

**CAPITAL CASE – TRIAL DATE HAS BEEN STRICKEN**

No. 88410-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH T. McENROE,

Respondent

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Feb 19, 2013, 12:03 pm  
BY RONALD R. CARPENTER  
CLERK

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

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~~DEFENDANT~~ RESPONDENT MCENROE'S SUPPLEMENTAL BRIEF  
OPPOSING STATE'S MOTION FOR DISCRETIONARY REVIEW

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 ORIGINAL

## STATUS OF CASE BELOW

The trial court has now stricken the trial date in this case and all summonsed jurors have been dismissed. See “**Appendix A**”. See notation order of Commissioner (“**Appendix B**” hereto).<sup>1</sup>

### THE TRIAL COURT’S ORDER IS A CORRECT INTERPRETATION OF WASHINGTON’S DEATH PENALTY SCHEME AND IS CONSISTENT WITH THE PRACTICE OF MOST PROSECUTORS

The State has attempted to portray as extreme and untethered-to-law the trial court’s decision finding it is improper under RCW 10.95.040 for a prosecutor to consider the strength of evidence of guilt in deciding whether to file notice of intent to seek the death penalty. But the trial court’s decision makes perfect sense, especially when illustrated by examples of prosecutors following the law.

On April 28, 2010, King County Prosecuting Attorney Dan Satterberg announced he would not seek the death penalty against Isaiah Kalebu. Mr. Kalebu tortured, stabbed, and raped two women in their home in the middle of the night, killing one of them. (Probable cause certification from Mr. Kalebu’s case is attached as “**Appendix C.**”) Mr.

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<sup>1</sup>On February 12, 2013, the trial court instructed the King County jury coordinator to release all summonsed jurors. The trial court was explicit that it believed this was the unambiguous meaning of the Commissioner’s stay order but also stated the trial court independently stayed the trial of Mr. McEnroe. The jury coordinator destroyed information that had been received from potential jurors.

Kalebu is also the only suspect in the earlier arson deaths of his aunt and her friend. Mr. Satterberg's press release regarding his decision not to seek death for Mr. Kalebu was as follows:

[I]n making this decision [whether to file a notice of intent] the prosecuting attorney must consider any and all relevant mitigating factors that would necessitate not seeking the death penalty...

The duty of the prosecutor 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 ...

April 28, 2010 Statement of Prosecutor Satterberg (see "**Appendix D**").

In Mr. Kalebu's case, Prosecutor Satterberg followed RCW 10.95.040 and evaluated the mitigating evidence on its merits. Satterberg did not insult the victims by comparing the death and terrible damage inflicted on them by Kalebu with mitigation offered by the defendant. The Prosecutor did not even mention the heinous crime Kalebu committed or the State's overwhelming evidence of Kalebu's guilt because he had already taken that into account when he charged Kalebu with aggravated murder. In aggravated murder cases after McEnroe and Anderson the Prosecutor changed his decision making process to begin evaluating the mitigating circumstances of defendants rather than reconsidering the always ugly facts of the charged aggravated murder.

Mr. Satterberg's predecessor, the late Norm Maleng, followed

RCW 10.95.040 as it is written. For example, in the case of Naveed Haq the defendant researched targets on the Internet, drove armed with several guns from the Tri-Cities to Seattle, forced his way into the Jewish Federation building, held six women hostage, and shot them all. One woman tried to escape, but Haq followed her and shot her in the head. This was all recorded on security video. In addition, when one of the victims called 911, Haq spoke with the operator and identified himself by name and social security number. This is just about the strongest evidence of guilt a prosecutor could hope for to prove a terrible capital hate crime. Yet Prosecutor Maleng did not seek the death penalty against Haq. Maleng said under RCW 10.95.040 he had to consider Haq's mental illness as a mitigating circumstance. (See "**Appendix E**" hereto.)

**THE TRIAL COURT'S ORDERS OF JANUARY 31 AND  
FEBRUARY 8 ARE SOUND AND WELL-REASONED**

The trial court in the instant case clarified its original (January 31) order on February 8, 2013 (copies of these two orders are attached hereto as "**Appendix F**" and "**Appendix G**", respectfully). In its February 8 ruling, the trial court pointed out that it was the State which first apprised the trial court of the prosecution's belief that the strength of evidence of guilt, not the quality of a defendant's mitigating circumstances, is critical to the Prosecuting Attorney's decision to file or not file a notice of

intention to seek the death penalty.<sup>2</sup> The trial court also noted the extensive oral arguments made by the State regarding “strength of evidence” of guilt. The trial court also observed that the State’s Reply brief in support of Motion for Discretionary Review continued to focus on evidence of the crime rather than the individual moral culpability of the defendants. The State describes the Prosecutor’s decision process as two pronged:

The first is a decision whether to file the charge of murder in the first degree with aggravating circumstances. This decision focuses on whether the evidence can prove the elements of the crime and the aggravating factors. Second, there is the decision whether to pursue the death penalty. This decision focuses on the nature of the crime and whether that crime is heinous, awful, and revolting such that the defendant him- or herself is deserving of special approbation and the ultimate penalty. All conclusions, however, must flow from the evidence.

State’s Reply in Support of Motion for Discretionary Review, p. 11. It is indeed striking that the State does not include the defendant’s mitigating circumstances in its description of the prosecutor’s decision process. The State again, as it has for the three years the trial court has been considering whether this Prosecuting Attorney followed RCW 10.95.040 and controlling constitutional principles, emphasized that the Prosecutor considered only the evidence of the crime in charging aggravated murder and in seeking the death penalty.

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<sup>2</sup> February 8 Order Denying Stay, p. 6, quoting “State’s Response to Defendant’s Motion to Strike Notice of Intent,” p. 8, n. 2.

The trial court observed that the State's reasoning "graphically illustrates the danger in conflating the concepts of a crime worthy of the death penalty with a defendant worthy of the death penalty."<sup>3</sup>

The trial court's January 31 decision, especially as amplified by its February 8 decision, boils down to this: A prosecutor's decision to seek death must be supported by something other than the strength of his case proving guilt. This is because strength of evidence regarding guilt has nothing to do with a defendant's individual moral culpability. If a defendant wears a mask and gloves during a murder the State may have a harder time proving guilt but the planning and guile associated with wearing a disguise doesn't render a murderer less morally culpable. Similar reasoning applies to confessions.

Both trial court orders, but especially the February 8 "Order Denying Stay", are based on the Eighth Amendment requirement that death penalty schemes be designed and implemented in such a way as to "minimize the risk of wholly arbitrary and capricious action," and to reserve the death penalty for only the worst of the worst crimes (function of aggravating factors) AND the worst of the worst individual offenders (function of evaluation of mitigating circumstances).<sup>4</sup> The trial court

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<sup>3</sup> February 8 Order Denying Stay, p. 7.

<sup>4</sup> February 8 Order Denying Stay, pp. 3-4.

interpreted Washington's death penalty scheme to require two phases of "winnowing." First, a prosecutor must determine whether to charge aggravated murder under RCW 10.95.020. The prosecutor assesses the strength of his evidence of the underlying murder and the statutory aggravating factors; cases with weak evidence of premeditation or aggravating factors should be weeded out at this charging phase. Second, a prosecutor determines whether there is "reason to believe there are not sufficient mitigating circumstances to merit leniency" under RCW 10.95.040(1). Having already decided he had evidence beyond a reasonable doubt a defendant is guilty of aggravated murder, a prosecutor must determine whether there is "reason to believe there are not sufficient mitigating circumstances to merit leniency." This step identifies which individual defendants are the worst of the worst murderers, which are the most morally culpable or, perhaps, least redeemable.

The trial court's orders are strongly informed by the fact that RCW 10.95.040 contains a restriction on a prosecuting attorney's decision to seek the death penalty that no other statute in the nation contains, the requirement that he may only file a notice "when he has reason to believe there are not sufficient mitigating circumstances to merit leniency." The State wants to proceed as though that unique clause was not in the statute.<sup>5</sup>

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<sup>5</sup> This Court has explained that during a penalty trial the prosecutor may rebut the

**THERE IS NO SEPARATION OF POWERS VIOLATION.  
COURT'S MAY REVIEW ACTIONS TAKEN BY PROSECUTORS  
EVEN IF THEY ARE WITHIN PROSECUTORIAL DISCRETION**

The State argues here and below that a prosecutor's decision whether to seek the death penalty is similar to a charging decision.<sup>6</sup> It further argues that "the Prosecutor is under no legal obligation to explain his filing decision because that discretion is vested in him as an independently elected official."<sup>7</sup> This is a strange arrogance.

The propriety of a charging decision is subject to review:

Under the law of this jurisdiction, the sufficiency of an information or indictment upon which an accused is charged may be properly challenged in some cases by a motion to dismiss. In considering the sufficiency of an information or indictment, however, we must keep in mind the rule that there is no presumption in favor of a pleading charging a crime. Such a pleading must be definite and certain.

State v. Morton, 83 Wn.2d 863 (1974). See also, State v. Flieger, 45

Wn.App. 667 (1986)(case overruled on other grounds). In charging a crime, a prosecutor cannot simply recite the statute allegedly violated.

Charging documents must cite specific facts in support of each element of

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defendant's mitigating evidence. "Rebuttal evidence might be relevant, for instance, if it casts doubt upon the reliability of a defendant's mitigating evidence." State v. Bartholomew, 101 Wn.2d 631 (1984)(emphasis added). It follows that to decide whether he has reason to believe there are not sufficient mitigating circumstances to merit leniency a prosecutor must consider whether he knows of (or a defendant presents) reliable mitigating evidence.

<sup>6</sup> State's Motion for Discretionary Review, p. 8

<sup>7</sup> Reply on MDR p. 7.

the crime charged. “Failure to provide the facts ‘necessary to a plain, concise and definite statement’ of the offense renders the information deficient.” State v. Nonog, 169 Wn.2d 220 (2010).

The State’s reliance on State v. Brown, 64 Wn.App. 606 (1992) is misplaced. First, Brown expressly left open the possibility a trial court may have “inherent authority to dismiss under these circumstances.” Brown, *id.* at footnote 4. Second, Brown held that a trial court could not dismiss statutory aggravating factors pursuant to a pretrial Knapstad motion because the guilt trial would still proceed and judicial economy would not be served. However, the Court of Appeals’ reasoning does not apply to dismissal of the Notice of Intent (hereafter, “NOI”). Dismissal of the NOI is not comparable to dismissal of an aggravating factor prior to trial because dismissal of the NOI *does* avoid a trial, namely, the penalty trial.<sup>8</sup> Also, unlike dismissal of aggravating factors, dismissal of the NOI is appealable.

**DISMISSAL OF THE NOTICE OF INTENT IS THE PROPER  
REMEDY FOR VIOLATION OF RCW 10.95.040**

RCW 10.95.040 states:

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

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<sup>8</sup> A capital sentencing hearing is in critical ways equivalent to a trial. Bullington v. Missouri, 451 U.S. 430 (1981).

reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, ...

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

Paragraph (3) sets forth the penalty for failure to comply with the preceding two paragraphs: “the prosecuting attorney may not request the death penalty.” That is the prosecutor is barred from seeking the death penalty. RCW 10.95.040 meets the definition of a mandatory statute under State v. Rice, 174 Wn.2d 884 (2012).

**A MOTION FOR DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE STATE CAN APPEAL**

“Interlocutory appeals are the antithesis of judicial efficiency and economy.” State v. Brown, 64 Wn.App. 606 (1992). All parties know that if the trial court’s order dismissing the death penalty is allowed to take effect, Mr. McEnroe will seek to enter an unconditional plea of guilty and be sentenced to life in prison without release pursuant to RCW 10.95.030. When that happens, if the State still feels aggrieved, it can appeal as a matter of right. The State may appeal any “final decision except not guilty” RAP 2.2(b)(1). Specifically, the State may appeal a sentence in a criminal case if it believes the sentence is unlawful. State v. Law, 154

Wn.2d 85 (2005), State v. Williams, 149 Wn.2d 143 (2003).

**REVIEW SHOULD BE DENIED BECAUSE THE TRIAL COURT'S  
ORDER DOES NOT "RENDER FURTHER PROCEEDINGS  
USELESS" OR "SUBSTANTIALLY ALTER STATUS QUO"**

Far from rendering further proceedings useless, the trial court order allows defendant McEnroe to plead guilty as charged and to be sentenced to life in prison without release.<sup>9</sup> A plea of guilty assures Mr. McEnroe is convicted of aggravated murder, which is the State's presumed goal in the prosecution. Furthermore, a plea of guilty provides finality for the State and especially for the victims' families. A plea of guilty is very useful to the State.<sup>10</sup>

A close review of the State's Motion for Discretionary Review and its Reply does not offer any argument that the trial court's order "renders future proceedings useless" under RAP 2.3(B)(1) or "adversely alters the state's quo" under RAP 2.3(B)(3). The State argues exclusively, albeit unpersuasively, that the trial court's order was probably wrong.

The Court should DENY review

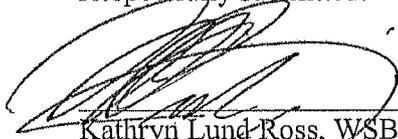
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<sup>9</sup> The defendants here have not denied they committed the murders charged. However, that doesn't mean they would be devoid of defenses if forced to trial. There are many elements to premeditated murder as well as to the aggravating factors. By pleading guilty the defendants would voluntarily waive their defenses.

<sup>10</sup> Life in prison without release is the presumed sentence for aggravated murder. RCW 10.95.030. WPIIC 31.05.

Dated: February 19, 2013.

Respectfully submitted:

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

Kathryn Lund-Ross, WSBA 6894

Leo Hamaji, WSBA 18710

William Prestia, WSBA 29912

Attorneys for Respondent Joseph T. McEnroe

# **APPENDIX A**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

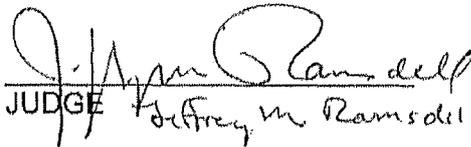


1 deny review before March 7, 2013, at the earliest, jurors specially summoned for this  
2 case and directed to appear on February 22 must be released, and the trial date <sup>must</sup> ~~should~~ June  
3 be stricken.

4 In the event anyone <sup>could</sup> ~~would~~ argue the Supreme Court's stay is ambiguous, this June  
5 Court independently hereby orders that the trial of Joseph McEnroe is stayed, the  
6 February 25, 2013, trial date is stricken, and jurors who have been summoned are June  
7 excused. <sup>for the reasons set forth above.</sup> Furthermore, because the notation ruling expressly provides that it "applies to  
8 both Mr. McEnroe and Ms. Anderson," superior court proceedings regarding Michele  
9 Anderson that might be affected by the validity of the superior court's order of January  
10 31, 2013, are also stayed.

11 Defendants McEnroe and Anderson, their counsel, and the State agree that the  
12 trial and proceedings should be stayed pending further ruling of the Supreme Court, and  
13 that a stay presents no time-for-trial issues under CrR 3.3, nor any constitutional speedy  
14 trial issue.

15 DONE this 19<sup>th</sup> day of February, 2013.

16  
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18 JUDGE Jeffrey M. Ramsdell

19 Presented by:

20  
21 

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SCOTT O'TOOLE, WSBA No. 13024  
22 Senior Deputy Prosecuting Attorney

23 Approved for entry:

24 

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

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Colleen O'Connor, WSBA No. 20265  
David Sorenson, WSBA No. 27617  
Attorneys for Defendant Anderson

ORDER STRIKING TRIAL DATE  
AND EXCUSING JURORS - 2

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
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(206) 296-9000, FAX (206) 296-0955

# **APPENDIX B**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
NO. 88410-2**

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY

**THE SUPREME COURT**  
STATE OF WASHINGTON



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February 11, 2013

**LETTER SENT BY E-MAIL**

Andrea Ruth Vitalich  
James Morrissey Whisman  
King County Prosecutor's Office  
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Colleen E. O'Connor  
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Washington State Death Penalty Assistance  
Center  
810 3rd Avenue, Suite 800  
Seattle, WA 98104-1695

Hon. Richard Johnson, Clerk  
Division I, Court of Appeals  
One Union Square  
600 University Street  
Seattle, WA 98101

Re: Supreme Court No. 88410-2 - State of Washington v. Joseph T. McEnroe  
Court of Appeals No. 69831-1-I  
and  
Supreme Court No. 88411-1 - State of Washington v. Michele Kristen Anderson  
Court of Appeals No. 69832-0-I

Clerk and Counsel:

Enclosed please find a copy of the RULING ACCEPTING CERTIFICATION entered on February 11, 2013, in the above referenced cases. Pursuant to the Commissioner's ruling, the cases will be consolidated under Supreme Court No. 88410-1.

In addition, the following notation ruling was entered by the Supreme Court Commissioner on February 11, 2013, in the above referenced cases:

EMERGENCY MOTION FOR STAY OF SUPERIOR COURT'S ORDER  
DISMISSING THE NOTICES OF INTENT TO SEEK THE DEATH  
PENALTY



Page 2  
88410-2 and 88411-1  
February 11, 2013

**“Given the debatability of the superior court’s order, and the likelihood that the potential benefit to the state of this review would be lost unless a stay is entered, the superior court’s order is stayed pending further order of this Court, as are superior court proceedings that might be affected by the validity of the superior court’s order. This ruling applies to both Mr. McEnroe and Ms. Anderson.”**

/s/ Steven M. Goff,  
Supreme Court Commissioner

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan L. Carlson".

Susan L. Carlson  
Supreme Court Deputy Clerk

SLC:alb

# **APPENDIX C**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

CAUSE NO. \_\_\_\_\_



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

GENERAL OFFENSE #	09-251588
UNIT FILE NUMBER	H09-224

That D.N. Duffy is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 09-251588;

There is probable cause to believe that Isaiah M. Kalebu B/M 08-01-85 committed the crime(s) of Murder 1, Attempt Murder, Rape and Burglary within the City of Seattle, County of King, State of Washington.

This belief is predicated on the following facts and circumstances:

On 7/19/09, at approximately 0307 hours, neighbors were awakened by two women who were hysterically screaming outside of their residence at 727 S. Rose Street, which is located in the City of Seattle, County of King, State of Washington. Witnesses stated that one of the women, T.B., broke out a bedroom window and escaped through the window, naked and covered in blood. T.B. ran into the street and collapsed.

A second victim, J.H., ran out the front door. J.H. also was naked and covered in blood. J.H. was screaming that she and her partner (T.B.) had been brutally assaulted and stabbed by a black male.

An investigation of the scene revealed that the suspect had entered the house at 727 S. Rose Street through a bathroom window, and apparently fled via the same route. The assailant escaped.

J.H. was transported to Harborview Medical Center. Later that same morning, she gave investigators a detailed account of the ordeal to which the suspect, a stranger, had subjected her and T.B. J.H. reported that she was awakened at approximately 0130 hours by the presence of man standing over her and T.B. The man was naked and holding a large, butcher-type knife in his hand. He told J.H. and T.B. "I won't hurt you. All I want is some pussy." He then directed J.H. and T.B. to remove their clothing.

Over the course of the next 90 minutes, the man repeatedly sexually assaulted J.H. and T.B. He forcibly compelled J.H. and T.B. to engage in multiple acts of vaginal, anal and oral sex with him. The man also ejaculated inside both women. After he completed a second series of sexual assaults, the man announced that their ordeal was only beginning.

Throughout the time that J.H. and T.B. were being sexually assaulted, the man also physically assaulted them with the butcher knife. He repeatedly used the knife to cut the necks of both women. After a time, the physical assaults intensified. The man began cutting more aggressively on the necks of both women. J.H., in particular, began to lose a large amount of blood.

T.B. eventually was able to kick the man off the bed, and she and J.H. attempted to defend themselves. Enraged, the man punched T.B. in the face with either his fist or the butt of the knife, knocking her across the room. He then began to stab her, striking her in the chest and upper arm. T.B. was able to grab a nightstand and throw it through the bedroom window. She



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

INCIDENT NUMBER	09-251588
UNIT FILE NUMBER	H09-224

then dove out of the window herself. J.H. ran from the room and out the front door, where she saw that T.B. had collapsed in the street. J.H. pounded on the door of neighbors across the street, screaming for help. The man apparently collected his clothes and fled out of the residence.

Neighbors heard the screams of J.H. and T.B. and called 911. When aid arrived on the scene, T.B. was dead from stab wounds inflicted by the defendant and J.H. was gravely wounded. J.H. was taken to Harborview Medical Center. Evidence was recovered from J.H. at Harborview. She also was able to provide a composite sketch of the suspect.

Analysts from the Seattle Police Latent Lab responded to the scene and were able to identify fingerprints found in the residence. However, a comparison of those prints with the AFIS data bank failed to turn up a match.

In addition, scientists at the Washington State Patrol Crime Laboratory were able to perform a DNA analysis on evidence recovered from J.H. at Harborview. On 7/23/09, the Crime Lab reported that a male DNA profile had been identified from the evidence. Although that profile was not found in the CODIS DNA data bank for known offenders, it did match a DNA profile recovered from an unsolved burglary case in the city of Auburn in 3/08. Moreover, that burglary case file included video images of a possible suspect. Auburn Police detectives made that video available to the Seattle Police.

On 7/24/09, the Auburn Police video was released to the public. Numerous individuals contacted the Seattle Police regarding the identity of the man in the video. That man is Isaiah M. Kalebu. Kalebu has a number of pending criminal matters, some under investigation and some for which he is being prosecuted. In one of those matters for which he is pending trial – Felony Harassment and Malicious Mischief in the First Degree regarding his mother – Kalebu was fingerprinted at the time of booking in the spring of 2008. A comparison of those booking prints and fingerprints found at the 727 S. Rose Street scene produced a match. In addition, as noted above, DNA recovered from the burglary in Auburn, in which Kalebu appears on video, matches that recovered from bodily fluids recovered following the assaults at the 727 S. Rose Street scene.

As noted above, a sketch was done by J.H. on the day of the incident. Kalebu's appearance is consistent with that sketch.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 29 day of July, 2009, at Seattle, Washington.

Det. D.U. Duffay #6218

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CAUSE NO. 09-1-04992-7 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR  
CONDITIONS OF RELEASE

The Certification for Determination of Probable Cause signed by Seattle Police Detective Dana Duffy on July 29, 2009, is hereby incorporated by reference.

REQUEST FOR BAIL

The State requests bail in the amount of \$10 million. The defendant's actions – the premeditated murder and rape of one victim, and the rape and attempted murder of another, both of whom were unknown to the defendant – demonstrate that he presents an extreme danger to the community. The threat posed by the defendant also is borne out by other pending criminal matters, some under investigation and some for which he is being prosecuted. These include a double murder and arson investigation arising from an incident on the evening of July 8-9, 2009, in Pierce County, and a Felony Harassment – Domestic Violence and Malicious Mischief case in which the defendant's mother is the alleged victim, scheduled for trial in August 2009. The defendant has a prior Theft 3 conviction in King County.

The defendant should also be ordered to have no contact with the surviving victim in this case, Jennifer Hopper, the families of the victims in this case and any of the witnesses.

Signed this 29 day of July, 2009.

  
\_\_\_\_\_  
Scott M. O'Toole, WSBA #13024

# **APPENDIX D**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

DANIEL T. SATTERBERG  
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 E**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

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from the Mid \$300's

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PACIFIC RIDGE  
HOMES

## Naveed Haq won't face death penalty

Jewish Federation shooting victims support decision

By TRACY JOHNSON, P-I REPORTER

Published 10:00 pm, Wednesday, December 20, 2008

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Two women who nearly lost their lives when a man burst into a Seattle Jewish charity and started shooting said they were glad the suspect would not face the death penalty.

The son and daughter of the woman who died in the July 28 rampage suggested a death sentence might be deserved, but they vowed not to think about the man or his fate.

King County Prosecutor Norm Maleng said Wednesday that he would not seek execution for Naveed Haq, accused of killing one woman and wounding five others at the Jewish Federation of Greater Seattle while ranting about Jewish people.

Maleng called the shooting "one of the most serious crimes that has ever occurred in this city" but said Haq's long history of mental illness is a reason for leniency.

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The grown children of Pamela Waechter, who was the charity's annual campaign director when she was killed, said Haq's "cruel and callous disregard for the lives of so many, in our view, forfeited his right to preserve his own."

But in their written statement, Nicole and Mark Waechter said they respected Maleng's decision and would not dwell on it -- or on Haq.

"We choose instead to spend our energies trying to mend our lives in a way that honors our mother and all she meant to us," they said. "We need all of our energies to heal our wounds and those of others."

Cheryl Stumbo and Layla Bush, who are still recovering from gunshot wounds, said they didn't believe in the death penalty -- although the crime made each of them rethink their position from the painful perspective of a victim.

"The death penalty most likely promulgates further violence and thoughts of revenge," Stumbo said.

Bush, who has the longest road to recovery and only recently began to walk again with the help of a cane, said she believed a life sentence would be a tougher punishment than execution.

"I think this guy is someone who could feel remorse in prison," she said. "Two wrongs don't make a right."

The Jewish Federation has no formal stance on the death penalty. Officials will focus on the recovery of the victims and follow the court case "to make sure each woman's spirit and energy are in the courtroom every day," said Robin Boehler, chairwoman of the federation.

Haq, who is from the Tri-Cities and has a degree in electrical engineering, faces nine criminal charges: aggravated murder, five counts of attempted murder, kidnapping, burglary and malicious harassment -- a hate crime.

His attorney, C. Wesley Richards, said he would now begin exploring other aspects of the case, including what role Haq's mental illness would play in his defense.

"I am pleased that Mr. Maleng recognized that Mr. Haq has a serious mental illness and, accordingly, that the death penalty is not appropriate,"

Richards said.

Haq's parents have been supportive of their son, Richards said. In a written statement soon after the shooting, the couple expressed shock about what happened and offered condolences and prayers for the victims and their families.

Acquaintances have said Haq struggles with bipolar disorder, which generally is characterized by drastic mood swings. In court documents, defense attorneys said Haq has "extensive medication and mental health issues" and has sought treatment from more than one place during the past decade.

Before making his decision, Maleng reviewed Haq's treatment records and the opinions of mental health experts hired by Haq's attorneys.

In the past 10 years, Maleng, a Republican entering his eighth term, has considered whether to seek execution for 31 people and has sought it for three, according to a P-I analysis of the cases. It takes a unanimous jury to impose it. He has spared several suspects who were clearly mentally ill -- a factor to be considered under state law.

Deputy Prosecutor Don Raz said he hoped to bring Haq to trial by the end of 2007.

On Wednesday, two of the shooting victims and a crowd of other Jewish Federation employees came to a brief King County Superior Court hearing for Haq, a stocky man who wore glasses, a wrinkled dress shirt and khaki pants and was accompanied by four officers.

"He's a lot smaller than I remember him being," Stumbo said after the hearing. "A gun makes a person look bigger."

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# **APPENDIX F**

**TO DEFENDANT/RESPONDENT MCEENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCEENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

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.

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 4<sup>th</sup>, 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 (9<sup>th</sup> 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.

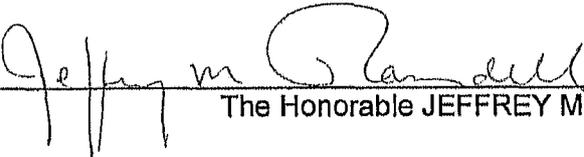
Unique to the State of Washington is the awesome authority conferred by statute upon prosecutors to decide as a separate matter whether to set in motion the powerful machinery of prosecution in pursuit of the death penalty after filing a charge of aggravated murder in the first degree. The filing of 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 31<sup>st</sup> day of January, 2013.

  
The Honorable JEFFREY M. RAMSDELL

# **APPENDIX G**

**TO DEFENDANT/RESPONDENT MCENROE'S SUPPLEMENTAL  
BRIEF OPPOSING STATE'S  
MOTION FOR DISCRETIONARY REVIEW**

**STATE OF WASHINGTON V. JOSEPH T. MCENROE  
SUPREME COURT OF THE STATE OF WASHINGTON  
No. 88410-2**

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 Denying Motion to Stay**

The State has requested that this Court stay the effective date of its January 31, 2013, order striking the notice of intent "until five days after the State's pending motion for discretionary review is decided by the Washington Supreme Court."

At present, the effective date of this court's order striking the notice of intent is February 12, 2013. The State appears concerned that the Supreme Court may not intervene quickly enough to forestall the effective date of this court's order, thus affording Defendant McEnroe the opportunity to plead guilty on February 13, 2013, and

**ORIGINAL**

receive a life sentence without the possibility of parole rather than face the prospect of a death sentence.

The State's request raises several practical issues for this Court to consider. First, if this Court extends its stay to five days after the Supreme Court rules on the State's motion for discretionary review, any sense of urgency in addressing the motion will evaporate. Secondly, given the fact that we are currently poised to start trial on February 25, 2013, the case would presumably have to proceed to trial as a death penalty case despite this Court's January 31, 2013, ruling striking the notice of intent. In effect, were this Court to grant the State's motion to stay, its prior ruling would be rendered a nullity. Following conviction, if the jury were to find that mitigating circumstances merited leniency, this Court's order would never be reviewed because it would no longer be of moment. If the jury did impose a death sentence, the issue ruled upon by this Court might be subsumed within a proportionality analysis rather than being addressed on its own merits.

In short, the relief requested in the State's motion would require this Court to conduct an "advisory" death penalty trial with all the attendant cost and consequences, despite this Court's entry of an order striking the notice of intent. The only reason this Court can think of that would warrant taking such an extraordinary step would be if the Court had lingering doubts as to the correctness of its order striking the notice of intent. Accordingly, this Court has viewed the State's motion as an opportunity to reflect upon its decision rendered on January 31, 2013. In so doing, the Court has had the benefit of the State's motion for discretionary review as well as the responses of the defendants

and the State's reply. The Court has also reviewed all of the past briefing of the parties pertaining to the issue and the available transcripts of oral arguments.

I.

Two primary principles of death penalty jurisprudence have emerged over the years since the United States Supreme Court addressed the constitutionality of states' new death penalty statutes following Furman v. Georgia in 1972.

The first principle is that a state's statute must meaningfully and narrowly channel imposition of the death penalty to avoid its random or arbitrary infliction. Shortly after its decision in Furman, the Supreme Court wrote that Furman required "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 188-189, 96 S.Ct. 2909, 2932 (1976).

Further, a statute's winnowing function must continually narrow its qualifying categories to select only those defendants who committed the "most serious crimes" and whose "extreme culpability makes them 'the most deserving of execution'." Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

Imbedded in the first principle is the second, that a death penalty statute must require the sentencing authority to engage in an individualized consideration of each eligible defendant to select only those most deserving of capital punishment. A mandatory death penalty statute, for example, would not be constitutional because it:

. . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (U.S.N.C. 1976).

These two principles remain guideposts in every state's death penalty statute. The State of Washington has been no exception. The principles are sometimes summarized as the constitutional requirement that death be imposed only on those who committed the very worst crimes and who are the very worst criminals. A statutory scheme must be constructed and applied to uphold these principles. It must function at each consecutive stage to narrow the categories of those against whom the death penalty will be imposed.

Washington's death penalty statute establishes two stages at which a prosecutor makes two separate, discretionary decisions. In the first decision a prosecutor decides whether to file charges of aggravated murder in the first degree. Having done so in a particular case, he or she next determines whether to seek the death penalty against that defendant. As this Court noted in its order of January 31, 2013, this statutory delegation of authority to a prosecutor does not violate equal protection because a prosecutor "merely determines whether sufficient evidence exists to take the issue of mitigating circumstances to the jury." State v. Dictado, 102 Wn.2d 277, 297f, 687 P.2d 172, 185 (1984).

Even though a statute on its face does not violate equal protection, the manner in which it is applied may. In its order of January 31, 2013, this Court ruled that RCW

10.95.040(1) does not permit a prosecutor to consider the strength of the State's evidence on guilt when deciding to seek the death penalty against a particular defendant. This Court concluded that the statute is rendered unconstitutional when a prosecutor considers the strength of evidence in the case as a "reason to believe" that a defendant's mitigating circumstances are insufficient to merit leniency. The Court can state candidly and without equivocation that its ruling of January 31, 2013, was the result of a lengthy evolution.

## II.

In June of 2010, this Court ruled against the Defendants on their contention that the State must consider mitigation evidence in complete isolation from the facts of the case when deciding whether to file a notice of intent under RCW 10.95.040(1). This Court narrowly ruled that a prosecutor may appropriately consider the facts and circumstances of the alleged crime when conducting an analysis under the statute. As crafted, the 2010 ruling was sufficient to dispose of the issue raised by the Defendants in their motion. It was intentionally narrow because the Court was significantly disquieted by assertions of the State that the strength of the evidence regarding guilt is an appropriate consideration when exercising discretion under RCW 10.95.040(1). The level of this Court's concern can be seen in the many pages of dialogue between State's counsel and the Court in the March 26, 2010, transcript of oral argument. The State has characterized the exchange as a "Socratic exercise" and indeed it was.

In the State's briefing in response to the Defendants' 2010 motions, the State included two hypothetical scenarios in a footnote, intended to illustrate the absurdity of the defense argument.

The footnote stated:

Based on the reading of the statute that the defendants propose, a prosecutor *would* seek the death penalty in a case where the available evidence proving premeditation, the defendant's identity, or some other necessary element is not especially strong, yet mitigation evidence is negligible. By the same token, that same prosecutor *would not* seek the death penalty in another case where the evidence of guilt is overwhelming, the 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.

State's Response to Defendant's Motion to Strike Notice of Intent, at 8, n. 2.

In the first scenario, the State believes that when confronted with a particularly heinous aggravated murder and a defendant who offers nothing to mitigate his personal culpability, a prosecutor must be permitted to decline the death penalty because the case upon filing appears weak. At oral argument on March 26, 2010, the State went so far as to indicate that it only files a notice of intent to seek the death penalty "in cases where guilt is not even remotely a question." From this statement the State appears to interpret RCW 10.95.040(1) as requiring a prosecutor to engage in a consideration of a defendant's mitigating circumstances only in cases they deemed sufficiently strong on the issue of guilt.

In the second hypothetical the State worries that this same prosecutor would not seek the death penalty, even though the "evidence of guilt is overwhelming, the defendant's criminal history is lengthy, [and] the crime is undeniably heinous." In this

scenario, despite a strong case, the statute would require a prosecutor to forego filing a notice of intent because the defendant presents compelling mitigation evidence.

At the outset, as this Court observed in its ruling of June 2010, there is nothing illogical in a prosecutor declining to file a notice of intent when compelling mitigation is presented even though the crime is particularly heinous. The fact that the State would characterize the defendant in the second scenario as "the most deserving of death" despite the presence of compelling mitigation graphically illustrates the danger in conflating the concepts of a crime worthy of the death penalty with a defendant worthy of the death penalty.

As reviewed above, for a state's administration of the death penalty to be constitutional its statutory scheme must constantly channel discretion narrowly to avoid random imposition, and must provide for a separate and distinct analysis of the moral culpability of each defendant. These two separate inquiries are designed to result in a final imposition of death only upon the very worst criminals who have committed the very worst crimes.

A defendant may be one of the worst criminals by virtue of the crime he committed, but because of personal mitigating factors he may not be among those most deserving of death for whom the State's penalty of death is reserved. A defendant, therefore, such as the defendant in the second scenario above, is not summarily "the most deserving of death" merely by virtue of committing the very worst crime, as the State would have it. That inquiry qualifies the defendant for death by half. He becomes the most deserving of death only if he is determined also to be the worst of the worst criminals.

This ultimate determination results from an evaluation of the facts and circumstances of each case, along with the personal mitigating circumstances unique to each defendant. As this Court's June 2010 order ruled, analysis of both of these categories is constitutionally sound. Injecting into that analysis, however, a prosecutor's consideration of information as potentially random as the strength of the State's case at an early snapshot stage of the prosecution taints that constitutionality.

As helpful as a prosecutor may find the relative strength of the evidence to be, that measure of strength is still a circumstance wholly arbitrary from case to case, dependent as it is each time upon random circumstances arising from the collateral environment in which the crime occurred, or even the present state of investigative resources available. Requiring a rational "reason to believe" existing apart from the strength of the evidence of a case is the only way to ensure a prosecutor's constitutional administration of the statute.

In summary as to the two scenarios presented, if a prosecutor may in some cases consider the weakness of the evidence as a mitigating factor, the citizens of this State lose the benefit of the statute's requirement that the State seek the death penalty against all defendants charged with the very worst crime who appear also to be the very worst criminal. More importantly, if the State may consider the strength of the evidence in some cases as an aggravating factor against a defendant, despite compelling mitigating circumstances, that defendant may lose the statute's protection when the evidence of guilt is overwhelming.

Declining to file a notice of intent to seek the death penalty in a case where the strength of the evidence is overwhelmingly strong, but compelling mitigating

circumstances exist to merit leniency, is undeniably a difficult decision to make.

Washington's unique statute, however, makes the prosecutor a participant in the sentencing process by affording the prosecutor the discretion to seek or not seek the death penalty. State v. Campbell, 103 W.2d 1, 26, 69 P.2d 929 (1984). Filing a notice of intent to seek death despite the presence of compelling mitigation would be an abdication of the prosecutor's duty. It would also contravene the statute's requirement that a prosecutor have reason to believe the mitigating evidence is insufficient to file the notice.

### III.

Finally, at oral argument on March 26, 2010, counsel for the State concluded with comments speculating that the legislators, when drafting Washington's death penalty statute, "simply wanted to give the prosecutors a channeled discretion to consider any and all information available at the time that a decision is made." In order to satisfy equal protection, however, a prosecutor's discretion under the statute must not be unfettered. It cannot be the case that legislators, aware of what the federal and state Constitutions required of them, intended to channel a prosecutor's discretion under the statute ever more broadly rather than increasingly narrowly.

RCW 10.95.040(1) grants authority to the State's prosecuting attorneys to make a truly profound determination: to decide for which defendants it will seek the State's greatest punishment. The statute delegates this authority to the office of the prosecuting attorney, and the citizens rely upon that office to bring its very best to bear upon the responsibility – not only in the cases that are the easiest to decide but also in

those that are the most difficult, the cases requiring the greatest exercise of a measured, dispassionate restraint.

Notably, the State's Reply Brief in Support of Discretionary Review only heightens this Court's concern regarding the State's interpretation and application of RCW 10.95.040(1). On page 11 of the brief, the State asserts that a decision made under that statutory provision "focuses on the nature of the defendant's crime and whether that crime is heinous, awful, and revolting such that the defendant him- or herself is deserving of special approbation and the ultimate penalty." Reply Brief at 11. Whether by intention or oversight, the word "mitigation" is completely absent from the State's calculus.

#### IV.

This Court admits that it has labored hard to reconcile the somewhat discordant statements found in over 30 years of Washington Supreme Court jurisprudence. To the extent that the State has characterized this Court's ruling as "based on a wholly novel theory unsupported by law," this Court concedes that this case is uniquely postured to address an issue that has heretofore effectively evaded review. Although the circumstance presented is novel, the law applicable to the analysis is long standing.

On January 31, 2013, this Court was painfully aware of the potential ramifications of its ruling. Given the pending trial date, the Court understood that any attempt to obtain appellate review of the decision would likely adversely affect a trial date that has already been too long delayed. The Court also understood that given the particularly

heinous facts alleged including the senseless murder of two innocent children, the Court's decision would not likely be well-received by the public.

Most importantly, this Court understood that its order might further delay closure for the victims' families. As much as this Court would like to bring closure and peace to a family that has experienced so much tragedy, I cannot in good conscience rewrite an order that I think, after over two years of reflection, is correct. All the Court can do is once again ask for your patience and indulgence and express its sincere sympathy for your situation.

#### V.

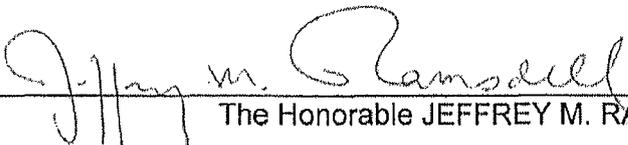
In summary, this Court has painstakingly reviewed its decision striking the notice of intent. The fundamental precepts upon which the decision is based are longstanding and well-founded. Although the issue has never been directly addressed in an appellate opinion, this Court is confident that if the Supreme Court grants discretionary review, a majority of the justices will affirm the decision of this Court after due deliberation and reflection.

The passion and conviction expressed in the State's briefing undoubtedly reflects the sincerity with which counsel hold their position. Nothing in this Court's ruling should be construed or interpreted as impugning the integrity or good faith of the prosecutor's office, or that of The Honorable Daniel Satterberg. Even as an impartial participant in this process, this Court took over two years to appreciate and comprehend fully the reasons for its amorphous discomfort with its own ruling of June 2010. With conviction

and sincerity equal to the State's, the Court is confident in the correctness of its ruling of January 2013.

Accordingly, this Court hereby denies the State's motion to extend the stay beyond February 12, 2013.

SIGNED this 8<sup>th</sup> day of February, 2013.

  
The Honorable JEFFREY M. RAMSDELL

**OFFICE RECEPTIONIST, CLERK**

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**Subject:** RE: State v. McEnroe, No. 88410-2

Rec'd 2/19/2013

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**From:** Bill Prestia [<mailto:bill.prestia@defender.org>]

**Sent:** Tuesday, February 19, 2013 11:57 AM

**To:** OFFICE RECEPTIONIST, CLERK; Vitalich, Andrea; [Jim.Whisman@kingcounty.gov](mailto:Jim.Whisman@kingcounty.gov); O'Toole, Scott; Wynne, Brian; O'Connor, Colleen; David Sorenson; Leo Hamaji; Katie Ross; [Wdpac@aol.com](mailto:Wdpac@aol.com)

**Subject:** State v. McEnroe, No. 88410-2

In the case of State of Washington (Plaintiff/Petitioner) v. Joseph T. McEnroe (Defendant/Respondent), No. 88410-2, kindly accept for filing the following attached document:

Defendant/Respondent McEnroe's Supplemental Brief Opposing State's Motion for Discretionary Review.

All counsel are cc'd on this email. I represent Mr. McEnroe. All my contact information is below.

Thank you,

--

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