

CAPITAL CASE

88410-2

No. 69831-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH T. McENROE,

Respondent

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

---

MCENROE'S RESPONSE TO STATE'S MOTION FOR  
DISCRETIONARY REVIEW

---

Kathryn L. Ross, WSBA No. 6894  
Leo Hamaji, WSBA No. 18710  
William Prestia, WSBA No. 29912  
Attorneys for Respondent McEnroe

[kerwriter@aol.com](mailto:kerwriter@aol.com)  
[leo.hamaji@defender.org](mailto:leo.hamaji@defender.org)  
[prestia@defender.org](mailto:prestia@defender.org)

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA 98104  
(206) 447-3900, ext. 774

FILED  
APPEALS DIV I  
COURT OF APPEALS  
STATE OF WASHINGTON  
2013 FEB -6 PM 4:41

## **A. IDENTITY OF RESPONDING PARTIES**

Joseph T. McEnroe is the defendant below in King County Cause No. 07-1-08716-4. This is Respondent McEnroe's brief.

Michele K. Anderson is the defendant below in King County Cause No. 07-1-08717-2.

## **B. RELIEF SOUGHT**

Respondent McEnroe ask this Court to deny the State's Motion for Discretionary Review because the criteria for acceptance of review set forth in RAP 2.3(b) are not met.

## **C. INTRODUCTORY CAVEAT**

As set forth in his "Objection To Accelerated Briefing Scheduled" filed this date, Mr. McEnroe has not had a reasonable time to review, digest, and draft his Answer. Therefore, initially, the trial court's Order must, to a great extent, fend for itself with less assistance from Respondents' counsel than it deserves.

Fortunately, the Order is well reasoned and carefully drawn. It is intentionally narrow in scope and applies only to the unusual factual circumstances the court has seen develop in this case.<sup>1</sup> The Order refers to and is best understood in the context of previous motions and rulings in the case which Mr. McEnroe will submit as an appendix to this brief (to

---

<sup>1</sup> Of course, the order has effect in this case and in the trial court only unless and until this Court would rule on the merits.

the extent possible in the time frame).

The previous briefing and transcripts of hearings contain additional reasons for denying review (because the trial court's order could be affirmed on grounds presented to the trial court in earlier hearings). RAP 2.5(a)(3) "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." If permission is granted, Mr. McEnroe will present additional reasons to deny review in a supplemental answer.

#### **D. STATEMENT OF THE CASE**

The trial judge has been presiding over the prosecution of Joseph McEnroe and Michele Anderson for five years. The trial court has a thorough knowledge of the issues raised by all parties.

Most importantly, as referenced in the "Order Striking the Notice of Intent to Seek the Death Penalty," the trial court ruled in the State's favor in Mr. McEnroe's earlier motion to dismiss the death notice for failure to comply with RCW 10.95.040, decided in 2010. (Mr. McEnroe's previous (2009-2010) motion, and the State's responses and Mr. McEnroe's replies, are attached hereto as **Appendix A**.) However, the court at that time was clearly troubled by some of the State's assertions and answers to the court's questions. The court's order denying the

defendants' "Motion to Dismiss for Failure to Comply with RCW 10.95.040" reveals the Court found it a close question but ruled in favor of the State. (That Order, dated June 4, 2010, is part of Appendix E to the *State's* Motion for Discretionary Review, and thus is not re-submitted herein by Mr. McEnroe.) It is notable in light of the State's current motion for discretionary review that argument on McEnroe's earlier motion contained extensive discussion on the issue of whether the strength of the state's case as to guilt of aggravated murder should be a deciding factor in whether the prosecutor should seek the death penalty. A partial transcript of that argument, which occurred on March 26, 2010, is all Mr. McEnroe could obtain during this extraordinarily short briefing period; that partial transcript is attached hereto as **Appendix B**. In fact, the trial court expressly disagreed with the State's position on that issue even as he denied the motion to dismiss the notice.

After McEnroe first filed his "Motion to Strike Notice of Intent to Seek the Death Penalty on Ground That it Was Filed in Violation of RCW 10.95.040" the elected prosecutor made decisions whether or not to file notices of intent to seek the death penalty in four unrelated, but all brutal, aggravated murder cases.<sup>2</sup> McEnroe's counsel noticed that the prosecutor

---

<sup>2</sup>The names of the other aggravated murder defendants and dates the prosecutor announced he would or would not seek death are: Isaiah Kalebu, 11-21-11; Christopher Monfort, 9-2-10; Daniel Hicks, 9-16-10, and Louis Chen, 11-21-11.

seemed to employ a different procedure in the later cases, a procedure in which he focused on and evaluated the strength of the mitigation evidence rather than the facts supporting charges of aggravated murder.<sup>3</sup>

In the wake of a particular violent double murder in which the Prosecutor did not seek the death penalty against Louis Chen, a wealthy physician, who stabbed his domestic partner over a hundred times, breaking and replacing five knives in the process, and then turned on their toddler son, carried him to the bathtub, held him down, and stabbed the little boy five times in the neck, killing him, McEnroe sought discovery as to the process the Prosecutor utilized in Chen's case as well as the other aggravated murder cases in comparison to the process used in McEnroe and Anderson cases. (That discovery motion, and attendant pleadings are orders, are attached hereto as **Appendix C**.) Although the State strongly resisted providing any information at all, the trial court, with express protection of any privileged or work product information, required the State to advise McEnroe and Anderson of

any information gathered as a result of any mitigation investigation conducted by the State, the name of the investigator(s) involved, and the reports of any mental health professionals that were

---

<sup>3</sup> Prosecuting Attorney Dan Satterberg became interim Prosecuting Attorney in mid 2007 following the sudden death of long time Prosecuting Attorney, Norm Maleng. McEnroe and Anderson, charged in January, 2008, were the first defendants for whom Satterberg was responsible for deciding whether or not to file a notice. It might be said that mistakes were made with the first decision effecting only these two defendants, but the new Prosecutor learned and quickly adopted a standard procedure in compliance with RCW 10.95.040.

considered by Mr. Satterberg.

Order to Compel Discovery, entered 3/15/2012 (see **Appendix C** hereto).

In response the State admitted it had not utilized a mitigation investigator nor consulted with a mental health expert. The Prosecutor considered only the “criminal investigation.” “State’s Objection and Response to Order Compelling Discovery,” 3/20/2012 (part of **Appendix C** hereto).

McEnroe sought more information on the basis of the Prosecutor’s decision to file a notice against him through a “Motion for A Bill of Particulars,” “specifying the facts and evidence the State relied on in alleging

... there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” ... In particular, Mr. McEnroe requests the State be required to identify with particularity what facts, separate from the charged murders, support the “element” of Mr. McEnroe being a “worst of the worst” individual deserving of the death penalty.”

Motion for Bill of Particulars, 5-11-12. (Motion for Bill of Particulars, and attendant pleadings are attached hereto as **Appendix D**.) The State responded by insisting it relied on the same facts for both the charges of aggravated murder and seeking the death penalty:

In the present case, it is difficult to conceive of a manner in which McEnroe can possibly misunderstand the facts that the elected prosecutor, in the exercise of his discretion, considered in “support of the State’s ‘charge’ made in the ‘notice of intention to hold special sentencing proceeding’ that there are not sufficient mitigating circumstances to merit leniency. The Information

provided to [McEnroe] more than four years ago states as follows: “there was more than one victim and the murders were part of a common scheme or plan or the result of a single act,” and each defendant “committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.” “That is precisely what it says ... There is no reasonable basis for concluding that [the defendant] was not adequately apprised of the basis for filing the notice of special sentencing proceeding.

State’s Memorandum in Opposition to Defendant McEnroe’s Motion for Bill of Particulars, filed 5-25-2012, p. 10 (part of **Appendix D** hereto). In case it wasn’t clear the Prosecutor considered nothing but the proof of aggravated murder in deciding to seek death, the State further explained,

Here McEnroe is not entitled to a bill of particulars because the charging document includes all statutory and court created elements of the crime, and the defendant has been provided full discovery.

State’s Memorandum in Opposition to Defendant McEnroe’s Motion for Bill of Particulars, filed 5-25-2012, p. 12 (see **Appendix D**). Furthermore,

The allegations in the charging documents and the discovery produced to date are more than adequate to provide notice of the basis by which the elected prosecutor determined that in this case there are not sufficient mitigating circumstances to merit leniency.

State’s Memorandum in Opposition to Defendant McEnroe’s Motion for Bill of Particulars, filed 5-25-2012, p. 14 (see **Appendix D**). Emphasis added.<sup>4</sup>

---

<sup>4</sup> The trial court was generous in its order by stating “Counsel [for the State] has repeatedly asserted ...that the elected prosecutor considered the mitigation material

After receiving the State's adamant confirmation that the Prosecutor considered nothing but the aggravated murder charging documents in seeking the death penalty against him, Defendant McEnroe established through a combination of declarations from defense counsel in later aggravated murder cases and a court ordered disclosure by the prosecutor that for all four of the death penalty decisions made after McEnroe and Anderson, the Prosecutor employed a private mitigation investigator to provide evidence pertinent to his determination whether there was "reason to believe there are not sufficient mitigating circumstances to merit leniency," as prescribed by RCW 10.95.040. Furthermore, the Prosecutor's public announcements of his decisions in the later cases focused on the quality of the mitigating circumstances, not the terrible facts of the aggravated murders. What became apparent is the Prosecutor started making his decisions to seek or not seek death based on the quality of a defendant's mitigating circumstances, as required by the statute, rather than as a subjective visceral response to the facts of a horrible crime, which all aggravated murders are.

McEnroe then filed another "Motion to Dismiss Notice of

---

proffered by the defendants here." Order, p. 4-5. The State has made only passing reference to mitigating evidence and has not suggested Mr. McEnroe's mitigation offer was insubstantial or deficient in any way. The State's Opposition to a bill of particulars candidly expresses the State's dogged determination that its evidence for charging aggravated murder is the only evidence it needed to file the notice of intent.

Intention to Seek the Death Penalty” which renewed the earlier motion and added the denial of equal application of the law.<sup>5</sup> With the further developments and bald admissions of the State as to the Prosecutor’s exclusive focus in McEnroe’s case on the State’s ability to prove the crime without regard to mitigating circumstances, the trial court granted this Motion and dismissed the notice of intention to seek the death penalty.

#### **E. ARGUMENT WHY REVIEW SHOULD BE DENIED**

##### **1. The trial court has not committed error under RAP 2.3 (b)(1) or (2) or (3).**

The court’s order rests on the unremarkable proposition that a prosecuting attorney deciding whether or not to seek the death penalty must make a different calculation than he did when deciding to charge aggravated murder. Filing a notice of intent is not based on ability to prove the crime, it is based on the quality or absence of an individual defendant’s mitigating circumstances. This is because of Washington’s unique death penalty statute which requires:

the prosecuting attorney shall file a written notice of a special sentencing proceeding to determine whether or not the death

---

<sup>5</sup>“Motion to Dismiss Notice of Intention to Seek Death Penalty Because it Was Filed in Violation of Mr. McEnroe’s Right to Equal Protection of Law and Due Process and Renewal of Motion to Dismiss Notice Because it Was Filed in Violation of RCW 10.95.040” filed 11-26-12. It is this motion that led to the trial court’s order of January 31, 2013, and the State’s filing its Motion for Discretionary Review.

penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency<sup>6</sup>

The trial court held the prosecutor must consider the individual moral culpability of the defendant in deciding whether to seek the death penalty. The trial court noted that this Court has upheld Washington death penalty scheme against equal protection challenges because, in addition to proof of aggravated murder, “the prosecutor was required to prove the ‘additional factor’ of the absence of mitigating circumstances.” State v. Campbell, 103 Wn.2d 1 (1984). Order, p. 8. The court also cited State v. Dictado, 102 Wn.2d 277 (1984) “the prosecutor’s discretion to seek or not seek the death penalty depends on an evaluation of mitigating circumstances.” The court discussed the recent case of State v. Davis, 175 Wn.2d 287 (2012). In answering the dissent’s argument that there was no rational basis for distinguishing defendants in Washington who were subject to death notices to the many more who were not, the Davis majority essentially said that even though the facts of the murders may be similar, it is the individualized mitigating circumstances that distinguish murderers subject to the death penalty from those who never were. Order,

---

<sup>6</sup> Research by the parties and the trial court in preparation of the briefs and for argument in the 2010 motion revealed no other death penalty statute in any jurisdiction which has a provision similar to RCW 10.95.040, requiring a prosecutor to have “reason to believe that there are not sufficient mitigating circumstances to merit leniency” prior to filing a notice. See **Appendix A** hereto.

p. 11-12.<sup>7</sup>

The core of the trial court's decision is its understanding that "The scope of the information appropriate for the prosecutor's review [in determining whether to file a notice] is as broad as that which may be considered by the jury" Order, p. 3, quoting the trial court's "Order on Defendants' Motion to Strike" 6/4/2010 (see Appendix E of *State's* Motion for Discretionary Review). The trial court held that the strength of the State's case regarding guilt is not relevant to the decision to seek death because death is never an available sentence without proof beyond a reasonable doubt of guilt. No jury will ever consider a death sentence unless it has already found the defendant was proven guilty beyond a reasonable doubt. If the consideration for seeking the death penalty is the strength of the evidence of guilt, every case charged as aggravated murder should have a death notice filed because the prosecutor reasonably believes he has proof of guilt beyond a reasonable doubt.

Very cogently, the court pointed out that the strength of evidence of guilt has "nothing whatsoever to do with the individual moral culpability of the respective defendant..." Order, p. 10, which is the

---

<sup>7</sup> The trial court acknowledged dicta in the *Davis* case recognizing that "The strength of the State's case often influences the decision." But, the trial court noted, the *Davis* court was talking about plea bargains in which a prosecutor does not seek death and the defendant pleads guilty to aggravated murder. No one will complain if a prosecutor does not file a notice of intent to seek the death penalty. However, that does not mean strength of proof of guilt is justification for seeking the death penalty.

necessary determination of a sentencing jury. Furthermore, if a prosecutor only filed death notices in the cases with the strongest proof of guilt the anomalous result would be murderers who suffer early remorse and offer detailed confessions, taking responsibility for their actions, perhaps offering some closure to victims' families, and assuring the public the "real killer" is in custody, as well as sparing investigative resources, would be most likely to face death sentences because there is no doubt as to their guilt. Murderers who are not troubled by guilty consciences, perhaps without consciences, who refuse to confess, who are more sophisticated in crime, will not face death merely because they obfuscate their guilt. Strength of the prosecutor's case as to guilt may very well have an inverse relationship to individual moral culpability.

The strength of proof that a prosecutor should consider in deciding whether to file a notice intent is the strength of evidence he has as to the merits of a defendant's mitigating circumstances. To file a notice of intention, a prosecutor must have "reason" to believe mitigating circumstances are insufficient regardless of the strength of proof of guilt. That reason cannot be that the murder was caught bare faced on a security camera and there is no doubt as to the killer's identity. If the defendant had worn a mask, the strength of the State's case would be reduced but his individual moral culpability would certainly be no less.

The lack of connection between strength of proof of guilt and moral culpability is undoubtedly why the Supreme Court has held there is no constitutional right to an instruction that a jury may consider residual doubt of guilt as a mitigating factor. Franklin v. Lynaugh, 487 U.S. 164 (1988).

**2. The trial court's order was not "premature."**

The trial court's order was not "premature." MDR p. 2. This Court has said that prosecutors must strictly comply with the provisions of RCW 10.95.040 or they may not pursue death sentences regardless of the nature of the murders. If the notice of intent in this case was filed in violation of the statute, it would be a colossal waste of public resources, as well as an imposition of great stress on the victims' family members for the six months or so trial is expected to consume. There would be no finality to the case for years if no death sentence resulted, longer if a death sentence were imposed but vacated by this Court on appeal. The Supreme Court has found notice of intent invalid before trial in State v. Dearbone, 125 Wn.2d 173 (1994). In State v. Luvenc, 127 Wn.2d 690 (1995) the issue of compliance with RCW 10.95.040 was not raised until the direct appeal when, long after a full trial and penalty phase and death sentence, the Supreme Court determined the notice had been improperly filed. The

death sentence was vacated. Trial courts can and should address the propriety of filing of a death notice before trial.

**3. There is no separation of powers problem.**

There is no separation of powers problem. However, undersigned counsel has simply run out of time to complete Mr. McEnroe's Answer.

**F. CORRECTION OF FACTS ALLEGED IN PETITIONER'S PLEADINGS**

**1.**

Defendant McEnroe will not go to trial if the death penalty stays off the table. Instead, once dismissal of the death notice is effective, Mr. McEnroe will plead guilty as charged, to all six counts he faces, and be sentenced to life without release, the presumed sentence for aggravated murder. RCW 10.95.030.

In its Motion for Emergency and Accelerated Review the State alleges that the

trial court has considered numerous motions attacking the death penalty and asking the trial court to submit this case to the jury without the death penalty as an option.

Motion for Emergency and Accelerated Review, p. 2, emphasis added.

... the defendants still face trial on six counts of aggravated murder

Motion for Discretionary Review, p. 6.

Although it is irrelevant to acceptance of review under RAP 2.3(b), the State indicates that if the “Order Striking the Notice of Intent to Seek the Death Penalty” stands, the defendants would still proceed to a lengthy trial on non-capital aggravated murder charges. The State suggests a trial filled with opportunities for reversible error and likely to lead to an appeal is going to happen anyway so it is a small matter to throw the death penalty back into the mix even if the notice of intent was not properly filed.

However, the State is not only aware Mr. McEnroe will not go to trial if the death penalty is removed, it has filed a motion in the trial court forestall the effective date of the trial court’s order to prevent Mr. McEnroe from entering a guilty plea and being sentenced to life in prison without release . See “State’s Motion to Stay the Effective Date of Court’s Order Striking Notice of Intent to Seek the Death Penalty,” a copy of which is attached hereto as **Appendix E**.

In fact, the State has known since July 10, 2008, that Mr. McEnroe intends to plead guilty as charged if the death penalty is removed as a sentencing option. See McEnroe Letter of July 10, 2008, to Prosecutor Satterberg, page 1 of which is attached hereto as **Appendix F**. Mr. McEnroe’s defense team has made at least a dozen requests to Prosecutor

Dan Satterberg to agree to a life without release sentence if Mr. McEnroe pleads guilty. As soon as the trial court announced its decision dismissing the notice of intent, while counsel were still in the courtroom we immediately approached the trial prosecutor and said McEnroe's counsel wished to meet with the elected prosecutor the next day to again discuss a guilty plea and this was soon followed up by two emails to the Prosecutor. Mr. McEnroe's last of many offers to plead guilty to a life without release sentence was undoubtedly fresh in prosecution counsels' minds as they prepared motions representing to the Court of Appeals that McEnroe had "ask[ed] the trial court to submit this case to the jury without the death penalty as an option."

2.

The trial court has heard argument regarding whether the "strength of the state's case" is an appropriate consideration for a prosecutor considering whether or not to file a notice of intent. See MDR p. 4 and 6.

At oral argument on McEnroe's Motion to Dismiss the court asked questions to both counsel about the consideration of the strength of the State's case on guilt. TR 58 (transcript of 1-17-2013 oral argument on this matter was submitted as part of Appendix I to the *State's* Motion for Discretionary Review). There was vigorous back and forth with both counsel but primarily the State's counsel covering approximately 18 pages

of transcript. TR 73 - 91.

The trial court stated that it had reviewed the previous motions and arguments related to the prosecutors filing the notice of intention. Order, p. 2. At oral argument on Mr. McEnroe's previous (2009-10) Motion to Dismiss regarding RCW 10.95.040, approximately 30 pages of transcript was devoted to the strength of the State's case in relation to notice filing. 3-26-2010 TR 2 – 31 (see **Appendix B** hereto). The "Court's Order on Defendants' Motions to Dismiss Notice," dated 6-4-2010, contained a significant discussion of the issue.

In addition the trial court was briefed on and heard argument on McEnroe's motions for discovery of the basis for filing or not filing notices in other aggravated murder cases and especially was repeatedly informed by the State of its rigid stance that the facts of the case and aggravating factors alone justify the notice of intent. Furthermore, the State has been consistently adamant that the Prosecutor's decision to seek the death penalty, and how he makes it, is impervious to review by any court. Even if the prosecutor were to make death seeking decisions based on race, gender or other suspect class, the State advised the trial court no inquiry could be made and the biased filing decisions would likely only be discovered if the Prosecutor publicly pronounced his racist practices.

**G. CONCLUSION**

Defendant McEnroe has run out of time to brief any further. For the foregoing reasons, the Court should DENY review in this case.

Dated: February 6, 2013.

Respectfully submitted:

A handwritten signature in black ink, appearing to be 'Kathryn Lund Ross', written over a horizontal line.

Kathryn Lund Ross, WSBA 6894

Leo Hamaji, WSBA 18710

William Prestia, WSBA 29912

Attorneys for Respondent Joseph T. McEnroe

**INDEX TO APPENDICES OF DEFENDANT/RESPONDENT MCENROE'S RESPONSE  
TO STATE'S MOTION FOR DISCRETIONARY REVIEW**

Appendix A: McEnroe's 2009-2010 RCW 10.95.040 motion & pleadings

Appendix B: Partial transcript of 3-26-2010 oral argument regarding 10.95.040 motion

Appendix C: Discovery motions re other (2009 – 2011) aggravated homicides in King County

Appendix D: McEnroe's Motion for Bill of Particulars and related pleadings

Appendix E: State's Motion to Stay Effective Date of Court's Order Striking Death Notice

Appendix F: McEnroe Letter of 7-10-2008 to Dan Satterberg (p. 1 only)

# **APPENDIX A**

**TO DEFENDANT/RESPONDENT MCENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 07-C-08716-4 SEA
COUNTY OF KING,	)	
	)	DEFENDANT McENROE'S MOTION
Plaintiff,	)	TO STRIKE NOTICE OF INTENT TO
	)	SEEK THE DEATH PENALTY ON
v.	)	GROUND THAT IT WAS FILED IN
	)	VIOLATION OF RCW 10.95.040 AND
JOSEPH T. McENROE,	)	MEMORANDUM OF LAW IN
	)	SUPPORT THEREOF
<u>Defendant</u>	)	

MOTION

Comes now Joseph T. McEnroe, by and through his undersigned counsel, Kathryn Lund Ross, Leo Hamaji, and William Prestia, and moves for an Order dismissing the Notice of Intention to Seek the Death Penalty filed herein and precluding the state from seeking the death penalty should Mr. McEnroe be convicted as charged.

The basis for this motion is that the requirements of RCW 10.95.040, regarding the procedures for filing a Notice of Intent, were not followed and the Notice was filed in violation

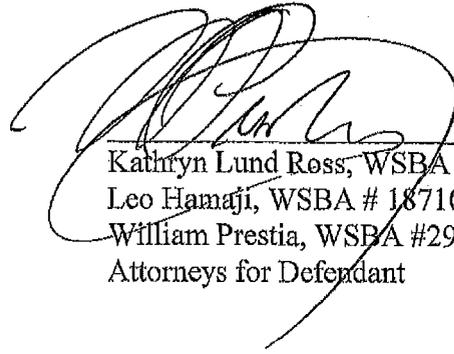
**DEFENDANT McENROE'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON GROUNDS THAT IT WAS FILED IN VIOLATION OF RCW 10.95.040 AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 of the standard set in the statute. Failure to comply with the statutory procedures violated Mr.  
2 McEnroe's rights under the Fifth and Fourteenth Amendments to the United States Constitution,  
3 and Article I, Section 14 of the Washington State Constitution. This Motion is based on the  
4 above-listed statutory and constitutional provisions, and the accompanying Memorandum of  
5 Law.  
6

7 Dated this 23<sup>rd</sup> day of October, 2009.  
8

Respectfully submitted:



Kathryn Lund Ross, WSBA #6894  
Leo Hamaji, WSBA # 18710  
William Prestia, WSBA #29912  
Attorneys for Defendant

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1  
2  
3  
4  
5  
6  
7

**MEMORANDUM OF LAW IN SUPPORT OF MOTION**

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Mr. McEnroe is currently charged with six counts of Aggravated Murder in the First Degree. The State has filed a Notice of Intent to Seek the Death Penalty (“Notice of Special Sentencing Proceeding”). A copy of same is attached hereto as “Appendix A.”

26

**Summary of Argument**

The notice of special sentencing proceeding should be dismissed because the prosecutor filed the notice in violation of RCW 10.95.040.

The Washington death penalty scheme allows the prosecutor to seek the death penalty only when the statute is scrupulously complied with. The presumptive sentence for aggravated murder is life imprisonment without release. There is a presumption of leniency. A prosecuting attorney may file notice of intention to seek a death sentence only when there is reason to believe there are not sufficient mitigating circumstances to merit leniency. The focus is statutorily required to be on mitigating factors. The standard to be applied by a prosecutor in determining whether to seek death is different and more stringent than the sentencing question decided by a penalty phase jury. Unlike a capital sentencing jury, a prosecuting attorney is not directed to “have in mind the crime” when evaluating the sufficiency of mitigating circumstances. The King County prosecuting attorney filed a notice of intent to seek the death penalty against Mr. McEnroe despite the fact he was presented with sufficient mitigating circumstances to merit leniency.

**DEFENDANT McENROE’S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 The State is seeking the death penalty against Mr. McEnroe without reason to believe there  
2 is an insufficiency of mitigating evidence; this denies Mr. McEnroe a procedural protection to  
3 which he is entitled under state law. Denial of a statutorily created liberty interest in state  
4 sentencing procedures is a denial of due process under the Fourteenth Amendment. Due process  
5 requirements are heightened in a capital case. The Washington Constitution may bestow greater  
6 protection to defendants than the federal constitution.  
7

### 8 Key Provisions of Washington's Death Penalty Law

#### 9 **1. Statutory Provisions**

10 **RCW 10.95.030** Sentences for aggravated first degree murder.

11 (1) Except<sup>1</sup> as provided in subsection (2) of this section, any person convicted of the  
12 crime of aggravated first degree murder shall be sentenced to life imprisonment without  
13 possibility of release or parole.  
14

15 ...  
16 (2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier  
17 of fact finds that there are not sufficient mitigating circumstances to merit leniency, the  
18 sentence shall be death.

19 **RCW 10.95.040** Special sentencing proceeding -- Notice -- Filing -- Service:

20 (1) If a person is charged with aggravated first degree murder as defined by RCW  
21 10.95.020, the prosecuting attorney shall file written notice of a special sentencing  
22 proceeding to determine whether or not the death penalty should be imposed when there  
23 is reason to believe that there are not sufficient mitigating circumstances to merit  
24 leniency.

25 \_\_\_\_\_  
26 <sup>1</sup>Unless otherwise noted, underlining throughout this memorandum is added by the writer for emphasis.

**DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 ...  
2 (3) If a notice of special sentencing proceeding is not filed and served as provided in this  
3 section, the prosecuting attorney may not request the death penalty.

4 **RCW 10.95.050** Special sentencing proceeding -- When held...

5 (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by  
6 acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting  
7 without a jury, a special sentencing proceeding shall be held if a notice of special  
8 sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of  
9 plea, admission, or agreement may abrogate the requirement that a special sentencing  
10 proceeding be held.

11 **RCW 10.95.060** Special sentencing proceeding -- Jury instructions -- Opening  
12 statements -- Evidence -- Arguments -- Question for jury.

13 ...

14 (4) Upon conclusion of the evidence and argument at the special sentencing  
15 proceeding, the jury shall retire to deliberate upon the following question: "Having in  
16 mind the crime of which the defendant has been found guilty, are you convinced beyond  
17 a reasonable doubt that there are not sufficient mitigating circumstances to merit  
18 leniency?"

19 **2. Cases**

20 The consequence of failing to serve notice is clear: "If a notice of special sentencing  
21 proceeding is not filed and served as provided in this section, the prosecuting  
22 attorney may not request the death penalty." RCW 10.95.040(3). Two observations  
23 are important here. First, a specific statute – Chapter 10.95 – not a rule of criminal  
24 procedure, requires the prosecuting attorney to serve notice. Given the unique  
25 qualities of the death penalty, the Legislature has tailored pretrial procedures to  
26 govern the use of a special sentencing proceeding. Second, filing and service of  
notice is mandatory; no notice, no death penalty.

27 *State v. Dearbone*, 125 Wash.2d 173 (1994).

28 **DEFENDANT McENROE'S MOTION TO STRIKE**  
29 **NOTICE OF INTENT TO SEEK THE DEATH**  
30 **PENALTY ON GROUNDS THAT IT WAS FILED**  
31 **IN VIOLATION OF RCW 10.95.040 AND**  
32 **MEMORANDUM OF LAW IN SUPPORT**  
33 **THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 As the United States Supreme Court has repeatedly noted, "the penalty of death is  
2 qualitatively different from a sentence of imprisonment, however long." *Woodson v.*  
3 *North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).  
4 Because of this difference, we should strive to ensure that the procedures and  
5 safeguards enacted by the Legislature are properly followed by the State. The  
6 determination of whether a defendant will live or die must be made in a particularly  
7 careful and reliable manner and in accordance with the procedures established by  
8 the Legislature.

9 *State v. Luvene*, 127 Wash.2d 690, 903 P.2d 960 (1995)(Footnote 8).

10 The State should be aware in light of *Dearbone* and *Luvene* that anything less than a  
11 punctilious approach toward the filing and service of the statutory notice in a death  
12 penalty case is a risky practice. Especially when the ultimate penalty is involved,  
13 this Court's duty is to ensure the defendant receives every statutory protection the  
14 Legislature has provided. We will not condone sloppy practice in service of the  
15 notice under RCW 10.95.040.

16 *State v. Clark*, 129 Wash.2d at 816, 920 P.2d 187 (emphasis added).

17 [The defendants] assert that if the Legislature had intended to allow service by  
18 means other than personal, hand-to-hand service, it would have indicated as much in  
19 the statute. Because RCW 10.95.040 does not indicate that the State may effect  
20 service on the attorney by delivering the notice to the office of the defense counsel,  
21 they argue, personal service is required. We disagree. We think, rather, that it is  
22 more significant that the Legislature did not include the word "personally" in RCW  
23 10.95.040 as it did in RCW 4.28.080. Where the Legislature uses certain statutory  
24 language in one instance, and different language in another, there is a difference in  
25 legislative intent. *United Parcel Serv., Inc. v. Department of Revenue*, 102 Wash.2d  
26 355, 362, 687 P.2d 186 (1984). As we observed in *Clark*, if the Legislature had  
intended that a notice of special sentencing proceeding be personally served, it  
would have indicated as much. The fact that it did not suggests that service in  
accordance with CR 5 is sufficient.

27 *State v. Cronin*, 130 Wash.2d 392, 923 P.2d 694 (1996).

28 **DEFENDANT McENROE'S MOTION TO STRIKE**  
29 **NOTICE OF INTENT TO SEEK THE DEATH**  
30 **PENALTY ON GROUNDS THAT IT WAS FILED**  
31 **IN VIOLATION OF RCW 10.95.040 AND**  
32 **MEMORANDUM OF LAW IN SUPPORT**  
33 **THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Relevant Facts

On December 28, 2007, King County Prosecutor Dan Satterberg released a statement announcing his office was filing aggravated murder charges against Joseph McEnroe and his co-defendant, Michele Anderson. A copy of same is attached hereto as "Appendix B." The charges stemmed from the killings of six members of Michele Anderson's family. Satterberg described in graphic detail the allegations against the co-defendants. He stated: "Given the magnitude of this crime, I pledge to give this case serious consideration for application of our state's ultimate punishment." Satterberg expressed his office was joining the community in grieving the loss of the Anderson family and was sharing the "community's distress over this crime."

On October 16, 2008, the Prosecutor released a statement announcing he was filing a notice of intention to seek the death penalty against McEnroe and Anderson. A copy of same is attached hereto as "Appendix C."<sup>2</sup> Satterberg stated:

The Prosecuting Attorney has the obligation in potential capital murder cases to consider all relevant information about the crime and to weigh that against any mitigating evidence favoring the charged defendants. ...

Given the magnitude of these alleged crimes, the slaying of three generations of a family, and particularly the slaying of two young children, I find that there are not sufficient reasons to keep the death penalty from being considered by the juries that will ultimately hear these matters. ...

---

<sup>2</sup>A copy of the filed notice is attached as "Appendix A."

1 The death penalty is this state's ultimate punishment and is to be reserved for our  
2 most serious crimes. I believe this is one of those crimes. The jury acting as the  
3 conscience of the community, should have all relevant information and all legal  
4 options before it in consideration of this case.

5 By letter dated May 22, 2009, counsel for Mr. McEnroe advised Prosecutor Satterberg that  
6 they were preparing a motion to dismiss the notice of intent to seek the death penalty on the basis  
7 the notice was filed in violation of RCW 10.95.040. A copy of the May 22 letter is attached hereto  
8 as "Appendix D." Defense counsel stated:

9 We are wondering whether there are other records of your reasons for seeking the  
10 death penalty against Mr. McEnroe that we should consider in bringing the motion.  
11 If there are no other records, are there reasons you can share now that are not  
12 contained in the documents mentioned above [reference to public statements quoted  
13 above]? For instance, did you have information from sources other than Mr.  
14 McEnroe's attorneys that contradicted ... Mr. McEnroe's materials submitted to you  
15 prior to your decision?

16 By letter dated June 1, 2009 (a copy of which is attached hereto as "Appendix E"), Mr.  
17 Satterberg responded:

18 In making my decision I considered the facts and circumstances alleged that form  
19 the basis for charging your clients and co-defendant Anderson with six counts of  
20 Aggravated First Degree Murder. I also considered the mitigation materials  
21 submitted by defense counsel in the above cases. I have previously shared with you  
22 the only public record reflecting that decision, the press release we issued on  
23 October 16, 2008.

24 By separate motion Mr. McEnroe seeks to submit to the court under seal the mitigating  
25 information he submitted to the Prosecutor's office prior to Mr. Satterberg's decision to file a notice  
26

**DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 to seek the death penalty. The materials amply support the following mitigating factors, set forth  
2 here in summary fashion:

- 3 1. Mr. McEnroe poses no danger to others in the future;
- 4 2. At the time of the offense, Mr. McEnroe was under extreme mental disturbance;
- 5 3. Mr. McEnroe was under duress;
- 6 4. Mr. McEnroe is extremely remorseful;
- 7 5. Mr. McEnroe, at age 29, had no prior criminal history, not even minor infractions.
- 8 6. Despite a difficult, impoverished and chaotic childhood, Mr. McEnroe had a good  
9 work history and was highly regarded by his co-workers for his work ethic and  
10 willingness to help others.

11 A detailed history of Mr. McEnroe's very difficult childhood was also set forth in the  
12 mitigation materials. Mr. McEnroe's relatives and friends of the family described Mr. McEnroe as  
13 an introverted and entirely non-violent child and young man who took on domestic responsibilities  
14 far beyond his years and went to work at a young age to support the family.

15 Mr. McEnroe submitted the declarations of a psychologist and a neuropsychologist  
16 supporting the mitigating factors and emphasizing that Mr. McEnroe is a passive individual who  
17 could not partake in the charged acts of violence absent the most extraordinary psychological forces  
18 which both doctors detailed in their statements. Both doctors are confident Mr. McEnroe will not  
19 be a danger to others in the future. The raw data relied upon by the psychologists was offered to the  
20 Prosecutor for consideration by experts of the state's choice<sup>3</sup> but Mr. Satterberg showed no interest  
21 in the psychological data.

22  
23  
24 <sup>3</sup>The professional etiquette of psychologists requires that raw testing data be transmitted directly to another mental  
25 health professional rather than to a lay person.

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 Mr. Satterberg did not dispute or question the accuracy of the information given to him on  
2 behalf of Mr. McEnroe.

3 Mr. McEnroe's counsel on multiple occasions requested the Prosecutor to advise the  
4 defense what category of mitigating evidence would be most important to him in making a decision  
5 whether to seek death. The defense had limited time to prepare a mitigation package and wanted to  
6 concentrate on areas that would be most relevant to the decision. Counsel (Kathryn Lund Ross) had  
7 the recent experience of preparing mitigation for Naveed Haq in which the late Prosecutor, Norm  
8 Maleng, early on made it clear he was interested in the documented history of Mr. Haq's mental  
9 illness. Mr. Satterberg never responded to the question of what kind of mitigating information, if it  
10 existed, would convince him there were sufficient mitigating circumstances to avoid seeking the  
11 death penalty.

12 It should also be noted that by letter dated January 17, 2008 (a copy of which is attached  
13 hereto as "Appendix F"), Chief Deputy Prosecutor Mark Larson stated the prosecution would be  
14 conducting its own investigation of mitigating factors which was "likely to include an analysis of  
15 potential mental health issues" by a prosecution retained expert. However, Mr. McEnroe has not  
16 received any evidence of such an investigation by the prosecution in discovery, despite requests for  
17 disclosure, and Mr. Satterberg did not mention any state retained mental health experts in his letter  
18 specifically addressing what information he considered prior to filing the notice. (See Appendix E.)  
19  
20  
21  
22  
23  
24  
25  
26

**DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 Identically worded letters from Mr. Larson were received by counsel for Mr. Haq and by counsel  
2 for Mr. Schierman<sup>4</sup> during early stages of those cases.

3 **Issues**

- 4 1. In filing a notice of intent to seek the death penalty against Joseph McEnroe did the  
5 prosecuting attorney comply with the standard set forth in RCW 10.94.040  
6 governing when a notice may be filed?
- 7 2. May a prosecutor file a notice of intent to seek the death penalty based on his  
8 perceptions of the factual circumstances of the crime weighed against the mitigating  
9 evidence known to him?

10 **Argument**

11 **I. The Prosecuting Attorney Weighed the Circumstances of the Crime Against the**  
12 **Mitigating Circumstances in Determining Whether or Not to File a Notice of**  
13 **Intention to Seek the Death Penalty Instead of Considering Whether the**  
14 **Mitigating Factors Independently Merited Leniency.**

15 In his June 1, 2009, letter to the McEnroe Defense Counsel, Prosecutor Satterberg described  
16 how he decided to seek the death penalty against Mr. McEnroe and co-defendant Anderson.

17 In making my decision I considered the facts and circumstances alleged that form  
18 the basis for charging your clients and co-defendant Anderson with six counts of  
19 Aggravated First Degree Murder. I also considered the mitigation materials  
20 submitted by defense counsel in the above cases.

21 See Appendix E.

22 In his earlier public statement, Satterberg explained:

23 <sup>4</sup>State v. Connor Schierman, (King County Superior Court Cause No. 06-1-06563-4 SEA), is currently being tried  
24 and the State is seeking the death penalty. Mr. Schierman is charged with murdering two young women and two  
25 little boys and then burning down their house.

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 The Prosecuting Attorney has the obligation in potential capital murder cases to  
2 consider all relevant information about the crime and to weigh that against any  
3 mitigating evidence favoring the charged defendants. ...

4 Given the magnitude of these alleged crimes, the slaying of three generations of a  
5 family, and particularly the slaying of two young children, I find that there are not  
6 sufficient reasons to keep the death penalty from being considered by the juries that  
7 will ultimately hear these matters. ...

8 The death penalty is this state's ultimate punishment and is to be reserved for our  
9 most serious crimes. I believe this is one of those crimes. The jury acting as the  
10 conscience of the community, should have all relevant information and all legal  
11 options before it in consideration of this case.

12 See Appendix C.

13 In his earliest statement – given only two days after Mr. McEnroe and Ms Anderson were  
14 arrested – Mr. Satterberg said,

15 Given the magnitude of this crime, I pledge to give this case serious consideration  
16 for application of our state's ultimate punishment.”

17 See Appendix B.

18 It is very clear the determining factor for the King County Prosecutor in seeking death  
19 against Mr. McEnroe was “the magnitude of this crime.” Mr. Satterberg expressly stated the  
20 “magnitude” of the alleged crimes, particularly the slaying of young children, caused him to find  
21 there are not sufficient reasons to “keep the death penalty from being considered by the juries.”  
22 Satterberg also stated he believed he had an “obligation” to “weigh” the circumstances of the crime  
23 against the mitigating factors in making the filing decision.  
24  
25

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 Mr. McEnroe submits it is fair to say that the Prosecuting Attorney, from his earliest  
2 comments, was overwhelmingly focused on the circumstances of the crime, especially the killing of  
3 the children, which he described in his statements and charging documents. By contrast, there was  
4 only *pro forma* mention of consideration of mitigating circumstances he was aware of and that was  
5 always secondary to the alleged crime facts.  
6

7 The fact that counsel for Mr. McEnroe asked what kind of mitigating evidence would be  
8 persuasive against filing a death notice and received no answer, combined with the prosecutor's  
9 emotive public comments on the circumstances of the crime, suggests the Prosecuting Attorney  
10 believed the circumstances of the crime were such there was no kind or amount of mitigating  
11 evidence that would dissuade Mr. Satterberg from seeking a death sentence against Mr. McEnroe.<sup>5</sup>  
12 Again, it appears Mr. Satterberg focused on the crime in contravention of his statutory mandate to  
13 evaluate the sufficiency of the mitigating evidence.  
14

15 Mr. Satterberg stated "The jury acting as the conscience of the community should have all  
16 relevant information and all legal options before it in consideration of this case." See Appendix C.  
17 As discussed below, the statute does not allow for a jury to consider a death sentence unless the  
18 prosecutor has followed the mandates of RCW 10.95.040 in filing a notice of intention.  
19  
20

21  
22  
23  
24 <sup>5</sup>Mr. McEnroe here is discussing mitigating evidence other than mental retardation which excludes a defendant from  
25 eligibility for the death penalty. RCW 10.95.030.

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1           **II. The Decision to File a Notice of Intention to Seek the Death Penalty Is Not a**  
2           **Matter of Discretion of a Prosecuting Attorney. Mitigating Factors Are**  
3           **Determinative of Whether a Notice May or May Not Be Filed**

4           When aggravated murder has been charged against a defendant, RCW 10.95.040 requires a  
5 prosecutor to file a notice if, and only if, “there is reason to believe that there are not sufficient  
6 mitigating circumstances to merit leniency” (emphasis added). The only standard the legislature has  
7 given prosecutors is the sufficiency of mitigating evidence known to the prosecutor. In fact, a  
8 prosecutor must affirmatively have reason to believe there is a lack of mitigating evidence in the  
9 case before him before he can seek file a death notice. If there is a lack of mitigating evidence the  
10 statute provides that a prosecutor “shall file” a notice. Nothing in the statute suggests the death  
11 notice decision is in the discretion of individual prosecutors or a matter of subjective reaction by  
12 individual prosecutors to the circumstances of the murder. Nothing in the statutory standard for  
13 filing a notice, RCW 10.95.040, directs a prosecutor to consider the circumstances underlying the  
14 particular charges of aggravated murder and/or to “weigh” those circumstances against the  
15 mitigating evidence known to the prosecutor.  
16  
17  
18

19           Since RCW 10.95.040 does not direct the prosecutor to consider the particular  
20 circumstances of the crime charged in evaluating the mitigating evidence neither the prosecutor nor  
21 the court should read “circumstances of the crime” into the statutory standard set for filing of a  
22 notice of intent. If the legislature intended a prosecutor to weigh mitigating evidence against  
23 allegations underlying the aggravated murder charge, the legislature would have included that  
24  
25

26 **DEFENDANT McENROE’S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 language in the statute. The legislature did include that very language in another part of the death  
2 penalty scheme, directing the jury how to consider mitigating evidence:

3           Upon conclusion of the evidence and argument at the special sentencing proceeding,  
4           the jury shall retire to deliberate upon the following question: "Having in mind the  
5           crime of which the defendant has been found guilty, are you convinced beyond a  
6           reasonable doubt that there are not sufficient mitigating circumstances to merit  
7           leniency?"

8 RCW 10.95.060(4). The absence of language telling the prosecuting attorney to "have in mind the  
9 crime" in making the filing decision cannot be ignored. In denying a capital defendant's challenge  
10 to service of the notice of intent on his attorney's receptionist rather than directly into the hands of  
11 his attorney as required for service under the civil rules, the Washington Supreme Court held:

12           It is more significant that the Legislature did not include the word "personally" in  
13           RCW 10.95.040 as it did in RCW 4.28.080. Where the Legislature uses certain  
14           statutory language in one instance, and different language in another, there is a  
15           difference in legislative intent.

16 *State v. Cronin, supra.* The legislature intended that juries have in mind the crime when  
17 determining the sufficiency of mitigating evidence but did not have the same intention for  
18 prosecutors deciding whether to file a notice of intent.

19           A statutory requirement that prosecutors focus on the mitigating evidence known to them  
20 regarding a defendant in determining whether to file a notice of intent makes sense in the context of  
21 the Washington death penalty scheme. The Washington statute, as written and interpreted by the  
22 Washington Supreme Court, strongly disfavors death as the sentence for aggravated murder. In  
23 addition to requiring conviction of premeditated murder with aggravating factors, the statute  
24

25  
26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 articulates that the sentence for aggravated murder shall be life imprisonment without possibility of  
2 release or parole, except when a special sentencing proceeding is held. RCW 10.95.030. A special  
3 sentencing proceeding may only be held when the prosecutor has filed a notice pursuant to RCW  
4 10.95.040, that is, “when there is reason to believe that there are not sufficient mitigating  
5 circumstances to merit leniency.” If the prosecutor does not scrupulously follow the requirements  
6 of RCW 10.95.040, even in mere service of the notice, “the prosecuting attorney may not request  
7 the death penalty.” The Washington Supreme Court has required strict compliance:  
8

9  
10 Given the unique qualities of the death penalty, the Legislature has tailored pretrial  
11 procedures to govern the use of a special sentencing proceeding. Second, filing and  
12 service of notice is mandatory; no notice, no death penalty.

13 *State v. Dearbone, supra.*<sup>6</sup> See also, *State v. Luvane, supra* (recognizing that death penalty cases  
14 required heightened scrutiny by the courts to “ensure that the procedures and safeguards enacted by  
15 the Legislature are properly followed by the State”). Assuming a notice to seek the death penalty is  
16

17 <sup>6</sup>In *Dearbone*, it was not disputed that the deputy prosecutor filed the notice on time and left a voice message for  
18 defense counsel that the notice was filed so they had actual notice but were not properly served with the written  
19 notice within the time required by RCW 10.95.040. Because the defendant had actual notice within the statutory  
20 time for serving notice and could articulate no prejudice, the trial court found good cause to reopen the service  
21 period and allowed the state to serve the defense and denied the defendant’s subsequent motion to dismiss the notice.  
22 Nonetheless, the Supreme Court accepted interlocutory review, reversed the trial court, and barred the state from  
23 seeking the death penalty. The case also illustrates that the facts of the crime are not to be considered in determining  
24 whether the state complied with RCW 10.95.040. The facts underlying the aggravated murder charges against  
25 Dearbone are not mentioned in the Court’s decision but were egregious. A newspaper account (a copy of which is  
26 attached hereto as “Appendix G”), indicate that Dearbone was a drug dealer who told his friend he would “smoke”  
the next person who approached him to buy drugs. A young couple, previously unknown to him, drove up to  
Dearbone. The couple’s two young children, ages one and three years old were in the back seat. Dearbone shot and  
killed both of the adults then attempted to shoot the three year old child but was out of ammunition. He then pulled  
the one year old out of the car and flung him into the street. Dearbone then got into the drivers seat and drove the car  
away.

**DEFENDANT McENROE’S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 properly filed and a defendant is convicted of aggravated murder, the prosecution must then prove  
2 beyond a reasonable doubt there are not sufficient mitigating factors to merit leniency. RCW  
3 10.95.060. Despite having the burden of proof, the state may present only the defendant's record of  
4 criminal convictions in its case in chief at the penalty trial. *State v. Bartholomew*, 101 Wash.2d 631  
5 (1984). The rules of evidence do not apply to a defendant's mitigation case. *Bartholomew, id.* The  
6 jury is instructed there is a presumption of leniency, WPIC 31.05, and that mercy alone may be  
7 sufficient mitigation to reject a death sentence. WPIC 31.07. The jury must be unanimous to return  
8 a sentence of death. RCW 10.95.060. If the jury is not unanimous, even if one juror is not  
9 convinced, the sentence will be life in prison without release. RCW 10.95.080. When a death  
10 sentence is imposed, the Washington Supreme Court must conduct a mandatory review of the  
11 sentence. RCW 10.95.130. Furthermore, the Washington Constitution is more protective of a  
12 defendant's due process right to a fair sentencing proceeding than the federal constitution.  
13 *Bartholomew*, 101 Wash.2d 631 (1984).

17 Given the statutory presumption in favor of life imprisonment as the sentence for  
18 aggravated murder and the numerous procedural safeguards the statute requires, it is consistent that  
19 the legislature would also require a prosecuting attorney to act as a gate keeper, and that the  
20 prosecutor be allowed to seek the death penalty only in those cases without clearly valid mitigating  
21 factors. The need for the prosecutor to focus on the individualized mitigating circumstances of  
22 individual defendants is greatest when the facts of the case are grizzly or inflammatory because in  
23  
24  
25

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@dcfender.org](mailto:prestia@dcfender.org)

1 such cases it is most likely a jury will succumb to passion or prejudice and be unable to consider  
2 mitigating evidence. The legislature's omission of language in RCW 10.95.040 telling the  
3 prosecutor to consider the facts of the crime is significant and should be understood to require the  
4 prosecutor to make his decision based solely on the quality of the mitigating information known to  
5 him, not to weigh it against the allegations underlying the aggravated murder charge. It might be  
6 said that at the filing stage the prosecutor is required by the statute to assure that defendants who are  
7 not themselves the "worst of the worst" do not face the death penalty, even if the crimes they are  
8 charged with are among the worst.  
9

10  
11 While the legislature in RCW 10.95.040 did not expressly define "sufficient" in relation to  
12 mitigating evidence, capital jurisprudence is helpful in understanding the term.

13  
14 A defendant's lack of likelihood of future dangerousness is widely considered to be a very  
15 substantial mitigating factor. Under Washington's previous death penalty statute, the jury was  
16 given that express interrogatory and if the answer was "no," the death penalty could not be  
17 imposed. In pro-death penalty Texas the sentencing jury still must answer that discreet question  
18 and a negative response results in a life sentence. Texas Code of Criminal Procedure Art. 37.071.  
19 Jury research shows that future dangerousness is one of the most determinative factors for capital  
20 juries in choosing life or death sentences. SCOTT E. SUNDBY, A LIFE AND DEATH DECISION (2005).  
21

22 Substantial mental impairment at the time of the offense is almost universally recognized as  
23 a reason not to seek or impose a death sentence. In King County mental illness by itself has  
24  
25

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 commonly been sufficient reason not to seek a death sentence. A recent example is Naveed Haq,  
2 charged with shooting six women and killing one in the Jewish Federation Building. Then-  
3 Prosecutor Maleng found Mr. Haq's mental illness sufficient reason not to seek a death sentence  
4 despite the fact there was widespread outrage at the crime and animosity toward the defendant who  
5 was portrayed an Islamic Jihadist. There is no indication Mr. Maleng "weighed" Mr. Haq's mental  
6 illness against the death and injuries to the victims of his crime and found the latter to carry less  
7 "weight." Instead it appears Maleng followed the statutory standard and focused on the mitigating  
8 factor; Mr. Haq's mental illness reduced his culpability regardless of the severity and particular  
9 circumstances of his crime.<sup>7</sup> Maleng also cited mental disability of the defendant when he declined  
10 to seek the death penalty against Ronald Matthews who murdered a King County Sheriff deputy.  
11 See newspaper account of non-death decision in *Matthews*, a copy of which is attached hereto as  
12 "Appendix H."

13 Sincere remorse is shown by jury researchers to be persuasive mitigating evidence. SCOTT  
14 E. SUNDBY, A LIFE AND DEATH DECISION (2005).

15  
16  
17  
18  
19  
20 <sup>7</sup>Maleng was quoted as saying regarding the Jewish Federation shootings, "I view the crime as one of the most  
21 serious crimes that has ever occurred in this city," but,

22 In making his announcement Wednesday, Maleng said he is required by state law to consider "mitigating  
23 factors" when deciding whether to seek the death penalty. "Mental disease or defect" is one of those listed  
24 factors.

25 *Seattle Times*, December 21, 2006, a copy of which article is attached hereto as "Appendix I."

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 This is not to say that a prosecutor can never seek the death penalty when the defendant  
2 presents some mitigation. For instance, the mere fact that a defendant was young, eighteen or  
3 nineteen for instance, at the time of the crime, although a mitigating factor, might reasonably be  
4 considered less than sufficient to deter the filing of a death notice. An absence of criminal record  
5 alone might reasonably fail to be considered substantial. Mitigation claims may not be substantial  
6 because the defense fails to support them, which was apparently the case when former Prosecutor  
7 Maleng decided to seek death in the *Dearbone* case:

9 Defense counsel told the deputy prosecutor that defendant had fetal alcohol  
10 syndrome and probably suffered from organic brain damage. On October 8, 1993,  
11 defense counsel sent a mitigation package which, according to the deputy  
12 prosecutor, provided no evidence to support these claims.

13 *State v. Dearbone, supra.*

14 However, Mr. McEnroe presented well supported substantial mitigating evidence of the  
15 kind generally considered "sufficient" to merit leniency.<sup>8</sup> Mr. McEnroe showed through expert  
16 opinion supported by lay witness observation that he does not constitute a danger to anyone in the  
17 future in any setting but especially in a prison setting. He presented detailed psychological  
18 evidence that at the time of the offense he suffered a serious mental impairment that prevented him  
19 from extricating himself from doing what was so alien to his nature. The prosecutor was presented  
20 with evidence that Mr. McEnroe is extremely remorseful to the extent of despair. Mr. McEnroe's  
21

22  
23  
24 <sup>8</sup>The State is in possession of the mitigation materials Mr. McEnroe presented to the Prosecuting Attorney. Because  
25 of the sensitive nature of the information in the package, Mr. McEnroe is seeking to submit it to the Court under seal.

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 personal history was one of trying to make a go of life through hard work despite a lack of formal  
2 education, social handicaps such as a serious speech disorder and an impoverished, remarkably  
3 chaotic, childhood. Mr. Satterberg did not indicate that the mitigating evidence was insubstantial or  
4 lacking in support but, as seen above, simply considered the crime alleged to be so severe that no  
5 mitigation could dissuade him from seeking death against Mr. McEnroe.  
6

7 **III. A Prosecutor Does Not Have the Option of "Letting the Jury Decide" Whether to**  
8 **Impose a Death Sentence When the Prosecutor Does Not Have the Required**  
9 **"Reason to Believe That There Are Not Sufficient Mitigating Circumstances to**  
10 **Merit Leniency."**

11 In announcing his decision to seek the death penalty against Mr. McEnroe, said "The jury  
12 acting as conscience of the community, should have all relevant information and all legal options  
13 before it in consideration of this case." RCW 10.95.040 does not mention the jury. The prosecutor  
14 has a duty to screen aggravated murder cases and preclude jury consideration of the death sentence  
15 in cases in which there is reason to believe there are not sufficient mitigating circumstances to merit  
16 leniency. The "conscience of the community" is not part of the standard by which a prosecuting  
17 attorney is required to evaluate mitigating information under the statute. Under Washington's death  
18 penalty scheme the jury may decide on a death sentence only in cases in which both the crime and  
19 the defendant are among the worst of the worst because only those cases are intended by statute to  
20  
21  
22  
23  
24  
25  
26

**DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 get past the prosecutor's initial determination to file a notice of intention to seek the death penalty.<sup>9</sup>  
2 Theoretically an experienced prosecutor should be able to put aside his own emotional reaction to  
3 the facts of a particular murder, follow statutory requirements, block out public hue and cry, and  
4 dispassionately evaluate mitigating evidence offered by a defendant. Punting the decision to seek  
5 or impose death to the jury in a case with emotionally charged facts does not assure a fair  
6 determination of sentence.<sup>10</sup>  
7

8 The determination of whether a defendant will live or die must be made in a  
9 particularly careful and reliable manner and in accordance with the procedures  
10 established by the Legislature.

11 *State v. Luvene, supra.*

12 It is of vital importance to the defendant and to the community that any decision to  
13 impose the death sentence be, and appear to be, based on reason rather than  
14 emotion.

15 *State v. Bartholomew, 101 Wash.2d 631 (1984).*

16 States must properly establish a threshold below which the penalty cannot be  
17 imposed... To ensure that this threshold is met, the "state must establish rational  
18 criteria that narrow the decisionmaker's judgement as to whether the circumstances  
19 of a particular defendant's case meet the threshold.

20 <sup>9</sup>Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes'  
21 and whose extreme culpability makes them 'the most deserving of execution.' *Roper v. Simmons, 543 U.S. 551*  
(2005).

22 <sup>10</sup>It can be anticipated that a jury will be especially outraged and inflamed by the murders of the two young children.  
23 This is an example of why it is especially important for a prosecuting attorney to scrupulously follow the standard set  
24 out in RCW 10.95.040 and not "weigh" the allegations underlying the aggravated murder charge against the  
25 mitigating evidence to avoid emotion from hijacking the sentencing process.

26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 *Romano v. Oklahoma*, 512 U.S. 1 (1994).

2 By enacting RCW 10.95.040, Washington established a threshold that only cases in which  
3 there is not sufficient mitigating circumstances should be prosecuted as death penalty cases. That  
4 threshold was not honored when the notice was filed in Mr. McEnroe's case.

5  
6 **IV. The Filing of a Notice of Intention to Seek the Death Penalty in Violation of RCW  
7 10.95.040 Violated Mr. McEnroe's Due Process Rights under the Fifth and  
8 Fourteenth Amendments to the U.S. Constitution and under Washington State  
9 Const. Art. 1, Sec. 14. and Was Filed in Violation of RCW 10.95.040**

10 **A. Deprivation of Due Process Rights**

11 Since the death penalty is the ultimate punishment, due process under this state's  
12 constitution requires stringent procedural safeguards so that a fundamentally fair  
13 proceeding is provided.

14 *State v. Bartholomew, supra.*

15 When a state provides criminal defendants with procedural safeguards, even when not  
16 required under the federal constitution, a defendant nevertheless has a constitutionally protected  
17 liberty interest in the exercise of that state procedure in his case, "and that liberty interest is one that  
18 the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks v.*  
19 *Oklahoma*, 447 U.S. 343 (1980). In the instant case, the State did not satisfy procedural safeguards  
20 set forth in RCW 10.95.040 that were intended to protect Mr. McEnroe's due process interest in  
21 liberty. Accordingly, Mr. McEnroe's due process rights under the Fifth and Fourteenth  
22 Amendments to the U.S. Constitution have been violated, and the Death Notice must be dismissed.

23 *Hicks.*

24  
25  
26 **DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestla@defender.org



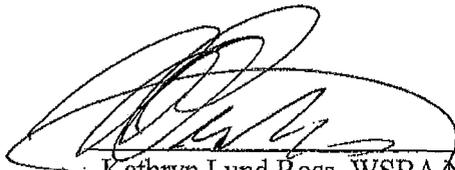
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Conclusion

For the foregoing reasons, the Notice of Intent to Seek the Death Penalty against Mr. McEnroe must be dismissed.

DATED: Friday, October 23, 2009.

Respectfully submitted,



Kathryn Lund Ross, WSBA No. 6894  
Leo J. Hamaji, WSBA No. 18710  
William Prestia, WSBA No. 29912  
Attorneys for Mr. McEnroe

**DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

# **APPENDIX A**

**NOTICE OF SPECIAL SENTENCING PROCEEDING  
(A.K.A., "NOTICE OF INTENT TO SEEK THE DETH  
PENALTY;" A.K.A. "DEATH NOTICE")**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE,

Defendant.

)  
) No. 07-C-08716-4 SEA

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

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

DATED this 16<sup>th</sup> day of October, 2008.

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

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

# **APPENDIX B**

**DECEMBER 28, 2007, STATEMENT OF KCPAO  
ANNOUNCING FILING OF AGGRAVATED HOMICIDE  
CHARGES AGAINST JOSEPH McENROE AND  
MICHELE ANDERSON**

**Statement of King County Prosecuting Attorney Dan Satterberg  
Anderson Family Murders**

Today we are announcing the filing of aggravated first degree murder charges against Michele Anderson and Joseph McEnroe.

We allege in the information supporting these charges that on Monday, Christmas Eve, while most families in the Puget Sound area were preparing to gather for an evening of fellowship, the defendants were preparing for an evening of murder.

Wayne and Judy Anderson owned a home on several acres near Carnation. Michele Anderson lived down a hill from her parents' home, in a mobile home which she shared with her boyfriend Joseph McEnroe.

Wayne and Judy Anderson had planned to spend Christmas Eve with Michele and Joseph, as well as their son Scott and his wife Erika, and their two young grandchildren Olivia, age 6 and Nathan, age 3. Wayne and Judy expected Scott and his family to arrive around 5:00 pm.

While Judy Anderson was busy wrapping Christmas presents for her grandchildren, the defendants were in their trailer, arming themselves with two handguns they had purchased this past summer. We allege that Michele Anderson armed herself with a .9 mm handgun, concealed it in a sweatshirt wrapped around her arm and walked up the hill to begin a lethal confrontation with her family. Joseph McEnroe, armed with a .357 magnum handgun, was at her side as she headed to the family home.

The motive for this crime may never be fully understood, but it appears that Michele Anderson was angry at her brother Scott, who she believed owed her money. She was also angry at her father Wayne and mother Judy, apparently over their lack of support for her.

As the defendants entered the home, Michele confronted her father Wayne. We allege that Michele fired her gun once at her father's head, but missed. McEnroe stepped in, leveled his gun and fatally shot Wayne Anderson in the head. Judy Anderson heard the shots and ran from the back room where she had been wrapping gifts. We allege that she was shot once in the head by defendant McEnroe.

For the next 30 to 45 minutes, the two defendants prepared for the arrival of Scott Anderson's family. They dragged the bodies of Judy and Wayne Anderson out of the home to a shed behind the house. They used towels and carpets to clean up blood stains. They burned evidence in a fire pit on the property. Then they waited for Michele's brother Scott; his wife Erika and Olivia and Nathan to arrive.

Scott Anderson arrived with his family and entered his parent's home. He was confronted by Michele Anderson as soon as he entered the living room. We allege that Scott Anderson was shot multiple times by his sister and also by McEnroe. Scott's wife Erika witnessed this murder and ran for the phone to call 911. Michele Anderson shot her sister-in-law twice as she ran for the phone. Erika was unable to speak to the 911 operator before McEnroe took the phone away from her. Defendant McEnroe then shot her two additional times. In this small room, witnessing this horror was six-year-old Olivia Anderson and her three-year-old brother Nathan. We allege that McEnroe spoke to each child and apologized for what he was about to do. The evidence will show that McEnroe then shot each child in the head from close range.

In the span of one hour, the defendants had turned this family's Christmas Eve celebration into a scene of mass murder.

On Christmas Day, the Anderson property was silent.

The investigation into what the defendants did after the murders is continuing, but it appears that they drove -- first north toward Canada, then south toward Oregon, arriving at neither destination -- in an evolving plan to avoid detection. They eventually decided to go back to the property and pretend to discover the bodies. They may have disposed of the firearms during this time. No guns have been recovered yet.

On Wednesday morning, the day after Christmas, when Judy Anderson had not arrived promptly at her job at the Carnation Post Office, a co-worker went out to the home, walked around the locked gate and discovered the crime scene. About two hours later, while Sheriff's deputies began to process the scene, defendants Michele Anderson and Joseph McEnroe drove up in their pickup truck. They claimed initially to be unaware of the murders. After being separated and interviewed at length the two were eventually booked into jail.

Today we are filing six counts of aggravated first-degree murder against each of these defendants. We are alleging the existence of two aggravating factors:

\* First, in each case that there were multiple victims and the murders were carried out as a part of a common scheme or plan or the result of a single act;

\* Second, in the murders of Erika, Olivia and Nathan Anderson that the murders were committed to conceal the commission of a crime, that is, the murder of Scott Anderson, or to protect or conceal the identity of the person committing a crime.

If convicted of aggravated murder, the penalty under law is either life in prison without possibility of release, or the death penalty.

As you know, the prosecuting attorney has 30 days from the date of arraignment to decide whether or not to file a notice declaring our intention to pursue the death penalty. During this period of time, we review the facts of the case, and consider any mitigating circumstances including any facts or issues that the defense may want to present. Given the magnitude of this crime, I pledge to give this case serious consideration for application of our state's ultimate punishment. But that decision is for another day.

Today, in addition to filing these charges, we want to join with those in our community who are grieving the loss of three generations of the Anderson family. We acknowledge too, the loss suffered by the Mantle family, the mother, step-father, brother and sister of Erika Anderson. The loss is profound and immeasurable. It impacts not only those who knew the Andersons, but all of us who desire to live in a peaceful community.

There is a natural tendency to look for a motive to try and make some sense of a violent crime like this. It is part of our investigation, but a search for a rational motive it is often a frustrating endeavor. In the end, what motive could you find that would make sense of the senseless slaying of the Anderson family?

While we share the community's distress over this crime, we are grateful, however, to be able to join our efforts with those professionals in the Sheriff's Office, the Medical Examiner's Office and the Crime Lab. Together we will work to uncover the truth and seek justice for those whose lives were so violently taken away.

# **APPENDIX C**

**OCTOBER 16, 2008, STATEMENT OF KCPAO  
ANNOUNCING FILING OF NOTICE OF SPECIAL  
SENTENCING PROCEEDING**

October 16, 2008

**Statement of King County Prosecuting Attorney Dan Satterberg regarding the death penalty option in the Carnation murder cases:**

In the case of State v. Michele Anderson and Joseph McEnroe, I have decided that the jury should have the option to consider the death penalty.

This decision is reached at the conclusion of a 10-month process in which the prosecution team has sought input from surviving family members, law enforcement, and the attorneys representing the accused. I come to this conclusion after reviewing all of the information, and in keeping with the role outlined for the prosecuting attorney under Washington State law.

The Prosecuting Attorney has the obligation in potential capital murder cases to consider all relevant information about the crime and to weigh that against any mitigating evidence favoring the charged defendants.

The crime that is alleged in this case against both defendants is the premeditated murders of Wayne Anderson, age 60, Judy Anderson, 61, Scott Anderson, 32, Erica Mantle Anderson, 32, Olivia Anderson, 6, and Nathan Anderson, 3.

Given the magnitude of these alleged crimes, the slaying of three generations of a family, and particularly the slaying of two young children, I find that there are not sufficient reasons to keep the death penalty from being considered by the juries that will ultimately hear these matters.

The death penalty is this state's ultimate punishment and is to be reserved for our most serious crimes. I believe this is one of those crimes. The jury, acting as the conscience of the community, should have all relevant information and all legal options before it in consideration of this case.

# **APPENDIX D**

**LETTER TO PROSECUTOR SATTERBERG FROM  
MCENROE DEFENSE COUNSEL, DATED MAY 22,  
2009**

KATHRYN LUND ROSS  
The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104  
(206) 447-3900, ext. 774

May 22, 2009

Dan Satterberg  
King County Prosecuting Attorney  
516 3rd Ave, Suite W 554  
Seattle, WA 98104-2390

Re: State v. McEnroe, No. 07-C-08716-4 SEA

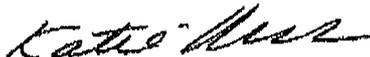
Dear Mr. Satterberg:

As you probably know, on behalf of Mr. McEnroe we are preparing a motion to dismiss the Notice of Intent to seek the death penalty on several grounds. One basis of the motion is we believe the statutory requirement of RCW 10.95.040, that "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" is not met in Mr. McEnroe's case.

At this point we are basing the motion on the only documents we know of that set forth your decision, the notice itself, filed on October 16, 2008, a "statement of King County Prosecuting Attorney Dan Satterberg regarding the death penalty option in the Carnation murder cases," dated October 16, 2008, (which I believe was a press release from your office), and a "Statement of King County Prosecuting Attorney Dan Satterberg regarding Anderson Family Murders," dated December 28, 2007. We are wondering whether there are other records of your reasons for seeking the death penalty against Mr. McEnroe that we should consider in bringing the motion. If there are no other records, are there reasons you can share now that are not contained in the documents mentioned above? For instance, did you have information from sources other than Mr. McEnroe's attorneys that contradicted the materials submitted in Mr. McEnroe's mitigation materials submitted to you prior to your decision?

Thank you for your attention to this request.

Sincerely,



Katie Ross  
Bill Prestia  
Leo Hamaji

# **APPENDIX E**

**LETTER TO MCENROE DEFENSE COUNSEL FROM  
PROSECUTOR SATTERBERG DATED JUNE 1, 2009**

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



**King County**

Office of the Prosecuting Attorney  
W400 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9067  
FAX (206) 296-9013

June 1, 2009

Kathryn Lund Ross  
The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104

Re: State v. McEnroe, King County Cause No. 07-C-08716-4 SEA  
State v. Anderson, King County Cause No. 07-C-08717-2 SEA

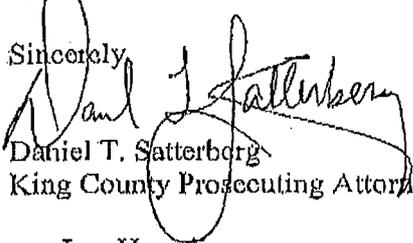
Dear Ms. Ross,

I am writing in response to your letter dated May 22, 2009, in which you ask what if any records or information I considered in making my decision to file written notices pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether or not the death penalty should be imposed in the above referenced cases.

In making my decision I considered the facts and circumstances alleged that form the basis for charging your client and co-defendant Anderson with six counts of Aggravated First Degree Murder. I also considered the mitigation materials submitted by defense counsel in the above cases. I have previously shared with you the only public record reflecting that decision, the press release we issued on October 16, 2008.

Please do not hesitate to contact my office if you have any further questions.

Sincerely,

  
Daniel T. Satterberg  
King County Prosecuting Attorney

cc: Leo Hamaji  
Bill Prestia  
Lisa Mulligan

# **APPENDIX F**

**LETTER FROM MARK LARSON DATED JANUARY 17,  
2008**

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



King County

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

January 17, 2008

Wes Richards  
Katie Ross  
The Defender Association  
810 3<sup>rd</sup> Ave. #800  
Seattle, WA 98104

Re: State v. Joseph McEnroe, KCSC Cause # 07-C-08716-4 SEA

Dear Wes and Katie,

I am writing to outline our expectations concerning the mitigation process in the case of State v. McEnroe, 07-C-08716-4 SEA. As you know, RCW 10.95.040 sets out a 30-day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame allows for the consideration of mitigating circumstances to merit leniency.

In this case, the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issues and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses. We anticipate that this process will be completed and a decision to file a notice made no later than May 2, 2008.

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than April 10, 2008. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of April 14 - 18, 2008. The final scheduling for that meeting can be arranged when the mitigation materials are received.

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

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

Sincerely,

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney

Mark R. Larson  
Chief Deputy, Criminal Division

# APPENDIX G

NEWSPAPER ACCOUNT OF INCIDENT IN *STATE V.*  
*DEARBONE*

## Maleng Will Seek Death Penalty -- Central Area Man Accused Of Gunning Down Couple In Car Without Provocation, Then Terrorizing Their Kids

By Richard Sever

King County Prosecutor Norm Maleng will seek the death penalty against a Central Area man accused of killing a husband and wife and terrorizing their two young children.

Solomon Dearbone, 22, is charged in Superior Court with two counts of aggravated first-degree murder in the deaths of Ryker Dean Johnson and Monica Jean Abat, both 26, as they sat in their car Sept. 3.

He also is charged with first-degree attempted murder after allegedly trying to shoot the couple's 3-year-old daughter, who was sitting in the back seat. Prosecutors said he aimed his handgun at the girl and pulled the trigger, but the weapon was out of ammunition.

Dearbone then allegedly took the couple's 1-year-old son from the car and flung him onto the street.

Prosecutors said Dearbone jumped into the blood-splattered vehicle and drove off.

The couple traveled from Suquamish, Kitsap County, to buy crack cocaine in Seattle's Central Area, prosecutors said.

Although Dearbone has no felonies on his record, Maleng said the case merits no leniency. The slayings were unprovoked, he said.

The "aggravating circumstance" under the law, Maleng said, is that Dearbone allegedly killed more than one victim as part of a common plan.

Dearbone allegedly was hanging around the 2100 block of East Terrace Street when he told friends he was going to "smoke" the next person who came by.

When the couple stopped their car, Dearbone walked up, spoke briefly and fired six times. Johnson was shot four times in the head. Abat had two head wounds.

Prosecutors have a .25-caliber handgun they believe was the slaying weapon. A 16-year-old friend of Dearbone had stolen it from his mother. Prosecutors also said they have several witnesses, and Dearbone's fingerprints allegedly were found on the victims' car.

Dearbone was arrested three days later, when police saw him walking along a street in Rainier Valley. A lifetime resident of King County, Dearbone is single with one child.

If convicted of aggravated murder, Dearbone would face the death penalty or a mandatory sentence of life in prison with no chance for parole. The case marks the 11th time Maleng has sought the death-penalty option, which became law in 1981.

Prosecutors are set to try their first such case in four years next week when Cal Brown's aggravated-murder trial begins.

Prosecutors claim Brown, an Oregon parolee, tortured, raped and robbed 21-year-old Holly Washa of Burien in 1991 before killing her and leaving her body in the trunk of her car near Seattle-Tacoma International Airport.

Copyright (c) 1993 Seattle Times Company. All Rights Reserved.

# APPENDIX H

NEWSPAPER ACCOUNT OF NON-DEATH DECISION IN  
*MATTHEWS CASE*

8-27-03

## Prosecutor won't seek death penalty in deputy's fatal shooting

By Sara Jean Green  
Seattle Times Staff Writer

King County Prosecutor Norm Maleng announced yesterday his office won't seek the death penalty against Ronald Keith Matthews, a 45-year-old Newcastle man accused of killing a King County sheriff's deputy with the deputy's own gun 14 months ago.

Psychiatric experts concluded Matthews, who has a long history of mental illness, was delusional and psychotic on that June afternoon when officials say he fatally shot sheriff's Deputy Richard Herzog on Coal Creek Parkway in Newcastle, Maleng said in a written statement.

While an expert hired by Matthews' attorneys said Matthews' cocaine use exacerbated a pre-existing mental disorder, an independent forensic psychiatrist retained by the state said cocaine had contributed to Matthews' "extreme state of mental disturbance," the statement said.

Matthews was charged with aggravated first-degree murder on June 26, 2002. Prosecutors say that four days earlier, Matthews, high on crack cocaine, was running naked through traffic, pounding on cars and shouting obscenities when Herzog confronted him.

Witnesses told police Matthews lunged at the deputy, who used pepper spray on Matthews with no effect, charging papers say. A struggle ensued — Herzog's .40-caliber Glock pistol dropped to the ground and its loaded magazine fell out of the firearm; Matthews picked up the gun and reloaded the magazine before firing all 16 bullets, four of them at Herzog's head, the papers say. Matthews later surrendered to police.

Herzog's position as a sheriff's deputy elevated the crime from first-degree murder to aggravated first-degree murder. The only punishments allowed under state law for the latter charge are life in prison without the possibility of release or the death penalty.

In explaining his decision not to seek the death penalty against Matthews, Maleng cited a list of eight mitigating circumstances that, under state law, merit leniency. He concluded there's evidence Matthews met two of the eight mitigating factors in that Matthews "was under the influence of extreme mental disturbance" and did not have the capacity "to appreciate the wrongfulness of his ... conduct" or the ability to "conform his conduct ... to the requirements of law" because of a mental disease or defect.

Matthews' attorneys could not be reached for comment yesterday.

Matthews has been held without bail in the King County Jail since his arrest. He is expected to appear in court Friday when a trial date likely will be set, said Dan Donahoe, spokesman for the county Prosecuting Attorney's Office.

Maleng's announcement came three days before a court-mandated deadline for a decision by prosecutors on whether to seek the death penalty. A Superior Court judge twice granted extensions for the decision.

Sara Jean Green; 206-415-5654 or [sgreen@seattletimes.com](mailto:sgreen@seattletimes.com)

# APPENDIX I

DECEMBER 21, 2006 *SEATTLE TIMES* ARTICLE  
REGARDING *HAQ* CASE

### Execution ruled out for alleged shooter

By Natalia Singer  
Seattle Times staff reporter

Naveed Haq, the man accused of a shooting rampage at the Jewish Federation of Greater Seattle that left one woman dead and five others wounded, will not face the death penalty.

King County Prosecuting Attorney Norm Maleng announced Wednesday that he will not seek the death penalty for Haq because of his history of mental illness. Maleng took several months to review a decade's worth of Haq's mental-health-treatment records before making his decision, he said in a statement.

"I view this crime as one of the most serious crimes that has ever occurred in this city," he said.

Haq, 31, is accused of forcing his way into the Belltown offices of the federation on July 28 by putting a gun to the back of a 14-year-old girl to enter the locked building. According to charges, he carried two guns and spewed anti-Semitic statements as he made his way through the offices, randomly shooting those he encountered while people screamed and tried to escape, some jumping out of windows or hiding inside.

"These are Jews," he reportedly told operators in a 911 call. "I want these Jews to get out."

Haq has identified himself as an American Muslim.

Pamela Waschter, director of the federation's annual fundraising campaign, was killed, and five other women were seriously injured.

Haq is charged with one count of aggravated first-degree murder, five counts of attempted murder, kidnapping, burglary and malicious harassment. The only possible punishments for aggravated first-degree murder are life in prison without the possibility of release, or the death penalty.

Now, Haq will face life in prison if convicted.

The news that he wouldn't face execution if convicted received mixed reaction Wednesday from those most closely affected by the rampage.

Representatives of the federation said Wednesday after a court scheduling hearing that the organization had no official position on the death penalty.

"We have every confidence that Prosecutor Maleng will conduct a fair and equitable trial that will result in a just decision," chairwoman Robin Boehler said.

In a statement, Waschter's children, Nicole and Mark Waschter, said they are choosing not to focus on Haq's fate. However, they added, "His cruel and callous disregard for the lives of so many, in our view, forfeited his right to preserve his own."

Victim Cheryl Stumbo, who was shot in the abdomen, said she had spent months thinking about the death penalty, relying on her faith and family, before concluding she couldn't support capital punishment.

"I think someone serving out the rest of their life thinking about what they did is a more just outcome," she said. "Death is a release."

Stumbo, who has returned to work part time, said she is slowly recovering physically, emotionally and psychologically from the shooting.

"I've pretty much relived everything," she said. "I can't think of any aspect of my life it hasn't touched. I pray more often. I wake up and think about what happened. I'm much more centered spiritually now ... I don't feel angry right now, I'm sad."

Another victim, Carol Goldman is also back at work. Christina Rexroad and Layla Bush are still recovering, as is victim Dayna Klein, who gave birth last month to a son.

In making his announcement Wednesday, Maleng said that he is required by state law to consider "mitigating factors" when deciding whether to seek the death penalty. "Mental disease or defect" is one of those listed factors. Maleng said he still believes that under the law Haq will be held fully accountable for his alleged crimes.

Records and interviews with friends and family show Haq has a tumultuous past with a history of mental issues.



PHOTOGRAPH BY JIM WATSON FOR THE SEATTLE TIMES  
Victims Cheryl Stumbo, (center), and Carol Goldman are comforted by friends during a Jewish Federation of Greater Seattle news conference after Naveed Haq's hearing. At far right is Janine Finkel, the federation's former president.

#### Related

Archive | Naveed Haq's name 8 shot at Jewish office

12-21-06

A Kennewick attorney representing Haq on a previous misdemeanor charge of lewd conduct said shortly after the shooting that Haq has been getting psychiatric help for about 10 years and has been diagnosed with bipolar disorder.

Though he graduated from college with a degree in electrical engineering, he hadn't held a stable job and was renting a small room in Everett before the shooting. Some friends said he had become increasingly isolated and angry.

C. Wesley Richards, Haq's attorney, said he was satisfied with Malong's decision and, at this time, Haq planned to maintain his plea of not guilty. Previously, Haq had attempted to plead guilty but later entered a not guilty plea.

Haq will return to court Jan. 17 to have future court hearings scheduled. Senior Deputy Prosecuting Attorney Don Raz said he expects the trial to begin sometime in 2007.

FILED

10 JAN -8 PM 2:52

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE, and  
MICHELE KRISTEN ANDERSON,

Defendants.

No. 07-C-08716-4 SEA ✓  
07-C-08717-2 SEA

STATE'S RESPONSE TO  
DEFENDANTS' "MOTION TO  
STRIKE NOTICE OF INTENT TO  
SEEK THE DEATH PENALTY ON  
GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.94.040"

**I. INTRODUCTION**

The defendants are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007 killings of six members of Michelle Anderson's family. In each count and as to each defendant, the aggravating circumstance alleged is that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act" pursuant to RCW 10.95.020(10).

The defendants have filed the second of their motions to strike the notice of intent to seek the death penalty. The defendants' memoranda in support of this second motion are substantially similar, and frame the defendants' claim as follows: That King County Prosecuting Attorney

STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 1

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



1 Daniel T. Satterberg did not follow the dictates of Chapter 10.95 RCW in deciding to seek the  
2 death penalty against these defendants because Mr. Satterberg considered information other than  
3 potential mitigation, such as the facts of the crimes themselves and the strength of the available  
4 evidence, in making his decision to seek the death penalty. In addition, the defendants urge this  
5 Court to reverse Mr. Satterberg's decision in these cases based its own review of the purported  
6 strength of the defendants' mitigation evidence.

7 The State's response to this motion is threefold. First, the plain language of the statute at  
8 issue shows the legislature's intent that the elected county prosecutor certainly should consider  
9 any relevant information at his or her disposal, including the facts of the case and the strength of  
10 the available evidence, in making the decision as to whether to seek the death penalty. Second,  
11 the construction of the statute proposed by the defendants is absurd on its face and would lead to  
12 absurd results, which courts must avoid when construing a statute. And third, given that the  
13 decision to seek the death penalty is a decision addressed solely to the discretion of the elected  
14 county prosecutor, any invitation from the defendants to this Court to second-guess that decision  
15 by re-weighing the defendants' potential mitigation evidence would constitute a violation of the  
16 separation of powers doctrine. In other words, and in short, 1) the plain language of the statute  
17 does not support the defendants' argument, 2) the defendants' proposed construction of the statute  
18 is absurd and would lead to absurd results, and 3) this Court is not vested with the authority to  
19 intervene in the elected prosecutor's decision. Thus, this second motion to dismiss the notices of  
20 intent to seek the death penalty should be denied.

21  
22  
23  
24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 2

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

1 **II. ARGUMENT**

2 A. THE PLAIN LANGUAGE OF THE STATUTE PROVIDES THAT THE  
3 PROSECUTOR SHOULD CONSIDER ANY RELEVANT INFORMATION AT  
4 HIS OR HER DISPOSAL, NOT JUST POTENTIAL MITIGATION  
5 EVIDENCE.

6 The defendants urge this Court to dismiss the death notices filed in these cases on  
7 grounds that Mr. Satterberg considered information that the applicable statute precludes him  
8 from considering in making his decisions regarding the death penalty. Specifically, the  
9 defendants argue that RCW 10.95.040 forbids the elected prosecutor from considering anything  
10 other than mitigating evidence in deciding whether to seek the death penalty in any given  
11 aggravated murder case. But the plain language of the statute defeats this claim. Accordingly,  
12 this motion should be denied.

13 It is axiomatic that in construing any statute, a court's primary objective is to ascertain  
14 and carry out the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005);  
15 State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the meaning of the statute in question  
16 is clear from its plain language, legislative intent is derived from the plain meaning of that  
17 statutory language alone; no further interpretation is necessary. State v. Wentz, 149 Wn.2d 342,  
18 346, 68 P.3d 282 (2003). The plain meaning of a statutory provision is to be discerned from the  
19 ordinary meaning of the language at issue, but not viewed in isolation; rather, the court must  
20 consider the context of the statute in which that provision is found, related provisions, and the  
21 statutory scheme as a whole. Jacobs, 154 Wn.2d at 600-01. Moreover, a court should not adopt  
22 an interpretation of a statute that renders any portion of the statute meaningless. State v. Keller,  
23 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Again, a court must be mindful that its purpose in  
24 construing a statute is to "determine and enforce the intent of the legislature"; thus, it must not

STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 3

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

1 interpret a statute in a manner that thwarts legislative intent. State v. Alvarado, 164 Wn.2d 556,  
2 562, 192 P.3d 345 (2008).

3 The statutory provision at issue here states that the elected county prosecutor "shall file  
4 written notice of a special sentencing proceeding to determine whether or not the death penalty  
5 should be imposed *when there is reason to believe that there are not sufficient mitigating*  
6 *circumstances to merit leniency.*" RCW 10.95.040(1) (emphasis supplied). The defendants  
7 contend that the italicized phrase of this provision means that in every aggravated murder case,  
8 the prosecutor must consider the evidence of potential mitigation -- *and nothing else* -- and  
9 determine whether that potential mitigation, considered in complete isolation, appears  
10 insufficient to merit leniency in and of itself.

11 But the defendants' proposed construction of the statute contradicts the plain language,  
12 which clearly states that the prosecutor should file a notice of intent to seek the death penalty  
13 "*when there is reason to believe*" that the potential mitigation evidence is insufficient to "*merit*  
14 *leniency.*" Simple logic and common sense dictate that such a "*reason to believe*" that the  
15 potential mitigation is insufficient to "*merit leniency*" must come from sources other than the  
16 potential mitigation evidence itself. Put another way, the plain meaning of RCW 10.95.040(1) is  
17 that the prosecutor will engage in a weighing process by considering any potential mitigation  
18 along with any and all other relevant information including, most obviously, the facts of the  
19 crime and the strength of the available evidence. By contrast, the defendants' proposed  
20 construction of the statute would render the words "reason" and "merit" functionally  
21 meaningless. Only after considering *all* of the available information would the prosecutor be  
22 able to come to a conclusion as to whether there is "reason to believe" that the death penalty is  
23 warranted. Any other reading of this provision simply defies common sense.

24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 4

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

1 Furthermore, although the Washington Supreme Court has not expressly rejected the  
 2 precise argument the defendants are making here, the court's cases impliedly recognize what is  
 3 obvious from a sensible reading of the statute's plain language: that consideration of the crime at  
 4 issue and the available evidence is an intrinsic part of a prosecutor's decision to seek the death  
 5 penalty. *See, e.g., State v. Rupe*, 101 Wn.2d 664, 700, 683 P.2d 571 (1984) (noting that  
 6 "prosecutors exercise their discretion in a manner which reflects their judgment concerning *the*  
 7 *seriousness of the crime or insufficiency of the evidence*" in determining whether to seek the  
 8 death penalty) (emphasis supplied); *State v. Campbell*, 103 Wn.2d 1, 26-27, 691 P.2d 929 (1984)  
 9 (same, quoting *Rupe*, 101 Wn.2d at 700); *State v. Dictado*, 102 Wn.2d 277, 297, 687 P.2d 172  
 10 (1984) (observing that when a prosecutor evaluates evidence of mitigation, "[t]his evaluation  
 11 must determine if *sufficient evidence* exists to convince a jury beyond a reasonable doubt that  
 12 there are not sufficient mitigating circumstances") (emphasis supplied). These pronouncements  
 13 by the court constitute further evidence that the defendants' interpretation of the statute is wrong.

14 Moreover, another basic rule of statutory construction requires that the plain meaning of  
 15 RCW 10.95.040(1) be considered in light of Chapter 10.95 RCW as a whole. Thus, it should be  
 16 noted that RCW 10.95.030(2) contains very similar language as that contained in RCW  
 17 10.95.040(1):

18 If, pursuant to a special sentencing proceeding held under RCW  
 19 10.95.050, the trier of fact finds that *there are not sufficient mitigating*  
*circumstances to merit leniency*, the sentence shall be death.

20 RCW 10.95.030(2) (emphasis supplied). If the defendants' proposed construction of RCW  
 21 10.95.040(1) were correct, meaning that elected county prosecutors are forbidden from  
 22 considering anything other than mitigating evidence in deciding whether or not to *seek* the death  
 23 penalty, then RCW 10.95.030(2) when read in isolation would mean that juries are also

24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
 TO STRIKE NOTICE OF INTENT TO SEEK THE  
 DEATH PENALTY ON GROUNDS THAT IT WAS  
 FILED IN VIOLATION OF RCW 10.95.040" - 5

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

1 forbidden from considering anything other than mitigating evidence in deciding whether or not  
2 to *impose* the death penalty. This also demonstrates that the defendants' proposed construction  
3 of RCW 10.95.040(1) is contrary to the legislature's intent as evidenced by a commonsense  
4 reading of the statutory language at issue.

5         Nonetheless, the defendants contend that the prosecutor cannot consider the facts of the  
6 crime or the strength of the evidence, whereas juries can, because a different provision requires a  
7 sentencing jury to answer this question: "*Having in mind the crime of which the defendant has*  
8 *been found guilty*, are you convinced beyond a reasonable doubt that there are not sufficient  
9 mitigating circumstances to merit leniency?" RCW 10.95.060(4) (emphasis supplied). Thus, the  
10 defendants argue, the *absence* of such language in RCW 10.95.040(1) means the prosecutor  
11 *cannot* consider the crime in deciding whether to seek the death penalty. Again, as will be  
12 discussed in detail in the next argument section, this construction of the statute is patently  
13 absurd. Moreover, the two provisions serve completely different functions: While the  
14 prosecutor must decide the threshold issue of whether a defendant's punishment should even be  
15 considered by a jury in the first place, the jury must decide beyond a reasonable doubt that the  
16 defendant's mitigation does not merit leniency in order to impose a death sentence. Accordingly,  
17 these provisions are easily harmonized, and the difference in the way they are worded makes  
18 perfect sense.

19         In sum, the defendant's proposed construction of RCW 10.95.040(1) requires a strained  
20 and contorted reading of the statutory language that does not comport with its plain meaning.  
21 Thus, the defendants' proposed construction contravenes legislative intent, and should be  
22 rejected.

23  
24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 6

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

1           B.     THE DEFENDANTS' PROPOSED CONSTRUCTION OF THE STATUTE IS  
 2                    ABSURD AND WOULD LEAD TO ABSURD RESULTS.

3           As discussed above, the defendants' arguments fail the first rule of statutory construction  
 4 under the "plain meaning" analysis. But secondarily, the defendants' arguments fail under  
 5 another well-established rule of statutory construction: that wherever possible, statutes must be  
 6 construed in a manner that avoids absurd results. The defendants' motion should be denied for  
 7 this reason as well.

8           When a court interprets a statute, the court must avoid reading the statute in a manner that  
 9 produces absurd results. State v. J.P., 149 Wn.2d at 450. This rule is based on the commonsense  
 10 notion that the legislature is presumed to intend that its enactments should not result in absurdity.  
 11 State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). In order to avoid such absurd results, a  
 12 court should avoid reading a statute in an overly narrow or constrained manner. As the United  
 13 States Supreme Court explained over 60 years ago,

14           We are mindful of the maxim that penal statutes are to be strictly  
 15 construed. And we would not hesitate, present any compelling reason, to apply it  
 16 and accept the restricted interpretation. But no such reason is to be found here.  
 17 The canon in favor of strict construction is not an inexorable command to  
 18 override common sense and evident statutory purpose. It does not require  
 19 magnified emphasis upon a single ambiguous word in order to give it a meaning  
 20 contradictory to the fair import of the whole remaining language. As was said in  
 21 United States v. Gaskin, [citation omitted], the canon "does not require distortion  
 22 or nullification of the evident meaning and purpose of the legislation." Nor does  
 23 it demand that a statute be given the "narrowest meaning"; it is satisfied if the  
 24 words are given their fair meaning in accord with the manifest intent of the  
 25 lawmakers.

26           United States v. Brown, 333 U.S. 18, 25-26, 68 S. Ct. 376, 92 L. Ed. 442 (1948).

27           In this case, even assuming for the sake of argument that the "plain meaning" analysis  
 28 does not defeat this motion outright, the defendants' proposed interpretation of RCW  
 29 10.95.040(1) would clearly lead to absurd results. Indeed, it strains the bound of reason to  
 30 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
 31 TO STRIKE NOTICE OF INTENT TO SEEK THE  
 32 DEATH PENALTY ON GROUNDS THAT IT WAS  
 33 FILED IN VIOLATION OF RCW 10.95.040" - 7

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

1 attempt to imagine how an elected prosecutor could possibly make a rational decision as to  
2 whether to seek the death penalty in any aggravated murder case without considering *all* relevant  
3 information at his or her disposal including, most obviously, the facts of the case and the strength  
4 of the available evidence. Put another way, if anything would lead to an arbitrary, wanton and  
5 freakish application of the death penalty in violation of Fuhrman v. Georgia,<sup>1</sup> a rule requiring a  
6 prosecutor to disregard everything but the defense's mitigation packet would certainly do so.<sup>2</sup>

7       Moreover, the defendants' proposed construction of the statute is not only absurd in the  
8 results it would produce, it would be impossible to implement. Given that it is the prosecutor  
9 who charges defendants with the crime of aggravated murder in the first place, how is it that the  
10 prosecutor is to shield him- or herself from the facts of the crime and the available evidence such  
11 that he or she can consider only the defendant's mitigation packet -- which, at least in this county,  
12 through no fault of the prosecutor's office, is not even produced by the defense until many  
13 months, a year, or more after the crime has occurred? The defendants' proposed construction  
14 fails for this reason as well.

15       In short, it should go without saying that the elected prosecutor must consider all relevant  
16 information before deciding whether to seek the death penalty in any given case, and to suggest

17 \_\_\_\_\_  
18 <sup>1</sup> 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

19 <sup>2</sup> Hypothetically, based on the reading of the statute that the defendants propose, a prosecutor  
20 *would* seek the death penalty in a case where the available evidence proving premeditation, the  
21 defendant's identity, or some other necessary element is not especially strong, yet the mitigation  
22 evidence presented is negligible. By the same token, that same prosecutor *would not* seek the  
23 death penalty in another case where the evidence of guilt is overwhelming, the defendant's  
criminal history is lengthy, and the crime is undeniably heinous, yet the defendant succeeds in  
presenting a compelling mitigation packet. In other words, those most deserving of death would  
be spared by the prosecutor's initial decision, while marginal cases would proceed to verdict. For  
obvious reasons, this simply cannot be the law.

24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 8

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

1 otherwise defies common sense. As one commentator has stated in an article generally critical of  
2 the application of the death penalty:

3 In sum, death-worthiness requires a holistic assessment of crime, record,  
4 background, and mitigation. Because a prosecutor has a universe of murder cases  
5 to compare, he/she is much better suited to applying a "worst of the worst" metric  
and legal framework that prosecutorial discretion is exercised.<sup>3</sup>

6 The defendants' proposed construction of RCW 10.95.040(1) would not allow this  
7 "holistic assessment." It should be rejected.

8  
9 C. THE DEFENDANTS' INVITATION TO THIS COURT TO REVERSE MR.  
10 SATTERBERG'S DECISION BASED ON THE PURPORTED STRENGTH OF THEIR  
11 MITIGATION PACKETS IS AN INVITATION TO VIOLATE THE SEPARATION OF  
12 POWERS DOCTRINE.

13 Lastly, viewing the defendants' pleadings as a whole, it seems clear that the defendants  
14 are asking this Court to independently re-examine their mitigation packets, to find that the  
15 information contained in those packets provides a basis to merit leniency, and to override Mr.  
16 Satterberg's decision to seek the death penalty in these cases. Such an undertaking would violate  
17 the separation of powers doctrine, as the initial decision as to whether a special sentencing  
18 proceeding will be held rests with the elected county prosecutors, not the judiciary. The  
19 defendants' claim fails for this reason as well.

20 The Washington Supreme Court has previously held that RCW 10.95.040(1) constitutes a  
21 proper delegation of legislative authority to the executive branch in vesting county prosecutors

22 <sup>3</sup> Prof. Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*,  
23 Widener Law School Legal Studies Research Paper Series no. 09-39, p. 11. This article may be  
24 downloaded free of charge from The Social Science Research Network, at  
<http://ssrn.com/abstract=1498704>.

STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 9

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

1 with the discretion to seek the death penalty in cases that meet the applicable standards.  
2 Campbell, 103 Wn.2d at 25-27. In addition, the court "has never recognized a prosecutor's  
3 discretion to file charges or to seek the death penalty as a judicial function." State v. Finch, 137  
4 Wn.2d 792, 809 975 P.2d 967 (1999). Moreover, "[a]lthough the exercise of prosecutorial  
5 discretion under the sentencing structure of RCW 10.95 is not strictly analogous to the exercise  
6 of discretion involved in the charging function, the principle is similar" in that the prosecutor  
7 examines the available evidence and determines whether the issue of mitigation should go to the  
8 jury. Dictado, 102 Wn.2d 297-98. Further, "[t]he power of the Legislature over sentencing is  
9 plenary[.]" State v. Benn, 120 Wn.2d 631, 670, 845 P.2d 289 (1993). Therefore, the fact that the  
10 legislature has properly delegated the initial decision whether to seek the death penalty to the  
11 county prosecutors *ipso facto* means that it would violate the separation of powers doctrine for a  
12 court to re-weigh the aggravating and mitigating circumstances and second-guess a prosecutor's  
13 decision in this regard.

14         Nonetheless, the defendants ask this Court to consider their mitigation packets and to  
15 make its own subjective decision as to whether a special sentencing proceeding should be held.  
16 In so doing, the defendants argue the purported merits of their mitigation evidence, and they  
17 question Mr. Satterberg's decision to submit the death penalty decision to the jury. This is an  
18 inappropriate inquiry for this Court to engage in, as the discretionary decision has already been  
19 made by the person entrusted to do so by the legislature. This Court should decline the  
20 defendants' invitation to override the legislative and executive branches in this fashion.  
21  
22  
23

24 STATE'S RESPONSE TO DEFENDANTS' "MOTION  
TO STRIKE NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY ON GROUNDS THAT IT WAS  
FILED IN VIOLATION OF RCW 10.95.040" - 10

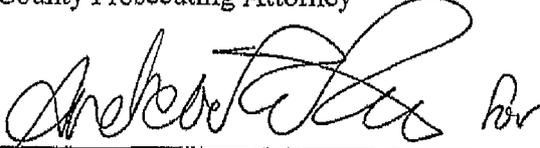
**Daniel T. Satterberg**, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

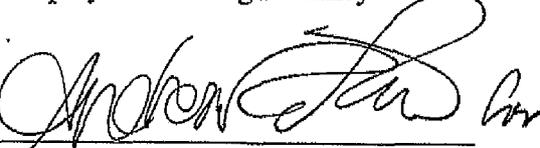
1 **III. CONCLUSION**

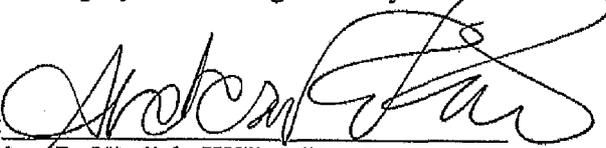
2 For all of the foregoing reasons, this Court should deny the defendants' "Motion to Strike  
3 Notice of Intent to Seek the Death Penalty on Grounds That It Was Filed in Violation of RCW  
4 10.05.040."

5 Respectfully submitted this 8<sup>th</sup> day of January, 2010,

6 DANIEL T. SATTERBERG  
7 King County Prosecuting Attorney

8 By:   
9 James Jude Konat, WSBA #16082  
10 Senior Deputy Prosecuting Attorney

11 By:   
12 Michael Mohandeson, WSBA #30389  
13 Senior Deputy Prosecuting Attorney

14 By:   
15 Andrea R. Vitalich, WSBA #25535  
16 Senior Deputy Prosecuting Attorney



1 Mr. McEnroe replies to this threefold response thusly: First, the State has ignored the  
2 "plain language" of RCW 10.95.040 and read into it language the state wishes the legislature had  
3 included. The legislature directed prosecuting attorneys to focus on the sufficiency of mitigating  
4 factors and not circumstances of the crime.

5  
6 Second, there is nothing "absurd" about Mr. McEnroe's assertion that a prosecutor's  
7 decision to file a notice of intention to seek the death penalty must be made based on the  
8 sufficiency of mitigating circumstances known to the prosecutor. Understanding and applying  
9 RCW 10.95 as a multiple filtering sentencing scheme effects legislative intention, honors  
10 constitutional separation of powers, and promotes efficient use of criminal justice resources. The  
11 State's Response essentially calls for the prosecutor to ignore the statutory sentencing scheme  
12 and determine whether to file a death notice using a procedure developed by the prosecutor  
13 himself, rather than by the legislature.

14  
15 Third, judicial review of the State's decision of whether to file a death notice does not  
16 violate separation of powers because a notice of intention to seek the death penalty is not a  
17 criminal charge nor within the prosecutorial charging function. Courts in this state have stricken  
18 death notices even for minor defects in form and service. All three parts of the State's Response  
19 are discussed in more detail below.  
20  
21  
22  
23  
24  
25

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1  
2 **I. The State Has Misread The Statute, the State Does Not Understand the**  
3 **Statutory Scheme of RCW 10.95.040, and Defendant's Construction Does**  
4 **Not Produce Absurd Results**

5 The State's reply admits that in filing notices of intention to seek the death penalty  
6 against the defendants here the prosecutor not only considered the alleged factual circumstances  
7 of the murders but considered them almost, if not entirely, to the exclusion of the mitigating  
8 evidence proffered by both defendants. In fact, the State's reply does not suggest any  
9 deficiencies at all in the mitigation evidence. The State's reply supports the contention that  
10 Prosecutor Dan Satterberg made up his mind to file a notice of intention to seek the death penalty  
11 very early on and there was no kind or amount of mitigating evidence that could dissuade him  
12 because of his reaction to the crime itself.  
13

14 Mr. McEnroe discussed the plain language of RCW 10.95.040 in his Opening Brief at 13  
15 - 20. In response the State urges the Court to ignore the omission of any reference to the  
16 circumstances of the crime. The state simply ignores the case law on interpretation of statutory  
17 language it does not like and denigrates the defendants' arguments as "absurd." As noted, the  
18 statutory scheme is not "absurd," and proper application of it will not lead to absurd results.  
19  
20

21 As explained in Mr. McEnroe's opening brief, Washington's death penalty scheme does  
22 not favor death sentences, Opening Brief at 15 - 17. It is not supposed to be easy for prosecutors  
23 to seek or to secure death sentences. Unlike many other states, the only crime that can even be  
24

25  
26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 considered as a potential capital prosecution is premeditated murder.<sup>1</sup> No matter how horrible a  
 2 rape-homicide might be, or a homicide of a child by neglect or abuse, or how reckless a  
 3 defendant might be in actions which resulted in the death or deaths of innocent victims, unless a  
 4 defendant deliberates and has a premeditated intent to kill, the death penalty is not an option  
 5 regardless of a defendant's criminal record or any other offensive circumstance of the crime or  
 6 the defendant.  
 7

8           When the state believes it can prove a murder is premeditated and the facts of the murder  
 9 seem to warrant more punishment than a bare charge of first degree murder carries under the  
 10 standard sentencing range, the prosecutor may consider whether statutory sentencing  
 11 enhancements under RCW 9.94A allow for adequate renouncement and punishment of crime.  
 12

13 The prosecutor may then consider whether the facts of the murder, when compared to other  
 14 premeditated murders, are especially heinous and, if so, whether one of the fourteen aggravating  
 15 factors defined by the legislature in RCW 10.95.020, applies and can be proven. This is when a  
 16 prosecutor selects the worst of the worst premeditated murders from the herd of all premeditated  
 17 murders – all of which are extremely serious crimes. A prosecutor properly focuses on the  
 18  
 19  
 20  
 21

22  
 23 <sup>1</sup> To give but a few examples, Texas allows death eligibility for "intentional or knowing" murder. TEX. CODE ANN.  
 24 19.02(b). Arizona allows death eligibility for premeditated or felony murder. ARIZ. REV. STAT. ANN. § 15.1(g)(1).  
 Oregon allows death eligibility for premeditated or felony murder, and California allows it for all first degree  
 murders. CAL. PENAL CODE § 187-199.

25  
 26 **DEFENDANT McENROE'S REPLY TO STATE'S  
 RESPONSE TO MOTION TO STRIKE NOTICE  
 OF INTENT TO SEEK THE DEATH PENALTY  
 ON GROUNDS THAT IT WAS FILED IN  
 VIOLATION OF RCW 10.95.040 AND  
 MEMORANDUM OF LAW IN SUPPORT  
 THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
 810 THIRD AVENUE, SUITE 800  
 SEATTLE, WASHINGTON 98104  
 TEL: 206-447-3900 EXT. 752  
 FAX: 206-447-2349  
 E-MAIL: prestia@defender.org

1 circumstances of the murder when he decides whether or not to charge aggravating factors under  
2 RCW 10.95.020, that is, whether to render a crime eligible for death sentencing.

3       Once a prosecutor has considered facts of a crime and charged aggravated murder, the  
4 eligibility phase of our capital sentencing process is over. The prosecutorial charging function is  
5 over. Prosecutorial assessment of any aggravated circumstances of the murder is over. At this  
6 point the process is sentence selection which marries legislative and judicial functions. The  
7 legislature sets the range of sentencing options (in the case of aggravated murder, this means life  
8 in prison without release, or the death penalty) and it is the court's function to assure the proper  
9 sentence is applied within the range. The prosecutor is tasked with filing a notice of intent to  
10 seek the death penalty under very restricted circumstances, when the prosecutor has reason to  
11 believe there are not sufficient mitigating circumstances to merit leniency (a life without release  
12 sentence). "Reason to believe" sets a "reasonable prosecutor" standard for assessing mitigating  
13 factors applicable to a defendant. The legislature has clearly attempted to minimize prosecutorial  
14 subjectivity and to assure standardized procedures throughout the state. The prosecutor's focus  
15 must be on mitigating circumstances and the court not only can but must oversee the filing  
16 procedures to assure death notices are filed only when the statute is followed, both procedurally  
17 and substantively. When prosecutors follow the clear language of RCW 10.95.040 and file  
18 notices only when there are not sufficient mitigating circumstances then the overarching design  
19 of Washington's death penalty scheme is achieved, capital trials and all of the extraordinary  
20  
21  
22  
23  
24

25  
26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 expenditure of public resources they entail, will be reserved only for the worst of the worst  
2 murders committed by the worst of the worst individuals.

3  
4 **II. RCW 10.95.020 Is Meant To Be Applied Only To The "Worst of the Worst"**  
5 **Premeditated Murders**

6 Premeditated murder is classified as a "worst" crime under Washington law. It is a Class  
7 A felony with a maximum sentence of life in prison with possibility of release. RCW 9A.20.021.  
8 It is a "most serious offense," RCW 9.94A.030 (29); a "violent offense," RCW 9.94A.030 (50);  
9 and a "serious violent offense," RCW 9.94A.030(41). One count of premeditated murder has a  
10 minimum standard sentence range of 240 to 320 months (20 years to 26 years and six months).  
11 A defendant's "offender score" is calculated from his prior criminal history, and may raise the  
12 standard range sentence as high as 411 months to 548 months (34 years, two months to 45 years,  
13 six months). RCW 9.94A.515. Proof of enumerated aggravating factors under RCW 9.94A.535  
14 permits the court to impose sentences greater than the standard range. The use of a deadly  
15 weapon (RCW 9.94A.517) or a firearm (RCW 9.94A.533) in a premeditated murder adds  
16 additional years to the standard range sentence which must be served consecutive to the total  
17 sentence otherwise imposed. Sentences for multiple counts of premeditated murder must be  
18 served consecutively.  
19  
20  
21  
22  
23  
24  
25

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 It is apparent that the legislature considers premeditated murder by itself to be a most  
2 serious crime and sentencing enhancements allow for identification and especially severe  
3 punishment of the worst premeditated murders. Standard sentencing protocols under RCW  
4 9.94A recognize a broad range of circumstances of premeditated murders and allow the state and  
5 the courts to appropriately distinguish a single victim murder with only a bit more than a  
6 “moment in time” of premeditation committed by a first time offender, meriting a sentence of  
7 twenty years, from murder or murders involving a “particularly vulnerable” victim, “manifest  
8 deliberate cruelty to the victim,” “a high degree of sophistication or planning,” or the other  
9 factors described in RCW 9.94A.535(3), for which sentencing enhancements assure  
10 imprisonment for most if not all of a defendant’s natural life.  
11

12  
13 Washington’s death penalty statute, RCW 10.95, does indeed require a prosecuting  
14 attorney to determine whether a premeditated murder is among the “worst of the worst” crimes  
15 and therefore eligible for a sentence of death. However, this death eligibility determination is a  
16 *charging decision* within the prosecutorial function – this death eligibility decision is not the  
17 decision to file a notice of intention to seek the death penalty. Instead, this death eligibility  
18 decision it is the decision whether or not to charge a defendant with aggravating factors under  
19 RCW 10.95.020.  
20  
21

22 RCW 10.95 is intended to be applied to those premeditated murders in which the facts of  
23 the crime are so offensive as to distinguish them from even the worst of the murders that can be  
24

25  
26 **DEFENDANT McENROE’S REPLY TO STATE’S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 charged and sentenced under RCW 9.94A. RCW 10.95 is for the worst of the worst of  
 2 premeditated murders.<sup>2</sup> A prosecutor's charging discretion must be applied at this critical  
 3 juncture. It is in deciding whether to elevate the charge to aggravated murder punishable by a  
 4 minimum of life in prison without release that the prosecutor must scrutinize the facts of the  
 5 crime and determine whether the facts are clearly more heinous than most premeditated murders.  
 6

7 The legislature has listed fourteen aggravating factors (RCW 10.95.020) which may  
 8 distinguish a premeditated murder from even one of the worst murders contemplated in RCW  
 9 9.94A. However, a prosecutor need not allege aggravating factors under RCW 10.95.020 if he  
 10 believes the evidence for such factors is weak or he believes the crime is appropriately charged as  
 11 premeditated murder, RCW 9A.32.030, and sentenced under RCW 9.94A.510, with upward  
 12 departures as appropriate and proven under RCW 9.94A.535. Indeed, many of the aggravating  
 13 factors listed under RCW 10.95.020 are similar to upward departure factors included in RCW  
 14 9.94A.535. It is appropriate for a prosecutor to consider at this charging stage whether the  
 15 totality of circumstances of a premeditated murder are so heinous as to elevate it to a charge  
 16 identifying it as truly among the worst of the worst crimes and punishable of one of the two most  
 17 severe sentences under Washington law, life in prison without release or the death penalty.  
 18  
 19  
 20  
 21

22  
 23 <sup>2</sup> "Aggravated murder is more serious than murder in the first degree, which lacks the statutory aggravating  
 24 circumstances. State v. Irizarry, 111 Wash.2d 591, 595, 763 P.2d 432 (1988); Kincaid, 103 Wash.2d at 312, 692  
 25 P.2d 823. Therefore, the aggravated murder statute, RCW 10.95, functions consistently with the SRA by prescribing  
 a more severe penalty than that provided in the SRA for "ordinary" first degree murder. Likewise, to satisfy the

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
 RESPONSE TO MOTION TO STRIKE NOTICE  
 OF INTENT TO SEEK THE DEATH PENALTY  
 ON GROUNDS THAT IT WAS FILED IN  
 VIOLATION OF RCW 10.95.040 AND  
 MEMORANDUM OF LAW IN SUPPORT  
 THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
 810 THIRD AVENUE, SUITE 800  
 SEATTLE, WASHINGTON 98104  
 TEL: 206-447-3900 EXT. 752  
 FAX: 206-447-2349  
 E-MAIL: prestia@defender.org

1 Premeditated murder as defined in RCW 9A.32.030(1)(a) is a worst crime always  
2 punishable by a maximum term life in prison (with possibility of release). RCW 9A.32.040.  
3 While all first degree murders are among the worst crimes, all worthy of a life sentence,  
4 premeditated murder is worse than murder through indifference to life or murder during  
5 enumerated felonies. The latter two situations of murder, no matter what the accompanying  
6 circumstances, can never be punishable by a sentence greater than life in prison with the  
7 possibility of release. The legislature determined that a premeditated murder is worse than a  
8 murder committed under a lesser mental state. The legislature in RCW 10.95.020 identified and  
9 codified fourteen aggravating factors which, if charged and proven, elevate a premeditated  
10 murder from the worst, deserving life in prison, to the worst of the worst, a crime certainly  
11 punishable by life in prison without release and eligible for the highest punishment, death. Thus  
12 the legislature itself has defined "worst of the worst" among premeditated murderers.  
13  
14  
15

16 Deciding whether to allege statutory aggravating factors is a charging decision entirely  
17 within the prosecutorial function. Aggravating factors are legislatively defined. It is up to the  
18 prosecutor to determine whether he can prove an aggravating factor beyond a reasonable doubt.  
19 Furthermore, like other charging decisions the prosecutor has discretion not to charge an  
20 aggravating factor if he believes the evidence for it is weak or other facts reasonably incline the  
21

22  
23  
24 SRA's purpose of like sentences for like crimes, it is important that 'ordinary' first degree murderers and aggravated  
murderers not receive the same degree of punishment." State v. Kron, 63 Wash.App. 688 (1992).

25  
26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 prosecutor against upgrading premeditated murder to aggravated murder. "Prosecuting attorneys  
2 are vested with great discretion in determining how and when to file criminal charges ... ."

3 State v. Korum, 157 Wash.2d 614 (2006), citing Deal v. United States, 508 U.S. 129

4 (1993)(recognizing prosecutors have "universally available and unvoidable power to charge or  
5 not to charge an offense.").

6  
7 A prosecutor's discretion to charge or not charge aggravating factors under RCW  
8 10.95.020 at this eligibility stage is the safeguard against the potential injustices, or "absurdities",  
9 raised by the state. State's Response at 8, footnote 2. If the prosecutor does not believe the  
10 murder before him stands out from other premeditated murders so as to merit eligibility for the  
11 most severe sentence available, despite the fact it may be provable as aggravated murder, he may  
12 exercise his discretion not to charge aggravating factors. If the evidence of premeditation or  
13 another element "is not especially strong" as posited in the State's Response, there is no need or  
14 obligation to allege statutory aggravating factors. It is at this stage the prosecutor can and should  
15 separate common premeditated murders from those that, considering only facts of the crime, are  
16 truly exceptional on the heinous scale. For instance, a prosecutor need not charge the  
17 convenience store robbery gone wrong as aggravated murder, he may instead charge first degree  
18 felony murder or even premeditated murder with a separate count of robbery.<sup>3</sup> There are many  
19  
20  
21  
22

23  
24 <sup>3</sup> Here are some examples of the alternatives available to the prosecutor in case of a convenience store robbery "gone  
25 bad" with the following facts: Defendant goes to convenience store with loaded pistol and demands money from the

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 ways a prosecutor can charge murder to recognize the very serious nature of the crime and assure  
 2 a lengthy sentence, often an effective life without release sentence under the SRA, and at the  
 3 same time acknowledge that the murder, while a worst crime, is not one of the few "worst of the  
 4 worst" murders. Declining to charge aggravating factors is not reviewable. Since charging is a  
 5 prosecutorial function the court may not involve itself in the appropriateness of the charges  
 6 brought except in very limited circumstances. This scheme is prescribed by the legislature, and  
 7 the results it produces are not absurd.  
 8  
 9  
 10  
 11

12 register. The store clerk and the defendant are the only two people present, and the clerk is a senior citizen, 75 years  
 13 old. The defendant kills the clerk by shooting him after the clerk hands the defendant the money. The prosecutor  
 14 has a number of options here. First, he could charge First Degree, Premeditated Murder under RCW  
 15 9A.32.030(1)(a), plus he could also charge Robbery 1° under RCW 9A.56.200. Both counts would carry with them  
 16 a firearm enhancement of five years. Assume defendant has no prior criminal convictions. If convicted of both  
 17 Murder 1° and Robbery 1°, the defendant would face a sentence of 261 to 347 for the Murder 1° (defendant's  
 18 Offender Score would be 2, based on the concurrent offense of Robbery 1° (and assuming that Robbery 1° is not  
 19 considered the "same criminal conduct as Murder 1°), plus 60 months for the firearm enhancement consecutive to  
 20 the Murder 1° base sentence, PLUS 41 to 54 months on the Robbery 1° which would be served concurrently with the  
 21 Murder 1° base sentence, plus a second (consecutive) period of 60 months for the firearm enhancement on the  
 22 Robbery 1°, for a total sentencing range of 381 to 467 months (31.75 to 38.9 years). The State could ask for an  
 23 exception sentence up to life in prison WITH the possibility of release if the jury found that the Defendant was a  
 24 "particularly vulnerable victim" due to being a senior citizen.

25 A second alternative would be for the prosecutor to charge Murder 1° either under 9A.32.030(1)(c) (Felony  
 26 Murder) or charge it under 9A.32.030(1)(a), and decide not to charge Robbery at all. In this case, if convicted,  
 Defendant's sentencing range would be 240 to 320 for the Murder 1° (no concurrent offenses, thus offender score is  
 0), plus 60 months for the firearm enhancement, for total sentence of 300 to 380 months (25 to 31.7 years). Again,  
 the State could ask for an exceptional sentence of up to life in prison with the possibility of release if the jury found  
 that the Defendant was a "particularly vulnerable victim" due to being a senior citizen.

A third alternative would be to file Aggravated First Degree Murder charges under 10.95.020(11)(a), for  
 which the Defendant's sentence would be either the Death Penalty or Life in Prison Without the Possibility of Parole.

**DEFENDANT McENROE'S REPLY TO STATE'S  
 RESPONSE TO MOTION TO STRIKE NOTICE  
 OF INTENT TO SEEK THE DEATH PENALTY  
 ON GROUNDS THAT IT WAS FILED IN  
 VIOLATION OF RCW 10.95.040 AND  
 MEMORANDUM OF LAW IN SUPPORT  
 THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
 810 THIRD AVENUE, SUITE 800  
 SEATTLE, WASHINGTON 98104  
 TEL: 206-447-3900 EXT. 752  
 FAX: 206-447-2349  
 E-MAIL: prestia@defender.org

1  
2  
3 **III. After the Decision To Charge Aggravating Factors Under RCW 10.95.020 Is**  
4 **Made and Charges Have Been Filed, the Court Can and Must Oversee the**  
5 **Sentencing Process Including Whether a Death Notice Has Been Properly**  
6 **Filed**

7  
8 Once the prosecutor has decided whether or not to charge aggravating factors the  
9 prosecutorial function ceases, and once that function ceases, decisions made by a prosecutor are  
10 reviewable by the courts. The Washington Supreme Court discussed the nature and limits of a  
11 prosecutor's constitutional duties in State v. Schillberg, 94 Wash.2d 772 (1980). In Schillberg, a  
12 DUI defendant petitioned the trial court for a deferred prosecution, a new sentencing alternative at  
13 the time. The state objected but the district court granted the deferred prosecution. The state  
14 sought a writ in Superior Court, which was granted. The Superior Court reluctantly granted the  
15 writ finding the deferred prosecution statute, RCW 10.05.030, "stripped" the court's equitable  
16 powers, because the language of the statute required the concurrence of the prosecutor before a  
17 defendant could be evaluated for deferred prosecution, thus limiting the sentencing court's  
18 authority. On appeal, the Washington Supreme Court ruled that as sentencing alternative  
19 referral for deferred prosecution was "at least partially a judicial act."  
20

21  
22 The State argues that vesting the court with sole authority to refer a person for  
23 evaluation invades the charging function which is traditionally reserved to the  
24 prosecuting attorney . . . . This contention overlooks the fact that the court's  
25

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 disposition of the petition follows the prosecutor's decision to charge; once the  
2 accused has been charged and is before the court, the charging function ceases.

3 Schillberg, id. (Emphasis added). State v. Campbell, 103 Wash.2d 1 (1984), relied upon by the  
4 state, expressly follows State v. Schillberg, supra. Schillberg held that even when the legislature  
5 delegates a role in sentence selection to the prosecutor, the prosecutor must strictly conform to  
6 standards set by the legislature and the court must be able to review whether the standards have  
7 been met. In Schillberg the Superior Court's refusal to reinstate a deferred prosecution over the  
8 state's objection was reversed by the Supreme Court. In other words, the Superior Court in  
9 Schillberg had a duty to assure the prosecutor met legislative standards. There is no separation of  
10 powers issue because sentence selection is not a constitutional prosecutorial function, it is a  
11 judicial function.<sup>4</sup>

12  
13  
14 Joe McEnroe and Michele Anderson were charged and before the court when they were  
15 arraigned on charges of Aggravated First Degree Murder. At that point the prosecutorial  
16 charging function ceased.

17  
18 A notice of intention to seek the death penalty is not a criminal charge. That is why even  
19 arguably minor defects in the way a notice is served, if service deviates from the procedure  
20 specified in RCW 10.95.040, mandates dismissal of the notice with prejudice. "No notice, no  
21

22  
23 <sup>4</sup> "The spirit of the law is in keeping with the acknowledged power of the Legislature to provide a minimum and  
24 maximum term within which the trial court may exercise its discretion in fixing sentence." State v. Le Pitre, 54  
25 Wash. 166, 103 P. 27 (1909).

26 **DEFENDANT McENROE'S REPLY TO STATE'S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 death penalty.” State v. Dearborn, 125 Wash.2d 173 (1994). Defects in charging documents or  
2 arrests do not automatically require dismissal of charges. CrR 2.2(f), (g).

3       State v. Campbell, *supra*, was a challenge to the statute and did not raise an issue as to  
4 whether the prosecutor followed the statute and properly filed a notice of intent in Campbell’s  
5 particular case. Nonetheless, Campbell supports Mr. McEnroe’s argument that RCW 10.95.040  
6 requires a prosecutor to seek the death penalty when and only when “there are reasons to believe  
7 there are not sufficient mitigating circumstances to merit leniency.” “There is no equal  
8 protection violation here because a sentence of death requires prosecutorial consideration of an  
9 additional factor beyond that for a sentence of life imprisonment, an absence of mitigating  
10 circumstances.” Campbell, *supra*. Campbell recognizes that the prosecutor’s role in deciding  
11 whether to file a notice to seek the death penalty is delegated authority from the legislature and as  
12 such it must be exercised pursuant to clear standards. “The separation of powers principle  
13 requires that the delegation of legislative power to the executive [prosecutor] be accomplished  
14 along with standards which guide and restrain the exercise of the delegated authority.”  
15

16  
17  
18 Campbell, *id.*, quoting Schillberg, *supra*. Prosecutors would be neither guided nor restrained if  
19 the courts could not review whether death notices were filed in compliance with RCW  
20 10.95.040.  
21

22       The position of the State, that a prosecutor is free to seek death based on his individual  
23 perception of the heinous nature of a murder renders the decision standardless in the same way an  
24

25  
26 **DEFENDANT McENROE’S REPLY TO STATE’S  
RESPONSE TO MOTION TO STRIKE NOTICE  
OF INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT IT WAS FILED IN  
VIOLATION OF RCW 10.95.040 AND  
MEMORANDUM OF LAW IN SUPPORT  
THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

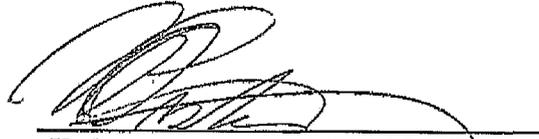
1 aggravating factor of "especially heinous, atrocious, or cruel," rendered several states' capital  
 2 sentencing schemes standardless and unconstitutional. "To say that something is "especially  
 3 heinous" merely suggests that the individual jurors should determine that the murder is more than  
 4 just "heinous", whatever that means, and an ordinary person could honestly believe that every  
 5 unjustified, intentional taking of human life is "especially heinous." Maynard v. Cartwright, 486  
 6 U.S. 356 (1988), quoting Godfrey v. Georgia, 446 U.S. 420 (1980). Our legislature has assured  
 7 that death sentences are not sought based on the subjective feelings of outrage of individual  
 8 prosecutors by directing that prosecutors seek death only in cases in which the defendants can  
 9 muster little or no mitigating evidence or cannot support the mitigating circumstances they claim.  
 10  
 11

### 12 Conclusion

13 For the foregoing reasons, the arguments in the State's Response must fail, and the Notice  
 14 of Intent to Seek the Death Penalty against Mr. McEnroe must be dismissed.  
 15

16 DATED: Tuesday, February 23, 2010.

17 Respectfully submitted,

18  
 19  
 20 

21 Kathryn Lund Ross, WSBA No. 6894  
 22 Leo J. Hamaji, WSBA No. 18710  
 23 William Prestia, WSBA No. 29912  
 24 Attorneys for Mr. McEnroe

25  
 26 **DEFENDANT McENROE'S REPLY TO STATE'S  
 RESPONSE TO MOTION TO STRIKE NOTICE  
 OF INTENT TO SEEK THE DEATH PENALTY  
 ON GROUNDS THAT IT WAS FILED IN  
 VIOLATION OF RCW 10.95.040 AND  
 MEMORANDUM OF LAW IN SUPPORT  
 THEREOF**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
 810 THIRD AVENUE, SUITE 800  
 SEATTLE, WASHINGTON 98104  
 TEL: 206-447-3900 EXT. 752  
 FAX: 206-447-2349  
 E-MAIL: prestia@defender.org

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

<b>STATE OF WASHINGTON</b>	)	<b>No. 07-C-08716-4 SEA</b>
<b>COUNTY OF KING,</b>	)	
<b>Plaintiff,</b>	)	<b>SUPPLEMENTAL BRIEFING IN</b>
	)	<b>SUPPORT OF DEFENDANT</b>
<b>v.</b>	)	<b>McENROE'S MOTION TO STRIKE</b>
	)	<b>NOTICE OF INTENT TO SEEK THE</b>
<b>JOSEPH T. McENROE,</b>	)	<b>DEATH PENALTY ON GROUNDS</b>
	)	<b>THAT IT WAS FILED IN VIOLATION</b>
<b>Defendant</b>	)	<b>OF RCW 10.95.040</b>

**SUPPLEMENTAL BRIEFING**

At oral argument on the Defendants "Motion to Strike Notice of Intent to Seek the Death Penalty on Grounds that it Was Filed in Violation of RCW 10.95.040," the Court requested supplemental briefing and materials regarding the legislative history of RCW 10.95.040 and a survey of corresponding statutes from other states. The defendants have jointly gathered the supplemental materials requested by the court. Appendix A to this supplement is comprised of significant documents verifying the legislative history of Washington's death penalty law, and other relevant materials. Appendix B contains a summary of, and copies of relevant portions of, the death penalty schemes of the 36 states which retain capital punishment and the two which

1 recently repealed it. Also included as Appendix C is the Model Penal Code's death penalty act  
2 from which most current death penalty schemes descended.<sup>1</sup>

3 *State v. Pirtle*

4 Preliminarily, the Court mentioned during the hearing on March 26, 2010, the case of  
5 *State v. Pirtle*, 127 Wash.2d 628 (1995). Mr. McEnroe's counsel, Ms Ross, advised the Court  
6 that Mr. Pirtle's death sentence had been vacated in federal habeas corpus proceedings in the  
7 Ninth Circuit Court of Appeals. In fact, Mr. Pirtle's death sentence was vacated by the Federal  
8 District Court, Eastern District of Washington, 150 F.Supp. 1078 (E.D. Wash., 2001). The  
9 District Court affirmed Mr. Pirtle's conviction of aggravated murder. However, this conviction  
10 was reversed when the case reached the Ninth Circuit, 313 F.3d 1160 (9<sup>th</sup> Cir. 2002). Both the  
11 district court and the appeals court held that Mr. Pirtle had received ineffective assistance of  
12 counsel. On remand Mr. Pirtle pleaded guilty to aggravated murder and the state agreed to a  
13 sentence of life in prison without release.<sup>2</sup>

14  
15  
16  
17 **SUMMARY OF INFORMATION GATHERED**

18 No other state death penalty statute has a notice of intent statute that includes a clause  
19 comparable to RCW 10.95.040's "when there is reason to believe that there are not sufficient  
20 mitigating circumstances to merit leniency." The federal death penalty statute does not have such  
21

22  
23  
24 <sup>1</sup>Only Appendices A and C are attached to this filing. Appendix B is filed separately (but captioned appropriately)  
because it is almost 400 pages long.

25 <sup>2</sup>The information on disposition on remand was provided by Mr. Pirtle's post-conviction attorney, Todd Maybrown,  
and a copy of the trial judge's report is attached. App. \_\_\_\_\_.

1 a clause. The model penal code, on which most modern schemes including Washington's are  
2 based, does not have such a clause. See Appendix C.

3 None of Washington's prior death penalty laws included the "when there is reason to  
4 believe that there are not sufficient mitigating circumstances to merit leniency" language. RCW  
5 10.94, the statute immediately preceding RCW 10.95, was enacted only four years earlier, Laws  
6 of 1977, Ex. Sess, ch. 206, eff. June 10, 1977. Our current death penalty statute, RCW 10.95,  
7 was passed on April 26, 1981, and became effective immediately. Many of the same legislators  
8 were in office and for the passage of both laws.  
9  
10

#### 11 **LEGISLATIVE HISTORY OF RCW 10.95.040**

12 The death penalty for murder was among the first laws enacted by the legislature of the  
13 territory of Washington in 1854. Death was the mandatory sentence for first degree murder,  
14 although the governor of the territory had pardon and commutation powers. Laws of 1854, p. 78,  
15 sec. 12. Under territorial law hangings were conducted in public in the county where the  
16 defendant was convicted. In 1901 the Washington State legislature amended the law to require  
17 executions to take place at Washington State Penitentiary. The laws of 1909, ch. 249, sec. 140  
18 provided that the punishment for first degree murder was death or life in prison "in the discretion  
19 of the court" rather than being mandatory. None of Washington's early death penalty laws  
20 included "notice of intention to seek the death penalty" provisions.  
21  
22  
23  
24  
25  
26

1 The legislature abolished the death penalty by the laws of 1913, ch. 167, p. 581,  
2 amending sec. 2392 Rem & Bal Code which prescribed life imprisonment as the sole punishment  
3 for first degree murder.

4 The death penalty was re-instituted by the laws of 1919, ch. 112, sec. 1, amending 2392  
5 of the Rem & Bal Code, codified as RCW 9.48.030, (See Appendix A) to provide, "Murder in  
6 the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the  
7 jury shall find that the punishment shall be death." Guilt and sentence were determined in one  
8 proceeding and the guilt and punishment verdicts were returned simultaneously. The statute did  
9 not include a notice provision.  
10

11 In 1972 the United States Supreme Court declared all state death penalty schemes  
12 unconstitutional under the Eighth Amendment because the punishment was being sought and  
13 inflicted in an arbitrary and capricious way. *Furman v. Georgia*, 408 U.S. 232 (1972)  
14

15 Soon after publication of *Furman*, the Washington Supreme Court found it controlling  
16 and declared the Washington death penalty statute, RCW 9.48, invalid, so "[the] state is now  
17 precluded from any attempt to have the death penalty imposed under the existing statute." *State*  
18 *v. Baker*, 81 Wash.2d 281 (1972).  
19

20 In November 1975, Washington voters enacted through the initiative process another  
21 death penalty law that made death the mandatory, automatic sentence for aggravated murder.  
22 Initiative 316, codified as RCW 9A.32.046. That statute provided:  
23  
24  
25  
26

1 A person found guilty of aggravated murder in the first degree as defined in RCW  
2 9A.32.045, shall be punished by the mandatory sentence of death. Once a person  
3 is found guilty of aggravated murder in the first degree, as defined in RCW  
4 9A.32.045, neither the court nor the jury shall have the discretion to suspend or  
5 defer the imposition or execution of the sentence of death. Such sentence shall be  
6 automatic upon any conviction of aggravated first degree murder. The death  
7 sentence shall take place at the state penitentiary under the direction of and  
8 pursuant to arrangements made by the superintendent thereof; Provided, that the  
9 time of such execution shall be set by the trial judge at the time of imposing  
10 sentence and as a part thereof.

11 Since a death sentence was mandatory upon conviction of aggravated murder, the filing of an  
12 information charging aggravated murder was all the notice needed.

13 Subsequent to passage of the initiative, the Supreme Court declared mandatory death  
14 sentences unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Washington  
15 Supreme Court then declared RCW 9A.32.046 unconstitutional and found that the initiative  
16 backers had misread *Furman*.

17 ... a mandatory death penalty cannot withstand constitutional scrutiny.  
18 Thus, we decline [the state's] invitation to disregard the decisions of the Supreme  
19 Court on this issue.

20 *State v. Green*, 91 Wash.2d 431 (1979), referring to *Woodson*, supra.

21 In 1977, the Washington legislature made another run at drafting a viable death penalty  
22 statute. RCW 10.94.010 required the filing of a notice of intention to seek the death penalty:

23 **10.94.010 Notice of Intention - Filing required, when - Service - Contents -**  
24 **Failure of as bar to request.** When a defendant is charged with the crime of  
25 murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting  
26 attorney or the prosecuting attorney's designee shall

1 file a written notice of intention to request a proceeding to determine whether or  
2 not the death penalty should be imposed when the prosecution has reason to  
3 believe that one or more aggravating circumstances, as set forth in RCW  
4 9A.32.045 as not or hereafter amended, was present and the prosecution intends to  
5 prove the presence of such circumstances or circumstances in a special sentencing  
6 proceeding under RCW 10.94.020.

7 The notice of intention to request the death penalty must be served on the  
8 defendant or the defendant's attorney and filed with the court within thirty days of  
9 the defendant's arraignment in superior court of the charge of murder in the first  
10 degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating  
11 circumstance or circumstances upon which the prosecuting attorney bases the  
12 request for the death penalty. The court may, within the thirty day period upon  
13 good cause being shown, extend the period for the service and filing of notice.

14 If the prosecution does not serve and file written notice of intent to request  
15 the death penalty within the specified time the prosecuting attorney may not  
16 request the death penalty.

17 See Appendix A, emphasis added.<sup>3</sup>

18 RCW 10.94 did not suffer the mandatory death sentence problem of its initiative  
19 predecessor but allowed defendants to avoid facing death by pleading guilty to aggravated  
20 murder.<sup>4</sup> The Washington Supreme Court held:

21 The Washington statutes for the imposition of the death penalty  
22 needlessly chill a defendant's constitutional rights to plead not guilty and demand  
23 a jury trial and violate due process. *United States v. Jackson, supra*. They do not  
24 meet the standards of the state or federal constitutions.

25 *State v. Frampton*, 95 Wash.2d 469 (1981).

26 <sup>3</sup>RCW 10.94 is attached in its final bill form, Substitute House Bill No. 615, passed June 3, 1977. See Appendix A.

<sup>4</sup>*State v. Martin*, 94 Wash.2d 1, 614 P.2d 164 (1980).

1 In addition to its constitutional infirmity of allowing defendants to avoid the death penalty  
2 by pleading guilty, there were several other aspects of RCW 10.94 that prosecutors in the state  
3 did not like. Washington Association of Prosecuting Attorneys (WAPA) testified before the  
4 legislature that it was too difficult to prove a defendant was likely to be violent in the future as  
5 required under RCW 10.94. "It's impossible to predict into the future," Pierce County  
6 Prosecutor, Don Herron, testified. Prosecutors also did not like the fact that under RCW 10.94  
7 the state had to prove there were "not sufficient mitigating evidence to merit leniency," and  
8 wanted the burden put on the defendant to prove there was sufficient mitigating evidence. And  
9 the prosecutors did not like the requirement under RCW 10.94 that the state prove in the penalty  
10 phase the defendant was guilty to a "clear certainty". Bremerton Sun, 2-8-1980, See Appendix  
11 A. Prosecutors were urging a complete rewrite of the death penalty law rather than a simple  
12 amendment to RCW 10.94 which would fix the guilty plea problem identified in *Martin* and  
13 *Frampton*.

14  
15  
16  
17 The prosecutors through WAPA drafted a proposed new death penalty statute which was  
18 first read to the house as HB 76 on January 16, 1981. WAPA explained its proposed new bill in  
19 a document entitled "Explanatory Material for 'An Act Concerning Murder and Capital  
20 Punishment,'" written by Ron Franz, December 31, 1980. See Appendix A. The original bill  
21 fulfilled WAPA's wish list in that it included a flowery preamble that expressed a legislative  
22 intent identical to the prosecutors' own sentiments:  
23

24  
25 ... The legislature therefore enacts this legislation to provide a sentence of death  
26 for those who commit certain particularly egregious murders to the ends that

1 others will be deterred, that murderers receive punishment commensurate with  
2 their crimes, that there be adequate retribution for the families and friends of  
3 murder victims, and/or that the sanctity of life is enhanced by imposing the  
4 ultimate penalty on those who take life.

5 HB 76, sec. 1.

6 The prosecutors' proposal aimed to eradicate some of the legal doctrines that had vexed  
7 them in their pursuit of executions, such as narrow construction of criminal statutes and the rule  
8 of lenity:

9 This act shall be liberally construed to give effect to its purposes and, to this end,  
10 the rule of lenity shall have no application ...

11 HB 76, Sec. 2. WAPA's "Explanatory Material" clarified thusly: "Typically a criminal statute is  
12 strictly construed but this section requires it be liberally construed. This basically tells a court  
13 not to nitpick." Appendix A.<sup>5</sup>

14 In defining the aggravating circumstances, the prosecutors expressly included attempts of  
15 the specified felonies which elevated a murder to aggravated murder. HB 76, Sec. 4.

16 The prosecutors also proposed to require the vote of ten jurors in order to answer the  
17 jury's sentencing question in the negative (no death sentence) and to provide for a mistrial and  
18

19  
20  
21  
22 <sup>5</sup>A memorandum, dated 2-3-81, to the House Ethics, Law and Justice Committee from the Office of  
23 Program Research, pointed out

24 This provision may be of questionable effect. It attempts to reverse the universal rule that criminal  
25 statutes have to be strictly construed, and is probably inconsistent with the rule that a defendant in  
26 a capital case has the right to every possible procedural protection...  
Appendix A, p. 3.

1 retrial of the penalty phase if there was not unanimity in favor of a death sentence and not ten  
2 votes against death. HB 76, Sec. 8.

3 While maintaining the structure of the original bill and significantly changing the jury  
4 questions, undoubtedly easing the burden of the state in death penalty trials, the legislature  
5 rejected all of the above proposed segments.  
6

7 To be fair to WAPA and the bill's sponsors, it appears the prosecutors may have wished  
8 to streamline the death penalty process because the proposal envisioned the death penalty to be  
9 sought against only the worst of the worst offenders, those without mitigating circumstances.  
10

11 The prosecutors included in their proposal, HB 76, a unique notice provision unlike any other in  
12 the country:

13 When a person is charged with aggravated first degree murder as defined by  
14 Section 4 of this act, the prosecuting attorney shall file written notice of a special  
15 sentencing proceeding to determine whether or not the death penalty should be  
16 imposed when there is reason to believe that there are not sufficient mitigating  
circumstances to merit leniency.

17 HB 76, sec. 6, App. \_\_\_\_\_. The Franz Explanatory Material explained the proposed Section 6:

18 This section provides for the notice of special sentencing proceeding through  
19 which the death penalty may be imposed. The notice must be filed within 30 days  
20 of the defendant's arraignment on a charge of aggravated first degree murder  
21 unless the period for filing the notice is extended by the court.

22 During the period in which the notice may be filed, the defendant may not  
23 plead guilty to the murder with which he is charged. ... This time is needed by the  
24 prosecuting attorney to adequately determine if a particular defendant is a suitable  
25 candidate for the death penalty. Such an investigation typically requires an  
26 extensive records and background investigation of the defendant from sources not  
quickly available.

1 App. \_\_\_\_, p. 8, emphasis added. The emphasis on whether “a particular defendant is a suitable  
2 candidate for the death penalty,” was a marked change from the notice requirement of RCW  
3 10.94.010 which required a notice to be filed “when the prosecution has reason to believe that  
4 one or more aggravating circumstances ... was present...” and said nothing about mitigating  
5 circumstances.  
6

7 The legislature made significant changes to the original HB 76 but it retained the notice  
8 provision, with its exclusive emphasis on the prosecuting attorney having reason to believe there  
9 are not sufficient mitigating circumstances. See SHB 76, App. \_\_\_\_ and the final passed version,  
10 SHB.76, App. \_\_\_\_\_. It is also significant that the Senate proposed its own bill which had a  
11 different, more conventional notice provision:  
12

13 If a person is charged with aggravated first degree murder as defined by section 1  
14 of this act, the prosecuting attorney shall file written notice of a special sentencing  
15 proceeding to determine whether or not the death penalty should be imposed if the  
16 defendant is found guilty.

17 Proposed substitute senate bill 3096, App. \_\_\_\_.

### 18 CONCLUSION

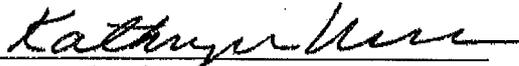
19  
20 RCW 10.95.040 is a unique provision among death penalty statutes requiring a prosecutor  
21 to focus on the mitigating circumstances of a particular defendant, and not the crime, in  
22 determining whether a particular defendant is among the worst of the worst deserving a sentence  
23 of death. The legislature knew this was a significant change from the prior statutes and  
24  
25  
26

1 considered alternative formulations but embraced the requirement that death be sought only  
2 against defendants who cannot produce substantial mitigating circumstances.

3 The requirement of RCW 10.95.040 has not been met in these defendants' cases and the  
4 notice should be dismissed.  
5

6  
7 DATED: Monday, April 19, 2010

8 Respectfully submitted,  
9

10  
11 

12 Kathryn Lund Ross, WSBA No. 6894  
13 Leo J. Hamaji, WSBA No. 18710  
14 William Prestia, WSBA No. 29912  
15 Attorneys for Mr. McEnroe  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**SUPPLEMENTAL BRIEFING IN SUPPORT OF  
DEFENDANT McENROE'S MOTION TO STRIKE  
NOTICE OF INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT IT WAS FILED  
IN VIOLATION OF RCW 10.95.040**

Page 11 of 11

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

# APPENDIX C

95105

343  
ASL:m  
No. 1  
cst

LAW LIBRARY  
UNIVERSITY OF WASHINGTON  
SEATTLE 5, WASHINGTON

PLEASE BRING THIS DRAFT  
TO THE ANNUAL MEETING

The American Law Institute

MODEL PENAL CODE

Proposed Final Draft No. 1

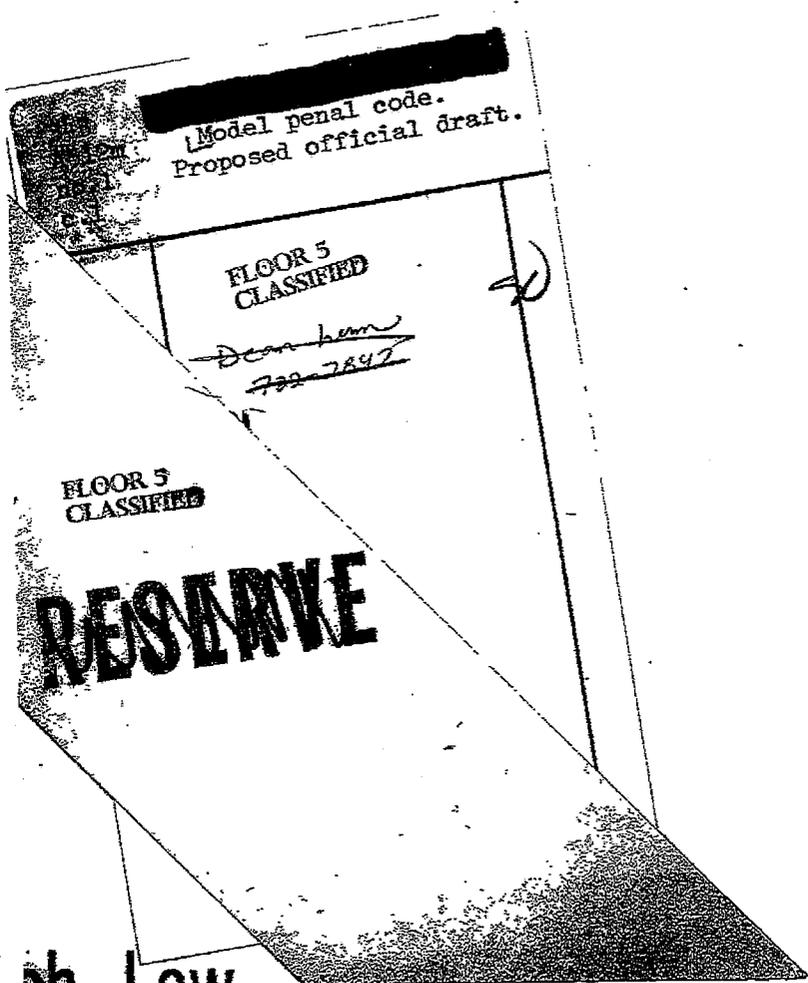
Submitted by the Council to the Members for Discussion at the  
Thirty-eighth Annual Meeting on May 17, 18, 19 and 20, 1961.

SUBJECT COVERED:

Sentencing and Correction.

April 24, 1961

The Executive Office  
THE AMERICAN LAW INSTITUTE  
133 South 36th Street  
Philadelphia 4, Pa.



sh. Law

## PART II. SPECIFIC OFFENSES

### ARTICLE 201. OFFENSES INVOLVING DANGER TO THE PERSON

Section 201.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death sentence excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether

the defendant should be sentenced for a felony of the first degree or sentenced to death. The determination shall be made by the Court if the defendant was convicted by a court sitting without a jury or upon his plea of guilty, or if the prosecuting attorney and the defendant waive a jury with respect to sentence. Otherwise, it shall be made by the same jury which determined the defendant's guilt, unless the Court for good cause shown discharges that jury, in which event it shall be made by a new jury which shall be empanelled for the purpose. When the determination is submitted to a jury, it shall be called upon to return a verdict stating expressly that the death sentence either shall or shall not be imposed and the Court shall sentence the defendant in accordance with such verdict. If the jury is unable to reach a unanimous verdict, the Court shall discharge the jury and impose sentence for a felony of the first degree.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court or jury as the case may be. In exercising such discretion, the Court or jury shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravat-

ing circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the determination is made by a jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated

in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(3) Aggravating circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or the attempt to commit, or flight after committing or attempting to commit robbery, rape by force or intimidation, arson, burglary or kidnaping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for hire or pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating circumstances.

(a) The defendant has no history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

#### STATUS OF SECTION

Presented to the Institute in Tentative Draft No. 9 for consideration at the May 1959 meeting.

Revised to reflect the action taken by the Institute, the principal change being the reversal of Subsection (2) and Alternative (2), to express a preference for the determination of the issue by the jury rather than the court in contested cases.

For Commentary, see Tentative Draft No. 9, p. 63.

The Code does not include provisions governing the execution of capital punishment. Though this topic must be dealt with in a jurisdiction authorizing sentence of death, including the method of execution and the traditional exemptions for pregnant women and persons insane at the time of execution, the primarily correctional preoccupation of the Code led to the omission of this subject.

### PART III. TREATMENT A

#### ARTICLE 301. SUSPENSION PROBATION

##### Section 301.1. Conditions of Suspension

(1) When the Court suspends sentence on a person who has been sentenced to a term of imprisonment, the Court may sentence him to be placed on probation under reasonable conditions, authorized by law, if the Court deems necessary to insure that he will lead a law-abiding life or likely to assist him to do so.

(2) The Court, as a condition of probation, may require the defendant:

(a) to meet his family requirements;

(b) to devote himself to a particular occupation;

(c) to undergo available treatment and to enter and remain in that treatment, when required for that purpose;

(d) to pursue a prescribed course of education or vocational training;

(e) to attend or reside in a particular institution, the instruction, recreation or other activities of which are prescribed;

(f) to refrain from frequenting disreputable places or associating with disreputable persons;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

**STATE OF WASHINGTON  
COUNTY OF KING,**

**Plaintiff,**

**v.**

**JOSEPH T. McENROE,**

**Defendant**

) **No. 07-C-08716-4 SEA**  
)  
) **APPENDIX B OF DEFENDANT**  
) **McENROE'S SUPPLEMENTAL**  
) **MATERIAL IN SUPPORT OF**  
) **10.95.040 MOTION**  
)  
)  
)  
)

**APPENDIX B OF SUPPLEMENTAL MATERIAL**

Defendant McEnroe's supplemental briefing in support of the Motion To Strike the Death Notice on the Grounds that it was filed in violation of RCW 10.95.040 is filed today under separate caption. This appendix constitutes Appendix B to that supplemental briefing. Appendix B consists of two (2) parts. The first part is a summary of the death penalty statute for each state of the United States that currently has or until recently has a statute allowing the death penalty. The second part is the actual text of each of the statutes summarized in the first part. Co-Defendant Michele Anderson's team compiled these statutes and drafted the summary herein,

**APPENDIX B OF DEFENDANT McENROE'S  
SUPPLEMENTAL MATERIAL IN SUPPORT OF  
10.95.040 MOTION**

**Page 1 of 14 of Summary of Statutes**

**LAW OFFICES OF  
THE DEFENDER ASSOCIATION  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org**

1 and thus they are signing off on this pleading with the McEnroe team. The Anderson team will  
2 file a separate joinder endorsing this supplementary material.

### 3 SUMMARY OF DEATH PENALTY STATUTES

4 What follows is a brief state-by-state description of the death penalty sentencing scheme  
5 for each state that currently has the death penalty as well as two states (New Jersey and New  
6 Mexico) that have recently repealed statutes authorizing the death penalty.<sup>1</sup> The notice  
7 requirements of each statutory scheme are also described. It is clear from this review that no  
8 other state has a statute that resembles RCW 10.95.040 in that no other state's statute requires the  
9 state to determine that "there is reason to believe that there are not sufficient mitigating  
10 circumstances to merit leniency." RCW 10.95.040 is unique in that regard.

11 In general, of the 36 jurisdictions considered, 13 did not contain a specific notification  
12 procedure. Most of these states have an implied notification requirement, in that the state is  
13 either required to waive the imposition of the death penalty or to state on the record that the state  
14 will not to seek the death penalty. In 16 of the remaining 23 jurisdictions the state is required to  
15 give notice of the aggravating circumstances that the state intends to rely upon at the sentencing  
16 proceeding. Six of the 23 notice provisions are contained in court rules of procedure and the  
17 remaining are part of the states' codes.

#### 18 ALABAMA:

19 The Code of Alabama (13A-5-40 et. seq.) lists 18 "capital offenses," (murder with  
20 specific aggravating circumstances). If a defendant is convicted of capital murder, then the court  
21 conducts a sentencing proceeding at which a jury (or judge if jury is waived) considers all  
22 relevant mitigating and aggravating factors. The prosecutor does not file a notice of intention to  
23 seek the death penalty. The prosecutor's decision about whether to seek the death penalty is the  
24 prosecutor's initial decision to charge a murder as a capital murder. Unless one of the 10  
25 aggravating factors listed 13A-5-49 is proved beyond a reasonable doubt, the sentence has to be  
26 life. The jury's decision is advisory.

<sup>1</sup> A handful of states have statutes on the books that purport to impose the death penalty for certain classes of repeat sex offenders. These statutes are not discussed as the death penalty for non-homicide sex crimes has been determined violate the Eighth Amendment to the U.S. Constitution, Kennedy v. Louisiana, 554 U.S. \_\_\_; 128 S.Ct. 2641 (2008). A handful of states define treason and certain acts of "terrorism" as capital crimes. These statutes are also not included in this analysis.

1 **ARIZONA:**

2  
3 A person convicted of first degree murder under Arizona Revised Statute (ARS) 13-1105  
4 is eligible to receive the death penalty. After making the decision to charge first degree murder,  
5 the prosecutor must file a notice of intention to seek the death penalty. The notice requirement is  
6 contained in the Rules of Criminal Procedure and places no limits on the discretion of the  
7 prosecutor. The prosecutor must, however, list the aggravating factors that the state intends to  
8 rely on in seeking the death penalty. ARS 13-751 lists 14 aggravating factors. ARS 13-752 sets  
9 forth the procedure to be followed by the trier of fact in determining whether to impose a  
10 sentence of death or life in prison.

11 **ARKANSAS:**

12 Arkansas Code section 5-10-101 specifies that the crime of capital murder shall be  
13 punished by death or life imprisonment. Under code section 5-4-602 the prosecutor may waive  
14 the death penalty, stipulate that no aggravating factors exist, or stipulate that the mitigating  
15 factors outweigh the aggravating factors. If the prosecutor so stipulates, then the mandatory  
16 sentence is life without parole. There is no limit placed on the prosecutor's discretion in making  
17 a determination under this section. 5-4-602 specifies the procedure to be followed if the  
18 prosecutor has not waived the death penalty. Code section 5-4-604 sets forth the aggravating  
19 circumstances.

20 **CALIFORNIA:**

21 California Penal Code section 190 allows punishment by death for murder in the first  
22 degree. Section 190.1 provides that if a jury finds a defendant guilty of first degree murder, the  
23 jury must at the same time determine the truth of all charged "special circumstances." Section  
24 190.2 lists 22 special circumstances (e.g. murder for financial gain, victim was a peace officer  
25 etc.). If one or more special circumstances is charged and proven, then the defendant is eligible  
26 to receive the death penalty. Section 190.3 provides that all relevant aggravation and mitigation  
evidence may be presented, but requires the prosecutor to give reasonable advance notice (as  
determined by the judge) of the evidence the state will introduce in the penalty phase. Apart  
from this notice requirement, no limit is placed on the prosecutors charging discretion. Section  
190.03 requires the jury to weigh aggravating circumstances against mitigating circumstances.  
The trier of fact must impose a death sentence if it finds that the aggravating circumstances  
outweigh the mitigating circumstances.

1 **COLORADO:**

2  
3 Colorado Revised Statute (CRS) 18.1.3-1201 sets forth the sentencing proceeding to be  
4 followed in the cases of defendants convicted of a class 1 felony (i.e. First Degree Murder as  
5 defined in CRS 18-3-102). Criminal Procedure Rule 32.1 requires the state to give notice of the  
6 intention to seek the death penalty no later than 60 days following arraignment. This rule sets  
7 forth the discovery obligations of the prosecutor and the defense as they relate to the sentencing  
8 hearing. (CRS 18-1.3-1201(3) sets forth the same disclosure obligations). The prosecutor is  
9 obligated to disclose the aggravating factors that the state intends to attempt to prove at the  
10 sentencing hearing. Neither CRS 18-1.3-1201 nor Rule 32.1 requires the state to consider  
11 mitigating factors (or any other matter) prior to filing a notification to seek the death penalty.

12 **CONNECTICUT:**

13 Connecticut permits imposition of the death penalty upon conviction for capital murder.  
14 Capital murder is murder committed in one of the 8 enumerated ways listed in Connecticut  
15 General Statutes (CGS) 53a-54b. There is no limit on the prosecutor's decision to charge a  
16 person with capital murder and there is no notice requirement. If a defendant is convicted of  
17 capital murder, the defendant is sentenced pursuant to CGS 53a-46a. That section provides that  
18 the state may stipulate that none of the statutory aggravating factors exist, or that one of the  
19 disqualifying factors listed in subsection (h) exists. CGS 53a-46a contains no limits upon the  
20 prosecutor's discretion to stipulate or refuse to stipulate. Subsection (i) lists the aggravating  
21 factors that may be considered by the sentencing trier of fact (either a jury or a three judge panel  
22 if the defendant waives the right to be sentenced by a jury). If the trier of fact finds that there are  
23 no disqualifying factors, that there are no mitigating factors, or that the aggravating factor or  
24 factors outweigh any mitigating factors, then the trier of fact is required to impose a death  
25 sentence.

26 **DELAWARE:**

Defendants convicted of first degree murder may be sentenced to death. Delaware Code  
section 636 defines first degree murder broadly. First degree murder includes an intentional  
killing, a reckless killing of a law enforcement officer, a reckless killing committed during the  
commission of a felony, a killing committed during an escape or to avoid capture, and a killing  
by means of an explosive device. A person convicted of first degree murder must be sentenced  
under Delaware code section 4209. Delaware Code section 4209(c) requires the each side to give  
notice of the aggravating and mitigating factors that each intends to rely upon at the punishment  
phase. There is no limit on the prosecutor's discretion to present evidence of aggravating factors.  
The sentencing jury considers whether there is proof beyond a reasonable doubt of one or more

1 statutory aggravating factors. The jury then must decide (by a preponderance of the evidence)  
2 whether the mitigating factors outweigh aggravating circumstances. The jury makes a sentencing  
3 recommendation. The jury's finding is constitutes a "recommendation" to the judge. The judge  
4 makes the sentencing decision and can impose a death sentence if the jury has found the  
existence of one statutory aggravating factor beyond a reasonable doubt, and if the judge finds  
that the mitigating circumstances do not outweigh the aggravating circumstances.

5 **FLORIDA:**

6 Florida allows the death penalty for capital murder as defined in Florida Statute section  
7 782.04. The prosecutors are not limited in their discretion to seek the death penalty, and are not  
8 required by statute or rule to give notice of the state's intention to seek the death penalty.  
9 Florida Rule of Criminal Procedure 3.202 does contain a notice provision. The rule governs the  
10 use of mental health experts in death penalty cases. The notice provision states that the rule  
11 3.202 only applies if the state has given notice of intent to seek the death penalty within 45 days  
12 of arraignment, but its failure to provide the notice does not preclude the death penalty. Florida  
13 Statute section 921.141 sets forth the proceedings to be followed in the penalty phase. The judge  
14 is charged with making the sentencing decision based on a finding of the existence of one or  
15 more aggravating factors and based on the recommendation of the jury.

13 **GEORGIA:**

14 Georgia Code § 16-51 allows imposition of the death penalty for the crime of Murder.  
15 Sections 17-10-30 and 31 set forth the procedure to be followed in a case for which the death  
16 penalty may be imposed. One or more of 11 statutory aggravating factors must be proved to the  
17 jury beyond a reasonable doubt. In order for the death penalty to be imposed, the jury must  
18 recommend the death penalty after considering all mitigating and aggravating circumstances.  
19 Unified Appeal Rule II requires the state to give written notice to the defense as to whether it will  
20 seek the death penalty. The rule requires the court to confer with the prosecutor and defense  
21 attorney at a hearing prior to arraignment. This rule is intended to ensure that adequate defense  
22 resources are allocated to a death penalty case and does not limit the prosecutor's discretion to  
23 seek the death penalty. Nor does it require the state to give notice as to which aggravating factors  
24 it will rely on.

22 **IDAHO:**

23 Idaho Code § 18-4004 allows punishment by death for the crime of murder in the First  
24 Degree. Section 19-2515 sets forth the sentencing procedure that must be followed. In order to  
25 impose the death penalty, the jury is required to find one or more of 11 statutory aggravating  
26 circumstances beyond a reasonable doubt. If it does, it then the jury weighs the aggravating

1 factors against mitigation. The state is required under section 18-4004A to give notice of its  
2 intention to seek the death penalty within 60 days of entry of a plea. The state must list the  
3 statutory aggravating factors that it intends to prove. Both sides must disclose evidence of  
4 aggravating and mitigating circumstances in compliance with criminal rule 16. Apart from  
disclosure requirements and the requirement to prove one of the enumerated aggravating factors,  
there are no constraints on discretion.

5 **ILLINOIS:**

6 Illinois permits the death penalty upon conviction for first degree murder with proof of  
7 one of 21 aggravating factors. Illinois Code Ch. 720, Art. 9. The court must conduct a separate  
8 sentencing hearing "where requested by the state." This is the only statutory notification  
9 requirement. There is no limit on the state's discretion apart from the requirement to prove one  
10 of the statutory aggravating factors beyond a reasonable doubt. If the jury finds one or more  
aggravating factors beyond a reasonable doubt, then it is instructed to weigh mitigating factors  
against the aggravating factors and make a binding sentencing recommendation.

11 **INDIANA:**

12 The death penalty is allowed upon conviction for murder. Pursuant to Indiana code Title  
13 42 Section 35-50 the state may seek the death penalty by alleging one or more of 16 aggravating  
14 factors." This is the only notice provision (although Indiana Rule of Criminal Procedure 24 does  
15 reference 35-50-2-9), and the state's discretion is limited only to the requirements that it allege  
16 and prove at least one of the statutory aggravating factors. The jury considers aggravating and  
mitigating circumstances and makes a binding recommendation.

17 **KANSAS:**

18 Kansas allows imposition of the death penalty upon conviction for capital murder as  
19 defined in Kansas Code section 21-3439 if one of 8 statutory aggravating factors listed in section  
20 21-4625 is found to exist. The sentencing procedure is set forth in section 21-4624. It requires  
21 the prosecutor to give notice within 5 days of arraignment of the state's intention to request a  
22 separate sentencing proceeding to determine whether the death penalty should be imposed. The  
23 state may only present aggravating evidence if it was made known prior to the proceeding. If the  
24 jury finds an aggravating circumstance beyond a reasonable doubt, then it is required to weigh  
25 mitigating circumstances. The judge can make a determination that the jury's verdict is not  
26 supported by the evidence and can sentence to life without parole.

1 **KENTUCKY:**

2  
3 Kentucky authorizes the death penalty upon conviction for murder with a finding of one  
4 of the eight aggravating factors set forth in Kentucky Code section 532.025. That section sets  
5 forth the procedures to be followed at a sentencing hearing. The state can only introduce  
6 evidence in aggravation that was revealed to the defendant prior to trial. This appears to be the  
7 only notice required by the statute. The jury is instructed to consider the aggravating factors and  
8 mitigating factors and can impose a death sentence if it finds one or more of the listed  
9 aggravating factors.

10 **LOUISIANA:**

11 In Louisiana, a defendant may be sentenced to death for conviction of First degree murder  
12 upon a finding of one or more of 13 aggravating factors. The Revised Statutes contain no  
13 notification provision, other than a statement that "if the district attorney does not seek a capital  
14 verdict, the offender shall be punished by life in prison . . ." La. Rev. Stat. § 14.30. The Code  
15 of Criminal Procedure section 905 also provides that the court may impose a life sentence on the  
16 joint motion of the defendant and the state. The Code of Criminal Procedure 905.4 lists the  
17 aggravating circumstances. A death sentence cannot be imposed unless the jury finds beyond a  
18 reasonable doubt that one of the aggravating circumstances has been proven and that, after  
19 considering mitigating circumstances, a sentence of death should be imposed.

20 **MARYLAND:**

21 In Maryland a death sentence is available on conviction for murder in the First Degree,  
22 upon a finding that one or more of 10 aggravating factors. The state must give notice under  
23 Maryland Criminal Code Title 2 section 202. The notice must be given 30 days before trial and  
24 must list the aggravating circumstances upon which the state intends to rely. There is no other  
25 limitation on the prosecutor's discretion. The death penalty is not available if the state relies  
26 solely on eyewitness evidence.

**MISSISSIPPI:**

Mississippi allows punishment by death for capital murder as defined in Mississippi Code  
section 97-3-19. The sentencing procedures are set forth in section 99-19-101. There is no  
notice provision requiring the state to advise the defendant that the state will seek the death  
penalty. Nor are there any limits placed on the prosecutor's discretion apart from the indictment  
for capital murder and the aggravating factors. Under Code section 99-19-101, the jury must find  
the existence of one or more of eight aggravating circumstances. The jury must then weigh the

1 aggravating circumstances against mitigating circumstances. In order for a death sentence to be  
2 imposed, the jury must unanimously find that there are insufficient mitigating circumstances to  
3 outweigh the aggravating circumstances.

4 **MISSOURI:**

5 Missouri allows imposition of the death penalty for First Degree Murder as defined in  
6 565.020 and upon proof of one or more of 17 aggravating factors. The state is required to  
7 provide notice of aggravating circumstances that it intends to prove at the penalty phase within a  
8 reasonable time before the first phase of the trial. Missouri Revised Statutes 565.005. This is  
9 the only notice requirement and the only limit on the state's discretion apart from the limitations  
10 imposed by requirement to prove one or more of the enumerated aggravating factors. Section  
11 565.032 sets forth the sentencing procedure. The jury must find one or more of the statutory  
12 aggravating factors to have been proved beyond a reasonable doubt and then consider whether  
13 the evidence as a whole justifies a sentence of death or life imprisonment without parole.

14 **MONTANA:**

15 Montana authorizes the death penalty upon conviction for deliberate homicide. Mont.  
16 Code § 45-5-102. Code section 46-18-303 lists statutory aggravating factors. One or more  
17 must be admitted or proven to the trier of fact beyond a reasonable doubt. By the terms of the  
18 statute, the court (not the jury) imposes a sentence of death if the trier of fact found the existence  
19 of one or more aggravating factors and the court finds that there are insufficient mitigating  
20 circumstances to call for leniency. There is no notice provision contained in the statute, and the  
21 prosecutor's discretion appears to lie in the decision to charge an aggravating factor. Montana  
22 has not revised its code to comply with Ring v. Arizona, and the most recent conviction for  
23 which someone is currently on death row is 1996.

24 **NEBRASKA:**

25 Nebraska authorizes the death penalty for First Degree Murder (Nebraska Revised  
26 Statutes 28-303) upon a finding of one or more of the aggravating factors. The state cannot seek  
the death penalty unless a "notice of aggravation" is contained in the information and alleges one  
or more aggravating circumstances. The state can amend and add aggravating factors up until 30  
days before trial. 29-1603. The eight statutory aggravating factors are listed in section 29-2523.  
The jury is discharged after deciding whether one of the statutory aggravating factors has been  
proven beyond a reasonable doubt. Then, a three judge panel hears evidence in aggravation and  
mitigation and renders a sentence.

1 **NEVADA:**

2 Nevada authorizes the death penalty upon conviction for first degree murder under  
3 Nevada Revised Statute 200.030 and a finding that one of 15 aggravating factors listed in section  
4 200.033 (This section as written was declared unconstitutional in Robins v. State, 2009 WL  
5 1490601 (Nev. Jan. 20, 2009) proposed legislation remedying the infirmity has been considered  
6 by the Nevada Legislature). Supreme Court Rule 250 requires the state to file a notice of intent  
7 to seek the death penalty. The notice must list all of the aggravating factors and allege with  
8 specificity the facts on which the state will rely to prove each aggravating factor. There is no  
9 requirement that that state consider mitigating factors prior to filing the notice.

8 **NEW HAMPSHIRE:**

9 New Hampshire Revised Statutes section 630.5 allows imposition of the death penalty for  
10 the crime of capital murder (as defined in section 630.1) if the jury finds beyond a reasonable  
11 doubt that one or more of 10 aggravating factors existed. The jury is instructed to consider  
12 whether the aggravating factors found to exist sufficiently outweigh any mitigating factors  
13 sufficient, or whether the aggravating factors themselves warrant a sentence of death. The jury  
14 may by unanimous vote recommend a sentence of death. Section 630.5 requires the state to give  
15 notice that it intends to seek a death sentence and set forth the aggravating factors it will seek to  
16 prove.

15 **NEW JERSEY (repealed):**

16 The New Jersey Legislature repealed the death penalty in 2007. New Jersey Rule of  
17 Court 3:13-14 requires the prosecutor to provide a defendant with the indictment containing the  
18 aggravating factors that the state intends to prove at the penalty phase, together with all discovery  
19 bearing on the aggravating factors. The prosecutor must also turn over any discovery relevant to  
20 mitigating factors.

20 **NEW MEXICO (repealed):**

21 New Mexico repealed the death penalty in 2009. New Mexico Criminal Procedure Rule  
22 5-704 provided that the state must file a notice of intent to seek the death penalty within ninety  
23 days after arraignment. The rule also required the prosecutor to specify the elements of the  
24 aggravating circumstances upon which the prosecutor would rely.

1 **NEW YORK:**

2  
3 New York permits the death penalty to be imposed upon conviction for murder in the first  
4 degree. The section provides that the state can determine at "any time that the death penalty  
5 shall not be sought, in which case a life sentence shall be imposed." Chapter 11-A of the  
6 Consolidated Laws of New York, section 400.27. The aggravating factors are deemed to be the  
7 same factors that make murder first degree murder. They consist of 14 circumstances (e.g.  
8 victim was a police officer, especially cruel and wanton etc.). The jury can only consider the  
9 factors that were proven at the trial beyond a reasonable doubt. The jury may only impose a  
10 sentence of death if it unanimously finds beyond a reasonable doubt that the aggravating factors  
11 outweigh the mitigating factors. Section 250.40 requires the state to give the defense notice of its  
12 intention to seek the death penalty within in 120 days of arraignment. There is no requirement  
13 that the state set forth the reasons for seeking the death penalty.

14 **NORTH CAROLINA:**

15 North Carolina General Statutes section 14-17 authorizes a sentence of death upon  
16 conviction for murder in the first degree. Section 15A-2000 sets forth the sentencing procedure.  
17 The jury must consider whether one or more of 11 aggravating circumstances exist and whether  
18 they outweigh any mitigating circumstances. The jury then makes a sentence recommendation,  
19 which must be unanimous. Section 15A-2004 provides that the state has discretion to not  
20 prosecute a defendant capitally even if the state believes there is evidence of an aggravating  
21 circumstance. This section requires the state to give notice to the defense of its intention to seek  
22 the death penalty no later than the pre-trial conference or the arraignment, whichever is later.  
23 There are no requirements that the state consider mitigating circumstances prior to filing notice.

24 **OHIO:**

25 Ohio authorizes imposition of the death penalty for the crime of aggravated murder as  
26 defined in Ohio Revised Code section 2903.1, but only if one of the aggravating factors set forth  
in Revised Code section 2941.14 is proven beyond a reasonable doubt. That section sets forth  
eight aggravating factors. Sections 2929.03 and 2929.04 set for the sentencing procedure that is  
to be followed upon conviction for aggravated murder. There are no apparent statutory  
notification requirements and the prosecutor's decision to seek the death penalty appears to be  
made when the state seeks an indictment for capital murder alleging one or more of the statutory  
aggravating circumstances.

1 **OKLAHOMA:**

2  
3 Oklahoma Statute Title 21 section 701.7 defines murder in the first degree. A death  
4 sentence is authorized upon conviction for murder in the first degree if the sentencing jury finds  
5 one of right statutory aggravating factors beyond a reasonable doubt, and makes a unanimous  
6 recommendation of death. The prosecutor must give notice of its intention to seek the death  
7 penalty. Section 701.10 allows introduction of evidence in aggravation only if the state provides  
8 notice of its intent to use the evidence "prior to trial." Apart from this section, there is no  
9 statutory notice requirement and no limit is placed on the prosecutor's discretion in seeking the  
10 death penalty.

11 **OREGON:**

12 The death penalty may be imposed upon a conviction for aggravated murder as defined in  
13 Oregon Revised Statute 163.095. ORS 163.150 sets forth the procedure to be followed at the  
14 sentencing hearing. It requires a unanimous finding beyond a reasonable doubt that one of three  
15 factors is proven and that mitigating circumstances do not warrant a recommendation of a  
16 sentence of life without parole. Subsection three states that a sentencing hearing at which a jury  
17 considers statutory aggravating factors will not be held if the prosecuting attorney states on the  
18 record that the state will not present evidence for the purpose of sentencing the defendant to  
19 death. Subsection three is the only notice requirement set forth in the statute. There is no limit  
20 placed on the prosecutor's discretion in seeking the death penalty once the charge of aggravated  
21 murder is made. In 2009 senate bill 295 was introduced to the legislature. That bill would have  
22 required the state to provide notice of its intention to seek the death penalty and a statement of  
23 the evidence upon which it would rely. The bill did not pass out of committee.

24 **PENNSYLVANIA:**

25 Pennsylvania allows imposition of the death penalty for the crime of Murder in the First  
26 Degree. Pennsylvania Code Section 15.66. Title 42 of Pennsylvania's statutes annotated, section  
9711 (42 Pa.Cons.Stat. § 9711) sets forth the sentencing procedure. This section lists 18  
aggravating factors. Pennsylvania Rule of Criminal Procedure 802 requires the state to file a  
"Notice of Aggravating Circumstances" that the state intends to submit at the sentencing hearing.  
The notice must be filed at or before arraignment unless the state becomes aware of aggravating  
circumstances subsequent to arraignment. The rule contains no provision limiting the  
prosecutor's discretion or requiring the prosecutor to consider mitigating circumstances prior to  
filing the notice.

1 **SOUTH CAROLINA:**

2 South Carolina Code section 16-3-10 authorizes imposition of the death penalty for  
3 murder. Section 16-3-20 sets forth the sentencing procedure that is to be followed. 16-3-26  
4 requires the prosecutor to notify the defense attorney of his intention to seek the death penalty at  
5 least 30 days before the trial. The state need not notify the defense of specific aggravating factors  
6 upon which it intends to rely. The statute places no limits on the state's discretion and does not  
7 require the state to take mitigation into consideration prior to filing a notice. 16-3-20 requires  
8 the jury to decide beyond a reasonable doubt whether one of 12 aggravating factors exists, and to  
9 make a binding sentencing recommendation to the judge. [Section 16-3-655 purports to  
authorize a death sentence for sexual abuse of a minor for persons with prior convictions for  
certain sex offenses (now determined to be unconstitutional). That code section sets forth an  
analogous sentencing procedure.]

10 **SOUTH DAKOTA:**

11 The death penalty is available for persons who commit a class-A felony (i.e. First Degree  
12 Murder). South Dakota Codified Laws section 22-16-14. There is no statutory notification  
13 provision. There is no limit on the prosecutor's discretion to seek the death penalty upon  
14 conviction for first degree murder. Section 23A-27A-1 lists 10 aggravating factors. If one or  
15 more is aggravating factor is found by the jury beyond a reasonable doubt, then the jury may  
recommend a death sentence.

16 **TENNESSEE:**

17 Tennessee allows a sentence of death upon conviction for first degree murder as defined  
18 in Tennessee Code section 39-13-202. Under code section 39-13-208 the state must file written  
19 notice of its intention to seek the death penalty no less than 30 days before trial, and must specify  
20 the aggravating circumstances that it intends to rely upon in seeking a death sentence. Code  
21 section 39-13-204 sets forth the sentencing procedure. It requires a jury to unanimously find  
beyond a reasonable doubt that one or more statutory aggravating circumstance exists and that  
they are not outweighed by mitigating circumstances.

22 **TEXAS:**

23 Texas Penal Code section 19.03 defines capital murder as a murder committed under one  
24 of several circumstances (e.g. murder while incarcerated, murder of a police officer). Section  
25 12.31 provides that capital murder shall be punished by the death penalty or life in prison without  
26 parole. Criminal Procedure Code section 37.071 sets forth the procedure to be followed when

1 the state seeks the death penalty. The state must prove beyond a reasonable doubt that there is a  
2 probability that the defendant would commit criminal acts of violence that would constitute a  
3 continuing threat to society and that the defendant actually caused the death or intended to kill  
4 the deceased. If the jury answers yes to each of these questions, then it is asked to weigh all  
5 circumstances, including mitigating circumstances and decide whether the mitigating  
6 circumstances warrant a sentence of life imprisonment. There is no apparent notice requirement  
7 in the Texas Code, although Texas Code of Criminal procedure allows a defendant to waive his  
8 right to a jury trial if the state has notified the court that it will not seek the death penalty, which  
9 has the practical effect of requiring the state to give notice. There are no limits on the  
10 prosecutor's discretion apart from the limitations contained in the indictment for capital murder  
11 and the ability to prove the two statutory aggravating circumstances.

### 8 UTAH:

9 Utah Code section 76-5-202 authorizes the death penalty for aggravated murder as defined in that  
10 section. In order to make aggravated murder punishable by death, the state must file notice of  
11 intent to seek the death penalty. Utah Code section 76-5-202 requires the notice to be filed  
12 within 60 days of arraignment unless the time is extended for good cause. There is no  
13 requirement that the prosecutor consider mitigating circumstances prior to filing the notification.  
14 Code section 76-3-207 sets for the procedure by which the trier of fact determines whether the  
15 punishment should be death, life in prison, or life in prison without parole. The death penalty  
16 requires the trier of fact to find beyond a reasonable doubt that the total of the aggravation  
17 outweighs the total mitigation.

### 16 VIRGINIA:

17 Virginia allows punishment for capital murder as defined in Code section 18.2-31. That  
18 section lists 15 means of committing capital murder. At the sentencing proceeding, the state  
19 must prove beyond a reasonable doubt that a defendant "would commit criminal acts of violence  
20 that would constitute a threat to society, or that this conduct in committing the offense was  
21 outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind  
22 or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4. The state is not required by  
23 statute to give notice of the intention to seek the death penalty, and there is no limit on the  
24 prosecutor's discretion once the decision to charge a capital murder has been made.

### 23 WYOMING:

24 Wyoming Code Section 6-2-101 authorizes a death sentence for first degree murder. Life  
25 without parole or life must be the sentence in "any case in which the state has determined not to  
26 seek the death penalty." There are no limits on the prosecutor's discretion. Wyoming Code

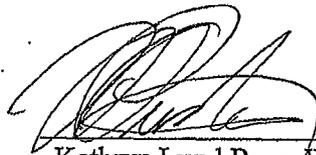
1 Section 6-1-102 sets forth the proceedings to be followed in determining a sentence for First  
2 Degree Murder. One of 12 aggravating circumstances must be found beyond a reasonable doubt  
3 by a unanimous jury. The jury must reach a unanimous verdict in favor of death.  
4

5 Conclusion

6 This Summary was prepared to aid the Court in deciding the pending Motion To Strike  
7 Notice Of Intent To Seek The Death Penalty On Grounds That It Was Filed In Violation Of RCW  
8 10.95.040.  
9

10 DATED: Monday, April 19, 2010

11 Respectfully submitted,

12  For

13 Kathryn Lund Ross, WSBA No. 6894  
14 Leo J. Hamaji, WSBA No. 18710  
15 William Prestia, WSBA No. 29912  
16 Attorneys for Mr. McEnroe  
17

18  27617 For

19 Lisa Mulligan, WSBA No. 29429  
20 David Sorenson, WSBA No. 27617  
21 Attorneys for Michele Anderson  
22  
23  
24  
25  
26

# **APPENDIX B**

**TO DEFENDANT/RESPONDENT MCENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3

---

4 STATE OF WASHINGTON, )  
5 Plaintiff, )  
6 vs. ) No. 07-1-08716-4 SEA  
7 JOSEPH McENROE and ) No. 07-1-08717-2 SEA  
8 MICHELE ANDERSON, )  
9 Defendants.)

---

10 VERBATIM REPORT OF PROCEEDINGS

11 **EXCERPT**

12

---

13 Heard before the Honorable Jeffrey Ramsdell  
14 King County Courthouse, 516 Third Avenue, Room W-813  
15 Seattle, Washington

16 APPEARANCES:

17 JAMES KONAT and ANDREA VITALICH, representing the State;  
18 KATHRYN ROSS, WILLIAM PRESTIA and LEO HAMAJI,  
19 representing Defendant McEnroe  
20 M. LISA MULLIGAN and DAVID SORENSON, representing  
21 Defendant Anderson.  
22

23 DATE REPORTED: MARCH 26, 2010

24 REPORTED BY: JOANN BOWEN, RPR, CRR, CCP, CCR# 2695

1 SEATTLE, WASHINGTON; FRIDAY, MARCH 26, 2010

2 -o0o-

3 (Begin excerpt)

4 \* \* \* \* \*

5 THE COURT: Thank you, counsel.

6 Ms. Vitalich, I think we're over to you now. Thanks.

7 MS. VITALICH: Good afternoon, Your Honor.

8 For the record, Andrea Vitalich representing the State  
9 of Washington. I have very little in the way of  
10 prepared remarks. So, I will probably end up talking  
11 for about 45 seconds and then entertain the Court's  
12 questions.

13 THE COURT: Okay.

14 MS. VITALICH: Just the prepared remarks are  
15 thus: This motion is frivolous. Their proposed  
16 construction of this statute is absurd on its face and  
17 flies in the face of what can readily be ascertained as  
18 the legislative intent of 10.95 as a whole. And,  
19 assuming that this Court rejects this motion as  
20 frivolous, as we contend that it should, their  
21 invitation to this Court to essentially reevaluate the  
22 mitigation packets and revisit and second-guess the  
23 decision that's already been made would, in fact,  
24 violate the Separation of Powers Doctrine in at least a  
25 couple of ways.

1           That's really all I have in the way of --

2           THE COURT: Let's start with the last comment  
3 first. Help me out with what the Supreme Court did in  
4 State v. Pirtle where they said: We've looked at it,  
5 and we conclude that the prosecutor didn't abuse its  
6 discretion. That sure looks like some kind of review is  
7 occurring in my mind.

8           MS. VITALICH: In Pirtle the situation was  
9 rather unusual in that you had a case where the  
10 prosecutor essentially announced from the moment of  
11 filing the case that he intended to seek the death  
12 penalty, and then there was essentially a backpedalling  
13 process going, oh, but, yes, Mr. Defense Attorney, I  
14 suppose I should give you 30 days to present me  
15 information, and I'll consider it.

16           But essentially you had the prosecutor in that  
17 particular case starting out from the get-go saying:  
18 I'm going to seek the death penalty in this case. And  
19 as Your Honor has gleaned from the record, there either  
20 wasn't mitigation presented or it was minimal at best.  
21 Although we don't necessarily -- we actually don't know  
22 what that was.

23           In addition, I would note that the information that  
24 the court cited in the Pirtle decision is all public  
25 record. Obviously the defendant's criminal history is a

1 matter of public record. That was essentially what the  
2 court looked at.

3 I think it's one of the reasons why there isn't a  
4 case that says, gee, the prosecutor ought to consider  
5 the facts of the crime when they're making a  
6 determination whether to seek the death penalty as it's  
7 such an obvious proposition that it's kind of like  
8 looking for authority for the proposition that the sky  
9 is blue on a sunny day. It's just -- it's essentially  
10 so inherent in all of the case law that it doesn't  
11 really say it anywhere.

12 I think in that case what the court is saying is:  
13 You know, did the prosecutor sort of act out of turn by  
14 essentially making the determination right out of the  
15 gate and just setting forth the record that he did leave  
16 it open for 30 days for any mitigation to be presented?  
17 And then the court said: Well, look at this, this guy's  
18 criminal history, it's bad. So based on that we can't  
19 say that the prosecutor abused his discretion in these  
20 particular circumstances.

21 Now, I'm not saying that a court couldn't find that  
22 a prosecutor did abuse its discretion.

23 THE COURT: How would we ever know?

24 MS. VITALICH: If a prosecutor -- for  
25 instance, if it somehow became known and it was a matter

1 of public record that a prosecutor had sought the death  
2 penalty because of a defendant's, let's say, race or  
3 religion or some other totally invalid reason.

4 THE COURT: How would we ever know, though,  
5 Ms. Vitalich? That's one of the things that Justice  
6 Utter keeps saying in his dissent in Campbell. I've got  
7 to say it makes some sense to me, because all of the  
8 other case law that I'm aware of talks about the  
9 prosecutor's charging decision, charging discretion in  
10 the context of everything that's above the table. Is  
11 this one of the kinds of crimes that is eligible for the  
12 death penalty? Does it meet the statutory factors? The  
13 question of whether it does is a very easy one for  
14 anybody to review at any time because it's all above the  
15 table.

16 If indeed a prosecutor, for whatever evil intent,  
17 decides that there are certain folks they are going to  
18 go after, unless they are in complete -- unless they are  
19 completely ignorant and say something on the record to  
20 somebody who is going to bring it forward, there's  
21 really no way for anybody to know what's happening,  
22 unless you get 30 cases down the road and you say, you  
23 know, every one of the 30 cases where the prosecutor's  
24 sought the death penalty, all of those defendants had  
25 remarkably the same ethnic background, for example.

1           How would you ever know?

2           MS. VITALICH: I'm finding it difficult to  
3 answer that question in the context of this motion which  
4 is being made, which is asking this Court to invalidate  
5 a decision because Mr. Satterberg has actually admitted  
6 in this case, as he should, that he considered all  
7 relevant information at his disposal in making this  
8 decision.

9           THE COURT: The reason I'm bringing that up  
10 is because of Pirtle.

11          MS. VITALICH: I understand.

12          THE COURT: I'm not suggesting --

13          MS. VITALICH: But, again, I think that the  
14 focus in Pirtle and what's vital to remember about  
15 Pirtle is that was an unusual case in which rather than  
16 filing the charge and then waiting the statutory period  
17 before making a decision one way or the other, that was  
18 a case where essentially from the word go the prosecutor  
19 essentially was on record saying I'm going to seek the  
20 death penalty. Oh, but wait a minute. If you could  
21 convince me otherwise, I guess maybe I won't, realizing  
22 that there is this duty to consider all of the relevant  
23 information that is available within the statutory time  
24 frame.

25           So, therefore, the argument was that the prosecutor

1 had abused his discretion because he had just said  
2 here's the charge, oh, and by the way, I'm going to seek  
3 the death penalty.

4 THE COURT: Here's where I am in this because  
5 you created some great segues for questions that I had  
6 for you. The statute says absolutely nothing about  
7 waiting 30 days. It just says you have to file the NOI  
8 within 30 days.

9 MS. VITALICH: Right.

10 THE COURT: So I could file the same day I  
11 arraign the gentleman, and I'm in compliance with the  
12 statute. Right?

13 MS. VITALICH: Right.

14 THE COURT: The statute says nothing about  
15 who does the investigation. And, in fact, the statute  
16 says nothing about the defense even having a right to  
17 provide a mitigating packet.

18 MS. VITALICH: And there isn't a right. In  
19 fact, the only constitutional right to present  
20 mitigation evidence is in the penalty phase.

21 THE COURT: Right.

22 MS. VITALICH: So, therefore, there is no  
23 constitutional requirement of a mitigation packet. That  
24 is something that through the culture of these cases has  
25 sort of evolved and essentially, in this county at

1 least, it's now an expectation. As I noted in my brief,  
2 through certainly no fault of the prosecuting attorney's  
3 office, we sometimes wait months or even a year or more  
4 for these packets to come in. It's becoming  
5 increasingly a problem.

6 But be that as it may, there is no constitutional  
7 right. All the statute is saying, as I've tried to  
8 convey in my brief, is: The prosecutor should exercise  
9 his discretion by -- or her discretion -- by considering  
10 all relevant information available at the time the  
11 decision is made. The prosecutor is -- does have a duty  
12 to consider whether there is any mitigation that -- and  
13 I just don't see how you can get around the fact that it  
14 has to be weighed against any and all other relevant  
15 information, which clearly would include the strength of  
16 the evidence and the facts of the case.

17 THE COURT: Let me ask you this: Do you see  
18 the statute as putting any burden on the State to even  
19 look at mitigating factors? The way it's written right  
20 now -- and let's -- I know there's a lot of gloss on  
21 this that has evolved over years, and it's become  
22 pattern and practice more than anything else. But if  
23 you look at the statute the way it's written, there's no  
24 reason the prosecutor has to wait 30 days. There's no  
25 right, as you pointed out, for the defense to provide a

1 mitigating packet.

2 According to Pirtle, if you accept what it says, the  
3 prosecutor's obligation, if you will, is nothing more  
4 than to take a look at the cert and say, yeah, it's  
5 death penalty eligible. This guy's got a lot of bad  
6 criminal history and he's not a juvenile and he's not  
7 ten years old, so I'm going to file the death notice.  
8 Is that the extent of the duty that the prosecutor has  
9 under this statute?

10 MS. VITALICH: I'm, again, having difficulty  
11 conceptualizing an answer to that question in a case  
12 where you obviously did have an elected prosecutor who  
13 considered an enormous amount of information at his  
14 disposal.

15 THE COURT: As he says.

16 MS. VITALICH: And made a holistic decision,  
17 I believe is what was the commentator that I quoted in  
18 my brief would call it. Therefore, I don't think it's  
19 necessary for purposes of this motion for the Court to  
20 define a baseline, if you will, as to what are the  
21 minimum requirements. I do think that at a minimum,  
22 based on the language of the statute, the prosecutor has  
23 a duty to, of course, consider all of the information  
24 available about the crime and also any information that  
25 is available about the defendant.

1           Now, what is available to the prosecutor without any  
2 help from the defense, as noted in Pirtle, is limited to  
3 what would be in the public record. Obviously the  
4 prosecutor couldn't walk over to the jail and interview  
5 the defendant and find out any information without  
6 defense counsel being involved. But certainly there  
7 would be information available regarding the defendant's  
8 criminal history, regarding the defendant's age.  
9 Perhaps there might be record that perhaps the defendant  
10 had been treated at Western State Hospital at some  
11 point.

12           Again, I think anything that's in the public record  
13 certainly would need to be considered. But as far as  
14 anything beyond that -- and that gets me to a segue as  
15 to another reason why their proposed construction of the  
16 statute is absurd. Let's say you had a defense attorney  
17 who didn't provide anything for whatever reason, whether  
18 it be out of ineffectiveness or there isn't anything  
19 available I don't think matters for purpose of this  
20 calculus.

21           Let's say you had a defense attorney who was, in  
22 fact, ineffective. They provided nothing because they  
23 were ineffective. Under --

24           THE COURT: I don't think Mr. Konat would let  
25 them get away with that. He would probably bring a

1 motion for me to compel them to provide something.

2 MS. VITALICH: I understand that. But let's  
3 just say you have a case where there is absolutely  
4 nothing provided by way of background of the defendant  
5 or any information about the defendant aside from what's  
6 available in the public record because the attorney just  
7 simply doesn't go out and find it and doesn't provide  
8 anything. Under Ms. Ross' calculus, if that case meets  
9 the statutory eligibility criteria for being an  
10 aggravated murder case, that defendant is going to have  
11 a death notice filed against him.

12 Whereas, someone who commits a far more heinous  
13 crime but presents a thorough mitigation packet isn't.  
14 And if anything was going to result in a wanton and  
15 freakish application of the death penalty, it seems to  
16 me that would be it.

17 THE COURT: That's your footnote, if I'm not  
18 mistaken. Right?

19 MS. VITALICH: I'm fond of footnotes.  
20 Apparently I felt that they were being disparaged. I  
21 feel that footnotes certainly have their place. Yes, as  
22 an aside, that is in essence the hypothetical I put in  
23 the footnote.

24 THE COURT: Here's what I would like you to  
25 help me with. Why is that second scenario so absurd?

1           Because what I'm hearing you saying is that we've got a  
2           strong case against an individual on a particularly  
3           heinous crime, but they present compelling mitigating  
4           circumstances, so, therefore, we might choose not to  
5           pursue the death penalty. You say that would be absurd.

6                     MS. VITALICH: As compared to the person who  
7           had no mitigation presented on their behalf at all.

8                     THE COURT: And you had a weak case.

9                     MS. VITALICH: But did not commit nearly as  
10          heinous of an offense.

11                    THE COURT: Well, let's start --

12                    MS. VITALICH: I think the facts of the  
13          offense are crucial to the calculus of whether to ask a  
14          jury to consider death as one of its sentencing options.  
15          And I just don't see how you can get past that.

16                    THE COURT: You said in your footnote -- and  
17          I'm not disparaging it. It is what it is. It's a  
18          footnote. It says: A prosecutor would seek the death  
19          penalty in a case where the available evidence proving  
20          premeditation, the defendant's identity, or some other  
21          necessary element is not especially strong, yet the  
22          mitigation evidence presented is negligible.

23                    So what you're saying is you would have a capital  
24          case that has some proof problems, let's say, and the  
25          defendant has no endearing qualities, no mitigation

1           whatsoever, but you would be forced to file the death  
2           notice, and somehow or other that would be absurd.

3           Help me out with why that would be absurd as opposed  
4           to why that wouldn't be effectuating the public policy  
5           expressed by the legislature in saying that this is a  
6           death eligible crime. You file the aggravated murder.  
7           Right? And then you get to the question of: Is this  
8           person less culpable for some reason?

9           MS. VITALICH: Then I think turning that on  
10          its head, that would create a presumption of a death  
11          sentence for every aggravated murder defendant.

12          THE COURT: Provided they don't have  
13          mitigating circumstances.

14          MS. VITALICH: Provided they don't present  
15          information about themselves that provides something in  
16          mitigation. I don't think that that's how the statute  
17          is intended to be applied. Again, it would also be --

18          THE COURT: Why not? Help me out with why  
19          not.

20          MS. VITALICH: Because the decision whether  
21          or not to give the jury the option to consider death as  
22          a sentencing option shouldn't turn on whether the  
23          defendant's attorneys prepare a decent mitigation packet  
24          or not. That makes no sense.

25          THE COURT: It doesn't have to be attorneys

1 preparing it because I don't even have a right under the  
2 statute. I'm trying to focus on the provisions of the  
3 statute that says if you have reason to believe that  
4 there's insufficient mitigation to warrant leniency, you  
5 shall file the death notice. It doesn't say you shall  
6 file the death notice unless, of course, your case is  
7 weak. It says you shall file the death notice. You've  
8 already passed the point of deciding that it's a death  
9 eligible case when you filed the aggravator. Right?

10 MS. VITALICH: I don't think that that's -- I  
11 don't think that's true at all actually.

12 THE COURT: How is that not true?

13 MS. VITALICH: The consideration of whether  
14 to file an aggravated murder case I think is a different  
15 decision entirely --

16 THE COURT: It is.

17 MS. VITALICH: -- from them deciding whether  
18 or not to give the jury ultimately the decision as to  
19 whether there aren't some mitigating circumstances  
20 essentially beyond a reasonable doubt.

21 THE COURT: Okay.

22 MS. VITALICH: So, just because a case meets  
23 the statutory criteria to be an aggravated murder  
24 doesn't automatically lead to the conclusion or the  
25 presumption that this is going to be a case where we're

1 going to seek the death penalty.

2 THE COURT: But you -- okay. But you filed  
3 the charge as an aggravated murder --

4 MS. VITALICH: That's correct.

5 THE COURT: -- presumably because you think  
6 you can prove it.

7 MS. VITALICH: Correct.

8 THE COURT: Okay. And now you're telling me  
9 for reasons related to proof issues, you might not want  
10 to pursue the death penalty.

11 MS. VITALICH: I hate to resort to examples.  
12 And I think that this is a policy discussion that is not  
13 appropriate for the statutory argument that's being  
14 made.

15 THE COURT: It is appropriate because the  
16 statute says you shall unless there's reason to believe  
17 there's insufficient mitigation. So as far as I can  
18 tell, what the statute is saying is that once you decide  
19 it's an aggravated murder and you file it as such, you  
20 are required to file the notice unless there's  
21 sufficient mitigation.

22 What you told me a moment ago is you could have no  
23 mitigation, but you don't want to file the death notice  
24 because you've got a lousy case. Those are mixing  
25 apples and oranges.

1 MS. VITALICH: I'm not saying a lousy case.  
2 I guess I will say this: It has long been the policy of  
3 the King County's Prosecutor Office, and I think we are  
4 quite proud of this policy --

5 THE COURT: That you don't argue the death  
6 penalty.

7 MS. VITALICH: -- that we only give the  
8 jurors the option of imposing death in cases where guilt  
9 is not even remotely a question.

10 THE COURT: But that's not the statute.  
11 That's the policy of the prosecutor's office.

12 MS. VITALICH: But inherent in the framework  
13 of 10.95 is the necessary step that the prosecutor must  
14 consider the facts of the crime and the strength of the  
15 available evidence as part of the holistic calculus when  
16 deciding whether there is or there isn't reason --  
17 sufficient mitigation to merit leniency. That  
18 necessarily has to be weighed against something. How do  
19 we determine whether the mitigation is sufficient or not  
20 sufficient unless we look at it within the framework of  
21 what did the defendant do --

22 THE COURT: Okay.

23 MS. VITALICH: -- and how strong is our  
24 evidence that he did it, or she?

25 THE COURT: And I'm not quarrelling with you.

1 I'm trying to go along with your analysis just to see  
2 where it takes me. But what you're saying is that let's  
3 assume we have somebody with zero mitigation. You just  
4 have to accept that premise. No mitigation whatsoever.  
5 And the statute -- again, I'm not talking about the  
6 laudability of the prosecutor's office policy. I'm  
7 talking about the way the statute's written. It says  
8 that you shall file written notice of special sentencing  
9 proceeding to determine whether or not the death penalty  
10 should be imposed when there's reason to believe that  
11 there are not sufficient mitigating circumstances to  
12 merit leniency. You've just told me the answer to that  
13 question is zero and yet you don't want to file the  
14 death penalty because you have weaknesses in your case.

15 To me that's something that gets dealt with later  
16 after you file the NOI. You can plea bargain all you  
17 want. Nobody's going to say you can't. If you have a  
18 weak case, you can plea bargain it afterwards. But this  
19 statute doesn't contemplate somebody with no mitigation  
20 being removed from the individual pool of folks eligible  
21 for the death penalty.

22 MS. VITALICH: Your Honor, the reason to  
23 believe has to come from somewhere. And it can't just  
24 spring forth from the mitigation packet or lack thereof.  
25 There has to be a reason for the prosecutor's decision.

1 THE COURT: Right.

2 MS. VITALICH: And that reason necessarily  
3 must include consideration of the strength of the  
4 available evidence and the facts of the case. And as  
5 Your Honor pointed out, there may very well be a case  
6 where although compelling mitigation has been presented,  
7 and reasonable minds can differ as to what is compelling  
8 from a mitigating standpoint, but the crime itself is so  
9 heinous and the proof of the defendant's guilt is so  
10 overwhelming that essentially all of that mitigation  
11 pales in comparison. There's simply nothing wrong with  
12 that.

13 I also don't think that there's anything wrong  
14 within the framework of 10.95 in taking a look at the  
15 strength of the available evidence and the facts of the  
16 crime and deciding, you know what, this is a case where  
17 the evidence in one aspect or another is not  
18 overwhelming, or perhaps this case -- you gave the  
19 example of the two murders of a judge.

20 THE COURT: Right.

21 MS. VITALICH: The facts are not as heinous  
22 perhaps. Heinous, yes, but not as heinous within the  
23 entire sort of universe of cases. That was one thing  
24 that the anti-death penalty commentator that I cited in  
25 my brief talked about. The prosecutor is in the unique

1 position of having this institutional knowledge and  
2 wealth of information at his disposal so that he can  
3 look at these cases within the universe of all other  
4 cases.

5 And we are ultimately looking at cases, not just  
6 defendants. Ms. Ross would have the Court construe the  
7 statute in a manner that all the prosecutor can look at  
8 in making this very important determination is the  
9 defendant. The prosecutor necessarily has to look at  
10 the case.

11 THE COURT: And as I pointed out to Ms. Ross,  
12 I can see places where that would backfire on a  
13 defendant. Like you pointed out: How heinous is  
14 heinous? Is this less heinous than another aggravated  
15 murder? And should the defendant be given some leniency  
16 because even though the mitigators are not that strong  
17 weighed against the gravity of the offense?

18 MS. VITALICH: Ms. Ross would have the Court  
19 rule that essentially the elected prosecutor has to  
20 ratchet back on the charging decision and that even if  
21 it does meet the statutory definition of an aggravated  
22 murder, it shouldn't be filed that way if for some  
23 reason the prosecutor thinks that it's going to be one  
24 of those cases where it's probably not going to be one  
25 where we're going to consider asking the jury to look at

1 a death sentence and that we should just file those as a  
2 first degree murder even if they really are an  
3 aggravated murder. That goes so far into intruding into  
4 a separation of powers violation in terms of the  
5 prosecutor's charging discretion, and I don't think  
6 that's appropriate either.

7 THE COURT: A moment ago I made a comment  
8 that after the NOI is filed you can still negotiate the  
9 case if you find that you have proof problems. You kind  
10 of grimaced when I said that. I'm just wondering --  
11 there's nothing that precludes negotiation after the  
12 death penalty notice is filed. See Gary Ridgway, for  
13 example.

14 MS. VITALICH: Our office has never, as a  
15 policy, gone about our business that way.

16 THE COURT: I know.

17 MS. VITALICH: Well, we can file this and say  
18 we're going to seek death, but then later on we can  
19 always just sort of -- we don't make these decisions  
20 lightly.

21 THE COURT: And you shouldn't.

22 MS. VITALICH: And when we make this  
23 decision, we make the decision with every effort toward  
24 making it a decision based on all of the available  
25 information and the best information available at the

1 time. Now, that's not to say that circumstances can't  
2 change down the road. But if you're looking at a case  
3 at the point of decision making and you're saying you  
4 can only consider this one very narrow slice of  
5 information, I think that that's foolhardy.

6 THE COURT: Can we go back to the example I  
7 gave you a little bit ago, and let's maybe have a little  
8 dialog about this. Because, again, I want to get back  
9 to the way the statute is written, not the way the  
10 practice has evolved over 25 years maybe.

11 But in the statute, the prosecutor can file the NOI  
12 within 30 days. It doesn't say anything about  
13 mitigation packets or anything of the sort. So  
14 apparently the legislature when they passed this statute  
15 was contemplating some process that was, for lack of a  
16 better term, fairly summary in the early part of the  
17 case. Would you agree with that interpretation?

18 MS. VITALICH: I think that's probably fair.  
19 Although, that's not the reality now.

20 THE COURT: No, it's not. Again, I'm trying  
21 to look at what the statute says, not what the practice  
22 is.

23 MS. VITALICH: Again, I think what the  
24 legislature anticipated was a system of channelled  
25 discretion because this discretionary decision is

1 clearly -- first of all, sentencing is plenary with the  
2 legislature. It's already been found in several cases  
3 that it's an appropriate delegation of discretion for  
4 the legislature to entrust this very important decision  
5 to the elected prosecutor's office. So that's not in  
6 question.

7 THE COURT: So let me ask you a follow-up on  
8 this. Again, I'm not trying to trap you. I'm just  
9 trying to get a good sense of what we think the statute  
10 contemplates.

11 So we have a very short period of time in which to  
12 make this rather momentous decision about whether to  
13 file the NOI. Okay? Thirty days. As you pointed out,  
14 there may be a case that has proof problems. It's  
15 definitely fileable as an aggravated murder. You think  
16 it should be. But being a lawyer, you're looking at the  
17 proof problems down the road.

18 So you file the case. You file it as an aggravated  
19 murder. It's on the death penalty track, if you will.  
20 All that's left now is to determine whether you're going  
21 to file the NOI. You get that defendant, who, as best  
22 you can tell, has no mitigating qualities whatsoever.  
23 And if you look at the lack of mitigation and your proof  
24 problems, you don't file the NOI within the 30 days.  
25 You either decide not to or you let the time frame

1 lapse.

2 And then later -- and we all know that these cases  
3 take years to prosecute -- later the case gets a lot  
4 better. All of a sudden those proof problems that you  
5 thought you had early on in the process start to go by  
6 the wayside, and all of a sudden now you've got what  
7 looks to be a great case. You've got a guy with no  
8 mitigating circumstances whatsoever, and you've lost  
9 your chance to file the death penalty notice because you  
10 considered those two things together.

11 What's your thoughts on that, counsel? Because it  
12 seems to me that if you look at the statute the way it's  
13 written where it says you shall do this, unless there's  
14 sufficient mitigation. You have no mitigation. You  
15 file the NOI within 30 days. And you let the chips  
16 fall, and the case gets better or the case gets worse.  
17 And then you decide whether you want to negotiate it or  
18 not.

19 So what do you think about that prospect of losing  
20 that valuable opportunity, if you will, by judging the  
21 case on the merits too early?

22 MS. VITALICH: Well, all I can say to that is  
23 all that the prosecutor could do, and all indeed he or  
24 she has a duty to do, is to make the best and most  
25 well-informed decision that he or she can at the point

1           that the decision is made. If that later turns out to  
2           be a decision that might have made -- that might have  
3           been made differently at a different point in the  
4           proceedings, hindsight's always 20/20.

5           In some cases that might be a case where based on  
6           the available information the prosecutor initially  
7           decided to ask the jury to consider a death penalty or  
8           it might be the case where the evidence was not as  
9           strong at the point the decision was made, and the  
10          prosecutor in his or her discretion decided, you know,  
11          this is not a case where I'm not going to seek that --  
12          give that option to the jury because I'm concerned about  
13          the strength of the evidence. It's not overwhelming.  
14          And then later on it turns out to be overwhelming.

15          Well, that's -- there has to be an endpoint for this  
16          decision. And in giving guided discretion to the  
17          elected prosecuting attorney with a suggested time  
18          frame -- I guess it is at this point --

19                   THE COURT: Thirty days.

20                  MS. VITALICH: -- it's almost, dare I say, an  
21          illusory time frame in this county, much to our dismay.  
22          But all that anyone can expect of the elected prosecutor  
23          is to make the best informed decision that he or she can  
24          at the point the decision is made.

25                  I would also want to make the point that in terms of

1 considering what is mitigating and what is not and  
2 whether there is a reason to merit -- or not sufficient  
3 reason to merit leniency, I think it bears mentioning  
4 that the strength of the evidence, or lack thereof, can  
5 be aggravating or mitigating.

6 Certainly a case that has overwhelming evidence of  
7 guilt and heinous facts, that in itself would give a  
8 prosecutor reason to believe that there's not sufficient  
9 mitigating circumstances to merit leniency.

10 THE COURT: So you could have a case where  
11 the prosecutor could say I'm not doing an 040 analysis  
12 per se because this crime is so heinous and the proof is  
13 so strong that nothing anybody could ever show me would  
14 be sufficient?

15 MS. VITALICH: That's not what I'm saying at  
16 all. I'm saying an 040 analysis would allow that type  
17 of a decision making because overwhelming evidence or a  
18 lack of evidence -- I think a lack of evidence can be  
19 considered by the elected prosecutor as mitigating. I  
20 think that that goes into the mitigating/not mitigating  
21 calculus in terms of the decision maker.

22 So if the prosecutor's looking at the case and says,  
23 you know, I have some concerns about -- again, I really  
24 despise trying to compare cases and cases because it's  
25 always an apples-and-oranges proposition.

1 I can think of a case that I worked -- have to  
2 continued to work on on appeal for almost ten years now  
3 where it was very clear that the murder the defendant  
4 committed was an aggravated murder, but the victim's  
5 body has never been found. It's pretty clear based on  
6 the evidence at the scene that the guy probably wasn't  
7 walking around in a great state of health after what had  
8 occurred in his apartment, and any reasonable person  
9 could conclude that he was dead, but we didn't have that  
10 body. And that's -- there were, I think, three  
11 aggravating factors present in that case. The facts  
12 were terrible. And, frankly, from what I know about the  
13 defendant, he didn't really have a lot to recommend him  
14 to the world.

15 But that was a case where an aggravated murder  
16 prosecution was vigorously pursued and a life without  
17 parole sentence was imposed without a death notice ever  
18 having been filed. That's just one example that comes  
19 very readily to my mind. But I think there, that's a  
20 valid exercise of prosecutorial discretion. The case  
21 clearly fits the statutory criteria as an aggravated  
22 murder.

23 THE COURT: Because of the proof problems --

24 MS. VITALICH: Well, because --

25 THE COURT: -- mitigating.

1 MS. VITALICH: Because of a very significant  
2 issue -- evidentiary issue in the case, that single  
3 consideration can be enough to tip the balance one way  
4 or the other. And that is a completely appropriate  
5 exercise of the prosecutor's discretion.

6 THE COURT: Okay.

7 MS. VITALICH: I just simply don't think it's  
8 possible to consider these cases without considering all  
9 of the available information which must necessarily  
10 include the evidence and the facts of the case.

11 THE COURT: Counsel, help me out with -- do  
12 you have any authority for the proposition that the  
13 strength or weakness of the case could be an aggravator  
14 or a mitigator?

15 MS. VITALICH: I don't, Your Honor.

16 THE COURT: I don't think anybody brought  
17 that up in any of the briefing.

18 MS. VITALICH: I don't, Your Honor. But the  
19 reason to believe that there are not sufficient  
20 mitigating circumstances to merit leniency -- the reason  
21 to believe has to come from somewhere. And, again, I  
22 don't think it comes from a mitigation packet, because  
23 there are going to be cases where there isn't a  
24 mitigation packet, and there isn't a right to a  
25 mitigation packet. There may be cases where there's a

1 great mitigation packet, but there's heinous facts and  
2 an avalanche of overwhelming evidence. Each case is  
3 unique. And each case must necessarily involve a  
4 holistic decision.

5 THE COURT: I know. The holistic decision  
6 quote that you got from that law review article, when  
7 read in context -- and I'm going to have a follow-up  
8 question for you on this -- it seems to stem from all  
9 those other cases where they involve the prosecutor's  
10 exercise of discretion to file the aggravator.

11 Our statute -- this 040 statute seems unique. Are  
12 you in agreement with that?

13 MS. VITALICH: To a degree. I think --

14 THE COURT: Do you know of anyplace else it  
15 exists or something similar to it?

16 MS. VITALICH: That specifically directs the  
17 prosecutor to make that particular decision?

18 THE COURT: After the aggravator is filed.

19 MS. VITALICH: I didn't do a search for that,  
20 but I certainly can.

21 THE COURT: Okay. Because it just seems to  
22 me like so many of the places where language has been  
23 lifted to support the notion of prosecutorial  
24 discretion, when you go back through the chain to find  
25 out where it emanated from, it's all talking about that

1 charging decision part, not the decision to file the  
2 notice of intent after the aggravator's already been  
3 filed. I gather you don't know of any other cases that  
4 are involving an 040 kind of scenario.

5 MS. VITALICH: I didn't do a fifty-state  
6 search on that. I could certainly try to do that.

7 THE COURT: I don't think it has to be 50  
8 states because most of the states don't have the death  
9 penalty anymore I don't think. I don't think it has to  
10 be that great.

11 MS. VITALICH: I don't think -- I'm not  
12 certain that it's most. One thing I did want to say  
13 about the mitigation idea is that we do have case law  
14 saying that, at least for the defendant, mitigation is  
15 not limited to the statutory mitigating factors that are  
16 listed in 10.95.

17 THE COURT: Right.

18 MS. VITALICH: In fact, we have a lot of case  
19 law that says essentially carte blanche as long as the  
20 court finds it relevant and it's somehow admissible  
21 under some theory, it's good to go, as far as presenting  
22 it in the penalty phase. So the defendant certainly  
23 isn't limited in terms of what kind of mitigation he or  
24 she can present to a jury. So I would query why it is  
25 that the prosecutor in terms of mitigation can only

1 consider what comes from the defendant's lawyers or the  
2 public record in terms of things like criminal history  
3 or age, et cetera.

4 THE COURT: I, frankly, think you could call  
5 up his relatives. You could do almost anything you  
6 wanted if you wanted to.

7 MS. VITALICH: So, again, under that, why is  
8 it that the prosecutor can't consider it as mitigating  
9 in terms of whether or not a jury's going to be given  
10 the option to impose a death sentence? Why can't the  
11 prosecutor consider a significant evidentiary issue in  
12 the case? I don't see why the prosecutor's discretion  
13 should be limited in that fashion.

14 What I hear Ms. Ross saying is that if there's no  
15 mitigation packet presented and it meets the criteria  
16 for aggravated murder, essentially that's an automatic  
17 filing of a notice. And I don't think that that is what  
18 the legislature anticipated at all in writing this  
19 statute. I think they simply wanted to give the  
20 prosecutors a channelled discretion to consider any and  
21 all information available at the time that a decision is  
22 made.

23 THE COURT: And the channel is reason to  
24 believe insufficient mitigation?

25 MS. VITALICH: Correct.

1 THE COURT: There was one other question I  
2 wanted to ask you and then I will let you have a  
3 breather. I have to find it. I know. Were you able to  
4 find any legislative history on 040?

5 MS. VITALICH: You know, frankly, I didn't  
6 look into it that much. I can take a look. I'm certain  
7 that there's --

8 THE COURT: Every time I've ever looked for  
9 legislative history I've been disappointed in not  
10 finding anything. I was wondering if there was any.

11 MS. VITALICH: I can take a look. I agree,  
12 Your Honor. There tends to be a paucity of information  
13 in that regard.

14 THE COURT: That's a good way to put it. I  
15 think that's all the questions I had for you. Thank you  
16 very much.

17 MS. VITALICH: Thank you, Your Honor.

18 \* \* \* \* \*

19 (End excerpt)

20

21

22

23

24

25

# **APPENDIX C**

**TO DEFENDANT/RESPONDENT MCENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**

FILED

12 FEB -6 PM 3:43

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

STATE OF WASHINGTON

Plaintiff,

vs.

JOSEPH T. McENROE.

Defendant.

No. 07-08716-4 SEA

MOTION FOR DISCOVERY OF  
MATERIALS REVEALING KING  
COUNTY PROSECUTOR'S  
PROCESS FOR DETERMINING  
WHICH DEFENDANTS WILL FACE  
DEATH

Comes now the defendant, Joseph T. McEnroe and moves Court to order the Prosecuting Attorney to disclose to the defendant the following information and materials:

REGARDING DECISIONS IN THE PROSECUTION AND SENTENCING OF JOSEPH T. MCENROE

1) Any and all information gathered by any investigator for the prosecution which was considered by King County Prosecutor Daniel Satterberg in deciding whether to file a notice of intent to seek the death penalty against Joseph T. McEnroe. This request includes but is not limited to information and materials acquired by the prosecution in the state's own mitigation investigation referred to in a letter dated January 17, 2008, from Mark Larson, chief of the Prosecutor's Criminal Division, in which Mr. Larson advised counsel for Mr. McEnroe:

In this case, the State will be conducting its own

MOTION FOR DISCOVERY RE  
DETERMINING WHICH DEFENDANTS  
WILL FACE DEATH

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104

*original*

1 investigation of mitigating factors. This is  
2 likely to include an analysis of potential mental  
3 health issues and the retention of a qualified  
4 expert. We will also examine social history and  
5 facts surrounding the alleged offenses...

6 A) Mr. McEnroe particularly demands the results  
7 of "[the State's] own investigation of mitigating  
8 factors," the State's "analysis of potential  
9 mental health issues," and the identity of any  
10 "qualified expert," retained by the prosecution,  
11 and all information acquired through the state's  
12 investigation into Mr. McEnroe's "social history";

13 2) If the state indicates that it has provided such  
14 materials or "complied with Brady" the defendant demands the  
15 state identify what materials and/or information it has  
16 provided to the defense was: the product of "[the State's]  
17 own investigation of mitigating factors;" all materials and  
18 information gathered by and allegedly produced by the state  
19 which was used in or the basis of "an analysis of potential  
20 mental health issues" Mr. Larson said the prosecutor  
21 conducted; the identity of any expert retained by the  
22 prosecution to assist in the "analysis of potential mental  
23 health issues"<sup>1</sup>; and what discovery produced by the state to  
24 date is the product of or relates to "the state's  
25 investigation into Mr. McEnroe's 'social history.'"

26 <sup>1</sup>To this date the State has not advised Mr. McEnroe of any mental  
27 health professional retained or consulted by the State for any purpose  
28 regarding Mr. McEnroe although Mr. McEnroe has requested the  
information.

MOTION FOR DISCOVERY RE  
DETERMINING WHICH DEFENDANTS  
WILL FACE DEATH

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104

1  
2 3) The identity of any investigator specially hired by  
3 the prosecution to conduct an investigation into the  
4 presence or absence of mitigating factors related to Mr.  
5 McEnroe;

6 4) Records and copies of all communications, in any  
7 form, between King County Prosecutor Dan Satterberg, his  
8 agents or other employees of the King County Prosecuting  
9 Attorney's office, and family members of the decedents, the  
10 Anderson family, including but not limited to the relatives  
11 of Erica Anderson (including Pam Mantle, Tony Mantle, Sarah  
12 Mantle, and any other adult family members) and the  
13 relatives of Wayne and Judy Anderson, Scott Anderson, Olivia  
14 Anderson and Nathan Anderson (including Mary Victoria  
15 Anderson and her sons or friends);

16 5) A list of any and all memorial services and/or other  
17 commemorations held in relation to the deaths or honoring  
18 the lives of the Anderson family homicide victims which were  
19 attended by King County Prosecutor Dan Satterberg or deputy  
20 prosecutors;

21 6) A list and description of any photographs or  
22 personal items relating to any of the victims of the  
23 Anderson family homicide victims which are maintained or  
24 posted outside the official case files of the trial deputy  
25 prosecuting attorney or law enforcement offices, which may  
26 be anywhere in the offices of the King County Prosecuting  
27 Attorney or in his home or other personal space.  
28

MOTION FOR DISCOVERY RE  
DETERMINING WHICH DEFENDANTS  
WILL FACE DEATH

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104

1  
2  
3 **REGARDING DECISIONS IN THE PROSECUTION AND SENTENCING OF**  
4 **LOUIS CHEN**

5 7) Any and all information gathered by any  
6 investigator for the prosecution, whether the investigator  
7 is a law enforcement officer, a full time employee of the  
8 King County prosecutors' office, or an outside investigator  
9 specially employed, which was considered by King County  
10 Prosecutor Daniel Satterberg in deciding whether to file a  
11 notice of intent to seek the death penalty against Louis  
12 Chen, Superior Court No. 11-1-07404-4 SEA. This request  
13 does not include production of materials provided to the  
14 prosecuting attorney by defense counsel for Louis Chen;

15 4) All photographs of the scene of the murders  
16 committed by Louis Chen especially those depicting the  
17 victims Eric Cooper and Cooper Chen and the injuries  
18 inflicted upon them by Louis Chen;

19 5) All witness statements, including those of law  
20 enforcement and crime scene investigators, describing the  
21 scene of the murders of Eric Cooper and Cooper Chen and the  
22 injuries inflicted upon them by Louis Chen;

23 6) The autopsy reports prepared by the King County  
24 Medical Examiner regarding Eric Cooper and Cooper Chen;

25 7) Photographs of the multiple weapons allegedly used  
26 by Louis Chen to attack Eric Cooper and Cooper Chen;

27 8) Any and all records of the participation or  
28 attendance of King County Prosecutor Daniel Satterberg, or

MOTION FOR DISCOVERY RE  
DETERMINING WHICH DEFENDANTS  
WILL FACE DEATH

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104

1 any King County deputy prosecutor, in funerals, vigils, or  
2 any kind of memorial events regarding Eric Cooper and/or  
3 Cooper Chen;

4 9) Any and all public statements made by King County  
5 Prosecutor Daniel Satterberg or any representative of the  
6 King County Prosecutor regarding the deaths of Eric Cooper  
7 and Cooper Chen;

8 10) Any and all records of communications between the  
9 King County Prosecuting Attorney, or his agents, and family  
10 and friends of Eric Cooper and Cooper Chen regarding the  
11 loss of the victims and/or the question of whether Mr.  
12 Satterberg should seek the death penalty against Louis Chen;

13 11) A list and description of any photographs or  
14 personal items relating to Eric Cooper or Cooper Chen which  
15 are maintained or posted outside the official case files of  
16 the trial deputy prosecuting attorney or law enforcement  
17 offices, which may be anywhere in the offices of the King  
18 County Prosecuting Attorney or in his home or other personal  
19 space;  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

This motion is brought pursuant to CrR 4.7 (a), (c), (d), (e), (g), and the attached declaration of counsel. Mr. McEnroe believes the information sought will support dismissal of the notice of intention to seek the death penalty against him.

Dated this 5th day of February, 2012.

Respectfully submitted:

By *Kathryn Ross*

Kathryn Ross, WSBA No. 6894  
Leo Hamaji, WSBA No. 18710  
William Prestia, WSBA No. 29912

The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA. 98104  
(206) 447-3968

**FILED**  
KING COUNTY, WASHINGTON

FEB 24 2012

DEPARTMENT OF  
JUDICIAL ADMINISTRATION

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE, and  
MICHELE KRISTEN ANDERSON,

Defendants.

)  
) No. 07-C-08716-4 SEA  
) 07-C-08717-2 SEA

) STATE'S RESPONSE TO  
) DEFENDANT McENROE's "MOTION  
) FOR DISCOVERY MATERIALS  
) REVEALING KING COUNTY  
) PROSECUTOR'S PROCESS FOR  
) DETERMINING WHICH  
) DEFENDANTS WILL FACE DEATH"

**I. INTRODUCTION**

The defendants are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007 killings of six members of Michelle Anderson's family. In each count, and as to each defendant, the aggravating circumstance alleged is that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act," pursuant to RCW 10.95.020(10). With respect to the counts relating to Erica Anderson, Olivia Anderson and Nathan Anderson, an additional aggravating circumstance is alleged, *i.e.*, that "the person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime," pursuant to RCW 10.95.020(9). The State has filed a notice of intent to seek the death penalty as to each defendant.

STATE'S RESPONSE TO McENROE's MOTION FOR  
DISCOVERY RE PROSECUTOR'S PROCESS FOR DETERMIN-  
ING WHICH DEFENDANTS WILL FACE DEATH - 1

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

1 Defendant McEnroe has filed a motion asking this Court to compel the King County  
2 Prosecutor's Office to provide "discovery" that would allegedly reveal the "process" by which  
3 King County Prosecutor Daniel T. Satterberg determines whether to allow a jury to consider  
4 imposing the death penalty in an aggravated murder case. More specifically, McEnroe not only  
5 demands "discovery" purportedly related to the decision to seek the death penalty in his own  
6 case, but he also demands "discovery" purportedly related to the decision not to seek the death  
7 penalty in State v. Chen, No. 11-1-07404-4 SEA.

8 It should be noted that this Court has previously denied McEnroe's motion to dismiss the  
9 death notice on grounds that Mr. Satterberg did not follow the dictates of Chapter 10.95 RCW in  
10 deciding to seek the death penalty against him because Mr. Satterberg properly considered  
11 information other than potential mitigation, such as the facts of the crimes themselves and the  
12 strength of the available evidence. *See* Clerk's Papers, State v. McEnroe, Sub No. 245 (filed  
13 6/4/10). Undeterred, McEnroe now apparently wishes to try to convince this Court of the absurd  
14 and utterly offensive proposition that Mr. Satterberg is "more open to mitigating factors and  
15 more inclined to leniency towards a defendant who is wealthy and highly educated" "than a  
16 defendant such as Mr. McEnroe from a lower or working class background," and on that basis,  
17 he plans to ask this Court once again to dismiss the death notice based on allegations of improper  
18 decision-making by Mr. Satterberg. *See* Declaration in Support of Motion ("Ross decl."), at 1.  
19 In other words, it appears McEnroe seeks this "discovery" based on his apparent belief that this  
20 case and defendant Chen's case are essentially identical and, therefore, that Mr. Satterberg's  
21 decisions in the two cases must have been based on improper considerations such as economic  
22 status.

1           The State's response to McEnroe's motion to compel is threefold. First, as the State has  
2 already informed McEnroe's counsel, the State is well aware of its discovery obligations and, as  
3 counsel has already been assured, the State has complied and will continue to comply with its  
4 ongoing obligations in that regard. Accordingly, there is nothing for this Court to compel.  
5 Second, McEnroe's demands, particularly with respect to materials related to the Chen case, do  
6 not constitute "discovery" under any possible definition of the term. Therefore, there is no  
7 authority under CrR 4.7 by which this Court could compel it. And third, given that the decision  
8 to seek the death penalty is a decision addressed solely to the discretion of the elected county  
9 prosecutor, and thus, given that McEnroe would have to demonstrate a *manifest abuse* of that  
10 discretion (even if it were proper for this Court to usurp the prosecutor's decision and to engage  
11 in the kind of pretrial proportionality review McEnroe seeks, which it is not), McEnroe's  
12 demands are frivolous and not material because this case is obviously very different from  
13 defendant Chen's.

14           In other words, and in short, 1) the State is well aware of its discovery obligations, 2)  
15 what McEnroe demands is *not* discovery, and 3) even if this Court were vested with the authority  
16 to intervene in the elected prosecutor's death penalty decisions by performing a pretrial  
17 proportionality review (which it is not), Mr. Satterberg's decision is manifestly reasonable in this  
18 case. Thus, this motion to compel "discovery" should be denied.

1 **II. ARGUMENT**

2 A. THE STATE IS WELL AWARE OF ITS DISCOVERY OBLIGATIONS; IT  
 3 HAS COMPLIED WITH THEM AND WILL CONTINUE TO DO SO.

4 Under CrR 4.7, the State's discovery obligations require the disclosure of the following  
 5 material when it is within the knowledge, possession, or control of the prosecutor's office:

- 6 - the names and addresses of persons the prosecutor intends to call as witnesses, together  
 7 with any written or recorded statements they have made or the substance of any  
 8 statements;
- 9 - any written, recorded, or oral statement by the defendant;
- 10 - when authorized by the court, grand jury minutes related to the testimony of the  
 11 defendant or any witness the prosecutor intends to call;
- 12 - any reports or statements by experts made in connection with the case;
- 13 - any books, papers, documents, photographs or objects the prosecutor intends to  
 14 introduce or which were obtained from or belonged to the defendant;
- 15 - any criminal history of the defendant or any witness;
- 16 - any electronic surveillance of the defendant's premises or conversations;
- 17 - any expert witnesses the prosecutor intends to call;
- 18 - any information indicating entrapment; and
- 19 - any material information within the prosecutor's knowledge that tends to negate the  
 20 defendant's guilt.

21 CrR 4.7(a). In addition, upon request by the defendant, the prosecutor is obligated to disclose  
 22 "relevant material and information" regarding searches and seizures, taking statements from the  
 23 defendant, and any relationships "of specified persons to the prosecuting authority." CrR 4.7(c).  
 24 Also upon request by the defendant, the prosecutor is required to attempt to obtain material and  
 information from third parties that would otherwise be discoverable if it were within the  
 knowledge, possession, or control of the prosecutor's office. CrR 4.7(d).

1 The State is acutely aware of its obligations under CrR 4.7 and Brady v. Maryland, 373  
2 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and has made and will continue to make every  
3 effort to comply. Indeed, the scrutiny to which capital cases are subjected gives the State an  
4 especially acute awareness in this case.

5 The State has consistently met its obligations under CrR 4.7 and Brady over the course of  
6 the past four-plus years. Yet, in a letter addressed directly to Mr. Satterberg<sup>1</sup> and in the motion  
7 to compel before this Court, McEnroe's counsel insists this is not the case. The State's efforts to  
8 reiterate its awareness of and compliance with these obligations have been thus far unavailing.<sup>2</sup>  
9 Without any evidence or proof (other than spurious accusations and speculation) that the State is  
10 failing to comply with its discovery obligations, this Court does not have grounds to compel  
11 compliance. In sum, there is no actual discovery or Brady material of which the State is aware  
12 that has not been disclosed. Accordingly, there is nothing to compel.

13 B. THE INFORMATION AND MATERIALS THAT McENROE DEMANDS IS  
14 NOT "DISCOVERY"; THUS, THERE IS NO AUTHORITY BY WHICH IT  
15 MAY BE COMPELLED.

16 As noted above, CrR 4.7 specifically enumerates the State's ongoing discovery  
17 obligations, including the obligation to disclose Brady material. The State has complied, and  
18 will continue to comply, with these obligations. Nonetheless, McEnroe demands disclosure of a  
19 laundry list of materials and information that he claims will show that Mr. Satterberg makes  
20 decisions whether to seek the death penalty in an arbitrary and discriminatory manner based on  
21 considerations such as economic status, based solely on the decisions made in this case and the  
22 Chen case. But the materials and information he demands are not material, are irrelevant, are  
23 work product, are related to a pending case other than his own, and/or does not exist. None of

24 <sup>1</sup> This letter is attached as Appendix A for the Court's information and convenience.

<sup>2</sup> Mr. O'Toole's response to counsel's letter is attached as Appendix B for the Court's information and convenience.

1 the materials and information demanded by McEnroe falls under any category enumerated in  
2 CrR 4.7. In other words, it is not discovery.

3 As a preliminary matter, it is telling that nowhere in McEnroe's motion to compel and  
4 supporting declaration is there a single citation to authority. Other than a generic reference to  
5 CrR 4.7, no court rule, appellate decision, statute, or any other form of legal support appears in  
6 McEnroe's pleadings on this matter. As such, if this were an appellate pleading, the appellate  
7 court would disregard it entirely. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,  
8 809, 828 P.2d 549 (1992) (arguments unsupported by citations to authority or persuasive  
9 reasoning will not be considered on appeal). Similarly, in the absence of any relevant authority  
10 supporting the notion that such non-discovery materials may be compelled, this Court should  
11 summarily deny these demands.

12 In any event, this Court should rule in accordance with relevant authority that the  
13 materials and information that McEnroe demands are not discovery, and thus, there is no basis in  
14 law to compel it.

15 The State's obligations are set forth in the first argument section above. In addition, CrR  
16 4.7 further provides that a court may in its discretion order the disclosure of additional materials  
17 as follows:

18 (1) Upon a *showing of materiality* to the preparation of the defense, and *if*  
19 *the request is reasonable*, the court in its discretion may require disclosure to the  
20 defendant of the *relevant* material and information not covered by sections (a),  
(c), and (d).

21 (2) The court may condition or deny disclosure authorized by this rule if it  
22 finds that there is a substantial risk to any person of physical harm, intimidation,  
23 bribery, economic reprisals or unnecessary annoyance or embarrassment,  
24 resulting from such disclosure, which outweigh any usefulness of the disclosure to  
the defendant.

1 CrR 4.7(e) (emphasis supplied). Although this provision is fairly broad, the emphasized portions  
2 dictate that the information must be shown to be material and relevant, and that the request itself  
3 must be reasonable. Without such a showing, again, the information is simply not discovery and  
4 thus it may not be compelled.

5 A showing of materiality is an absolute prerequisite for a defendant's request for the  
6 disclosure of any materials not specifically enumerated in CrR 4.7. State v. Blackwell, 120  
7 Wn.2d 822, 828, 845 P.2d 1017 (1993). As the Washington Supreme Court has unequivocally  
8 held, "[t]he mere *possibility* that an item of undisclosed evidence *might* have helped the defense  
9 or *might* have affected the outcome of the trial . . . does not establish 'materiality' in the  
10 constitutional sense." Id. (quoting State v. Mak, 105 Wn.2d 692, 704-05; 718 P.2d 407 (1986))  
11 (emphasis and alterations in original). The facts of Blackwell are instructive here.

12 In Blackwell, the defense demanded disclosure of the arresting officer's personnel records  
13 based on defense counsel's asserted belief that the officer arrested the defendant due to racial  
14 animus. The defense argued that the officer's records would show evidence of a pattern of  
15 improper conduct, *i.e.*, "arrests based on race and excessive force that might rebut the officers'  
16 claim of proper police conduct." Blackwell, 120 Wn.2d at 829. After citing case law holding  
17 that materiality cannot be shown based on mere accusations and conjecture, the court held that  
18 the defense had not shown materiality, and thus, the trial court had manifestly abused its  
19 discretion in requiring disclosure of the records:

20 A defendant must advance some factual predicate which makes it  
21 reasonably likely the requested file will bear information material to his or her  
22 defense. A bare assertion that a document "might" bear such fruit is insufficient.  
Our review of the record indicates that no such showing of materiality was made  
in this case.

23 Id. at 830. The same situation presents itself here.

1 In the declaration in support of McEnroe's motion to compel, counsel states:

2 The discovery demanded here will show *whether* the King County  
3 Prosecuting Attorney decides which defendants will face a capital prosecution in  
4 an arbitrary and discriminatory manner, disregarding valid mitigating factors  
5 presented by poor defendants, while favoring defendants with wealth and  
6 resources. Only transparency in the Prosecutor's process for selecting which  
7 defendants he will try to have executed will reveal the validity of the saying in  
8 capital defense circles, "It's called capital punishment because if you have the  
9 capital, you don't face the punishment."

10 Ross decl., at 5-6 (emphasis added). Aside from inadvertently revealing why "capital defense  
11 circles" are exceptionally small in diameter, this statement is facially absurd.<sup>3</sup> And more to the  
12 point, as was true in Blackwell, this statement shows that the "discovery" demand in this case is  
13 based on nothing but accusations and conjecture. It is also based on the completely unsupported  
14 assumption that McEnroe presented "valid mitigating factors" whereas defendant Chen did not,  
15 or that McEnroe's "valid mitigating factors" were greater than or, at a minimum, the equal of  
16 Chen's. Thus, according to McEnroe, the reason Mr. Satterberg chose to seek the death penalty  
17 against McEnroe and not against Chen is a disparity in their respective wealth.

18 Alternatively, McEnroe tacitly concedes that the "discovery" may show that the decision-  
19 making "process" was proper; nevertheless, in his view, "transparency" is still somehow  
20 required. However, "transparency" is not a basis upon which to find materiality. In sum, under  
21 Blackwell, McEnroe has not made the requisite showing of materiality and his "discovery"  
22 demand must be denied.

23 Although the failure to make the requisite showing of materiality is dispositive to this  
24 motion, it bears mentioning that McEnroe's demand implicates the work product doctrine and the  
attorney-client privilege. Although McEnroe has not (yet) specifically demanded information

<sup>3</sup> No doubt comments like these are uncritically well-received in those aforementioned small circles, but they have no place in any part of the instant case.

1 regarding communications between Mr. Satterberg and his staff, communications between Mr.  
2 Satterberg and the attorneys for McEnroe, Anderson, and/or Chen, or the mitigation packets  
3 submitted by Anderson and Chen, such information would become necessary to rebut McEnroe's  
4 absurd accusations if this Court were to order disclosure of the information McEnroe currently  
5 seeks in support of his motion. The State would be placed in the untenable position of revealing  
6 privileged information in order to thoroughly rebut McEnroe's position in this matter. This  
7 demonstrates that McEnroe's demands are not reasonable as required under CrR 4.7(e)(1).  
8 Indeed, this is not the first time that McEnroe's counsel has sought to place the King County  
9 Prosecutor's Office in such an untenable position based on accusations and speculation, and it  
10 also should not be the first time a court declines the invitation to do so. *See Memorandum*  
11 *Ruling, State v. Champion*, No. 01-1-02529-1 SEA (in which the Superior Court rejected the  
12 motion of special counsel [the same counsel who now appears for McEnroe] for an evidentiary  
13 hearing into the Prosecutor's decision to seek the death penalty based on, among other things, the  
14 impact on issues of attorney-client privilege and attorney work product; that memorandum ruling  
15 is attached as Appendix C for the Court's information and convenience).

16 It further bears mentioning that McEnroe demands not only information purportedly  
17 related to his own case, but extensive materials and information related to the Chen case as well.  
18 There is no indication in McEnroe's pleadings that proper notice of these demands has been  
19 given to Chen's attorneys, nor has there been any apparent request for their position in the matter.  
20 And again, McEnroe has not cited a single legal authority for the proposition that such demands  
21 may be made under CrR 4.7.<sup>4</sup>

22  
23 <sup>4</sup> As noted in Mr. O'Toole's letter, McEnroe's initial demand has been forwarded to Senior Deputy Prosecutor John  
Gerberding for review under the Public Records Act. Appendix B.

1 In sum, the information McEnroe demands does not constitute discovery; there has been  
2 no showing of materiality, the demands are unreasonable, and privileges are squarely implicated.  
3 Accordingly, McEnroe's motion to compel is without merit.

4 C. EVEN ASSUMING THIS COURT COULD USURP THE DISCRETION OF  
5 THE PROSECUTOR AND PERFORM A PRETRIAL PROPORTIONALITY  
6 REVIEW, THERE CAN BE NO SHOWING OF AN ABUSE OF DISCRETION  
7 BY THE PROSECUTOR IN THIS CASE.

8 Even assuming, for the sake of argument, that the information McEnroe demands could  
9 be characterized as potential discovery, his motion is frivolous for other reasons as well. The  
10 decision whether to seek the death penalty is a discretionary decision reserved solely for the  
11 elected prosecutor in each county. As such, it would violate the separation of powers doctrine  
12 for this Court to interfere in that discretionary decision-making process. Moreover, this Court is  
13 not authorized to perform the pretrial proportionality review that McEnroe demands; that task is  
14 exclusively reserved for the Washington Supreme Court on appeal. But furthermore, McEnroe's  
15 motion to compel should be denied because he cannot show that Mr. Satterberg abused his  
16 discretion *in this case* in any event.

17 The Washington Supreme Court has previously held that RCW 10.95.040(1) constitutes a  
18 proper delegation of legislative authority to the executive branch in vesting county prosecutors  
19 with the discretion to seek the death penalty in cases that meet the applicable standards. State v.  
20 Campbell, 103 Wn.2d 1, 25-27, 691 P.2d 929 (1984). In addition, the court "has never  
21 recognized a prosecutor's discretion to file charges or to seek the death penalty as a judicial  
22 function." State v. Finch, 137 Wn.2d 792, 809 975 P.2d 967 (1999). Moreover, "[a]lthough the  
23 exercise of prosecutorial discretion under the sentencing structure of RCW 10.95 is not strictly  
24 analogous to the exercise of discretion involved in the charging function, the principle is similar"  
in that the prosecutor examines the available evidence and determines whether the issue of

1 mitigation should go to the jury. State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984).  
2 Further, "[t]he power of the Legislature over sentencing is plenary[.]" State v. Benn, 120 Wn.2d  
3 631, 670, 845 P.2d 289 (1993). Therefore, the fact that the legislature has properly delegated the  
4 initial decision whether to seek the death penalty to the county prosecutors *ipso facto* means that  
5 it would violate the separation of powers doctrine for a court to re-weigh the aggravating and  
6 mitigating circumstances and second-guess a prosecutor's decision in this regard.

7 In addition, McEnroe indicates in his pleadings that he will be asking this Court to look at  
8 his case in light of another aggravated murder case (Chen), and to conclude based on that  
9 comparison that the State should be barred from seeking the death penalty in this case. In other  
10 words, McEnroe will be asking this Court to conduct a pretrial proportionality review. This task  
11 is the sole province of the Washington Supreme Court on direct appeal in the event that a jury  
12 imposes a death sentence; it is not a pretrial finding to be made by the trial court.

13 Upon conviction for aggravated murder and the imposition of a death sentence, Chapter  
14 10.95 RCW requires that the Washington Supreme Court conduct a proportionality review on  
15 direct appeal to determine, in part, "whether the sentence of death is excessive or  
16 disproportionate to the penalty imposed in similar cases, considering both the crime and the  
17 defendant[.]" State v. Elmore, 139 Wn.2d 250, 301, 985 P.2d 289 (1999) (quoting State v.  
18 Brown, 132 Wn.2d 529, 550, 940 P.2d 546 (1997)). As the court held, in no uncertain terms,

19 Proportionality review is a special statutory proceeding that is conducted by this  
20 court and this court alone. RCW 10.95.100, .130(1). *There is no statutory*  
21 *authority for a trial court to engage in a proportionality review, with the purpose*  
22 *of forgoing the special sentencing proceeding, as suggested by Elmore.*

23 Elmore, 139 Wn.2d at 301 (emphasis supplied); *see also* State v. Gregory, 158 Wn.2d 759, 858,  
24 147 P.3d 1201 (2006) (holding that proportionality review is the province of the Washington  
Supreme Court, not the jury).

1 McEnroe's endgame appears to be a motion to dismiss the death penalty based on a  
2 comparison between this case and the Chen case. Indeed, the overarching theme of McEnroe's  
3 Motion for Discovery and Declaration in Support is the facts of the Chen case, almost to the  
4 exclusion of his own. That is a proportionality review. Thus, McEnroe demands "discovery" in  
5 order to make a motion that this Court cannot consider in the first instance. This is yet another  
6 reason to deny this motion to compel.

7 Lastly, McEnroe's motion to compel is frivolous because there is no reasonable  
8 possibility, let alone a reasonable likelihood (which is required for a showing of materiality), that  
9 he could ever show a manifest abuse of discretion in the decision to seek the death penalty.

10 The Legislature has pronounced that the elected county prosecutor "shall file written  
11 notice of a special sentencing proceeding to determine whether or not the death penalty should  
12 be imposed when there is reason to believe that there are not sufficient mitigating circumstances  
13 to merit leniency." RCW 10.95.040(1). As noted previously, this is a discretionary decision  
14 reserved for the elected county prosecutor alone. An abuse of discretion is shown only when a  
15 decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137  
16 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion  
17 only if it finds that no reasonable person would have made the same decision. State v. Atsbeha,  
18 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

19 McEnroe simply cannot show an abuse of discretion in seeking the death penalty in this  
20 case, either standing alone or when compared with the Chen case. McEnroe's assertions to the  
21 contrary notwithstanding, there are material and patently obvious differences between this case  
22 and Chen's case that are apparent from even a mere cursory reading of the respective  
23  
24

1 Certifications for Determination of Probable Cause filed in each case. These material and  
2 patently obvious differences include (but are by no means limited to) the following<sup>5</sup>:

3 - Defendant Chen killed two people, one of whom was a child. Defendant McEnroe and  
4 his accomplice killed six people, two of whom were children.

5 - Defendant Chen remained at the crime scene and opened the door to a person that came  
6 to the apartment to check on him; there were no apparent efforts to hide evidence or flee.  
McEnroe and his accomplice fled the crime scene and made up a story that they were  
driving to Las Vegas to get married at the time of the murders.

7 - There is no evidence that defendant Chen did not kill both of his victims at  
8 approximately the same time. McEnroe and his accomplice killed their first two victims  
(Judy and Wayne), dragged the bodies out of the house, cleaned up the crime scene, and  
9 then laid in wait in order to ambush their last four victims (Scott, Erica, Olivia and  
Nathan), whom they knew were coming over for a Christmas Eve celebration.

10 - Defendant Chen was treated for his apparently self-inflicted injuries; he did not provide  
11 any detailed statements to the authorities. McEnroe and his accomplice confessed to their  
12 crimes at great length and in chilling detail, including McEnroe's calm and repeated  
admissions that he killed Erica and the children specifically so that there would not be  
any living witnesses.

13 In sum, the number of victims, the overwhelming evidence of planning and  
14 premeditation, and the utter lack of any apparent remorse demonstrated by McEnroe's statements  
15 to the police (among other factors) clearly distinguish this case from the Chen case. As such,  
16 there is no reasonable basis upon which to conclude that the non-discoverable information  
17 McEnroe demands could demonstrate that Mr. Satterberg manifestly abused his discretion by  
18 deciding that a jury should consider the death penalty in this case. Indeed, this is a case so far  
19 from the margins of discretion that to suggest otherwise is simply absurd.

20 As such, McEnroe's motion to compel is frivolous. Even putting aside all other  
21 considerations, his motion to compel would result in a waste of time and resources, an invasion  
22 of the work product doctrine and most likely the attorney-client privilege as well, with no

23  
24 <sup>5</sup> The State takes great pains to emphasize that this list is both (i) apparent from the pleadings filed in each respective case, and (ii) non-exclusive. This is done in anticipation of the someday surely-to-be-filed motion to dismiss the  
STATE'S RESPONSE TO McENROE'S MOTION FOR  
DISCOVERY RE PROSECUTOR'S PROCESS FOR DETERMIN-  
ING WHICH DEFENDANTS WILL FACE DEATH - 13

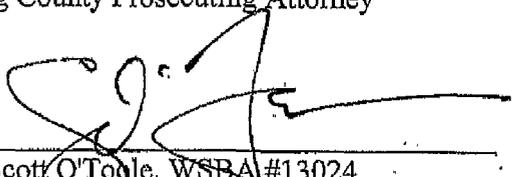
1 likelihood whatsoever that the relevant legal showing (*i.e.*, manifest abuse of discretion) would  
2 be made.

3 **III. CONCLUSION**

4 For all of the foregoing reasons, this Court should deny defendant McEnroe's "Motion for  
5 Discovery of Materials Revealing King County Prosecutor's Process for Determining Which  
6 Defendants Will Face Death."

7 Respectfully submitted this 24 day of February, 2012,

8 DANIEL T. SATTERBERG  
9 King County Prosecuting Attorney

10   
11 By: \_\_\_\_\_  
12 Scott O'Toole, WSBA #13024  
13 Andrea R. Vitalich, WSBA #25535  
14 Senior Deputy Prosecuting Attorneys

15  
16  
17  
18  
19  
20  
21  
22  
23  
24 death penalty notice based solely upon the differences enumerated here.  
STATE'S RESPONSE TO McENROE's MOTION FOR  
DISCOVERY RE PROSECUTOR'S PROCESS FOR DETERMIN-  
ING WHICH DEFENDANTS WILL FACE DEATH - 14

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

Appendix A

Letter from Ms. Ross to Mr. Satterberg,  
dated 1/25/12

**THE DEFENDER ASSOCIATION**  
810 Third Avenue, Suite 800  
Seattle, Washington 98104  
(206) 447-3900

January 25, 2012

Daniel Satterberg  
Prosecuting Attorney of King County  
W. 554 King County Courthouse  
513 Third Avenue  
Seattle, WA. 98104

Re: State v. McEnroe, No. 07-C-08716-4 SEA

Dear Mr. Satterberg:

On behalf of Mr. McEnroe we are preparing a new motion to dismiss the notice of intention to seek the death penalty. We believe your recent decision not to file a notice against Louis Chen is an example of you following the dictate of RCW 10.95.040 to focus on mitigating factors, and to file a notice only "when there is reason to believe there are not sufficient mitigating circumstances to merit leniency." We further believe the Chen case contradicts the State's position in opposition to our previous motion to dismiss based on RCW 10.95.040 (the state argued a prosecutor should focus on the crime and/or "weigh" the crime against mitigating factors) and, also, proves wrong the court's reasoning in its order denying that motion. Your decision in the Chen case casts a shadow on your comment to me, Mr. Hamaji and Mr. Prestia, that you would be more open to our efforts to resolve the Mr. McEnroe's case with LWOP if "it weren't for the children [victims]." Little Cooper Chen died horribly, at the hand of his own father, after witnessing the incredibly violent attack on his other daddy.

We will argue that Mr. McEnroe did not receive the same consideration of his mitigation evidence as was given to Chen's mitigation evidence. We believe a reasonable prosecutor should view a defendant with an elite education and medical experience, with training in psychiatry, as more able to control his situation and avoid a homicidal rampage (and therefore being more culpable) than a 10<sup>th</sup> grade dropout such as Joe McEnroe who suffered undiagnosed serious psychological deficits. Furthermore, while Louis Chen acted on his own, Joe McEnroe faced enormous pressure from a controlling partner whose pathology was far beyond his ability to understand or suppress.

Dr. Chen had the knowledge and resources to properly address his mental problems long before his jealousy and anger triggered the knife slashing attacks against his partner and child. According to media reports it appears Chen did not seek help out of fear he would be stigmatized and his career ambitions jeopardized. In other words, Dr. Chen made a calculated choice to live with the consequences of his mental illness. Joe McEnroe did not have training or an opportunity to recognize and deal with his psychological impairments.

As you know, since 2008 Mr. McEnroe has been willing to waive his guilt phase defenses and appeals, plead as charged, and accept a sentence of life in prison without possibility of release. Mr. McEnroe has offered finality for the survivors and for the state. Despite having death removed as an option, Louis Chen is continuing to contest his guilt and go to trial.

We are aware that in Louis Chen's case your office employed Linda Montgomery to conduct an investigation into possible mitigation evidence. We request you provide to us the product of Ms Montgomery's investigation in its entirety. While we respect your policy of keeping mitigation information provided by the defense confidential, Ms Montgomery's investigation was independent of the defense and apparently unknown to Chen's defense team until after you announced your decision not to seek death in that case.

In Mr. McEnroe's case we received a letter from Mark Larson dated January 17, 2008, in which Mr. Larson stated:

In this case the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issue and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses.

Mr. McEnroe has demanded disclosure of the State's "own investigation of mitigating factors" and any opinions or reports of the states retained "qualified expert" and have been told there was nothing outside the normal police crime investigation for aggravated homicides. Detective Tompkins, the lead detective in Mr. McEnroe's case, stated at his recorded interview that he was never asked to make any investigation regarding mitigating evidence and he was unaware of any such investigation being made by any agent of the state. Mr. Larson said the state would likely retain a qualified mental health expert to analyze potential mental health issues. With that in mind, we urged you to allow our doctors to send their test data to an expert of the state's choosing but our offer has been ignored.<sup>1</sup>

Mr. McEnroe has not received the same concern for mitigating factors by your office ask did Louis Chen. In making the decision not so seek death against Chen it seems highly unlikely you considered Chen's mental illness to "outweigh" the enormity of his crime, including his

---

<sup>1</sup>After much prodding me that you identify an expert to review Mr. McEnroe's psychological test data we long belatedly received a response from Mr. O'Toole that we send such results directly to HIM, apparently for use by the State at trial as opposed to validation of Mr. McEnroe's mitigation material. Mr. Larson then wrote that the State would not limit the use of such data to consideration of mitigation or settlement of the case but would use it for any purpose it desired. At no time did the State identify an expert they wished to review the data (professional ethics prohibit mental health professionals from delivering raw test data to any other than another mental health professional) and at no time did you personally respond you would consider the test data. Furthermore, despite SPRC 5 notice of mental health experts from the defense, the State has failed to take advantage the SPRC 5 provision for having Mr. McEnroe examined by an expert of the State's choosing.

betrayal and brutal murder of his own beautiful little boy. Again, it appears you were properly concerned with mitigation evidence in Louis Chen's case, as we argue is required by RCW 10.95.040. For Dr. Chen, your office hired an expert in mitigation investigation, which is very different from crime investigation. It also appears to us that you were far more open to Dr. Chen's mental health mitigating evidence than you were to Mr. McEnroe's.

At this time we restate our demand for the results of any investigation by the State of Mr. McEnroe's mitigating factors and expressly demand identification of any "outside" investigators, such as Ms Montgomery, who were tasked by the State to investigate the presence or lack of mitigating factors in Mr. McEnroe's case. We also renew our request for the product of any investigation of Mr. McEnroe's mitigating factors whether such investigation was conducted by law enforcement, employees of the prosecutor's office, or specially contracted investigators who may not be full time employees of King County or the State.

We also demand disclosure of any information in the possession of the State which may refute the mitigating factors Mr. McEnroe has already presented to your office. This request includes but is not limited to information you considered prior to filing the notice of intention to seek the death penalty.

Please let us know by Friday whether you agree to provide the information requested above. It is our intention to file the primary motion to dismiss to dismiss the notice of intent next week to allow the parties to complete briefing and have the matter argued at the next status conference, March 1<sup>st</sup>.

Thank you for your attention to this issue of fairness and transparency regarding the State's selection of defendants to face death.

Sincerely,

Katie Ross,  
With Leo Hamaji and Bill Prestia  
(206) 447-3968

Appendix B

Letter from Mr. O'Toole to McEnroe's  
attorneys, dated 1/30/12

---

OFFICE OF THE PROSECUTING ATTORNEY  
KING COUNTY, WASHINGTON

Daniel T. Satterberg  
Prosecuting Attorney

W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

January 30, 2012

SENT VIA EMAIL  
SENT VIA U.S. MAIL

Kathryn Lund Ross  
Leo Hamaji  
William Prestia  
The Defender Association  
810 Third Avenue, Suite 800  
Seattle, WA 98104

Re: State v. McEnroe; Case No. 07-C-08716-4 SEA

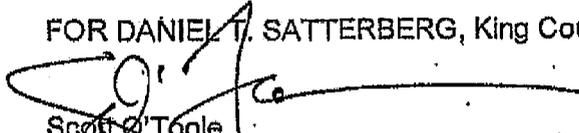
Counsel:

Your correspondence of January 25, 2012, has been referred to me for reply. Please be advised that we are treating your request for information relating to Mr. McEnroe as a supplemental discovery request. We have provided, and will continue to provide, all investigative material as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and CrR 4.7. We will continue to comply with our discovery obligations in the future.

With regard to materials you requested from the case of State v. Chen, Case No. 11-1-07404-4 SEA, we are referring your letter to John Gerberding in the Civil Division of the Prosecutor's Office for review under the Public Records Act (PRA), even though it is unclear whether you intended to make a request under the PRA.

If you have any questions, please do not hesitate to contact the undersigned.

FOR DANIEL T. SATTERBERG, King County Prosecuting Attorney,

  
Scott C. Toole  
Senior Deputy Prosecuting Attorney

Cc: John Gerberding

Appendix C

Memorandum Ruling, State v.  
Champion, No. 01-1-02529-1 SEA

---

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

**FILED**  
KING COUNTY, WASHINGTON

NOV 17 2003

SUPERIOR COURT CLERK  
BY VICTORIA ERICKSEN  
DEPUTY

BEST AVAILABLE IMAGE POSSIBLE

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

STATE OF WASHINGTON,

Plaintiff,

vs.

CHARLES CHAMPION,

Defendant.

No. 01-1-02529-1 SEA

MEMORANDUM RULING ON  
STATE'S MOTION TO RESCIND  
APPOINTMENT OF INDEP. COUNSEL  
AND ON  
DEFENDANT'S MOTION  
FOR EVIDENTIARY HEARING

On March 28, 2001, the State filed aggravated murder charges against the defendant herein, Charles Champion.

In October of 2001, the State gave notice that it intended to seek the death penalty against Charles Champion.

On or before August 1, 2003, the Superior Court Judge assigned to conduct the trial in this case appointed independent defense counsel to investigate claims made on defendant's behalf that the State had in 2001 promised Charles Champion's brother, Lonya Champion, that it would not pursue the death penalty in this case in return for Lonya Champion's cooperation. Under the authority given them by this appointment, the newly appointed counsel, Kathryn Ross and Roger

1 Hunko, began to investigate facts pertaining to the question of whether such promise(s) had been  
2 made, and if so, what form of relief, up to and including dismissal of a possible death penalty,  
3 could be sought.

4 After the State learned of the appointment of these additional counsel for defense, the  
5 State filed a Motion to Rescind Order Appointing Independent Counsel. The defense then filed a  
6 cross-Motion for an Order Setting Evidentiary Hearing.

7 In order to avoid the possibility of any ex parte contact occurring and/or impacting the  
8 assigned trial judge, this Court was assigned the two motions.

9 This Court met with counsel on September 3, 2003, and set a schedule for briefing on  
10 these issues. The parties thereafter submitted the following materials, all of which the Court has  
11 read:

- 12 a. State's Motion to Rescind Order Appointing Independent Counsel, along with August,  
13 2003 declaration of Steven Fogg and attachments thereto (August 13, 2003);
- 14 b. Defendant's Motion for an Order Setting Evidentiary Hearing, with August, 2003  
15 declaration of Roger Hunko (August 19, 2003);
- 16 c. Defendant's Response to State's Motion to Rescind Order Appointing Independent  
17 Counsel, with August, 2003 Declaration of Katiryn Ross (August 19, 2003);
- 18 d. State's Reply to Defendant's Response to Motion to Rescind (August 20, 2003);
- 19 e. State's Preliminary Response to Defendant's Request for an Evidentiary Hearing, with  
20 attachments and appendices, including September, 2003 declaration of Steven Fogg  
21 (September 2, 2003);
- 22 f. Defendant's Memorandum in Support of Evidentiary Hearing and Dismissal of Notice  
23 of Death (September 23, 2003);
- 24 g. State's Response to Defendant's Motion for Evidentiary Hearing and to Dismiss  
25 Death Notice, with appendices, including October, 2003 declaration of Dan Satterberg  
26 (October 3, 2003);

## BEST AVAILABLE IMAGE POSSIBLE

1 h. Defendant's Reply Brief Re: Evidentiary Hearing and Motion to Dismiss Death  
2 Notice, with copies of June, 2003 declarations of Jeffrey Robinson and Song  
3 Richardson (October 17, 2003).

4 On October 27, 2003, the Court took oral argument from counsel as to (i) the factual  
5 foundation for defendant's request for an evidentiary hearing, (ii) the legal characterization each  
6 counsel would apply to the defendant's claims in support of an evidentiary hearing and to the  
7 State's objections and defenses thereto, and (iii) the identity of witnesses who might be called,  
8 together with an explanation of the scope of examination, cross-examination and privilege that  
9 might properly be applied during any such evidentiary hearing. The parties also addressed the  
10 scope of appropriate relief should the Court find that the State had made and breached a promise  
11 to Lonya Champion.

12 The Court's Factual Inquiry

13 The Court has carefully considered the parties' oral arguments and written briefing, with  
14 particularly close attention paid to the declarations filed by Jeffrey Robinson, Song Richardson  
15 and Steven Fogg. The declarations of Roger Hunko, Kathryn Ross and Daniel Satterberg were  
16 reviewed, but contained no personal knowledge about the making of any promise(s) at issue  
17 herein.

18 For the purposes of ruling on these cross-motions, the Court treats certain facts as true,  
19 based on the following reasoning: if an asserted fact has not been disputed, it may reasonably be  
20 treated as true; if a dispute of fact has been raised, the Court has construed all reasonable factual  
21 inferences in favor of the defendant from the affidavits and declarations submitted by the parties  
22 to the Court. The Court has not speculated on facts or inferences as to which neither side has  
23 presented some explicit factual foundation.

24 In sum, the Court has treated the declarations submitted by defense counsel as a proffer of  
25 the testimony they would offer at a fact-finding hearing. Moreover, for purposes of this motion,  
26 the Court has also assumed that the direct testimony offered by defense and summarized for the  
27 Court in declarations would be found to be true. The Court has not assumed hypothetical factual  
28 possibilities in the absence of specific sworn support.

1 As a result, for the purpose of ruling on these cross-motions, the Court treats the  
2 following facts as true:

3 1. On March 7, 2001, Officer Underwood was shot to death. Because Charles  
4 Champion's name had been mentioned by that officer on the radio shortly before he was shot,  
5 Charles Champion became an early suspect. It was also believed that his brother Lonya  
6 Champion had been present at the time of the acts charged herein.

7 2. On March 7, 2001, Lonya and Charles Champion's mother, Tina Jones, informed law  
8 enforcement that Charles Champion had admitted to her that he had shot and killed Officer  
9 Underwood.

10 3. On March 13, 2001, Lonya Champion's counsel Jeffrey Robinson met with Steven  
11 Fogg and others to discuss possible immunity for Lonya Champion. (Robinson Decl., Para. 7).  
12 Lonya Champion's presence at the scene of the homicide, his possession of a firearm at that time,  
13 his possible rendering of criminal assistance to his brother, and his false statements to law  
14 enforcement, presented him with a significant risk of criminal prosecution and also gave rise to a  
15 Fifth Amendment privilege. No immunity agreement was reached on that date. (Robinson Decl.,  
16 Para. 7)

17 4. On March 21, 2001, Jeffrey Robinson met with Charles Champion and his attorneys at  
18 the King County Jail. At the end of that meeting, Charles Champion gave Jeffrey Robinson  
19 permission to tell his brother Lonya Champion to go ahead and speak to the police. (Robinson  
20 Decl., Paras. 8-13)

21 5. At some unidentified time and date on or before March 28, 2001, Steven Fogg  
22 informed Jeffrey Robinson he would personally argue against a death notice if the Champion  
23 family cooperated with the investigation, but made no promise about the outcome of the King  
24 County Prosecutor's decision process on a death notice. (Robinson Decl., Paras. 14-17)

25 6. Jeffrey Robinson knew of both Lonya Champion's own potential criminal liability and  
26 Lonya Champion's concern that a death notice could be filed against his brother Charles; Jeffrey  
27 Robinson told Lonya Champion of his discussions with Steven Fogg, but did not tell Steven Fogg  
28

1 that Fogg's oral promise was the only reason that Lonya Champion would enter into a written  
2 immunity agreement. (Robinson Decl., Paras. 11-18)

3 7. Jeffrey Robinson knew of both Lonya Champion's own potential criminal liability and  
4 Lonya Champion's concern that a death notice could be filed against his brother Charles; Jeffrey  
5 Robinson told Lonya Champion of his discussions with Steven Fogg, but did not tell Steven Fogg  
6 that Fogg's oral promise would be the basis of the bargain set forth in the written immunity  
7 agreement. (Robinson Decl., Paras. 11-18)

8 8. On March 28, 2001, the State and Lonya Champion reached an immunity agreement  
9 (Robinson Decl., Paras. 14 and 17) that concluded with the following two sentences:

10 If you agree to the terms of this agreement as set forth in this letter, please so indicate by  
11 signing the letter and obtaining the signature of your attorney. Our signature below  
12 indicates our agreement to the terms, which are fully set forth in this document.

13 9. On March 28, 2001, immediately after entering into this agreement, Lonya Champion  
14 provided the State with information relating to the homicide. (Robinson Decl., Paras. 14 and 17)

15 10. On March 28, 2001, the State filed aggravated murder charges against defendant  
16 Charles Champion.

17 11. On April 3, 2001, Lonya Champion's attorney Song Richardson met with Steven Fogg  
18 and others at the scene of the homicide. Lonya Champion did provide further evidence to law  
19 enforcement officers at that time. After Lonya Champion had done so, Steven Fogg stated to  
20 Song Richardson that he believed Lonya Champion's cooperation was important and that he  
21 would argue against a death notice. (Richardson Decl., Para. 6)

22 12. In October, 2001, the State filed a death notice in this case.

23 13. At no time between October 2001 and July 2003 did either of Lonya Champion's  
24 attorneys, Jeffrey Robinson and Song Richardson, inform Steven Fogg that the filing of the death  
25 notice against Charles Champion breached the basis of the immunity agreement Lonya Champion  
26 had signed with the State.

27 Now, therefore, based on the foregoing, which the Court treats as factual and as true for  
28 the purpose of ruling on the cross-motions now before the Court, the Court concludes as follows:

1                   Contractual and Quasi-Contractual Claims and Defenses

2           1. On March 21, 2001, before any date identified by Jeffrey Robinson for Steven Fogg to  
3 have made statements about arguing against the death notice, Charles Champion had given his  
4 brother his permission and encouragement to speak to the police.

5           2. Despite his testimony about his belief as to the importance of such a promise, Jeffrey  
6 Robinson has provided no testimony that at any time on or before March 28, 2001 he had  
7 informed Steven Fogg that the absence of a promise to argue against the death notice would  
8 prevent the making of an immunity agreement with Lonya Champion.

9           3. Accepting as true Jeffrey Robinson's testimony as to his and Lonya Champion's belief  
10 in the importance of such a promise by Steven Fogg, the law is clear that unexpressed intentions  
11 do not become part of a contract, nor can evidence as to unexpressed intentions or beliefs be  
12 admitted to add to or modify the terms of an integrated written contract.

13           4. The written contract was clear and complete in its terms. On its face, it professed to  
14 be an integrated contract. On its face, it provided immunity to Lonya Champion for certain of his  
15 own specified actions and omissions on March 7, 2001. In return, the contract for immunity  
16 explicitly required that Lonya Champion tell the full truth about the events of March 7, 2001, a  
17 provision which could reasonably be believed to require testimony and cooperation which would  
18 be largely or completely inculpatory to Charles Champion. The express terms of this written  
19 contract cannot reasonably be characterized as treating Charles Champion as a third-party  
20 beneficiary.

21           5. There is no legal support for the proposition urged by defense that the Court may now  
22 from the foregoing evidence add a new provision, unrelated to the type of provisions explicitly set  
23 forth in this written and apparently integrated document, which would change it from a contract  
24 benefiting only Lonya Champion and likely harming Charles Champion to a contract making  
25 Charles Champion its third-party beneficiary and providing a form of *de facto* immunity from or  
26 obstacle to possible imposition of the death penalty on Charles Champion.

27           6. At the time Steven Fogg made additional statements to Song Richardson on April 3,  
28 2001, Lonya Champion already was contractually required to provide full cooperation and had

1 completed a walk-through at the scene. His cooperative conduct on that date, which preceded  
2 Steven Fogg's additional statements, certainly merits consideration by the Prosecutor when  
3 making a decision whether to file a death notice, but as a matter of law it cannot constitute formal  
4 legal consideration rendering such a promise enforceable in contract.

5 7. As a matter of contract law, defendant's contract-based arguments are insufficient and  
6 therefore fail.

7 8. The parties also presented argument on equitable and quasi-contractual claims for  
8 relief. The only direct evidence presented to the Court by defendant's counsel as to reliance or  
9 estoppel does not show any change of position or detrimental reliance by Charles Champion on  
10 statements made by Steven Fogg. The evidence instead is that Charles Champion gave his brother  
11 encouragement to cooperate with the police on March 21, 2001, one full week before the  
12 immunity agreement was signed. Nowhere in his declaration does Jeffrey Robinson state that he  
13 had, on or before March 21, 2001, relayed to Charles Champion any statements of Steven Fogg.  
14 However else Charles Champion's situation may be characterized, no evidence was submitted to  
15 the Court which would permit him to make a *personal* claim of promissory estoppel or  
16 detrimental reliance arising out of anything said by Steven Fogg.

17 9. To the extent that Lonya Champion (rather than Charles Champion) could show a  
18 change of position or some other form of detriment or reliance flowing from any promise made by  
19 Steven Fogg, either on or before March 28, 2001 or on April 3, 2001, it is possible that Lonya  
20 Champion could himself file a motion and assert his own claim for relief, whether to withdraw his  
21 agreement and/or to suppress his testimony and/or any fruits of investigations flowing therefrom,  
22 and/or to obtain other relief. Charles Champion has not sought, and has no standing to seek,  
23 relief on behalf of Lonya Champion, nor may Charles Champion waive any attorney-client or  
24 work-product privilege that Lonya Champion may otherwise have in seeking relief on his own  
25 behalf.

26 Evidentiary and Discovery Issues

27 10. In the appropriate case, courts may delay rulings on disputed issues in order to permit  
28 further discovery and a more complete development of the factual record. On summary judgment

## BEST AVAILABLE IMAGE POSSIBLE

1 motions, a court may, for example, grant a CR 56(f) continuance upon a party's showing of  
2 specific facts that are reasonably believed to exist and that may be demonstrated upon further  
3 discovery. No such showing has yet been made in this case, even assuming the correctness of the  
4 facts urged upon this Court by defense counsel.

5 If there were a further fact-finding hearing held in this case, as urged by defense counsel,  
6 the ensuing factual inquiry would not be easily limited and could easily require full examination  
7 and cross-examination of many witnesses. It would necessarily raise factual questions as to  
8 matters on all sides of this controversy which would normally be protected by the attorney-client  
9 and work-product privileges. For example, if testimony were taken as to questions of promise,  
10 breach of promise, reliance, reasonableness and fairness, the following inquiries would likely have  
11 to be made:

12 -- **Lonya Champion:** Lonya Champion and his counsel would have to be  
13 examined as to the relevant facts, which include not only Steven Fogg's statements, but  
14 also the extent and reasonableness of their reliance on such statements, when considered in  
15 light of and balanced against Lonya Champion's own potential independent criminal  
16 liability. In order to weigh the credibility of defense claims that without the explicit  
17 promise of Steven Fogg to argue against the death penalty, (i) Jeffrey Robinson and Song  
18 Richardson would not have advised Lonya Champion to cooperate, and (ii) Lonya  
19 Champion would not have agreed to cooperate, evidence would likely have to be taken as  
20 to communications with counsel (e.g., what he said to counsel and what they said to him  
21 about; what he had done at the scene; what offenses he could be liable for; what his  
22 defenses might be; his personal risk(s) if he were not to negotiate an immunity agreement;  
23 his brother's risk in each situation; and the like). During oral argument on October 27,  
24 2003, defense counsel for Charles Champion were careful not to appear to be waiving and  
25 indeed, they could not have waived, any privilege belonging to Lonya Champion; in any  
26 event, no claim of reliance by Lonya Champion could be adjudicated without such a  
27 waiver by him. Lonya Champion's rights and risks are on their face different from those  
28 of the defendant Charles Champion.

BEST AVAILABLE IMAGE POSSIBLE

1           -- **Charles Champion:** Defendant Charles Champion could himself be subject to  
2 examination about the nature of his communications with counsel concerning any possible  
3 affirmative act of encouragement of Lonya Champion's cooperation. If Charles Champion  
4 were to pursue his counsel's suggestion that without a promise from Steven Fogg he  
5 (Charles Champion) would not have told his brother to cooperate either independently or  
6 through counsel, and/or that he would have instructed his brother Lonya not to pay  
7 attention to Lonya's own legal rights and risks unless Charles Champion also got some  
8 benefit, such discovery could well be required. Clearly there are serious Fifth Amendment  
9 implications raised by such possible discovery, but any claim by Charles Champion that he  
10 changed his position in reliance on Steven Fogg's statements would necessarily have to be  
11 treated as the equivalent of an affirmative defense raising matters outside the narrow  
12 confines of the facts pertaining to the charged crime, and would therefore be a matter on  
13 which he would logically bear the burden of proof.

14           -- **King County Prosecutor:** King County Prosecutor Norm Maleng and his  
15 staff would also be subject to examination as to who said what when they gave  
16 consideration to the possibility of issuing a death notice. Just as credibility determinations  
17 would require the Court to permit broad questioning of the Champions and their  
18 respective counsel, credibility determinations relating to the actions and testimony of  
19 Norm Maleng, Steven Fogg and others in his office could reasonably involve inquiry not  
20 only into this case but also into standard practices, specific examples from other cases, and  
21 detailed notes of thought processes of each participant.

22           Such an invasion, prior to trial, of each side's work product and attorney-client privilege,  
23 their innermost thoughts about strengths and weaknesses of their cases, could cause a severe  
24 disruption of the trial preparation process. It could run the risk of tainting future jurors, should  
25 such information become public, as may be likely.

26           The Court must balance the seriousness of the death penalty issues against the need to  
27 preserve attorney-client confidences for defendant, for witnesses and for the State, and the need

1 to ensure a fair trial by avoiding pretrial publicity from such testimony as might be elicited in the  
2 inquiry sought by defense counsel.

3 A case in which the death penalty is sought raises the most difficult questions a criminal  
4 justice system can be called upon to address. The utmost care is demanded when courts  
5 determine how to make decisions of life and death. Traditional privileges necessarily must bend in  
6 order to assure that decisions of life and death are fairly and constitutionally reached.

7 If inquiries are warranted into the attorneys' statements and actions, their advice and their  
8 clients' responses and reliance thereon, courts should and must make those inquiries. However,  
9 given the likely breadth of such discovery once commenced, it cannot lightly be ordered. There  
10 must be a reasonable showing that such inquiry is warranted *in fact*. In this case, a careful reading  
11 of the submissions of defense counsel does not reveal direct factual support for the following  
12 critical propositions:

13 --that any alleged promise of Steven Fogg pre-dated Charles Champion's decision to  
14 encourage his brother to cooperate;

15 --that Charles Champion in any other way changed his position in reliance on a promise by  
16 Steven Fogg in a way giving rise to equities compelling the elimination of the death penalty as  
17 part of an explicit or implicit quid-pro-quo reached with Charles Champion;

18 --that Jeffrey Robinson told Steven Fogg that a specific promise would be the basis of the  
19 bargain with Lonya Champion; or

20 --that Lonya Champion is seeking to cancel his immunity agreement or obtain other relief  
21 on his own behalf.

22 Fundamental Fairness Claims and Defenses

23 11. In the absence of a personal reliance or estoppel claim of his own, and in the absence  
24 of standing to raise his brother's claims, Charles Champion's final possible claim for relief is one  
25 based upon fundamental fairness.

26 12. The State must be extremely scrupulous in cases in which the death penalty is being or  
27 may be sought.

1 13. No case law or other authority has to date been cited by counsel for defense to  
2 support the argument that the application of the fundamental fairness doctrine requires the relief  
3 sought in the circumstances of this case, where (i) there is no evidence of any promise made to  
4 Charles Champion or any showing that Charles Champion himself changed his position in reliance  
5 upon promise(s) made by Steven Fogg, and (ii) the only evidence submitted to date is that Charles  
6 Champion himself encouraged his brother Lonya Champion to cooperate before any statements  
7 were made by Steven Fogg.

8 14. There is an additional aspect pertaining to fundamental fairness that has arisen only  
9 recently, and as to which neither the State nor the defense has yet had an opportunity to file  
10 motions or provide briefing.

11 15. No person in this jurisdiction can be unaware of pleas recently entered in the case filed  
12 against Gary Ridgway. He has pled guilty to 48 counts of Aggravated Murder in the First Degree  
13 in return for the State's promise not to seek the death penalty.

14 16. It is not disputed that in the present case the defendant Charles Champion's mother  
15 Tina Jones cooperated with law enforcement, and that defendant's brother Lonya Champion  
16 entered into an immunity agreement and provided evidence against Charles Champion. Further,  
17 on the materials it has submitted to this Court, the State does not and cannot argue either that the  
18 family members' actions or that Charles Champion's own actions encouraging his brother to  
19 cooperate with law enforcement were made in reliance on any promises or other statements by  
20 Steven Fogg. Thus, it may be possible for defense to argue that Charles Champion and his family  
21 were on the relevant dates acting on their own without either specific promise or specific threat by  
22 the State concerning the handling of the charges in this case.

23 17. Whether the extent of voluntary and/or non-voluntary cooperation by Charles  
24 Champion and his family as to the homicide with which he is charged should under the  
25 fundamental fairness, Equal Protection, Due Process or other legal doctrine, merit or even  
26 mandate the same treatment received by Gary Ridgway in return for his cooperation on 48  
27 homicides is an issue neither side has briefed and as to which no court can yet express an opinion.

28

29 MEMORANDUM RULING ON  
CROSS-MOTIONS

Page 11

Judge Robert E. Aisdorf  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
(206) 296-9203

1 18. Thus, whether there are now or may in the future be other factual or legal bases to  
 2 challenge the possible imposition of a death penalty on Charles Champion are matters which must  
 3 be decided by the Court then assigned to the case and be based upon the motion(s) filed and the  
 4 facts then made available to that Court.

5 19. Charles Champion's counsel have argued here only that the simple fact of Lonya  
 6 Champion's cooperation in providing evidence in this case based on statement(s) made by Steven  
 7 Fogg requires this Court to bar the application of the death penalty. No contract, quasi-contract,  
 8 estoppel or fundamental fairness argument can successfully be made in this case by defendant  
 9 based on the temporal congruence alone of Lonya Champion's cooperation and the statements  
 10 attributed to Steven Fogg.

11 20. This Court now finds and concludes only that, on the specific set of facts and motions  
 12 currently briefed and argued to the Court, defendant has provided neither a legally cognizable  
 13 claim for the relief requested nor a sufficient factual foundation to justify further evidentiary  
 14 hearings on those issues.

15 *Now therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the*  
 16 *current Motion of the Defendants for an Evidentiary Hearing is DENIED, and*  
 17 *The State's current Motion to Rescind Order Appointing Independent Counsel to*  
 18 *investigate statements or promises allegedly made by Steven Fogg and the State is*  
 19 *GRANTED,*  
 20 *provided that, this Order is not meant to bar such defense counsel from taking any steps*  
 21 *they deem reasonable and appropriate if they decide to seek appellate review of this*  
 22 *Order.*

23 IT IS SO ORDERED this 10<sup>th</sup> day of November, 2003.

24  
 25  
 26   
 27 \_\_\_\_\_  
 Judge Robert H. Alsdorf  
 KING COUNTY SUPERIOR COURT





## II. ARGUMENT

Anderson's discovery motion demands essentially three categories of materials: 1) materials related to any investigation conducted by the King County Prosecutor's Office into potential mitigation in this case; 2) materials related to the internal decision-making process of the King County Prosecutor's Office with respect to "how mental health mitigating circumstances factor into" Mr. Satterberg's decision to seek the death penalty in any given case; and 3) materials related to other "recent King County aggravated murder cases in which the death penalty could have been sought but was not."

As to the first category of materials, as was stated in the State's written response to McEnroe's motion (pgs. 4-5), the State is fully aware of and is complying with its discovery obligations under CrR 4.7 and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). There is no actual discovery or Brady material of which the State is aware that has not been disclosed.

As to the second category of materials, assuming such materials exist, they would not be discoverable because they would be work product. Internal documents related to the elected prosecutor's decision-making process in death penalty cases (again, assuming such documents exist) would necessarily involve an evaluation of the prosecutor's opinions regarding the legal and factual strengths and weaknesses of a given case. Such material is not discoverable. See CrR 4.7(f)(1) (codifying work product doctrine); State v. Pawlyk, 115 Wn.2d 457, 475-79, 800 P.2d 338 (1990) (analyzing the work product doctrine in the context of a criminal case).

As to the third category of materials (again, assuming such material exists), Anderson's motion fails for the same reasons that McEnroe's motion fails with respect to his demand for materials related to the Chen case. Specifically, there has been no showing of materiality under

STATE'S RESPONSE TO DEFENDANT  
ANDERSON'S "MOTION FOR DISCOVERY OF  
MATERIALS CONSIDERED IN DECISION TO  
SEEK THE DEATH PENALTY (CrR 4.7)" - 2

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

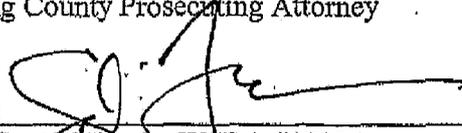
1 State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993), the work product doctrine and  
 2 the attorney-client privilege are squarely implicated, and there is no indication that counsel for  
 3 any other defendant in any other "recent" aggravated murder case has been notified of this  
 4 motion. *See State's Response to McEnroe's Motion*, at 6-9. In addition, as is true of McEnroe's  
 5 motion, it appears this material is being requested in an effort to convince this Court that it  
 6 should revisit the elected prosecutor's executive decisions in death penalty cases, and to compare  
 7 and contrast those decisions in some form of pretrial proportionality review. As discussed at  
 8 length in the State's response to McEnroe's motion and at oral argument on March 1, this Court is  
 9 without authority to perform either of these tasks. Lastly, as the State has already stated in its  
 10 response to McEnroe's motion, there is no reasonable likelihood that Anderson could show a  
 11 manifest abuse of prosecutorial discretion in this case. *See State's Response to McEnroe's*  
 12 *Motion*, at 10-14.

### 13 III. CONCLUSION

14 For the foregoing reasons, and for the reasons stated in the "State's Response to  
 15 Defendant McEnroe's Motion for Discovery Materials Revealing King County Prosecutor's  
 16 Process for Determining Which Defendant's Will Face Death," Anderson's motion should be  
 17 denied.

18 Respectfully submitted this 6 day of March, 2012,

19 DANIEL T. SATTERBERG  
 King County Prosecuting Attorney

20  
 21 By:   
 22 Scott O'Toole, WSBA #13024  
 Andrea B. Vitalich, WSBA#25535  
 Senior Deputy Prosecuting Attorneys

23 STATE'S RESPONSE TO DEFENDANT  
 ANDERSON'S "MOTION FOR DISCOVERY OF  
 MATERIALS CONSIDERED IN DECISION TO  
 SEEK THE DEATH PENALTY (CrR 4.7)" - 3

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

FILED

12 FEB 29 PM 12:46

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH T. McENROE,

Defendant.

No. 07-1-08716-4 SEA

REPLY ON MOTION FOR  
DISCOVERY

...[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280 (1976), emphasis added. Mr. McEnroe is seeking discovery of how and why the King County Prosecutor decided to seek the death penalty against him. Mr. McEnroe has shown the Court enough evidence that he has not been treated with equal consideration of his character and record as other defendants, particularly Louis Chen, to merit the discovery. If the Prosecutor is allowed to keep secret his processes and reasons for seeking death against Mr. McEnroe while showing leniency to others there is no "reliability in the determination that death is the appropriate punishment" in this specific case. Greater due process

1 is mandated in a capital case and that includes fairness in the process in which the Prosecutor  
2 applies the death penalty statute in selecting defendants to face the death penalty.

3 **State v. Blackwell does not help the State.**

4 The State relies heavily but mistakenly on State v. Blackwell, 12 Wn2d 822 (1993).  
5 Blackwell, in fact, supports the discovery requested by Mr. McEnroe. In Blackwell the defendant  
6 sought and was granted in the trial court discovery of the arresting police officers' personnel files.  
7 The only support for the discovery request was a "suggestion that the arrests ... might have been  
8 racially motivated." Blackwell, p. 829. The prosecution in Blackwell was unable to provide the  
9 personnel files in part because they were in the possession of the police administration and the  
10 trial court dismissed the charges against Blackwell on an CrR 8.3(b) motion. The Supreme Court  
11 reversed the trial court's dismissal of the charges for the following reasons:

- 12 1) The defense had failed to "establish any factual predicate to demonstrate that the  
13 officers' service records contained information material to [the defense] to this particular  
14 assault charge."  
15 2) "No misconduct by either officer [was] alleged."  
16 3) Defense counsel "offered no affidavit, no statement that indicated" the arresting officer  
17 was racially motivated "during *this* incident."

18 State v. Blackwell at 829, emphasis in original. The Blackwell court explained that "defense  
19 counsel should have provided an affidavit or representation to the court asserting the factual basis  
20 for believing the arrest of their clients was racially motivated." Id. In fact, the Supreme Court  
21 noted, "There is nothing in the record which indicates the race of the defendants," Blackwell, FN  
22 1.

23 Mr. McEnroe has supported his motion for discovery in the way the Supreme Court  
24 prescribed in Blackwell. Defense counsel here provided a six page declaration asserting the  
25 factual basis for counsel's belief that "the discovery sought will reveal a disparity in the  
26 consideration given to mitigating factors by King County Prosecutor Dan Satterberg in the recent  
27 case of State v. Louis Chen ... and the consideration afforded Mr. McEnroe by the Prosecutor."  
28 Declaration of Counsel, p. 1. Counsel's declaration specifically alleges that the Prosecutor didn't

1 believe the mental illness claims of Louis Chen and supported the allegation with quotations from  
 2 the State's own pleadings in the Chen case, Declaration of Counsel, p. 3. It is alleged (and not  
 3 denied by the State) that Mr. Satterberg employed a special outside investigator to uncover  
 4 mitigating evidence for Louis Chen and no such effort was made for Mr. McEnroe. At the same  
 5 time, defense counsel swore that Mr. McEnroe submitted substantial mitigating evidence which  
 6 was never questioned by the Prosecutor. Unlike Blackwell, Mr. McEnroe is alleging, with  
 7 support, that the Prosecutor denied Mr. McEnroe impartial application of state law and that the  
 8 discovery requested will show that Mr. Satterberg favors wealthy professional defendants when  
 9 it comes to deciding whether or not to seek the death penalty.

10 **The Court has Authority to Order the Discovery Requested**

11 CrR 4.7(a) describes discovery obligations in the ordinary criminal prosecution and except  
 12 for criminal record of the defendant has little relevance to criminal sentencing procedures.  
 13 However, the rules also anticipate proceedings and situations which are outside the ordinary.

14 **CrR 4.7(e) Discretionary Disclosures:**

15 (1) Upon a showing of materiality to the preparation of the defense, and if the request is  
 16 reasonable, the court in its discretion may require disclosure to the defendant of relevant  
 material and information not covered by sections (a), (c) and (d).

17 CrR 4.7(e)(2) alerts the Court to be cautious about discovery of information if there is  
 18 "substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or  
 19 unnecessary annoyance or embarrassment resulting from such disclosure." None of these  
 20 concerns apply here and, if any did, they would not "outweigh any usefulness of the disclosure  
 21 to the defendant." Also, if any such concerns materialize they may be addressed through requests  
 22 for protective orders. CrR 4.7(h)(4).<sup>1</sup>

23  
 24  
 25  
 26  
 27  
 28  
 1

Counsel for Louis Chen, Todd Maybrown, was provided with copies of Mr. McEnroe's  
 original "Motion for Discovery," and the State's Response, nearly contemporaneously with  
 filing and service on the parties hereto. This Reply will also be provided to Mr. Maybrown.  
 Mr. Maybrown also has been advised of the time and date of argument on the discovery  
 motion.

1  
2 **The State Has Not Identified Any "Work Product" or "Privilege" That Would Be**  
3 **Violated by the Discovery Requested**

4 The State speculates the discovery requested would be "an invasion of the work  
5 product doctrine and most likely the attorney-client privilege" without identifying a single  
6 item that would fall under these categories. Response, p. 13.

7 Evidentiary privileges are defined in RCW 5.60.060. None apply to the discovery  
8 requested here. If the State believes some specific item which would be included in the  
9 requested discovery is privileged, the State should specify from who to whom the  
10 communications were made, identify the provision of RCW 5.60.060 which defines the  
11 privilege, and allow the Court to rule on the specific discovery request. Even if some item  
12 included in the discovery requested here were determined to fall under a privilege, that would  
13 not be a reason to deny the balance of the request.

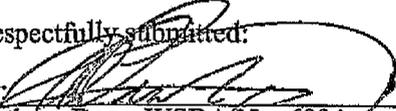
14 Work product is defined at CrR 4.7(f)(1). Again the State identifies nothing it claims  
15 would fall under work product exclusion. Any materials claimed to be work product should  
16 be submitted in camera to the Court for appropriate redaction if a sufficient showing is made.  
17 State v. Yates, 111 Wn2d 993 (1988).

18 **Conclusion**

19 The discovery requested by Mr. McEnroe should be granted. The merits of his coming  
20 motion to dismiss should be argued after the facts are established and the Court is fully  
21 briefed.

22 Dated: February 29, 2012. \

23 Respectfully submitted:

24 by:   
25 Kathryn Ross, WSBA No. 6894  
26 Leo Hamaji, WSBA No. 18710  
27 William Prestia, WSBA No. 29912  
28 The Defender Association  
(206) 447-3968

**FILED**  
KING COUNTY, WASHINGTON

MAR 15 2012

SUPERIOR COURT CLERK  
KIRSTIN GRANT  
DEPUTY

IN THE SUPERIOR COURT of the STATE OF WASHINGTON  
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and

Michele K. Anderson,

Defendants.

Cause No. 07-1-08716-4 SEA ✓

and

Cause No. 07-1-08717-2 SEA

**Order to Compel Discovery**

Defendant Joseph T. McEnroe has requested that this court order the King County Prosecuting Attorney to disclose various information and materials related to the prosecutor's decision to file the notice of intent to seek the death penalty in his case. He also requests similar discovery of information and materials related to the decision not to file a notice of intent in the case of State v. Louis Chen, No. 11-7-07404-4 SEA.

Defendant McEnroe maintains that the information he requests will "reveal a disparity in the consideration given to the mitigating factors by King County Prosecutor Dan Satterberg" in the two cases. Specifically, McEnroe alleges that Mr. Satterberg employed a special outside

investigator to uncover mitigating evidence for Mr. Chen and that "no such effort was made for Mr. McEnroe."

At the conclusion of oral argument on Mr. McEnroe's motion, co-defendant Anderson orally announced her intent to join in his motion. This court directed Ms. Anderson's attorney to file a formal motion designating with particularity what materials she wishes to obtain. Ms. Anderson's counsel has done so and the State has responded in writing.

This court has considered Mr. McEnroe's Motion, the State's Response, and Mr. McEnroe's Reply, as well as Ms. Anderson's belated Motion and the State's Response. The court also heard oral argument on March 1, 2012. For the reasons set forth herein, the court grants the defendants' motions in part.

Pursuant to RCW 10.95.040, the decision to file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed rests within the discretion of the elected prosecutor. When the State charges a person with aggravated first degree murder as defined by RCW 10.95.020, then the statute directs that "the prosecuting attorney shall file written notice of a special proceeding ... when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

The decision made by the prosecutor is deemed to be executive rather than adjudicative in nature. State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). Although the prosecutor's decision may ultimately result in the imposition of different punishments, the Supreme Court of Washington has held that this exercise of discretion does not violate equal protection because the ultimate imposition of "a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment – namely, an absence of mitigating circumstances." State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). In other words, the decision to file the special sentencing notice does not result in disparate treatment between similarly situated individuals because the prosecutor has to prove the extra "factor" of an absence of sufficient mitigating circumstances in order to secure a death sentence.

Analogizing the exercise of prosecutorial discretion in the death penalty context to a more routine charging decision, the Campbell court quoted State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), for the proposition that “[t]he prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury.” Campbell, 103 Wn.2d at 26 (quoting State v. Dictado, 102 Wn.2d at 298). Stated in the converse, the court in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), opined that “the prosecutor’s decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty.” State v. Rupe, 101 Wn.2d at 700.

The defense motions currently before this court seek only to obtain discovery related to the prosecutor’s exercise of discretion to file the notice of special sentencing proceeding. Prosecutor Satterberg concluded that there was reason to believe that there were “not sufficient mitigating circumstances to merit leniency” for either Mr. McEnroe or Ms. Anderson. As illustrated by the aforementioned case law, the prosecutor’s exercise of discretion in filing the notice of special sentencing proceeding is the equivalent of a charging decision. Accordingly, this court concludes that Defendants McEnroe and Anderson are each presently entitled to discovery of the information considered by Mr. Satterberg in deciding to file the notice of special sentencing proceeding as to them.

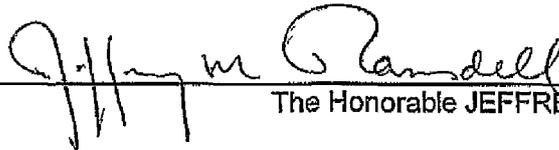
The discovery that must be disclosed includes any information gathered as a result of any mitigation investigation conducted by the State, the name of the investigator(s) involved, and the reports of any mental health professionals that were considered by Mr. Satterberg.

The court specifically declines to order the disclosure of: (1) any internal documents generated by the prosecutor’s office during the decision-making process; (2) any internal filing standards; (3) any correspondence with the Anderson family, relatives, or friends; (4) a list of memorial services and whether any employees of the prosecutor’s office were in attendance; and (5) whether any photographs or personal items of the decedents are kept in the offices of

the prosecuting attorney, a trial deputy's work space or a deputy's home. The court concludes that these latter requests are not relevant to the question at issue and not discoverable under CrR 4.7.

Mr. McEnroe also requests discovery related to the prosecution of Mr. Louis Chen and the King County Prosecutor's decision not to file a notice of special sentencing proceeding in that case (State of Washington v. Louis Chen, No. 11-1-07404-4 SEA). This court finds that the request for this discovery is beyond the scope of CrR 4.7 and is unwarranted at this juncture.

SIGNED this 15<sup>th</sup> day of March, 2012.



The Honorable JEFFREY M. RAMSDELL

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

FILED  
2012 MAR 20 AM 9:40  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE, and  
MICHELE KRISTEN ANDERSON, and each  
of them,

Defendants.

No. 07-C-08716-4 SEA  
07-C-08717-2 SEA

STATE'S OBJECTION AND  
RESPONSE TO ORDER  
COMPELLING DISCOVERY

I. STATE'S OBJECTION TO ORDER COMPELLING DISCOVERY

The State hereby notes its objection to the Court's Order Compelling Discovery,  
dated March 15, 2012.

II. STATE'S OBJECTION TO ORDER COMPELLING DISCOVERY

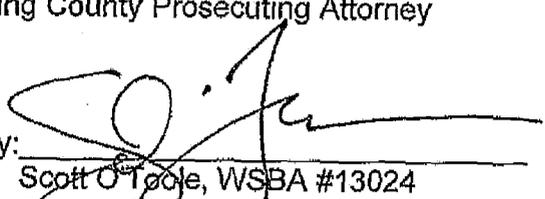
The State is fully aware of and is complying with its discovery obligations under  
CrR 4.7, and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).  
Further, the State, after noting its objection, hereby complies with the Court's Order  
Compelling Discovery, dated March 15, 2012: No investigator or mental health  
professional was retained for purposes of the consideration of the decision to file the

1 notice of special sentencing proceeding. The King County Sheriff's Office conducted  
2 the criminal investigation, which has been provided in discovery.

3 Respectfully submitted this 20 day of March, 2012,

4 DANIEL T. SATTERBERG  
5 King County Prosecuting Attorney

6  
7 By:



8 Scott O'Toole, WSBA #13024  
9 Andrea R. Vitale, WSBA#25535  
10 Senior Deputy Prosecuting Attorneys  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

# **APPENDIX D**

**TO DEFENDANT/RESPONDENT MCENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**



**DO NOT USE THIS FORM FOR FAMILY LAW OR EX PARTE MOTIONS.**

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE

**Scott O'Toole and Andrea Vitalich  
King County Prosecuting Attorney's Office  
King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
206.296.9000**

**Colleen O'Connor and David Sorenson  
SCRAP  
1401 E. Jefferson Street, Suite 200  
Seattle, WA 98122  
Phone: (206) 322-8400**

**IMPORTANT NOTICE REGARDING CASES**

Party requesting hearing must file motion & affidavits separately along with this notice. List the names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than six court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

**IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 07-C-08716-4 SEA</b>
	)	
<b>Plaintiff,</b>	)	<b>MOTION FOR BILL OF</b>
	)	<b>PARTICULARS REGARDING</b>
<b>v.</b>	)	<b>ALLEGED INSUFFICIENCY OF</b>
	)	<b>MITIGATING CIRCUMSTANCES</b>
<b>JOSEPH T. McENROE,</b>	)	
	)	
<b>Defendant</b>	)	

**MOTION**

Pursuant to CrR 2.1(C), Defendant Joseph T. McEnroe moves the Court to order the Prosecuting Attorney to provide a bill of particulars as to what facts support the State's "charge" made in the "notice of intention to hold special sentencing proceeding" that there are not sufficient mitigating factors to merit leniency.

**RELIEF SOUGHT**

Mr. McEnroe requests the Court to order the State to provide to him a bill of particulars specifying the facts and evidence the State relied on in alleging "there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." At a minimum, the bill of particulars should answer the question: "What facts refute or show insubstantial the

**MOTION FOR BILL OF PARTICULARS  
REGARDING ALLEGED INSUFFICIENCY OF  
MITIGATING CIRCUMSTANCES – Page 1 of 5**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 mitigating information Mr. McEnroe has submitted to the Prosecuting Attorney?" In particular,  
2 Mr. McEnroe requests the State be required to identify with particularity what facts, separate  
3 from the charged murders, support the "element" of Mr. McEnroe being a "worst of the worst"  
4 individual deserving of the death penalty.

5  
6 **SEALING / PROTECTIVE ORDER / CONFIDENTIALITY**

7 Until and unless the Court orders otherwise, Mr. McEnroe moves the Court to order the  
8 State to provide the bill of particulars directly to counsel for Mr. McEnroe without open filing or  
9 publication to the public or co-defendant.

10 **ARGUMENT**

11  
12 Mr. McEnroe cannot prepare his defense for a possible sentencing phase of trial because  
13 the State has failed to identify the factual basis of its "charge" that there are not sufficient  
14 mitigating circumstances to merit leniency.

15 In its Order dated March 15, 2012, this Court held "the prosecutor's exercise of discretion  
16 in filing the notice of special sentencing proceeding is the equivalent of a charging decision."<sup>1</sup> A  
17 copy of this Court's Order dated March 15, 2012 (hereafter, "Order of March 15"), is attached  
18 hereto as "Appendix A." In so ordering, this Court relied on language from State v. Campbell,  
19 103 Wn.2d 1, (1984). Campbell held that the additional element the State must prove to justify a  
20 capital prosecution and be constitutional is the "absence of mitigating circumstances."<sup>2</sup> Since the  
21  
22

23  
24 <sup>1</sup> As previously argued, Mr. McEnroe does not agree that the death notice filing decision under RCW 10.95.040 is  
equivalent of a routine charging decision.

25 <sup>2</sup> The Campbell court stated:

26 We dispose of defendant's three arguments under the following analysis: First, equal protection of  
27 the laws is denied when a prosecutor is permitted to seek varying degrees of punishment when

28 **MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 2 of 5**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 State had not provided Mr. McEnroe any details regarding the facts that they allege in support of  
2 this additional element, Mr. McEnroe is entitled to a bill of particulars. “The function of a bill of  
3 particulars is to allow the defense to prepare for trial by providing it with sufficient details of the  
4 charge and eliminating surprise.” State v. Gatlin, 158 Wn.App. 126 (2010).

5  
6 Even in “routine” charging documents the State must support the charges with a factual  
7 foundation specific to the allegations sufficient to allow a defendant to prepare his defense. State  
8 v. Turner, 2012 WL 1512107 (5-1-12). Ordinarily, a certificate of probable cause identifies what  
9 facts the State intends to prove to establish the elements of crime[s] charged in the criminal  
10 information. The State has not filed a certificate of probable cause in support of its notice of  
11 intent to seek the death penalty in Mr. McEnroe’s case, nor has it otherwise disclosed what facts  
12 establish the “element” of an absence of mitigating circumstances.

13  
14 Based on its categorization of the death penalty notice as a “charging decision,” in its  
15 Order of March 15, this Court directed the prosecution to disclose to Mr. McEnroe “discovery of  
16 information considered by Mr. Satterberg in deciding to file the notice of special sentencing  
17 proceeding” including “any information gathered as a result of any mitigation investigation  
18 conducted by the State, the name of the investigator[s] involved, and the reports of any mental  
19  
20

---

21 proving identical criminal elements. State v. Zornes, 78 Wn.2d 9, 21, 475 P.2d 109 (1970).  
22 However, *no constitutional defect exists when the crimes which the prosecutor has discretion to*  
23 *charge have different elements.* State v. Wanrow, 91 Wn.2d 301, 312, 588 P.2d 1320  
24 (1978)[emphasis added]. Before the prosecutor may seek the death penalty, he must have reason to  
25 believe that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.040(1).  
26 Similarly, the jury must be convinced beyond a reasonable doubt that there are not sufficient  
27 mitigating circumstances to merit leniency. RCW 10.95.060(4). Absent a unanimous finding, life  
imprisonment is imposed. RCW 10.95.080(2). *There is no equal protection violation here,*  
*because a sentence of death requires consideration of an additional factor beyond that for a*  
*sentence for life imprisonment, namely, an absence of mitigating circumstances.* Campbell, *id.*  
(emphasis added).

28 **MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 3 of 5**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 health professionals that were considered by Mr. Satterberg.” Order of March 15.

2 On March 20, 2012, in response to the Court’s order, the State filed “State’s Objection  
3 and Response to Order Compelling Discovery” (hereafter, “State’s Response,” a copy of which  
4 is attached hereto as “Appendix B”), in which the State did not identify any information  
5 “considered by Mr. Satterberg in deciding to file the notice of special sentencing proceeding,”  
6 nor “any information gathered as a result of any mitigation investigation conducted by the State.”  
7 The State disclosed only that it had not retained an investigator or mental health professional.  
8 The State did not provide any information regarding on what basis Prosecutor Satterberg stated  
9 he had reason to believe there were not sufficient mitigating circumstances to merit leniency in  
10 Mr. McEnroe’s case.<sup>3</sup>

11  
12  
13 Through Chief Deputy Prosecutor Mark Larson, the State had earlier indicated that it  
14 would be

15 conducting its own investigation of mitigating factors ... likely to include an  
16 analysis of potential issues and the retention of a qualified expert. We will also  
17 examine social history and facts surrounding the alleged offenses...

18 Letter from Mark Larson dated January 17, 2008 (hereafter, “Larson Letter,” a copy of which is  
19 attached hereto as “Appendix C”). However, despite his repeated requests, Mr. McEnroe has  
20 never received any discovery outside standard homicide investigation materials. The State has  
21 produced no discovery of “its own investigation of mitigating factors.”

22  
23 Mr. McEnroe has provided the State with a summary of his mitigating evidence and  
24 supplemented those materials. The State is fully aware of the nature of Mr. McEnroe’s mitigating  
25

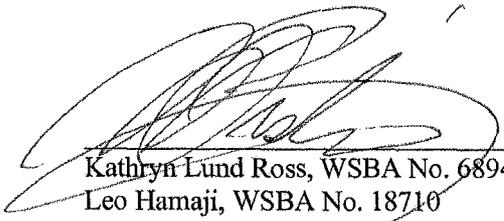
26  
27 <sup>3</sup> In the context of RCW 10.95 “leniency” means a sentence of life in prison with no possibility of ever being released.

1 circumstances. The State necessarily knows what evidence it believes will prove Mr. McEnroe's  
2 mitigating circumstances are not sufficient to merit leniency or else there is no factual support  
3 for the "element" that consists of "an absence of mitigating circumstances" in the State's notice  
4 of special sentencing proceeding.

5  
6 **CONCLUSION**

7 The Court should order the State to provide Mr. McEnroe with a bill of particulars  
8 specifying all facts it relies on to prove the "element" of "an absence of mitigating  
9 circumstances" defining Mr. McEnroe as a "worst of the worst" murderer.

10  
11  
12 Respectfully submitted:

13  
14  
15   
16 Kathryn Lund Ross, WSBA No. 6894  
17 Leo Hamaji, WSBA No. 18710  
18 William Prestia WSBA No. 29912  
19 Attorneys for Joseph McEnroe  
20  
21  
22  
23  
24  
25  
26

27 **MOTION FOR BILL OF PARTICULARS**  
28 **REGARDING ALLEGED INSUFFICIENCY OF**  
29 **MITIGATING CIRCUMSTANCES – Page 5 of 5**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

# **APPENDIX A**

IN THE SUPERIOR COURT of the STATE OF WASHINGTON  
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and

Michele K. Anderson,

Defendants.

Cause No. 07-1-08716-4 SEA

and

Cause No. 07-1-08717-2 SEA

**Order to Compel Discovery**

Defendant Joseph T. McEnroe has requested that this court order the King County Prosecuting Attorney to disclose various information and materials related to the prosecutor's decision to file the notice of intent to seek the death penalty in his case. He also requests similar discovery of information and materials related to the decision not to file a notice of intent in the case of State v. Louis Chen, No. 11-7-07404-4 SEA.

Defendant McEnroe maintains that the information he requests will "reveal a disparity in the consideration given to the mitigating factors by King County Prosecutor Dan Satterberg" in the two cases. Specifically, McEnroe alleges that Mr. Satterberg employed a special outside

investigator to uncover mitigating evidence for Mr. Chen and that "no such effort was made for Mr. McEnroe."

At the conclusion of oral argument on Mr. McEnroe's motion, co-defendant Anderson orally announced her intent to join in his motion. This court directed Ms. Anderson's attorney to file a formal motion designating with particularity what materials she wishes to obtain. Ms. Anderson's counsel has done so and the State has responded in writing.

This court has considered Mr. McEnroe's Motion, the State's Response, and Mr. McEnroe's Reply, as well as Ms. Anderson's belated Motion and the State's Response. The court also heard oral argument on March 1, 2012. For the reasons set forth herein, the court grants the defendants' motions in part.

Pursuant to RCW 10.95.040, the decision to file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed rests within the discretion of the elected prosecutor. When the State charges a person with aggravated first degree murder as defined by RCW 10.95.020, then the statute directs that "the prosecuting attorney shall file written notice of a special proceeding ... when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

The decision made by the prosecutor is deemed to be executive rather than adjudicative in nature. State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). Although the prosecutor's decision may ultimately result in the imposition of different punishments, the Supreme Court of Washington has held that this exercise of discretion does not violate equal protection because the ultimate imposition of "a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment – namely, an absence of mitigating circumstances." State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). In other words, the decision to file the special sentencing notice does not result in disparate treatment between similarly situated individuals because the prosecutor has to prove the extra "factor" of an absence of sufficient mitigating circumstances in order to secure a death sentence.

Analogizing the exercise of prosecutorial discretion in the death penalty context to a more routine charging decision, the Campbell court quoted State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), for the proposition that “[t]he prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury.” Campbell, 103 Wn.2d at 26 (quoting State v. Dictado, 102 Wn.2d at 298). Stated in the converse, the court in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), opined that “the prosecutor’s decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty.” State v. Rupe, 101 Wn.2d at 700.

The defense motions currently before this court seek only to obtain discovery related to the prosecutor’s exercise of discretion to file the notice of special sentencing proceeding. Prosecutor Satterberg concluded that there was reason to believe that there were “not sufficient mitigating circumstances to merit leniency” for either Mr. McEnroe or Ms. Anderson. As illustrated by the aforementioned case law, the prosecutor’s exercise of discretion in filing the notice of special sentencing proceeding is the equivalent of a charging decision. Accordingly, this court concludes that Defendants McEnroe and Anderson are each presently entitled to discovery of the information considered by Mr. Satterberg in deciding to file the notice of special sentencing proceeding as to them.

The discovery that must be disclosed includes any information gathered as a result of any mitigation investigation conducted by the State, the name of the investigator(s) involved, and the reports of any mental health professionals that were considered by Mr. Satterberg.

The court specifically declines to order the disclosure of: (1) any internal documents generated by the prosecutor’s office during the decision making process; (2) any internal filing standards; (3) any correspondence with the Anderson family, relatives, or friends; (4) a list of memorial services and whether any employees of the prosecutor’s office were in attendance; and (5) whether any photographs or personal items of the decedents are kept in the offices of

the prosecuting attorney, a trial deputy's work space or a deputy's home. The court concludes that these latter requests are not relevant to the question at issue and not discoverable under CrR 4.7.

Mr. McEnroe also requests discovery related to the prosecution of Mr. Louis Chen and the King County Prosecutor's decision not to file a notice of special sentencing proceeding in that case (State of Washington v. Louis Chen, No. 11-1-07404-4 SEA). This court finds that the request for this discovery is beyond the scope of CrR 4.7 and is unwarranted at this juncture.

SIGNED this 15<sup>th</sup> day of March, 2012.

  
The Honorable JEFFREY M. RAMSDELL

# **APPENDIX B**

FILED  
2012 MAR 20 AM 9:40  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE, and  
MICHELE KRISTEN ANDERSON, and each  
of them,

Defendants.

No. 07-C-08716-4 SEA  
07-C-08717-2 SEA

STATE'S OBJECTION AND  
RESPONSE TO ORDER  
COMPELLING DISCOVERY

I. STATE'S OBJECTION TO ORDER COMPELLING DISCOVERY

The State hereby notes its objection to the Court's Order Compelling Discovery, dated March 15, 2012.

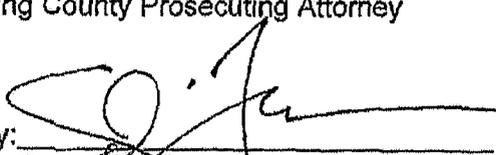
II: STATE'S OBJECTION TO ORDER COMPELLING DISCOVERY

The State is fully aware of and is complying with its discovery obligations under CrR 4.7, and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Further, the State, after noting its objection, hereby complies with the Court's Order Compelling Discovery, dated March 15, 2012: No investigator or mental health professional was retained for purposes of the consideration of the decision to file the

1 notice of special sentencing proceeding. The King County Sheriff's Office conducted  
2 the criminal investigation, which has been provided in discovery.

3 Respectfully submitted this 20 day of March, 2012,

4 DANIEL T. SATTERBERG  
5 King County Prosecuting Attorney

6  
7 By: 

8 Scott O'Toole, WSBA #13024  
9 Andrea R. Vitale, WSBA#25535  
10 Senior Deputy Prosecuting Attorneys  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

# **APPENDIX C**

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



King County

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

January 17, 2008

Wes Richards  
Katie Ross  
The Defender Association  
810 3<sup>rd</sup> Ave. #800  
Seattle, WA 98104

Re: State v. Joseph McEnroe, KCSC Cause # 07-C-08716-4 SEA

Dear Wes and Katie,

I am writing to outline our expectations concerning the mitigation process in the case of State v. McEnroe, 07-C-08716-4 SEA. As you know, RCW 10.95.040 sets out a 30-day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame allows for the consideration of mitigating circumstances to merit leniency.

In this case, the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issues and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses. We anticipate that this process will be completed and a decision to file a notice made no later than May 2, 2008.

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than April 10, 2008. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of April 14 - 18, 2008. The final scheduling for that meeting can be arranged when the mitigation materials are received.

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

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

Sincerely,

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney

Mark R. Larson  
Chief Deputy, Criminal Division

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

HON. JEFFREY RAMSDELL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 07-C-08716-4 SEA
Plaintiff,	)	07-C-08717-2 SEA
	)	
vs.	)	
	)	STATE'S MEMORANDUM IN
JOSEPH THOMAS McENROE, and	)	OPPOSITION TO DEFENDANT
MICHELE KRISTEN ANDERSON, and each	)	McENROE'S MOTION FOR BILL OF
of them,	)	PARTICULARS
	)	
Defendants.	)	

I. INTRODUCTION

The defendants, Joseph McEnroe and Michele Anderson, are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007, murder of Anderson's parents, brother, sister-in-law, niece and nephew. The Information that was filed on December 28, 2007, identified two aggravating factors. First, regarding all six victims, the Information alleged that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act." RCW 10.95.020 (10). In addition, regarding Erica Anderson, who was shot multiple times, and Erica's small children, Olivia and Nathan Anderson, each of whom was shot in the head, the Information alleged that each defendant "committed the murder to conceal the

1 commission of a crime or to protect or conceal the identity of any person committing a  
2 crime." RCW 10.95.020 (9).

3 Now, in May 2012, more than four-and-one-half years after the murders occurred  
4 and the Information was filed, McEnroe has filed a Motion for Bill of Particulars  
5 Regarding Alleged Insufficiency of Mitigating Circumstances. He claims that it took him  
6 four and one-half years to realize that he cannot adequately prepare his defense without  
7 a "bill of particulars as to what facts support the State's 'charge' made in the 'notice of  
8 intention to hold special sentencing proceeding' that there are not sufficient mitigating  
9 circumstances to merit leniency."<sup>1</sup> He makes this claim despite the express language,  
10 quoted above, in the Information filed on December 28, 2007, and in the face of the  
11 detailed Certification for Determination of Probable Cause that accompanied the  
12 Information, as well as more than 20,000 pages and items produced in discovery, and  
13 the more than 110 defense witness interviews that have occurred to date.

14 McEnroe's attempt to use the vehicle of a bill of particulars to gain discovery into  
15 the elected prosecutor's thought process and deliberation underlying the decision to file  
16 the notice of special sentencing proceeding should be denied for a host of reasons.  
17 First, as a threshold issue, McEnroe's predicate for justifying a bill of particulars – that  
18 "the absence of mitigating factors is an element" – is false. Washington law is clear that  
19 "the absence of mitigating factors" is not an element. Second, and fundamentally,  
20 McEnroe has failed to show why a bill of particulars is necessary to give him notice of  
21 the charges against him and essential to the preparation of his defense. Most  
22 important, McEnroe is attempting to use a bill of particulars to improperly discover the

23 \_\_\_\_\_  
<sup>1</sup> McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances,  
5/11/12, at 1.

1 State's theory of the case and reasoning as to facts. Indeed, McEnroe's attempt to use  
2 a bill of particulars is particularly inappropriate when it is to discover the prosecutor's  
3 reasoning and deliberation underlying the decision to file the notice of special  
4 sentencing proceeding.

## 5 II. BACKGROUND

6 On February 6, 2012, McEnroe filed a motion to compel the King County  
7 Prosecutor's Office to provide "discovery" that would allegedly reveal the "process" by  
8 which King County Prosecutor Daniel T. Satterberg determines whether to allow a jury  
9 to consider imposing the death penalty in an aggravated murder case. Moreover,  
10 McEnroe not only demanded "discovery" related to the decision to seek the death  
11 penalty in his own case, but he also demanded "discovery" related to the decision not to  
12 seek the death penalty in State v. Chen, King County Case No. 11-1-07404-4 SEA.

13 On March 15, 2012, this Court granted McEnroe's motion in part. After first  
14 acknowledging that the decision to file a notice of special sentencing proceeding rests  
15 within the discretion of the elected prosecutor, pursuant to RCW 10.95.040,<sup>2</sup> the Court  
16 noted that "[t]he decision made by the prosecutor is deemed to be executive rather than  
17 adjudicative in nature."<sup>3</sup> However, the Court then reasoned, by way of analogy, that the  
18 filing of a notice of special sentencing proceeding "is equivalent to a charging decision"  
19 and concluded that the defendants "are presently entitled to discovery of the information  
20 considered by Mr. Satterberg in deciding to file the notice of special sentencing  
21 proceeding as to them."<sup>4</sup> The Court limited that discovery to "any information gathered  
22 as a result of any mitigation investigation conducted by the State, the name of the

23  

---

<sup>2</sup> Order to Compel Discovery, 3/15/12, at 2.

<sup>3</sup> Id.

1 investigator(s) involved, and the reports of any mental health professionals that were  
2 considered by Mr. Satterberg."<sup>5</sup> The Court pointedly denied McEnroe's request for  
3 discovery relating to the elected prosecutor's reasoning or deliberative process in  
4 deciding whether to file the notice of special sentencing proceeding:

5 The Court specifically declines to order disclosure of: (1) any internal documents  
6 generated by the prosecutor's office during the decision making process; (2) any  
7 internal filing standards; (3) any correspondence with the Anderson family,  
8 relatives or friends; (4) a list of memorial services and whether any employees of  
9 the prosecutor's office were in attendance; and (5) whether any photographs or  
10 personal items of the decedents are kept in the offices of the prosecuting  
11 attorney, a trial deputy's work space or a deputy's home.<sup>6</sup>

12 On March 20, 2012, the State filed its Objection and Response to Order  
13 Compelling Discovery. The State responded as follows: "No investigator or mental  
14 health professional was retained for purposes of the consideration of the decision to file  
15 the notice of special sentencing proceeding. The King County Sheriff's Office  
16 conducted the criminal investigation, which has been provided in discovery."<sup>7</sup>

17 Apparently emboldened by the Court's reasoning and the Order Compelling  
18 Discovery, on May 11, 2012, McEnroe filed the present motion, claiming he requires a  
19 "bill of particulars as to what facts support the State's 'charge' made in the 'notice of  
20 intention to hold special sentencing proceeding' that there are not sufficient mitigating  
21 circumstances to merit leniency."<sup>8</sup> Incredibly, he makes this claim with full knowledge of  
22 the following language contained in the Information provided to him more than four  
23 years ago: "there was more than one victim and the murders were part of a common

---

22 <sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> State's Objection and Response to Order Compelling Discovery, 3/20/12.

<sup>8</sup> McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances, 5/11/12, at 1.

1 scheme or plan or the result of a single act," and each defendant "committed the murder  
2 to conceal the commission of a crime or to protect or conceal the identity of any person  
3 committing a crime."<sup>9</sup> McEnroe claims that these allegations are inadequate to provide  
4 notice as to why the elected prosecutor determined there are not sufficient mitigating  
5 circumstances to merit leniency in this case.

6 McEnroe's claim that he is unaware of "what facts refute or show insubstantial  
7 the mitigating information [he] submitted to the Prosecuting Attorney"<sup>10</sup> is not a credible  
8 request for notice of the charges against him, nor is it intended to assist him in  
9 preparing his defense. Rather, McEnroe seeks not only what the elected prosecutor  
10 considered in making the decision whether to file the notice of special sentencing  
11 proceeding (a question that was answered by the State on March 20), he now demands  
12 the why of that decision – discovery of the thought process and deliberation undertaken  
13 by the prosecutor in making that decision. Although couched as a request for discovery  
14 relating to a charging decision, McEnroe's motion for a bill of particulars is actually a  
15 demand for discovery into the factual basis for not doing something -- i.e., for not  
16 accepting the defense mitigation as sufficient to merit leniency. The law is clear:  
17 McEnroe may not have such discovery.

18 This Court should deny the defendant's motion. The purpose of a bill of  
19 particulars is to provide notice to the defendant of the allegations in the charging  
20 documents; it is not to limit the State's evidence or proof, or to require that the State  
21 give a preview of its theory of the case. Consistent with Washington law, notice of the  
22

23 <sup>9</sup> It bears noting, that McEnroe has moved for a bill of particulars not within 10 days of arraignment, as contemplated in CrR 2.1, but four-and-one-half years after the murders occurred and the Information was filed.

<sup>10</sup> Id. at 1-2.

1 charge and evidence that the State will rely upon in proving its case has been fully  
2 provided in the Information, the Amended Information, in the detailed Certification of  
3 Probable Cause, in voluminous discovery, and in witness statements and interviews to  
4 date. The defendant has failed to demonstrate why a bill of particulars is required. As a  
5 result, his motion should be denied.

### 6 III. ARGUMENT

7 A. McENROE'S PREDICATE FOR JUSTIFYING A BILL OF PARTICULARS –  
8 THAT "THE ABSENCE OF MITIGATING FACTORS IS AN ELEMENT" – IS  
9 FALSE. WASHINGTON LAW IS CLEAR THAT THAT "THE ABSENCE OF  
10 MITIGATING FACTORS" IS NOT AN ELEMENT OF THE CHARGES  
11 AGAINST HIM.

12 As a threshold matter, McEnroe bases his demand for a bill of particulars on a  
13 claim that the "absence of mitigating factors" is an "additional element the State must  
14 prove to justify a capital prosecution."<sup>11</sup> This, in turn, is based upon his reading of this  
15 Court's May 11 order, which he argues "relied on State v. Campbell, 103 Wn.1 (1984).  
16 Campbell held that the additional element the State must prove to justify a capital  
17 prosecution is the 'absence of mitigating circumstances.'<sup>12</sup> Unfortunately for McEnroe,  
18 Campbell contains no such holding; in fact, Washington law specifically states the  
19 opposite.

20 In State v. Campbell, 103 Wn.2d 1, 691 P.2d 929, 942 (1984), the defendant  
21 claimed on appeal that the Washington death penalty statute was unconstitutional  
22 because (i) it violated equal protection by vesting the prosecutor with unfettered  
23 discretion to choose different punishments for similar acts, (ii) it usurped the judicial

---

<sup>11</sup> Id. at 2.

<sup>12</sup> Id. at 2 (emphasis added). McEnroe repeats this argument elsewhere in his memo: "Since the State has not provided Mr. McEnroe with any details regarding the facts that they allege in support of this additional element, Mr. McEnroe is entitled to a bill of particulars." Id. at 3 (emphasis added).

1 sentencing function and was an unlawful delegation of legislative authority in violation of  
2 the separation of powers doctrine, and (iii) it was void for vagueness under the due  
3 process clause because it invites arbitrary ad hoc prosecutorial discretion to request the  
4 death penalty. Campbell, 103 Wn.2d at 24. The Washington Supreme Court rejected  
5 those arguments and held, with respect to the first, that "[t]here is no equal protection  
6 violation here, because a sentence of death requires consideration of an additional  
7 factor beyond that for a sentence for life imprisonment – namely, an absence of  
8 mitigating circumstances." Id. at 25 (emphasis added). That language is quoted by  
9 McEnroe in his own motion. Nowhere did the Supreme Court hold that the "absence of  
10 mitigating circumstances" was an "additional element the State must prove to justify a  
11 capital prosecution." It is simply a factor, not an element.

12 The distinction between a "factor" and an "element" is not mere semantics. In  
13 State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007), the Washington Supreme Court  
14 addressed this issue and held that proof of "the absence of mitigating circumstances is  
15 not an essential element of the crime of aggravated first degree murder: The statutory  
16 death notice here is not an element of the crime of aggravated murder." Yates, 161 Wn.  
17 2d at 759 (emphasis added). Thus, McEnroe's entire argument that he is entitled to a  
18 bill of particulars regarding the "element" of the "absence of mitigating circumstances"  
19 crumbles.<sup>13</sup>

20  
21 <sup>13</sup> Similarly, McEnroe's claim of right and remedy based on his assertions that "The State has not filed a  
22 certificate of probable cause in support of its notice of intent to seek the death penalty," id. at 3, is  
23 baseless. No separate certification for determination of probable cause is required for the notice of  
special sentencing proceeding. "The statutory death notice . . . simply informs the accused of the penalty  
that may be imposed upon conviction of the crime. While we require formal notice to the accused by  
information of the criminal charges to satisfy the Sixth Amendment and art. I § 22, we do not extend such  
constitutional notice to the penalty exacted for conviction of the crime. [Citation omitted.] The purpose of  
the charging document – to enable the defendant to prepare a defense – is distinct from the statutory  
notice requirements regarding the State's decision to seek the death penalty." Yates, 161 Wn. at 759.

1 B. ABSENT A SHOWING OF INADEQUATE NOTICE AND WHY A BILL OF  
2 PARTICULARS IS "ESSENTIAL TO THE DEFENSE," McENROE'S MOTION  
FOR A BILL OF PARTICULARS SHOULD BE DENIED.

3 Even assuming for the sake of argument that the "absence of mitigating  
4 circumstances" is an allegation that the State is required to justify factually (which it is  
5 not), McEnroe still is not entitled to a bill of particulars.

6 Criminal Rule 2.1 provides, in pertinent part:

7 Bill of Particulars. The court may direct the filing of a bill of particulars. A  
8 motion for a bill of particulars may be made before arraignment or within  
ten days after arraignment or at such later time as the court may permit.

9 CrR 2.1(c).

10 There is no dispute that a defendant has a constitutional right to be informed of  
11 the nature and cause of the accusation against him in order to enable the defense to  
12 prepare its defense and to avoid a subsequent prosecution for the same crime.

13 Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L. Ed. 2d 590 (1974); State v.  
14 Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978) (citing Seattle v. Proctor, 183 Wash.  
15 299, 48 P.2d 241 (1935)). "[T]he purpose of the bill of particulars is to give the  
16 defendant sufficient notice of the charge so that he can competently defend against it."  
17 State v. Peerson, 62 Wn.App. 755, 768, 816 P.2d 43 (1991) (citing State v. Devine, 84  
18 Wn.2d 467, 471, 527 P.2d 72 (1974)).

19 A bill of particulars thus is furnished only when necessary to inform the defendant  
20 of the nature of the charges against him, and to avoid unfair surprise at trial.

21 Compelling a bill of particulars is a matter for the discretion of the trial court and is  
22 appropriate only where there is a demonstrated need. State v. Mesaros, 62 Wn.2d 579,  
23 585, 384 P.2d 372 (1963); State ex. rel Clark v Hogan, 49 Wn.2d 457, 303 P.2d 290  
(1956); Devine, 84 Wn.2d at 471 (bill of particulars unnecessary where there is no

1 danger of unfair surprise in counsel's ability to prepare a defense). Denial of a request  
2 for a bill of particulars is discretionary with the trial court and will not be disturbed absent  
3 an abuse of that discretion. State v. Dictado, 102 Wn.2d 277, 286, 687 P.2d 172  
4 (1994).

5 The right to adequate notice of the charges against a defendant invariably is  
6 satisfied by a charging document that charges a crime in the language of the statute,  
7 where the crime is defined with certainty within the statute. State v. Merrill, 23 Wn.App.  
8 577, 580, 597 P.2d 446, review denied, 92 Wn.2d 1036 (1979); Grant, 89 Wn.2d at 686.

9 "It is sufficient to charge in the language of a statute if the statute defines the offense  
10 with reasonable certainty." State v. Noltie, 116 Wn.2d 831, 840, 809 P.2d 190 (1991).

11 When the Information utilizes the language of the statute, the charging language  
12 is deemed sufficient to notify a criminal defendant of the charges. State v. Bates, 52  
13 Wn.2d 207, 324 P.2d 810 (1958). The State is not required to set forth the evidence in  
14 detail in the charging documents. Id. at 211.

15 It is sufficient, in charging a crime, to follow the language of the statute,  
16 where such crime is there defined and the language used is adequate to  
17 apprise the accused with reasonable certainty of the nature of the  
18 accusation. . . . If the information charges a crime, . . . an information will  
be considered sufficient when the facts constituting the crime are so  
stated that a man of common understanding can determine therefrom the  
offense with which he is charged.

19 Id. at 210-211 (holding that an Information that utilized the words of the statute  
20 sufficiently apprised the defendant of the nature of the charge against him without  
21 specifying the underlying factual basis of the defendant's actions).

22 State v. Bryant, 65 Wn.App. 428, 828 P.2d 1121 (1992), also addressed the  
23 sufficiency of the Information to adequately advise an accused of the nature of the crime

1 charged. In Bryant, the defendant was charged with Second Degree Murder (Felony-  
2 Murder) in the death of his wife. Specifically, that the deceased was killed in the  
3 commission of Assault in the First Degree at the hands of the defendant. Id. at 437.

4 The defendant claimed that the Information was defective for failing to specify the prong  
5 of the statute on which the underlying charge of Assault in the First Degree was based.

6 Id. at 437. In rejecting the defendant's claim, the Court of Appeals, Division I, noted that  
7 "[a]n information sufficiently charges a crime if it apprises accused persons of the  
8 accusations against them with reasonable certainty." Id. at 437-38 (citing State v.  
9 Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)).

10 It is difficult to conceive of a manner in which Bryant could have misunderstood  
11 that the information charged him with assaulting his wife in a manner that caused  
12 her death. That is precisely what it says. Nor was Bryant prejudiced as a result  
13 of any purported inadequacy in the charging document. . . . There is no  
14 reasonable basis for concluding that Bryant was not adequately apprised of the  
15 charges against which he would have to defend.

16 Id. at 439-40.

17 In the present case, it is difficult to conceive of a manner in which McEnroe can  
18 possibly misunderstand the facts that the elected prosecutor, in the exercise of his  
19 discretion, considered in "support the State's 'charge' made in the 'notice of intention to  
20 hold special sentencing proceeding' that there are not sufficient mitigating  
21 circumstances to merit leniency."<sup>14</sup> The Information provided to him more than four  
22 years ago states as follows: "there was more than one victim and the murders were part  
23 of a common scheme or plan or the result of a single act," and each defendant  
"committed the murder to conceal the commission of a crime or to protect or conceal the  
identity of any person committing a crime." "That is precisely what it says. . . . There is

1 no reasonable basis for concluding that [the defendant] was not adequately apprised of'  
2 the basis for filing the notice of special sentencing proceeding. Id. at 439-40.<sup>15</sup>

3 If the charging document states each element, but is vague as to some other  
4 matter significant to the defense, a bill of particulars is capable of amplifying or clarifying  
5 particular matters that are essential to the defense. State v. Holt, 104 Wn.2d 315, 320,  
6 704 P.2d 1189 (1985). In determining whether to order a bill of particulars in a specific  
7 case, the trial court should consider whether the defense has been advised adequately  
8 of the charges through the charging document and all other disclosures made by the  
9 government since full discovery obviates the need for a bill of particulars. United States  
10 v. Long, 706 F.2d 1044 (9th Cir. 1983); United States v. Giese, 597 F.2d 1170 (9th Cir.),  
11 cert. denied, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405 (1979).

12 Washington law is in accord. In State v. Paschall, 197 Wash. 582, 85 P.2d 1046  
13 (1939), the court held that it was not prejudicial error to deny a motion for a bill of  
14 particulars when the prosecutor had disclosed to the defendant's attorney practically all  
15 of the facts concerning which evidence the government intended to use at trial. See  
16 also State v. Merrill, 23 Wn.App. at 580 (trial court properly denied motion for bill of  
17 particulars where the defendant was made aware through discovery of all the  
18 information available to the prosecutor for proving the offense); State v. Grant, 89  
19 Wn.2d at 686-87 (trial court properly denied motion for bill of particulars stating "the  
20 officer's report is about as much as the court could compel the prosecutor to furnish [the  
21  
22

23 <sup>14</sup> McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances, 5/11/12, at 1.

<sup>15</sup> Note that CrR 2.1 in entitled "The Indictment and the Information," and provides for a bill of particulars, thus reaffirming that bills of particular are not discovery devices.

1 defendant]”).<sup>16</sup> Here, McEnroe is not entitled to a bill of particulars because the  
2 charging document includes all statutory and court-created elements of the crime, and  
3 the defense has been provided full discovery.

4 In State v. Noltie, 116 Wn.2d 831, the Washington Supreme Court considered  
5 and affirmed a trial court's denial of a bill of particulars where the defendant was  
6 charged with multiple counts of indecent liberties occurring over a period of time. He  
7 argued that he had innocent contact with the victim on several occasions and that  
8 without specificity as to the particular acts alleged -- "the 'when, where or how' of the  
9 charged crimes" -- he could not mount an effective defense. Id. at 843. The Supreme  
10 Court rejected the defendant's argument and affirmed the trial court's denial of the  
11 requested bill of particulars, stating "[b]ased on the record before us, it appears that  
12 defense counsel's interview of the child victim was an adequate way to provide the  
13 defense with the particulars of the allegations." Id. at 845.

14 The test in passing on a motion for a bill of particulars should be whether it  
15 is necessary that defendant have the particulars sought in order to  
16 prepare his defense and in order that prejudicial surprise be avoided. A  
17 defendant should be given enough information about the offense charged  
18 so that he may, by use of diligence, prepare adequately for the trial. If the  
19 needed information is in the indictment or information then no bill of  
20 particulars is required. The same result is reached if the government has  
21 provided the information called for in some other satisfactory manner.

19 <sup>16</sup> Washington law is rife with examples of the adequacy of charging language in fully apprising a  
20 defendant of the nature and cause of the accusation against him or her to enable the defense to prepare  
21 its defense. Thus, for example, the precise time that a crime has been committed need not be stated in  
22 the charging document unless the time is a material ingredient, and the information is not thereafter  
23 subject to attack for imprecision. State v. Gottfreedson, 24 Wash. 398, 64 P. 523 (1901); State v.  
Myrberg, 56 Wash. 384, 105 P. 622 (1909); State v. Oberg, 187 Wash. 429, 60 P.2d 66 (1936); State v.  
Stockmyer, 83 Wn.App. 77, 87, 920 P.2d 1201 (1996) (State may rely on a continuing course of conduct  
rather than charging a separate count for each isolated act, and therefore did not have to identify a  
specific incident in the two-hour period as the basis for assault and manslaughter charges); State v.  
Gooden, 51 Wn.App. 615, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988) (no need to specifically  
identify which acts of prostitution were being relied upon when there is a continuing course of conduct);  
State v. Love, 80 Wn.App. 357, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996) (multiple instances  
of drug possession may constitute a continuing course of conduct forming the basis for a single charge of  
possession of a controlled substance with intent to deliver).

1 Id. (quoting 1 C. Wright, Federal Practice § 129, at 436-37 (2d ed. 1982)) (emphasis  
2 added).

3 In the present case, McEnroe cannot credibly claim to be unaware of the six  
4 counts of the Information that identify the factual basis for filing the notice of special  
5 sentencing proceeding. In addition, the State has filed, and McEnroe has received, a  
6 comprehensive Certification for Determination of Probable Cause, as well as  
7 approximately 20,000 pages and items of discovery. Defense counsel also has been  
8 provided access to all physical evidence and witness interviews have been conducted.  
9 It is inconceivable that the defendant is not adequately apprised of the basis for the  
10 prosecutor's decision to file the notice of special sentencing proceeding.

11 Thus, in addition to the charging language of the Information, the State has  
12 provided the factual basis for the charges and the notice of special sentencing  
13 proceeding "in some other satisfactory manner." Noltie, 116 Wn.2d at 845. And, of  
14 course, the explicit language of the Information is direct and to the point regarding the  
15 aggravating factors: "there was more than one victim and the murders were part of a  
16 common scheme or plan or the result of a single act," and each defendant "committed  
17 the murder to conceal the commission of a crime or to protect or conceal the identity of  
18 any person committing a crime."<sup>17</sup> McEnroe has known of these aggravating factors for  
19 more than four years. The allegations in the charging documents and the discovery  
20 produced to date are more than adequate to provide notice of the basis by which the  
21

22  
23 <sup>17</sup> It bears noting, that McEnroe has moved for a bill of particulars not within 10 days of arraignment, as contemplated in CrR 2.1, but four-and-one-half years after the murders occurred and the Information was filed. Would he really have this Court believe it took him four and one-half years to realize that he cannot adequately prepare his defense without a bill of particulars?

1 elected prosecutor determined that in this case there are not sufficient mitigating  
2 circumstances to merit leniency.

3 C. McENROE IS ATTEMPTING TO MISUSE THE BILL OF PARTICULARS TO  
4 DISCOVER THE STATE'S THEORY OF THE CASE OR REASONING AS  
5 TO THE FACTS. HIS MOTION SHOULD BE DENIED.

6 Despite the clear statement of Washington law, McEnroe apparently believes  
7 that a bill of particulars is a vehicle for discovery rather than a means of ensuring the  
8 sufficiency of the charging document. Such a belief leads to the incorrect conclusion  
9 that the defense is entitled to know the prosecution's theory of the case, in writing, prior  
10 to trial, by asking the court to essentially require the prosecution to provide its closing  
11 arguments to the defense.

12 In the present case, McEnroe clearly is attempting to misuse the vehicle of a bill  
13 of particulars to discover the State's theory of the case. As discussed above, a bill of  
14 particulars is designed to allow the defense to know what facts are alleged, not what  
15 theory the State has as to the import of those facts. Contrary to his claims, McEnroe is  
16 not really seeking the disclosure of facts; rather, he is seeking the State's theory or its  
17 reasoning as to the facts. This is impermissible.

18 It is axiomatic that "[a]n accused is not entitled as of right to the grant of a motion  
19 for a bill of particulars which calls merely for conclusions of law or the legal theory of the  
20 prosecution's case." 5 A.L.R.2d 444, § 3(f) (1949) (citing to United States v. Dilliard,  
21 101 F.2d 829 (2<sup>nd</sup> Cir. 1938), cert. denied, 306 U.S. 635, 83 L.Ed. 1036, 59 S.Ct 484  
22 (1939). "An accused is not entitled as of right to . . . a bill of particulars which calls  
23 merely for conclusions of law or the legal theory of the prosecution's case. . . . A bill of  
particulars is not a discovery device." 41 Am.Jur.2d, Indictments and Informations,

1 §158 at 768-769 (1995). "A bill of particulars may not be used for discovery purposes,  
2 and may not be used to compel the government to disclose evidentiary details or  
3 explain the legal theories upon which it intends to rely at trial." 42 C.J.S., Indictments,  
4 §184 at 565 (2007). "A bill of particulars may not be used to compel the Government to  
5 disclose evidentiary details or 'to explain the legal theories upon which it intends to rely  
6 at trial.'" United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983) (quoting and  
7 citing to United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir.1980), cert. denied, 449  
8 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).<sup>18</sup> There is universal agreement that it  
9 is not the function of a bill of particulars to compel the prosecution to spread its entire  
10 case before accused, and an order requiring the prosecution to state in bill of particulars  
11 overt acts upon which indictment is based would be vacated. See, e.g., Cooper v.  
12 United States, 282 F.2d 527, 532 (9th Cir. 1960) (citing to United States v. Bryson, 16  
13 F.R.D. 431, 436 (1954)). In judging the sufficiency of a charging document, the law is  
14 clear that the prosecution need not allege its supporting evidence, theory of the case or  
15 whether or not it can prove its case. United States v. Buckley, 689 F.2d 893 (9<sup>th</sup> Cir.  
16 1982), cert. denied, 460 U.S. 1086, 103 S. Ct. 1778, 76 L. Ed. 2d 349 (1983); State v.  
17 Bates, 52 Wn.2d 207, 324 P.2d 810 (1958).

18  
19 <sup>18</sup> This view is historic and consistent. See, e.g., United States v. Dillard, 101 F.2d 829 (2nd Cir. 1938),  
20 cert. denied, 306 U.S. 635, 83 L.Ed 1036, 59 S.Ct. 484 (1939) (an accused is not entitled as of right to the  
21 grant of a motion for a bill of particulars which calls merely for conclusions of law or the legal theory of the  
22 prosecution's case); Rose v. United States 149 F.2d 755 (9<sup>th</sup> Cir. 1945); United States v. Grunenwald, 66  
23 F.Supp 223 (DC Pa 1946); People v. Flinn, 261 N.Y.S. 654 (1931). See also United States v Schillaci,  
166 F.Supp. 303 (D.C.N.Y. 1958) (request for bill seeking government's theory of the case denied);  
United States v. Stromberg (1957, DC NY) 22 F.R.D. 513 (D.C.N.Y. 1957) (request for bill seeking theory  
of government's case denied); United States v. Raff, 161 F Supp 276 (D.C. Pa. 1958) (request for bills  
seeking government's legal theories denied); United States v. Ansanj, 240 F2d 216 (7<sup>th</sup> Cir. 1957), cert.  
denied, 353 U.S. 936, 1 L.Ed.2d 759, 77 S.Ct 813 (bill of particulars properly denied where defendant  
attempted to secure legal-theory, not facts); United States v Doyle, 234 F.2d 788 (7<sup>th</sup> Cir. 1956), cert.  
denied, 352 U.S. 893, 1 L.Ed 2d 87, 77 S.Ct. 132 (proper bill of particulars does not require inclusion of  
statement of theory of law upon which government expects to proceed).

1 Washington law is in accord. A defendant is not entitled to discovery of the  
2 State's theory as to criminal culpability. See State v. Hoffman, 116 Wn.2d 51, 81, 804  
3 P.2d 577 (1991) (in prosecution for First Degree Assault and Aggravated First Degree  
4 Murder in connection with a shootout with tribal police officers on an Indian reservation,  
5 the Washington Supreme Court rejected defendant's contention that CrR 4.7 requires  
6 prosecution theories of culpability be disclosed to defendants).

7 D. McENROE'S ATTEMPT TO MISUSE THE BILL OF PARTICULARS TO  
8 DISCOVER THE PROSECUTOR'S REASONING AND DELIBERATION  
9 UNDERLYING THE DECISION TO FILE THE NOTICE OF SPECIAL  
SENTENCING PROCEEDING IS PARTICULARLY INAPPROPRIATE AND  
SHOULD BE DENIED.

10 Not only is McEnroe's attempt to discover the State's theory of the case and  
11 reasoning as to the facts contrary to Washington law, it is particularly inappropriate in  
12 attempting to discover the reasoning underlying the elected prosecutor's exercise of his  
13 discretion in filing the notice of special sentencing proceeding. The Washington  
14 Supreme Court has repeatedly reaffirmed that the prosecutor's decision to file the notice  
15 is discretionary and subjective. The process leading to that decision is not subject to  
16 discovery by the defense. In addition, any effort to do so would violate the separation of  
17 powers doctrine. And, finally, to the extent that McEnroe's motion for a bill of particulars  
18 is a not-too-cleverly disguised request for a proportionality review, Washington law is  
19 clear that such a review may not be conducted by this Court.

1           1. The reasoning and deliberation underlying the Prosecutor's subjective  
2           exercise of his discretion is not discoverable through a bill of  
3           particulars, or otherwise.

4           As discussed above, a bill of particulars is appropriate only to put the defendant  
5           on notice as to the facts that underlie a charge, so he can defend against the charge. It  
6           is not intended as a means to attack the prosecutor's exercise of discretion or judgment  
7           in bringing the charge in the first place.

8           It is well settled in Washington that the elected prosecutor's decision to file a  
9           notice of special sentencing proceeding is discretionary and subjective. In Harris By &  
10          Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1284-85 (W.D. Wash. 1994), aff'd  
11          sub nom., Harris By & Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995), for  
12          example, the defendant was convicted in Pierce County of capital murder. He claimed  
13          on appeal that his Fifth, Eighth, and Fourteenth Amendment rights were violated  
14          because the prosecutor filed the statutorily required notice of intent to seek the death  
15          penalty without making a determination that there were no mitigating circumstances to  
16          warrant leniency. The federal court that heard Harris's habeas corpus petition  
17          disagreed:

18               Generally, the prosecutor has broad discretion in making the decision to seek the  
19               death penalty. The U.S. Supreme Court has not required prosecutors to explain  
20               these decisions.

21               Our refusal to require that the prosecutor provide an explanation for his  
22               decisions in this case is completely consistent with this Court longstanding  
23               precedents that hold that a prosecutor need not explain this 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, 296-97 n. 18, 107 S.Ct. 1756, 1769 n. 18, 95  
               L.Ed.2d 262 (1986) (citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90  
               L.Ed.2d 69 (1986) and Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84  
               L.Ed.2d 547 (1985)). The Supreme Court's statement is based on its general

1 policy of protecting prosecutors from diversion of their attentions from their duty  
2 of enforcing the criminal law to explaining their charging decisions. *Id.*

3 In Washington, the decision to seek the death penalty is distinguished from  
4 determining the ultimate sentence. In the charging decision, "the prosecutor  
5 merely determines whether sufficient evidence exists to take the issue of  
6 mitigation to the jury. This type of discretion does not violate equal protection."  
7 State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984). Thus, pursuant  
8 to RCW 10.95.040(1) the filing of a notice of intent to seek the death penalty is a  
9 prosecutorial statement that he does not know of sufficient mitigating  
10 circumstances to merit leniency. At the same time, the prosecutor is determining  
11 whether he has a strong enough belief that he can convince a jury of the same.  
12 *Id.* at 297, 687 P.2d 172.

13 *Id.* at 1284 (emphasis added).

14 The reviewing federal court in Harris By & Through Ramseyer noted that under  
15 Washington law the prosecutor does not have to cite his reasons for filing the notice of  
16 special sentencing proceeding; the court also noted the criticism of that policy. *Id.* at  
17 1285. To the critics, however, the court wrote that "[t]he merit of these arguments must  
18 be addressed to the Washington State Legislature and Washington courts. The scheme  
19 does not violate the federal Constitution." *Id.*

20 The subjective nature of the elected prosecutor's decision to file the notice of  
21 special sentencing proceeding has also been long recognized by the Washington  
22 Supreme Court. As discussed above, in State v. Campbell the defendant claimed,  
23 among other things, that the Washington death penalty statute was unconstitutionally  
void for vagueness under the due process clause because it invites arbitrary ad hoc  
prosecutorial discretion to request the death penalty. Campbell, 103 Wn.2d at 24. The  
Supreme Court rejected that argument, noting that "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

1 evidence." Id. at 26-27 (quoting State v. Rupe, 101 Wn.2d at 664, 700, 683 P.2d 571  
2 (1984); emphasis added).

3 In Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835, decision  
4 clarified sub nom., In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964  
5 (1994), the defendant claimed that the the death penalty notice was invalid because it  
6 was filed the same day as the amended information charging him with aggravated first  
7 degree murder and, therefore, the timing of the notice proved that the prosecutor did not  
8 exercise discretion in seeking the death penalty, but did so automatically, upon the filing  
9 of an aggravated murder charge. The Washington Supreme Court rejected the  
10 defendant's argument: "This issue is patently frivolous. The decision to impose the  
11 death penalty requires the prosecutor to make the 'subjective determination of whether  
12 there is "reason to believe that there are not sufficient mitigating circumstances to merit  
13 leniency"." Id. at 305 (quoting In re Harris, 111 Wn.2d 691, 694, 763 P.2d 823 (1988),  
14 cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989); emphasis added).  
15 The Harris court had earlier expounded on the subjective nature of the prosecutor's  
16 deliberating process: "Although some statutory mitigating factors involve objective facts  
17 the prosecutor can readily ascertain (see, e.g., RCW 10.95.070(1) (lack of criminal  
18 history)), most are in the nature of explanations or excuses related to the crime itself.  
19 RCW 10.95.070(2) (extreme mental disturbance), (3) (consent of victim); (4) (minor  
20 participation as an accomplice), (5) (duress), and (6) (mentally impaired capacity)."  
21 Harris, 111 Wn.2d at 694.

22 The discretionary, subjective nature of the elected prosecutor's decision to file  
23 the notice of special sentencing proceeding has been upheld in other contexts as well.

1 For example, in State v. Finch, 137 Wn.2d 792, 975 P.2d 967, certiorari denied, 120  
2 S.Ct. 285, 528 U.S. 922, 145 L.Ed.2d 239 (1999), the Washington Supreme Court held  
3 that the appearance of fairness doctrine is inapplicable to the prosecutor with respect to  
4 a number of decisions inherent in a capital case: "The evils the appearance of fairness  
5 doctrine seek to prevent are not implicated in this case because a prosecutor is not a  
6 quasi-judicial decisionmaker. A prosecutor's determination to file charges, to seek the  
7 death penalty or to plea bargain are executive, not adjudicatory, in nature and therefore  
8 the doctrine does not apply." Id. at 810. (emphasis added).

9 In Matter of Jeffries, 114 Wn.2d 485, 789 P.2d 731 (1990), the defendant argued  
10 that death sentence was disproportionate to the prison terms imposed in numerous  
11 aggravated first degree murder cases in which the State did not seek the death penalty.  
12 The Washington Supreme Court rejected that argument, finding that the proportionality  
13 of a particular defendant's death sentence does not depend upon the number of cases  
14 the State seeks the death penalty. "The charging decision must be based, in each  
15 case, on the prosecutor's assessment of the State's ability to prove there are insufficient  
16 mitigating circumstances to merit leniency. . . . The purpose of proportionality review  
17 is not to second-guess evidentiary determinations or value judgments inherent in  
18 prosecutors' charging decisions or juries' verdicts in other cases. The purpose is instead  
19 to ensure that a death sentence is not "affirmed where death sentences have not  
20 generally been imposed in similar cases, nor where it has been 'wantonly and freakishly  
21 imposed'." Id. at 490 (emphasis added). See also State v. Baker, 451 S.E.2d 574, 599  
22 (N.C. 1994) (no right to a bill of particulars disclosing statutory aggravating  
23 circumstances on which the State intended to rely in seeking the death penalty).

1           2. Any order compelling discovery of the reasoning and deliberation  
2           underlying the Prosecutor's subjective exercise of his discretion would  
3           violate the doctrine of separation of powers.

4           As noted in earlier briefing by the State regarding earlier attempts by McEnroe to  
5           gain discovery of the elected prosecutor's thought process and deliberations underlying  
6           his decision to file the notice of special sentencing proceeding, the Washington  
7           Supreme Court has previously held that RCW 10.95.040(1) constitutes a proper  
8           delegation of legislative authority to the executive branch in vesting county prosecutors  
9           with the discretion to seek the death penalty in cases that meet the applicable  
10          standards. Campbell, 103 Wn.2d at 25-27. In addition, the court "has never recognized  
11          a prosecutor's discretion to file charges or to seek the death penalty as a judicial  
12          function." Finch, 137 Wn.2d at 809. Moreover, "[a]lthough the exercise of prosecutorial  
13          discretion under the sentencing structure of RCW 10.95 is not strictly analogous to the  
14          exercise of discretion involved in the charging function, the principle is similar" in that  
15          the prosecutor examines the available evidence and determines whether the issue of  
16          mitigation should go to the jury. Dictado, 102 Wn.2d at 297-98. Further, "[t]he power of  
17          the Legislature over sentencing is plenary[.]" State v. Benn, 120 Wn.2d 631, 670, 845  
18          P.2d 289 (1993). Therefore, the fact that the legislature has properly delegated the  
19          initial decision whether to seek the death penalty to the county prosecutors ipso facto  
20          means that it would violate the separation of powers doctrine for a court to re-weigh the  
21          aggravating and mitigating circumstances and second-guess a prosecutor's decision in  
22          this regard.  
23

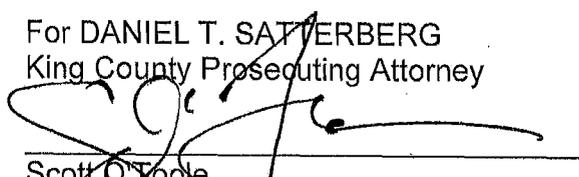
1 IV. CONCLUSION

2 For the reasons stated above, the State requests that this Court deny the  
3 defendant's motion for a bill of particulars. The defendant has predicated his request on  
4 the mistaken belief that the "absence of sufficient mitigating circumstances" is an  
5 "element" of the charges against him. It is not. In addition, he has failed to show why a  
6 bill of particulars is necessary to give him notice of the charges against him and is  
7 essential to the preparation of his defense. Most important, McEnroe is attempting to  
8 misuse the bill of particulars to improperly discover the State's theory of the case and  
9 reasoning as to facts; in particular, the prosecutor's reasoning and deliberation  
10 underlying the decision to file the notice of special sentencing proceeding.

11 The defendant's motion should be denied.

12 DATED this 25 day of May, 2012.

13  
14 For DANIEL T. SATTERBERG  
King County Prosecuting Attorney

15   
16 Scott O'Toole  
Senior Deputy Prosecuting Attorney  
17 WSBA #13024/Office WSBA #91002

1  
2  
3  
4  
5  
6  
7 **IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

8 **STATE OF WASHINGTON,** ) **No. 07-C-08716-4 SEA**  
9 **Plaintiff,** )  
10 **v.** ) **SUPPLEMENTAL**  
11 **JOSEPH T. McENROE,** ) **MEMORANDUM IN SUPPORT OF**  
12 **Defendant** ) **MOTION FOR BILL OF**  
13 ) **PARTICULARS REGARDING**  
14 ) **ALLEGED INSUFFICIENCY OF**  
15 ) **MITIGATING CIRCUMSTANCE**

16 **INTRODUCTION**

17 On Wednesday, May 30, 2012, the Court heard oral argument on Defendant Joseph  
18 McEnroe's Motion for Bill of Particulars. Mr. McEnroe is seeking:

19 [A] bill of particulars specifying the facts and evidence the State relied on in alleging  
20 "there is reason to believe that there are not sufficient mitigating circumstances to merit  
21 leniency." What facts refute or show insubstantial the mitigating information Mr.  
22 McEnroe has submitted to the Prosecuting Attorney?

23 Motion for Bill of Particulars, p. 1. This memorandum supplements Mr. McEnroe's arguments in  
24 reply to the State's written response and addresses some questions that arose during the hearing.

25 **ARGUMENT**

26 **1. REASON FOR SEEKING A BILL OF PARTICULARS**

27 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
28 **OF MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 1 of 10**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: prestia@defender.org

1 Initially, it should be clarified that Mr. McEnroe is seeking a bill of particulars because  
2 he needs to know what facts the State relied on when the State asserted, through the notice of  
3 intention to seek the death penalty, there are not sufficient mitigating factors to merit leniency.  
4 Without knowledge of the facts underlying the alleged lack of mitigating factors Mr. McEnroe  
5 will not be able to prepare his defense at a possible penalty trial, should he be convicted of  
6 aggravated murder.  
7

8 An accused has a constitutional right to be informed of the nature and cause of the  
9 accusation against him or her so as to enable the accused to prepare a defense. Where an  
10 information does not allege the nature and extent of the crime with which the defendant is  
11 accused, so as to enable the defendant to properly prepare his or her defense, a bill of  
12 particulars is appropriate and is specifically authorized by our court rules.

13 State v. Bergeron, 105 Wn.2d 1, (1985).

14 The defendant next argues that the information was defective for lack of specificity  
15 because it did not state the “when, where or how” of the charged crime. Washington  
16 courts have repeatedly distinguished informations which are constitutionally deficient  
17 and those which are merely vague. If an information states each statutory element of a  
18 crime but is vague as to some other matter significant to the defense, a bill of particulars  
19 can correct the defect. In that event, a defendant is not entitled to challenge the  
20 information on appeal if he or she has failed to timely request a bill of particulars.

21 State v. Nolte, 116 Wn.2d 831 (1991). Mr. McEnroe has received a notice of intention in the  
22 statutory language of RCW 10.95.040. The allegation is vague in that it provides no factual  
23 basis for “reason to believe there are not sufficient mitigating circumstances to merit leniency.”  
24 In order to prepare his defense against a death sentence, he needs to be apprised of facts the State  
25 relied on in “charging” that there are not sufficient mitigating factors to merit leniency.

26  
27 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
28 **OF MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 2 of 10**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 If the State cannot point to facts it relied on in support of its allegation that Mr. McEnroe  
2 has no mitigating circumstances sufficient to merit leniency, the Court has authority to dismiss  
3 the notice and avoid a costly and unnecessary penalty trial:

4 Thus, a trial court may dismiss if the State's pleadings, including any bill of particulars,  
5 are insufficient to raise a jury issue on all elements of the charge. Akin to *Gallagher* and  
6 *Maurer*, when the material facts of a prosecution are not in dispute, the case is in the  
7 posture of an isolated and determinative issue of law as to whether the facts establish a  
8 prima facie case of guilt.

9 State v. Knapstad, 107 Wn.2d 346 (1986).

10  
11 **2. INSUFFICIENCY OF MITIGATING CIRCUMSTANCES IS AN “ELEMENT”  
12 OF CAPITAL MURDER NOT MERELY A SENTENCING “FACTOR.”**

13 In Washington the crime of aggravated murder, defined in RCW 10.95.020, is punishable  
14 by life in prison without release. Upon return of a jury verdict convicting a defendant of  
15 aggravated murder no greater sentence can be imposed.

16 ...the New Jersey Supreme Court correctly recognized that it does not matter whether the  
17 required finding is characterized as one of intent or of motive, because [l]abels do not  
18 afford an acceptable answer. 159 N.J. at 20, 731 A.2d at 492. **That point applies as well  
19 to the constitutionally novel and elusive distinction between elements and sentencing  
20 factors.** *McMillan*, 477 U.S. at 86, 106 S.Ct. 2411 (noting that the sentencing factor –  
21 visible possession of a firearm – might well have been included as an element of the  
22 enumerated offenses). Despite what appears to us the clear elemental nature of the factor  
23 here, **the relevant inquiry is one not of form, but of effect – does the required finding  
24 expose the defendant to a greater punishment than that authorized by the jury's  
25 guilty verdict?**

26 Apprendi v. New Jersey, 530 U.S. 466 (2000) (emphasis added). The Supreme Court expressly  
27 applied the holding of Apprendi to capital cases in Ring v. Arizona, 536 U.S. 584 (2002):

28 “Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury

1 determination of any fact on which the legislature conditions an increase in their maximum  
2 punishment.” Id.

3 The State maintains there is no equal protection violation because imposition of death  
4 requires proof of an additional **element** (insufficient mitigating circumstances to merit  
5 leniency) that need not be proved if the crime is to be punished by life imprisonment.

6 ...  
7 [E]qual protection of the laws is denied when a prosecutor is permitted to seek varying  
8 degrees of punishment when proving identical criminal **elements** ... However “no  
9 constitutional defect exists when the crimes which the prosecutor has discretion to charge  
10 have different **elements** ... **Before the prosecutor may seek the death penalty, he must**  
11 **have “reason to believe that there are not sufficient mitigating circumstances to**  
12 **merit leniency.”** Similarly, the jury must be “convinced beyond a reasonable doubt that  
13 there are not sufficient mitigating circumstances to merit leniency.” ... There is no equal  
14 protection violation here, because a sentence of death requires consideration of an  
15 additional **factor** beyond that for a sentence of life imprisonment - **namely, an absence**  
16 **of mitigating circumstances.**

17 State v. Campbell, 103 Wn.2d 1 (1984) (emphasis added). It is clear the Court in Campbell uses  
18 the words “element” and “factor” interchangeably to explain what elevates the potential  
19 punishment for aggravated murder from life without release to death. Based on the guilt phase  
20 verdict alone, the maximum punishment available to the sentencing court is life without release.  
21 Under RCW 10.95, there is an additional required finding to make death a choice for the  
22 sentence, and that finding is an insufficiency of mitigating circumstances.

23 The United States Supreme Court was clear in Apprendi that it does not matter what the  
24 label is, if a factual finding is necessary to increase punishment for a crime, that factual finding  
25 meets the definition of an element. Proof beyond a reasonable doubt of insufficiency of  
26 mitigating circumstances is necessary under Washington law to increase the punishment for  
27 aggravated murder to death. Under Washington law, regardless of what it may be labeled,

1 insufficiency of mitigating circumstances is an element of the crime of capital murder punishable  
2 by death.

3  
4 **3. THE STATE IS WRONG IN ASSERTING THE PROSECUTOR'S DECISION TO**  
5 **SEEK THE DEATH PENALTY IS ENTIRELY DISCRETIONARY AND**  
6 **SUBJECTIVE AND OUTSIDE THE REALM OF JUDICIAL REVIEW**

7 RCW 10.95.040 mandates:

8  
9 (1) If a person is charged with aggravated first degree murder as defined by RCW  
10 10.95.020, the prosecuting attorney shall file written notice of a special sentencing  
11 proceeding to determine whether or not the death penalty should be imposed when there  
12 is reason to believe that there are not sufficient mitigating circumstances to merit  
13 leniency.

14 There is nothing subjective about when a prosecuting attorney shall file a notice. The statute  
15 does not say notice should be filed "when the prosecutor believes that there are not sufficient  
16 mitigating circumstances." The standard is objective, "there is reason to believe" there are not  
17 sufficient circumstances. RCW 10.95.040(1). To have any meaning and to constitute a standard  
18 for filing a notice of intention, the "reason to believe" must be based on facts and circumstances  
19 the prosecutor can articulate and the Court can review.

20 "Reason to believe" is not an uncommon standard in the law. For instance, claims of  
21 homicide justified by self defense require that "the slayer reasonably believed that the person  
22 slain intended to inflict death or great personal injury;" whether the slayer's belief was  
23 reasonable is measured by whether a "reasonably prudent person would use [lethal force] under  
24 the same or similar conditions as they reasonably appeared to the slayer, taking into  
25 consideration all the facts and circumstances..." WPIC 16.02. Reason must be based on facts.

26  
27 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
28 **OF MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 5 of 10**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 It is important to this point that Washington is the only jurisdiction in the nation that  
2 requires "there is reason to believe that there are not sufficient mitigating circumstances to merit  
3 leniency" before a prosecutor "shall" file a notice of intent. This language does not exist in any  
4 other statute so it is not language legislators may have modeled, perhaps without deep analysis,  
5 from already approved schemes. Rather, the drafters of RCW 10.95 deliberately placed a  
6 restriction on prosecuting attorneys in Washington that does not exist in other states' capital  
7 sentencing schemes.  
8

9 Had the drafters of RCW 10.95 intended for prosecutors to seek the death penalty  
10 whenever individual prosecutors subjectively viewed aggravated murders as especially heinous,  
11 it could have and would have simply left the language requiring "reason to believe there are not  
12 sufficient mitigating circumstances" out of RCW 10.95.040. If prosecutors need never identify  
13 facts in support of reasons they believe mitigating circumstances are insufficient, the carefully  
14 considered language of the statute is meaningless.  
15

16  
17 **4. PUBLIC POLICY CONSIDERATIONS SUPPORTED LEGISLATIVE  
18 LIMITATIONS ON SEEKING THE DEATH PENALTY IN WASHINGTON**

19 Washington's current death penalty scheme, RCW 10.95, was passed in 1981. It was  
20 passed in the wake of the prevailing death penalty schemes across the nation being declared  
21 unconstitutional because they allowed people to be sentenced to death and executed in an  
22 arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238 (1972). As Justice Stewart  
23 famously said in his concurring opinion:  
24

25 The penalty of death differs from all other forms of criminal punishment, not in degree,  
26 but in kind. It is unique in its total irrevocability. It is unique in its rejection of  
27 rehabilitation of the convict as a basic purpose of criminal justice. And it is unique,  
28 finally, in its absolute renunciation of all that is embodied in our concept of humanity.

1 ...

2 These death sentences are cruel and unusual in the same way that being struck by  
3 lightning is cruel and unusual. For, of all the people convicted of rapes and murders in  
4 1967 and 1968, ... many just as reprehensible as these, the petitioners are among a  
5 capriciously selected random handful upon whom the sentence of death has in fact been  
6 imposed.

7 Like many other states, Washington reinstated the death penalty soon after the Supreme Court  
8 found constitutional the new death penalty laws adopted by Georgia and Texas after the Furman  
9 decision, see Gregg v. Georgia, 408 U.S. 238 (1972) and Jurek v. Texas, 428 U.S. 262 (1976).  
10 However, Washington's first efforts to establish a constitutional death penalty scheme believed  
11 to comply with the requirements of Gregg and Jurek were declared unconstitutional by the  
12 Washington Supreme Court.<sup>1</sup>

13  
14  
15  
16 <sup>1</sup>The Washington Supreme Court summarized the then recent history of capital statutes in one of its earliest cases  
17 reviewing the newly enacted RCW 10.95:

18 For 50 years prior to *Furman*, this state had a death penalty statute, passed in 1919. Laws of 1919,  
19 ch. 112 (codified as RCW 9.48.030). This law authorized the jury to impose the death penalty in  
20 cases of first degree murder. No guidelines were given the jury in the exercise of this discretion.  
21 Not surprisingly, the law was declared unconstitutional by this court following *Furman v.*  
22 *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. *State v. Baker*, 81 Wash.2d 281, 501 P.2d  
23 284 (1972). Three years later the death penalty was reintroduced in RCW 9A.32.046, the  
24 codification of Initiative 316. This provided for a mandatory death penalty for certain types of first  
25 degree murder accompanied by aggravating circumstances. This was the very type of statute  
26 nullified in *Woodson v. North Carolina, supra*, and *Roberts v. Louisiana, supra*. Consequently,  
27 this court declared it unconstitutional in *State v. Green*, 91 Wash.2d 431, 588 P.2d 1370 (1979). A  
28 new statute was enacted in 1977. Laws of 1977, 1st Ex.Sess., ch. 206 (codified in RCW 9A.32 and  
29 10.94). This statute provided for the death penalty where, after having found a person guilty of  
premeditated first degree murder, the jury in a subsequent sentencing proceeding found: an  
aggravating circumstance, no mitigating factors sufficient to merit leniency, guilt with clear  
certainty, and a probability of future criminal acts of violence. This statute was found  
unconstitutional by reason of a procedural flaw (identified in *State v. Martin*, 94 Wash.2d 1, 614  
P.2d 164 (1980)) in *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981).

27 State v. Bartholomew, 98 Wn.2d 173 (1982).

28 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
29 **OF MOTION FOR BILL OF PARTICULARS**  
**REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 7 of 10**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1 With this history in mind it is easy to see why the statute finally passed in 1981 was  
2 intended to embody all the safeguards to defendants' right and heightened due process the  
3 legislature understood had been articulated by the United States and State high courts or that  
4 legislators could reasonably foresee being required. In addition, it was already understood that  
5 capital trials would be more costly than non-capital trials even though many of the requirements  
6 in effect today were not established in 1981. At a minimum, capital cases involved two phases  
7 of trial under Gregg, two kinds of defense investigation, more pre-trial motions, more careful and  
8 longer voir dire, and a longer and more thorough and expensive appellate process should death  
9 be imposed.  
10

11  
12 After RCW 10.95 was passed developments in capital jurisprudence greatly increased the  
13 time and monetary costs triggered when the state seeks the death penalty. Ake v. Oklahoma, 470  
14 U.S. 68, 84 L. Ed. 53, 105 S. Ct. 1087 (1985) required states to fund experts for defense  
15 consultation and testimony; Wiggins v. Smith, 539 U.S. 510 (2003), identified failure to  
16 conduct exhaustive investigations into potential mitigating evidence as ineffective  
17 representation; the American Bar Association published lengthy standards for both capital trial  
18 lawyers and their mitigation teams; the Washington Supreme Court instituted its SPRC 2  
19 qualified list which attorneys must be on to be appointed at any level in a capital case and  
20 required a minimum of two attorneys to be appointed<sup>2</sup> so long as the death penalty is a  
21 possibility.  
22  
23  
24  
25

26 <sup>2</sup>At the May 30 hearing, there seemed to be some disagreement by counsel for the State regarding the requirements  
27 of SPRC such as the appointment of two attorneys to the defense. The rules are clear:

1 It makes sense that the design of Washington's statute strongly favors life without  
2 possibility of release or parole (LWOP) as the sentence for worst of the worst murders,  
3 aggravated murder defined in RCW 10.95.020, and, if properly implemented, reserving the  
4 possibility of a death sentence for the few defendants who are the worst of the worst human  
5 beings who have committed premeditated murder. RCW 10.95 anticipates that only those  
6 defendants who can reasonably be said to lack legitimate ("substantial") mitigating  
7 circumstances should be subject to death penalty prosecutions. Moral and philosophical issues  
8 aside, limiting applicability of the death penalty to the worst of the worst murderers is a  
9 pragmatic conservation of public resources. Only murderers who are so lacking in positive or  
10 sympathetic character traits that they are beyond the ordinary penological goals of rehabilitation  
11 and redemption should be subject to the increase in public expense for trial and beyond.  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

---

25 SPRC 1 SCOPE OF RULES (a) Except as otherwise stated, these rules apply to all stages of  
26 proceedings in criminal cases in which the death penalty has been or may be decreed. These rules  
do not apply in any case in which imposition of the death penalty is no longer possible.

27 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**  
28 **OF MOTION FOR BILL OF PARTICULARS**  
29 **REGARDING ALLEGED INSUFFICIENCY OF**  
**MITIGATING CIRCUMSTANCES – Page 9 of 10**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**  
810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104  
TEL: 206-447-3900 EXT. 752  
FAX: 206-447-2349  
E-MAIL: [prestia@defender.org](mailto:prestia@defender.org)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

**CONCLUSION**

The Court should order the State to provide the Mr. McEnroe with a bill of particulars supplementing the notice of intent to seek the death penalty by identifying the facts the prosecuting attorney relied on in asserting that there is reason to believe there are not sufficient mitigating circumstances to merit leniency.

Respectfully submitted:



Kathryn Lund Ross, WSBA No. 6894  
Leo Hamaji, WSBA No. 18710  
William Prestia WSBA No. 29912  
Attorneys for Joseph McEnroe

# **APPENDIX E**

**TO DEFENDANT/RESPONDENT MCENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**

HAWAII  
PRESTIA  
ROSS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JOSEPH THOMAS McENROE, )  
and MICHELE KRISTEN ANDERSON, )  
and each of them, )  
Defendants. )

No. 07-C-08716-4 SEA  
07-C-08717-2 SEA

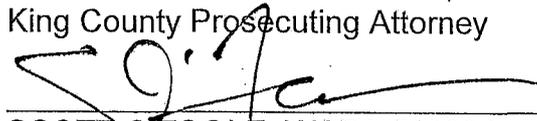
STATE'S MOTION TO STAY THE  
EFFECTIVE DATE OF COURT'S  
ORDER STRIKING NOTICE OF  
INTENT TO SEEK THE DEATH  
PENALTY

MOTION

COMES NOW the State of Washington by Daniel T. Satterberg, King County  
Prosecuting Attorney, by and through his deputy Scott O'Toole, and moves this court for  
entry of an order staying this court's Order Striking the Notice of Intent to Seek the Death  
Penalty, dated January 31, 2013. This motion is based upon the included certification and  
attached proposed form of order.

DATED this 5 day of February, 2013.

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney



SCOTT O'TOOLE, WSBA #13024  
Senior Deputy Prosecuting Attorney  
Office WSBA #91002

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

CERTIFICATION

That Scott O'Toole is a senior deputy prosecuting attorney for King County, Washington, is familiar with the records and files herein, and certifies as follows:

I am a Senior Deputy Prosecuting Attorney in the King County Prosecuting Attorney's Office, and I am the prosecutor representing the State of Washington in this case.

On January 4, 2013, jury summonses were mailed to 3,000 prospective jurors in King County. Jurors were directed to submit any request for hardship excusal no later than February 8, 2013. Jurors currently are scheduled to appear at the King County courthouse on February 22, 2013.

Review of more than 600 juror hardship requests began yesterday, February 4, 2013, in open court, the Honorable Jeffrey Ramsdell presiding. Counsel for both parties were present, as was defendant Joseph McEnroe.

Last night, at 10:26 p.m., Kathryn Ross, counsel for McEnroe, emailed King County Prosecuting Attorney Dan Satterberg and the undersigned regarding defense counsels' intentions in the wake of this court's order of January 31, 2013:

Mr. Prestia said that Mr. O'toole [sic] asked him today if Joe is going to attempt to plead guilty as soon as the order dismissing the death penalty is effective. The answer is yes, as we have consistently said for five years, the moment we are certain the death penalty is off the table, Mr. McEnroe will plead guilty to a life without release sentence.

(A copy of Ross's email of 2/4/13 is attached.)

The State is asking this Court to stay the Order Striking the Notice of Intent to Seek the Death Penalty until five days after the State's pending motion for discretionary review is decided by the Washington Supreme Court. A stay is necessary because this court's January 31 order by its terms is stayed only until February 12, 2013; i.e., next Tuesday. Entry of an order staying this court's Order Striking the Notice of Intent to Seek the Death Penalty is necessary and in the interests of justice (i) "to permit all counsel to review the content of [the court's] ruling and reflect on their next course of action," as stated in the court's order of January 31; (ii) to prevent an attempt by McEnroe to plead guilty once the court's order striking the notice of death penalty is effective, and (iii) prevent a later claim by McEnroe that, once stricken, the notice of death penalty may not be reinstated without violating his protection against Double Jeopardy.

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

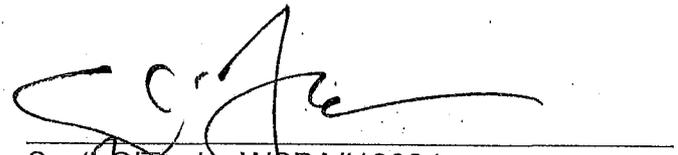
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

The defendant will suffer no prejudice as a result of an entry of such an order.

Pursuant the Criminal Department manual, and LCR 7(b)(10), counsel for both defendants were notified via e-mail that this motion is being filed.

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

Signed and dated by me this 5 day of February, 2013.



Scott O'Poole, WSBA#13024  
Senior Deputy Prosecuting Attorney

## O'Toole, Scott

---

**From:** KERwriter@aol.com  
**Sent:** Monday, February 04, 2013 10:26 PM  
**To:** Satterberg, Dan  
**Cc:** Prestia@defender.org; Hamaji, Leo; O'Toole, Scott  
**Subject:** Re: State v. McEnroe - request for meeting

Dan, Thank you for your response. When I finish the current briefing I undoubtedly will write to you again.

Don't worry, we understand you share our communications with others in your office. We do the same.

As for us, if you, Mr. O'Toole, or your appellate lawyers have any questions regarding our response to Judge Ramsdell's order or our response to the State's motion for discretionary review, please direct them to me.

Mr. Prestia said that Mr. O'toole asked him today if Joe is going to attempt to plead guilty as soon as the order dismissing the death penalty is effective. The answer is yes, as we have consistently said for five years, the moment we are certain the death penalty is off the table, Mr. McEnroe will plead guilty to a life without release sentence.

Regards,  
Katie Ross  
TDA  
810 Third Avenue. Suite 800  
Seattle, WA. 98104  
(206) 447-3968

In a message dated 2/4/2013 12:58:38 P.M. Pacific Standard Time, [Dan.Satterberg@kingcounty.gov](mailto:Dan.Satterberg@kingcounty.gov) writes:

Counsel,

We are appealing the latest order on this case so that we can get this case to trial. That will be our focus in the coming weeks. If you have something to submit in writing I will read it. Feel free to send me a communication in writing, with the understanding that it will be shared within my office with our team assigned to this case.

Regards,

DAN SATTERBERG  
King County Prosecuting Attorney  
516 Third Avenue, W400  
Seattle, WA 98104  
(206) 296-9067  
(206) 296-9013-Fax

---

**From:** [KERwriter@aol.com](mailto:KERwriter@aol.com) [mailto:KERwriter@aol.com]

**Sent:** Monday, February 04, 2013 11:51 AM

**To:** Satterberg, Dan; Colasurdo, Mary  
**Cc:** [Prestia@defender.org](mailto:Prestia@defender.org); Hamaji, Leo  
**Subject:** State v. McEnroe - request for meeting

Dear Dan,

We would like to meet with you at your convenience. Of course, we would like to discuss Judge Ramsdell's order dismissing the notice of intention and this opportunity to resolve the case with finality. However, even before Thursday's order we intended to ask for a meeting to bring to your attention other recent developments in the case which we believe support a plea to a life without release sentence.

We look forward to talking with you.

# **APPENDIX F**

**TO DEFENDANT/RESPONDENT MCEENROE'S RESPONSE TO  
STATE'S MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCEENROE, COURT OF  
APPEALS, DIVISION I, CASE NO. 69831-1-I**

LAW OFFICES OF  
**THE DEFENDER ASSOCIATION**

810 THIRD AVENUE, SUITE 800  
SEATTLE, WASHINGTON 98104

206-447-3900  
Toll Free 877-241-1695  
TTY 800-833-6384

**COPY RECEIVED**  
JUL 10 2008  
CRIMINAL DIVISION  
KING COUNTY PROSECUTORS OFFICE

July 10, 2008

Dan Satterberg, Esq.  
King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
*Via Hand Delivery*

**Re: *State v. Joseph T. McEnroe, Cause No. 07-C-08716-4 SEA***

Dear Mr. Satterberg:

We write to urge you not to seek the death penalty for Joseph McEnroe but to instead resolve this case with a guilty plea and a sentence of life in prison without release.

We understand your feelings that the murders of Wayne, Judy, Scott, Erica, Olivia and Nathan Anderson, are among the "worst of the worst" kinds of crimes for which the death penalty is justly considered. Certainly, if one looks only at the murders as described in the probable cause statements, it is hard to resist an extreme corporal response. However, whether to seek the death penalty requires consideration of more than the murders; it is necessary to consider the individual circumstances of each defendant.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ... we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976).

State v. Joseph T. McEnroe  
Mitigation Letter

Page 1 of 24

*(ONLY PAGE 1 is submitted to Cover of Appeals)*