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NO. 88522-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

vs.

CHRISTOPHER JOHN MONFORT,

Respondent/Cross-Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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FILED
SUPREME COURT
STATE OF WASHINGTON
2013 JUN -14 A 10:46
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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. They are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. *See* RCW 36.27.020(4). As such, they have a vital interest in any action that seeks to diminish their independence or that seeks to delay resolution of cases.

II. ISSUES PRESENTED

1. What challenges may a defendant bring to the accusatorial decision?
2. What factors may a prosecutor consider in making a charging decision?

III. STATEMENT OF THE CASES

The facts as presented in the briefs of the parties are adequate for resolution of these cases.

IV. ARGUMENT

- A. A DEFENDANT'S RIGHT TO PARTICIPATE IN OR AFFECT THE ACCUSATORIAL PHASE OF A CRIMINAL MATTER IS EXTREMELY CIRCUMSCRIBED.

The Washington constitution divides governmental authority into three branches—legislative, executive, and judicial. Before a person can be punished for a crime, all three branches of government must act; the

legislature by defining crimes and sentences, the executive by collecting evidence and seeking an adjudication of guilt; and the judiciary by determining guilt and imposing an appropriate sentence. *State v. Rice*, 174 Wn.2d 884, 279 P.3d 849 (2012).

The instant appeal deals with repeated challenges to the executive branch's charging decision, and repeated invitations to the trial court to review that charging decision. These trespasses upon the executive branch's charging decision lengthened the pre-trial proceedings to the detriment of the public's right to "[j]ustice ...without unnecessary delay." Const. art. I, § 10. The arguments advanced by Christopher Monfort and Judge Kessler's ruling display a fundamental confusion about the different phases of a prosecution.

Every prosecution has two phases. The first is the accusatorial phase. The second is the adjudicatory phase. The character of each phase and the nature of the decisions being made in each phase determine the rights afforded the defendant.

The accusatory phase involves the prosecuting authority, exercising executive functions, to determine whom to charge with a public offense and what charges to bring. Decisions made in the accusatory phase largely occur outside the courtroom.¹ These decisions routinely affect the sentence that the

¹Monfort disputes that the decision to file a notice of special sentencing proceeding is a charging decision. See Monfort's Response to State's Opening Brief and Opening Brief on Issue on Cross-Appeal, at 7. Monfort acknowledges that his position is contrary to existing precedent. *Id.*, at n. 2 (asking the Court to "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.

court may impose upon conviction.² For example, if the prosecutor charges

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.’”).

Under the doctrine of stare decisis, this Court will reverse itself on an established rule of law only upon a showing that the rule is incorrect and harmful. *State v. Ray*, 130 Wn.2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. *State v. Siers*, 174 Wn.2d 269, 276, 274 P.3d 358 (2012). Monfort has not established that this Court’s determination that the decision to file a notice of special sentencing proceeding is a charging decision is incorrect or detrimental.

This characterization of the decision to file a notice of special sentencing proceeding as a “charging decision” is consistent with how the United States Supreme Court treats the decision to pursue a death sentence. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986). This characterization of the decision, moreover, is supported by the plain language of the statute. The State’s decision to charge aggravated first degree murder, by itself, subjects the defendant to the possibility of a death sentence. That possibility continues, for all defendant who committed the murder on or after their eighteenth birthday and who does not suffer from an intellectual disability, until the prosecutor affirmatively announces that a notice of special sentencing proceeding will not be filed or the statutory time limit for filing such a notice expires. *See generally*, RCW 10.95.030 (penalties for aggravated first degree murder); RCW 10.95.040 (2) (guilty plea cannot be entered to a charge of aggravated first degree murder without the prosecutor’s consent prior to the expiration of the period for filing a notice of special sentencing proceeding). The decision to file the notice is vested solely in the prosecutor, the notice need not be served in open court, and the court’s permission or consent is not required prior to the filing of the notice. *See generally State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996) (notice of special sentencing served through designated public defender mail pick up box); RCW 10.95.040 (service of notice).

²Monfort contends that the prosecutor “determines the sentence.” Monfort’s Response to State’s Opening Brief and Opening Brief on Issue on Cross-appeal, at 7 n.2. This position is contrary to precedent and its adoption would require this Court to overrule *Campbell* and a large number of capital and non-capital cases which recognize that a prosecutor does not decide the sentence merely by filing charges. *See, e.g., State v. Finch*, 137 Wn.2d 792, 809-10, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (“Additionally, this court has emphasized that when making the determination to seek the death penalty ‘the prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury.’ *Dictado*, 102 Wn.2d at 297-98.”); *State v. Manussier*, 129 Wn.2d 652, 667-69, 684, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997) (prosecutors do not decide the sentence by charging someone with the status of “persistent offender” or “habitual criminal”).

Monfort’s position, moreover, is contrary to the logic he espouses in footnote 2. Monfort claims that the jury cannot return a verdict of death if the prosecutor does not file a notice of special sentencing proceeding, so this requires the sentencing decision to be laid at the prosecutor’s feet. Monfort, however, ignores that, absent his own murderous actions, the prosecutor could not file a charge of aggravated first degree murder or a notice of special

a defendant with first-degree murder, the court must impose a minimum sentence of twenty years³ if the defendant is convicted. However, the prosecutor could choose to charge that same defendant with a lesser offense, in which case the court could impose a lower sentence upon conviction. The prosecutor could even choose not to charge the defendant with any crime whatsoever.

The prosecutor's decision is not without checks and balances, for the magistrate must determine that probable cause exists⁴ to believe that the defendant committed the charged offense, and the trier of fact must determine at trial whether the defendant is guilty beyond a reasonable doubt of the charged offense. *See State v. Campbell*, 103 Wn.2d 1, 26, 691 P.2d 929 (1984), *cert. denied*, 417 U.S. 1094 (1985) (explaining why the prosecutor's charging decision does not violate separation of powers). The community,

sentencing proceeding. In truth, the jury's ultimate sentencing decision rests squarely upon Monfort's own shoulders.

³See RCW 9.94A.540(1)(a).

⁴If a court should find that the charge is not supported by probable cause, the court may not impose conditions of release in addition to personal recognizance and an accused's promise to appear for subsequent hearings. *See generally* CrR 3.2; CrRLJ 3.2. A court cannot dismiss a charge prior to trial for an alleged lack of probable cause unless there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). In making this determination, the court must view all evidence in the light most favorable to the prosecuting attorney and must not weigh conflicting statements and base its decision on the statement it finds most credible. *Id.* Accord CrR 8.3(c)(3); CrRLJ 8.3(c)(3). A sentencing enhancement or aggravating circumstance cannot be dismissed unless the underlying charge is dismissed under this standard. CrR 8.3(c)(3); CrRLJ 8.3(c)(3); *State v. Brown*, 64 Wn. App. 606, 825 P.2d 350, *review denied*, 119 Wn.2d 1009 (1992).

moreover, may remove the prosecuting attorney from office if it disagrees with how the prosecutor exercises his discretion. Const. art. XI, § 5 (prosecuting attorneys shall be elected); RCW 36.16.030 (same); *Hildebrand v. Padget*, 678 P.2d 870, 873-74 (Wyo. 1984) (“This is not to say that the citizens of our state are without recourse if they feel the prosecuting attorney is not exercising his discretion in their best interests. . . . One obvious remedy is that district and county attorneys hold elective office; if their constituents are unsatisfied, they are free to express their feelings at the voting polls.”).

The adjudicatory phase occurs in the courtroom. During this phase, a criminal defendant is afforded all of the full panoply of due process, an attorney, the right to call witnesses, the right of confrontation, the right to seek suppression of illegally obtained evidence, the right to a judge who is both fair and who appears fair, the right to a jury, and many other rights. *See generally* Const. art. I, § 22; *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011) (explaining the scope of exclusionary rule in Washington); *State v. Gamble*, 168 Wn.2d 161, 187-188, 225 P.3d 973 (2010) (appearance of fairness doctrine).

The rights granted to a defendant in the adjudicatory phase, however, are not applicable in the accusatory phase. A defendant’s ability to influence or challenge the decisions made in the accusatory phase are extremely limited.

The accusatory phase in Washington may take a variety of forms as the Washington Constitution specifically authorizes offenses to be prosecuted by information or indictment. Const. art. I, § 25. The choice of mechanism to be used rests with the prosecuting attorney, not with the defendant. *See generally State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971). The mechanism to be used does not vary according to the severity of the offense. *State v. Jeffries*, 105 Wn.2d 398, 423-24, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986) (capital crimes may be charged by information).

The defendant's inability to select the method of initiating the prosecution extends to other choices. The defendant is not entitled to a hearing by the prosecutor before the prosecutor makes his charging decision. *See United States v. Bland*, 472 F.2d 1329, 1337 (D.C. Cir. 1972) (due process does not require "an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom"); *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) ("prosecutor need not hold a public hearing before deciding whether to file charges"); *State v. Tracy M.*, 43 Wn. App. 888, 892, 720 P.2d 841 (1986) (due process not violated because the prosecutor makes the decision to file charges without a hearing).

The defendant does not have the right to decide which of two applicable statutes he will be charged with or what penalty scheme he will be sentenced under. *United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct.

2198, 60 L. Ed. 2d 755 (1979) (“a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.”). While the defendant has a right to a conflict-free prosecutor, the defendant does not have a right to have the charging decision made by a non-adversarial prosecutor. *Finch*, 137 Wn.2d at 810 (“A prosecutor's determination to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in nature and therefore the [appearance of fairness] doctrine does not apply.”); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (prosecutor barred from deciding whether to seek the death penalty where the defendant was a former client of the prosecutor). The defendant does not have a right to select when the prosecutor makes the charging decision. *State v. Pirtle*, 127 Wn.2d 628, 641-42, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996) (not error to deny the defendant’s request to extend the thirty-day deadline for filing a notice of special sentencing proceeding).

Cases addressing a defendant’s rights before a grand jury are also relevant to a prosecutor’s charging decision as the duties of the grand jury are “coterminous” with those of the prosecutor seeking an indictment or filing an information. *United States v. Williams*, 504 U.S. 36, 51, 53, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). The grand jury cases establish that the defendant is not entitled to demand that the authority making the charging decision

consider exculpatory evidence. *See generally Williams*, 504 U.S. at 51 (the Fifth Amendment does not require the prosecutor to present exculpatory as well as inculpatory evidence to the grand jury and the grand jury is not required to consider exculpatory evidence prior to making a charging decision). The defendant does not have a constitutional right to testify before the grand jury. *Id.* at 52.

The defendant is not entitled to prevent the charging authority from considering illegally obtained evidence or incompetent evidence. *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (grand jury may consider incompetent evidence and evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination and Fourth Amendment privilege to be free from illegal searches). The defendant cannot preclude the charging authority from considering hearsay or otherwise incompetent evidence. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 261, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1989) ("the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment", and an indictment that is valid on its face is not subject to a challenge to the reliability or competence of the evidence presented to the grand jury).

The courts have steadfastly refused to allow defendants to challenge an indictment returned by a legally constituted and unbiased grand jury or an information drawn by a prosecutor, if valid on its face on the ground that they

are not supported by adequate or competent evidence. As noted by the United States Supreme Court many years ago and as demonstrated in the instant case, a rule that allows defendants to challenge the nature of the information considered in making the charging decision “would result in interminable delay [and] add nothing to the assurance of a fair trial.” *Costello v. United States*, 350 U.S. 359, 364, 76 S. Ct. 406, 100 L. Ed. 2d 397 (1956). *Accord Calandra*, 414 U.S. at 350-52 (it is uncertain that any benefit may be obtained from extending various adjudicatory rights to the accusatorial process while it is clear that allowing litigation over the information considered would frustrate the public’s interest in the fair and expeditious administration of the criminal laws).

While defendants cannot challenge the nature or the quality of the information considered by the charging authority or the weight given to the information that was considered, defendants may bring challenges based upon errors in the composition of the grand jury, the presence of an unauthorized person, and similar procedural irregularities. *See generally* RCW 10.40.070. When such a challenge is successful, the government may still pursue the prosecution. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 557, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) (discrimination in the selection of the grand jury foreman was a valid ground for setting aside a criminal conviction, but the government may reindict); *Ballard v. United States*, 329 U.S. 187, 196, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (indictment struck because women were

excluded from the grand jury; government not barred from seeking a new indictment from a properly constituted grand jury); RCW 10.40.090 (an order to set aside the indictment or information on any of the grounds identified in Chapter 10.40 RCW does not bar a future prosecution for the same offense). A missed statutory deadline, however, can forever bar prosecution. *See, e.g., State v. Luvene*, 127 Wn.2d 690, 714-19, 903 P.2d 960 (1995) (state's failure to timely serve the notice of special sentencing proceeding barred the state from seeking the death penalty); *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994) (same).

A defendant may also challenge a charging decision on the grounds that he was selected for prosecution based upon an unjustifiable standard such as race,⁵ religion or other arbitrary classification or in retaliation for the exercise of a constitutional right. *See generally United States v. Goodwin*, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (constitutional

⁵For the first time in this Court, Monfort implies that the Prosecutor's decision was racially motivated. This spurious accusation is based on nothing more than the mere fact that Monfort is multi-racial and Officer Brenton was white. Monfort's Response to State's Opening Brief and Opening Brief on Issue on Cross-Appeal at 22 and n.7.

The relevant issue in this case was the victim's profession. *See* RCW 10.95.020(1) ("The victim was a law enforcement officer . . . who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing"). Monfort targeted police officers, without regard to race or gender, in his multi-week crime wave. Our police departments are comprised of men and women, gay and straight, whites, blacks, Latino/a, Asians, American Indians, native born citizens and naturalized citizens. *See, e.g.,* Seattle Police Department, 2009 Racial/Ethnic Composition of Sworn Personnel, available at <http://www.seattle.gov/police/policy/RSJI.htm> (Last visited May 24, 2013). Monfort's suggestion that slayers of white police officers should receive lighter punishments to satisfy some statistical model is reprehensible.

due process principles prohibit prosecutorial vindictiveness); *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446(1962) (constitutional equal protection principles prohibit basing the decision whether to prosecute on “an unjustifiable standard such as race, religion, or other arbitrary classification”). A defendant, however, must satisfy an extremely high threshold to obtain discovery or a hearing on such a claim. *See generally United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). The reluctance to entertain these motions absent a compelling initial showing arises from the same concerns that bar most other challenges to a charging decision – a concern that examining the basis of a prosecution delays the criminal proceeding, may chill effective law enforcement, and diverts prosecutor’s resources from other duties. *Armstrong*, 517 U.S. at 465, 468. The rule that a defendant may generally not require a prosecutor to explain his reasons for making a particular charging decision applies equally to capital cases. *See McCleskey v. Kemp*, 481 U.S. 279, 296-97 n.18, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1986).

In the instant case, probable cause exists for the filing of the notice of special sentencing proceeding. Probable cause for such a notice is satisfied by probable cause to proceed on a count of premeditated first degree murder with one or more aggravating circumstances, a defendant who was at least 18

years of age on the day of the murder, and probable cause to believe the defendant does not have an “intellectual disability” at the time of the crime. *See State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (Chapter 10.95 RCW does not apply to a defendant who committed murder while a juvenile); RCW 10.95.020 (aggravating circumstances); RCW 10.95.030 (exempting defendants who suffer from an “intellectual disability” from the death penalty). The existence of one or more “mitigating circumstances” does not defeat probable cause for a sentence of death, nor does the existence of one or more “mitigating circumstances” preclude the imposition of a death sentence. *See, e.g., State v. Brown*, 132 Wn.2d 529, 551-52, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998) (a difficult childhood, troubled family life, and various personality disorders insufficient to preclude a death sentence); *State v. Rupe*, 108 Wn.2d 734, 765-66, 743 P.2d 210 (1987) (lack of future danger and absence of prior criminal convictions insufficient to preclude a death sentence).⁶

In the instant case, the prosecution satisfied the statutory requirements for filing a notice of special sentencing proceeding. The prosecutor exercised

⁶Non-capital cases also establish that probable cause is not defeated by the existence of some exculpatory evidence or information. *See, e.g., City of College Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43, *review denied*, 147 Wn.2d 1024 (2002) (fact that a suspect performs well on one or more field sobriety tests will not vitiate the existence of probable cause to arrest for DUI based upon other factors or observations). *Accord Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011) (probable cause exists even when the evidence is not determinative of guilt and the facts do not exclude the possibility of innocence; standard is less than a preponderance of the evidence).

his discretion based upon all the information known to him on the date he filed the notice of special sentencing proceeding, and he indicated a willingness to reconsider if new evidence was called to his attention.⁷ *See Pirtle*, 127 Wn.2d at 642-43 (“prosecutor must perform individualized weighing of the mitigating factors – an inflexible policy is not permitted”); RCW 10.95.040(1). The prosecution filed the notice within the statutory time limit, as extended at the defendant’s request. *See* CP 135 and 360.

At its heart, Judge Kessler’s dismissal of the notice of special sentencing proceeding reflects his dissatisfaction with the quality and quantity of the evidence that the prosecutor relied upon in deciding that there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. RP (2/22/13) 34-35. Judge Kessler’s dissatisfaction was based upon his comparing Monfort’s description of the prosecutor’s mitigation investigation with the penalty phase investigation guidelines promulgated by the American Bar Association. *See* RP (2/22/13) at 26-35. These ABA guidelines, however, are not “inexorable commands” with which all defense counsel, much less prosecutors, must fully comply. *Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009).

A prosecutor must compare the entire investigation with the mitigating circumstances contained in RCW 10.95.070 before making his

⁷CP 149.

decision to file a notice of special sentencing proceeding. A prosecutor, however, does not have any obligation to expand his investigation to seek out potential mitigation evidence.⁸ Cf. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999) (“the State has no duty to search for exculpatory evidence”); *State v. Entzel*, 116 Wn.2d 435, 442, 808 P.2d 228 (1991) (“while the State may in some instances have a duty to preserve potentially material and exculpatory evidence, it is not required to search for exculpatory evidence”); *State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984) (“Neither *Brady* nor *Wright*, or their progeny, imposes a duty on the State to expand the scope of a criminal investigation.”); *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980) (“The State ‘is required to preserve all potentially material and favorable evidence.’ This rule, however, has not been interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case.”). Where a prosecutor has no duty to conduct his own mitigation investigation, it is improper to sanction the prosecutor for going the extra mile.

⁸Nothing in Chapter 10.95 RCW imposes any obligation upon the prosecuting attorney to conduct an independent mitigation investigation or to expand the murder investigation to encompass a search for mitigation evidence. To the contrary, the 30 day decision period in RCW 10.95.040(2) would generally limit the available information to the reports of the initial police investigation.

B. A PROSECUTOR PROPERLY CONSIDERS MANY FACTORS IN DETERMINING WHAT CHARGES TO FILE AND WHICH PENALTIES TO SEEK

It is a long-recognized principle that prosecutors are vested with wide discretion in determining how and when to file criminal charges, and that the exercise of their discretion involves consideration of numerous factors, including the strength of the case, pending conviction on another charge, the defendant's relative level of culpability, confinement on other charges, the prosecution's general deterrence value, the government's enforcement priorities, available resources, the victim's wishes, and the cost of prosecution. *Armstrong*, 517 U.S. at 464-66; *State v. Howard*, 106 Wn.2d 39, 44, 722 P.2d 783 (1985); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *Judge*, 100 Wn.2d at 713; RCW 9.94A.411; National District Attorney's Association, *National Prosecution Standards*, Std. 4-2.4 (3rd ed. 2012)⁹; American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-3.9 Discretion in the Charging Decision (3d ed. 1993). So long as the prosecutor has probable cause to proceed upon the charge, the legislature has sought to prevent judicial review

⁹Although the *National Prosecution Standards* are aspirational and "are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations upon violations of rules of ethical conduct; (c) create any right of action in any person; and (d) alter existing law in any respect," National District Attorney's Association, *National Prosecution Standards*, Introduction (3rd ed. 2012), prosecutors seek guidance from the standards in the day-to-day performance of the prosecution function. The standards that prosecutors consider, in making any charging decision, are reproduced in appendix A.

of the prosecutor's charging decisions. See RCW 9.94A.401; D. Boerner, *Sentencing in Washington* § 12.24, at 12-47 (1985).

This legislative determination is consistent with a host of judicial pronouncements recognizing that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed. 2d 547(1985).¹⁰ It is also consistent with the principle that the decision of what charges to file and whether to engage in plea bargaining are executive branch, not judicial branch functions. *Finch*, 137 Wn.2d at 810 ("A prosecutor's determination to file charges, to seek the death penalty, or to plea bargain are executive, not adjudicatory").

While the Legislature¹¹ has provided standards to guide prosecutors in the exercise of their discretion, the standards do not create rights that are enforceable against the state. RCW 9.94A.401. The legislative guidelines, whether worded as suggested criteria or as mandatory exhortations, do not limit the charging discretion of prosecuting attorneys. *Rice*, 174 Wn.2d at 896. A deviation from the guidelines carries no legal repercussions. *Rice*,

¹⁰Courts may review a prosecutor's charging discretion only to protect an individual from prosecutorial misconduct that is based upon an unconstitutional motive or carried out in bad faith. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process or otherwise prejudices the defendant. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (prosecution may be dismissed when prosecutor engages in vindictive prosecution, selective enforcement of a statute, or other prejudicial misconduct under CrR 8.3(b)). *Monfort* has not established either bad faith or misconduct in this case.

¹¹The Constitution of this state authorized the Legislature to establish the powers and duties of the county prosecutor. Const. Art. XI § 5.

174 Wn.2d at 896. *Accord State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899) (“The prosecuting attorney, in the faithful discharge of his duties, must exercise his independent judgment as to the prosecution or dismissal of an information or indictment, and it is in the interest of sound public policy that his discretion in the exercise of his duties should not be in any wise controlled by legal consequences unpleasant or unfavorable to himself.”).

In the instant case, there is no evidence that the King County Prosecuting Attorney did not faithfully discharge his duties in the selection of charges and the choice of penalty to be requested. Monfort’s chief complaint is that the King County Prosecuting Attorney did not wait to make his decision until after Monfort submitted a mitigation packet. Chapter 10.95 RCW, however, does not mention a “mitigation packet.” And, while RCW 9.94A.411(2)(iv) allows a prosecuting attorney to engage in pre-filing discussions with a defendant, the statute does not require such discussions.

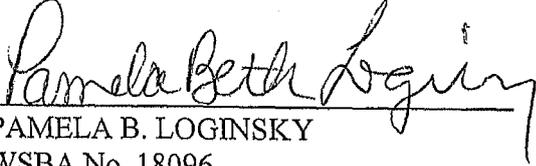
V. CONCLUSION

The public is entitled to justice without unnecessary delay. Const. art. I, § 10. This constitutional provision recognizes that lengthy delays between the commission of a crime and the trial can increase the likelihood that key witnesses and evidence will no longer be available for presentation to the trier of fact. While the deterioration of memory and death or disability of witnesses can impact both parties in a criminal case, the prospect of trying a case without access to all of the evidence which was available originally is

especially oppressive on the State, which bears the burden or proof .

This Court should reject any rule that allows a defendant to control the timing of a notice of special sentencing proceeding by his refusal to provide the prosecuting attorney with a non-statutory mitigation packet.

Respectfully submitted this 24th day of May, 2013.


PAMELA B. LOGINSKY
WSBA No. 18096
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APPENDIX A

Selected National Prosecution Standards

1. SCREENING

4-1.1 Prosecutorial Responsibility

The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued.

4-1.2 Prosecutorial Discretion

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

4-1.3 Factors to Consider

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

- a. Doubt about the accused's guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;
- d. The availability of adequate civil remedies;
- e. The availability of suitable diversion and rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice

authority;

h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;

i. The charging decisions made for similarly-situated defendants;

j. The attitude and mental status of the accused;

k. Undue hardship that would be caused to the accused by the prosecution;

l. A history of non-enforcement of the applicable law;

m. Failure of law enforcement to perform necessary duties or investigations;

n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;

o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;

p. Whether the accused has already suffered substantial loss in connection with the alleged crime;

q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction;

4-1.4 Factors Not to Consider

Factors that should not be considered in the screening decision include the following:

a. The prosecutor's individual or the prosecutor's office rate of conviction;

b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;

c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;

d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;

e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

4-1.5 Information Sharing

The prosecutor should attempt to gather all relevant information that would aid in rendering a sound screening decision. The prosecutor's office should take steps to ensure that other government and law enforcement agencies cooperate in providing the prosecutor with such information.

4-1.6 Continuing Duty to Evaluate

In the event that the prosecutor learns of previously unknown information that could effect a screening decision previously made, the prosecutor should reevaluate that earlier decision in light of the new information.

4-1.7. Record of Declinations

Where permitted by law, a prosecutor's office should retain a record of the reasons for declining a prosecution.

4-1.8 Explanation of Declinations

The prosecutor should promptly respond to inquiries from those who are directly affected by a declination of charges.

2. CHARGING

4-2.1 Prosecutorial Responsibility

It is the ultimate responsibility of the prosecutor's office to determine

which criminal charges should be prosecuted and against whom.

4-2.2 Propriety of Charges

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

4-2.3 Improper Leveraging

The prosecutor should not file charges where the sole purpose is to obtain from the accused a release of potential civil claims.

4-2.4 Factors to Consider

The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

- a. The nature of the offense, including whether the crime involves violence or bodily injury;
- b. The probability of conviction;
- c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;
- d. Potential deterrent value of a prosecution to the offender and to society at large;
- e. The value to society of incapacitating the accused in the event of a conviction;
- f. The willingness of the offender to cooperate with law enforcement;
- g. The defendant's relative level of culpability in the criminal activity;
- h. The status of the victim, including the victim's age or special vulnerability;

i. Whether the accused held a position of trust at the time of the offense;

j. Excessive costs of prosecution in relation to the seriousness of the offense;

k. Recommendation of the involved law enforcement personnel;

l. The impact of the crime on the community;

m. Any other aggravating or mitigating circumstances.

National District Attorney's Association, National Prosecution Standards, Stds. 4-1.1 through 4-1.8 and 4-2.1 through 4-2.4 (3rd ed. 2012).

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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: Pam Loginsky [<mailto:Pamloginsky@waprosecutors.org>]
Sent: Friday, May 24, 2013 3:20 PM
To: OFFICE RECEPTIONIST, CLERK; Ann Summers; Deborah Dwyer; suzanne-elliott@msn.com
Subject: State v. Christopher Monfort, No. 88522-2

Dear Clerk and Counsel,

Attached, for filing, is a motion for leave to file amicus curiae brief, the proposed amicus curiae brief, and a proof of service.

Please let me know if you should encounter any difficulty in opening these documents.

Sincerely,

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