SUPREME COURT NO.
99376-9
COA NO. 36281-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RICHARD VASQUEZ, JR.,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

Yakima County Cause No. 14-1-01397-39

The Honorable Gayle M. Harthcock, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Richard Vasquez, Jr., the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Richard Vasquez, Jr. seeks review of the Court of Appeals unpublished opinion entered on December 10, 2020. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

> Art. I, § 14 of the Washington Constitution is more protective than the Eighth Amendment and erects a categorical bar against sentences based on juvenile convictions when those sentences run contrary to national consensus and should not be permitted in the exercise of independent judicial judgment. Did the trial court violate art. I, § 14 by counting Mr. Vasquez's 1983 conviction from when he was sixteen years old as a "strike" offense, leading to a mandatory sentence of life without the possibility of parole?

IV. STATEMENT OF THE CASE

Richard Vasquez was convicted in adult court of first-degree robbery when he was just sixteen years old. *See* Ex. SE-CC (sentencing). Based on the conclusion that that conviction from when Mr. Vasquez was a juvenile qualified as a "strike," a court sentenced him to a sentence of Life Without the Possibility of Parole (LWOP) after a third "strike" conviction after he reached adulthood. CP 14-22. The court dismissed Mr.

Vasquez's objection that the LWOP sentence constituted cruel and unusual punishment. RP 737.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review and hold that the conviction entered when Mr. Vasquez was sixteen years old is categorically barred under art. I, § 14 from qualifying as a "strike" offense supporting a sentence of Life Without the Possibility of Parole.

Mr. Vasquez was sentenced to a term of life without the possibility of parole (LWOP) under the Persistent Offender Accountability Act, or three-strikes statute. CP 14-22. One of the predicate "strike" offenses for his LWOP sentence occurred in 1983, when Mr. Vasquez was sixteen years old. *See* Ex. SE-CC (sentencing).

But recent advancements in adolescent brain research have led to significant evolvements in Eighth Amendment and art. I, § 14 jurisprudence related to young offenders. *See e.g. Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010); *State v. Bassett*, 192 Wn.2d 67, 85, 428 P.3d 343 (2018); *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017). Accordingly, the This Court has held that the State Constitution categorically bars LWOP sentences for offenses committed by juveniles. *Bassett*, 192 Wn.2d at 85.

In this case, however, a conviction from when Mr. Vasquez was sixteen years old led to the imposition of a mandatory LWOP sentence in the instant case. CP 14-22; Ex. SE-CC. Under the logic of *Graham*, *Miller*, *Bassett*, and related cases, Mr. Vasquez's reduced culpability at the age of sixteen bars that conviction from counting as a "strike" under the POAA. *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Bassett*, 192 Wn.2d 67; *Houston-Sconiers*, 188 Wn.2d 1.

"Children are different" under the Eighth Amendment and art. I, § 14. *Miller*, 567 U.S. at 481; *Houston-Sconiers*, 188 Wn.2d at 18; U.S. Const. Amend. VIII; art. I, § 14.

This is because the still-developing adolescent brain causes young people to be "overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (*citing* Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992)); *Graham*, 560 U.S. at 68. Brain science demonstrates fundamental differences between juvenile and adult minds as related to the parts of the brain that control behavior. *Graham*, 560 U.S. at 68.

Juveniles are also more susceptible to negative influences and outside pressures than adults and are also less able to control their own environment. *Roper*, 543 U.S. at 569 (*citing* Steinberg & Scott, Less

Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)); *See also Graham*, 560 U.S. at 68.

Adolescents' relative lack of control over their conduct and environment means that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper,* 543 U.S. at 570.

Additionally, a young person's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys" also create a greater likelihood that a juvenile will be convicted of a more serious offense in circumstances under which an adult would only have sustained a less serious conviction. *Miller,* 567 U.S. at 477-78 (*citing Graham*, 560 U.S. at 78; *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Accordingly, sentencing courts are required to consider a juvenile's age before entering an LWOP sentence, regardless of whether s/he was convicted in juvenile or adult court. *Houston-Sconiers*, 188 Wn.2d at 19–20 (*citing Miller*, 132 S.Ct. at 2461-62; *Graham*, 560 U.S. at 53; *Roper*, 543 U.S. at 557).

Following the abandonment of the death penalty in Washington, an LWOP sentence presents the harshest punishment available to a criminal court. *State v. Moretti*, 193 Wn.2d 809, 833, 446 P.3d 609 (2019); *See also*

Moretti¸ 193 Wn.2d at 836-37 (Yu, J. concurring) (noting that the LWOP sentence's new status as the harshest penalty changes the proportionality analysis under art. I, § 14).

An LWOP sentence represents the "denial of hope." *Moretti*¸ 193 Wn.2d at 837-38 (Yu, J. concurring). It signifies judgment that a person is "irredeemable and incapable of rehabilitation." *Id.* Through the enactment of the POAA, the legislature has set the threshold for the "worst of the worst" who can be subjected to this most severe punishment at offenders who have been convicted of a "most serious offense" on three separate occasions in adult court. RCW 9.94A.570; RCW 9.94A.030(38).

But Mr. Vasquez has only been convicted of such an offense on two occasions since reaching the age of majority. If not for the fact that his case was declined to adult court when he was sixteen years old, he would not be subject to such a "denial of hope." RCW 9.94A.030(38)(a)(ii); RCW 9.94A.030(35). His first "strike" conviction, entered far before his brain was fully developed, should be categorically barred from being used to place him within the category of the "worst of the worst."

Art. I, § 14 of the Washington Constitution provides greater protection against cruel punishment than the Eighth Amendment in the contexts of juvenile sentencing and of three-strikes sentences. *Bassett*, 192

Wn.2d at 82; *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014).

The state constitution categorically bars the imposition of an LWOP sentence for an offense committed by a juvenile. *Bassett*, 192 Wn.2d at 90. This Court held in *Bassett* that the statute permitting LWOP sentences for young offenders was unconstitutional even though it required the sentencing court to consider youth as a mitigating factor. *Id.*

The "categorical bar analysis" applied in *Bassett* is also applicable to Mr. Vasquez's claim: that art. I, § 14 categorically bars the inclusion of a conviction entered against a juvenile as a later "strike" offense. *Id.* at 85 (discussing the application of the categorical analysis).

The first step of the art. I, § 14 categorical analysis is to determine whether there is a national consensus against the challenged sentencing practice. *Id.* at 85-86 (*citing Graham*, 560 U.S. at 61; *Roper*, 543 U.S. at 563; *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Many states either do not have a three-strikes law or impose a sentence less severe than LWOP upon conviction for a third "strike" offense. *See Witherspoon*, 180 Wn.2d at 911 (Gordon McCloud, J., dissenting).

California is the only state that allows an adjudication from juvenile court to be counted as a "strike" leading to a later life sentence. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes As Cruel and Unusual Punishment*, 46 U.S.F.L. Rev. 581, 622 (2012). A number of states have created explicit exceptions, prohibiting convictions of juvenile offenders from qualifying as "strikes" even when they are entered in adult court. *Id.* at 627-28.

Washington stands in a minority of jurisdictions permitting a conviction entered against a juvenile to qualify as a "strike" offense, leading to a subsequent mandatory LWOP sentence. *Id.*; *Witherspoon*, 180 Wn.2d at 911 (Gordon McCloud, J., dissenting). The first step of the categorical bar analysis under art. I, § 14 points to an emerging national consensus against the sentencing practice used in Mr. Vasquez's case. *Bassett*, 192 Wn.2d at 85.

The second step of the categorical bar analysis requires a "judicial exercise of independent judgment," looking to the culpability of the offenders at issue, the severity of the punishment, and "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 87 (*quoting Roper*, 560 U.S. at 67).

As outlined above, evolving psychological and neurological research indicates that humans are inherently less culpable for offenses

committed as juveniles than for those committed in adulthood. *Bassett*, 192 Wn.2d at 87 (*citing State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015); *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70).

Additionally, the nature of the adolescent brain and its desire for immediate gratification, combined with diminished capacity to engage in rational decision-making, leads many youths to accept plea deals that put "strike" offenses on their records in order to obtain other benefits, such as earlier release from custody. Caldwell, 46 U.S.F.L. Rev. at 610. Thus, later use of those juvenile "strikes" to impose a sentence of LWOP fails to address the true culpability of the offenders at issue.

In Washington, the three-strikes scheme draws a line between adjudications in juvenile court and convictions entered against juveniles in adult court, counting only the later as "strikes." *See* RCW 9.94A.030(38)(a)(ii); RCW 9.94A.030(35).

But recent jurisprudence regarding juvenile sentencing has all but eliminated that distinction for constitutional purposes because "children are different" regardless of which court system they encounter. *See Houston-Sconiers*, 188 Wn.2d at 19-20 (*citing Miller*, 132 S.Ct. at 2461-62; *Graham*, 560 U.S. at 53; *Roper*, 543 U.S. at 557).

Critically, data demonstrates that the mechanism through which juveniles find themselves in adult court, the decline procedure, is employed in a racially disproportionate manner. *Washington State Juvenile Justice Annual Reports: 2010,* WASH. P'SHIP COUNCIL FOR JUVENILE JUSTICE, p. 190[1] (reporting significant racial disproportionality in the number of African American and Native American juveniles who are "declined" into the adult court system, compared to their representation in the state's population). This means that African Americans and Native Americans are more likely to be affected by the distinction between juvenile and adult courts in the POAA – and to find themselves with LWOP sentences based on convictions entered when they were juveniles -- because they are more likely to have their cases declined to adult court when they are children.

The outdated and racially discriminatory statutory distinction between juveniles adjudicated in juvenile versus adult court also weighs in favor of an exercise of independent judgment against the use of any conviction entered against a juvenile as a "strike" in Washington.

Finally, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences" based on

[1]https://www.digitalarchives.wa.gov/do/FB553F71EEDD5B8613C301E87ED90455.pdf (last accessed October 26, 2020).

offenses committed by juveniles. *Bassett*, 192 Wn.2d at 88. This Court should exercise its independent judicial judgment against the use of any convictions entered against juveniles as "strikes" under art. I, § 14. *Id.* at 87.

This Court recently decided in *Moretti* that a conviction imposed on a young adult – over the age of eighteen -- can constitutionally contribute to an LWOP sentence. *Moretti*, 193 Wn.2d 809.

But the *Moretti* court explicitly declined to comment on whether the constitution would permit an LWOP sentence in a case like Mr. Vasquez's:

> We express no opinion on whether it is constitutional to apply the POAA to an offender who committed a strike offense as a juvenile and was convicted in adult court.

Id. at 821 n. 5.

This Court relied heavily in *Moretti* on the fact that the appellants in that case had not provided any information regarding whether offenses committed by young adults qualify as "strikes" in other states. *Id.* at 821. Rather, the petitioners pointed only to evidence that other states "overwhelmingly prohibit the use of *juvenile* offenses to drastically enhance later sentences under recidivist schemes." *Id.* (emphasis in original).

Because the petitioners in *Moretti* were not juveniles at the time of their predicate offenses, the Court found that authority unavailing. *Id.* But Mr. Vasquez *was a juvenile* – just sixteen-years-old -- at the time of his first predicate offense. CP 14-22; Ex. SE-CC. As a result, the "categorical bar" analysis in Mr. Vazquez's case is drastically different from that in *Moretti*.

Evolving jurisprudence has provided greater protections under the Eighth Amendment and art. I, § 14 to young adults than was previously afforded. *See e.g. O'Dell*, 183 Wn.2d 680. But those safeguards are still not nearly as strong as the constitutional protection afforded to juveniles. *See e.g. Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48; *Miller*, 567 U.S. 460; *Houston-Sconiers*, 188 Wn.2d; *Bassett*, 192 Wn.2d 67.

Art. I, § 14 of the Washington Constitution should be read to place a categorical bar on the use of juvenile convictions as "strike" offenses, leading to mandatory LWOP sentences. *Id.* Mr. Vasquez's 1983 conviction from when he was sixteen years old should not have qualified as a "strike." *Id.*

This significant issue of constitutional law if of substantial public interest because it affects the rights of countless juveniles in Washington. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

This Court's recent decision in *Moretti* left open the question of whether a conviction entered against a juvenile can constitutionally qualify as a "strike" offense, leading to an LWOP sentence. Mr. Vasquez's case presents the opportunity for the court to answer that question. This Court should accept review of Mr. Vasquez's case pursuant to RAP 13.4(b)(3) and (4).

This Court has also signaled its unanimous interest in addressing legal questions that could work to remedy the racial disproportionality that severely harms black Americans in the criminal justice system. *See* Supreme Court Open Letter (06/04/20) ("We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful. The systemic oppression of black Americans is not merely incorrect and harmful; it is shameful and deadly.")

The fact that the decline procedure is used to disproportionately place Black and Native American children into adult court means that the section of the POAA permitting convictions entered against those children to count as "strikes" directly results in similar racial disproportionality in the imposition of the harshest sentence available in our state. This Court should grant review to remedy an unconstitutional practice – the imposition of an LWOP sentence based, in part, on conduct committed by

children – which negatively impacts Black and Native American Washingtonians at a disproportionate rate.

Respectfully submitted December 30, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Richard Vasquez, Jr./DOC#290756
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1830 Eagle Crest Way
Clallam Bay, WA 98326

and I sent an electronic copy to

Yakima County Prosecuting Attorney
appeals@co.yakima.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on December 30, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

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December 10, 2020

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CASE # 362817
State of Washington v. Richard Vasquez, Jr.
YAKIMA COUNTY SUPERIOR COURT No. 141013979

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
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FILED
DECEMBER 10, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 36281-7-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
RICHARD VASQUEZ JR.,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Richard Vasquez appeals his convictions and life sentence. We affirm, but remand to strike the $100 DNA[1] collection fee.

FACTS

In September 2014, Richard Vasquez asked a friend, Lawrence Quiroz, if he had any pistols for use in a robbery. He also asked Quiroz if he would be a driver for him and another individual, Samuel Crafton-Jones. Vasquez told Quiroz they were targeting an older couple because they were less likely to fight back. Quiroz declined to participate in Vasquez's plan.

[1] Deoxyribonucleic acid.

On the morning of October 1, 2014, Kristen Fork and Robert Miller, an older couple, were inside their home. At about 6:15 a.m., Miller heard a knock on his door and opened it. A man, later identified as Vasquez, claimed his car was overheating. Miller told Vasquez to wait there, and he shut the door. Miller then went to the master bedroom and told Fork that something was not right. When he returned to speak with Vasquez, Miller saw Vasquez and a man, later identified as Samuel Crafton-Jones, inside the home. Crafton-Jones held a gun to Miller's head and demanded gold from him. He threatened he would kill both Miller and Fork.

Vasquez and Crafton-Jones tied up Miller and Fork and continued to threaten the couple. Crafton-Jones pistol-whipped Miller and demanded the combination to his safe. When Miller had trouble opening the safe, Crafton-Jones kicked Miller in the face and again threatened to kill him. When Miller opened the safe, Crafton-Jones saw there were only papers in the safe and again threatened to kill Miller unless he gave them gold.

Fork used a ruse to get Vasquez and Crafton-Jones to break their line of sight with her. She then escaped out a window. Vasquez chased her outside and Fork ran to her front yard yelling for help. Vasquez tried to get her to stop yelling and hit her two or three times. When that did not quiet her, he went back inside and told Crafton-Jones what was happening. Both of them then went outside. Crafton-Jones hit Fork with his gun and

told her to shut up. Both men kicked Fork to try to stop her from yelling. The assault shattered Fork's dentures and cheekbone, and caused profuse bleeding from her mouth and face resulting in approximately 65 stitches.

Fork's yelling attracted a neighbor, who came outside. When the two men saw the neighbor, they ran to a brown van and fled. Fork saw the van's license plate number and wrote it down.

Fork reported to 911 that she and Miller were the victims of a home invasion robbery and violent assault.[2] She said her attackers were armed and had fled in a brown van, license plate AFS8595. She said "she believed that the suspects were Hispanic males in their 30s." Clerk's Papers (CP) at 141. Dispatch ran the plate number and quickly advised officers of the owner of the van and the owner's address.

Within minutes, Officers Terryl Way and Renard Edwards arrived at the owner's address and located the van. The officers were familiar with the address because the residence was frequented by drug users. Tree cover made the area darker in the early morning, and the officers needed flashlights to see. Using a flashlight, the officers saw a black firearm holster on the driver's side floorboard. Officer Edwards felt the van's

[2] Because Vasquez raises a suppression issue, the facts in this and the next three paragraphs come from the trial court's findings in its order denying suppression. The evidence at trial and the evidence at the suppression hearing differ in some respects.

hood, and it was still warm. The officers then saw two men, Vasquez and Crafton-Jones, walking from the rear of the residence less than 30 feet away. Officer Edwards, with his firearm in the low ready position, identified himself as a police officer, and ordered the suspects to the ground because he believed they possibly were the two who attacked Fork and Miller. Vasquez complied immediately, but Crafton-Jones hesitated and appeared he might run. After ordering Crafton-Jones to the ground several times, he slowly complied.

The officer patted down both suspects for officer safety. During the pat down, the officers found a black stun gun in Crafton-Jones's pants pocket. They questioned the suspects about whether either had driven the van. Vasquez began sweating profusely and said "'they had been tweaking all night at a graveyard.'" CP at 144.

The officers detained the two suspects so Miller could be brought to them for a showup identification. Within minutes, Miller arrived and positively identified both men as the robbers.

The officers recovered keys and jewelry belonging to Miller and Fork in the back yard of the address where the van was parked. Investigators found a cap and a glove at the burgled home. Vasquez's DNA was found on the cap, and Crafton-Jones's DNA was found on the glove.

By amended information, the State charged Vasquez with one count of first degree burglary, two counts of first degree kidnapping, two counts of first degree robbery, one count of first degree assault, one count of second degree assault, and one count of first degree unlawful possession of a firearm. Before trial, Vasquez moved to suppress the showup identification and all resultantly discovered evidence. He argued that the police did not have reasonable suspicion to seize him because neither he nor Crafton-Jones matched the description of the robbery suspects. Specifically, Vasquez, although Hispanic, was 48 years old and Crafton-Jones, although 38 years old, is white. The court held a CrR 3.6 hearing, denied the motion, and later entered findings and conclusions. The case proceeded to trial.

With respect to the kidnapping counts, the second element of the to-convict instruction read:

> (2) That the defendant or an accomplice abducted that person with intent
> (a) to hold the person for ransom or reward, or
> (b) to hold the person as a shield or hostage, or
> (c) to facilitate the commission of First Degree Burglary and/or First Degree Robbery or flight thereafter[. . . .]

CP at 116. The instruction explained to the jury that it need not be unanimous as to which of the three alternatives is proved beyond a reasonable doubt, as long as each juror finds that one alternative has been proved beyond a reasonable doubt.

The jury found Vasquez guilty as charged. The trial court determined that Vasquez qualified as a persistent offender and sentenced him to life imprisonment without the possibility of parole. The determination was based in part on Vasquez's first degree robbery conviction when he was 16 years old. The trial court also ordered Vasquez to pay a $100 DNA collection fee and found him indigent for purposes of appeal.

Vasquez timely appealed.

ANALYSIS

UNANIMOUS JURY VERDICT

Vasquez contends his right to a unanimous jury verdict was violated. He argues there was not sufficient evidence to support each of the alternative means charged for his kidnapping charge. We disagree.

Under article I, section 21 of the Washington Constitution, criminal defendants are entitled to a unanimous jury verdict. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). This right extends to the right to unanimity of means if the charge includes alternative means of committing the offense. *Id.* This is satisfied if there is sufficient evidence to support each of the alternative means charged. *Id.* When reviewing a challenge to sufficiency of the evidence, this court looks to whether the evidence, viewed

in the light most favorable to the State, could justify a rational trier of fact finding the defendant guilty, beyond a reasonable doubt, as to each of the alternative means charged. *State v. Armstrong*, 188 Wn.2d 333, 341, 394 P.3d 373 (2017).

Alternative means crimes are those that categorize distinct acts that amount to the same crime. *State v. Harrington*, 181 Wn. App. 805, 818, 333 P.3d 410 (2014). RCW 9A.40.020, which defines first degree kidnapping, provides:

> (1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:
> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
> (b) To facilitate commission of any felony or flight thereafter; or
> (c) To inflict bodily injury on him or her; or
> (d) To inflict extreme mental distress on him, her, or a third person; or
> (e) To interfere with the performance of any governmental function.

In *Harrington*, we held that these five subparts are distinct specific intentions that represent five alternative means for proving first degree kidnapping. 181 Wn. App. at 818.

Nevertheless, the trial court's instruction separated subpart (a) into two means, yet properly listed subpart (b) as one mean. And as noted previously, the instruction told the jurors they did not have to be unanimous on which of the three alternatives was proved, as long as each juror found that at least one alternative had been proved beyond a reasonable

doubt. For this reason, the law of the case doctrine requires us to analyze the factual sufficiency of each of these three alternatives. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

"Abduct" includes restraining a person by use or threat of use of deadly force. RCW 9A.40.010(1). Here, Vasquez and Crafton-Jones not only tied up the older couple, they threatened to kill them if they did not say where the gold was. The tying up did not prevent the couple from leaving. The threat of deadly force did. Vasquez does not challenge that he and Crafton-Jones abducted the older couple.

Vasquez also does not challenge that there was sufficient evidence that he and Crafton-Jones abducted Miller and Fork to facilitate burglary and robbery. For this reason, we focus on whether there was sufficient evidence to support the remaining two alternates—intent to "hold the person for ransom or reward" and intent to "hold the person as a shield or hostage."

Hold the person for ransom or reward

"Reward" is a broad term and implies something given in return for evil or good. *State v. Aleck*, 10 Wn. App. 796, 802, 520 P.2d 645 (1974). Here, Vasquez threatened to kill the older couple if they did not give him and Crafton-Jones gold. Giving gold in return for a threat satisfies the meaning of "reward."

Holding a person as a shield or hostage

A "hostage" is someone held as security for the performance or forbearance of some act by a third person. *State v. Garcia*, 179 Wn.2d 828, 839, 318 P.3d 266 (2014). The person held as a hostage must be held to coerce someone else to act. *Id.* at 840.

There is no direct evidence that Vasquez or his accomplice held Miller to secure gold from Fork or held Fork to secure gold from Miller. Nevertheless, circumstantial evidence is entitled to as much weight as direct evidence. *State v. Dollarhyde*, 9 Wn. App. 2d 351, 355, 444 P.3d 619 (2019). A trier of fact could have found that Crafton-Jones's threats to kill Miller coerced Fork to find gold or other valuables for her attackers. That is, Fork was coerced to find valuables not simply for her own survival but for Miller's. The evidence was sufficient for a jury to find that Miller was being held as a hostage to coerce Fork.

SUPPRESSION OF EVIDENCE

Vasquez contends the trial court erred by denying his motion to suppress because the arresting officers lacked reasonable suspicion to stop him. We disagree.

Seizures, except in very few limited circumstances, must be based on probable cause. *In re Armed Robbery*, 99 Wn.2d 106, 109, 659 P.2d 1092 (1983). One exception

is an investigative *Terry*[3] stop. *State v. Smith*, 145 Wn. App. 268, 275, 187 P.3d 768 (2008). "*Terry* requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). A *Terry* stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Denial of a suppression motion is first reviewed to determine whether substantial evidence supports the findings of fact and then whether those findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence exists where the evidence is sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Vasquez assigns error to multiple findings of fact. However, he presents an argument for only one of these assignments of error. An appellant waives an assignment of error when he presents no argument in support of the assigned error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The one preserved

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

assignment of error relates to a portion of finding of fact 19—that Vasquez and Crafton-Jones "matched the general suspect descriptions given by the victims." CP at 143.

Fork "believed that the suspects were Hispanic males in their 30s." CP at 141. The record from the suppression hearing confirms this is what the officers were told. Vasquez is a Hispanic male and was 48 at the time and Crafton-Jones is a white male and was 38 at the time. One officer testified he immediately recognized Crafton-Jones and knew he was white. He also testified that he was unsure of the second man's race. If their physical descriptions were the only reason the officers stopped the pair, Vasquez's argument would be persuasive. However, additional evidence supported the *Terry* stop.

Here, the officers knew there was a home robbery committed by two suspects armed with a pistol and that the suspects fled in a van. Dispatch learned the license plate number of the van and advised the officers of the address associated with the van. The officers drove to this address, arrived within 10 minutes of the 911 call, and found the van parked in the driveway, still warm to the touch.

The officers peered into the van and saw an empty gun holster. They then saw two men walking from behind the house about 30 feet away. One officer immediately recognized Crafton-Jones, knew that Jones was white, but was unsure of the second

man's race. This was the inception, from which we must determine if the requisites of a *Terry* stop were met.

Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer. *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). No single rule can be fashioned to meet every conceivable confrontation between the police and a citizen. *Id.* The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

Faced with the decision of ordering the pair to stop or allowing the two to walk away, the officers made the only reasonable choice. The van had not been parked long and the suspects were likely near. Because the pair emerged from behind the house early in the morning, it was reasonable to believe that the two were associated with the house and thus the van. And even though Crafton-Jones is white, the physical description of the suspects could have been of Vasquez and a second Hispanic man. Crafton-Jones could have been merely the driver and never in the burgled home. We conclude that the officers had a reasonable articulable suspicion that Vasquez—and perhaps Crafton-Jones, too—

was involved in the robbery. Under *Terry*, the officers were permitted to stop Vasquez and briefly detain him in order to arrange a showup identification.

CATEGORICAL BAR OF A JUVENILE CONVICTION AS A PREDICATE OFFENSE

Vasquez argues, under article I, section 14 of the Washington Constitution, his conviction when he was 16 years old is categorically barred from qualifying as a "strike" offense for his current sentence. The State briefly responds that we recently decided this issue against Vasquez's argument in *State v. Teas*, 10 Wn. App. 2d 111, 447 P.3d 606 (2019), *review denied*, 195 Wn.2d 1008 (2020).

In *Teas*, Division Two of this court squarely addressed the issue raised by Vasquez and decided that issue against his argument. Nevertheless, "horizontal stare decisis" does not apply between or among the divisions of the Courts of Appeals. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 150-54, 410 P.3d 1133 (2018). And while we are not bound by a decision of a sister division, we should give respectful consideration to it. *Id.* at 154.

We have examined *Teas* and are of the opinion that Division Two's decision is clearly correct and we will follow it. In rejecting the defendant's categorical bar argument, *Teas* persuasively concluded:

> "The purpose of the POAA[4] is the segregation of persistent offenders from the rest of society, generally deterring others." *State v. Hart*, 188 Wn. App. 453, 461, 353 P.3d 253 (2015). As the Tenth Circuit has explained, "Unlike defendants who receive severe penalties for juvenile offenses . . . recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct." *United States v. Orona*, 724 F.3d 1297, 1308 (10th Cir.), *cert. denied*, 571 U.S. 1034 (2013). Punishing an adult for continuing to commit violent crimes after being given the chance for rehabilitation supports the penological goal of separating repeat offenders from the rest of society.
>
> Our courts have recognized that "children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence." [State v.] *Bassett*, 192 Wn.2d [67,] 90[, 428 P.3d 343 (2018)]. However, Teas is not a juvenile being punished for a crime he committed as a juvenile. He was 39 years old when he raped R.C. by forcible compulsion. Therefore, the mitigating factors of youth were not applicable when he was sentenced for this crime.

10 Wn. App. 2d at 134-35.

Here, Vasquez was 48 years old when he and his accomplice robbed an elderly couple, repeatedly threatened to kill them, and brutally assaulted the woman. The mitigating factors of youth were not applicable when he was sentenced for these crimes.

LEGAL FINANCIAL OBLIGATIONS (LFOs)

Vasquez contends the trial court erred in imposing a $100 DNA collection fee. He cites *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018), and argues the LFO

[4] Persistent Offender Accountability Act of the Sentencing Reform Act of 1981, chapter 9.94A RCW.

amendments contained in Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) apply to his appeal. Then citing RCW 10.01.160(3), one of these amendments, he argues a trial court may no longer impose discretionary LFOs on indigent defendants. He concludes we should vacate the order requiring payment of the collection fee because he was indigent at sentencing and *he previously paid the fee*. We disagree a bit with Vasquez's argument, but agree he is entitled to relief.

Under RCW 43.43.7541, every sentence imposed for a crime that requires DNA collection must include a $100 collection fee unless the State has previously collected the offender's DNA. Here, the State concedes that it had previously collected Vasquez's DNA. For this reason, and not because Vasquez had previously paid the fee, the fee is only discretionary.

RCW 10.01.160(3) prohibits courts from imposing discretionary costs on defendants who were indigent at the time of sentencing. Vasquez was indigent at the time of his sentence. We, therefore, remand with instructions for the trial court to strike the DNA collection fee.

Affirmed, but remanded to strike DNA collection fee.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Korsmo, J.

LAW OFFICE OF SKYLAR BRETT

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