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Supreme Court No. 88522-2

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IN THE WASHINGTON SUPREME COURT

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STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

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MONFORT'S RESPONSE TO STATE'S MOTION FOR  
DISCRETIONARY REVIEW

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 ORIGINAL

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## I. IDENTITY OF RESPONDING PARTY

Christopher John Monfort, through his attorney Suzanne Lee Elliott, asks this Court to deny the State's request for review because Judge Kessler had the power to strike the death notice and was correct in doing so.

## II. ARGUMENT

### A. THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY IS SUBJECT TO JUDICIAL SCRUTINY – SUCH SCRUTINY DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

The State seems to believe that the Prosecutor's decision regarding the death penalty can never be subject to any judicial scrutiny. But this is not true. 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 1, 24-25, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). Before the death penalty can be sought, there must be "reason to believe that there are not sufficient mitigating circumstances to merit leniency." *Campbell*, 103 Wn.2d 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 691, 693, 763 P.2d 823 (1988), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989). 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).

Even the State admits that 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.

B. THE TRIAL COURT'S ORDER WAS NOT PREMATURE

This Court has previously reviewed the prosecutor's compliance with RCW 10.95.040 before trial. *See State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994). As Monfort argued in his Cross-Motion for Discretionary Review, there is nothing that can now cure the Prosecutor's failure to follow the statute. The trial court properly concluded that there is no reason to engage in the enormous waste of public funds that proceeding with an improperly sought penalty phase would entail.

C. THE TRIAL COURT'S ORDER WAS MADE AFTER THE STATE REFUSED TO ALLOW DEFENSE COUNSEL SUFFICIENT TIME TO COMPLETE THEIR CONSTITUTIONALLY MANDATED DUTIES

The State seeks to blame the defense for the Prosecutor's flawed decision making in this case. But the errors in this case 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. 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. The defense had yet to arrange for full psychological and medical testing for the defendant.

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 that 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.

And 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 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.

D. JUDGE KESSLER'S RULING WAS CORRECT

The evidence in this case is that the Prosecutor did not start with the presumption that there were mitigating factors in this case. 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. The investigation was turned over to Judge Kessler and the defense in April, 2010. *See* Supplemental Sealed Appendix. Judge Kessler reviewed these materials in camera. Supp. App. 44 (Letter from Baird to Defense Team dated April 2, 2010). It has been provided to this court under seal because, although the Prosecutor's Office has provided it to the defense, that Office continues to assert a work product privilege and because mitigation packages are not public records. *Cowles Pub. Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 45 P.3d 620 (2002). It is being provided to this Court because the State is challenging Judge Kessler's basis for knowledge of its contents. The State has also alleged that its investigation was complete and revealed no mitigation. A review of the sealed materials will demonstrate that is not true. Counsel will reference only those portions necessary to rebut the State's claim that review is merited.

That investigation, performed by an outside investigator, appears to have commenced in late November or early December, 2009. 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. But as early as February, 2010, the Prosecutor’s mitigation investigator had noted that there were many areas even in her report that needed additional investigation. *See* Supp. App. 58.

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.”

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). The United States Supreme Court requires that a mitigation investigation “comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor,” incorporating medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and

cultural influences. *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003), citing and adopting approvingly ABA Guideline for the Appointment and Performances of Defense Counsel in Death Penalty Cases. 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.

This misunderstanding is demonstrated by the fact that, contrary to the Deputy's statement, the Prosecutor's own mitigation investigation reveals many mitigating factors. Monfort had no criminal history, up until this offense he had completed college, was employed, had the love and support of his mother and aunt and volunteered with juveniles.<sup>1</sup> *See, e.g.*, Supp. App. 7-11, 37-38, 40, 99, 110. Most glaring are the statements suggesting that Monfort's act was completely out of character. Supp. App. 34, 38, 122, 127. A number of the witnesses suggested that that Monfort

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<sup>1</sup> The report provided by the Prosecutor does not contain verbatim accounts of the questions posed to the interviewees. There are only summaries of her conversations. But outside investigator's report suggests that she questioned some of the witnesses about Monfort's political beliefs. For example, in several places she notes what witnesses recalled in terms of discussions with Monfort about his political beliefs. Supp. App. 18-19, 27, 35-36. At one point she notes that documentation shows that in college Monfort "spoke out against the Patriot Act." Supp. App. 53. Like race, religion and gender, a person's free expression of his or her political beliefs should have no bearing on the Prosecutor's death penalty determination.

must have had some sort of mental breakdown because the alleged crimes were so out of character for him. Supp. App. 18, 19, 38.<sup>2</sup>

E. 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.

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

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<sup>2</sup> A careful reading of the investigation also leaves the reader with the impression that some of the interviews were not about mitigation at all but rather about aggravation. Her reports indicate that she told every witness that she is an investigator who is hired by the Prosecutor "to conduct an investigation into the charged defendant." It does not appear that she told any of the witnesses that she wanted to talk them about any of the reasons Monfort should be spared the death penalty. For example, the investigator spent a considerable amount of time interviewing people who thought that Monfort had rigged a student election. One witness only met Monfort one or two times and was only interviewed to discuss this alleged voting fraud. Supp. App. 30-31, 57.

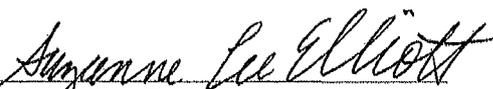
determination of whether to apply the judicial estoppel doctrine is guided by three core factors: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the 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 misleads the Court about the need to make the death decision in September 2010. In addition, 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 factors in this case.

### III. CONCLUSION

For the reasons stated, this Court should deny review of the State's Motion for Discretionary Review.

DATED this 20th day of March, 2013.

Respectfully submitted,

  
Suzanne Lee Elliott  
WSBA 12634

**CERTIFICATE OF SERVICE**

I certify that on March 20, 2013, I served one copy of the foregoing pleading by Email and I served one copy of the accompanying sealed supplemental appendix by hand-delivery on the following:

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William Hackney

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Attached for filing in *State v. Monfort*, No.88522-2, is Monfort's response to the State's motion for discretionary review. The sealed appendix will be sent to the Court via FedEx overnight, and I'm about to go hand-deliver a copy to the King County Prosecutor's Office.

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

~William Hackney  
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