn't apply in Washington.

14:03:26 18 Q. Thank you.

14:03:27 19 Turning to the jury instructions, the state had
14:03:30 20 talked about the instructions that mentioned the
14:03:33 21 presumption of the leniency to merit leniency.

14:03:37 22 Do you recall reading the, essentially, similar
14:03:41 23 to the to convict instruction for the penalty phase,
14:03:45 24 the question that the jurors would have to answer in
14:03:47 25 Washington?

APP000691

14:03:47 1 A. The precise question that they have to answer?

14:03:49 2 Q. Ah-hum?

14:03:50 3 A. Yes, I have read that.

14:03:51 4 Q. What is the question that they have to answer?

14:03:56 5 A. "Having in mind the crimes of which the
14:03:57 6 defendant has been found guilty, are you convinced
14:04:00 7 beyond a reasonable doubt that there are not
14:04:02 8 sufficient mitigating circumstances to merit
14:04:04 9 leniency?"

14:04:05 10 Q. Did you also review the statute where that
14:04:08 11 language was taken from in Washington?

14:04:10 12 A. Yes, I did. In the statute they actually have
14:04:12 13 that language in quotation marks and say that the jury
14:04:15 14 has to be asked this question.

14:04:17 15 Q. So based on your studies and other instructions
14:04:21 16 in the other states in the CJP, are there any problems
14:04:24 17 that you see with that instruction?

14:04:28 18 A. With all due respect, I think that it is one of
14:04:30 19 the worse instructions that I have ever seen.
14:04:33 20 Because, as I mentioned earlier, it reminds the jurors
14:04:37 21 of the crime, which plays right into a common problem
14:04:42 22 of jurors' thinking that mitigation has to relate to
14:04:45 23 the crime, when the Supreme Court has made it clear
14:04:47 24 that there does not have to be any nexus to the crime.
14:04:50 25 But here they are reminded to think of the crime.

APP000692

14:04:53 1 Then, at the time when they are told to think
14:04:57 2 about mitigation, they are told to consider the beyond
14:05:04 3 a reasonable doubt standard.

14:05:05 4 I think that is going to make them more likely
14:05:07 5 to think, all right, with mitigation, you have to use
14:05:10 6 that reasonable doubt standard. That is the one that
14:05:12 7 they want to use any way, because that is the more
14:05:14 8 familiar one.

14:05:15 9 Perhaps the worse part of it is the requirement
14:05:20 10 that they find something is not sufficient, which is a
14:05:24 11 very difficult concept to wrap your head around,
14:05:27 12 because it is a double negative.

14:05:29 13 I have trouble having my students answer which
14:05:35 14 of the following is not true. It is just hard for
14:05:39 15 people to think in those terms.

14:05:41 16 So, I tell them -- "turn around and treat them
14:05:45 17 each as true false questions." I think that's what
14:05:49 18 jurors would tend to do.

14:05:50 19 They would say, "okay, I am not sure what is not
14:05:53 20 sufficient, but I guess that means that the defendant
14:05:55 21 has to prove the mitigation is sufficient."

14:05:58 22 So that's put the burden back on the defendant
14:06:00 23 to prove that something is sufficient. It is just
14:06:03 24 hard to even think about what would not be sufficient.

14:06:06 25 Then using the word merit suggests that the

APP000693

14:06:10 1 defendant has to have earned something. I think
14:06:14 2 that's problematic. I think that the word leniency is
14:06:17 3 problematic because a jury is not going to want to
14:06:21 4 feel that they are being lenient, that they just
14:06:23 5 convicted of aggravated murder.

14:06:26 6 They are being asked to decide whether a person
14:06:30 7 deserves death or life in prison. In my mind, life in
14:06:34 8 prison isn't lenient. I think that that is an
14:06:37 9 unfortunate word to use. But then that is the word
14:06:43 10 that's in the statute.

14:06:47 11 Q. Before we took a recess, the State had asked
14:06:50 12 you whether you believe that the -- all death penalty
14:06:53 13 cases were unconstitutional?

14:06:54 14 A. Yes.

14:06:54 15 Q. You had answered yes.

14:06:58 16 A. Yes.

14:06:58 17 Q. Why is that?

14:07:00 18 A. Because of everything that I have testified to
14:07:02 19 this morning. The Supreme Court has established
14:07:04 20 certain standards that have to be met for the death
14:07:07 21 penalty to be constitutional and we have an abundance
14:07:11 22 of evidence -- both in the co-morbidities and a myriad
14:07:13 23 of other studies -- that shows that those standards
14:07:16 24 are not being met.

14:07:19 25 With the magnitude of the problems and the

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14:07:23 1 widespread nature of the problems, the obvious
14:07:27 2 conclusion from the number of jurors who are getting
14:07:32 3 things wrong. It is just beyond comprehension that
14:07:35 4 there would be any jury who does what the Supreme
14:07:38 5 Court said that they are supposed to be doing,
14:07:40 6 especially when they have made it clear that you have
14:07:42 7 to have all 12 jurors following the rules.

14:07:45 8 They have also established that all you need is
14:07:49 9 a reasonable likelihood, that there is a problem and
14:07:54 10 our data shows that it is actually more likely than
14:07:57 11 not that there is a problem, because most of our
14:07:59 12 percentages are above 50 percent.

14:08:02 13 Q. You have mentioned before that you are actually
14:08:05 14 doing a second version, I guess, of the CJP from 1999
14:08:08 15 to 2009; correct?

14:08:09 16 A. Yes, I am not actually doing it.

14:08:11 17 Bill Bowers and some other people are doing it.

14:08:13 18 Q. The state was discussing quite a bit about how
14:08:16 19 you do not have the voir dire back in the original CJP
14:08:20 20 to see the questions that were being asked or what the
14:08:23 21 jurors were told.

14:08:25 22 A. That's correct.

14:08:25 23 Q. Now, is that being taken care of in the new CJP
14:08:29 24 study?

14:08:29 25 A. In the new study they are looking at

APP000695

14:08:31 1 transcripts.

14:08:32 2 There also has been a very much expanded use of
14:08:37 3 the Colorado methods in the past 10 years. A lot of
14:08:41 4 these jurors would have been exposed to very extensive
14:08:45 5 voir dire. As I pointed out this morning, the
14:08:48 6 percentages are very similar, despite that.

14:08:52 7 Q. That was my last question. The findings are
14:08:54 8 consistent with the earlier findings?

14:08:56 9 A. Yes, remarkably so.

14:08:58 10 MS. MacDONALD: One moment, Your Honor.

14:08:59 11 Thank you.

14:09:02 12 THE COURT: Recross?

14:09:03 13 MR. CASTLETON: None, Your Honor.

14:09:04 14 THE COURT: All right.

14:09:09 15 Before CJP, 1996, is that when it started,
14:09:16 16 about?

14:09:18 17 THE WITNESS: 1996 is when I got involved.
14:09:20 18 It actually started in 1991.

14:09:23 19 THE COURT: Before your involvement in CJP,
14:09:25 20 did you have an opinion about the constitutionality of
14:09:28 21 the death penalty?

14:09:29 22 THE WITNESS: The death penalty was not an
14:09:32 23 area of my --

14:09:35 24 THE COURT: I will put it --

14:09:37 25 THE WITNESS: I didn't know much about the

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14:09:39 1 constitutionality of the death penalty before I got
14:09:41 2 involved. It is not something that I focused on. I
14:09:43 3 was much more focused on the psychological issues.

14:09:47 4 THE COURT: Before this, did you have an
14:09:49 5 opinion about the policy of the death penalty?

14:09:52 6 THE WITNESS: I never thought that the
14:09:56 7 death penalty was a good idea, if that is what you are
14:09:59 8 asking.

14:09:59 9 THE COURT: That is what I am asking. You
14:10:01 10 are not Clarence Thomas. You have heard of the word
14:10:04 11 abortion before. All right.

14:10:05 12 Any questions -- one largely irrelevant
14:10:09 13 question, did Rowan used to be Glassboro State?

14:10:13 14 THE WITNESS: Yes, it did.

14:10:14 15 THE COURT: All right.

14:10:15 16 MS. MacDONALD: Thank you.

14:10:16 17 THE COURT: Old enough to remember the
14:10:18 18 Summit Conference there. Anything else?

14:10:21 19 MS. MacDONALD: No.

14:10:23 20 MR. CASTLETON: Nothing from the State,
14:10:24 21 Your Honor.

14:10:25 22 MS. MacDONALD: Nothing from the defense,
14:10:26 23 Your Honor.

14:10:27 24 THE COURT: Thank you. You may step down.

14:10:34 25 MS. MacDONALD: Do you want to go to

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14:10:35 1 argument now or take a break?

14:10:37 2 THE COURT: You may step down. Do you need
14:10:41 3 to take your stuff?

14:10:42 4 THE WITNESS: Yes.

14:10:43 5 THE COURT: We can take a few minutes
14:10:45 6 break. But -- just take it, I will sit here for a
14:10:48 7 moment.

14:11:31 8 What I propose to do is hear argument. As
14:11:34 9 I indicated last time that we were together, I don't
14:11:37 10 intend to rule on any of these motions until they are
14:11:39 11 done.

14:11:40 12 I understand we need to recalculate the
14:11:43 13 next hearing date. That is fine. That is doable.

14:11:47 14 MS. MacDONALD: We have a proposed order for
14:11:49 15 you that has been reviewed.

14:11:51 16 THE COURT: Then I want to hear from the --
14:11:55 17 you may have made a decision on this. I want to hear
14:11:57 18 from the defense, if you want to pursue the shackling
14:12:03 19 issue, which I think will be done by a separate
14:12:07 20 hearing, if we need to. But that is up to you. Let
14:12:11 21 me know. I am not going to deal with it sua sponte,
14:12:17 22 as to how far to the next step. All right.

14:12:24 23 MR. GRUENHAGEN: Since it relates to what
14:12:27 24 happens in your courtroom, Your Honor, we will have --
14:12:30 25 we will have the order for the next scheduled, hearing

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14:12:33 1 that would be a hearing without testimony.

14:12:36 2 I gather you are probably scheduling it in
14:12:38 3 the afternoon. If the court wants to just address it
14:12:42 4 at that time, or set it separately, either or,
14:12:46 5 whatever is convenient for the court.

14:12:48 6 THE COURT: You haven't decided yet if you
14:12:50 7 want to pursue it even?

14:12:52 8 MR. GRUENHAGEN: It will be pursued. It
14:12:54 9 will get worked out.

14:12:55 10 THE COURT: It may not get worked out, but
14:12:57 11 I may require --

14:12:58 12 MR. GRUENHAGEN: It gets worked out, when
14:13:00 13 the court enters an order.

14:13:02 14 THE COURT: It worked out really well
14:13:04 15 today.

14:13:04 16 MR. GRUENHAGEN: There is a certain
14:13:06 17 irony -- yes.

14:13:07 18 THE COURT: All right. I will hear the
14:13:09 19 argument from the defense.

14:13:10 20 MS. MacDONALD: Thank you, Your Honor.

14:13:11 21 Your Honor, Washington's death penalty
14:13:15 22 scheme, which is at issue in this motion, is
14:13:17 23 unconstitutional based on the uncontroverted
14:13:35 24 scientific findings of the Capital Jury Project, the
14:13:37 25 testimony of Dr. Wanda Foglia and also the declaration

APP000699

14:13:41 1 of the proper testimony that we submitted for Dr. Gail
14:13:46 2 Stygall regarding the instructions.

14:13:47 3 The CJP found that there were seven
14:13:49 4 fundamental flaws that were found in all 14 states
14:13:52 5 that it studied, which had the widest variation of the
14:13:58 6 capital sentencing schemes that have been approved,
14:14:00 7 that these applied across the State regardless of the
14:14:03 8 sentencing because they were fundamental and thus
14:14:05 9 would apply to Washington.

14:14:06 10 What it found with these flaws is that
14:14:08 11 jurors are either unwilling or unable to comply with
14:14:11 12 the requirements that have been imposed by the
14:14:13 13 constitution in capital cases.

14:14:15 14 In 1972 in Furman V. Gregg the Supreme
14:14:19 15 Court had struck down the death penalty, because of
14:14:22 16 the risk for arbitrary and capricious decision. It
14:14:25 17 was not that it needed to be proved that these
14:14:27 18 decisions were arbitrary and capricious, but the
14:14:30 19 decision was alone was enough to violate the 8th
14:14:39 20 amendment prohibition against cruel and unusual
14:14:43 21 punishment.

14:14:44 22 Four years later in Greg V. Georgia the
14:14:46 23 court did come up with the safeguards that it believed
14:14:48 24 would take care of the risk of arbitrary and
14:14:52 25 capricious decisions. The safeguards would be that

APP000700

14:14:55 1 the class offenders would be narrowed as to who to be
14:14:59 2 charged with aggravated murders; that the sentencers
14:15:02 3 would be -- discretion would be guided, that there
14:15:04 4 would be a rationale reasonable appellate review of
14:15:07 5 the sentencing decision.

14:15:08 6 Now, in 1994, Justice Blackman who had been
14:15:13 7 in the -- on the court for Furman, I believe was in
14:15:17 8 the dissent, then wrote in the dissent on Collins V.
14:15:21 9 Collins about how his view of death penalty had
14:15:23 10 changed based on his time on the Supreme Court bench.

14:15:26 11 He said:

14:15:27 12 "From this day forward, I shall no longer
14:15:29 13 tinker with the machinery of death. For more than
14:15:32 14 20 years I have endeavored, indeed, I have struggled
14:15:35 15 with the majority of this court to develop
14:15:39 16 procedural and substantive rules that would lend
14:15:42 17 more than the mere appearance of fairness to the
14:15:45 18 death penalty endeavor."

14:15:46 19 He says:

14:15:47 20 "Rather than to continue to coddle the
14:15:50 21 court's dilution, the desired level of fairness has
14:15:53 22 been achieved and the need for regulation
14:15:56 23 eviscerated, I feel morally and intellectually
14:15:59 24 obligated to simply concede that the death penalty
14:16:01 25 experiment has failed. It is virtually self-evident

APP000701

14:16:04 1 to me now that no combination of procedural rules or
14:16:07 2 substantial regulations can ever save the death
14:16:10 3 penalty from its inherent constitutional
14:16:12 4 deficiencies."

14:16:13 5 "The problem is that the inevitability of
14:16:16 6 factual, legal and moral error gives us a system
14:16:19 7 that we know must wrongly kill some defendants, a
14:16:23 8 system that fails to deliver the fair consistent and
14:16:26 9 reliable sentences of death as required by the
14:16:29 10 constitution."

14:16:29 11 We go now to today and we see, based on the
14:16:33 12 Capital Jury Project's findings, based on the
14:16:36 13 interviews of actual jurors, that that is true. There
14:16:39 14 are fundamental flaws within the constitution --
14:16:42 15 within the sentencing schemes that do not allow it to
14:16:46 16 rise to the constitutional adequacy that the
14:16:48 17 constitution requires.

14:16:49 18 The CJP was funded in 1991. It is still
14:16:56 19 ongoing now, with the second version of it from 1999
14:16:59 20 to 2009. It talked with jurors, who actually sat on
14:17:02 21 capital cases, went through the entire process,
14:17:06 22 through deliberations on both life and death cases to
14:17:09 23 see what they were thinking and how they were deciding
14:17:11 24 the cases, to see whether or not these trials
14:17:17 25 comported with the safeguards and the requirements of

APP000702

14:17:20 1 the constitution. In part this was done based on
14:17:24 2 Lockhart, which wanted to know what jurors were
14:17:26 3 thinking.

14:17:27 4 The seven flaws that they decided the
14:17:30 5 premature decision-making, the premature
14:17:32 6 decision-making, found that the national average was
14:17:35 7 30.3 percent have decided death before they have even
14:17:39 8 heard of the end of the first trial and made a
14:17:42 9 decision on the guilt or innocence or heard any of the
14:17:43 10 mitigation.

14:17:45 11 Of the jurors that have made their mind up
14:17:47 12 before the end of the first case, only three percent
14:17:52 13 acknowledged that their position had changed by the
14:17:54 14 end of the penalty phase. Even when questioned at
14:17:57 15 length to put in their own words why their minds had
14:18:00 16 changed, it became clear that their minds really did
14:18:03 17 not change. They wanted to avoid a hung jury. Part
14:18:06 18 of the problem is that jurors are used to, in criminal
14:18:08 19 cases -- we are not used to capital cases.

14:18:12 20 We are used to criminal trials where the
14:18:14 21 only issue is factual findings, where it is clear that
14:18:18 22 the court requires unanimous decisions and where hung
14:18:23 23 juries are frowned upon in a way that the jurors have
14:18:28 24 not done their duty if they can't come to a decision
14:18:29 25 of unanimous conclusion of guilt or innocence. In

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14:18:32 1 capital cases you are going from that type of a trial
14:18:34 2 to a penalty phase, where the standards are different
14:18:37 3 and the obligations are different.

14:18:40 4 Also, the second flaw of failure to remove
14:18:45 5 the automatic death penalty jurors and the bias
14:18:48 6 towards death. As we heard on the stand, death is
14:18:52 7 reiterated over and over again through the process.
14:18:54 8 Yes, there is an obligation to death qualify and life
14:19:03 9 qualify jurors.

14:19:04 10 You cannot have a trial made up of jurors
14:19:07 11 who, upon conviction of the charge of murder, will
14:19:10 12 automatically impose a death sentence. Nor can you
14:19:13 13 have jurors that cannot consider imposing a death
14:19:16 14 sentence, you want a juror who is able to consider
14:19:19 15 both options.

14:19:21 16 Having to address that in the voir dire it
14:19:26 17 does -- the jurors do hear over and over again about
14:19:29 18 having to talk about death. They can see, when jurors
14:19:33 19 are excused, they say that "I can never imposed a
14:19:36 20 death penalty," they are excused. When a juror would
14:19:39 21 say, "I always will" and they will be rehabilitated,
14:19:43 22 subconsciously they know that the death is desired
14:19:47 23 decision.

14:19:47 24 THE COURT: We have an answer to the
14:19:48 25 rehabilitation from the witness; correct? Don't

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14:19:51 1 rehabilitate and kick them out.

14:19:53 2 MS. MacDONALD: There is also -- if the
14:19:54 3 court has reviewed some of the studies that actually
14:19:57 4 have the quotes from the jurors, another problem that
14:19:59 5 you have is when jurors are back in the courtroom
14:20:02 6 deliberating, we are not there, that other jurors will
14:20:04 7 actually overcome them by saying that, "you took an
14:20:09 8 oath that you swore that you would agree to the death
14:20:12 9 penalty" -- their deception in that they have agreed
14:20:14 10 that they will and use that against each other, which
14:20:17 11 is actually described by some jurors in the articles.

14:20:20 12 Additionally, when you look at the
14:20:22 13 instructions, death always comes first. It is death
14:20:25 14 or life without parole.

14:20:26 15 When we go through our instructions, death
14:20:28 16 is mentioned, I believe, 11 times in the instructions.

14:20:35 17 THE COURT: You know, it is the same thing
14:20:37 18 that I asked you before.

14:20:41 19 Other than the verdict form, what says I
14:20:47 20 have to give instructions according to the WPI? I
14:20:52 21 mean, the answer is nothing.

14:20:55 22 MS. MacDONALD: There are two responses to
14:20:56 23 that.

14:20:56 24 THE COURT: Other than the reasonable doubt
14:20:59 25 instruction and that one I have to give as described,

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14:21:04 1 but nothing else has been said has to, nothing else
14:21:07 2 has been ordered to provide.

14:21:10 3 MS. MacDONALD: I have two responses in part
14:21:12 4 with that instruction.

14:21:13 5 THE COURT: All right.

14:21:14 6 MS. MacDONALD: We can give instructions
14:21:16 7 that are not part of the WPICS. We can try to improve
14:21:19 8 the language.

14:21:20 9 However, I think that we have seen clearly
14:21:23 10 since over the last 40 years where the courts and the
14:21:28 11 states have tried to revise and redraft and come up
14:21:31 12 with the instructions that have those words that will
14:21:33 13 make it so it is understandable, so it comports with
14:21:36 14 the constitution and it has not been done.

14:21:38 15 This study of these 354 cases shows us, it
14:21:43 16 has not been done. Yes, we may be able to improve it.
14:21:47 17 I don't believe that we can come up in this courtroom,
14:21:50 18 right now, with the words that will make it to the
14:21:52 19 point where it becomes -- where it takes care of these
14:21:55 20 flaws and where it doesn't violate the 8th amendment.

14:21:58 21 THE COURT: You have about 10 months to get
14:22:00 22 working on it.

14:22:03 23 MS. MacDONALD: Your Honor did point out
14:22:05 24 regarding the main question that is part of the
14:22:06 25 instructions for the penalty phase:

APP000706

FILED
KING COUNTY, WASHINGTON

MAR 07 2013

SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant

) Case No.: 09-1-07187-6

) ORDERS RE: DEATH NOTICE

At a hearing on 22 February 2013, the court announced its ruling regarding a number of defense motions to strike the death penalty notice. The defense has submitted proposed findings of fact and conclusions of law regarding the court's oral decision. The court has no reason to believe that findings are necessary. The court's oral ruling is adequate for review. For the purposes of memorializing the court's decision, it is hereby

ORDERED that defendant's motion to strike the death notice because the plaintiff considered the offense in weighing mitigating factors is denied; it is further

ORDERED that defendant's motion to strike the death notice because jurors in other states and other cases were confused by the instructions given in other states and other cases is denied; it is further

ORDERED that defendant's motion to strike the death notice because the Washington Pattern Jury Instructions are confusing is denied; it is further

ORDERED that defendant's motion to strike the death notice because the imposition of the death penalty in Washington has allegedly been disproportionate is denied; and it is further

1 ORDERED that defendant's motion to strike the death notice because the plaintiff abused
2 its discretion and failed to properly exercise discretion in considering mitigating materials is
3 granted, for the reasons set forth in the court's oral decision.

4 DATED this 6th day of March, 2013.

5 
6 RONALD KESSLER, Judge

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