

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Mar 18, 2013, 11:10 am  
BY RONALD R. CARPENTER  
CLERK

NO. 88522-2

RECEIVED BY E-MAIL

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

---

FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER, JUDGE

---

**MOTION FOR DISCRETIONARY REVIEW**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DEBORAH A. DWYER  
Senior Deputy Prosecuting Attorney

ANN M. SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Plaintiff

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

|   | Page |
|---|------|
| A. <u>IDENTITY OF MOVING PARTY</u> .....  | 1    |
| B. <u>DECISION BELOW AND STATEMENT OF RELIEF SOUGHT</u> .....   | 1    |
| C. <u>ISSUES PRESENTED FOR REVIEW</u> .....   | 2    |
| D. <u>FACTS RELEVANT TO MOTION</u> .....  | 3    |
| E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u> .....  | 7    |
| 1. THE TRIAL COURT'S RULING IS PREMATURE .....  | 8    |
| 2. THE TRIAL COURT'S RULING VIOLATES THE SEPARATION OF POWERS DOCTRINE .....  | 10   |
| 3. THE TRIAL COURT'S RULING IS CONTRARY TO THE STATUTE AND ALLOWS THE DEFENSE TO CONTROL THE TIMING OF, AND ULTIMATELY PREVENT, THE PROSECUTING ATTORNEY'S DECISION TO SEEK THE DEATH PENALTY ..... | 13   |
| 4. THE PROPER REMEDY, IF ANY IS NEEDED, IS TO REOPEN THE STATUTORY PERIOD FOR FILING THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY .....   | 17   |
| F. <u>CONCLUSION</u> .....  | 18   |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bordenkircher v. Hayes, 434 U.S. 357,  
98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)..... 12

Washington State:

Carrick v. Locke, 125 Wn.2d 129,  
882 P.2d 173 (1994)..... 12

In re Personal Restraint of Woods, 154 Wn.2d 400,  
114 P.3d 607 (2005)..... 9

Koenig v. Thurston County, 175 Wn.2d 837,  
287 P.3d 523 (2012)..... 11

State v. Brown, 64 Wn. App. 606,  
825 P.2d 350, review denied,  
119 Wn.2d 1009 (1992)..... 9

State v. Campbell, 103 Wn.2d 1,  
691 P.2d 929 (1984)..... 12

State v. Dictado, 102 Wn.2d 277,  
687 P.2d 172 (1984)..... 11, 12

State v. Finch, 137 Wn.2d 792,  
975 P.2d 967 (1999)..... 11

State v. Pirtle, 127 Wn.2d 628,  
904 P.2d 245 (1995)..... 8, 13, 14, 15, 16

Statutes

Washington State:

RCW 10.95.020..... 3, 10  
RCW 10.95.040..... 2, 4, 5, 10, 11, 13, 17, 18

Rules and Regulations

Washington State:

RAP 2.3..... 7, 18

A. IDENTITY OF MOVING PARTY

The State of Washington, plaintiff, represented by Daniel T. Satterberg, King County Prosecuting Attorney, by and through his deputies Deborah A. Dwyer and Ann M. Summers, seeks the relief designated in part B.

B. DECISION BELOW AND STATEMENT OF RELIEF SOUGHT

The State asks this Court to grant discretionary review of the decision of the King County Superior Court, the Honorable Ronald Kessler, striking the notice of intent to seek the death penalty in Christopher Monfort's case. The superior court found that the elected county prosecutor abused his discretion in filing the notice, in that the prosecutor relied on the information in his possession and failed to postpone his decision indefinitely to await mitigation materials from the defense. To this day, more than three years after Monfort's arraignment, the defense has not provided the State with a mitigation packet.

The Superior Court issued its oral ruling on February 22, 2013. Appendix A. On February 26, 2013, the court issued an

order clarifying its oral ruling.<sup>1</sup> Appendix B. The court issued its written order on March 6, 2013; this order, filed in the superior court on March 7, 2013, encompasses the court's rulings on several defense challenges to the death penalty notice, including the challenge at issue in this motion. Appendix C.

The State asks this Court to promptly consider this issue on the merits, reverse the trial court, and order this trial to go forward as scheduled, on September 13, 2013, as a capital case.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's ruling is premature, given that Monfort has neither been convicted nor sentenced to death, and given that, should he be convicted and sentenced to death, he may raise this issue on appeal.

2. Whether the trial court's ruling violates the separation of powers doctrine by reversing a decision that the legislature, by enacting RCW 10.95.040, has vested in the sole discretion of the elected county prosecutor.

3. Whether the trial court's ruling is contrary to RCW 10.95.040, which states that a notice of special sentencing

---

<sup>1</sup> The clarification did not relate to the ruling at issue in this motion.

proceeding "shall" be filed within 30 days after the defendant's arraignment unless the court, for good cause shown, extends or reopens the filing period.

4. Whether the proper remedy for any deficiency in the information on which the prosecutor based his decision to file the notice of intent to seek the death penalty is to reopen the period for filing the notice to allow the defense additional time to submit its mitigation packet, rather than strike the notice.

D. FACTS RELEVANT TO MOTION

Defendant Christopher Monfort is charged by information filed on November 12, 2009, with Aggravated Murder in the First Degree for shooting and killing Seattle Police Officer Timothy Brenton on October 31, 2009. The State alleged the aggravating circumstance that "the victim was a law enforcement officer who was performing his 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," pursuant to RCW 10.95.020(1). Monfort is also charged with Arson in the First Degree and three counts of Attempted Murder in the First

Degree for crimes committed on October 22, 2009, October 31, 2009, and November 6, 2009. Appendix D.

Monfort was arraigned on December 14, 2009. Appendix E. Almost nine months later, on September 2, 2010, King County Prosecuting Attorney Daniel T. Satterberg filed a "Notice of Special Sentencing Proceeding to Determine Whether Death Penalty Should Be Imposed," pursuant to RCW 10.95.040. Appendix F.

In moving to dismiss this notice, the defense alleged that the elected prosecutor lacked a sufficient factual basis to support his statutory determination that there were not sufficient mitigating circumstances to merit leniency. Appendix G. The defense disparaged the investigation into Monfort's background initiated by the State as "random and superficial" and "deficient in every conceivable way." *Id.* at 5, 14. Measuring the State's investigation by the standards established by the American Bar Association ("ABA") for the defense mitigation investigation, Monfort's attorneys found the State's investigation wanting.<sup>2</sup> *Id.* at 15-19.

In response, the State noted that, in spite of the defense team having expended considerable resources in mitigation investigation, they had nevertheless chosen not to provide any

---

<sup>2</sup> The ABA Guidelines cited by Monfort refer explicitly to "penalty phase preparation." Appendix G at 16 (quoting Comments to Guideline 10.7).

evidence of mitigating circumstances to the State. Appendix H. The prosecuting attorney's office had undertaken its own investigation into Monfort's background, and the elected prosecutor had taken into consideration the information obtained from that investigation in making his decision. Id. The State argued that, under these circumstances, the prosecutor was not required under RCW 10.95.040 to postpone indefinitely his decision whether to seek the death penalty in this case. Id.

The trial court found that the defense had made a "*tactical decision* not to provide the State with the results of its mitigation investigation until it is deemed complete by the defense." Appendix A at 26 (italics added). The court found that the defense "err[ed] in not providing the State with what it had during the last period of time that the State told the court and the defense that it had for doing so before Mr. Satterberg made his decision." Id. at 30.

The trial court appeared to follow the defense lead in comparing the State's investigation into Monfort's background with what would be required of the defense in preparing mitigation for the penalty phase in a capital case: "Had the sole defense mitigation been limited to what the State learned from its own

investigator, *had a jury found Mr. Monfort guilty and had a jury imposed death*, this court has no doubt that the Supreme Court would reverse the penalty stage due to ineffective assistance of counsel . . . .” Id. at 27 (italics added). The court concluded that the State’s investigation was inadequate and biased.<sup>3</sup> Id.

The trial court acknowledged that “[t]he State has maintained that it is still willing to consider defense mitigation information and if persuaded from a defense mitigation package that Mr. Monfort deserved leniency, the State would ask the court to strike the death notice.”<sup>4</sup> Id. at 30. However, noting that the court had assured the prosecuting attorney that “the defendant was moving apace in its mitigation investigation,” the court held that “the prosecutor failed both to exercise the discretion it is statutorily and constitutionally obliged to exercise, and to the extent that the prosecutor considered the flawed minimalist mitigation materials, the

---

<sup>3</sup> In its order of clarification, the trial court confirmed that it had relied for its information as to the contents of the State’s investigation on the brief and attachments filed by the defense on July 20, 2012 (Appendix G) and the State’s response filed on September 6, 2012 (Appendix H). Appendix B. Neither of these documents contains a copy of the report prepared by the investigator hired by the State. See Appendix G, H.

<sup>4</sup> The trial court followed this observation with a comparison of a judge’s ability to “unring a bell” with a jury’s ability to do so, but appeared to reach no conclusion as to the prosecuting attorney’s ability to do so. Appendix A at 31-32.

prosecutor abused its discretion, both substantively and procedurally.” Id. at 34-35.

On this basis, the trial court concluded that the “only rational remedy” was to strike the notice of intent to seek the death penalty, and the court so ordered. Appendix A at 35; Appendix C. The court further ruled that, “until such time as the prosecutor either declares it will not seek discretionary review, or that the Supreme Court either denies the discretionary review, or affirms this court’s decision, the parties will proceed as if this remains a capital case.” Appendix A at 35.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Discretionary review should be granted when the trial court has committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act, or when the trial court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court. RAP 2.3(b) (2) and (3).

The trial court’s ruling in this case meets both of these criteria. As argued below, the trial court has committed probable error, and has substantially altered the status quo by striking the

prosecutor's notice of intent to seek the death penalty. Moreover, the court's ruling has substantially limited the State's freedom to prosecute this capital case; under the trial court's ruling, if this Court were to deny discretionary review, this case could no longer proceed as a capital case. Finally, under the relevant statute and controlling case law, the trial court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's review.

This Court should accept review, reverse the trial court's ruling, and order that this trial should proceed as scheduled as a capital case.

1. THE TRIAL COURT'S RULING IS PREMATURE.

The trial court's ruling is premature because Monfort has neither been found guilty by a jury nor sentenced to death. Should both of these results ever come to pass, Monfort may obtain review on appeal, as the defendant in State v. Pirtle<sup>5</sup> did, of his claim that the elected prosecutor abused his discretion in filing the notice of intent to seek the death penalty.

---

<sup>5</sup> 127 Wn.2d 628, 641-43, 904 P.2d 245 (1995).

Moreover, it is not proper for a trial court to dismiss an aggravating circumstance prior to trial; such a ruling contravenes society's interest in having a full opportunity to convict those who have violated the law, "does not relieve the defendant of the burden of undergoing a trial" on the underlying charges, and forces the State to seek interlocutory review, which is "the antithesis of judicial efficiency and economy." State v. Brown, 64 Wn. App. 606, 615, 617, 825 P.2d 350, review denied, 119 Wn.2d 1009 (1992) (cited with approval in In re Personal Restraint of Woods, 154 Wn.2d 400, 424, 114 P.3d 607 (2005)). These concerns apply equally to a trial court's pretrial dismissal of a notice of intent to seek the death penalty.

Based on what appears to be a virtually unprecedented usurpation of the prosecutor's prerogative to file a notice of intent to seek the death penalty, the trial court in this case has deprived the citizens of Washington of the opportunity to prosecute this defendant to the full extent of the law. Monfort must in any event undergo a trial on all of the charges against him, including aggravated first-degree murder, and the State has been forced to expend scarce public resources seeking interlocutory review. This is truly "the antithesis of judicial efficiency and economy." If Monfort

is not sentenced to death, this issue will be moot; if he is sentenced to death, he may raise this issue on appeal. This Court should accept review and reverse the trial court's ruling on this basis.

2. THE TRIAL COURT'S RULING VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The legislature has vested the decision whether to file a notice of intent to seek the death penalty solely in the discretion of the elected county prosecutors of Washington. RCW 10.95.040.

The relevant statute provides:

- (1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, *the prosecuting attorney* shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.
- (2) The notice of special sentencing proceeding *shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment* upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to

the charge of aggravated first degree murder or any lesser included offense.

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

RCW 10.95.040 (italics added).

The prosecutor's decision whether to file charges is an executive decision, not an adjudicatory one. State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). "The prosecutor is empowered with substantial discretion and autonomy in making the determination to seek a sentence of death." Koenig v. Thurston County, 175 Wn.2d 837, 846, 287 P.3d 523 (2012) (citing State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984)).

The trial court here, in dismissing the death penalty notice based on the court's largely uninformed evaluation of the quality and quantity of the information that the prosecutor relied on in making his decision, has fundamentally undermined the discretion and autonomy that the legislature properly delegated to the elected prosecutor in making this critical executive decision. As such, the trial court's ruling is a violation of the separation of powers doctrine, which "serves mainly to ensure that the fundamental functions of

each branch remain inviolate.” Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

This Court has analogized the prosecutor’s exercise of discretion in deciding whether to seek the death penalty to the exercise of discretion in deciding whether to charge a defendant with a crime. State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984) (citing Dictado, 102 Wn.2d at 298)).<sup>6</sup> In the charging context, so long as probable cause exists, the prosecutor’s discretion to charge a defendant with a crime is not reviewable unless it has been exercised based on race, religion, or some other constitutionally impermissible basis. Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Here, the trial court overturned the prosecutor’s decision to seek the death penalty, a decision that was firmly grounded in the police investigation of Monfort’s crimes and the prosecutor’s independent investigation into Monfort’s background. The trial court’s ruling is based on untenable grounds, and impermissibly infringes on an executive function. This Court should accept review and reverse the trial court’s ruling on this basis.

---

<sup>6</sup> “The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury.” Campbell, 103 Wn.2d at 26 (quoting Dictado, 102 Wn.2d at 298).

3. THE TRIAL COURT'S RULING IS CONTRARY TO THE STATUTE AND ALLOWS THE DEFENSE TO CONTROL THE TIMING OF, AND ULTIMATELY PREVENT, THE PROSECUTING ATTORNEY'S DECISION TO SEEK THE DEATH PENALTY.

The trial court's ruling dismissing the notice of intent to seek the death penalty is based on an erroneous reading of the controlling statute. The court has engrafted onto the statute requirements that are not contained therein. In so doing, the court has enabled a defendant to control the timing of, and ultimately even prevent, an elected prosecutor's decision to seek the death penalty. This Court should not countenance this result.

The trial court inarguably has a role in ensuring that the prosecutor complies with the governing statute in making the decision whether to file a notice of special sentencing proceeding. But RCW 10.95.040(1) requires only that there be "reason to believe that there are not sufficient mitigating circumstances to merit leniency" before such notice is filed. The statute says nothing about *where* the prosecutor must gain the necessary information, or *how much* information is enough to make the decision.

Some guidance may be found in this Court's death penalty jurisprudence. In State v. Pirtle, the prosecutor conveyed his decision to seek the death penalty on the day on which Pirtle was

charged, while at the same time assuring the defense that he would accept mitigating evidence. 127 Wn.2d 628, 641-42, 904 P.2d 245 (1995). The prosecutor refused to extend the statutory 30-day period to allow the defense more time to gather mitigation evidence. Id. at 642. At the end of the 30-day period, the prosecutor filed notice of intent to seek the death penalty. Id.

This Court commented at some length on the proper exercise of prosecutorial discretion in this regard:

We have held a prosecutor's discretion to seek the death penalty is not unfettered. Before the death penalty can be sought, there must be "reason to believe that there are not sufficient mitigating circumstances to merit leniency." The prosecutor must perform individualized weighing of the mitigating factors – an inflexible policy is not permitted. *Input from the defendant as to mitigating factors is normally desirable*, because the subjective factors are better known to the defendant while other factors, such as age and lack of prior criminal record, can be readily ascertained by the prosecutor.

Had the prosecutor in this case announced a decision on [the charging date] and then refused to accept any additional evidence, it would indicate an unwillingness to engage in the individualized weighing required in *Harris*. However, that is not what happened here. The prosecutor announced a tentative decision, specifically said he would look at mitigating evidence developed by the defense, and then waited the full thirty days.

Pirtle, 127 Wn.2d at 642 (internal citations omitted) (italics added).

Under the standard set out in Pirtle, the prosecutor here properly exercised his discretion under the statute. The prosecutor agreed to extend the time for making his decision on whether to file a notice of intent to seek the death penalty *almost eight months* beyond the statutory thirty-day period, to allow the defense time to prepare mitigation materials for the prosecutor's consideration. The prosecutor has assured the defense team that, should they present persuasive evidence in mitigation of Monfort's crimes, he will revisit the decision even now. This is hardly the "inflexible policy" that Pirtle forbids.

In addition, the prosecutor in this case took the extra step of hiring an investigator to look into Monfort's background. In Pirtle, the prosecutor had some limited knowledge of the defendant by virtue of the fact that Pirtle had criminal history – ten juvenile convictions and five adult convictions, mostly for burglary and theft, with one felony assault. Pirtle, 127 Wn.2d at 642-43. This Court deemed this information "substantial." Id. at 642. The investigator hired by the prosecutor here conducted "dozens of interviews with Monfort's associates, family members, fellow employees, fellow

students, former teachers and others.”<sup>7</sup> Appendix H at 8-9. The prosecutor clearly had a basis to engage in the “individualized weighing” referenced in Pirtle. See Pirtle, 127 Wn.2d at 642.

This Court concluded in Pirtle that, “[g]iven what the prosecutor already knew and his willingness to wait thirty days to see if the defense could develop additional information, we find the prosecutor did not abuse his discretion.” Pirtle, 127 Wn.2d at 643. In finding an abuse of discretion in *this* case, the trial court clearly erred.

Moreover, it is apparent from the record that the defense team made a tactical decision in this case to withhold from the prosecutor what information they *had* gathered about Monfort’s background. Monfort’s attorneys told the trial court that they did not think that providing the prosecutor with the information they had in September 2010 would have been “beneficial” to their client. Appendix J at 36. Going even further, they told the court that providing incomplete information would have been “detrimental” to Monfort. Id. at 37. They reiterated, “We didn’t think that it would be helpful.” Id.

---

<sup>7</sup> While Monfort disparages the quality of the interviews, and the choice of interviewees, he does not dispute that these interviews were conducted. Appendix I at 7 n.1.

To this day, more than three years after the thirty-day statutory period expired, the defense has provided the prosecutor with no mitigation packet. Monfort's defense team has clearly made a tactical decision to withhold any information that they may have gathered about their client, in the belief that it will not assist him at this stage of the proceedings.

This Court cannot allow this tactical decision by the defense to subvert the clear intent of RCW 10.95.040. The trial court clearly erred in dismissing the properly filed notice of intent to seek the death penalty in this case. This Court should accept review and reverse the trial court's ruling on this basis.

4. THE PROPER REMEDY, IF ANY IS NEEDED, IS TO REOPEN THE STATUTORY PERIOD FOR FILING THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY.

The State believes that the elected prosecutor, in filing the notice of special sentencing proceeding in this case, fully complied with RCW 10.95.040. However, even if this Court determines that the prosecutor relied on insufficient information in reaching his decision, the remedy is not to strike the notice. Rather, under these circumstances, the proper remedy is to reopen the statutory period,

as provided in RCW 10.95.040(2), allow the defense a specific amount of time to provide the prosecutor with any mitigation materials, and allow the prosecutor to re-initiate the decision process based on all available information.

F. CONCLUSION

For the reasons set forth above, the State asks this Court to grant discretionary review in accordance with RAP 2.3(b) (2) and (3), reverse the trial court's ruling dismissing the notice of intent to seek the death penalty, and order that this case proceed as a capital case.

DATED this 18<sup>th</sup> day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Deborah A. Dwyer  
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney

By: Deborah A. Dwyer  
ANN M. SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Plaintiff  
Office WSBA #91002

# APPENDIX A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

-----  
STATE OF WASHINGTON, )  
                  PLAINTIFF, )   CASE NO.  
                                  )  
                  VERSUS                    )09-1-07187-5SEA  
                                  )  
CHRISTOPHER MONFORT, )  
                  DEFENDANT.                )

-----  
                  Proceedings Before Honorable RONALD KESSLER  
-----

KING COUNTY COURTHOUSE  
SEATTLE, WASHINGTON

DATED:   FEBRUARY 22, 2013

A P P E A R A N C E S:

FOR THE PLAINTIFF:

BY:   JEFFREY BAIRD, ESQ.,  
      JOHN CASTLETON, ESQ.,  
      DEBORAH DWYER, ESQ.

FOR THE DEFENDANT:

BY:   TODD GRUENHAGEN, ESQ.,  
      CARL LUER, ESQ.,  
      STACEY MacDONALD, ESQ.

13:20:15

## P R O C E E D I N G S

(Afternoon session. Open court.)

13:20:15 1

13:20:15 2

13:20:15 3

13:20:17 4

13:20:18 5

13:20:22 6

13:20:23 7

13:20:25 8

13:38:43 9

13:38:44 10

13:38:49 11

13:38:53 12

13:38:57 13

13:39:00 14

13:39:06 15

13:39:08 16

13:39:10 17

13:39:14 18

13:39:18 19

13:39:18 20

13:39:20 21

13:39:22 22

13:39:24 23

13:39:27 24

13:39:32 25

THE BAILIFF: All rise, court is in session the Honorable Ronald Kessler presiding in the Superior Court in the State of Washington in and for King County.

THE COURT: Thank you, please be seated.

MR. BAIRD: Your Honor, this is cause number 09-1-07187-6 SEA, the State of Washington versus Christopher Monfort. Mr. Monfort is present here today with his lawyers, Carl Luer, Todd Gruenhagen and Stacey McDonald. I am accompanied by John Castleton and Debbie Dwyer. Ms. Dwyer is responding to the motion that was scheduled by the defense. We have some matters that we would like to take up with the court after the motion is heard, but the hearing was primarily scheduled for the defense motion.

THE COURT: What are the matters?

MR. BAIRD: The matters have to do with preparation towards trial and other motions that we have been given notice will be brought.

THE COURT: All right. Defense may proceed.

13:39:32 1 MR. GRUENHAGEN: Good afternoon, Your  
13:39:34 2 Honor.

13:39:34 3 "Because the Eight Amendment must draw its  
13:39:41 4 meaning from evolving standards of decency that mark  
13:39:43 5 the progress of a maturing society, its stare  
13:39:49 6 decisis does not play the typical role constituting  
13:39:53 7 the capital punishment."

13:39:56 8 That is language from Furman. There is a  
13:39:59 9 certain way that we believe that the court should or  
13:40:01 10 must look at the consideration of this issue. That is  
13:40:05 11 enunciated both by the United States Supreme Court and  
13:40:10 12 our State Superior Court in State versus Martin that  
13:40:13 13 death is different, and that that difference must  
13:40:15 14 impact on the court's decision-making requiring the  
13:40:19 15 utmost solicitous for the defendant's position.

13:40:23 16 Now, that is the Superior Court talking, of  
13:40:26 17 course. But I dare say that the constitution needs to  
13:40:29 18 have the same level of scrutiny at the trial court  
13:40:32 19 level -- indeed, at every stage of the proceedings as  
13:40:34 20 it does in the Supreme Court.

13:40:37 21 There is a high service rendered by the  
13:40:40 22 cruel and unusual punishment clause of the Eight  
13:40:43 23 Amendment. It is to require that the legislature  
13:40:46 24 write penal laws that are even handed, non-selective  
13:40:49 25 and non-arbitrary to require judges to see to it that

13:40:52 1 the general laws are not applied sparsely, selectively  
13:40:57 2 and spottily to unpopular groups. So those are kind  
13:41:00 3 of over-arching doctrines or precepts that I believe  
13:41:08 4 that should govern the way that the court looks at the  
13:41:11 5 issue.

13:41:11 6 What we are asking the court to do is find  
13:41:13 7 within Article 1, Section 14 of the State  
13:41:17 8 constitution, or the Eight Amendment the United States  
13:41:20 9 constitution, based on the evolved state of the law,  
13:41:23 10 that the application -- the exposure to the  
13:41:26 11 application of the death sentence on Mr. Monfort would  
13:41:30 12 be cruel punishment.

13:41:31 13 In the defense's reply brief I have given  
13:41:37 14 the court a catalog, a spreadsheet, if you will, that  
13:41:45 15 identifies the capital -- potential capital cases for  
13:41:57 16 killing of police officers while on duty. That is on  
13:42:01 17 page 2. They are spread across the counties of King,  
13:42:05 18 Spokane, Pierce, Okanagan, Snohomish, Franklin, Chelan  
13:42:12 19 and Clallam County. Interestingly only King and  
13:42:18 20 Chelan County are represented within the last 10  
13:42:23 21 years.

13:42:23 22 The reason that it is important to look at  
13:42:27 23 those, is that there is not one of those cases where  
13:42:29 24 there is an existing sentence of death existing. Only  
13:42:35 25 one of those cases had a sentence of death imposed.

13:42:38 1 That was Elmore. Elmore resulted in a reversal on  
13:42:44 2 review, a remand for a resentencing and a second jury  
13:42:48 3 making a determination that life without was  
13:42:52 4 appropriate sentence. Mr. Elmore is deceased of  
13:43:01 5 natural causes.

13:43:02 6 If you take those matters, the ones that  
13:43:05 7 have existed since the re-enactment of the statute, we  
13:43:10 8 will call it the modern era of 1981, when we got the  
13:43:15 9 new death penalty in Washington. And if you go back  
13:43:18 10 further, you get the list of executions that have  
13:43:20 11 taken place in Washington since 1904. This is the  
13:43:23 12 appendix to the original submission.

13:43:27 13 Commencing in 1904 you have to go to 1929  
13:43:33 14 to find an instance, where one Luther Baker was  
13:43:39 15 convicted of killing police officers -- actually, a  
13:43:44 16 sheriff's deputy and was executed. That relates to an  
13:43:50 17 offense that took place in 1928. He was defending it  
13:43:56 18 still.

13:43:57 19 Beyond 1928, you have to go to 1931, a case  
13:44:03 20 that was decided by Supreme Court finally in 1934,  
13:44:13 21 where George Miller was executed. From 1934 to today,  
13:44:17 22 I don't believe that there is any instance of a  
13:44:19 23 Washington citizen being executed. Mr. George Miller  
13:44:26 24 being the last of them in 1934. Nor is there any  
13:44:30 25 outstanding death sentence for any individual for

13:44:35 1 killing a police officer.

13:44:37 2 At some point that starts to speak about  
13:44:41 3 evolving standards:

13:44:43 4 THE COURT: Is it the verdict of the other  
13:44:46 5 cases that the court should be considering, or the  
13:44:52 6 fact that the prosecutor seeks or does not seek the  
13:44:56 7 death penalty?

13:44:58 8 We are talking here about police officer  
13:45:00 9 murderers.

13:45:03 10 MR. GRUENHAGEN: The records are sparse on  
13:45:04 11 those old opinions. Some of those old cases, some of  
13:45:09 12 them have no facts, on the older capital cases. There  
13:45:12 13 are no trial reports. There is only the --

13:45:14 14 THE COURT: Even in the modern era, you are  
13:45:16 15 still presenting the court with cases in which the  
13:45:21 16 penalty was filed or not filed.

13:45:24 17 MR. GRUENHAGEN: No.

13:45:24 18 THE COURT: Then you are address the  
13:45:26 19 verdicts.

13:45:26 20 MR. GRUENHAGEN: It is exposure too. If  
13:45:28 21 you are potentially exposed to the potential of  
13:45:31 22 capital punishments that is you are exposed to an  
13:45:34 23 aggravating first degree murder charge that you could  
13:45:39 24 get the death penalty, that is within the catch man  
13:45:43 25 area.

13:45:43 1 But I am saying when you narrow the scope  
13:45:45 2 down to the single aggravator here, and look at cases  
13:45:49 3 where the death penalty has been imposed, you can't  
13:45:52 4 find it until you go back to the crime committed in  
13:45:55 5 1931 and an execution execution in 1934.

13:45:59 6 Interestingly, at least interestingly to  
13:46:02 7 me, you can go to 1940 and find in the case of State  
13:46:14 8 of Washington versus Merivale, a death sentence is  
13:46:16 9 imposed. The execution carried out in 1940 for an  
13:46:23 10 individual convicted of rape and kidnap. There was no  
13:46:27 11 homicide.

13:46:29 12 Of course, now we know that as things have  
13:46:32 13 evolved, as standards of decency have evolved more  
13:46:37 14 towards an enlighten view or less barbarous view. We  
13:46:42 15 don't execute the mentally retarded. We no longer  
13:46:45 16 look at them as diabolically clever enough, regardless  
13:46:51 17 of how heinous the crime may be, where they are fit  
13:46:54 18 and appropriate for so society to punish by the death  
13:46:57 19 penalty.

13:46:58 20 Nor do we currently execute juveniles. The  
13:47:03 21 standards have evolved. We don't kill kids any more.  
13:47:07 22 Not only that, just recently we decided that not only  
13:47:10 23 do we not kill kids, we don't give them life  
13:47:15 24 imprisonment without the possibility of release, if  
13:47:17 25 they are juveniles, because that also is cruel.

13:47:21 1 So that the definition of cruel, or cruel  
13:47:24 2 and unusual is evolving. Washington's courts have a  
13:47:31 3 history that you can look at that suggests that there  
13:47:34 4 is an evolution taking place, where this court ought  
13:47:37 5 to recognize that if you have to go back to 1934 --  
13:47:42 6 some 80 years -- to get to the point where you can  
13:47:45 7 find in an instance where an individual accused of  
13:47:48 8 killing a police officer is executed, that at some  
13:47:53 9 point the conclusion is inevitability. It is  
13:47:56 10 arbitrary. It is freakish. It is carious. It is  
13:48:01 11 wanton. Whatever the Supreme Courts of the State or  
13:48:04 12 the United States have used and used repeatedly to  
13:48:07 13 describe the constitutional defect that Furman dealt  
13:48:13 14 with. If you are going to have it, you have to have  
13:48:15 15 it and it is going to have to be applied even handedly  
13:48:19 16 and fairly.

13:48:19 17 In this state, we have serious issues with  
13:48:24 18 regard to fairness. Fairness is best represented by  
13:48:29 19 taking a look at the past, then taking a look at the  
13:48:34 20 more recent past and seeing which way is society in  
13:48:38 21 Washington evolving.

13:48:40 22 Then you get to the point where you have  
13:48:42 23 some problematical cases, so-called outlier cases that  
13:48:49 24 bear on this issue as well. Because somewhere within  
13:48:52 25 the Furman reforms, you will have to deal with the

13:48:55 1 issue of fairness and its application because that is  
13:49:00 2 what Furman demanded.

13:49:02 3           The fact that there were reforms that  
13:49:05 4 were implemented in response to Furman, doesn't mean  
13:49:07 5 that they have been successfully implemented and that  
13:49:10 6 they provide any meaningful -- any real, tangible  
13:49:16 7 protection or benefit to the accused against  
13:49:20 8 arbitrariness.

13:49:22 9           The record says that they don't. The  
13:49:24 10 historical record of the cases says that they don't.  
13:49:29 11 There are two few where it is imposed.

13:49:32 12           I have digested out the cases where the  
13:49:34 13 death penalty has actually been imposed recently.  
13:49:38 14 With the exception of two of them, they involve sexual  
13:49:43 15 psychopathy in spades.

13:49:46 16           So you might look at that and say, "well,  
13:49:49 17 there is a trend to not evolve away from imposition of  
13:49:54 18 the death penalty and those types of cases." But  
13:49:57 19 there is no corollary trend with regard to the police  
13:50:00 20 officer killing cases. They are represented here and  
13:50:05 21 there are none.

13:50:06 22           So, the Supreme Court says, "well, we don't  
13:50:11 23 look at these cases and view them from a statistical  
13:50:15 24 model. We won't create algorithm and run it through  
13:50:19 25 big blue or Watson, and say, "tell us whether or not

13:50:23 1 this is either proportional or cruel under Article 1,  
13:50:28 2 Section 14."

13:50:29 3 What they do is they sit and they do what  
13:50:33 4 lawyers do and justices do. They indulge in  
13:50:42 5 rhetorical sophistry.

13:50:44 6 THE COURT: That raises the question that  
13:50:45 7 the State points out. Yes, lawyers do it and justices  
13:50:48 8 do it. But are judges allowed to do it?

13:50:53 9 MR. GRUENHAGEN: Well they do.

13:50:55 10 THE COURT: I mean, by statute and by case  
13:50:57 11 law, isn't this the Supreme Court's call?

13:51:01 12 MR. GRUENHAGEN: No. No.

13:51:03 13 It is under statute with regard to the  
13:51:06 14 strict proportionality review, not under the Eighth  
13:51:10 15 Amendment not under more importantly Article 1.14.

13:51:14 16 Just because a statute that exists that  
13:51:17 17 gives a four-part test to guide the court in making a  
13:51:21 18 decision with regard to the proportionality, doesn't  
13:51:24 19 mean that this court doesn't need to address the issue  
13:51:27 20 of constitutionality as applied to this case.

13:51:35 21 The Washington State Supreme Court has not  
13:51:40 22 established a coherent analytical test that anybody  
13:51:45 23 can decipher that is going to identify meaningful  
13:51:53 24 parameters for determining proportionality or whether  
13:51:58 25 a sentence is cruel.

13:52:00 1 Capital cases are like real estate. Every  
13:52:04 2 one is unique. The indulgence that the prosecuting --  
13:52:09 3 THE COURT: I would suggest it is more like  
13:52:11 4 pornography. They know it, when they see it.  
13:52:14 5 MR. GRUENHAGEN: That too.  
13:52:15 6 THE COURT: But they can, because they are  
13:52:16 7 the Supreme Court.  
13:52:17 8 MR. GRUENHAGEN: So as clever lawyers and  
13:52:20 9 intelligent justices, they go forth and they find  
13:52:24 10 either a fact about the case, the charge, the conduct,  
13:52:30 11 or a fact about the defendant. They say, "well, this  
13:52:35 12 is different." As long as they are able to identify a  
13:52:38 13 distinction then that's good enough.  
13:52:41 14 What is their record?  
13:52:42 15 The record is one of, well the record is  
13:52:48 16 zero to four, none, zero, as in none. That is the  
13:52:53 17 number of cases that they have reversed because the  
13:52:57 18 sentence imposed was not proportional. The court  
13:53:01 19 itself dissent, albeit it is saying that this  
13:53:07 20 proportionality review is a myth. It is an illusion.  
13:53:11 21 It is a mockery, it is a SNAR.  
13:53:13 22 Here it is, legislature has enacted it. It  
13:53:17 23 is to serve the interests identified in Furman that  
13:53:20 24 you can only kill constitutionally, if it is not  
13:53:23 25 arbitrary or freakish or wanton or capricious.

13:53:27 1 But, this State has a record of 0-4, our  
13:53:33 2 statute based on Georgia. In Georgia, they have  
13:53:36 3 actually reversed cases on that review. Likewise,  
13:53:39 4 even Florida, right there in the death belt, south of  
13:53:45 5 the Mason-Dixon Line, but not in Washington.

13:53:47 6 There is a reason they are able to do that.  
13:53:55 7 That is simply the fact that there is no fungibility  
13:53:58 8 in these cases. They are all unique.

13:54:00 9 As long as the court is composed at least  
13:54:03 10 five individuals who will say that this fact is  
13:54:05 11 sufficient to distinguish it from all others, never  
13:54:08 12 mind the -- you know, the outlier cases, like  
13:54:13 13 Ridgeway, then it is good enough for us. That isn't  
13:54:18 14 meaningful. That is mythical.

13:54:22 15 So that the obligation that I think that  
13:54:27 16 the court has is to take a look at history and at some  
13:54:31 17 point those words have to have real substantive  
13:54:35 18 meaning. They are not just platitudes. They have to  
13:54:39 19 have some benefit to the individuals, who are supposed  
13:54:43 20 to be provided the protection under the Eighth or 1.14  
13:54:49 21 or even the statute. The proportionality statute is a  
13:54:52 22 subagent of the cruel punishment clause.

13:54:56 23 It doesn't change the fact that it is just  
13:55:02 24 a way of additionally serving the protected interests.  
13:55:08 25 Those protected interests, again, are to be free from

13:55:11 1 arbitrariness. Proportionality has been a component  
13:55:15 2 of that analytical thought process ever since williams  
13:55:20 3 versus United States or before, probably going back to  
13:55:23 4 our common law roots in England.

13:55:28 5 With a record of non-application of the  
13:55:37 6 death penalty to the police officer killing cases, the  
13:55:42 7 court can easily come to a conclusion that well we can  
13:55:48 8 just ignore that, because this case is different, or  
13:55:51 9 that somehow that's representing the evolving  
13:55:54 10 standards since 1934. I think that the latter  
13:55:59 11 approach is the proper one.

13:56:08 12 Justice Marshal, in referring to human  
13:56:19 13 institutions, wrote the future is in their care and  
13:56:22 14 provision for events of good and bad tendencies of  
13:56:25 15 which no prophecy can be made in the application of a  
13:56:28 16 constitution, therefore, contemplation cannot be only  
13:56:32 17 of what has been but of what may be. Under any other  
13:56:37 18 rule, the constitution would, indeed, be as easy an  
13:56:40 19 application as it would be deficient in efficacy and  
13:56:44 20 power. "The general principles would have little  
13:56:47 21 value and be controverted by precedent into impotent  
13:56:51 22 and lifeless formulas."

13:56:55 23 That is Justice Marshal in 1910, I believe,  
13:57:04 24 anticipating the process that this State has gone  
13:57:07 25 through with respect to the application of the death

13:57:09 1 penalty, particularly the application of the death  
13:57:12 2 penalty in cases like Mr. Monfort, where there is a  
13:57:15 3 single aggravator of killing a police officer.

13:57:20 4 The Supreme Court -- at least some of the  
13:57:32 5 justices on the Supreme Court -- have an I am poe test  
13:57:39 6 or an incentive, probably philosophically, that they  
13:57:45 7 carry to the bench that wants to preserve the rapid  
13:57:49 8 ritual of capital punishment as they find a social or  
13:57:53 9 moral utility in doing so.

13:57:54 10 There are other individuals on the court  
13:57:56 11 that are probably a little more circumspect with  
13:57:59 12 regard to that calculus.

13:58:02 13 Justice Scalia famously says, "there are  
13:58:08 14 two kind of cases that never cause me a problem --  
13:58:10 15 capital cases and abortion cases." I don't know  
13:58:14 16 whether that reveals a bias towards his consideration  
13:58:17 17 of any case that comes to his bar, where there is  
13:58:22 18 issues in the case.

13:58:25 19 But, there is something in that particular  
13:58:29 20 justice's expression of lack of concern that one will  
13:58:38 21 never change, and two, doesn't accord the accused what  
13:58:41 22 I believe and others believe is one of those  
13:58:45 23 principles that Justice Marshal was writing about in  
13:58:50 24 Weems.

13:58:51 25 THE COURT: Of course, Scalia is the bull

13:58:55 1 goose original naturalist, recognizes that the capital  
13:58:59 2 punishment is in the constitution. It is there.

13:59:03 3 MR. GRUENHAGEN: It is there. It is there.

13:59:06 4 THE COURT: So --

13:59:07 5 MR. GRUENHAGEN: But it is evolved from the  
13:59:09 6 time of the drafting and that's why I started with the  
13:59:15 7 reference to -- it is Furman and Trop versus Dulles,  
13:59:34 8 meaning from the evolving standards. Scalia will  
13:59:38 9 never draw meaning from the evolving standard because  
13:59:42 10 he is an originalist. He is not going to move on. He  
13:59:47 11 might be happy with the fact that they used to hang  
13:59:49 12 and then draw and quarter them for extra measure. I  
13:59:52 13 mean, he probably wouldn't find any problem with that,  
13:59:56 14 because he doesn't evolve.

13:59:58 15 But the question I think that before here  
14:00:01 16 this court is in this State does the record of the  
14:00:04 17 application of the death penalty show an evolution  
14:00:07 18 that in this case should bar the State from seeking  
14:00:10 19 the death penalty?

14:00:12 20 Because by historical definition, by the  
14:00:16 21 historical evidence, its application would be just --  
14:00:22 22 would be arbitrary. Now, we have some real  
14:00:28 23 difficulties with regard to these words and the  
14:00:31 24 definitions. I mean, torture used to mean one thing,  
14:00:37 25 but it means a different thing if you simply call

14:00:39 1 whatever it was that you were referring to as an  
14:00:42 2 enhanced interrogation technique.

14:00:46 3 We know how well that went. It went very  
14:00:50 4 well for John Yoo and Jay Beebe; one is at Berkeley  
14:00:58 5 and the other is on the 9th Circuit Court of Appeals.

14:01:01 6 Recently, John Brennan was asked in his  
14:01:06 7 confirmation hearing, as he is a candidates to be the  
14:01:11 8 head of the CIA, whether or not he believed water  
14:01:16 9 boarding was torture. Well, John Brennan had been  
14:01:21 10 nominated at the beginning of the first Obama term.  
14:01:27 11 He withdrew. He withdrew because the stuff was coming  
14:01:30 12 out that he had been fully involved in these enhanced  
14:01:33 13 interrogation techniques. He was probably -- I don't  
14:01:39 14 want to say dirty, but questionably involved enough  
14:01:42 15 that he wasn't going to pass. But here he is back  
14:01:46 16 four years later and he is asked a question. His  
14:01:49 17 response was very clever. His response was, "Well,  
14:01:57 18 torture is a term that requires a legal definition."  
14:02:01 19 I think that he might have even said that he is not a  
14:02:03 20 lawyer. I don't remember.

14:02:05 21 But he ducked the question by saying,  
14:02:08 22 "well, that is a legal term that requires a legal  
14:02:11 23 definition." That is what Alberto Gonzalez and John  
14:02:16 24 Woo and Jay Beebe were all about, creating legal  
14:02:20 25 justifications to evade the international convention

14:02:25 1 on torture and provide an insulation for these  
14:02:29 2 activities that were going to take place at these  
14:02:32 3 black sites and at arrow GU Ray. Words are really  
14:02:37 4 just quick sand.

14:02:38 5           Lawyers and judges use them creatively and  
14:02:43 6 with imagination. But the defense point in this  
14:02:46 7 argument is that at some point, somebody has to draw a  
14:02:51 8 line or step up and say, "like the descending justice  
14:02:58 9 in Davis. It has become a myth. It has become a  
14:03:04 10 myth. Does the cruel and unusual in the Eighth, or  
14:03:09 11 the cruel punishment clause in Article 1.14 represent  
14:03:13 12 nothing more than a myth? Or does it have substance?

14:03:18 13           We are asking the court to give it  
14:03:20 14 substance, to look at the historical record to look at  
14:03:23 15 the cases and say, "we are not going to go from 1934  
14:03:30 16 to 2012 and have no instance, not where anybody was  
14:03:35 17 never charged with the potential for a death penalty  
14:03:41 18 on a police officer killing case, but where no death  
14:03:45 19 sentence has ever been imposed. If you look at it  
14:03:48 20 from the standpoint of never charged, you get to this  
14:03:52 21 representation (indicating). It is even more  
14:03:56 22 revealing.

14:03:57 23           Either way that you look at it, we don't do  
14:04:00 24 it. We haven't done it. At least for years. Even  
14:04:04 25 though that during the interim, we have actually

14:04:07 1 executed for rape.

14:04:12 2 Facts are different things. To ignore that

14:04:16 3 history -- that factual history -- is to expose this

14:04:23 4 gentleman to the potential of a capital sins, where

14:04:34 5 all of the other cases -- I won't reiterate them, that

14:04:37 6 I referred to for just purposes of the relative

14:04:41 7 comparative value to try to get the court an idea of

14:04:45 8 what types of cases are getting death sentences, would

14:04:53 9 be, I guess the exception that proves the rule. It

14:04:58 10 would be arbitrary. It would be freakish. The court

14:05:02 11 should prevent the State from pursuing that. The

14:05:05 12 reason that the court should do that is because of the

14:05:08 13 high probability and the great inherent risks of a

14:05:14 14 potential sentence in this type of case to be based on

14:05:19 15 fashion and prejudice.

14:05:23 16 The court probably is familiar enough with

14:05:26 17 the media attention in this case. It hasn't been

14:05:33 18 particularly charitably disposed towards Mr. Monfort.

14:05:39 19 For pretty obvious reasons, but it is persistent. It

14:05:43 20 has been persistent over the course of the pendency of

14:05:46 21 this case. It is going to continue. It isn't going

14:05:50 22 to get any more accommodating of his interests in

14:05:53 23 having a fair trial -- having a trial that isn't going

14:05:58 24 to be infected at some level by passion and prejudice.

14:06:02 25 If there is any question of about that, all

14:06:06 1 you have to do is dial up some reported incident of  
14:06:10 2 the situation where an individual, for instance, is  
14:06:16 3 having his solitary confinement ameliorated with a  
14:06:21 4 television set and read the blog responses.

14:06:25 5 THE COURT: Comments? All right. Go  
14:06:28 6 ahead.

14:06:28 7 MR. GRUENHAGEN: Well, yes, comments. And  
14:06:33 8 read the community's reaction and how they describe  
14:06:37 9 what they think is the appropriate resolution of this  
14:06:41 10 case. They are full of virtual and they are full of  
14:06:47 11 passion and they are full of prejudice. In this court  
14:06:50 12 should protect Mr. Monfort from an exposure to that.

14:06:54 13 Thank you.

14:06:55 14 THE COURT: Thank you, the State.

14:06:58 15 MS. DWYER: Good afternoon, Your Honor,  
14:07:02 16 Deborah Dwyer representing the State of Washington.

14:07:04 17 I am going to keep my remarks brief this  
14:07:06 18 afternoon. I think that the State sets its arguments  
14:07:09 19 to the pretty fully in the response to the State's  
14:07:13 20 motion. I would like to summarize the main points of  
14:07:16 21 our argument.

14:07:16 22 First and foremost, this court, and  
14:07:19 23 probably everybody in the courtroom recognizes that  
14:07:21 24 the trial court has no authority to conduct the  
14:07:23 25 statutorily required proportionality review under RCW

14:07:28 1 10.95. The Washington Supreme Court has made it clear  
14:07:33 2 in Elmore that that review is exclusively province of  
14:07:38 3 the Washington Supreme Court. The Washington Supreme  
14:07:41 4 Court and the U.S. Supreme Court has both said that  
14:07:44 5 there is no separate constitutionally based  
14:07:48 6 proportionality review that is required in the capital  
14:07:51 7 case.

14:07:51 8 Now, counsel asks you to look at this case  
14:07:57 9 through the guise of the lens of the Eight Amendment  
14:08:01 10 and Article 1, Section 14 of the Washington  
14:08:04 11 constitution, under the ban on cruel and unusual  
14:08:08 12 punishment and the parallel ban on the cruel  
14:08:12 13 punishment in Washington.

14:08:13 14 Even to the extent that there could be a  
14:08:15 15 separate review under those constitutional provisions,  
14:08:20 16 any such review at this point would be premature.  
14:08:24 17 These are bans on the cruel and unusual punishment.  
14:08:30 18 At this point the jury has not even convicted  
14:08:34 19 Mr. Monfort of a crime that would make him eligible  
14:08:38 20 for the death penalty, much less as that penalty has  
14:08:42 21 been imposed.

14:08:43 22 THE COURT: A reason why trial courts -- a  
14:08:53 23 reason amongst others, perhaps, but a reason why trial  
14:08:58 24 courts even make the decisions based upon the  
14:09:03 25 constitution is because there may be fact finding,

14:09:08 1 that is the trial court's responsibility.

14:09:13 2 Then on the law, the appellate courts  
14:09:17 3 decide the law de novo.

14:09:19 4 MS. DWYER: Correct.

14:09:20 5 THE COURT: A fact finding in this  
14:09:23 6 process? Or are we all agreed as to what the facts  
14:09:26 7 are?

14:09:27 8 MS. DWYER: No, Your Honor. That is  
14:09:28 9 actually going to be my next point.

14:09:30 10 Waiting until when and if the death penalty  
14:09:34 11 is actually imposed in this case is not simply a  
14:09:37 12 formality. No one -- not a jury and not this court  
14:09:42 13 has heard of all of the facts yet as to the crimes  
14:09:47 14 that are charged and no one, not a jury and not this  
14:09:51 15 court, has yet heard any evidence of mitigation that  
14:09:54 16 will eventually be presented to this court.

14:09:57 17 It is on those facts that any decision on  
14:10:00 18 proportionality, whether it is statutory or whether it  
14:10:03 19 is based on the factors, under which you decide  
14:10:06 20 whether a punishment is cruel and unusual. Those  
14:10:09 21 decisions have to be based on the facts you don't even  
14:10:13 22 have in the record yet.

14:10:15 23 Proportionality review is simply impossible  
14:10:18 24 at this stage of the proceedings for the trial court.  
14:10:23 25 In the end, if Mr. Monfort is convicted of aggravated

14:10:30 1 murder in the first degree, and if the jury finds and  
14:10:33 2 confirms not sufficient mitigating circumstances to  
14:10:35 3 merit death penalty, Mr. Monfort will get a full  
14:10:37 4 proportionality review by the Washington Supreme  
14:10:37 5 Court.

14:10:39 6 In addition, if he wants to make separate  
14:10:41 7 claims that a punishment tat has been imposed at that  
14:10:44 8 time is cruel and unusual, either under the federal  
14:10:47 9 constitution or the state constitution, he can make  
14:10:50 10 those claims and those claims will be fully addressed  
14:10:53 11 by the Washington Supreme Court.

14:10:55 12 They simply can't be done at this point in  
14:10:59 13 any meaningful way. For that reason and for all of  
14:11:02 14 the reasons, we have argued in our response, we would  
14:11:05 15 ask the court to decline the defense invitation to  
14:11:08 16 conduct a proportionality review at this point.

14:11:12 17 Unless the court has any questions --

14:11:17 18 THE COURT: Thank you.

14:11:18 19 Defense any rebuttal?

14:11:20 20 MR. GRUENHAGEN: Your Honor, again, the  
14:11:29 21 proportionality review is just a small statutory  
14:11:35 22 component that is an enhancement to what the  
14:11:39 23 constitution provides.

14:11:41 24 So, our argument -- and I think that the  
14:11:46 25 court's correct in its observation -- the courts

14:11:49 1 decide constitutional questions all of the time. But  
14:11:53 2 the standards, I don't believe, with regard to this  
14:11:59 3 case has really changed since Furman. We had these  
14:12:07 4 reforms. The reforms are meaningless in this State.  
14:12:11 5 We have the clauses in the constitution. At some  
14:12:18 6 point they have to have some meaning.

14:12:20 7 Now, the State Supreme Court may have  
14:12:25 8 relaxed into a perspective that proportionality review  
14:12:30 9 on what has been questioned as an adequate data base  
14:12:34 10 with regard to the completion and comprehensiveness is  
14:12:39 11 sufficient.

14:12:39 12 We are asking the court to make its  
14:12:43 13 consideration under Article 1, Section 14 and the  
14:12:46 14 Eighth Amendment.

14:12:52 15 Thank you.

14:12:52 16 THE COURT: All right.

14:12:56 17 On the various issues that have been  
14:13:02 18 brought to the court's attention to date, I will  
14:13:05 19 address them individually:

14:13:07 20 I think that the argument that the State  
14:13:11 21 cannot consider the crime in weighing mitigating  
14:13:17 22 factors defies logic and requires a strained  
14:13:22 23 interpretation of the statute.

14:13:25 24 No prosecutor could, for example, treat the  
14:13:29 25 murder of a single person the same as the murder of 48

14:13:34 1 people in determining whether or not there are  
14:13:37 2 sufficient mitigating factors to merit leniency.

14:13:41 3 The reference to 48 people murderers is, of  
14:13:45 4 course, not a random number. It references State  
14:13:49 5 versus Ridgeway. It appears from the Supreme Court  
14:13:55 6 that like the United States Supreme Court asks us in  
14:13:58 7 Bush versus Gore to treat it as having no precedential  
14:14:02 8 value.

14:14:07 9 Arguably, for the Supreme Court of  
14:14:09 10 Washington, Ridgeway is murder of 48 women is a mere  
14:14:13 11 oddity, when we look at death penalty jurisprudence in  
14:14:17 12 Washington.

14:14:18 13 A prosecutor may consider the crime or  
14:14:21 14 crimes in making its determination of whether or not  
14:14:23 15 to seek death, including mulling over whether or not  
14:14:26 16 the defendant is deserving of death. Here, while it  
14:14:32 17 is clear that the prosecutor did consider the crime  
14:14:35 18 alleged against Mr. Monfort, it is not a basis to  
14:14:39 19 dismiss the death notice.

14:14:43 20 The court, while finding Dr. Foglia's  
14:14:50 21 testimony wholly credible is not persuaded that voir  
14:14:55 22 dire by competent counsel cannot adequately result in  
14:14:59 23 the exclusion of jurors who will not follow the law.  
14:15:06 24 I suppose that I should add there also competent judge  
14:15:09 25 whose will apply the law in those circumstances.

14:15:13 1 I don't find that the use of mock jurors  
14:15:17 2 from Highline Community College has any value as mock  
14:15:21 3 jurors, particularly in the context of a capital case,  
14:15:24 4 will not have the intellectual and, in fact, emotional  
14:15:30 5 involvement of a real death penalty juror. I fully  
14:15:36 6 understand why the defense chose to obtain opinions  
14:15:43 7 from mock jurors, Washington mock jurors.

14:15:47 8 Nor am I persuaded by the arguments that  
14:15:51 9 confusion and flaws in the pattern instructions is a  
14:15:54 10 basis to dismiss all or part of the State's case.  
14:15:59 11 While the Supreme Court has commended and recommended  
14:16:02 12 the use of the Washington Pattern Instructions, the  
14:16:06 13 court has on numerous occasions pointed out that the  
14:16:09 14 pattern instructions are not law. Careful wording of  
14:16:15 15 jury instructions can deal with all of the flaws that  
14:16:18 16 the defense has addressed with the exception of the  
14:16:21 17 statutory verdict form, which, indeed, is confusing.  
14:16:27 18 But the court will invite the parties to submit an  
14:16:30 19 explanatory instruction. The motions to dismiss the  
14:16:35 20 notice of intent on those bases are denied.

14:16:42 21 While I agree with the defense that the  
14:16:44 22 issue of proportionality arises from the constitution,  
14:16:51 23 the Eighth Amendment, and Article 1 and Section 14 of  
14:16:55 24 the State constitution. The imposition, even the  
14:17:03 25 request for the death penalty in Washington, is

14:17:06 1 disproportional from County to County and within  
14:17:10 2 counties, from prosecutor to prosecutor, from  
14:17:12 3 year-to-year, from crime to crime, from criminal to  
14:17:17 4 criminal. The Supreme Court has made it clear,  
14:17:20 5 however, that it is for the Supreme Court alone to  
14:17:22 6 address proportionality. Because proportionality  
14:17:29 7 analysis doesn't require actual fact finding, the  
14:17:32 8 review of any decision would be de novo. This court  
14:17:35 9 must defer to the wisdom of the Supreme Court. The  
14:17:41 10 defense in this case as agreed by Mr. Luer in colloquy  
14:17:48 11 with the court in a prior hearing made a tactical  
14:17:51 12 decision not to provide the State with the results of  
14:17:55 13 its mitigation investigation until it is deemed  
14:17:59 14 complete by the defense. The court has had the  
14:18:03 15 advantage of periodic ex parte status reports from the  
14:18:08 16 defense up until the point where the State announced  
14:18:11 17 its intent to seek Mr. Monfort's death. Then, again,  
14:18:16 18 one was received yesterday.

14:18:18 19 The court, on more than one occasion, at  
14:18:22 20 hearings expressed its findings that the defense was  
14:18:24 21 moving ahead with both of its mitigation investigation  
14:18:28 22 and its preparation for trial. While the State is  
14:18:33 23 kept in the dark about the specifics of the defense  
14:18:36 24 mitigation efforts, other than the fact that the court  
14:18:39 25 has actually expressed its admiration of the defense

14:18:42 1 process, the State is and has been aware that the  
14:18:47 2 defense is investigating the offense for trial  
14:18:50 3 preparation as the State has appropriately been  
14:18:53 4 assisting the defense with witness interviews, where  
14:18:56 5 the State's presence has been requested by the  
14:18:58 6 prosecution witnesses. This, then, belies chief  
14:19:04 7 criminal deputy prosecuting attorney Larson's  
14:19:09 8 assertion, delaying the decision whether or not to  
14:19:11 9 seek Mr. Monfort's death will needlessly delay the  
14:19:15 10 trial.

14:19:15 11 So the State hired its own investigator to  
14:19:18 12 learn about the defendant. The defense analogizes the  
14:19:23 13 State's purported mitigation investigation to  
14:19:27 14 effective assistance of counsel jurisprudence, which  
14:19:30 15 at first blush appear to be absurd. But deeper  
14:19:35 16 analysis I think renders the suggestion meritorious.  
14:19:39 17 Had the sole defense mitigation been limited to what  
14:19:45 18 the State learned from its own investigator, had a  
14:19:48 19 jury found Mr. Monfort guilty and had a jury imposed  
14:19:52 20 death, this court has no doubt that the Supreme Court  
14:19:56 21 would reverse the penalty stage due to ineffective  
14:19:59 22 assistance of counsel under its "death is different"  
14:20:03 23 appellate scrutiny. Not only was the State's  
14:20:08 24 investigation inadequate, it has the taint of bias,  
14:20:11 25 since it is not subject to the adversary process

14:20:15 1 demanded as far back and further back than Gideon  
14:20:22 2 versus Wainwright.

14:20:22 3           The parties addressed State versus Pirtle,  
14:20:25 4 in which the Supreme Court did affirm a death sentence  
14:20:27 5 where the State had made its decision to seek death in  
14:20:31 6 part, at least, on the State's own mitigation  
14:20:34 7 investigation.

14:20:34 8           The Supreme Court stated:

14:20:36 9           "We have held a prosecutor's discretion to  
14:20:39 10 seek the death penalty is not unfettered... before  
14:20:43 11 the death penalty can be sought, there must be  
14:20:46 12 "reason to believe that there are not sufficient  
14:20:48 13 mitigating circumstances to merit leniency..." The  
14:20:52 14 prosecutor must perform individualized weighing of  
14:20:55 15 the mitigating factors - an inflexible policy is  
14:21:00 16 not permitted. Input from the defendant as to  
14:21:03 17 mitigating factors is normally desirable, because  
14:21:06 18 the subjective factors are better known to the  
14:21:09 19 defendant while other factors, such as age and lack  
14:21:12 20 of prior criminal record, can be readily ascertained  
14:21:16 21 by the prosecutor."

14:21:18 22           Continuing to quote from Pirtle:

14:21:22 23           "Had the prosecutor in this case announced  
14:21:24 24 the decision on May 20 and then refused to  
14:21:26 25 accept any additional evidence indicated an

14:21:30 1  
14:21:33 2  
14:21:35 3  
14:21:37 4  
14:21:41 5  
14:21:44 6  
14:21:47 7  
14:21:51 8  
14:21:55 9  
14:21:57 10  
14:21:59 11  
14:22:02 12  
14:22:05 13  
14:22:08 14  
14:22:11 15  
14:22:14 16  
14:22:18 17  
14:22:21 18  
14:22:23 19  
14:22:26 20  
14:22:26 21  
14:22:31 22  
14:22:39 23  
14:22:41 24  
14:22:44 25

unwillingness to engage in the individualized waiting required in State versus Harris."

However, that is not what happened here. The prosecutor announced a tentative decision, specifically said that he would look at the mitigating evidence developed by the defense and then waited the full 30 days. Even without input from the defense, the prosecutor had a substantial amount of information about Pirtle.

"Pirtle was born in Spokane and lived both of most of his life there. His contact with the law enforcement officers had been extensive. He had 10 juvenile convictions, including three for second degree burglary. He had five adult convictions including one for first degree theft and another for felony assault. Because of the Pirtle's history the prosecutor had some information about each of the statutory mitigating factors, with the possible exception of the defendant's mental state at the time of the crime."

This is the end of the quote from State versus Pirtle, 127 Wn.2nd at 642, 643 in 1995.

The comparison with Monfort fails however, because Pirtle had five prior felony convictions including crimes of violence, spanning his whole life.

14:22:47 1 Mr. Monfort has no criminal history.

14:22:51 2 Thus it is, in fact, the need for full  
14:22:53 3 mitigation information that the State should rely.

14:22:57 4 Yet the State chose to proceed without it.

14:23:01 5 The defense, I believe, did err in not  
14:23:04 6 providing the State with what it had during the last  
14:23:07 7 period of time that the State told the court and the  
14:23:09 8 defense that it had for doing so before Mr. Satterberg  
14:23:14 9 made his decision. The defense sought a further  
14:23:18 10 extension. The court believed that it lacked the  
14:23:20 11 authority to continue to grant it as it is clear that  
14:23:23 12 the prosecuting attorney was ready to make his  
14:23:25 13 decision and announcement, which is what the court  
14:23:28 14 believed it lacked the ability to halt. The court  
14:23:31 15 could have further delayed the time period for the  
14:23:34 16 State to make its announcement, but the court could  
14:23:36 17 not have stopped the announcement itself. Even if the  
14:23:39 18 court effectively gagged the prosecutor, the effect  
14:23:43 19 would not have stopped the decision, but would merely  
14:23:46 20 have delayed the announcement of the decision.

14:23:49 21 The State has maintained that it is still  
14:23:53 22 willing to consider defense mitigation information and  
14:23:56 23 if persuaded from a defense mitigation package that  
14:23:59 24 Mr. Monfort deserved leniency, the State would ask the  
14:24:04 25 court to strike the death notice.

14:24:06  
 14:24:10  
 14:24:13  
 14:24:16  
 14:24:21  
 14:24:25  
 14:24:28  
 14:24:33  
 14:24:37  
 14:24:39  
 14:24:42  
 14:24:47  
 14:24:50  
 14:24:55  
 14:24:57  
 14:25:02  
 14:25:05  
 14:25:09  
 14:25:13  
 14:25:16  
 14:25:19  
 14:25:22  
 14:25:27  
 14:25:30  
 14:25:33

1  
 2  
 3  
 4  
 5  
 6  
 7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

Judges unring bells, in bench trials,  
 judges declare when sustaining objections to evidence  
 that has already been presented, that the judge will  
 not consider the evidence in coming to its conclusion.  
 Sometimes this is easy. For example, in a criminal  
 case where there is sufficient proof that a crime  
 occurred, but the only evidence tying the defendant to  
 the crime is the defendant's statements to the police,  
 and the court decides that the statement is  
 inadmissible because the police did not honor the  
 arrestee's request for a counsel, then acquittal is  
 the only possible judgment. The judge has heard the  
 substance of the confession, but can readily disregard  
 it because there is no other evidence to support the  
 argument that the defendant committed the crime.  
 Sometimes jurors are told to disregard evidence that  
 they have already heard, but we assign a different  
 standard when we deal with a jury trial and sometimes,  
 even though instructed to disregard evidence, courts  
 decide that it cannot, in fairness, be expected that a  
 jury can disregard such evidence, and defendant is  
 granted a mistrial or a new trial. We do have a  
 different standard, when jurors are ordered to  
 disregard evidence and judges decide that the judge is  
 not considering the evidence. Appellate courts will

14:25:37 1 almost always rely upon a judge's assertion that the  
14:25:42 2 judge did not consider something that the judge heard  
14:25:45 3 or saw, but will scrutinize whether or not a jury  
14:25:48 4 could have done so.

14:25:50 5           Generally courts do not interfere with the  
14:25:54 6 exercise of prosecution discretion. As an example, in  
14:26:01 7 states such as Washington, where charges may be filed  
14:26:04 8 by information, the court has no role in a  
14:26:08 9 prosecutor's initial charging decision. When a charge  
14:26:12 10 is filed, the court may be asked to determine if there  
14:26:16 11 is probable cause to detain, but even where the court  
14:26:20 12 finds that there is no probable cause to detain, the  
14:26:23 13 court cannot preclude the prosecutor from filing the  
14:26:27 14 information. There is a summary judgment type remedy,  
14:26:33 15 via Criminal Rule 8.3, (c) available to the defense, if  
14:26:37 16 it appears that there is insufficient admissible  
14:26:40 17 evidence to support the charge. But the test there is  
14:26:44 18 inapposite to the abuse of the discretion argument.  
14:26:48 19 In death penalty jurisprudence, however, the  
14:26:51 20 legislature and the Supreme Court have put limits on  
14:26:54 21 the prosecutor's exercise of the discretion, and thus,  
14:26:57 22 the prosecutor's discretion is subject to judicial  
14:27:01 23 scrutiny.

14:27:02 24           In a very different context, but one that  
14:27:05 25 is illustrative of the Supreme Court of the New

14:27:08 1 Jersey, in New Jersey versus Wallace, at 684 P.2d 1355  
14:27:16 2 (1996) explained judicial scrutiny as:

14:27:20 3 "Ordinarily, an abuse of discretion would  
14:27:23 4 be manifest, if the defendant can show that a  
14:27:27 5 prosecutorial veto was not premised upon a  
14:27:31 6 consideration of all relevant factors, or was  
14:27:34 7 based upon a consideration of irrelevant or  
14:27:36 8 inappropriate factors or amounted to a clear  
14:27:40 9 error in judgment...in order for such an abuse  
14:27:43 10 of discretion to rise to the level of patent and  
14:27:47 11 gross, it must further be shown that the  
14:27:50 12 prosecutorial error complained of will clearly  
14:27:54 13 subvert the goals underlying pretrial  
14:27:56 14 intervention."

14:27:57 15 Other cases make it clear that the court is  
14:28:00 16 not to substitute its judgments for that of the  
14:28:04 17 prosecutor and must defer to the prosecutor's  
14:28:06 18 discretionary decisions and if the facts support  
14:28:10 19 either conclusion and the court must defer.

14:28:14 20 Here, the defense has continually  
14:28:17 21 maintained that it is preparing a mitigation package  
14:28:20 22 not only for the purpose of the penalty phase but also  
14:28:23 23 for the consideration of the prosecutor in determining  
14:28:27 24 whether or not to seek Mr. Monfort's death. That, by  
14:28:31 25 itself, might not support a need for the delay of the

14:28:35 1 prosecutor's decision-making. Mr. Larson's letter  
14:28:39 2 expressing concerns about trial delays made sense. It  
14:28:43 3 was reasonable and appropriate. But it is clear that  
14:28:46 4 the letter is not sui generis to this case and has  
14:28:52 5 been used in other death or potential death penalty  
14:28:54 6 cases.

14:28:55 7 Here, the prosecutor was fully aware that  
14:28:57 8 the defense was investigating the facts of the case  
14:28:59 9 for the fact finding stage and was not delaying the  
14:29:03 10 commencement of the investigation pending its  
14:29:05 11 mitigation investigation, because the prosecutor has  
14:29:09 12 been involved in the defense fact-finding  
14:29:12 13 investigation.

14:29:13 14 Furthermore, the prosecutor has had the  
14:29:15 15 court's assurance that the defendant was moving apace  
14:29:21 16 in its mitigation investigation, following the  
14:29:28 17 requirements of ABA standards regarding counsel in  
14:29:31 18 death penalty cases.

14:29:33 19 The court concludes that the prosecuting  
14:29:36 20 attorney relied upon a flawed, practically useless  
14:29:40 21 mitigation investigation prepared by its own  
14:29:43 22 investigator. Thus, the prosecutor failed both to  
14:29:46 23 exercise the discretion it is statutorily and  
14:29:50 24 constitutionally obliged to exercise, and to the  
14:29:54 25 extent that the prosecutor considered the flawed

14:29:58 1 minimalist mitigation materials, the prosecutor abused  
14:30:02 2 its discretion, both substantively and procedurally.

14:30:07 3 The only rational remedy that the court  
14:30:10 4 could impose is to strike the notice of intent to seek  
14:30:13 5 the death penalty and it is so ordered.

14:30:17 6 That said, until such time as the  
14:30:22 7 prosecutor either declares it will not seek  
14:30:25 8 discretionary review, or that the Supreme Court either  
14:30:29 9 denies the discretionary review, or affirms this  
14:30:33 10 court's decision, the parties will proceed as if this  
14:30:38 11 remains a capital case.

14:30:40 12 The defense shall continue its mitigation  
14:30:43 13 investigation. And as the defense has set forth in  
14:30:48 14 its 21 February ex parte status report, submit its  
14:30:53 15 mitigation materials to the State as anticipated.

14:30:57 16 Further, the parties shall continue to  
14:31:00 17 investigate and prepare for a possible penalty phase.  
14:31:04 18 The court's decision today should not delay in any way  
14:31:08 19 the process of this case, be it capital or not.

14:31:15 20 Now, the State indicated that there was  
14:31:16 21 some scheduling issues and other matters that were for  
14:31:20 22 the court.

14:31:21 23 MR. BAIRD: May I?

14:31:22 24 THE COURT: Yes, please.

14:31:23 25 MR. BAIRD: Could I ask one question about

14:31:25 1 the court's ruling, if I might.

14:31:26 2 THE COURT: You may ask.

14:31:28 3 MR. BAIRD: The court has referred to some  
14:31:30 4 ex parte involvement in the mitigation process,  
14:31:33 5 representations made by the court to the prosecutor  
14:31:37 6 and has characterized the work of the private  
14:31:41 7 investigator hired by the prosecution as flawed and  
14:31:44 8 practically useless.

14:31:45 9 I am just wondering if the court has had an  
14:31:47 10 opportunity to review that material during those ex  
14:31:50 11 parte communications?

14:31:51 12 THE COURT: I believe that I have seen it  
14:31:53 13 in non-ex parte communications. I don't remember  
14:31:57 14 where I saw it.

14:31:57 15 MR. BAIRD: But the court is making --

14:31:59 16 THE COURT: In any case the ex parte --  
14:32:01 17 when I say ex parte communications, they were written  
14:32:05 18 communications that are filed. They are just under  
14:32:09 19 seal. So there is a record.

14:32:12 20 MR. BAIRD: I was just wondering if the  
14:32:14 21 court had actually seen the materials.

14:32:16 22 THE COURT: All right.

14:32:17 23 MR. BAIRD: Thank you.

14:32:18 24 The other, to get back to the court's  
14:32:20 25 question about further scheduling, I was going to

14:32:24 1 alert the court that the defense and the prosecutors  
14:32:29 2 met a few days ago to sort of assess our progress  
14:32:34 3 towards trial. We were informed at that time that  
14:32:36 4 they were going to make five additional motions  
14:32:39 5 concerning the death penalty.

14:32:41 6 Now, the court has suggested after its  
14:32:45 7 ruling today that the case will proceed as if it going  
14:32:48 8 to be a death penalty case.

14:32:50 9 Does that mean that we should begin  
14:32:52 10 scheduling these five hearings?

14:32:55 11 THE COURT: I would suggest yes.

14:32:57 12 MR. BAIRD: All right.

14:32:59 13 I have one other suggestion, that is, that  
14:33:01 14 one of the motions that the defense gave notice of was  
14:33:04 15 along the lines of a ruling by Judge Ramsdell earlier  
14:33:08 16 to this month in Anderson case.

14:33:13 17 Because that case is under review by the  
14:33:15 18 Supreme Court, because once King County Superior Court  
14:33:20 19 judge, at least, has ruled in the defense favor in  
14:33:23 20 that issue, I wonder if we could schedule that motion  
14:33:26 21 first.

14:33:27 22 THE COURT: Sure. The reality is that is  
14:33:29 23 an as applied -- I mean, that was a facial attack.

14:33:33 24 MR. BAIRD: I am not arguing the merits.

14:33:34 25 THE COURT: I am just pointing out that

14:33:36 1 that decision -- the ultimate decision on that issue  
14:33:38 2 should be made, I hope, before this case is scheduled  
14:33:43 3 for trial.

14:33:45 4 MR. BAIRD: All I am suggesting --

14:33:47 5 THE COURT: Predicting how fast the Supreme  
14:33:49 6 Court will rule, who knows, but I understand.

14:33:52 7 MR. BAIRD: All I am suggested to the  
14:33:55 8 court, that they intend to bring the motion similar to  
14:33:59 9 the one that was based on the ruling,

14:34:00 10 I was suggesting since I don't believe that  
14:34:02 11 there is another status conference scheduled now, can  
14:34:05 12 we set a time when that motion would be heard?

14:34:07 13 THE COURT: Sure. Work with the bailiff in  
14:34:10 14 terms of the setting the times.

14:34:11 15 MR. BAIRD: Very good.

14:34:14 16 THE COURT: She has my schedule.

14:34:16 17 MR. LUER: Your Honor, with respect to the  
14:34:17 18 State's request, I don't have a problem with arguing  
14:34:20 19 those motions first of the ones that we have  
14:34:22 20 identified.

14:34:22 21 We indicated to the prosecutors when we met  
14:34:27 22 with them on Wednesday, we have five motions  
14:34:29 23 identified. I think that we can probably address them  
14:34:32 24 in a total three separate hearings. Some of them can  
14:34:36 25 be combined for purposes of the one hearing.

14:34:38 1 THE COURT: Why not all at once? Are you  
14:34:42 2 going to get worn out?

14:34:44 3 MR. LUER: I would be.

14:34:47 4 THE COURT: We have a lot of lawyers over  
14:34:48 5 there.

14:34:49 6 MR. LUER: What I proposed -- fair enough.  
14:34:51 7 What I propose is that we discuss this next  
14:34:56 8 week and propose a briefing and a hearing schedule for  
14:35:00 9 the court. I think that we can have something to the  
14:35:03 10 court by the middle of next week or something.

14:35:06 11 THE COURT: All right. All right.  
14:35:07 12 Anything else?

14:35:10 13 MR. BAIRD: No.

14:35:10 14 THE COURT: Accordance with my -- amounts  
14:35:13 15 to an agreement with the adult juvenile detention, if  
14:35:18 16 the Department wants me to remain another bench while  
14:35:20 17 Mr. Monfort is reshackled, I will do that now. Your  
14:35:25 18 call.

14:35:26 19 Do you care? Don't care. All right. The  
14:35:30 20 court is in recess.

14:35:31 21

14:35:32 22 THE BAILIFF: Please rise.

14:35:32 23

14:35:32 24

14:35:38 25 (Court was recessed.)

## **APPENDIX B**

**FILED**  
KING COUNTY, WASHINGTON

FEB 26 2013

SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant

Case No.: 09-1-07187-6

COURT'S CLARIFICATION

At a hearing on 22 February 2013, the court announced its ruling regarding a number of defense motions to strike the death penalty notice. Following the court's ruling, Senior Deputy Prosecuting Attorney Baird inquired what the court was relying upon regarding the information about the state's "mitigation investigation;" the court replied that it did not remember.

Upon review of materials, the court clarifies that the court relied upon the 20 July 2012 brief and attachments in support of the defense motion and the 6 September 2012 state's response. The court did not rely upon any information provided in the *ex parte* defense status reports. The defense mentions, briefly, in its third *ex parte* status report to the court that the state had informed the defense that it was doing its own investigation; nothing substantive is reported. There are no other references to the state's "mitigation investigation" in the defense status reports.

DATED this 26<sup>th</sup> day of February, 2013.

  
RONALD KESSLER, Judge

## APPENDIX C

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FILED**  
KING COUNTY, WASHINGTON

MAR 07 2013

SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant

Case No.: 09-1-07187-6

ORDERS RE: DEATH NOTICE

At a hearing on 22 February 2013, the court announced its ruling regarding a number of defense motions to strike the death penalty notice. The defense has submitted proposed findings of fact and conclusions of law regarding the court's oral decision. The court has no reason to believe that findings are necessary. The court's oral ruling is adequate for review. For the purposes of memorializing the court's decision, it is hereby

ORDERED that defendant's motion to strike the death notice because the plaintiff considered the offense in weighing mitigating factors is denied; it is further

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; it is further

ORDERED that defendant's motion to strike the death notice because the Washington Pattern Jury Instructions are confusing is denied; it is further

ORDERED that defendant's motion to strike the death notice because the imposition of the death penalty in Washington has allegedly been disproportionate is denied; and it is further

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ORDERED that defendant's motion to strike the death notice because the plaintiff abused its discretion and failed to properly exercise discretion in considering mitigating materials is granted, for the reasons set forth in the court's oral decision.

DATED this 6<sup>th</sup> day of March, 2013.

  
RONALD KESSLER, Judge

## **APPENDIX D**

FILED

09 NOV 12 AM 10:27

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

WARRANT ISSUED  
CHARGE COUNTY \$200.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. )  
 )  
 ) CHRISTOPHER JOHN MONFORT, )  
 )  
 ) )  
 ) )  
 ) )  
 ) )  
 ) )  
 ) Defendant. )

No. 09-1-07187-6 SEA  
INFORMATION

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse CHRISTOPHER JOHN MONFORT of the crime of **Arson in the First Degree**, committed as follows:

That the defendant CHRISTOPHER JOHN MONFORT in King County, Washington, on or about October 22, 2009, did knowingly and maliciously cause a fire or explosion located at 714 South Charles Street, Seattle, which fire or explosion was manifestly dangerous to any human life, including firemen, and was in a building in which there was at that time a human being who was not a participant in the crime;

Contrary to RCW 9A.48.020(1)(a) and (c), and against the peace and dignity of the State of Washington.

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse CHRISTOPHER JOHN MONFORT of the crime of **Attempted Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

INFORMATION - 1

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1  
2 That the defendant CHRISTOPHER JOHN MONFORT in King County, Washington, on  
3 or about October 22, 2009, with premeditated intent to cause the death of another person, did  
4 attempt to cause the death of a human being; attempt as used in the above charge means that the  
5 defendant committed an act which was a substantial step towards the commission of the above  
6 described crime with the intent to commit that crime;

7  
8 Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and  
9 dignity of the State of Washington.

10 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the  
11 authority of the State of Washington further do accuse the defendant CHRISTOPHER JOHN  
12 MONFORT at said time of being armed with a deadly weapon, to-wit: a bomb, an improvised  
13 explosive device, under the authority of RCW 9.94A.602 and 9.94A.533(4).

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

COUNT III

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse  
CHRISTOPHER JOHN MONFORT of the crime of **Attempted Murder in the First Degree**, a  
crime of the same or similar character and based on a series of acts connected together with  
another crime charged herein, which crimes were part of a common scheme or plan, and which  
crimes were so closely connected in respect to time, place and occasion that it would be difficult  
to separate proof of one charge from proof of the other, committed as follows:

That the defendant CHRISTOPHER JOHN MONFORT in King County, Washington, on  
or about October 31, 2009, with premeditated intent to cause the death of another person, did  
attempt to cause the death of Seattle Police Officer Britt Sweeney, a human being; attempt as  
used in the above charge means that the defendant committed an act which was a substantial step  
towards the commission of the above described crime with the intent to commit that crime;

Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and  
dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the  
authority of the State of Washington further do accuse the defendant CHRISTOPHER JOHN  
MONFORT at said time of being armed with a .223/5.6mm rifle, a firearm as defined in RCW  
9.41.010, under the authority of RCW 9.94A.533(3).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

COUNT IV

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse CHRISTOPHER JOHN MONFORT of the crime of **Aggravated Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant CHRISTOPHER JOHN MONFORT in King County, Washington, on or about October 31, 2009, with premeditated intent to cause the death of another person, did cause the death of Seattle Police Officer Timothy Brenton, a human being, who died on or about October 31, 2009; that further aggravating circumstances exist, to wit: the victim was a law enforcement officer who was performing his 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;

Contrary to RCW 9A.32.030(1)(a) and 10.95.020(1), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant CHRISTOPHER JOHN MONFORT at said time of being armed with a .223/5.6 mm rifle, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT V

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse CHRISTOPHER JOHN MONFORT of the crime of **Attempted Murder in the First Degree**, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

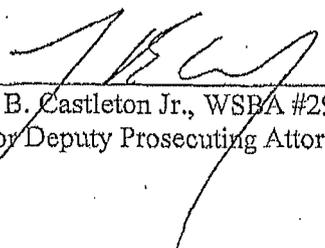
That the defendant CHRISTOPHER JOHN MONFORT in King County, Washington, on or about November 6, 2009, with premeditated intent to cause the death of another person, did attempt to cause the death of Seattle Police Detective Gary Nelson; attempt as used in the above charge means that the defendant committed an act which was a substantial step towards the commission of the above described crime with the intent to commit that crime;

Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant CHRISTOPHER JOHN MONFORT at said time of being armed with 9mm Glock semi-automatic handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG  
Prosecuting Attorney

By:   
John B. Castleton Jr., WSBA #29445  
Senior Deputy Prosecuting Attorney

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

09 - 1 - 07187 -

**ORIGINAL**SEATTLE  
POLICE  
DEPARTMENT**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                   |           |
|-------------------|-----------|
| GENERAL OFFENSE # | 09-383210 |
| UNIT FILE NUMBER  | H09-348   |

That Clloyd Steiger is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 09-383210;

There is probable cause to believe that Christopher John Monfort committed the crime(s) of Murder and Attempted Murder within the City of Seattle, County of King, State of Washington.

This belief is predicated on the following facts and circumstances:

On October 31, 2009, at approximately 9:30 p.m., Seattle Police Department Officers Timothy Brenton and Britt Sweeney conducted a traffic stop near the intersection of Martin Luther King Jr. Way and East Jefferson Street in Seattle. The stop, which lasted approximately 25 minutes, was uneventful. However, a witness walking her dog observed what appeared to be suspicious behavior by the driver of a car in the area. The car she observed drove past the officers, then turned at the next intersection, and pulled into a small park directly across from the officers. The headlights in the vehicle went off. The car then backed out of the paved area and onto a raised grassy area in the park. The car was directly facing the patrol car. The woman thought she saw two silhouettes in the car, but was not certain of this. It appeared to the woman that the occupant(s) in the car were watching the officers conduct the stop. She later described the car as a small, white or light-colored, older, foreign vehicle, with a sloped rear windshield, like a hatchback. In-car video from the officer's patrol car later depicted a car matching that description pass the officer's patrol vehicle at about 9:46 pm. These images were shown to the woman who had been walking her dog in the area at the time; she said that was the car that she subsequently saw "watching" the officers.

At almost at the exact time the officers left in their patrol car, the car the woman had been watching drove off the grass, onto Jefferson, and headed east. The woman walked a few blocks to her residence; just as she arrived there she heard multiple gunshots.

After the traffic stop, at approximately 10:06 p.m., Officers Brenton and Sweeney pulled their patrol car to the west side of 29<sup>th</sup> Avenue, a residential street, near East Yesler Way in Seattle, approximately six blocks from the traffic stop. The officers were discussing the traffic stop: Brenton was a Field Training Officer, and Sweeney was his student. Sweeney was sitting in the driver's seat; Brenton was in the front passenger seat.

As the officers were parked in that location, a resident north of them saw what she described as a white or light-colored Toyota, possibly a hatchback, driving in a manner that appeared suspicious to her. (Later she told detectives that she suspected the car might be preparing to do a "drive-by shooting.") As she watched, the car drove northbound down 29<sup>th</sup> Avenue, then saw it return southbound and drive toward East Yesler Way.

As Officer Sweeney sat in the patrol car, talking with Officer Brenton, she became aware that a car had stopped almost directly adjacent to the patrol car. The street is narrow; she later said that she could have reached out and touched the other car. She sensed danger, and ducked in her seat, yelling to Brenton to do the same. She saw muzzle flashes, heard explosions, and felt a stinging sensation on the top of her head. She was aware that bullets were striking Brenton. She immediately radioed for help, and was aware that the other car was backing away from the patrol car. She got out of the patrol car and saw the other car making a turn mid-block, by backing into



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                  |           |
|------------------|-----------|
| INCIDENT NUMBER  | 09-383210 |
| UNIT FILE NUMBER | H09-348   |

a space between cars and then driving north. Officer Sweeney fired approximately ten rounds from her duty weapon at the fleeing car. Officer Sweeney does not know whether any of the rounds she fired at the car struck it.

Officer Brenton was obviously dead at the scene. A search for the assailant was immediately commenced by the scores of patrol units that had responded to the scene from all over the city.

The immediate scene of the shooting was secured. Homicide detectives were summoned to the scene. Detective E. Jason Kasner and myself were designated as the primary detectives assigned to investigate this case.

Witnesses were interviewed in the area. A man who lives very close to the scene of the shooting was smoking a cigarette outside. He saw the other car pull up next to the patrol car, watched as shots were fired from that car into the patrol car, and saw the car back down the street, turn around, and drive away. He later described the car to detectives as a white or light-colored vehicle similar to a 1980's model Toyota Corolla.

Two other witnesses sitting in a car in a driveway just north of the shooting scene saw what they later described as a light-colored car, possibly a Toyota, drive southbound past them before the shooting. They heard the shots, and saw the same car drive past them at a high speed, in reverse, and then proceed northbound.

At a later point, Officer Brenton's body was removed from the scene and taken to the King County Medical Examiner's Office. An autopsy was conducted by Chief Medical Examiner Dr. Richard Harruff. Dr. Harruff said that Officer Brenton was struck several times in the head and torso by a weapon that fires .223 caliber, (5.56mm) rounds, commonly fired from an AR-15 or similar weapon. He ruled the cause of death as gunshot wounds, and the manner of death as Homicide.

Crime Scene Unit detectives were also summoned to process the crime scene. During the processing of the crime scene, CSI detectives noted and recovered a small bandana. This bandana had an American flag print on it. It was found just north of the shooting scene, at about the spot the suspect vehicle reportedly had turned around just after the shooting before fleeing northbound. We immediately placed significance on this piece of evidence because of the bombing of police equipment at the Charles Street shops nine days earlier, in which an American Flag was left by the suspect in that case, (a fact not widely reported or known outside very few in the police department).

Later, while reviewing in-dash cameras on responding patrol units, detectives reviewed the camera from Officers Brenton and Sweeney's patrol car. It is clear from that video that when they arrived at 29<sup>th</sup> and Yesler, the flag bandana was not in the street. We then reviewed the videos from the first arriving back-up units. The bandana is clearly seen in the street when they arrived very shortly after the shooting. We considered this signature evidence for this case, clearly left intentionally by the killer for that purpose.

We later learned that a male DNA profile had been developed on the flag found at the Charles Street shops, and that that profile had been searched in the state DNA databank with negative results. We submitted the bandana to the crime lab for DNA testing. A male DNA profile was developed. That profile was compared to the profile developed for Charles Street. The profile was matched to the Charles Street profile.



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                  |           |
|------------------|-----------|
| INCIDENT NUMBER  | 09-383210 |
| UNIT FILE NUMBER | H09-348   |

Numerous patrol cars responded from various parts of the city to Officer Sweeney's call for assistance. Most, if not all of these patrol cars had operating in-car video. Detectives viewed these videos and were able to see the same vehicle identified by the witness walking her dog driving away from the scene of the shooting. In several of the in-car videos, this car can be seen moving to the right of a large SUV, despite Yesler being one lane in each direction at those points, in what appeared to be an attempt to stay out of the sight of the responding patrol vehicles. Some of this video and some still photos of this car were shown to an expert vehicle salvage retailer, Harvey Gunderson, who is located in Bellingham. After reviewing the videos and the photos, using forensic-like techniques measuring point by point, Gunderson opined that the car is a 1980-82 Datsun 210. A 1980-82 Datsun 210 can appear to the casual observer to be a very similar in body style to a 1980s Toyota Corolla.

Further review of patrol car videos revealed that the car described above is actually captured on the Coban digital recording system installed in the car occupied by Officers Brenton and Sweeney. This image is time stamped 9:59 pm, just 8 minutes before the murder of Officer Brenton. At 21:46:50 video shows that this car passed the location where Officers Brenton and Sweeney were discussing their traffic stop in the same direction as the patrol car was parked. The car then made a right turn, toward the west, at the next street. This maneuver put the car in position to round the block and approach the patrol car from behind, southbound. At 22:06:18 headlights appear approaching from the north. The headlights stop. The interior of the patrol unit can be seen rocking. At 22:06:23, spatter appears on the front windshield of the patrol car. At 22:06:37, Officer Sweeney appears out of and in front of the patrol car, with her weapon in hand. She is speaking into her portable radio microphone. At 212:08:03 the first back up units arrive.

In the days following the murder of Officer Brenton the Seattle Police Department received several hundred tips from the public relating to this case. A task force made up of detectives from units outside of the Homicide Unit was assigned to conduct follow-up investigation on many of these tips.

At 11:30 AM on Friday, November 6<sup>th</sup>, Detective Timothy Renihan of the Criminal Intelligence Section received a tip from Kim Karns, the manager of the Terrace Apartments, 13725 56<sup>th</sup> Ave. S., Tukwila, WA 98168. Karns told Detective Renihan that the leaseholder/occupant of unit D402 owned a "Datsun 210." Karns further stated that she found it "weird" that the occupant had covered the Datsun with a tarp during the last few days while it had been parked in the open for many months prior. Karns identified the occupant of D 402 as "Chris Monfort."

Detective Renihan checked available computer systems and found that Christopher Monfort was listed as residing at the Tukwila address given by Karns. Detective Renihan then searched Washington State Motor Vehicles records through the DAPS (Driver and Plate Search) program and found that Christopher Monfort was the owner of a 1980 Datsun 210 Coupe, WA license #313UHG. The registration shows the same Tukwila address, 13725 56<sup>th</sup> Ave. S., #D-402, Tukwila, WA 98168.

Contemporaneous to this, I received a phone call from Sarah Atterbury, a scientist with the crime lab. Atterbury told me that she had developed a male DNA profile from the flag bandana recovered at the shooting scene. She then compared this profile to the male DNA profile developed from the flag, (and other items) from the Charles Street bombing. She told me that the two profiles were a match.



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                  |           |
|------------------|-----------|
| INCIDENT NUMBER  | 09-383210 |
| UNIT FILE NUMBER | H09-348   |

Detectives from the Homicide Unit responded to the scene to watch the vehicle while a search warrant was sought. SWAT officers were also dispatched. Upon the detectives arrival Monfort confronted them, produced a weapon and was shot by the detectives.

We obtained a search warrant to search his apartment. Upon entering the apartment, Kasner and I saw, among other things, an AR-15 type assault rifle in the living room, as well as other firearms, etc. Home-made explosives had been removed by the Bomb Squad prior to our entry.

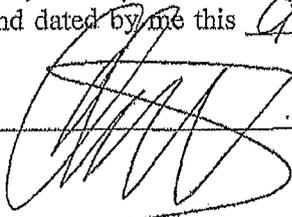
The AR-15 style rifle was submitted to the crime lab and examined by Forensic Scientist Rick Wyant. He compared it with spent bullet fragments recovered at the scene and from autopsy. Wyant matched the weapon to the rounds to the exclusion of all other weapons in the world.

Bloody clothing from Monfort was examined by Forensic Scientist Sarah Atterbury. Atterbury developed a DNA profile from that clothing. The profile was compared to DNA profiles from the flag at Charles Street and the bandana from the shooting scene. The three profiles were matched to the same source.

At the time of its recovery, the Datsun 210 did not have louvers. (The video of the suspect vehicle passing Brenton and Sweeney's car clearly showed that the car had louvers). Among the items recovered in the search of Monfort's apartment were a cell phone and two computers. We turned those items over to Seattle Police Detective David Dunn, a member of the US Secret Service Electronic Crimes Task Force. Dunn brought us printouts of the cell phone text messages and photographs from the cell phone. Among the photographs was one in which the Datsun 210 is shown with louvers on.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 9th day of November, 2009, at Seattle, Washington.

\_\_\_\_\_



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



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                                |
|--------------------------------|
| GENERAL OFFENSE #<br>09-371678 |
| UNIT FILE NUMBER               |

That Rik Hall is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 09-371678;

There is probable cause to believe that Christopher John Monfort 09/13/68 committed the crime(s) of Arson and Attempted Murder within the City of Seattle, County of King, State of Washington.

This belief is predicated on the following facts and circumstances:

On October 22, 2009, at about 0450 hours, Seattle Police were called regarding a fire and a suspicious person at the "Charles Street" maintenance lot. The lot is located at 714 South Charles Street, Seattle, WA, and houses the mechanical maintenance facility for vehicles belonging to the City of Seattle, including patrol cars and other marked Seattle Police Department vehicles. The maintenance lot is in use 24 hours per day. The maintenance lot is a secure facility surrounded by an eight foot razor wire-topped fence. City of Seattle staff work in adjacent buildings and staff are present in the maintenance yard throughout a 24 hour period.

On October 22, 2009 at approximately 0435 hours, Michael Rongren was on-duty, as a City of Seattle SDOT employee. He was sitting in his truck located in the northwest portion (six spaces south of the northwest fence line) of the maintenance yard at Charles Street. RONGREN looked to the south and saw a single person on the north/south drive path two west of 7<sup>th</sup> Av South (the seventh stall, approximately). The single person was weaving around vehicles; a pattern RONGREN believed was not-consistent with an employee. Concerned, RONGREN drove south from his parking stall, driving through the lot to look for the suspicious person. RONGREN had called Kelvin Green on his phone, GREEN exited the SDOT dispatch facility and got into a SDOT Prius. GREEN drove south from the SDOT building on 8<sup>th</sup> Av S, where he met up with RONGREN who was out of his vehicle and now on foot. RONGREN walked north on the 2<sup>nd</sup> drive path while GREEN went east to 8<sup>th</sup> Av S and drove north. As GREEN was driving north, RONGREN walked north on drive path 2 and noticed the suspect approximately twenty feet east of his first position. RONGREN continued north and advised GREEN of what he had seen. GREEN turned west on Charles Street then south on the 3<sup>rd</sup> drive path. He observed the suspect squatting down a few feet south of the SPD Mobile Precinct. GREEN, convinced this was not a homeless person, backed out to the intersection of Charles Street/8<sup>th</sup> Avenue South. The next time GREEN saw the suspect was when the suspect was crouching between the patrol cars on the ready-line. GREEN maintained his position in his vehicle, facing south on 8<sup>th</sup> Avenue South. GREEN saw the suspect was walking toward him, with purpose, so he backed his vehicle north of the intersection. Meanwhile, Karl Fairburn had arrived at the 7<sup>th</sup> Av S/S Charles Street gate and was being advised by RONGREN of what they had seen. FAIRBURN and RONGREN were now on foot on Charles Street, facing east. They slowly walked east and saw the suspect as he went northeast through the intersection and crouched near a large propane tank at the southwest corner of the automatic vehicle car wash. The mobile precinct erupted in flames, RONGREN called 911. FAIRBURN and RONGREN ran toward the suspect at the propane tank, they could see him moving his hands about, skin was showing and it appeared to be white. The suspect stood up, hoodie covering his face. He was standing close to a fence and was well illuminated. Compared to the height of the fence, they estimated the suspect's height to be approximately 6'2". The suspect was wearing a dark sweatshirt (described as dark red or maroon), dark backpack and dark pants. They did not see any eyeglasses. The subject turned and ran east on Charles Street, past the police car with the knife with an attached American flag impaled in the roof. The suspect pointed toward the Mobile Precinct. The witnesses looked toward the Mobile Precinct, the suspect ran east out of view. Two single-officer Seattle Police cars arrived moments later. They drove in from the 7<sup>th</sup> South/South Charles Street gate. They



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                              |
|------------------------------|
| INCIDENT NUMBER<br>09-371678 |
| UNIT FILE NUMBER             |

were flagged down by the witnesses who were near the car wash. A few minutes later there were several explosions near the police ready line, damaging/burning three police cars as well as fire damage to a portion of the west wall and windows of the main Charles Street maintenance garage. Officer Lopez stated that had he not been flagged down, he would have parked his car adjacent to the ready line to set begin a perimeter around the Mobile Precinct.

Seattle Police Arson/Bomb Unit, Seattle Police Intelligence and the Seattle Police CSI responded to the scene. During an examination of the Mobile Precinct, detectives located a 5 gallon gas can inside. Based on available evidence, the fire investigation performed by the Seattle Fire Department Arson Investigators indicated that the fire was intentionally set. In the area around and to the south of the Mobile Precinct was evidence consistent with the presence of a detonated improvised explosive device (IED). An examination of the ready line scene was consistent/indicated the presence of two detonated IED's with bottles of propane as well as liquid accelerant attached or adjacent to the IED's.

Based on the design of one of the partial remnants of a recovered IED, they likely used a "hobby fuse" to ignite the IED. The IED's were constructed, placed and fused to explode after the Mobile Precinct was ablaze, clearly intended as secondary devices used to injure or kill first-responders. Based on estimates the time from initially setting the fire to when the first devices went off was at least twelve minutes, a reasonable response time for police in the early morning when there is limited vehioular traffic.

- 0452 hours the 911 call was made by RONGREN, the Mobile Precinct was clearly ablaze (this process typically would take five to ten minutes from the time of initial setting of the fire)
- 0456 hours the first police car arrives
- 0459 hours two explosions are heard in the area of the ready line
- 0501 hours, one explosion near the Mobile Precinct

Within the Charles Street facility the suspect had placed messages on cars and buildings. A new police vehicle had two messages taped to the windows of the patrol car as well as knife stabbed through the roof. In the hilt of the knife (end cap removed) was a metal flagpole which was attached to a 3'x5' American flag. There were nine of the shorter message and one of the long messages which were affixed with duct tape. The shorter message which references death and police funerals is below:

OCTOBER 22<sup>ND</sup> is the 14<sup>TH</sup> National day of protest to stop Police Brutality  
 These Deaths are dedicated to Deputy Travis Bruner, he stood by and did nothing, as  
 Deputy Paul Schene Brutally beat and Unarmed 14 year old Girl in their care.  
 You Swear a Solemn Oath to Protect US From All Harm, That includes You ! Start  
 policing each other or get ready to attend a lot of police funerals.  
 We Pay your bills.  
 You Work for US.

Several items recovered from the Charles Street scene were submitted for DNA analysis. Among those items was the American flag with pole and a partial plastic bottle and end-cap with burn marks that were likely attached to or placed near the IED's that were under/around the ready-line police cars. DNA analysis indicated a partial DNA result, the flag/pole and plastic end cap containing matching DNA.

On October 31, 2009, Seattle Police Officer Timothy Brenton was assassinated while on duty in a marked police car. Left at the scene of the assassination was a bandanna with a US flag motif. The flag left at the Charles Street arson/bombing and the flag-motif bandanna indicated a possible link for the same suspect for both crimes. The information regarding the flag from Charles Street and the flag-



SEATTLE  
POLICE  
DEPARTMENT

**CERTIFICATION FOR DETERMINATION  
OF PROBABLE CAUSE**

|                  |           |
|------------------|-----------|
| INCIDENT NUMBER  | 09-371678 |
| UNIT FILE NUMBER |           |

motif bandanna was disseminated to a limited number of police personnel. DNA analysis was performed on the bandanna; the DNA test indicated a match with the Charles Street evidence. A concurrent investigation of the Charles Street incident and the Officer Brenton assassination eventually led to the discovery of a possible suspect, Christopher John Monfort.

A warrant was prepared and served on the apartment residence of Christopher John Monfort. Among other items located was a knife matching the one used to stab the police car at Charles Street. The end cap for the knife used at Charles Street was located. An American flag kit matching the one used at Charles Street was located. A copy of the long message (which was not disseminated to the media) left on the front door of the Charles Street dispatch building was on the glass platter of MONFORT's computer printer. A notebook containing the time it took for various lengths of fuse to burn was located. Within an athletic bag located in a storage closet on the apartment deck was two cans of powdered propellant, commonly used in the reloading of firearms ammunition as well as commonly used as a propellant which when lit while in a contained space (sealed off container) can cause an explosion. There were two Worthington 14.6 oz propane canisters (same type size as those found at the ready line at Charles Street). There were two plastic capped bottles thought to contain a liquid accelerant with duct tape attached. There were two road flares as well as "hobby fuse" consistent with fusing believed to be used at the Charles Street facility. Within MONFORT's apartment were four fully constructed shrapnel (nails and metal wire) attached IED's with short fuses. The fuse and design of these IED's suggest that they are to be used/thrown in a manner consistent with a hand grenade.

A DNA profile was developed from bloody clothing removed from MONFORT. The DNA profile was compared to the DNA information taken from the flag/pole and bottle end-cap. The three DNA profiles were matched to the same source.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 10<sup>th</sup> day of November, 2009, at Seattle, Washington.

[Signature] 6154

1 CAUSE NO.

2 CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

3 That Jon C. Holland is a(n) Detective with the King County Sheriff's  
4 Office and has reviewed the investigation conducted in the King County  
5 Sheriff's case number(s) 09-276882;

6 There is probable cause to believe that Christopher John Monfort  
7 committed the crime(s) of Attempted Murder in The First Degree.  
8 This belief is predicated on the following facts and circumstances:

9 On the evening of October 31<sup>st</sup>, 2009, Seattle Police Officer Timothy Brenton  
10 was the victim of a homicide. Officer Britt Sweeney was also injured during  
11 the incident. The death of Officer Brenton and the attempted murder of  
12 Officer Sweeney initiated an investigation by the Seattle Police Department.  
13 During the investigation, detectives identified a vehicle of interest that  
14 was described as a light colored Datsun 210.

15 On October 6<sup>th</sup>, 2009 at about 10:00AM, Seattle Police Department Detective  
16 Timothy Renihan received a call from a citizen informant. The citizen  
17 reported that a vehicle matching the description of the vehicle of interest  
18 was parked at the Terrace Apartments located at 13725 56<sup>th</sup> Ave S in Tukwila,  
19 WA. The citizen reported that the vehicle was parked in front of building D  
20 and now was covered by a car cover. The citizen reported that the vehicle is  
21 usually uncovered. The citizen told Detective Renihan that the vehicle  
22 belonged to the resident of apartment D-402 and that the sole resident of the  
23 apartment was a male known as Christopher John Monfort.

24 At about 11:30AM; Detective Renihan, Seattle Police Department Detective Rick  
25 Hall and Tukwila Police Department Detective Ron Corrigan arrived at the  
Terrace Apartments to investigate the tip. The detectives located the covered  
vehicle in parked next to building D. The detectives examined the exterior of  
the vehicle which did match the description of the vehicle of interest and  
decided to contact Monfort. The detectives knocked on the door of apartment  
D-402 several times. There was no answer.

26 Detectives Renihan and Hall returned to the Seattle Police Department and  
27 reported the information to Seattle Police Homicide Sgt. Gary Nelson. Sgt.  
28 Nelson, Seattle Police Department Sgt. Bob Vallor and Seattle Police  
29 Department Homicide Detective Rolf Norton decided that the information  
30 regarding the vehicle and its owner should be investigated further.

31 On 10-06-2009 at about 2:00PM, Tukwila Sgt. Mark Dunlap spoke to Sgt. Nelson.  
32 Sgt. Nelson requested that the covered vehicle be surveilled until his  
33 arrival. At about 2:20PM, Sgt Dunlap and Tukwila Officer Dave Cruz located  
34 the covered vehicle and positioned themselves near Building D. Tukwila  
35 Officer Brenden Kerin was also assisting in the surveillance.

36 Certification for Determination  
37 of Probable Cause

Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

1 Initially, it was not known what time Sgt. Vallor, Sgt. Nelson and Det.  
2 Norton arrived at the apartment complex. Their exact location at the complex  
3 was not known.

4 While on surveillance, Sgt. Dunlap states that about 3:20PM, a male exited D-  
5 402 and began walking towards him while he was parked in his vehicle. Sgt.  
6 Dunlap described the male as a light skinned African American male wearing a  
7 brown leather jacket. Sgt. Dunlap states that he drove away from the male to  
8 a different position in the parking lot. Sgt. Dunlap states that he did not  
9 engage the male and felt that his safety was in jeopardy. While walking  
10 around the parking lot, the male in the leather jacket, spoke to another  
11 subject in the lot. The identity of this male is unknown.

12 Sgt. Dunlap was able to relay the information about the male to Sgt. Nelson.  
13 At about 3:25PM Tukwila Officers Cruz, Kerin and Sgt. Dunlap state that they  
14 heard on the police radio one of the Seattle Sgts, or Det. Norton say "He's  
15 running", Sgt. Dunlap states that he heard something to the effect "He's  
16 pulling a gun" over the police radio. Sgt. Dunlap states that a few second  
17 later, he heard one of the Seattle officers say something to the effect "He's  
18 pulling the trigger". A few seconds later, Sgt. Dunlap states that he heard  
19 four to six gunshots. Sgt. Dunlap states that when he arrived in the area  
20 where the shooting took place, he saw Seattle Officers behind their vehicle  
21 in the lot below apartment D-402. Sgt. Dunlap states that he saw a body  
22 laying in the breezeway outside of D-402. Officer Cruz states that as he was  
23 exiting his vehicle on the north side of the building, when he heard  
24 approximately three gunshots. Officer Kerin states that he was near building  
25 D. He states that he had a view of the Seattle officers however; his view of  
the suspect was blocked because of a stairwell. Officer Kerin states that he  
heard the Seattle officers giving voice commands. Officer Kerin states that  
saw the Seattle officers with their pistols drawn. As he was coming into the  
area on foot, one of the Seattle officers told him to stop and take cover.  
One of the officers told him "He had a gun and it didn't go off". Officer  
Kerin states that a few seconds later, he heard what he thought was two  
gunshots.

During this incident, a 10-33 (help the officer) call went out to all law  
enforcement agencies. Upon officers' arrival, they secured the scene and  
called medical personnel. Upon discovering that Monfort had been shot, Sgt.  
Dunlap directed a team of officers to the fourth floor breezeway of building  
D where they located the male. The male had sustained a gunshot wound to the  
head and a gunshot wound to the lower back. The officers secured the hands of  
the male and carried him downstairs to the ground level. Medical personnel  
provided aid and transported the male to HVMC where he has been undergoing  
treatment for two gunshot wounds. The male was positively identified as  
Christopher John Monfort. Monfort is currently at HVMC in serious condition  
and under police guard.

Certification for Determination  
of Probable Cause

Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

1 When removing Monfort from the scene, officers' discovered that Monfort was  
2 lying on a Glock 9mm semi-automatic pistol. The pistol, contents of Monfort's  
3 pockets and clothing were seized at the scene prior to Monfort being  
4 transported to HVMC. One of Monfort's possessions in his pocket was a small  
5 book that contained a copy of the Declaration of Independence and the  
6 Constitution of The United States of America. The evidence was collected by  
7 Tukwila Sgt. Dunlap and stored in Officer Kerin's patrol car. All evidence  
8 seized from Monfort was later released by Officer Kerin to the Seattle Police  
9 Department CSI unit.

10 The King County Sheriff's Office Major Crimes Unit was asked to investigate  
11 this incident. Det. Jon Holland is the lead detective.

12 Sgt. Nelson, Sgt. Vallor and Det. Norton were transported to the Norm Maleng  
13 Regional Justice Center in Kent, WA. Post officer involved shooting  
14 procedures were completed which includes the examination and seizure of the  
15 officer's firearms. It was determined that each officer had fired twice for a  
16 total of six rounds. It's not known at this time which of the officer(s) had  
17 shot Monfort. The officers provided detectives with the locations where they  
18 were positioned during the shooting.

19 After Monfort's apartment was secured by Seattle Police Department SWAT and  
20 the Bomb Squad, the sheriff's office Major Crimes Unit processed the shooting  
21 scene. There were six 40 caliber casings found in the parking lot near the D  
22 building. The location of the casings is consistent with the information that  
23 the Seattle officers provided regarding their positions during the shooting.  
24 All six of the fired rounds have been accounted for. One round remains in  
25 Monfort. One slug was found in the parking lot. Four slugs were removed from  
the walls of D building near Monfort's apartment.

On 11-08-2009, the King County Sheriff's Office in conjunction with the  
Seattle Police Department issued a request that the statements regarding the  
shooting of Charles J. Monfort be administratively compelled. On 11-10-2009,  
I received the compelled statements of Sgt. Vallor, Sgt. Nelson and Det.  
Norton.

At approximately 2:30PM, Sgt. Nelson, Sgt. Vallor and Detective Norton  
arrived at the Terrace Apartments (Sgt. Vallor was the driver; Sgt. Nelson  
and Det. Norton were passengers). Sgt. Dunlap was in communication with Sgt.  
Nelson cellular phone. Sgt. Vallor, Sgt. Nelson and Det. Norton located the  
vehicle of interest next to building D. Sgt. Vallor ordered a tow truck to  
have the vehicle impounded. Sgt. Nelson also spoke with the Seattle Police  
Department SWAT team and requested that they respond to their location. Their  
initial plan was to impound the vehicle and have the SWAT team provide  
tactical support while Sgt. Vallor, Sgt. Nelson and Det. Norton contacted  
Monfort in D-402. Sgt. Vallor moved his vehicle to a safe location and waited  
for the arrival of the SWAT team.

Certification for Determination  
of Probable Cause

Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

1 While Sgt. Vallor, Sgt. Nelson and Det. Norton were waiting for the SWAT  
2 team, Sgt. Nelson received a call from Sgt. Dunlap. Sgt. Dunlap reported that  
3 a male later identified as Monfort had exited D-402 and now was in the  
4 parking lot of the complex. Sgt. Nelson requested that Sgt. Dunlap and his  
5 officers (Kerin and Cruz) stop and detain the male. Sgt. Dunlap reported that  
6 he and Officers Kerin and Cruz were not in a position to do so. Sgt. Dunlap  
7 provided Sgt. Nelson the description of the male.

8 Sgt. Nelson states that he saw the male directly in front of them. Sgt.  
9 Nelson told Sgt. Vallor and Det. Norton that this was the person that sat.  
10 Dunlap had described.

11 Monfort had both hands in his jacket pockets. Det. Nelson and Sgt. Vallor  
12 exited their unmarked police car. Det. Norton verbally engaged Monfort and  
13 said that they needed to talk to him. Monfort fled on foot from Det. Norton  
14 and Sgt. Nelson. Monfort ran into a stairwell of building D.

15 Det. Norton gave chase. Det. Norton ran to the south and took a cover  
16 position behind a vehicle. Sgt. Nelson entered a stairwell of the D building.  
17 Sgt. Nelson climbed a few steps and stopped. Sgt. Nelson states that the area  
18 was dark and that the stairs led to a landing area. As Sgt. Nelson was  
19 stepping into the landing area, Monfort appeared.

20 Sgt. Nelson states that Monfort was in possession of a semi-automatic pistol  
21 and that Monfort was an estimated six to eight feet away from him. Sgt.  
22 Nelson states that Monfort had the pistol in his hand with his arm fully  
23 extended at shoulder height. Sgt. Nelson states that the gun was aimed  
24 directly at his face. Sgt. Nelson states that Monfort, he heard the sound of  
25 a "dry fire". A dry fire is a term used when the trigger is pulled on a  
firearm and the sound it produces when a bullet is not fired. During this  
engagement, Sgt. Nelson's pistol was secured in his holster. Sgt. Nelson  
states that when the gun didn't fire, Monfort turned and ran. Sgt. Nelson  
yelled warnings to Det. Norton, Sgt. Vallor and Tukwila officers that Monfort  
had "Put a gun in my face and pulled the trigger".

Sgt. Vallor had moved the police car in the D building parking lot. Det.  
Norton positioned himself near the right rear passenger side of the vehicle.  
Sgt. Norton had positioned himself near the right front passenger side of the  
vehicle. Sgt. Nelson positioned himself in the parking lot to the south of  
them near other vehicles in the lot.

For a few minutes, Sgt. Nelson, Sgt. Vallor and Sgt. Nelson did not know the  
location of Monfort other than he was more than likely hiding somewhere in  
the stairwell which led to landing areas where apartment doors are located.  
Numerous verbal commands were given to Monfort to show himself and surrender.

Monfort did not obey the voice commands given by Sgt. Vallor, Sgt. Nelson and  
Det. Norton. Det. Norton states that he saw Monfort briefly going up the

Certification for Determination  
of Probable Cause

Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

1 stairwell. Det. Norton warned Sgt. Vallor and Sgt. Nelson of Monfort's  
2 movement. Monfort appeared on the fourth floor landing and was running.  
3 Upon reaching the fourth floor landing, Sgt. Nelson states that Monfort had  
4 his pistol aimed at him a second time. Sgt. Vallor also states that Monfort  
5 had the gun aimed in the direction of Sgt. Nelson. Sgt. Vallor states that it  
6 appeared to him that Monfort's gun jerked in his hand as if he fired it or  
7 was trying to fire it.

8 Sgt. Vallor, Sgt. Nelson and Det. Norton all feared for their lives. All  
9 three of them fired their pistol at Monfort. Monfort fell on the landing in  
10 front of his door. Additional voice commands were given and Monfort did not  
11 move. After Monfort was secured by Tukwila officers, Sgt. Vallor, Sgt. Nelson  
12 and Det. Norton removed themselves from the immediate scene.

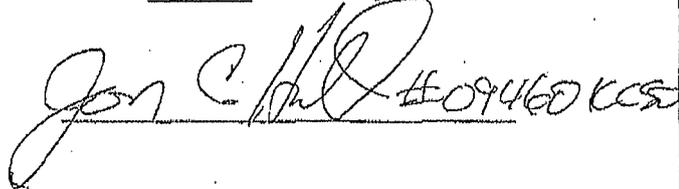
13 The Glock 9mm pistol that Monfort was in possession of was examined by King  
14 County Sheriff's Office Det. Thien Do and Seattle Police Department CSI  
15 detectives. The pistol held one round in the chamber and sixteen rounds in  
16 the magazine. There were no visible hammer strikes on the chambered round.

17 Based on the information gathered in this investigation and evidence  
18 collected; Charles J. Monfort produced a firearm and aimed it at Seattle  
19 Police Department Sgt. Gary Nelson twice. Sgt. Nelson states that Monfort  
20 pulled the trigger and the gun didn't fire. According to the Seattle Police  
21 Department CSI detectives, there is no hammer strike or firing pin markings  
22 on the primer of the chambered round. Had the weapon fired, Sgt. Nelson would  
23 have more than likely sustained serious bodily injury or death.

24 Based on Sgt. Nelson's information that Monfort did pull the trigger, Monfort  
25 attempted to fire the weapon on an empty chamber. The weapon was found with a  
round in the chamber which indicates that while fleeing from the Seattle  
detectives, Monfort pulled the slide of the pistol back and "racked" a round  
in the chamber. During the incident, Monfort had ample time to chamber a  
round and resolve the malfunction.

Based on the findings during the investigation, probable cause exists for the  
arrest and filing of charges on Charles John Monfort for the crime of  
Attempted Murder in The first Degree.

Under penalty of perjury under the laws of the State of Washington,  
I certify that the foregoing is true and correct. Signed and dated  
By me this 12th day of November, 2009, at Seattle, Washington.



Certification for Determination  
of Probable Cause

Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

CAUSE NO. 09-1-07187-6 SEA

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

The facts for Counts I and II are set forth in the Certification for Determination of Probable Cause signed by Seattle Police Detective Rik Hall on November 10, 2009, and based on Seattle Police Department incident number 09-371678.

The facts for Counts III and IV are set forth in the Certification for Determination of Probable Cause signed by Seattle Police Detective Cloyd Steiger on November 9, 2009, and based on Seattle Police Department incident number 09-383210.

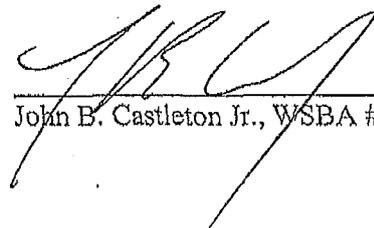
The facts for Count V are set forth in the Certification for Determination of Probable Cause signed by King County Sheriff's Detective John Holland on November 12, 2009, and based on King County Sheriff's Office incident number 09-276882.

All three of these Certifications for Determination of Probable Cause are hereby incorporated by reference.

REQUEST FOR BAIL

Because the crime charged in Count IV, Aggravated Murder in the First Degree, carries a potential sentence of death, and pursuant to CrR 3.2(g), the State requests that the defendant be **held without bail** and that he be precluded, by written order, from having any contact with the family of the victims in this case or with any of the witnesses, either directly or through third persons.

Signed this 12 day of November, 2009.

  
\_\_\_\_\_  
John B. Castleton Jr., WSBA #29445

## **APPENDIX E**



## **APPENDIX F**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

FILED

SEP 02 2010

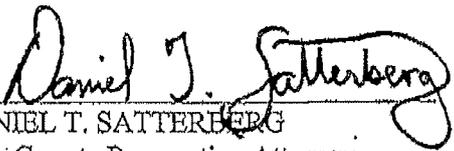
SUPERIOR COURT  
BY Susan Bone  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

|                           |   |                              |
|---------------------------|---|------------------------------|
| STATE OF WASHINGTON,      | ) |                              |
|                           | ) | No. 09-1-07187-6 SEA         |
| Plaintiff,                | ) |                              |
|                           | ) | NOTICE OF SPECIAL SENTENCING |
| vs.                       | ) | PROCEEDING TO DETERMINE      |
|                           | ) | WHETHER DEATH PENALTY        |
| CHRISTOPHER JOHN MONFORT, | ) | SHOULD BE IMPOSED            |
|                           | ) |                              |
| Defendant.                | ) |                              |

COMES NOW Daniel T. Satterberg, King County Prosecuting Attorney, and gives notice pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether the death penalty should be imposed, there being reason to believe that there are not sufficient mitigating circumstances to merit leniency.

DATED this 2<sup>nd</sup> day of September, 2010.

By:   
DANIEL T. SATTERBERG  
King County Prosecuting Attorney  
Office WSBA #91002

## **APPENDIX G**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FILED**  
**KING COUNTY, WASHINGTON**  
JUL 20 2012  
**SUPERIOR COURT CLERK**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

Cause No: 09-1-07187-6 SEA

DEFENSE MOTION TO STRIKE NOTICE OF  
INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT THE STATE FAILED  
TO COMPLY WITH THE MANDATES OF  
RCW 10.95.040

**MOTION**

The defendant, Christopher Monfort, through his attorneys, Carl Luer, Todd Gruenhagen and Stacey MacDonald asks this court to dismiss the Notice of Intent to Seek the Death Penalty filed on September 2, 2010 and preclude the state from seeking the death penalty in the event Mr. Monfort is convicted of aggravated first degree murder as charged in Count IV.

This motion is based upon the King County Prosecutor's failure to follow the requirements of RCW 10.95.040 when filing the notice of intent to seek the death penalty against Mr. Monfort. Specifically, the prosecutor improperly based his decision to seek death on the facts underlying the charged offenses and did not make the requisite determination that there are not sufficient mitigating circumstances to merit leniency because he lacked a factual basis to make that determination. This failure to comply with the statutory procedures that govern when the state may

1 seek the death penalty violated Mr. Monfort's rights under the Fifth and Fourteenth Amendments to  
2 the United States Constitution and Article I, Section 14 of the Washington State Constitution. This  
3 motion is based on these constitutional provisions, RCW 10.95, the appendices to this motion and  
4 other authorities cited.  
5

6  
7 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2012.  
8

9  
10 Carl Luer WSBA #16365  
11 Todd Gruenhagen WSBA #12340  
12 Stacey MacDonald WSBA # 35394  
13 Attorneys for Christopher Monfort

14 **FACTS AND PROCEDURAL BACKGROUND**

15 On November 12, 2009 the State charged Mr. Monfort with five separate crimes arising out  
16 of a series of three separate incidents on October 22, 2009, October 31, 2009, and November 6,  
17 2009. The first two counts allege that Mr. Monfort committed the crimes of arson in the first  
18 degree and attempted first degree murder at the City of Seattle' Charles Street vehicle maintenance  
19 facility on October 22, 2009. The third and fourth counts allege that, with premeditated intent, Mr.  
20 Monfort killed SPD Officer Timothy Brenton and attempted to kill SPD Officer Britt Sweeney on  
21 October 31, 2009. The fifth count alleges that with premeditated intent, Mr. Monfort attempted to  
22 kill SPD Sergeant Gary Nelson on November 6, 2009.  
23

24  
25 When announcing the charges, King County Prosecuting Attorney Dan Satterberg asserted  
26 that Mr. Monfort "waged a one man war" against the Seattle Police Department and stated that:  
27 "We've never seen anything like this. When discussing the possibility that he would seek Mr.  
28

1 Monfort's execution, Satterberg commented that: "The death penalty is reserved in the State of  
2 Washington for the worst of the worst. We're going to take our time, but there is no greater crime  
3 in my view than the murder of a police officer." Copies of news articles from seattlepi.com and  
4 mynorthwest.com quoting Mr. Satterberg are attached as Appendix A and Appendix B.  
5

6 On December 14, 2009, the King County Prosecutor's Chief Criminal Deputy Mark Larson  
7 sent defense counsel a letter regarding the timing for submitting a mitigation package. The letter  
8 informed counsel that the state was setting a deadline of May 15<sup>th</sup> for submission of mitigation  
9 materials and that Mr. Satterberg would issue his decision on the death penalty on June 15<sup>th</sup>. Mr.  
10 Larson's letter also explained his general policy on the timing for submitting mitigation materials:  
11

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

18 A copy of the December 14, 2009 letter from Mr. Satterberg is attached as Appendix C. Also  
19 attached as Appendix D through F are letters sent to counsel representing Naveed Haq (King Co.  
20 No. 06-1-06658-4 SEA), Isaiah Kalebu (King Co. No. 09-1-04992-7) and Daniel Hicks (No. 09-1-  
21 07578-2). As is readily apparent, Mr. Satterberg's December 14, 2009 letter regarding this case is  
22 remarkably similar if not identical to the letters sent in other aggravated murder cases during the  
23 same time period. Each letter contained identical language regarding the perceived benefits of  
24 maintaining a short time period for submitting mitigation.

25 On June 4 2010, the parties agreed to extend the deadline for filing the death notice to  
26 September 3, 2010. As the September 3, 2010, deadline approached, the defense again asked Mr.  
27 Satterberg for additional time to complete and submit a mitigation package so that he would have  
28 an adequate factual basis to determine whether there were mitigating circumstances that would

1 preclude seeking the death penalty against Mr. Monfort. The State refused the defense request for  
2 additional time and indicated that it would proceed with its announcement on the death penalty by  
3 September 3, 2010. In August, 2010, the defense filed a motion asking the court to preclude the  
4 state from announcing its decision on seeking the death penalty until the defense had adequate time  
5 to submit a mitigation package. The Court heard argument on that motion on August 25, 2010. In  
6 denying the defense motion, the court concluded that it lacked the authority to order the State to  
7 delay announcing its decision on seeking the death penalty but also noted that the State was  
8 "needlessly rushing to judgment" and that if in fact the court did have the authority to direct the  
9 state to delay announcing its decision, it would exercise that authority and do so.

10  
11  
12 At a subsequent hearing on September 2, 2010, the State announced its intention to seek Mr.  
13 Monfort's execution. During subsequent press conferences and media interviews, Mr. Satterberg  
14 made it clear that his focus in electing to seek Mr. Monfort's death was the facts of the charged  
15 crimes and not any possible mitigating factors in Mr. Monfort's background:

16  
17 This morning, I filed a notice of intent to seek the death penalty in the case of State v.  
18 Christopher Monfort, who is charged with the aggravated first degree murder for the slaying  
19 of Seattle Police Officer Timothy Brenton.

20 Monfort is also charged with the attempted first degree murder of Seattle Police Officer  
21 Britt Sweeney, Officer Brenton's partner, the attempted first degree murder of Seattle Police  
22 Sergeant Gary Nelson, arising from Monfort's conduct when apprehended and the arson and  
23 attempted murder of additional law enforcement personnel stemming from bombs that were  
24 planted at the Charles Street Vehicle Services Facility used by the Seattle Police  
25 Department.

26 The intentional, premeditated and random slaying of a police officer is deserving of the full  
27 measure of punishment under the law. The magnitude of the crimes with which the  
28 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.

Q13 Fox News Report dated September 2, 2010. (Copy attached as Appendix G.) A copy of the  
death notice filed that day is attached as Appendix H. Although Mr. Satterberg's afterthought

1 regarding "the absence of significant mitigating factors" pays lip service to his statutory obligations,  
2 it is clear from the entirety of his statement that the decision to seek the death penalty was based  
3 upon the facts of the charged crimes and not an absence of mitigating factors. In other interviews  
4 Mr. Satterberg apparently made no reference to the absence of mitigating circumstances and  
5 focused entirely on the alleged facts of the crimes:  
6

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

10 KUOW News Report dated 9/2/2010 (attached as Appendix I).

11       In a subsequent interview on September 2<sup>nd</sup> 2010, Mr. Satterberg went further in explaining  
12 his decision to seek Mr. Monfort's execution. In an interview with Northwest Public Radio on  
13 September 2<sup>nd</sup> 2010, Mr. Monfort's previous attorney raised questions about the adequacy of a  
14 purported mitigation investigation conducted by a private investigator retained by the prosecutor's  
15 office. In response to that criticism, Mr. Satterberg described the work done by that investigator in  
16 expansive terms:  
17

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

21 A copy of the Northwest Public Radio report describing that interview is attached as Appendix J.

22       Mr. Satterberg was apparently referring to an investigation conducted by Aimee Rachunok,  
23 a private investigator hired by the King County Prosecutor's Office. If Mr. Satterberg actually  
24 believes that Ms. Rachunok interviewed everyone who ever met Mr. Monfort, then he is sadly  
25 mistaken and his factual basis for asserting an absence of mitigating factors is completely  
26 undermined. Ms. Rachunok interviewed a total of 25 individuals who knew Mr. Monfort. Her  
27 selection of people to interview can best be described as random and superficial. Of the 25 people  
28

1 Ms. Rachunok spoke with, 16 knew Mr. Monfort from his time at Highline Community College,  
2 either directly through the school or through jobs he did while at Highline. Of the remaining nine  
3 witnesses, four were co-workers of Mr. Monfort's either at the King County Juvenile Detention  
4 Center where he volunteered during his time at the University of Washington or at Pilot Freight  
5 Services where he worked in 2009. Three of the remaining witnesses can be described as family  
6 members though none was particularly close to Mr. Monfort for any period of time. One is his  
7 former step-father who was married to Mr. Monfort's mother Suzan for several years while Mr.  
8 Monfort was in junior high school. The second is married to one of Mr. Monfort's second cousins  
9 and the third is Mr. Monfort's estranged wife, Toi Limolansuk. Mr. Monfort and Ms. Limolansuk  
10 married in 1995 and never divorced, however, they only lived together for approximately one  
11 month and maintained very infrequent contact over the ensuing years. The remaining two  
12 witnesses hardly knew Mr. Monfort at all. One was a co-worker at American Freightways in  
13 Shreveport Louisiana who indicated he had "very few memories related to Monfort" and that in his  
14 brief contact with Mr. Monfort he had no recollection of them discussing anything personal. The  
15 final witness met Mr. Monfort briefly on May 25, 1991 when the two were involved in a traffic  
16 accident.<sup>1</sup>

17  
18  
19  
20 Of the 25 interviews that Ms. Rachunok conducted, 24 were done over the phone and one  
21 was a brief email correspondence. None were conducted face-to-face and she did not do any  
22 follow-up interviews.  
23

24  
25 LAW AND ARGUMENT  
26

27  
28 <sup>1</sup> It is unclear whether Mr. Satterberg was aware of the contents of several of these interviews when he made the decision to seek death. Two of them occurred after the State filed the death notice and another took place the day before.

1           A. The Prosecuting Attorney improperly based his decision to seek the death penalty  
2           on the facts of the charged offenses and not on a reasoned determination that there  
3           are not sufficient mitigating circumstances to merit leniency as required by RCW  
4           10.95.040.

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

7           (1) If a person is charged with aggravated first degree murder as defined  
8           by RCW 10.95.020, the prosecuting attorney shall file written notice of a  
9           special sentencing proceeding to determine whether or not the death  
10          penalty should be imposed when there is reason to believe that there are  
11          not sufficient mitigating circumstances to merit leniency. [Emphasis  
12          added.]

13          (2) The notice of special sentencing proceeding shall be filed and served  
14          on the defendant or the defendant's attorney within thirty days after the  
15          defendant's arraignment upon the charge of aggravated first degree  
16          murder unless the court, for good cause shown, extends or reopens the  
17          period for filing and service of the notice. Except with the consent of the  
18          prosecuting attorney, during the period in which the prosecuting attorney  
19          may file the notice of special sentencing proceeding, the defendant may  
20          not tender a plea of guilty to the charge of aggravated first degree murder  
21          not may the court accept a plea of guilty to the charge of aggravated first  
22          degree murder or any lesser included offense.

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

26          The statute provides several safeguards for defendants facing aggravated murder charges. First, the  
27          prosecutor must personally file the death notice upon the defendant or the defendant's attorney  
28          within 30 days of arraignment or at such later date if the court finds good cause to extend or reopen  
29          the filing period. RCW 10.95.040(2). The statute provides additional safeguards by requiring that  
30          the prosecuting attorney can only elect to seek the death penalty when there is reason to believe that  
31          there are no sufficient mitigating circumstances to merit leniency. RCW 10.95.040

32          The presumptive sentence for aggravated murder in Washington is life imprisonment  
33          without the possibility of parole. RCW 10.95.030. Washington courts require strict compliance

1 with RCW 10.95.040 before the state can seek to overcome that presumption. In *State v. Dearbone*,  
2 125 Wn.2d 173, 883 P.2d 303 (1994), the state filed notice of its intent to seek the death penalty the  
3 morning of the agreed upon filing date. The deputy prosecutor assigned to the case left a voicemail  
4 message with defense counsel that same morning and met briefly with the defense attorney in the  
5 courthouse on the way to file the death notice. The prosecutor failed, however, to provide written  
6 notice of the State's intent to seek the death penalty until four days after the deadline. 125 Wn.2d at  
7 175-76. At a subsequent hearing the defense moved to preclude the State from requesting the death  
8 penalty based on the fact that the written copy of the notice was served after the statutory time for  
9 service had expired. The trial court granted the State's request to reopen the time for serving the  
10 notice, finding that there was good cause under RCW 10.95.040(1).  
11

12  
13 The Supreme Court reversed and emphasized that the procedures outlined in 10.95.040 are  
14 mandatory:

15 Given the unique qualities of the death penalty, the Legislature has  
16 tailored pretrial procedures to govern the use of a special sentencing  
17 proceeding. Second, filing and service of notice is mandatory -- no notice,  
18 no death penalty.

19 *Dearbone*, 125 Wn.2d at 177. See also, *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995)

20 (Recognizing that death penalty cases require heightened scrutiny by the courts to ensure that the  
21 procedures and safeguards enacted by the Legislature are properly followed by the State.)

22 *Dearbone* went on to reject the State's contention that it has substantially complied with the statute,  
23 noting that: "We decline to graft the doctrine of substantial compliance onto RCW 10.95.040." 125  
24 Wn.2d at 182.

25  
26 In addition to the procedural notice requirement, RCW 10.95.040 restricts the prosecutor  
27 from seeking the death penalty to cases where "there is reason to believe that there are not sufficient  
28 mitigating circumstances to merit leniency." The standard established by the legislature in

1 determining whether the State may file a death notice is the sufficiency of the mitigating evidence.  
2 A prosecutor must affirmatively have reason to believe there is an absence of adequate mitigating  
3 evidence in the case before he can seek to file a death notice. In such a case, the decision is  
4 mandatory – the prosecutor “shall file” the notice if there are not sufficient mitigating  
5 circumstances.  
6

7 There is nothing in RCW 10.95.040, however, that suggests the prosecutor should consider  
8 the particular circumstances of the charged offenses and then weigh those circumstances against the  
9 mitigating evidence in deciding whether to seek death. In the absence of such language the  
10 prosecutor is precluded from inferring the circumstances of the charged crime into the statutory  
11 standard established for filing a death notice. If the legislature intended the prosecutor to weight  
12 mitigating evidence against the underlying facts of the case, it would have included that language in  
13 the statute.  
14

15 The legislature did in fact direct that capital juries consider the underlying facts of the  
16 charged crime in making the life or death decision:  
17

18 Upon conclusion of the evidence and argument at the special sentencing  
19 proceeding, the jury shall retire to deliberate upon the following question:  
20 “Having in mind the crime of which the defendant has been found guilty,  
21 are you convinced beyond a reasonable doubt that there are not sufficient  
22 mitigating circumstances to merit leniency?”

23 RCW 10.95.060(4). It is significant that the legislature specifically instructed the jury to consider  
24 the crime for which the defendant has been found guilty in determining the appropriate sentence but  
25 did not instruct the prosecutor to consider the facts of the charged crimes when deciding whether to  
26 file a death notice. By expressly including that consideration in one part of the statute, the  
27 legislature impliedly provided that it is not included in other parts of the statute. *State v. Delgado*,  
28 148 Wn.2d 723, 729, 63 P.2d 792 (2003); *State v. Meacham*, 154 Wn.App. 467, 472, 225 P.3d 472

1 (2010). As the Washington Supreme Court noted in *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694  
2 (1996):

3 . . . We think, rather, that it is more significant that the Legislature did not  
4 include the word "personally" in RCW 10.95.040 as it did in RCW  
5 4.28.080. Where the Legislature uses certain statutory language in one  
6 instance, and different language in another, there is a difference in  
7 legislative intent.

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

12 Requiring the prosecutor to focus on the mitigating evidence regarding a defendant in  
13 determining whether to seek death is consistent with the Washington death penalty scheme as a  
14 whole. RCW 10.95 strongly disfavors death as the sentence for aggravated murder. Initially, the  
15 statute requires a conviction for premeditated murder plus proof of at least one aggravating factor  
16 for a defendant to be sentenced to life without the possibility of parole. A person convicted of any  
17 other offense in Washington has at least the possibility of being released. The only crime that  
18 carries a sentence without any possibility of release is aggravated first degree murder, which is  
19 punishable by life without the possibility of parole or death.  
20

21 RCW 10.95 establishes an exacting process the State must satisfy before it can seek death.  
22 First, the state must determine that it can prove the elements of a premeditated murder. Second, if  
23 the prosecutor believes that the facts of a premeditated murder warrant more punishment than that  
24 carried by a charge of first degree murder it may consider whether one of the 14 aggravating factors  
25 set out in RCW 10.95.020 applies. It is at that stage of the process where the prosecutor must  
26 consider the underlying facts of the charged crime. This is when the prosecutor identifies and  
27  
28

1 selects the small subset of the "worst of the worst" premeditated murders in determining which will  
2 be charged as aggravated. In making that decision, a prosecutor must focus on the circumstances of  
3 the murder when deciding whether or not to charge aggravating factors under RCW 10.95.020.  
4 Even if an aggravating factor exists in a given case, there is nothing in the statute that obligates the  
5 prosecutor to charge aggravated murder.  
6

7 RCW 10.95.040 operates differently. Once the prosecutor has considered the facts of the  
8 crime and elected to charge aggravated murder, the eligibility stage of Washington's capital  
9 sentencing process is over and the underlying facts of the crime are not relevant to the next part of  
10 the decision making process, which is the prosecutor's selection of which punishment to seek. By  
11 statute there are two options: life without parole or death. If the prosecutor makes an informed  
12 decision that there is reason to believe there are not sufficient mitigating circumstances to merit  
13 leniency, he must file a death notice. The "reason to believe" language establishes a reasonableness  
14 standard for assessing mitigating factors applicable to the defendant. RCW 10.95.040 clearly limits  
15 prosecutorial subjectivity and requires that the focus at this stage of the decision making process be  
16 on mitigating circumstances. If the prosecutor fails to scrupulously follow the mandates of RCW  
17 10.94.050, even with respect to the technical requirements of serving the notice, he may not request  
18 the death penalty. *Dearbone*, 125 Wn.2d at 177. The Washington Supreme Court explained the  
19 underlying reasons for requiring strict adherence to the mandates of RCW 10.95.040 as follows:  
20  
21  
22

23 As the United States Supreme Court has repeatedly noted, "the penalty of  
24 death is qualitatively different from a sentence of imprisonment, however  
25 long." Citing *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct.  
26 2978, 2991, 49 L.Ed.2d 944 (1976). Because of this difference, we should  
27 strive to ensure that the procedures and safeguards enacted by the  
28 Legislature are properly followed by the State. The determination of  
whether a defendant will live or die must be made in a particularly careful  
and reliable manner in accordance with the procedures established by the  
Legislature.

1 *State v. Luvene*, 127 Wn.2d 690, 719, 903 P.2d 960 (1995) *f.n.* 8.

2 It is clear in this case, however, that Mr. Satterberg's focus when deciding to seek Mr.  
3 Monfort's execution was not the absence of mitigating circumstances or any other circumstances of  
4 Mr. Monfort's life, but rather on the facts of the charged crimes. When explaining his reasons for  
5 seeking the death penalty, Mr. Satterberg emphasized the underlying facts of the charges and made  
6 only passing reference to his view that there was a lack of mitigating circumstances:  
7

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

12 Monfort is also charged with the attempted first degree murder of Seattle  
13 Police Officer Britt Sweeney, Officer Brenton's partner, the attempted  
14 first degree murder of Seattle Police Sergeant Gary Nelson, arising from  
15 Monfort's conduct when apprehended and the arson and attempted murder  
16 of additional law enforcement personnel stemming from bombs that were  
17 planted at the Charles Street Vehicle Services Facility used by the Seattle  
18 Police Department.

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

25 In another interview the day he announced his intention to seek death, Mr. Satterberg stated that:

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

Appendix I. These statements were entirely consistent with Mr. Satterberg's comments when he  
filed charges against Mr. Monfort and stated that in his opinion there is no greater crime than the  
murder of a police officer.

1           The State here has violated RCW 10.95.040 in a manner that is far more harmful than the  
2 procedural defect in *Dearbone, supra*. In this case the prosecutor based his decision to seek the  
3 death penalty on impermissible considerations and failed to make an informed determination that  
4 there are not sufficient mitigating circumstances to merit leniency. As a result, the State has  
5 violated the substantive provisions of the statute. Because the state failed to adhere to the statutory  
6 requirements for filing a death notice, it should be precluded from seeking the death penalty.  
7

8           **B. Even if RCW 10.95.040 permits a prosecutor to factor in the circumstances of the**  
9 **charged crime in deciding whether to seek death, the primary focus must be on**  
10 **mitigating factors and the prosecutor here lacked a reasonable factual basis to**  
11 **conclude that leniency is not warranted.**

12           Based on Mr. Satterberg's public statements in announcing his decision to seek the death  
13 penalty, there is no question that his primary reasons for doing so are the facts underlying the  
14 charged crimes. Even if those are not completely impermissible considerations, it is clear from the  
15 plain language of RCW 10.05.040 that the primary consideration must be the absence of mitigating  
16 circumstances. Although Mr. Satterberg did mention in passing that in his view there is an absence  
17 of mitigating factors, the fact that he lacked a reasonable factual basis for that assertion and his  
18 heavy emphasis on the facts underlying the charges violates the mandates of RCW 10.95.040.  
19

20           When attempting to explain his claim that there is an absence of mitigating circumstances in  
21 this case, Mr. Satterberg referenced an investigator hired by the state who conducted what purports  
22 to be a mitigation investigation into Mr. Monfort's background. According to Mr. Satterberg, that  
23 investigator "spent months talking to everybody Monfort came into contact with throughout his life.  
24 . . . " The state did hire a private investigator named Aimee Rachunok who conducted phone  
25 interviews with 24 people who had at least some minimal contact with Mr. Monfort during his life,  
26 and had one brief e-mail exchange with a 25<sup>th</sup> individual. Apparently because of the work Ms.  
27  
28

1 Rachunok did on the case, Mr. Satterberg believed he could go ahead with seeking the death  
2 penalty without the benefit of a mitigation package by the defense.

3 A prosecutor's discretion to seek the death penalty is not unfettered. *State v. Pirtle*, 127  
4 Wn.2d 628, 642; 904 P.2d 245 (1995); *State v. Campbell*, 103 Wn.2d 1, 24-25, 691 P.2d 929 (1984)  
5 *cert. denied*, 471 U.S. 1094 (1985). Before a prosecutor can seek the death penalty there must be  
6 "reason to believe there are not sufficient circumstances to merit leniency. *Pirtle*, 127 Wn2d at 642.  
7 Input from the defendant as to mitigating factors is normally desirable, because the subjective  
8 factors are better known to the defendant. *Id.* While the prosecutor need not delay his decision  
9 until the defense provides mitigation materials, he must still base his decision to seek death on some  
10 reasoned factual basis supporting the absence of mitigating factors.

11 At first blush, *Pirtle* might appear to support the state's position that there is a minimal  
12 threshold for the state to satisfy the substantive provisions of RCW 10.95.040. While the  
13 prosecutor there announced his decision to seek the death penalty only 30 days following  
14 arraignment and without the benefit of defense mitigation materials, the state had access to a  
15 substantial information about the defendant as a result of his extensive arrest and conviction history.  
16 127 Wn.2d at 642. *Pirtle* had 10 juvenile convictions and five adult convictions for a variety of  
17 felonies and misdemeanors including an adult conviction for felony assault. Here Mr. Monfort has  
18 no criminal history that would provide the state with any information about his background or life  
19 history. As a result, the prosecutor's decision to seek death without the benefit of a defense  
20 mitigation package rests upon the mitigation investigation conducted by Ms. Rachunok.

21 That investigation was deficient in every conceivable way. Ms. Rachunok's investigation  
22 focused heavily on people who knew Mr. Monfort during a relatively brief period of his life while  
23 at Highline Community College or the period immediately following those years. All of her  
24

1 interviews were by telephone – she never met a single witness face-to-face. Moreover, Ms.  
2 Rachunok did no follow-up interviews and gleaned virtually no significant information about major  
3 periods of Mr. Monfort’s life including his childhood, his schooling and the twelve years he lived in  
4 Las Vegas and the Los Angeles area after graduating high school.

5  
6 The American Bar Association (ABA) has established exacting standards for conducting an  
7 adequate mitigation investigation. *Guidelines for the Appointment and Performance of Defense*  
8 *Counsel in Death Penalty Cases* (2003) and *Supplementary Guidelines for the Mitigation Function*  
9 *of Defense Teams in Death Penalty Case* (2008). The U.S. Supreme Court and other federal courts  
10 have determined that these Guidelines establish the prevailing professional norms for competent  
11 mitigation investigations. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed. 2d 471  
12 (2003); *Rompilla v. Beard*, 545 U.S. 375, 125 S.Ct. 2456, 162 L.Ed. 2d 360 (2005); *Detrich v.*  
13 *Smith*, 677 F.3d 958 (9<sup>th</sup> Cir. 2012); *Jells v. Mitchell*, 538 F.3d 478 (6<sup>th</sup> Cir. 2008). While these  
14 cases dealt with claims of ineffective assistance of counsel, they establish that the adequacy of  
15 mitigation investigations are to be judged by the standards set out in the *ABA Guidelines* and  
16 *Supplementary Guidelines*. Even assuming that investigations conducted by agents of the state are  
17 subject to less exacting standards, it is clear that Ms. Rachunok’s efforts fall short of any reasonable  
18 mitigation investigation and that Mr. Satterberg’s reliance on that investigation as justification for  
19 seeking the death penalty is badly misplaced.  
20  
21  
22

23 The *Guidelines* set out the qualifications for mitigation investigators:

24 Mitigation specialists possess clinical and information-gathering skills and  
25 training that most lawyers simply do not have. They have the time and  
26 ability to elicit sensitive, embarrassing and often humiliating evidence  
27 (e.g. family sexual abuse) that the defendant may never have disclosed.  
28 They have the clinical skills to recognize such things as congenital, mental  
or neurological conditions, to understand how these conditions may have  
affected the defendant’s development and behavior, and to identify the  
most appropriate experts to examine the defendant or testify on his behalf.

1 . . . The mitigation specialist compiles a comprehensive and well-  
2 documented psychosocial history of the client based on an exhaustive  
3 investigation; analyzes the significance of the information in terms of  
4 impact on development, including effect on personality and behavior;  
5 finds mitigating themes in the client's life history. . .

6 *Guideline 4.1A.1.* The *Guidelines* also establish a very broad scope for the required mitigation  
7 investigation. The Comments to *Guideline 10.7* provide specific guidance into the extensive  
8 requirements for a competent mitigation investigation:

9 Because the sentence in a capital case must consider in mitigation  
10 "anything in the life of the defendant which might militate against the  
11 appropriateness of the death penalty for the defendant," "penalty phase  
12 preparation requires extensive and generally unparalleled investigation  
13 into personal and family history. In the case of the client this begins with  
14 the moment of conception. Counsel needs to explore:

- 15 (1) Medical history . . .
- 16 (2) Family and social history (including physical, sexual or emotional  
17 abuse; family history of mental illness, cognitive impairments, substance  
18 abuse, or domestic violence; poverty, familial instability, neighborhood  
19 environment and peer influence); other traumatic events such as exposure  
20 to criminal violence, the loss of a loved one or natural disaster;  
21 experiences of racism or other social or ethnic bias; cultural or religious  
22 influences; failures of government or social intervention (e.g. failure to  
23 intervene or provide necessary services, placement in poor quality foster  
24 care or juvenile detention facilities);
- 25 (3) Educational history . . .
- 26 (4) Military service . . .
- 27 (5) Employment and training history. . .
- 28 (6) Prior juvenile and adult correctional experience. . .

Moreover, the *Guidelines* expressly acknowledge that the process of completing an adequate  
mitigation is arduous and time consuming. As described further in the comments to *Guideline 10.7*:

It is necessary to locate and interview the client's family members (who  
may suffer from some of the same impairments as the client), and  
virtually everyone else who knew the client and his family, including  
neighbors, teachers, clergy, case workers, doctors, correctional,  
probation or parole officers and others. Records -- from courts,  
government agencies, the military, employers, etc., -- can contain a wealth  
of mitigating evidence, documenting or providing clues to childhood  
abuse, retardation, brain damage, and/or mental illness, and corroborating  
witnesses' recollections. Records should be requested concerning not

1 only the client, but also his parents, grandparents, siblings and children. A  
2 multi-generational investigation frequently discloses significant patterns  
3 of family dysfunction and may help establish or strengthen a diagnosis or  
4 underscore a hereditary nature of a particular impairment. The collection  
5 of corroborating information from multiple sources – a time-consuming  
6 task – is important wherever possible to ensure the reliability and thus the  
7 persuasiveness of the evidence. [Emphasis added.]

8 The *Supplementary Guidelines* promulgated by the ABA in 2008 also set out the extensive  
9 nature of a competent mitigation investigation including conducting a multi-generational family  
10 history. *Supplementary Guideline 10.11B*. *Supplementary Guideline 10.11B* also lists an extensive  
11 variety of sources that mitigation investigators must review during the course of their investigation.  
12 The *Supplementary Guidelines* expressly mandate multiple in-person face-to-face interviews with  
13 potential mitigation witnesses:

14 Team members must conduct in-person, face-to-face, one-on-one  
15 interviews with the client, the client's family, and other witnesses who are  
16 familiar with the client's life, history, or family history or who would  
17 support a sentence less than death. Multiple interviews will be necessary  
18 to establish trust, elicit sensitive information and conduct a thorough and  
19 reliable life-history investigation. Team members must endeavor to  
20 establish the rapport with the client and witnesses that will be necessary to  
21 provide the client with a defense in accordance with constitutional  
22 guarantees relevant to a capital sentencing proceeding.

23 *Supplementary Guideline 10.11C*. The wide range of witnesses that a mitigation specialist is  
24 expected to locate, contact and interview is set out in greater detail in *Supplementary Guideline*  
25 *10.11E.2*

26 The investigation that Mr. Satterberg admits he relied upon in concluding that there are not  
27 sufficient mitigating circumstances fails on all points to satisfy the requirements set out in the *ABA*  
28 *Guidelines* and *Supplementary Guidelines*. *Guideline 10.7* sets out the requirement that a  
competent mitigation investigator conduct a multi-generational investigation of the defendant's  
family history from multiple sources. Ms. Rachunok merely compiled a list of possible family

1 members with virtually no information about their background or life histories. Much of the  
2 information contained in her report appears to have been gathered from collateral sources such as  
3 news reports about Mr. Monfort following his arrest. *Guideline 10.7* also requires that a mitigation  
4 investigator locate and interview "virtually everyone else who knew the client and his family,  
5 including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole  
6 officers and others." Ms. Rachunok interviewed only one person who knew Mr. Monfort during his  
7 childhood. Dan Fruits was married to Mr. Monfort's mother Suzan for approximately four years  
8 when Mr. Monfort was roughly ages 11 through 15.<sup>2</sup> Mr. Fruits provided some facts about the time  
9 Mr. Monfort spent in Bethel, Alaska but very little about his first 11 years in Las Vegas and Indiana  
10 or his subsequent time growing up in Indiana and Denver. Mr. Fruits did tell Ms. Rachunok that  
11 Suzan Monfort's sister "Kam" might have helpful information, however there is no indication that  
12 Ms. Rachunok attempted to contact her.

13  
14  
15         Aside from Mr. Fruits, the only relative of Mr. Monfort that Ms. Rachunok spoke with is  
16 Tony Scott, who is married to Mr. Monfort's second cousin Brenda Hanning. Mr. Scott has been  
17 married to Brenda Hanning for fifteen years and there is no indication he knew Mr. Monfort before  
18 that time. Mr. Scott was unable to provide any substantive information about Mr. Monfort's  
19 childhood and only a few sparse details about his family background. Mr. Scott did provide the  
20 names of Mr. Monfort's aunt Nancy Hanning and cousins Brenda Hanning and David Hanning but  
21 there is no indication that Ms. Rachunok attempted to interview these individuals who clearly  
22 would have more information about Mr. Monfort's background and family history. Even assuming  
23 some of Mr. Monfort's family members would have been unwilling to speak with Ms. Rachunok,  
24  
25  
26

27  
28 <sup>2</sup> Mr. Fruits and Suzan Monfort were legally married until 1998 but they separated in 1982 and had no substantive contact after that date.

1 there is no indication she attempted to interview other potential witnesses from his childhood such  
2 as teachers, neighbors, friends or other people living in the towns where Mr. Monfort grew up.  
3 Moreover, Ms. Rachunok neither interviewed nor apparently attempted to interview any members  
4 of Mr. Monfort's paternal family to learn about that side of his background. Those gaping holes in  
5 Ms. Rachunok's investigation render it virtually useless as a source of information about any  
6 potential mitigating circumstances in this case.  
7

8         The *Guidelines* and *Supplementary Guidelines* also require mitigation investigators to  
9 conduct multiple in-person interviews with people familiar with the defendant's life. The reasons  
10 are that multiple face-to-face interviews are necessary to establish trust, elicit sensitive information  
11 and conduct a thorough and reliable life-history investigation. *Supplementary Guideline 10.11C*.  
12 None of Ms. Rachunok's interviews satisfy these criteria. All were over the phone and she did not  
13 conduct a single follow-up interview. As a result, the information she obtained about Mr. Monfort  
14 was random and superficial. Her investigation fell short of even the most rudimentary background  
15 investigation.  
16

17         While mitigation input from the defense is desirable, Washington courts have not concluded  
18 that it is a prerequisite for filing a death notice under RCW 10.95.040. However, the statute  
19 requires that the prosecutor base his decision on whether to seek death on having reason to believe  
20 that there are not sufficient mitigating circumstances to merit leniency. Here, Mr. Satterberg lacked  
21 a factual basis to make that determination because the investigation he relied upon did not provide  
22 sufficient information about Mr. Monfort life history and family background.  
23

24         It is clear that from the outset of this case the prosecutor intended to rush the pace of his  
25 decision to seek the death penalty and that his decision to seek death is based upon the underlying  
26 facts of the crimes and not on an absence of mitigation. Ms. Rachunok's purported mitigation  
27  
28

1 investigation is an obvious attempt to provide some cover for that decision and not a genuine effort  
2 at uncovering mitigating evidence. The state's decision to seek the death penalty failed to adhere to  
3 the requirements of RCW 10.95.040 and as a result, the death notice should be dismissed.

4  
5 **C. The State's Decision to File the Death Notice in Violation of RCW 10.95.040**  
6 **Violated Mr. Monfort's Due Process Rights under the Fifth and Fourteenth**  
7 **Amendments to the U.S. Constitution and under Article 1 Section 14 of the**  
8 **Washington State Constitution.**

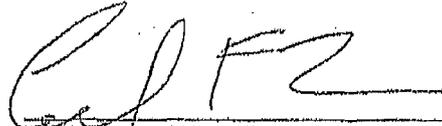
9 When a state provides criminal defendants with procedural safeguards, even when not  
10 required by the federal constitution, a defendant has a protected liberty interest in the exercise of  
11 that state procedure in his case and that liberty interest is protected by the Fourteenth Amendment.  
12 *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d (1980). In this case, the state did not  
13 satisfy safeguards set forth in RCW 10.95.040 that protect Mr. Monfort's due process interest in life  
14 and liberty. As a result, his due process rights under the Fifth and Fourteenth Amendments to the  
15 United States Constitution have been violated and the death notice should be dismissed. *Hicks*,  
16 *supra*.

17 **CONCLUSION**

18 In Washington, a prosecutor may seek the death penalty only through scrupulous  
19 compliance with RCW 10.95.040. Under that statute, the prosecutor may seek death only when  
20 there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.  
21 The statute focuses on mitigating factors and not the underlying facts of the charged crimes. Unlike  
22 a capital sentencing jury, a prosecutor is not directed by statute to "have in mind the crime" when  
23 determining whether there are sufficient mitigating circumstances to merit leniency. The King  
24 County Prosecuting Attorney filed the notice of intent to seek the death penalty against Mr. Monfort  
25 based upon the facts of the charged crimes and lacked a reasonable factual basis to conclude there  
26 are insufficient mitigating circumstances to merit leniency. Denial of a statutorily created liberty  
27  
28

1 interest in state sentencing procedures is a denial of due process under the Fourteenth Amendment,  
2 particularly in a capital case. For these reasons, this court should dismiss the death notice filed by  
3 the state on September 2, 2010.  
4

5  
6 Respectfully submitted this 20th day of July, 2012.

7  
8 

9  
10 Carl Lueck WSBA #16365  
11 Todd Gruenhagen WSBA #12340  
12 Stacey MacDonald WSBA #35394  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# APPENDIX A



## Murder charge filed in Seattle officer's shooting

By LEVI PULKKINEN, SEATTLEPI.COM STAFF  
Updated 10:00 p.m., Wednesday, November 11, 2009

Ads by Google

### Job Openings

Search For Job Openings. Apply For a Position Today! [www.findtherightjob.com](http://www.findtherightjob.com)

---

Accusing the alleged cop killer of waging a "one-man war against police," King County Prosecutor Dan Satterberg announced charges that could see Christopher J. Monfort executed.

Monfort, 41, has been charged with aggravated first-degree murder in the Oct. 31 slaying of Seattle Police Officer Tim Brenton, Satterberg announced Thursday. Prosecutors also charged Monfort with three counts of attempted first-degree murder and one count of arson, asserting that the man rigged several bombs at a City of Seattle garage hoping to kill officers and firefighters.

Like Monfort's other intended victims, Brenton and partner Officer Britt Sweeney were "targeted solely because of the badge they wore," Satterberg claimed.

"He had a plan to wage a personal war against the Seattle Police Department," the elected prosecutor said.

Ads by Google

## **Chihuly Café in Seattle**

Taste the best of the Northwest at the new Collections Café.

[chihulygardenandglass.com](http://chihulygardenandglass.com)

## **Seattle Colocation**

Datacenters in Downtown Seattle, Redmond and Bellevue

[www.isomedia.com](http://www.isomedia.com)

Described as a "domestic terrorist" by police, Monfort is accused of ambushing Brenton and Sweeney as they sat in a patrol car in Seattle's Leschi neighborhood. Sweeney, who suffered a grazing wound in the shooting, told investigators Monfort pulled up next to the patrol car in a light-colored coupe and opened fire; Brenton was struck by multiple rounds and died at the scene.

Following a tip, Seattle and Tukwila detectives went to Monfort's Tukwila home on Friday hoping to contact the 41-year-old. As a memorial service for Brenton concluded in Seattle, Seattle homicide detectives spotted Monfort in the parking lot of the Terrace Apartments. Police contend Monfort drew a pistol, and was shot in the face and stomach by three Seattle detectives.

Describing the incident, Satterberg said Monfort pointed a pistol at one Seattle homicide detective and pulled the trigger. The gun failed to fire because Monfort hadn't chambered a round, Satterberg said.

As Monfort tried to run to his fourth-floor apartment, the three homicide detectives fired on him, according to court documents. Each fired two shots, though investigators have yet to determine which bullets struck Monfort.

Revealing more of the case against Monfort, Satterberg claimed Seattle homicide detectives arriving at the accused's Tukwila apartment denied Monfort the final battle for which he was stockpiling guns and bombs.

Monfort, Satterberg said, had a large incendiary device rigged to destroy his apartment. Investigators also found several homemade grenades loaded with nails and wire, as well as a large number of tires apparently procured to create a barricade.

Prosecutors allege that detectives searching Monfort's apartment found bomb-making equipment and the .223-caliber assault rifle that ballistics tests matched to bullets recovered at the Brenton's slaying. Two other rifles and a shotgun were found, as were explicit photos believed to be child pornography, Satterberg said.

In court documents, police detectives describe the bombs found at Monfort's home as similar to those used to destroy several cars at City of Seattle maintenance garage at 714 S. Charles St. on Oct. 22.

Satterberg alleged that Monfort rigged explosives under three police cruisers, then started a fire inside a RV-style mobile command center. Monfort, Satterberg said, had hoped to draw firefighters and police to the burning command center before the bombs under the police cruisers detonated.

In court documents, prosecutors allege that several notes left at the scene described the incident as though several police officers had been killed in the attack. One note referred to an incident involving King County Sheriff's Deputy Paul Schene, who is currently facing charges on allegations that he kicked and beat a teenage girl who was in custody.

"OCTOBER 22nd is the 14th National day of protest to stop Police Brutality," the note read, according to police reports. "These deaths are dedicated to (King County Sheriff's) Deputy Travis Bruner, he stood by and did nothing, as Deputy Paul Schene Brutally beat and Unarmed 14 year old Girl in their care.

"You Swear a Solemn Oath to Protect US From All Harm, That includes You ! Start policing each other or get ready to attend a lot of police funerals. We Pay your bills. You Work for US."

Police go on to note that a large hunting knife was found stabbed through the hood of one cruiser. An American flag had been fixed to its handle.

Prosecutors allege that DNA found at the Charles Street bombings and the site of Brenton's slaying match Monfort.

In announcing the decision Thursday morning, Satterberg has left open the possibility that he will seek a death sentence against Monfort in the shooting death of Brenton. Under state law, an aggravated murder conviction carries one of two sentences -- life in prison without the possibility of parole, or death.

"The death penalty is reserved in the State of Washington for the worst of the worst," Satterberg said. "We're going to take our time, but there is no greater crime in my view than the murder of a police officer."

Authorities have previously been reluctant to comment on any possible motive for the attacks. University of Washington records and other documents show that Monfort had long-standing complaints about the administration of justice, though no specific event has been offered to explain what might have prompted the slaying.

Under law, Satterberg has 30 days from Monfort's arraignment to decide whether to seek a death sentence. In practice, that deadline is usually extended to allow defense attorneys time to gather mitigating or exculpatory evidence that might sway the prosecutor away from seeking execution.

In addition to the aggravated murder and attempted murder charges in the attack on Brenton and Sweeney, prosecutors charged Monfort with first-degree arson and one count of attempted first-degree murder in the Charles Street bombing. Monfort was also charged with one count of attempted first-degree murder on allegations that he attempted to kill one of the detectives near his apartment.

On Thursday, Monfort remained at Harborview Medical Center in Seattle where he was being treated for his wounds. He is expected to be arraigned as soon as the hospital approves his release.

Ads by Google

**Office To Let Ready To Go**

Find an Office to Let today. Offer ends Soon, Hurry [www.Regus.com/OfficestoLet](http://www.Regus.com/OfficestoLet)

**Dunder Mifflin Copy Paper**

20 lb. 92 bright. 100% Fun. Only \$39.99 per Carton! [www.Quill.com/DunderMifflin](http://www.Quill.com/DunderMifflin)

## APPENDIX B

**MyNorthwest.com**

[Return to MyNorthwest.com](#)

[Click to Print This Page](#)

Updated Nov 12, 2009 - 8:34 pm

## King County Prosecutor: We've never seen anything like this

MyNorthwest.com staff

King County prosecutor Dan Satterberg called a suspect in the murder of police officer Timothy Brenton a "brazen and calculated" murderer at a news conference on Thursday morning before charging Christopher Monfort with five counts, including aggravated first degree murder which could carry the death penalty.

Satterberg claimed that 41 year-old Monfort waged a "one man war" against the Seattle Police Department, adding that, "We've never seen anything like this."

Satterberg gave a point by point presentation of the case against Monfort beginning with igniting homemade bombs that destroyed several police vehicles at a city maintenance yard in October. Satterberg said Monfort's next crime was the assassination-style killing of Brenton and wounding another officer as they sat in a parked patrol car on Halloween. He also detailed how Monfort tried to fire a gun at homicide detectives who approached him outside his Tukwila apartment complex on Friday.

In addition to the aggravated first degree murder charge, Monfort has been charged with three counts of attempted first degree murder and first degree arson.

Prosecutors say they have ample evidence for their case including a ballistics match between a rifle of Monfort's and the bullets that killed Officer Brenton, and a DNA profile match linking Monfort to the killings as well as the arson at the city maintenance yard.

The head of the Seattle Police Guild, Sergeant Rich O'Neill said he was pleased with the charges, "I think the charges are very very appropriate. We're very pleased with the decision of King County Prosecutor Dan Satterberg."

Seattle attorney and legal analyst Anne Bremner believes that the evidence points toward the death penalty for Monfort, "We have premeditation, the torching of police cars, the leaving of notes (saying) that there would be police funerals, the potential detonation of explosive devices to kill first responders."

Satterberg has 30 days to decide whether to seek the death penalty, though such decisions often are delayed to give defense attorneys more time to prepare.

Monfort remains at Harborview Medical Center in satisfactory condition. However, the shooting left him paralyzed, The Seattle Times reported Tuesday evening, citing a statement issued by Monfort's mother, Suzan Monfort.

© 2009 The Associated Press contributed to this report.

## APPENDIX C

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney  
CRIMINAL DIVISION  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

December 14, 2009

Julie Lawry and Paige Garberding  
Associated Counsel for the Accused  
200 110 Prefontaine Place South  
Seattle, WA 98104-2674

Re: State v. Christopher Monfort, #09-1-07187-6 SEA.

Dear Julie and Paige:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than June 15, 2010, six months from today's arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than May 15, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of June 1-5, 2010. That meeting can be scheduled when we receive your mitigation materials.

I understand that this time frame may be shorter than in some previous cases. But it has been our experience that making 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.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney

A handwritten signature in dark ink, appearing to read "Mark Larson".

Mark Larson  
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney  
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney  
Jeff Baird and John Castleton, Senior Deputy Prosecuting Attorneys, King County

## APPENDIX D

OFFICE OF THE PROSECUTING ATTORNEY  
KING COUNTY, WASHINGTON

Norm Maleng,  
Prosecuting Attorney

WSP4 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

August 2, 2006

Wes Richards  
The Defender Association  
810 3<sup>rd</sup> Ave. #800  
Seattle, WA 98104

Re: State v. Naveed Fiqh, KCSC Cause # 06-1-06658-4 SBA

Dear Wes,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Fiqh, 06-1-06658-4 SBA. As you know, RCW 10.95.040 sets out a 30 day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame is meant to allow time for the consideration of mitigating circumstances to merit leniency.

In this case, the State will be conducting its own investigation of mitigating factors. This is likely to include an analysis of potential mental health issues and the retention of a qualified expert. We will also examine social history and facts surrounding the alleged offenses. We anticipate that this process will be completed and a decision to file a notice made no later than November 8, 2006 (90 days after arraignment).

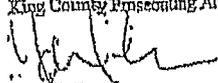
We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials to be submitted no later than October 30, 2006. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of October 30 - November 3, 2006. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by some cases in the past, but it has been our experience that the longer time period does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For NORM MALENG,  
King County Prosecuting Attorney

  
Mark R. Larson  
Chief Deputy, Criminal Division

## APPENDIX E

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY

RECEIVED

2009 SEP -2 AM 11:04



NORTHWEST DEFENDERS  
King County

Office of the Prosecuting Attorney  
CRIMINAL DIVISION  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

September 1, 2009

Ramona Brandes  
Northwest Defenders Association  
1111 3<sup>rd</sup> Ave, Ste. 200  
Seattle, WA 98101-3292

Michael Schwartz  
Law Offices of Michael Schwartz  
524 Tacoma Ave S  
Tacoma, WA 98402-5416

Re: State v. Isaiah Kalebu, # 09-1-04992-7 SEA.

Dear Ramona and Michael,

I am writing to outline our expectations concerning the mitigation process in the case of State v. Kalebu, # 09-1-04992-7 SEA. As you know, RCW 10.95.040 sets out a 30-day time frame for the decision on whether to file a notice to seek a special sentencing proceeding. That time frame allows for the consideration of mitigating circumstances to merit leniency.

In this case, we anticipate that this process will take us longer than 30 days, provided your client is willing to waive his right to a more speedy decision. Should he be willing to waive, it is our intention to complete our review and make a decision no later than February 12, 2010, which is six months from the date of arraignment.

We invite you to offer input into this process and the Prosecutor's decision. To that end, we are soliciting any defense mitigation materials be submitted no later than January 12, 2010. We are also willing to offer an opportunity for you to meet with the Prosecutor prior to his decision deadline during the week of February 1-5, 2010. The final scheduling for that meeting can be arranged when the mitigation materials are received.

I understand that this time frame may be shorter than the time taken by other cases in the past, but it has been our experience that the longer time frame does not result in an appreciable improvement in the mitigation information, and the longer period unnecessarily delays the RCW 10.95.040 decision and, accordingly, the trial. It is our view that adequate information can be gathered within the time frame described in this letter, and that the public interest is better served by a time frame closer to what is contemplated in the statute.

Please feel free to contact me if you have any questions. I can be reached at 296-9450.

Sincerely,

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney

Mark R. Larson  
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney  
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney  
James Konat, Senior Deputy Prosecuting Attorney

## APPENDIX F

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney  
CRIMINAL DIVISION  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

January 25, 2010

Gary Davis  
Kevin Dolan  
Associated Counsel for the Accused  
200 110 Prefontaine Place South  
Seattle, WA 98104-2674

Re: State v. Daniel Thomas Hicks, #09-1-07578-2 SEA

Dear Gary and Kevin:

I am writing to outline our expectations concerning the mitigation process in this case. As you know, RCW 10.95.040 establishes a 30-day period within which the prosecutor decides whether to file a notice to seek a special sentencing proceeding. That period allows time to consider mitigating circumstances.

In this case, we anticipate that this process will require more than 30 days, provided your client is willing to waive his right to a more speedy decision. If he is willing to waive, we will complete our review and the Prosecutor will make a decision no later than July 19, 2010, six months from his January 19, 2010, arraignment.

We invite your input into this process and the Prosecutor's decision. Any defense mitigation materials must be submitted to our office no later than June 18, 2010, which will afford us one month to review and consider them before the Prosecutor makes his decision. You may also meet with the Prosecutor during the week of July 6-9, 2010. That meeting can be scheduled when we receive your 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.

Please feel free to contact me with any questions. I can be reached at 206-296-9450.

Sincerely,

For DANIEL T. SATTERBERG,  
King County Prosecuting Attorney

Mark Larson  
Chief Deputy, Criminal Division

cc: Daniel T. Satterberg, King County Prosecuting Attorney  
Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney  
Kristin Richardson and David Martin, Senior Deputy Prosecuting Attorneys, King County

## APPENDIX G

q13fox.com/news/kcpq-080210-monfort-death-penalty,0,5193624.story

## KCPQ

### King County Prosecutor Will Seek Death Penalty For Christopher Monfort

#### Accused Killer Is Charged With Officer Timothy Brenton's Murder

Q13 FOX News Online

Web Reporter

9:03 AM PDT, September 2, 2010

SEATTLE

King County Prosecuting Attorney Dan Satterberg has decided to seek the death penalty in the case against Christopher Monfort, the man accused of murdering Seattle Police Officer Timothy Brenton on Halloween in 2009.

advertisement



Below is a statement from Satterburg regarding the death penalty option in the case of State v. Christopher Monfort:

"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 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."

Monfort is charged with aggravated murder in the shooting of Officer Timothy Brenton as he sat in a patrol car on Halloween. Monfort has pleaded not guilty.

Copyright © 2012, KCPQ-TV

## APPENDIX H

FILED

SEP 02 2010

SUPERIOR COURT  
BY Susan Bone  
DEPUT

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER JOHN MONFORT,

Defendant.

No. 09-1-07187-6 SEA

NOTICE OF SPECIAL SENTENCING  
PROCEEDING TO DETERMINE  
WHETHER DEATH PENALTY  
SHOULD BE IMPOSED

COMBS NOW Daniel T. Satterberg, King County Prosecuting Attorney, and gives notice pursuant to RCW 10.95.040 of a special sentencing proceeding to determine whether the death penalty should be imposed, there being reason to believe that there are not sufficient mitigating circumstances to merit leniency.

DATED this 2<sup>nd</sup> day of September, 2010.

By: *Daniel T. Satterberg*  
DANIEL T. SATTERBERG  
King County Prosecuting Attorney  
Office WSBA #91002

# APPENDIX I

KUOW NEWS

[Support KUOW](#)

## Monfort's Attorney Says Guilty Plea Rejected

[Patricia Murphy](#)

09/02/2010

King County Prosecutor Dan Satterberg says he'll seek the death penalty for Christopher Monfort. Monfort is charged in the shooting death of Seattle police officer Timothy Brenton on Halloween. But Monfort has offered to plead guilty in exchange for a life sentence. KUOW's Patricia Murphy reports.

---

### TRANSCRIPT

Now that King County Prosecutor Dan Satterberg has decided to seek the death penalty, a lengthy trial is almost certain. But Monfort's attorney Julie Lawry says she recently offered prosecutors a streamlined approach to the case: Monfort's guilty plea in exchange for a sentence of life in prison.

Lawry: "We had a conversation with Mr. Satterberg discussing that as an option and he wasn't interested in discussing it."

When asked about the offer, Satterberg said his office doesn't discuss plea negotiations.

Satterberg: "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 should have all options on."

In addition to aggravated murder, the 41-year-old is charged with attempted murder of Seattle Police Officer Britt Sweeney, who was in the car alongside Brenton. Monfort also faces charges in connection with an alleged firebombing of police vehicles.

I'm Patricia Murphy, KUOW News.

© Copyright 2010, KUOW

### RELATED LINKS

KUOW does not endorse nor control the content viewed on these links as they appear now or in the future.

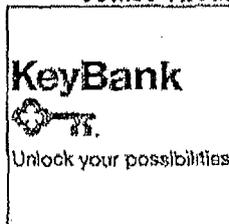
- [Coburn Brown Loses Stay Request](#)
- [Lethal Injection, Hawaiian Trash, Quake Closure System, Basque Resurgence](#)
- [Judge Rejects Death Penalty Challenge and Neighborhood News Roundup](#)
- [Lethal Injection Court Challenge](#)
- [Death Penalty, the Seattle P-I, and Investigating the Bush Administration?](#)

### KUOW NEWS FEATURES

#### [Civilian Observer Says Seattle Police Review Board Puts Her On Sidelines](#)

A Seattle Police review board is looking into the fatal shooting of John T. Williams. The board includes a civilian observer, but the observer has few opportunities for input. [More »](#)

SUPPORT FOR KUOW.ORG  
COMES FROM:



© 2010 KUOW Puget Sound Public Radio, A service of the [University of Washington](#)

## APPENDIX J



Wednesday, September 22, 2010, 12:36 PM

HOME NEWS MUSIC & CULTURE SUPPORT ABOUT JOBS CONTACT

Find Us on the Airwaves  
(Enter zip code or city.)

Find

SUPPORT



NWPR Schedules

NPR & Classical Music

NPR News

BBC World News

Morning Edition

All Things Considered

Northwest News

More On Demand

## King County Prosecutor: No Plea Deal for Monfort

Posted: Thursday, September 2, 2010

The King County prosecutor says he'll seek the death penalty against Christopher Monfort if he's convicted of killing a Seattle police officer. Monfort is charged with aggravated murder in the shooting of Officer Timothy Brenton as he sat in a patrol car on Halloween. KUOW's Patricia Murphy reports.

Prosecutor Dan Satterberg says Monfort's intentional, premeditated and random slaying of a police officer is deserving of the full measure of punishment under the law. But Monfort's defense attorney says Satterberg's decision is not in the best interest of the state or the tax payer. Julie Lawry says her client has offered to plead guilty in exchange for a life sentence.

She says that offer was turned down.

Julie Lawry: "There's a political agenda here about killing this man. And it's different than just having him take responsibility for what he did or didn't do."

Satterberg says his office doesn't discuss plea negotiations. Last week King County Superior Court Judge Ronald Kassler denied a defense motion requesting that Satterberg delay announcing his decision on the death penalty until Lawry's team could complete its investigation.

Lawry says there's a great deal of information about her client and his background that merit leniency and weigh heavily against this severe a punishment. Julie Lawry: "We have an expert who is doing our mitigation work which is time consuming and detailed and requires more than an Internet search. What Mr. Satterberg has is a regular investigator who did something akin to you know that any ten year old child could do."

Dan Satterberg disagrees.

Dan Satterberg: "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."

In addition to aggravated murder Monfort is charged with attempted murder of Seattle Police Officer Britt Sweeney, who was in the car alongside officer Brenton. He also faces charges in connection with an alleged firebombing of police vehicles.

Copyright 2010 KUOW

[Listen](#)

HOME NEWS MUSIC & CULTURE SUPPORT ABOUT CONTACT

NWPR is a service of Washington State University, along with KWSU and KTNW public television stations  
Comments and Questions: [Webmaster](#)  
Copyright 2006 Washington State University  
[Disclaimer](#)

## **APPENDIX H**

FILED

12 SEP -6 AM 10:07

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER MONFORT,

Defendant.

No. 09-1-07187-6 SEA

STATE'S RESPONSE TO DEFENSE  
MOTION TO STRIKE NOTICE OF  
INTENT TO SEEK THE DEATH  
PENALTY ON GROUNDS THAT  
STATE FAILED TO COMPLY WITH  
RCW 10.95.040.

Christopher Monfort is charged with arson in the first degree, three counts of attempted murder in the first degree and aggravated murder in the first degree. In regard to the aggravated murder charge, the State has alleged the following aggravating circumstance: the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing. In this motion, Monfort argues that the State violated RCW 10.95.040 because the prosecuting attorney considered the facts of the crime in deciding whether to seek the death penalty. Monfort also apparently argues that the State violated RCW 10.95.040.

State's Response to Defense Motion to Strike Notice of Intent to Seek the Death Penalty on Grounds that State Failed to Comply with RCW 10.95.040. - 1

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 because the State did not retain a "mitigation specialist" before deciding whether to seek the  
2 death penalty. Both of these claims are without merit, and should be rejected. Monfort's motion  
3 to strike the death penalty notice on these bases should be denied.

4 1. UNDER WASHINGTON LAW, THE PROSECUTING ATTORNEY MUST  
5 CONSIDER THE FACTS OF THE CRIME IN DETERMINING WHETHER  
6 THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT  
7 LENIENCY.

8 Monfort argues that the King County Prosecuting Attorney violated RCW 10.95.040 by  
9 considering the facts of the charged crime in making a determination whether to seek the death  
10 penalty in this case. This claim must be rejected. Viewed within the context of the  
11 constitutional requirements imposed by the United States Supreme Court, the plain language of  
12 the relevant Washington statutes demonstrates that the presence or absence of mitigating  
13 circumstances must be considered in relation to the circumstances of the crime. The State has  
14 fully complied with the constitutional and statutory requirements in this case.

15 Current death penalty jurisprudence began, to a large extent, with the United States  
16 Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346  
17 (1972) (*per curiam*). In Furman, the Court struck down the discretionary death penalty statutes  
18 of Georgia and Texas, which left imposition of the death penalty wholly to the jury's discretion  
19 once the jury found the defendant guilty of a capital crime. Each justice of the five-person  
20 majority wrote a separate opinion in Furman, and none of those opinions were signed by more  
21 than one justice. Thus, as Chief Justice Burger, writing for the four-person dissent, noted, "The  
22 actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is  
23 not entirely clear." 408 U.S. at 397 (C.J. Burger, dissenting).

1 In response to Furman, Georgia enacted a new death penalty scheme that the Court held  
2 to be constitutional just four years later in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49  
3 L.Ed.2d 859 (1976). Georgia's new statutory scheme narrowed the class of persons eligible to  
4 receive the death penalty to those convicted of murder and found guilty of one of ten aggravating  
5 circumstances, including that the victim was a police officer engaged in official duties at the time  
6 of the murder. Id. at 196. The jury was also allowed to consider any appropriate mitigating  
7 circumstances in deciding whether to make a recommendation of mercy to the court. Id. The  
8 Court found that Georgia's scheme sufficiently guided the jury's discretion to render it  
9 constitutional. Id. As the Court subsequently explained in Kansas v. Marsh, 548 U.S. 163,  
10 173-74, 126 S. Ct. 2516, 2524-25, 165 L. Ed. 2d 429 (2006) (emphasis added):

11 Together, our decisions in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d  
12 346 (1972) (*per curiam*), and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d  
13 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), establish that a state  
14 capital sentencing system must: 1) rationally narrow the class of death-eligible  
15 defendants; and (2) permit a jury to render a reasoned, individualized sentencing  
16 determination based on a death-eligible defendant's record, personal characteristics, and  
17 the circumstances of his crime. See *id.*, at 189, 96 S.Ct. 2909. So long as a state system  
18 satisfies these requirements, our precedents establish that a State enjoys a range of  
19 discretion in imposing the death penalty, including the manner in which aggravating and  
20 mitigating circumstances are to be weighed. See Franklin v. Lynaugh, 487 U.S. 164, 179,  
21 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) (citing Zant v. Stephens, 462  
22 U.S. 862, 875-876, n. 13, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

23 Thus, in order for a death penalty scheme to be constitutional it must be both narrowing and  
24 individualized. A scheme is individualized if it allows the decision maker to decide punishment  
based on both the facts of the crime and the defendant's personal characteristics. Id. As the  
Court explained in Gregg v. Georgia, "[w]e have long recognized that '[f]or the determination of  
sentences, justice generally requires . . . that there be taken into account the circumstances of the  
offense together with the character and propensities of the offender.'" Gregg, 428 U.S. at 189

1 (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43  
2 (1937)) (emphasis added).

3  
4 RCW 10.95 et seq. establishes a constitutional death penalty procedure because it both  
5 narrows the class of persons eligible for the death penalty and requires an individualized  
6 determination of whether the death penalty is appropriate in a particular case. State v. Rupe, 101  
7 Wn.2d 664, 699, 603 P.2d 571 (1984); Campbell v. Wood, 18 F.3d 662, 674-75 (9<sup>th</sup> Cir. 1994),  
8 cert. denied, 511 U.S. 1119 (1994). Individualization occurs twice under Washington's statutes:  
9 when the prosecuting attorney decides whether to seek the death penalty, and when the jury  
10 decides whether to impose the death penalty. As to the first step, RCW 10.95.040(1) provides  
11 that:

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

16 As to the second step, RCW 10.95.060(4) provides that:

17 Upon conclusion of the evidence and argument at the special sentencing proceeding, the  
18 jury shall retire to deliberate upon the following question: "Having in mind the crime of  
19 which the defendant has been found guilty, are you convinced beyond a reasonable doubt  
20 that there are not sufficient mitigating circumstances to merit leniency?"

21 In construing a statute, a court's primary objective is to ascertain and carry out the  
22 legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); State v. J.P., 149  
23 Wn.2d 444, 450, 69 P.3d 318 (2003). If the meaning of the statute in question is clear from its  
24 plain language, legislative intent is derived from the plain meaning of that statutory language  
alone; no further interpretation is necessary. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282  
(2003). The plain meaning of a statutory provision is to be discerned from the ordinary meaning

State's Response to Defense Motion to Strike Notice of  
Intent to Seek the Death Penalty on Grounds that State  
Failed to Comply with RCW 10.95.040. - 4

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 of the language at issue, but not viewed in isolation; rather, the court must consider the context  
2 of the statute in which that provision is found, related provisions, and the statutory scheme as a  
3 whole. Jacobs, 154 Wn.2d at 600-01. Moreover, a court should not adopt an interpretation of a  
4 statute that renders any portion of the statute meaningless. State v. Keller, 143 Wn.2d 267, 277,  
5 19 P.3d 1030 (2001). Again, a court must be mindful that its purpose in construing a statute is to  
6 "determine and enforce the intent of the legislature"; thus, it must not interpret a statute in a  
7 manner that thwarts legislative intent. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345  
8 (2008).

9 Monfort argues that in regard to the first step of individualization contained in RCW  
10 10.95.040(1)—the prosecuting attorney's decision to seek the death penalty—the prosecuting  
11 attorney may not consider the facts of the crime. The claim is contradicted by the plain language  
12 of the relevant statutes, and it defies common sense. RCW 10.95.040 requires the prosecuting  
13 attorney to consider "whether there is reason to believe that there are not sufficient mitigating  
14 circumstances to merit leniency." RCW 10.95.070 sets forth a non-exclusive list of "relevant  
15 factors" that the trier of fact may consider in deciding whether there are sufficient mitigating  
16 circumstances to merit leniency. These relevant factors include:

- 17 (2) Whether the murder was committed while the defendant was under the influence of  
18 extreme mental disturbance;
- 19 (3) Whether the victim consented to the act of murder;
- 20 (4) Whether the defendant was an accomplice to a murder committed by another person  
21 where the defendant's participation in the murder was relatively minor;
- 22 (5) Whether the defendant acted under duress or domination of another person;
- 23 (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the  
24 wrongfulness of his or her conduct or to conform his or her conduct to the requirements  
of law was substantially impaired as a result of mental disease or defect.
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the  
future.

1 This list of non-exclusive mitigating circumstances conclusively demonstrates that the facts of  
2 the crime must be considered in determining whether "there are not sufficient mitigating  
3 circumstances to merit leniency," as required by both RCW 10.95.040(1) and 10.95.060(4). For  
4 example, the facts of the crime must be considered in determining whether the murder was  
5 committed while the defendant was under an extreme mental disturbance. The facts of the crime  
6 must be considered in determining whether the victim consented to the act of murder. The facts  
7 of the crime must be considered in determining whether the defendant was an accomplice to a  
8 murder committed by another person and the defendant's participation was relatively minor. The  
9 facts of the crime must be considered in determining whether the defendant acted under duress.  
10 The facts of the crime must be considered in determining whether the defendant's capacity to  
11 appreciate the wrongfulness of his conduct was substantially impaired at the time of the murder.  
12 And finally, the facts of the crime, and particularly the defendant's relationship with or the lack  
13 of any relationship with the victim, must be considered in determining whether there is any  
14 likelihood that the defendant will pose a danger to others in the future.

15         Although the Washington Supreme Court has not addressed the precise argument  
16 Monfort is making here, the court's cases impliedly recognize what is obvious from a sensible  
17 reading of the plain language of the statutory scheme: that consideration of the facts of the crime  
18 is a crucial aspect of a prosecutor's decision to seek the death penalty. See Rupe, 101 Wn.2d at  
19 700 (noting that "prosecutors exercise their discretion in a manner which reflects their judgment  
20 concerning *the seriousness of the crime or insufficiency of the evidence*" in determining whether  
21 to seek the death penalty) (emphasis supplied); State v. Campbell, 103 Wn.2d 1, 26-27, 691 P.2d  
22 929 (1984) (same, quoting Rupe, 101 Wn.2d at 700).

1           When a court interprets a statute, the court must avoid reading the statute in a manner that  
2 produces absurd results. J.P., 149 Wn.2d at 450. The legislature is presumed to intend that its  
3 enactments should not result in absurdity. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185  
4 (1983).

5           Monfort's proposed interpretation of RCW 10.95.040(1) would lead to absurd results and  
6 in all likelihood render Washington's death penalty scheme unconstitutional. How could a  
7 prosecuting attorney make a rational decision as to whether to seek the death penalty without  
8 considering the facts of the crime? Indeed, a rule requiring a prosecutor to disregard everything  
9 but potentially mitigating evidence would likely lead to arbitrary application of the death penalty.  
10 Monfort's proposed construction would also be impossible to implement. How could the  
11 prosecuting attorney shield himself or herself from the facts of the crime so as to consider only  
12 potentially mitigating evidence?

13           In short, the prosecuting attorney must consider the circumstances of the crime in  
14 deciding whether to seek the death penalty. The prosecuting attorney did not violate RCW  
15 10.95.040(1) in this case.

16           2. THERE IS NO CONSTITUTIONAL OR STATUTORY REQUIREMENT THAT  
17 THE PROSECUTING ATTORNEY HIRE A MITIGATION SPECIALIST.

18           Although this Court's records reflect that it has authorized the expenditure of  
19 \$367,950.00 for "mitigation services" on behalf of Monfort as of July 23, 2012, the defense has  
20 chosen not to provide evidence of mitigating circumstances to the State. See Sub 540. In the  
21 present motion, Monfort has conceded that "the prosecutor need not delay his decision [to seek  
22 the death penalty] until the defense provides mitigation material."

23           Nonetheless, Monfort suggests that when the defense chooses not to provide evidence of  
24 mitigating circumstances, the prosecuting attorney may not decide to seek the death penalty

State's Response to Defense Motion to Strike Notice of  
Intent to Seek the Death Penalty on Grounds that State  
Failed to Comply with RCW 10.95.040. - 7

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 pursuant to RCW 10.95.040(1) unless the prosecuting attorney hires his or her own mitigation  
2 specialist whose investigation meets the Supplementary Guidelines for the Mitigation Function  
3 of Defense Teams in Death Penalty Cases promulgated by the American Bar Association in  
4 2008. There is simply no authority for this proposition whatsoever, and it should be rejected out  
5 of hand.

6 The defense argues that the background information gathered by the prosecuting attorney  
7 in this case was insufficient and attempts to rely on State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d  
8 245 (1995). This reliance is misplaced. In Pirtle, the prosecuting attorney made a decision to  
9 seek the death penalty thirty days after the defendant's arraignment, having received no input  
10 from the defense. The state supreme court held that the prosecuting attorney had complied with  
11 the requirements of RCW 10.95.040(1) by considering the information it had, which consisted  
12 primarily of Pirtle's criminal history. Pirtle, 127 Wn.2d at 642-43. The court stated,

13 Even without input from the defense, the prosecutor had a substantial amount of  
14 information about Pirtle. Pirtle was born in Spokane and lived most of his life there. His  
15 contact with law enforcement officers had been extensive. He had ten juvenile  
16 convictions, including three for second degree burglary. He had five adult convictions,  
17 including one for first degree theft and another for felony assault. Because of Pirtle's  
18 history, the prosecutor had some information about each of the statutory mitigating  
19 factors, with the possible exception of the Defendant's mental state at the time of the  
20 crime.

21 Given what the prosecutor already knew and his willingness to wait thirty days to  
22 see if the defense could develop additional information, we find the prosecutor did not  
23 abuse his discretion.

24 Id.

25 In the present case, the prosecuting attorney gathered background information about  
26 Monfort prior to deciding to seek the death penalty. As previously noted in filings before this  
27 court, the State's investigation into Monfort's background included dozens of interviews with  
28 Monfort's associates, family members, fellow employees, fellow students, former teachers and

29 State's Response to Defense Motion to Strike Notice of  
30 Intent to Seek the Death Penalty on Grounds that State  
31 Failed to Comply with RCW 10.95.040. - 8

**Daniel T. Satterberg**, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 others. The State also considered Monfort's lack of any significant criminal history. The  
2 prosecuting attorney's decision in the present case was based on more information than that  
3 known to the prosecuting attorney in Pirtle. As in Pirtle, the prosecuting attorney did not abuse  
4 his discretion or fail to comply with the statutory requirements.<sup>1</sup>

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22 

---

<sup>1</sup> Monfort also briefly argues that his right to due process was violated by the State's failure to  
23 comply with RCW 10.95.040. As argued above, the State has complied with the requirements of  
RCW 10.95.040, and Monfort's due process claim need not be further addressed.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

3. CONCLUSION.

For the foregoing reasons, the motion to strike the notice of intent to seek the death penalty should be denied.

Respectfully submitted this 6th day of September, 2012.

DANIEL SATTERBERG  
King County Prosecuting Attorney

By:   
JOHN B. CASTLETON, JR., WSBA # 29445  
Senior Deputy Prosecuting Attorney

By:   
ANN M. SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

# APPENDIX I

FILED

12 SEP 17 AM 10: 24

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE WA

1  
2  
3  
4  
5  
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
7 IN AND FOR THE COUNTY OF KING  
8

9  
10 STATE OF WASHINGTON,

11 Plaintiff,

12 vs.

13 CHRISTOPHER MONFORT,

14 Defendant.  
15

Cause No: 09-1-07187-6 SEA

DEFENSE REPLY TO STATE'S RESPONSE  
TO MOTION TO STRIKE NOTICE OF  
INTENT TO SEEK THE DEATH PENALTY  
ON GROUNDS THAT THE STATE FAILED  
TO COMPLY WITH THE MANDATES OF  
RCW 10.95.040

16 ARGUMENTS IN REPLY

17 A. The State Incorrectly Asserts that the United States Constitution and RCW  
18 10.95.040 Require a Prosecutor to Consider the Facts of the Crime in Determining  
19 Whether to Seek the Death Penalty.

20 The State incorrectly asserts that Washington law requires prosecutors to consider the facts  
21 of the crime in deciding whether to seek the death penalty in aggravated murder cases. The State  
22 initially cites to federal Eighth Amendment law for that proposition and quotes the following  
23 language from *Kansas v. Marsh*, 548 U.S. 163, 173-74, 126 S.Ct. 2516, 2524-25, 165 L.Ed.2d 429  
24 (2006):  
25

26 Together, our decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346  
27 (1972), (*per curiam*), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859  
28 (1976) (joint opinion of Stewart, Powell and Stevens, JJ), establish that a state capital system  
must: 1) permit a jury to render a reasoned, individualized sentencing determination and  
based on a death-eligible defendant's record, personal characteristics, and the circumstances

1  
ORIGINAL

Associated Counsel for the  
Accused

420 West Harrison Street  
Kent Washington 98032

1 of his crime. See *id.*, at 189, 96 S.Ct. 2909. So long as a state system satisfies these  
2 requirements, our precedents establish that a State enjoys a range of discretion in imposing  
3 the death penalty, including the manner in which aggravating and mitigating circumstances  
4 are to be weighed. See *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101  
5 L.Ed.2d (1988) (plurality opinion) (citing *Zant v. Stephens*, 462 U.S. 862, 875-76, n. 13, 103  
6 S.Ct. 2733, 77 L.Ed. 235 (1983)).

7 While the State emphasizes the “circumstances of the crime” language in *Marsh*, the  
8 operative term in the quoted passage is “jury.” Federal law requires that capital punishment statutes  
9 narrow the class of death eligible defendants and permit the *jury* to make an individualized  
10 sentencing determination based on the defendant’s history, personal characteristics and the  
11 circumstances of the crime. RCW 10.95 complies with the latter constitutional mandate. RCW  
12 10.95.060(4) requires capital jurors to consider the facts of the crime in rendering their verdict by  
13 providing that they deliberate on the following question:

14 Having in mind the crime of which the defendant has been found guilty, are you convinced  
15 beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit  
16 leniency?

17 The statute does not, however, require that prosecutors consider the crime of which the  
18 defendant has been charged when making the determination to seek death in the first place. That  
19 decision is governed by RCW 10.95.040, which requires the prosecutor to seek the death penalty  
20 “when there is reason to believe that there are not sufficient mitigating circumstances to merit  
21 leniency.” Unlike RCW 10.95.060(4), RCW 10.95.040(1) makes no mention of the charged crime  
22 being a consideration in the prosecutor’s determination on whether to seek death. Under *expressio*  
23 *unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute  
24 implies the exclusion of the other, *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). In  
25 *Delgado*, the court presumed that the absence of language relating to “comparable offenses” in  
26 Washington’s two-strikes law meant that the list of strike offenses in that statute is exclusive, unlike  
27  
28

1 the three-strikes law, which includes comparable offenses. *Id.* The same analysis applies here.  
2 RCW 10.95.060(4) expressly requires the jury to consider the “crime of which the defendant has  
3 been convicted” while RCW 10.95.040(1) omits that language. As in *Delgado*, the State here asks  
4 the court to graft the omitted language onto 10.95.040(1). This court should reject that invitation as  
5 did the Supreme Court in *Delgado*. See also *State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694  
6 (1996) (“Where the Legislature uses certain statutory language in one instance, and different  
7 language in another, there is a difference in legislative intent.”)  
8

9  
10 The State does not deny that Mr. Satterberg placed heavy emphasis on the facts of the  
11 charged crimes in electing to seek Mr. Monfort’s death. Instead, it argues that the statute authorizes  
12 him to do so because RCW 10.95.070 lists a series of non-exclusive relevant actors that the trier of  
13 fact may consider in deciding whether there are not sufficient mitigating circumstances to merit  
14 leniency. The State again glosses over the specific language of the statute. RCW 10.95.070  
15 expressly applies only to juries and the court in cases where a jury trial is waived:  
16

17 In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is  
18 waived, may consider any relevant factors, including, but not limited to the following. . .

19 RCW 10.95.040(1) is unique among capital punishment schemes in this country – there is no  
20 other jurisdiction with a similar provision requiring the prosecutor to determine whether there is not  
21 sufficient mitigation to merit leniency before seeking the death penalty. The court should not  
22 assume, as the State does, that the Legislature intended something other than the plain language it  
23 used in crafting that provision. The prosecutor’s decision to seek death is limited to consideration  
24 of mitigating circumstances and does not include the facts of the crime. That consideration is  
25 reserved for the jury when making the ultimate determination following trial. The State’s proposed  
26  
27  
28

1 interpretation of the statute ignores the clear differences between its various provisions and should  
2 be rejected.

3  
4 Even if RCW 10.95.070 does somehow apply to the prosecutor's decision making process  
5 under 10.95.040, it does not authorize wholesale consideration of the underlying charges that the  
6 State proposes. The factors listed in RCW 10.95.070 describe circumstances that are specific to the  
7 defendant himself and therefore fairly characterized as mitigation. For example, RCW 10.95.070(2)  
8 and (6) are concerned with a defendant's mental state at the time of the offense and potential mental  
9 illnesses. RCW 10.95.070(3) and (4) focus on whether the victim consented to the murder and  
10 whether the defendant was a relatively minor actor in the killing. RCW 10.95.070(5) looks to  
11 whether the defendant acted under duress from another person and 10.95.070(7) concerns the  
12 defendant's age at the time of the offense. Finally, RCW 10.95.070(8) looks to whether the  
13 defendant poses a future danger to others. These are all factors that focus on characteristics of the  
14 defendant himself, some of which overlap into considerations dealing with the facts of the charged  
15 offense.  
16  
17

18 It is clear from Mr. Satterberg's grand pronouncements regarding this case and his decision  
19 to seek death that the prosecutor in this case went far beyond any of the factors detailed in RCW  
20 10.95.070. When announcing his decision, Mr. Satterberg proclaimed that:  
21

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

27 Appendix G, *Defense Motion to Strike Notice of Intent to Seek the Death Penalty* ("Defense  
28 *Motion*"). In a subsequent interview further explaining that decision Mr. Satterberg elaborated on  
his reasons for seeking death:

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

4 *Defense Motion, Appendix I.*

5 Mr. Satterberg's focus in seeking Mr. Monfort's execution was the fact that the victim in this  
6 case was a Seattle police officer. That fact is certainly one of the circumstances that elevates a  
7 premeditated first degree murder to an aggravated murder. RCW 10.95.020(1). It is therefore a  
8 proper consideration for the prosecutor to take into account when deciding what crime to charge.  
9 However, once the prosecutor has elected to charge an aggravating circumstance under RCW  
10 10.95.020, the statute requires him to focus entirely on mitigating circumstances, or the lack of them  
11 in determining whether to seek the death penalty. Mr. Satterberg's public statements make clear  
12 that he did not limit himself to the considerations required by 10.95.040(1) and instead views the  
13 aggravating circumstance outlined in RCW 10.95.020(1) as sufficient in itself to warrant seeking the  
14 death penalty. It is clear from Mr. Satterberg's announcement that he did not follow the mandates  
15 of RCW 10.95.040 and that he did not have a reasoned basis to conclude that there are not sufficient  
16 mitigating circumstances to merit leniency in this case. As a result, the death notice should be  
17 dismissed.  
18  
19  
20

21 The State also contends that the defense's interpretation of RCW 10.95.040(1) would lead to  
22 absurd results, render the entire death penalty scheme unconstitutional and be impossible to  
23 implement. The State fails to explain however, why any of these outcomes would flow from  
24 applying the statute as written and as urged here, and instead frames its response in terms of  
25 unanswered questions. In fact, the correct interpretation of RCW 10.95.040(1) would not produce  
26 absurd results. If there is virtually no mitigation in a given case, there is nothing absurd in  
27 requiring the State to file a death notice consistent with the mandate of RCW 10.95.040(1).  
28

1 Conversely, even if the aggravated murder at issue is exceptionally egregious, there is nothing  
2 inherently absurd in declining to seek the death penalty if there is compelling mitigation evidence.  
3  
4 In fact other prosecutors in Washington State have been able to apply the statute properly. The most  
5 recent and comparable example is *State v. Zamora* in Skagit County. Zamora killed six people  
6 including a Skagit County police officer. Despite that, the Skagit County prosecutor determined  
7 that Zamora's mental illness was a sufficient mitigating circumstance to merit leniency and sought  
8 life in prison without the possibility of parole rather than the death penalty. The State's mere  
9 assertion, without any explanation as to how this interpretation of the statute would produce absurd  
10 results, is without merit.

12 **B. The State Mischaracterizes the Basis for this Motion to Dismiss the Death**  
13 **Notice. The Defense does not Contend that the State is Required to Retain the**  
14 **Services of a Mitigation Specialist. This Motion is Based on the Fact that the**  
15 **Prosecutor in this Case Lacked a Factual Basis for Concluding that there are**  
16 **not Sufficient Mitigating Circumstances to Merit Leniency.**

16 In its response brief at page 7, the State deliberately misrepresents the defendant's position.  
17 The defense does not argue that a prosecutor must hire his or her own mitigation specialist who  
18 meets the requirements of the ABA's *Supplementary Guidelines for the Mitigation Function of*  
19 *Defense Teams in Death Penalty Cases*. The defense Motion to Dismiss the Death Notice is instead  
20 based upon the fact that the prosecutor in this case lacked a factual basis for determining that there  
21 were not sufficient mitigating circumstances to merit leniency.

23 Shortly before the State announced its decision to seek death, the defense requested  
24 additional time to submit mitigation materials. The State denied that request and the court denied  
25 the defense's Motion to Extend the Time of the State to Decide Whether to File Death Penalty  
26 Notice, concluding that it lacked the authority to order the State to delay announcing its decision. In  
27  
28

1 justifying his decision to proceed with filing the death notice, Mr. Satterberg specifically referenced  
2 the work done by Aimee Rachunok:

3  
4 We hired our own investigator who spent months talking to everybody who Monfort came  
5 into contact with throughout his life<sup>1</sup> and I think we have a pretty good picture of who this  
individual is.

6 *Defense Motion*, Appendix J. Since the prosecutor himself has represented that he relied upon this  
7 investigation to satisfy the mandates of RCW 10.95.040(1), it is necessary for this court to  
8 determine whether that investigation was in fact adequate to meet the statutory standard. The  
9 numerous shortcomings and superficial nature of Ms. Rachunok's investigation are detailed in the  
10 *Defense Motion* and will not be repeated here. It is significant, however, that the State's Response  
11 does not address in any way the inadequacies of that investigation and instead simply  
12 mischaracterizes the basis for the defense's motion.  
13

14 The State also asserts that it considered Mr. Monfort's lack of any significant criminal  
15 history in its determination. This is the first time that the State has made that claim. It appears in  
16 none of the public statements Mr. Satterberg made prior to or contemporaneously with his decision  
17 to seek death and is nothing more than an after-the-fact rationalization in response to the defense's  
18 Motion to Dismiss. Unlike in *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), where the  
19 prosecutor had detailed documentation of the defendant's background through police reports and  
20 other records pertaining to his extensive criminal history, there are no such records in Mr. Monfort's  
21 case because he has no criminal past. Thus the State is left with relying upon a woefully inadequate  
22 investigation to provide cover for its decision to seek death. That investigation does not provide an  
23  
24  
25  
26

27 <sup>1</sup> The State has apparently backed off of Mr. Satterberg's astounding assertion that Ms. Rachunok talked to everyone  
28 who Mr. Monfort came into contact with throughout his life. Instead, the State now maintains that its investigation into  
Mr. Monfort's background included "dozens of interviews with Mr. Monfort's associates, family members, fellow  
employees, fellow students, former teachers and others." As detailed in the *Defense Motion*, Ms. Rachunok conducted

1 adequate factual basis for determining that there are not sufficient mitigating circumstances to merit  
2 leniency and, as a result, the death notice should be dismissed.

3 Respectfully submitted this 17th day of September, 2012.  
4

5 *Carl Luer by A Gruenhagen*  
6

7 Carl Luer WSBA #16385 12385  
8 Todd Gruenhagen WSBA #12340  
9 Stacey MacDonald WSBA #35394  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

28 phone interviews with 24 people who had met Mr. Monfort at some point during his 41 years. As a result, the State's  
characterization of its investigation as encompassing "dozens" of interviews is technically correct.

## **APPENDIX J**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

|                      |   |                 |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, | ) |                 |
| PLAINTIFF,           | ) | CASE NO.        |
| VERSUS               | ) | 09-1-07187-6SEA |
| CHRISTOPHER MONFORT, | ) |                 |
| DEFENDANT.           | ) |                 |

Proceedings Before Honorable RONALD KESSLER

KING COUNTY COURTHOUSE  
SEATTLE, WASHINGTON

DATED: OCTOBER 26, 2012

A P P E A R A N C E S:

FOR THE PLAINTIFF:

BY: JEFF BAIRD, ESQ.,  
JOHN CASTLETON, ESQ.,  
DEBORAH DWYER, ESQ.

FOR THE DEFENDANT:

BY: CARL LUER, ESQ.,  
TODD GRUENHAGEN, ESQ.,  
STACEY MacDONALD, ESQ.

## 1 P R O C E E D I N G S .

2 (Afternoon session. Open court.)

3

13:23:02

4

THE BAILIFF: All rise, court is in session.

13:23:03

5

The Honorable Ronald Kessler presiding in the Superior

13:23:08

6

Court in the State of Washington in and for King

13:23:11

7

County.

13:34:38

8

THE COURT: Thank you. Please be seated.

13:34:40

9

MR. CASTLETON: Good afternoon.

13:34:41

10

We are here for the State of Washington

13:34:43

11

versus Christopher Monfort, cause number

13:34:45

12

09-1-07187-6SEA. John Castleton and Jeff Baird on

13:34:48

13

behalf of the State. The defendant is present with

13:34:51

14

counsel, Mr. Laur, Mr. Gruenhagen and Ms. McDonald.

13:34:55

15

We are here on the defense motion to

13:34:58

16

dismiss the notice of seeking the death penalty

13:35:01

17

pursuant to the RCW 107.95040. I will defer to

13:35:05

18

Mr. Laur at this time.

13:35:10

19

MR. LAUR: Good afternoon, Your Honor.

13:35:12

20

Your Honor, this afternoon we, basically, present two

13:35:15

21

questions to this court.

13:35:16

22

The first, does RCW 107.95.040 permit the

13:35:24

23

prosecutor to consider the specific underlying facts

13:35:27

24

of the crime charged, when deciding when to seek the

13:35:31

25

death penalty?

13:35:31 1 The second question: Whether in this case,  
13:35:34 2 the prosecutor had an adequate factual basis for  
13:35:37 3 concluding that there are not sufficient mitigating  
13:35:39 4 circumstances to merit leniency.

13:35:42 5 The answer to both those questions is no.

13:35:47 6 The first question really raises the issue  
13:35:49 7 of statutory consumption. Let's take a look at the  
13:35:52 8 statute. The specific provision at issue here is RCW  
13:35:56 9 10.95.040 (1), which provides that "if a person is  
13:36:02 10 charged with aggravated murder, the prosecuting  
13:36:05 11 attorney shall file notice in the special sentencing  
13:36:09 12 proceeding to determine whether or not the death  
13:36:11 13 penalty should be imposed, when there is reason to  
13:36:13 14 believe that there are not sufficient mitigating  
13:36:16 15 circumstances to merit leniency."

13:36:18 16 But that is part of a broader statute that  
13:36:20 17 defines the crime of aggravated murder and sets out  
13:36:23 18 the requirements for the imposition of the capital  
13:36:26 19 punishment in Washington.

13:36:27 20 Those requirements serve essentially as a  
13:36:30 21 filter, to kind of segregate which defendants and  
13:36:35 22 which crimes are eligible for the imposition of death.

13:36:37 23 The first stage of that is RCW 10.95.020,  
13:36:42 24 which defines aggravated first degree murder. First,  
13:36:46 25 it limits to the aggravated murder case charges to the

13:36:50 1 premeditated murder. The issue is then when the  
13:36:55 2 prosecutor has to determine whether 1 or 4, or more,  
13:37:01 3 determine the aggravating stages, that is the stage in  
13:37:04 4 the statute where the prosecutor has to consider the  
13:37:06 5 facts of the crime where the prosecutor exercises his  
13:37:10 6 or her charges discretion.

13:37:12 7 Only after the prosecutor makes that  
13:37:14 8 charging decision do we get to the statute that is at  
13:37:17 9 issue here today. 10.95.040, which basically consists  
13:37:21 10 of two parts, subpart 1, is what I refer to as the  
13:37:25 11 substantive provision, the provision that I read  
13:37:29 12 earlier and subpart 2, which is the procedural  
13:37:32 13 provision.

13:37:33 14 The substantive provision of 10.59.040  
13:37:37 15 requires the prosecutor to base the decision on  
13:37:39 16 whether to seek the death penalty on the issue of  
13:37:42 17 whether there are sufficient mitigating circumstances  
13:37:44 18 to merit leniency.

13:37:46 19 The plain language of that statute requires  
13:37:49 20 that that determination be based on mitigating  
13:37:52 21 circumstances and mitigating circumstances alone.

13:37:56 22 That becomes more clear, when you look at  
13:37:59 23 other sections of the statute, particularly the  
13:38:03 24 section that lays out what the jury is required to  
13:38:05 25 decide during a sentencing proceeding in a capital

13:38:09 1 punishment case that is 10.95.060(4), which says:  
13:38:15 2 "Upon the conclusion of the evidence and  
13:38:17 3 the argument of the special sentencing procedure,  
13:38:19 4 the jury shall retire to deliberate on the following  
13:38:23 5 question, having in mind the crime of which the  
13:38:25 6 defendant has been found guilty, are you convinced  
13:38:27 7 beyond a reasonable doubt that they are not  
13:38:29 8 sufficient mitigating circumstances to merit  
13:38:31 9 leniency."

13:38:32 10 That phrase "having in mind the crime of  
13:38:34 11 which the defendant has been found guilty," does not  
13:38:37 12 appear in 040(1). The clear implication based on the  
13:38:42 13 differences in the language between the two provisions  
13:38:44 14 is while the jury is required to consider the facts of  
13:38:47 15 the crime in deciding whether to impose the death  
13:38:51 16 penalty the prosecutor may not consider them in  
13:38:53 17 deciding whether to seek death.

13:38:55 18 THE COURT: Doesn't this get close to the  
13:38:58 19 situation that we talked about some months ago, in  
13:39:00 20 which defense was asking the court to tell the  
13:39:04 21 prosecutor, "don't decide yet." Right? Essentially,  
13:39:08 22 that is what you were asking?

13:39:10 23 MR. LAUR: Yes.

13:39:11 24 THE COURT: I mean, the court's position  
13:39:13 25 was "well, how do I stop the prosecutor from

13:39:17 1  
13:39:19 2  
13:39:21 3  
13:39:26 4  
13:39:28 5  
13:39:29 6  
13:39:33 7  
13:39:36 8  
13:39:40 9  
13:39:43 10  
13:39:47 11  
13:39:49 12  
13:39:52 13  
13:39:55 14  
13:39:57 15  
13:40:01 16  
13:40:02 17  
13:40:04 18  
13:40:07 19  
13:40:09 20  
13:40:12 21  
13:40:14 22  
13:40:18 23  
13:40:21 24  
13:40:24 25

thinking?"

I mean, the prosecutor has already made the decision on the facts of the case. Then what? Scrub? How --

MR. LAUR: If there is evidence in the record, and there is in this case, that the prosecutor considered the underlying facts of the crime and, in fact, based the decision largely on that, then the prosecutor has violated the substantive provisions of 40(1). They have gone beyond what they are permitted to consider in seeking the death penalty.

It is not a question of the court telling the prosecutor what to think. It is a question of the court evaluating the prosecutor's decision-making process, as the prosecutor himself laid out and as the State concedes.

The State doesn't contend that Mr. Satterberg did not consider the underlying facts of the crime in making his decision.

There is really no factual dispute here. Did he take that into account? The answer is yes.

So, what the court needs to do today, which is different than what we were asking the court to do some time ago, is given what we know, the record in this case, did the prosecutor comply with the

13:40:31 1 didn't, because he clearly considered the underlying  
13:40:35 2 facts of the crime. He is not permitted to do so by  
13:40:38 3 statute.

13:40:39 4 I say that for a couple of reasons.

13:40:41 5 Several reasons -- actually three.

13:40:42 6 First, we don't have any cases,  
13:40:46 7 unfortunately, that address the issue that we are  
13:40:47 8 presenting here, either of two issues. We believe  
13:40:51 9 that when the courts have interpreted the procedural  
13:40:55 10 section of 10.95.040, subpart 2, that they have  
13:40:59 11 required absolute strict compliance with the  
13:41:03 12 provisions of that statute.

13:41:04 13 I mentioned a couple of cases in my brief,  
13:41:08 14 where the prosecutor filed the death notice in a  
13:41:10 15 timely manner, left the voice mail with the defense  
13:41:13 16 attorney, but didn't serve written notice on the  
13:41:16 17 defense attorney or the defendant.

13:41:17 18 The court said in that case, "the State  
13:41:19 19 can't seek the death penalty. Strict compliance with  
13:41:22 20 the statute is required. Substantial compliance isn't  
13:41:25 21 enough."

13:41:25 22 The court specifically noted that the  
13:41:28 23 unique qualities of the death penalty was a primary  
13:41:31 24 basis for requiring strict compliance.

13:41:34 25 In the State versus Laveen, the court

13:41:37 1 the death sentence where there was some confusion on  
13:41:39 2 the part of the prosecutor as to what the deadline was  
13:41:42 3 and he served the notice and filed it four days after  
13:41:46 4 the deadline. The trial court found that there was  
13:41:50 5 good cause for the late filing. The Supreme Court  
13:41:53 6 disagreed.

13:41:53 7 They held that the determination of whether  
13:41:55 8 the defendant will ever die must be made in  
13:41:58 9 particularly careful and reliable manner and in  
13:42:01 10 accordance with the procedures established by the  
13:42:03 11 legislature.

13:42:04 12 Well, the substantive decision stacked by  
13:42:09 13 the legislature that a prosecutor needs to make in  
13:42:11 14 desaiding whether to seek the death penalty is simply  
13:42:14 15 whether or not there are sufficient mitigating  
13:42:16 16 circumstances to merit leniency. Again, focus is  
13:42:19 17 mitigating circumstances not the facts of the crime.  
13:42:22 18 By going beyond that, there is not strict compliance  
13:42:24 19 with the substantive provisions of 10905040 (1).

13:42:29 20 THE COURT: Whether hypothetical a  
13:42:31 21 defendant killed one or a hundred or a thousand  
13:42:33 22 people.

13:42:34 23 MR. LAUR: Yes.

13:42:35 24 THE COURT: Doesn't matter.

13:42:36 25 All right. Go

13:42:37 1 ahead.

13:42:37 2 MR. LAUR: The second reason, I maintain,  
13:42:39 3 that the prosecutor is precluded from considering the  
13:42:42 4 facts of the crime in deciding whether -- to back up a  
13:42:45 5 second.

13:42:45 6 In response to the court's question, I  
13:42:47 7 don't think that if the legislature were to have  
13:42:50 8 decided that the prosecutor can consider the fact of  
13:42:54 9 the crime, they can take other things, other  
13:42:56 10 mitigation into consideration. They don't have to  
13:42:59 11 simply limit the decision to the presence or the  
13:43:02 12 absence of the mitigating circumstances. I think that  
13:43:05 13 would comply with the constitution. There would be  
13:43:08 14 nothing unconstitutional about that. But that is not  
13:43:10 15 the decision that the legislature made and that's not  
13:43:14 16 the procedure and the substantive requirement that the  
13:43:18 17 legislature in this state has set forth.

13:43:21 18 This issue -- the issue that we are  
13:43:24 19 presenting here is one of interpreting the statute as  
13:43:27 20 written.

13:43:28 21 That brings me to the second reason why I  
13:43:33 22 maintain that the prosecutor is precluded from  
13:43:35 23 considering the facts of the crime.

13:43:36 24 It really comes down to the basic rules of  
13:43:38 25 statutory construction, the rules that we have heard

13:43:41 1 for 20 years, 30 years. In crimes known the court  
13:43:46 2 notes where the legislature uses statutory language in  
13:43:49 3 one instance and different in another, there is a  
13:43:51 4 difference in the legislative intent.

13:43:53 5 Here the legislature used the language,  
13:43:56 6 "having in mind of which the defendant has been found  
13:43:58 7 guilty" in 0604 and not in 401.

13:44:02 8 Really, what the State is asking this court  
13:44:04 9 to do is rewrite 401, to take the language that was in  
13:44:08 10 060 (4) and to graft it on 401. What we are asking  
13:44:14 11 the court to do is apply the statute as the  
13:44:16 12 legislature wrote it.

13:44:18 13 The third reason that it is clear that the  
13:44:21 14 prosecutor is precluded from considering the facts of  
13:44:24 15 the crime in deciding whether to seek death is really  
13:44:27 16 contained in the State's response itself.

13:44:29 17 They make no effort whatsoever to reconcile  
13:44:33 18 the language differences in 10.95.401 and 10.95.060  
13:44:40 19 (4). And instead what the State's brief does is on a  
13:44:43 20 number of occasions confuse or mix up the roles of the  
13:44:47 21 jury and the prosecutor as laid out in the case law  
13:44:49 22 and the statute.

13:44:50 23 They first site Gregg versus Georgia for  
13:44:53 24 the proposition that the prosecutor must consider  
13:44:56 25 mitigating circumstances in relation to the

13:45:04 1 What Greg says is that a capital jury must be  
13:45:07 2 permitted to render a reasoned individual sentencing  
13:45:10 3 determination, based on death eligible defendant's  
13:45:15 4 record, personal characteristics and circumstances of  
13:45:17 5 the crime. It is the jury, not the prosecutor, that  
13:45:20 6 needs to make that determination.

13:45:23 7 That's what the Washington legislature  
13:45:25 8 provided for in 10.95.060(4), they next site scans SS  
13:45:31 9 versus marsh for the proposition that the death  
13:45:34 10 penalty scheme is individualized if it allows the  
13:45:37 11 decision maker to decide punishment based on the facts  
13:45:40 12 of the crime and the defendant's personal  
13:45:42 13 characteristics.

13:45:43 14 Well, that is a clever little use of the  
13:45:47 15 terminology of the decision maker, because that is not  
13:45:49 16 the language in Marsh. What Marsh says, is that the  
13:45:53 17 law cannot preclude a sentencer from considering any  
13:45:57 18 aspect of the defendant's character or record and any  
13:45:59 19 of the circumstances of the offense. They don't use  
13:46:02 20 the term decision maker because in some instances the  
13:46:05 21 prosecutor can be a decision maker. The prosecutor is  
13:46:09 22 not the sentencing -- in citing Marsh for the  
13:46:11 23 proposition that the prosecutor is required to  
13:46:13 24 consider the fact of the crime in deciding whether to  
13:46:16 25 seek the death, has no support.

13:46:18 1 The case doesn't say that the State  
13:46:25 2 contends that its statute requires the prosecutor to  
13:46:29 3 require -- consider the facts of the crime is not  
13:46:31 4 unsupported by the case that they cite. The State  
13:46:35 5 cites a list of mitigating circumstances in 10.97.070;  
13:46:41 6 that is, prove that the prosecutor can base the  
13:46:43 7 decision on whether to seek death on the underlying  
13:46:47 8 facts of the crime.

13:46:48 9 But 10.95.070 applies just to the jury or  
13:46:52 10 the court, if the jury is waived. The fact is in no  
13:46:56 11 point in the State's brief do they attempt to  
13:46:58 12 reconcile the fact that 0604 expressly requires  
13:47:04 13 consideration of the underlying facts of the crime,  
13:47:06 14 while 401 does not. That difference makes clear that  
13:47:11 15 juries have to consider the facts of the crime in  
13:47:13 16 deciding the sentence, but that the prosecutor cannot  
13:47:15 17 do so when deciding whether to seek death.

13:47:18 18 There is no question, as I said earlier,  
13:47:20 19 that the prosecutor here did base the decision  
13:47:22 20 primarily, if not almost exclusively, on the  
13:47:25 21 underlying facts of the crime. Mr. Satterberg's  
13:47:28 22 pronouncements at the time that he announced the death  
13:47:31 23 penalty established that that reliance on the fact of  
13:47:35 24 the crime violated the substance and the mandates of  
13:47:38 25 0.95.401. Therefore, this court --

13:47:42 1 THE COURT: He did say, he did refer to his  
13:47:45 2 own mitigation specialists; correct? It wasn't  
13:47:51 3 exclusively.

13:47:53 4 MR. LAUR: He did one interview.  
13:47:54 5 He talked mostly about the fact that the  
13:48:00 6 focus was on the victim in the case, the facts of the  
13:48:03 7 crime.

13:48:06 8 I have some of the quotes in my brief, I  
13:48:08 9 will refer the court to that. But there was statement  
13:48:10 10 after statement about how "the killings were  
13:48:13 11 deliberate killings of the police officers, the most  
13:48:15 12 serious crime that I can think of." That was his  
13:48:18 13 focus.

13:48:18 14 He does reference an investigation done by  
13:48:23 15 an investigator hired by their office and that brings  
13:48:26 16 me to the second issue here. That raises the issue of  
13:48:33 17 whether, assuming that the prosecutor may give some  
13:48:36 18 consideration to the facts of the crime, in this case  
13:48:38 19 did he have an adequate factual basis for concluding  
13:48:41 20 that there were not sufficient mitigating  
13:48:43 21 circumstances to merit leniency.

13:48:45 22 As the court has already pointed out,  
13:48:49 23 clearly, there was reliance on the investigation done  
13:48:52 24 by the outside investigator.

13:48:55 25 We are dealing what the courts have not

13:49:00 1 really addressed. We know that the standard is not  
13:49:02 2 particularly high.

13:49:03 3 The standard is abuse of discretion. But  
13:49:06 4 we also know from Curdle and Campbell that the  
13:49:10 5 prosecutor's discretion is not completely unfettered.  
13:49:14 6 Curdle says: "Before the death must be sought there  
13:49:19 7 must not be circumstances that operates. It  
13:49:23 8 operates as a limit or a check to the prosecutor's  
13:49:27 9 limit in seeking death."

13:49:28 10 It is also clear that the law considering  
13:49:33 11 mitigating facts in weighing. The ruling in Curdle  
13:49:36 12 upheld the mitigating circumstance factors to seek  
13:49:39 13 death, despite that he didn't allow defense to  
13:49:44 14 mitigating materials, because in that case there were  
13:49:46 15 extensive records resulting from Curdle's fairly  
13:49:50 16 lengthy criminal history, he had 10 prior juvenile  
13:49:54 17 convictions, five prior felon conviction, including a  
13:49:57 18 felony assault conviction.

13:49:59 19 The court doesn't elaborate on what all of  
13:50:01 20 the records would have been available for that. We  
13:50:03 21 know that there is police reports, court records,  
13:50:05 22 probation records, which would have provided a fairly  
13:50:09 23 extensive factual basis, dating back to the time when  
13:50:12 24 the defendant was a juvenile.

13:50:14 25 Here, we don't have any of that.

13:50:17 1 Mr. Monfort has no criminal history whatsoever.

13:50:20 2 So in order to, I think, that given him  
13:50:24 3 some cover, the State retained the private  
13:50:27 4 investigator, in order to do what was termed at one  
13:50:32 5 time, I think, the mitigation investigation.

13:50:34 6 Mr. Satterberg said: "We hired our own  
13:50:37 7 investigator who spent months talking to everybody  
13:50:39 8 who Mr. Monfort came into contact with throughout  
13:50:42 9 his life."

13:50:43 10 That is a fairly grand pronouncement and  
13:50:45 11 also not true. If it were he certainly would have a  
13:50:49 12 reasonable factual basis for seeking the death  
13:50:51 13 penalty.

13:50:51 14 THE COURT: How many months was it between  
13:50:54 15 filing and his announcement?

13:50:57 16 MR. LAUR: Filing was in December of 2009,  
13:51:10 17 September 2010.

13:51:11 18 THE COURT: About nine months is that what  
13:51:12 19 you are saying?

13:51:13 20 MR. LAUR: About nine months.

13:51:15 21 THE COURT: Defense can choose not to  
13:51:17 22 present mitigating information that, of course, would  
13:51:24 23 be challenged later. So that the defense can make  
13:51:26 24 that decision then the prosecutor goes ahead.

13:51:30 25 At what point does the prosecutor decide it

13:51:32 1 is not going to come?

13:51:35 2 I mean, we are talking about a long time,  
13:51:37 3 nine months.

13:51:38 4 MR. LAUR: Right.

13:51:39 5 THE COURT: The defense has maintained all  
13:51:42 6 along: "We are working on it. We are working on it.  
13:51:45 7 We are working on"; correct?

13:51:46 8 MR. LAUR: Yes.

13:51:47 9 THE COURT: "We are working on the  
13:51:48 10 mitigation package."

13:51:50 11 Is it your position that the prosecutor has  
13:51:51 12 to wait until it happens?

13:51:53 13 MR. LAUR: No.

13:51:54 14 THE COURT: What is the cutoff? I don't  
13:51:56 15 know.

13:51:57 16 MR. LAUR: I don't know that there is a  
13:51:59 17 specific cutoff. I mean, in this case, we provided  
13:52:02 18 reasons why, although the case was filed in November  
13:52:06 19 of 2009. As the court is aware and the State is  
13:52:12 20 aware, there were a series of circumstances that  
13:52:14 21 prevented our mitigation specialist from getting going  
13:52:17 22 on the case until April of 2010. We didn't have a --

13:52:21 23 THE COURT: Those being the client's  
13:52:23 24 physical condition and mental condition.

13:52:24 25 MR. LAUR: Also some circumstances with

13:52:27 1 respect to the mitigation specialist's family and  
13:52:30 2 situations that, as I say, we notified the court and  
13:52:34 3 the State at that time.

13:52:34 4 He was not able to really get going on the  
13:52:39 5 case until some months after it was filed. But I  
13:52:44 6 think that the issue is not so much.

13:52:46 7 What's the cutoff as what is the State  
13:52:50 8 required to do?

13:52:51 9 The State is required to have an adequate  
13:52:54 10 factual basis for determining that there are not  
13:52:57 11 sufficient mitigating circumstances. So they can  
13:52:59 12 extend adequate time to the defense, which, quite  
13:53:03 13 frankly, I maintain we did not get in this case.

13:53:06 14 Or, they can make sure that they have  
13:53:08 15 developed an adequate factual basis on their own,  
13:53:12 16 which brings us to the investigation done in this  
13:53:14 17 case.

13:53:16 18 That's the reason why I cited some of the  
13:53:19 19 AVA standards for mitigation investigations. It is  
13:53:22 20 not that I maintain that they are required to follow  
13:53:25 21 each and every one of those. But I think that they do  
13:53:28 22 provide guidelines as to what is considered adequate  
13:53:32 23 for mitigation investigation. Here, the investigation  
13:53:36 24 fell, was nowhere near satisfying those requirements  
13:53:39 25 or satisfying any reasonable requirements.

13:53:42 1 The mitigation investigator, as far as I  
13:53:44 2 can tell, based on the materials that we have been  
13:53:46 3 provided, did some internet searches, pulled up some  
13:53:50 4 newspaper articles, interviewed a full 25 people, 20  
13:53:55 5 of them were from a relatively narrow period in  
13:54:00 6 Mr. Monfort's life.

13:54:01 7 THE COURT: Did you get discovery on this?

13:54:03 8 MR. LAUR: We did.

13:54:06 9 Each of the interviews was a one-time shot  
13:54:10 10 over the phone. The guidelines required follow-up  
13:54:13 11 interviews, require in-person interviews. We are  
13:54:16 12 talking a series of phone interviews here.

13:54:19 13 I don't even do phone investigators, when I  
13:54:23 14 am investigating a PSP 2 case. I bet that the State  
13:54:26 15 doesn't either, at least not when they are trying to  
13:54:29 16 generate useful information about the case.

13:54:31 17 But, that is not what they were doing here.  
13:54:34 18 What they were trying to do is provide a fig leaf for  
13:54:38 19 the prosecutor to justify or claim that he had a  
13:54:40 20 reasonable factual basis for seeking the death penalty  
13:54:42 21 in this case.

13:54:43 22 The investigation relied on by the State, I  
13:54:45 23 think, was woefully inadequate. It was far too  
13:54:51 24 superficial for the prosecutor to claim that he had  
13:54:53 25 sufficient factual basis to seek death.

13:54:55 1 For that reason and the fact that he  
13:54:57 2 clearly considered the underlying facts of the crime  
13:55:00 3 in making this decision, this court should dismiss the  
13:55:02 4 death penalty.

13:55:03 5 THE COURT: So it is like in the AVA  
13:55:06 6 standards are essentially addressing effective  
13:55:09 7 assistance? Would you agree?

13:55:11 8 MR. LAUR: I would agree.

13:55:21 9 THE COURT: Curdle establishes that the  
13:55:23 10 prosecutor, under those circumstances, could  
13:55:25 11 substitute for defense counsel's assistance. Is that  
13:55:30 12 right?

13:55:30 13 MR. LAUR: I think that is a fair  
13:55:32 14 assessment.

13:55:32 15 THE COURT: If the facts are sufficient.

13:55:33 16 MR. LAUR: Yes.

13:55:34 17 THE COURT: The Supreme Court said that  
13:55:36 18 they were. So I go back to the other question then.  
13:55:45 19 I recognize that you can't give me a number, how long  
13:55:47 20 do they wait?

13:55:52 21 I know that this wasn't happening in this  
13:55:54 22 case, because I got your status report. But there  
13:55:58 23 could be circumstances in which the defense attorney  
13:56:00 24 just says, "we have to wait until I get around to it.  
13:56:03 25 That's going to be -- I am not doing anything, judge.

13:56:07 1 Doesn't require the status report."

13:56:10 2 MR. LAUR: I guess there could be.

13:56:13 3 THE COURT: It would be an obstructionist  
13:56:15 4 way of trying the case, but it could happen.

13:56:17 5 MR. LAUR: I would say we did not say that  
13:56:19 6 in this instance.

13:56:20 7 THE COURT: I know. You addressed that  
13:56:22 8 through your status reports.

13:56:23 9 MR. LAUR: It is difficult for me to pull a  
13:56:25 10 number out of the air.

13:56:26 11 THE COURT: You can't and I am not asking  
13:56:28 12 for a number.

13:56:29 13 But where is -- how does any one decide  
13:56:33 14 where the cutoff is?

13:56:36 15 MR. LAUR: I guess I can't offer any -- I  
13:56:40 16 hadn't thought of that specific question. I can't  
13:56:42 17 offer anything other than a reasonableness standard.

13:56:46 18 Under all of the circumstances of the case,  
13:56:47 19 is it reasonable to say that this is too much time and  
13:56:52 20 we should cut it off here? We certainly didn't reach  
13:56:55 21 that point.

13:56:56 22 THE COURT: It comes down to whatever I say  
13:56:58 23 for the time being, any way.

13:57:00 24 MR. LAUR: I think if you reach that point  
13:57:02 25 then the court has authority to supervise the process,

13:57:07 1 Potentially set the cut-offs. But that wasn't done in  
13:57:11 2 this case. They simply made the decision.

13:57:14 3 THE COURT: Thank you.

13:57:16 4 The State.

13:57:16 5 MR. CASTLETON: Thank you, Your Honor.

13:57:18 6 Your Honor, in five days it will be three  
13:57:21 7 years since Officer Brenton was murdered by the  
13:57:24 8 defendant and the State has received nothing from the  
13:57:28 9 defenses as it relates to the mitigation in this case.

13:57:31 10 What they consider to be mitigation, what  
13:57:32 11 they think we consider to be mitigation, they have  
13:57:35 12 given us nothing. They have gone on the record in  
13:57:37 13 this courtroom telling the court that they will be  
13:57:39 14 doing that. Yet we have received nothing.

13:57:41 15 We have received not even an indication  
13:57:44 16 that there is something that we should be hopeful for,  
13:57:48 17 or wait for. They were given numerous opportunities  
13:57:51 18 for 10 months.

13:57:52 19 THE COURT: But you have announced that you  
13:57:54 20 are going to the death penalty, now. Now, we are  
13:57:58 21 talking about the discovery for the penalty phase;  
13:58:00 22 aren't we?

13:58:01 23 ~~MR. CASTLETON: The court said in the~~  
13:58:02 24 Curdle, the court found that the prosecutor's filing  
13:58:05 25 was in 30 days, based on the defendant's criminal

13:58:08 . 1 history and the fact that he left the possibility and  
13:58:11 2 the fact that the prosecutor would consider  
13:58:13 3 mitigation, he left that open, was sufficient.

13:58:16 4 We have said numerous times, both on the  
13:58:18 5 record and in writing to the defense counsel,  
13:58:20 6 Mr. Satterberg will always consider mitigation in this  
13:58:23 7 case.

13:58:23 8 Yet, three years later, we have received  
13:58:26 9 nothing. The court's question, I think, is a good  
13:58:33 10 one, regarding how long do we wait.

13:58:35 11 Really, what the defense counsel is saying,  
13:58:37 12 unless the State spends its \$367,000 on the mitigation  
13:58:41 13 like the defense counsel has in this case, we can't  
13:58:45 14 ever seek the death penalty. We have to wait for  
13:58:47 15 them.

13:58:47 16 If it were the case here, we wouldn't even  
13:58:50 17 have a trial date. We wouldn't even know if the State  
13:58:52 18 was seeking the death penalty in this case, because we  
13:58:54 19 have received nothing.

13:58:55 20 Now, I want to go back to the first issue  
13:58:58 21 that was brought in the briefing regarding considering  
13:59:00 22 the facts of the case. I would point out that we do,  
13:59:07 23 in fact, address this issue between what the  
13:59:09 24 prosecutor is instructed to consider versus what the  
13:59:11 25 jury is instructed to consider.

13:59:12 1 When we talk in our briefing about  
13:59:13 2 statutory construction, you can't look at the statute  
13:59:16 3 in a vacuum. Obviously, if the jury is instructed to  
13:59:20 4 look at the facts and consider mitigation, certainly  
13:59:24 5 the prosecutor, in making a decision as to whether or  
13:59:27 6 not to seek the death penalty, has to make a decision,  
13:59:29 7 would a jury in this case find the facts in this case  
13:59:34 8 sufficient to impose the death penalty, or are there  
13:59:38 9 mitigating factors as we listed that would keep a jury  
13:59:41 10 from doing that. That is a calculus that has made  
13:59:44 11 every time that this issue comes up.

13:59:46 12 As we point out in our briefing, those  
13:59:48 13 factors that are set forth all are factually based,  
13:59:54 14 whether the murder was committed while the --

13:59:57 15 THE COURT: Is that really the same  
13:59:58 16 decision?

13:59:59 17 MR. CASTLETON: I am sorry.

13:59:59 18 THE COURT: Is that the same decision that  
14:00:02 19 the prosecutor is make something -- the prosecutor is  
14:00:03 20 making a decision on the mitigation to file. But  
14:00:07 21 isn't the prosecutor also making the decision -- I  
14:00:11 22 mean, a prosecutor is saying, "I would really likely  
14:00:14 23 to impose the death penalty in this case, but there  
14:00:17 24 is no chance a jury is going to, based upon the  
14:00:21 25 factors that we have got."

14:00:22 1 Why waste the \$367,000? That is happening  
14:00:28 2 throughout the United States, actually. But in some  
14:00:35 3 jurisdictions, are they the same decision? They are  
14:00:39 4 not, are they?

14:00:40 5 MR. CASTLETON: They are not the same  
14:00:41 6 decision. The decision made by the prosecutor is  
14:00:44 7 whether the jury gets to make the decision, what the  
14:00:46 8 ultimate punishment is.

14:00:48 9 However, if the State is filing charges and  
14:00:50 10 deciding whether or not to seek the death penalty, it  
14:00:52 11 cannot be. The prosecutor can't be blind how the jury  
14:00:56 12 would interpret the case.

14:00:57 13 Would they look at the facts of the case,  
14:00:58 14 would they look at the mitigation and decide whether  
14:01:01 15 or not there are those mitigating factors that would  
14:01:03 16 make it unlikely that they would seek the death  
14:01:05 17 penalty.

14:01:06 18 I think that Your Honor is right. We  
14:01:08 19 aren't just going to file a notice to seek the death  
14:01:10 20 penalty just because we want to.

14:01:12 21 We have to look at what those mitigating  
14:01:14 22 factors are, in fact, I think that the court has seen  
14:01:17 23 ~~over the last five or six years, several cases that~~  
14:01:20 24 were egregious, extremely egregious, aggravated murder  
14:01:24 25 cases, where the State did not seek the death penalty

14:01:27 1 because the State was provided with evidence regarding  
14:01:30 2 the defendant's mental state and other factors that  
14:01:34 3 goes into whether or not we believe that a jury would  
14:01:36 4 consider those mitigating.

14:01:37 5 A defendant's mental state at the time of  
14:01:40 6 the crime cannot be assessed without looking at the  
14:01:42 7 crime, looking at the facts. Yet defense counsel's  
14:01:46 8 argument is when making the decision as to whether to  
14:01:49 9 seek the death penalty, all Mr. Satterberg, or any  
14:01:53 10 prosecutor can look at is the mitigation.

14:01:55 11 How was the prosecutor to decide whether  
14:01:57 12 the victim consents to the fact of the murder?

14:02:00 13 Obviously, it is not appropriate here.

14:02:02 14 How does he decide that if he is just  
14:02:05 15 looking at the mitigation?

14:02:06 16 Do they take defense counsel word for it?

14:02:08 17 Do they take the word of the witness who  
14:02:11 18 has been talked to solely for the mitigation?

14:02:13 19 How do they know that the defendant  
14:02:14 20 continues to have premeditated the crime, without the  
14:02:19 21 mental defects or disease without looking at facts to  
14:02:22 22 show of this case?

14:02:23 23 ~~Mr. Monfort, this wasn't a one-time thing.~~

14:02:27 24 This was a series of things over nine days. He sets  
14:02:30 25 the bombs and left notes indicating that other officer

14:02:34 1 are going to be killed. He kills an officer and also  
14:02:37 2 kills another one, upon his arrest he almost kills  
14:02:39 3 another officer.

14:02:40 4 Are those to be ignored in deciding whether  
14:02:43 5 he had the ability to premeditate the crime? Of  
14:02:46 6 course not. It is absurd to think that the court or  
14:02:49 7 the prosecutor can't look at the facts.

14:02:50 8 I would point to two cases that I provided  
14:02:54 9 to the court today that were both decided by the  
14:02:57 10 Washington Supreme Court. After the case was filed in  
14:03:03 11 this case, the first was State of Washington versus  
14:03:05 12 Davis, which was September 20th, 2012. I have tabbed  
14:03:09 13 the area of interest. It was a death penalty case.  
14:03:12 14 The issue had to do with whether or not -- there were  
14:03:16 15 a variety of issues but one of them had to do with the  
14:03:18 16 prosecutor's decision to seek the death penalty. As  
14:03:21 17 the Supreme Court stated:

14:03:22 18 "Mitigating evidence is not the only reason  
14:03:25 19 that a prosecutor might decide not to seek the death  
14:03:27 20 penalty. The strength of the State's case often  
14:03:30 21 influences that decision."

14:03:33 22 Apparently, our Supreme Court doesn't have  
14:03:34 23 a problem with the prosecutor considering the fact. In  
14:03:37 24 fact, it is something that they always consider.

14:03:40 25 Conant versus Thurston County was filed

14:03:44 1 seven or eight days after that, after the State  
14:03:47 2 Supreme Court indicated to make the decision of  
14:03:49 3 whether to seek the death penalty, the prosecutor must  
14:03:51 4 be free to investigate the defendant's background,  
14:03:54 5 family and the evidence in the case without being  
14:03:56 6 influenced by public opinion or scrutiny.

14:03:59 7 Again, the facts of the case. The defense  
14:04:02 8 counsel is saying that, no, they can't do that. But  
14:04:05 9 the Supreme Court has said, within a week of each  
14:04:07 10 other, less than a month ago, "yes, they can" and in  
14:04:10 11 fact, they do.

14:04:11 12 Mr. Laur brought up a good point as well,  
14:04:14 13 saying that the reason that the State can look at the  
14:04:16 14 facts in the charging decision, whether to seek  
14:04:18 15 aggravation is because it is a charging decision.  
14:04:21 16 That is our function.

14:04:21 17 The very next line in Campbell, the Supreme  
14:04:25 18 Court says that the decision to seek the death penalty  
14:04:28 19 is properly considered a charging decision.

14:04:31 20 So, there is simply no basis to state that  
14:04:42 21 the State can't consider the elements of the crime.  
14:04:44 22 It is absurd.

14:04:45 23 THE COURT: I made it clear from the  
14:04:46 24 questions that I was asking the defense, logically, it  
14:04:49 25 is absurd. But, it is not the first time we have seen

14:04:53 1 absurd statutes,

14:04:55 2 MR. CASTLETON: The statute isn't absurd.

14:04:57 3 That is the point that we have made in our brief. You

14:05:00 4 have to read them in conjunction with one other. The

14:05:03 5 legislature didn't feel that it was important to

14:05:05 6 explicitly say that the prosecutor "after considering

14:05:08 7 the facts of the case," because obviously the

14:05:11 8 prosecutor considers the facts of the case. It is

14:05:13 9 absurd to think that they would have to put that in

14:05:16 10 there.

14:05:16 11 They have to put in there that the thinking

14:05:19 12 and believing that there is no reason to believe that

14:05:21 13 there is any mitigation, because that is something

14:05:23 14 that they want the prosecutor to look at, which gets

14:05:25 15 to the second point, which is the defense counsel

14:05:27 16 argument that the mitigation considered here was not

14:05:32 17 up to snuff, as far as the defense counsel's briefing

14:05:40 18 indicates.

14:05:41 19 The thing that I indicated, this is similar

14:05:43 20 to the issue that was brought months ago, the

14:05:46 21 separation of powers. This is where the separation of

14:05:49 22 powers issue becomes more apt in trying to get into

14:05:52 23 the head of the prosecutor and what he considered and

14:05:54 24 what he didn't consider, that's an executive function.

14:05:58 25 Just as Your Honor said "I can't change his mind," you

14:06:01 1 can't know what he considered, what Mr. Satterberg  
14:06:04 2 considers to be sufficient or insufficient mitigation.  
14:06:08 3 What we have here is the defense counsel --  
14:06:11 4 THE COURT: Is there a test here?  
14:06:12 5 Is there an abuse of discretion test or a  
14:06:15 6 failure to exercise discretion test?  
14:06:19 7 MR. CASTLETON: I think that there is  
14:06:20 8 evidence indicating that mitigation was provided or  
14:06:22 9 mitigation was available and the prosecutor explicitly  
14:06:25 10 chose not to look at it.  
14:06:27 11 Then I think that you might have an  
14:06:28 12 argument there. But that is not what we have.  
14:06:31 13 THE COURT: That raises the question that  
14:06:33 14 we have discussed before, which is, as you know, the  
14:06:39 15 court ordered the defense to provide the court with  
14:06:42 16 periodic ex parte status reports.  
14:06:46 17 Without disclosing the substance, the court  
14:06:48 18 has made clear on numerous hearings with the  
14:06:52 19 prosecutor that they are moving ahead on both  
14:06:55 20 mitigation and the fact finding phase.  
14:07:00 21 Yet, the State said, "well, too bad."  
14:07:04 22 MR. CASTLETON: Because they have to move  
14:07:06 23 forward on the mitigation regardless. If the  
14:07:08 24 defendant is found guilty, there is a penalty phase in  
14:07:12 25 which they are required -- actually what the AVA

14:07:15 1 standards apply to is the mitigation factors at  
14:07:18 2 sentencing. It has nothing to do with the mitigation  
14:07:20 3 prior to the filing. I think that the term that was  
14:07:22 4 used was what was required for mitigation  
14:07:25 5 investigation.

14:07:25 6 There is no such thing as a prefiling  
14:07:27 7 mitigation investigation.

14:07:28 8 THE COURT: If the defense -- if the  
14:07:32 9 defense had presented a mitigation package to the  
14:07:37 10 prosecutor that consisted entirely of what the  
14:07:41 11 prosecutor's office obtained from its own hire, what  
14:07:46 12 is the chance of that getting affirmed on appeal?  
14:07:48 13 Wouldn't that be ineffective assistance?

14:07:51 14 MR. CASTLETON: Yes.

14:07:51 15 THE COURT: It would be; right.

14:07:52 16 MR. CASTLETON: Right. Because they did no  
14:07:54 17 work. Bus that is only -- you are talking about  
14:07:57 18 prefiling the death penalty notice?

14:07:58 19 THE COURT: Yes.

14:07:59 20 MR. CASTLETON: No.

14:08:00 21 There is nothing that requires it. In  
14:08:01 22 fact, the case law specifically says that it is  
14:08:04 23 desirable to have input from the defense counsel. But  
14:08:06 24 we didn't get that here.

14:08:07 25 We did the best that we could in talking to

14:08:10 1 people who knew Mr. Monfort. We don't have access to  
14:08:13 2 his medical records. We don't have access to any  
14:08:15 3 psychological records that may be out there. Those  
14:08:19 4 are all in his possession. That is what we have been  
14:08:21 5 waiting for this whole time.

14:08:23 6 What is the mitigations?

14:08:24 7 There is really only two ways to look at  
14:08:26 8 it. Either it is a tactical decision by the defense  
14:08:29 9 counsel to not tip their hand at what their mitigation  
14:08:31 10 is until we go to the trial, or there is none.

14:08:34 11 I can tell you from our investigation,  
14:08:37 12 there is nothing out there indicating anything other  
14:08:39 13 than his lack of criminal history that mitigates the  
14:08:43 14 crime here.

14:08:43 15 Yes, I am taking into consideration the  
14:08:45 16 facts of this crime, because, you have to. So, it is  
14:08:50 17 one or the other. It either doesn't exist or it is  
14:08:53 18 tactical.

14:08:53 19 THE COURT: How do you know that? How  
14:08:55 20 would you know that?

14:08:56 21 MR. CASTLETON: How would I know that it  
14:08:59 22 doesn't exist or it is tactical?

14:09:01 23 THE COURT: The tactical is an argument. I  
14:09:03 24 recognize that. How you would you know that it  
14:09:06 25 doesn't exist? You don't know.

14:09:07 1 MR. CASTLETON: What we were able to glean,  
14:09:09 2 there is nothing in there that fits under what is  
14:09:11 3 considered mitigation.

14:09:12 4 Now, the defense counsel may have  
14:09:16 5 something, as Mr. Satterberg has said for the last  
14:09:18 6 three years. He is ready and able and willing to look  
14:09:21 7 at it. They haven't given us.

14:09:22 8 THE COURT: Not quite the same as it  
14:09:24 9 doesn't exist, but go ahead.

14:09:26 10 MR. CASTLETON: It doesn't exist because we  
14:09:28 11 haven't seen it.

14:09:28 12 THE COURT: You don't have it.

14:09:30 13 MR. CASTLETON: Correct.

14:09:33 14 We can't consider it, if we don't have it.  
14:09:37 15 The other thing that the hiring of the investigator  
14:09:40 16 was a fig leaf to cover up an over-all decision to  
14:09:43 17 file the death penalty that is not it at all.

14:09:45 18 In fact, if the court looks at the letters  
14:09:47 19 that counsel submitted for Mr. Larson, and what not,  
14:09:50 20 this is a process that is not unfamiliar to the State  
14:09:53 21 and the State knows how long this process is.

14:09:56 22 Getting a jump on who are the people that  
14:09:58 23 are going to be talked to, who are the friends of the  
14:10:00 24 defendant, who are the people who know him best to  
14:10:04 25 give us an opinion, that is of value to us, not only

14:10:08 1 of whether or not to seek the death penalty, but the  
14:10:10 2 case itself.

14:10:11 3 To say what I am getting is some sort of  
14:10:14 4 ruse, we are not really seeking mitigation, because  
14:10:16 5 frankly, there wasn't a mitigation expert. This was  
14:10:19 6 an investigator who talked to people who we thought  
14:10:22 7 would have an insight into who the defendant is.

14:10:25 8 Since the defense didn't do that for us, we  
14:10:28 9 did it ourselves, based on the investigation. It was  
14:10:31 10 nothing that showed reasons to show mitigation to  
14:10:35 11 support leniency.

14:10:36 12 THE COURT: Except from my telling you that  
14:10:39 13 they were proceeding on it.

14:10:41 14 MR. CASTLETON: They have to proceed on it,  
14:10:43 15 regardless.

14:10:44 16 THE COURT: Right. They have to proceed on  
14:10:47 17 it for the penalty phase. But it may very well be  
14:10:51 18 that it is the same, might be the same stuff, it might  
14:10:54 19 not be. But you did have my statement. You didn't  
14:11:05 20 have the substance of it, of course.

14:11:07 21 MR. CASTLETON: Right. Your Honor, the  
14:11:08 22 standard as counsel has indicated is not high. The  
14:11:11 23 question is whether there is reasons to believe that  
14:11:13 24 there are not sufficient mitigating circumstances to  
14:11:16 25 merit leniency. It is not that there is any

14:11:18 1 mitigation.

14:11:19 2 It is that there are sufficient mitigating  
14:11:22 3 circumstances to merit leniency. I would include in  
14:11:24 4 there, considering the facts of the case and  
14:11:26 5 considering who the defendant is, as known to the  
14:11:29 6 State.

14:11:29 7 He has no criminal history, clearly  
14:11:31 8 mitigating factor. That is all we have. There is not  
14:11:34 9 a single person, who was talked to either by the  
14:11:37 10 police or by the investigator that shed any light or  
14:11:40 11 gave us any mitigation into this situation.

14:11:44 12 It is for those reasons Mr. Satterberg  
14:11:47 13 chose, after 10 months of waiting, to indicate his  
14:11:51 14 desire to have the jury make this decision.

14:11:55 15 THE COURT: Did the State give the defense  
14:11:57 16 a deadline?

14:11:59 17 MR. CASTLETON: We gave them several  
14:12:01 18 deadlines, Your Honor. We kept continuing them.

14:12:03 19 THE COURT: Kept continuing the hearings.

14:12:06 20 MR. CASTLETON: Yes. We gave them  
14:12:07 21 deadlines and they would come back and say, "we need  
14:12:09 22 more time."

14:12:11 23 What happens in most case is that they say,  
14:12:13 24 "This is what we have and this is what we have." They  
14:12:16 25 told us nothing. We have asked numerous times before

14:12:19 1 and after the decision was made, "are we going to get  
14:12:22 2 something?"

14:12:22 3 Your Honor has asked that question and been  
14:12:25 4 told yes. But we have been told nothing, not a  
14:12:28 5 scintilla of information.

14:12:29 6 THE COURT: Rebuttal.

14:12:30 7 MR. LAUR: A few points in rebuttal, Your  
14:12:33 8 Honor. First trying to take them in chronological  
14:12:35 9 order in which they were raised.

14:12:38 10 The State makes repeated points of the fact  
14:12:42 11 that we have not provided a mitigation package yet. I  
14:12:46 12 think the court points out once they make the  
14:12:48 13 determination to seek the death penalty, that  
14:12:51 14 dramatically changed the dynamics of the  
14:12:54 15 circumstances.

14:12:55 16 THE COURT: If you have a -- again, I am  
14:12:58 17 not trying to telegraph anything here. But if you  
14:13:01 18 have a compelling case, might not a prosecutor,  
14:13:07 19 indeed, change his mind?

14:13:09 20 MR. LAUR: I don't know of any instance  
14:13:12 21 when they have. Although I am sure that it has  
14:13:15 22 happened. But, yes, they might. But at this point,  
14:13:22 23 the burden -- there is no legal change in the burden.

14:13:26 24 But we all know that it is going to be much  
14:13:28 25 more difficult to persuade the prosecutor, once he has

14:13:31 1 publicly announced the decision in a high profile case  
14:13:34 2 to seek the death penalty to change that position.

14:13:37 3 THE COURT: So why did you make a tactical  
14:13:39 4 decision not to provide what you got up to some point  
14:13:45 5 before he made the decision.

14:13:47 6 MR. LAUR: Before he made the decision.

14:13:48 7 THE COURT: Before he made the decision,  
14:13:50 8 did you make a decision -- you must have made, decided  
14:13:54 9 that you not going to present what you already have.

14:13:56 10 MR. LAUR: I guess it would depend upon --  
14:13:58 11 we did make that decision.

14:14:00 12 THE COURT: Right.

14:14:00 13 MR. LAUR: But I don't know if I would  
14:14:02 14 characterize it as a tactical decision. We based that  
14:14:06 15 decision on the fact that the mitigation investigation  
14:14:09 16 was still in a relatively early phase, that there were  
14:14:14 17 a -- the vast number of witnesses that we have  
14:14:17 18 identified as potential mitigation witnesses, we  
14:14:20 19 hadn't spoken to yet, that there were a number of  
14:14:24 20 records that we hadn't done. There was other work,  
14:14:27 21 other assessments.

14:14:29 22 So we were not at a point at that point in  
14:14:32 23 September of 2010 where we felt that simply throwing  
14:14:37 24 together what we had at that point would have been  
14:14:39 25 beneficial.

14:14:40 1 So I guess in that sense --

14:14:42 2 THE COURT: "Here is what we have. Give me  
14:14:45 3 more time and we will develop it."

14:14:47 4 MR. LAUR: We said that --

14:14:48 5 THE COURT: You didn't say, "this is what  
14:14:51 6 we have." You definitely said "give us more time."

14:14:54 7 MR. LAUR: We definitely said "give us more  
14:14:56 8 time." We felt in presenting an inadequate incomplete  
14:15:01 9 mitigation investigation would have been detrimental  
14:15:04 10 to Mr. Monfort in this case.

14:15:06 11 THE COURT: To the decision-making with the  
14:15:10 12 prosecutor?

14:15:11 13 MR. LAUR: And to the decision-making of  
14:15:13 14 the prosecutor.

14:15:13 15 THE COURT: That is what I mean.

14:15:15 16 MR. LAUR: We didn't think that it would be  
14:15:16 17 helpful. We didn't think that it would have been  
14:15:19 18 helpful in the form that we had would have done us any  
14:15:23 19 good.

14:15:24 20 We are still working on mitigation. We  
14:15:26 21 still are interviewing witnesses, some for the first  
14:15:28 22 time.

14:15:28 23 As I indicated, we argued this, laid this  
14:15:32 24 out back in September 2010 or August of 2010, when we  
14:15:37 25 had the hearing.

14:15:37 1 Mr. Monfort was 40 years old at the time  
14:15:42 2 that he was arrested. He had lived in approximately  
14:15:44 3 seven states. He had worked numerous jobs. There  
14:15:49 4 were witnesses, literally, spread all over the country  
14:15:53 5 in something like 25, 26 states, that we had  
14:15:57 6 identified.

14:15:57 7 This was, I mean, I have worked on and read  
14:16:01 8 other mitigation investigations, other mitigation  
14:16:04 9 packages. The universe of information available in  
14:16:09 10 those cases was much more, much smaller than here.

14:16:14 11 This case presented a particularly  
14:16:17 12 difficult mitigation investigation, because of the  
14:16:19 13 broad scope of the information out there. It was our  
14:16:22 14 determination -- I think a reasoned one, that rather  
14:16:26 15 than -- again, Your Honor, they are talking about nine  
14:16:29 16 or 10 months. That is just not accurate.

14:16:31 17 Our mitigation investigation for all  
14:16:33 18 intents and purposes began in April. We, essentially,  
14:16:36 19 had, what is that, five months. At the time that they  
14:16:42 20 made the decision, we had been five months in, in  
14:16:45 21 terms of actually doing the mitigation investigation.  
14:16:48 22 That is simply not an adequate enough time to pull  
14:16:51 23 together a sufficient information that we thought  
14:16:54 24 would be beneficial to Mr. Monfort or their  
14:16:58 25 decision-making process. We asked for more time. We

14:17:00 1 didn't get it.

14:17:02 2           The State went forward and at that point  
14:17:05 3 they maintained that they had an adequate factual  
14:17:08 4 basis for making the determination to seek death. I  
14:17:11 5 don't think that the record supports that.

14:17:15 6           The second point that I would like to  
14:17:17 7 address is the State's reliance on 10.95.070, which  
14:17:24 8 lists the mitigating circumstances that the jury can  
14:17:27 9 consider in making the decision at the conclusion of  
14:17:29 10 the capital trial.

14:17:30 11           Again, the statute, we got to assume that  
14:17:33 12 the legislature knows what they are talking about,  
14:17:36 13 that the legislature knows the intend of the import of  
14:17:41 14 their words.

14:17:41 15           If they use the words jury, they used jury.  
14:17:45 16 They didn't say "these are the decision that is the  
14:17:48 17 prosecutor should employ." Those circumstances that  
14:17:50 18 are listed are all circumstances that are fairly  
14:17:52 19 particularized individual circumstances relating to  
14:17:56 20 the defendant, him or herself.

14:17:57 21           In this case, it is clear that  
14:17:59 22 Mr. Satterberg's focus in deciding the death penalty  
14:18:03 23 was on the circumstances and the nature of the victim,  
14:18:06 24 not the defendant.

14:18:08 25           Then the prosecutor, Mr. Castleton talked

14:18:14 1 about, "well, he has to consider the facts of the case  
14:18:17 2 in determining, for example, whether there is  
14:18:20 3 premeditation, prior alleged incidents would go to the  
14:18:23 4 premeditation."

14:18:24 5 I would agree with that, but premeditation  
14:18:26 6 is not the issue that the prosecutor needs to  
14:18:28 7 determine in deciding whether to seek death under 401.

14:18:33 8 Premeditation is a threshold issue that  
14:18:36 9 needs to be determined, if the case can be charged as  
14:18:39 10 aggravated murder in the first place. That comes  
14:18:41 11 under a different provision of the statute.

14:18:44 12 They cite a couple of new cases in support  
14:18:48 13 of their proposition. The first is State versus  
14:18:53 14 Davis. Again, in Davis the court doesn't address the  
14:18:57 15 issue representing here. It was a completely -- they  
14:19:01 16 are kind of reading that passage out of context.

14:19:04 17 The situation where the package came up was  
14:19:10 18 in response -- in Davis, wrote a fairly lengthy  
14:19:17 19 decision on the number of issues including the issue  
14:19:20 20 of proportionality review.

14:19:22 21 Then in the body of that opinion the court  
14:19:23 22 was addressing points raised by the dissent. The  
14:19:28 23 dissent in Davis cited a trial case from a trial  
14:19:34 24 report where the prosecutor and the defense reached a  
14:19:40 25 plea agreement to the life without parole, Martin

14:19:44 1 Sanders case.

14:19:44 2           The dissent in Davis said, "well, this is  
14:19:48 3 facts similar to ours. They didn't go death on that  
14:19:51 4 case, therefore no proportionality --  
14:19:54 5 disproportionality."

14:19:55 6           The majority was attempting to address that  
14:19:58 7 assertion, when they said that the mitigation evidence  
14:20:00 8 is not the only reason that the prosecutor might not  
14:20:03 9 decide to seek the death penalty. They can also --  
14:20:06 10 they also considered -- often considered the strength  
14:20:11 11 of the State's case.

14:20:12 12           It is completely different issue. They  
14:20:14 13 were not interpreting the statute. The issue we are  
14:20:18 14 presenting here wasn't raised.

14:20:21 15           Koenig is really even further afield.

14:20:26 16 Koenig, I reviewed it together -- Mr. Castleton  
14:20:30 17 provided it for me. It was a Public Records Act case  
14:20:34 18 in which the court was distinguishing between the  
14:20:36 19 mitigation package and a victim impact statement.

14:20:41 20           Again, it does not address the issues here,  
14:20:51 21 I don't think, that without any analysis of the  
14:20:54 22 statute whatsoever is in any indicative of the statute  
14:21:00 23 whatsoever.

14:21:01 24           The language in Koenig, in the prosecutor's  
14:21:03 25 decision under 401, being akin to the charging

14:21:06 1 decision, is actually contrary to the court's own  
14:21:10 2 precedent. In particular, in the Campbell, where the  
14:21:15 3 court was addressing the equal protection challenge  
14:21:18 4 and said:

14:21:18 5 "There is no equal protection challenge,  
14:21:20 6 because a sentence of death requires consideration  
14:21:22 7 of an additional factor beyond that for a sentence  
14:21:25 8 for life imprisonment, namely an absence of  
14:21:30 9 mitigating circumstances. In Campbell the court  
14:21:32 10 used absence of mitigating circumstances as an  
14:21:35 11 additional factor required for the death penalty,  
14:21:38 12 not a charging factor. There is inconsistencies  
14:21:43 13 when the court was not thinking through when it  
14:21:46 14 addressed Koenig. Koenig was not interpreting  
14:21:51 15 10.95.040."

14:21:51 16 Finally, a question to address that the  
14:21:56 17 court raised, is there a standard, an abuse of  
14:22:00 18 aggressive standard, in reviewing the prosecutor's  
14:22:03 19 decision to reviewing the case in seeking the death  
14:22:08 20 statute? And the answer is yes.

14:22:09 21 THE COURT: I M going to reserve ruling on  
14:22:11 22 this issue until I have heard the arguments on the  
14:22:15 23 other motions to challenge death notice.

14:22:23 24 With that, let's talk about the scheduling.

14:22:25 25 MS. MacDONALD: Your Honor, we have the

14:22:27 1 agreed order to reschedule the motion.

14:22:30 2 THE COURT: Did you work this out with the  
14:22:32 3 bailiff?

14:22:33 4 MS. MacDONALD: It was the same date that I  
14:22:34 5 e-mailed Salina about that she said was fine. The  
14:22:38 6 other dates are regarding the briefing schedule.

14:22:40 7 THE COURT: All right. I guess I need some  
14:23:19 8 help here in terms of --

14:23:22 9 MS. MacDONALD: Yes, Your Honor.

14:23:22 10 THE COURT: The next hearing would be --

14:23:24 11 MS. MacDONALD: The next hearing for actual  
14:23:27 12 argument would be on December 7th. That is based on  
14:23:29 13 expert's availability and the holidays.

14:23:32 14 THE COURT: Let's discuss whether we will  
14:23:34 15 get an evidentiary hearing or not. Does the State  
14:23:43 16 intend to offer evidence?

14:23:46 17 MR. CASTLETON: No. In fact, Your Honor,  
14:23:48 18 we filed our response to that motion today. We are  
14:23:53 19 actually objecting to an evidentiary hearing.

14:23:55 20 THE COURT: Is the State --

14:23:57 21 MS. MacDONALD: The defense has experts  
14:23:58 22 that the defense would intend to offer testimony from.  
14:24:00 23 One is the expert on the capital jury project, who  
14:24:04 24 also scored mock jurors' surveys regarding Washington  
14:24:08 25 State death penalty instructions on a capital case.

14:24:10 1 THE COURT: I get that, but what am I going  
14:24:14 2 to get from this witness live that I have not already  
14:24:18 3 received?

14:24:18 4 MS. MacDONALD: There would be something --  
14:24:20 5 that the court will have the questions of, that I may  
14:24:22 6 not be able to -- I am not the expert -- to be able to  
14:24:25 7 answer that the expert would have more information for  
14:24:27 8 the court.

14:24:27 9 That is the reason that we attached the  
14:24:29 10 transcript from the Judge Ramsdel, who heard a similar  
14:24:34 11 motion with the declaration from a Professor Foglia to  
14:24:39 12 show all of the areas that the court had  
14:24:41 13 misinformation, not enough information.

14:24:43 14 Had she be been allowed to testify, the  
14:24:46 15 court would have more information, with making its  
14:24:49 16 decision.

14:24:49 17 The State did just file their brief this  
14:24:52 18 afternoon. I haven't read it yet. I would ask that  
14:24:54 19 the court reserve ruling as to whether or not to have  
14:24:58 20 an evidentiary hearing until we have had a chance to  
14:25:00 21 respond to the motion.

14:25:02 22 THE COURT: Just to help me, you wouldn't  
14:25:04 23 present -- if we had an evidentiary hearing, you don't  
14:25:06 24 anticipate presenting evidence?

14:25:13 25 MR. CASTLETON: No, we don't. Our

14:25:15 1 understanding is the defense is going to.

14:25:17 2 THE COURT: The prosecutor, I understand.

14:25:19 3 I see the difference.

14:25:24 4 MS. MacDONALD: Your Honor, I don't

14:25:26 5 anticipate that it would take that much of the court's

14:25:28 6 time, just two witnesses, that we would ask to be

14:25:31 7 allowed to testify for the court.

14:25:34 8 THE COURT: Does the State intend to

14:25:42 9 challenge -- part of this evidence would be

14:25:52 10 effectively legal argument. I realize that. But does

14:25:55 11 the State intend to dispute the factual basis that the

14:26:00 12 defense witnesses intend to offer, based upon what you

14:26:05 13 know already by now?

14:26:06 14 MR. BAIRD: Your Honor, may I?

14:26:07 15 THE COURT: Yes.

14:26:08 16 MR. BAIRD: Yes, we replied to some of the

14:26:11 17 court's questions, I think that you raised just now in

14:26:14 18 the brief that we filed today. The court may want to

14:26:16 19 consider it.

14:26:17 20 I think strictly if the court does, we

14:26:22 21 don't believe that the evidentiary hearing is

14:26:24 22 necessary.

14:26:25 23 I can explain that or try to explain that

14:26:27 24 further, if the court wishes. If the court does

14:26:30 25 conduct an evidentiary hearing then, of course, we

14:26:33 1 will have some questions for the experts.

14:26:38 2 I believe that the experts retained in this  
14:26:45 3 case, one is Wanda Foglia, who distributed a little  
14:26:51 4 over two dozen of Highline Community students. I  
14:26:56 5 don't think that it is fair to be called mock jurors.  
14:26:58 6 But they filled out a questionnaire.

14:26:59 7 To say that she scored the results, is to  
14:27:01 8 say that she counted up the actual percentages of the  
14:27:07 9 answers that they answered one way or the other. The  
14:27:10 10 defense has appended to their brief in this matter all  
14:27:13 11 of the questionnaires, so that the raw data is  
14:27:15 12 available for the court as is the declaration of  
14:27:19 13 Ms. Foglia.

14:27:21 14 The defense also retained someone who  
14:27:23 15 describes herself as an English language linguist, who  
14:27:29 16 wrote a declaration in which she urges the court to  
14:27:33 17 find that, in fact, the WPICs are unintelligible and  
14:27:38 18 unfathomable work. We don't intend to respond to that  
14:27:47 19 by presenting a declaration of any one.

14:27:49 20 We discussed that declaration in the brief  
14:27:52 21 that we submitted today. We don't believe that the  
14:27:57 22 testimony of any of these people would help the court  
14:28:01 23 decide the issues raised by the defense. But, again,  
14:28:09 24 perhaps the court wants to read our brief and the  
14:28:12 25 materials submitted with the defense and their brief

14:28:15 1 before reaching a decision.

14:28:18 2 THE COURT: I don't know. I would think  
14:28:21 3 that the defense might think that it is better off not  
14:28:23 4 having the prosecutor question these witnesses.

14:28:27 5 MS. MacDONALD: No, Your Honor.

14:28:28 6 I think that as we have seen just within  
14:28:30 7 the last few months, when a court had a hearing on  
14:28:33 8 this motion in the McEnroe and Anderson case, not  
14:28:36 9 having the experts testify to the court in the court  
14:28:39 10 hearing, did not give the court all of the  
14:28:42 11 information, because the court had questions that  
14:28:44 12 counsel were not able to answer, or, I don't think  
14:28:47 13 this this was intentional put both sides -- both  
14:28:50 14 counsel for the State and the defense -- gave the  
14:28:55 15 court information that was inaccurate, that is going  
14:28:57 16 to view how the court makes its decision. We are  
14:29:00 17 asking for the court to allow for the evidentiary  
14:29:03 18 hearing.

14:29:03 19 We would ask the court, if it is not  
14:29:05 20 considering not allowing it, to wait to review the  
14:29:09 21 State's brief.

14:29:10 22 THE COURT: I am not going to rule on this  
14:29:11 23 now since I just got the brief.

14:29:17 24 MS. MacDONALD: The court asked me are we  
14:29:20 25 also making a record. We have to make sure that we

14:29:23 1 make --

14:29:23 2 THE COURT: I believe that I have four  
14:29:25 3 binders.

14:29:28 4 MR. BAIRD: I believe that it is five, Your  
14:29:31 5 Honor.

14:29:31 6 MS. MacDONALD: I don't know if the court  
14:29:32 7 will have questions; it is a lot of information. I  
14:29:35 8 can't anticipate every question that you will have.  
14:29:38 9 We will want to have the evidentiary hearing. That  
14:29:40 10 way that the court has all of the information that it  
14:29:42 11 needs.

14:29:51 12 THE COURT: Are you prepared to suggest how  
14:29:53 13 long your direct will take?

14:29:54 14 MS. MacDONALD: Not at this point, but I  
14:29:56 15 can to the court. I will go back and think it over.  
14:30:00 16 We only had -- we are anticipating just being one day.  
14:30:03 17 I am not saying a whole day, but we have asked, when  
14:30:06 18 we looked at the scheduling for one day for the  
14:30:08 19 experts. I will go back and talk with them and give  
14:30:10 20 the court an idea how long the direct of each will  
14:30:15 21 take.

14:30:16 22 MR. BAIRD: If the court reads that portion  
14:30:17 23 of the brief that we submitted today discussing, for  
14:30:20 24 example, the declaration of the self described English  
14:30:23 25 language linguist, the court may get a sense of just

14:30:27 1 how long cross examination might last.

14:30:31 2 THE COURT: Having watched jurors' eyes  
14:30:34 3 when we read to them some of the Washington Pattern  
14:30:37 4 Instructions, particularly the ones on mens rea, we  
14:30:43 5 might all agree there is an English problem.

14:30:45 6 MR. BAIRD: I think that we can all agree  
14:30:48 7 that the instructions in the WPIC -- I certainly mean  
14:30:51 8 no offense to the Supreme Court.

14:30:53 9 THE COURT: They didn't write it, actually.

14:30:55 10 MR. BAIRD: The committee did.

14:30:56 11 I think that everyone would agree that they  
14:31:01 12 can be improved.

14:31:02 13 Before the court conducts an evidentiary  
14:31:05 14 hearing, I would recommend against reading the  
14:31:07 15 declaration of the linguist to see whether or not that  
14:31:09 16 you think that that individual is going to shed light  
14:31:12 17 on comprehensiveness.

14:31:15 18 THE COURT: There is also a question, why,  
14:31:16 19 indeed, if the WPIC is muddled -- the WPIC is not law.  
14:31:28 20 Then doesn't that come down to writing some decent  
14:31:32 21 English language instructions.

14:31:33 22 MR. BAIRD: Exactly.

14:31:34 23 MS. MacDONALD: The court may want to hear  
14:31:36 24 from the expert as to what would constitute something  
14:31:40 25 that is --

14:31:41 1  
14:31:43 2  
14:31:46 3  
14:31:48 4  
14:31:49 5  
14:31:50 6  
14:31:51 7  
14:31:51 8  
14:31:51 9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE COURT: That is something that I don't need to hear yet. We are a ways from there.

All right. Thank you. The court is adjourned.

THE BAILIFF: Please rise. Court is adjourned for the day.

(Court was recessed.)

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Carl Luer, Todd Gruenhagen, and Stacey MacDonald**, the attorneys for the defendant, at **Associated Counsel for the Accused**, 110 Prefontaine Place S., Suite 200, Seattle, WA 98103, containing a copy of the **Motion for Discretionary Review**, in STATE V. CHRISTOPHER JOHN MONFORT, Cause No. 88522-2, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



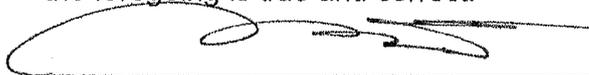
Name  
Done in Seattle, Washington

03-18-13  
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Suzanne Lee Elliott**, the attorney for the defendant, at 705 Second Avenue, Suite 1300, Seattle, WA 98104-1797, containing a copy of the **Motion for Discretionary Review**, in **STATE V. CHRISTOPHER JOHN MONFORT**, Cause No. 88522-2, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

03-18-13  
Date

## OFFICE RECEPTIONIST, CLERK

---

**To:** Ly, Bora  
**Cc:** Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann; Luer, Carl-acapd.org; Gruenhagen, Todd-acapd.org; 'stacey.macdonald@acapd.org'; Whisman, Jim  
**Subject:** RE: State of Washington v. Christopher John Monfort/Case # 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:** Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]  
**Sent:** Monday, March 18, 2013 11:09 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann; Luer, Carl-acapd.org; Gruenhagen, Todd-acapd.org; 'stacey.macdonald@acapd.org'; Whisman, Jim  
**Subject:** State of Washington v. Christopher John Monfort/Case # 88522-2

Dear Supreme Court Clerk:

Attached for filing in the above-referenced case, please find the **Motion for Discretionary Review. File 1 of 2.**

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

Bora Ly  
Paralegal  
Criminal Division, Appellate Unit  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
Phone: 206-296-9489  
Fax: 206-205-0924  
E-Mail: [bora.ly@kingcounty.gov](mailto:bora.ly@kingcounty.gov)

For

Debbie Dwyer  
Ann Summers  
Senior Deputy Prosecuting Attorneys  
Attorneys for the Respondent

## OFFICE RECEPTIONIST, CLERK

---

**To:** Ly, Bora  
**Cc:** Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann; Luer, Carl-acapd.org; Gruenhagen, Todd-acapd.org; 'stacey.macdonald@acapd.org'; Whisman, Jim  
**Subject:** RE: State of Washington v. Christopher John Monfort/Case # 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:** Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]  
**Sent:** Monday, March 18, 2013 11:12 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann; Luer, Carl-acapd.org; Gruenhagen, Todd-acapd.org; 'stacey.macdonald@acapd.org'; Whisman, Jim  
**Subject:** State of Washington v. Christopher John Monfort/Case # 88522-2

Dear Supreme Court Clerk:

Attached for filing in the above-referenced case, please find the **Motion for Discretionary Review. File 2 of 2.**

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

Bora Ly  
Paralegal  
Criminal Division, Appellate Unit  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
Phone: 206-296-9489  
Fax: 206-205-0924  
E-Mail: [bora.ly@kingcounty.gov](mailto:bora.ly@kingcounty.gov)

For

Debbie Dwyer  
Ann Summers  
Senior Deputy Prosecuting Attorneys  
Attorneys for the Respondent