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No. 98496-4

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALAN JENKS, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

**SUPPLEMENTAL BRIEF OF RESPONDENT IN RESPONSE TO
APPELLANT'S SECOND SUPPLEMENTAL BRIEF**

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I. RESPONDENT'S ISSUES PRESENTED

1. Is Jenks entitled to a resentencing if he was sentenced as a “persistent offender” in 2017, with second-degree robbery as one of his predicate offenses and is on direct review, if the legislature subsequently repealed second-degree robbery as a “most serious offense”?

2. Has Jenks met his burden to establish the amendment to RCW 9.94A.030(33)(o), repealing second-degree robbery as a “most serious offense,” applies to his crime committed before the effective date of the July 28, 2019 repeal, if the long standing rule in this State is that RCW 10.01.040 (savings clause) and RCW 9.94A.345 (law in effect at the time a crime was committed governs sentencing) require that the repeal of a statute not apply to crimes committed before its effective date?

II. STATEMENT OF THE CASE

Regarding the issues raised in Appellant’s second supplemental brief, Alan Jenks was convicted by a jury of first-degree robbery. CP 73. He was sentenced on June 22, 2017, as a persistent offender based upon his two prior strike offenses – a 2011 first-degree robbery conviction and a 2004 second-degree robbery conviction. CP 110-11, 113-14, 116.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

The repeal of second-degree robbery as a “most serious offense” is a substantive change in the law which applies to offenders after its effective date of July 28, 2019. Since the amendment is not procedural in nature nor does it govern the conduct of criminal prosecutions, it does not apply to Jenks who is on direct review.

Furthermore, the Legislature did not include a retroactive clause in the repealing amendment, ESSB 5288; nor did it indicate any intent to apply the amendment retroactively. Indeed, the Senate Bill Report to ESSB 5288 clearly reflects the Legislature’s intent that the statute not apply retroactively, considering the Senate’s removal of language from the bill that would have allowed those defendants sentenced as persistent offenders to be resentenced if he or she had a second-degree robbery conviction as a predicate offense. The express language of ESSB 5288 shows that the Legislature did not intend to depart from the presumption of RCW 10.01.040 and RCW 9.94A.345, which require prospective application of ESSB 5288 from its effective date.

B. JENKS, WHO IS ON DIRECT REVIEW, IS NOT ENTITLED TO A RESENTENCING BASED UPON THE LEGISLATURE'S RECENT REPEAL OF SECOND-DEGREE ROBBERY AS A "MOST SERIOUS OFFENSE."

Jenks asserts that because he is on direct review he is entitled to the benefit of the July 28, 2019 legislative amendment repealing second-degree robbery as a "most serious offense," under RCW 9.94A.030(33)(o). He asks this Court to remand for resentencing without consideration of his second-degree robbery conviction as a strike offense. This claim has no merit.

Standard of review.

An appellate court reviews questions of statutory interpretation de novo. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for early release. RCW 9.94A.570. A "persistent offender" is someone currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). At the time of Jenks' sentencing on June 22, 2017, RCW 9.94A.030(33) listed Washington's "most serious offenses," which included first-degree robbery¹ and second-degree robbery,² among others.

¹ RCW 9.94A.030(33)(a).

² Former RCW 9.94A.030(33)(o).

Thereafter, the classification of second-degree robbery as a “most serious offense,” under former RCW 9.94A.030(33)(o), was repealed by the Legislature, which took effect on July 28, 2019. Laws of 2019, ch. 187 (ESSB 5288³).

Jenks relies primarily on the holding in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), which dealt with the imposition of certain legal financial obligations on defendants pending direct review. *Ramirez* has no application to the present case. In *Ramirez*, the Court had to determine whether the 2018 legislative amendments to various legal financial obligations imposed upon convicted defendants, which required trial courts not impose discretionary costs on indigent defendants, applied prospectively to defendants currently on direct appeal. *Id.* at 723. Ultimately, the Court held that the LFO amendments under RCW 10.01.160(3), applied prospectively to cases pending on direct review because the imposition of those costs are governed by the statute in effect at the termination of a defendant’s particular case, and *Ramirez*’ case was not yet final at the time the statute was enacted. *Id.* at 749.

The *Ramirez* court relied on *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997), for its holding. In *Blank*, the defendants’ appeals

³ Engrossed Substitute Senate Bill (ESSB) 5288, attached hereto as “Attach. A.”

were pending when the legislature enacted a statute to recoup appellate defense costs from a convicted defendant. *Id.* at 234. In determining whether the recoupment statute⁴ applied to defendants whose cases were on appeal, the *Blank* court held that “[a] statute operates prospectively when the precipitating event for [its] application ... occurs after the effective date of the statute.” *Id.* at 248. The *Blank* court found that the “precipitating event” for the statute “*concerning attorney fees and costs of litigation*” was the termination of the defendant’s case (presumably at the conclusion of community custody) and held that the recoupment statute applied prospectively to cases that were pending on appeal when that statute was enacted. *Id.* at 249 (emphasis added). The court reasoned that, “the Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment.” *Id.* at 242.

Accordingly, the language in the statutes at issue in *Ramirez* and *Blank* made it clear that the completion of a defendant’s sentence and/or appeal was the triggering event for application of the fees and costs associated with the amended statutes.

⁴ RCW 10.73.160.

Regarding Jenks' argument, *Ramirez* resolved an issue involving *criminal procedure* (when fees and costs could be collected from defendants), not a statutory, substantive change in the law. Only new rules of criminal procedure or rules regarding the conduct of criminal prosecutions apply retroactively to all cases pending on direct review or which are not yet final. See e.g. *State v. Wences*, 189 Wn.2d 675, 681, 406 P.3d 267 (2017); *In re Haghghi*, 178 Wn.2d 435, 443, 309 P.3d 459 (2013); *State v. Kilgore*, 167 Wn.2d 28, 35, 216 P.3d 393 (2009); *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005); *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The repeal of second-degree robbery under ESSB 5288 is a substantive change in the law altering punishment for a given offense. Where the statutory language is not ambiguous, the court “presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.” *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992).

Consequently, a comparison of the court's holding in *Ramirez* has no bearing on whether the repeal of second-degree robbery as a “most serious offense” applies to Jenks on direct review. Jenks' analysis equating the “triggering event” in *Ramirez* to the “triggering event” under ESSB 5288 is the same as comparing apples to oranges. As discussed

below, based upon the plain language of ESSB 5288, the repeal of second-degree robbery as a “most serious offense,” applies only to sentences imposed after the July 28, 2019 effective date of the legislation. Hence, *Ramirez* is inapplicable to the present case.

C. THE REPEAL OF SECOND-DEGREE ROBBERY AS A “MOST SERIOUS OFFENSE” DOES NOT APPLY RETROACTIVELY TO JENKS’ SENTENCING WHICH OCCURRED ON JUNE 22, 2017.

Regarding persistent offenders, a defendant must be sentenced to a term of total confinement for life without the possibility of parole at the time of sentencing. RCW 9.94A.570. A “persistent offender” is a defendant who has been convicted in this state of a “most serious offense” and has, before the commission of the most recent “most serious offense,” been convicted on at least two separate occasions of felonies that would be considered “most serious offenses.” See RCW 9.94A.030(38)(a)(i) and (ii) (persistent offender definition). On April 20, 2019, the legislature repealed RCW 9.94A.030(33)(o) to remove second-degree robbery as a “most serious offense,” with an effective date of July 28, 2019. Laws of 2019, ch. 187 (ESSB 5288).

Generally, statutory amendments are presumed to operate prospectively, not retroactively. *In re Flint*, 174 Wn.2d 539, 546, 277 P.3d 657 (2012); *In re Hegney*, 138 Wn. App. 511, 542, 158 P.3d 1193

(2007), *review denied*, 152 Wn.2d 1034 (2004). Courts disfavor retroactivity. *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999), *as amended* (Oct. 28, 1999), *overturned due to legislative action on other grounds* (July 22, 2001). The presumption is overcome only when the legislature explicitly provides for retroactive application or an amendment is curative or remedial.⁵ *Id.* at 546. The United States Supreme Court has recognized the same. In *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982), a bankruptcy case, the Court summarized the well-established legal principles governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining:

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This court has often pointed out:

the first rule of construction is that legislation must be considered as addressed to the future, not to the past.... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights

⁵ Exceptions are made where retroactivity is expressed or implied in the legislation or where the statute is remedial or curative. *See State v. Jefferson*, 192 Wn.2d 225, 248, 429 P.3d 467 (2018). “A remedial statute is one which relates to practice, procedures, and remedies.” *T.K.*, 139 Wn.2d at 332-33. A legislative amendment is “curative only if it clarifies or technically corrects an ambiguous statute.” *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006), *as corrected* (Nov. 15, 2006). Jenks makes no plausible claim that ESSB 5288 is remedial or curative.

... unless such be “the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.”

Id. at 79-80 (alterations in original).

In that regard, Washington’s savings statute, RCW 10.01.040, presumptively “saves” offenses already committed and penalties or forfeitures already incurred from being affected by a substantive amendment or repeal of a criminal statute. *State v. Rose*, 191 Wn. App. 858, 860, 365 P.3d 756 (2015), *review denied*, 185 Wn.2d 1030 (2016). That statute states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

The savings clause “is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.” *State v. Gradt*, 192 Wn. App. 230, 233-34, 366 P.3d 462 (2016), *as amended* (Feb. 11, 2016) (quoting *State v. Ross*, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004)). RCW 10.01.040 applies to both repeals and amendments of criminal statutes. *Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010). In *State v. Kane*, 101 Wn. App. 607, 617-18, 5 P.3d 741 (2000), *as amended* (Aug. 4, 2000), Division One of this Court recognized:

The fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 718 P.2d 796 (1986). The saving statute is a basic principle of construction the Legislature is entitled to rely on when it makes changes to criminal and penal statutes. To ignore the presumption established by the saving statute is to introduce uncertainty into legislation and intrude into legislative prerogatives. For example, an amendatory statute that substitutes treatment for time spent in prison may well require fiscal or administrative adjustments. The Legislature may have decided that such changes should be phased in gradually as new cases arise. Or it may not have thought about timing at all. The Legislature is not obliged to express its thinking on such matters in its criminal and penal statutes. It is entitled to assume that the courts will enforce the saving statute and give prospective application to criminal and penal statutes that do not express a contrary intent.

However, since the savings statute is strictly construed,⁶ the legislature need not expressly state its intention for the statute to apply retroactively to *pending* prosecutions for crimes committed before the effective date of the amendment. *Ross*, 152 Wn.2d at 238. “Instead, such intent need only be expressed in words that fairly convey that intention.” *Id.* at 238.

In determining whether a statute applies retroactively, an appellate court may examine its “purpose and language, legislative history, and legislative bill reports.” *State v. Ramirez*, 140 Wn. App. 278, 289 n.7, 165 P.3d 61 (2007), *review denied*, 163 Wn.2d 1036 (2008). In the present case, the legislature did not express any intent that the repeal of RCW 9.94A.030(33)(o), was to apply retroactively. In fact, the legislative history imparts the opposite intent. The Senate first substitute bill would have allowed offenders the opportunity to be resentenced if second-degree robbery had been used as a predicate offense for sentencing those defendants as persistent offenders. Senate Bill Report, SB 5288, at 2 (Attach. B). However, the Senate subsequently removed that provision from the amendment. SSB 5288 AMD 161, at 1 (Attach. C); Senate Engrossed

⁶ Under the common law, all pending cases must be decided according to the current law “at the time of the decision.” *State v. Brewster*, 152 Wn. App. 856, 859, 218 P.3d 249 (2009).

First Substitute Bill 5288, as passed by the Senate on March 13, 2019; Senate Bill Report, ESSB 5288, at 1-4 (Attach. D). As enacted, ESSB 5288 removed second-degree robbery from the list of offenses that qualify as a “most serious offense” when sentencing persistent offenders, which became effective date of July 28, 2019.

Accordingly, RCW 9.94A.570 (Persistent Offender Accountability Act), RCW 9.94A.030(33) (“most serious offense” defined), RCW 9.94A.030(38)(a)(i) and (ii) (defining “persistent offender”), and ESSB 5288 are unambiguous and contain a clear legislative indication that the statutes’ terms are to be applied at the time of a defendant’s “sentencing,” when a trial court determines a defendant’s term of incarceration. ESSB 5288 does not alter the act of “sentencing” as the precipitating event for prospective application of the new legislation removing robbery as a “most serious offense.” ESSB 5288 states: “Persistent Offenders – Removing Robbery in the Second Degree.” That statute applies prospectively after its effective date of July 28, 2019, and it has no application to Jenks who was sentenced two years earlier in 2017.

Jenks’ reliance on *State v. Heath*, 85 Wn.2d 196, 197, 532 P.2d 621 (1975), is misplaced. In that case, Heath had his driver’s license revoked in a 1972 civil proceeding under the Washington Habitual Traffic Offenders Act. That statute was amended and became effective in July 1973. The

amendment allowed a trial court to stay a driver's license revocation if the offense involved alcohol and the offender was in treatment. *Id.* at 196. The superior court stayed Heath's revocation order because Heath was in treatment. The State argued on appeal that the new statute should be given only prospective application, but the Supreme Court held that the superior court did not error giving the statute retroactive application under general rules of statutory construction because it was "patently remedial." *Id.* at 198.

Thereafter, this Court distinguished *Heath* in *State v. Toney*, 103 Wn. App. 862, 862-63, 14 P.3d 826 (2000). In that case, the State appealed a trial court use of a new Drug Offender Sentencing Alternative (DOSA) for sentencing Toney for a crime committed before the effective date of the new sentencing alternative. In 1995, the legislature created DOSA as a sentencing alternative. In 1999, the legislature amended the statute to include those offenders who had a prior felony conviction, which took effect July 25, 1999. *Id.* at 827. Toney was charged with an offense which took place on June 22, 1999. *Id.* The superior court sentenced Toney under the 1999 amendment even though the State argued he was ineligible because the amendment to the DOSA statute was not in effect when Toney committed the crime. *Id.* at 864.

On appeal, *Toney* relied, in part, on *Heath. Id.* at 865. Judge Morgan, writing for this Court, rejected *Toney*'s argument and differentiated *Heath*, stating:

By its plain terms, this statute [RCW 10.01.040] says that when a criminal or penal statute is amended, its preamendment version applies to offenses before the amendment's effective date, "unless a contrary intention is expressly declared in the amendatory ... act[.]" DOSA is criminal and penal, and the 1999 amendments to it do not contain an express declaration on retroactivity. Accordingly, we are constrained to hold that the 1999 amendment does not apply to crimes committed before its effective date.

...

Toney relies on *State v. Grant*⁷ and *State v. Heath*, but neither of those cases governs this one. In *Heath*, RCW 10.01.040 seems to have been overlooked. In *Grant*, according to the Supreme Court, the statute in issue contained an express declaration on retroactivity.

Id. at 864-65 (internal footnote citations omitted).

Judge Morgan further observed:

It seems obvious that RCW 10.01.040 should have been noted, and either followed or distinguished, in the fifth paragraph of the *Heath* opinion. In that paragraph, however, the court cites only a California case and a New York case. *Heath*, 85 Wn.2d at 198, 532 P.2d 621. It appears, then, that the parties and the court overlooked RCW 10.01.040.

Id. at 865 n.12. *See also Ross*, 152 Wn.2d at 239 ("*Heath* did not directly implicate the savings clause since it pertained to amendments governing civil driver license revocations under the Washington Habitual Traffic

⁷ *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978).

Offenders Act); *Kane*, 101 Wn. App. at 615-16 (distinguishing *Heath* stating: “The court’s suggestion that an ameliorative sentencing statute should be applied retroactively in the face of a saving statute was dicta because the presumption against retroactivity established by RCW 10.01.040 was not at issue in *Heath*”).

Jenks further relies on *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994), for the proposition that an amendment to a statute which reduces punishment requires retroactive application. That case is easily distinguished. Jenks arguably focuses on the Supreme Court’s statement in *Wiley* that a legislative downgrading of a crime based upon a determination that the conduct is less culpable will ordinarily be given retroactive effect. *See Wiley*, 124 Wn.2d at 688. However, as recognized later and distinguished by our high court in *Ross*, the *Wiley* court did not consider the impact of RCW 10.01.040 on its decision. *See, Ross*, 152 Wn.2d at 240.

Moreover, *Wiley’s* comments about retroactivity were based upon pre-2000 versions of the Sentencing Reform Act of 1981 (SRA). In 2000, the legislature clarified its intent regarding retroactivity by enacting RCW 9.94A.345: “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” The law was designed to cure any ambiguity as to what

law to use when calculating a defendant's offender score for sentencing and "to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives." Laws of 2000, ch. 26, § 1.

Accordingly, under the SRA, a defendant must be sentenced in accordance with the law in effect at the time of his or her offense. *State v. Medina*, 180 Wn.2d 282, 287, 324 P.3d 682, 685 (2014) (the terms of a defendant's sentence are governed by the version of the SRA in effect when the crime was committed); *In re Carrier*, 173 Wn.2d 791, 808, 272 P.3d 209 (2012) (same); *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (same); *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.3d 792 (2003) (same).

By its plain terms, RCW 9.94A.345 does not limit its application to an offender score calculation. In this context, courts have applied RCW 9.94A.345 outside the setting of offender score calculations. *See e.g. State v. Coombes*, 191 Wn. App. 241, 250, 361 P.3d 270 (2015) (holding that a trial court's authority to impose community custody conditions "must be in accordance with the law in effect when the offense was committed," citing RCW 9.94A.345); *State v. Small*, 1 Wn. App.2d 254, 404 P.3d 543 (2017), *review denied*, 190 Wn.2d 1014 (2018) (in an ex post facto context, it was error to enhance the defendant's sentencing range since the

enhancement provision was not in existence at the time of the commission of crime based upon RCW 9.94A.345).

Applying RCW 10.01.040 in conjunction with RCW 9.94A.345, a court is required to sentence a defendant under the law in effect at the time the offense was committed, absent legislative intent to the contrary. These statutes, which were not addressed in *Wiley* or *Heath*, establish there is no retroactivity when the punishment for a crime is later reduced or repealed by the legislature for an offender already sentenced under a prior version of the law. *Heath* and *Wiley* do not apply to this case. Jenks' claim is without merit.

IV. CONCLUSION

Jenks has not overcome the presumption that the repeal of second-degree robbery as a "most serious offense" under ESSB 5288 is a substantive change in the law that applies only prospectively past the effective date of the legislation. The legislature did not explicitly (or implicitly) provide for retroactive application. To the contrary, it removed language from the passed bill that would have allowed for resentencing of individuals in Jenks' position. Under RCW 10.01.040 and RCW 9.94A.345,

Jenks is not entitled to retroactive application of ESSB 5288 and is not entitled to resentencing.

Dated this 24 day of September, 2019.

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Attorney for Respondent

ATTACHMENT A

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5288

Chapter 187, Laws of 2019

66th Legislature
2019 Regular Session

PERSISTENT OFFENDERS--REMOVING ROBBERY IN THE SECOND DEGREE

EFFECTIVE DATE: July 28, 2019

Passed by the Senate March 13, 2019
Yeas 29 Nays 20

KAREN KEISER
President of the Senate

Passed by the House April 16, 2019
Yeas 53 Nays 45

FRANK CHOPP
Speaker of the House of Representatives
Approved April 29, 2019 3:06 PM

JAY INSLEE
Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE SENATE BILL 5288 as passed by Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON
Secretary

FILED

April 30, 2019

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 5288

Passed Legislature - 2019 Regular Session

State of Washington 66th Legislature 2019 Regular Session

By Senate Law & Justice (originally sponsored by Senator Darneille)

READ FIRST TIME 02/22/19.

1 AN ACT Relating to removing robbery in the second degree from the
2 list of offenses that qualify an individual as a persistent offender;
3 and amending RCW 9.94A.030.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 9.94A.030 and 2018 c 166 s 3 are each amended to
6 read as follows:

7 Unless the context clearly requires otherwise, the definitions in
8 this section apply throughout this chapter.

9 (1) "Board" means the indeterminate sentence review board created
10 under chapter 9.95 RCW.

11 (2) "Collect," or any derivative thereof, "collect and remit," or
12 "collect and deliver," when used with reference to the department,
13 means that the department, either directly or through a collection
14 agreement authorized by RCW 9.94A.760, is responsible for monitoring
15 and enforcing the offender's sentence with regard to the legal
16 financial obligation, receiving payment thereof from the offender,
17 and, consistent with current law, delivering daily the entire payment
18 to the superior court clerk without depositing it in a departmental
19 account.

20 (3) "Commission" means the sentencing guidelines commission.

1 (4) "Community corrections officer" means an employee of the
2 department who is responsible for carrying out specific duties in
3 supervision of sentenced offenders and monitoring of sentence
4 conditions.

5 (5) "Community custody" means that portion of an offender's
6 sentence of confinement in lieu of earned release time or imposed as
7 part of a sentence under this chapter and served in the community
8 subject to controls placed on the offender's movement and activities
9 by the department.

10 (6) "Community protection zone" means the area within eight
11 hundred eighty feet of the facilities and grounds of a public or
12 private school.

13 (7) "Community restitution" means compulsory service, without
14 compensation, performed for the benefit of the community by the
15 offender.

16 (8) "Confinement" means total or partial confinement.

17 (9) "Conviction" means an adjudication of guilt pursuant to Title
18 10 or 13 RCW and includes a verdict of guilty, a finding of guilty,
19 and acceptance of a plea of guilty.

20 (10) "Crime-related prohibition" means an order of a court
21 prohibiting conduct that directly relates to the circumstances of the
22 crime for which the offender has been convicted, and shall not be
23 construed to mean orders directing an offender affirmatively to
24 participate in rehabilitative programs or to otherwise perform
25 affirmative conduct. However, affirmative acts necessary to monitor
26 compliance with the order of a court may be required by the
27 department.

28 (11) "Criminal history" means the list of a defendant's prior
29 convictions and juvenile adjudications, whether in this state, in
30 federal court, or elsewhere, and any issued certificates of
31 restoration of opportunity pursuant to RCW 9.97.020.

32 (a) The history shall include, where known, for each conviction
33 (i) whether the defendant has been placed on probation and the length
34 and terms thereof; and (ii) whether the defendant has been
35 incarcerated and the length of incarceration.

36 (b) A conviction may be removed from a defendant's criminal
37 history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640,
38 9.95.240, or a similar out-of-state statute, or if the conviction has
39 been vacated pursuant to a governor's pardon.

1 (c) The determination of a defendant's criminal history is
2 distinct from the determination of an offender score. A prior
3 conviction that was not included in an offender score calculated
4 pursuant to a former version of the sentencing reform act remains
5 part of the defendant's criminal history.

6 (12) "Criminal street gang" means any ongoing organization,
7 association, or group of three or more persons, whether formal or
8 informal, having a common name or common identifying sign or symbol,
9 having as one of its primary activities the commission of criminal
10 acts, and whose members or associates individually or collectively
11 engage in or have engaged in a pattern of criminal street gang
12 activity. This definition does not apply to employees engaged in
13 concerted activities for their mutual aid and protection, or to the
14 activities of labor and bona fide nonprofit organizations or their
15 members or agents.

16 (13) "Criminal street gang associate or member" means any person
17 who actively participates in any criminal street gang and who
18 intentionally promotes, furthers, or assists in any criminal act by
19 the criminal street gang.

20 (14) "Criminal street gang-related offense" means any felony or
21 misdemeanor offense, whether in this state or elsewhere, that is
22 committed for the benefit of, at the direction of, or in association
23 with any criminal street gang, or is committed with the intent to
24 promote, further, or assist in any criminal conduct by the gang, or
25 is committed for one or more of the following reasons:

26 (a) To gain admission, prestige, or promotion within the gang;

27 (b) To increase or maintain the gang's size, membership,
28 prestige, dominance, or control in any geographical area;

29 (c) To exact revenge or retribution for the gang or any member of
30 the gang;

31 (d) To obstruct justice, or intimidate or eliminate any witness
32 against the gang or any member of the gang;

33 (e) To directly or indirectly cause any benefit, aggrandizement,
34 gain, profit, or other advantage for the gang, its reputation,
35 influence, or membership; or

36 (f) To provide the gang with any advantage in, or any control or
37 dominance over any criminal market sector, including, but not limited
38 to, manufacturing, delivering, or selling any controlled substance
39 (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen
40 property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88

1 RCW); human trafficking (RCW 9A.40.100); promoting commercial sexual
2 abuse of a minor (RCW 9.68A.101); or promoting pornography (chapter
3 9.68 RCW).

4 (15) "Day fine" means a fine imposed by the sentencing court that
5 equals the difference between the offender's net daily income and the
6 reasonable obligations that the offender has for the support of the
7 offender and any dependents.

8 (16) "Day reporting" means a program of enhanced supervision
9 designed to monitor the offender's daily activities and compliance
10 with sentence conditions, and in which the offender is required to
11 report daily to a specific location designated by the department or
12 the sentencing court.

13 (17) "Department" means the department of corrections.

14 (18) "Determinate sentence" means a sentence that states with
15 exactitude the number of actual years, months, or days of total
16 confinement, of partial confinement, of community custody, the number
17 of actual hours or days of community restitution work, or dollars or
18 terms of a legal financial obligation. The fact that an offender
19 through earned release can reduce the actual period of confinement
20 shall not affect the classification of the sentence as a determinate
21 sentence.

22 (19) "Disposable earnings" means that part of the earnings of an
23 offender remaining after the deduction from those earnings of any
24 amount required by law to be withheld. For the purposes of this
25 definition, "earnings" means compensation paid or payable for
26 personal services, whether denominated as wages, salary, commission,
27 bonuses, or otherwise, and, notwithstanding any other provision of
28 law making the payments exempt from garnishment, attachment, or other
29 process to satisfy a court-ordered legal financial obligation,
30 specifically includes periodic payments pursuant to pension or
31 retirement programs, or insurance policies of any type, but does not
32 include payments made under Title 50 RCW, except as provided in RCW
33 50.40.020 and 50.40.050, or Title 74 RCW.

34 (20) "Domestic violence" has the same meaning as defined in RCW
35 10.99.020 and 26.50.010.

36 (21) "Drug offender sentencing alternative" is a sentencing
37 option available to persons convicted of a felony offense other than
38 a violent offense or a sex offense and who are eligible for the
39 option under RCW 9.94A.660.

40 (22) "Drug offense" means:

1 (a) Any felony violation of chapter 69.50 RCW except possession
2 of a controlled substance (RCW 69.50.4013) or forged prescription for
3 a controlled substance (RCW 69.50.403);

4 (b) Any offense defined as a felony under federal law that
5 relates to the possession, manufacture, distribution, or
6 transportation of a controlled substance; or

7 (c) Any out-of-state conviction for an offense that under the
8 laws of this state would be a felony classified as a drug offense
9 under (a) of this subsection.

10 (23) "Earned release" means earned release from confinement as
11 provided in RCW 9.94A.728.

12 (24) "Electronic monitoring" means tracking the location of an
13 individual, whether pretrial or posttrial, through the use of
14 technology that is capable of determining or identifying the
15 monitored individual's presence or absence at a particular location
16 including, but not limited to:

17 (a) Radio frequency signaling technology, which detects if the
18 monitored individual is or is not at an approved location and
19 notifies the monitoring agency of the time that the monitored
20 individual either leaves the approved location or tampers with or
21 removes the monitoring device; or

22 (b) Active or passive global positioning system technology, which
23 detects the location of the monitored individual and notifies the
24 monitoring agency of the monitored individual's location.

25 (25) "Escape" means:

26 (a) Sexually violent predator escape (RCW 9A.76.115), escape in
27 the first degree (RCW 9A.76.110), escape in the second degree (RCW
28 9A.76.120), willful failure to return from furlough (RCW 72.66.060),
29 willful failure to return from work release (RCW 72.65.070), or
30 willful failure to be available for supervision by the department
31 while in community custody (RCW 72.09.310); or

32 (b) Any federal or out-of-state conviction for an offense that
33 under the laws of this state would be a felony classified as an
34 escape under (a) of this subsection.

35 (26) "Felony traffic offense" means:

36 (a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW
37 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-
38 run injury-accident (RCW 46.52.020(4)), felony driving while under
39 the influence of intoxicating liquor or any drug (RCW 46.61.502(6)),

1 or felony physical control of a vehicle while under the influence of
2 intoxicating liquor or any drug (RCW 46.61.504(6)); or

3 (b) Any federal or out-of-state conviction for an offense that
4 under the laws of this state would be a felony classified as a felony
5 traffic offense under (a) of this subsection.

6 (27) "Fine" means a specific sum of money ordered by the
7 sentencing court to be paid by the offender to the court over a
8 specific period of time.

9 (28) "First-time offender" means any person who has no prior
10 convictions for a felony and is eligible for the first-time offender
11 waiver under RCW 9.94A.650.

12 (29) "Home detention" is a subset of electronic monitoring and
13 means a program of partial confinement available to offenders wherein
14 the offender is confined in a private residence twenty-four hours a
15 day, unless an absence from the residence is approved, authorized, or
16 otherwise permitted in the order by the court or other supervising
17 agency that ordered home detention, and the offender is subject to
18 electronic monitoring.

19 (30) "Homelessness" or "homeless" means a condition where an
20 individual lacks a fixed, regular, and adequate nighttime residence
21 and who has a primary nighttime residence that is:

22 (a) A supervised, publicly or privately operated shelter designed
23 to provide temporary living accommodations;

24 (b) A public or private place not designed for, or ordinarily
25 used as, a regular sleeping accommodation for human beings; or

26 (c) A private residence where the individual stays as a transient
27 invitee.

28 (31) "Legal financial obligation" means a sum of money that is
29 ordered by a superior court of the state of Washington for legal
30 financial obligations which may include restitution to the victim,
31 statutorily imposed crime victims' compensation fees as assessed
32 pursuant to RCW 7.68.035, court costs, county or interlocal drug
33 funds, court-appointed attorneys' fees, and costs of defense, fines,
34 and any other financial obligation that is assessed to the offender
35 as a result of a felony conviction. Upon conviction for vehicular
36 assault while under the influence of intoxicating liquor or any drug,
37 RCW 46.61.522(1)(b), or vehicular homicide while under the influence
38 of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal
39 financial obligations may also include payment to a public agency of

1 the expense of an emergency response to the incident resulting in the
2 conviction, subject to RCW 38.52.430.

3 (32) "Minor child" means a biological or adopted child of the
4 offender who is under age eighteen at the time of the offender's
5 current offense.

6 (33) "Most serious offense" means any of the following felonies
7 or a felony attempt to commit any of the following felonies:

8 (a) Any felony defined under any law as a class A felony or
9 criminal solicitation of or criminal conspiracy to commit a class A
10 felony;

11 (b) Assault in the second degree;

12 (c) Assault of a child in the second degree;

13 (d) Child molestation in the second degree;

14 (e) Controlled substance homicide;

15 (f) Extortion in the first degree;

16 (g) Incest when committed against a child under age fourteen;

17 (h) Indecent liberties;

18 (i) Kidnapping in the second degree;

19 (j) Leading organized crime;

20 (k) Manslaughter in the first degree;

21 (l) Manslaughter in the second degree;

22 (m) Promoting prostitution in the first degree;

23 (n) Rape in the third degree;

24 (o) ~~((Robbery in the second degree;~~

25 ~~(p))~~ Sexual exploitation;

26 ~~((q))~~ (p) Vehicular assault, when caused by the operation or
27 driving of a vehicle by a person while under the influence of
28 intoxicating liquor or any drug or by the operation or driving of a
29 vehicle in a reckless manner;

30 ~~((r))~~ (q) Vehicular homicide, when proximately caused by the
31 driving of any vehicle by any person while under the influence of
32 intoxicating liquor or any drug as defined by RCW 46.61.502, or by
33 the operation of any vehicle in a reckless manner;

34 ~~((s))~~ (r) Any other class B felony offense with a finding of
35 sexual motivation;

36 ~~((t))~~ (s) Any other felony with a deadly weapon verdict under
37 RCW 9.94A.825;

38 ~~((u))~~ (t) Any felony offense in effect at any time prior to
39 December 2, 1993, that is comparable to a most serious offense under
40 this subsection, or any federal or out-of-state conviction for an

1 offense that under the laws of this state would be a felony
2 classified as a most serious offense under this subsection;

3 ~~((v))~~ (u)(i) A prior conviction for indecent liberties under
4 RCW 9A.44.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex.
5 sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b),
6 and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW
7 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986,
8 until July 1, 1988;

9 (ii) A prior conviction for indecent liberties under RCW
10 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988,
11 if: (A) The crime was committed against a child under the age of
12 fourteen; or (B) the relationship between the victim and perpetrator
13 is included in the definition of indecent liberties under RCW
14 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27,
15 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25,
16 1993, through July 27, 1997;

17 ~~((w))~~ (v) Any out-of-state conviction for a felony offense with
18 a finding of sexual motivation if the minimum sentence imposed was
19 ten years or more; provided that the out-of-state felony offense must
20 be comparable to a felony offense under this title and Title 9A RCW
21 and the out-of-state definition of sexual motivation must be
22 comparable to the definition of sexual motivation contained in this
23 section.

24 (34) "Nonviolent offense" means an offense which is not a violent
25 offense.

26 (35) "Offender" means a person who has committed a felony
27 established by state law and is eighteen years of age or older or is
28 less than eighteen years of age but whose case is under superior
29 court jurisdiction under RCW 13.04.030 or has been transferred by the
30 appropriate juvenile court to a criminal court pursuant to RCW
31 13.40.110. In addition, for the purpose of community custody
32 requirements under this chapter, "offender" also means a misdemeanor
33 or gross misdemeanor probationer ordered by a superior court to
34 probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and
35 supervised by the department pursuant to RCW 9.94A.501 and
36 9.94A.5011. Throughout this chapter, the terms "offender" and
37 "defendant" are used interchangeably.

38 (36) "Partial confinement" means confinement for no more than one
39 year in a facility or institution operated or utilized under contract
40 by the state or any other unit of government, or, if home detention,

1 electronic monitoring, or work crew has been ordered by the court or
2 home detention has been ordered by the department as part of the
3 parenting program or the graduated reentry program, in an approved
4 residence, for a substantial portion of each day with the balance of
5 the day spent in the community. Partial confinement includes work
6 release, home detention, work crew, electronic monitoring, and a
7 combination of work crew, electronic monitoring, and home detention.

8 (37) "Pattern of criminal street gang activity" means:

9 (a) The commission, attempt, conspiracy, or solicitation of, or
10 any prior juvenile adjudication of or adult conviction of, two or
11 more of the following criminal street gang-related offenses:

12 (i) Any "serious violent" felony offense as defined in this
13 section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a
14 Child 1 (RCW 9A.36.120);

15 (ii) Any "violent" offense as defined by this section, excluding
16 Assault of a Child 2 (RCW 9A.36.130);

17 (iii) Deliver or Possession with Intent to Deliver a Controlled
18 Substance (chapter 69.50 RCW);

19 (iv) Any violation of the firearms and dangerous weapon act
20 (chapter 9.41 RCW);

21 (v) Theft of a Firearm (RCW 9A.56.300);

22 (vi) Possession of a Stolen Firearm (RCW 9A.56.310);

23 (vii) Malicious Harassment (RCW 9A.36.080);

24 (viii) Harassment where a subsequent violation or deadly threat
25 is made (RCW 9A.46.020(2)(b));

26 (ix) Criminal Gang Intimidation (RCW 9A.46.120);

27 (x) Any felony conviction by a person eighteen years of age or
28 older with a special finding of involving a juvenile in a felony
29 offense under RCW 9.94A.833;

30 (xi) Residential Burglary (RCW 9A.52.025);

31 (xii) Burglary 2 (RCW 9A.52.030);

32 (xiii) Malicious Mischief 1 (RCW 9A.48.070);

33 (xiv) Malicious Mischief 2 (RCW 9A.48.080);

34 (xv) Theft of a Motor Vehicle (RCW 9A.56.065);

35 (xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);

36 (xvii) Taking a Motor Vehicle Without Permission 1 (RCW
37 9A.56.070);

38 (xviii) Taking a Motor Vehicle Without Permission 2 (RCW
39 9A.56.075);

40 (xix) Extortion 1 (RCW 9A.56.120);

- 1 (xx) Extortion 2 (RCW 9A.56.130);
- 2 (xxi) Intimidating a Witness (RCW 9A.72.110);
- 3 (xxii) Tampering with a Witness (RCW 9A.72.120);
- 4 (xxiii) Reckless Endangerment (RCW 9A.36.050);
- 5 (xxiv) Coercion (RCW 9A.36.070);
- 6 (xxv) Harassment (RCW 9A.46.020); or
- 7 (xxvi) Malicious Mischief 3 (RCW 9A.48.090);

8 (b) That at least one of the offenses listed in (a) of this
9 subsection shall have occurred after July 1, 2008;

10 (c) That the most recent committed offense listed in (a) of this
11 subsection occurred within three years of a prior offense listed in
12 (a) of this subsection; and

13 (d) Of the offenses that were committed in (a) of this
14 subsection, the offenses occurred on separate occasions or were
15 committed by two or more persons.

16 (38) "Persistent offender" is an offender who:

17 (a)(i) Has been convicted in this state of any felony considered
18 a most serious offense; and

19 (ii) Has, before the commission of the offense under (a) of this
20 subsection, been convicted as an offender on at least two separate
21 occasions, whether in this state or elsewhere, of felonies that under
22 the laws of this state would be considered most serious offenses and
23 would be included in the offender score under RCW 9.94A.525; provided
24 that of the two or more previous convictions, at least one conviction
25 must have occurred before the commission of any of the other most
26 serious offenses for which the offender was previously convicted; or

27 (b)(i) Has been convicted of: (A) Rape in the first degree, rape
28 of a child in the first degree, child molestation in the first
29 degree, rape in the second degree, rape of a child in the second
30 degree, or indecent liberties by forcible compulsion; (B) any of the
31 following offenses with a finding of sexual motivation: Murder in the
32 first degree, murder in the second degree, homicide by abuse,
33 kidnapping in the first degree, kidnapping in the second degree,
34 assault in the first degree, assault in the second degree, assault of
35 a child in the first degree, assault of a child in the second degree,
36 or burglary in the first degree; or (C) an attempt to commit any
37 crime listed in this subsection (38)(b)(i); and

38 (ii) Has, before the commission of the offense under (b)(i) of
39 this subsection, been convicted as an offender on at least one
40 occasion, whether in this state or elsewhere, of an offense listed in

1 (b)(i) of this subsection or any federal or out-of-state offense or
2 offense under prior Washington law that is comparable to the offenses
3 listed in (b)(i) of this subsection. A conviction for rape of a child
4 in the first degree constitutes a conviction under (b)(i) of this
5 subsection only when the offender was sixteen years of age or older
6 when the offender committed the offense. A conviction for rape of a
7 child in the second degree constitutes a conviction under (b)(i) of
8 this subsection only when the offender was eighteen years of age or
9 older when the offender committed the offense.

10 (39) "Predatory" means: (a) The perpetrator of the crime was a
11 stranger to the victim, as defined in this section; (b) the
12 perpetrator established or promoted a relationship with the victim
13 prior to the offense and the victimization of the victim was a
14 significant reason the perpetrator established or promoted the
15 relationship; or (c) the perpetrator was: (i) A teacher, counselor,
16 volunteer, or other person in authority in any public or private
17 school and the victim was a student of the school under his or her
18 authority or supervision. For purposes of this subsection, "school"
19 does not include home-based instruction as defined in RCW
20 28A.225.010; (ii) a coach, trainer, volunteer, or other person in
21 authority in any recreational activity and the victim was a
22 participant in the activity under his or her authority or
23 supervision; (iii) a pastor, elder, volunteer, or other person in
24 authority in any church or religious organization, and the victim was
25 a member or participant of the organization under his or her
26 authority; or (iv) a teacher, counselor, volunteer, or other person
27 in authority providing home-based instruction and the victim was a
28 student receiving home-based instruction while under his or her
29 authority or supervision. For purposes of this subsection: (A) "Home-
30 based instruction" has the same meaning as defined in RCW
31 28A.225.010; and (B) "teacher, counselor, volunteer, or other person
32 in authority" does not include the parent or legal guardian of the
33 victim.

34 (40) "Private school" means a school regulated under chapter
35 28A.195 or 28A.205 RCW.

36 (41) "Public school" has the same meaning as in RCW 28A.150.010.

37 (42) "Repetitive domestic violence offense" means any:

38 (a)(i) Domestic violence assault that is not a felony offense
39 under RCW 9A.36.041;

1 (ii) Domestic violence violation of a no-contact order under
2 chapter 10.99 RCW that is not a felony offense;

3 (iii) Domestic violence violation of a protection order under
4 chapter 26.09, 26.10, (~~26.26~~) 26.26B, or 26.50 RCW that is not a
5 felony offense;

6 (iv) Domestic violence harassment offense under RCW 9A.46.020
7 that is not a felony offense; or

8 (v) Domestic violence stalking offense under RCW 9A.46.110 that
9 is not a felony offense; or

10 (b) Any federal, out-of-state, tribal court, military, county, or
11 municipal conviction for an offense that under the laws of this state
12 would be classified as a repetitive domestic violence offense under
13 (a) of this subsection.

14 (43) "Restitution" means a specific sum of money ordered by the
15 sentencing court to be paid by the offender to the court over a
16 specified period of time as payment of damages. The sum may include
17 both public and private costs.

18 (44) "Risk assessment" means the application of the risk
19 instrument recommended to the department by the Washington state
20 institute for public policy as having the highest degree of
21 predictive accuracy for assessing an offender's risk of reoffense.

22 (45) "Serious traffic offense" means:

23 (a) Nonfelony driving while under the influence of intoxicating
24 liquor or any drug (RCW 46.61.502), nonfelony actual physical control
25 while under the influence of intoxicating liquor or any drug (RCW
26 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an
27 attended vehicle (RCW 46.52.020(5)); or

28 (b) Any federal, out-of-state, county, or municipal conviction
29 for an offense that under the laws of this state would be classified
30 as a serious traffic offense under (a) of this subsection.

31 (46) "Serious violent offense" is a subcategory of violent
32 offense and means:

33 (a)(i) Murder in the first degree;

34 (ii) Homicide by abuse;

35 (iii) Murder in the second degree;

36 (iv) Manslaughter in the first degree;

37 (v) Assault in the first degree;

38 (vi) Kidnapping in the first degree;

39 (vii) Rape in the first degree;

40 (viii) Assault of a child in the first degree; or

1 (ix) An attempt, criminal solicitation, or criminal conspiracy to
2 commit one of these felonies; or

3 (b) Any federal or out-of-state conviction for an offense that
4 under the laws of this state would be a felony classified as a
5 serious violent offense under (a) of this subsection.

6 (47) "Sex offense" means:

7 (a)(i) A felony that is a violation of chapter 9A.44 RCW other
8 than RCW 9A.44.132;

9 (ii) A violation of RCW 9A.64.020;

10 (iii) A felony that is a violation of chapter 9.68A RCW other
11 than RCW 9.68A.080;

12 (iv) A felony that is, under chapter 9A.28 RCW, a criminal
13 attempt, criminal solicitation, or criminal conspiracy to commit such
14 crimes; or

15 (v) A felony violation of RCW 9A.44.132(1) (failure to register
16 as a sex offender) if the person has been convicted of violating RCW
17 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130
18 prior to June 10, 2010, on at least one prior occasion;

19 (b) Any conviction for a felony offense in effect at any time
20 prior to July 1, 1976, that is comparable to a felony classified as a
21 sex offense in (a) of this subsection;

22 (c) A felony with a finding of sexual motivation under RCW
23 9.94A.835 or 13.40.135; or

24 (d) Any federal or out-of-state conviction for an offense that
25 under the laws of this state would be a felony classified as a sex
26 offense under (a) of this subsection.

27 (48) "Sexual motivation" means that one of the purposes for which
28 the defendant committed the crime was for the purpose of his or her
29 sexual gratification.

30 (49) "Standard sentence range" means the sentencing court's
31 discretionary range in imposing a nonappealable sentence.

32 (50) "Statutory maximum sentence" means the maximum length of
33 time for which an offender may be confined as punishment for a crime
34 as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute
35 defining the crime, or other statute defining the maximum penalty for
36 a crime.

37 (51) "Stranger" means that the victim did not know the offender
38 twenty-four hours before the offense.

39 (52) "Total confinement" means confinement inside the physical
40 boundaries of a facility or institution operated or utilized under

1 contract by the state or any other unit of government for twenty-four
2 hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

3 (53) "Transition training" means written and verbal instructions
4 and assistance provided by the department to the offender during the
5 two weeks prior to the offender's successful completion of the work
6 ethic camp program. The transition training shall include
7 instructions in the offender's requirements and obligations during
8 the offender's period of community custody.

9 (54) "Victim" means any person who has sustained emotional,
10 psychological, physical, or financial injury to person or property as
11 a direct result of the crime charged.

12 (55) "Violent offense" means:

13 (a) Any of the following felonies:

14 (i) Any felony defined under any law as a class A felony or an
15 attempt to commit a class A felony;

16 (ii) Criminal solicitation of or criminal conspiracy to commit a
17 class A felony;

18 (iii) Manslaughter in the first degree;

19 (iv) Manslaughter in the second degree;

20 (v) Indecent liberties if committed by forcible compulsion;

21 (vi) Kidnapping in the second degree;

22 (vii) Arson in the second degree;

23 (viii) Assault in the second degree;

24 (ix) Assault of a child in the second degree;

25 (x) Extortion in the first degree;

26 (xi) Robbery in the second degree;

27 (xii) Drive-by shooting;

28 (xiii) Vehicular assault, when caused by the operation or driving
29 of a vehicle by a person while under the influence of intoxicating
30 liquor or any drug or by the operation or driving of a vehicle in a
31 reckless manner; and

32 (xiv) Vehicular homicide, when proximately caused by the driving
33 of any vehicle by any person while under the influence of
34 intoxicating liquor or any drug as defined by RCW 46.61.502, or by
35 the operation of any vehicle in a reckless manner;

36 (b) Any conviction for a felony offense in effect at any time
37 prior to July 1, 1976, that is comparable to a felony classified as a
38 violent offense in (a) of this subsection; and

1 (c) Any federal or out-of-state conviction for an offense that
2 under the laws of this state would be a felony classified as a
3 violent offense under (a) or (b) of this subsection.

4 (56) "Work crew" means a program of partial confinement
5 consisting of civic improvement tasks for the benefit of the
6 community that complies with RCW 9.94A.725.

7 (57) "Work ethic camp" means an alternative incarceration program
8 as provided in RCW 9.94A.690 designed to reduce recidivism and lower
9 the cost of corrections by requiring offenders to complete a
10 comprehensive array of real-world job and vocational experiences,
11 character-building work ethics training, life management skills
12 development, substance abuse rehabilitation, counseling, literacy
13 training, and basic adult education.

14 (58) "Work release" means a program of partial confinement
15 available to offenders who are employed or engaged as a student in a
16 regular course of study at school.

Passed by the Senate March 13, 2019.

Passed by the House April 16, 2019.

Approved by the Governor April 29, 2019.

Filed in Office of Secretary of State April 30, 2019.

--- END ---

ATTACHMENT B

SENATE BILL REPORT

SB 5288

As Reported by Senate Committee On:
Law & Justice, February 21, 2019

Title: An act relating to persistent offenders.

Brief Description: Sentencing for persistent offenders.

Sponsors: Senator Darneille.

Brief History:

Committee Activity: Law & Justice: 2/14/19, 2/21/19 [DPS, DNP].

Brief Summary of First Substitute Bill

- Removes robbery in the second degree from the list of three-strike offenses requiring a life sentence without parole.
- Requires resentencing of offenders previously sentenced to life without parole as a result of a conviction for robbery in the second degree.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5288 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; Holy and Wilson, L..

Staff: Shani Bauer (786-7468)

Background: In Washington, a persistent offender must be sentenced to life in prison without parole when the person is convicted of a most serious offense on three separate occasions or when the person is convicted of certain sex offenses on at least two separate occasions. These offenses are generally referred to as three-strike or two-strike offenses.

Three-strike offenses—most serious offenses—include:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- assault in the second degree;
- assault of a child in the second degree;
- child molestation in the second degree;
- controlled substance homicide;
- extortion in the first degree;
- incest when committed against a child under age fourteen;
- indecent liberties;
- kidnapping in the second degree;
- leading organized crime;
- manslaughter in the first degree;
- manslaughter in the second degree;
- promoting prostitution in the first degree;
- rape in the third degree;
- robbery in the second degree;
- sexual exploitation;
- vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, or by the operation of any vehicle in a reckless manner;
- any other class B felony offense with a finding of sexual motivation; and
- any other felony with a deadly weapon verdict.

Two-strike offenses include:

- rape in the first degree;
- rape of a child in the first degree;
- child molestation in the first degree;
- rape in the second degree;
- rape of a child in the second degree;
- indecent liberties by forcible compulsion;
- any of the following when committed with sexual motivation: murder in the first or second degree, homicide by abuse, kidnapping in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, or burglary in the second degree; and
- an attempt to commit any of the above crimes.

Assault in the second degree is a class B felony and includes circumstances not amounting to assault in the first degree—intent to inflict great bodily harm—and where the person intentionally assaults another and recklessly inflicts substantial bodily harm.

Robbery in the second degree is a Class B felony. A person commits robbery in the second degree when the person unlawfully takes personal property from another by the use or threatened use of force in circumstances not amounting to robbery in the first degree. A person is guilty of robbery in the first degree when the person is armed with a deadly weapon

or what appears to be a deadly weapon, the person inflicts bodily injury, or when the person commits robbery against a financial institution.

Summary of Bill (First Substitute): Robbery in the second degree is deleted from the definition of a most serious offense, thereby removing the offense as a three strike offense.

Any offender previously sentenced as a persistent offender when one of the offenses resulting in life without parole was robbery in the second degree shall be entitled to a resentencing hearing. At resentencing, the court must sentence the offender as if robbery in the second degree was not a most serious offense at the time the original sentence was imposed.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute): Assault in the second degree is restored as a most serious offense for the purposes of determining whether an offender is a persistent offender.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: There have been several movements over time to address the three-strikes law. I-593 in 1993 came about when there was a concern about a very high crime rate. Research has not shown that laws such as these make a difference in the crime rate.

Offenders should be held accountable, but should not have to spend their entire life in prison. Fifty-three percent of those serving life for a three-strike offense are over the age of fifty and have a reduced recidivism rate.

There is racial disparity in how the persistent offender statute is enforced. Four percent of the population is African American yet a disproportionate number have been convicted as persistent offenders. Several offenders could be resentenced with a significant cost savings for taxpayers.

CON: These two offenses are especially serious and significant for the person who is a victim. This is not the second time they have committed these serious offenses, but the third. There needs to be a point where we protect the community from these individuals.

OTHER: We are generally opposed to the bill as drafted, but amenable to looking at robbery 2. Assault 2 runs the gamut from a fist fight to strangulation. Assault 2 is also regularly plead down from an assault 1.

This could potentially require a large number of offenders to be brought back for resentencing which would be a cost for local government. We should not forget that many of

these individuals were involved in crimes that involved victims. While victims may not be here to testify, it is the prosecutor who will hear from the victim when the offender is granted resentencing. The prosecutor has discretion whether to seek a third strike which already prevents egregious cases.

Persons Testifying: PRO: Senator Jeannie Darneille, Prime Sponsor; Adam Paczkowski, Washington Defenders Association.

CON: James McMahan, Washington Association Sheriffs and Police Chiefs.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: No one.

ATTACHMENT C

5288-S AMS PADD S2657.1

SSB 5288 - S AMD 161
By Senator Padden

ADOPTED 03/13/2019

1 Beginning on page 15, line 17, strike all of section 2

SSB 5288 - S AMD 161
By Senator Padden

ADOPTED 03/13/2019

2 On page 1, line 1 of the title, after "offenders;" insert "and"

3 On page 1, beginning on line 1 of the title, after "9.94A.030"
4 strike all material through "date" on line 3

EFFECT: Removes provisions requiring offenders be resentenced if Robbery 2 was used as a basis for finding the offender was a persistent offender prior to the effective date of the bill.

--- END ---

ATTACHMENT D

SENATE BILL REPORT

ESSB 5288

As Passed Senate, March 13, 2019

Title: An act relating to removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender.

Brief Description: Removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senator Darneille).

Brief History:

Committee Activity: Law & Justice: 2/14/19, 2/21/19 [DPS, DNP].

Floor Activity:

Passed Senate: 3/13/19, 29-20.

Brief Summary of Engrossed First Substitute Bill

- Removes robbery in the second degree from the list of three-strike offenses requiring a life sentence without parole.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5288 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; Holy and Wilson, L...

Staff: Shani Bauer (786-7468)

Background: In Washington, a persistent offender must be sentenced to life in prison without parole when the person is convicted of a most serious offense on three separate occasions or when the person is convicted of certain sex offenses on at least two separate occasions. These offenses are generally referred to as three-strike or two-strike offenses.

Three-strike offenses—most serious offenses—include:

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- any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- assault in the second degree;
- assault of a child in the second degree;
- child molestation in the second degree;
- controlled substance homicide;
- extortion in the first degree;
- incest when committed against a child under age fourteen;
- indecent liberties;
- kidnapping in the second degree;
- leading organized crime;
- manslaughter in the first degree;
- manslaughter in the second degree;
- promoting prostitution in the first degree;
- rape in the third degree;
- robbery in the second degree;
- sexual exploitation;
- vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, or by the operation of any vehicle in a reckless manner;
- any other class B felony offense with a finding of sexual motivation; and
- any other felony with a deadly weapon verdict.

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- rape in the first degree;
- rape of a child in the first degree;
- child molestation in the first degree;
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- rape of a child in the second degree;
- indecent liberties by forcible compulsion;
- any of the following when committed with sexual motivation: murder in the first or second degree, homicide by abuse, kidnapping in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, or burglary in the second degree; and
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or what appears to be a deadly weapon, the person inflicts bodily injury, or when the person commits robbery against a financial institution.

Summary of Engrossed First Substitute Bill: Robbery in the second degree is deleted from the definition of a most serious offense, thereby removing the offense as a three strike offense.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: There have been several movements over time to address the three-strikes law. I-593 in 1993 came about when there was a concern about a very high crime rate. Research has not shown that laws such as these make a difference in the crime rate.

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CON: These two offenses are especially serious and significant for the person who is a victim. This is not the second time they have committed these serious offenses, but the third. There needs to be a point where we protect the community from these individuals.

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CON: James McMahan, Washington Association Sheriffs and Police Chiefs.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: No one.

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN JENKS,

Respondent.

NO. 52450-3-II

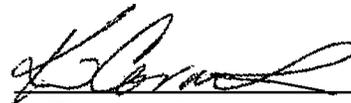
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 24, 2019, I e-mailed a copy of the Supplemental Brief of Respondent to Appellant's Second Supplemental Brief in this matter, pursuant to the parties' agreement, to:

Jan Trasen
wapofficemail@washapp.org

9/24/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

September 24, 2019 - 10:40 AM

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