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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
Petitioner,
vs.
JOSEPH T. McENROE and
MICHELE ANDERSON,
Respondents.

) No. 89881-2
) 7-1- 2014
) RESPONDENTS'
) STATEMENT OF ADDITIONAL
) AUTHORITIES REGARDING STATE'S
) BURDEN TO PROVE ABSENCE OF
) MITIGATING CIRCUMSTANCES
) RAP 10.8

**Additional Authorities Regarding Whether the State Has the Burden of Proving an
Absence of Sufficient Mitigating Circumstances Beyond a Reasonable Doubt**

In answers to questions posed by Justice Gonzalez at 6/26/2104, TVW.ORG, 17:54 and
by Chief Justice Madsen 56:04, counsel for the State indicated that under Washington law the
State does not have to prove the absence of sufficient mitigating circumstances.¹

The following authorities are relevant in response to the State's argument that it does not
have to prove an absence of mitigating circumstances.

[I]n Washington the State must prove aggravating factors at the guilt phase of the trial,
and must prove beyond a reasonable doubt the absence of mitigating factors in the

¹At TVW.ORG, 18:01, Mr. Whisman said: "... its not as though the absence of the
mitigating factor itself is either alleged or something that we have to prove and I don't know how
we would prove a negative." At 56:17, Mr. Whisman said: "But the state does not have to prove
a negative and I don't know how else to say it, except to say that we will stand up in closing
argument the evidence in the case and the aggravators and argue that justifies the penalty of
death."



penalty phase. Despite this difference, the State must nonetheless prove matters in the sentencing phase, similar to the requirement in *Bullington* that the State prove aggravating factors in the sentencing phase. Thus, like that of Missouri, **Washington's sentencing proceeding is not a discretionary, standardless proceeding. It is possible to determine whether the State has met its burden of proving beyond a reasonable doubt the absence of mitigating factors.**

State v. Rupe, 108 Wn2d 737, 745 (1987), emphasis added.

[Distinguishing from pre-Furman statutes] a system where a jury's sentencing decision is made at a bifurcated proceeding's second stage at which **the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed.**

Bullington v. Missouri, 451 U.S. 430, 431, (1981).

In contrast, the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence ... there was no separate sentencing proceeding wherein the prosecution was required to prove - beyond a reasonable doubt or otherwise - additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered.

Bullington, at 439.

This stands in contrast to the reasonable doubt standard of the Missouri statute, the same standard required to be used at the trial on the issue of guilt or innocence.

Bullington, at 441.

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 order to return an affirmative answer to the question posed by this subsection, the jury must find so unanimously.

RCW 10.95.060(4), emphasis added.

During this sentencing phase proceeding, **the State has the burden of proving to you beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.** If the State meets this burden the death penalty will be imposed. **The defendant does not have to prove the existence of any mitigating circumstances or**

the sufficiency of any mitigating circumstances.

The defendant is presumed to merit leniency which would result in a sentence of life in prison without possibility of release or parole. This presumption continues throughout the entire proceeding unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief that there are not sufficient mitigating circumstances to merit leniency, you are satisfied beyond a reasonable doubt.]

NOTE ON USE: This instruction should be included in the sentencing phase instructions in every case.

WPIC 31.05 Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases), emphasis added.

Dated: July 1, 2014.

Respectfully submitted:

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PROOF OF SERVICE

On July 1, 2014, I sent by electronic mail and by United States Postal Service, properly stamped and addressed, the above document, to counsel listed below:

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Kathryn Ross
7/01/2014 at Seattle, Washington.

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Mr. Carpenter:

Please file and distribute the attached 7-1-2014 Respondents Additional Authorities Regarding State's Burden to Prove Absence of Mitigating Circumstances. Also attached is a letter to the Clerk clarifying Respondents' filings and correcting a misstatement of fact made in oral argument.

Please contact me if there are any questions regarding the attached documents.

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