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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 88522-2

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IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

MONFORT'S RESPONSE BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

By:

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I. IDENTITY OF RESPONDING PARTY

Christopher John Monfort, through his attorney Suzanne Lee Elliott, responds to the Washington Association of Prosecuting Attorneys [WAPA].

II. ARGUMENT

A. THIS IS NOT A CASE ABOUT PROSECUTORIAL CHARGING DISCRETION; IT IS ABOUT THE PROPER CONSTRUCTION OF RCW 10.95.040

The Washington Association of Prosecuting Attorneys has provided a lengthy recitation of state and federal cases discussing prosecutorial charging discretion. While this might be a useful scholarship in some other case, it is largely irrelevant to the issues before this Court in this case. In fact, amicus cites to – and discusses – RCW 10.95.040 only twice in the 18-page brief, both times in a footnote.

WAPA simply misstates the entire inquiry. WAPA asserts:

In the instant case, probable cause exists for the filing of the notice of special sentencing proceeding. Probable cause for such notice is satisfied by probable cause to proceed on one count of premeditated murder with one or more aggravating circumstances, a defendant who was at least 18 years of age on the day of the murder and probable cause to believe the defendant does not have an “intellectual disability” at the time of the crime.

Brief of Amicus at 12. This statement ignores RCW 10.95.040 in its entirety. The phrase “probable cause” does not appear in the statute. And just because a prosecutor has probable cause to file one count of aggravated murder does not ipso facto mean that there is “reason to

believe that there are not sufficient mitigating circumstances to merit leniency.”

WAPA also makes the assertion that there are two – and only two – phases of a prosecution: the accusatorial phase and the adjudicatory phase. There is no citation to this assertion and, in fact, prosecutions also involve the investigatory phase, the sentencing phase, the appellate phase, and the post-conviction phase. Even assuming a capital prosecution can be neatly divided into “phases,” RCW 10.95.040(1) does not unambiguously fall into the “accusational” phase. That is because, before RCW 10.95.040 even comes into play, the charge has already been made.

WAPA also says: “The State’s decision to charge aggravated first degree murder, by itself, subjects the defendant to the possibility of a death sentence.” Brief of Amicus at 3 fn 1. This is simply not true. Absent the second required step of filing and serving the notice under RCW 10.95.040, no defendant charged with aggravated murder will receive the death penalty.

Finally, WAPA states that under RCW 10.95.040, the Prosecutor has “no duty to conduct his own mitigation investigation.” But he does have a duty to determine whether there is “reason to believe that there are not sufficient mitigating circumstances to merit leniency.” That may actually require an investigation if, as here, the Prosecutor refuses to wait for the defense to complete its own investigation.

Judge Kessler’s decision (and Judge Ramsdell’s decision in *State v. McEnroe and Anderson*) does not “display a fundamental confusion

about the different phases of trial.” Brief of Amicus Curie at 2. Rather, his decision is the astute recognition that RCW 10.95.040 does not fall into either the “accusatory” or “adjudicatory” phase. It is unique. As Monfort has argued in his other briefs filed in this Court, Judge Kessler’s ruling does not in any way affect the Prosecutor’s decision to charge Monfort with premeditated murder with aggravating circumstances.

B. THIS COURT HAS NEVER UNEQUIVOCALLY STATED THAT THE PROSECUTOR’S DECISION UNDER RCW 10.95.040 IS A CHARGING DECISION AND IT SHOULD NOT DO SO IN THIS CASE

Amicus does not cite to any decision by this Court that includes an in-depth analysis of the language and legislative history of RCW 10.95.040 and that unequivocally holds that the prosecutor’s special notice is a charging decision. Thus, there is no existing precedent that this Court must overrule.

Instead, Amicus says: “The characterization of the decision to file a notice of special sentencing proceeding is consistent with how the United States Supreme Court treats the decision to pursue the death sentence.” Amicus then cite only to *McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S.Ct. 1756, 95 L.Ed.2d 262, *reh’g denied*, 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987). But in *McCleskey*, the issue was whether the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The question was what weight to give a statistical study that demonstrated a disparity in the

imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. *McCleskey*, 481 U.S. at 286. The Court refused to consider this study, in part because Georgia had no practical opportunity to rebut the Baldus study because it could not poll the jurors on their decision-making and because of the Court's "longstanding precedent" that holds that a prosecutor need not explain his charging decisions. Obviously, that case adds nothing to the determination of whether or not the prosecutor's decision under RCW 10.95.040 can be construed as a charging decision given our statute's unique nature and its legislative history.

C. THIS COURT SHOULD REJECT THE REMINDER OF WAPA'S VARIOUS ASSERTIONS

WAPA disputes Monfort's assertion that, because a jury cannot return a death sentence absent the prosecutor's decision to file a 10.95.040 notice, the sentencing decision must be "laid at the prosecutor's feet." Instead WAPA asserts it was Monfort's own "murderous actions." While it is true that Monfort's actions have clearly subjected him to the charge of aggravated murder, it is not true that only those actions subject him to a death sentence. If that were the only consideration, RCW 10.95.040 would be superfluous. Moreover, were the defendant's actions the only consideration in these cases then Mr. Ridgway's "murderous actions" (on 48+ occasions) would have also subjected him to a death sentence. But, of course, Mr. Ridgway is not on death row for one reason only – the prosecutor did not file the notice. Contrary to WAPA's arguments,

prosecutors do decide which defendants are subjected to the death penalty in Washington and which are not.

Finally, WAPA deliberately misreads Monfort's argument regarding race and the death penalty. In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, *reh'g denied*, 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972), Justice Stewart concluded that executing only 15-20% of the convicted rapists and murders in those jurisdictions where the death penalty was an available punishment offended the Eighth Amendment. Neither King County nor WAPA quarrel with Monfort's statement that under Washington's current capital sentencing scheme the death sentence is imposed in less than 1% of the cases for which the punishment is available, a full 19% less than the figure found unconstitutional in *Furman*. The facts demonstrate that Washington's death penalty statute yields results more arbitrary and capricious than the results obtained under Georgia's capital sentencing scheme in place 41 years ago. To paraphrase Justice Stewart, Washington's death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.

As a subset of this argument, Monfort pointed out that the influence of race in capital punishment should be of concern to this Court because there is a substantial argument that our system produces death sentences based -- not upon consideration aggravating and mitigating circumstances -- but rather upon race. In fact, the Task Force on Race and the Criminal Justice System issued a Preliminary Report in 2011 that

concluded that Washington's criminal justice system overall continues to produce unfair racial disparities. Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System at page 21 (July 2011).

The point is this: The United States Supreme Court has declared that the death penalty must be imposed fairly and with reasonable consistency, or not at all, see *Furman v. Georgia*. Thus, given evidence that Washington's statute is producing racially biased and arbitrary results, now is not the time to hold that the Prosecutor's decisions under RCW 10.95.040 are insulated by the unexamined mantra that they are "charging decisions." Now is the time to subject those decisions to considerable scrutiny.

Of course, in the alternative, this Court could conclude that despite the best efforts of the Legislature and this Court to devise legal formulas and procedural rules to meet the daunting challenge of providing a constitutional capital punishment scheme, the death penalty in Washington remains fraught with arbitrariness, discrimination, caprice, and mistake. If that were this Court's conclusion then it is time for this Court to acknowledge that continued tinkering with the machinery of death is futile. See *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994).

III. CONCLUSION

This Court should reject Amicus's arguments.

DATED this 17th day of June, 2013.

Respectfully submitted,


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

I certify that on June 17, 2013, I served one copy of the foregoing pleading on the following by Email:

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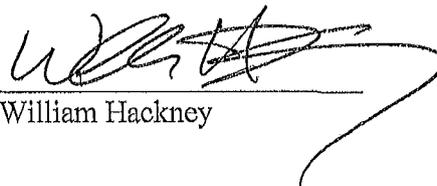
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I further certify that on June 17, 2013, I served one copy of the foregoing First Class U.S. Mail, postage prepaid, on the following:

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Rec'd 6-17-13

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From: William Hackney [<mailto:william@davidzuckermanlaw.com>]
Sent: Monday, June 17, 2013 2:57 PM
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Subject: State v. Monfort, No. 88522-2

Attached for filing in *State v. Monfort*, No.88522-2, is Monfort's response brief to the WAPA amicus brief.

These pleadings are filed by Suzanne Lee Elliott, WSBA #12634, 206-623-0291, Suzanne-elliott@msn.com. A paper copy of the brief is being sent to Mr. Monfort. Thank you for your assistance.

~William Hackney
Legal Assistant