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NO. 36281-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD VASQUEZ, JR.,  
Appellant.

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

Yakima County Cause No. 14-1-01397-9

The Honorable Gayle M. Harthcock, Judge

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BRIEF OF APPELLANT

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Skylar T. Brett  
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT, PLLC  
PO BOX 18084  
SEATTLE, WA 98118  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Vasquez's kidnapping convictions were entered in violation of his Wash. Const. art. I, § 21 right to a unanimous jury verdict.
2. The alternative means of first degree kidnapping, requiring proof that Mr. Vasquez held a person for reward or ransom is not supported by substantial evidence.
3. The alternative means of first degree kidnapping, requiring proof that Mr. Vasquez held a person as a shield or hostage is not supported by substantial evidence.
4. The trial court erred by giving Jury Instruction 20.
5. The trial court erred by giving Jury Instruction 21.

**ISSUE 1:** In order to protect the constitutional right to a unanimous jury verdict, reversal is required when alternative means of committing an offense are submitted to the jury if each means is not supported by substantial evidence. Were Mr. Vasquez's convictions for kidnapping entered in violation of his art. I, § 21 right to a unanimous verdict when the jury was instructed on two alternative means that were not supported by any evidence?

6. The trial court violated Mr. Vasquez's rights under the Fourth and Fourteenth Amendments by denying his motion to suppress.
7. The trial court violated Mr. Vasquez's rights under the Wash. Const. art. I, § 7 by denying his motion to suppress.
8. The trial court erred by entering Finding of Fact 15.
9. The trial court erred by entering Finding of Fact 18.
10. The trial court erred by entering Finding of Fact 19.
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18. The trial court erred by entering Conclusion of Law 11.
19. The trial court erred by entering Conclusion of Law 12.
20. The trial court erred by entering Conclusion of Law 14.

**ISSUE 2:** A *Terry* stop must be justified at its inception and is not justified based on a person's mere presence in an area where the police expect to find a crime suspect unless the person also matches the description of that suspect. Did the trial court err by denying Mr. Vasquez's motion to suppress the evidence discovered pursuant to his seizure when neither he nor his companion matched the description of the robbery suspects the police were looking for?

21. Wash. Const. art. I, § 14 categorically bars the use of a conviction entered against a juvenile as a "strike" under the Persistent Offender Accountability Act.
22. The sentencing court erred by sentencing Mr. Vasquez to a term of life without the possibility of parole.

**ISSUE 3:** 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?

23. The sentencing court erred by ordering Mr. Vasquez to pay a \$100 DNA collection fee.

**ISSUE 4:** An indigent person may not be ordered to pay a DNA collection fee when his/her DNA has already been collected pursuant to a prior felony conviction. Did the sentencing court err by ordering Mr. Vasquez to pay that fee when it also found him indigent and his DNA had already been collected?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Two Hispanic men in their thirties invaded the home of Robert Miller and Kristen Fork with a gun drawn, tied them up, and robbed them. *See* RP 494-503, 534-45.<sup>1</sup> As Ms. Fork attempted to flee, the men attacked her, hitting her in the head several times with a gun. RP 544-45.

Ms. Fork told the police that her attackers were both Hispanic and that they were both in their thirties. RP (4/26/18) 84. She said that one of them was named Jimmy. RP (4/26/18) 52; RP 484.

But the police never located or investigated two Hispanic men in their thirties, or anyone named Jimmy. *See* RP *generally*. Instead, they stopped a white man and a forty-eight-year-old Hispanic man. RP (4/26/18) 95, 109; CP 38-43.

Those men were Richard Vasquez and Samuel Crafton-Jones. At least one of the officers immediately recognized Crafton-Jones and knew that he was not Hispanic. RP (4/26/18) 109. He was not sure whether Mr. Vasquez was Hispanic or not when he detained him. RP (4/26/18) 95. The officers immediately ordered Mr. Vasquez and Crafton-Jones to the ground at gunpoint. FFCL from 3.6 hearing, entered on 11/2/18, p. 4, Supp. CP.

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<sup>1</sup> Unless otherwise noted, all citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volumes covering 7/9/18 through 8/3/18.

Mr. Vasquez and Crafton-Jones told the officers that they had not used the van and did not know who had. RP (4/26/18) 98. Neither of them was the registered owner of the van but they were present on the property where the van was parked. RP (4/26/18) 128-29, 137.

The police transported Mr. Miller, whose head had been covered by a blanket during almost the entire robbery, to the property to conduct a show-up identification. RP 146, 525, 527. Mr. Miller said that he was ninety percent sure that Mr. Vasquez and Mr. Crafton-Jones were the ones who had invaded his home. RP 146.

The state charged Mr. Vasquez with first-degree burglary, two counts of first-degree robbery, two counts of first-degree kidnapping, first-degree assault, second-degree assault, and unlawful possession of a firearm. CP 56-60.<sup>2</sup>

Mr. Vasquez moved to suppress the show-up identification and all resultingly-discovered evidence, arguing that the police did not have reasonable suspicion to seize him because neither he nor Mr. Crafton-Jones matched the description of the robbery suspects. *See* CP 38-55.

Mr. Vasquez pointed out that there was no evidence tying him or Mr. Crafton-Jones to the van at the time of the stop, other than their

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<sup>2</sup> Mr. Vasquez's case was originally consolidated with that of Mr. Crafton-Jones, but Mr. Vasquez proceeded to trial on his own. *See* CP 61-63; *See* RP *generally*. Mr. Crafton-Jones did not testify at Mr. Vasquez's trial. *See* RP *generally*.

relative proximity to it. RP (4/26/18) 153. No witness had seen them drive the van, get out of it, or flee from it. *See* RP (4/26/18) *generally*.

The trial court denied Mr. Vasquez's motion to suppress. FFCL from 3.6 hearing, entered on 11/2/18, Supp. CP. The court entered a finding of fact that Mr. Vasquez and Crafton-Jones "matched the general suspect descriptions given by the victims." FFCL from 3.6 hearing, entered on 11/2/18, pp. 4, 7, Supp. CP.

The court also relied heavily on the officers' testimony that their suspicion in Mr. Vasquez and Mr. Crafton-Jones had increased based on things that happened *after* they had been seized and handcuffed. FFCL from 3.6 hearing, entered on 11/2/18, Supp. CP. For example, the court entered findings regarding a stun gun found in Crafton-Jones's pocket pursuant to a weapons pat-down, the fact that Mr. Vasquez and Crafton-Jones denied having driven the van, and the claim that Mr. Vasquez was sweating during questioning. FFCL from 3.6 hearing, entered on 11/2/18, p. 5, Supp. CP.

By denying Mr. Vasquez's motion to suppress, the trial court admitted extensive evidence discovered as a result of his seizure by the police, including: the show-up identification; coins from Ms. Fork and Mr. Miller's house (which were found in Crafton-Jones's pockets); a stun gun

found in Crafton-Jones's pocket; and the shoes that Mr. Crafton-Jones and Mr. Vasquez were wearing at the time of arrest. RP 146, 442, 444.

The police also relied on the initial seizure to obtain a warrant for the search of the property, where Mr. Vasquez lived along with numerous other people. *See* RP 235. Pursuant to the warrant search, the police found a watch that belonged to Mr. Miller, some jewelry and coins, and a gun. RP 174, 180.

At Mr. Vasquez's jury trial, crime lab technician testified that he had identified Ms. Fork's DNA on the inside of the magazine of the gun that was found at the property where Mr. Vasquez was arrested. RP 407. He also said that Ms. Fork's DNA was on Mr. Vasquez's shoes and that Mr. Vasquez's DNA was on a hat that was left behind at the scene of the robbery. RP 400, 405.

Ms. Fork and Mr. Miller both testified at trial, describing the robbery and identifying Mr. Vasquez as one of the people who had broken into their home. RP 494-503, 534-45.

The court's to-convict instructions for the kidnapping charges included three alternative means of committing that offense. The instructions required the jury to convict if it found that Mr. Vasquez had, *inter alia*, abducted Ms. Fork and Mr. Miller with intent:

- (a) to hold the person for ransom or reward, or

(b) to hold the person as a shield of hostage, or  
(c) to facilitate the commission of First Degree Burglary and/or  
First Degree Robbery or flight thereafter...  
Court's Instructions, pp. 23-24, Supp CP.

The jury convicted Mr. Vasquez of each charge against him. CP 30-37. The jury also answered yes to interrogatories regarding whether he had been armed with a firearm. CP 23-29.

The court sentenced Mr. Vasquez to a term of life imprisonment without the possibility of parole (LWOP), based in part on a conviction from 1983, when he was sixteen-years-old. CP 14-22; *See Ex. SE-CC* (sentencing). The court dismissed Mr. Vasquez's objection that the LWOP sentence constituted cruel and unusual punishment. RP 737.

The sentencing court also ordered Mr. Vasquez to pay a \$100 DNA fee. CP 18. The court also found him indigent for purposes of appeal. CP 11-13.

Mr. Vasquez timely appealed. CP 1-10.

## **ARGUMENT**

### **I. MR. VASQUEZ'S KIDNAPPING CONVICTIONS VIOLATE HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY BECAUSE EACH OF THE ALTERNATIVE MEANS SUBMITTED TO THE JURY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The court's to-convict instructions for each of the kidnapping charges in Mr. Vasquez's case permitted the jury to convict if it found that he had, *inter alia*, abducted Ms. Fork and Mr. Miller with intent:

(a) to hold the person for ransom or reward, or  
(b) to hold the person as a shield of hostage, or  
(c) to facilitate the commission of First Degree Burglary and/or  
First Degree Robbery or flight thereafter...  
Court's Instructions, pp. 23-24, Supp CP.

The instructions explicitly told the jury that they did not have to unanimously agree as to which of the means, (a), (b), or (c) had been proved beyond a reasonable doubt. Court's Instructions, pp. 23-24, Supp CP.

But the state did not present any evidence that Mr. Vasquez had abducted Ms. Fork or Mr. Miller with intent to hold him/her for ransom, for a reward, or as a shield or hostage. *See RP generally*. This lack of substantial evidence supporting two out of the three alternative means included in the to-convict instructions requires reversal of Mr. Vasquez's kidnapping convictions for violation of his constitutional right to a unanimous jury verdict. *State v. Garcia*, 179 Wn.2d 828, 835–36, 318 P.3d 266 (2014).

The Washington Constitution guarantees the right to a unanimous jury verdict. *Id.*; *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); art. I, sec. 21.<sup>3</sup> In order to safeguard this right, when alternative means of

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<sup>3</sup> Manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Alleged violations of the right to a unanimous jury verdict constitute manifest error affecting a constitutional right. *See State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

(Continued)

committing an offense are presented to the jury, reversal is required unless each means is supported by substantial evidence.<sup>4</sup> *Garcia*, 179 Wn.2d at 835-36.

Kidnapping is an alternative means offense. *Id.*; RCW 9A.40.020. Accordingly, when the jury is instructed on each of the three alternative means in the statute, reversal is required unless substantial evidence supports the conclusion that the accused abducted a person: to hold him/her for ransom/reward, to hold him/her as a shield/hostage, *and* to facilitate the commission of a felony or flight therefrom. *Id.*; RCW 9A.40.020(1).

Mr. Vasquez's kidnapping convictions must be reversed because the jury was instructed on each of these alternative means but the state did not present any evidence that he had abducted Ms. Fork or Mr. Miller to hold them for ransom/reward or to hold them as a shield/hostage. *Id.*

The terms "ransom," "reward," "shield," and "hostage" are not defined by the kidnapping statute or the related provisions. *See* RCW 9A.40.040; RCW 9A.40.010; *Garcia*, 179 Wn.2d at 836.

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Constitutional issues are reviewed *de novo*. *Id.*

<sup>4</sup> Review looks to the evidence in the light most favorable to the prosecution. *Garcia*, 179 Wn.2d at 836.

The Washington Supreme Court has held that the “hostage/shield” means of committing first degree kidnapping requires proof that the “the defendant intended to use the victim as security for the performance of some action by another person or the prevention of some action by another person.” *Garcia*, 179 Wn.2d at 840. The *Garcia* court held that proof of anything less would “collapse the distinction between first and second degree kidnapping.” *Id.*

In Mr. Vasquez’s case, there was no evidence that he abducted Ms. Fork or Mr. Miller with the intent to secure the performance or prevention of some action by any other person. *Id.*; *See RP generally*. That alternative means of committing kidnapping is not supported by substantial evidence. *Id.*

Nor did the state present any evidence that Mr. Vasquez committed kidnapping in order to hold a person for ransom or a reward. There was no evidence that he solicited any thing of value from any third person.

Mr. Vasquez’s kidnapping convictions violate his constitutional right to a unanimous jury because substantial evidence does not support each of the alternative means submitted to the jury. *Garcia*, 179 Wn.2d at 835-36. Mr. Vasquez’s kidnapping convictions must be reversed. *Id.*

**II. THE POLICE DID NOT HAVE REASONABLE SUSPICION TO DETAIN MR. VASQUEZ BECAUSE HE AND HIS COMPANION DID NOT MATCH THE DESCRIPTION OF THE ROBBERY SUSPECTS AND NO OTHER EVIDENCE TIED HIM TO THE CRIMES. THE TRIAL COURT ERRED BY DENYING MR. VASQUEZ’S MOTION TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO THAT UNLAWFUL SEIZURE.**

The police were told that the robbery suspects were two Hispanic men in their thirties, one of whom was named Jimmy. RP (4/26/18) 84. But they detained Mr. Vasquez (who was forty-eight-years-old at the time) and Crafton Jones (whom the officers knew to be white). RP (4/26/18) 95, 109; CP 38-43. Because there was no other evidence tying Mr. Vasquez or Crafton Jones to the robbery (other than their proximity to the van), the officers lacked reasonable suspicion to seize Mr. Vasquez. The trial court erred by denying his motion to suppress.

The Fourth Amendment to the U.S. Constitution protects against unlawful search and seizure. U.S. Const. Amends. IV; XIV. Art. I, § 7 of the state constitution protects against unlawful intrusion into private affairs. Art. I, § 7. Art. I, § 7 provides greater protection than the Fourth Amendment because it focuses on “the disturbance of private affairs” rather than the reasonableness of police conduct. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011) *review denied*, 173 Wn.2d 1011, 268 P.3d 943 (2012).

If the state seeks to justify seizure of a person under an exception to the probable cause requirement, the state must establish that exception by clear and convincing evidence. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011), *review denied*, 272 P.3d 850 (2011). If the state fails to meet its burden of establishing an exception, “all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *State v. Young*, 167 Wn. App. 922, 928, 275 P.3d 1150 (2012).

Police may briefly seize a person for questioning based on reasonable suspicion alone. *Young*, 167 Wn. App. at 929. Reasonable suspicion exists if there are specific, articulable facts indicating that a person has been or is about to be involved in a crime. *Id.* A mere hunch on the part of law enforcement does not give rise to reasonable suspicion. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). A reviewing court must look to the totality of the circumstances surrounding the stop to evaluate its reasonableness. *Id.*

A *Terry* stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (*citing State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)).

A temporary seizure for purposes of conducting a show-up identification constitutes a *Terry* stop. *United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006).

A person's presence in an area where the police expect to find a crime suspect is insufficient to justify a *Terry* stop when the person does not also sufficiently match the description of the suspect or when the description is too vague. *Id.* at 247-48.

Mr. Vasquez and Mr. Crafton-Jones did not match the description of the robbery suspects – of two Hispanic men in their 30's -- in any way except that Mr. Vasquez is Hispanic. Mr. Vasquez was forty-eight-years-old at the time of the seizure and Mr. Crafton-Jones is Caucasian. RP (4/26/18) 95, 109; CP 38-43. Indeed, one of the officers immediately recognized Mr. Crafton-Jones and knew him not to be Hispanic. RP (4/26/18) 109. That same officer said that he could not tell whether Mr. Vasquez was Hispanic or not at the time of the seizure. RP (4/26/18) 95.

Even so, the trial court entered a finding that Mr. Vasquez and Crafton-Jones “matched the general suspect descriptions given by the victims.” FFCL from 3.6 hearing, entered on 11/2/18, p. 4, Supp. CP. That finding is unsupported by any evidence and must be vacated. *Gatewood*, 163 Wn.2d at 539 (findings of fact must be supported by substantial evidence).

The fact that Mr. Vasquez and Crafton-Jones were walking near the parked van is inadequate to arise to the level of reasonable suspicion because there was no other evidence tying them to the vehicle – no witness or officer had seen them drive or get out of the van; they were not walking away from the van when the officers noticed them. *Id.* at 247-48.

The police lacked reasonable suspicion to detain Mr. Vasquez. *Young*, 167 Wn. App. at 929. The stop was unjustified at its inception. *Diluzio*, 162 Wn. App. at 590-91.

Even so, the trial court denied Mr. Vasquez’s motion to suppress, relying heavily on evidence that the officers said had “increased” their suspicion *after* Mr. Vasquez had already been seized. *See* FFCL from 3.6 hearing, entered on 11/2/18, p. 5, Supp. CP. But that evidence – most of which was obtained pursuant to the unlawful stop itself – cannot be used to justify a seizure that had already occurred. *Gatewood*, 163 Wn.2d at 539.<sup>5</sup> The trial court erred by using unlawfully-obtained evidence to justify a stop that was unlawful at its inception. *Id.* The court should have granted Mr. Vasquez’s motion to suppress.

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<sup>5</sup> Indeed, the trial court relied, *inter alia*, on claims that Mr. Vasquez was sweating when he spoke to the officers and that Crafton-Jones looked like he wanted to flee. FFCL from 3.6 hearing, entered on 11/2/18, p. 5, Supp. CP. But nervousness and “startled reactions” in response to encounters with the police do not support a finding of reasonable suspicion. *Gatewood*, 163 Wn.2d at 540.

Because Mr. Vasquez was subjected to an unconstitutional seizure by the police, any evidence obtained as a result of that seizure must be suppressed as fruit of the poisonous tree. *Young*, 167 Wn. App. at 928. In this case, the fruit of the poisonous tree includes, at least: Mr. Miller’s show-up identification; the evidence seized from Mr. Crafton-Jones’s pockets; all statements made at the time of the seizure; Mr. Vasquez’s clothes and shoes, which were removed when he was booked into jail; and the video of Mr. Vasquez in the jail holding cell. That evidence was admitted in violation of Mr. Vasquez’s constitutional rights. *Id.*

Because the police did not have reasonable suspicion to seize Mr. Vasquez, the trial court erred by denying his motion to suppress. *Id.* Mr. Vasquez’s convictions must be reversed. *Id.*

**III. UNDER ART. I, § 14, THE CONVICTION ENTERED WHEN MR. VASQUEZ WAS SIXTEEN-YEARS-OLD IS CATEGORICALLY BARRED FROM QUALIFYING AS A “STRIKE” OFFENSE FOR HIS CURRENT SENTENCE.**

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 evolvments 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 Washington Supreme 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 three-strikes statutes. *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). This substantive new rule of constitutional law applies retroactively. *Montgomery v. Louisiana*, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016), *as revised* (Jan. 27, 2016).

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. The *Bassett* court held the statute permitting LWOP sentences for young offenders to be 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.<sup>6</sup> *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

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<sup>6</sup> The Washington Supreme Court and Court of Appeals have left open the possibility that an offender’s youth at the time of a claimed “strike” offense affects the constitutionality of the application of the imposition of an LWOP sentence under the three-strikes statutes. *See Witherspoon*, 180 Wn.2d at 890 (Aug. 11, 2014) (rejecting a state constitutional challenge to a three-strikes sentence because the defendant “was an adult when he committed all three of his strike offenses”); *See also State v. Hart*, 188 Wn. App. 453, 463, 353 P.3d 253 (2015) (same).

(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) (defining a “persistent offender” as someone who has been convicted “as an offender” on at least two separate prior occasions); RCW 9.94A.030(35) (defining “offender” to include someone younger than eighteen-years-old but under Superior Court jurisdiction).

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). This outdated and arbitrary distinction 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 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.

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” and his case must be remanded for resentencing within the standard range. *Id.*

**IV. THE SENTENCING COURT ERRED BY ORDERING MR. VASQUEZ TO PAY A DNA COLLECTION FEE BECAUSE HE IS INDIGENT AND HIS DNA HAS ALREADY BEEN COLLECTED IN THE PAST.**

On September 20, 2018, the Washington Supreme Court decided in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), that the amendments to the Legal Financial Obligations (LFO) statutes passed as HB 1783 applies prospectively to all cases pending on direct appeal. *Ramirez*, 191 Wn.2d at 749-50.

Pursuant to those amendments, a trial court may no longer impose discretionary LFOs upon indigent persons. RCW 10.01.160(3).

Accordingly, a sentencing court may not order an indigent person to pay a \$100 DNA collection fee if s/he has already paid that fee previously because of a prior felony conviction. Laws of 2018, ch. 269, §§ 1, 18, 7; *Ramirez*, 191 Wn.2d at 747.

Because he is indigent has already had his DNA collected as a result of previous felony convictions, the sentencing court is prohibited from ordering Mr. Vasquez to pay the \$100 DNA collection fee. *Id.*

Accordingly, this Court must vacate the order requiring Mr. Vasquez to pay a \$100 DNA collection fee.

### **CONCLUSION**

Mr. Vasquez's kidnapping convictions were entered in violation of his right to a unanimous verdict. The trial court violated Mr. Vasquez's constitutional rights by denying his motion to suppress. The conviction entered when Mr. Vasquez was sixteen-years-old cannot be counted as a "strike" under art. I, § 14. Mr. Vasquez's convictions must be reversed. In the alternative, his case must be remanded for resentencing within the standard range.

Additionally, the sentencing court erred by ordering Mr. Vasquez to pay a DNA collection fee because he is indigent his DNA has already been collected pursuant to a prior felony conviction.

Respectfully submitted on April 9, 2019,



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

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

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 April 9, 2019.



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

**LAW OFFICE OF SKYLAR BRETT**

**April 09, 2019 - 11:58 AM**

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