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Supreme Court No. 88522-2

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IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

MONFORT'S RESPONSE TO STATE'S OPENING BRIEF AND  
OPENING BRIEF ON ISSUE ON CROSS-APPEAL

By:

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## I. IDENTITY OF RESPONDING PARTY

Christopher John Monfort, through his attorney Suzanne Lee Elliott, asks this Court to affirm Judge Kessler's order striking the death penalty notice. CP 841-42.

## II. ARGUMENT IN RESPONSE TO THE STATE'S BRIEF

### A. PERTINENT STATUTORY HISTORY

The 1970's were a significant period in the legislative attempts to formulate state capital punishment statutes that did not violate the Eighth and Fourteenth Amendments. In 1972, in *State v. Baker*, 81 Wn.2d 281, 501 P.2d 284 (1972), this Court invalidated Washington's then existing death penalty in the wake of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, *reh'd denied*, 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972). The statute in place at the time, RCW 9A.48.030, was constitutionally flawed because it left the imposition of the death penalty completely in the discretion of the jury. The United States Supreme Court concluded that the problem with the unlimited discretion approach was that it produced arbitrary and capricious results by allowing juries to consider irrelevant facts such as the defendant's race.

In 1974, the people of the State of Washington enacted Initiative 316 reinstating a death penalty in Washington. The initiative was codified at RCW 9A.32.046. That statute tried to correct the problems of arbitrary and capricious decision making by mandating the death penalty for any person convicted of aggravated first degree murder. 2<sup>nd</sup> Supp. App. 26-56.

Then, in 1976, the United States Supreme Court struck down “mandatory” death penalty statutes. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The Court held that the mandatory imposition of death was equally arbitrary and unconstitutional because any law that required the execution of all persons convicted of a capital offense regardless of arguably relevant factors is equally arbitrary. In light of *Woodson*, on August 5, 1976, the Office of the Attorney General opined that the statute that resulted from Initiative 316 was likely unconstitutional. AGO 1976 No. 15; 2<sup>nd</sup> Supp. App. 58-68.

Thus, in 1977, legislation was introduced in an effort to construct a death penalty statute that passed constitutional muster under the then existing United States Supreme Court precedent. There was considerable debate about how to craft a fair sentencing bill. 2<sup>nd</sup> Supp. App. 69-82. The first bill failed by three votes. 2<sup>nd</sup> Supp. App. 83. The clear import of the various debates was to draft a bill that eliminated “arbitrary” imposition of the death penalty. 2<sup>nd</sup> Supp. App. 84-102. It appears that in the 1977 special session, the first iteration of what is now RCW 10.95.040 appeared in ESHB 615:

NEW SECTION. Section 1. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney’s designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such

circumstance or circumstances in a special sentencing proceeding under section 2 of this 1977 amendatory act.

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

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

2<sup>nd</sup> Supp. App. 10 (emphasis added). It is, of course, apparent that at that time the statute made no mention of mitigating factors – only aggravating circumstances.

Shortly thereafter, in *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980), this Court found that under the 1977 statute a defendant was free to plead guilty at arraignment and avoid the death penalty altogether. One year later this Court found the 1977 statute unconstitutional. *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). This Court, citing *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), said: "Where pursuant to a statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty and a trial, but it is not imposed when there is a plea of guilty, that statute is unconstitutional." *Frampton*, 95 Wn.2d at 478-79. The Court reasoned that: "The Washington statutes for the imposition of the death penalty needlessly

chill a defendant's constitutional rights to plead not guilty and demand a jury trial and violate due process." *Id.* at 479.

In 1981, the legislature tried again. HB75, read for the first time on January 16, 1981, contained the following section:

NEW SECTION. Sec. 6. When a person is charged with aggravated first degree murder as defined by section 4 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

The notice of special sentencing proceeding shall be filed and served on the defendant or his attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any included offense.

Unless the notice of special sentencing proceeding is filed and served as provided in this section, the death penalty may not be sought.

The legislative history contains a copy of "Explanatory Material for 'an Act Concerning Murder and Capital Punishment.'" This document was apparently authored by the Washington Association of Prosecuting Attorneys in order to educate the legislators. In regard to the above quoted section, that document states:

During the period in which the notice may be filed, the defendant may not plead guilty to the murder with which he is charged. This corrects one of the problems in our current statute found by the Court in *State v. Martin*, supra. This time is needed by the prosecuting attorney to adequately determine if a particular defendant is a suitable candidate for the death penalty. *Such an investigation typically requires an extensive records and background investigation of the defendant from sources not quickly available.*

Emphasis added.

This new statutory provision was unique to Washington. It remains unique among the states that continue to impose the death penalty.<sup>1</sup> But one thing is clear: it mandated that after charging the defendant with aggravated premeditated first degree murder the prosecutor's focus must switch from the facts of the crime and any aggravating factors to the personal circumstances of the defendant and any other mitigating factors about him or her.

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<sup>1</sup> The fundamental constitutional flaws with capital prosecutions in this country are leading to its abolition. Maryland abolished the death penalty in March. Prior to 2007, no legislature had abolished the death penalty since the 1960s. The other five states to recently abolish the death penalty are New Jersey, New York, New Mexico, Illinois and Connecticut. Virginia's death row population has significantly decreased from a peak of 57 inmates in 1995 to 8 presently. The number of new death sentences in 2012 was the second lowest since the death penalty was reinstated in 1976, representing a nearly 75% decline. Only nine states carried out executions in 2012, equaling the fewest number of states to do so in 20 years. In 2012, use of the death penalty was clustered in a few states. Just four states (Texas, Oklahoma, Mississippi, and Arizona) were responsible for over three-quarters of the executions nationwide. See <http://deathpenaltyinfo.org/home>. The Death Penalty Information Center is a national non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment.

B. THE STANDARD OF REVIEW IS DE NOVO

The determination of whether or not the prosecutor has properly considered mitigation under RCW 10.95.040 is a question of first impression for this Court. The Court is considering a similar question in *State v. McEnroe* and *State v. Anderson*, No. 88410-2, but, as of the date of this brief, there is no decision from this Court on the issues raised by Judge Kessler's order.

As an initial matter, this Court must identify the proper standard of review for the order. In *State v. Dearbone*, this Court said that:

The Legislature's adoption of special pretrial procedures for seeking the death penalty implies that a finding of good cause is not a matter left solely to the trial court's discretion. Because the determination of good cause under RCW 10.95.040 is a mixed question of fact and law, centered on the meaning of the legal standard of good cause, we review the trial court's ruling on the issue de novo. *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir.1989), cert. denied, 498 U.S. 878, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990) (trial court's ruling on mixed questions reviewable de novo); *State v. Cauthron*, 120 Wash.2d 879, 887, 846 P.2d 502 (1993) (mixed question of law and fact under *Frye* test reviewed de novo); *State v. Tatum*, 74 Wash.App. 81, 86, 871 P.2d 1123 (1994) (“[w]hen the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo”).

*State v. Dearbone*, 125 Wn.2d 173, 178-79, 883 P.2d 303, 305 (1994).

The same analysis would apply here. The trial court applied a particular statute to particular facts. Thus, the issue is one of law and this Court's review is de novo.

Adopting this standard of review also resolves the State's complaints about the fact that Judge Kessler did not have sufficient information to determine that the Prosecutor failed to engage in a proper consideration of Monfort's mitigating circumstances. *See* Petitioner's Opening Brief, page 8, fn. 8 and page 9, fn. 9. Monfort does not concede that the information before the Court was insufficient. But, if there is some question, this Court can simply review the written reports given to the Prosecutor and make its own de novo determination. Monfort submitted those documents to this Court, under seal, on March 22, 2013.

C. THE DECISION TO FILE WRITTEN NOTICE THAT THE STATE IS SEEKING THE DEATH PENALTY IS NOT A "CHARGING DECISION" AND, IN ANY EVENT, IS SUBJECT TO JUDICIAL REVIEW

Under separation of powers principles, prosecutors are entitled to exercise discretion in determining what charges to file, when to file them, and, generally speaking, whether to amend them. *State v. Korum*, 157 Wn.2d 614, 625, 655, 658, 141 P.3d 13 (2006); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). The State argues that the process of deciding to seek the death penalty is a "charging decision."<sup>2</sup> But under

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<sup>2</sup> This Court should disavow the statement found in *State v. Campbell*, 103 Wn.2d 1, 26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985), that the "prosecutor does not determine the sentence, the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury." First, this is a misstatement of the law. If the prosecutor files a notice to seek death, the issue of mitigation will *always* go to the jury if the jury finds the defendant guilty during the guilt phase. It is only when the prosecutor does *not* seek death that mitigation does not go to the jury – because it is irrelevant. And, the statement is simply not true. By filing a death notice the prosecutor is requiring that the jury impose death if there are not sufficient mitigating circumstances presented. Second, no person in Washington can be sentenced to death unless the prosecutor files a notice. And, no other entity can file such a

Washington's unique statute it is not. In Washington the charging decision was made when the prosecutor elected to file information alleging that Monfort committed aggravated first degree murder, on November 12, 2009. CP 1-18. The question of whether there are sufficient circumstances to merit leniency arises only after the prosecutor has made the decision to charge aggravated premeditated first degree murder.

Washington's unique statute was enacted after the decision in *Woodson* and was aimed directly at the concerns expressed by the Supreme Court in that case. The Court said:

we believe that in capital cases the fundamental respect for humanity underlying the eighth amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

*Woodson*, 428 U.S. at 304 (citation omitted). The Court explained:

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case

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notice – not the legislature, not the judiciary and not the victims. The jury cannot spontaneously make such findings. Thus, in capital cases, it is truly the prosecutor who determines the sentence. In this case, Judge Kessler recognized this fact when he said: “While it may not seem like it, it appears that the prosecution is needlessly rushing to judgment, and the prosecutor can’t simply hide behind the fact that once the prosecutor has made the decision to seek the death penalty, it is just a jury decision. The jury wouldn’t get the chance to make the decision otherwise.” 8/25/10 RP 42.

*Id.*

Our Legislature provided a first line of defense against any Eighth or Fourteenth Amendment violations by requiring the prosecuting attorney to engage in “an extensive records and background investigation of the defendant from sources not quickly available.” This inquiry is very different from the determination of whether or not the evidence supports the elements of any particular offense. It is, in fact, “*sui generis*” – that is, unique. And here the Prosecutor failed in his statutory duty.<sup>3</sup>

A determination of mitigation and leniency in a capital case involves many factors, such as the defendant’s personal background, that would ordinarily be irrelevant to the question of whether there was probable cause to file charges. It also excludes factors that might be relevant to the charging decision, like the strength of the State’s case. Instead:

The prosecutor must perform individualized weighing of the mitigating factors—an inflexible policy is not permitted. Input from the defendant as to mitigating factors is normally desirable, because the subjective factors are better known to the defendant while other factors, such as age and lack of prior criminal record, can be readily ascertained by the prosecutor.

*State v. Pirtle*, 127 Wn.2d 628, 642, 904 P.2d 245, 254 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996), citing *In re Harris*, 111 Wn.2d 691, 693, 763 P.2d 823 (1988), *cert. denied*, 490

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<sup>3</sup> Because Washington’s statute is unique, citations to decisions from other states or analyzing other state statutes are of marginal use in construing RCW 10.95.040.

U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989). But, when determining what crimes to charge, the prosecutor would not consider the defendant's education, family background or age and the prosecutor would almost certainly never ask for "input" from defense counsel on which crimes to charge.

Thus the State's reliance on cases that discuss the prosecutor's decision about whether to charge a defendant with a crime are not controlling. And, nothing in Judge Kessler's order prevented or impaired the Prosecutor's decision to charge Monfort with aggravated premeditated first degree murder. That charge still stands.

Even if the filing of the notice is a "charging decision," this Court has repeatedly held that a prosecutor's discretion to seek the death penalty is not unfettered. *See State v. Campbell*, 103 Wn.2d at 24-25. Before the death penalty can be sought, there must be "reason to believe that there are not sufficient mitigating circumstances to merit leniency." *Id.* at 25 (quoting RCW 10.95.040(1)). The prosecutor must perform individualized weighing of the mitigating factors – an inflexible policy is not permitted. *In re Harris*, 111 Wn.2d at 693. That requires the prosecutor to consider seriously whether, in any particular case, it would be inappropriate to seek the sentence at all. *State v. Cross*, 156 Wn.2d 580, 623, 132 P.3d 80, 100, *cert. denied*, 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006).

There are limits to the Prosecutor's power:

Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Osler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446.

*Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604, *reh'g denied*, 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511 (1978). In capital cases the Washington State Legislature has, via RCW 10.95.040, foreclosed the Prosecutor's ability to invoke the death penalty unless he has engaged in a complete and individualized assessment of a defendant's mitigating circumstances. This Court can enforce the plain wording of the statute. Judge Kessler did not impermissibly intrude on the King County Prosecutor's charging authority.

D. THE ERROR COMMITTED BY THE PROSECUTOR WAS NOT THE FAULT OF THE DEFENSE

The State seeks to blame the defense for the Prosecutor's flawed decision making in this case. But the errors were committed by the Prosecutor, not the defense team. The defense team repeatedly pointed out to the Prosecutor that it needed more time to read all of the discovery, fully investigate the facts of the case, develop a relationship of trust with Mr. Monfort and his family, develop his entire 41-year personal history (including school, employment and residence in seven states), obtain funding for experts required by the ABA Guidelines, allow for a full investigation by said experts once they were rendered available, develop

theories of mitigation and put together a presentation of mitigating circumstances for consideration by the prosecution. 8/25/10 RP 1-20. There was no rush to make the announcement – trial could not commence until the defense completed its mitigation investigation and its preparations for trial. Discovery was ongoing and much of the forensic analysis had not taken place before September 2, 2010. On August 25, 2010, defense counsel notified Judge Kessler that the State had sent the defense team 127 CD's of discovery materials. 8/25/10 RP 8.

Trial was not set by the parties until May 18, 2012, 22 months after the death notice had been filed. At the February 22, 2013 hearing, Judge Kessler recognized that the State's assertion that trial could not go forward until the death decision was made was disingenuous. He explained that the State knew the defense team was both preparing for trial while continuing on with their mitigation investigation.

But when the defense team explained in the fall of 2010 why it needed more time to complete the mitigation investigation, the Prosecutor refused to withhold his decision. Monfort sought discretionary review by this Court but the State resisted and review was denied. *State v. Monfort*, No. 85109-3; CP 268-273.

The risk of presenting a less than fully developed mitigation packet is clear. In *Dearbone*, 125 Wn.2d at 175, the defense rushed to meet the 30-day deadline.

On *September 13, 1993*, the Superior Court for King County arraigned defendant Solomon Dearbone on two counts of aggravated first degree murder, one count of

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attempted first degree murder, and one count of fourth degree assault. Under RCW 10.95.040(2), the State had 30 days, or until October 13, 1993, to file notice of a special sentencing proceeding.

On *October 4, 1993*, the State requested that defense counsel submit any mitigating information which would contravene seeking the death penalty. Defense counsel told the deputy prosecutor that defendant had fetal alcohol syndrome and probably suffered from organic brain damage. *On October 8, 1993, defense counsel sent a mitigation package which, according to the deputy prosecutor, provided no evidence to support these claims.*

Emphasis added. The defense team not only needs to provide the mitigation package, it must attach detailed and comprehensive support documenting that evidence. The Prosecutor can either conduct the same type of investigation on his own or can wait for the defense to complete their work.

[REDACTED]

E. RCW 10.95.040 DOES NOT INVOLVE A BALANCING TEST OR A PROPORTIONALITY REVIEW

The State, at various points in this case and in *State v. McEnroe* and *State v. Anderson*, No. 88410-2, has suggested that the decision under RCW 10.95.040 involves a “balancing” of the facts of the crime, the mitigation and the aggravators. That is simply not the case. The plain language of the statute confines the prosecutor’s consideration to whether there are sufficient mitigating circumstances to merit leniency.

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In addition, the decision under RCW 10.95.040 does not involve any sort of proportionality review. Nothing in the statute permits the Prosecutor to compare Monfort's circumstances to that of any other person charged with or convicted of aggravated premeditated murder. The statute mandates consideration only of Monfort's mitigating circumstances.

F. JUDGE KESSLER'S RULING IS CORRECT

The evidence in this case is that the Prosecutor did not start with the presumption that there were mitigating factors. The statute does not permit the prosecutor to ask if there are any mitigating factors. On its plain terms it assumes mitigating factors and then asks only if there are not "sufficient mitigating ones." In fact, it appears that the Prosecutor did not consider mitigation at all.

The Prosecutor performed "a flawed and practically useless mitigation investigation." 2/22/13 RP 34. [REDACTED]

[REDACTED]  
[REDACTED] The State continues to allege that its investigation was complete and revealed no mitigation. [REDACTED]

[REDACTED]  
Moreover, even if the actual documents were not before Judge Kessler, Monfort's motion to strike the notice of intent summarized the Prosecutor's investigation for the judge. CP 320-64. The trial prosecutor did not dispute the defense summary or provide any other evidence to Judge Kessler in support of the State's contention that it had complied with RCW 10.95.040. In fact, the deputy prosecutor admitted that if the

defense had presented a mitigation package to the prosecutor that consisted entirely of what the prosecutor's office obtained from its own investigation, defense counsel would not have provided the effective assistance of counsel. 10/26/12 RP 30.

That investigation, performed by an outside investigator, appears to have commenced in late November or early December, 2009, just after the charging decision had been made and before 30 days had elapsed.<sup>4</sup> By September 9, 2010, the Prosecutor told the defense team that "it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials." App. 60. [REDACTED]

After the Prosecutor's investigation concluded, his Deputy stated:

I can tell you from our investigation, there is nothing out there indicating anything other than his lack of criminal history that mitigates the crime here.

App. 545. When the judge asked the Deputy: "How do you know it doesn't exist? You don't know." The Deputy answered: "What we are able to glean; there is nothing in there that fits under what is considered mitigation."

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<sup>4</sup> The State calls the hiring of a mitigation investigator an "additional proactive step." Petitioner's Opening Brief at 12. It is the defense position that a mitigation investigation by the Prosecutor is mandated by RCW 10.95.040.

This appears to be a misunderstanding of the term “mitigation.” In capital proceedings the term is all-encompassing and incorporates “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* was published shortly before the enactment of RCW 10.95.040. Thus, the statutory use of the term “mitigating circumstances” must logically refer to the definition of mitigating circumstances set forth in that case. Here, there is no evidence that the prosecutor engaged in a searching investigation of Monfort’s character or record, such as medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

The State suggests that the term “mitigation” in RCW 10.95.040 means something different for the Prosecutor than for the defense. Petitioner’s Opening Brief at 13, 15. That is – while the State agrees that the defense must conform to the ABA Standards and the duties set out by the United States Supreme Court most recently in *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the Prosecutor’s mitigation investigation need not be as searching.

In light of the legislative history, however, this Court should conclude that the word mitigation in RCW 10.95.040 means the same thing for both parties.

It is clear that in 1981, the Legislature was seeking to enact a statute that addressed the *Lockett* decision. 2<sup>nd</sup> Supp. App. 18. The Legislature used the same word to describe the Prosecutor's post-charging decision as the word used to describe the jury's post-conviction inquiry. The Legislature clearly intended that the State's mitigation investigation pursuant to RCW 10.95.040 be parallel to the mitigation investigation that would be undertaken by the defense. *Wiggins*, is a direct lineal descendant of *Lockett*. See *Wiggins* at 535, citing *Lockett v. Ohio*. Thus, this Court must conclude that the term "mitigation" means the same for both parties and involves a searching investigation of Monfort's character or record, including medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences by the Prosecutor.

In this State, any fact can be mitigating, as evidenced by the decision to spare Gary Ridgway. As this Court noted:

Ridgway was spared because a highly respected, honorable, and thoughtful prosecutor made the decision to stay the hand of the executioner in return for information that would otherwise have died some midnight within the walls of the state penitentiary. The information received in return for a life sentence allowed so many families to, at long last, know what happened to their loved ones.

*Cross*, 156 Wn.2d at 622.

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Judge Kessler was also correct because this Court has consistently stated that the capital sentencing scheme in Washington must be strictly construed. *See, e.g., State v. Martin, supra; State v. Dearbone, supra.* Strict construction of the statute supports Judge Kessler's determination that the Prosecutor must engage in an in-depth examination of the defendant and his circumstances.

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Finally, this Court should reject the Prosecutor's argument that no court can review the Prosecutor's compliance with RCW 10.95.040 on public policy grounds. The administration of the death penalty is the one area of the law where all of the participants' actions – police, prosecutors, defense counsel – are subjected to the strictest scrutiny. Forty-one (41) years ago, in *Furman v. Georgia*, supra, the United States Supreme Court concluded that existing death penalty statutes across the United States violated the Eighth Amendment's prohibition against cruel and unusual punishment because they failed to protect against arbitrary, discriminatory, and random application of capital punishment.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

*Furman*, 408 U.S. at 309-10 (Stewart, J., concurring; citations and footnotes omitted; emphasis added). Writing for the majority, Justice Stewart concluded that executing only 15-20% of the convicted rapists and murders in those jurisdictions where the death penalty was an available punishment offended the Eighth Amendment.

As noted above, RCW 10.95 was enacted in 1981 in response to *Furman*. In *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982), *reversed on other grounds*, 463 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), this Court was asked whether RCW 10.95 protected against the dangers of arbitrary death verdicts. This Court rejected the challenge and took solace in the statute's prophylactic features. *Id.* at 192. Only one justice dissented on this issue.

Seventeen (17) years later in *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80, *cert. denied*, 549 U.S. 1022, 127 S.Ct. 559, 166 L.Ed.2d 415 (2006), the defendant identified the core problem with Washington's death penalty statute. Cross argued that because serial killer Gary Ridgway, who admittedly murdered 48 women, had been spared the death penalty in a plea bargain, his death sentence for far fewer murders was disproportionate. Only a bare majority of this Court found that a "rational explanation exists for Gary Ridgway escaping a death sentence and Dayva Cross not." *Id.* at 622. Five justices found that the procedures in RCW 10.95 provided sufficient protection against arbitrary and unfair death verdicts. Specifically, the Court recounted eight "statutory protections" that it believed insure proportionality. *Id.* at 623-24. One of those "protections" was RCW 10.95.040(1), which the majority said required the prosecutor to consider seriously whether, in any particular case, it would be inappropriate to seek the sentence at all.

The dissent, on the other hand, concluded Cross's sentence was disproportionate because the *Ridgway* case "does not 'stand alone,' as

characterized by the majority, but instead is symptomatic of a system where all mass murderers have, to date, escaped the death penalty.” *Id.* at 641. The dissent also stated:

Properly recognizing and analyzing what has happened in the administration of capital cases in this state inevitably leads to the conclusion that the sentence of death in this case, and generally, is disproportionate to the sentences imposed in similar cases. Contrary to what we had expected to find when we established an analytical framework to conduct our statutory review, that the worst of the worst offenders would be subject to the death penalty, what has happened is the worst offenders escape death.

*Id.*

Information from reported cases and trial judge reports submitted pursuant to RCW 10.95.120 reveal that the death sentence is imposed in Washington in less than 1% of the cases for which the punishment is available, a full 19% less than the 20% figure found unconstitutional in *Furman*. Since the enactment of RCW 10.95 there have been in excess of 7,000 homicide cases filed in Washington State. Of those, there have been nearly 300 convictions for aggravated first degree murder. Of these aggravated murder convictions, the punishment of death was sought about 85 times and imposed in less than half of those cases. In the last 47 years, Washington State has, on average, executed less than one person every ten years. Since 1975, there have been five executions. Three of the condemned were “volunteers” who requested and/or did not challenge the death sentence. Only Charles Campbell and Cal Coburn Brown were

executed involuntarily. Arbitrariness and caprice are the inevitable side effects of such a rarely-imposed punishment of death.

Clearly, when this State's capital punishment statute produces such arbitrary results, the Prosecutor's failure to comply with RCW 10.95.040 is of critical concern. This is particularly true in the present case because Mr. Monfort is an African-American charged with killing a white police officer. "A review of the reports of prosecutions for aggravated first degree murder quickly discloses that African-American defendants are more likely to receive the death penalty than Caucasian defendants." *State v. Davis*, 175 Wn.2d 287, 389, 290 P.3d 43, 92 (2012) (Wiggins, J. dissenting).<sup>7</sup>

In sum, Judge Kessler properly reviewed Monfort's claim that the Prosecutor did not discharge his duty under RCW 10.95.040 and properly found that the Prosecutor had abused his discretion both substantively and procedurally.

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<sup>7</sup>As further evidence of the influence of race in capital punishment, this Court accepted review of *In Re Gentry*, No. 86585-0. In that case, Mr. Gentry argues that his death sentence was tainted by race. He is alleged to have killed a white child. There are three other African-American men on death row: Dwayne Woods, *State v. Woods*, 143 Wn.2d 561, 570-72, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001); Cecil Davis, *State v. Davis*, 141 Wn.2d 798, 809-13, 10 P.3d 977 (2000), *post-conviction relief granted in part*, 152 Wn.2d 647, 101 P.3d 1 (2004); and Allen Gregory, *State v. Gregory*, 158 Wn.2d 759, 811, 147 P.3d 1201 (2006). All three are alleged to have killed women. Woods's and Gregory's victims were white and Davis's victim was Asian.

G. THE COURT SHOULD REJECT THE PROSECUTOR'S  
BELATED SUGGESTION THAT THE REMEDY IS TO  
REOPEN THE STATUTORY PERIOD FOR FILING THE  
DEATH PENALTY

The Prosecutor's failure to properly exercise his discretion in the first instance is not good cause to reopen the statutory period as provided in RCW 10.95.040(2). This is particularly true in this case where, until today, the Prosecutor has insisted that there was *no* cause for him to continue the time to make his decision.

To prove good cause necessary to extend or reopen time for filing death penalty notice, the State must first show an external impediment which prevented it from complying with the requirements of the statute; second, the State must establish that the delay in filing or serving notice did not prejudice preparation of the defendant's case. *State v. Dearbone*, supra. The State cites to *State v. Pettit*, 93 Wn.2d 288, 609 P.2d 1364 (1980), and ignores *Dearbone*. But *Dearbone* specifically addressed the definition of "good cause" in RCW 10.95.040(2). *Pettit* concerned the prosecutor's abuse of discretion under the habitual criminal statute. Here, the State has not even tried to establish an external impediment that prevented the Prosecutor from complying with the requirements of the statute or lack of prejudice to Monfort.

Moreover, the Prosecutor is judicially estopped from making this argument now. Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *See Anfinson v.*

*FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861-62, 281 P.3d 289, 294-95 (2012). There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time. *Id.* A trial court's determination of whether to apply the judicial estoppel doctrine is guided by three core factors: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. *Id.* (internal citations and quotation marks omitted). The argument that the State now makes is inconsistent with the position that it previously took in the trial court and in *State v. Monfort*, No. 85109-3. Accepting the State's argument now creates the perception that the State misled the Court about the need to make the death decision in September 2010.

Finally, accepting the State's position now is unfair to Monfort. It seems unlikely after so vociferously taking the public position that there are no mitigating factors in this case, the Prosecutor will be able to put aside his premature conclusion that there are no mitigating circumstances. As defense counsel pointed out, nearly two years ago:

I think that it is easier for Mr. Satterberg, as a human being, to consider the mitigation and possibly change his position if he hasn't made a public announcement. I think that is true just in human nature.

4/25/13 RP 16.

If, however, this Court believes this is the proper remedy, at the very least, it should order the appointment of a special prosecutor, unburdened by any previously formed assessments, to review the State's flawed mitigation along with the mitigation packet provided by the defense last month. That special prosecutor could make a fresh, unbiased assessment of the mitigating circumstances in this case.

### **III. ARGUMENT ON CROSS APPEAL**

#### **A. ASSIGNMENT OF ERROR**

Judge Kessler erred in failing to dismiss the death notice because the Prosecutor improperly considered the facts of the crime when deciding to file a death notice.

#### **B. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR**

RCW 10.95.040 provides that before filing a death notice a prosecutor must have "reason to believe that there are not sufficient mitigating circumstances to merit leniency." Because that statute makes no provision for considering the facts of the offense in this process but where the King County prosecutor considered the facts of the crime, did the prosecutor violate his duty and must the notice be stricken?

#### **C. ARGUMENT**

There is nothing in RCW 10.95.040 that suggests the prosecutor should consider the particular circumstances of the charged offenses and then weigh those circumstances against the mitigating evidence in deciding whether to seek death. In the absence of such language the

prosecutor is precluded from inferring the circumstances of the charged crime into the statutory standard established for filing a death notice. If the legislature intended the prosecutor to weigh mitigating evidence against the underlying facts of the case, it would have included that language in the statute.

The legislature did in fact direct that capital juries consider the underlying facts of the charged crime in making the life or death decision:

Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: “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). It is significant that the legislature specifically instructed the jury to consider the crime for which the defendant has been found guilty in determining the appropriate sentence, but did not instruct the prosecutor to consider the facts of the charged crimes when deciding whether to file a death notice. By expressly including that consideration in one part of the statute, the legislature impliedly provided that it is not included in other parts of the statute. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.2d 792 (2003); *State v. Meacham*, 154 Wn. App. 467, 472, 225 P.3d 472 (2010). As this Court noted in *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996):

. . . We think, rather, that it is more significant that the Legislature did not include the word “personally” in RCW 10.95.040 as it did in RCW 4.28.080. Where the Legislature uses certain statutory language in one instance,

and different language in another, there is a difference in legislative intent.

Here, the legislature provided language instructing juries to consider the facts of the crime, and omitted that language in the provisions directing when prosecutors may file the death notice. There is a different legislative intent in the two provisions and, as a result, the prosecutor may not consider the facts of the charges in deciding whether to seek death.

The State responded by stating that “the plain language of the statutes” and “common sense” dictate that a prosecutor can and should consider the facts of the crime. Indeed, the State argued that a rule requiring the prosecutor to consider only mitigating evidence “would likely lead to arbitrary application of the death penalty.” But, as Monfort argued above, the death penalty is currently arbitrarily applied in Washington. Arguably, that arbitrary application has been caused by the improper consideration of the facts of the crime before deciding whether to file the death notice.<sup>8</sup>

The plain language of the statute does not permit a consideration of the facts of the crime. And, a prosecutor can easily consider Monfort’s medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences without reference to the fact that the

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<sup>8</sup> The defense suspects that Washington’s statute will never yield results that are anything other than arbitrary and capricious. For example, although there are 39 counties in Washington, it appears that only three counties have sought the death penalty in recent years – King, Snohomish and Pierce. This is likely due to the fact that the remaining counties do not have the money to fund capital prosecutions.

victim of his crime was a police officer. In essence, the State argued that the evidence of mitigation has to be weighed against the status of the victim. RCW 10.95.040 does not permit this kind of weighing.

#### IV. CONCLUSION

Here, Judge Kessler correctly found that the Prosecutor failed to properly discharge his duty under RCW 10.95.040. This Court should affirm his ruling.

Moreover, this Court should also conclude that the Prosecutor may not consider the facts of the crime when making his decision under RCW 10.95.040.

DATED this 13<sup>th</sup> day of May, 2013.

Respectfully submitted,

  
Suzanne Lee Elliott  
WSBA 12634

**CERTIFICATE OF SERVICE**

I certify that on May 13, 2013, I served one copy of the foregoing pleading and the 2<sup>nd</sup> Supplemental Appendix on the following by Email:

Ms. Deborah Dwyer  
Deputy King County Prosecutor  
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I further certify that on May 13, 2013, I served one copy of the foregoing pleading and the 2<sup>nd</sup> Supplemental Appendix by First Class U.S. Mail, postage prepaid on the following:

Mr. Christopher John Monfort  
B/A 209040021  
King County Jail  
505 Fifth Avenue  
Seattle, WA 98104

MAY 13, 2013  
Date

Christina Alburas  
Christina Alburas

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May 13, 2013

Dear Clerk, Ms. Dwyer & Ms. Summers:

Attached for filing in *State of Washington v. Christopher John Monfort*, No. 88522-2, is Monfort's Response to State's Opening Brief and Opening Brief on Issue on Cross-Appeal and Second Supplemental Appendix. Please contact me with any questions or concerns.

Ms. Dwyer and Ms. Summers, please contact me as soon as possible if you would like a hardcopy mailed to you as well.

Thank you for your kind attention.

Sincerely,  
Christina Albouras  
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\* \* \* \*

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