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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, APPELLANT

v.

JASON ALLEN GRAHAM

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF APPELLANT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court's finding of fact number 15 that "the multiple offense policy of RCW 9.94A.589 results in a clearly excessive sentence in this case," and that "the punishment is not proportionate to the seriousness of the offenses" is conclusory and is insufficient to support an exceptional sentence downward. This finding is not supported by substantial evidence and fails to explain how the standard range sentence is "clearly excessive" by relating the sentences to the crimes, the defendant's culpability for the crimes, or the past criminal record of the defendant.

2. The trial court's finding of fact number 16 that "the sentence under RCW 9.94A.589 does not promote respect for the law, is simply a life sentence, and is not commensurate with the punishment imposed on others," is unsupported by any evidence. This finding only evidences the trial court's subjective determination that the sentencing ranges are unwise. This subjective determination is not a substantial and compelling reason justifying a downward departure from the standard range.

3. The trial court's finding of fact number 17 that the defendant's sentence under RCW 9.94A.589 would not allow him an opportunity to use his prison-learned skills outside of prison erroneously

substitutes the trial court's judgment for the legislature's judgment on the appropriate length of incarceration and the funding for prisons. The finding that the sentence would "not offer the offender the opportunity to improve himself" is erroneously based upon the conclusion that one cannot improve himself in prison. Moreover, this finding is contradicted by the trial court's finding that Mr. Graham has taken advantage of programs and has learned skills - intimating that he has improved himself.

4. The trial court's finding of fact number 18 is in error. The allegation that the sentence does not make frugal use of the state's resources takes into account factors already considered by the legislature in determining the presumptive sentence range. Additionally, in making this finding, the trial court failed to examine the crimes committed, the defendant's culpability for the crimes, or the past criminal record of the defendant. This finding cannot support an exceptional downward departure because it is unsupported by any reference to the facts of the case. The court's reliance on the fact that the prison populations are aging and aging prison populations require a lot of money is improper, again because this is a factor considered by the legislature in determining the presumptive sentence range, and moreover, is addressed elsewhere in RCW 9.94A.728 regarding early release for medical reasons.

5. The trial court's conclusion of law number 4 is erroneous because it lacks any factual findings in support of the finding. Factors that serve as a justification for an exceptional sentence must relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant.

6. The exceptional sentences imposed in conclusion of law number 5 are clearly too lenient under the facts of this case.

7. The trial court's departure from the standard range sentence to the sentence it reached in each count was clearly erroneous.

## **II. ISSUES PRESENTED**

1. Are the reasons given by the sentencing court supported by the evidence in the record?

2. Do the reasons provided by the sentencing court justify a downward departure from the standard range?

3. Is the overall sentence clearly too lenient?

## **III. STATEMENT OF THE CASE**

On January 7, 2002, at approximately 1:00 a.m., Spokane Police Officer Christopher Lewis pulled over a speeding Toyota 4Runner at Scott Street and First Avenue. Officer Lewis stopped his patrol car behind the

4Runner.<sup>1</sup> As he emerged from the patrol car, gunfire erupted from inside the 4Runner, shattering the rear window. Officer Lewis dove to the ground and the 4Runner sped away. Report of Proceedings<sup>2</sup> (No. 22336-1) 503-506. Officer Lewis chased the 4Runner to a parking area at First Avenue and Division Street, where the 4Runner rolled over and came to rest on the driver's side. The passenger door opened and Jeremiah Jones jumped out and fled down some railroad tracks. Mr. Jones soon surrendered to police. Jason Graham then emerged from the 4Runner, holding a gun. He paused, looked at Officer Lewis, and ran down the railroad tracks.

Officer Aaron Ames responded to the area. He saw Mr. Graham armed with an AK-47 assault rifle. He drew his gun and ordered Mr. Graham to drop his weapon. Mr. Graham continued to hold the AK-47 with both hands, pointed down, and responded that “I am really fucked up” or “I really fucked up” and that he just wanted to leave.

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<sup>1</sup> The facts are taken almost verbatim from the appellate court’s thorough analysis of the case on its first appeal. *State v. Jones*, 136 Wn. App. 1009, 2006 WL 3479055, at \*1-2 (2006) *review granted, cause remanded*, 169 Wn.2d 1005, 234 P.3d 210 and *review granted, cause remanded sub nom. State v. Graham*, 169 Wn.2d 1005, 234 P.3d 210. The 4Runner had been stolen by the defendant’s.

<sup>2</sup> The original trial transcripts are filed in appeal No. 22336-1-III, and will be referred to as “RP (No. 22336-1).” The transcript for the resentencing on June 12, 2015, will simply be referred to as “RP.” A Motion to Take Judicial Notice of Documents Filed in Appeal No. 22336-1-III is being filed simultaneously with this brief.

RP (No. 22336-1) 588. When Mr. Graham took off, Officer Ames followed while attempting to maintain protective cover. At one point, Mr. Graham turned and raised his weapon slightly as if to point it at Officer Ames. As Mr. Graham fired, Officer Ames retreated for cover while Mr. Graham fled toward the Intermodal Center, a commercial bus and train terminal.

Officer John Stanley, of the canine unit, arrived to assist. As Officer Stanley drove his patrol car up the entrance ramp and through the covered bus passenger loading area, Mr. Graham stepped out from between two parked vehicles and started shooting at Officer Stanley's car, which suffered ricochet damage. RP (No. 22336-1) 896-898, 901-902. Officer Stanley accelerated through the passageway and down the exit ramp and joined other officers taking position on that side of the building.

Officer Alan Edwards arrived at the scene and loaded Sergeant Daniel Torok, Officer Kevin Vaughn, and Officer Jason Uberuaga into his patrol car. As Officer Edwards approached the Intermodal Center, gunfire erupted. Sergeant Torok saw Mr. Graham on the ramp, approximately 15 feet above street level, shooting at the patrol car. Officer Edwards and Sergeant Torok each understood that they were in a vulnerable position. Sergeant Torok, Officer Vaughn, and Officer Uberuaga got out of the vehicle and took cover. Sergeant Torok fired a shot at Mr. Graham.

Officer Ames also caught up with Mr. Graham and fired. Mr. Graham was hit and taken into custody. Police found Mr. Jones' 9–mm Daewoo pistol in the 4Runner.

Mr. Graham was charged with and tried on six counts of attempted first degree murder (Sergeant Torok and Officers Ames, Stanley, Edwards, Uberuaga, and Vaughn), one count of unlawful possession of a firearm, one count of first degree assault (Officer Lewis) and one count of first degree possession of stolen property (4Runner).

Mr. Graham was found guilty of two counts of attempted first degree murder (Officers Stanley and Edwards), four counts of first degree assault (Sergeant Torok and Officers Uberuaga, Vaughn, and Lewis), one count of second degree assault (Officer Ames), and one count of first degree possession of stolen property. Graham was also convicted of first degree unlawful possession of a firearm and taking a motor vehicle without permission. CP 211. The jury found by special verdict that Mr. Graham was in possession of a deadly weapon—which the court defined as a firearm—during the commission of the attempted murders and assaults.

Mr. Graham received an aggregate sentence of 1,225.5 months, the result of an increased offender score and consecutive sentences in accordance with RCW 9.94A.589(1)(b), in addition to several firearm

enhancements. *State v. Graham*, 181 Wn.2d 878, 880-81, 337 P.3d 319, (2014). The Court of Appeals affirmed the original judgment and sentence. Review was granted and remanded to the Court of Appeals to reconsider the firearm enhancements in light of *State v. Williams–Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). *State v. Graham*, 169 Wn.2d 1005, 234 P.3d 210 (2010). On reconsideration, the Court of Appeals vacated Graham's sentence and remanded for resentencing. *State v. Graham*, noted at 163 Wn. App. 1011, 2011 WL 3570120, *review denied*, 173 Wn.2d 1011, 2012 WL 414895. At resentencing, the court imposed an exceptional sentence downward by finding that his presumptive range was clearly excessive. RP 1-42; CP 244-247, 210-222. The State timely appealed the exceptional sentence to this Court on February 11, 2015. CP 83.

#### IV. ARGUMENT

**A. THE TRIAL COURT’S IMPOSITION OF AN EXCEPTIONAL SENTENCE IMPERMISSIBLY RELIED ON FACTORS NECESSARILY CONSIDERED BY THE LEGISLATURE IN ESTABLISHING THE STANDARD SENTENCE RANGE. ADDITIONALLY, THE TRIAL COURT FAILED TO “DISTINGUISH THE CRIME IN QUESTION FROM OTHERS IN THE SAME CATEGORY.” THEREFORE, NONE OF THE FACTORS RELIED ON BY THE TRIAL COURT WERE SUFFICIENTLY SUBSTANTIAL AND COMPELLING TO JUSTIFY AN EXCEPTIONAL SENTENCE.**

**1. The defendant’s violent and serious violent offenses involved different victims at different times and locations.**

The defendant was convicted of six serious violent felonies arising from at least four separate events involving separate victims. The first crime event<sup>3</sup> involving the first victim in this continuing act of terrorism<sup>4</sup> occurred when Officer Lewis stopped the defendant’s vehicle for speeding. After stopping his patrol car behind the stolen 4Runner driven by the defendant, Officer Lewis emerged to a hail of gunfire erupting from inside the 4Runner which shattered the rear window of the 4Runner. Officer Lewis dove to the ground and the 4Runner sped away. For this crime and this victim the jury convicted the defendant of the charged offense, first degree assault. The sentencing judge believed the defendant was more culpable than the charged offense, stating the defendant had

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<sup>3</sup> Arguably the first victim was the owner of the purloined vehicle Mr. Graham was convicted of possessing, a separate event and victim.

<sup>4</sup> As noted by the trial court on several occasions, see below.

tried, but failed to kill this particularly vulnerable officer (with his AK-47 assault rifle), while also noting that this was a form of terrorism:

Most compelling for me was the firing on Officer Lewis from the back of the vehicle. He was in a very vulnerable position when the two of you started firing upon him, there was no doubt in my mind that you intended to kill him. You engaged in what I think is a form of terrorism. You held the whole Intermodal at bay that night. There was a round that went through the train car, luckily you didn't strike anyone. You struck, I forget what it was, a loaf of bread or whatever it was, you could have killed a citizen, you could have killed police officers who are also citizens of the United States, who are also family, they are all family men. This is a long sentence, and your attorney makes a compelling case in that the amount of charges that you have result in a very large sentence that we don't often see. With the behavior that you engaged in this is nothing short of terrorism in my book. So, for those reasons, I don't believe there is any grounds for a position of an exceptional sentence downwards.

RP (No. 22336-1) pp 2012-13 (emphasis added).

At the most recent sentencing, the sentencing court acknowledged that after a dozen years, she still remembered the case:

Okay. All right. Well, let me just say that I -- I just want to assure the state that I have vivid recollections of this trial and the -- I have vivid recollections of being a citizen of this community when Mr. Graham did what he did. And I just remember it being front page news and it was a pretty big deal in Spokane, because it was -- I think I even used the term in your sentencing that it was akin to an act of terrorism. Of course, that was a long time ago, so I may be a little bit off on that. But I seem to recall that, at least in my thoughts.

RP 24.

In the defendant's second act of terrorism, the second victim, Officer Aaron Ames, responded to the area and saw Mr. Graham armed with an AK-47 assault rifle. He drew his gun and ordered Mr. Graham to drop his weapon. Mr. Graham continued to hold the AK-47 with both hands and then fled - Officer Ames followed while attempting to maintain protective cover. At one point, Mr. Graham turned and raised his weapon slightly as if to point it at Officer Ames. As Mr. Graham fired, Officer Ames retreated for cover while Mr. Graham fled toward the Intermodal Center. For this act, the defendant was convicted of second degree assault.

After reaching the Intermodal Center, the defendant tried to kill his third victim-officer, Officer John Stanley of the canine unit, who had arrived to assist. As Officer Stanley drove his patrol car up the entrance ramp and through the covered bus passenger loading area, Mr. Graham stepped out from between two parked vehicles and started shooting his AK-47 at Officer Stanley, hitting the officer's car, which suffered ricochet damage. RP (No. 22336-1) 896-898, 901-902. Officer Stanley accelerated through the passageway and down the exit ramp and joined other officers taking position on that side of the building. For this incident the defendant was convicted of attempted first degree murder.

In the fourth episode, and the count involving Officer Edwards, Mr. Graham stood above Officer Edwards' patrol car on the ramp placing Officer Edwards in a position of vulnerability. Mr. Graham fired at the four officers occupying Officer Edwards's patrol car. Officer Edwards remained in the vehicle and took fire while Sergeant Torok, Officer Vaughn, and Officer Uberuaga escaped. Officer Edwards could feel the bullets concuss his patrol car. For these acts, the defendant was convicted of the attempted first degree murder of Officer Edwards, as well as the first degree assaults of Sergeant Torok and Officers Uberuaga and Vaughn.

The defendant, Mr. Graham, had one prior adult class A felony, one additional prior adult felony assault and one prior juvenile assault. CP 46-47. At the time of his latest sentencing, his offender score was "18." CP 213.

2. **The trial court impermissibly relied on factors necessarily considered by the Legislature in establishing the standard sentence range. The trial court failed to "distinguish the crime in question from others in the same category." None of the factors relied on by the trial court were sufficiently substantial and compelling to justify an exceptional sentence.**

*Standard of review*

Generally, a trial court must impose a sentence within the standard range. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005); *see*

RCW 9.94A.505(2)(a)(i). But the Sentencing Reform Act, chapter 9.94A RCW, permits departures from the standard range if the sentencing court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. *Law*, 154 Wn.2d at 94; RCW 9.94A.535. The standard of review is set forth in *Law*:

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

*Law*, 154 Wn.2d at 93.

Therefore, to reverse an exceptional sentence, the appellate court must find: (1) under a clearly erroneous standard, insufficient evidence in the record supports the sentencing court's reasons for imposing an exceptional sentence; (2) under a de novo standard, the sentencing court's reasons do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

The trial court apparently<sup>5</sup> did not examine this case under the extant and traditional approach regarding downward departures which focuses on whether the difference between the effect of the first criminal act (first degree assault of Officer Lewis) and the cumulative effects of the subsequent criminal acts (the felony assault on Officer Ames and the subsequent and separate attempted murders of Officer Stanley and Officer Edwards), was nonexistent, trivial or trifling. That test, comes from a line of Court of Appeals cases. *See State v. Sanchez*, 69 Wn. App. 255, 260-61, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993) (the difference between the first drug buy and all three buys was trivial or trifling); *State v. Hortman*, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994), *rev. denied*, 126 Wn.2d 1025 (1995) (where three buys occurred in an identical location with the same buyer over a short period of a month, difference between the effects of first controlled buy and the cumulative effects of the subsequent buys was nonexistent, trivial, or trifling, exceptional downward departure from presumptive sentence was proper under the multiple offense policy); *State v. McCollum*, 88 Wn. App. 977, 986, 947 P.2d 1235 (1997) (difference between McCollum's drug offenses not trifling); *State v. Kinneman*, 120 Wn. App. 327, 342-43, 84 P.3d 882 (2003), *rev. denied*, 152 Wn.2d 1022 (2004); *State v. McKee*, 141 Wn.

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<sup>5</sup> It is not clear what analysis the trial court was relying on.

App. 22, 33, 167 P.3d 575 (2007), *rev. denied*, 163 Wn.2d 1049 (2008) (reversing exceptional sentencing rejecting argument that prostitutes are not as traumatized by rape as other victims are). Notably, despite reliance on the "nonexistent, trivial or trifling" standard in these lower courts, the Supreme Court in *Graham* did not repudiate this standard. The *Graham* court likely left the standard in place because it is firmly rooted in the purposes of the SRA. The court in *Hortman* elaborated on this connection:

Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act. See RCW 9.94A.010 (setting forth the purposes of the SRA). *Sanchez* [69 Wn. App. 255] holds that a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling. We fully agree. The purposes of the SRA include ensuring punishments that are proportionate to the seriousness of the offense and the offender's criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public, offering the offender an opportunity for self-improvement and making frugal use of the State's resources. RCW 9.94A.010.

*None of these purposes is served by the multiple offense policy when the difference between the effects of the first act and the cumulative effects of the subsequent acts is de minimis.*

*Hortman*, 76 Wn. App. at 463-64 (emphasis added).

The State would submit the court in *Hortman* correctly tied the “nonexistent, trivial or trifling” standard to the purposes of the SRA as expressed in RCW 9.94A.010. Moreover, while the statutory mitigating factors listed in RCW 9.94A.535 are “illustrative” only, “it should be noted that all the examples relate directly to the crime or the defendant’s culpability for the crime committed.” *Law*, 154 Wn.2d at 94-95. An analysis similar to the analysis undertaken in *Hortman, supra*, should be applied in the instant case. It is consistent with the Supreme Court’s requirement, expressed in the instant case, to “examine each of these policies when imposing an exceptional sentence under .535(1)(g).” *Graham*, 181 Wn.2d at 887.

**RCW 9.94A.010(1).**

In the present case, the trial court noted that the punishment for the current offenses was “not similar to sentences imposed for other crimes unless homicide. (low end standard range for one count of 1<sup>st</sup> murder, depending on offender score, is 240 to 411 months).” CP 246, finding 15. The sentencing court failed to weigh or explain that this case included two attempted first degree murder convictions, that the defendant had a prior offense record including one class A felony, and, moreover, had committed numerous present, separate offenses involving separate victims. The Legislature considered the “seriousness” factor in setting the

sentencing range for attempted crimes at 75% of the range for completed crimes. RCW 9.94A.595. Indeed, the maximum sentence for any one of defendant's six current class A felonies is life imprisonment. RCW 9A.20.021. There is no difference between the mental culpability required for attempted first degree murder and first degree murder in the present case, where, but for bullets missing their intended targets contrary to the defendant's requisite premeditated murderous intent, it would have been first degree murder. The legislature has set these presumptive ranges. As our State Supreme Court explained:

The Legislature has stated that the SRA was designed to promote several significant interests, including protection of the public, the need for rehabilitation, and the need to make frugal use of State resources. *See* RCW 9.94A.010(4), (5), (6). The presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated. *See* D. Boerner, § 2.5(b), (c), (d). The trial court's subjective determination that these ranges are unwise, or that they do not adequately advance the above goals, is not a substantial and compelling reason justifying a departure.

*State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

Therefore, the accounting for additional significant harm caused by multiple serious violent offenses ensures that the punishment is "proportionate to the seriousness of the offense." RCW 9.94A.010(1). By holding otherwise, the trial court has simply arrogated the legislative

determination of what sentence is appropriate under the SRA. The impetus for this arrogation may be because laudably, the defendant has taken advantage of prison programs, and has sought rehabilitation and improved himself. CP 246, finding 17. However, a sentencing court's desire to see an atypically altruistic defendant given an opportunity to improve him or herself, rather than further overcrowding jail facilities, has been found to be an improper mitigating factor in *State v. Freitag*, 127 Wn.2d 141, 144-45, 896 P.2d 1254 (1995). A trial court abuses its discretion by doing so:

Although sentencing within the standard range may at times appear unnecessary or even unjustified, it is the function of the judiciary to impose sentences consistent with legislative enactments. As we have recognized previously,

[d]etermination of crimes and punishment has traditionally been a legislative prerogative, subject to only very limited review in the courts. A belief on the part of the judiciary that sentencing possibilities are inadequate goes to the wisdom of the dispositional standards and cannot be enough to overcome the legislatively prescribed range of punishment.

(Citations omitted.) *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The trial court's reliance on Freitag's concern for others when determining her sentence was an abuse of discretion. *See* RCW 9.94A.340.

*Freitag*, 127 Wn.2d at 144-45.

**RCW 9.94A.010(2)-(3).**

The sentencing court's opinion that the sentence does not promote respect for the law because it is "simply a life sentence" and is "not commensurate with the punishment imposed on others committing similar offenses" is conclusory, and factually unsupported. No other AK-47 armed-terroristic attempted cop-killing defendants were discussed by the sentencing court.

Punishing the offender for his additional harm caused by his additional offenses also "[p]romote[s] respect for the law by providing punishment which is just." RCW 9.94A.010(2). Including the additional harm in the calculus results in a sentence that is generally "commensurate with the punishment imposed on others committing similar offenses." The sentencing court does not explain why a life sentence would not be appropriate. Again, there are six class A felonies. Of import, if the crimes had occurred more recently, the sentencing court could have imposed an upward departure based upon the aggravating factors that the victims were law enforcement officers,<sup>6</sup> or because Mr. Graham committed multiple

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<sup>6</sup> RCW 9.94A.535(3)(v). The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

current offenses and his high offender score results in some of the current offenses going unpunished.<sup>7</sup>

**RCW 9.94A.010(4).**

The sentencing court did not address or discuss this factor. However, punishing an offender for the additional harm that he has caused to others also “[p]rotect[s] the public” by lengthening the term of incarceration. RCW 9.94A.010(4).

**RCW 9.94A.010(5).**

Keeping the offender in prison for a lengthy period of time for serious violent crimes that caused additional significant harm offers the offender “an opportunity to improve himself” by taking advantage of the structure and programs that prison provides. RCW 9.94A.010(5). Mr. Graham has sought to improve himself. However, it is a non-sequitur that the opportunity to improve one’s self in prison requires an early release from prison to allow a defendant the opportunity to use those new improvements. This is no different than the trial court’s desire that Ms. Freitag improve herself through community service while limiting prison overcrowding which was found unjustified because the Legislature

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<sup>7</sup> RCW 9.94A.535(2)(c). The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

already considered these purposes when establishing the presumptive sentencing ranges. *Freitag*, 127 Wn.2d at 145.

**RCW 9.94A.010(6).**

Keeping defendants confined, those who have caused more harm, committed more serious offenses, and have proven themselves more dangerous, for a term commensurate with that harm makes “frugal use of the state’s and local governments’ resources.” RCW 9.94A.010(6). The Legislature considered these outcomes when it proscribed the range of punishment. *See Freitag*, 127 Wn.2d at 145-46. It necessarily considered the fact that a life sentence could be imposed when it adopted a potential life sentence for class A felonies and set the standard range sentences. The trial court’s frugal sentence argument fails to account for other similarly situated defendants being treated similarly, and, taken to its logical conclusion, would call for no prison terms for anyone to save money. The trial court’s comment that aging prison populations cost more was necessarily considered by the legislature in its establishment of standard range sentences. The Legislature also has considered and addressed aging prison populations elsewhere. See RCW 9.94A.728, regarding early release for medical reasons.

**RCW 9.94A.010(7).**

The sentencing court did not address this factor. The Legislature has determined that a lengthier term for the offender who has caused significant additional harm through multiple serious violent offenses reduces the “risk of reoffending.” RCW 9.94A.010(7). There was no factual basis for the sentencing court to find otherwise in the present case and the sentencing court did not discuss this factor, even though the Court in *Graham* required sentencing courts to “examine each of these policies when imposing an exceptional sentence under .535(1)(g).” *Graham*, 181 Wn.2d at 887.

After reviewing the above factors in this case, one thing is clear: the sentencing court could not find significant factual variations underlying Mr. Graham’s offenses warranting a departure.<sup>8</sup> Instead, the sentencing court simply identified the multiple offense policy as the mitigating factor to support the downward exceptional sentence. This is an incorrect application of the law. “[T]he purposes of the [SRA] enumerated in RCW 9.94A.010 are not in and of themselves mitigating circumstances. Rather, they may provide support for the imposition of an exceptional

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<sup>8</sup> See *State v. Graham*, 181 Wn.2d at 886 (“The legislature recognized it could not craft a standard range that could account for *all factual variations underlying offenses and offenders*. It adopted .535 as a safety valve. *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986).” (Emphasis added)).

sentence once a mitigating circumstance has been identified by the trial court.” *State v. Alexander*, 125 Wn.2d 717, 730 n. 22, 888 P.2d 1169 (1995). There are no valid mitigating circumstances identified by the sentencing court in the instant case. The sentencing court’s decision to the contrary is clearly erroneous. *State v. Law*, 154 Wn.2d at 93. The stated reasons for the exceptional sentence are not exceptional and do not justify a departure as a matter of law. *Id.*

Finally, the sentencing court abused its discretion by imposing an exceptional sentence that is clearly too lenient. The defendant received a 10-year sentence for his ten crimes, crimes consisting of six serious violent felonies, including two attempted first degree murders. The sentence is practically the same that could be given for ten gross misdemeanors. *State v. Bowen*, 51 Wn. App. 42, 751 P.2d 1226 (1988). The defendant, who had a prior class A felony conviction, received less of a sentence<sup>9</sup> than any other adult defendant would receive as a standard range sentence for “only” one attempted murder offense with no prior record. (75% of 240-320 = 180-240 months as a “zero” for standard range level XV, see CP 214). Mr. Graham’s 10-year sentence is less than his codefendant’s 180-month sentence for first degree assault. That defendant,

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<sup>9</sup> The exceptional sentence provisions apply to presumptive sentences and not to enhancements.

Mr. Jones, was armed with a handgun, not an AK-47.<sup>10</sup> Mr. Jones gave up almost immediately,<sup>11</sup> while Mr. Graham continued on to commit acts the sentencing court considered as amounting to “nothing short of terrorism.” No court would sentence someone, a terrorist, with six serious violent offenses to less of a sentence than was received by his less culpable codefendant who gave up immediately, who had but one serious non-murderous violent offense. The sentencing court abused its discretion by imposing such an extreme downward departure from the presumptive sentences.

## V. CONCLUSION

The trial court’s imposition of an exceptional downward sentence, based on the stated purposes of the SRA, impermissibly relied on factors necessarily considered by the Legislature in establishing the standard sentence range. Additionally, the trial court’s finding that the operation of

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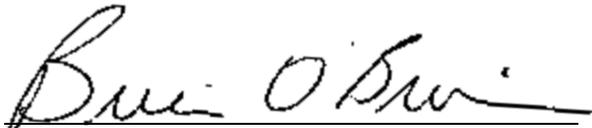
<sup>10</sup> “The court sentenced Mr. Jones to 180 months' incarceration for the first degree assault....” *State v. Jones*, 158 Wn. App. 1055, 2010 WL 5071841, at \*1 (2010).

<sup>11</sup> “Police stopped Jason Allen Graham and Jeremiah Justin Jones for speeding in a stolen car. Shots were fired out of the rear window as the officer approached the car, and the men sped away. Police caught up with them when they rolled the car. Mr. Jones soon surrendered.” *State v. Jones*, 136 Wn. App. 1009, 2006 WL 3479055, at \*1 (2006) *review granted, cause remanded*, 169 Wn.2d 1005, 234 P.3d 210 and *review granted, cause remanded sub nom. State v. Graham*, 169 Wn.2d 1005, 234 P.3d 210.

the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of the SRA failed to “distinguish the crime in question from others in the same category.” Therefore, none of the factors relied on by the trial court were sufficiently substantial and compelling to justify an exceptional sentence. Additionally, the sentence imposed was clearly too lenient. The State requests this Court reverse the lower court and remand for resentencing.

Dated this 6 day of January, 2016.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921  
Deputy Prosecuting Attorney  
Attorney for Appellant

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

STATE OF WASHINGTON,

Appellant,

v.

JASON GRAHAM,

Respondent,

NO. 33642-5-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on January 6, 2016, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

David L. Donnan  
[wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

1/6/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)