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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHRISTOPHER J. MONFORT,

Respondent.

DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR
KING COUNTY, THE HONORABLE RONALD KESSLER

PETITIONER'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

1. The trial court erred in dismissing the notice of special sentencing proceeding ("death penalty notice") in this case.

B. ISSUES PRESENTED¹

1. Whether the trial court acted outside its statutory authority under RCW 10.95.040 when it dismissed the death penalty notice based on the court's unfounded belief that the King County Prosecuting Attorney abused his discretion and considered inadequate and insufficient mitigation information in reaching his decision to file the notice.

2. Whether the trial court's dismissal of the death penalty notice on the above-stated basis impermissibly intruded on the constitutional charging authority of the Prosecuting Attorney.

3. Whether the remedy for any deficiency in the quantity or quality of the information that the Prosecuting Attorney considered in deciding to file the death penalty notice is to reopen the period for filing the notice to allow such deficiency to be addressed and corrected.

¹ In Its Motion for Discretionary Review, the State also argued that the trial court's ruling is premature. State's Motion at 8-10. The State maintains this position, but will not present further argument on the issue in this brief.

C. STATEMENT OF THE CASE

King County Prosecuting Attorney Daniel T. Satterberg ("the Prosecutor"), by information filed on November 12, 2009, charged Christopher Monfort with Aggravated Murder in the First Degree for shooting and killing Seattle Police Officer Timothy Brenton on October 31, 2009. At the time of the shooting, Officer Brenton was sitting in his patrol car with trainee Officer Britt Sweeney, discussing a traffic stop that the two had just conducted. CP 1-8.

The State alleged the aggravating circumstance that "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 person to be such at the time of the killing," pursuant to RCW 10.95.020(1).

CP 3.

Monfort was also charged with Arson in the First Degree and three counts of Attempted Murder in the First Degree for crimes committed on October 22, 2009, October 31, 2009, and November 6, 2009. CP 1-17.

Monfort was arraigned on these charges on December 14, 2009. CP 18. Pursuant to RCW 10.95.040(2), the Prosecutor had

until January 13, 2010, to file and serve any notice of special sentencing proceeding.²

On the day of the arraignment, the Prosecutor sent Monfort's attorneys a letter, offering to extend the time period during which the Prosecutor must decide whether to file a notice of special sentencing proceeding until June 15, 2010, five months beyond the statutory time period. CP 123. The Prosecutor asked that the defense submit any mitigation materials by May 15, 2010, to allow sufficient time "to review and consider them before the Prosecutor makes his decision." Id. The Prosecutor also offered to meet with the defense team during the week of June 1-5, 2010. Id.

On December 29, 2009, pursuant to the joint request of the parties, the trial court found good cause to extend the statutory time period, and accordingly extended the period for filing the notice of special sentencing proceeding to June 15, 2010. CP 34-35.

² If, following conviction for aggravated first degree murder, the trier of fact at a special sentencing proceeding finds that there are not sufficient mitigating circumstances to merit leniency, the defendant will be sentenced to death. RCW 10.95.030. Any notice of special sentencing proceeding must be filed and served on the defendant within thirty days after arraignment, unless the period is extended by the trial court for good cause shown. RCW 10.95.040(2).

On April 26, 2010, the defense requested an additional extension of the time for filing the notice, to December 1, 2010.³ CP 77-85. At a hearing in the trial court on April 30, 2010, one of Monfort's attorneys stated unequivocally that "[w]e are not going to present anything on the deadline to the state, period." RP (4/30/10) 19.

The Prosecutor responded to the defense request by offering to agree to an additional three-month extension of the time period for making his decision, until September 3, 2010. CP 135. He asked that defense counsel submit any mitigation materials by August 2, 2010, and offered to meet with the defense team during the week of August 16-20, 2010. Id.

On June 4, 2010, the trial court again found good cause and signed a second agreed order, extending the time for filing the death penalty notice to September 3, 2010. CP 97-98.

On August 16, 2010, Monfort's attorneys sought further extension of the time period for filing the notice. CP 232-66. They again asked the trial court to extend the time until December 1,

³ The defense justified this request in part by claiming that "the election cycle . . . puts Mr. Satterberg squarely in the middle of using this case as a political tool." RP (4/30/10) 20. This gratuitous accusation of bias was echoed by one of Monfort's attorneys in an interview reported by Northwest Public Radio on September 2, 2010, in which the attorney accused Prosecutor Satterberg of having "a political agenda . . . about killing [Monfort]." CP 364.

2010. CP 232-34. In addition, they asked the court to “direct the State not to announce its filing decision before that date,” and to “preclude the State from filing a death notice during the extension period.” CP 232, 250.

The State opposed this request. CP 99-164. The State pointed out that the decision at issue under RCW 10.95.040 was a charging decision, and would not determine Monfort’s sentence:

The issue of whether or not Mr. Satterberg files a notice to seek a special sentencing proceeding is not his notice to have the defendant executed. It is simply to have the question put before a jury so they can hear all of the evidence proving his guilt and all the mitigation evidence

RP (8/25/10) 22. The State expressed frustration with the rigidity of the defense position in refusing to provide the Prosecutor with *any* information about their mitigation investigation:

In all the prior previous capital, potential capital cases, defense counsel, in seeking extensions of this type have come in and spoken with Mr. Larson⁴, and the trial counsel explained what the issues are, where they are going, why they need more time, what is happening, here is where we are going; nothing is concrete, but here is what we are looking at and this is what we are hoping to develop, but we need a couple more months. Generally speaking, that time is granted.

⁴ Mark Larson is Mr. Satterberg’s Chief Criminal Deputy.

The State has asked counsel time and time again as the court saw in the letters that were sent to counsel that we were willing to listen to any information of mitigation, anything. Just something to indicate what you are doing, where it is going, what are the hang-ups, what are you hoping to develop. And they have turned us down time and time again.

In fact, in the reply brief they indicate they are not going to play that game. That is fine. That is their choice. But Mr. Satterberg has a decision to make by September 3rd of this year. And he is working towards that decision.

RP (8/25/10) 33-34.⁵

Although the Prosecutor declined to agree to a third extension, he assured defense counsel that, “[a]s is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution.” CP 149. Monfort's attorneys responded by assuring the Prosecutor that they would “continue to work toward preparing a mitigation package.” CP 153. This representation was made on August 10, 2010. CP 151. To

⁵ The State referred to this same recalcitrance at a subsequent hearing: “What happens in most cases is that [defense counsel] say, ‘This is what we have and this is what we have.’ [Monfort’s attorneys] told us nothing. We have asked numerous times before and after the decision was made, ‘are we going to get something?’ Your Honor has asked that question and been told yes. But we have been told nothing, not a scintilla of information.” RP (10/26/12) 34-35.

date, the Prosecutor has received no mitigation materials from Monfort's attorneys.⁶ CP 383.

The trial court denied Monfort's motion for a third extension, finding that the court "lacks the practical authority to stop the prosecuting attorney from making a decision." RP (8/25/10) 42; CP 230-31. Monfort's motion for discretionary review of the trial court's ruling was denied by this Court. CP 267-71.

On September 2, 2010, the Prosecutor filed and served on Monfort's attorneys a notice of special sentencing proceeding pursuant to RCW 10.95.040. CP 360; RP (9/2/10) 2-3.

More than two years later, on October 26, 2012, the trial court heard argument on Monfort's motion to dismiss the death penalty notice on two separate bases: 1) that RCW 10.95.040 does not permit the Prosecutor to consider the facts of the crime when making his decision whether to file the notice, but rather limits his consideration to mitigating circumstances only; and 2) that the Prosecutor, in filing the death penalty notice, did not have an

⁶ In a pleading filed on January 28, 2013, Monfort's attorneys informed the trial court that they were "currently finalizing our mitigation package and will have that provided to the State in February." CP 405. February has gone by, as have March and April, and the State has received nothing by way of mitigation materials from Monfort's attorneys. Monfort's defense team does not appear to have been hampered by lack of funds; as of July 23, 2012, Monfort's attorneys had received \$367,950 for "mitigation services." CP 383.

adequate factual basis for concluding that there were not sufficient mitigating circumstances to merit leniency. RP (10/26/12) 2-3. The court heard argument on these motions, but reserved its rulings. RP (10/26/12) 42.

At a hearing on February 22, 2013, the trial court announced its rulings on these motions.⁷ The court denied Monfort's motion to dismiss the death penalty notice on the first basis, finding that "the argument that the State cannot consider the crime in weighing mitigating factors defies logic and requires a strained interpretation of the statute." RP (2/22/13) 23.

The court granted the defendant's motion on the second basis, however, and dismissed the death penalty notice:

The court concludes that the prosecuting attorney relied upon a flawed, practically useless mitigation investigation prepared by its own investigator. Thus, the prosecutor failed both to exercise the discretion it is statutorily and constitutionally obliged to exercise, and to the extent that the prosecutor considered the flawed minimalist mitigation materials, the prosecutor abused its discretion, both substantively and procedurally.⁸

⁷ The court also announced its rulings on several other motions, none of which is presented for review to this Court.

⁸ The trial court's characterization of the report prepared by the investigator hired by the State, a report the trial court never saw (*see infra*), closely tracks the criticisms of the defense team that the State's investigation was "woefully inadequate" (RP (10/26/12) 18), "deficient in every conceivable way" (CP 333), "random and superficial" (CP 338), "virtually useless" (CP 338), and "fell short of even the most rudimentary background investigation" (CP 338).

RP (2/22/13) 34-35. The court concluded that “[t]he only rational remedy that the court could impose is to strike the notice of intent to seek the death penalty, and it is so ordered.” RP (2/22/13) 35.

At the conclusion of the hearing, the State asked whether the court had actually *seen* the materials compiled by the State's private investigator. RP (2/22/13) 36. The court responded that it believed that it had, but “I don't remember where I saw it.” Id. Several days later, the trial court issued a “Court's Clarification,” explaining that it had relied solely on the brief filed by the defense in support of Monfort's motion to strike the death penalty notice (CP 320-64), and the State's response to that motion (CP 377-86). CP 836.

Neither of the pleadings referenced by the trial court contains a copy of the State's investigator's report. CP 320-64, 377-86. Moreover, the record shows that the trial court never saw the report in question.⁹

⁹ In litigating a public records request, the State and the Seattle Times agreed that the report was exempt from disclosure; thus, the report was never provided to the court for its review during this process. See CP 72-73 (report placed in “exempt” category for Public Records Act purposes), 74-76 (Seattle Times agrees to this exemption), 86 (documents subject to agreed exemption not provided to court), 96 (discovery pages 1680-1727, encompassing report, “not provided”). See also “State's Reply to Monfort's Response to State's Motion for Discretionary Review” at 1-4, filed in this Court on March 22, 2013.

On March 7, 2013, the trial court issued a written order memorializing its rulings on several motions brought by Monfort to dismiss the death penalty notice. CP 837-38. As relevant here, the court denied Monfort's "motion to strike the death notice because the plaintiff considered the offense in weighing mitigating factors." CP 837. The court, however, "[o]rdered that defendant's motion to strike the death notice because the plaintiff abused its discretion and failed to properly exercise discretion in considering mitigating materials is granted, for the reasons set forth in the court's oral decision." CP 838.

This Court granted the State's motion for discretionary review of the trial court's action striking the death penalty notice based on the Prosecutor's alleged abuse of discretion as to mitigation. The Court also granted Monfort's cross-motion for discretionary review "as to whether the Prosecutor should have considered the nature of the offense in deciding whether to file the death penalty notice." Trial in this matter is currently scheduled for September 13, 2013. CP 277.

D. SUMMARY OF ARGUMENT

Under RCW 10.95.040, an elected prosecuting attorney has broad discretion in an aggravated first degree murder case to decide whether to file a notice of special sentencing proceeding, thereby permitting a jury to consider whether the death penalty should be imposed. The only statutory guidance as to the exercise of the prosecutor's discretion is that the prosecutor must determine whether there is "reason to believe that there are not sufficient mitigating circumstances to merit leniency" before filing the notice.

If the prosecutor decides to file the notice, the statute requires that this be accomplished within thirty days after the defendant's arraignment. The trial court may extend this period "for good cause shown."

The King County Prosecuting Attorney agreed to extensions of this time period totaling almost eight months above and beyond the statutory thirty days. He repeatedly invited Monfort's attorneys to submit any mitigating material in their possession, and he repeatedly invited them to meet with him to discuss any evidence in mitigation within their knowledge. Despite this, the defense team has adamantly refused, to this day, to provide the Prosecutor with *anything* in reference to mitigation.

The Prosecutor took the additional proactive step of hiring an investigator to look into Monfort's background. Based in part on the investigator's report, as well as the thousands of pages of discovery from the criminal investigation, the Prosecutor concluded that filing the notice of special sentencing proceeding was appropriate under the statute. Almost nine months after Monfort's arraignment, the Prosecutor filed and served the notice.

Even then, the Prosecutor did not cut off any avenue for the defense to present its own information in mitigation. Rather, the Prosecutor assured Monfort's defense team that he would consider evidence in mitigation *at any point in the proceedings*. To date, the Prosecutor has received nothing from the defense in support of mitigation.

Almost two and one-half years after the Prosecutor filed the death penalty notice, the trial court found that the Prosecutor had relied on insufficient information in making his decision to file the notice, and that the Prosecutor had accordingly abused his discretion. The court dismissed the notice of special sentencing proceeding.

In so doing, the trial court overstepped the bounds of its statutory authority, and improperly intruded on the charging

authority vested solely in the prosecutor. While the statute entrusts the decision on the sufficiency of mitigating circumstances to the prosecuting attorney, and a prosecutor's charging decisions in general need only be based on probable cause, the trial court here made *itself* the arbiter of the sufficiency and the quality of the information considered by the Prosecutor in reaching his decision. Worse yet, the trial court usurped the Prosecutor's role without ever *seeing* the report compiled by the investigator whom the Prosecutor had hired to look into Monfort's background.

The trial court's ruling in essence gives defense attorneys in a capital case complete control over a prosecutor's decision whether to file a death penalty notice, including the power to delay such a case indefinitely. Despite the fact that the statute contains no requirement that the prosecutor consider a "mitigation package" from the defense before making the decision whether to file a death penalty notice, the trial court's decision here allows a defense team to hold the decision hostage – and ultimately prevent the filing of the notice altogether – simply by refusing to turn over mitigation materials.

As this case shows, the delay caused by defense counsel's recalcitrance may be lengthy and indefinite. This cannot be what

the Legislature intended when it enacted RCW 10.95.040. This Court should not countenance such flagrant intrusion by the trial court on a decision properly entrusted to the discretion of an elected executive. The trial court's order should be vacated, and this matter should proceed to jury trial as a capital case.

E. ARGUMENT

1. THE TRIAL COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY IN DISMISSING THE DEATH PENALTY NOTICE.

In concluding that the King County Prosecuting Attorney abused his discretion in filing the notice of special sentencing proceeding in Monfort's case, the trial court overstepped the bounds of its own authority under RCW 10.95.040. Without ever seeing the information gathered by the investigator hired by the Prosecutor, the trial court summarily concluded that it was insufficient. In reaching this conclusion, the court improperly relied on the defense attorneys' disparaging characterizations of the investigator's report. This Court should reverse.

The procedure for filing a notice of special sentencing proceeding is set out in RCW 10.95.040. Where the prosecuting attorney has charged a defendant with aggravated first degree

murder, the prosecutor "shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.040(1).

The statute also requires that the notice be served and filed within thirty days of arraignment unless the trial court has extended the period "for good cause shown," and it precludes a defendant from pleading guilty as charged during the period for filing the notice. RCW 10.95.040(2). If the notice is not filed and served as provided by statute, the prosecutor may not request the death penalty. RCW 10.95.040(3).

This is the sum total of the requirements established by the Legislature for filing the death penalty notice. The statute says nothing about the source of the information that a prosecutor must consider in addressing mitigation, nor does it specify the quantum of information required. Significantly, the statute says nothing about a "mitigation package" from the defense.

This Court has provided guidance as to the scope of the discretion afforded to prosecutors in making the decision whether to seek the death penalty in an aggravated first degree murder case.

In State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the prosecutor conveyed the decision to seek the death penalty on the date Pirtle was charged. Id. at 641. While assuring the defense that he would accept mitigating evidence, the prosecutor refused to extend the thirty-day statutory period. Id. at 641-42. At the end of the thirty-day period, the prosecutor filed a notice of special sentencing proceeding. Id. at 642.

This Court observed that a prosecutor's discretion in seeking the death penalty is not unfettered – before seeking this penalty, there must be “reason to believe that there are not sufficient mitigating circumstances to merit leniency.” Id. The prosecutor must approach each case individually – an inflexible policy is not permitted. Id. (citing In re Personal Restraint of Harris, 111 Wn.2d 691, 693, 763 P.2d 823 (1988)). Input from the defense is “normally desirable,” since subjective factors are better known to the defendant. Id.

The Court declined to find, however, that the prosecutor had violated the statute by moving relatively swiftly in Pirtle's case:

Had the prosecutor in this case announced a decision on [the date the charge was filed] and then refused to accept any additional evidence, it would indicate an unwillingness to engage in the individualized weighing required in *Harris*. However, that is not what

happened here. The prosecutor announced a tentative decision, specifically said he would look at mitigating evidence developed by the defense, and then waited the full thirty days.

Pirtle, at 642. Noting that the prosecutor had information about most of the statutory mitigating factors from Pirtle's extensive prior contacts with law enforcement, the Court concluded: "Given what the prosecutor already knew and his willingness to wait thirty days to see if the defense could develop additional information, we find the prosecutor did not abuse his discretion." Id. at 643.

In In re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), the prosecutor filed the death penalty notice on the same day as filing the amended information charging Lord with aggravated first degree murder. Id. at 304. Lord argued that the timing of the notice showed that the prosecutor did not exercise discretion in seeking the death penalty, but rather did so automatically upon filing a charge of aggravated first degree murder. Id. This Court rejected the claim: "Although a policy of seeking the death penalty in every aggravated murder case would be an abrogation of [the duty to make the statutory determination as to mitigating circumstances] and, in that sense, an abuse of discretion, Lord has made no showing that the Kitsap County

Prosecutor does in fact seek the death penalty in every aggravated murder case.” Id. at 305 (internal citation omitted).

The facts of this case do not approach those of Pirtle and Lord. The King County Prosecuting Attorney agreed to two significant extensions of the time for filing the notice, totaling almost eight months beyond the statutory thirty-day period. And the Prosecutor has repeatedly said that he will consider evidence of mitigation *whenever* it is presented to him.¹⁰ CP 114 (“The Prosecutor will always consider mitigating evidence, from any source, at any time”), 149 (“As is our practice, our office will always consider any evidence of mitigation presented to us at any stage of a criminal prosecution.”); RP (10/26/12) 22 (“We have said numerous times, both on the record and in writing to the defense counsel, Mr. Satterberg will always consider mitigation in this case.”). This is hardly the “inflexible policy” that this Court warned against in Pirtle.

Moreover, in the absence of information relevant to mitigation from the defense, the Prosecutor undertook an investigation into Monfort’s background, hiring a private investigator to contact people who knew Monfort at various times in his life.

¹⁰ The defense has acknowledged the possibility that the Prosecutor might change his mind if presented with compelling mitigation. RP (10/26/12) 35.

The investigator interviewed approximately two dozen persons, including family members, associates, fellow employees, fellow students, and former teachers of Monfort. CP 384-85. In addition, the criminal investigation in this case was substantial, and the Prosecutor had that information available as well. See RP (8/25/10) 31-32.

This is undoubtedly more information than the prosecutor in Pirtle had when he made his decision to file the death penalty notice. And the type of investigation conducted in Monfort's case is far more likely to lead to mitigating information than simply perusing records of criminal convictions (the information available in Pirtle).

This Court found no abuse of the prosecutor's discretion in Pirtle, and there was certainly none here. Neither the statute nor Pirtle suggests that the trial court may reweigh a prosecutor's decision to file a death penalty notice, based on the court's own opinion of the sufficiency of the information that the prosecutor had available in making that decision. In doing so here, the trial court exceeded its statutory authority.

The trial court also overstepped its bounds by empowering the defense to control the *timing* of the prosecutor's decision. The requirement in RCW 10.95.040 that the prosecutor make the

decision whether to file a notice of special sentencing proceeding within thirty days of arraignment, and file and serve any notice on the defendant within that same time period or forfeit the right to do so, ensures that a defendant will get early notice of the State's decision to seek the death penalty. The Legislature added a safety valve – the availability of a “good cause” extension of the thirty-day time period for a prosecutor to make the decision.

There is nothing in the statute that even *hints* that the Legislature intended to allow a defendant to unilaterally prevent the prosecutor from going forward on a capital case by adamantly refusing to timely provide any mitigating evidence whatsoever. The trial court acted outside its statutory authority in dismissing the death penalty notice in this case, and this Court should not allow that ruling to stand.

This is not to say that a trial court has no ability to oversee the prosecutor's actions under RCW 10.95.040. Were a prosecutor to blatantly disregard the statutory requirement by refusing to consider *any* mitigating evidence before filing the death penalty

notice, the trial court would be within its authority to intervene.¹¹

See State v. Pettit, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980) (“We have held in several instances that a trial court may order a public official to exercise discretion, if the official has refused to do so.”).

However, there is no authority for the trial court to weigh the quantity and quality of the evidence, or to substitute its judgment for the prosecutor’s, where the decision whether to file a notice of special sentencing proceeding is at issue. This is what the trial court did here. The trial court’s action in striking the death penalty notice, based on its opinion that the Prosecutor “abused his discretion,” illustrates the trial court’s fundamental misunderstanding of its role under the statutory scheme.

The record in this case shows no basis for dismissing the death penalty notice. The Prosecutor delayed his decision for a significant period of time, specifically to allow Monfort’s attorneys the opportunity to present material in mitigation. The Prosecutor gathered information on his own to aid him in making his decision. This record supports the conclusion that the Prosecutor properly

¹¹ When the trial court in this case asked whether there is “an abuse of discretion test or a failure to exercise discretion test,” the State candidly responded: “I think that there is [if there is] evidence indicating that mitigation was provided or mitigation was available and the prosecutor explicitly chose not to look at it.” RP (10/26/12) 29.

complied with the statute in filing the notice of special sentencing proceeding. The trial court overstepped its statutory authority in dismissing the notice.

2. THE TRIAL COURT'S DISMISSAL OF THE DEATH PENALTY NOTICE IMPERMISSIBLY INTRUDED ON THE CONSTITUTIONAL CHARGING AUTHORITY OF THE PROSECUTING ATTORNEY.

In dismissing the notice of special sentencing proceeding filed by the King County Prosecuting Attorney in this case, the trial court improperly intruded on the charging authority that resides exclusively with prosecuting attorneys. This Court should reverse.

"The charging discretion of prosecuting attorneys is an integral part of the constitutional checks and balances that make up our criminal justice system." State v. Rice, 174 Wn.2d 884, 889, 279 P.3d 849 (2012). Prosecutors are vested with "wide discretion" to determine whether to charge suspects with criminal offenses.

State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984).

"A prosecuting attorney's most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file." Rice, 174 Wn.2d at 901.

"[A] prosecutor's broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." Rice, 174 Wn.2d at 904. Prosecutors in the federal system similarly retain broad discretion charging discretion. Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed.2d 547 (1985).

This discretion is not unfettered; it must comport with constitutional and statutory requirements. Rice, 174 Wn.2d at 903. The decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Wayte, 470 U.S. at 608 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed.2d 604 (1978)).

Nevertheless, "the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. at 607. "[A] prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." McCleskey v. Kemp, 481 U.S. 279, 296 n.18, 107 S. Ct. 1756, 95 L. Ed.2d 262 (1987).

This Court has been careful, in the death penalty context, to distinguish the prosecutorial function from the judicial function. “The decision to seek the death penalty is properly considered a charging decision.” Koenig v. Thurston County, 175 Wn.2d 837, 846, 287 P.3d 523 (2012) (citing State v. Bartholomew, 104 Wn.2d 844, 848-49, 710 P.2d 196 (1985)). “The prosecutor is empowered with substantial discretion and autonomy in making the determination to seek a sentence of death.” Koenig, 175 Wn.2d at 846 (citing State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984)). “This court has never recognized a prosecutor’s discretion to file charges or to seek the death penalty as a judicial function.” State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999).

This Court has also recognized the limited effect of a prosecutor’s decision to file a notice of special sentencing proceeding under RCW 10.95.040(1): “the prosecutor can neither impose the sentence nor require that it be imposed.” State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984). The prosecutor’s discretion in this context is similar to his discretion in charging a crime: “The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient

evidence exists to take the issue of mitigation to the jury." Id.
(quoting Dictado, 102 Wn.2d at 297-98).

There is certainly no *prima facie* case of improper conduct on the part of the King County Prosecuting Attorney in filing the death penalty notice in Monfort's case. The Prosecutor gathered and considered information about Monfort from a variety of sources before concluding that there was "reason to believe that there are not sufficient mitigating circumstances to merit leniency."

RCW 10.95.040(1). The Prosecutor followed the requirements of the statute by making his decision to seek a special sentencing proceeding within the "good cause" extensions of time.

RCW 10.95.040(2).

In addition, despite the absence in the statute of any mention of a "mitigation package" from the defense, the Prosecutor acquiesced in two extensions of the statutory time period to allow the defense additional time to gather and provide evidence in mitigation. Rather than the statutory thirty days, Monfort's defense

team was allowed almost nine months to present such information to the Prosecutor for use in his decision.¹²

Finally, and perhaps most significantly, the Prosecutor has announced his willingness to consider evidence in mitigation *at any time* it becomes known to him. As long ago as August 2010, Monfort's attorneys acknowledged this: "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." CP 153. To date, however, despite the passage of more than three years since Monfort's arraignment and the expenditure of more than \$367,000 allocated specifically for the

¹² In concluding that the Prosecutor abused his discretion by not waiting even longer for the defense to present a mitigation package, the trial court emphasized that it had "on more than one occasion" told the State that the defense was "moving ahead" with its mitigation investigation. RP (2/22/13) 26. *See also* RP (10/26/12) 29 ("[T]he court has made clear on numerous hearings with the prosecutor that [the defense is] moving ahead on both mitigation and the fact finding phase."), 33 ("Except from my telling you that [the defense was] proceeding on [mitigation investigation] . . . But you did have my statement.").

These comments, which were based on *ex parte* reports provided to the trial court by the defense, imply that the trial court believed that *the court* was the proper arbiter of the length of time that the Prosecutor must wait for mitigation evidence from the defense before exercising his discretion and making his decision. The statute gives the court no such role in the process.

mitigation investigation, the defense has provided the State with exactly nothing.¹³

The Prosecutor's approach to the decision to seek a special sentencing proceeding hardly demonstrates the "inflexible policy" denounced by this Court in Pirtle. There is no evidence that the Prosecutor acted improperly in reaching his decision. The trial court's ruling that the Prosecutor "abused his discretion" in effect substituted the court's own judgment as to the propriety of filing the death penalty notice for that of the Prosecutor. In so doing, the court improperly invaded the constitutionally granted inherent authority of the Prosecutor to make charging decisions. This Court should reverse.

3. THE REMEDY FOR ANY VIOLATION IS AN ORDER TO CONSIDER ANEW THE DECISION WHETHER TO FILE A DEATH PENALTY NOTICE, USING PROPER PROCEDURES.

The King County Prosecuting Attorney properly complied with every requirement of RCW 10.95.040. In the event that this

¹³ The trial court, undoubtedly correctly, concluded that the defense team had made a *tactical decision* not to provide the Prosecutor with any mitigating information that they had collected prior to the Prosecutor making his decision. RP (10/26/12) 36-37; RP (2/22/13) 26. While Monfort's attorneys were hesitant to explicitly characterize their decision as "tactical," they admitted that they did not think providing the information to the Prosecutor during the statutory time period would have been "beneficial" or "helpful" to their client. RP (10/26/12) 36, 37, 38.

Court disagrees, the proper remedy is not to strike the notice of special sentencing proceeding, as the trial court did here, but to reopen the statutory time period so that the Prosecutor can comply with any additional requirements announced by this Court.

This Court has already imposed the State's suggested remedy in a similar situation. In Pettit, the prosecutor had adopted a mandatory policy in filing a habitual criminal allegation, under which he did not consider any mitigating circumstances before filing the information. 93 Wn.2d at 294. This Court found that such a mandatory policy was "an abuse of the discretionary power lodged in the prosecuting attorney." Id. at 296. The Court "remand[ed] the matter for resentencing based on a recommendation reached through the exercise of prosecutorial discretion." Id.

Should this Court conclude that the King County Prosecuting Attorney improperly exercised his charging discretion in this case by making the decision to file the death penalty notice without considering sufficient evidence as to mitigation, this Court should remand the matter to the trial court for the Prosecutor to exercise his discretion anew under appropriate circumstances.

F. CONCLUSION

For the foregoing reasons, the trial court's ruling should be reversed, the notice of special sentencing proceeding reinstated, and the case remanded for trial.

DATED this 29th day of April, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

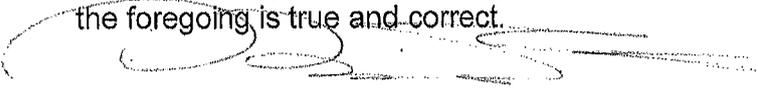
By: 
DEBORAH A. DWYER, WSBA #18887
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for By: 
ANN M. SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Suzanne Lee Elliott**, the attorney for the defendant, at the Hoge Building, 705 Second Avenue, Suite 1300, Seattle, WA 98104-1797, containing a copy of the **Petitioner's Opening Brief**, in **STATE V. CHRISTOPHER JOHN MONFORT**, Cause No. 88522-2, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

04-29-13

Date

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Dwyer, Deborah; Summers, Ann; Suzanne Elliott (suzanne-elliott@msn.com)
Subject: RE: State of Washington v. Christopher John Monfort/Case # 88522-2

Rec'd 4-29-13

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

From: Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]
Sent: Monday, April 29, 2013 2:52 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; Summers, Ann; Suzanne Elliott (suzanne-elliott@msn.com)
Subject: State of Washington v. Christopher John Monfort/Case # 88522-2

Dear Supreme Court Clerk:

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

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

Sincerely,

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