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SUPREME COURT
STATE OF WASHINGTON
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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

ERRATA TO DEFENDANTS/RESPONDENTS' JOINT RESPONSE

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ORIGINAL

ERRATA

Errata to Respondents Brief Originally filed April 12, 2013:

1. The restatement of issues was inadvertently omitted from the final assembled brief. It has been added to an amended brief, filed today. A copy of the Statement of Issues is set forth in full below.
2. In the Original Brief: P. 53, the quotation of RCW 10.95.040 mistakenly quoted part (2) instead of part (1). The page should read:

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).

3. In the Original Brief, a footnote was inadvertently omitted on p. 39. This should have been footnote 15, and it should have come after the citation for Bartholomew (III) and the words “(internal citations omitted)(emphasis added).” FOOTNOTE:

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.)

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?

DATED: April 16, 2013

Respectfully submitted:

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William Prestia, WSBA 29912
Attorneys for Respondent Joseph McEnroe

Colleen O’Connor, WSBA 20265
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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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From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 16, 2013 3:54 PM
To: 'Bill Prestia'; Vitalich, Andrea; Jim.Whisman@kingcounty.gov; Pam Loginsky; O'Connor, Colleen; David Sorenson; Katie Ross; Leo Hamaji
Subject: RE: Respondents' Errata: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 88410-2

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To: OFFICE RECEPTIONIST, CLERK; Vitalich, Andrea; Jim.Whisman@kingcounty.gov; Pam Loginsky; O'Connor, Colleen; David Sorenson; Katie Ross; Leo Hamaji
Subject: Respondents' Errata: State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 88410-2

In the case of State v. Joseph T. McEnroe and Michele K. Anderson, Supreme Court No. 88410-2,

Please accept for filing the following document:

Errata to Defendants'/Respondents' Joint Response

The document is attached hereto. Please feel free to contact me with questions.

Thank you

--

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