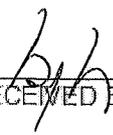


RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 18, 2013, 11:30 am
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 88522-2


RECEIVED BY E-MAIL

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

MONFORT'S CROSS-MOTION FOR DISCRETIONARY REVIEW

By:

SUZANNE LEE ELLIOTT
WSBA 12634
Attorney for Defendant
Law Office of Suzanne Lee Elliott
Suite 1300 Hoge Building
705 Second Avenue
Seattle, WA 98104

TABLE OF CONTENTS

I. IDENTITY OF MOVING PARTY1

II. DECISION1

III. ISSUES PRESENTED FOR REVIEW2

IV. STATEMENT OF THE CASE.....2

 A. FACTS RELEVANT TO THE PROSECUTOR’S ABUSE OF DISCRETION2

 B. FACTS RELEVANT TO THE JURY’S ABILITY TO APPLY THE WASHINGTON CAPITAL PUNISHMENT STATUTE IN A CONSTITUTIONAL MANNER10

V. ARGUMENT13

 A. THE PROSECUTOR ABUSED HIS DISCRETION WHEN HE BASED HIS DECISION TO SEEK THE DEATH PENALTY ON THE FACTS OF THE CHARGED CRIME RATHER THAN ON A REASONED DETERMINATION THAT THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY AS REQUIRED BY RCW 10.95.04013

 B. WASHINGTON’S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE THE UNCONTESTED EVIDENCE IS THAT JURIES DO NOT AND CANNOT APPLY THE STATUTE IN A CONSTITUTIONAL MANNER....19

VI. CONCLUSION24

TABLE OF AUTHORITIES

Cases

<i>Eddings v. Oklahoma</i> , 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).....	22
<i>In re Rupe</i> , 115 Wn.2d 379, 798 P.2d 780 (1990).....	22
<i>Lockett v. Ohio</i> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)21, 22	
<i>Morgan v. Illinois</i> , 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).....	23
<i>Roberts v. Louisiana</i> , 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977).....	24
<i>State v. Bartholomew</i> , 101 Wn.2d 631, 683 P.2d 1079 (1984).....	24
<i>State v. Cronin</i> , 130 Wn.2d 392, 923 P.2d 694 (1996).....	15
<i>State v. Davis</i> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	21
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	15
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105, <i>cert. denied</i> , 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).....	23
<i>State v. McEnroe</i> , No. 88410-2.....	17
<i>State v. Meacham</i> , 154 Wn. App. 467, 225 P.3d 472 (2010)	15
<i>Turner v. Murray</i> , 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986)...	19
<i>Witherspoon v. Illinois</i> , 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, <i>reh'g denied</i> , 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968).....	23
<i>Woodson v. North Carolina</i> 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).....	24

Statutes

RCW 10.95.030	14
---------------------	----

RCW 10.95.040 passim

RCW 10.95.060 15

Rules

RAP 2.3 13, 16, 18

Constitutional Provisions

Const., art. I, § 14 (Excessive Punishment) 19

Const., art. I, § 22 (Amend. 10) (Confrontation) 19

Const., art. I, § 3 (Due Process) 19

U.S. Const., amend. VIII (Cruel & Unusual Punishment) 19

U.S. Const., amend. XIV (Due Process) 19

I. IDENTITY OF MOVING PARTY

Christopher John Monfort, through his attorney Suzanne Lee Elliott, asks this Court to accept review of the decision designated in Part II of this motion. If this Court does not accept review of the State's Motion for Discretionary Review, both of these issues will be moot. Thus, review should be accepted but only if there is any actual risk that the State will be permitted to seek the death penalty.

II. DECISION

On March 7, 2013, Judge Kessler struck the death notice because the King County Prosecutor failed to properly exercise his discretion in considering the mitigating evidence before seeking the death penalty. In that order Judge Kessler also entered the following orders that Monfort wishes to have reviewed:

1. "Ordered that the defendant's motion to strike the death notice because the plaintiff considered the offense in weighing mitigating factors is denied."
2. "Ordered that defendant's motion to strike the death notice because jurors in other states and other cases were confused by the instructions given in other states and other cases is denied."
3. "Ordered that defendant's motion to strike the death notice because the Washington pattern jury instructions are confusing is denied."
App. 707-708.

III. ISSUES PRESENTED FOR REVIEW

1. 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 case, did the prosecutor violate his duty and must the notice be stricken?

2. Is Washington’s death penalty scheme unconstitutional because the uncontested evidence is that juries do not and cannot apply the statute in a constitutional manner?

IV. STATEMENT OF THE CASE

In light of the very constrained briefing schedule, the importance of these issues and the fact that no clerk’s papers or transcripts have been transmitted to this Court by the Superior Court Clerk, Monfort has filed a fairly voluminous Appendix that supports the factual assertions made below. Monfort will also cite to this Appendix in any further briefs that he files in this case in the coming week.

A. FACTS RELEVANT TO THE PROSECUTOR’S ABUSE OF DISCRETION

In October 2012, Monfort moved to strike the death notice because the Prosecutor abused his discretion under RCW 10.95.040 when he

considered the facts of the offense rather than Monfort's mitigating circumstances when deciding to seek the death penalty. App. 187- 231.¹

On November 12, 2009, the State charged Mr. Monfort with five separate crimes arising out of a series of three separate incidents on October 22, 2009, October 31, 2009 and November 6, 2009. The first two counts allege that Mr. Monfort committed the crimes of arson in the first degree and attempted first degree murder at the City of Seattle's Charles Street vehicle maintenance facility on October 22, 2009. The third and fourth counts allege that, with premeditated intent, Mr. Monfort killed SPD Officer Timothy Brenton and attempted to kill Officer Britt Sweeney on October 31, 2009. The fifth count alleges that with premeditated intent, Mr. Monfort attempted to kill SPD Sergeant Gary Nelson on November 6, 2009.

When announcing the charges, the Prosecutor Attorney asserted that Monfort "waged a one man war" against the Seattle Police Department and stated that: "We've never seen anything like this." When discussing the possibility that he would seek Mr. Monfort's execution, the Prosecutor commented that: "The death penalty is reserved in the State of Washington for the worst of the worst. We're going to take our time, but there is no greater crime in my view than the murder of a police officer." App. 209-212, 214.

¹ The motion was argued on October 26, 2012, App. 516-564, but Judge Kessler did not issue a written order until March 7, 2013.

On December 14, 2009, the King County Prosecutor's Chief Criminal Deputy Mark Larson² sent defense counsel a letter regarding the timing for submitting a mitigation package. App. 60. In that letter the State set a deadline of May 15, 2010, for submission of mitigation materials. The Prosecutor said he would issue his decision on the death penalty on June 15, 2010. The Prosecutor's letter also explained his general policy on the timing for submitting mitigation materials:

I understand that this time frame may be shorter than in some previous cases, but it has been our experience that taking more time does not result in any appreciable difference in the mitigation materials, and the longer period unnecessarily delays the 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the period described in this letter, and that the public interest is better served by an interval after arraignment closer to that contemplated in the statute.

Id.

The Prosecutor's December 14, 2009 letter regarding this case is remarkably similar if not identical to the letters sent in other aggravated murder cases during the same time period. Each letter contained identical language regarding the perceived benefits of maintaining a short time period for submitting mitigation. App. 126-130.

² The elected prosecutor makes the decision regarding the death penalty. Many of the letters and pleadings sent to trial counsel in this case were signed by Mr. Larsen or other Deputy Prosecuting Attorneys. In order to avoid needless confusion, Monfort will simply refer to the "the Prosecutor."

On June 4, 2010, the parties agreed to extend the deadline for filing the death notice to September 3, 2010. App. 62-63. As the September 3, 2010 deadline approached, the defense again asked the Prosecutor for additional time to complete and submit a mitigation package so that he would have an adequate factual basis to determine whether there were mitigating circumstances that would preclude seeking the death penalty against Monfort. App 1-35, 84. The defense pointed out that the Prosecutor had agreed to longer extensions of time in other potential capital cases. App. 20-35.

The Prosecutor refused the defense request for additional time and indicated that he would proceed with its announcement on the death penalty “on or before September 3, 2010.” App. 86. The Prosecutor wrote:

As you know, eight months have now passed since Mr. Monfort was arraigned on the current charges and nine months have passed since he was charged with these crimes. Our office has provided you with extensive discovery regarding the crimes with which he is charged and the evidence implicating him in those crimes. We have also provided you with all the reports generated by a private investigator we retained to look into your client’s background.

Id. The defense responded by pointing out that the mitigation investigation in this case was daunting:

At the time of the charged offenses, Mr. Monfort was 41 years old and had never been incarcerated. As a result of his relatively advanced age (for a capital defendant) and his clean record, Mr. Monfort lived in at least seven states and held numerous jobs throughout the country prior to his

arrest. There are friends, relatives and former teachers with important information about Mr. Monfort's life and upbringing currently living in at least sixteen different states. In addition, Mr. Monfort attended school or worked in at least seven states and we have had to gather records from various institutions in each of those states. That effort is ongoing.

App 88.

Because the Prosecutor would not relent, the defense filed a motion asking the court to preclude the State from announcing its decision on seeking the death penalty until the defense had adequate time to submit a mitigation package. App. 1-35. In denying the defense motion, the court concluded that it lacked the authority to order the State to delay announcing its decision on seeking the death penalty but also noted that the State was "needlessly rushing to judgment" and that if in fact the court did have the authority to direct the State to delay announcing its decision, it would exercise that authority and do so.³

At a subsequent hearing, Judge Kessler said that he had made it clear on a number of occasions he had received sealed defense status reports that indicated the defense was working diligently on mitigation, App. 543. He noted that despite that fact, the State had responded with "well too bad." App. 543. In response, the Deputy Prosecutor opined that "there are only two ways to look at it." Either it was a "tactical decision" by defense counsel to fail to provide the Prosecutor with

³ The defense sought discretionary review of the decision but review was denied. App. 183-86.

mitigation information within the Prosecutor's timetable or there was nothing mitigating in Monfort's life. He 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." He clarified that it "doesn't exist" because "we haven't seen it" apparently referring to the fact that the defense had not yet provided a completed mitigation presentation. App. 546.

The Prosecutor's Notice of Intent to Seek the Death Penalty was filed on September 3, 2010. App. 113.

During subsequent press conferences and media interviews, Mr. Satterberg made it clear that his focus in electing to seek Mr. Monfort's death was the facts of the charged crimes and not any possible mitigating factors in Mr. Monfort's background:

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

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

Street Vehicle Services Facility used by the Seattle Police Department.

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

App. 224-225.

Although the Prosecutor's afterthought regarding "the absence of significant mitigating factors" pays lip service to his statutory obligations, it is clear from the entirety of his statement that the decision to seek the death penalty was based upon the facts of the charged crimes and not an absence of mitigating factors. In other interviews the Prosecutor apparently made no reference to the absence of mitigating circumstances and focused entirely on the alleged facts of the crimes:

At the end of the day this is an extremely serious case. It's about as serious as it gets when you ambush police and try to kill multiple police officers. So this is a case a jury needs to hear. And it's a case that a jury needs to have all options on.

App. 229.

In a subsequent interview with Northwest Public Radio, the Prosecutor went further in explaining his decision to seek Mr. Monfort's execution. In response to the criticism that he was rushing to judgment, the Prosecutor described the work done by that investigator in expansive terms:

We hired our own investigator who spent months talking to everybody who Monfort came into contact with throughout his life and I think we have a pretty good picture of who this individual is.

App. 231.

The Prosecutor was apparently referring to an investigation conducted by Aimee Rachunok, a private investigator hired by the King County Prosecutor's Office. App. 191-92. Rachunok interviewed a total of 25 individuals who knew Mr. Monfort. Rachunok did not interview Monfort's mother or aunt who knew him better than anyone else in the world and who were readily available. Moreover, it goes without saying that these were the people who knew Monfort his entire life.

Of the 25 people Rachunok spoke with, 16 knew Mr. Monfort from his time at Highline Community College, either directly through the school or through jobs he did while at Highline. Of the remaining nine witnesses, four were co-workers of Mr. Monfort's either at the King County Juvenile Detention Center where he volunteered during his time at the University of Washington or at Pilot Freight Services where he worked in 2009.

Three of the remaining witnesses can be described as family members. One is his former stepfather who was married to Monfort's mother Suzan for several years while Monfort was in junior high school. The second is married to one of Monfort's second cousins and the third is Monfort's wife, Toi Limolansuk. Monfort and Limolansuk married in 1995 and never divorced; however, they only lived together for

approximately one month and maintained very infrequent contact over the ensuing years.

The remaining two witnesses hardly knew Monfort at all. One was a co-worker at American Freightways in Shreveport, Louisiana who indicated he had “very few memories related to Monfort” and that in his brief contact with Monfort he had no recollection of them discussing anything personal. The final witness met Monfort briefly on May 25, 1991, when the two were involved in a traffic accident.

Of the 25 interviews that Rachunok conducted, 24 were done over the phone and one was a brief email correspondence. None were conducted face-to-face and she did not do any follow-up interviews.

In oral argument on this issue, the Deputy Prosecutor argued that, despite the plain wording of the statute, the Prosecutor decided a mixed question – both whether the State would file charges and, at the same time, whether to seek the death penalty. The Deputy acknowledged that the Prosecutor would look at the strength of the State’s case and “can’t be blind to how that jury would interpret the case.” App. 538. He asserted that otherwise the Prosecutor might have to take the word of a witness who “has been talked to solely for the purpose of mitigation.” App. 539.

B. FACTS RELEVANT TO THE JURY’S ABILITY TO APPLY THE WASHINGTON CAPITAL PUNISHMENT STATUTE IN A CONSTITUTIONAL MANNER

Monfort also moved to strike the death notice based upon extensive peer-reviewed social science research that demonstrates that

jurors in capital cases make their decisions to impose the death penalty in an unconstitutional manner. App. 250-461, 565-706.⁴

Monfort's motion was based upon the work done by the Capital Jury Project [CJP], a national research endeavor funded by the National Science Foundation. It is operated by law professors, psychologists, criminologists, and other social scientists. The CJP interviewed over 1,200 former jurors from 354 capital trials in fourteen states. These states were chosen for geographical diversity and for coverage of the different types of capital statutes now in effect. The CJP thoroughly analyzed how capital jurors go about making capital sentencing decisions, and compared their findings with the Supreme Court's proclamations.

The CJP found constitutional defects with the capital punishment process in every state it studied. This consistency of the results of their investigation establishes that there are fundamental problems with existing capital punishment statutes structuring for jurors death penalty decision making, not just problems specific to the laws or procedures of any particular state.⁵

⁴ Monfort has attached the core motion, the supporting declarations and PowerPoint presentation and the testimony on this issue. There were also more than 1,000 pages of scholarly articles attached to the motion. Given the extremely short timeline set by the Court for review of this Motion, counsel has not placed these articles in the appendix. Suffice it to say that the articles supported the testimony and the science was largely unchallenged by the State.

⁵ The fundamental constitutional flaws with capital prosecutions in this country are leading to its abolition. Maryland's bill to abolish the death penalty will likely be signed by Governor Martin O'Malley next week. Prior to 2007, no legislature had abolished the death penalty since the 1960s. The other 5 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.

In support of this motion, Monfort presented in-court testimony about CJP's findings from Dr. Wanda Foglia, a Ph.D. in criminology who teaches at Rowan University in Glassboro, New Jersey. She also testified that she has a J.D. from the University of Pennsylvania Law School.

Dr. Foglia testified regarding seven specific findings regarding jury decision making in capital cases. Those findings are: 1. Jurors make premature decisions regarding the death penalty; 2. Jury selection fails to remove jurors who will automatically vote for the death penalty; 3. Jurors fail to understand capital jury instructions; 4. Jurors fail to recognize that the death penalty is never mandatory; 5. Jurors fail to recognize that they have primary responsibility for the sentencing decision; 6. Jurors continue to be influenced by the race of the defendant and the race of the victim in deciding whether to impose a sentence of death; and 7. Jurors underestimate non-death sentencing alternatives.

The court found Dr. Foglia's testimony wholly credible.⁶ The specific findings will be discussed in depth below. Nevertheless, Judge Kessler denied the motion. App. 707.

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.

⁶ The defense also presented evidence regarding the results of a mock juror survey conducted on a hypothetical aggravated murder case with students at Highline Community College's paralegal program. Judge Kessler found that the information gleaned from this mock juror study does not have any value because mock jurors,

V. ARGUMENT

Monfort will discuss why review should be granted for each issue separately in the arguments below.

A. THE PROSECUTOR ABUSED HIS DISCRETION WHEN HE BASED HIS DECISION TO SEEK THE DEATH PENALTY ON THE FACTS OF THE CHARGED CRIME RATHER THAN ON A REASONED DETERMINATION THAT THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY AS REQUIRED BY RCW 10.95.040

Pursuant to RAP 2.3(b), this Court may review a trial court order if the moving party demonstrates that:

- (1) The superior court has committed an obvious error which would render further proceedings useless; or
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act

Here, Judge Kessler committed error or probable error in failing to strike the death notice because the Prosecutor considered the facts of the case instead of mitigating circumstances when deciding to seek the death penalty. In doing so, he has rendered any possibility that this case might be resolved short of trial and, thereby limited Monfort's freedom to enter a plea if he so wished.⁷ The Prosecutor's statements and his minimal

particularly in the context of a capital case, will not have the intellectual and emotional involvement of a real death penalty juror. Thus, nothing Monfort argues here is based upon that survey.

⁷ On September 2, 2010, the defense offered to enter a plea of guilty in exchange for a sentence of life in prison without the possibility of parole but the Prosecutor "wasn't interested in discussing it." App. 229.

mitigation investigation reveal that his only consideration in seeking the death penalty was the facts of the crime.

RCW 10.95.040 sets out the procedures that prosecuting attorneys must follow when electing to seek death for a charge of first degree aggravated murder. Subsection 1 provides as follows:

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

As Monfort argued below, the presumptive sentence for aggravated murder in Washington is life imprisonment without the possibility of parole. RCW 10.95.030. Washington courts require strict compliance with RCW 10.95.040 before the State can seek to overcome that presumption. In addition to the procedural notice requirement, RCW 10.95.040 restricts the prosecutor from seeking the death penalty to cases where “there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” The standard established by the Legislature in determining whether the State may file a death notice is the sufficiency of the mitigating evidence. A prosecutor must affirmatively have reason to believe there is an absence of adequate mitigating evidence in the case before he can seek to file a death notice.

There is nothing in RCW 10.95.040, however, 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.3d 792 (2003); *State v. Meacham*, 154 Wn. App. 467, 472, 225 P.3d 472 (2010). As the Washington Supreme 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. App. 236. 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.” App. 238.

But the plain language of the statute does not permit a consideration of the facts of the crime. And a prosecutor can easily consider only the fact that the defendant is mentally ill, under duress or a minor participant without reference to the fact that the victim 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.

Moreover, RAP 2.3(b)(4) provides that this Court may take review if the parties or the Superior Court have certified that the order involves “a controlling question of law as to which there is substantial ground for a

difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” There is no certification here, but clearly there is substantial disagreement as to whether the King County Prosecutor abused his discretion under RCW 10.95.040. If this Court agrees with Monfort, the ultimate termination of the litigation *before trial* would actually become possible. Without the unwarranted threat of death, the parties could enter into meaningful negotiations regarding a plea agreement.

Further, this Court has recently accepted review in *State v. McEnroe*, No. 88410-2. In that case the issue is whether the Prosecutor abused his discretion when, instead of considering the mitigating evidence about Mr. McEnroe and his co-defendant Ms. Anderson, he considered the amount and nature of the evidence against the defendants. The issue Monfort seeks review of in this case is closely related to the issue raised in *McEnroe*. Both concern the Prosecutor’s misreading of RCW 10.95.040.

This issue is also closely related to the ruling that the State seeks to have reviewed here. That issue is whether the Prosecutor abused his discretion when he failed to consider the wealth of mitigating materials available to him by September, 2010 or, if such materials were not readily available, to wait until the defense team completed their constitutionally mandated duties to fully investigate any mitigating factors.

Judicial economy would be served by considering these three interrelated issues now.

In addition, although not part of the RAP 2.3(b) criteria, it is obvious that this is a case involving a fundamental and urgent issue of broad public import, which requires prompt and ultimate determination. In the last year there has been intense public scrutiny of the administration of the death penalty in those few remaining counties where elected prosecutors continue to file notices of the intent to seek the death penalty. The King County Office of Public Defense has reported that legal costs for the defense team in this case alone have topped \$2 million. The prosecution costs are not as transparent but certainly between the Prosecutor's Office, the police agencies and state experts there has been an equally large expenditure of public funds. As recently as February 6, 2013, the Seattle Weekly ran a cover story on this case. The public's interest appears to have increased in the wake of Mr. Monfort's plea of not guilty by reason of insanity.

The issue of costs is an issue of broad public import. If the prosecutor violated his duties under RCW 10.95.040 in this case, then there is no reason to expend additional public resources in seeking a death verdict. Nothing that will occur between now and the time of trial can correct the error that has been made. Thus, if Monfort's analysis of the statute is correct, the time to stop these expenditures is now.

B. WASHINGTON'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE THE UNCONTESTED EVIDENCE IS THAT JURIES DO NOT AND CANNOT APPLY THE STATUTE IN A CONSTITUTIONAL MANNER

Monfort moved to strike the death notice because the application of RCW 10.95 by jurors is unconstitutional because jurors in capital cases engage in arbitrary and discriminatory death decisions in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and Const. Art. I §§ 3, 14 and 22 (Amend. 10).

Race cannot play any role in the capital jury's decision-making. "In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Turner v. Murray*, 476 U.S. 28, 33, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Monfort presented evidence that the responses of the CJP jurors adds to the existing evidence that race continues to impermissibly influence who gets the death penalty in this country. App. 379-381, 642-646. The United States General Accounting Office's [GAO] review of prior research showed that 82% of the studies indicate that defendants were more likely to get the death penalty if the victim was white. The GAO review, as well as other research, has found that the death penalty is also more likely when the defendant is black, and especially when the defendant is black and the victim is white.

The more recent research done by the CJP also demonstrates that the process of capital jury decision-making is influenced, not only by the

race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors. CJP data demonstrates that along gender lines, the outcome of a capital jury's verdict is greatly dependent on how many white males make it on the jury, and whether any African American males serve as jurors.

The data demonstrates, for instance, that white male capital jurors (generally speaking) do not experience lingering doubt about the defendant's guilt. They see the defendant as remorseless and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe that the defendant will be dangerous in the future unless executed.

On the other hand, African American male capital jurors (generally speaking) frequently have at least some doubts about the evidence of guilt. They are able to see the defendant as someone who is sorry for what he has done. They are able to put themselves in the defendant's situation and understand what it must be like for the defendant's family. And, they do not see the defendant as someone who will hurt other people in the future.

Of all of the flaws identified by the CJP, this is the one that this Court can find necessitates striking the death notice now. Mr. Monfort is a black male and Officer Timothy Brenton was white. Race is an issue in this capital case. It would be difficult to imagine a more arbitrary circumstance than having to depend on the racial composition of the jury for a life sentence. Nevertheless, the CJP data demonstrates that the outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall racial composition of the jury as a whole. *Id.*

And it is clear that there is already a problem with race-based death decisions in Washington. Justice Wiggins, in his dissent in *State v. Davis*, 175 Wn.2d 287, 389, 290 P.3d 43, 92 (2012), said that: “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.” As Justice Wiggins noted: “Attitudes about race can be so deeply buried in our individual and collective unconscious that it is difficult to evaluate their effect on our judgments or the judgments of others.” This is not an issue that can be cured by careful voir dire or tepid jury instructions that remind jurors that they should keep an open mind.

Other flaws will undoubtedly deprive Monfort of a fair trial. Since *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the United States Supreme Court has repeatedly made it clear that capital jurors must be permitted to consider a wide range of mitigating circumstances in deciding whether death is the appropriate sentence. Monfort presented evidence via Dr. Foglia that the CJP data shows that close to half of those who served as capital jurors failed to realize that they were allowed to consider mitigating factors that were not listed in the statute. App. 373-377. Overall, an astonishing 44.6% failed to understand that they were allowed to consider any mitigating evidence. 66.5% of jurors in all 14 states failed to realize that unanimity was not required for findings of mitigation. While no jurisdiction requires the defendant to prove mitigation beyond a reasonable doubt, the CJP data reveals that

almost half of all CJP jurors (49.2%) erroneously assumed that this heightened standard of proof was applicable. *Id.* at 69. Conversely, even when the statutes of most states explicitly required proof beyond a reasonable doubt for findings of aggravation, over one quarter (29.9%) of the jurors failed to realize the higher standard of proof applied. And if the evidence proves that the defendant will be dangerous in the future, 30% of jurors in both life and death cases believe, incorrectly, that the law requires them to impose a death sentence.

In this case, Mr. Monfort has entered a plea of not guilty by reason of insanity. Thus, it is plain that he has compelling mitigation evidence and will be asking jurors to forgo the death penalty based upon his mental health. But the evidence proves that nearly half will misunderstand that his mental health is a compelling reason to choose life in prison rather than death.

Premature decision-making will also likely prevent Monfort from receiving a fair trial. App 365-368, 582-600. The Eighth and Fourteenth Amendments dictate that there needs to be an individualized determination of the appropriate sentence. *Lockett*, *supra*. Just as the statutory scheme cannot preclude consideration of mitigating evidence, so too “the sentencer [may not] refuse to consider as a matter of law, any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *In re Rupe*, 115 Wn.2d 379, 383-84, 798 P.2d 780 (1990). Yet the evidence produced by Monfort via Dr. Foglia established that the CJP data shows 50.8 % of all capital jurors make their

sentencing decision before the penalty phase begins. These jurors feel strongly about their decision. And they do not waiver from it over the course of the trial. 97.4% of those who had taken a premature stance for death indicated they felt strongly about their early pro-death stance, including 70.4% who indicated that they were “absolutely convinced” and 27% who were pretty sure.

Monfort’s right to a fair trial will also be denied by “death qualification” of the panel. Potential jurors who have scruples about the death penalty are not automatically disqualified from serving on a capital jury. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, *reh’g denied*, 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968); *State v. Gentry*, 125 Wn.2d 570, 633-34, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). *Witherspoon*’s prohibition against a capital jury biased toward death was extended in *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), to require the disqualification of death-biased jurors. The *Morgan* Court held that potential jurors who would automatically impose a sentence of death without regard to mitigating circumstances are disqualified from serving as capital jurors.

But Monfort presented evidence that the CJP survey results in documented profound deviations between what the capital jurisprudence requires and what actual capital jurors believe. Many jurors who had been screened as capital jurors under *Morgan* standards, and who decided an actual capital case, approached this task believing the death penalty was

the only appropriate penalty for many of the kinds of murders. In effect, mandatory death penalty laws banned by the federal and state Supreme Courts under *Woodson v. North Carolina* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), and *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), are still being applied by jurors despite the procedural safeguards of *Morgan* and discretionary statutory schemes on which jurors are instructed. App 368-72, 601-618.

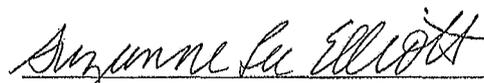
By failing to strike the death notice based upon the uncontested CJP findings, the trial court committed error or probable error that will render further proceedings useless. This Court should not sanction proceeding to trial when science establishes that the jurors will be unable to render a verdict in a constitutionally valid manner. Thus, this Court should review these issues now.

VI. CONCLUSION

For the reasons stated, if this Court grants review of the State's Motion for Discretionary Review, this Court should grant cross-review of both issues raised by Monfort in this Cross-Motion.

DATED this 18th day of March, 2013.

Respectfully submitted,


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

I certify that on March 18, 2013, I served one copy of the foregoing pleading and accompanying appendix by Email on the following:

Ms. Deborah Dwyer
Deputy King County Prosecutor
Deborah.Dwyer@kingcounty.gov

Ms. Ann Summers
Deputy King County Prosecutor
Ann.Summers@kingcounty.gov

18 Mar 2013

Date



William Hackney

OFFICE RECEPTIONIST, CLERK

To: William Hackney
Cc: suzanne-elliott@msn.com; calbouras@hotmail.com
Subject: RE: State v. Monfort, No 88522-2

Rec'd 3-18-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: William Hackney [<mailto:william@davidzuckermanlaw.com>]
Sent: Monday, March 18, 2013 11:23 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: suzanne-elliott@msn.com; calbouras@hotmail.com
Subject: State v. Monfort, No 88522-2

Attached for filing in *State v. Monfort*, No.88522-2, is Monfort's cross-motion for discretionary review, Monfort's statement of grounds for direct review, and Monfort's motion for permission to file 24-page cross-motion for discretionary review. Per Ms. Elliott's correspondence with the Clerk of the Court, the lengthy appendix to the cross-motion for direct review will be sent to the Court via FedEx overnight.

These pleadings are filed by Suzanne Lee Elliott, WSBA #12634, 206-623-0291, Suzanne-elliott@msn.com. Thank you for your assistance.

~William Hackney
Legal Assistant

SUPREME COURT NO. 88522-2

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

SEE VOLUMES I AND II FOR APPENDICES TO
MONFORT'S CROSS-MOTION FOR DISCRETIONARY
REVIEW