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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

CHRISTOPHER J. MONFORT,

Respondent/Cross-Petitioner.

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

**REPLY BRIEF OF PETITIONER AND
RESPONSE BRIEF OF CROSS-RESPONDENT**

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I. PETITIONER'S ARGUMENT IN REPLY

A. ISSUE

Whether the trial court impermissibly intruded on the constitutional charging authority of the King County Prosecuting Attorney when the court dismissed the notice of special sentencing proceeding, based on the court's unfounded belief that the Prosecutor had considered inadequate and insufficient mitigation information in reaching the decision to file the notice.

B. ARGUMENT

1. THE *DE NOVO* STANDARD OF REVIEW.

Citing State v. Dearbone, 125 Wn.2d 173, 178-79, 883 P.2d 303 (1994), Monfort asserts that the standard of review of Judge Kessler's ruling dismissing the notice of special sentencing proceeding is *de novo*. While the State agrees that this Court should review *de novo* Judge Kessler's interpretation of his own authority over the Prosecutor's actions pursuant to RCW 10.95.040, the State disagrees with Monfort's understanding of the nature of *de novo* review.¹

¹ As a rule, when a party obtains a ruling in its favor in the trial court, that party argues for the most deferential standard of review on appeal, the abuse of discretion standard. Monfort's reason for instead urging a *de novo* standard of review becomes clear, however, upon understanding his unique interpretation of that standard. *See infra*.

The appellate courts have explained what *de novo* review means in a number of different contexts over the years. Across the spectrum of judicial review, the courts have consistently adhered to the principle that *de novo* review does *not* mean that the appellate court takes *new evidence* on review.

This Court took care to explain the limits of *de novo* review in reviewing the conclusion of the Commission on Judicial Conduct that a judge's conduct had violated canons of the Code of Judicial Conduct:

This *de novo* review does not mean that we hold a new evidentiary hearing *or that the judge and Commission are free to build a factual record anew upon our review*. Rather, *de novo* review means we are not bound by the Commission's findings and conclusions. We must independently evaluate the evidence *in the Commission's record* to determine if the judge violated the Code and to determine the proper sanction.

In re Disciplinary Proceeding Against Turco, 137 Wn.2d 227, 245-46, 970 P.2d 731 (1999) (italics added).

De novo review means that "the court must determine the correct law independent of the agency's decision and then apply the law to *established facts de novo*." Port of Seattle v. Pollution Control Hearings Board, 151 Wn.2d 568, 588, 90 P.3d 659 (2004)

(citing Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982)) (italics added). The same limitation applies in the criminal context: "De novo review applies to [the Miranda² custody determination] to the extent that the trial court must apply 'the controlling legal standard *to the historical facts.*'" State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025 (2003) (quoting Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed.2d 383 (1995)) (italics added).

Despite this clear precedent limiting *de novo* review on appeal to the facts established in the trial court, Monfort attempts to persuade this Court to take new evidence in furtherance of review:

Adopting this [*de novo*] standard of review also resolves the State's complaints about the fact that Judge Kessler did not have sufficient information to determine that the Prosecutor failed to engage in a proper consideration of Monfort's mitigating circumstances. Monfort does not concede that the information before the Court was insufficient. But, if there is some question, *this Court can simply review the written reports given to the Prosecutor and make its own de novo determination.*

Monfort's Response to State's Opening Brief and Opening Brief on Issue on Cross Appeal ("Response"), at 7 (internal citations

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

omitted) (*italics added*). This of course turns appellate review on its head, making the reviewing court into a second trial court, authorized to make new factual determinations based on new evidence.³

There is no dispute that Judge Kessler never saw, and thus could not have relied on, the report prepared by the State's hired investigator.⁴ That report thus cannot properly play a part in *any* appellate review, whether under the *de novo* standard or any other.

2. THE PROSECUTOR'S FILING DECISION DOES NOT DETERMINE PUNISHMENT.

Monfort contends that the prosecutor's decision whether to file a notice of special sentencing proceeding under RCW 10.95.040(1) is not a charging decision. Monfort does not specify exactly how this decision should be characterized, other than to describe it as "*sui generis*." Response, at 9.

But Monfort fails to explain how the decision to place a criminal charge or an aggravating factor before a jury for its

³ Actually, Monfort goes even further. In asking this Court to "make its own *de novo* determination," he appears to be asking this Court to assess any mitigating circumstances anew, and to substitute its own answer to the statutory question in place of the prosecutor's. See Response, at 7, 17-18. This, of course, would be a wholesale usurpation of the decision allocated to the prosecutor under RCW 10.95.040.

⁴ The State has filed a separate motion to strike this report from the record on review.

determination, either of which will result in punishment *if* the jury finds the charge or aggravating factor supported beyond a reasonable doubt, is fundamentally different from the decision to place a capital case before the jury for its determination as to punishment. In each case, the prosecutor's decision is a charging decision.

This Court has been clear about the nature of the prosecutor's decision under RCW 10.95.040(1):

[T]he prosecutor can neither impose the sentence nor require that it be imposed. In *Dictado*,⁵ we observed that *the prosecutor's discretion in this regard 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." *Dictado*, at 298.

State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984) (internal citation omitted) (italics added).

Recognizing that Campbell is contrary to his position, Monfort asks this Court to "disavow" the final sentence of the above quotation, taken directly from Dictado, as a "misstatement of the law." Response, at 7 n.2. Monfort's reasoning is difficult to follow.

⁵ State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984).

He first points out that “[i]f the prosecutor files a notice to seek death, the issue of mitigation will *always* go to the jury if the jury finds the defendant guilty during the guilt phase.” Id. (italics in original). But this is exactly what this Court said in Campbell and Dictado – the prosecutor, in making the filing decision, determines whether the evidence supports placing the decision on mitigation (and thus the decision whether the death penalty will be imposed) before the jury. The prosecutor’s decision to *file the notice* does not require the jury to *impose the penalty*.

Monfort nevertheless strains all logic in reaching his conclusion. He reasons that, “[b]y filing a death notice the prosecutor is requiring that the jury impose death if there are not sufficient mitigating circumstances presented.” Response, at 7 n.2. He adds that “no person in Washington can be sentenced to death unless the prosecutor files a notice,” and that “no other entity can file such a notice.” Id. at 7-8 n.2. He then concludes with this non sequitur: “Thus, in capital cases, it is truly the prosecutor who determines the sentence.” Id. at 8 n.2. This, of course, ignores the fact that, while a prosecutor may file a notice under RCW 10.95.040, it is *the jury* that considers the ultimate punishment,

under the instruction set out in RCW 10.95.060(4), and the jury may spare the defendant's life in spite of the prosecutor's filing decision.

Perhaps recognizing that the law does not support his position, Monfort argues that, even if filing the death penalty notice is a charging decision, the prosecutor's discretion is not unfettered. Response, at 10. He points out that an inflexible policy is not permitted, that the prosecutor must in each case consider seriously whether it is appropriate to file the notice, and that the decision may not be based on race, religion, or other such classifications. Id. at 10-11.

There is no dispute about any of these principles. The problem for Monfort here is that the King County Prosecuting Attorney ("Prosecutor") did not demonstrate an inflexible policy. Rather, the Prosecutor repeatedly invited Monfort's attorneys to submit any mitigating information that they had discovered, and several times agreed to an extension of the deadline for making his decision to afford Monfort's team more time to gather such information. In all, the Prosecutor waited almost eight months beyond the statutory thirty-day period. In addition, the Prosecutor

has assured Monfort's attorneys that he will accept and consider mitigating information at *any* time in the process. *Cf. State v. Pirtle*, 127 Wn.2d 628, 642, 904 P.2d 245 (1995).⁶

Nor can it be said on this record that the Prosecutor did not consider seriously whether it was appropriate to file the death penalty notice in Monfort's case. The Prosecutor undertook an investigation into Monfort's background, thus likely gathering at least as much information relevant to mitigation as the prosecutor in *Pirtle* had from Pirtle's prior contacts with law enforcement. *Pirtle*, 127 Wn.2d at 642-43. Nor did the Prosecutor here base his decision on race, religion, or any other inappropriate classification.⁷

⁶ "Had the prosecutor in this case announced a decision on [the day Pirtle was charged with aggravated first degree murder] 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*, 127 Wn.2d at 642.

⁷ Monfort's implication that the Prosecutor improperly based his decision on Monfort's political beliefs should be rejected. Response, at 18 n.5. Monfort's suggestion that the State's investigator questioned people specifically about Monfort's political beliefs is based on speculation only. In any event, Monfort readily and publicly made known his political beliefs in diverse ways and forums. See, e.g., RP (8/25/10) 3, (9/2/10) 4 (spontaneous in-court statements); CP 10 (note left at Charles Street arson on October 22, 2009, a little over one week before he shot and killed Officer Brenton: "October 22nd is the 14th National day of protest to stop Police Brutality[.] These Deaths are dedicated to Deputy Travis Bruner, he stood by and did nothing, as Deputy Paul Schene Brutally beat and [sic] 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.").

Contrary to Monfort's claim (Response, at 19), the State has never argued that a prosecutor's decision to file a notice of special sentencing proceeding under RCW 10.95.040(1) is unreviewable. Rather, the State has consistently urged this Court to be guided by its own precedent in Pirtle in assessing whether the Prosecutor has complied with the statute here. See also In re Personal Restraint of Lord, 123 Wn.2d 296, 304-05, 868 P.2d 835 (1994) (not inflexible where notice not filed in every case). Under that standard, the Prosecutor had sufficient information on which to base his filing decision, afforded the defense ample time to provide him with additional information, and did not pursue an inflexible policy.

Fairly assessed, the record in this case supports the conclusion that the Prosecutor's decision to file the death penalty notice was considered and well-reasoned, and was based on sufficient information. The decision was well within the authority vested in the Prosecutor under the statute, and the trial court's intervention was inappropriate.

3. THE MEANING OF MITIGATION.

Monfort claims that the State suggests that mitigation means something different for the prosecutor than it does for the defense. Response, at 16. Monfort misapprehends the distinction that the

State urges. It is the difference between the *pretrial filing phase* and the *penalty phase of the trial* that is critical with respect to mitigation.

This important difference is well illustrated by the language of the relevant statutes. While both RCW 10.95.040(1) and 10.95.060(4) refer to "mitigating circumstances," it is clear that mitigating information is put to very different uses at these different phases. In the early stages of a case in which a defendant is charged with aggravated first degree murder, the prosecutor is directed to file a notice of special sentencing proceeding "when there is *reason to believe* that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.040(1) (*italics added*). By contrast, after the defendant has been found guilty of that crime, the jury must answer the following question: "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?" RCW 10.95.060(4) (*italics added*).

The amount of information that is sufficient to create a "reason to believe" is necessarily, and properly, not the same as that which is required to make a finding "beyond a reasonable

doubt.” The wide gulf between “reason to believe” and “convinced beyond a reasonable doubt” parallels the critical difference between the two functions at issue here: the prosecutor decides only *whether the jury will address* capital punishment, while only the jury may decide to *impose* that punishment.

Monfort's reliance on Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003) and Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed.2d 360 (2005) to establish the requirements for a *pre-filing* mitigation investigation is misplaced. In both of those cases, the Court addressed the requirements for a constitutionally adequate mitigation investigation in preparation for the *penalty phase* of a capital case. Rompilla, 545 U.S. at 380 (“This case, like some others recently, looks to norms of adequate investigation in preparing for *the sentencing phase of a capital trial.*”) (italics added); Wiggins, 539 U.S. at 519-20 (“Petitioner renews his contention that his attorneys’ performance *at sentencing* violated his Sixth Amendment right to effective assistance of counsel.”) (italics added).

Monfort has cited to no authority in support of his contention that what is constitutionally required for the mitigation investigation in preparation for the penalty phase, where punishment will be

imposed, is the same as what is required before the prosecutor may file a notice of special sentencing proceeding, an act that merely places the decision before the jury following conviction of aggravated first degree murder. Neither law nor logic supports Monfort's position.

Monfort misstates the record when he claims that the deputy prosecuting attorney ("DPA") "admitted that if the defense had presented a mitigation package to the prosecutor that consisted entirely of what the prosecutor's office obtained from its own investigation, defense counsel would not have provided the effective assistance of counsel." Response, at 14-15. The record is clear that the DPA initially misunderstood the court's question and, after clarifying what the court was referring to, said just the opposite of what Monfort claims.

COURT: If the defense – if the defense had presented a mitigation package to the prosecutor that consisted entirely of what the prosecutor's office obtained from its own hire, what is the chance of that getting affirmed on appeal? Wouldn't that be ineffective assistance?

DPA: Yes.

COURT: It would be; right.

DPA: Right. Because they did no work. Bu[t] that is only – you are talking about prefiling the death penalty notice?

COURT: Yes.

DPA: No. There is nothing that requires it. In fact, the case law specifically says that it is desirable to have input from the defense counsel.⁸ But we didn't get that here.

RP (10/26/12) 30.

Monfort's assumption that the amount of information in mitigation that the prosecutor must have before making the filing decision under RCW 10.95.040(1) is the same as what the jury should be provided with before making its decision at the penalty phase in a capital case pursuant to RCW 10.95.060(4) finds support neither in the language of the relevant statutes, case law, or logic.⁹ This Court should reject Monfort's position.

⁸ Pirtle, 127 Wn.2d at 642 (input from the defendant as to mitigating factors is "normally desirable" prior to the prosecutor making the decision whether to file a notice of special sentencing proceeding).

⁹ In enacting RCW 10.95.040, the legislature clearly envisioned that the inquiry into "mitigating circumstances" under that statute could be completed in as little as 30 days. This alone strongly suggests that the inquiry under that statute is not the same as the exhaustive investigation that is required under prevailing standards for constitutionally effective assistance of counsel at the penalty phase of a capital case.

4. REMEDY.

In arguing against the State's proposed remedy (should one be needed), Monfort contends that the State is taking a position that is inconsistent with its position in the trial court, and thus the State is "judicially estopped" from asking that the statutory period under RCW 10.95.040(2) be reopened. This is incorrect. The State took the position in the trial court that it had complied with the statute, and it maintains that position before this Court.¹⁰ However, should this Court announce a new standard for compliance, one that goes beyond the standard set out in Pirtle, supra, the only appropriate remedy would be to allow the State an opportunity to comply with the statute under the newly announced standard.

Monfort's reliance on Dearbone is equally unavailing. In that case, there was no question that the State had failed to fulfill the statutory requirement of serving the notice of special sentencing

¹⁰ Monfort contends that "[a]ccepting the State's argument now creates the perception that the State misled the Court about the need to make the death decision in September 2010." Response, at 24. The State indeed argued that "[T]his is Phase 1 of a multi-faceted case here. The prosecutor needs to make his decision and move on. Then we can prepare for trial. . . . Once that decision is made, then we can look forward, what is our trial date now, what are our time lines, what are the briefing schedules we are going to have in place here." RP (8/25/10) 29. In fact, since the notice was filed, the parties have completed approximately one year of litigating defense challenges to the notice, and there are more such motions scheduled. See CP 278, 320, 837-38; RP (2/22/13) 23-35. Had the notice not been filed until Monfort finally submitted his mitigation packet on April 30, 2013, this year of litigation would still lie ahead, further delaying any trial date.

proceeding on the defendant within the statutory time period. 125 Wn.2d at 176. This Court held that “good cause requires a reason *external* to the prosecutor for his failure to serve notice.” *Id.* at 179 (italics in original). Monfort argues that the Prosecutor here must similarly show some external impediment that prevented compliance with the statute.

But here, the very issue before this Court is *whether* the Prosecutor complied with the statutory requirement, i.e., whether he had “reason to believe that there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.040(1). Again, if this Court announces a new standard for compliance with that portion of the statute, the Prosecutor should be allowed to consider his decision anew under the revised standard.

Finally, Monfort urges this Court to “order the appointment of a special prosecutor” if the statutory time period is reopened. Response, at 25. Monfort cites to neither statute nor case law in support of this request.

“The power of the court to appoint a special prosecuting attorney is limited to cases where such an appointment is provided

by statute." Hoppe v. King County, 95 Wn.2d 332, 339, 622 P.2d 845 (1980) (citing State v. Heaton, 21 Wash. 59, 62, 56 P. 843 (1899), and Const. art. 11, § 5). The requirements are clear:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

RCW 36.27.030. "In order for a special prosecutor to be appointed, the prosecuting attorney must be *unable* to perform a duty of that office." Hoppe, 95 Wn.2d at 339 (italics added).

Much as Monfort may wish to get a second opinion on the statutory question under RCW 10.95.040(1), he cannot show that the King County Prosecuting Attorney, the elected official designated in the statute to decide whether there is "reason to believe that there are not sufficient mitigating circumstances to merit leniency," is unable to perform that duty. Monfort's suggestion that this Court usurp the Prosecutor's authority by appointing someone else in his stead should be rejected.

5. MANY OF MONFORT'S ARGUMENTS ARE IRRELEVANT.

Monfort makes a number of arguments that have little or nothing to do with the two issues before this Court on review. The State's response to these arguments will be brief.

Monfort's recitation of the states that have abolished the death penalty in recent years falls into this category. Response, at 5 n.1. Even if Monfort were correct that those states' actions were driven by "fundamental constitutional flaws with capital punishment in this country,"¹¹ what is at issue here is not the constitutionality of the statutes governing capital punishment in Washington, but whether the Prosecutor has complied with the requirements of one of those statutes. This Court should not be swayed here by this irrelevant information.

Monfort employs a classic "straw man" to inject additional irrelevant argument into this review. He begins by urging this Court to "reject the Prosecutor's argument that no court can review the Prosecutor's compliance with RCW 10.95.040." Response, at 19. The State has never made such a categorical claim, but has merely

¹¹ Repeal of the death penalty in any given state could as easily be driven by concern about the costs associated with imposing and carrying out the death penalty and, in many cases, the futility of imposing that penalty.

alleged that the trial court here exceeded its authority and improperly dismissed the notice of special sentencing proceeding.

From this false premise, Monfort embarks on pages of argument to the effect that the death penalty is so arbitrary, and so infrequently imposed, that it amounts to cruel and unusual punishment in violation of the Eighth Amendment. Response, at 19-22. He also takes the opportunity to inject arguments about proportionality. Id. at 20-22. Finally, he implies that the Prosecutor's decision was racially motivated, a spurious accusation based on nothing more than the mere fact that Monfort is multi-racial and Officer Brenton was white. Id. at 22 and n.10.

None of these arguments illuminates the issues before this Court on review, which are issues of statutory interpretation. This Court should disregard these irrelevant arguments.

Finally, the State has never argued that RCW 10.95.040 involves a "balancing test" or a "proportionality review." Response, at 13-14. The State *has* argued, and continues to argue before this Court, that a prosecutor is not required to ignore the facts of the crime when determining whether there are sufficient mitigating

circumstances to merit leniency. As the trial court in this case concluded, Monfort's argument to the contrary "defies logic." RP (2/22/13) 23.

II. CROSS-RESPONDENT'S ARGUMENT IN RESPONSE

A. ISSUE

Whether the trial court properly concluded that RCW 10.95.040 does not prohibit the prosecutor from considering the facts of the crime in determining whether to seek the death penalty.

B. RELEVANT FACTS

In July of 2012, Monfort argued that the death penalty notice in this case should be stricken because the State "failed to comply with the mandates of RCW 10.95.040." CP 320. In particular, Monfort argued that the facts and circumstances of the crime "are not relevant" to the prosecutor's decision to seek the death penalty. CP 330. Monfort thus concluded that the Prosecutor here violated RCW 10.95.040 by considering the facts and circumstances of Monfort's crimes in deciding whether to seek the death penalty in this case. CP 332.

In its oral ruling denying the motion to strike the death penalty notice on this basis, the trial court concluded 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. On March 6, 2013, the trial court entered its written order, denying the defense motion to strike the death penalty notice on this basis. CP 837.

C. ARGUMENT

1. RCW 10.95.040(1) DOES NOT PROHIBIT THE PROSECUTOR FROM CONSIDERING THE FACTS OF THE CRIME.

Monfort argues on cross appeal that RCW 10.95.040(1) prohibits a prosecutor from considering the facts of the crime in deciding whether to seek the death penalty. Viewed within the context of the constitutional requirements imposed by the United States Supreme Court and the plain language of the relevant Washington statutes, this argument "defies logic," as the trial court concluded. The existence of mitigating circumstances that merit leniency must be considered in relation to the facts and circumstances of the crime. The trial court properly ruled that a prosecutor does not violate the statute by considering the facts and circumstances of the crime.

As the United States Supreme Court explained in Kansas v. Marsh, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 165 L. Ed.2d 429 (2006), in order for a state's death penalty scheme to be constitutional it must be both narrowing and 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, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976), "[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.*'" (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S. Ct. 59, 82 L. Ed. 43 (1937)) (italics added).¹² "The use of mitigation evidence is a product of the requirement of individualized sentencing." Marsh, 548 U.S. at 174.

¹² In Gregg v. Georgia, the Court upheld Georgia's death penalty scheme as constitutional because the discretion to impose the death penalty was suitably directed and limited where the "jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." 428 U.S. at 192.

This Court has found that chapter 10.95 RCW establishes a constitutional death penalty procedure because it both narrows the class of persons eligible for the death penalty and requires an individualized determination of whether the death penalty is appropriate in a particular case. State v. Rupe, 101 Wn.2d 664, 699, 683 P.2d 571 (1984) (citing State v. Bartholomew, 98 Wn.2d 173, 192-93, 654 P.2d 1170 (1982), *vacated*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed.2d 1383 (1983), *aff'd on remand*, 101 Wn.2d 631, 683 P.2d 1079 (1984)); Campbell v. Wood, 18 F.3d 662, 674-75 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). Individualization occurs twice under Washington's statutes: when the prosecutor makes a charging determination whether to seek the death penalty, and when the trier of fact decides whether to impose the death penalty. As to the first step, RCW 10.95.040(1) provides that:

If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

As to the second step, RCW 10.95.060(4) provides that:

Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to

deliberate upon the following question: "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?"

In construing a statute, a court's primary objective is to ascertain and carry out the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, but not viewed in isolation; rather, the court must consider the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Id. at 600-01.

Monfort argues that in regard to the first step of individualization contained in RCW 10.95.040(1)—the prosecutor's decision to seek the death penalty—the prosecutor may not consider the facts of the crime. This claim is contradicted by the plain language of the relevant statutes, and it defies common sense.

RCW 10.95.040(1) requires the prosecutor to consider "whether there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.070 sets

forth a non-exclusive list of "relevant factors" that the trier of fact may consider in deciding whether there are sufficient mitigating circumstances to merit leniency. These factors include:

- (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;
- (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;
- (5) Whether the defendant acted under duress or domination of another person;
- (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. . . .;
- (7) Whether the age of the defendant at the time of the crime calls for leniency; and
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

This non-exclusive list of mitigating circumstances conclusively demonstrates that the facts of the crime *must* be considered in determining whether "there are not sufficient mitigating circumstances to merit leniency," as required by both RCW 10.95.040(1) and 10.95.060(4). For example, the facts of the

crime must be considered in determining whether the murder was committed while the defendant was under an extreme mental disturbance. Similarly, the facts of the crime must be considered in determining whether the victim consented to the act of murder, or whether the defendant was a minor accomplice to a murder committed by another, or whether the defendant acted under duress or domination of another person. See In re Matter of Harris, 111 Wn.2d 691, 694, 763 P.2d 823 (1988) (noting that most of the statutory mitigating factors that the prosecutor should consider "are in the nature of explanations or excuses related to the crime itself.")

Since the legislature clearly intended the prosecutor to consider these statutory mitigating factors, and since these statutory factors require consideration of the facts of the crime, the legislature must have intended the facts of the crime to be part of the prosecutor's calculus in determining whether "there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.040(1).

Monfort bases his argument primarily on the difference in wording between RCW 10.95.040(1) and 10.95.060(4). However,

his argument ignores the differing purposes of those two statutes. RCW 10.95.060(4) sets forth the precise question that is to be presented to the jury in the court's instructions: "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?" While RCW 10.95.040(1) generally mirrors the inquiry set forth in RCW 10.95.060(4), there is no need to explicitly remind the prosecutor to consider the facts of the crime. Consideration of the facts of the crime is inherent in every charging decision, and the facts will already be known to the prosecutor by virtue of having made the initial determination that the defendant should be charged with aggravated murder.

This Court has repeatedly recognized what is obvious from a sensible reading of the plain language of the statutory scheme: consideration of the facts of the crime is a crucial aspect of a prosecutor's decision to seek the death penalty. In holding that RCW 10.95.040(1) is not unconstitutionally vague, this Court correctly characterized the inquiry under that statute as involving the facts and circumstances of the crime: "We believe the

legislative standard provides guidance so that prosecutors may 'exercise their discretion in a manner which reflects their judgment concerning the seriousness of the crime or insufficiency of the evidence.'" Campbell, 103 Wn.2d at 26-27 (citing Rupe, 101 Wn.2d at 700); *see also* State v. Davis, 175 Wn.2d 287, 357, 290 P.3d 43 (2012) (noting that the strength of the case as well as mitigating evidence properly influences a prosecutor's decision not to seek the death penalty).

Statutes must be interpreted to avoid absurd results because "it will not be presumed that the legislature intended absurd results." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Monfort's proposed interpretation of RCW 10.95.040(1) would lead to absurd results. How could a prosecutor make a rational decision as to whether to seek the death penalty without considering the facts of the crime?

Indeed, whether a fact is mitigating is not something that can be determined in a vacuum; it can be determined only in relation to the facts of the crime. For example, in Davis, this Court upheld the imposition of the death sentence because "[t]he jury could have rationally determined that given the calculated, heinous nature of

the crime, mental slowness and a difficult childhood did not warrant leniency." 175 Wn.2d at 347. As a hypothetical example, a defendant charged with aggravated murder might present to the prosecutor evidence of a history of physical abuse as a reason to merit leniency. Such evidence would be far more mitigating if the victim was the defendant's abuser, rather than a stranger to the defendant. Generally, the weight of mitigating circumstances must be judged in relation to the facts of the crime.

Finally, Monfort's proposed construction of the statute would be impossible to implement. How *could* the prosecutor shield himself or herself from the facts of the crime so as to consider only potentially mitigating evidence when deciding whether to file a notice to seek the death penalty?

In short, the prosecutor can and should consider the facts and circumstances of the crime in deciding whether to seek the death penalty as directed by the legislature in RCW 10.95.040.

D. CONCLUSION

For the reasons set out above and in Petitioner's Opening Brief, the State respectfully asks this Court to reverse the trial court's ruling dismissing the notice of special sentencing proceeding and reinstate that notice, affirm the trial court's ruling that the Prosecutor may consider the facts of the crime in making his decision to file the notice, and remand this case for trial as a capital case.

DATED this 28th day of May, 2013.

Respectfully submitted,

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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 **Reply Brief of Petitioner and Response Brief of Cross-Respondent**, 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

Date

05/28/13

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann
Subject: RE: Christopher John Monfort/Case # 88522-2

Rec'd 5/28/2013

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: Tuesday, May 28, 2013 3:53 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann
Subject: Christopher John Monfort/Case # 88522-2

Dear Supreme Court Clerk:

Attached for filing in the above-referenced case, please find the Reply Brief of Petitioner and Response Brief of Cross-Respondent.

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

Sincerely,

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