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

State of Washington,  
  
Plaintiff,

vs.

Michele Anderson and Joseph McEnroe,  
  
Defendants.

No. 07-1-08717-2 SEA  
No. 07-1-08716-4 SEA

**ORDER ON DEFENDANTS' MOTIONS  
TO STRIKE THE NOTICE OF SPECIAL  
SENTENCING PROCEEDING**

Two issues are presented for decision today by Defendants Anderson and McEnroe. First, Defendants contend that RCW 10.95.020 violates the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14, of the Washington State Constitution because the list of aggravating factors has been expanded to the point that the statute no longer narrowly defines a subclass of crimes that are particularly serious for which the death penalty is appropriate. Second, Defendants contend that they were denied due process because the King County Prosecutor failed to comply with the statutory requirements of RCW 10.95.040(1) when deciding whether to file written notice of a special sentencing proceeding.

1 Taking the issues in the order presented, the Defendants acknowledge that RCW  
2 10.95.020 as originally enacted has been held to pass constitutional muster. State v.  
3 Bartholomew I, 98 Wn.2d 173, 192, 654 P.2d 1170 (1982). They argue, however, that  
4 subsequent case law interpretation of the factors, and the addition of four additional statutory  
5 factors with subparts, have rendered the statute so broad in application that aggravating  
6 circumstances can be applied to nearly every premeditated murder. The Defendants' briefing  
7 contains a lengthy compilation of cases interpreting and applying the statutory aggravating  
8 factors. They maintain that the legislative expansion of the aggravating factors and the "very  
9 loose interpretation of the statute by the Washington courts" render the entire Washington  
10 death penalty statute unconstitutional because the aggravating factors no longer genuinely  
11 narrow the class of persons eligible for the death penalty. After considerable review, this Court  
12 is not persuaded by Defendants' argument.

13 At the outset, this Court recognizes that, in Washington State, only premeditated first  
14 degree murder is a death penalty eligible offense. In his reply brief on the second issue before  
15 this Court, Defendant McEnroe himself notes that "[u]nlike other states, the only crime that can  
16 even be considered as a potential capital prosecution is premeditated murder." Defendant  
17 McEnroe's Reply to State's Response to Motion to Strike Notice of Intent at Pages 3-4  
18 (emphasis in original). In a footnote, McEnroe acknowledges that in some other states felony  
19 murder, all first degree murders, or intentional or knowing murders are eligible for the death  
20 penalty. Id. at 4, n. 1. Accordingly, in Washington State the death penalty is somewhat  
21 narrowly circumscribed by its limitation to only first degree premeditated murder.

22 The Defendants cite Arave v. Creech, 113 S.Ct. 1534, 507 U.S. 463, 123 L.Ed.2d 188  
23 (1993) for the proposition that because the "aggravating circumstances in Washington can be

1 applied to nearly every premeditated murder, [the statute] is constitutionally infirm.” Defendant  
2 McEnroe’s Motion to Strike at page 4. Although they maintain that they are not asserting a  
3 vagueness challenge, Arave v. Creech involved, in part, the defendant’s contention that the  
4 aggravating circumstance that he exhibited “utter disregard for human life” was  
5 unconstitutionally vague. Ultimately, the United States Supreme Court held that the language  
6 was not unconstitutionally vague given the limiting construction placed upon the language by  
7 the Idaho Supreme Court in a prior case. The Court also noted that in Idaho the sentencer  
8 was the judge rather than a jury and the judge was presumed to know the law. Arave at 8.

9 The Arave Court acknowledged, however, that the inquiry did not end there. Instead  
10 the Court was required to determine whether the State’s capital sentencing scheme genuinely  
11 narrowed the class of persons eligible for the death penalty. “If the sentencer fairly could  
12 conclude that an aggravating circumstance applies to every defendant eligible for the death  
13 penalty, the circumstance is constitutionally infirm.” Arave at 10. The Court held that although  
14 the question was “close,” the limiting construction placed upon the “utter disregard” language  
15 satisfied the narrowing requirement. Arave at 10. In short, the Court answered the question of  
16 whether the capital sentencing scheme genuinely narrowed the class of persons eligible for the  
17 death penalty by reviewing whether the aggravating circumstance pertaining to the defendant  
18 himself was constitutionally infirm. The Court did not conduct a global review of all the  
19 aggravating factors set forth in the entire Idaho death penalty statute.

20 The only case that Defendants have cited in support of the proposition that they may  
21 assert a constitutional challenge based on the contention that aggravating factors not alleged  
22 against them do not perform an adequate narrowing function is United States v. Cheely, 36  
23 F.3d 1439 (1994). In fact, the only portion of that case cited in support of the proposition is a

1 footnote. In that case, however, both of the death penalty provisions found to be  
2 unconstitutional had been alleged against Cheely, so the proposition asserted by Defendants  
3 is not squarely supported by the case.

4 In summary, the aggravating factors alleged against Defendants Anderson and  
5 McEnroe have long been recognized as constitutional. The Defendants have failed to provide  
6 persuasive authority for the proposition that they may challenge the constitutionality of the  
7 entire Washington State death penalty statute based upon infirmities in aggravating factors  
8 that have not been alleged against them. Furthermore, even if this Court were to accept the  
9 argument and rule in favor of the Defendants, the remedy would be to strike the  
10 unconstitutional aggravating factors, rather than to strike the notice of special sentencing  
11 proceeding. RCW 10.95.900.

12 The second issue is the narrower of the two and does not appear to have been directly  
13 addressed in any appellate court opinion. It is important to note that RCW 10.95.040(1) is a  
14 unique statute. Neither the Federal Death Penalty Act nor any state death penalty statute  
15 appears to have a comparable provision. RCW 10.95.040(1) provides in pertinent part that the  
16 "prosecutor shall file written notice of special sentencing proceeding to determine whether or  
17 not the death penalty should be imposed when there is reason to believe that there are not  
18 sufficient mitigating circumstances to merit leniency."

19 On December 28, 2007, when the King County Prosecutor announced the filing of  
20 aggravated first degree murder charges against the Defendants, the Prosecutor stated:

21 As you know, the prosecuting attorney has 30 days from the date of arraignment to  
22 decide whether or not to file a notice declaring our intention to pursue the death penalty.  
23 During this period of time, we review the facts of the case, and consider any mitigating  
circumstances including any facts or issues that the defense may want to present.

1 Given the magnitude of this crime, I pledge to give this case serious consideration for  
2 application of our state's ultimate punishment. But that decision is for another day.

3 Ten months later, the Prosecutor issued a statement regarding his decision to seek the  
4 death penalty against both Defendants. He stated in pertinent part:

5 The Prosecuting Attorney has the obligation in potential capital murder cases to  
6 consider all relevant information about the crime and to weigh that against any  
7 mitigating evidence favoring the charged defendants.

8 The crime that is alleged in this case against both defendants is the premeditated  
9 murders of Wayne Anderson, age 60, Judy Anderson, 61, Scott Anderson, 32, Erica  
10 Mantle Anderson, 32, Olivia Anderson, 6, and Nathan Anderson, 3.

11 Given the magnitude of these alleged crimes, the slaying of three generations of a  
12 family, and particularly the slaying of two young children, I find that there are not  
13 sufficient reasons to keep the death penalty from being considered by the juries that will  
14 ultimately hear these matters.

15 The death penalty is this state's ultimate punishment and is to be reserved for our most  
16 serious crimes. I believe this is one of those crimes. The jury acting as the conscience  
17 of the community, should have all relevant information and all legal options before it in  
18 consideration of this case.

19 The Defendants contend that the Prosecutor failed to follow the directive of RCW  
20 10.95.040(1) to consider only the mitigating factors in deciding whether to file the special  
21 sentencing notice. Instead, they contend that the prosecutor erroneously weighed the  
22 evidence in mitigation against the heinousness of the factual allegations underlying the  
23 charges, thereby, inappropriately commingling the seriousness of the offense with the  
assessment of the defendant's individual culpability. Defendants reason that the seriousness  
of the offense was already determined and established by virtue of the filing of the aggravating  
circumstances. Therefore, reconsideration of the heinousness of the offense is inconsistent  
with the statutory directive to determine whether "there is reason to believe that there are not  
sufficient mitigating circumstances to merit leniency."

1           The State counters by asserting that the plain language of RCW 10.95.040(1) provides  
2 that the prosecutor should consider any relevant information available when deciding whether  
3 to file the special sentencing notice. The prosecutor is not constrained to consider only  
4 evidence pertaining to mitigation. The State maintains that the prosecutor can consider the  
5 facts of the case itself and the strength of the available evidence in making the decision. To  
6 hold otherwise, the State argues, would lead to absurd results.

7           A great deal has been written about the death penalty over the past four decades and  
8 numerous cases have articulated basic principles central to death penalty jurisprudence. Two  
9 of these principles are that death penalty statutes must be narrowly circumscribed to target the  
10 worst of the worst crimes. Second, that the imposition of the death penalty should be reserved  
11 for individuals who are deemed to be the worst of the worst offenders. With this fundamental  
12 backdrop in mind, we must review how the Washington State death penalty statute addresses  
13 these core principles.

14           First, the Legislature has defined the worst of the worst crimes that are eligible for the  
15 death penalty in Washington State. If the facts alleged indicate that the defendant has  
16 committed the crime of first degree premeditated murder as defined in RCW 9A.32.030(1)(a),  
17 and one or more of the 14 aggravating circumstances set forth in RCW 10.95.020 are present,  
18 then the State may charge the defendant with aggravated first degree murder. Aggravated  
19 first degree murder is an offense eligible for the death penalty.

20           In most jurisdictions the filing of the aggravating factor or circumstance provides the  
21 defendant notice that the State will be seeking the death penalty. Also, in some jurisdictions,  
22 the adjudication of the aggravating circumstance is conducted in the sentencing phase of the  
23 proceeding rather than the guilt phase. State v. Bartholomew II, 101 Wn.2d 631, 635, 683

1 P.2d 1079 (1984). In other words, if the defendant is convicted of the underlying murder, then  
2 proof of the aggravating circumstance that would elevate the crime to a death penalty eligible  
3 offense is presented at the sentencing phase.

4 Early drafts of Washington State's current death penalty statute were consistent with  
5 this approach. However, the version that was finally enacted incorporated proof of the  
6 aggravating factor in the guilt phase of the proceeding rather than reserving that determination  
7 to the sentencing phase. Our Supreme Court in State v. Kincaid, 103 Wn.2d 304, 312, 692  
8 P.2d 823 (1983) described the process as the jury being asked to decide whether the  
9 defendant was guilty of premeditated murder in the first degree and, if so, being asked to  
10 answer a special verdict regarding the existence of a statutory aggravating circumstance. The  
11 Court held that while the aggravating circumstance is determined in the same proceeding,  
12 conceptually the crime is premeditated murder in the first degree with aggravating  
13 circumstances rather than a new crime of aggravated first degree murder. The aggravating  
14 circumstance functions as an "aggravation of penalty" provision justifying the increased  
15 penalty. Kincaid at 312.

16 If the jury finds the defendant guilty of premeditated murder in the first degree and also  
17 finds aggravating circumstances exist, the special sentencing proceeding is conducted. At this  
18 proceeding, the jury is charged with answering the following question, "Having in mind the  
19 crime of which the defendant has been found guilty, are you convinced beyond a reasonable  
20 doubt that there are not sufficient mitigating circumstances to merit leniency?" To return an  
21 affirmative answer to that question, the jury must be unanimous.

22 It is in this special sentencing proceeding that the jury addresses the second guiding  
23 principle – is this the worst of the worst offender deserving the ultimate punishment? RCW

1 10.95.070 provides a non-exclusive list of the factors that the jury may consider in determining  
2 whether leniency is merited. They include the presence or absence of prior criminal history or  
3 activity, whether the crime was committed while the defendant was under the influence of  
4 extreme mental disturbance, whether the victim consented to the murder, whether the  
5 defendant was an accomplice to the murder committed by another but played a minor role,  
6 whether the defendant acted under duress or domination of another, whether the defendant's  
7 capacity to appreciate the wrongfulness of his conduct or conform his/her conduct to the  
8 requirements of the law was substantially impaired as a result of mental disease or defect,  
9 whether the age of the defendant at the time of the crime calls for leniency, and whether there  
10 is a likelihood that the defendant will pose a danger to others in the future. Evidence in  
11 mitigation of punishment is the focus of the proceeding. State v. Bartholomew II, 101 Wn.2d at  
12 645 (1984).

13 Before a case arrives at the sentencing stage of the proceeding, however – indeed,  
14 before even the guilt phase – Washington State has a unique intermediate determination set  
15 forth in RCW 10.95.040(1). As described above, this provision states that after the prosecutor  
16 has filed the death penalty eligible charge of aggravated murder in the first degree, the  
17 prosecutor has 30 days to decide whether to file the notice of special sentencing proceeding  
18 indicating that the State will pursue the death penalty rather than settling for the prospect of life  
19 without the possibility of parole. During this 30 day window, the defendant may not tender a  
20 plea of guilty to aggravated first degree murder nor may the Court accept such a plea or a plea  
21 to any other lesser included offense. This restriction is obviously intended to afford the State  
22 an opportunity to consider the propriety of filing a special sentencing notice without running the  
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1 risk of the defendant pleading guilty in the meantime and precluding the prospect of receiving a  
2 death sentence.

3           Interestingly, although the statute allows for extension of the 30 day period for “good  
4 cause,” the statute makes no provision for defense counsel’s input or involvement during this  
5 review process. We are all aware that a culture and practice has evolved over the years that  
6 permit and encourage defense counsel to prepare and provide a “mitigation packet” to the  
7 prosecutor to assist in making this significant decision. We are also all aware that this practice  
8 has inexorably led to numerous agreed extensions of the 30 day period to afford counsel  
9 ample opportunity to investigate and prepare materials in mitigation for consideration.  
10 Defense counsel’s agreement to the extension ostensibly is predicated on a desire to prepare  
11 the most compelling packet possible. The State’s assent is presumably not only based upon a  
12 desire to obtain the most complete information possible to assist in the decision, but also a  
13 desire to curtail a later argument that defense counsel was ineffective.

14           Despite these current practical realities, when this Court is called upon to determine the  
15 meaning of RCW 10.95.040(1), the Court must consider the Washington State Death Penalty  
16 Act as it is written rather than construing it according to the practices that have evolved in  
17 various jurisdictions out of whole cloth.

18           In keeping with this principle, it is evident that the Legislature intended to afford a  
19 prosecutor only a narrow window in which to determine whether to file a notice of special  
20 sentencing proceeding once the prosecutor has elected to charge an individual with  
21 aggravated first degree murder. Absent a showing of good cause, the prosecutor is required  
22 to make the decision within 30 days of arraignment. Notably, the statute does not require the  
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1 prosecutor to wait for any length of time either. In fact, the prosecutor may file the notice much  
2 earlier in the process.

3 In State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the prosecutor expressed a  
4 desire to do just that. On May 20<sup>th</sup>, 1992, Pirtle was charged with 2 counts of aggravated first  
5 degree murder. On that same day, the prosecutor informed defense counsel that he intended  
6 to seek the death penalty. On appeal, Pirtle argued that the prosecutor abused his discretion  
7 by failing to consider mitigating evidence before deciding to seek the death penalty. The  
8 Supreme Court held that the prosecutor did not abuse his discretion in that instance because  
9 he had merely expressed a tentative decision and indicated to defense counsel that he would  
10 accept and consider mitigating evidence from the defense if provided before the 30 day  
11 expiration period for filing the notice of intent. On the 30th day, the prosecutor filed the notice  
12 of intent.

13 Although the case does not specifically indicate whether the defense submitted any  
14 evidence in mitigation, it appears that they did not. The Supreme Court held that the  
15 prosecutor's expressed willingness to consider evidence in mitigation indicated that the  
16 prosecutor was not applying an unconstitutionally rigid policy in making his decision. However,  
17 the Court implied that had the prosecutor announced his decision on May 20<sup>th</sup> and then  
18 refused to consider any additional evidence in mitigation, it "would indicate an unwillingness to  
19 engage in the individualized tempering" required. Pirtle at 642, citing In re Harris, 111 Wn.2d  
20 691, 693, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075 (1989). The salient fact for the  
21 Pirtle Court was the willingness of the prosecutor to consider evidence in mitigation rather than  
22 subscribing to a rigid, inflexible policy of filing a notice of special sentencing in every  
23 aggravated first degree murder case.

1 Having found that the prosecutor's expressed willingness to consider evidence in  
2 mitigation after his tentative announcement thwarted any argument that the prosecutor was  
3 employing an absolute policy that violated the constitutional requirement of individual  
4 tempering, the record itself still failed to illuminate the prosecutor's reasons for filing the notice  
5 of special sentencing. The reason for this deficiency is contained in RCW 10.95.040 itself.  
6 Pursuant to the statute, in order to file the notice of special sentencing the prosecutor need  
7 only have "reason to believe that there are not sufficient mitigating circumstances to merit  
8 leniency". The prosecutor need not articulate his reason or the underlying evidence in support.  
9 As Justice Utter lamented in a dissenting opinion over a decade earlier:

10 If the prosecutor believes there is one reason to believe the mitigating circumstances  
11 are not sufficient, this is all that is required to put the question of capital punishment  
12 before the jury. The statute requires no reason to be stated for the record, nor any  
13 justification for requesting capital punishment. No affidavit filed with the court is  
14 required and we are absolutely unable to determine what the underlying reason is for  
15 allowing the jury to consider the imposition of the death penalty that distinguishes it from  
16 other aggravated murders.

14 State v. Campbell, 103 Wn.2d 1, 47, 691 P.2d 929 (1984) (Utter, J., dissenting).

15 Undeterred by the absence of an explanation on the record, the Supreme Court filled  
16 the void in Pirtle by turning to evidence in the public record to glean possible justifications.

17 Having done so, they stated:

18 Even without input from the defense, the prosecutor had a substantial amount of  
19 information about Pirtle. Pirtle was born in Spokane and lived most of his life there. His  
20 contact with law enforcement officers had been extensive. He had ten juvenile  
21 convictions, including three for second degree burglary. He had five adult convictions  
22 including one for first degree theft and another for felony assault. Because of Pirtle's  
23 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. Given 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.

1           State v. Pirtle, 127 Wn.2d at 642-43.

2           Although Pirtle is viewed as an anomaly by the State, at least three relevant principles  
3 can be gleaned from the case. First, the prosecutor's duty under RCW 10.95.040(1) is not  
4 particularly onerous. The State need not conduct a deeply searching inquiry in order to satisfy  
5 its statutory obligation. This holding is consistent with the Court's prior holding in In re Harris,  
6 *supra*. In Harris the Court upheld a Pierce County Prosecuting Attorney's Office policy that  
7 required automatic filing of the notice of special sentencing unless the defendant or his counsel  
8 brought forth some evidence in mitigation for consideration. In re Harris, 111 Wn.2d at 691.

9           Secondly, Pirtle appears to indicate that although it may be a good practice to afford the  
10 defense an opportunity to submit mitigating evidence for consideration, there is no obligation to  
11 wait longer than the statutory 30 days for the information before rendering a decision to file the  
12 special sentencing notice.

13           Lastly, Pirtle indicates that while the court must be respectful of the discretion afforded  
14 the prosecutor in making a decision pursuant to RCW 10.95.040(1), the exercise of that  
15 discretion is not unfettered and is not immune from review by the court. That review, however,  
16 is conducted pursuant to a highly deferential abuse of discretion standard. Furthermore, even  
17 absent any expressed articulation by the prosecutor of the reason for believing the evidence in  
18 mitigation is insufficient, the Supreme Court will review public facts in the record on its own to  
19 determine if evidence exists that would support the prosecutor's determination.

20           Given the low burden imposed on the prosecutor in Pirtle to seek out mitigating  
21 evidence and given the highly deferential standard of review employed by the Supreme Court,  
22 this Court asked Ms. Ross at oral argument whether Pirtle was at all helpful to the defense  
23

1 position. Ms. Ross responded that although the Pirtle Court was highly deferential to the  
2 prosecutor, the telling part of the Court's analysis was reflected in the Court's self-expressed  
3 rationale in support of the prosecutor's decision. She noted that each of the factors relied  
4 upon by the Supreme Court was a factor specific to the defendant himself from his place of  
5 birth to his criminal record. She noted that the Court did not comment on the heinousness of  
6 the offense or the strength of the State's case in evaluating the mitigating factors. Accordingly,  
7 she contended that the actual analysis conducted by the Supreme Court itself validates the  
8 defense contention that the prosecutor should not weigh the facts of the underlying charge in  
9 making a special sentencing notice decision pursuant to RCW 10.95.040(1).

10 The State counters that the plain language of RCW 10.95.040(1) permits the prosecutor  
11 to consider any relevant information, not just potential mitigation. The State argues that simple  
12 logic and common sense dictate that a "reason to believe" that potential mitigation is  
13 insufficient to merit leniency must come from sources other than the potential mitigation itself.  
14 At oral argument, the State noted that it is their office policy to "only give the jurors the option  
15 of imposing death in cases where guilt is not even remotely a question." Accordingly, the facts  
16 of the crime alleged and the strength of the evidence available is an essential component of  
17 the calculus. To illustrate its point, the State poses the following two hypotheticals:

18 Based on the reading of the statute that the defendants propose, a prosecutor *would*  
19 seek the death penalty in a case where the available evidence proving premeditation,  
20 the defendant's identity, or some other necessary element is not especially strong, yet  
21 mitigation evidence is negligible. By the same token, that same prosecutor *would not*  
22 seek the death penalty in another case where the evidence of guilt is overwhelming, the  
23 defendant's criminal history is lengthy, the crime is undeniably heinous, yet the  
defendant succeeds in presenting a compelling mitigation packet. In other words, the  
most deserving of death would be spared by the prosecutor's initial decision, while  
marginal cases would proceed to verdict. For obvious reasons, this simply cannot be  
the law.