

73760-1

73760-1

No. 73760-1-1

King County Superior Court Cause No. 14-1-02388-6 SEA  
COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

CLARENCE C. YOUNG, JR.,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE LAURA INVEEN

2019 DEC 28 AM 11:59  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

	<u>Page</u>
<b>Table of Authorities</b>	<b>ii, iii</b>
<b>Introduction</b>	<b>1</b>
<b>Statement of the Case</b>	<b>1</b>
<b>Argument</b>	<b>7</b>
<b>1. Preliminary Considerations and Standard of Review</b>	<b>7</b>
<b>2. Mr. Young's Payments to the Listed Victims,     Prior to the Criminal Investigation, Qualifies as a     Statutory Mitigating Circumstance</b>	<b>8</b>
<b>3. Non-Statutory Mitigating Circumstances</b>	<b>9</b>
<b>4. The Courts Should Consider the Respondent's Age     and Medical Condition</b>	<b>15</b>
<b>Conclusion</b>	<b>16</b>

## TABLE OF AUTHORITIES

### Table of Cases

<u>U.S. Supreme Court:</u>	<u>Page(s)</u>
<i>Miller v. Alabama</i> , 567 U.S. _____, 132 S.Ct. 2455, 2471, 183 L.Ed.2d 407 (2012)	15, 16
<i>United States v. Booker</i> , 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)	14
 <u>Washington State:</u>	
<i>State v. Allert</i> , 117 Wn.2d 156, 163, 815 P.2d 752 (1991)	8
<i>State v. Branch</i> , 129 Wn.2d 635, 645–46, 919 P.2d 1228 (1996)	7
<i>State v. Dennis</i> , 101 Wn. App. 223, 229, 6 P.3d 1173 (2000)	11 (fn.5)
<i>State v. Edelman</i> , 97 Wn. App. 161, 166, 984 P.2d 421 (1999)	11 (fn.5)
<i>State v. Ha'mim</i> , 132 Wn.2d 834, 840, 940 P.2d 633 (1997)	7, 8, 10
<i>State v. Kinneman</i> , 120 Wn. App. 327, 84 P.3d 882 (2003), <i>review denied</i> , 152 Wn.2d 1022, 101 P.3d 108	10, 11 (fn.5)
<i>State v. Law</i> , 154 Wn.2d 85, 93, 104 (2005)	7, 10, 13, 14
<i>State v. O'Dell</i> , 183 Wn.2d 680 (2015)	15
<i>State v. Ronquillo</i> , 2015 WL 6447740 (Wn. App. 2015)	9, 15
<i>State v. Smith</i> , 119 Wn.2d 385, 389, 831 P.2d 1082 (1992)	11 (fn.5)
<i>State v. Statler</i> , 160 Wn. App. 622, 640, 248 P.3d 165 (2011)	13

## Statutes

### Washington State:

RCW 9.94A.010	10, 16
RCW 9.94A.010(1)	12
RCW 9.94A.010(2)	12
RCW 9.94A.510	3
RCW 9.94A.535	7
RCW 9.94A.535(1)	8, 9
RCW 9.94A.535(1)(b)	9
RCW 9.94A.585(4)	7
RCW 9.94A.753(3)	11 (fn.4)
RCW 9A.56.030	11 (fn.6)
RCW 9A.56.040	11 (fn.6)
RCW 9A.56.040(1)(a)	14
RCW 9A.56.050	11 (fn.6)
RCWA 9.94A.010	10, 16
RCW 21.20.010	2, 14

### Other Authorities

Sentencing Reform Act of 1981 (SRA)	1, 8, 10, 12, 16, 17, 18
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### **Introduction**

Clarence “Bud” Young pled guilty to ten counts of securities fraud with restitution stipulated at \$1,264,802.00. Respondent Young received an exceptional sentence of six months work release and six months electronic home detention. In support of this exceptional sentence, the sentencing court relied on the Respondent’s prior repayments before detection, his ability to make restitution payments, Respondent’s age and notable poor health. This sentence is consistent with the Sentencing Reform Act of 1981 and relevant case law.

### **Statement of the Case**

Mr. Young is a 69-year-old man (he turned 70 on November 5, 2015) with no prior criminal history. CP<sup>1</sup> 53. On June 16, 2014, the State of Washington filed an Information charging Mr. Young with 16 counts of Securities Fraud. CP 1. Prior to the filing of criminal charges, the prosecution was aware that, at least, \$170,260.00 had been repaid to the victims and that at least one investor was paid back in full. CP 18. After the filing of charges and further investigation, it was determined that Mr. Young had actually made \$523,456.00 in repayments to the victims. CP 74. At sentencing, Judge Inveen asked “just for clarification, it [the repayments] was repaid when the—when the investigation was ongoing or

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<sup>1</sup> CP refers to Clerk’s Papers and applicable page number(s).

brought to light.” VRP<sup>2</sup> 20:12-14. Defense counsel, Mr. McDonough, explained the repayments were made “prior to the information being filed...I don’t think the state’s investigation was going on.” VRP 20:15-18. The State did not object to this factual presentation or provide further explanation.

On April 29, 2015, Mr. Young pled guilty to ten counts of securities fraud, RCW 21.20.010. CP 35. Defense counsel and Prosecuting Attorney Scott Peterson stipulated to a restitution amount of \$1,264,802.00. CP 50, 74. This amount was a reflection of monetary damage to the victims, minus the amount previously repaid.

Sentencing occurred on July 10, 2015, in front of Judge Inveen. CP 115-118. Present at sentencing were listed victims Steve Kenney, John Jackson and Terry Hoder<sup>3</sup>. VRP 2:10-12; VRP 24:11-28:15. Mr. Kenney addressed the court and discussed the impact this case had on his life and retirement funds; he told the court “I would like to see some restitution.” VRP 13:2. Similarly, Mr. Jackson shared his troubles related to this case and commented “So from our standpoint, you know, we would certainly appreciate some restitution. I don’t expect that we are ever going to see much. I guess in exchange for restitution that it would be my thought that–

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<sup>2</sup> VRP refers to Verbatim Report of Proceedings, and references are to page number and line numbers, if applicable.

<sup>3</sup> The victim’s true name is Terry Hoder, but the record refers to him as Terry Horder. His true name of Terry Hoder is used in this brief.

ask that Bud (Mr. Young) should spend some time incarcerated.”

VRP 15:23-25; 16:1-3. Mr. Hoder explained to the court his feelings that “if everybody is truly interested in getting restitution and getting their money back—for all of us it would be in our best interests to keep Bud out there working on trying to get our money back for us in whichever way he can continue doing that.” VRP 24:21-25; 25:1-5. The court also received letters from victims Elworth Stegriy and Peter Perry; neither asked for Bud Young’s incarceration. VRP 16:12-16; 17:10-13.

Pursuant to RCW 9.94A.510, the standard sentencing range to a plea of ten counts of securities fraud, with an offender score of 9, seriousness level III, is 51-60 months in the Department of Corrections. CP 37. As agreed in the plea agreement, the State recommended that Respondent Young be sentenced to 51 months in the Department of Corrections, the low end of the standard sentencing range. CP 51. Respondent Young, through defense counsel, requested an exceptional sentence of twelve months of electronic home detention along with payment of restitution and costs. CP 52-104.

At sentencing, Judge Inveen commented that an extraordinary sentence would provide the victims for the potential of repayment, consistent with the victims’ requests. VRP 9:6,7. An extraordinary sentence “would facilitate repayment for the victims.” VRP 9:9,10. The

potential for repayment was legitimized by Respondent Young's repayments prior to the filing of the Information of "approximately half a million dollars" and actual ability to earn income to continue repay the victims. RP:20:7,8. Respondent Young currently works as a general business consultant providing market research, operation guidance, and feasibility studies. CP 60. Without incarceration, Respondent Young estimates he can generate a gross income of \$120,000.00 a year and that he could pay approximately \$12,000.00 a month in restitution. CP 60, 124, 125; VRP 31:6-12. This income potential provides a realistic ability to make restitution payments consistent with the victims' primary request. CP 61, 125. Mr. Young is committed to repaying the victims in this case and told Judge Inveen "I will strive until the day I die to make full restitution to them [the victims] and repair the damage to my family. If I'm allowed to commit full-time energies to work, the monies earned will repay the victims." VRP 29:2-5.

Further, Judge Inveen questioned the logic of "putting him into the Department of Corrections, cause the taxpayers to be paying tens of thousands of dollars in medical bills and making special circumstances and arrangements for him at the Department of Corrections." VRP 9:10-14. Respondent Young has significant medical expenses. CP 123-124, 65-68, 84-88. Respondent Young's medical ailments include cone-rod



dystrophy, injured knee (which will require a full knee replacement at \$70,000.00), chronic mastoiditis, spastic bladder, high cholesterol, and chronic cysts. CP 54-57, 67-68, 122-124. From 2012 to April of 2015, Respondent Young submitted \$90,303.78 in medical claims through his insurance; this does not include co-pays, payments toward the deductible, or amounts not covered by insurance. CP 57. At the time of sentencing, Respondent Young was on track to have claims of \$33,128.10 for 2015; those costs would have been passed on to the State if Respondent Young had been sentenced to the Department of Corrections. CP 58.

Judge Inveen in a thoughtful decision weighed the “wreckage” caused by Mr. Young and the victim’s request for repayment. VRP 34-35. “I want to see these folks have the ability to get at least some pennies on the dollar of a return, and virtually certain that if he goes to prison, their chances of getting any money back are pretty much zero.” VRP 35:7-10. Judge Inveen, in an effort to facilitate repayment, agreed with the defense that an exceptional sentence was justified and sentenced Respondent Young to six months work release and six months home detention. CP 112, 116-127. The sentencing court ordered restitution and accepted the stipulated restitution amount of \$1,264,802.00. CP 113, 116-127. As mentioned, this amount reflects repayments made to the listed victims

prior to the filing of the Information in the amount of \$523,456.00. CP 59, 74.

In support of the exceptional sentence, the court relied on the following:

4. Mr. Young suffers from several serious medical conditions that would make his incarceration particularly difficult, especially when considering his age.
5. An exceptional sentence in this case would save the State from having to expend its limited resources on a large amount of medical expenses, due to the defendant's multiple medical conditions that require ongoing treatment.
6. Mr. Young has the ability to continue working and make substantial restitution payments if electronic home monitoring is imposed. If he is incarcerated, he will only be able to make the most minimal payments towards restitution.
7. Mr. Young made some restitution payments to the victims in this case prior to his plea.
8. Mr. Young is remorseful and wants to repay the victims in the case in full.
9. Mr. Young is 69 years old and has no criminal history, whether felony, misdemeanor or juvenile. Mr. Young has no arrest history or history disruptive or unlawful behavior. This case did not involve any violence. He poses no threat to the community.

CP 126, 127.

The Findings of Fact and Conclusions of Law in Support of the Exceptional Sentence explicitly state that the "bases for an exceptional

sentence are sufficient to merit a departure from the sentencing guidelines standing alone or taken together as a whole.” CP 126.

### **Argument**

#### **1. Preliminary Considerations and Standard of Review.**

“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. “If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).” Therefore, “[t]o reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4). The issue of whether or not the sentencing court’s reasons “justify a departure from the standard range is reviewed de novo as a matter of law.” *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005), *State v. Ha’ mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997) (citing former RCW 9.94A.210(4)); *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d

1228 (1996); and *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)).

In this case, the prosecution argues that the exceptional sentence is unsupported by mitigating factors. *See* Brief of Appellant. Mr. Young, through defense counsel, disputes this. The exceptional sentence is supported by reasons which are not only in the record but additional mitigating circumstances also justify the sentence outside of the standard range.

**2. Mr. Young's Payments to the Listed Victims, Prior to the Criminal Investigation, Qualifies as a Statutory Mitigating Circumstance.**

“The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1). The Sentencing Reform Act (SRA) sets forth a list of mitigating circumstances that are specifically described as “illustrative only and are not intended to be exclusive reasons for exceptional sentences.” RCW 9.94A.535(1). *See also State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997) (court noted that statutory mitigating factors are only illustrative, and a court may use non-statutory mitigating factors in setting a more lenient sentence so long as the asserted non-statutory factors are sufficiently substantial).

On the “illustrative” list of mitigating circumstances and relevant to this case is:

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

RCW 9.94A.535(1).

In this case, sentencing Judge Inveen relied on the fact, amongst other factors, that Mr. Young made payments to the victims in the amount of \$523,456.00. These payments were indisputably made prior to the criminal filing of the Information in this case. These acknowledged facts are consistent with the compensation before detection circumstance listed in RCW 9.94A.535(1)(b) and stated above. This circumstance, by itself, could justify the exceptional sentence received by Respondent Young. This circumstance is both supported by the record and justifies a sentence outside the standard sentence range.

### **3. Non-Statutory Mitigating Circumstances.**

The sentencing court has the discretion to make a downward departure from the standard range. *State v. Ronquillo*, 2015 WL 6447740 (Wn. App. 2015). “In determining whether a factor legally supports departure from the standard sentencing range [the court] employs a two part test:

- (1) a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range;
- (2) the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.”

*Law*, 154 Wn. 2d at 95, 110 P.3d 717.

The enumerated purposes of the SRA provide support for the imposition of an exceptional sentence, once a mitigating circumstance has been identified by the trial court. *State v.*

*Kinneman*, 120 Wn. App. 327, 84 P.3d 882 (2003), *review denied*,

152 Wn.2d 1022, 101 P.3d 108 (2004); *State v. Ha'mim*, 132

Wn.2d 834, 940 P.2d 633 (1997).

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, *discretionary* decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCWA 9.94A.010 (emphasis added).

In this case, Judge Inveen cites to Mr. Young’s “ability to continue working and *make substantial restitution payments* if electronic home monitoring is imposed.” CP 126 (emphasis added). Restitution<sup>4 5</sup> is not considered by the legislature in establishing the standard sentencing range for the conviction of securities fraud as the severity of the punishment is not dependent on the damages, like it is for example, in the charge of theft<sup>6</sup>. Next, the amount of damages in this case and Mr. Young’s unique ability to make restitution payments distinguish him from other similarly situated defendants and perhaps more importantly the impact on the victims. Further, the act of making the victims whole again relates directly

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<sup>4</sup> “Restitution shall be or ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” Restitution “shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.” RCW 9.94A.753(3).

<sup>5</sup> Restitution is both compensatory and punitive in nature. *State v. Kinneman*, 155 Wn.2d 272, 280, 119 P.3d 350 (2005). *See State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992) (restitution promotes respect for the law by providing punishment which is just); *State v. Dennis*, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000) (restitution has a compensatory purpose but is primarily punitive); *State v. Edelman*, 97 Wn. App. 161, 166, 984 P.2d 421 (1999) (restitution is part of an offender’s sentence and is primarily punitive).

<sup>6</sup> A person is guilty of theft in the first degree (class B felony) if he or she commits theft of property or services which exceed(s) \$5,000.00 in value. RCW 9A.56.030. A person is guilty of theft in the second degree (class C felony) if he or she commits theft of property or services which exceed(s) \$750.00 but does not exceed \$5,000.00 in value. RCW 9A.56.040. A person is guilty of theft in the third degree (gross misdemeanor) if he or she commits theft of property or services which does not exceed \$750.00 in value. RCW 9A.56.050.

to the crime committed and also the Respondent's culpability because if the victims are made whole, the crime becomes less severe, less damaging.

Here, Respondent Young has been ordered to pay \$1,264,802.00 in restitution. This is a significant amount and a punishment indicative of the seriousness of the case. This portion of the punishment will require an uncomfortable, but justified, lifestyle adjustment for the rest of Mr. Young's life. This punishment is also the best option in making the victims whole.

As a result, Judge Inveen's exceptional sentence, paying particular attention to the restitution component, is consistent with the purposes of the Sentencing Reform Act. For example, this sentence with the substantial restitution order "ensures that the punishment for a criminal offense is proportionate to the seriousness of the offense." RCW 9.94A.010(1). This sentence with the restitution factor also "promotes respect for the law by providing punishment which is just." RCW 9.94A.010(2). Restitution payments protect the public by seeking to make victims whole again. Next, the seriousness of the offense in this case is directly related to the significant amount of damages. As a result, Mr. Young will have to commit the rest of his life to repayments, making the punishment justly proportionate to the crime. Next, justice in this case requires the victims get as much money back as they can. A sentence that



allows Mr. Young to work in order to repay the victims is just, primarily for the victims. Mr. Young's legal obligation to repay his victims will prevent his ability or desire to reoffend because every extra cent over his frugal necessities will go to restitution.

In *State v. Statler*, the court considered the defendant's age, incarceration time compared to co-defendants, and the fact that no victims were seriously injured during the robbery to be sufficient to justify an exceptional sentence. *State v. Statler*, 160 Wn. App. 622, 640, 248 P.3d 165 (2011). The *Statler* case confirms that impact on the victims directly relates to the crime or the defendant's culpability for the crime committed. Therefore, Mr. Young's ability or efforts to cure the victims or reduce the impact of his actions on the listed victims should also be considered in relation to the Respondent's culpability or the crime itself.

In *State v. Law*, the court held that the defendant's inability to pay restitution while incarcerated, amongst other reasons, was "personal in nature, failed to 'distinguish the crime in question from others in the same category,'" and therefore was "not sufficiently substantial and compelling to justify an exceptional sentence." *State v. Law*, 154 Wn. 2d at 104 (2005). However, the facts in the *Law* case are dramatically distinguishable from Mr. Young's case. First, Mr. Young's exceptional sentence was based on his ability to make substantial payments; this is

unique to Mr. Young and the legitimate career he has created over the years. While in *Law* the exceptional sentence was denied because of the defendant's inability to pay if incarcerated, that is a circumstance common to the majority of, if not all, defendants. *Id.* at 104. Next, the defendant in *Law* pled guilty to theft in the second degree in which the damages range between \$750.00 and \$5000.00. RCW 9A.56.040(1)(a). *Id.* at 104.

Mr. Young pled guilty to ten counts of securities fraud (RCW 21.20.010) with 16 victims and damages resulting in \$1,264,802.00. Clearly the restitution payments in Mr. Young's case will require significant effort, and are more substantial and impactful than in the *Law* case. Further, witnesses at the *Law* sentencing hearing discussed the defendant's personal progress in various aspects of her life. *Id.* The testimony at Mr. Young's hearing, from both prosecution and defense friendly witnesses, was undeniably focused on recouping money lost and the request for restitution payments. The court was clearly persuaded by the victims' requests.

Finally, as cited in the Defendant's Response to the State's Sentencing Memorandum, *State v. Law*, was argued in 2004, prior to the United States Supreme Court decision in 2005 *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). CP 70, 71. The *Booker* court found that mandatory Federal Sentencing Guidelines

violated the Sixth Amendment of the U.S. Constitution and that the Guidelines must be considered advisory. *Id.* Relevant to this case, the Supreme Court held that the sentencing judge should consider a number of factors including the characteristics of the defendant and the need to provide the defendant with needed medical care. *Id.* at 764-76.

**4. The Courts Should Consider the Respondent's Age and Medical Condition.**

The *State v. Hamim* holding that age is irrelevant was recently and successfully attacked in *State v. Ronquillo*, in which the Washington Court of Appeals held that youthfulness could be a possible mitigating factor justifying an exceptional sentence below the standard sentence range. *State v. Ronquillo*, 2015 WL 6447740 (2015); *see also State v. O'Dell*, 183 Wn.2d 680 (2015) (Respondent's youthfulness can be a possible mitigating factor justifying an exceptional sentence below the standard sentence range.). In *Ronquillo* the court stated:

“Until recently, age was viewed narrowly as only a personal characteristic....A recent opinion by our Supreme Court has significantly revised the interpretation of *Ha'mim* relied on by the trial court. [State v.] O'Dell, 183 Wn.2d 680, 2015 WL4760476.”

The *Ronquillo* court relied on *Miller v. Alabama*, finding that a sentence must “follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty.”

*Miller v. Alabama*, 567 U.S. \_\_\_\_\_, 132 S.Ct. 2455, 2471, 183 L.Ed.2d

407 (2012). The United States Supreme Court held that to sentence a juvenile to a life sentence without considering his personal characteristics violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller v. Alabama, Id.*

Here, Mr. Young is a 70-year-old man with serious and expensive medical conditions. If the Court is prevented from considering these personal circumstances, then the Court is prevented from achieving the purposes enumerated in the SRA specifically providing just punishment, offer the offender an opportunity to improve himself, make frugal use of the state's and local governments' resources and reduce the risk of reoffending as provided in RCW 9.94A.010. It should be also noted that between 2012 and 2014, Washington courts on 31 occasions have imposed exceptional sentences in order to "make frugal use of the state's resources" and on 3 occasions have issued an exceptional sentence based on age. CP 70-72. Even more, to sentence Mr. Young to 51 months could amount to a life sentence; failure to consider his personal circumstances in conjunction with a per se life sentence sounds familiar to the Eighth Amendment violation discussed in *Alabama v. Miller*.

### **Conclusion**

First and foremost, Mr. Young's sentence is validated by the statutory mitigating circumstance of repayment prior to detection. The

facts supporting this exceptional sentence based on repayment prior to detection are within the record and justified.

Respondent Young's sentence is also justified by the non-statutory mitigating circumstance of ability to make restitution. In this case, ability to make restitution payments is not considered by the Legislature in establishing the standard sentence range as the charge of securities fraud is independent of damages caused. Also, ability to make restitution payments becomes sufficiently substantial and compelling to distinguish the crime from other crimes in the same category when the \$1,264,802.00 in restitution and Respondent Young's ability to repay are considered.

Next, the sentence in this case is also justified when considering Respondent Young's multiple severe medical conditions and advanced age. Recognizably, age and medical conditions are personal in nature and have not been given weight by sentencing courts until recently. The U.S. Constitution, Washington case law and policy support personal considerations at sentencing.

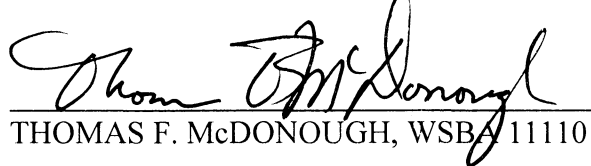
Finally, Respondent Young's sentence is consistent with the purposes of the SRA. The sentence, especially with the restitution element, is proportionate to the seriousness of the offense and Respondent Young's lack of criminal history. Second, the sentence honors the victims' primary request for repayment and therefore is just. Third, the sentence is

based on the court and the victims' desire for repayment, and this consideration is entirely consistent with protecting the public. Fourth, with this sentence, Respondent Young is put in a position to not only improve himself by working towards correcting his wrongs but also improve the lives of those injured. Fifth, Judge Inveen's sentence avoids burdening the State with Respondent Young's exorbitant medical bills.

Because this sentence is consistent with the purposes of the SRA and is supported by statutory, non-statutory and policy driven mitigation, Respondent Young asks this Court to affirm the sentence imposed by Judge Inveen.

Respectfully submitted this 22<sup>nd</sup> day of December, 2015.

ATTORNEY FOR RESPONDENT:

  
THOMAS F. McDONOUGH, WSBA 11110

## DECLARATION OF SERVICE

I, Lynn Wood DeLaMare, declare as follows:

I am a resident of the State of Washington, residing or employed in Edmonds, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 510 Bell Street, Edmonds, Washington 98020.

Today, I served the following parties with the foregoing **BRIEF OF RESPONDENT** by transmitting a true and correct copy as indicated below:

Scott Allen Peterson  U.S. Mail  
King County Senior Deputy Prosecuting Attorney  
W554 King County Courthouse  
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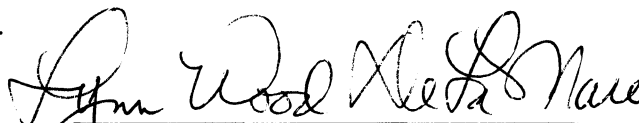
Email

and that I filed the original of said **BRIEF OF RESPONDENT** by mailing it to:

Clerk of Court  
Court of Appeals, Division 1  
600 University Street  
One Union Square  
Seattle, WA 98101-1176

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed and dated in Edmonds, Washington, this 23<sup>RD</sup> day of December, 2015.

  
\_\_\_\_\_  
Lynn Wood DeLaMare  
Legal Assistant