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CAPITAL CASE

No. 88410-2
(Consolidated with 88411-1)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH T. McENROE, and
MICHELE K. ANDERSON

Respondents

DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR
KING COUNTY, THE HONORABLE JEFFREY RAMSDELL

DEFENDANTS/RESPONDENTS' AMENDED JOINT RESPONSE

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ISSUES PRESENTED

1. Was the trial court correct in following this Court's holdings that "equal protection is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements" and further understanding this Court's case law (State v. Campbell, 103 Wn.2d 1 (1984)) to the effect that RCW 10.95.040 saves the State's death penalty scheme from violating equal protection by requiring prosecuting attorneys to assess the sufficiency of mitigating circumstances prior to deciding whether to file the statutory notice?
2. Was the trial court correct in determining that the ease with which the State can prove guilt of aggravated murder, the "strength of the case," is not relevant to the moral culpability of a defendant or any known definition of mitigating circumstances, and is not a proper factor in evaluating the sufficiency of mitigating circumstances under RCW 10.95.040 ?
3. Was the trial court correct in determining that the "strength of the case," is an appropriate consideration when a prosecutor is deciding whether to make a murder charge "death eligible" by charging aggravating factors under RCW 10.95.020 but not when "selecting" which defendants will be subject to a notice of intention to seek the death penalty under the requirements of RCW 10.95.040(1)?
4. If a prosecutor is allowed "subjective discretion" based on his "value judgments" in deciding whether or not to seek the death penalty under RCW 10.95.040, and if the prosecutor's decision and process for making such decisions is unreviewable, as argued by the State, does a prosecutor actually have unfettered discretion to seek or not seek the death penalty?
5. Is RCW 10.95.040(1), which requires that a prosecuting attorney "shall file the 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" mandatory or is it an

unenforceable suggestion?

6. Should this Court ignore the fact that the “subjective discretion” exercised by prosecuting attorneys in seeking the death penalty has resulted in the murderers of white victims being overwhelmingly disproportionately represented in the executions, current death row inmates and currently pending death penalty prosecutions in Washington?

I. OVERVIEW

The trial court's "Order Striking the Notice of Intent to Seek the Death Penalty" (CP 598-610) should be affirmed because it flows directly from the unambiguous language of RCW 10.95.040 and furthers the legislative intention that only defendants lacking in substantial mitigating circumstances face capital trials. The trial court listened carefully to counsel in multiple hearings over two and a half years, asked questions, read all the pertinent authorities and, perhaps most importantly, really thought about an issue that concerned the court about whether the Prosecuting Attorney had complied with the substantial provision of RCW 10.95.040 when he decided to file notices of intent to seek the death penalty. The trial court finally and clearly identified the problem; the prosecutor considered the strength of evidence of guilt as a major factor in whether a notice should be filed against particular individuals. In fact, the State insisted that strength of the case of guilt was pivotal in deciding whether to seek death against a defendant, the King County Prosecutor's Office seemed proud to have a policy that the Prosecuting Attorney would only file notice of intent to seek the death penalty when the strength of the case was overwhelming. Oral Argument 3-26-2010, RP 59.

The trial court's reasoning starts with RCW 10.95.040(1) which provides "the prosecuting attorney shall file the 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.” The trial court thought it to be very significant that the statute is unique; no other death penalty scheme in the country has a similar provision mandating a prosecutor to file notices only when there is reason to believe a defendant’s mitigating circumstances are insubstantial. Washington’s statute is designed to avoid subjecting a defendant to (and investing resources in) a capital trial when there is reason to believe the defendant is redeemable, or does have sufficient mitigating circumstances to keep out of the class of worst-of-the-worst murderers (despite having committed a worst-of-the-worst murder). The statute does not mention “strength of the case” as a factor the prosecutor may consider in filing a death notice and strength of the case is not related to the sufficiency of mitigating factors. Therefore, a prosecutor should not be allowed to base seeking the death penalty on the “strength of the case.”

A recent decision of this Court exhibits similarly vigilant construction of a statute (which had been interpreted in a somewhat confusing way by the Courts of Appeals) which had far less consequence than 10.95. In State v. Ortega, Wn.2d , 297 P.3d 57 (Wash. 2013), the Court strictly construed RCW 10.31.100 requiring a police officer to

be present when a misdemeanor is committed in order to arrest a suspect. The State argued that interpreting the statute to require actual physical presence was “absurd” and urged the Court to adopt a “fellow officer” rule loosening the rule. But the Ortega court, while not unsympathetic to the State’s position, held “such an interpretation conflicts with the plain language of RCW 10.31.100.” The old saying is that “bad facts make bad law” but the Court should be at least as careful interpreting the statute prescribing when a prosecutor “shall” file a notice of intent to seek death as it has been in interpreting a law restricting arrests for misdemeanors.

II. FACTUAL STATEMENT OF THE CASE BELOW

Joseph McEnroe and Michele Anderson are charged with murdering six members of Ms. Anderson’s family. Both defendants gave lengthy confessions during their first interrogations by detectives.¹ There is no claim that McEnroe and Anderson are not the killers.

¹ Knowing that neither this Court nor the trial court has read or listened to the confessions, the Petitioner’s counsel has characterized the defendants’ confessions to suit the State’s purposes here. State’s Reply in Support of Motion for Discretionary Review, p. 9 - 10. The facts of this crime are bad, of course, but the state’s carefully chosen adjectives of “chilling”, “callous” and “calculated” or the children being “forced” to watch their parents die (as opposed an accurate statement of the order of multiple shootings within a short span of seconds) is hyperbole in a scenario we can all agree does not need to be embellished to be understood as a terrible crime. Counsel for McEnroe and Anderson, and their mental health experts, have spent hours listening to the defendants’ statements and heard both defendants crying, expressing regret and remorse, and also clearly evidencing severe mental impairments including delusions and extreme paranoia. Giving a full confession by itself is consistent with remorse, contrary to some assertions of the state here and below.

On December 27, 2007, the day after McEnroe and Anderson were arrested, King County Prosecuting Attorney Dan Satterberg issued a press statement describing in graphic detail the murders and promising,

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

CP 23. Satterberg said his office was joining the community in grieving the loss of the Anderson family and was sharing the "community's distress over this crime." CP 23.

Both defendants were arraigned on charges of aggravated murder in King County Superior Court on January 10, 2008. One week later each defendant received a letter from Mark Larson, chief of the prosecuting attorney's criminal division. Mr. Larson advised McEnroe and Anderson,

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...

1-17-2008, Letter from Mark Larson, CP 54. Counsel for both defendants conducted investigations into their clients' backgrounds and social histories.² Both defense teams obtained mental evaluations of the defendants. Both defendants' attorneys had multiple meetings with Mr.

² Defense counsel for each defendant conducted entirely separate mitigation investigations and neither team knew the substance of information the other defendant submitted to Mr. Satterberg.

Satterberg to answer any questions he had regarding the submitted information.

Mr. Larson said in his letter the prosecution intended to limit the time for counsel to submit mitigating information. Therefore, in order to focus their mitigation investigation on areas that were most significant to the prosecutor's decision, Mr. McEnroe's counsel requested Mr. Satterberg to advise them of what kind of mitigation evidence, if it existed, could persuade him not to seek the death penalty. CP 25-26. Mr. Satterberg never personally answered that question, but the State's later statements and arguments were crystal clear that the answer was in fact that *nothing could have made a difference*.

III. ARGUMENT

A. HISTORY OF MOTIONS PRACTICE IN THIS CASE RELATING TO STATE'S DECISION TO FILE THE NOTICE OF INTENT

The trial judge in this matter 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 and is well equipped to determine facts when confronted with varying and arguably inconsistent representations made by counsel.

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. See “Order on Defendants’ Motions to Strike the Notice of Special Sentencing Proceeding,” dated June 4, 2010, CP 445-67. (Ms. Anderson Joined in this Motion.) However, the court at that time was clearly troubled by some of the State’s assertions and answers to the court’s questions. The following exchange shows the trial court’s concern:

Ms. Vitalich: ... Now, I’m not saying a court couldn’t find that a prosecutor did abuse its discretion.

The Court: How would we ever know?

Ms. Vitalich: If a prosecutor - for instance, if it somehow became known and it was a matter of public record that a prosecutor had sought the death penalty because of a defendant’s ... race or religion or some other totally invalid reason.

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

If indeed a prosecutor, for whatever evil intent, decides that there are certain folks they are going to go after ... unless they are completely ignorant and say something on the

record to somebody who is going to bring it forward,
there's really no way for anybody to know what's
happening ...

How would you ever know?

Oral argument 3-26-2010, RP 48-49.

The court's June 4, 2010 order reveals that the Court seemed to believe that whether the prosecuting attorney complied with RCW 10.95.040 was a close question, but it denied the motion to dismiss the notice. CP at 458.

Subsequently, the elected prosecutor made decisions whether or not to file notices in four unrelated, but all brutal, aggravated murder cases.³ McEnroe's counsel noticed that the prosecutor apparently employed 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.⁴

³ The names of the other aggravated murder defendants and dates the prosecutor announced he would or would not seek death are: Isaiah Kalebu, 11-21-2011 (King County Superior Court No. 09-1-04992-7); Christopher Monfort, 9-2-2010 (King County Superior Court No 09-1-07187-6); Daniel Hicks, 9-16-2010 King County Superior Court No. 09-1-07578-2 SEA), and Louis Chen, 11-21-2011 (King County Superior Court No. 11-1-07404-4 SEA). CP 521, 527, 535, 523-24.

⁴ 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 December 2007, 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 affecting only these two defendants, but the new Prosecutor learned and quickly adopted a standard procedure in compliance with RCW 10.95.040. It should also be noted that Christopher Montfort's crime occurred on October 31, 2009; this was the first aggravated homicide in King County following the

Louis Chen, a wealthy physician, 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. CP 1189-90. Satterberg did not seek the death penalty. McEnroe sought discovery as to the process the Prosecutor utilized in Chen's case in the death notice decision and in the other aggravated murder cases in order to compare those processes to the process used in the McEnroe and Anderson cases. CP 1181-86. McEnroe noted that the Prosecutor did not file a death notice against Chen despite the fact that when the notice decisions were made, King County prosecutors argued to Chen's trial judge that they were suspicious of Chen's mental illness claims because as "a highly educated and trained physician" Chen was "uniquely equipped to feign mental illness" and "could be exaggerating, malingering, or feigning in order to better serve his defense." "Declaration of Counsel in Support of Motion for Discovery of Materials Revealing King County Prosecutor's Process for Determining Which Defendants will Face Death," p. 3, CP 1189. McEnroe pointed out:

incident in Mr. McEnroe's and Ms. Anderson's case. Mr. McEnroe had just filed his first motion alleging that the State had not followed 10.95.040 on October 23, 2009 (CP 17-61), and – perhaps not coincidentally -- Mr. Monfort's case was the first where the State hired its own mitigation specialist and began to try to follow the dictates of 10.95.040.

Rather than simply rejecting Chen's claims of mental illness which the prosecutor suspected might be feigned, Mr. Satterberg hired an outside investigator specially trained in conducting capital case mitigation investigations to seek out reasons not to subject Chen to a death penalty prosecution ... Unlike McEnroe, Louis Chen did not offer finality and closure to the victims, or sparing of resources to the public, by agreeing to plead guilty when the prosecutor removed the threat of the death penalty.

Declaration of Counsel in Support of Motion for Discovery of Materials
Revealing King County Prosecutor's Process for Determining Which
Defendants Will Face Death, p. 4, CP 1190. McEnroe also argued:

The discovery demanded here will show whether the King County Prosecuting Attorney decides which defendants will face capital prosecution in an arbitrary and discriminatory manner, disregarding valid mitigating factors presented by poor defendants, while favoring defendants with wealth and resources.

Declaration of Counsel in Support of Motion for Discovery of Materials
Revealing King County Prosecutor's Process for Determining Which
Defendants Will Face Death, p. 5-6, CP 1191-92. Ms. Anderson Joined in
this Motion. CP 735-739. 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:

[A]ny 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.

Order to Compel Discovery, entered 3/15/2012 CP 1242-45. In response, the State admitted it had not utilized a mitigation investigator nor consulted with a mental health expert prior to filing a notice of intention to seek death against McEnroe and Anderson. The Prosecutor considered only the “criminal investigation.” “State’s Objection and Response to Order Compelling Discovery,” 3/20/2012. CP 1246-47.

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.” CP 746-60; CP 743-44. McEnroe and Anderson wanted disclosure of the facts relied on by the Prosecutor in determining “... there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.040(1).

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, filed 5-11-2012. CP 747. 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, CP 1257-58. In case it wasn’t clear that 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. CP 1259 (emphasis added).

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. CP 1200-01 (emphasis added).⁵ The State repeatedly stated the decision to file a notice of intent is "discretionary and subjective" CP 1264-66.

At oral argument on the Motion for Bill of Particulars McEnroe raised his concern that the Prosecutor might be considering the socio-economic status of defendants and race of victims in making death penalty decisions. McEnroe argued that if the prosecutor cannot offer objective facts to support a "reason to believe there are not sufficient mitigating circumstances to merit leniency" arbitrary and improper reasons could never be revealed. Oral Argument 5-30-12, RP 30.

The State responded by again reciting the allegations in support of the aggravated murder charges and then making it clear mitigating information offered by the defendants could make no difference,

Mr. O'Toole: And I keep repeating that, because counsel suggests to this court that they really can't figure out what

⁵ The trial court was generous in its January 31, 2013 (CP 598-610), order by stating "Counsel [for the State] has repeatedly asserted ...that the elected prosecutor considered the mitigation material proffered by the defendants here." Order, p. 4-5 (CP 601-602). The State has made only passing reference to mitigating evidence and has not suggested Mr. McEnroe's or Ms. Anderson'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.

the problem is with their mitigation. There may be nothing wrong with their mitigation, there may be lots of things wrong with their mitigation, but that mitigation is swamped by the facts known to them, the murder of six human beings.

Oral Argument 5-30-2012 RP 33 (emphasis added). The State also emphasized how subjective it believed the prosecutor's decision to seek death is:

Mr. O'Toole: ... the bottom line here is defense counsel does not accept that it is the prosecutor's discretion to make that call, doesn't accept the fact that yes, that decision is subjective ... this is a subjective determination by the prosecutor based on value judgments made by the prosecutor ... you may not compel the prosecutor to state a reason, because we have the reason in front of them. It's the presence of six dead human beings. That is overwhelming ... the nature of the decision that is ... at issue is so fundamentally subjective and based on the values and the subjective review of the evidence by the prosecutor...

Oral argument 5-30-2012, RP 37-40.

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. CP 536-40, 584-86, 785-86. 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. CP 527, 523-4, 535. 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 Intention to Seek the Death Penalty” which renewed the earlier motion and added the denial of equal application of the law. CP 495-535 (filed 11-26-2012). Anderson Joined in this Motion. CP 668-69. 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 intent to seek the death penalty. CP 598-610.

B. HISTORY OF WASHINGTON DEATH PENALTY LAWS

1. History of the Post-Furman Death Penalty in Washington

In 1972, in a plurality decision, the United States Supreme Court declared all state death penalty schemes unconstitutional under the Eighth Amendment (U.S. CONST. AMEND. VIII) because the punishment was being sought and inflicted in an arbitrary and capricious way.

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily... When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison...

Furman v. Georgia, 408 U.S. 238, 293, 92 S.Ct. 2726 (1972), Brennan, J. concurring (emphasis added).

In 1972 The Supreme Court found the death penalty schemes of Georgia and Texas to violate the Eighth Amendment because in both states defendants appeared to be selected for death sentences in an arbitrary and capricious manner. The constitutional infirmity of the nation's death penalty laws at the time was that so few people were being chosen for death out of so many who had committed equal or worse crimes.

Soon after publication of Furman, the Washington Supreme Court declared the Washington death penalty statute, RCW 9.48, invalid under Furman so "[the] state is now precluded from any attempt to have the death penalty imposed under the existing statute." State v. Baker, 81 Wn.2d 281, 284, 501 P.2d 284 (1972).

When the Supreme Court eventually approved some of the new death penalty schemes enacted by states after Furman, it expected states to increasingly narrowly define eligibility for capital punishment:

As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate ... it becomes reasonable to expect that juries ... will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

Gregg v. Georgia, 428 U.S. 153, 222, 96 S.Ct. 2909 (1976), Justice White, concurring (emphasis added).

The Supreme Court also prescribed that procedures applied to capital cases be designed and exercised in a careful way so as to insure death is an available punishment for only a narrow class of worst crimes and worst defendants.

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, 305, 96 S.Ct. 2978 (1976).

In November 1975, through the initiative process, Washington voters enacted another death penalty law that made death the mandatory, automatic sentence for aggravated murder. Initiative 316 was codified as RCW 9A.32.046.⁶

The Supreme Court soon declared mandatory death sentences unconstitutional. Woodson v. North Carolina, 428 U.S. at 304. Over prosecutors' opposition this Court then declared RCW 9A.32.046 unconstitutional and found that the initiative backers had misread Furman.

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

State v. Green, 91 Wn.2d 431, 445 (1979), referring to Woodson, supra.⁷

⁶ Former RCW 9A.32.046 provided, in part: "A person found guilty of aggravated murder in the first degree ... shall be punished by the mandatory sentence of death." Laws of 1975, 2d Ex.Sess., ch. 9, § 2.

⁷ In Green the state had argued that the Washington Supreme Court should not follow Woodson because Woodson was a plurality opinion. The state also argued that since Woodson's invalidation of mandatory death sentences was in part based on contemporary

The legislature then enacted RCW 10.94 which clearly borrowed from both the Model Penal Code's capital punishment act and the death penalty schemes that had been approved in Gregg, the statutes of Georgia, Florida and Texas:

Notice of Intention - Filing required, when - Service - Contents - Failure of as bar to request. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstances or circumstances in a special sentencing proceeding under RCW 10.94.020.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court of the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice. If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

standards of decency the fact that Washington's mandatory death sentence was passed by the voters showed contemporary Washington standards of decency accepted a mandatory death penalty.

Former RCW 10.94.010, see CP 229-231 (emphasis added).⁸

RCW 10.94 did not suffer the mandatory death sentence problem of its initiative predecessor but allowed defendants to avoid facing death by pleading guilty to aggravated murder.⁹ The Washington Supreme Court held:

The Washington statutes for the imposition of the death penalty needlessly chill a defendant's constitutional rights to plead not guilty and demand a jury trial and violate due process. [United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).] They do not meet the standards of the state or federal constitutions.

State v. Frampton, 95 Wn.2d 469, 478 (1981).

After RCW 10.94 was found constitutionally wanting, the legislature began anew to enact an acceptable death penalty statute. Instead of urging the legislature to simply amend RCW 10.94 by adding language expressly addressing defendants pleading guilty to aggravated murder, Washington prosecutors saw an opportunity for a statute that would make it far easier to win death sentences. There were several aspects of RCW 10.94 that prosecutors did not like. Washington Association of Prosecuting Attorneys (WAPA) testified before the legislature that under RCW 10.94 it was too difficult to prove a defendant

⁸ Substitute House Bill No. 615, passed June 3, 1977. See CP 374-384.

⁹ State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980).

was likely to be violent in the future as RCW 10.94 required. "It's impossible to predict into the future," Pierce County Prosecutor, Don Herron, testified. Prosecutors also did not like the fact that under RCW 10.94 the state had to prove there were "not sufficient mitigating circumstances evidence to merit leniency," and wanted the burden put on defendants to prove sufficient mitigating evidence. And prosecutors did not like that under RCW 10.94 the State had to prove guilt to a "clear certainty" in the penalty phase, a standard higher than beyond a reasonable doubt, before a jury could return a death sentence. *Bremerton Sun*, 2-8-1980, See CP 369.

Through WAPA, the prosecutors drafted a proposed new death penalty bill (see CP 332-340). WAPA explained its proposed bill in a document entitled "Explanatory Material for An Act Concerning Murder and Capital Punishment," written by Ron Franz, December 31, 1980 (see CP 342-364). The original bill included a preamble that expressed a legislative intent identical to the prosecutors' own sentiments:

... The legislature therefore enacts this legislation to provide a sentence of death for those who commit certain particularly egregious murders to the ends that others will be deterred, that murderers receive punishment commensurate with their crimes, that there be adequate retribution for the families and friends of murder victims, and/or that the sanctity of life is enhanced by imposing the ultimate penalty on those who take life.

HB 76, sec. 1

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

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

HB 76, Sec. 2. WAPA's "Explanatory Material" clarified: "Typically a criminal statute is strictly construed but this section requires it be liberally construed. This basically tells a court not to nitpick." See CP 342-364.¹⁰

In defining the aggravating circumstances, the prosecutors proposed including attempts of the specified felonies which elevated a murder to aggravated murder. HB 76, Sec. 4 (CP 332-340).

The prosecutors also wished to reduce the State's burden by requiring ten jurors voting against death to answer the jury's sentencing question in the negative (no death sentence). Less than ten votes against death would be a mistrial and the State could retry the penalty phase. HB

¹⁰ A memorandum, dated 2-3-81, to the House Ethics, Law and Justice Committee from the Office of Program Research, pointed out

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

CP 328-330.

76, Sec. 8 (CP 332-340). But the legislature rejected all of the above WAPA proposed provisions.

Prosecutors may have felt their proposal was reasonable because they intended that prosecutors would not file notices of intention against defendants with valid mitigating circumstances. The prosecutors included in their proposal, HB 76, a unique notice provision unlike any other in the country:

When a person is charged with aggravated first degree murder as defined by Section 4 of this act, 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.**

HB 76, sec. 6 (see CP 332-340). The proposed statute radically changed the emphasis of the death notice decision from aggravating factors, the only consideration in the model penal act and every other state's death penalty scheme, to mitigating factors. The statute being replaced, RCW 10.94.010, required a notice to be filed "when the prosecution has reason to believe that one or more aggravating circumstances ... was present..." and said nothing about mitigating circumstances. The Franz Explanatory Material explained the proposed Section 6:

This section provides for the notice of special sentencing proceeding through which the death penalty may be imposed. The notice must be filed within 30 days of the

defendant's arraignment on a charge of aggravated first degree murder unless the period for filing the notice is extended by the court.

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

See CP 342-364 at 350 (emphasis added). The emphasis on whether "a particular defendant is a suitable candidate for the death penalty," was not modeled on any other statute.

The legislature made significant changes to the prosecutor drafted original HB 76 but it retained the notice provision, with its unique emphasis on the prosecuting attorney having reason to believe there are not sufficient mitigating circumstances. See SHB 76, at CP 238-248 and the final passed version, SHB 76, contained in the record at CP 256-265. It is also significant that the Senate proposed its own bill which had a different, more conventional notice provision:

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

Proposed substitute Senate bill 3096 (See CP 297-313). Under the Senate's bill charging aggravated murder mandated seeking death. Mitigating circumstances were not considered.

The legislature then enacted RCW 10.95 in 1981 which, with amendments, is still in effect.

2. The Supreme Court of Washington Has Strictly Construed Washington's Capital Sentencing Statutes

State v. Martin, 94 Wn.2d 1 (1980), illustrates that the Washington Supreme Court required any death penalty statute to be strictly construed. In Martin the defendant had attempted to enter a plea of guilty to first degree murder if the trial court would assure him that under the then-new death penalty statute, RCW 10.94, his maximum sentence would be life with parole. Id. at 3. The statute provided that if the prosecutor filed a notice of intent to seek the death penalty and "the trial jury returns a verdict of murder in the first degree ... the trial judge shall reconvene the same trial jury to determine "whether the death penalty will be imposed." Id. at 6, FN 2. RCW 10.94 did not address what happened if a defendant pleaded guilty to first degree murder and the defendant argued the death penalty could not be imposed in that case because the statute expressly stated after a "verdict" of guilty the "same trial jury" had to determine whether or not to impose a death sentence. If there was no guilt trial there

could be no “same trial jury.” The trial court refused to accept the defendant's guilty plea. The defendant was granted interlocutory review.

On review, the state vigorously urged the Court to a) find the defendant had no right to plead guilty to first degree murder and if he did, the death penalty statute impliedly overruled such a right; b) find that another statute, RCW 10.01.060, prohibited a defendant charged with first degree murder from waiving a jury trial and to hold that that statute should be read to prohibit a guilty plea as well; and c) to “imply the existence of a special sentencing provision in which the death penalty could be imposed in guilty plea cases.” The court declined the state's invitation to read provisions into the statute that were not written by the legislature.

Clearly, the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first degree murder. Thus, it simply failed to provide for that eventuality. As attractive as the state's proposed solution may be, **we do not have the power to read into a statute that which we may believe the legislature** has omitted, be it an intentional or an inadvertent omission.

...

The need for interpretive restraint is greatly increased in this case because of the subject matter ... The United States Supreme Court has more than once reminded us of the indisputable fact that "death is different" and that this difference must impact on the court's decision making, requiring the utmost solicitousness for the defendant's position.

Martin at 8 (emphasis added) and 21 (Horwitz, J., concurring).

Following Martin, the Court considered the arguments of nine separate defendants who claimed RCW 10.94 was unconstitutional because it allowed defendants who pleaded guilty (not because of an agreed negotiation) to escape death when defendants who went to trial would be subject to the death penalty. State v. Frampton, et al, 95 Wn.2d 469 (1981). The state urged the Court to overturn its then-recent decision in Martin and find that an old statute, RCW 10.49.010, authorized the empanelling of a special sentencing jury when a defendant pleaded guilty. This Court refused to read into the statute what the legislature left out:

If the legislature had meant RCW 10.49.010 and RCW 10.94.020(1) and (2) to be read together when a defendant pleaded guilty [to murder] it is unreasonable to believe it would have failed to say so. ... For this court now to say the legislature, in the case of a guilty plea when the state requests the death penalty, expected or authorized reference to RCW 10.49.010, an 1854 statute whose entire reference had been to previous homicide statutes, places too great a strain on statutory construction.

...

Furthermore, as has been observed so many times, death as a punishment is different. When a defendant's life is at stake, the courts have been particularly sensitive to insure that every safeguard is observed.

Frampton at 475-76.

RCW 10.95 was soon challenged by State v. Bartholomew, 98 Wn.2d 173 (1982).¹¹ In Bartholomew the Court approved the new death penalty law in general but found part of it unconstitutional. The new statute stated that in the penalty phase of a capital case:

The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

RCW 10.95.060(3). The Bartholomew court acknowledged that the language of the Supreme Court in Gregg might be read broadly enough to allow evidence in support of non-statutory aggravating factors as well as mitigating factors regardless of its admissibility under the rules of evidence, but reasoned that the Supreme Court's rationale allowing such evidence in Lockett v. Ohio, 438 U.S. 586 (1978), was best understood to apply to mitigating evidence only.

Different considerations apply ... where the prosecution seeks to put prior criminal activity other than convictions before the jury. Here, the element of prejudice looms larger ... To allow the jury which has convicted the defendant of aggravated first degree murder to consider

¹¹ The Bartholomew case also contains a thorough summary of what it calls a "strange, eventful history" of the death penalty following its invalidation in Furman v. Georgia.

evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted defendant of capital murder is unlikely to fairly and impartially weigh evidence of prior alleged offenses.

Bartholomew at 196-97 (emphasis added). The prosecution was prohibited from offering in its case in chief any non-statutory aggravating information, other than defendant's criminal record. Because non-statutory aggravating information had been admitted against Bartholomew his death sentence was vacated. Id.

The state filed a writ of certiorari to the Supreme Court on the issue of whether state could introduce non-statutory aggravating information (generally bad acts not resulting in convictions) in its case in chief at the penalty phase. The Supreme Court held the case pending its decision in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983). The Zant court held, in a Georgia case, that under the Eighth Amendment the invalidation of an aggravating factor involving prior felony convictions did not invalidate the defendant's death sentence because the jury had found two valid aggravating factors and evidence of the prior convictions would have been admissible even had the particular factor not been charged. Id. at 888-89.

~~After a remand from the Supreme Court, the Washington court~~
first stated that Zant did not change its prior opinion that introduction of

non-statutory aggravating circumstances violated the Eighth and Fourteenth Amendments (U.S. CONST AMEND. VIII and U.S. CONST AMEND XIV) but also made clear that its interpretation of RCW 10.95 would not be limited to the Supreme Court's opinions regarding what might be allowable under the federal constitution:

We note that our interpretation of the due process and cruel punishment clauses of our state constitution is not constrained to the Supreme Court's interpretation of the Eighth and Fourteenth Amendments. We have, in the past, interpreted [Washington] Const. Art. 1 § 14 to provide broader protection than in the Supreme Court's interpretation of the Eighth Amendment ... Additionally, in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause.

State v. Bartholomew, 101 Wn.2d 631, 639 (1984)(internal citations omitted). Applying the Washington Constitution, this Court would not tolerate the likely prejudice to a capital defendant of admission of uncharged criminal conduct even though such evidence was admissible in a penalty trial under the Fourteenth Amendment and under the schemes of all other capital punishment states.

C. REVIEW OF THE TRIAL COURT'S DECISION

1. This Court May Affirm the Trial Court on Any Grounds Presented Below

The State suggests this Court must confine its review to the trial court's intentionally narrow holding that an elected prosecutor, after considering the evidence of guilt in charging premeditated murder and aggravating factors, may not reconsider the strength of his proof of aggravated murder as a reason to file a notice of intention to the death penalty under RCW 10.95.040(1). State's Reply in Support of Motion for Discretionary Review, p. 15.

The trial court's reasoning is sound and well supported, but this Court may also affirm the trial court's decision to strike the notice on any ground "within the pleadings and proof" below. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997), State v. Hudson, 79 Wash.App. 193, 194, 900 P.2d 1130 (1995) (holding that an appellate court may affirm the trial court on any alternative theory argued to the trial court), aff'd, 130 Wn.2d 48, 921 P.2d 538 (1996). See also Hoflin v. City of Ocean Shores, 121 Wn.2d 113, 134, 847 P.2d 428 (1993) (affirming the trial court's reaching the right result, even though the trial court arrived at that result for the wrong reasons).

It is important to place the trial court's decision in the context of important information the court learned through multiple related rounds of briefings and arguments by all parties beginning with McEnroe's original Motion to Dismiss the Notice of Intent because it was filed in violation of RCW 10.95.040. In its response to the defendants' latest Motion to Dismiss, the State referred the trial court back to McEnroe's earlier motion to dismiss as well as the interim motions for information on the process utilized by the Prosecuting Attorney to select defendants for the death penalty. State's Response to Defendant's "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," CP 541-583 at 542-543.

As the trial court expressly stated, in considering McEnroe's Motion to Dismiss the Notice on Equal protection and Due Process grounds (that is, the motion that led to the trial court's 1-31-2013 ruling that is on appeal before this Court), it did not confine itself to the new pleadings as though operating in a vacuum, but instead the trial court "also reviewed all of the past briefing of the parties pertaining to the issue and the available transcripts of oral arguments." 2-8-2013 Order Denying Motion to Stay, p. 3 (CP 652-663 at 654). The earlier written and oral arguments support the trial court's decision on the grounds stated by the

trial court and also provide alternative grounds to uphold the dismissal of the notices of intent to seek death against McEnroe and Anderson.¹²

2. The State Originated, Briefed and Extensively Argued in the Trial Court the Proposition That a Prosecuting Attorney May Consider the “Strength of the Case” When Deciding Whether or Not to File a Notice of Intention to Seek the Death Penalty

Petitioner’s sole assignment of error is

The trial court erred in dismissing the notices of special proceedings on grounds that were not raised by either defendant, that were not briefed or argued by the parties, and that are unsupported by relevant authority and contrary to well-settled precedent.¹³

If not read carefully, it appears the State is saying the trial court, out of the blue, injected the issue of whether a death notice decision can be made based on the strength of the evidence of guilt. The state refers often to the trial court’s decision as “*sua sponte*.”

¹² At oral argument on “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” the trial court advised the parties:

I went back and reread everything that was submitted before on this issue just to refresh my own recollection ...

1-17-2013.RP p. 50

¹³ Opening Brief of Petitioner, p. 1.

In fact, the State itself raised the claim that prosecutors can consider “the facts of the crimes themselves and the strength of the available evidence in making his decision to seek the death penalty.” See CP 89. In response to McEnroe’s 2009 “Motion to Strike the Notice of Intent to Seek the Death Penalty on Grounds That it Was Filed in Violation of RCW 10.95.040” (Motion at CP 17-61, State’s Response at CP 88-169), the State argued as its first of three points, “the plain language of the statute at issue shows the legislature’s intent that the elected county prosecutor certainly should consider any relevant information at his or her disposal, including the facts of the case and the strength of the available evidence, in making the decision as to whether to seek the death penalty.” CP 89. The State devoted four pages of its 2010 response to arguing:

“Put another way, the plain meaning of RCW 10.95.040(1) is that the prosecutor will engage in a weighing process by considering any potential mitigation along with any and all other relevant information including most obviously, the facts of the crime and the strength of the available evidence.”

CP 91 (emphasis added). The state also argued: “Nonetheless, the defendants contend that the prosecutor cannot consider the facts of the case or the strength of the evidence, whereas juries can ...” CP 93

(emphasis added). In the second section of the 2010 response, the State argues:

“it strains the bound of reason to attempt to imagine how an elected prosecutor could possibly make a rational decision as to whether or not to seek the death penalty in any aggravated murder case without considering all relevant information at his or her disposal including, most obviously, the facts of the case and the strength of the available evidence.”

CP 94-95 (emphasis added). The State inserted a footnote giving an example of what it considered the absurdity of the defendant’s argument that would lead to a prosecutor seeking the death penalty in a case with weak evidence supporting the charge of aggravated murder but “negligible” mitigating evidence¹⁴ and would not seek in a case with “overwhelming” evidence of guilt and “the defendant’s criminal history is lengthy,” yet the “the defendant presented a compelling mitigation packet.” CP 95 at footnote 2.

At the 3-26-2010 oral argument on the 2009 motion to dismiss the deputy prosecutor reiterated what was in her brief,

Ms. Vitalich: ...The prosecutor... has a duty to consider whether there is any mitigation that - and I just don’t see how you can get around the fact that it has to be weighed against any and all other relevant information, which

¹⁴ A “lengthy criminal history” is actually a factor a prosecutor may consider as diminishing the value of mitigating information because it has nothing to do with the strength of evidence of the aggravated murder in question, may show the defendant is not a good subject for rehabilitation or redemption and may support a conclusion the defendant will be danger in the future.

clearly would include the strength of the evidence and the facts of the case.

Oral Argument 3-26-2010, RP 51-52. The prosecutor went on to describe the same scenario she had described in her footnote, which the trial court recognized,

Court: That's your footnote.

Ms. Vitalich: I'm fond of footnotes ... Yes, as an aside, that is in essence the hypothetical I put in the footnote.

Oral Argument 3-26-2010 RP 55. The trial court then explored the State's reasoning:

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

Ms. Vitalich: As compared to the person who had no mitigation presented on their behalf at all.

The Court: And you had a weak case.

Ms. Vitalich: But did not commit nearly as heinous of an offense. .. I think the facts of the offense are crucial to the calculus of whether to ask a jury to consider death as one of its sentencing options.

Oral Argument 3-26-13 RP 55-56

Ms. Vitalich: ... There has to be a reason for the prosecutor's decision ... And that reason necessarily must include consideration of the strength of the available evidence and the facts of the case. And ... there may very

well be a case where although compelling from a mitigation standpoint, but the crime itself is so heinous and the proof of the defendant's guilt is so overwhelming that essentially all of that mitigation pales in comparison. There's simply nothing wrong with that.

I also don't think that there's anything wrong within the framework of 10.95 in taking a look at the strength of the available evidence and the facts of the crime and deciding ... this is a case where the evidence in one aspect or another is not overwhelming ...

Oral Argument 3-26-2010 RP 61-62 (emphasis added).

Court: ... I'm trying to focus on the provisions of the statute that says if you have reason to believe that there's insufficient mitigation to warrant leniency, you shall file the death notice. It doesn't say you shall file the death notice unless ... your case is weak. It says you shall file the death notice. You've already passed the point of deciding it's a death eligible case when you filed the aggravator. Right?

Oral Argument 3-26-2010 RP 57

As set forth below, the state reiterated and argued "strength of the evidence" in multiple pleadings and arguments leading up to the trial court's dismissal of the notice of intent over a two and half year period. It is important to note that the State's arguments were in response to McEnroe's argument that RCW 10.95.040(1) requires a prosecuting attorney to focus exclusively on the caliber of mitigating evidence known to him at the time of decision whether or not to file a notice. Obviously

focusing exclusively on mitigation circumstances excludes reconsideration of the state's ability to prove guilt.

At oral argument on the 2013 motion to dismiss, the prosecution was mindful of its earlier arguments regarding strength of the case the courts interest in that issue.

Ms. Vitalich: In my prior briefing, what I repeated over and over again, is that, of course, the prosecutor can consider the facts of the case and the strength of the evidence...

Oral Argument1-17-13 RP 76.

At the 1-17-2013 hearing, the State's proposition that it can and should consider "strength of the case" was the subject of an extended dialogue between the trial court and State's counsel. If the State nonetheless felt it had inadequate opportunity to address the issue it could have asked for supplemental briefing. It did not. It is also notable that the State did not ask for reconsideration of the Court's 1-31-2013 order.

The State's assignment of error, that the trial court dismissed the notice of intent on a basis considered "sua sponte," is not supported by the factual history of proceedings in the trial court.

3. RCW 10.95.040 Sets a Mandatory Standard Prosecuting Attorneys Must Meet in Order to File a Notice of Intention to Seek the Death Penalty and the Trial Court Found the Prosecutor Did Not Conform to the Requirements of the Statute in this Case

The trial court's opinion clearly interpreted RCW 10.95.040(1) to limit prosecutorial discretion to file a notice of intent to seek the death penalty to disallow consideration of whether the State's proof of the charge of aggravated murder is strong or weak. While a prosecutor may consider the nature of the crime itself when it considers the sufficiency of a defendant's mitigating information, the strength of the evidence the prosecutor has to prove the crime does not bear on either the nature of the crime or the mitigating factors. The trial court held that "the strength of the State's case regarding the defendant's guilt is of no relevance" because "[t]he purpose of the mitigation phase is to determine the moral culpability of the defendant in light of the crime for which he now stands convicted." Order Striking the Notice of Intent to Seek the Death Penalty, p. 9-10. CP 598-610.

The State repeatedly said that the Prosecutor could and did consider the strength of the evidence proving aggravated murder in deciding to seek death against these defendants. Furthermore, the State insisted the Prosecutor's decision to file a notice of intention to seek death

is a matter of unreviewable discretion and no one, including the court, was entitled to any explanation of what facts the Prosecutor relied on to determine mitigating circumstances were not sufficient to merit leniency.

The Court found that the Prosecutor violated RCW 10.95.040(1) by basing the filing of the death notice, in part, on the strength of evidence of guilt. The trial court applied RCW10.95.040(3) in dismissing the notice of intent because it prohibits the prosecuting attorney from seeking death “if a notice of special sentencing proceeding is not filed and served as provided in this section.” This Court has found that RCW 10.95 imposes mandatory obligations on the prosecutor. In interpreting the application of RCW 10.95 this Court has stated,

The general rule is that the word ‘shall’ is presumptively imperative and operates to create a duty rather than conferring discretion. ... The legislature used the word “shall” 67 times in RCW 10.95 while using “may” 15 times. This indicates that the Legislature intended the two words to have different meanings; “may” being directory while “shall” being mandatory.

....

To allow the prosecution this discretion in a death penalty case absent specific statutory guidance could also give an unconstitutional delegation of authority to the prosecutor ... The prosecutor does have discretion to decide whether to seek the death penalty at the charging phase of a case pursuant to RCW 10.95.040(1). We have held this does not vest unconstitutional discretion with the prosecutor as the prosecutor must decide pursuant to the statute that sufficient mitigating circumstances to merit leniency do not

exist ... The ‘discretion’ the prosecutor possesses at the charging stage is narrowly focused. The prosecutor can only follow the statutory instructions.

State v. Bartholomew (III), 104 Wn.2d 844, 848 (1985) (internal citations omitted) (emphasis added).¹⁵ Contrary to the State’s arguments to the trial court, seeking the death penalty is not something a prosecutor is supposed to decide based on his personal value system and subjective discretion¹⁶ because “the prosecutor can only follow the statutory instructions,” Id. The statutory instructions say the prosecutor “shall,” not “may,” file a notice “when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” This mandate is objective, “when there is reason to believe” not “when he or she believes” there are not sufficient mitigating circumstances to merit leniency.

¹⁵ Even in pure charging decisions, the legislature has not accorded prosecutors unfettered or unreviewable discretion. See: RCW 10.16.110, which reads:

Statement of prosecuting attorney if no information filed — Court action.

It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail, or become recognized or held to bail; and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he or she shall make, subscribe, and file with the clerk of the court a statement in writing containing his or her reasons, in fact and in law, for not filing an information in such case, and such statement shall be filed at and during the session of court at which the offender shall be held for his or her appearance: PROVIDED, That in such case such court may examine such statement, together with the evidence filed in the case, and if upon such examination the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial. (Emphasis added.)

¹⁶ See Oral Argument 5-30-2012, RP 37.

This Court has found RCW 10.95.040(2) to be mandatory. Regardless of defense counsel having actual knowledge, the State must serve the physical notice of intention to seek the death penalty on a defendant or his attorney within 30 days (or an agreed extension thereof) or RCW 10.95.040(3) – the penalty provision – kicks in, and the prosecuting attorney may not request the death penalty.” State v. Dearbone, 125 Wn.2d 173, 177, 883 P. 2d 303 (1994).

... we should strive to ensure that the procedures and safeguards enacted by the legislature are properly followed by the State. The determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedures established by the Legislature.

State v. Luvene, 127 Wn.2d 690, 719 n.8 (1995) (quoting Woodson v. North Carolina, 420 U.S. 280, 305, 96 S. Ct. 2987, 49 L. Ed. 2d. 944 (1976)).

RCW 10.95.040(3) applies to both parts (1) regarding when a prosecutor shall file a notice of intention, and part (2) regarding the mechanics of service and filing. Otherwise the penalty would be contained within part (2) instead of a free standing provision.

The State relies on State v. Rice, 174 Wn.2d 884 (2012), in support of its claim that any limits on its discretion to file a notice of intention is a violation of separation of powers. But the Rice opinion only proves that

filing a notice of intent to seek death is not a charging decision, and if it is, RCW 10.95.040 is unconstitutional. In Rice the defendant molested a ten year old boy and kidnapped the same boy. The prosecutor filed special allegations that her crimes were predatory and sexually motivated. Id. at 890-91. The special allegations increased her sentence. On appeal Rice claimed that under RCW 9.94A.835, the legislature required the charging of special allegations whenever there is sufficient evidence to support them. Id. at 892. Rice claimed the enhancement statute was unconstitutional because the legislature's act of mandating a prosecutor to file the special allegations encroaches on prosecutorial discretion. Id. The Rice court agreed that that would be true if the special allegations statute was mandatory; however the court determined the statute is directory.

The charging statutes are mandatory only if a prosecuting attorney can be forced to comply or if a prosecutor's failure to comply has legal repercussions. Otherwise, the statutes are directory only ...

Rice, at 896.

RCW 10.95.040(1) is mandatory because there is a legal penalty: If the prosecuting attorney does not comply with section (1), he cannot seek the death penalty. RCW 10.95.040(3). And, as set forth above, in Bartholomew (III) this Court already decided that in RCW 10.95 "shall" is mandatory and the statute is mandatory even to the point of requiring the

State to subject a defendant to a penalty phase trial when the State does not believe the death penalty is justified.

The State is mistaken in equating the charging of “special allegations” described in Rice with the filing of a notice of intent under RCW 10.95.040(1). The “special allegations,” such as sexual motivation, have *mens rea* elements which must be proven beyond a reasonable doubt. The “special allegations” are akin to aggravating factors under RCW 10.95.020 which must be charged in the information and proven beyond a reasonable doubt to enhance the penalty for first degree murder to life in prison without release.

If a kidnapper has a sexual motivation, the sexual motivation makes the crime worse, so it is an extension of the underlying criminal charge. However, if a murderer lacks childhood trauma and mental disease (examples of mitigating factors), that does not make his crime worse but merely deprives the murderer of reasons for mercy in sentencing.

Therefore, the court enforcing the mandatory requirement that a death notice be filed only when there are not sufficient mitigating circumstances, without consideration of strength of the case on guilt, does not encroach on separation of powers.

The decision to file a notice of intention to seek the death penalty

is notice of a proceeding. That proceeding cannot legally be held or even scheduled unless “there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.”

Even if the Court deems the notice of intent to be a “charge” it is a change to the original charge of aggravated murder. A notice cannot be filed until after an information charging aggravated murder has been filed. Based on the information, the maximum sentence is life in prison without release. The filing of a notice of intent to seek the death penalty, if it is a charge as asserted by the State, effectively amends the original information adding allegations that raise the maximum penalty to death. Although “there is no role for the court at the time the prosecuting attorney files the original charge ...the amendment of an information is not an initial decision to prosecute.” State v. Haner, 95 Wn.2d 858, 863 (1981). The Haner court affirmed a trial court refusing to permit the State to amend an information downward pursuant to a plea bargain.

4. It Is Important To Recognize That RCW 10.95 Is The Only Death Penalty Statute In The Entire Nation, Including the Federal Death Penalty Act, Which Requires a Prosecutor to File a Notice of Intent Only When There Are Not Sufficient Mitigating Circumstances to Merit Leniency

The State has relegated mention of the fact that RCW 10.95.040(1)

is *sui generis* among death penalty statutes to a footnote and says it is irrelevant to the legal analysis. Opening Brief of Petitioner, p.17, fn 9. But if the legislature makes a death penalty law no other state has or has had in the previous two hundred years of national history, the law should not be read as if it IS the same as every other state's death penalty laws or the federal government's death penalty law.

At the time of argument on McEnroe's 2009 Motion to Dismiss the Notice based on 10.95.040 (March 2010), the trial court asked the parties to research the legislative history of RCW 10.95.040 and to find out whether other states' death penalty laws required a prosecutor to consider mitigating circumstances when deciding whether to file a notice of intent. Oral Argument 3-26-2010, RP 81. Both parties reported they could find no other statute with a filing provision focused on mitigating circumstances. CP 188.

The State's reliance on cases interpreting the federal death penalty law is misplaced.¹⁷ The federal law is very different than RCW 10.95.040. The federal law expressly provides that notices of intent to seek death be filed based on "circumstances of the offense." A federal death penalty notice appraises defendants of the aggravating factors the government intends to prove at a penalty phase trial. The federal notice statute does

¹⁷ See Opening Brief of Petitioner, p. 17.

not mention mitigating circumstances.

Special hearing to determine whether a sentence of death is justified

(a) Notice by the government. If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

18 USC § 3593 (emphasis added). The federal statute directs the government to look only at the circumstances of the offense. In looking at the offense the government is allowed an entirely subjective evaluation,

simply whether the “government believes” the circumstances of the offense justify a sentence of death. At the filing stage, mitigation is not considered at all.

Also, the federal notice statute is not mandatory. There is no penalty set forth for failure to comply with the statute. There is not even a specific time limit for giving notice.

But Washington State is different. Washington is the only jurisdiction in the United States which by statute requires:

If a person is charged with aggravated first degree murder ... 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.*

RCW 10.95.040 (emphasis added). No other states’ statutes or rules require prosecuting attorneys to focus only on mitigating circumstances when deciding whether or not to file a notice of intention to seek the death penalty. In fact, it appears no other jurisdiction’s capital punishment laws mention mitigating circumstances with reference to when a prosecutor may seek the death penalty.¹⁸

¹⁸ The trial court found:

RCW 10.95.040(1) is a unique statute. Neither the Federal Death Penalty Act nor any state death penalty statute appears to have a comparable provision.

Order on Defendants’ Motion to Strike the Notice of Special Sentencing Proceeding, 6-

When RCW 10.95 was adopted, the United State Supreme Court in Gregg v. Georgia had found the death penalty schemes of Georgia, Texas and Florida to be constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976). Other states, including Washington, looked to those states' statutes, and the Model Penal Code cited in Gregg, as safe models when re-enacting death penalty statutes. However, the Supreme Court did not discourage states from customizing the approved schemes:

We do not intend to suggest that only the above described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis.

Id. at 195, 96 S.Ct. at 2935. It is significant to interpreting RCW 10.95.040 that Washington's legislature did not copy other states' approved notice provisions but instead created a unique provision that a prosecutor shall file a notice of intention to seek the death penalty only when there are not sufficient mitigating circumstances. The Legislature wrote RCW 10.95.040 to require a prosecutor to file a notice of intent to seek the death penalty "when there is reason to believe there are not

4-10, p. 4. CP 448

Washington State has a unique intermediate determination set forth in RCW 10.95.040(1).

Order on Defendants' Motion to Strike the Notice of Special Sentencing Proceeding, 6-4-10, p. 8, CP 452

sufficient mitigating circumstances to merit leniency” because regardless of aggravating factors or strength of proof of guilt, the legislature did not intend for defendants with sufficient mitigating circumstances to face a death sentence.

The Texas death penalty scheme did not provide for any notice of intention to seek death. Every person convicted of capital murder faced a capital penalty jury.¹⁹ The Supreme Court approved the Texas statute which accorded no discretion to prosecutors. This suggests that a decision to seek the death penalty is not a “charging” decision under the separate powers of a prosecutor. Contrary to the State’s assertion that “[u]nder all death penalty schemes the prosecutor must exercise discretion to either pursue the death penalty or not,”²⁰ state legislatures can and have made seeking the death penalty mandatory when aggravated murder is charged, removing prosecutorial discretion.

¹⁹ See Tex. Crim. Code Ann. § 26.052. In 1996 the statute was amended to provide that all persons charged with capital murder automatically faced a death sentencing proceeding unless the prosecutor affirmatively put on the record that the state would not seek death in a particular case. Prior to 1996 the prosecutor had no authority to decline to seek a death sentence.

²⁰ Opening Brief of Petitioner, p. 17, fn. 9.

D. ALLOWING PROSECUTING ATTORNEYS TO EXERCISE UNREVIEWABLE SUBJECTIVE DISCRETION IN SEEKING THE DEATH PENALTY HAS PRODUCED AN UNSETTLING PATTERN OF DEATH PENALTY DECISIONS AND DEATH SENTENCES BASED ON THE RACE AND MINORITY STATUS OF VICTIMS IN KING COUNTY AND WASHINGTON

As argued above, RCW 10.95.040 provides a strict standard which tells a prosecutor when he may seek a death sentence, that is when and *only* when there is reason to believe there are not sufficient mitigating circumstances to merit leniency. However, in practice over the last thirty-two years since RCW 10.95 was enacted, prosecutors have filed notices based on their “subjective discretion,” which the State argues cannot be examined by the court.

This Court has recognized that the subjective discretion of elected prosecutors results in disparity in application of the death penalty throughout the state. In State v. Cross, 156 Wn.2d 580, 625, 132 P.3d 80 (2006), the Court acknowledged,

It is clear to us that counties in Washington do have different standards for when they seek the death penalty, given the distribution of cases across the state.

But even though the Court found that

it is more important to establish regularity in the imposition of the death penalty than the method of recounting ballots[.]

the Court “declined to apply the principles announced in [Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)] outside of election law. Cross at 625-626.

In State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012), the majority and dissenters debated the disparate application of the death penalty via the Court’s proportionality review. Justice Wiggins concurred in the dissent but added his concern,

I write separately to add my deep concern that the death penalty might be much more predictable than we have recognized. I refer, of course, to the race of the defendant.

Davis at 389 (Wiggins, J., dissenting).

It appears Justice Wiggins is correct but the predictability is more closely tied to the race of the victims than the race of the defendants.

Including McEnroe and Anderson, King County Prosecutor Dan Satterberg had made six death penalty decisions in his tenure. He filed notices against three defendants, McEnroe, Anderson, and Christopher Monfort, who is charged with killing a police officer. All of the victims of their cases where the death notice was filed were mainstream white people. Satterberg did not file notices against Dr. Louis Chen, who brutally killed his gay partner and their Asian child. He did not file a

notice against Daniel Hicks, who shot his girlfriend twelve times and their thirteen week old mixed-race baby seven times with a .45 caliber gun. He did not file a notice against Isaiah Kalebu, who tortured, stabbed and brutally raped two Lesbian women over a period of 90 minutes, killing one of them. Kalebu was also known to be the only suspect in the arson deaths of his aunt and a friend of hers. In King County, the three defendants who killed white people are facing death penalty trials. Three others who killed minority victims were shown leniency.

In Snohomish County, Byron Scherf is currently being capitally tried after being charged with killing a white prison guard.

Eight men are now on death row. Seven of those men killed white victims. One killed an Asian woman. None killed an African American.

Five men have been executed in Washington since 1981. Four of those men killed only white victims and one killed a white victim and two Native American victims.

Of the eight men currently on death row, four are African American and four are Caucasian. Three of the African American men each killed only one victim, one killed two victims. One of the white condemned prisoners killed only one victim, one killed three victims, one killed four victims, and one killed fourteen victims.

In summary, of the eighteen people who collectively have been

executed since 1981, are on death row, or are now facing death penalty trials in Washington, seventeen of them killed or are charged with killing white victims. African Americans make up fifty per cent of death row but only four percent of Washington's population. At least based on number of victims, African Americans are on death row for less serious crimes than the white men on death row.

It is beyond the expertise, resources and time of Respondents to analyze these figures, but it appears decades of "subjective discretion" in the administration of RCW 10.95 has resulted in the killers of white victims disproportionately facing harsher penalties than the killers of any set of minority victims²¹.

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On Death Row:

Trial Ct. Rpt. No.165; Clark Elmore, D is white, single V is white
Trial Ct. Rpt. No.220; Dayva Cross, D is white, three V's are white
Trial Ct. Rpt. No.251; Robert Yates, D is white, two V's, one white, one Native American
Trial Ct. Rpt. No.303; Conner Schierman, D is white, 4 V's are white
Trial Ct. Rpt. No.216; Allen Gregory, D is Black, V is white
Trial Ct. Rpt. No.119; Jonathan Gentry, D is black, single V is white
Trial Ct. Rpt. No.180; Cecil Davis, D is black, single V is Asian
Trial Ct. Rpt. No.177; Dwayne Woods, D is black, two V's are white

Already executed:

Trial Ct. Rpt. No.140; Cal Brown, D was white, V white
Trial Ct. Rpt. No.160; Jeremy Sagastagui, D was white, three V's all white
Trial Ct. Rpt. No.183; Elledge, D is W, single V was white
Trial Ct. Rpt. No.76; Wesley Allen Dodd, D was W, three V's, one white, two Native American
Trial Ct. Rpt. No.9 Charles Campbell, D was W, three V's all white

E. DISMISSAL OF THE DEATH NOTICE IS THE PROPER REMEDY

RCW 10.95.040 provides in relevant part:

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

...

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

Id., (emphasis added).

Contrary to the state's assertion, State v. Dearbone, 125 Wn.2d 173, 883 P.2d 303 (1994) is applicable here. As in Dearbone, the language of the statute in question is unambiguous – before filing a notice of special sentencing proceeding, the prosecutor must determine whether “there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.040(1). As in Dearbone, the prosecutor here failed to comply with his mandatory statutory obligation.

Given the unique qualities of the death penalty, the Legislature has tailored pretrial procedures to govern the

use of a special sentencing proceeding. ... [F]iling and service of notice is mandatory - no notice, no death penalty.

Dearbone, 125 Wn.2d at 177. As in Dearbone, strict compliance with the statute is required, and the state must follow the mandated procedures. 125 Wn.2d at 182; see also, State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995). There is no reason to remand the matter to allow the prosecutor an opportunity "to consider the matter anew." This is not a situation where the court has created a new requirement for prosecutors to follow. RCW 10.95.040(1) has always required the prosecutor to consider mitigation, not the strength of the evidence, in deciding whether to file a notice of intent. Dearbone and Luvene, decided in 1994 and 1995, made it clear that this statute demands strict compliance. Thus, State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364 (1980), is inapposite.

The cases cited by the state, like Dearbone, provide remedies for specific errors made by prosecutors and trial courts. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) involved an error in the charging document. Godefroy v. Reilly, 140 Wn. 650, 250 P. 59 (1926) was a civil action and involved the failure of the trial court to properly instruct the jury as directed by this Court. State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995) involved the trial court's failure to include the "ultimate facts" relied upon for each element of the offense under JuCR 7.11(d), and this

Court determined remand was the appropriate remedy because it was “apparent from the record” that the State had met its burden of proof. *Id.* at 20. Similarly, in Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 215 P.3d 977 (2009), the trial court’s ruling on a sealing order was ambiguous, and the matter was remanded for the court to properly apply the standard for sealing court records.

The remedy here is dismissal of the notice of intent to seek the death penalty. In cases involving the death penalty, courts must “strive to ensure that the procedures and safeguards enacted by the Legislature” – here, RCW 10.95.040(1) – are properly followed by the State. Luvene, 127 Wn.2d at 719 n.8, citing Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Death is different in kind from other American punishments; therefore, it is of vital importance to the defendant *and to the community* that any decision to impose the death sentence be, and appear to be, based on reason. Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

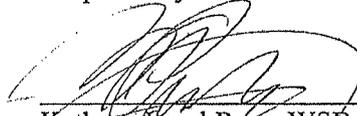
IV. CONCLUSION

The trial court should be affirmed and the state should not be permitted to re-file the notice of intent to seek the death penalty.

DATED: _____

4/16/2013

Respectfully submitted:



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Certificate of Service by U.S. Mail and Electronic Mail

State of Washington (Petitioner)

v.

**Joseph T. McEnroe and Michele K. Anderson (Respondents)
(consolidated under WA Supreme Ct. No. 88410-2)**

On April 16, 2013, I served the below listed document(s) by placing a copy in the U.S. Mail (for Ms. Loginsky), postage pre-paid, and by Inter-Office Mail (for all other recipients). On the same date, I delivered the below-listed document to the below-listed attorneys via electronic mail.

Document served:

1. Defendants/Respondents Amended Joint Response.
2. Errata to Defendants/Respondents' Joint Response (that was filed April 12, 2013)
3. Motion for Leave to Amend Response

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

/S/ William Prestia

April 16, 2013, Seattle, WA

William Prestia

Date and Place

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Subject: RE: Corrected/Amended Response Brief: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 88410-2

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In the following case, State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 88410-2, please accept for filing the following document:

Respondents' Amended Response Brief, a copy of which is attached.

Please feel free to contact me if you have any questions.

--

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