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NO. 69831-1-I

69832-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH THOMAS McENROE AND
MICHELE KRISTEN ANDERSON,

Defendants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF MOVING PARTY

The State of Washington, plaintiff, represented by Daniel T. Satterberg, King County Prosecuting Attorney, by and through his deputies Andrea R. Vitalich and James M. Whisman, seeks the relief designated in part B.

B. DECISION BELOW AND STATEMENT OF RELIEF SOUGHT

The State asks this Court to grant discretionary review of the decision of the King County Superior Court, the Honorable Jeffrey Ramsdell, dismissing the notices of intent to seek the death penalty in these cases on grounds that the elected county prosecutor cannot consider the strength of the available evidence of guilt when deciding whether to file a notice of intent to seek the death penalty, and that in doing so in this case, the King County Prosecutor erred as a matter of law. The Superior Court's ruling was issued and filed on January 31, 2013, and is attached as Appendix A.

The State further asks this Court to promptly consider the issue on the merits, to reverse the trial court, and to order that McEnroe's trial should go forward as scheduled.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's ruling is premature, given that neither defendant has been convicted or sentenced to death, and given that in the event that the defendants are convicted and sentenced to death, this issue may be raised on direct appeal.

2. Whether the trial court's ruling violates the separation of powers doctrine by reversing a decision that the legislature has vested within the sole discretion of the elected county prosecutor.

3. Whether the trial court's ruling is contrary to controlling authority from the Washington Supreme Court, which holds that the elected county prosecutor may consider any and all available information regarding the defendant *and* the crime.

4. Whether the trial court's ruling is unsound as a matter of logic.

5. Whether the trial court's ruling is erroneous because its equal protection analysis is baseless.

D. FACTS RELEVANT TO MOTION

The defendants are charged with six counts of aggravated murder for the December 24, 2007 killings of six members of defendant Anderson's family: Wayne and Judy Anderson, Anderson's parents; Scott Anderson, Anderson's brother; Erica Anderson, Scott's wife; Olivia

Anderson (age 5), Scott and Erica's daughter; and Nathan Anderson (age 3), Scott and Erica's son. In each count, and as to each defendant, the aggravating circumstance alleged is that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act," pursuant to RCW 10.95.020(10). As to the counts relating to Erica Anderson, Olivia Anderson and Nathan Anderson, an additional aggravating circumstance is alleged, *i.e.*, that "the person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime," pursuant to RCW 10.95.020(9). A notice of intent to seek the death penalty has been filed as to each defendant. The Information and Certification for Determination of Probable Cause are attached as Appendix B.

Throughout the five-plus years that this case has been pending, the trial court has considered and rejected numerous motions to dismiss the notices of intent to seek the death penalty. The most recent of these motions, which was filed by defendant McEnroe, alleged that the King County Prosecutor treated this case differently from other recent aggravated murder cases with respect to the consideration of potential mitigating evidence, and that this alleged disparate treatment constitutes a violation of either due process or equal protection. Appendix C, D, F, G.

The State responded, *inter alia*, that this motion was merely a rephrasing of other motions that had been previously denied. Appendix E.

After considering the written materials and the arguments of counsel,¹ on January 31, 2013, the trial court dismissed the notices of intent to seek the death penalty on grounds that had not been briefed or argued by either defendant: namely, that an elected county prosecutor, as a matter of law, is forbidden from considering the strength of the available evidence to be presented at trial when making the executive decision whether to file a notice of intent to seek the death penalty. Appendix A.

After more than five years of pretrial proceedings, which have included a previous interlocutory appeal on a wholly ancillary issue filed by defendant McEnroe,² one of these defendants is at last on the cusp of trial. Three thousand potential jurors have been summonsed for McEnroe's trial, which is scheduled to begin on February 25, 2013. Potential jurors will be screened for hardship beginning today, February 4, 2013, and the remaining potential jurors are scheduled to arrive at the King County Courthouse to begin the voir dire process in three weeks, on February 22, 2013.

¹ A transcript of the oral argument is attached as Appendix I.

² See State v. McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Discretionary review should be granted when the trial court has committed an obvious error that renders further proceedings useless, when the trial court has committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act, or if the trial court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court.

RAP 2.3(b)(1), (2) and (3). The trial court's ruling in this case meets all of these criteria. Accordingly, this Court should accept review, reverse the trial court's ruling, and order that the trial of defendant McEnroe proceed as scheduled.

1. THE TRIAL COURT'S RULING IS PREMATURE.

The trial court's ruling is premature because neither defendant has yet been convicted or sentenced to death. Indeed, neither defendant has yet been tried. There is no legal basis to dismiss the notices of intent to seek the death penalty at this juncture, especially based on a wholly novel theory unsupported by law.

This Court has previously held that it is not proper for a trial court to dismiss aggravating circumstances pretrial because such a ruling is antithetical to society's interest in having a full opportunity to convict

those who have violated the law, “does not relieve the defendant of the burden of undergoing a trial” on the underlying charges, and forces the State to seek interlocutory review, which is “the antithesis of judicial efficiency and economy.” State v. Brown, 64 Wn. App. 606, 615, 617, 825 P.2d 350, rev. denied, 119 Wn.2d 1009 (1992) (cited with approval in In re Personal Restraint of Woods, 154 Wn.2d 400, 424, 114 P.3d 607 (2005)). This reasoning applies perforce to the trial court’s ruling dismissing the notices of intent to seek the death penalty against McEnroe and Anderson.

Based on a theory never raised in any defense motion and unsupported by any legal authority, the trial court in this case has deprived the citizens of Washington of a full opportunity to prosecute these defendants. Further, the defendants still face trial on six counts of aggravated first-degree murder, and the State has been forced to expend scarce public resources seeking emergency interlocutory review. Neither defendant has yet been convicted or sentenced to death. If the defendants are not sentenced to death, this issue will be moot. If they are sentenced to death, this issue may be raised on direct appeal.

The trial court’s ruling has placed the State in the untenable position of seeking emergency discretionary review – a procedure that this Court recognizes is not in the interests of judicial economy – in an attempt

to *conserve* scarce judicial and public resources and proceed with McEnroe's trial as scheduled. If the State did not seek review now, the defendants would doubtless argue that the State could not seek to reinstate the death penalty on direct appeal on double jeopardy grounds. As in Brown, the trial court's ruling is improper because it is premature, and because it deprives the State of the ability to fully enforce the laws of the State of Washington. The trial court's ruling may be reversed on this basis alone.

2. THE TRIAL COURT'S RULING VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The decision whether to seek the death penalty is a decision that the legislature has vested solely within the discretion of the elected county prosecutors of Washington. RCW 10.95.040(1). The decision whether to seek the death penalty is not a judicial function. State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). To the contrary, "[t]he prosecutor is empowered with substantial discretion and autonomy in making the determination to seek a sentence of death." Koenig v. Thurston County, 175 Wn.2d 837, 287 P.3d 523, 527 (2012) (citing State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984)). Moreover, in making the decision whether to seek the death penalty, "the prosecutor must be free to investigate a defendant's background, family, *and the evidence in the case*

without being influenced by public opinion and scrutiny.” Koenig, 287 P.3d at 527 (emphasis supplied).

In this case, the trial court ruled that a prosecutor errs as a matter of law by considering the strength of the evidence in deciding whether to seek the death penalty, and it dismissed the notices of intent to seek the death penalty on that basis. In so doing, the trial court has usurped the prosecutor’s executive decision by determining what aspects of a case the prosecutor can and cannot consider. Moreover, the trial court has fundamentally undermined the discretion and autonomy that the legislature has properly delegated to the elected prosecutor in making this critical executive decision. As such, the trial court’s ruling is a violation of the separation of powers doctrine, which “serves mainly to ensure that the fundamental function of each branch remain inviolate.” Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

The Washington Supreme Court has held repeatedly that the prosecutor’s exercise of discretion in deciding whether to seek the death penalty is similar to his or her exercise of discretion in deciding whether to charge a defendant with a crime. State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984) (citing Dictado, 102 Wn.2d at 298)). In the charging context, so long as probable cause exists, the prosecutor’s discretion to charge a defendant with a crime is not reviewable unless that discretion

has been exercised based on race, religion, or some other constitutionally impermissible basis. Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). In this case, the trial court overturned the equivalent of a charging decision based on the prosecutor's consideration of *the available evidence* – the most fundamental consideration driving any charging decision in *any* case, capital or otherwise. As such, the trial court's ruling impermissibly infringes on an executive function on wholly untenable grounds.

3. THE TRIAL COURT'S RULING IS CONTRARY TO CONTROLLING AUTHORITY.

The trial court's ruling that the elected county prosecutor cannot consider the strength of the available evidence to be presented at trial is contrary to controlling authority from the Washington Supreme Court. More specifically, the Washington Supreme Court has held that the prosecutor should consider any available information about the defendant *and* the crime in deciding whether to seek the death penalty.

In State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), the defendant argued, *inter alia*, that Washington's death penalty statute "is unconstitutional because it allows prosecutorial discretion in the decision to seek the death penalty." Rupe, 101 Wn.2d at 699. In summarily

rejecting this argument, the court observed that “courts may assume that prosecutors exercise their discretion in a manner which reflects their judgment concerning *the seriousness of the crime or insufficiency of the evidence.*” *Id.* at 700 (emphasis supplied). This observation reflects the court’s acknowledgment that the strength (or lack thereof) of the available evidence is a proper consideration in the prosecutor’s exercise of discretion in determining whether seeking the death penalty may be appropriate in a given case.

And very recently, in State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012), in the course of performing its statutorily-mandated proportionality review, the court stated:

Mitigating evidence is not the only reason a prosecutor might decide not to seek the death penalty. *The strength of the State’s case often influences that decision.* For example, the trial judge’s report regarding Martin Sanders states, “The plea agreement to recommend life without possibility of parole was due to the fact that the State felt there was a reasonable possibility of acquittal due to the circumstantial evidence available in the case.” [. . .] Similarly, the report concerning Jack Spillman relates that “the prosecution’s case did not include direct evidence of [the] defendant’s involvement in the murders,” although there was “strong circumstantial evidence,” and that “members of the victims’ family spoke at the sentencing hearing in support of the life sentence and resolution of the case.”

Davis, 175 Wn.2d at 357-58 (emphasis supplied). Again, this pronouncement from the court acknowledges the obvious fact that it is

proper for the elected prosecutor to consider the strength of the available evidence when determining whether to allow a jury to consider imposing the death penalty in any given case.

Indeed, the trial court acknowledged the existence of these cases in its ruling. *See* Appendix A, at 10-11 (citing Rupe and Davis).

Nevertheless, the trial court reasoned that these cases were distinguishable because, “to the extent that the Court’s statement condones consideration of the strength of the case in declining to file the notice of intent, the case is distinguishable because here the prosecutor did file the notice of intent.” Appendix A, at 11 (emphasis in original). This reasoning strains credulity. If, as the trial court acknowledges, the strength of the evidence is a proper consideration in deciding *not to seek* the death penalty, it does not logically follow that the strength of the evidence cannot be considered at all in deciding *to seek* the death penalty.³ Moreover, although the trial court attempted to distinguish Rupe and Davis on these tenuous grounds, it provided no authority that actually supports its decision. This is because no such authority exists.

Furthermore, in reaching its decision, the trial court relied on the notion that a *jury* cannot consider the strength of the evidence during the penalty phase, and therefore, the *prosecutor* cannot consider it in

³ Of course, such a rule would be literally impossible to follow because the prosecutor must either look at the evidence, or not.

determining whether a penalty phase will occur in the first instance. See Appendix A, at 9 (“While the facts and circumstances of the offense are appropriate considerations for a jury to consider when assessing mitigation at the penalty phase, the strength of the State’s case regarding the defendant’s guilt is of no relevance.”). The trial court’s view that a *jury* cannot consider the strength of the evidence during the penalty phase is fundamentally incorrect.

Jurors are specifically instructed at the beginning of the penalty phase that “[d]uring your deliberations, you should *consider anew the evidence* presented to you in the first phase of this case.” WPIC 31.02 (emphasis supplied). As noted in the commentary for this instruction, it is proper “to instruct the jury to consider *all the evidence* during the penalty phase, and not just whether there were insufficient mitigating circumstances.” Comment, WPIC 31.02 (2008) (citing State v. Brown, 132 Wn.2d 529, 613-23, 940 P.2d 546 (1997)) (emphasis supplied).

Additionally, the Washington Supreme Court’s jurisprudence further establishes that it is entirely proper for jurors to consider the strength of the State’s case as presented in the guilt phase in determining whether there are insufficient mitigating circumstances to merit leniency in the penalty phase. See, e.g., State v. Campbell, 103 Wn.2d 1, 29, 691 P.2d 929 (1984) (holding that “the *overwhelming evidence* against

Campbell during the guilt phase” supported the jury’s conclusion in the penalty phase that there were not sufficient mitigating circumstances to merit leniency) (emphasis supplied); State v. Woods, 143 Wn.2d 561, 615, 23 P.3d 1046 (2001) (holding that the “*strong evidence* that convinced a jury that Woods was guilty of these crimes that were extremely ghastly and violently executed” was sufficient to support the jury’s verdict that the death penalty should be imposed) (emphasis supplied).⁴

In sum, the trial court’s decision is not only unsupported by authority, it is directly contrary to controlling authority. The trial court’s ruling should be reversed.

4. THE TRIAL COURT’S RULING IS BASED ON A FAILURE OF LOGIC.

The trial court’s ruling is unsound as a matter of logic because the “facts and circumstances” of the case (which the trial court ruled the prosecutor *may* consider) simply cannot be uncoupled from the “strength

⁴ Conversely, although McEnroe argued to the trial court that a capital defendant is not constitutionally entitled to a jury instruction on the concept of “residual doubt” in the penalty phase (*see* Appendix H, and Appendix I, at 85-86), this certainly does not mean that a capital defendant would be constitutionally *precluded* from arguing weaknesses in the evidence as a reason for the jury not to impose the death penalty. If the strength or weakness of the State’s case is a proper consideration for the jury in deciding whether to *impose* the death penalty, then it is certainly relevant to the prosecutor’s decision whether to *seek* the death penalty. A prosecutor who decides to proceed with the death penalty only in cases where there is no doubt of the defendant’s guilt does not violate equal protection of the laws.

of the evidence” (which the trial court ruled the prosecutor *cannot* consider).

The trial court concluded that the “facts and circumstances” of a case is a wholly separate and distinct concept from the “strength of the evidence.” Appendix A, at 3-4. This is a logical failure because the “facts and circumstances” of a case are necessarily defined by the evidence that is available to prove those “facts and circumstances” at trial. For example, the “facts and circumstances” of the cases against defendants McEnroe and Anderson include each defendant’s lengthy, detailed confession. In each confession, each defendant explains what he or she did, and further explains why he or she did it. Plainly, without these confessions, the evidence against each defendant would be different, and that difference could be relevant to either a prosecutor or to a jury.

Yet the trial court’s ruling suggests that the prosecutor should disregard these confessions, because they make the State’s case stronger. *See* Appendix A, at 12 (“In a scenario suggestive of Camus, a defendant’s early confession and cooperation could become his downfall.”). It is unclear whether the trial court’s reference to Camus is intended as sarcasm or irony, but it is neither appropriate nor legally relevant. Surely the law cannot require a prosecutor to ignore strong evidence of guilt in a capital case simply because the evidence comes from the defendant’s own mouth.

And to the extent the trial court may believe that a confession diminishes culpability, that is a question that the jurors may consider during the penalty phase. It is hardly a basis to preclude the filing of a death notice as a matter of law.

In sum, the trial court's ruling is unsound as a matter of logic because "the facts and circumstances" of a case simply cannot be considered separately from "the strength of the evidence" that is presented to prove those "facts and circumstances." In a court of law, there is no Platonic form of "facts and circumstances" that exists independently from the evidence. Rather, these concepts are inextricably linked; they cannot be parsed in the manner employed by the trial court.

5. THE PROSECUTOR'S CONSIDERATION OF THE AVAILABLE EVIDENCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

The trial court seems to have reached the conclusion that consideration of the strength of the evidence constitutes a violation of equal protection based upon a hypothetical. Specifically, the trial court posited a scenario whereby two defendants commit identical crimes, yet one case is weak and the other is strong due to the relative competence and

resources of the investigating police agencies. Appendix A, at 9-10.

From this hypothetical, the court concludes that it would violate equal protection principles to seek the death penalty against one defendant but not the other. This reasoning is erroneous for several reasons.

First, the trial court's ruling does not include even a rudimentary equal protection analysis; it fails to consider, for example, whether defendants charged with similar crimes but facing different evidence are really "similarly situated" for equal protection purposes.⁵ This is plainly erroneous, and cannot constitute a legal basis to dismiss the death penalty against two defendants who are charged with the premeditated killings of four adults and two young children.⁶

⁵ The trial court's ruling also fails to acknowledge that the Washington Supreme Court has held repeatedly that Washington's death penalty scheme does not violate equal protection on grounds prosecutors have the discretion to decide whether to seek the death penalty. See State v. Benn, 120 Wn.2d 631, 672, 845 P.2d 289 (1993) (holding that prosecutorial discretion in determining whether to seek the death penalty does not violate equal protection, citing numerous cases).

⁶ Also, the trial court suggests that the State has argued that "the prosecutor could legitimately pursue the death penalty against one defendant *solely* because the evidence of guilt was extremely strong." Appendix A, at 12 (emphasis supplied). This suggests that mitigation may not be relevant in a strong case. That is not now, nor has it ever been, the State's position. See Appendix I, at 71-84. Mitigation is relevant in any decision regarding the death penalty, whether that decision is made by the prosecutor or the jury.

Second, the trial court's hypothetical does not account for the fact that capital murders can and do go wholly unsolved and unpunished. Surely the legality of the death penalty does not depend on whether police and prosecutors can catch and convict every person who has committed a capital murder. Put another way, nothing in state or federal law requires that every capital murder be successfully investigated and that every capital murderer be convicted and put to death, or else *no one* may face the death penalty. The trial court's ruling falters on this failure of logic as well as the failure to conduct any meaningful equal protection analysis.

Finally, the trial court's ruling is fundamentally unsound as a matter of public policy. One of the primary arguments put forth in support of abolishing the death penalty is the possibility that an innocent person may be executed. *See Furman v. Georgia*, 408 U.S. 238, 290-91, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) (lamenting that the death penalty "must inevitably be inflicted upon innocent men"). Yet the trial court has ruled that the strength of the evidence that will be used to prove a defendant's guilt cannot be considered *as a matter of law* when

an elected prosecutor makes the decision whether to seek the death penalty.

A prosecutor's role is to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). Surely, in carrying out his or her duty to seek justice, a prosecutor may consider the evidence of a defendant's guilt in determining whether the death penalty may be considered by the jury.⁷ In so doing, the prosecutor ensures that only those defendants who are truly guilty of the most heinous crimes will face the harshest punishment that the law allows. To suggest otherwise, as the trial court has, is inconsistent with both justice and common sense.

F. CONCLUSION

For the reasons set forth above, the State asks this Court to grant discretionary review in accordance with RAP 2.3(b)(1), (2), and (3), to reverse the trial court's ruling dismissing the notices of intent to seek the

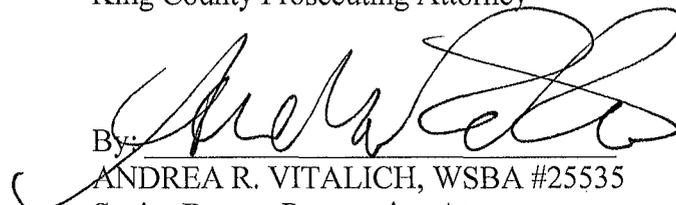
⁷ Another pillar of opposition to the death penalty is the argument that death penalty cases take too long and are too expensive. By focusing public resources on the most deserving cases – *i.e.*, those with strong evidence of guilt – a prosecutor exercises sound discretion. The trial court's ruling constitutes poor public policy for this reason as well.

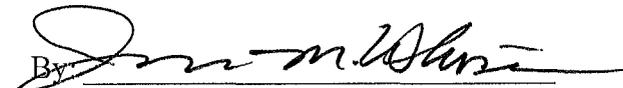
death penalty, and to order that the trial of defendant McEnroe proceed as soon thereafter as possible.

DATED this 4th day of February, 2013.

Respectfully submitted,

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APPENDIX A

Trial Court's Ruling

FILED
KING COUNTY, WASHINGTON

JAN 31 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and
Michele K. Anderson,

Defendants.

No. 07-1-08716-4 SEA

No. 07-1-08717-2 SEA

**Order Striking the Notice of Intent to
Seek the Death Penalty**

Defendant McEnroe alleges that the King County Prosecutor violated both the Equal Protection and Due Process clauses of the Federal and State Constitutions by employing a different process in evaluating the mitigating circumstances in his case than was employed in subsequent death penalty eligible cases. He notes that in State v. Hicks, State v. Kalebu, State v. Chinn and State v. Monfort the State retained its own mitigation investigator prior to the prosecutor exercising his discretion under RCW 10.95.040(1). The State did not retain such an investigator in his or co-defendant Anderson's cases.

ORIGINAL

Mr. McEnroe also reasserts that in his case the Prosecutor improperly "weighed" the evidence of the crime against the mitigation presented. Defendant McEnroe contends that in the subsequent cases the Prosecutor corrected this error and considered the mitigation presented by those defendants as an entirely separate inquiry. He argues that these differences in treatment mandate dismissal of the notice of intent in his case. Co-Defendant Anderson has joined in this motion as of January 4, 2013.

The State responds that these Equal Protection and Due Process arguments are essentially a "rehash" of previously denied motions. The State maintains that contrary to Defendant McEnroe's assertions, the Prosecutor did consider evidence of mitigation and simply found it inadequate to justify forgoing the filing of the notice of intent. Furthermore, the State contends that the Prosecutor's decisions in other cases have no bearing on the decision made in Defendant McEnroe's case and such a comparison would amount to an improper pretrial proportionality review.

In reply, Defendant McEnroe asserts that he is not arguing for a pretrial proportionality review, but is instead questioning "whether the Prosecutor followed the law equally for all the defendants." In short, he maintains that his focus is on "process" rather than "result."

Because the State contends that the defendants' arguments are merely a "rehash" of prior unsuccessful arguments, it may be helpful to review what has been decided thus far. In June 2010 this Court did consider defendants' challenges to the manner in which the Prosecutor applied RCW 10.95.040(1) in their cases. At the time the defendants contended that the Prosecutor failed to follow the directive of RCW

10.95.040(1) to consider only the mitigating factors when deciding whether to file the notice of special sentencing proceeding. They argued that the Prosecutor erred in "weighing" the evidence in mitigation against the heinousness of the crimes alleged, thereby inappropriately commingling the seriousness of the offense with the assessment of evidence mitigating the defendants' individual culpability.

This Court denied the defendants' motions for the reasons set forth in its memorandum decision and held that:

The prosecutor's role in exercising the discretion conferred by RCW 10.95.040(1) is to determine if there is reason to believe that the mitigating circumstances are insufficient to merit leniency. The scope of the information appropriate for the prosecutor's review is as broad as that which may be considered by the jury. The statute does not preclude the prosecutor from considering the facts and circumstances of the crime, but rather requires the prosecutor to anticipate and, in essence, preview the case as it will look to the jury at trial and through the special sentencing.

Order on Defendants' Motion to Strike, June 4th, 2010, at page 22.

Accordingly, this Court concluded that the Prosecutor did not improperly apply RCW 10.95.040(1) by failing to consider the defense mitigation in total isolation from the facts and circumstances of the alleged crimes. Like the jury, the Prosecutor need not put blinders on when considering the evidence in mitigation.

Although mentioned in passing in the State's Response Brief, this Court's ruling did not directly address the question of whether a prosecutor could consider the strength of the evidence when exercising discretion pursuant to RCW 10.95.040(1). The issue presented by the defense motion at the time was whether the prosecutor could consider the facts and circumstances of the crime when exercising discretion under the statute. The facts and circumstances of the crime is a concept distinct from the strength of the evidence of the crimes. The facts and circumstances of the crime

are comprised of the allegations being made in the charge. The strength of the evidence is the persuasiveness of the evidence in support of those allegations.

As this Court has previously recognized, RCW 10.95.040(1) is a statute unique to the State of Washington. Under the statute a prosecutor's decision whether to file the notice of intent to seek the death penalty is an exercise of discretion separate from his prior decision to file charges of aggravated murder in the first degree. Both decisions are given great deference by the court. Several Supreme Court cases have reiterated the principle that the prosecutor need not explain or justify the decision to file or not file the notice of intent. In order to file the notice of intent, the prosecutor need only state that he or she has a reason to believe that there is insufficient mitigation to merit leniency. The prosecutor need not state what that "reason to believe" is based upon.

Although the prosecutor's decision is potentially subject to review on an abuse of discretion standard, the absence of a record or other insight into the decision-making process renders the prospect of a meaningful review more theoretical than real. At least one federal court judge in Washington has expressed his belief that "the decision to seek the death penalty should be predicated on specific, articulated guidelines" yet in the context of the case before him was compelled to find no constitutional error. Harris By and Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1285 (WD WA. 1994), aff'd sub. nom. Harris By and Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995).

During the course of oral argument and in briefing in the cases at bar, the Prosecutor's Office has provided some insight into the factors it considers when deciding whether or not to file the notice of special sentencing proceeding. Counsel has repeatedly asserted, for example, that the elected Prosecutor considered the

mitigation material proffered by the defendants here. Counsel has also maintained that, consistent with this Court's earlier ruling, the Prosecutor appropriately considered the facts and circumstances of the crime.

Going further, however, counsel asserts that the Prosecutor also considers the strength of the evidence in a case when exercising discretion under RCW 10.95.040(1). Counsel maintains that such consideration is logical and appropriate. In prior briefing, the State specifically expressed disdain for the notion that a proper application of RCW 10.95.040(1) would preclude a Prosecutor from filing the notice of intent in a case where compelling evidence of mitigation exists but the evidence of the defendant's guilt is overwhelming. In various arguments before this Court the State has repeatedly referenced the strength of the cases against Defendants Anderson and McEnroe. Given the strategically crafted statements of experienced defense counsel both in open court and in the media, it appears that the strength of the State's case as to guilt is essentially not controverted and the salient issue at trial will be the appropriate sanction to impose.

It is well-known that prosecutors around this State make decisions on a daily basis that depend on an assessment of the strength of the evidence. It is a function that is familiar, routine and necessary. In fact, every case that comes to a prosecutor's office for a filing decision is subjected to that assessment. Weak cases may be declined for prosecution or sent back to a detective for additional investigation. Other cases bearing sufficient evidentiary support are filed pursuant to statutory authority (RCW 9.94.401, et. seq.) and internal standards and guidelines.

Depending on the strength of the evidence on each element of the potentially chargeable offenses, discretion is exercised as to the appropriate charge to file. If the State wishes to detain or impose conditions on the person charged, the charging decision must be submitted to the court to determine if probable cause supports the charging decision. CrR 3.2. This same transparent process is followed whether the crime is a relatively insignificant misdemeanor or the most grievous of offenses such as aggravated murder in the first degree.

This familiar weighing of the strength of the evidence undoubtedly occurred when the Prosecutor made the decision to file six counts of aggravated murder in the first degree against Defendants McEnroe and Anderson. RCW 9.94A.411(2)(a) provides that “[c]rimes against persons will be filed if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.” The basis for filing these most serious charges is reflected in the certificate for determination of probable cause supporting the charges.

The decision whether to file the notice of intent is far less transparent. While the decision is afforded great deference by the court, several Supreme Court cases have held the exercise of discretion is not unfettered. Although RCW 10.95.040(1) itself provides little guidance as to exactly what the prosecutor can and cannot consider when exercising this discretion in the death penalty context, case law has articulated the statute's purpose, as well as the parameters of its constitutional application.

In the face of a challenge to the breadth of discretion afforded to prosecutors under this State's death penalty statute, for example, our Supreme Court stated that a

prosecutor's discretion is constitutional when it functions to eliminate "only those cases in which juries could not have imposed the death penalty." State v. Rupe, 101 Wn.2d 664, 700, 683 P.2d 571 (1984). To meaningfully achieve this goal, this Court has previously held in the cases at bar that the scope of a prosecutor's assessment must be coextensive with that of the jury. Since the jury is instructed at the penalty phase that they should "have in mind" the crime of which the defendant has been convicted, a prosecutor is likewise permitted to consider the facts and circumstances of the alleged crime that he anticipates will be presented to the jury and then determine whether there is reason to believe that the evidence in mitigation will be insufficient to merit leniency.

If a prosecutor is permitted to consider the facts and circumstances of the crime when deciding whether to file the notice of intent, may he or she also consider the strength of the evidence supporting those facts and circumstances? Obviously, in the guilt phase the jury is not only permitted but required to consider the strength of the evidence. This stage of the proceeding is analogous to the prosecutor's filing decision. If the jury concludes that the State failed to prove the crime of aggravated murder in the first degree, the prospect of a death sentence evaporates and the jury is discharged. The case does not proceed to the penalty phase unless and until the jury unanimously finds the defendant guilty beyond a reasonable doubt.

The sufficiency or strength of the evidence regarding guilt is no longer the issue for consideration in the penalty phase. At this phase the jurors are instructed to "have in mind" the crime of which the defendant was convicted, but they are not instructed to reconsider the strength of the evidence in deciding the sufficiency of the evidence in mitigation. To illustrate this point, if a jury were to summarily discount evidence on

mitigation because they believed that the evidence had been so overwhelmingly strong in the guilt phase, it is undeniable that they would have failed to fulfill their duty as jurors in the penalty phase. Accordingly, if the factors that may be considered by a prosecutor under RCW 10.95.040(1) are circumscribed by what the jury may consider at the penalty phase, then the prosecutor may not consider the strength of the evidence of guilt when deciding to file the notice of intent.

There is another reason why the prosecutor should not consider the strength of the evidence in this analysis. It is a long standing principle of constitutional law that equal protection is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements. State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). In State v. Campbell, the Court disposed of an equal protection challenge to the discretion afforded prosecutors under RCW 10.95.040(1) by noting that in order to obtain a sentence of death, the prosecutor was required to prove the "additional factor" of the absence of mitigating circumstances. Campbell at 25. Notably, the State in its briefing had apparently referred to the absence of mitigating circumstances as an "element" consistent with prior equal protection analysis jurisprudence. Campbell at 24. Despite the State's asserted position on the question, the Supreme Court was unwilling to cloak the absence of mitigation with the status of an "element" and deemed that the term "additional factor" was sufficient for equal protection purposes. Campbell at 25.

Regardless of the holding in Campbell, it does not answer the narrow question presented here: May a prosecutor consider the strength of the evidence of guilt when exercising his discretion to seek the death penalty pursuant RCW 10.95.040(1)? In

State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), the Supreme Court considered another equal protection challenge to this discretion. The Court prefaced its remarks by noting that an equal protection issue does not arise when "the requirements of proof and the State's ability to meet them are the considerations guiding the prosecutor's discretion." Dictado at 297 (citing State v. Canady, 69 Wn.2d 886, 421 P.2d 347 (1966)). The Court concluded in Dictado that under RCW 10.95.040(1) a prosecutor's discretion does not violate equal protection because "[t]he prosecutor's discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances." Dictado at 297f.

Observing that a similar principle supports the State's exercise of discretion in its charging function as in its decision to file a notice of intent, the Dictado Court stated that in the latter decision the "prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury." Dictado at 297-98. In other words, the process of analysis is similar but the focus of the analysis shifts. At this second, separate stage in the statutory scheme the discrete additional "factor" that must be proven by the State at the penalty phase is the insufficiency of the mitigating circumstances. State v. Campbell at 25. It is the proof of insufficiency of the mitigating circumstances, therefore, and the State's ability to prove that factor that must guide a prosecutor's discretion in making the decision to file the notice of intent.

While the facts and circumstances of the offense are appropriate considerations for a jury to consider when assessing mitigation at the penalty phase, the strength of the State's case regarding the defendant's guilt is of no relevance. At the penalty phase guilt has already been found by the jury beyond a reasonable doubt. The 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. To hold otherwise would permit the following scenario to occur. Consider two defendants who separately commit identical offenses in King County, Washington. The first defendant commits his offense in a jurisdiction that has ample resources and an excellent investigation unit. As a result, the evidence in that case is substantial and the case against that defendant is strong on the merits. The second defendant, however, commits his offense in a jurisdiction that has fewer resources and an undertrained, overtaxed police force. The evidence in that case is comparatively sparse, and the case against that defendant is weak on the merits. Both defendants are subsequently charged with aggravated murder in the first degree. Both defendants submit identical evidence of mitigation to the prosecutor. The prosecutor declines to file the notice of intent as to the second defendant but does file the notice as to the first. The difference in the result has nothing whatsoever to do with the individual moral culpability of the respective defendants but hinges rather on the wholly unrelated factor of the strength of the evidence in the State's case as to guilt. In this hypothetical, insufficiency of proof of mitigation was clearly not the consideration guiding the prosecutor's discretion as required by State v. Dictado.

In fairness to the State, language can be found in Supreme Court cases such as State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), which would seem to permit a prosecutor's unbridled discretion as to what can be considered. For example, referring back to the United States Supreme Court decision in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. CT. 2909 (1976), the majority in Rupe stated that "[t]he courts may assume that prosecutors exercise their discretion in a manner which reflects their

judgment concerning the seriousness of the crime or the sufficiency of the evidence.” Rupe at 700. The decision in Gregg v. Georgia, however, concerned a statutory scheme very different from the State of Washington’s statute that establishes a two-stage process in the exercise of prosecutorial discretion. Likewise, the Rupe court was not presented with an issue similar to the one presently at bar.

Most recently in State v. Davis, 175 Wn.2d 287, ___ P.2d ___ (2012), our Supreme Court considered, among other things, Davis’s proportionality challenges to his death sentence. In the context of addressing the dissent’s concerns regarding the failure of a prosecutor to file a notice of intent in another case, the majority opinion stated that “[m]itigating evidence is not the only reason a prosecutor might decide not to seek the death penalty. The strength of the State’s case often influences the decision.” Id. at 357.

While this statement may be factually accurate, the Court did not acknowledge or attempt to reconcile this statement with its prior pronouncement in State v. Dictado that “[t]he prosecutor’s discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances.” State v. Dictado at 297. Furthermore, to the extent that the Court’s statement condones consideration of the strength of the case in declining to file the notice of intent, the case is distinguishable because here the prosecutor did file the notice of intent.

Perhaps the most instructive and enlightening aspect of the Davis opinion appears two pages later. In response to the dissent’s conclusion that the death penalty statute suffers from constitutionally impermissible randomness in application, the majority writes, “[t]he dissent’s argument that the system is plagued by randomness

would have greater force if the same prosecutor looked at similar aggravated murders committed by similar defendants and decided to seek the death penalty on one but not the other." State v. Davis at 359. Ironically, interpreting RCW 10.95.040(1) as permitting a prosecutor to consider the strength of the evidence when exercising discretion under the statute increases the prospect of precisely this outcome as illustrated by this Court's earlier hypothetical.

In summary, if the State is correct in asserting that a prosecutor may consider the strength of the evidence when deciding to file the notice of intent, then two identically situated defendants presenting the same compelling mitigation could be treated differently by the same prosecutor. As argued by the State, the prosecutor could legitimately pursue the death penalty against one defendant solely because the evidence of guilt was extremely strong. To paraphrase the State's interpretation of the broad discretion afforded by the language of RCW 10.95.040(1): extremely strong evidence of guilt is a valid reason to believe that a defendant's compelling mitigation is insufficient to merit leniency. In a scenario suggestive of Camus, a defendant's early confession and cooperation could become his downfall.

Unique to the State of Washington is the awesome authority conferred by statute upon prosecutors to decide as a separate matter whether to set in motion the powerful machinery of prosecution in pursuit of the death penalty after filing a charge of aggravated murder in the first degree. The filing of the Notice of Intent is a substantively different decision than the initial decision to file the charge. The decision relates solely to the potentially applicable punishment and the State's ability to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt.

After considerable deliberation and for the reasons set forth herein, this Court concludes that the Prosecutor erred as a matter of law in considering the strength of the evidence on the issue of guilt against Defendants McEnroe and Anderson when exercising his discretion under RCW 10.95.040(1) to file the Notice of Intent. To hold otherwise would be to interpret RCW 10.95.040(1) in a manner that violates equal protection.

The Court hereby strikes the notice of intent to seek the death penalty as to both defendants. The effective date of this order is stayed until February 12, 2013, to permit all counsel to review the content of this ruling and reflect on their next course of action.

Having reached this decision on the narrow basis set forth above, the Court declines to rule at this time on the remaining issues presented by the defense.

SIGNED this 31st day of January, 2013.


The Honorable JEFFREY M. RAMSDELL

APPENDIX B

Information and Certification for Determination
of Probable Cause

FILED

2007 DEC 28 PM 12: 22

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

WARRANT ISSUED
CHARGE COUNTY \$200.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 JOSEPH THOMAS McENROE, and)
 MICHELE KRISTEN ANDERSON,)
 and each of them,)
)
 Defendants.)

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

INFORMATION

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, of the crime of **Aggravated Murder in the First Degree**, committed as follows:

That the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, in King County, Washington, on or about December 24, 2007, with premeditated intent to cause the death of another person, did cause the death of Wayne S. Anderson, a human being, who died on or about December 24, 2007; that further aggravating circumstances exist, to-wit: there was more than one victim and the murders were part of a common scheme or plan or the result of a single act;

Contrary to RCW 9A.32.030(1)(a) and 10.95.020(10), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

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

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COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, of the crime of **Aggravated Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, in King County, Washington, on or about December 24, 2007, with premeditated intent to cause the death of another person, did cause the death of Judith Anderson, a human being, who died on or about December 24, 2007; that further aggravating circumstances exist, to-wit: there was more than one victim and the murders were part of a common scheme or plan or the result of a single act;

Contrary to RCW 9A.32.030(1)(a) and 10.95.020(10), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT III

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, of the crime of **Aggravated Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, in King County, Washington, on or about December 24, 2007, with premeditated intent to cause the death of another person, did cause the death of Scott Anderson, a human being, who died on or about December 24, 2007; that further aggravating circumstances exist, to-wit: there was more than one victim and the murders were part of a common scheme or plan or the result of a single act;

1 Contrary to RCW 9A.32.030(1)(a) and 10.95.020(10), and against the peace and dignity
2 of the State of Washington.

3 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the
4 authority of the State of Washington further do accuse the defendants JOSEPH THOMAS
5 McENROE and MICHELE KRISTEN ANDERSON, and each of them, at said time of being
6 armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW
7 9.94A.533(3).

8 COUNT IV

9 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOSEPH
10 THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, of the crime
11 of **Aggravated Murder in the First Degree**, a crime of the same or similar character and based
12 on a series of acts connected together with another crime charged herein, which crimes were part
13 of a common scheme or plan, and which crimes were so closely connected in respect to time,
14 place and occasion that it would be difficult to separate proof of one charge from proof of the
15 other, committed as follows:

16 That the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN
17 ANDERSON, and each of them, in King County, Washington, on or about December 24, 2007,
18 with premeditated intent to cause the death of another person, did cause the death of Erika
19 Anderson, a human being, who died on or about December 24, 2007; that further aggravating
20 circumstances exist, to-wit: the person committed the murder to conceal the commission of a
21 crime or to protect or conceal the identity of any person committing a crime, and there was more
22 than one victim and the murders were part of a common scheme or plan or the result of a single
23 act;

Contrary to RCW 9A.32.030(1)(a) and 10.95.020(9) and (10), and against the peace and
dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the
authority of the State of Washington further do accuse the defendants JOSEPH THOMAS
McENROE and MICHELE KRISTEN ANDERSON, and each of them, at said time of being
armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW
9.94A.533(3).

COUNT V

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOSEPH
THOMAS McENROE and MICHELE KRISTEN ANDERSON, and each of them, of the crime
of **Aggravated Murder in the First Degree**, a crime of the same or similar character and based
on a series of acts connected together with another crime charged herein, which crimes were part
of a common scheme or plan, and which crimes were so closely connected in respect to time,

1 place and occasion that it would be difficult to separate proof of one charge from proof of the
2 other, committed as follows:

3 That the defendants JOSEPH THOMAS McENROE and MICHELE KRISTEN
4 ANDERSON, and each of them, in King County, Washington, on or about December 24, 2007,
5 with premeditated intent to cause the death of another person, did cause the death of Olivia
6 Anderson, a human being, who died on or about December 24, 2007; that further aggravating
7 circumstances exist, to-wit: the person committed the murder to conceal the commission of a
8 crime or to protect or conceal the identity of any person committing a crime, and there was more
9 than one victim and the murders were part of a common scheme or plan or the result of a single
10 act;

11 Contrary to RCW 9A.32.030(1)(a) and 10.95.020(9) and (10), and against the peace and
12 dignity of the State of Washington.

13 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the
14 authority of the State of Washington further do accuse the defendants JOSEPH THOMAS
15 McENROE and MICHELE KRISTEN ANDERSON, and each of them, at said time of being
16 armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW
17 9.94A.533(3).

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COUNT VI

24 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOSEPH
25 THOMAS McENROE of the crime of **Aggravated Murder in the First Degree**, a crime of the
26 same or similar character and based on a series of acts connected together with another crime
27 charged herein, which crimes were part of a common scheme or plan, and which crimes were so
28 closely connected in respect to time, place and occasion that it would be difficult to separate
29 proof of one charge from proof of the other, committed as follows:

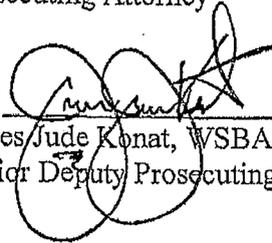
30 That the defendant JOSEPH THOMAS McENROE in King County, Washington, on or
31 about December 24, 2007, with premeditated intent to cause the death of another person, did
32 cause the death of Nathan Anderson, a human being, who died on or about December 24, 2007;
33 that further aggravating circumstances exist, to-wit: the person committed the murder to conceal
34 the commission of a crime or to protect or conceal the identity of any person committing a crime,
35 and there was more than one victim and the murders were part of a common scheme or plan or
36 the result of a single act;

37 Contrary to RCW 9A.32.030(1)(a) and 10.95.020(9) and (10), and against the peace and
38 dignity of the State of Washington.

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And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant JOSEPH THOMAS McENROE at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

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

07 - C - 08716 - 4 SEA
07 - C - 08717 - 2 SEA

CAUSE NO.

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Scott Tompkins is a(n) Detective with the King County Sheriff's Office and has reviewed the investigation conducted in the King County Sheriff's case number(s) 07-366042;

There is probable cause to believe that Michele K. Anderson & Joe T. McEnroe committed the crime(s) of Six counts of Aggravated First Degree Murder.

This belief is predicated on the following facts and circumstances:

On Wednesday morning, December 26, 2007, just before 8:00 a.m., 911 operators received a frantic call from a woman reporting a multiple murder. The woman was calling from the home of her dear friend Judith Anderson who owned and lived in the house located at 1910 346th Avenue N. E. in Carnation, King County, Washington.

The caller stated that she went to the Anderson residence where Judy lived with her husband Wayne because Judy did not show up at the United States Post Office in Carnation where she had worked faithfully for many years. The caller reported that Judy was her best friend and that she had become concerned when she could not reach her by telephone. The caller stated that she was peering in a window and could clearly see the bodies of two adults and one small child on the living room floor.

Certification for Determination
of Probable Cause

Norm Maleng
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ORIGINAL

1 King County sheriff's deputies responded to the location. It
2 did not take long for the investigators to realize that a 911
3 "hang up" call had been made from the Anderson residence at
4 about 5:00 p.m. on Monday, December 24, 2007. The 911 operator
5 that received the call noted that while nobody spoke to her
6 directly, she could hear loud noises and possibly voices in the
7 background.

8
9 When deputies responded on the 24th to the 911 "hang up" call,
10 they found that the extensive and heavily wooded property was
11 protected by a large gate across the driveway. The gate was
12 closed and secured with a chain and several locks. No contact
13 was made with any of the occupants of the Anderson home at that
14 time.

15
16 When the first officers arrived on the morning of December 26,
17 they found that there were actually four bodies in the living
18 room. A second small child who was also dead was discovered
19 with her body mostly hidden by the body of the adult female. In
20 addition to the four bodies inside the primary residence,
21 officers discovered two additional bodies in the back yard.
22 Fire personnel responded shortly after the initial police
23 response and found, in the course of their life saving duties,
24 that the bodies were cold to the touch.

25
Certification for Determination
of Probable Cause

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ORIGINAL

1
2 The area where the Anderson property is located is rural, and
3 the hilly terrain is mostly covered with woods. Homes are
4 hundreds of feet apart and the closest neighbors might not see
5 one another for days at a time. The Anderson property is no
6 exception and investigators eventually learned that there was a
7 second modular home on the property.

8
9 While the modular home has a separate address, it is situated on
10 the Anderson property. It was built near the bottom of the
11 long, steep driveway that leads to the home where Wayne and
12 Judith lived. As a result of the terrain and the abundant
13 forest, one home is not visible from the other.

14
15 Investigators quickly learned that the Andersons' daughter
16 Michele lived in the modular home at the bottom of the property.
17 While Michele was not home when officers arrived on the morning
18 of December 26, investigators learned that she lived with her
19 boyfriend Joe McEnroe.

20
21 Investigators applied for and received judicial authority to
22 search the entire Anderson property. The search consisted of
23 acres of woods, the two primary homes, several other buildings,
24 and numerous automobiles and trailers. At the time of this
25

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ORIGINAL

1 writing, the search continues and it will not be completed for
2 several days.

3
4 The King County Medical Examiner's Office has been, and
5 continues to be, an integral part of the law enforcement
6 response. Pathologists have been to the scene no fewer than
7 four times and have confirmed that six people are dead as a
8 result of homicidal violence. Autopsies have begun but none of
9 the six are complete at this time.

10
11 A number of hours after the crime scene response had been
12 established, investigators learned that there were two people on
13 the perimeter of the scene who indicated they lived on the
14 Anderson property. They were driving a dark colored pick up
15 truck and were requesting permission to enter their home. The
16 two were indentified as the defendants; Michele Anderson, the
17 29-year-old daughter of Wayne and Judy Anderson, and her
18 boyfriend Joe McEnroe.

19
20 At the time the two arrived, there was a large police presence
21 in what was otherwise a quiet and rural area. Yellow police
22 tape was strewn across driveways and yards, there were dozens of
23 police vehicles, mobile command centers, helicopters, and many,
24 many, uniformed and plain clothes personnel on the scene. There
25

Certification for Determination
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ORIGINAL

1 was also a very large press contingent with their own trucks,
2 vans and helicopters. Interestingly, neither Michele Anderson
3 nor Joe McEnroe ever asked what was going on or why they were
4 not being allowed to return to their home. Neither of them
5 inquired if the Anderson family was safe. The two were
6 separated and interviewed by detectives.

7
8 Separately, the two defendants laid out a detailed explanation
9 of their activities over the previous two days. They both
10 stated that a decision to drive to Las Vegas to get married had
11 been made on Monday, December 24, 2007. They both outlined how
12 they surprised Wayne and Judy Anderson with the news of their
13 pending marriage on the morning of the 24th. Both defendants
14 declared that Wayne and Judy were very happy about their
15 daughter's decision. Similarly, both defendants told detectives
16 that they knew that the family had planned to celebrate
17 Christmas Eve with Michele's brother Scott, his wife Erika, and
18 their two children Olivia and Nathan the same day the two
19 defendants decided to get married.

20
21 Eventually, the defendants were confronted about their story and
22 both admitted the trip to Las Vegas was a story they had worked
23 out in anticipation of being questioned by police. Both
24 defendants were advised of their constitutional rights, they
25

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1 waived those rights, and both gave lengthy confessions to the
2 murders of Wayne and Judy Anderson. Similarly, both defendants
3 confessed to the murders of Scott Anderson, his wife Erika
4 Anderson, and their two children Olivia and Nathan Anderson.

5
6 Michele Anderson told detectives that her brother owed her a lot
7 of money. She indicated that she had given her brother Scott
8 money on numerous occasions and that the last time was years
9 ago. She told the detectives that she was very close to her
10 brother until he got married. She told detectives that she was
11 upset with her parents because they would not support her in her
12 conflict with her brother. Additionally, her parents were
13 pressuring her to start paying rent for the house she and
14 McEnroe had been living in for the last six or seven months.

15
16 Eventually, Michele Anderson told detectives that she and
17 McEnroe each owned a handgun. She told them that her gun was a
18 semi-automatic and the gun McEnroe owned was a revolver. She
19 explained how she and McEnroe loaded their guns and drove up the
20 hill to confront her parents on the afternoon of December 24,
21 2007.

22
23 Michele told detectives that her father Wayne was killed first
24 and then his wife Judy. She indicated that she shot at her Dad
25

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1 (it appears that she missed) and that McEnroe shot Wayne in the
2 head. Michele told detectives that McEnroe killed her Mother
3 after Wayne was killed. Michele recounted how she and McEnroe
4 then dragged the bodies out of the house so her brother Scott
5 would not see them when he arrived with his family to celebrate
6 Christmas Eve. She described how she and McEnroe tried to clean
7 up the blood from her parents' bodies with towels and rugs and
8 how they disposed of those items so Scott and his family would
9 not know what had happened.

10
11 Michele admitted that she and McEnroe planned to confront Scott
12 when he arrived at the parents' house. Michele told detectives
13 Scott charged her when she pulled out the gun and that she shot
14 him at least twice and maybe as many as four times. Michele
15 stated that one of the shots hit her brother in the neck.
16 Michele stated she also shot Erika twice. Michele indicated
17 that Erika was able to crawl over the back of the couch to call
18 911 even after she had been shot two times.

19
20 Michele stated that McEnroe had to finish Erika because she
21 (Michele) had run out of ammunition. Michele told detectives
22 that McEnroe shot both of the kids because she couldn't do it.

23
24
25
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1 When asked why she killed her entire family Michele stated that
2 she was tired of everybody stepping on her. She stated that she
3 was upset with her parents and her brother and that if the
4 problems did not get resolved on December 24th, then her intent
5 was definitely to kill everybody. When asked about Erika and
6 the children in particular, she stated it was a combination of
7 not wanting them to have to live with the memories and not
8 wanting there to be any witnesses.

9
10 Michele also admitted that sometime after the killings but
11 before officers arrived, she went down the hill and closed and
12 locked the gate at the end of the driveway because they knew
13 Erika had dialed 911.

14
15 In his lengthy confession Joe McEnroe admits that he shot both
16 of Michele's parents in the head. He said that he was in the
17 rear of the house with Judy when Michele fired her first shot at
18 Wayne. McEnroe stated that he and Judy stepped into the room
19 with Michele and Wayne, and McEnroe fired a shot into Wayne's
20 head. Judy was screaming after he shot Wayne, so he shot Judy
21 one time and she fell to the floor. McEnroe said that Judy was
22 still screaming so he apologized to her and then shot her again,
23 this time in the head.

24
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1 McEnroe's version of these events is entirely consistent with
2 the confession of his codefendant Michele. He, too, described
3 in detail how they dragged the bodies out of the house so Scott
4 would not see them when he arrived. While McEnroe stated he was
5 not sure who shot Scott, he does recall struggling with him to
6 prevent him from stopping Michele.

7
8 McEnroe describes in dramatic fashion how he shot Erika in the
9 head. He stated that he did not shoot her immediately after she
10 was shot by Michele. Rather, McEnroe described how he took the
11 cordless phone from Erika and saw that she had made a call and
12 that the call was connected. McEnroe told detectives that he
13 tore the telephone apart and then allowed Erika to huddle with
14 her children before he shot Erika in the head. McEnroe made
15 sure to mention that he apologized to Erika after she pleaded
16 with him not to shoot her saying "...you don't have to do this."
17 McEnroe recalled how he looked at her and said "...yes, we do."

18
19 In similar fashion, McEnroe admitted that he shot Olivia after
20 Erika was dead. Finally, McEnroe told detectives that three-
21 year-old Nathan had picked up the batteries McEnroe had torn out
22 of the cordless telephone moments before. McEnroe told
23 detectives that Nathan held the batteries up in one hand and
24 gave him (McEnroe) "...the look of complete comprehension.....as
25

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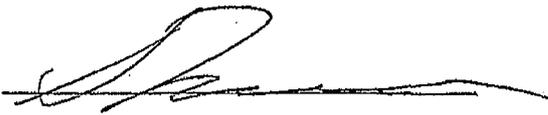
1 if he understood..." McEnroe then fired one last bullet through
2 Nathan's head.

3
4 When asked why he shot Erika, Olivia, and Nathan in particular,
5 McEnroe stated three consecutive times, word for word: "I
6 didn't want them to turn us in."

7
8 The crime scene investigation is currently ongoing. Although
9 the weapons have not yet been recovered, all casings found at
10 the scene are consistent with the two firearms described by
11 Michele Anderson and Joe McEnroe as the firearms they used to
12 kill all six family members.

13
14 The medical examiner is continuing with the autopsies on all six
15 family members at this time. Preliminary results indicate that
16 Wayne was shot one time to the left temple and Judy was shot
17 twice with one bullet to the left temple. Nathan was also shot
18 one time to the left temple. Scott, Erika and Olivia were each
19 shot multiple times to the head and body.

20
21 Under penalty of perjury under the laws of the State of Washington,
22 I certify that the foregoing is true and correct. Signed and dated
23 By me this 28 day of December, 2007, at Seattle, Washington.

24 

25
Certification for Determination
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ORIGINAL

APPENDIX C

Defendant McEnroe's most recent Motion to
Dismiss the Notice of Intent to Seek the Death
Penalty

NOV 26 PM 4:14
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	) No. 07-C-08716-4 SEA
COUNTY OF KING,)
	) MOTION TO DISMISS NOTICE OF
Plaintiff,	) INTENTION TO SEEK DEATH
	) PENALTY BECAUSE IT WAS FILED
v.	) IN VIOLATION OF MR. MCENROE'S
	) RIGHT TO EQUAL PROTECTION OF
JOSEPH T. McENROE,	) LAW AND DUE PROCESS
)
Defendant)

MOTION

NOW COMES Defendant Joseph T. McEnroe and moves the Court to dismiss the notice of intention to seek the death penalty filed herein because, according to the only information disclosed by the prosecuting attorney, the State seeking the death penalty against Mr. McEnroe violates his right to equal protection of the law under the Fifth and Fourteenth Amendments to the U.S. Constitution and under Article I, sec. 12 of the Washington State Constitution.

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 - Page 1 of 16

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THE PROSECUTOR'S PROCESS FOR SEEKING THE DEATH PENALTY AGAINST MR. MCENROE VIOLATES MR. MCENROE'S RIGHT TO EQUAL PROTECTION OF THE LAW AND DUE PROCESS

Defendant Joseph McEnroe and his codefendant, Michele Anderson, are both charged with six counts of aggravated murder. RCW 10.95.040(1) provides:

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.

(Emphasis added.) Although Mr. McEnroe presented substantial and well supported mitigating evidence, the prosecutor filed a notice of intent to seek the death penalty against him as well as his codefendant¹.

In Mr. McEnroe's Case the Prosecutor Did Not Seek Mitigating Information Himself and Did Not Truly Consider Mitigating Evidence Presented by the Defendant

There is no question Mr. McEnroe has been treated differently by the King County Prosecutor with regards to the filing of a notice to seek death than other defendants charged with aggravated murder. In Mr. McEnroe's case the state has claimed the prosecutor needs to look no further than the "magnitude" of the crime to justify his filing of the notice. On October 16, 2008,

¹Mr. McEnroe does not know what information his codefendant submitted to the prosecutor.

1 the Prosecutor released a statement announcing he was filing a notice of intention to seek the
2 death penalty against McEnroe and Anderson. Mr. Satterberg stated:

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

7
8 ...
9 Given the magnitude of these alleged crimes, the slaying of three generations of a
10 family, and particularly the slaying of two young children, I find that there are not
11 sufficient reasons to keep the death penalty from being considered by the juries
12 that will ultimately hear these matters.

13
14 ...
15 The death penalty is this state's ultimate punishment and is to be reserved for our
16 most serious crimes. I believe this is one of those crimes. The jury acting as the
17 conscience of the community should have all relevant information and all legal
18 options before it in consideration of this case.

19
20 Mr. McEnroe submitted substantial mitigating information to Mr. Satterberg. The
21 prosecutor to date has never denied the legitimacy of information presented, never questioned the
22 diagnoses of the Mr. McEnroe's experts or their professional qualifications. This Court ordered
23 the state to disclose to Mr. McEnroe,
24

25 any information gathered as a result of any mitigation investigation conducted by
26 the State, the name of the investigator(s) involved, and the reports of any mental
health professionals that were considered by Mr. Satterberg.²

The Court's order was based in part on the fact that state through Chief Deputy Prosecutor Mark
Larson had sent the defense a letter stating the prosecution would be conducting its own
investigation of mitigating factors which was "likely to include an analysis of potential mental

²Order to Compel Discover, entered March 15, 2012.

health issues” by a prosecution retained expert.³

In response to the Court’s order, the State admitted “No investigator or mental health professional was retained for the purposes of the consideration of the decision to file the notice of special sentencing proceeding.”⁴ The lead detective in the case stated that he had never been asked to do any investigation of mitigating evidence and he had no knowledge of any other police investigators conducting any mitigation investigation.⁵

Finally, the state has clearly stated that Prosecutor Satterberg did not consider Mr. McEnroe’s mitigating evidence in deciding whether or not to seek 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 him 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 the special sentencing proceeding.”⁶

The state has admitted expressly that the only facts considered by the prosecutor prior to

³Letter from Mark Larson dated January 17, 2008. A copy of this letter is attached hereto as “Appendix A.”

⁴State’s Objection and Response to Order Compelling Discovery, filed March 20, 2012.

⁵Tape recorded interview of Detective Scott Tompkins, April 21, 2011 (Discovery production pp. 16867-17035; relevant pages are attached hereto as “Appendix B”).

⁶State’s Memorandum in Opposition to Defendant McEnroe’s Motion for Bill of Particulars”, pp. 10-11, filed May 25, 2012, emphasis added.

1 filing a notice of intent were those facts supporting the charged aggravating factors. Mitigating
2 information was completely disregarded.

3
4 **In Other Aggravated Murder Cases the Prosecuting Attorney, in Deciding Whether to File**
5 **a Notice of Intent, Focused on the Nature and Quality of Mitigating Circumstance**

6
7 In all other cases of aggravated murder in which Prosecutor Dan Satterberg has made a
8 decision to file or not to file a notice of intention to seek the death penalty, he has stressed the
9 importance of mitigating evidence. In no other case has the prosecutor suggested that mitigating
10 evidence must "outweigh" the horrible circumstances of the aggravated murder before death can
11 be taken off the table.

12
13 In State v. Monfort, King County Superior Court Cause No. 09-1-07187-6 SEA, the
14 defendant is charged with killing a police officer and shooting the officer's partner. Several days
15 earlier Monfort allegedly bombed police cars hoping to draw officers close to be injured or killed
16 by a second explosion.

17
18 Monfort did not submit mitigating information to the prosecutor⁷ but Prosecutor
19 Satterberg did not leave it at that. It appears Mr. Satterberg tried to comply with RCW
20 10.95.040(1) and to file a notice only if "there is reason to believe there are not sufficient
21 mitigating circumstances to merit leniency". The prosecutor hired the private investigation firm
22 of Linda Montgomery to seek information relevant to the prosecutor's decision to file or not file
23

24
25 ⁷Seattle Times, September 2, 2010, a copy of which is attached hereto as "Appendix C."
26

1 a notice of intention to seek the death penalty. Montgomery's investigation apparently revealed
 2 there was an "absence of significant mitigating factors"⁸. The prosecutor did file a notice of
 3 intention to seek death against Mr. Monfort but, based on his announcement; it seems to be
 4 because there were no significant mitigating factors made known to the prosecutor, not because
 5 the crime "outweighed" legitimate mitigating evidence.

7 In State v. Louis Chen, King County Superior Court cause no. 11-1-07404-4 SEA, a well-
 8 to-do physician, is charged with stabbing to death his domestic partner, using five different
 9 knives to inflict over 100 wounds, and then carrying the couple's toddler son to the bathtub and
 10 stabbing him at least five times in the throat, killing him. The prosecution did not give much
 11 credence to Chen's mental health mitigation evidence and suspected Chen used his medical
 12 knowledge to feign mental illness.⁹ In the Chen case it seems the defendant did present
 14 mitigating evidence but the prosecutor was not impressed with its quality. Nonetheless, the
 15 prosecutor focused on mitigation and hired his own mitigation investigator, Linda Montgomery.
 16 Mr. McEnroe has been denied discovery of what mitigating evidence the prosecutor's own
 17 investigation in Chen's case uncovered.¹⁰ However, the prosecutor did not file a notice to seek

20 ⁸"September 2, 2010, statement of Dan Satterberg regarding the death penalty option in the case of State v.
 21 Christopher Monfort." A copy of this statement is attached hereto as "Appendix D."

22 ⁹Two days after announcing the prosecutor would not seek death against Mr. Chen, Chen's trial prosecutors sought a
 23 custodial mental evaluation of Chen because,

The concern for a full evaluation is more acute where the patient is a highly educated and trained
 physician who would be, should he so desire, uniquely equipped to feign mental illness.

24 Motion for Custodial Evaluation filed November 23, 2011, in State v. Chen, Superior Court No. 11-1-07404-4.

25 ¹⁰Order to Compel Discovery, entered March 15, 2012.

1 death against Louis Chen and Mr. Satterberg announced it was because of consideration of
2 mitigating factors.¹¹

3 In State v. Daniel Hicks, King County Superior Court Cause No. 09-1-07578-2 SEA,
4 Hicks was upset that his girlfriend got pregnant and the baby turned out to be a girl. He shot his
5 girlfriend at least twelve times and his thirteen week old baby girl at least seven times, killing
6 both of them. Hicks had to reload his gun at least twice. Hicks was later apprehended after he
7 fled to California. Hicks did submit a mitigation package. Prosecutor Satterberg announced he
8 would not seek the death penalty "after careful consideration of the circumstances of this case,
9 including an extensive review of the background of the defendant."¹² Satterberg did not say Mr.
10 Hicks' background "outweighed" the brutal murders of his girlfriend and infant daughter. No
11 mitigation could do that.
12

13
14 In the case of State v. Isaiah Kalebu, King County Superior Court Cause No. 09-1-04992-
15 7 SEA, the defendant was charged with breaking into the home of two women in the middle of
16 the night, stripping naked, waking them with the threat they would die if they didn't submit to
17 his sexual demands. Kalebu repeatedly raped each woman while pressing a butcher knife against
18 her throat, "as he would rape one woman, he would cut the other" Prosecutor Satterberg
19 explained. The attack lasted at least ninety minutes with both women being slashed. One
20 woman managed to escape and lived but the other one died of her wounds at the scene. Kalebu
21
22

23 ¹¹Seattle Times, November 21, 2011, a copy of which is attached hereto as "Appendix E."

24 ¹²Seattle Post Intelligencer, September 15, 2010, a copy of which is attached hereto as "Appendix F."
25
26

1 was also the only suspect in the arson deaths of his aunt and her friend in Pierce County¹³. In
2 announcing he would not seek the death penalty against Kalebu, the Prosecutor explained,

3 in making this decision the prosecuting attorney must consider any and all
4 relevant mitigating factors that would necessitate not seeking the death penalty...

5 The duty of the prosecutor is to ask whether there are any reasons to merit
6 leniency, and, if such reasons exist, to remove the possibility of the death penalty
7 from the potential outcomes of an aggravated murder case ...

8 After careful consideration of the circumstances of this case, including an
9 extensive review of the background of the defendant, input from the surviving
10 victim, the deceased victim's family, the attorneys for the defense and others with
11 detailed knowledge of this case, I have decided this case is not appropriate for the
12 death penalty...¹⁴

13 Again, the prosecutor did not weigh Mr. Kalebu's mitigating evidence against the horrific rape,
14 stabbing and death he inflicted on his victims. In Kalebu's case the prosecutor was explicit that
15 he asked himself "whether there are any reasons to merit leniency." The existence of a reason to
16 merit leniency caused Satterberg "to remove the possibility of the death penalty from the
17 potential outcomes of an aggravated murder case," for Mr. Kalebu.

18
19
20
21
22
23
24 ¹³ Seattle Times, July 30, 2009, a copy of which is attached hereto as "Appendix G."

25 ¹⁴ April 28, 2010, "Statement of King County Prosecuting Attorney Dan Satterberg on Capital Punishment Decision
26 in the Case of State V. Isaiah Kalebu." A copy of this statement is attached hereto as "Appendix H."

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The Prosecutor's Disparate Treatment of Mr. McEnroe's Case Rendered the Death Notice a Foregone Conclusion and Presentation of Mitigation Evidence by the Defense an Empty Ritual

The prosecutor has applied the law differently to Mr. McEnroe than he has to all the other individuals charged with aggravated murder since Mr. Satterberg took office. Only in Mr. McEnroe's case did the prosecutor "weigh" Mr. McEnroe's mitigating evidence against the "magnitude" of the murders. This Court has noted that mitigation, no matter how valid, cannot outweigh the severity of aggravated murder:

Evidence presented in mitigation is not intended to mitigate the heinousness of the offense. Nothing could. The crimes that give rise to a charge of aggravated murder in the first degree are by legislative fiat deemed to be the most heinous crimes. Proof of the crime and the aggravating circumstances are the subject and purpose of the guilt phase.

...
[N]o amount of mitigation, however strong, irrefutable and compelling it may be, will mitigate the horror of the offenses committed on members of the Anderson family. No amount of mitigation will lessen the loss or hurt experienced by their loved ones. Mitigation instead focuses on the individual moral culpability of the individual defendant despite the acknowledged heinousness of the crime.¹⁵

Because the prosecutor was concerned only with the murders, Mr. McEnroe never had a chance to prove there was reason to believe he merited leniency. The death notice was a foregone conclusion.

Proper prosecutorial focus on mitigating evidence gives defendants a chance to show they

¹⁵Order on Defendants' Motion to Strike the Notice of Special Sentencing Proceeding, p. 15, entered June 4, 2010.

1 should not face the death penalty despite their worst of the worst crimes. No mitigating evidence
 2 could outweigh the extraordinarily violent and certainly excruciating deaths inflicted on Eric
 3 Cooper and little Cooper Chen by Louis Chen. One need only imagine two year old Cooper
 4 looking to his father for some kind of solace after witnessing his other daddy being stabbed to
 5 death. Instead of comfort Louis Chen gave his little boy the terror of being held down as Daddy
 6 Louis repeatedly plunged a knife down into his neck.
 7

8 Prosecutor Satterberg did not compare the mitigation he knew about Chen to the horror of
 9 his crime or the loss of Eric Cooper and Cooper Chen to their mother and grandmothers. Any
 10 mitigation would pale compared to the crime. But looking separately at the mitigation as
 11 evidence of the character of Louis Chen, illuminating as to whether Chen as an individual is one
 12 of the worst of the worst murderers, Satterberg concluded Chen was not among the most morally
 13 culpable of murderers and did not file a notice.
 14

15 The Prosecutor employed similar independent evaluations of mitigating evidence in the
 16 cases of Hicks and Kalebu. No mitigation could balance their terrible homicidal attacks on
 17 innocent people - including Hicks's shooting an infant with seven rounds from a .45 caliber
 18 pistol. Instead, in the official statements of the prosecutor that death would not be sought against
 19 Hicks and Kalebu there was no mention of the murders, only that there were mitigating facts
 20 meriting leniency.
 21

22 In the case of Christopher Monfort the prosecutor was not given any mitigating argument
 23 by the defense. But the decision to file a death notice was made because Satterberg's own
 24 mitigation investigator failed to turn up a "significant" mitigating factor. The focus was properly
 25
 26

1 on the quality of the mitigating evidence known to the prosecutor, not a comparison of mitigating
2 evidence to the murder of a police officer.

3 Under the Equal Protection Clause of the Fourteenth Amendment, as well as
4 article I, section 12 of the Washington Constitution, persons similarly situated
5 with respect to the legitimate purpose of the law must receive like treatment.

6 State v. Langstead, 155 Wash.App. 448, 228 P.3d 799 (Div. 1, 2010). Harris v. Charles, 171
7 Wash.2d 455, 256 P.3d 328 (2011).

8 Mr. McEnroe was similarly situated to Monfort, Chen, Hicks and Kalebu. All were
9 charged with aggravated murder and all were the subjects of consideration for notices of intent to
10 seek death decisions. But the Prosecutor did not treat McEnroe the same as the others. The
11 prosecutor followed RCW 10.95.040(1) in the latter cases focusing on known mitigation
12 evidence and even launching his own investigations into mitigating factors which might be
13 reasons for leniency. In none of the other four cases did the prosecutor impose the impossible
14 burden on the defendant of offering mitigation that would outweigh the crimes. In none of the
15 other cases did the prosecutor consider only the aggravating factors, oblivious to mitigating
16 evidence.
17
18
19

20 The prosecutor denied Mr. McEnroe equal application of RCW 10.95.040(1). The notice
21 of intent to seek the death penalty should be dismissed.
22
23
24
25
26

**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 - Page 11 of 16**

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1 **The Prosecutor Violated Mr. McEnroe's Right to Equal Protection of the Law by**
 2 **Filing a Notice of Intention to Seek the Death Penalty Because He Did Not Allege Facts**
 3 **Showing He Had "Reason to Believe That There Are Not Sufficient Mitigating**
 4 **Circumstances to Merit Leniency," an Element Required by RCW 10.95.040 to**
 5 **Subject a Defendant to the Death Penalty**

6 The prosecutor has said the facts supporting its filing of the death notice are simply the
 7 charged aggravating factors.¹⁶ The charged aggravating factors support only the charge of
 8 aggravated murder punishable by life in prison without release.¹⁷ In Washington an additional
 9 element must be shown before a prosecutor may seek the death penalty, an absence of mitigating
 10 factors.¹⁸ There is no question that any fact that must be proven to raise the maximum sentence
 11 available on the guilt phase verdict is an element regardless of what the state may call it.¹⁹ The
 12 state has yet to allege any facts proving an absence or insufficiency of mitigating circumstances.

13 ...equal protection of the laws is denied when a prosecutor is permitted to seek
 14 varying degrees of punishment when proving identical criminal elements. State v.
 15 Zornes, 78 Wash.2d 9, 21, 475 P.2d 109 (1970). However, no constitutional
 16 defect exists when the crimes which the prosecutor has discretion to charge have
 17 different elements. State v. Wanrow, 91 Wash.2d 301, 312, 588 P.2d 1320 (1978).
 18 Before the prosecutor may seek the death penalty, he must have reason to believe
 19 that there are not sufficient mitigating circumstances to merit leniency. RCW
 20 10.95.040(1). Similarly, the jury must be convinced beyond a reasonable doubt
 21 that there are not sufficient mitigating circumstances to merit leniency. RCW
 22 10.95.060(4). Absent a unanimous finding, life imprisonment is imposed. RCW
 23 10.95.080(2). There is no equal protection violation here, because a sentence of

24 ¹⁶State's Memorandum in Opposition to Defendant McEnroe's Motion for Bill of Particulars" p. 10, filed May 29,
 25 2012.

26 ¹⁷RCW 10.95.030.

¹⁸RCW 10.95.040(1), State v. Campbell, 103 Wash.2d 1 (1984).

¹⁹Ring v. Arizona, 536 U.S. 584 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000).

1 death requires consideration of an additional factor beyond that for a sentence for
2 life imprisonment – namely, an absence of mitigating circumstances.

3 State v. Campbell, 103 Wash.2d 1 (1984).

4 The prosecutor has not alleged an absence of mitigating circumstances and, despite being
5 ordered to disclose, cannot point to facts or evidence that reduce the amount or reliability of the
6 mitigating information produced by Mr. McEnroe. The state has been insistent that the
7 aggravating factors alone in Mr. McEnroe's case support seeking the death penalty.
8

9 Pursuant to RCW 10.94.040, the state cannot seek the death penalty when it can only
10 prove first degree murder with aggravating factors because it would then have unfettered
11 discretion to seek either life without release or the death penalty for an identical crime with the
12 same elements, the elements constituting premeditated murder plus the elements of the
13 aggravating factors, violating equal protection. Zornes, supra. Only an absence of mitigating
14 circumstances elevates aggravated murder with a sentence of life without release to capital
15 aggravated murder allowing a sentence of death. Campbell, supra.
16
17

18 The State's exclusive focus on the number of victims and the sadness of two young
19 children being among the victims as justifying a notice of intent (and the huge investment of
20 resources of the public and years of uncertainty for the family members) is a misreading of
21 Washington's homicide and capital punishment scheme.
22

23 Six premeditated murders do not necessarily constitute aggravated murder. Killing more
24 than one person is not an aggravating factor unless the murders "were part of a common scheme
25 or plan or the result a single act of the person." RCW 10.92.020(10). So if "A" kills his boss
26

**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 – Page 13 of 16**

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

1 because he was fired on one day, and kills a fellow motorist because of road rage another day,
2 and kills a prostitute because he hates sin on another day, and kills a football coach because his
3 poor play calling lost the game, and kills a small child for crying in the movie theater, and kills
4 the mailman because all he gets is junk mail, the six murders do not fall under Washington's
5 multiple murder aggravating factor. They may together or separately be subject to sentence
6 enhancement under RCW 9.94A.535 (2) or (3), non-capital aggravating circumstances, but
7 unless the murders are connected by an overarching criminal plan,²⁰ they do not add up to
8 aggravated murder making "A" eligible for the death penalty. It is important to note that killing
9 a child is not an aggravating factor making a crime eligible for the death penalty under RCW
10 10.95.020.
11

12
13 The state charged Mr. McEnroe with six counts of premeditated murder and alleged
14 statutory aggravating factors. Repeatedly the state has argued that the facts underlying the
15 murder charges are sufficient to support the state filing a notice of intention. But those
16 allegations support charging aggravated murder. They do not suggest anything about the
17 presence or absence of mitigating circumstances. Under the State's argument a prosecuting
18 attorney has unfettered discretion to seek the death penalty in any aggravated murder case
19 because every aggravated murder case alleges aggravating factors. But the Washington Supreme
20 Court has repeatedly held that a prosecutor's discretion is constrained by the need to prove an
21 absence of mitigating circumstances. In order to avoid violation of the Zornes doctrine and to
22
23
24

25 ²⁰State v. Yates, 161 Wash.2d 714 (2007), State v. Grisby, 97 Wash.2d 493 (1982)
26

1 comply with the requirements of State v. Campbell, the state must rely on facts supporting an
2 element in addition to those supporting the charge of aggravated murder, namely, the "element"
3 of absence of mitigating circumstances.

4 The Prosecutor here has repeatedly stated he relied only on the circumstances of the
5 murders and repeatedly stated he has no other facts in support of a "reason to believe there are
6 not sufficient mitigating circumstances to merit leniency." If there is no distinction between
7 aggravated murders in which a prosecutor may not seek death and those in which he may file a
8 notice of intent under RCW 10.95.040 then equal protection is violated because the prosecutor
9 may seek different maximum punishments for the exact same crime based solely on his whim.
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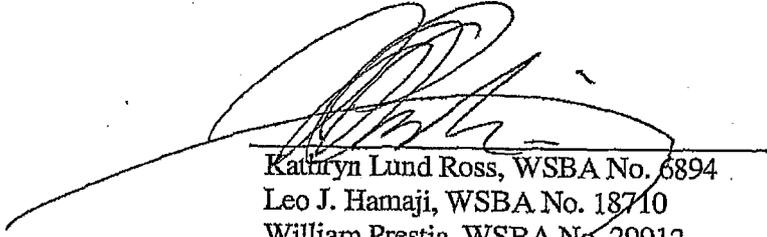
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CONCLUSION

The notice of intention to seek the death penalty filed against Mr. McEnroe should be dismissed because the prosecutor has applied RCW 10.95.040(1) to Mr. McEnroe differently than to other similarly situated defendants. The notice should also be dismissed because the prosecutor did not allege or have evidence to support the element of absence of mitigating circumstances. The prosecutor cannot have unfettered discretion to seek the death penalty or not based on the same crime with the same elements.

DATED: Monday, November 26, 2012.

Respectfully submitted,



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

APPENDIX A

BEST AVAILABLE IMAGE POSSIBLE

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

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

January 17, 2008

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

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

Dear Wes and Katie,

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

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

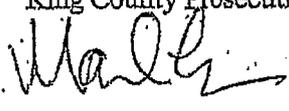
We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than April 10, 2008. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during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

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

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

Sincerely,

For DANIEL T. SATTERBERG,
King County Prosecuting Attorney


Mark R. Larson
Chief Deputy, Criminal Division

APPENDIX B

1 UNKNOWN: And, and you probably explained this, but I might a missed it. How, what
2 did you do to avoid them seeing each other or passing, passing by?

3 TOMPKINS: I think, I think we kind a went behind the command post. Um so as Jake
4 was in Toner's truck it was facing, uh on the easement road facing the
5 gate, and I think we just kind a went behind it and up, um and ultimately
6 when we left in my car um we uh...we had to drive past them as I recall.

7 UNKNOWN: Okay. Um and, just so I'm, I guess I'm thinking of a few things that I have
8 questions about. Um on that, on the, earlier you said that you were not
9 involved in any mitigation uh investigation or didn't know what the
10 mitigation packages said. Is that, is that right?

11 TOMPKINS: What it said?

12 UNKNOWN: Yeah.

13 TOMPKINS: I didn't read it. I know uh...I know from talking to either James or
14 somebody in the Prosecutor's Office um...I guess I don't know specifics.
15 I guess uh just general hardship and that Joe's claiming he was under her
16 control and uh that's gonna be the, the defense.

17 UNKNOWN: Did you take any um, did, did the prosecutors ask you to take any, do any
18 investigation on any specific topics on (unintelligible) mitigation
19 (unintelligible)?

20 TOMPKINS: No. No, no follow-up as far as the mitigation, no. Not that I'm a, not that
21 I can think of.

22

23

24

TRANSCRIPT OF SCOTT TOMPKINS
INTERVIEW - 134
1108-001C

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

017000

1 UNKNOWN: Did you get any direction from anyone besides Mr. Konat um what to do
2 regarding any uh death penalty part of the investigation, like Mr. Larson or
3 Mr. Satterburg himself?

4 TOMPKINS: I would, no, would not have talked to them about it.

5 UNKNOWN: And, and specifically by mitigation, I just wanted to clarify cause you
6 know we've just kind a been saying mitigation, uh were you ever asked to
7 make any investigation into reasons for either of these defendants why,
8 why perhaps the death penalty should not be sought?

9 TOMPKINS: No.

10 UNKNOWN: And, and when you, I just made these notes that's why they're all...

11 TOMPKINS: No problem.

12 UNKNOWN: out of order. When you first arrived at the scene, had the hou, had the
13 main house uh been vacated and Linda Thiele already been removed?

14 TOMPKINS: Oh yes. Yeah, she wasn't allowed to stay up there.

15 UNKNOWN: I, I wasn't sure how, when you arrived as opposed to when like the first
16 nine-one-one call she makes. Wasn't there a little period of time where
17 she was still in the house...

18 TOMPKINS: Uh-huh.

19 UNKNOWN: when the police were outside?

20 TOMPKINS: Correct, yeah.

21 UNKNOWN: But, but she was out by the time you got...

22 TOMPKINS: Yes.

23 UNKNOWN: there?

24

TRANSCRIPT OF SCOTT TOMPKINS
INTERVIEW - 135
1108-001C

Daniel T. Satterberg, Prosecuting Attorney
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APPENDIX C

SECTION SPONSOR



Originally published Thursday, September 2, 2010 at 8:27 AM

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Prosecutor to seek death penalty for Monfort in officer's slaying

The death penalty is on the table for Christopher Monfort, charged with killing a Seattle police officer, wounding another and attempting to kill others.

By Jennifer Sullivan and Jonathan Martin
Seattle Times staff reporters

The King County prosecutor announced Thursday that he will seek the death penalty for Christopher Monfort, the man charged in last year's Halloween night ambush that killed one Seattle police officer and wounded another.

"The magnitude of the crimes with which the defendant is charged, and the absence of significant mitigating factors, convinced me that we should submit this case to the jury with the full range of applicable punishments, including the possibility of the death penalty," Prosecutor Dan Satterberg said in a prepared statement.



[enlarge](#)
Christopher Monfort, 41

MIKE SIEGEL / THE SEATTLE TIMES

Related

[King County prosecutor's statement \(PDF\)](#)

Monfort learned of the decision Thursday at a previously scheduled court hearing. When the announcement was read, Monfort, 41, looked down. His mother, in the court gallery, sat up straight and stared toward the judge.

Monfort's defense lawyer, Julie Lawry, said afterward that defense lawyers had told prosecutors Monfort would plead guilty if prosecutors would take the death penalty off the table in favor of life in prison without parole. She said she never heard back from Satterberg's office.

Satterberg said he could not discuss the issue except to say that the case underwent "intense scrutiny" before he made his decision.

Monfort, in a pair of interviews with The Seattle Times earlier this year, suggested that he expected to be sentenced to death, but said he was more likely to die from gunshot wounds he suffered during his arrest. He is paralyzed from the waist down and a bullet is still lodged near his spine.

"There's two paths out of here," Monfort said. Asked if he expected to be acquitted, he said no.

Monfort is charged with aggravated murder in the fatal shooting of Officer Timothy Brenton and attempted first-degree murder in the wounding of Britt Sweeney on Oct. 31 last year.

Brenton, 39, and officer-trainee Sweeney, 33, were seated in their parked patrol car in the Leschi neighborhood shortly after 10 p.m. when, police say, Monfort drove alongside and opened fire.

Brenton was killed immediately, and Sweeney suffered minor injuries.

Monfort's defense team was notified about Satterberg's decision on Wednesday and handed out a prepared statement after Thursday's hearing.

"Seeking the death sentence against Mr. Monfort will not ease the pain and grief caused by the death of Officer Brenton," the defense statement said.

Monfort, who has used several of the hearings in his case to denounce police brutality, announced in court that "we cannot be upstanding citizens unless we are willing to stand up."

Monfort did not explain the statement.

Police and prosecutors say Monfort had intentionally targeted officers. He is accused of firebombing four police cruisers at a city maintenance yard on Oct. 22. Investigators found an unexploded device that was intended to detonate as police and firefighters responded to the initial blaze. Nobody was hurt.

However, the assailant left behind a note railing against police brutality, along with other items. Similar items were left at the scene of the ambush, police said.

After Brenton's slaying, a massive manhunt ensued and on Nov. 6, the day of Brenton's memorial service a team of detectives was directed to a Tukwila apartment complex where a tipster reported seeing a car believed to have been in the area where the officer was slain.

As detectives approached the car, Monfort appeared, pulled a handgun and pointed it at Sgt. Gary Nelson. Monfort's weapon misfired, however, and he was shot in the face and abdomen when he tried to flee.

When police later searched Monfort's apartment, they say, they found an arsenal of guns, explosives and a manifesto on police brutality.

Monfort is also charged with firebombings and two additional counts of attempted first-degree murder — for pointing a gun at Nelson and another count for allegedly trying to kill officers at the scene of the firebombings.

Sweeney, Brenton's widow, Lisa, and Monfort's mother, Suzan, have attended many of Monfort's King County Superior Court hearings. Both Lisa Brenton and Suzan Monfort declined to comment after Thursday's hearing.

A member of Brenton's family told The Times that the family supports Satterberg in his decision to seek the death penalty.

As part of the death-penalty decision, Satterberg is required by law to consider any mitigating circumstances — reasons why a defendant should not be considered for the death penalty — as he carries out an examination of the case and Monfort's background.

Satterberg made the decision to seek the death penalty without receiving mitigation materials from the defense.

In court last week, defense attorney Julie Lawry said they were not ready to submit the materials to Satterberg's office. Lawry asked Superior Court Judge Ronald Kessler to have Satterberg delay announcing his decision, but Kessler said he didn't believe he had the authority to intervene.

The prepared defense statement read: "There is a great deal of information about Mr. Monfort and his background that merit leniency and weigh heavily against the death penalty."

The statement did not delve into what the potential mitigating factors are.

Information from Seattle Times archives is included in this report.

Jennifer Sullivan: 206-464-8294 or jensullivan@seattletimes.com

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APPENDIX D

9-2-10

Statement of King County Prosecuting Attorney Dan Satterberg regarding the death penalty option in the case of State v. Christopher Monfort:

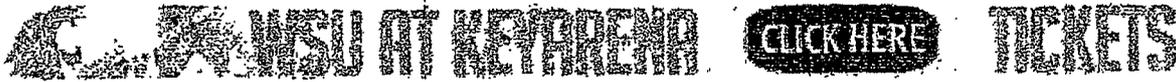
This morning, I filed a notice of intent to seek the death penalty in the case of State v. Christopher Monfort, who is charged with aggravated first degree murder for the slaying of Seattle Police Officer Timothy Brenton.

Monfort is also charged with the attempted first degree murder of Seattle Police Officer Britt Sweeney, Officer Brenton's partner, the attempted first degree murder of Seattle Police Sergeant Gary Nelson, arising from Monfort's conduct when apprehended and the arson and attempted murder of additional law enforcement personnel stemming from bombs that were planted at the Charles Street Vehicle Services Facility used by the Seattle Police Department.

The intentional, premeditated and random slaying of a police officer is deserving of the full measure of punishment under the law. The magnitude of the crimes with which the defendant is charged, and the absence of significant mitigating factors, convinced me that we should submit this case to the jury with the full range of applicable punishments, including the possibility of the death penalty.

###

APPENDIX E



Doctor won't face death penalty in slayings of son, partner

First Hill case began Aug. 11

Published 12:45 p.m., Monday, November 21, 2011

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The First Hill physician who police say killed his partner and 2-year-old son earlier this year will not face the death penalty.

King County Prosecutor Dan Satterberg announced Monday that he would seek a sentence of life in prison without the possibility of release if Louis Chen is convicted.

Chen has been charged with two counts of aggravated murder in the first degree for the deaths of Eric Cooper, and their son, Cooper Chen.

Under state law, jurors who choose the death penalty must unanimously agree that they're convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.

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Satterberg said he did not think a jury could be convinced of that, his spokesman said. The only other punishment for the charge is life in prison without the possibility of release.

Chen's attorneys had previously said they were confident the death penalty wouldn't be sought.

"We do believe there's a great deal of information that will be mitigating in this case," defense attorney Todd Maybrow said in an August court hearing, adding that the defense team will "show there is no basis for a death penalty" against Chen.

Newly hired at Virginia Mason Medical Center, Chen was found bloodied and naked at his First Hill home on Aug. 11.

In court documents, Seattle police claimed Chen told officers he killed his partner.

An autopsy performed by the King County Medical Examiner's Office showed Eric Cooper suffered more than 100 stab wounds; he'd been stabbed in the face, neck, torso and hands.

Cooper Chen's throat had been cut.

At 9 a.m. the day the killings were discovered, a property manager at the M Street Apartments received a phone call from Chen's sister who said she had not heard from her brother in days, Seattle Detective J.D. Mudd told the court.

Responding to a request from Chen's sister, the property manager knocked on Chen's door and spoke with him briefly. The property manager told him his sister was hoping to hear from him, and Chen said he would call her.

By then, Chen had already missed a 7:50 a.m. orientation at Virginia Mason Medical Center. A concerned manager from the hospital tried to reach Chen by phone, then went to his apartment building.

The property manager and Chen's colleague knocked on Chen's door. Standing outside, they heard a rustling sound, Mudd told the court, and then looked on as Chen opened the door.

"The defendant was wearing no clothes," the detective said in court documents. "He was covered in dried blood, his right eye was swollen shut, and he was holding a box in front of himself."

Standing in the threshold, one of the women could see Eric Cooper lying on the apartment floor. Chen's colleague asked about his son; the woman told police she thought Chen said "baby" but offered no other reply.

Chen's colleague called 911 and reported seeing a cleaver.

Seattle officers arriving at the apartment at 10:20 a.m. found Chen slumped in the front door, then found Eric Cooper's body.

Cooper Chen was found in the bathroom of the master bedroom.

One of two officers arriving at the scene then asked Chen about the slayings.

"Who did this?" the officer asked.

"What?" Chen responded.

"Stabbed you and him," the officer continued.

"I did," Chen said, according to Mudd's report.

Reviewing access logs for the apartment, investigators learned Chen and Cooper's key fobs – pass cards that allowed access to the lock-out building – hadn't been used since Aug. 8, three days before the deaths were discovered. None of those close to Chen reported seeing him after Aug. 8.

Five knives possibly used in the slayings were recovered from the apartment. All had blood stains on them. Investigators do not note whether Chen made any other statements to police, or give any indication what might have motivated the attack.

Senior Deputy Prosecutor Don Raz successfully argued that Chen should be held without bail, and described him as a man with few ties to Washington and the money to flee.

"He faces either life imprisonment or the death penalty, has significant ties to Taiwan, and has access to financial means sufficient to arrange his flight," Raz told the court in August. "The defendant poses a significant risk of danger to the community based upon the serious penalties he faces combined with his exhibited willingness to use extreme violence."

Chen is scheduled for a case setting hearing on at 1 p.m. Dec. 8 at the King County Courthouse.

For more Seattle police and crime news visit the front page of the Seattle 911 blog.

Seattlepi.com reporter Levi Pulkkinen contributed to this report. Casey McNerthney can be reached at 206-448-8220 or at caseymcnerthney@seattlepi.com. Follow Casey on Twitter at twitter.com/mcnerthney.

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Former Prosecutor, Stellar Results "I win hard cases"

APPENDIX F

Prosecutor: No death sentence in death of woman, 3-month-old daughter

By SCOTT SUNDE, SEATTLEPI.COM STAFF
Published 10:09 p.m., Wednesday, September 15, 2010

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King County Prosecutor Dan Satterberg will not seek a death sentence against a Beacon Hill man accused of killing his girlfriend and the couple's 3-month-old daughter on Dec. 21.

King County Prosecutor Dan Satterberg announced Thursday morning his decision not to seek execution should Daniel T. Hicks be convicted of killing his girlfriend, Jennifer Morgan, and their 13-week-old daughter, Emma, on Dec. 21, 2009 in Seattle.

There have been questions about Hicks' mental health. In a statement, Satterberg didn't mention Hicks' mental health but did say mitigating factors in the case prompted him to make his decision.

"After careful consideration of the circumstances of this case, including an extensive review of the background of the defendant, I have decided that this case is not appropriate for the death penalty," he said in a statement. "The only other punishment for aggravated murder is life in prison without the possibility of release. We will pursue a sentence of life in prison in this case."

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A spokesman for Satterberg noted that Hicks' attorney had submitted information that the defendant was under extreme mental disturbance at the time of the shooting.

Such a claim isn't a defense at trial but can be used to argue against the death penalty.

Kevin Dolan, one of Hicks' attorneys, said he is please by Satterberg's decision and that the Prosecutor's Office considered the matter thoroughly.

A trial date hasn't been set in the case.

In recent months, Satterberg has elected to seek execution in one aggravated murder case -- that of accused cop killer Christopher Monfort -- while opting not to in the case of Isaiah Kalebu, citing concerns about the man's history of mental illness. The only other punishment for aggravated murder is life in prison without the possibility of parole.

In charges filed on Christmas Eve, prosecutors claim Hicks, 30, shot and killed Morgan and their baby.

Detailing the gruesome scene, Seattle detectives said in court documents that Morgan was on the day of the shooting preparing to kick Hicks out of a home they shared with Morgan's mother. Police also say that, in a note left for his brother, Hicks referred to a murder-suicide committed by his own grandfather in 1983 in which his grandfather killed his wife.

"I'm sorry," Hicks wrote his brother, who is currently serving in Iraq. "I hope your stuff is not stolen by the police. I am sick, like grandpa.

"Sorry (I) cannot fix life. Please live for yourself and not others. Do not cry."

Hicks had been out of work for more than a year, Detective Eugene Ramirez said in court documents, and Morgan had begun to tell those close to her that there was trouble in the relationship.

"Jennifer confided in (her mother) that the defendant, Daniel Hicks, was upset the baby was a girl and not a boy," Ramirez said in court documents. "Most recently he became very jealous and suspicious of Jennifer and expressed reservations about being Emma Lyn's biological father."

As the couple's problems intensified, Morgan decided Hicks should move out of the home, and told her mother she would tell him to on Monday. Instead, police contend Hicks shot and killed Morgan and his infant daughter, leaving their bodies for Morgan's mother to find the following morning.

Morgan's mother, who lived in the South Ferdinand Street home's upper floor, said she had not seen her daughter since she left for work Monday morning. Seeing that Hicks' truck was gone,

she assumed her daughter had kicked him out.

That morning, the woman went to the downstairs apartment to ask her daughter about a Christmas gift when she stumbled upon the grisly scene. Morgan and the child had been shot multiple times and left to die.

Investigators ultimately collected 21 shell casings at the scene, leaving police to believe Hicks reloaded several times during the slayings.

In interviews with Morgan's family and friends, detectives came to believe Hicks had become increasingly abusive and paranoid in recent weeks. He had previously threatened to kill Morgan, a friend told officers, while armed with two firearms.

"This case has an undeniable component of domestic violence," Senior Deputy Prosecutor James Konat said in court documents. "After murdering his 13-week-old infant and the infant's mother, the defendant left their bullet-ridden bodies to be discovered by the mother and grandmother of the victims."

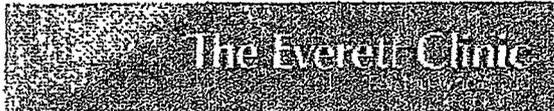
After fleeing the state, Hicks was arrested in California. He remains in the King County Jail.

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APPENDIX G

SECTION SPONSOR



Originally published Thursday, July 30, 2009 at 12:00 AM

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South Park attacks 'a nightmare ... all too real'

The 23-year-old man accused of creeping into a South Park home and attacking two women, leaving one dead and the other seriously wounded, could face the death penalty.

By Jennifer Sullivan
Seattle Times staff reporter

The 23-year-old man accused of creeping into a South Park home and attacking two women, leaving one dead and the other seriously wounded, could face the death penalty.

Isaiah Kalebu was charged Wednesday with aggravated first-degree murder, attempted first-degree murder, two counts of first-degree rape and first-degree burglary. King County Prosecutor Dan Satterberg said his office is weighing whether to seek the death penalty against Kalebu.

He is being held at the King County Jail on \$10 million bail.

Satterberg said Kalebu randomly selected Teresa Butz, 39, and her 36-year-old partner as victims.

Kalebu is accused of crawling through their open bathroom window around 1:30 a.m. on July 19, stripping naked and waking the two women with a threat that they would die if they didn't submit to his sexual demands, according to court charging papers filed Wednesday.

The women were raped repeatedly and a butcher knife was pressed against their throats. During the course of the 90-minute attack the women were slashed on their necks and cut on their arms, Satterberg said.

"As he would rape one woman, he would cut the other," Satterberg said. "It was a nightmare, but it was all too real."

When Butz fought back by kicking her attacker off the bed she was punched in the face, prosecutors said. Butz then was stabbed in the chest and arm but somehow managed to hurl a nightstand out the bedroom window, charging papers said. Butz leapt out the window, creating enough of a distraction for her partner to run out the front door.

Kalebu then escaped through the same window he came in through, prosecutors said.



Isaiah Kalebu charged in rapes, slaying

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[South Park suspect charged with aggravated murder, could face death penalty](#)

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Once outside the house, the two naked women screamed for help. Neighbors rushed to them, but Butz was pronounced dead in the street, Satterberg said. Butz's partner has been released from the hospital and has talked with police about the attack.

Once Kalebu is arraigned on the charges Aug. 12, Satterberg has 30 days to decide whether he will seek the death penalty. The 30-day deadline, which is required under state law, could potentially be pushed back if Kalebu's defense attorneys need more time to prepare, said Dan Donohoe, spokesman for Satterberg.

Satterberg said his office will consider a number of factors before deciding whether to pursue the death penalty, including Kalebu's mental state at the time of the attack. Last year, Kalebu was diagnosed as being bipolar.

Satterberg said the 36-year-old survivor has given police no indication the man was having some sort of mental-illness-related episode when he sneaked into her house and viciously attacked her and Butz.

"There is nothing about the conduct of the defendant during that time that suggests that he was under any delusion, that he was acting under any symptom of mental illness," Satterberg said.

Kalebu is also a suspect in the deaths of his aunt and her tenant — Rachel Kalebu, 62, and John Jones, 57 — in a July 9 fire at the aunt's University Place home. Pierce County sheriff's detectives questioned Kalebu at the scene but released him.

The fire broke out a day after Kalebu's aunt filed for a protection order against him and made him leave the

house.

Kalebu's arrest resulted from a surveillance video obtained by Auburn police after a break-in at Auburn City Hall in March 2008. The video captured someone believed to be Kalebu walking into the building.

Kalebu, according to sources close to the investigation, is believed to have found his way into the basement and cut his hand opening a box of keys that would help him gain access to the elevator and offices.

The State Patrol crime lab matched DNA evidence from the South Park crime scene to evidence found at the Auburn crime scene. While both departments had DNA from the same man, and that DNA was on file with the state, no one knew whose it was.

When Seattle police saw the video from the unsolved Auburn City Hall burglary, they noted the suspect resembled the man in a police sketch drawn after the South Park attacks. The Pierce County Sheriff's Department and the King County Prosecutor's Office, which both had recent dealings with Kalebu, quickly pointed him out as the man on the video.

Kalebu was arrested Friday, soon after a snippet of the video was released to the media.

Seattle Times staff reporter Christine Clarridge contributed to this report.

Jennifer Sullivan: 206-464-8294 or jensullivan@seattletimes.com

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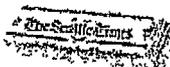
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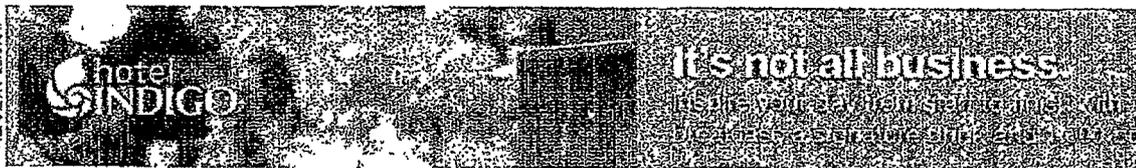
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APPENDIX H

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PROSECUTING ATTORNEY



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April 28, 2010

Statement of King County Prosecuting Attorney Dan Satterberg on capital punishment
decision in the case of State v. Isaiah Kalebu.

When the crime of Aggravated Murder in the First Degree is charged, Washington State's capital punishment statute requires the Prosecuting Attorney to make a threshold decision about whether or not the option of the death penalty should be presented to a future jury. In making this decision the Prosecuting Attorney must consider any and all relevant mitigating factors that would necessitate not seeking the death penalty.

The question that is eventually asked of any capital case jury, which must first be answered by the Prosecuting Attorney, is set forth as follows: "*Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?*" RCW 10.95.060(4).

The duty of the Prosecuting Attorney is to ask whether there are any reasons to merit leniency, and, if such reasons exist, to remove the possibility of the death penalty from the potential outcomes of an aggravated murder case. The Prosecutor should conduct this analysis, appreciating that the jury must use the "beyond a reasonable doubt" standard in deciding whether there are not sufficient mitigating circumstances.

After careful consideration of the circumstances of this case, including an extensive review of the background of the defendant, input from the surviving victim, the deceased victim's family, the attorneys for the defense and others with detailed knowledge of this case, I have decided that this case is not appropriate for the death penalty.

I base this conclusion on the belief that a jury would be justified in finding that a mitigating factor exists based upon the defendant's documented history of mental illness. While we do not believe that the history of his mental illness rises to the level of a defense to the criminal charges, we do find that it meets one or more of the statutory criteria set forth in the law that constitutes a "mitigating factor" for purposes of the capital punishment statute. Under state law, the presence of such a mitigating factor weighs against the imposition of the death penalty.

This case will go forward as charged and we will seek to set a trial date as soon as possible. If convicted as charged, the defendant will be sentenced to life in prison without the possibility of release.

##

APPENDIX D

Appendix to Defendant McEnroe's Motion to
Dismiss the Notice of Intent to Seek the Death
Penalty

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KING COUNTY
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SEATTLE, WA

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

STATE OF WASHINGTON

Plaintiff,

Vs

JOSEPH T. McENROE,
Defendant.

No. 07-C-08716-4 SEA

SUPPLEMENT TO APPENDIX TO
MOTION TO DISMISS NOTICE
OF INTENTION TO SEEK DEATH
PENALTY BECAUSE IT WAS FILED
IN VIOLATION OF MR. MCENROE'S
RIGH TO EQUAL PROTECTION OF
LAW AND DUE PROCESS

Attached hereto are declarations from Carl Luer, attorney for Christopher Monfort, and Todd Maybrown, attorney for Louis Chen, confirming that King County Prosecutor Dan Satterberg did hire a private investigator to gather information relevant to whether or not Mr. Satterberg would seek the death penalty against their clients.

Ramona Brandes, trial attorney for Isaiah Kalebu, has advised undersigned counsel that the Prosecutor did employ a private investigator to gather information regarding whether or not to seek the death penalty against Mr. Kalebu but she does not recall the name of the investigator. The staff member who can find the records is on vacation but will return soon and Ms Brandes will then provide a declaration.

Mr. Luer, Mr. Maybrown, and Ms Brandes, all said the Prosecutor did not disclose the fact he hired a private mitigation investigator in their cases until after the announcement was made to seek death or not seek death. At that point the private investigator's reports were disclosed in discovery.

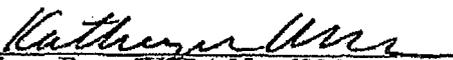
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Kevin Dolan, attorney for Daniel Hicks, advised undersigned counsel that he doesn't know whether or not the prosecutor utilized a private investigator regarding mitigation in Mr. Hicks' case because Mr. Hicks pleaded guilty as soon as death was removed and there was not further discovery provided.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: January 3, 2013, at Seattle, Wa.

Respectfully submitted:


Kathryn Ross, WSBA No. 6894
Attorney for Defendant
The Defender Association
810 Third Avenue, Suite 800
Seattle, Wa. 98104
(206) 447-3968

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

STATE OF WASHINGTON

Plaintiff,

Vs

JOSEPH T. McENROE,
Defendant.

)
) No. 07-C-08716-4
)
)
)
) DECLARATION OF COUNSEL
) REGARDING STATE'S
) MITIGATION INVESTIGATION
) IN STATE v. MONFORT

I am an attorney of record for Christopher Monfort, Superior Court No. 09-1-07187-6
SEA. Mr. Monfort is charged with aggravated murder. At the time he filed charges against Mr.
Monfort's for aggravated murder, the King County Prosecutor Dan Satterberg announced that he
was considering whether or not to seek the death penalty. Several months after charges were
filed the assigned prosecutors, Jeff Baird and John Castleton, informed me and the other
attorneys assigned to the case that the King County Prosecutor's office had hired an investigator
to conduct a mitigation investigation in Mr. Monfort's case. Over the next several months, we
received discovery that included materials from that investigator consisting of some records and
25 interview summaries. The investigator hired by the prosecutor's office was Aimee
Rochunok, who I understand works for Linda Montgomery. When Mr. Satterberg announced his
decision to seek the death penalty against Mr. Monfort, he cited Ms. Rochunok's investigation as
one basis for that decision.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: January 3rd, 2013, at Kent, Washington.



Carl Luer WSEA No. 16365

APPENDIX E

State's Response to Defendant McEnroe's
Motion to Dismiss the Notice of Intent to Seek
the Death Penalty

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CASE NUMBER: 07-1-08716-4 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	No. 07-C-08716-4 SEA
Plaintiff,	)	07-C-08717-2 SEA
)	
vs.	)	STATE'S RESPONSE TO
	)	DEFENDANT McENROE's "MOTION
JOSEPH THOMAS McENROE, and	)	TO DISMISS NOTICE OF
MICHELE KRISTEN ANDERSON,	)	INTENTION TO SEEK DEATH
	)	PENALTY BECAUSE IT WAS FILED
Defendants.	)	IN VIOLATION OF MR. McENROE'S
	)	RIGHT TO EQUAL PROTECTION OF
	)	LAW AND DUE PROCESS"

I. INTRODUCTION

The defendants are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007 killings of six members of Michelle Anderson's family. In each count, and as to each defendant, the aggravating circumstance alleged is that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act," pursuant to RCW 10.95.020(10). With respect to the counts relating to Erica Anderson, Olivia Anderson and Nathan Anderson, an additional aggravating circumstance is alleged, *i.e.*, that "the person committed the murder to conceal the commission of a crime or to protect or conceal the

STATE'S RESPONSE TO DEFENDANT McENROE'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" - 1

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1 identity of any person committing a crime," pursuant to RCW 10.95.020(9). The State has filed
2 a notice of intent to seek the death penalty as to each defendant.

3 Defendant McEnroe has filed another motion moving to dismiss the notice of special
4 sentencing proceeding on the following grounds: 1) that King County Prosecutor Daniel T.
5 Satterberg allegedly did not consider any mitigating evidence regarding McEnroe; 2) that Mr.
6 Satterberg apparently *did* consider mitigating evidence regarding other King County defendants
7 charged with aggravated murder; 3) that this allegedly "disparate treatment" of McEnroe versus
8 other defendants "rendered the death notice a foregone conclusion" and "presentation of
9 mitigation evidence by the defense an empty ritual"; and 4) that the absence of sufficient
10 mitigation is an "element" of the crime for which the State must allege a specific factual basis.
11 *See Motion*, at 2-15.

12 It should be noted that this Court has previously denied McEnroe's motion to dismiss the
13 notice of special sentencing proceeding on grounds that Mr. Satterberg did not follow the
14 dictates of Chapter 10.95 RCW because Mr. Satterberg considered information other than
15 potential mitigation, such as the facts of the crimes themselves and the strength of the available
16 evidence, in deciding to seek the death penalty. *See Clerk's Papers, State v. McEnroe*, Sub No.
17 245 (filed 6/4/10), attached as Appendix A. It should also be noted that this Court has previously
18 denied all but three narrow aspects¹ of McEnroe's motion to compel "discovery" into the process
19

20 ¹ The Court ordered the State to provide "any information gathered as a result of any mitigation
21 investigation conducted by the State, the name of the investigator(s) involved, and the reports of
22 any mental health professionals that were considered by Mr. Satterberg." McEnroe's motion
23 was denied in all other respects.

23 STATE'S RESPONSE TO DEFENDANT McENROE'S
24 "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" - 2

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1 by which Mr. Satterberg made his decisions as to whether to seek the death penalty in this case
 2 and in State v. Chen, 11-1-07404-4 SEA. See Clerk's Papers, State v. McEnroe, Sub No. 369
 3 (filed (3/15/12), attached as Appendix B. And it should further be noted that this Court has
 4 previously denied McEnroe's motion for a "bill of particulars" on grounds that the absence of
 5 sufficient mitigation is an "element" of the crime that the State must support and prove with
 6 specific facts. See Clerk's Papers, State v. McEnroe, Sub No. 405A (filed 6/8/12), attached as
 7 Appendix C.

8 This latest motion is essentially a rehash of these and other previous motions. Thus, like
 9 the previous motions that have spawned this one, this latest motion should be denied.

11 **II. ARGUMENT**

12 A. McENROE'S ARGUMENT THAT THE KING COUNTY PROSECUTOR DID
 13 NOT CONSIDER ANY MITIGATING EVIDENCE IS BASELESS.

14 As noted above, this Court has previously denied McEnroe's motion to dismiss the notice
 15 of special sentencing proceeding in which McEnroe argued that an elected prosecutor is not
 16 allowed to consider anything other than mitigation in exercising his or her executive discretion in
 17 deciding whether to allow a jury to consider imposing a death sentence in any given case.
 18 Appendix A. Undeterred, McEnroe now argues the converse of his original motion – that the
 19 notice of special sentencing proceeding should be dismissed based on the unsubstantiated
 20 accusation that Mr. Satterberg did not consider mitigation *at all* in this case. See Motion, at 2-5.
 21 This argument has no basis in fact or law.

23 STATE'S RESPONSE TO DEFENDANT McENROE's
 24 "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" - 3

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1 This portion of McEnroe's motion stems from a fundamentally flawed starting premise:
 2 specifically, that McEnroe's mitigating evidence is so clearly compelling that Mr. Satterberg
 3 surely must have disregarded it entirely in deciding to file a notice of special sentencing
 4 proceeding. For example, McEnroe asserts that he "submitted substantial mitigating information
 5 to Mr. Satterberg," and that Mr. Satterberg "has never denied the legitimacy of information
 6 presented, never questioned the diagnoses of Mr. McEnroe's experts or their professional
 7 qualifications."² Motion, at 3.

8 In making these and other similarly baseless accusations (for years on end) that the King
 9 County Prosecutor is not carrying out his executive duties properly and in accordance with
 10 Washington law, it is apparent that McEnroe cannot accept the rather obvious alternative
 11 explanation for the Prosecutor's decision in this case: that McEnroe's mitigation evidence, no
 12 matter how "substantial" he may subjectively believe it to be, is simply not very compelling
 13 when viewed in light of the facts of this case and the strength of the evidence. This evidence –
 14 which includes McEnroe's own calm, rational, and repeated admissions that he shot a 3-year-old
 15 in the head at point-blank range³ so that there would be no living witnesses to his and
 16 Anderson's crimes – is substantial indeed. The notion that the Prosecutor disregarded his

17
 18 ² As an aside, McEnroe does not identify the manner in which Mr. Satterberg would have made
 19 such pronouncements "den[ying] the legitimacy" of McEnroe's mitigation evidence. Given that
 20 such pronouncements could implicate McEnroe's right to a fair trial, it certainly seems obvious
 why such pronouncements would not be made prior to trial, if at all.

21 ³ The medical examiner found fragments of Nathan Anderson's skull inside Erica Anderson's
 22 chest cavity. This evidence indicates that Nathan's head was huddled against his dead or dying
 mother's body when McEnroe shot him at close range.

1 statutory duty and ignored all mitigation in reaching the decision to seek the death penalty in this
2 case simply defies reason.

3 As this Court correctly stated in denying McEnroe's previous (similar) motion,
4 "[a]lthough mitigating evidence was presented by both defendants Anderson and McEnroe, the
5 mere presence of mitigating factors does not require the jury to grant leniency *nor require the*
6 *prosecutor to forego filing the notice of special sentencing proceeding.*" Appendix A, at 22
7 (emphasis supplied). McEnroe is apparently unable or unwilling to concede that RCW
8 10.95.040 confers on the prosecutor, and not the defendant or the courts, the discretion to seek
9 the death penalty "when there is reason to believe that there are not sufficient mitigating
10 circumstances to merit leniency." McEnroe's baseless allegation that the King County
11 Prosecutor refused to consider any mitigation submitted in this case should be soundly rejected.

12 B. THE KING COUNTY PROSECUTOR'S DECISIONS IN OTHER CASES
13 HAVE NO BEARING ON THE DECISION IN THIS CASE; EACH CASE
14 AND EACH DEFENDANT IS DIFFERENT.

15 McEnroe next argues that the King County Prosecutor's decisions as to whether to file a
16 notice of special sentencing proceeding in the Monfort, Chen, Hicks, and Kalebu cases somehow
17 demonstrate that the decision in this case is the result of some sort of unconstitutional unfairness.
18 In order to support this argument, McEnroe picks isolated pieces of distorted information
19 regarding the other cases, completely ignores the facts of his own case, and reaches the
20 unsupportable conclusion that the decision in this case must have been the result of Mr.
21 Satterberg's complete disregard of any mitigating evidence on McEnroe's behalf rather than a
22 proper exercise of executive discretion. See Motion, at 5-8.

23 STATE'S RESPONSE TO DEFENDANT McENROE'S
24 "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" - 5

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1 As a preliminary matter, this argument asks this Court to compare this case to other
2 aggravated murder cases and perform what amounts to a pretrial proportionality review – a task
3 that the Washington Supreme Court has held this Court cannot perform, as explained in State v.

4 Elmore:

5 Elmore asserts his sentence must be reversed because the trial court
6 erroneously believed it did not have the authority to engage in a proportionality
7 review. Before the trial court, Elmore moved to strike the special sentencing
8 proceeding on proportionality grounds, asserting “[i]t makes little sense and
wastes judicial resources to require a defendant to wait and see if a jury imposes
death where that sentence would then be reversed on appeal on proportionality
grounds.” Clerk's Papers at 472. The trial court denied the motion.

9 In his Opening Brief of Appellant on Conflict Issues at 7-9, Elmore argues
10 while RCW 10.95.130(2) *requires* the Supreme Court to engage in a
11 proportionality review, it does not *prevent* the trial court from engaging in such
12 inquiry, urging such review for the sake of judicial economy. The plain language
13 of RCW 10.95.130, however, is determinative of this issue. RCW 10.95.130(2)
14 states: “[w]ith regard to the sentence review required by this act, *the supreme
court of Washington shall* determine: . . .” (emphasis added). Proportionality
review is a special statutory proceeding that is conducted by this Court and this
Court alone. RCW 10.95.100, .130(1). There is no statutory authority for a trial
court to engage in a proportionality review, with the purpose of foregoing the
special sentencing proceeding, as suggested by Elmore.

15 State v. Elmore, 139 Wn.2d 250, 300-01, 985 P.2d 289 (1999). McEnroe’s motion should be
16 denied on this basis alone.

17 But even putting aside the impropriety of performing a pretrial proportionality review,
18 McEnroe’s argument does not withstand even superficial scrutiny on the merits. The Monfort
19 case is unhelpful to McEnroe’s position because the State is seeking the death penalty in that
20
21

22
23 STATE'S RESPONSE TO DEFENDANT McENROE'S
24 "MOTION TO DISMISS NOTICE OF INTENTION
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TO EQUAL PROTECTION OF LAW AND DUE
PROCESS" - 6

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1 case.⁴ In the Hicks and Kalebu cases, unlike in this case, there is substantial evidence of serious,
2 long-term mental illness. In the Chen case, unlike in this case, there is no apparent evidence of
3 substantial planning, lying in wait, altering the crime scene, disposing of evidence, or attempting
4 to manufacture an alibi. In the Kalebu and Chen cases, unlike in this case, there were no
5 confessions explaining in detail why the defendants committed their crimes. And in this case,
6 unlike *any* of the other cases, the defendants killed *six* people, including two young children who
7 were shot to death *by McEnroe* for the express purpose of eliminating them as potential
8 witnesses.

9 In sum, even if this Court were to engage in the impermissible exercise of comparing this
10 case with the others, there is no basis for this Court to conclude that the decision to file a notice
11 of special sentencing proceeding in this case is unfair, unreasonable, or an abuse of discretion.
12 Each case is different, and each defendant is different; it is therefore wholly unsurprising that
13 different decisions based on individualized considerations are made in each case. Indeed, this is
14 precisely what the elected prosecutor is supposed to do. *See State v. Rupe*, 101 Wn.2d 664, 700,
15 683 P.2d 571 (1984) ("The courts may assume that prosecutors exercise their discretion in a
16 manner which reflects their judgment concerning the seriousness of the crime or insufficiency of
17 the evidence.").

18
19
20 ⁴ Furthermore, the fact that the State hired an investigator in Monfort's case is of no moment in
21 this case, because Monfort's attorneys (unlike the attorneys in this case) did not provide a
22 "mitigation packet" before the final deadline for filing the notice of special sentencing
23 proceeding.

1 As the Washington Supreme Court has recently reaffirmed, aggravated murder cases
2 “cannot be matched up like so many points on a graph.” State v. Davis, 175 Wn.2d 287, ___
3 P.3d ___ (2012), paragraph 133 (internal quotation marks and citations omitted). This Court
4 should soundly reject McEnroe’s arguments to the contrary.

5 C. McENROE’S ARGUMENT THAT THE PRESENTATION OF MITIGATION
6 WAS AN “EMPTY RITUAL” AND THAT SEEKING THE DEATH PENALTY
7 WAS A “FOREGONE CONCLUSION” IS BASED ON THE SAME FAULTY
8 PREMISE ADDRESSED IN SECTION “A” ABOVE.

9 McEnroe next argues that the Prosecutor disregarded his mitigation evidence, and
10 focused solely on the crimes he committed; that, as a result, McEnroe has been treated
11 differently from other aggravated murder defendants; and, thus, that this constitutes an Equal
12 Protection Clause violation. McEnroe also takes this a step further, and accuses the Prosecutor
13 of disregarding the facts and evidence in the other cases, and focusing solely on mitigation. *See*
14 *Motion*, at 9-11.

15 This argument is based on the same faulty premise addressed in Argument Section “A”:
16 namely, that McEnroe’s mitigation evidence is so compelling that Mr. Satterberg would not have
17 sought the death penalty but for his complete disregard of that evidence. For the reasons
18 previously stated, this faulty premise should be rejected. The converse argument – that the only
19 way Mr. Satterberg could have made the decision not to seek the death penalty against
20 defendants Chen, Hicks, and Kalebu was to completely disregard the facts in those cases – is
21 equally flawed. As explained in Argument Section “B,” each case is different, and thus, a
22 different result is not surprising.

23 STATE'S RESPONSE TO DEFENDANT McENROE's
24 "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" - 8

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1 McEnroe's motion is frivolous because he cannot show a manifest abuse of discretion in
 2 the decision to seek the death penalty in this case. The Legislature has pronounced that the
 3 elected county prosecutor "shall file written notice of a special sentencing proceeding to
 4 determine whether or not the death penalty should be imposed when there is reason to believe
 5 that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.040(1). As
 6 this Court has observed many times before, this is a discretionary decision reserved for the
 7 elected county prosecutor alone. An abuse of discretion is shown only when a decision is
 8 manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675,
 9 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds
 10 that no reasonable person would have made the same decision. State v. Atsbeha, 142 Wn.2d
 11 904, 914, 16 P.3d 626 (2001).

12 McEnroe simply cannot show an abuse of discretion in the decision to seek the death
 13 penalty in this case, either standing alone or when compared with other cases. Indeed, this is a
 14 case so far from the margins of discretion that to suggest otherwise is simply absurd.

15 D. THE ABSENCE OF SUFFICIENT MITIGATION IS STILL NOT AN
 16 "ELEMENT" OF AGGRAVATED MURDER.

17 Lastly, McEnroe attempts to resuscitate an argument that this Court has previously
 18 rejected: namely, that the absence of sufficient mitigating circumstances is an "element" of
 19 aggravated murder that the State must allege, support, and prove with specific facts. *See Motion*,
 20 at 12-15; *see also* Appendix C. This argument has been previously rejected not only by this
 21 Court, but (as noted by the State in previous briefing and oral argument) by the Washington
 22 Supreme Court as well:

23 STATE'S RESPONSE TO DEFENDANT McENROE's
 24 "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" - 9

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1 As to Yates's third claimed defect (the information's failure to allege the
2 absence of mitigating circumstances), we have previously held that the absence of
3 mitigating circumstances is not an essential element of the crime of aggravated
4 first degree murder:

5 The statutory death notice here is not an element of the crime of
6 aggravated murder. Instead, the notice simply informs the accused
7 of the penalty that may be imposed upon conviction of the crime.
8 While we require formal notice to the accused by information of
9 the criminal charges to satisfy the Sixth Amendment and art. I §
10 22, we do not extend such constitutional notice to the *penalty*
11 exacted for conviction of the crime.

12 State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996) (citation omitted). The
13 purpose of the charging document – to enable the defendant to prepare a defense –
14 is distinct from the statutory notice requirements regarding the State's decision to
15 seek the death penalty.

16 State v. Yates, 161 Wn.2d 714, 759, 168 P.3d 359 (2007) (footnote omitted) (emphasis in
17 original).

18 This argument merits no further consideration.

19 E. THIS MOTION SHOULD BE DENIED WITHOUT ORAL ARGUMENT.

20 As previously noted, this motion is a rehashing of arguments that have already been
21 rejected by the Court. Accordingly, there is certainly no need to for oral argument.

22 **III. CONCLUSION**

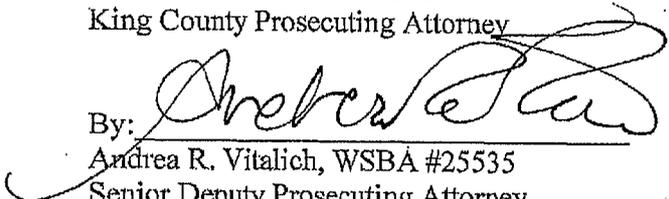
23 For all of the foregoing reasons, and for the reasons set forth in previous briefing, oral
24 arguments, and rulings from this Court, this Court should deny defendant McEnroe's "Motion to
Dismiss Notice of Intention to Seek Death Penalty Because it was Filed in Violation of Mr.
McEnroe's Right to Equal Protection of Law and Due Process."

STATE'S RESPONSE TO DEFENDANT McENROE'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" - 10

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Respectfully submitted this 4th day of January, 2013,

DANIEL T. SATTERBERG
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By: 
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STATE'S RESPONSE TO DEFENDANT McENROE's
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Appendix A

1 Taking the issues in the order presented, the Defendants acknowledge that RCW
2 10.95.020 as originally enacted has been held to pass constitutional muster. State v.
3 Bartholomew I, 98 Wn.2d 173, 192, 654 P.2d 1170 (1982). They argue, however, that
4 subsequent case law interpretation of the factors, and the addition of four additional statutory
5 factors with subparts, have rendered the statute so broad in application that aggravating
6 circumstances can be applied to nearly every premeditated murder. The Defendants' briefing
7 contains a lengthy compilation of cases interpreting and applying the statutory aggravating
8 factors. They maintain that the legislative expansion of the aggravating factors and the "very
9 loose interpretation of the statute by the Washington courts" render the entire Washington
10 death penalty statute unconstitutional because the aggravating factors no longer genuinely
11 narrow the class of persons eligible for the death penalty. After considerable review, this Court
12 is not persuaded by Defendants' argument.

13 At the outset, this Court recognizes that, in Washington State, only premeditated first
14 degree murder is a death penalty eligible offense. In his reply brief on the second issue before
15 this Court, Defendant McEnroe himself notes that "[u]nlike other states, the only crime that can
16 even be considered as a potential capital prosecution is premeditated murder." Defendant
17 McEnroe's Reply to State's Response to Motion to Strike Notice of Intent at Pages 3-4
18 (emphasis in original). In a footnote, McEnroe acknowledges that in some other states felony
19 murder, all first degree murders, or intentional or knowing murders are eligible for the death
20 penalty. Id. at 4, n. 1. Accordingly, in Washington State the death penalty is somewhat
21 narrowly circumscribed by its limitation to only first degree premeditated murder.

22 The Defendants cite Arave v. Creech, 113 S.Ct. 1534, 507 U.S. 463, 123 L.Ed.2d 188
23 (1993) for the proposition that because the "aggravating circumstances in Washington can be

1 applied to nearly every premeditated murder, [the statute] is constitutionally infirm." Defendant
2 McEnroe's Motion to Strike at page 4. Although they maintain that they are not asserting a
3 vagueness challenge, Arave v. Creech involved, in part, the defendant's contention that the
4 aggravating circumstance that he exhibited "utter disregard for human life" was
5 unconstitutionally vague. Ultimately, the United States Supreme Court held that the language
6 was not unconstitutionally vague given the limiting construction placed upon the language by
7 the Idaho Supreme Court in a prior case. The Court also noted that in Idaho the sentencer
8 was the judge rather than a jury and the judge was presumed to know the law. Arave at 8.

9 The Arave Court acknowledged, however, that the inquiry did not end there. Instead
10 the Court was required to determine whether the State's capital sentencing scheme genuinely
11 narrowed the class of persons eligible for the death penalty. "If the sentencer fairly could
12 conclude that an aggravating circumstance applies to every defendant eligible for the death
13 penalty, the circumstance is constitutionally infirm." Arave at 10. The Court held that although
14 the question was "close," the limiting construction placed upon the "utter disregard" language
15 satisfied the narrowing requirement. Arave at 10. In short, the Court answered the question of
16 whether the capital sentencing scheme genuinely narrowed the class of persons eligible for the
17 death penalty by reviewing whether the aggravating circumstance pertaining to the defendant
18 himself was constitutionally infirm. The Court did not conduct a global review of all the
19 aggravating factors set forth in the entire Idaho death penalty statute.

20 The only case that Defendants have cited in support of the proposition that they may
21 assert a constitutional challenge based on the contention that aggravating factors not alleged
22 against them do not perform an adequate narrowing function is United States v. Cheely, 36
23 F.3d 1439 (1994). In fact, the only portion of that case cited in support of the proposition is a

1 footnote. In that case, however, both of the death penalty provisions found to be
 2 unconstitutional had been alleged against Cheely, so the proposition asserted by Defendants
 3 is not squarely supported by the case.

4 In summary, the aggravating factors alleged against Defendants Anderson and
 5 McEnroe have long been recognized as constitutional. The Defendants have failed to provide
 6 persuasive authority for the proposition that they may challenge the constitutionality of the
 7 entire Washington State death penalty statute based upon infirmities in aggravating factors
 8 that have not been alleged against them. Furthermore, even if this Court were to accept the
 9 argument and rule in favor of the Defendants, the remedy would be to strike the
 10 unconstitutional aggravating factors, rather than to strike the notice of special sentencing
 11 proceeding. RCW 10.95.900.

12 The second issue is the narrower of the two and does not appear to have been directly
 13 addressed in any appellate court opinion. It is important to note that RCW 10.95.040(1) is a
 14 unique statute. Neither the Federal Death Penalty Act nor any state death penalty statute
 15 appears to have a comparable provision. RCW 10.95.040(1) provides in pertinent part that the
 16 "prosecutor shall file written notice of special sentencing proceeding to determine whether or
 17 not the death penalty should be imposed when there is reason to believe that there are not
 18 sufficient mitigating circumstances to merit leniency."

19 On December 28, 2007, when the King County Prosecutor announced the filing of
 20 aggravated first degree murder charges against the Defendants, the Prosecutor stated:

21 As you know, the prosecuting attorney has 30 days from the date of arraignment to
 22 decide whether or not to file a notice declaring our intention to pursue the death penalty.
 23 During this period of time, we review the facts of the case, and consider any mitigating
 circumstances including any facts or issues that the defense may want to present.

1 Given the magnitude of this crime, I pledge to give this case serious consideration for
2 application of our state's ultimate punishment. But that decision is for another day.

3 Ten months later, the Prosecutor issued a statement regarding his decision to seek the
4 death penalty against both Defendants. He stated in pertinent part:

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

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

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

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

19 The Defendants contend that the Prosecutor failed to follow the directive of RCW
20 10.95.040(1) to consider only the mitigating factors in deciding whether to file the special
21 sentencing notice. Instead, they contend that the prosecutor erroneously weighed the
22 evidence in mitigation against the heinousness of the factual allegations underlying the
23 charges, thereby, inappropriately commingling the seriousness of the offense with the
assessment of the defendant's individual culpability. Defendants reason that the seriousness
of the offense was already determined and established by virtue of the filing of the aggravating
circumstances. Therefore, reconsideration of the heinousness of the offense is inconsistent
with the statutory directive to determine whether "there is reason to believe that there are not
sufficient mitigating circumstances to merit leniency."

1 The State counters by asserting that the plain language of RCW 10.95.040(1) provides
 2 that the prosecutor should consider any relevant information available when deciding whether
 3 to file the special sentencing notice. The prosecutor is not constrained to consider only
 4 evidence pertaining to mitigation. The State maintains that the prosecutor can consider the
 5 facts of the case itself and the strength of the available evidence in making the decision. To
 6 hold otherwise, the State argues, would lead to absurd results.

7 A great deal has been written about the death penalty over the past four decades and
 8 numerous cases have articulated basic principles central to death penalty jurisprudence. Two
 9 of these principles are that death penalty statutes must be narrowly circumscribed to target the
 10 worst of the worst crimes. Second, that the imposition of the death penalty should be reserved
 11 for individuals who are deemed to be the worst of the worst offenders. With this fundamental
 12 backdrop in mind, we must review how the Washington State death penalty statute addresses
 13 these core principles.

14 First, the Legislature has defined the worst of the worst crimes that are eligible for the
 15 death penalty in Washington State. If the facts alleged indicate that the defendant has
 16 committed the crime of first degree premeditated murder as defined in RCW 9A.32.030(1)(a),
 17 and one or more of the 14 aggravating circumstances set forth in RCW 10.95.020 are present,
 18 then the State may charge the defendant with aggravated first degree murder. Aggravated
 19 first degree murder is an offense eligible for the death penalty.

20 In most jurisdictions the filing of the aggravating factor or circumstance provides the
 21 defendant notice that the State will be seeking the death penalty. Also, in some jurisdictions,
 22 the adjudication of the aggravating circumstance is conducted in the sentencing phase of the
 23 proceeding rather than the guilt phase. State v. Bartholomew II, 101 Wn.2d 631, 635, 683

1 P.2d 1079 (1984). In other words, if the defendant is convicted of the underlying murder, then
2 proof of the aggravating circumstance that would elevate the crime to a death penalty eligible
3 offense is presented at the sentencing phase.

4 Early drafts of Washington State's current death penalty statute were consistent with
5 this approach. However, the version that was finally enacted incorporated proof of the
6 aggravating factor in the guilt phase of the proceeding rather than reserving that determination
7 to the sentencing phase. Our Supreme Court in State v. Kincaid, 103 Wn.2d 304, 312, 692
8 P.2d 823 (1983) described the process as the jury being asked to decide whether the
9 defendant was guilty of premeditated murder in the first degree and, if so, being asked to
10 answer a special verdict regarding the existence of a statutory aggravating circumstance. The
11 Court held that while the aggravating circumstance is determined in the same proceeding,
12 conceptually the crime is premeditated murder in the first degree with aggravating
13 circumstances rather than a new crime of aggravated first degree murder. The aggravating
14 circumstance functions as an "aggravation of penalty" provision justifying the increased
15 penalty. Kincaid at 312.

16 If the jury finds the defendant guilty of premeditated murder in the first degree and also
17 finds aggravating circumstances exist, the special sentencing proceeding is conducted. At this
18 proceeding, the jury is charged with answering the following question, "Having in mind the
19 crime of which the defendant has been found guilty, are you convinced beyond a reasonable
20 doubt that there are not sufficient mitigating circumstances to merit leniency?" To return an
21 affirmative answer to that question, the jury must be unanimous.

22 It is in this special sentencing proceeding that the jury addresses the second guiding
23 principle – is this the worst of the worst offender deserving the ultimate punishment? RCW

1 10.95.070 provides a non-exclusive list of the factors that the jury may consider in determining
2 whether leniency is merited. They include the presence or absence of prior criminal history or
3 activity, whether the crime was committed while the defendant was under the influence of
4 extreme mental disturbance, whether the victim consented to the murder, whether the
5 defendant was an accomplice to the murder committed by another but played a minor role,
6 whether the defendant acted under duress or domination of another, whether the defendant's
7 capacity to appreciate the wrongfulness of his conduct or conform his/her conduct to the
8 requirements of the law was substantially impaired as a result of mental disease or defect,
9 whether the age of the defendant at the time of the crime calls for leniency, and whether there
10 is a likelihood that the defendant will pose a danger to others in the future. Evidence in
11 mitigation of punishment is the focus of the proceeding. State v. Bartholomew II, 101 Wn.2d at
12 645 (1984).

13 Before a case arrives at the sentencing stage of the proceeding, however -- indeed,
14 before even the guilt phase -- Washington State has a unique intermediate determination set
15 forth in RCW 10.95.040(1). As described above, this provision states that after the prosecutor
16 has filed the death penalty eligible charge of aggravated murder in the first degree, the
17 prosecutor has 30 days to decide whether to file the notice of special sentencing proceeding
18 indicating that the State will pursue the death penalty rather than settling for the prospect of life
19 without the possibility of parole. During this 30 day window, the defendant may not tender a
20 plea of guilty to aggravated first degree murder nor may the Court accept such a plea or a plea
21 to any other lesser included offense. This restriction is obviously intended to afford the State
22 an opportunity to consider the propriety of filing a special sentencing notice without running the
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1 risk of the defendant pleading guilty in the meantime and precluding the prospect of receiving a
2 death sentence.

3 Interestingly, although the statute allows for extension of the 30 day period for "good
4 cause," the statute makes no provision for defense counsel's input or involvement during this
5 review process. We are all aware that a culture and practice has evolved over the years that
6 permit and encourage defense counsel to prepare and provide a "mitigation packet" to the
7 prosecutor to assist in making this significant decision. We are also all aware that this practice
8 has inexorably led to numerous agreed extensions of the 30 day period to afford counsel
9 ample opportunity to investigate and prepare materials in mitigation for consideration.
10 Defense counsel's agreement to the extension ostensibly is predicated on a desire to prepare
11 the most compelling packet possible. The State's assent is presumably not only based upon a
12 desire to obtain the most complete information possible to assist in the decision, but also a
13 desire to curtail a later argument that defense counsel was ineffective.

14 Despite these current practical realities, when this Court is called upon to determine the
15 meaning of RCW 10.95.040(1), the Court must consider the Washington State Death Penalty
16 Act as it is written rather than construing it according to the practices that have evolved in
17 various jurisdictions out of whole cloth.

18 In keeping with this principle, it is evident that the Legislature intended to afford a
19 prosecutor only a narrow window in which to determine whether to file a notice of special
20 sentencing proceeding once the prosecutor has elected to charge an individual with
21 aggravated first degree murder. Absent a showing of good cause, the prosecutor is required
22 to make the decision within 30 days of arraignment. Notably, the statute does not require the
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1 prosecutor to wait for any length of time either. In fact, the prosecutor may file the notice much
2 earlier in the process.

3 In State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the prosecutor expressed a
4 desire to do just that. On May 20th, 1992, Pirtle was charged with 2 counts of aggravated first
5 degree murder. On that same day, the prosecutor informed defense counsel that he intended
6 to seek the death penalty. On appeal, Pirtle argued that the prosecutor abused his discretion
7 by failing to consider mitigating evidence before deciding to seek the death penalty. The
8 Supreme Court held that the prosecutor did not abuse his discretion in that instance because
9 he had merely expressed a tentative decision and indicated to defense counsel that he would
10 accept and consider mitigating evidence from the defense if provided before the 30 day
11 expiration period for filing the notice of intent. On the 30th day, the prosecutor filed the notice
12 of intent.

13 Although the case does not specifically indicate whether the defense submitted any
14 evidence in mitigation, it appears that they did not. The Supreme Court held that the
15 prosecutor's expressed willingness to consider evidence in mitigation indicated that the
16 prosecutor was not applying an unconstitutionally rigid policy in making his decision. However,
17 the Court implied that had the prosecutor announced his decision on May 20th and then
18 refused to consider any additional evidence in mitigation, it "would indicate an unwillingness to
19 engage in the individualized tempering" required. Pirtle at 642, citing In re Harris, 111 Wn.2d
20 691, 693, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075 (1989). The salient fact for the
21 Pirtle Court was the willingness of the prosecutor to consider evidence in mitigation rather than
22 subscribing to a rigid, inflexible policy of filing a notice of special sentencing in every
23 aggravated first degree murder case.

1 Having found that the prosecutor's expressed willingness to consider evidence in
 2 mitigation after his tentative announcement thwarted any argument that the prosecutor was
 3 employing an absolute policy that violated the constitutional requirement of individual
 4 tempering, the record itself still failed to illuminate the prosecutor's reasons for filing the notice
 5 of special sentencing. The reason for this deficiency is contained in RCW 10.95.040 itself.
 6 Pursuant to the statute, in order to file the notice of special sentencing the prosecutor need
 7 only have "reason to believe that there are not sufficient mitigating circumstances to merit
 8 leniency". The prosecutor need not articulate his reason or the underlying evidence in support.
 9 As Justice Utter lamented in a dissenting opinion over a decade earlier:

10 If the prosecutor believes there is one reason to believe the mitigating circumstances
 11 are not sufficient, this is all that is required to put the question of capital punishment
 12 before the jury. The statute requires no reason to be stated for the record, nor any
 13 justification for requesting capital punishment. No affidavit filed with the court is
 required and we are absolutely unable to determine what the underlying reason is for
 allowing the jury to consider the imposition of the death penalty that distinguishes it from
 other aggravated murders.

14 State v. Campbell, 103 Wn.2d 1, 47, 691 P.2d 929 (1984) (Utter, J., dissenting).

15 Undeterred by the absence of an explanation on the record, the Supreme Court filled
 16 the void in Pirtle by turning to evidence in the public record to glean possible justifications.

17 Having done so, they stated:

18 Even without input from the defense, the prosecutor had a substantial amount of
 19 information about Pirtle. Pirtle was born in Spokane and lived most of his life there. His
 20 contact with law enforcement officers had been extensive. He had ten juvenile
 21 convictions, including three for second degree burglary. He had five adult convictions
 22 including one for first degree theft and another for felony assault. Because of Pirtle's
 23 history, the prosecutor had some information about each of the statutory mitigating
 factors, with the possible exception of the Defendant's mental state at the time of the
 crime. Given what the prosecutor already knew and his willingness to wait thirty days to
 see if the defense could develop additional information, we find the prosecutor did not
 abuse his discretion.

1 State v. Pirtle, 127 Wn.2d at 642-43.

2 Although Pirtle is viewed as an anomaly by the State, at least three relevant principles
3 can be gleaned from the case. First, the prosecutor's duty under RCW 10.95.040(1) is not
4 particularly onerous. The State need not conduct a deeply searching inquiry in order to satisfy
5 its statutory obligation. This holding is consistent with the Court's prior holding in In re Harris,
6 supra. In Harris the Court upheld a Pierce County Prosecuting Attorney's Office policy that
7 required automatic filing of the notice of special sentencing unless the defendant or his counsel
8 brought forth some evidence in mitigation for consideration. In re Harris, 111 Wn.2d at 691.

9 Secondly, Pirtle appears to indicate that although it may be a good practice to afford the
10 defense an opportunity to submit mitigating evidence for consideration, there is no obligation to
11 wait longer than the statutory 30 days for the information before rendering a decision to file the
12 special sentencing notice.

13 Lastly, Pirtle indicates that while the court must be respectful of the discretion afforded
14 the prosecutor in making a decision pursuant to RCW 10.95.040(1), the exercise of that
15 discretion is not unfettered and is not immune from review by the court. That review, however,
16 is conducted pursuant to a highly deferential abuse of discretion standard. Furthermore, even
17 absent any expressed articulation by the prosecutor of the reason for believing the evidence in
18 mitigation is insufficient, the Supreme Court will review public facts in the record on its own to
19 determine if evidence exists that would support the prosecutor's determination.

20 Given the low burden imposed on the prosecutor in Pirtle to seek out mitigating
21 evidence and given the highly deferential standard of review employed by the Supreme Court,
22 this Court asked Ms. Ross at oral argument whether Pirtle was at all helpful to the defense
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1 position. Ms. Ross responded that although the Pirtle Court was highly deferential to the
2 prosecutor, the telling part of the Court's analysis was reflected in the Court's self-expressed
3 rationale in support of the prosecutor's decision. She noted that each of the factors relied
4 upon by the Supreme Court was a factor specific to the defendant himself from his place of
5 birth to his criminal record. She noted that the Court did not comment on the heinousness of
6 the offense or the strength of the State's case in evaluating the mitigating factors. Accordingly,
7 she contended that the actual analysis conducted by the Supreme Court itself validates the
8 defense contention that the prosecutor should not weigh the facts of the underlying charge in
9 making a special sentencing notice decision pursuant to RCW 10.95.040(1).

10 The State counters that the plain language of RCW 10.95.040(1) permits the prosecutor
11 to consider any relevant information, not just potential mitigation. The State argues that simple
12 logic and common sense dictate that a "reason to believe" that potential mitigation is
13 insufficient to merit leniency must come from sources other than the potential mitigation itself.
14 At oral argument, the State noted that it is their office policy to "only give the jurors the option
15 of imposing death in cases where guilt is not even remotely a question." Accordingly, the facts
16 of the crime alleged and the strength of the evidence available is an essential component of
17 the calculus. To illustrate its point, the State poses the following two hypotheticals:

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

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State's Response to Defendant's Motion to Strike Notice of Intent at Page 8, n. 2.
(emphasis in the original).

Contrary to the State's assertion, these two hypotheticals do not illustrate the inherent absurdity of the defense position. In fact, they appear to support the defense contention. In the first example above, presumably at the time of filing, the State made an initial assessment that it could prove a charge of aggravated murder in the first degree. If it could not, then the charge would not have been filed. If RCW 10.95.040(1) is applied as written, the State must file the notice of special sentencing proceeding if the prosecutor has reason to believe that mitigating circumstances are insufficient to merit leniency. If the evidence of mitigation is non-existent, there is nothing inherently absurd or illogical in requiring the State to file the notice of special sentencing proceeding consistent with the direction of RCW 10.95.040(1). Conversely, in the second hypothetical, even if the aggravated murder in the first degree is exceptionally heinous, there is nothing inherently illogical or absurd in declining to file a notice of special sentencing proceeding if the evidence in mitigation is compelling.

Application of two additional hypotheticals illustrates the flaw in the State's logic and the danger arising from its application. In the State's first hypothetical, the State declines to file the notice of special sentencing not because the defendant presents compelling mitigation; in fact, in that hypothetical the defendant presents no mitigation. Rather, the State declines to file the notice because the State's case is weak. Consider this situation with the following addition. After the prosecutor decides not to file notice of special sentencing proceeding and allows the deadline to pass, continued investigation yields new evidence and additional witnesses that shore up the State's case. The weak case is now strong, but the State has lost its opportunity

1 to pursue the death penalty on an individual who perhaps is most deserving of the ultimate
2 punishment.

3 Second, assume that an especially heinous aggravated murder in the first degree is
4 committed and the proof is extraordinarily strong. However, the evidence presented in
5 mitigation is "compelling" as the State suggests in its hypothetical. Is there anything inherently
6 illogical or absurd in not filing a notice of special sentencing in such circumstances? What is
7 the reason for believing that the evidence of mitigating circumstances is insufficient if indeed it
8 is compelling?

9 While the State's construction of the statute renders it a useful case management tool, it
10 conflates the concept of the heinousness of the crime with the individual culpability of the
11 individual defendant. Evidence presented in mitigation is not intended to mitigate the
12 heinousness of the offense. Nothing could. The crimes that give rise to a charge of
13 aggravated murder in the first degree are by legislative fiat deemed to be the most heinous
14 crimes. Proof of the crime and the aggravating circumstance are the subject and purpose of
15 the guilt phase.

16 Mitigating circumstances according to Black's Law Dictionary, as quoted in State v.
17 Bartholomew II, are those circumstances which "do not constitute a justification or excuse of
18 the offense in question, but which in fairness and mercy, may be considered as extenuating or
19 reducing the degree of moral culpability." State v. Bartholomew II at 647, quoting Black's Law
20 Dictionary, 903 (5th rev. ed. 1979).

21 As we sit here today, no amount of mitigation, however strong, irrefutable and
22 compelling it may be, will mitigate the horror of the offenses committed on the members of the
23 Anderson family. No amount of mitigation will lessen the loss or the hurt experienced by their

1 loved ones. Mitigation instead focuses on the individual moral culpability of the individual
2 defendant despite the acknowledged heinousness of the crime.

3 Over 40 years of death penalty jurisprudence has repeatedly reaffirmed the simple
4 premise that in order to pass constitutional muster death penalty statutes must be crafted in
5 such a way as to limit the applicability of the death penalty to the worst crime and the most
6 morally culpable offender. Each discretionary decision made during the progress of the case
7 must be "guided" so as to avoid the prospect of arbitrary and capricious application of the
8 penalty. The fundamental questions, therefore, remain: (1) what is the function of RCW
9 10.95.040(1) in this scheme, and (2) what may the prosecutor consider in deciding whether
10 there is reason to believe that the mitigating circumstances do not merit leniency in any given
11 case?

12 Although there is a dearth of legislative history on RCW 10.95.040(1), our Supreme
13 Court seems to have answered the first question on at least two occasions. In upholding the
14 constitutionality of the discretion afforded prosecutors in RCW 10.95.040(1), the Supreme
15 Court in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) stated that "the prosecutor's
16 decision not to seek the death penalty, in a given case, eliminates only those cases in which
17 juries could not have imposed the death penalty. We believe that this analysis accurately
18 portrays the function prosecutorial discretion plays in our death penalty statute. This discretion
19 is constitutional." Rupe at 700.

20 Later that same year, the Supreme Court echoed the same position in State v. Dictado,
21 102 Wn.2d 277, 687 P.2d 172 (1984). In upholding RCW 10.95.040(1) against an equal
22 protection challenge, the Court stated that "[t]he prosecutor's discretion to seek or not seek the
23 death penalty depends on an evaluation of the evidence of mitigating circumstances. This

1 evaluation must determine if sufficient evidence exists to convince a jury beyond a reasonable
2 doubt that there are not sufficient mitigating circumstances. See RCW 10.95.040(4)." State v.
3 Dictado, at 297; see also State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984).

4 The Dictado Court described the function of the prosecutor under RCW 10.95.040(1) as
5 being similar to the exercise of discretion in the charging function. Although the prosecutor
6 does not determine the sentence, the prosecutor does decide whether sufficient evidence
7 exists to take the issue of mitigation to the jury. Dictado, at 297-98.

8 It is abundantly clear to this Court that our Supreme Court has held for over 25 years
9 that RCW 10.95.040(1) is intended to winnow out cases that should not proceed to special
10 sentencing because the jury would not be able to impose the death penalty at the conclusion
11 of the hearing. It is in light of this function that we must review what factors and evidence the
12 prosecutor may consider in making the decision whether or not to file the notice of special
13 sentencing proceeding.

14 Although a list of statutory factors is given to the jury to consider at the special
15 sentencing proceeding, the list is non-exclusive and the jury may consider any relevant factors.
16 The State is entitled to present evidence to rebut mitigating evidence produced by the
17 defendant. State v. Bartholomew II, 101 Wn.2d at 642-43. In fact, the jury may even be
18 invited in the State's closing argument to view the crime through the eyes of the deceased
19 child victim when deciding if the mitigating evidence is sufficient to merit leniency. State v.
20 Rice, 110 Wn.2d 577, 606-07, 757 P.2d 889 (1988). In Rice, the Court stated that in the
21 penalty phase the jury "weighs the nature of the criminal acts against any mitigating factors.
22 The jury should be allowed to consider as part of the analysis, the crime's impact on the
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1 victims, and argument on that topic is proper to the extent that it is restricted to the
2 circumstances of the crime." Rice at 607.

3 Nine years later, the Supreme Court further refined its articulation of the role of the jury
4 in the sentencing phase in State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). The United
5 States Supreme Court has classified state death penalty statutes as either "weighing" or "non-
6 weighing." In "weighing" states, the death penalty may be imposed only where the specified
7 aggravating factors outweigh all the mitigating evidence. In a "non-weighing" state, "the fact
8 finder considers all the circumstances from both the guilt phase and penalty phase in deciding
9 penalty. These circumstances relate to both the crime and the defendant." Brown at 615-16.

10 Relying in part on our Supreme Court's own repeated use of variations of the word
11 "weigh" in reference to penalty phase deliberations, Defendant Cal Brown contended that the
12 trial court erred in refusing his proposed penalty phase jury instructions. In sum, Brown's
13 proposed instructions were predicated on the premise that Washington State's death penalty
14 statute was a "weighing" statute rather than a "non-weighing" statute. Brown at 616.

15 Despite the Court's own reiteration of the words "weigh," "weighs," and "outweighs" in
16 the context of sentencing phase jurisprudence, the Supreme Court stated that it was not
17 "convinced" that Washington's statute is a "weighing" statute. Brown at 616. The Court
18 quoted Williams v. Calderon, 52 F.3rd 1465 (9th Cir. 1995) cert. denied, 516 U.S. 1124 (1996),
19 for the proposition that:

20 [T]he Supreme Court's weighing/non-weighing distinction may involve both procedural
21 and substantive components. Procedurally, is the sentence restricted to a "weighing" of
22 aggravation against mitigation? Substantively, is the sentencer prevented from
23 considering evidence in aggravation other than discrete, statutorily-defined factors?
Our review of federal and state court decisions reveals that where both constraints are
present, the regimes involved are uniformly treated as weighing; where neither is
present, the regimes are uniformly treated as non-weighing . . .

1 Brown at 617.

2 The Court then held that under our statute the jury "is not restricted to weighing
3 aggravating factors against mitigating factors, but may consider all evidence presented during
4 both the guilt and penalty phases. The jury may also consider non-statutory aggravating
5 factors." Id. Furthermore, the Court specifically affirmed the trial court's rejection of Brown's
6 Proposed Instruction P-12 which stated that the jury must "not weigh the crime, any of its
7 elements, any aspect of it or any circumstance surrounding it against the mitigating evidence"
8 and that the "sole focus" of the jury should be whether there were insufficient mitigating
9 circumstances to merit leniency. Brown at 619. The Court held that Brown's proposed
10 instruction was an erroneous statement of the law and that a "capital sentencer in a non-
11 weighing state need not be instructed how to weigh any particular fact in the capital sentencing
12 decision." Id. The Court stated that the trial court had correctly instructed the jury "to
13 consider all the evidence from both the guilt and penalty phases, not just whether there were
14 insufficient mitigating circumstances." Id.

15 If the function of RCW 10.95.040 is to ferret out cases in which the jury could not
16 impose the death penalty after the special sentencing proceeding, then logically the prosecutor
17 should be permitted to evaluate all the evidence and factors that may bear on the jury's
18 decision. Accordingly, it would follow that the prosecutor can consider all of the relevant facts
19 known at the time including the facts of the case itself. As the Court in Rice stated "the mere
20 presence of mitigating factors does not require a jury to grant leniency, so long as it is
21 convinced beyond a reasonable doubt that any mitigating factors are outweighed by the
22 circumstances of the crime." Rice, 110 Wn.2d at 624. Even though Washington is not a
23

1 "weighing" state, neither the sentencing jury nor the prosecutor by extrapolation is precluded
2 from weighing any particular fact in the decision either to impose or to seek the death penalty.

3 Despite the case law and reasoning set forth above, Anderson and McEnroe argue that
4 the prosecutor's evaluation of the mitigating circumstances under RCW 10.95.040(1) is more
5 circumscribed than that employed by the jury at the special proceeding stage. In support of
6 this argument they note that RCW 10.95.060(4) specifically charges the jury to "hav[e] in mind
7 the crime of which the defendant has been found guilty" when deliberating on mitigation. They
8 note that no similar language can be found in RCW 10.95.040(1). Accordingly, they assert that
9 the absence of similar language is an indication that the legislature did not intend for the
10 prosecutor to consider the facts or circumstances of the crime when deciding whether to file
11 the notice of special sentencing proceeding and such consideration violates the statute.
12 Although this argument has initial allure, it ultimately fails when the statutory scheme of RCW
13 10.95 is considered in its entirety.

14 RCW 10.95.030 is titled "Sentences for aggravated first degree murder." Subsection 2
15 of the statute states in pertinent part "[i]f, pursuant to a special sentencing proceeding held
16 under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating
17 circumstances to merit leniency, the sentence shall be death." RCW 10.95.030 itself provides
18 no guidance as to the procedures to be employed during the special sentencing process. The
19 statute directs you to RCW 10.95.050 for that information. Notably, the statute mandates a
20 death sentence if the trier of fact finds "that there are not sufficient mitigating circumstances to
21 merit leniency". The same language is found in RCW 10.95.040(1). The prosecuting attorney
22 shall file notice of special sentencing proceeding "when there is reason to believe that there
23 are not sufficient mitigating circumstances to merit leniency".

1 Although defense counsel correctly point out that RCW 10.95.060(4) expressly states
2 that the jury shall retire to deliberate on the question "[h]aving in mind the crime of which the
3 defendant has been found guilty, are you convinced beyond a reasonable doubt that there are
4 not sufficient mitigating circumstances to merit leniency", the purpose of the statute is to set
5 forth broad parameters for the manner in which the special sentencing proceeding shall be
6 conducted before the jury. That proceeding, by definition, occurs after the defendant has been
7 found guilty. The language quoted by the defense is simply the charge given to the jury at the
8 conclusion of the evidence and argument at the special sentencing phase. In short, it is
9 essentially a jury instruction that informs 12 lay person jurors of the question they must answer
10 in that portion of the proceeding. The fact that similar charging language cannot be found in
11 RCW 10.95.040(1) does not imply that the prosecutor cannot consider the circumstances or
12 the facts of the crime. Unlike the jury, the prosecutor has the benefit of reading the entire
13 statutory scheme and case law decisions when fulfilling the role of decision-maker under RCW
14 10.95.040(1). The jury, on the other hand, is only instructed on the law as provided by the
15 court. Hence, the provision of explicit charging language in the statute.

16 Furthermore, as set forth earlier in this opinion, several Washington Supreme Court
17 decisions have indicated that the prosecutor's role under RCW 10.95.040(1) is to ferret out
18 cases in which the jury could not impose death following the special sentencing proceeding. It
19 is presumed that the legislature is familiar with court opinions and failure to amend a statute is
20 evidence that the legislature agrees with the prior opinions interpreting the statute. Friends of
21 Snogualmie Valley v. King Co. Review Board, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992).
22 Accordingly, this Court is not persuaded that the difference between RCW 10.95.060(4) and
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1 RCW 10.95.040(1) connotes a legislative intent to circumscribe the information the prosecutor
2 may consider in the manner argued by the defense.

3 In summary, this Court recognizes and acknowledges consistent with prior Supreme
4 Court precedent that RCW 10.95.040(1) is a constitutional delegation of discretionary authority
5 to the prosecuting attorney and that the discretion afforded is not unfettered. Dictado at 297;
6 In re Harris at 693. Although the prosecuting attorney in this case "pledged" to give the case
7 serious consideration for the death penalty due to the magnitude of the crime, there is no
8 evidence that suggests that he prejudged the matter. Not only did he agree to consider any
9 mitigating evidence the defense wished to present, he agreed to extend the notice period for
10 months to afford the defense an opportunity to garner and present evidence in mitigation.
11 Pirtle at 642.

12 The prosecutor's role in exercising the discretion conferred by RCW 10.95.040(1) is to
13 determine if there is reason to believe that the mitigating circumstances are insufficient to merit
14 leniency. The scope of the information appropriate for the prosecutor's review is as broad as
15 that which may be considered by the jury. The statute does not preclude the prosecutor from
16 considering the facts and circumstances of the crime, but rather requires the prosecutor to
17 anticipate and, in essence, preview the case as it will look to the jury at trial and through the
18 special sentencing proceeding.

19 Although mitigating evidence was presented by both defendants Anderson and
20 McEnroe, the mere presence of mitigating factors does not require the jury to grant leniency
21 nor require the prosecutor to forego filing the notice of special sentencing proceeding. See
22 Rice at 624. The evidence and arguments presented by Defendants fail to demonstrate that
23 the King County Prosecutor did not comply with the requirements of RCW 10.95.040(1).

1 Accordingly, there is no basis for this Court to believe that the prosecutor abused his
 2 discretion, nor any reason for this Court to take the extraordinary step of reviewing the
 3 evidence in mitigation prepared and submitted for his review.

4 For the reasons set forth in this memorandum opinion, Defendants' motions to strike the
 5 notice of special sentencing proceeding are denied.

6 Done this 4th day of June, 2010.

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 9 Judge JEFFREY M. RAMSDELL

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Appendix B

investigator to uncover mitigating evidence for Mr. Chen and that "no such effort was made for Mr. McEnroe."

At the conclusion of oral argument on Mr. McEnroe's motion, co-defendant Anderson orally announced her intent to join in his motion. This court directed Ms. Anderson's attorney to file a formal motion designating with particularity what materials she wishes to obtain. Ms. Anderson's counsel has done so and the State has responded in writing.

This court has considered Mr. McEnroe's Motion, the State's Response, and Mr. McEnroe's Reply, as well as Ms. Anderson's belated Motion and the State's Response. The court also heard oral argument on March 1, 2012. For the reasons set forth herein, the court grants the defendants' motions in part.

Pursuant to RCW 10.95.040, the decision to file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed rests within the discretion of the elected prosecutor. When the State charges a person with aggravated first degree murder as defined by RCW 10.95.020, then the statute directs that "the prosecuting attorney shall file written notice of a special proceeding ... when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

The decision made by the prosecutor is deemed to be executive rather than adjudicative in nature. State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). Although the prosecutor's decision may ultimately result in the imposition of different punishments, the Supreme Court of Washington has held that this exercise of discretion does not violate equal protection because the ultimate imposition of "a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment – namely, an absence of mitigating circumstances." State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). In other words, the decision to file the special sentencing notice does not result in disparate treatment between similarly situated individuals because the prosecutor has to prove the extra "factor" of an absence of sufficient mitigating circumstances in order to secure a death sentence.

Analogizing the exercise of prosecutorial discretion in the death penalty context to a more routine charging decision, the Campbell court quoted State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), for the proposition that "[t]he prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury." Campbell, 103 Wn.2d at 26 (quoting State v. Dictado, 102 Wn.2d at 298). Stated in the converse, the court in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), opined that "the prosecutor's decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty." State v. Rupe, 101 Wn.2d at 700.

The defense motions currently before this court seek only to obtain discovery related to the prosecutor's exercise of discretion to file the notice of special sentencing proceeding. Prosecutor Satterberg concluded that there was reason to believe that there were "not sufficient mitigating circumstances to merit leniency" for either Mr. McEnroe or Ms. Anderson. As illustrated by the aforementioned case law, the prosecutor's exercise of discretion in filing the notice of special sentencing proceeding is the equivalent of a charging decision. Accordingly, this court concludes that Defendants McEnroe and Anderson are each presently entitled to discovery of the information considered by Mr. Satterberg in deciding to file the notice of special sentencing proceeding as to them.

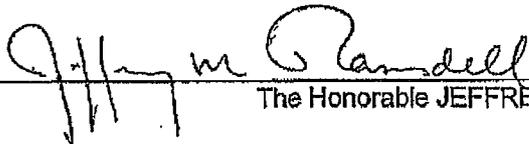
The discovery that must be disclosed includes any information gathered as a result of any mitigation investigation conducted by the State, the name of the investigator(s) involved, and the reports of any mental health professionals that were considered by Mr. Satterberg.

The court specifically declines to order the disclosure of: (1) any internal documents generated by the prosecutor's office during the decision-making process; (2) any internal filing standards; (3) any correspondence with the Anderson family, relatives, or friends; (4) a list of memorial services and whether any employees of the prosecutor's office were in attendance; and (5) whether any photographs or personal items of the decedents are kept in the offices of

the prosecuting attorney, a trial deputy's work space or a deputy's home. The court concludes that these latter requests are not relevant to the question at issue and not discoverable under CrR 4.7.

Mr. McEnroe also requests discovery related to the prosecution of Mr. Louis Chen and the King County Prosecutor's decision not to file a notice of special sentencing proceeding in that case (State of Washington v. Louis Chen, No. 11-1-07404-4 SEA). This court finds that the request for this discovery is beyond the scope of CrR 4.7 and is unwarranted at this juncture.

SIGNED this 15th day of March, 2012.


The Honorable JEFFREY M. RAMSDELL

Appendix C

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FILED
KING COUNTY, WASHINGTON

JUN 8 - 2012

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and Michele Anderson,

Defendants.

Cause Nos. 07-1-08716-4 SEA and
07-1-08717-2 SEA

**Order Denying Defendants' Motions for
Bill of Particulars**

On May 30, 2012, this Court heard oral argument on Defendant McEnroe's motion for an order pursuant to CrR 2.1(c) requiring the King County Prosecutor to "provide a bill of particulars as to what facts support the State's "charge" made in the "notice of intention to hold special sentencing proceeding" that there are not sufficient mitigating factors to merit leniency." Defendant McEnroe's Motion for Bill of Particulars at 1. Defendant Anderson joined in Defendant McEnroe's motion and adopted the "factual assertions and arguments submitted by" Mr. McEnroe in his motion. Defendant Anderson's Motion for Bill of Particulars at 1.

Both defendants have also requested that the Court order the State to provide the bills of particulars directly to their respective clients without open filing or publication to the public or to the co-defendant.

ORIGINAL

1 The Court has considered the Defendants' Motions, the State's Memorandum in Opposition, the
2 Supplemental Memorandum of Defendant McEnroe, the State's Supplemental Memorandum in
3 Opposition, and oral arguments of counsel.

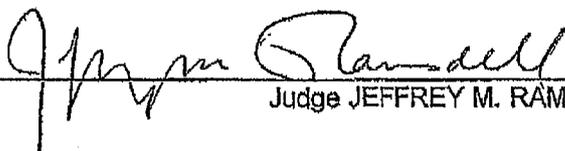
4 IT IS NOW HEREBY ORDERED THAT the Defendants' motions for bills of particulars are
5 denied.

6 First, Defendant McEnroe has argued that the State's allegation in the notice of intention he
7 received is "vague in that it provides no factual basis for 'reason to believe there are not sufficient
8 mitigating circumstances to merit leniency'." He states that he needs to be apprised of those facts "[i]n
9 order to prepare his defense against a death sentence." Defendant's Supplemental Memorandum at 2.
10 This Court is satisfied, however, that the State, in both its briefing and its oral argument on the motions,
11 has amply apprised the Defendants of the facts underlying the Prosecutor's reason.

12 Second, to the extent that counsel seek to require the Prosecutor to explain his decision, "a
13 prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of
14 unconstitutional conduct with respect to his case." McClesky v. Kemp, 481 U.S. 279, 296-97, n.18
15 (1986).

16 Defendants' motions for bills of particulars are denied.

17 Done this 8th day of June, 2012

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20 Judge JEFFREY M. RAMSDELL
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APPENDIX F

Second Appendix to Defendant McEnroe's
Motion to Dismiss the Notice of Intent to Seek
the Death Penalty

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,
vs.
JOSEPH T. McENROE.

Defendant.

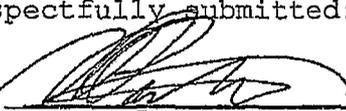
07-C-08716-4
No. ~~WA08716-4~~ SEA
SECOND SUPPLEMENT TO
APPENDIX TO MOTION TO
DISMISS NOTICE OF
INTENTION TO SEEK DEATH
PENALTY BECAUSE IT WAS
FILED IN VIOLATION OF MR.
MCENROE'S RIGHT TO EQUAL
PROTECTION OF LAW AND DUE
PROCESS

Attached is a declaration from Ramona Brandes, trial attorney for Isaiah Kalebu, confirming that King County Prosecutor Dan Satterberg did hire a private investigator to gather information relevant to whether or not Mr. Satterberg would seek the death penalty against Mr. Kalebu.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: January 7, 2013.

Respectfully submitted:

By: 
Attorneys for Mr. McEnroe
Kathryn Ross, WSBA No. 6894
Leo Hamaji, WSBA No. 18710
William Prestia, WSBA No. 29912
(206) 447-3968

SECOND SUPPLEMENT TO APPENDIX TO
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 Defender Association
810 Third Avenue, Suite 800
Seattle, WA. 98104

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

STATE OF WASHINGTON

Plaintiff,

Vs

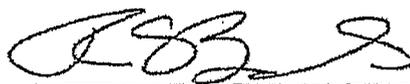
JOSEPH T. McENROE,
Defendant.

)
) No. 07-C-08716-4 SEA
)
)
) DECLARATION OF COUNSEL
) REGARDING STATE'S
) MITIGATION INVESTIGATION
) IN STATE v. KALEBU
)

I was an attorney of record for Isaiah Kalebu, Superior Court No. 09-1-04992-7 SEA. Mr. Kalebu was charged with aggravated murder. At the time of Mr. Kalebu's charge for aggravated murder, the King County Prosecutor Dan Satterberg announced that he was considering whether or not to seek the death penalty. It is my recollection that after Mr. Satterberg announced that he would not file a notice of intention to seek the death penalty in Mr. Kalebu's case, we received from the State discovery disclosing that Mr. Satterberg had employed the private investigation firm of Linda Montgomery, LMI Inc., to investigate on the Prosecutor's behalf whether or not there was reason to believe there were sufficient mitigating circumstances to merit leniency. In that discovery we received from the State copies of materials, documents and reports obtained by and prepared by LMI, Inc., that related only to mitigation and served no other purpose.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: January 4, 2013, at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'R. Brandes', written over a horizontal line.

RAMONA C. BRANDES, WSBA 27113

APPENDIX G

Defendant McEnroe's Reply to State's Response
to Motion to Dismiss the Notice of Intent to
Seek the Death Penalty

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON) No. 07-C-08716-4 SEA
COUNTY OF KING,)
	) DEFENDANT MCENROE'S REPLY
Plaintiff,	) TO STATE'S RESPONSE TO MOTION
	) TO DISMISS NOTICE OF INTENTION
v.	) TO SEEK DEATH PENALTY
	) BECAUSE IT WAS FILED IN
JOSEPH T. McENROE,	) VIOLATION OF MR. MCENROE'S
	) RIGHT TO EQUAL PROTECTION OF
Defendant	) LAW AND DUE PROCESS

REPLY

"Evidence Presented in Mitigation Is Not Intended to Mitigate the Heinousness of the Offense. Nothing Could... Proof of the Crime and the Aggravating Circumstances Are the Subject and Purpose of the Guilt Phase."¹

The Prosecuting Attorney Did Not Consider the Significance, Substance or Sufficiency of Mr. McEnroe's Mitigating Evidence

The State's Response to this motion continues to illuminate the fact that the Prosecuting Attorney filed a notice of intent to seek death against Joe McEnroe not because his mitigating

¹6-4-10 Order Denying Motion to Strike Notice.

1 evidence was insufficient to merit leniency, but because it did not "mitigate the heinousness of
2 the offense."

3 The State admits that Mr. Satterberg fixated on the crimes charged against Mr. McEnroe
4 rather than the quality of mitigating evidence. Without citing any evidence diminishing the
5 substance and validity of Mr. McEnroe's mitigating circumstances, the State now says, "Mr.
6 McEnroe's evidence ... is simply not very compelling when viewed in light of the facts of this
7 case and the strength of the evidence."² The State goes on to give its view of the crime
8 investigation. The State says nothing about the validity of Mr. McEnroe's mitigating evidence
9 as a measure of his individual worth as a human being or his potential for redemption or his lack
10 of future dangerousness.³ The State says nothing about Mr. McEnroe's mitigating evidence
11 considered on its own merits. None of that mattered to Mr. Satterberg in deciding whether to
12 seek the death penalty. The State continues to justify, in this case, weighing mitigating factors
13 against the heinous murders on scales that can never tip in Mr. McEnroe's or any other
14 defendant's favor. In the Prosecutor's consideration of seeking death against McEnroe, the
15 crime is all that mattered.
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20 ²Response, p. 4.

21 ³In reply to the State's footnoted query as to how Mr. Satterberg could have "denied the legitimacy" of McEnroe's
22 evidence without implicating McEnroe's right to a fair trial, the answer is simple. Mr. Satterberg could have
mentioned his lack of confidence in the offered mitigating evidence in a letter to defense counsel or in the several
face to face meetings between Satterberg and defense counsel - he never did.

23 The State has no hesitation in impairing Mr. McEnroe's right to a fair trial by citing highly
24 sensitive allegations regarding the crime and the state's speculative conclusions drawn from the autopsy reports.
25 Response, p. 4 and fn 3.

26 Also, the prosecution had little concern for defendant Chen's right to a fair trial when it openly
stated its concerns that Chen "is a highly educated and trained physician who would be, should he so desire,
uniquely equipped to feign mental illness." State's Motion for Custodial Evaluation filed November 23, 2011, State
v. Chen, Superior Court no. 11-1-07404-4.

1 The gravamen of Mr. McEnroe's instant Motion to Dismiss the notice is that the
 2 Prosecuting Attorney followed the process and applied the standard set forth in RCW 10.95.040
 3 in deciding whether or not to seek the death penalty against defendants Monfort, Kalebu, Hicks
 4 and Chen but he ignored the key point of the statute, focus on mitigating circumstances, when he
 5 decided to seek death against Mr. McEnroe. The Prosecutor's consideration of mitigating factors
 6 in the other cases is relevant to Mr. McEnroe's equal protection argument because clearly
 7 McEnroe did not receive the same treatment as those similarly situated defendants. Due process
 8 is implicated because Satterberg's focus on mitigation in the later cases shows how the notice
 9 decision process mandated by RCW 10.95.040 is supposed to work and did not work for Mr.
 10 McEnroe.⁴
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13 The Other Cases

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 15 The State doesn't make too much effort to convince the Court the Prosecuting Attorney
 16 employed the same process or same standard for evaluating mitigating information in the cases
 17 of Monfort, Kalebu, Hicks and Chen. The weakness of an argument that the stabbing and
 18 slashing attacks on Louis Chen's partner and small child was outweighed by mitigating evidence
 19 that WAS "very compelling when viewed in the when viewed in light of the facts of [that] case
 20 and the strength of the evidence"⁵ is apparent. The prosecution was highly suspicious of Chen's
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24 ⁴. The fact that, with later defendants, the Prosecutor changed his process for deciding when to file a death notice,
 25 conforming to the language of RCW 10.95.020 that he must focus on mitigating evidence, is new support for Mr.
 26 McEnroe's previous motion to dismiss for failure to follow RCW 10.95.040.

⁵The standard now claimed to have been used in McEnroe's case. Response, p. 4.

1 claims of mental illness. The strength of the evidence in the Chen case includes the facts that
2 Chen was alone in the apartment with the two dead bodies, all the broken knives used in the
3 attack were also in the apartment, and Chen admitted killing the victims. One of the victims was
4 his own son and under the age of three. Chen was savvy enough to refuse to give a detailed
5 confession and has refused to plead guilty but that only diminishes any claims of remorse or
6 acceptance of responsibility. There can be no serious claim that Prosecutor Satterberg found
7 mitigating evidence in Chen's case favorably compared to the facts of the crime. Had Satterberg
8 used the same process and standard for deciding whether or not to seek death in Chen's case as
9 he did in McEnroe's surely he would have filed a notice against Chen.
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11
12 Regarding Hicks and Kalebu, their crimes were horrible and they had criminal records.
13 The State says in those cases "there is substantial evidence of serious, long term mental illness."⁶
14 That is surely substantial mitigating evidence but no one could claim it "outweighed" the facts of
15 the gruesome murders both committed. In fact, the mental conditions afflicting Hicks and
16 Kalebu make them more dangerous in the future (Kalebu's disruptions of his trial revealed he is
17 a very dangerous assaultive person). Mental illness does not exclude a person from capital
18 punishment in Washington and it is highly unlikely Satterberg believed juries, having in mind
19 the crimes, would not return death sentences in these cases. The only reasons Satterberg could
20 have decided not to seek death against Hicks, Chen, and Kalebu was his evaluation of their
21 mitigating evidence regarding themselves as individuals independent of the severity of their
22 crimes.
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26 ⁶Response, p. 7.

1 The State says Satterberg's action in the Monfort case is of "no moment in this case
 2 because Monfort's attorneys ... did not provide a mitigation packet." Response, p. 7, fn 4. The
 3 Monfort case may be the strongest proof that AFTER dealing with Mr. McEnroe's case the
 4 prosecutor started complying with RCW 10.95.040. The Prosecutor was so concerned with
 5 considering mitigating evidence in Monfort's case that even though he received none from the
 6 defense he hired his own private mitigation investigator to try to find some. The fact that his
 7 investigator failed to turn up substantial mitigating evidence (not surprising given a lack of
 8 access to the defendant) does not mean he didn't focus on mitigation in making his decision to
 9 seek death. The Prosecutor's announcement in the Monfort case did not suggest any weighing of
 10 the crime against mitigating factors. Instead Satterberg said "The magnitude of the crimes... and
 11 the absence of significant mitigating factors" convinced him to seek a death sentence.⁷ If the
 12 magnitude of the Monfort's crime alone convinced him to file a notice of intent, Mr. Satterberg
 13 would not have hired the private mitigation investigator to find or give some assurance there was
 14 no significant mitigating information. In Monfort's case, because he did conscientiously focus
 15 on mitigating evidence to the extent of his ability, absent input from the defense, the Prosecutor
 16 had "reason to believe" there were not sufficient mitigating circumstances to merit leniency.

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 22 The point is not to compare the facts of other defendants' crimes with McEnroe's crimes;
 23 the question is whether the Prosecutor followed the law equally for all the defendants. As to Mr.
 24 McEnroe, he did not.

25
 26 ⁷Statement of Prosecuting Attorney regarding death penalty in State v. Monfort, 9-2-10.

Mr. McEnroe Is Not Asking for a Proportionality Review

Nothing about Mr. McEnroe's Motion to Dismiss the Notice is a "proportionality argument". Response, p. 5. Proportionality reviews compare one death penalty case to all the other aggravated murder cases (approximately 310) to determine, "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(1) (b). A proportionality review is not concerned with how a prosecutor decided to seek the death penalty and presumes prosecutors properly followed the restriction of RCW 10.95.040 and declined to seek death against defendants if there was reason to believe they had substantial mitigating circumstances. .⁸

The Prosecutor's Filing of Notice of Intention to Seek the Death Penalty Is Subject to Court Review

The State argues that Mr. Satterberg's decision to seek the death penalty is a matter of discretion which cannot be disturbed absent proof the prosecutor abused his discretion.

Response, p. 9. However, the case cited by the State does not support its assertion that the Prosecutor's election to seek the death penalty is sacrosanct. State v. Enstone, 137 Wn.2d 675

⁸Prosecutors failing to adhere to RCW 10.95.040 cause a skewing of the comparison cases because they allow juries to consider death sentences when a prosecutor should have used his/her more dispassionate professional evaluation of mitigating evidence to decline a death notice. Prosecutors seeking death sentences despite substantial mitigation could be one reason that only two of the thirty four men sentenced to death in Washington have been executed against their wills and twenty men's death sentences have been vacated in post-conviction reviews, ten of those also won reversal of their convictions.

Eight men of the thirty four sentenced to death since 1981 are still on death row and their appeals are not final. Three men waived their appeals and were voluntarily executed. Information from Washington Supreme Court trial court reports on aggravated murder cases, the DOC inmate information, and the Attorney General Reports on Capital Cases.

1 (1999) involves a trial court's order of restitution in a criminal case. It is not about prosecutorial
2 discretion. In Enstone the supreme court notes that restitution is "authorized by statute" and
3 within the discretion of the trial court. But, the case makes clear that a court's discretion must be
4 exercised within the statutory authority. "This court cannot read into a statute that which it may
5 believe the legislature has omitted, be it an intentional or an inadvertent omission." Enstone, id.,
6 quoting State v. Taylor, 97 Wn.2d 724 (1982).
7

8 RCW 10.95.040(1) prescribes when a prosecutor may file a notice of intention to seek the
9 death penalty. It says he may do so only when "there is reason to believe there are not sufficient
10 mitigating circumstances to merit leniency." The statute does not say anything about weighing
11 the mitigating circumstances against the crime and neither the prosecutor nor the Court should
12 read into the statute that which the legislature has omitted. Enstone, supra.
13

14 Finally, the State here and in previous pleadings urges the Court to essentially disregard
15 the mandate of RCW 10.95.040(1) that a prosecutor must have "reason to believe there are not
16 sufficient mitigating circumstances to merit leniency." Certainly that language means nothing if
17 a prosecutor's filing of a death notice can never be challenged on the basis a prosecutor did/does
18 not have such a reason to believe there are insufficient mitigating circumstances. It also means
19 nothing if the legislature's intent was to grant a prosecutor the same discretion allowed under
20 every other death penalty statute in the nation, to seek death completely at his or her discretion
21 whenever aggravated murder is charged.
22

23
24 By way of illustration the Federal Death Penalty Act which is more cautious in allowing
25 prosecutors to seek death than many states provides:
26

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 U.S.C. § 3593. The federal statute focuses only on the circumstances of the crime, which is what the State says is allowed in Washington.

But Washington State is different, at least if its law is followed by prosecutors and the courts. 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.*

1 RCW 10.95.040, emphasis added. No other states' statutes or rules require prosecuting attorneys
 2 to focus on mitigating circumstances when deciding whether or not to file a notice of intention to
 3 seek the death penalty. In fact, it appears no other jurisdiction's capital punishment laws
 4 mention mitigating circumstances with reference to when a prosecutor may seek the death
 5 penalty.⁹

6
 7 Mr. Satterberg has acted as if the restrictive language in the statute means something in
 8 the cases of Monfort, Kalebu, Hicks and Chen. In Mr. McEnroe's case he has acted as though he
 9 were a federal prosecutor and need consider only the circumstances of the crime.

10 Mr. McEnroe is entitled to the process and standard mandated in Washington's law.
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22 ⁹This Court has found:

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

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

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

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

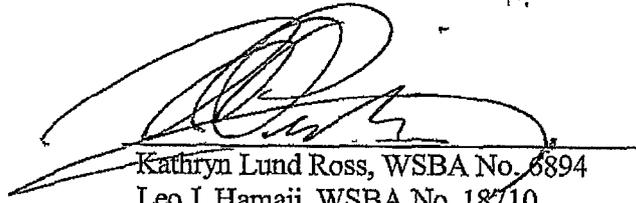
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Conclusion

The Prosecutor's failure to focus on Mr. McEnroe's mitigating circumstances in deciding whether or not to seek the death penalty denied McEnroe equal protection of the laws as well as the due process required under the statute.

DATED: Friday, January 11, 2013.

Respectfully submitted,


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

APPENDIX H

Supplemental Authority Submitted by McEnroe
regarding Motion to Dismiss the Notice of Intent
to Seek the Death Penalty

FILED

13 JAN 22 AM 10:12

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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STATE OF WASHINGTON

Plaintiff,
vs.
JOSEPH T. McENROE.

Defendant.

No. 07-1-08716-4 SEA
1-22-13
SUPPLEMENTAL AUTHORITY IN
SUPPORT OF
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

During oral argument on January 17, 2013, a question arose regarding residual doubt of guilt as a mitigating factor. Undersigned counsel responded that the United States Supreme Court has addressed the issue but counsel could not recall the relevant case[s]. The following cases discuss residual doubt as a mitigating factor:

Franklin v. Lynaugh
487 U.S. 164, 108 S.Ct. 2320 (1988)

See also:

PRP of Lord,
123 Wn2d 296, FN 13 (1994).

Dated this 22 DAY OF JANUARY, 2013.

Respectfully submitted:

Kathryn Ross
Kathryn Ross, WSBA No. 6894
Leo Hamaji, WSBA No. 18710
William Prestia, WSBA No. 29912

SUPPLEMENTAL AUTHORITY IN SUPPORT
OF MOTION TO DISMISS NOTICE OF
INTENTION TO SEEK DEATH PENALTY -
EQUAL PROTECTION

The Defender Association
810 Third Avenue, Suite 800
Seattle, WA. 98104
(206) 447-3968

APPENDIX I

Transcript of Oral Argument (1/17/13)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)	
vs.	)	No. 07-1-08716-4 SEA
JOSEPH McENROE and MICHELE ANDERSON,	)	07-1-08717-2 SEA
Defendants.)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Jeffrey M. Ramsdell, at King
County Courthouse, 516 Third Avenue, Room W-813, Seattle,
Washington

APPEARANCES:

SCOTT O'TOOLE and ANDREA VITALICH, representing the State;
WILLIAM PRESTIA, LEO HAMAJI and KATHRYN LUND ROSS,
representing the Defendant Joseph McEnroe;
COLLEEN O'CONNOR and DAVID SORENSON, representing the
Defendant Michele Anderson.

DATE: January 17, 2013

REPORTED BY: Joanne Leatiota, RPR, CRR, CCP

1 Seattle, Washington; Thursday, January 17 2013

2 AFTERNOON SESSION - 2:12 P.M.

3 --oOo--

4 THE COURT: Good afternoon, counsel. If you wouldn't
5 mind putting the caption on the record.

6 MR. O'TOOLE: Thank you. This is the State of
7 Washington versus Joseph McEnroe. The case number is
8 07-C-08716-4; State of Washington versus Michele
9 Anderson, 07-C-08717-2. Both defendants are present
10 this afternoon in court with their respective counsel.
11 My name is Scott O'Toole appearing on behalf of the
12 State of Washington, and with me is Andrea Vitalich who
13 also appears for the State.

14 THE COURT: Good afternoon again, folks. A couple of
15 things I'd like to address before we get started on the
16 other substantive motions. The first thing I have here
17 is a motion from Ms. Anderson to be excused from
18 upcoming hearings.

19 Counsel, I just wanted to address this on the record,
20 because I think we can handle it pretty quickly. The
21 Court intends to start reviewing the juror hardships on
22 the record with Mr. McEnroe and his counsel present
23 starting February 4th. Obviously that would be, in
24 effect, a commencement of a portion of his trial alone,
25 and I can see no reason to require Ms. Anderson's

1 attendance then. I can certainly understand if counsel
2 wants to be present, but she would be excused from that.

3 As far as releasing her from attendance on the status
4 conference on January 31st, I am disinclined to do that
5 at this point, counsel, simply because I am not exactly
6 sure which additional motions might pop up in the
7 interim that have to be addressed or anything like that.
8 So I am inclined to keep us all together, at least on
9 the 31st. But after that I have no quarrel with
10 excusing her from the proceedings that are effectively
11 Mr. McEnroe's trial portion.

12 Does that make sense to you?

13 MS. O'CONNOR: Yes, your Honor.

14 THE COURT: If there is something else to consider,
15 let me know, but I think that addresses it.

16 The other issue that I have to take up with all of
17 you right now, and it comes basically from the "what's
18 the likelihood" department.

19 I have an email from Mr. Wheeler down in the jury
20 room indicating that he already has 325 requests for
21 excusals in the queue, which means we are going to be
22 busy addressing all of those requests starting
23 February 4th.

24 But he already has an individual that I think we need
25 to address right now, and as I indicated, my point in

1 saying "what's the likelihood" is basically this
2 gentleman has been summoned twice now within a month.

3 He's a gentleman with juror badge number 0001793136
4 by the name of Keith Gregory, and he writes to
5 Mr. Wheeler giving his name and says, "Two months ago I
6 received a jury summons to report to King County
7 Superior Court in Kent on January 23rd. But then last
8 Monday I received another jury summons asking me to
9 report to the King County Superior Court in Seattle on
10 February 22nd.

11 "If I look at the website" -- and then he cites the
12 website address -- "it tells me that I am reporting to
13 the Seattle King County Superior Court on January 23rd.
14 Which one do I report to?"

15 The poor guy doesn't know which way is up at this
16 point in time. But it seems to me that under the
17 circumstances, he's required to report to service on
18 January 23rd because that's the earlier summons he got.
19 The normal protocol for the King County Superior Court
20 is to excuse people from service if they have been
21 summoned twice in the same year. This poor guy got
22 summoned twice in the same month, if you look at the
23 dates.

24 Does anyone have an objection to me instructing
25 Mr. Wheeler that he can indicate to this gentleman that

1 he can go to a service on the 23rd and call it good?

2 MR. O'TOOLE: I can think of no good reason to
3 object.

4 THE COURT: I didn't think to make copies and
5 circulate them, but I am reading it verbatim as it was
6 written to me.

7 Ms. Ross or Mr. Hamaji?

8 MS. ROSS: I will hand that off to Mr. Hamaji.

9 THE COURT: Sure.

10 MR. HAMAJI: That was done on the jury summons under
11 penalty of perjury, your Honor?

12 THE COURT: That's a good question, counsel. Let me
13 look at the email here. Let's see. It looks like it
14 was forwarded to me as an email, so I don't know exactly
15 how Mr. Wheeler received it. That's a good question. I
16 assume it came in through the, quote-unquote, portal,
17 but I don't have an affirmative representation that it
18 was done under oath, if that's where you are going with
19 your question.

20 MR. HAMAJI: That is.

21 THE COURT: And I can't answer that at this moment.

22 Kenya, do you know?

23 THE BAILIFF: It does appear that it came through an
24 email.

25 THE COURT: That's all I have, so I don't know

1 whether it came as an email and Greg is just
2 paraphrasing what came through the portal. I can check
3 on that, Mr. Hamaji.

4 MR. HAMAJI: That would be my only question.

5 THE COURT: Well, let me ask you this, Mr. Hamaji.
6 If I am able to verify that it was under oath, as I know
7 we are going to talk about in a few minutes, do you have
8 any quarrel with excusing him other than that? Because
9 I can check on that detail and confirm.

10 MR. HAMAJI: Certainly if we could have a record of
11 that.

12 THE COURT: No problem.

13 MR. HAMAJI: Thank you.

14 THE COURT: I will basically take it under
15 advisement, Mr. Hamaji. I will double-check on the oath
16 part of it. And if he indeed was under oath under
17 penalty of perjury, I will go ahead and excuse him. And
18 if not, we will figure out something else to do with
19 him.

20 MR. O'TOOLE: Your Honor, it also occurs to me that,
21 unless Mr. Wheeler is under penalty of perjury, he would
22 be the one who knows whether this person was double set.
23 I would think administratively he can confirm whether or
24 not this man is committed to Seattle on January 23 --
25 excuse me, January 23 to Kent and February 22nd to

1 Seattle. It would be pretty easy. I don't think the
2 fact that he may have sent an email alerting us to an
3 administrative issue in the jury room.

4 THE COURT: I think that effectively has been done.
5 The email that I got above that email that came directly
6 from Mr. Wheeler says, "Mr. Gregory was summoned last
7 winter and, after having his excusal request denied,
8 opted to postpone his service to this January. He has
9 also been picked up in your pool for 2/22 since that is
10 more than a year from the date of his original summons.
11 I think I need to respond to him. Can't wait until
12 February 4th."

13 So the long and the short of it is, he postponed his
14 original service, which the jury room allows. Greg has
15 apparently checked and indicated that he was summoned
16 for the 23rd of January and then got our summons on
17 this. So I think we've got that covered, but --

18 MR. O'TOOLE: My point is, I don't think we really
19 need to have him, the juror, confirm under oath what we
20 already know.

21 THE COURT: Oh, I'm sorry. I misunderstood what you
22 meant. I apologize. That's a good point, I think.

23 Mr. Hamaji? In all honesty, I didn't give a heck of
24 a lot of thought about this particular piece of this
25 afternoon's proceeding, but go ahead.

1 MR. HAMAJI: Your Honor, if Mr. Wheeler has confirmed
2 all that, then I don't have a problem.

3 THE COURT: All right. Then I will endeavor to
4 absolutely double-check all of these pieces, but it
5 sounds to me like we can at least tentatively excuse him
6 from this matter and have him serve on January 23rd.
7 All right. Thank you, folks.

8 So that brings me up to the other issues that we have
9 on the agenda for this afternoon. And I don't know that
10 there is any order of importance that makes particular
11 sense, but it seems to me that perhaps we could start
12 off with the issue with regard to Mr. McEnroe's motion
13 to disclose whether a mitigation investigator was
14 utilized in the Hicks case. Not the identity, just the
15 mere fact of whether that case involved the
16 State-involved mitigation investigator.

17 And I believe, Ms. Ross, this is your motion?

18 MS. ROSS: Yes, your Honor.

19 THE COURT: Okay, go ahead.

20 MR. SORENSON: Your Honor, before we get started with
21 that, I actually have a jury that is out on another
22 matter in Judge Yu's courtroom. If I get notified
23 during the course of these proceedings the jury has
24 returned, I'd ask for permission just to sort of quietly
25 excuse myself if the Court doesn't mind.

1 THE COURT: Sure, no problem. As long as we don't
2 lose both of you, I don't mind.

3 MR. SORENSON: You won't.

4 THE COURT: Ms. Ross, go ahead.

5 MS. ROSS: Your Honor, I really don't have a lot to
6 add beyond what's in the written motion and reply that
7 we have submitted.

8 We know from Mr. Satterberg's public comments that he
9 did, in fact, not file a death notice against Mr. Hicks
10 because of mitigating evidence he received and
11 considered. So definitely if they did hire a mitigating
12 investigator, that is more evidence that Mr. Satterberg
13 was interested in mitigation in that case. But in that
14 case he also, according to the public statements,
15 received a large amount of mitigating evidence from the
16 defense.

17 So we think it is -- well, there is no question it's
18 relevant and then argue there's no question it's
19 discoverable. We think it should be disclosed if it is
20 not in any way that is privileged or work product. It's
21 very easy for the prosecutors to say yes or no.

22 So we do think it should be disclosed, but we also
23 think there is very sufficient evidence of what
24 Mr. Satterberg considered in Mr. Hicks' case, whether
25 it's disclosed or not.

1 THE COURT: Thank you, counsel.

2 Mr. O'Toole, are you handling it or Ms. Vitalich?

3 MR. O'TOOLE: I am, your Honor.

4 THE COURT: Okay, go ahead.

5 MR. O'TOOLE: Your Honor, counsel's, I think, premise
6 that if there is no question, as she put it, that this
7 is relevant and no question that it is discoverable is
8 exactly the question before the Court. It is not
9 relevant. What happened in -- what may or may not have
10 happened in another case is not relevant to what
11 happened in this case.

12 Whether it's discoverable, the foundational question
13 here, is absolutely relevant because there is no basis,
14 and counsel cites to no basis in Criminal Rule 4.7, any
15 other rule in any statute, any case authority whatsoever
16 that she is entitled or that Mr. McEnroe is entitled to
17 the discovery that she seeks.

18 And as the State pointed out in its memorandum,
19 this -- what highlights its lack of relevance is that
20 there is no context to the answer that she would be
21 given, whether it is yes or no, and without further
22 discussion of -- if it's yes for the purposes of
23 argument -- identity, substance, how that impacted the
24 prosecutor's decision, whether it impacted the
25 prosecutor's decision, and how we establish that.

1 There is absolutely no relevance or materiality, and
2 there is no legal basis for this to be disclosed. And I
3 think this goes back to the Court's order, I think, of
4 March 25th, 2012, in which you denied a similar request
5 with respect to State v. Chen.

6 So just because counsel wants this doesn't mean she's
7 entitled to it, and, in fact, there is a very important
8 question that is not relevant and not discoverable.

9 THE COURT: A couple things come to mind, Mr.
10 O'Toole. We already know about three of these cases:
11 Chen, Kalebu, and Monfort, right?

12 And obviously that information was made available to
13 Mr. McEnroe's counsel, I guess, through defense counsel
14 in those cases. So there is nothing secretive about
15 this in any way, shape, or form, correct?

16 MR. O'TOOLE: I don't think that there is.

17 THE COURT: So we are not talking about anything that
18 even looks like work product or anything of that sort.
19 I think that was your concession.

20 MR. O'TOOLE: I don't think it would be -- it's
21 necessarily work product with respect to this case or
22 some claim of privilege, no.

23 THE COURT: And if they had gotten that information
24 from Mr. Hicks' counsel -- I gather Mr. Hicks' counsel
25 never found out one way or the other.

1 MR. O'TOOLE: I don't know.

2 MS. ROSS: It's what they told us, your Honor.

3 THE COURT: So the bottom line is, but for the
4 circumstances of the entry of the plea, that information
5 would be known to Ms. Ross just like the other cases,
6 right?

7 MR. O'TOOLE: Well, I don't know that that's
8 necessarily true. But I guess there -- what seems to me
9 to be being leaped over here is the fact that there
10 is -- other than this happened in other cases where
11 counsel found out through other channels or back
12 channels the answer to that doesn't mean that there is a
13 discovery right in this case. And that's my concern.

14 THE COURT: And I appreciate that, counsel. I am
15 just trying to make sure that there is no unknown land
16 mines for me right now.

17 And the reason I am asking you those questions is
18 that, as we all know, the context in which these issues
19 come up are oftentimes very different than what's
20 contemplated in Criminal Rule 4.7, for example. So I am
21 being very solicitous of the defense here, because new
22 arguments are made all the time in death penalty cases
23 which have no prior precedent.

24 So given the low standard of relevance -- and I am
25 acknowledging how low that standard is -- and not

1 knowing exactly how the information might play out in an
2 argument to be made by the defense, it seems to me that
3 it would be prudent to provide that information with the
4 understanding that, regardless of what the answer is, it
5 may not drive the decision-making on a subsequent
6 motion.

7 Do you see what I am saying? It's not my job to
8 decide whether there is any motion out there that might
9 be a good motion for them to make that might involve
10 this information.

11 MR. O'TOOLE: I guess to say that death is different
12 and then to draw from that that there is a low standard
13 of relevance, even if that's true, there is -- it
14 doesn't mean that there is no standard of relevance
15 here.

16 THE COURT: Sure.

17 MR. O'TOOLE: And if counsel had come before the
18 Court and asked for this information in all those other
19 cases, whether it's Monfort or Kalebu or Chen and now
20 Hicks, I am pretty confident, based on this Court's
21 rulings in the past, you would have denied all of them.

22 And now to come and say -- if that would have been
23 the proper ruling back, then to come and say, well, they
24 have gotten it from other channels, so I am going to go
25 ahead and grant it now, even though before there was no

1 legal basis to compel the State, there still is no legal
2 basis to compel the State.

3 If they want to ask the prosecutor that question, I
4 understand them asking it. But they are also going to
5 get an answer. Just because they get the answer they
6 don't like, they receive the answer that they don't like
7 doesn't somehow create a right or some nonexistent
8 standard of relevance.

9 Am I being unclear in our position?

10 THE COURT: No, not at all. And the truth of the
11 matter is, in large measure, the arguments that come up
12 in these kind of cases result in more hypothetical
13 potentialities than any other criminal case I have ever
14 tripped over.

15 And quite candidly, counsel, I spend a lot of time
16 fretting about the hypothetical horrors that spin from
17 either decision. So that's why I'm trying to exercise a
18 little bit of caution here, because the way I see it, I
19 have from the defense perspective an argument that goes
20 something like this: In Mr. McEnroe's case, the
21 prosecutor filed the death notice. Prior to filing the
22 death notice, the prosecutor had indicated to us early
23 on that they were going to do their own investigation of
24 mitigation.

25 It's clear to us now from other information you have

1 received that that didn't happen, but we know of three
2 other cases at least where the prosecutor did hire
3 mitigation specialists -- or investigators, I guess I
4 should say, of their own, and we are just wondering
5 whether that's the normal practice. And since it was
6 represented to us early on in this case that that was
7 going to happen in our case, it seems odd that it
8 didn't.

9 Now, how that plays into a legal constitutional
10 argument, I don't know. That's not my job right now.
11 But it seems to me that there is enough fodder for
12 wonderment and a concern that it might play into a
13 bigger picture that I am inclined to say yes, unless
14 there is really some good reason to protect that
15 information from view.

16 So I am just tipping my hand to you, Mr. O'Toole.

17 And, again, you know, you guys are always worried
18 about the ineffective assistance and reversal issue, and
19 so am I. And it seems to me that if this is a piece of
20 information that is not really an issue for protection,
21 then it may be best to get it all out on the table. And
22 if it doesn't lead anywhere, so be it.

23 MR. O'TOOLE: I guess my point is, it can't lead to
24 anywhere, because let's assume the answer is yes. And I
25 will tell you, as an officer of the court, I do not know

1 what the answer is.

2 THE COURT: Okay. Fair enough.

3 MR. O'TOOLE: And if the answer is yes, I don't know
4 who that person was.

5 THE COURT: And they're not asking for that even.

6 MR. O'TOOLE: But I think it's important for this
7 court to keep in mind, when you evaluate whether the
8 standard of relevance is low, whether the standard of
9 materiality is low, whether it exists at all, is that
10 much of what is being presented to you is the defense
11 argument as to what they believe they're entitled to,
12 not based on facts, but based on argument.

13 So for example, when counsel writes that
14 Mr. Satterberg did not -- clearly did not consider our
15 substantial mitigation evidence, it's an inability on
16 the part of counsel to appreciate that sometimes people
17 say no. When you ask them to consider something, they
18 come up with a conclusion or a result that is contrary
19 to what you want. And counsel cannot accept that.

20 We have answered the question with respect to the
21 investigation in this case. It was conducted by the
22 King County Sheriff's Office. It was conducted by
23 Detective Tompkins. That doesn't mean that there wasn't
24 mitigation that may have been discovered by Detective
25 Tompkins that was produced in the ordinary course of the

1 investigation in discovery and has been given over to
2 the defense.

3 So I guess what I am trying to point -- when defense
4 counsel says, well, they didn't do it in our case,
5 that's not true. The King County Sheriff's Office
6 conducted the investigation. We relied on them to
7 conduct the investigation and on Detective Tompkins.
8 It's not an investigation that anyone has ever labeled
9 as mitigation. It's the criminal investigation.

10 And someone can say, well, Mr. Larson put in a letter
11 X number of years ago that we will be conducting our own
12 mitigation investigation. That might have been an
13 unfortunate choice of words, but what I think he meant
14 to say was, the criminal investigation of this case that
15 we will be conducting will encompass what -- we'll find
16 what we find.

17 So as the Court probably does not know, there is a
18 tremendous amount of work done by the King County
19 Sheriff's detectives in talking to witnesses and trying
20 to go into background information with respect to both
21 defendants and talking to family members. Wherever that
22 led is where it led, and all of that has been given over
23 to discovery.

24 So I guess my point is, the premise of their
25 questioning -- of their argument is ill-founded. There

1 was a full investigation here, and the fact that they
2 claim there was no mitigation investigation or that
3 Mr. Satterberg didn't consider what they considered to
4 be substantial and compelling mitigation shouldn't
5 impact what the standard of relevance is for discovery
6 regarding a case that's completely unrelated to this
7 case and for which there is no legal basis other than
8 "wouldn't it be nice."

9 Well, you know, I guess it would be nice, but it's
10 not legally compelled. I think we should be mindful
11 that there are rules here and that we all -- we all have
12 to abide by them.

13 THE COURT: Okay, thank you.

14 Ms. Ross, any rebuttal?

15 MS. ROSS: I am unsure what motion Mr. O'Toole was
16 addressing because he sounded like he was getting into a
17 lot of the substance of what their opinion is regarding
18 the motion to dismiss for equal protection.

19 Your Honor, I am sorry because I walked away without
20 it, but I believe that the case is Edwards, and I will
21 submit it after. But it's a United States Supreme Court
22 case, and it talks about when a defendant has a
23 challenge to a prosecuting attorney's procedures
24 regarding composing racially discriminatory grand
25 juries.

1 And there is language in there about the defendant
2 being entitled to not just the information about the
3 Grand Jury that indicted him, but information about
4 grand juries going back for some period of time to
5 assess the prosecutor's practices.

6 And what the -- the quotation in the Supreme Court
7 case was -- it was that the government has misunderstood
8 the difference between the motion being brought and
9 evidence needed to support the motion. The evidence
10 needed to support the motion can go beyond just what is
11 the history of that particular, you know, case and
12 charging. Otherwise, the prosecutors could hide all
13 kinds of mischief because nobody could ever, you know,
14 see that they were doing this right, and then it's all
15 over the place.

16 So there is nothing sacrosanct at all about these --
17 the process or the prosecutor in seeking death as a
18 process in his office against all the defendants to come
19 before him. There is nothing work product about it,
20 whether they hired a person or not. There is nothing
21 privileged about it. I think we would be entitled to
22 more as in the past, but there is -- certainly in
23 regards to this initial question, there is no issue.

24 I think the prosecutor here is really -- is really
25 expressing their overall opinion and policy that they

1 have, you know, expressed many times in this court, that
2 they have to answer nothing, they have to show nothing,
3 they have to prove nothing, and everyone just has to
4 take their word for whatever it is that's being done.

5 Well, we are all on equal footing here, and we are
6 entitled to know what -- what process they used to seek
7 death against Mr. McEnroe.

8 So again, I think the papers that you have before you
9 are clear. I will address later Mr. O'Toole's, and I
10 guess it will be Ms. Vitalich's arguments regarding the
11 substance of our motion. They have, in response to an
12 order from this court, said exactly what Mr. Satterberg
13 considered, and they said it was the aggravating
14 factors. They articulated them, and they were ordered
15 to tell us what he considered. So there is not any real
16 question there, although they tried to hedge around
17 that.

18 So anyway, I will submit it to the Court. We think
19 in this particular instance, whether they did or didn't,
20 it's clear from Mr. Havoc, the investigator in this
21 case. It's clear Mr. Satterberg was focused on
22 mitigation for Mr. Hicks, but there is certainly no
23 legal principle that would prevent the Court from having
24 the prosecutor disclose whether or not they hired a
25 mitigation investigator in Mr. Hicks' case.

1 THE COURT: Thank you.

2 Mr. O'Toole, any surrebuttal, if you like.

3 MR. O'TOOLE: Well, I'll just mention, for counsel to
4 stand up and say there is this case out there that I
5 forgot to bring --

6 MS. ROSS: Wait a second. That's what I am saying.
7 I will submit it after this hearing, your Honor.

8 MR. O'TOOLE: That's great. I mean, so I will submit
9 one too. There are rules here, and to say that, well, I
10 have got this case out here, but I forgot to bring it, I
11 think it's called Edwards, and here's what it says.
12 Unfortunately, it never made an appearance in the
13 initial motion, in the initial memorandum or in the
14 reply memorandum or in the initial argument.

15 But I guess I am supposed to sit here and listen to
16 this and rely on counsel's representation.

17 Your Honor, you know, I teach a course in criminal
18 procedures at the law school. I am familiar with the
19 concept of selective prosecution, and counsel is
20 absolutely wrong with respect to the presumptions that
21 are afforded prosecutors. The presumption of regularity
22 would be one example of the deference that's given to
23 prosecutors with respect to charging decisions and
24 things like that.

25 So I guess I am objecting here to now all of a sudden

1 we are going to go through another layer of I will
2 present you a case that I failed to present in two
3 previous attempts to give you materials.

4 I'd ask you to deny this because there simply isn't a
5 legal basis other than "we want it."

6 THE COURT: With regard to your observation about
7 authority showing up later, I can feel your pain because
8 I saw a lot of authority in the Supreme Court's decision
9 in McEnroe that I never saw before me in the six months
10 earlier, which I would have loved to have addressed in
11 my own ruling that the Supreme Court completely ignored.

12 That being the case, to me this issue is a little bit
13 more circumscribed. The request is simply to find out,
14 did you hire a mitigation investigator in the Hicks
15 case.

16 And the backdrop of all of this is it appears that
17 it's well-established that investigators were hired in
18 three other death penalty cases: Kalebu, Monfort, and I
19 forget the other one now -- Chen. And that may be the
20 prosecutor's office's normal protocol. Maybe it is,
21 maybe it isn't. I don't know.

22 I also have an indication in a letter that I referred
23 to early on that indicated that the prosecutor's office
24 would be doing its own mitigation investigation.

25 Exactly what that meant in the letter, I have no idea.

1 It could have meant, as Mr. O'Toole pointed out, just
2 looking at facts in the context of the overall
3 investigation, maybe it meant hiring a specific
4 mitigation investigator.

5 I don't know what all was intended there, but I know
6 it ended up not happening. Why that didn't happen,
7 again, I don't know. I am not passing judgment on who
8 did what and what their motivations might be, but there
9 is not the same pattern in this case that seems to
10 happen with regularity in other cases.

11 I think that establishes sufficient relevance, at
12 least at this juncture, for answering the inquiry of did
13 that happen in the Hicks case. Not asking who the
14 investigator was or what information they imparted to
15 the prosecutor's office, but simply is that the process
16 that was followed. Whether or not that leads to a
17 substantive motion that has merit is not the question
18 before me.

19 So I am going to grant the request to require the
20 prosecutor's office to simply disclose whether or not an
21 investigator on mitigation was hired by the prosecutor's
22 office. That's the scope of it. Nothing more than
23 that.

24 So, Ms. Ross, I will invite you to craft an order
25 consistent with that ruling, okay?

1 MS. ROSS: All right.

2 THE COURT: So let's go on to Mr. Hamaji's argument
3 about the jury summonses and how to avoid the pitfalls
4 that he sees there.

5 So Mr. Hamaji, go ahead, sir.

6 MR. HAMAJI: Your Honor, in appendix B, which I
7 received in response to a request to Ms. Ridge, who is
8 the deputy chief administrative officer of the King
9 County Superior Court, the request was with regard to
10 people who did not basically ask for excusal from jury
11 duty in the Schierman case.

12 And to put this -- she wrote this. It's part of the
13 appendix, that, "As requested, attached is a spreadsheet
14 containing a list of all persons identified by ZIP code
15 who did not respond to the summons in the Schierman case
16 (and whose summons was not returned as undeliverable).
17 It also includes those individuals who confirmed receipt
18 but did not appear for service. I trust this
19 information is responsive to your request."

20 Well, your Honor, there were 531 individuals listed
21 by jury number in that category, and that is out of
22 3,000 jurors. That's 17.7 percent. So what I have
23 done -- I hope I have done -- is to point out to the
24 Court a real problem that, from our perspective with
25 regard to getting people to respond to jury summons,

1 that 17.7 percent were individuals who self-selected out
2 of the process completely.

3 THE COURT: Can I interrupt you for a second,
4 counsel? And maybe we can jump to the end of this a
5 little bit.

6 Number one, I want to assure you that I have no
7 intention of having the jury room excuse anybody without
8 our vetting it first in open court. So with regard to
9 your first issue, I think we have covered that. So I
10 don't think we have to spend any time on that, just to
11 let you know.

12 MR. HAMAJI: This is the oath issue?

13 THE COURT: I am sorry?

14 MR. HAMAJI: The oath issue?

15 THE COURT: The oath issue, yes. If we don't get the
16 information under oath that is required by the statute,
17 we are going to bring them in, and we will again start
18 that whole vetting process on February 4th. So I don't
19 think we have to spend any other time on that first
20 issue.

21 MR. HAMAJI: Fine.

22 THE COURT: But with regard to your second issue, and
23 I think you would concede this, but tell me if you
24 don't. There is no indication of systemic exclusion by
25 the government in any way, shape, or form here. We are

1 sending the summonses out to anybody who is eligible to
2 serve under the statute. And your complaint is we have
3 got a significant group that just doesn't respond.

4 MR. HAMAJI: That's essentially correct.

5 THE COURT: Okay. Although I can't tell by the ZIP
6 codes alone, your contention is that there is a core
7 group there that represents a particular population.

8 MR. HAMAJI: Well, studies suggest, and I put the
9 cites to the law review article.

10 THE COURT: Right.

11 MR. HAMAJI: I want to make something clear. This is
12 not geared toward a constitutional challenge at this
13 point. This is addressing an issue that -- I should say
14 under fair cross-section law, okay?

15 THE COURT: Okay.

16 MR. HAMAJI: What I am hoping this court will do is
17 to recognize that this certainly is an issue. The study
18 suggests that the people who do not respond are
19 generally from a lower socioeconomic class and that when
20 the Court engages in follow-up, such as other letters,
21 other summons to those people, the response rate drops
22 significantly.

23 THE COURT: Does it say anything about whether or not
24 they ultimately get seated? It seems to me if we have
25 low income folks or folks who have challenging

1 circumstances -- I think we have all kind of experienced
2 that that's a lot of people nowadays who don't have jobs
3 or whatever -- they tend to not make it through jury
4 selection for the very same reasons they might not be
5 showing up for jury selection in the first place.

6 MR. HAMAJI: Your Honor, that's an assumption that I
7 don't think that under the statutory scheme that we can
8 make. I think that if, in fact, they respond and they
9 come up with legitimate hardship excuses, then at that
10 point we make a decision.

11 But what we are doing right now, what we are doing at
12 this moment is to just ignore that situation, ignore
13 those people and say that, you know, we are just not
14 going to do anything.

15 THE COURT: Well, notably, you have this law review
16 article which is interesting and says many things I
17 would agree with. But what I am not seeing is what the
18 State pointed out. I am not seeing any case law that
19 says, you know, the Court is required to do all of these
20 steps that you are talking about, and if you don't,
21 convictions are in jeopardy.

22 It seems to me, given the prevalence of this problem,
23 not only in this state but in others, I would think that
24 I would see case law that says that we need to do this
25 extra step or two. And I am not suggesting that it

1 wouldn't be great in a perfect world, but I am not
2 seeing the case law.

3 MR. HAMAJI: Well, I can refer the Court to the
4 article where it indicated that 80 percent of the
5 jurisdictions in a further study who do follow-up
6 substantially reduce the people -- the number of people
7 who do not -- who just ignore the summons.

8 THE COURT: Right.

9 MR. HAMAJI: And I am not -- I don't think we are
10 asking for something that is really onerous for this
11 court to send another letter or send another summons and
12 say come in.

13 One of the notes that -- footnotes that the -- I
14 would like to point out the defense really has no remedy
15 here. We don't -- unlike the prosecutor who could bring
16 a criminal charge against people who willfully fail to
17 appear -- and I would -- frankly, in the many years that
18 I have practiced, I have never seen such a prosecution.
19 So clearly the State is not going to use its
20 prosecutorial authority to try to address this problem.

21 And that leaves you. That leaves the Court, because
22 we don't have any statutory authority to try to remedy
23 this problem.

24 THE COURT: Well, and frankly, I don't have a cadre
25 of officers who are dedicated to do my every whim. And

1 I suspect that if I sent the order that you are asking
2 for, I'd get a response back saying we don't have the
3 resources. So I understand where you are coming from,
4 and all too often I find that I am powerless to fix
5 things because of resources that aren't mine.

6 But what I am getting at, Mr. Hamaji, is I am not
7 seeing the case law saying that if the Court doesn't do
8 something that it doesn't have the resources to do,
9 convictions are in jeopardy.

10 And that's what I am -- that's what I am looking for
11 is my linchpin so that I can say, you know what? I
12 don't care that it costs money, and I don't care that I
13 don't have a standing army to do my bidding. You better
14 give me one, or this trial is in jeopardy. And that's
15 what I am not seeing. That make sense?

16 MR. HAMAJI: I understand what you are saying, your
17 Honor. My position is, because we have identified a
18 problem, something that the State basically ignores, we
19 are asking for a prospective remedy --

20 THE COURT: Can I ask you another question on the
21 prospective remedy, Mr. Hamaji?

22 MR. HAMAJI: Yes.

23 THE COURT: That's another thing I have thought quite
24 a bit about. I won't know who will show up until
25 February 22nd. When they start not showing up on

1 February 22nd, that's when the machinery starts cranking
2 up and I send out certified letters telling them they
3 missed their court date, they'd better show up some date
4 in the future for the new-and-improved jury call date on
5 this case. Because we are not talking about a general
6 pool; we are talking about a specific jury call for a
7 specific case.

8 So then I am going to have to send out effectively a
9 new summons by certified mail giving them a new date and
10 a new chance to show up and then take the list from that
11 date and send out show cause notices and summons those
12 folks in for a show cause hearing. And if they don't
13 show up on the show cause, send out warrants to pick
14 them up. And on we go.

15 And I am trying to figure out exactly when the jury
16 from February 22nd starts the trial that we have
17 scheduled for them.

18 And as a practical matter, I have no solution
19 whatsoever for that problem. So I guess what I am
20 asking you is, if I gave you the relief you are asking
21 for, mechanically how would I -- how would I do it?

22 MR. HAMAJI: Well, I think the first step would be
23 to, as you say, find out who does not respond at all.

24 THE COURT: On the 22nd? Because that's when I would
25 know.

1 MR. HAMAJI: Okay.

2 THE COURT: Right?

3 MR. HAMAJI: At that time you send out letters
4 advising those people that they must show up on another
5 day. From there, I guess -- that's the first step.
6 After that, we will see what happens.

7 I think that -- I think that studies show that once
8 people understand that there are consequences to
9 ignoring a jury summons that the rate of people actually
10 not ignoring it increases. So I think as a first step,
11 I would suggest that the Court engage in that.

12 THE COURT: And the other thing that occurred to me
13 too, Mr. Hamaji, I know we are all saying that death is
14 different, and obviously we have a dedicated jury pool
15 in this case which we don't have during the normal
16 course of events. In any other jury trial, we just have
17 jurors summoned in.

18 If, indeed, the process that you are referring to is
19 requisite to doing this jury summons incorrectly, then I
20 would have to assume that we would need to do it with
21 every jury pool regardless of whether the folks are
22 summoned for a specific case or the general jury panels
23 that we get every Monday and Wednesday, right?

24 MR. HAMAJI: Well, your Honor, I am not concerned
25 about those other cases. I am concerned about this

1 case.

2 THE COURT: Well, in all candor, I am concerned about
3 setting a precedent that would obviously have
4 ripple-through effect, right?

5 MR. HAMAJI: Well, this is a death penalty case, so I
6 think strict adherence to the -- the goal of fairness to
7 Mr. McEnroe is definitely on the table.

8 THE COURT: And that brings up one other question I
9 wanted to ask you in that regard. How do we know that
10 these extra steps are going to ensure any more fairness
11 to Mr. McEnroe? Because in all candor, folks who
12 generally don't want to respond to jury summonses are
13 folks that I probably wouldn't want on juries anyway, to
14 be quite candid.

15 I want somebody who wants to be here and will take
16 their oath seriously and be a participant in the process
17 in a way that I think we all want them to be. So how
18 exactly would this foster a more fair process for
19 Mr. McEnroe or Ms. Anderson in the future, for that
20 matter?

21 MR. HAMAJI: I think it would require people who are
22 otherwise not as engaged in society or our government to
23 be required, as the legislature has mandated, that they
24 participate in jury duty. And we are asking just that
25 there be a -- be a legitimate cross-section of the pool

1 that's called in here to try Mr. McEnroe's case.

2 And again, I am just saying our position is not these
3 people must sit on the jury. That's not what we are
4 saying. We are saying these people must be part of the
5 process, part of the pool to determine whether or not
6 they will be selected to sit on this case.

7 THE COURT: One other question, Mr. Hamaji. I am
8 looking at your brief again, and I think you said in
9 passing a moment ago that you weren't bringing a
10 constitutional challenge here.

11 MR. HAMAJI: We are not bringing -- as the cases, the
12 six -- the cross-section cases for jury selection and,
13 you know, the cognizable class, we are not bringing it
14 on that ground. I am bringing it on the ground of basic
15 fairness and due process.

16 THE COURT: So you are bringing it on constitutional
17 grounds.

18 MR. HAMAJI: Well, not for the cross-section.

19 THE COURT: Okay. I just wanted to clear that up
20 because the claim in your brief says the 6th and the
21 14th Amendment, Article I, Section 22, so I wanted to
22 make sure I was on the same page with you. All right,
23 thank you.

24 Anything further, Mr. Hamaji? I want to give you the
25 opportunity for rebuttal, obviously.

1 MR. HAMAJI: No, your Honor.

2 THE COURT: Mr. O'Toole, is this yours?

3 MR. O'TOOLE: Yes, it is.

4 Your Honor, I think the issue that sort of -- sort of
5 encapsulates what's going on here is Mr. Hamaji's
6 statement that, quote, we are not making a
7 constitutional analysis that there is a real problem in
8 getting people to respond to summonses.

9 Your Honor, with all due respect, that's not the
10 issue. The issue here is, is the defendant entitled to
11 a jury drawn from a fair cross-section of the community.
12 Of course he is. And there's been no showing at all by
13 the defense of any case law or court rule that says it
14 in any way has been abrogated or ignored in this
15 particular case or any other case.

16 It would be nice for everybody to be good citizens
17 and show up when requested and show up without pain of
18 or threat of contempt or arrest, but some people do
19 self-select out of this process. That doesn't mean that
20 the defendant is not getting a jury drawn from a fair
21 cross-section of the community. It may mean that people
22 aren't responding, but that's -- I mean, that's not this
23 court's concern.

24 The fact that Mr. Hamaji concedes that this is not a
25 constitutional issue, I think that ends the analysis

1 right there. It would be nice if people obeyed and
2 followed the state statute, but some people elect not
3 to, and it's not within this court's, I think, interest
4 in compelling people to do it against their will.

5 I would also suggest, as the Court noted, there is
6 absolutely no authority by way of case law or statutory
7 authority in support of what defense asks. But the law
8 review article that they quote from actually, I think,
9 undercuts everything that they have asked for by way of
10 remedy or relief.

11 The article claims that those who are -- who are
12 subjected to follow-up entreaties to come in and be good
13 jurors that a higher percentage of people come in. All
14 right, but everything that the defense suggests with
15 respect to threats of contempt, threats of arrest, the
16 article itself says that's going too far.

17 In fact, the article acknowledges the initial point,
18 which this court, I think, made with respect to Mr.
19 Hamaji's argument, that the failure of citizens to
20 respond to a jury summons is not of constitutional
21 magnitude. Self-exclusion of those individuals from
22 juror source lists does not violate the fair
23 cross-section requirement. End of analysis.

24 It just -- there is no authority the defense could
25 sign to, and their own authority undercuts their

1 argument.

2 The other part of it, as I mentioned in the State's
3 brief, is, as nice as it is to read a law review
4 article, we all know that many law review articles are
5 prescriptive. There is a problem that's at least in the
6 perception of the author of the article, and there's
7 some proposals made to remedy the problem. This article
8 is at least up-front in acknowledging that the whole
9 point here is to devise a better system of jury
10 management.

11 In a perfect world, that would be great, but the
12 article itself talks in terms of worlds of possibility.
13 It's long overdue that we do this or we don't do that or
14 we do this thing or the other. It talks about a
15 negligence theory of jury system management which
16 imposes a penalty on the court for not going out and
17 making sure everyone responds to jury service. And it
18 envisions a world that simply does not exist.

19 Your Honor, it also, as I say, mentioned, I think, in
20 detail that those very, very coercive steps that the
21 defense would encourage the Court to take are something
22 that this article itself would back away from, talking
23 about all of a sudden how this effort to coerce people
24 into jury service is going to undercut the function of
25 efficient jury administration and trial administration.

1 And as I mentioned, as I think this court hinted at
2 the last hearing and earlier today, the ramifications of
3 this are significant. I mean, if one sends out
4 follow-up certified letters and you get 10 percent or
5 20 percent or a 90 percent response rate, what happens
6 to those who don't respond? I guess the order of
7 contempt goes out or there is an order of show cause
8 that goes out. What if those people don't respond?
9 This never ends.

10 As the Court has suggested, I think, in your
11 questioning, we'll never go to trial. And as the
12 question you asked last time, the basic issue, the
13 bottom line is, when would the trial ever begin? And
14 under this system, even if everything -- even if it was
15 supported by case law or other authority under the
16 proposal suggested by the defense, no trial would ever
17 be good.

18 So I ask you to deny the defense motion.

19 THE COURT: Thank you.

20 Mr. Hamaji, back to you.

21 MR. HAMAJI: Yes. In fact, the article does
22 indicate -- and I am quoting from page 7 of my brief,
23 second sentence. "A 1997 pilot program in Eau Claire,
24 Wisconsin, found increasingly aggressive steps to
25 follow up on nonresponders reduced the nonresponse rate

1 from 11 percent on the first mailing to 5 percent after
2 the second mailing and to less than 1 percent after
3 issuing orders to show cause notices in capital use
4 warrants."

5 And it goes on further to say that, "When there was
6 further actions done in Los Angeles, the initial
7 nonresponse rate was 41 percent, but follow-up efforts
8 reduced the final nonresponse rate to 2.7 percent."

9 One of the things that I have noticed -- and I think
10 that is no surprise that the State is really -- is fine
11 with the status quo. And that is, the juries in this
12 county are, frankly, not very diverse. That's my
13 experience. And I think most of the public defenders in
14 this county would agree with that.

15 So I think that -- all we have are certainly a
16 greater population of minorities who live in this county
17 than who are representative on the jury pool. I can't
18 help but think that many of the nonresponds --
19 nonresponders, sorry, could be minorities. And I am not
20 saying that we have proven that, but I strongly suspect
21 that's the case.

22 Thank you.

23 THE COURT: Thank you, Mr. Hamaji.

24 Any surrebuttal, Mr. O'Toole? Don't feel compelled,
25 but --

1 MR. O'TOOLE: No, your Honor. Thank you.

2 THE COURT: Thanks. First off, I want to note that
3 with regard to the initial motion or the first part of
4 the motion that Mr. Hamaji brought asking that the Court
5 make sure that written declarations under penalty of
6 perjury are provided before people are deemed
7 statutorily ineligible or excused from service on the
8 request, we're dealing with that, and we're going to
9 start dealing with those on February 4th.

10 So, in effect, I am granting that motion, but I don't
11 think it has to be memorialized because we have already
12 got a schedule set to engage in that activity.

13 With regard to the request for follow-ups of
14 certified letters and the potential for a show cause
15 hearing and so forth and so on, I have to agree to a
16 certain extent with Mr. Hamaji. I wish we had better
17 response than we do.

18 Frankly, I believe that given our response rate in
19 Schierman -- which I think it was 17.7 percent didn't
20 respond in that particular case to the initial summons.
21 Obviously it was honed down quite a bit by the time they
22 got the final 600 in the courthouse, but that was
23 because of requests to be excused and so forth.

24 But the flip side of that is we have an 82 percent
25 response rate. I guess you can look at the glass as

1 half empty or half full, but it seems to me that's a
2 fairly good response rate overall to a general jury
3 summons that goes out.

4 Do I wish it was better? Of course. Do I wish it
5 was perfect? Definitely. But I think the response rate
6 we have is pretty good. And I think the impediments to
7 employing the practice that you have suggested,
8 Mr. Hamaji, are legion, and I don't know of any case law
9 whatsoever that says it's required.

10 And last but not least, as I have indicated to you,
11 try as I might, I cannot come up with a game plan that
12 would work to employ the kinds of follow-up that you are
13 requesting that would allow us to ever get the trial off
14 the ground in a reasonable amount of time.

15 And furthermore, I am not even sure how far we would
16 need to go in order to satisfy this exercise. Do we
17 have to have 99 percent that we have talked to or
18 somehow or other interacted with, or will 90 percent do?
19 And if 90 percent was sufficient, then why isn't the
20 initial 82 percent response rate good enough?

21 So I am going to deny the motion, Mr. Hamaji, with
22 the caveat being I understand where you are coming from,
23 and in a better world, I would appreciate more jurors
24 showing up. By the same token, empaneling people who
25 don't want to be here, in my mind, isn't of great

1 benefit to either side in any litigation. So I am
2 denying that motion.

3 So let's go to the other -- and I think it's the last
4 substantive motion we have on the agenda, and I believe
5 this is yours, right, Ms. Ross?

6 MS. ROSS: Yes. But could I bring up a scheduling
7 matter first just because it's in my mind and I am
8 afraid I will walk out of here without mentioning it?

9 THE COURT: Go ahead.

10 MS. ROSS: At the last status conference, your Honor
11 set the briefing schedule for the trial briefs.
12 Apparently I was not paying proper attention when you
13 mentioned the date the reply briefs are due on the trial
14 briefs.

15 THE COURT: I don't have that schedule in front of
16 me.

17 MS. ROSS: It was the week of -- the response brief
18 was also -- I will be out of town the week -- on a
19 family commitment that was set long before the trial
20 date was set the week of February 17th. So the week
21 before the February 26th trial date.

22 THE COURT: Okay.

23 MS. ROSS: The response brief is due in that time.
24 That's no problem. I will get it done before I leave
25 town. But the reply briefs are due in the middle of

1 that week now, and I will not be around to attend to the
2 reply briefs scheduled for February --

3 THE COURT: 22nd. That's the day that we have the
4 jury come in.

5 MS. ROSS: And so I am not clear there would be any
6 argument on these trial brief matters while the jury is,
7 you know, coming in and out.

8 THE COURT: I am going to be busy that entire day
9 with 650 of my new friends, so you are right.

10 MS. ROSS: I am just asking if the reply brief could
11 be due, you know, at some point the next week, both
12 sides' reply briefs, assuming that the Court wouldn't
13 have time to hear our arguments on the actual
14 substantive trial brief issues, which we are not even
15 sure what they're going to be yet, but...

16 THE COURT: So what exactly are you asking for?

17 MS. ROSS: I am asking for -- the due date currently
18 on the reply briefs, the replies on the trial brief
19 which are in the middle of that week, I think you said
20 February 22nd. I will be gone that entire week. I will
21 be returning on the following Monday, so I would just
22 ask for at least a few days, maybe the middle or end of
23 that week to do the reply brief. And obviously both
24 sides' reply briefs.

25 THE COURT: The response brief is due on the 19th,

1 which is the Tuesday, and you are saying that's not a
2 problem.

3 MS. ROSS: That's not a problem, because I can get it
4 done -- you know, I can get it done and filed before I
5 leave town, which is on the Monday. So I will just get
6 that done by the weekend at the latest, and it can be
7 filed. So that's not a problem.

8 But the reply briefs are a problem because I will not
9 be here, and I will not be in a position where I will
10 have, you know, working ability.

11 THE COURT: Well, part of the problem, from my
12 perspective, is I assume that we are going to be dealing
13 with the jurors on the 22nd. We have them coming back
14 for individual voir dire on March 4th. I was
15 anticipating that we would be plowing through motions in
16 limine and so forth on the week of February 25th, trying
17 to get everything wrapped up and out of the way so we
18 could focus on voir dire the next Monday.

19 And while we were doing that, we would also be going
20 through the questionnaires and weeding out whatever
21 jurors we needed to weed out in the interim. We are on
22 a pretty tight timeline, counsel, and I will be candid
23 with you, I expect my life to be totally driven by this
24 case from the moment we start, weekends, nights,
25 whatever, and it's not going to matter whether I am

1 going somewhere or not.

2 MS. ROSS: The motions *in limine* will -- excuse me,
3 your Honor, those are related to the guilt phase,
4 though, at this point.

5 THE COURT: What's that?

6 MS. ROSS: The motions *in limine* are related to the
7 initial accusatorial phase of trial.

8 THE COURT: Absolutely.

9 MS. ROSS: Not to any potential future sentencing
10 issues.

11 THE COURT: That's what I am assuming.

12 MS. ROSS: Yes. So I think the motions *in limine*
13 will be largely handled by Mr. Hamaji and Mr. Prestia.

14 THE COURT: Okay.

15 MS. ROSS: And my understanding was that there is --
16 in addition to motions *in limine* -- I guess motions *in*
17 *limine*, I am thinking of evidentiary issues.

18 THE COURT: So am I.

19 MS. ROSS: Other motions *in limine* which might be
20 more procedural, there could be a number of things --
21 not motions -- well, they're motions *in limine* in the
22 sense of being brought before trial, but there is a
23 separate trial briefs issue, as I understand it. Am I
24 out to lunch here?

25 THE COURT: Normally my trial briefs include motions

1 in *limine* and whatever else -- whatever other motion
2 needs to be vetted prior to trial, and in other
3 circumstances, that might include a myriad of issues
4 that we have already dealt with. So I don't know what
5 you are contemplating, counsel, so I am having a hard
6 time formulating --

7 MS. ROSS: Well, perhaps I may just need to revisit
8 this once we get each other's trial briefs, because I am
9 only concerned with the reply briefs that I might have
10 to attend to. And again, we didn't know, you know, when
11 the trial date was going to be when my schedule was set.
12 So -- because I am not sure what's happening with the
13 jurors, I guess that was my --

14 THE COURT: I guess I am a little perplexed about
15 this, to be quite candid. I have three counsel over
16 here representing Mr. McEnroe. I have got one of me. I
17 am doing the jury part of it, I am doing the motions *in*
18 *limine*, I am trying to coordinate it all, and yet I am
19 trying to figure out how to manage your calendar so that
20 it's easier for you when, quite frankly, one of the
21 reasons I set the response brief for Friday was so I'd
22 have the whole weekend to go through the whole pile by
23 myself.

24 So -- and I want to be prepared on that following
25 Monday so that we can hit the motions hard and get

1 things done in that week that we have.

2 So that's the only reason I am saying, counsel, I am
3 disinclined to say well, let's kick it to Monday or
4 Tuesday of the following week, because that -- that
5 diminishes our ability to get things done on that
6 following week. And I don't know why co-counsel might
7 not be able to at least address the issues in the reply
8 brief.

9 MS. ROSS: It's very possible, your Honor. It's very
10 possible. And they certainly are fully capable of --

11 THE COURT: Absolutely, or they wouldn't be here.

12 MS. ROSS: I'm not sure what issues there will be.
13 Some of the issues -- and it may be I am, you know,
14 worrying when I don't need to, but especially anything
15 to do with death penalty issues, which apparently, you
16 know, are not going to be huge on this -- on the
17 briefing you are expecting at that time.

18 THE COURT: Counsel, at this point in time I am going
19 to deny the request to extend the time for the reply
20 briefs just because I don't see any good reason to do
21 that at this point in time, because Mr. McEnroe's got
22 perfectly capable counsel who could fill in for you when
23 you are not available to do that, particularly on
24 something like a reply brief, which should be far
25 narrower than the original briefs that I get.

1 And I am afraid that if I push it out to Monday, we
2 only put ourselves at a greater disadvantage. And I
3 want to have everything on Friday so I spend the weekend
4 looking at it, and we get things done in a hurry on that
5 following week so we free up for voir dire on March 4th.
6 I am going to say no to that, Ms. Ross, at this point in
7 time.

8 So let's go on to your motion you have at this
9 moment, which is the equal protection motion with regard
10 to the NOI. Go ahead, counsel.

11 MS. ROSS: Yes, your Honor. We have got a motion to
12 dismiss the notice of intent to seek the death penalty
13 against Mr. McEnroe as a violation both of his equal
14 protection, right to equal protection under the law, and
15 due process.

16 And I think that what's happened when we previously
17 moved to dismiss the death notices on due process
18 grounds in 2009, we have had some further developments.
19 At that time the Court found certainly in the body of
20 its opinion that very clearly there are two -- two
21 necessary factors in seeking a death penalty against an
22 individual. One, the worst of the worst crime, which
23 the Court acknowledged was addressed through the
24 charging of aggravated murder; and two, individualized
25 consideration of the defendant as a person and

1 whether -- in his personal circumstances and whether
2 he's one of the worst of the worst individuals who are
3 charged with aggravated murder. That's the, you know,
4 universe of people you are considering, whether to seek
5 the death penalty or not.

6 Since that time, I believe what we have found and
7 what we have submitted to the Court on this basis is
8 that the prosecuting attorney has actually adjusted his
9 practices to follow what we originally argued in 2009,
10 which is that the Washington state death penalty
11 statute, RCW 10.95.040, requires that a prosecutor -- a
12 prosecuting attorney, in deciding whether to seek --
13 file a notice of intent to seek the death penalty, may
14 only do so when he has reason to believe that there are
15 not sufficient mitigating circumstances to merit
16 leniency.

17 And at that time, you know, back in 2009, there was
18 kind of -- there was this attention between the idea
19 that the statute should mean something, and the Court
20 found that it was unique among all statutes in the
21 United States. And I have, just by way of illustration,
22 submitted with our materials the federal death penalty
23 statute and the notice which only requires consideration
24 of aggravating factors.

25 In the original motion, we went over other states as

1 well, and none of them had this requirement that the
2 prosecutor consider the sufficiency of mitigating
3 circumstances and didn't even mention the aggravating
4 circumstances in that section of the statute which deals
5 with whether he can file a notice of intent to seek the
6 death penalty.

7 The prosecution argued then, and many times since,
8 no, you know, the prosecutor doesn't have to consider
9 mitigating factors. When the Court ordered the State to
10 disclose information regarding what they considered in
11 seeking the -- seeking the death penalty against
12 Mr. McEnroe, the State responded, and it's quoted in our
13 brief, how can they possibly even question why we are
14 seeking the death penalty against Mr. McEnroe? It's
15 right there in the charging documents. He's charged
16 with aggravated murder under these two statutory
17 aggravating factors. Nothing about an absence of
18 mitigating evidence.

19 At most, the State -- and it continues to do so in
20 its response to this motion. The most it's ever said is
21 well, there was some weighing of Mr. McEnroe's
22 mitigating factors, which they never describe or
23 attribute --

24 THE COURT: And they don't have to, right?

25 MS. ROSS: Perhaps. But what they have to -- what

1 they have to put in charging documents is not what this
2 is about. It's the process that Mr. Satterberg has to
3 go through in order to seek the death penalty.

4 And we submitted then that the process he had to go
5 through was to consider on their own merit the
6 mitigating factors, which is what the statute says,
7 unique amongst all statutes in the United States.

8 THE COURT: So, counsel, cutting to the chase,
9 because I will be honest with you all, I went back and
10 reread everything that was submitted before on this
11 issue just to refresh my own recollection and refresh my
12 own recollection of my own opinion at the time.

13 So what makes this motion different specifically?
14 Because that's what counsel is going to harp on in a
15 moment, I am sure.

16 MS. ROSS: It's because we have this body of other
17 cases that this prosecuting attorney has considered and
18 has shown that he has treated Mr. McEnroe differently
19 than every other death penalty case that this prosecutor
20 has decided.

21 In every other death penalty case that he's decided
22 whether or not to seek the death penalty, his focus
23 openly in his public statements and in the fact that in
24 some of the cases at least -- we don't know about Hicks
25 or not -- he has hired a mitigation specialist to

1 illuminate him as to whether there's mitigating factors
2 or not. That's true whether or not he received
3 mitigating information from the defense.

4 There was no evidence, there was no public statement,
5 there was -- certainly it can't be derived from the
6 facts of the crimes that were charged here that he did
7 any weighing.

8 He said oh, you know, Mr. Kalebu is mentally ill, and
9 that far outweighs his 90-minute torture and rape of
10 these two women, who he broke into their house in the
11 middle of the night, slashing their throats, and then
12 one of them happened to escape and the other he stabbed
13 to death. By the way, he is also the only suspect in
14 the murders of his aunt and her friend in an arson
15 murder. And he was so dangerous, he had to be moved out
16 of the courtroom. So his mental illness outweighs these
17 crimes. I'm sure the survivors of those people wouldn't
18 agree with that.

19 How about Dr. Hicks? There is no evidence whatsoever
20 in the public statements or in any conceivable reality
21 of evaluating the facts in that case that the prosecutor
22 weighed any conceivable mitigating factors in Dr. Hicks'
23 case against his vicious stabbing of his partner and
24 under-three-year-old son, which he stabbed his partner a
25 hundred times, went through five knives and then carried

1 the baby to the bathtub and stabbed him to death in the
2 neck.

3 Does his -- what the prosecutors considered his very
4 suspect mental health claims, they said, oh, he's
5 probably fabricating. Truthfully, he is a highly
6 trained physician and has been through psychiatric
7 rotations. He could easily fabricate a mental illness.
8 And that was right at the time the charging decision was
9 made. They didn't believe that that outweighed the
10 horrible, horrible murders in that case.

11 That was not the process they subjected Dr. Hicks to.
12 No weighing. They just looked independently. And I
13 don't know what other information they had besides, you
14 know, mental health clients that have been in the media,
15 because we were not given access to that. But whatever
16 it was, it's very clear that the prosecutor's office did
17 not put it to a weighing against the facts of that
18 crime.

19 THE COURT: Why is that so clear to you? Because I
20 don't know anything about that gentleman or his mental
21 health situation, so I am left wondering, I don't know
22 how things were weighed because I don't know what was on
23 what scale.

24 MS. ROSS: Well, in that particular case, we know
25 that the prosecutor didn't think much of his mental

1 mental mitigation because of their own pleadings in the
2 case. They said they were suspecting he was feigning
3 his mental health. But more importantly, your Honor --

4 THE COURT: So if they said that about Mr. McEnroe,
5 for example, would that satisfy the analysis?

6 MS. ROSS: No. As your Honor has pointed out, no
7 mitigation could outweigh the facts of any of these
8 crimes that we are talking about. No mitigation.

9 So we don't have to know specifically what mitigation
10 was presented in Dr. Hicks' case or Mr. Kalebu's case.
11 We know that in Mr. Monfort's case that the defense
12 didn't submit any mitigating evidence.

13 So despite not receiving any mitigating evidence from
14 the defense, Mr. Satterberg still followed the statute.
15 He was still concerned with mitigating evidence. He
16 hired a private investigator to look into mitigating
17 evidence in Monfort's case. Not surprisingly, they
18 didn't conclude it was that good, because they -- in
19 fact, the investigator wouldn't have access to
20 Mr. Monfort or his confidential information.

21 So the prosecutor was able to say with credibility,
22 because he had looked into the mitigation, hired his own
23 mitigation investigator and focused on mitigation to the
24 extent that he could, somewhat similar to Pirtle. His
25 statement was there was no specific mitigating evidence

1 in that case. He didn't say, "I weighed it." He said
2 there was none; no significant mitigating evidence.

3 In Hicks, there is a guy that shoots his girlfriend
4 because she gave birth to a girl baby instead of a boy
5 baby, I guess, was his preferred baby, shoots her 14
6 times, I believe that was the number, and then shot the
7 baby, 13 weeks old, seven times in the stomach with a
8 45-caliber weapon.

9 And in that case, do you think there is some -- the
10 guy's mentally ill, so that outweighs the facts of that
11 crime, that that grandmother's loss -- mother and
12 grandmother of those victims, would that outweigh it?
13 It's impossible it could outweigh it, and that's what
14 this court found. It can't outweigh it.

15 THE COURT: Counsel, you are going to have to help me
16 get to where you want me to be. What I hear you saying
17 is that, in your opinion, these things couldn't outweigh
18 the gravity of the offense.

19 MS. ROSS: And in your opinion, according to your
20 order. No amount of mitigation could outweigh the facts
21 of these kinds of crimes.

22 THE COURT: I mean, let's not take things out of
23 context necessarily. I want to know what your argument
24 is as to how Mr. McEnroe was treated differently by Mr.
25 Satterberg, because if I remember one of your arguments

1 back when, it was that he shouldn't have weighed things.

2 MS. ROSS: Right.

3 THE COURT: And now I hear you saying that he weighed
4 things in these other cases --

5 MS. ROSS: No, I am saying he didn't. He didn't
6 weigh them. He only focused on the mitigating evidence.
7 Because had he weighed them -- and this is in the
8 brief -- they would have sought death on all of those
9 cases if it was a weighing between the stabbing 100
10 times of the partner of Dr. Chen and killing -- stabbing
11 five times in the neck of a three-year-old after he'd
12 witnessed his other father be stabbed 100 times by the
13 other father. There is nothing that could outweigh
14 that.

15 And I don't think that's my opinion. I mean, I am
16 pretty sure that no rational person would say oh, this
17 Dr. Chen is highly educated and he has some mental
18 illness, so that outweighs this horrible, horrible crime
19 that he did.

20 THE COURT: Well, it's the facts that drive the
21 weighing, so it all depends on what the facts are.

22 MS. ROSS: Well, we are saying also, you know, Dan
23 Satterberg never -- he makes his public announcements,
24 and they are included in our documents. He makes his
25 public announcements, and he did not even mention the

1 crimes. He didn't even mention the crime with Dr. Chen,
2 Mr. Hicks, Mr. Kalebu. He just said I looked at the
3 mitigating evidence, and I didn't -- like in Kalebu, he
4 said, well, I looked at the mitigating evidence and, you
5 know, there was reason to believe -- you know, there was
6 mitigating evidence, and if there is a reason to believe
7 that there is sufficient mitigating evidence, we don't
8 file. The exact wording is in the documents, your
9 Honor.

10 We know, because, you know, the State has responded
11 that they didn't hire anyone to look into mitigation in
12 Mr. McEnroe's case, and the State did not deny this. We
13 interviewed -- and it's recorded, so if there is a
14 dispute, we can certainly bring the recording to the
15 Court -- the chief detective, Detective Tompkins. He
16 said he was never asked to do any mitigating
17 investigation, and to his knowledge, no one else in the
18 sheriff's department was.

19 THE COURT: So your equal protection argument has
20 nothing to do with the statute *per se*. It has to do
21 with the procedure, protocol, process that was followed
22 by Mr. Satterberg between Mr. McEnroe's case and the
23 subsequent cases.

24 MS. ROSS: It has to do with the statute, yes,
25 because our argument is in the cases of Monfort, Kalebu,

1 Chen and Hicks, Mr. Satterberg followed the statute. He
2 followed the statute. He gave meaning to 10.95.040.
3 And he focused on the mitigating factors. He did not --
4 he used the standard not to file it -- he shall file it
5 if there's reason to believe there is not mitigating
6 circumstances to merit leniency. That's why the State's
7 argument well Monfort doesn't mean anything abundance of
8 caution he didn't get mitigation from the defense or he
9 did file it.

10 It doesn't say he never will file it if he's focused
11 on mitigating evidence, but it means that he has to
12 evaluate that mitigating evidence on its own merits. Is
13 it substantial, solid, well-backed-up mitigating
14 evidence. That's one reason you can hire a mitigation
15 investigator.

16 It could cut both ways. She investigates, she finds
17 out some of the claims aren't valid that are made in the
18 mitigation package, if that's the case, or they are.
19 But either way, the prosecutor's focused on the quality
20 of the mitigating evidence that he's aware of, whether
21 he's aware of it because of his own investigation or
22 because the defense has presented it.

23 THE COURT: So in a nutshell, your new argument is
24 that Mr. Satterberg finally got it right, he didn't get
25 it right in my client's case, but Judge Ramsdell was

1 wrong in saying that Mr. Satterberg followed the law,
2 and now we have an equal protection problem because Mr.
3 Satterberg isn't doing it -- or is doing it right now
4 but didn't do it right before.

5 MS. ROSS: Well, I think your Honor would have --
6 correct. But I think your Honor would have -- with the
7 further perspective of what it looks like when the
8 prosecutor does follow the statute and focuses only on
9 mitigating factors. At the time we only had our
10 clients.

11 THE COURT: Okay. Well, let me ask you --

12 MS. ROSS: But now you can see how -- what it looks
13 like when he does it properly.

14 THE COURT: Let me ask you a question, counsel,
15 because this is one of those be careful what you ask for
16 kind of scenarios.

17 If you are revisiting the issue to some extent about
18 weighing and considering the facts of the crime, it
19 seems to me that there are places and times when that
20 may backfire on a defendant who's potentially looking at
21 the notice of intent being filed.

22 For example, not all aggravated murders are equal. I
23 mean, they are all qualified to receive the death
24 penalty, but the facts are different in every one of
25 them, some more heinous than others. And I can

1 conceive, at least in theory, of a circumstance where
2 you might have a defendant who falls under the umbrella
3 of aggravated murder in the first degree, but the
4 circumstances of the case might indicate to the
5 prosecutor that the person was misguided, and therefore,
6 not as culpable based on the facts of the case. Sort of
7 like a Kevorkian thing, if you understand my drift.

8 And if he can consider that along with the
9 mitigation, he may say I don't have much in the way of
10 mitigation here, but when I look at the mitigation that
11 I have and the facts that I have, I am inclined not to
12 file the notice of intent.

13 You see what I am saying?

14 MS. ROSS: I understand --

15 THE COURT: It cuts both ways.

16 MS. ROSS: -- and your Honor addressed that very
17 issue in your earlier order, because the prosecutor made
18 that argument. It was her hypothetical, well, what if
19 there is a case where it's weak on the evidence of the
20 crime of aggravated murder, but the mitigation is low or
21 nonexistent, and what if there is a case that it's a
22 more aggravated or more heinous crime but there is
23 compelling mitigation.

24 And your Honor's answer was if you have weakness in
25 the aggravating circumstances, you don't need to file

1 aggravated murder, because aggravated murder is supposed
2 to be reserved for the worst of the worst crimes.

3 And the reason I submitted that supplemental -- those
4 cases yesterday, they were both cases of multiple
5 murders, three -- by coincidence, they each involved a
6 defendant who killed three people. They killed three
7 people. Each of them was sexually motivated, both
8 defendants -- well, no, actually, the Harris one wasn't
9 all sexually motivated. But they killed three people,
10 were serial killers.

11 George Russell stalked young girls -- young women and
12 killed them in the night and left them posed in
13 terrible, you know, sexually suggestive ways to be
14 discovered.

15 The other one, you know, killed transient women and,
16 you know, for various -- he enjoyed -- in his statement,
17 and it was in the case, enjoyed strangling them and
18 watching their eyes pop out or something like that.
19 Pretty horrific.

20 But apparently the prosecutor didn't consider it,
21 they didn't file it. Just because you do three horrible
22 first-degree premeditated murders doesn't add up to
23 aggravated murder necessarily. In those cases, the
24 prosecutors declined to file aggravated murder.

25 THE COURT: Which they have the ability to do.

1 MS. ROSS: Correct. And that's what I am saying,
2 your Honor. If it's not, in their eyes, a super, you
3 know, serious murder among murders, they don't have to
4 put it in that category of aggravated murder.

5 But once they do, if they file aggravated murder, the
6 statute then tells them exactly -- tells the elected
7 prosecutor exactly what to do in terms of determining
8 whether to file a notice of intent to seek the death
9 penalty. And what he or she is supposed to do is -- we
10 have already determined by our charging decision that
11 this is among the worst of the worst murders. We have
12 already determined that. Now focus on the defendant.
13 What mitigating information do we have about that
14 individual and -- and say he was forced to do the crime
15 or something like that. Well, that would be what you
16 would also consider as mitigating evidence. But what is
17 it about this individual that's mitigating? Is there
18 some or is there not some?

19 And we have in the previous pleadings, you know, I
20 had mentioned those cases where -- it's the Dearborn
21 case where in the opinion it talks about what the
22 prosecuting attorney had said, yes, we received some
23 mitigating evidence, but we looked into it, and the
24 doctors' opinions, you know, weren't valid and, you
25 know, we have contradictory opinions from our doctor or

1 whatever.

2 But the point was, they focused on the mitigation,
3 they found and could articulate there is something about
4 this mitigation that we don't trust, it's not valid, it
5 wasn't well-supported. So it isn't that you can just
6 throw anything out, but when it is well-supported -- and
7 the prosecutor, again, has never said this is not, even
8 in these pleadings here, that the response was well, you
9 know, they're assuming their mitigation was good, but it
10 really wasn't compelling. Even in this case, they said
11 when you compare it to the aggravating factors.
12 However, when the Court ordered them to state why they
13 sought the death penalty, they only cited the
14 aggravating factors. Anyway...

15 So our point is Mr. McEnroe, and Ms. Anderson as
16 well, did not receive the same treatment as other
17 defendants when the prosecutor's deciding whether to
18 seek the death penalties or not. They did not receive
19 the same treatment in a very bad way, and that's that
20 they were not accorded the process that is prescribed by
21 statute in this state, and in no other state, that the
22 prosecutor focus on their mitigating evidence. The
23 prosecutor only focused on the crime itself.

24 And the most the -- the State has ever alleged is
25 that there was a weighing between the mitigating factors

1 offered and the circumstances of the crime. But that --
2 if that's what goes on, there is no way any defendant
3 that makes it through the process and is charged with
4 aggravated murder could not have the death penalty filed
5 against them.

6 But we have, you know, a body of over 300 people
7 serving life without in DOC for aggravated murder. All
8 of those murders are pretty darn bad. It's the
9 mitigating factors that distinguish who should have the
10 death notices filed against them and who not.

11 So that is the argument. And the later cases show
12 that Mr. Satterberg got the light turned on, and he has
13 started to apply the statute properly. But he didn't in
14 Mr. McEnroe's case and in Ms. Anderson's case. He
15 didn't apply the statute properly. He focused only on
16 the aggravators, and he didn't evaluate the value of
17 their mitigating factors. And they are substantial, the
18 prosecutor's never denied that, and your Honor has seen
19 most of Mr. McEnroe's because it's in the open court
20 file.

21 THE COURT: I have seen most of what?

22 MS. ROSS: Most of his mitigating packet, because it
23 was filed in conjunction with one of our previous --

24 THE COURT: I haven't seen any of his mitigation
25 packet. I have specifically insulated myself from --

1 MS. ROSS: Well, I mean it was in the open court
2 files, not sealed. It's in the open court file, your
3 Honor.

4 THE COURT: I think that you guys asked me to file it
5 under seal and -- in order to preserve the record.

6 MS. VITALICH: That was Ms. Anderson's.

7 THE COURT: I can't remember now, but I resisted that
8 and was finally beat into submission, in effect, by
9 virtue of the fact that somebody has to preserve it
10 somewhere in case there is a later claim of ineffective
11 assistance.

12 MS. ROSS: Except for the doctors' reports, most
13 of -- at least half, if not most of Mr. McEnroe's
14 mitigating packet to Mr. Satterberg was filed -- I
15 believe it was in conjunction with the -- regarding who
16 would go first in that litigation. It's open file. We
17 didn't submit it just to the Court.

18 THE COURT: It may be, but in any event, I am just
19 making clear to you that I have done my best to insulate
20 myself from that, because I think me getting involved in
21 that could have other --

22 MS. ROSS: Well, it's sort of as a side light to the
23 motion today, your Honor.

24 And in the Yates -- the response mentioned the Yates
25 case. The section in our brief dealing with alleged

1 allegations, the Yates case -- that's just that the
2 prosecutors never alleged any deficiencies in Mr.
3 McEnroe's mitigating evidence. Not to us, not publicly.
4 We've just never heard from Mr. Satterberg, despite
5 numerous interactions, that he had any issues with the
6 quality of our experts or our mitigating evidence. That
7 was the kind of allegations alleged, alleging we met.

8 The Yates case deals with alleging in the charging
9 documents. That is not part of our motion that has any
10 material --

11 THE COURT: I will give you an opportunity for
12 rebuttal, Ms. Ross. Thank you.

13 MS. ROSS: Thank you.

14 THE COURT: Ms. Vitalich, is this your matter?

15 MS. VITALICH: Yes.

16 THE COURT: Go ahead.

17 MS. VITALICH: Your Honor, I am just going to respond
18 very briefly to a few things that Ms. Ross stated so
19 that I can make my record on that, and then I am going
20 to ask the Court if you have any questions, because I
21 don't want to regurgitate everything that's in the
22 briefing.

23 I don't believe the State has ever argued that the
24 prosecutor doesn't have to consider mitigation. That
25 was something Ms. Ross stated. I don't think that's

1 ever been stated by either Mr. O'Toole or myself.

2 THE COURT: I'll be honest with you, if that was your
3 position, it would make my job a lot easier right now.

4 MS. VITALICH: Yes, and I would agree with your
5 Honor, but I don't believe that that has ever been the
6 State's position.

7 I also want to correct the record, because these
8 things tend to take on a life of their own. There have
9 been repeated references to mitigation investigators and
10 mitigation specialists. I can state unequivocally, the
11 King County prosecutor's office has never employed such
12 a person ever.

13 What may have occurred in these other cases is the
14 hiring of a private investigator to investigate
15 information to augment the criminal investigation that
16 is conducted by the police. As Mr. O'Toole stated, an
17 extensive investigation has been conducted and continues
18 to be conducted in this particular case.

19 THE COURT: And counsel, just to make it clear, I
20 don't know whether there's mitigation specialists,
21 mitigation investigators, private investigators. Those
22 are all factual issues that would have to be vetted in a
23 factual issue kind of forum.

24 I do know that there was somebody named Linda
25 Montgomery who was involved in some of this, and I am

1 not exactly sure what she would say her own status was.
2 But more than that, I don't know, and I am not
3 pretending to at this point.

4 MS. VITALICH: I am merely stating that because,
5 again, these things take on a life of their own, and
6 from this point forward until 25 years from now when
7 there is a federal habeas motion that there will be
8 something about a mitigation specialist, and I just want
9 to state early and often that there is no such person
10 that's ever been hired by the King County prosecutor's
11 office.

12 THE COURT: And counsel, just for what it's worth,
13 that's one of the reasons why I'd like to have some of
14 this stuff cleared up so it doesn't take on a life of
15 its own ten years hence with people assuming they know
16 what we are talking about.

17 MS. VITALICH: For what it's worth.

18 THE COURT: Okay.

19 MS. VITALICH: The public statements of the King
20 County prosecutor's office obviously are not the same
21 thing as whatever process may be followed in each
22 individual case, the consideration of individual
23 mitigation evidence versus the individual facts and
24 evidence presented by each case.

25 Obviously, the focus of the prosecutor's public

1 statements in each case focus on the germane issue. In
2 this case the germane issue is, why have you decided to
3 allow the jury to consider the option of the death
4 penalty. In the other cases where that -- the opposite
5 decision is made, obviously the germane question that
6 the press is interested in is, why have you chosen not
7 to seek that in that case.

8 Those public statements simply do not equate to a
9 conclusion that in this case the prosecutor completely
10 disregarded any information that was presented or
11 gathered by the police, and in these other cases he
12 completely disregarded the facts of the cases and
13 focused solely on mitigation. That is a fundamentally
14 flawed premise.

15 THE COURT: Let me ask you a question on that,
16 counsel, and I know I am kind of stretching here, but
17 bear with me. If I did have a pronouncement from Mr.
18 Satterberg that said, you know, I am filing the notice
19 of intent against Mr. McEnroe because there is nothing
20 he or his attorneys or anybody could tell me that would
21 change my mind. Public pronouncement. Would the Court
22 be able to give that any weight, credence in this
23 analysis?

24 Because this is one of the few times, in my
25 experience as a judge, where the Court is sort of in a

1 position where it's sort of required to oversee the
2 process from a constitutional overlay, but has no
3 ability to see behind the screen.

4 So if a prosecutor were to make such a pronouncement
5 in the media, would it have any teeth at all?

6 MS. VITALICH: I am sorry to say that I don't know.

7 THE COURT: I don't either.

8 MS. VITALICH: I would have to research that. I
9 think obviously -- and we have discussed this before.
10 If you had a public pronouncement that the prosecutor
11 is -- has made a decision based on an impermissible
12 attribute of the defendant, such as race or religion or
13 some other status that is not constitutionally valid,
14 then that would be a very clear case.

15 The case you just mentioned, I am not so certain that
16 that would be necessarily a problem. But I still don't
17 think that's the case we have here.

18 THE COURT: And I am not suggesting that it's that
19 bold or bald. But the bottom line is, I am just
20 wondering since you said public pronouncements, can't
21 put a lot of stock in them, I am just wondering when you
22 can, if ever.

23 MS. VITALICH: And again, I think you could if there
24 was a bold statement that the prosecutors relied on some
25 constitutionally impermissible attribute of the

1 defendant. But short of that, I think that's a very
2 open question.

3 But the assumption that based on these various public
4 statements, which are necessary to give to members of
5 the press, that that necessarily is the end-all be-all
6 of the prosecutor's process and leads to some conclusion
7 that the prosecutor's not carrying out his statutory and
8 constitutionally mandated duties in an appropriate
9 manner, in an appropriate exercise of discretion, I
10 think, strains credulity beyond its breaking point.

11 What we really are talking about here is an abuse of
12 discretion. The defendant would have to show that this
13 was an abuse of discretion to file the notice, to give
14 the jury the option to consider the death penalty in
15 this particular case. And that burden simply has not
16 been met.

17 I know counsel cited the Russell case and the
18 unpublished Dwayne Harris case yesterday. I would
19 object to that on procedural grounds. But in any event,
20 both of those cases involve serial killings rather than
21 mass killings.

22 And I don't know if your Honor may recall that in --
23 I believe in the '80s and up through part of the '90s,
24 there was a substantial dispute in the law as to whether
25 a common scheme or plan, multiple victim, aggravating

1 factor could be applied in a serial killing case because
2 of State v. Kincaid, which addressed common scheme or
3 plan and said there had to be a nexus between the
4 murderers and the victims, which was problematic.

5 That changed, I believe, with the Luft decision from
6 the state Supreme Court where they said you could commit
7 a series of crimes that were similar, and that could
8 also be a common scheme or plan. So that's directly
9 attributable to a change in the law.

10 Those really are all the comments that I have in
11 direct to Ms. Ross's comment. So at this point, I guess
12 I would rest on my briefing and invite the Court to ask
13 any questions they might have of me at this point in
14 time.

15 THE COURT: Sure. And some of this is going to go
16 back to some things we have talked about earlier. But
17 new issues have come to mind, new concerns have come to
18 mind in the meantime, as they probably do to you, too.
19 The more you think about things, the more issues you
20 spot.

21 Back when we discussed this awhile ago -- and I know
22 my opinion keeps getting recited back to me, so it
23 forces me to reread it. But back in 2010, I believe it
24 was, we were discussing this very same issue with regard
25 to the statute and the application of it. And at that

1 point in time, the statement was made -- I think it was
2 by you, although I can't say for sure -- that it was the
3 office policy to only give the jurors the option of
4 imposing death in cases where guilt is not even remotely
5 a question. Do you remember that?

6 MS. VITALICH: I think that is -- I think that's a
7 fair statement.

8 THE COURT: And I take it that's a true articulation
9 of office policy, right?

10 MS. VITALICH: Well, I think based on my knowledge of
11 the cases that our office has handled over the years, I
12 think that's a fair statement.

13 THE COURT: I am not accusing you of misstating
14 things. I am just trying to find out if it's as
15 accurate as I remember it.

16 Here's a couple of things that have come to mind
17 since we had that discussion the last time. If, indeed,
18 that's the case, and I have no reason to doubt you on
19 that, we also had a couple of hypotheticals that were
20 spun out as, you know, if we follow the defense theory,
21 here's what happens. And one of them was the flip side
22 of the strength of the case.

23 And the quote here is, "By the same token, that same
24 prosecutor would not seek the death penalty in another
25 case where the evidence of guilt is overwhelming, the

1 defendant's criminal history is lengthy, the crime is
2 undeniably heinous, yet the defendant succeeds in
3 presenting a compelling mitigation packet. In other
4 words, the most deserving of death would be spared by
5 the prosecutor's initial decision, while the marginal
6 cases would proceed to verdict. For obvious reasons,
7 this simply cannot be the law."

8 Remember that? I think that was from your brief.

9 MS. VITALICH: Vaguely.

10 THE COURT: The concern that came to mind when I was
11 looking at that in the context of this motion, if,
12 indeed, the strength of the State's case had some
13 bearing into the calculus of the mitigation -- and in
14 that last example that you posited, I think it can be
15 summarized as if we have a really strong case, more
16 mitigation is going to be necessary to overcome the
17 strength of that case. Right?

18 MS. VITALICH: I think that's a fair statement.

19 THE COURT: Then I gather what that means
20 subtextually or right out front is that in order to
21 present a mitigation packet that is going to be
22 successful for that defendant whose case is very strong,
23 the defense first has to overcome the hurdle of
24 convincing you that the case isn't as strong as you
25 think it is. And therefore, you shouldn't require as

1 much in the way of mitigation.

2 In other words, you have got this weight over here
3 saying the case is very strong, so even compelling
4 evidence is not going to satisfy us. Which means the
5 defense has to first knock down the strength of the case
6 before they're going to be able to successfully convince
7 you of the strength of the mitigation.

8 Does that make sense, counsel?

9 MS. VITALICH: I sort of lost you somewhere in the
10 middle there.

11 THE COURT: That's okay. That's okay.

12 MS. VITALICH: I think it's hard -- I think it's very
13 difficult -- and part of one of the points I was at
14 least attempting to make in my briefing is that it's
15 almost impossible to draw an overarching generalization,
16 because we are talking about every case is individual,
17 and it has to be considered in an individualized
18 fashion.

19 I think the point I was trying to make in a different
20 context is that, of course, the strength of the
21 available evidence of guilt is something that needs to
22 weigh in the calculus, because that's the starting
23 point. I mean, the first job of the prosecutor is, do I
24 have plenty of evidence to convince the jury of the
25 defendant's guilt before we even get to a consideration

1 of what the penalty has to be?

2 THE COURT: Okay. And counsel --

3 MS. VITALICH: So I think that the way that you are
4 drawing out the hypothetical, which I would note your
5 Honor pretty strongly rejected in your multipage ruling,
6 in any event --.

7 THE COURT: Yeah, I am sorry about that.

8 MS. VITALICH: -- is perhaps taking it a bit further
9 than it was intended in the original context.

10 THE COURT: And counsel, I know the discomfort of
11 having your words quoted back to you two years after the
12 fact. I am not trying to trick you, but my concern is
13 simply this. And again, it's probably lost on everybody
14 in the courtroom but those of us who have fretted over
15 every word in these statutes.

16 It seems to me that if, indeed, the strength of the
17 case has some relevance -- not the facts of the case. I
18 think I've pretty much defeated Ms. Ross's notion that
19 the prosecutor has to totally put blinders on about what
20 happened in the case. But if we also factor in the
21 strength of the case at this relatively early stage of
22 the process, we are setting up a situation where the
23 defense has to address the strength of the case in their
24 mitigation packet in order to be successful. And I
25 don't know how in the heck they would to that.

1 MS. VITALICH: I think I have just figured out the
2 answer to what your Honor is --

3 THE COURT: Go ahead, then.

4 MS. VITALICH: At least from my perspective.

5 THE COURT: Sure.

6 MS. VITALICH: In my prior brief, what I repeated
7 over and over again is that, of course, the prosecutor
8 can consider the facts of the case and the strength of
9 the evidence. Those are inextricably linked concepts,
10 because the strength of the case is -- you can't divorce
11 that from the facts of the case.

12 Do you see what I am saying? I am considering those
13 two things together. It's not the facts of the case as
14 an individual consideration and the strength of the
15 evidence as some divorced, outside of the facts of the
16 case consideration. They necessarily go together.

17 And I just don't think you can uncouple them in the
18 way that your Honor is questioning me about, so that's
19 perhaps why I am having difficulty answering your
20 question as a preliminary matter, because I see those
21 two things as going right together.

22 THE COURT: Okay. And my reason for asking you the
23 question, counsel, is what I foresee down the road 10
24 years hence, 15 years hence, is somebody raising the
25 issue that well, counsel provided ineffective assistance

1 of counsel because in their mitigation packet, they
2 didn't attack the strength of the State's case, and that
3 was one of the things the prosecutor was going to
4 consider in engaging in this calculus at a time when,
5 quite frankly, nobody really knows what the discovery's
6 totally going to look like in most cases, and I don't
7 know how the defense would ever bear that burden without
8 basically tipping their hand as to their defense in the
9 case as a part of doing their mitigation packet.

10 Is that -- are you understanding where I am going
11 with this?

12 MS. VITALICH: I am trying to, but again, I think I
13 disagree that the strength of the case is a standalone
14 proposition.

15 The only point I was trying to make, and again, we
16 are going back to previous arguments that already have
17 been rejected, which is my primary point from the
18 get-go --

19 THE COURT: That's true.

20 MS. VITALICH: -- that this is all a rehash of stuff
21 that's already been decided.

22 THE COURT: And counsel, that's one of the reasons I
23 went back and looked at everything was to see how close
24 to the mark you were on that representation.

25 MS. VITALICH: But all I was trying to say is as a

1 preliminary gateway consideration, I think it's fair to
2 say that this office doesn't consider the death penalty
3 in cases where there is any question -- there is any
4 reason to doubt the guilt of the defendants. And that
5 goes to the strength of the case.

6 But then from that point forward, as far as giving
7 consideration to the mitigation and does it provide some
8 reason to believe that leniency is merited, that
9 necessarily has to be looked at in light of the facts of
10 the case and the strength of the evidence, which, again,
11 I don't think can be uncoupled from one another in terms
12 of that consideration.

13 THE COURT: So is it fair to say, counsel, that if I
14 had two different defendants who were charged with the
15 same identical offense and they both had the same
16 mitigation packet to present to the prosecutor's office,
17 if one -- one had a really strong case from the
18 prosecutor's perspective against them, that person would
19 be less likely -- or more likely to have the notice of
20 intent filed against them than the other person?

21 MS. VITALICH: I am not following that at all. I am
22 sorry. If you start from it's the same case and then
23 it's two defendants and they have the same mitigation --

24 THE COURT: It's a poorly crafted question.

25 MS. VITALICH: -- so I guess I am not understanding

1 how those cases are different.

2 THE COURT: Assume two different defendants, A and B.
3 They have committed the same offense allegedly in two
4 different locations. One is in Seattle, the other is
5 in -- I don't want to disparage any police force, so one
6 is in another jurisdiction, okay? The case that occurs
7 in Seattle is well-investigated from the prosecutor's
8 perspective, that the case is very strong on the merits,
9 on the guilt phase.

10 In the other case, B, that is investigated by another
11 jurisdiction, they have dropped the ball a few places.
12 The case isn't as firm or well-crafted and solid from
13 the prosecutor's perspective because the law enforcement
14 officers just weren't as well-trained.

15 Is there going to be a likelihood that this person in
16 the other jurisdiction is more likely than not to have
17 the notice of intent filed against them because it was
18 lousy police work, yet the person in the Seattle case
19 will have the NOI filed -- or will have the NOI filed
20 against them because the case is so strong even though
21 they have got the same mitigation evidence?

22 That's what I am trying to get at.

23 MS. VITALICH: First, I don't think I can possibly
24 answer that question, because I don't know what
25 necessarily considerations are going to go into that.

1 But I can say -- I will say this, and I don't want to
2 take it further than I want to. But I think it's fair
3 to say that the -- a lack of evidence against a
4 defendant, I think, under some circumstances could be in
5 itself mitigating.

6 And I don't know how else to describe that, but I am
7 really struggling with that hypothetical.

8 THE COURT: So the strength of the evidence can be
9 aggravating, the lack of evidence can be mitigating?

10 MS. VITALICH: Under some circumstances. But again,
11 I am talking in such an abstract that I really am having
12 difficulty with answering that. Again, I just don't
13 think you can uncouple facts of the case and strength of
14 the evidence in such a definite way.

15 THE COURT: Okay.

16 MS. VITALICH: And at this point I think we are just
17 rearguing the motion that we had originally, because the
18 Court has already determined that, of course, the
19 prosecutor can consider all of the information that's
20 available, and that includes the facts of the case and
21 the strength of the evidence, and along with any
22 mitigation that is presented in order to determine
23 whether there's reason to believe that there are not
24 sufficient mitigating circumstances to merit leniency.

25 And again, all of this flows from a presumption that

1 the mitigation that was presented is in itself so
2 compelling that certainly Mr. Satterberg must have
3 disregarded it in making his decision in this particular
4 case. And again, I think that's a fundamentally faulty
5 premise.

6 THE COURT: Okay. Well, I will be real candid with
7 you, counsel, because I don't want to hide the ball on
8 you. I am kind of sideswiping you with my old opinion
9 as it is.

10 The reason I am asking the question is this, and I
11 need to find the quote from Pirtle -- I am sorry, it was
12 Rupe that I wanted to go back to. Because in Rupe --
13 yes, Rupe is one of the few cases where the Supreme
14 Court gives us much guidance on exactly what is going on
15 in this decision to not file the notice or to file the
16 notice.

17 And in that case, they said the prosecutor's decision
18 not to seek the death penalty in a given case eliminates
19 only those cases in which juries could not have imposed
20 the death penalty. It doesn't say anything about the
21 guilt phase part of it, right?

22 And I guess what I am trying to ask you, and the
23 reason I keep harping on the strength of the case part,
24 is if Rupe means what it says, then the decision to not
25 seek the death penalty is tied with mitigation part of

1 the case, not the strength of the guilt phase.

2 MS. VITALICH: I would disagree with that, your
3 Honor, because as your Honor found in your prior ruling,
4 essentially what the prosecutor is supposed to be doing
5 is looking at the case, in effect, through the eyes of a
6 hypothetical or theoretical jury in determining whether
7 a jury would conclude that the State's overcome beyond a
8 reasonable doubt that there is not sufficient mitigating
9 circumstances to merit leniency.

10 And what the jurors have to determine, as we have
11 spent an enormous amount of time talking about, is
12 having in mind the crime or crimes of which the
13 defendant has been convicted, are you convinced beyond a
14 reasonable doubt that there are not sufficient
15 mitigating circumstances to merit leniency.

16 So necessarily having in mind the crime requires to
17 look at the mitigation through the lens of the crime,
18 and that necessarily gets back to the facts of the case
19 and the strength of the evidence.

20 THE COURT: Okay. But when you read this in
21 isolation, which I think we have to, the prosecutor's
22 decision not to seek the death penalty in a given case
23 eliminates only those cases in which juries could not
24 have imposed the death penalty.

25 If we cull out -- if the prosecutor doesn't file the

1 notice of intent because the case is weaker than the
2 prosecutor would like it to be, for example, that's not
3 culling out the case because the jury can't impose the
4 death penalty. It's culling out the case because the
5 prosecutor's made a discretionary decision that he
6 believes that the case is weak on the merits.

7 MS. VITALICH: I disagree, your Honor, because having
8 in mind the crime language, and the jurors are
9 instructed to consider all of the evidence that was
10 submitted in the guilt phase.

11 And we know that any reason to merit leniency is a
12 mitigating factor, and that would necessarily encompass
13 an argument by defense counsel that this -- this -- you
14 have ruled that the State has met its burden, but is
15 this case really strong enough that this defendant
16 should face the ultimate penalty of death. I think that
17 would be a completely rational and appropriate argument
18 for defense counsel to make in a penalty phase.

19 THE COURT: So we found beyond a reasonable doubt,
20 but we still have misgivings, I guess would be the
21 analysis?

22 MS. VITALICH: Well, and your Honor may recall that a
23 previous version of the death penalty actually required
24 jurors to find that the defendants were guilty with
25 absolute certainty in order to impose the death penalty.

1 That's no longer the law, but I still think that would
2 be a rational argument during the penalty phase and
3 could potentially in a particular case be something to
4 argue to the jurors was a reason to merit leniency.

5 THE COURT: Thank you, counsel. I appreciate it.
6 Anything else, Ms. Vitalich?

7 MS. VITALICH: The very last thing I wanted to say is
8 to make an equal protection argument, there necessarily
9 has to be some constitutional right that's involved and
10 similarly situated people who were being treated
11 differently. There is no constitutional right to
12 present mitigation until the penalty phase.

13 So I think as even assuming to be true that, you
14 know, we have the notion that there are investigators in
15 some cases and not investigators in others, or all of
16 these other sorts of things that have been argued as far
17 as, well, this case was considered differently or that
18 case was considered differently, I don't think creates a
19 constitutional issue.

20 Thank you.

21 THE COURT: Thank you.

22 Ms. Ross, any brief rebuttal?

23 MS. ROSS: Yes, your Honor.

24 First of all, as to the last point, in Washington
25 there is statutory mandate that the prosecutor not seek

1 the death penalty unless he has reason to believe there
2 is not sufficient mitigating evidence.

3 When you deny a defendant -- that is not true all
4 over the country. It's not true anywhere else in the
5 country. So Ms. Vitalich might be right in Texas or
6 even in a federal court, but she's not right here,
7 because when there is a statutory right in the state,
8 every defendant has a due process right to have that
9 statute properly applied to them. And if it's denied
10 and it's granted to others, then similarly situated
11 defendants -- in this case, people charged with
12 aggravated murder -- are not receiving the same
13 protection of the law, and that does violate equal
14 protection.

15 Lingering doubt, which Ms. Vitalich was talking
16 about, is a mitigating evidence. We used to think that,
17 too, until the Supreme Court said you cannot argue
18 lingering doubt in the penalty -- as a mitigating
19 circumstance in the penalty phase of the case. And I
20 will submit that statute -- I mean the Supreme Court
21 decision to you. That is something that's decided in
22 the guilt phase of the case.

23 The Rupe decision. The thing about Rupe is that's --
24 that quotation that your Honor has used is -- WestLaw, I
25 put that in WestLaw. There is only one other case ever

1 that either that exact quote or anything meaning that
2 appears, and that is in Cross in which the same justices
3 quoted themselves.

4 So the fact that -- the only reason -- and this might
5 even count against what your Honor might be thinking as
6 cases being in our favor. But the only reason a juror
7 cannot return a death sentence in any aggravated murder
8 case is simply if prosecutor doesn't a notice to seek
9 the death penalty. Circular argument.

10 Take any of the cases we have talked about today:
11 Chen, Kalebu, Hicks. Exactly why is it that a jury
12 could not return a sentence of death in those cases?
13 They certainly could. There is nothing about that that
14 excludes it from being considered for death by the jury
15 or that a jury would not be horrified by the facts of
16 the crime and return a sentence of death.

17 Mental illness, mentally ill people have been
18 sentenced to death throughout the country and often.
19 Look at the original case of David Rice. He was
20 severely mentally ill, committed a crime of killing a
21 family, and yet the prosecutor sought the death penalty
22 against him and received a death sentence.

23 My argument to the Court is, the statute is intended
24 to have a dispassionate professional, the prosecuting
25 attorney, who is used to seeing a lot of highly

1 emotionally charged factual situations to be able to
2 focus on the mitigating factors separate from the crime.
3 That's much harder for a jury to do, and I think the
4 statute anticipated that.

5 State v. Rupe not one single time mentions RCW
6 10.95.040. It was not about that. It wasn't about that
7 statute or how our statute is different than other
8 statutes.

9 So dealing with the strength of the State's case as
10 either aggravating or mitigating, the strength of their
11 case is what they should consider -- and your Honor
12 alluded to this in his original orders, what they should
13 consider when they charge aggravated murder. And by the
14 way, there is no rule that says they have to charge it
15 initially. They can charge first-degree murder, and if
16 the facts come up that strongly support an aggravating
17 factor, they can amend the information based on the new
18 evidence.

19 So it's not that they should file a weak case and
20 then decide, oh, we are going to seek the death penalty
21 or not seek the death penalty based on the weakness or
22 strength of the underlying facts of the crime. It said
23 if that's strong enough, file aggravated murder.
24 Because you think you can prove it beyond a reasonable
25 doubt, file it, and then look at the mitigating factors

1 to see if you go to the next step of filing a notice of
2 intent to seek the death penalty.

3 And the State has alluded to in their brief here
4 today and in the past, well, in this case we have
5 confessions. You know, Dr. Chen confessed that he did
6 it, but he didn't give a full confession, and Mr. Kalebu
7 didn't confess. As if refusing to confess was somehow a
8 mitigating factor instead of assuming responsibility and
9 confessing what you did and, by the way, offering to
10 plead guilty, which Dr. Chen did not do and Mr. McEnroe
11 did.

12 Because pleading -- offering to plead guilty is, in
13 fact, a mitigating factor that we'll come to some later
14 time but is admissible to the jury. That is a known
15 mitigating factor. Taking responsibility is a known
16 mitigating factor. Showing remorse is a known
17 mitigating factor, which a confession is consistent
18 with.

19 So this idea that oh, since Dr. Chen and Mr. Kalebu
20 didn't fully confess or didn't confess at all, that's
21 somehow something we consider as mitigating that we are
22 not going to seek the death penalty against them, that
23 doesn't even make sense.

24 You know, you put everybody to more trouble, you
25 refuse to take responsibility, and you cause the

1 victims' families and the Court and the State to go
2 through all the money to put you on trial. In Dr.
3 Chen's case, not even pleading guilty; and in
4 Mr. Kalebu's, because he also went through a full trial
5 and years of appeals. Their argument just doesn't make
6 sense.

7 You consider the strength of the case in charging
8 aggravated murder or not, or waiting until you have a
9 stronger case.

10 Mr. Satterberg's public statements. He isn't
11 speaking for someone else. He is speaking for himself.
12 He is the only person who can make the decision to seek
13 the death penalty or not, and he is the only person that
14 can address what his reasoning was, and he did so.

15 His public statements are evidence. Because the
16 prosecution's been so secretive and absolutely refusing
17 to disclose anything more, that is the evidence we have
18 of how he's handled Mr. McEnroe's case as opposed to how
19 he's handled and the public statements he's made in the
20 other cases. He's saying it's his decision, he's
21 describing why he did what he did. And that is
22 admissible evidence.

23 THE COURT: Thank you, Ms. Ross.

24 MS. ROSS: So that's something the Court can
25 consider.

1 THE COURT: I am going to take this particular piece
2 under advisement and hopefully turn around a ruling a
3 lot quicker than I did last time for you folks.

4 But what we need to do in the future is I have a
5 deadline for you to submit any changes or additions to
6 the jury questionnaire by January 28th. I hope we can
7 adhere to that. We will discuss any disputes about that
8 on January 31st at 3 o'clock when we meet together.

9 In the meantime, I will get a decision out for you on
10 this last issue.

11 And one other update. Kenya communicated with Greg
12 Wheeler down in the jury room, and Mr. Wheeler confirmed
13 that the request by that juror Mr. Gregory did come
14 through as an email that was unsworn, but Mr. Wheeler
15 obviously knows what responses went out.

16 So again, I think, Mr. O'Toole, there is no reason to
17 get a sworn declaration from Mr. Gregory confirming what
18 Mr. Wheeler can confirm for us.

19 Any quarrel with that, Mr. Hamaji?

20 MR. HAMAJI: No. Mr. Wheeler confirmed the factual
21 basis?

22 THE COURT: Yes. So I think we are fine on that even
23 without a sworn statement from Mr. Gregory. So we will
24 instruct Mr. Wheeler to let him know that he doesn't
25 have to report for this matter.

1 And again, we will start taking up the rest of the
2 current 325 on February 4th. Okay?

3 All right. Thank you very much. I think that's all
4 we had for today. Anything further, folks?

5 MR. O'TOOLE: Not from the State. Thank you, your
6 Honor.

7 THE COURT: Great. We will see you all on the 31st.
8 And have a good weekend in the meantime, folks.

9 (Proceedings adjourned at 4:13 p.m.)

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Katherine L. Ross, Leo Hamaji and William Prestia, the attorneys for Joseph McEnroe, at 810 Third Avenue, Suite 800, Seattle, WA 98104-1695, containing a copy of the Motion for Discretionary Review, in STATE V. JOSEPH MCENROE, Cause No. 69831-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

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Date

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Colleen O'Connor and David Sorenson, the attorneys for Michele Anderson, at 1401 E. Jefferson Street, Suite 200, Seattle, WA 98122-5570, containing a copy of the Motion for Discretionary Review, in STATE V. MICHELE ANDERSON, Cause No. 69832-0-1, in the Court of Appeals, Division I, for the State of Washington.

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

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February 4, 2013
Court of Appeals
Division I
State of Washington

Certificate of Service by Electronic Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

Attorney for Petitioner Michele K. Anderson Colleen E. O'Connor Society of Counsel 1401 E Jefferson St Ste 200 Seattle WA 98122-5570 colleen.oconnor@scraplaw.org	Attorney for Other Party: Joseph T McEnroe Leo J. Hamaji Attorney at Law 810 3rd Ave 8th Fl Seattle WA 98104-1655 leo@defender.org
Attorney for Petitioner Michele K. Anderson David P Sorenson SCRAP 1401 E Jefferson St Ste 200 Seattle WA 98122-5570 david.sorenson@scraplaw.org	Attorney for Other Party: Joseph T McEnroe William J Prestia The Defender Association 810 3rd Ave Ste 800 Seattle WA 98104-1695 prestia@defender.org
Attorney for Other Party: Joseph T McEnroe Kathryn Lund Ross WA State Death Penalty Assistance Center 810 3rd Ave Ste 800 Seattle WA 98104-1695 wdpac@aol.com	

containing a copy of the Motion for Discretionary Review , in STATE V. JOSEPH T. MCENROE & MICHELE K. ANDERSON, Cause No. 69831-1-I and 69832-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

uBrame
Name
Done in Seattle, Washington

2/4/13
Date 2/4/13