

No. 34141-7-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**CORNELL SHEGOG,**

**Appellant/Defendant.**

*See*  
2011 JUN 27 11:21  
CLERK OF COURT  
SUPERIOR COURT  
PIERCE COUNTY, WASH.

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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NO. 05-1-00152-8**

**THE HONORABLE FREDERICK W. FLEMING,**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

	<u>Page(s)</u>
<b>A. ASSIGNMENTS OF ERROR.....</b>	<b>1-2</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....</b>	<b>3-5</b>
<b>C. STATEMENT OF THE CASE.....</b>	<b>5-21</b>
<b>1. Procedural History.....</b>	<b>5-8</b>
<b>2. Statement of the Facts.....</b>	<b>8-9</b>
<b>3. Summary of Trial Testimony.....</b>	<b>9-17</b>
<b>4. POAA Hearing and Ruling.....</b>	<b>17-18</b>
<b>D. ARGUMENT.....</b>	<b>21-77</b>
<b>1. THE STATE’S INITIAL CHARGING DECISION CONSTITUTED AN ABUSE OF DISCRETION UNDER RCW 9.94A.411.....</b>	<b>21</b>
<b>2. THE STATE’S INITIAL CHARGING DECISION DENIED MR. SHEGOG HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS.....</b>	<b>26</b>

**TABLE OF CONTENTS (continued)**

	<u>Page(s)</u>
<b>3. APPLICATION OF THE ROBBERY STATUTE TO THE FACTS OF THIS CASE LEAD TO AN ABSURD RESULT, VIOLATING PRINCIPLES OF STATUTORY CONSTRUCTION.....</b>	<b>33-34</b>
<b>4. THE PROSECUTOR'S DECISION TO AMEND THE SECOND DEGREE ROBBERY CHARGE TO FIRST DEGREE ROBBERY AFTER MR. SHEGOG DECLINED TO ACCEPT A PLEA OFFER WAS VINDICTIVE AND PREJUDICIAL TO MR. SHEGOG.....</b>	<b>37</b>
<b>5. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. SHEGOG OF SECOND DEGREE ROBBERY BECAUSE MR. SHEGOG DID NOT TAKE FROM OR IN THE PRESENCE OF A PERSON AND HIS MODERATE USE OF FORCE WAS EMPLOYED FOR THE PURPOSE OF PREVENTING PHYSICAL HARM TO HIMSELF.....</b>	<b>43</b>
<b>6. IN THE EVENT THIS COURT DETERMINES THAT A SELF-DEFENSE CLAIM IS AVAILABLE TO A DEFENDANT CHARGED WITH ROBBERY, AS A MATTER OF LAW, THE TRIAL COURT COMMITTED REVERSIBLE ERROR OF CONSTITUTIONAL MAGNITUDE, BECAUSE IT FAILED TO SO INSTRUCT THE JURY.....</b>	<b>49</b>

**TABLE OF CONTENTS (continued)**

**Page(s)**

**7. THE TRIAL COURT’S FAILURE TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE THEFT PREJUDICED MR. SHEGOG AND REQUIRES REVERSAL.....53**

**8. THE TRIAL COURT HAD THE LEGAL AUTHORITY AND DUTY TO PERFORM A PROPORTIONALITY ANALYSIS TO DETERMINE WHETHER A LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN MR. SHEGOG’S CASE.....59**

**9. THE LIFE SENTENCE IMPOSED IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATE CONSTITUTION AND ARTICLE 1, § 14 OF THE WASHINGTON CONSTITUTION.....61**

**a. Nature of the Offense**

**b. Legislative Purpose of the Persistent Offender Statute**

**c. Punishment in Other Jurisdictions for Same Offense**

**d. Punishment in Washington for Other Offenses**

**E. CONCLUSION.....77-78**

**APPENDIX:**

**A - RCW 9A16.080**

**B - RCW 4.24.220**

**C - STATUS CONFERENCE (dated June 22, 2005)**

## TABLE OF AUTHORITIES

### Washington Cases

	<u>Page(s)</u>
<u>Dep't of Ecology v. Campbell &amp; Gwinn. L.L.C.</u> , 46 Wn.2d 1, 43 P.3d 4 (2002).....	36,37
<u>In re Costello</u> , 22 Wn.2d 697,157 P.2d 713 (1945).....	74
<u>In re PRP of Grisby</u> , 121 Wn.2d 419,853 P.2d 801(1993).....	73
<u>In re PRP of Eckmann</u> , 117 Wn.2d 678,818 P.2d 1350(1991).....	75
<u>Seattle v. Gellein</u> , 112 Wn. 2d 58, 768, P.2d 470 (1989).....	44
<u>State v. Acosta</u> , 101 Wn.2d 612,683 Wn.2d 1069 (1984).....	32
<u>State v. Antwerp</u> , 22 Wn.App. 674,591 P.2d 844(1979).....	27
<u>State v. Arth</u> , 121 Wash.App. 205,87 P.3d 1206 (2004).....	29,50,51,52
<u>State v. Berlin</u> 133 Wn. 2d 541,947 P.2d 700 (1997) .....	54
<u>State v. Bockman</u> , 37 Wn.App.477,682 P.2d 925, rev.denied, 102 Wn.2d 1002 (1984).....	39
<u>State v. Brightman</u> , 155 Wash. 2d 506,122 P.3d 150 (2005).....	52
<u>State v. Camarillo</u> , 115 Wn. 2d 60, 794 P.2d 850 (1990) .....	44
<u>State v. Dennison</u> , 54 Wn.App.577,744 P.2d 1237 (1989).....	29,30,52
<u>State v. Fain</u> , 94 Wn.2d 386,617 P.2d 720 (1980).....	62,63,64,73,75

**Washington Cases** (continued)

	<b><u>Page(s)</u></b>
<i>State v. Frampton</i> , 95 Wn.2d 469,627 P.2d 922(1981).....	73
<i>State v. Graves</i> , 97 Wn.App.55,982 P.2d (1999).....	29
<i>State v. Grayson</i> , 154 Wash.2d 333,111 P.3d 1183 (2005).....	60
<i>State v. Green</i> , 54 Wn. 2d 216, 616 P.2d 628 (1960).....	43,44
<i>State v. Guilliot</i> , 105 Wn.App.355,22 P.3d 1266 review denied, 145 Wn.2d 1004(2001).....	56,57
<i>State v. Hansen</i> , 46 Wn.App. 292,730 P.2d 706 (1986), <u>opinion modified</u> by 737 P.2d 670(1987).....	56
<i>State v. Hughes</i> , 106 Wn.2d 176.721 P.2d 902(1986).....	
<i>State v. Huson</i> , 73 Wn.2d 660,440 P.2d 192 (1968) <u>cert.denied</u> 393 U.S. 1096,89 S.Ct. 886 (1996)).....	21
<i>State v. J.M.</i> , 144 Wn.2d 472,28 P.3d 720 (2001).....	36
<i>State v. Johnston</i> , 85 Wash.App.549,933 P.2d 448 (1997).....	25,30
<i>State v. J.P.</i> , 149 Wn.2d 444,69 P.3d 318(2003) .....	36,37
<i>State v. Jones</i> , 63 Wn. App.703,821 P.2d 543 (1992).....	30
<i>State v. Korum</i> , 120 Wn. App. 686,86 P.3d 166 (2004)..	21-24,26,39,40-41

**Washington Cases** (continued)

**Page(s)**

State v. Landiges, 66 Wn.2d 273,277,401 P.2d 977 (1965).....33

State v. LeFaber, 128 En.2d 896,913 P.2d 369(1996).....31

State v. Lucky, 128 Wn.2d 727,912 P.2d 483 (1996).....54

State v. McDowell, 102 Wn.2d 341,685 P.2d 595 (1984).....39

State v. McCullum, 98 Wn. 2d 484,656 P.2d 1064 (1983).....32,33

State v. McKenzie, 31 Wn.App.450,642 P.2d 760 (1981).....39

State v. Manussier 129 Wn. 2d 652,921 P.2d 473 (1996)..62-64,68-69,72,75

State v. Maupen, 63 Wn. App. 887, 822 P. 2d 355 (1992).....43

State v. Miller, 141 Wash. 104,250 P.645 (1926).....28,29,43

State v. Morley, 134 Wash.2d 588,952 P.2d 167(1998).....59,60

State v. Mulcare, 189 Wash. 625,628,66 P.2d 360 (1937).....60

State v. Pettitt, 93 Wn.2d 288,604 P.2d 1364(1989).....76

State v. Redmond, 122 Wash. 392,392,210 Pac. 772 (1922).....46

State v. Redwine, 72 Wn.App. 625,865 P.2d 552  
697,712-13, 921 P.2d 495(1996).....32,33,53

State v. Rivers, 129 Wn.2d 697,921 P.2d 495 (1996).....62,69-71,73,75

State v. Rodrigues, 21 Wn.2d 667,152 P.2d 970 (1944).....29

**Washington Cases** (continued)

	<b><u>Page(s)</u></b>
<i>State v. Salinas</i> , 119 Wn. 2d 192, 829 P.2d 1068 (1992).....	44
<i>State v. Steele</i> , 58 Wn.App.169,791 P.2d 921 (1990).....	43
<i>State v. Tili</i> , 139 Wn.2d 107.126.985 P.2d 365(1999).....	33
<i>State v. Thorne</i> , 129 Wn. 2d 736,767,921 P. 2d 514 (1996).....	60,62-63,72,74,75
<i>State v. Tvedt</i> , 153 Wn.2d 705,107 P.3d 728 (2005).....	36,45,51
<i>State v. Varga</i> , 151 Wn. 2d 705,107 P.3d 139(2004).....	59,60
<i>State v. Walden</i> , 131 Wn.2d 469,932 P.2d 1237 (1997).....	31,52
<i>State v. Warden</i> , 133 Wn.2d 559,947 P.2d 708 (1997).....	55
<i>State v. Workman</i> , 90 Wn.2d 443,584 P.2d 382 (1978).....	5,54,56

**Washington Statutes**

RCW 4.24.220.....	28,30
RCW 9.94A.310.....	70,71
RCW 9.94A.320.....	70,71
RCW 9A.16.020.....	70
RCW 9A.16.080.....	28,30
RCW 9A.32.030.....	70
RCW 9A.36.031(a).....	25

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Statutes</u> (continued)	
RCW 9A.36.041.....	25
RCW 9A.44.040.....	71
RCW 9A.56.190.....	5,34,35
RCW 9A.56.030.....	37,57
RCW 9A.56.040.....	58
RCW 9A.56.050.....	25,34
RCW 9A.56.210.....	5,34,35
RCW 9A.76.175.....	5
Former RCW 9.94A.030(28).....	6,34
RCW 9.94A.030(32).....	3
Former RCW 9.94.A.440.....	23,40
RCW 9.94A.411.....	3,21,22,23,24,26,40
RCW 9.94A.570.....	3
RCW 10.61.006.....	53
RCW 10.95.020.....	70

TABLE OF AUTHORITIES

Page(s)

**Washington Court Rules and Pattern Jury Instructions**

RAP 2.5(a)(3).....33,52  
WPIC 37.04.....46

**Federal Cases**

*Beck v. Alabama*, 447 U.S.625,100 S. Ct. 2382,  
65 L.Ed.2d392 (1980).....57  
*Bordenhircher v. Hayes*, 434 U.S. 357,365,54 L.Ed.  
2d 604,98 S.Ct. 663, rev.denied, 435 U.S. 918 (1978).....38  
*Chatman v. Manquez*, 754 F.ed 1531 (9<sup>th</sup> Cir. 1985).....74  
*Hardwick v. Doolittle*, 558 F.2d,301 (5<sup>th</sup> Cir. 1977),  
cert. denied, 434 U.S. 1049 (1978).....38  
*Harmelin v. Michigan*, 501 U.S. 957,115 L.Ed.2d  
836,111 S.Ct. 2680 (1991) .....63-64,71,74  
*Hart v. Coiner*,483, F.2d 136,143 (4<sup>th</sup> Cir.1973).....64  
*Jackson v. Virginia*, 443 U.S. 30,61 L.Ed 2d  
99S. Ct.2871 (1974).....44

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b><u>Federal Cases</u></b>	
<i>Keeble v. United States</i> , 412 U.S. 205, 93 S.Ct. 1993,36 L.Ed.2d 844 (1973).....	57
<i>Lindsey v. Washington</i> , 301 U.S. 397,81 L.Ed. 1182, 57 S.Ct. 797 (1936).....	74
<i>Miracle v. Estelle</i> , 592 F.2d 1269 (5 <sup>th</sup> Cir 1979).....	41
<i>Rummel v. Estelle</i> , 445 U.S. 263,63 L.Ed. 2d 382,100 S.Ct. 1133(1980).....	74
<i>Schmuck v. United States</i> , 489 U.S. 705, 109 S.Ct. 2091,103 L.Ed. 734 (1989).....	53
<i>Simmons v. South Carolina</i> , 512 U.S. 154,129 L.Ed. 2d 133,114 S.Ct. 2187 (1994).....	74
<i>Solem v. Helm</i> , 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983).....	74
<i>United States v. Goodwin</i> , 457 U.S. 368,78 L.Ed.2d 74 102 S.Ct. 2485 (1982).....	38,39
<i>United States v. Jones</i> , 983 F.2d 1425 (7 <sup>th</sup> Cir. 1993).....	21,22
<i>United States v. Young</i> , 464 F.2d 160(5 <sup>th</sup> Cir.1972).....	51

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Other Jurisdictions</u>	
<u>Cases</u>	
<i>Boget v. State</i> , 74 S.W.3d 23 (Tex.2002).....	51
<i>In re Lynch</i> , 105 Cal.Rptr. 217,503 P.2d 921(1972).....	72
<i>People v. Gaskins</i> , 923 P.2d 292 (Colo.App.1996).....	64
<i>Seabold v. State</i> , 959 P.2d 780 (Alaska Ct.App. 1998).....	51
<i>Solomon v. State</i> , 730 P.2d 809,810 (Alaska Ct.App. 1987)..	69,74
<i>State v. Lee</i> , 110 Ore. App.528,530,823 P.2d 445, review denied, 313 Ore. 211,830 P.2d 596 (1992).....	69
<u>Other Jurisdictions</u>	
<u>Statutes</u>	
AS 12.55.125(d).....	67
O.R.S. § 161,725-735.....	67
O.R.S. § 161,605.....	68
Cal. Penal Code § 667(e)(2)(A).....	68
Del. Code Ann. tit.11, § 4214(b).....	70

**TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b><u>Federal Constitutional Provisions</u></b>	
U.S. Const. amend. 5.....	27
U.S. Const. amend. 6.....	27
U. S. Const. amend. 8.....	27,62
U.S. Const. amend 14.....	27
<b><u>Washington Constitutional Provisions</u></b>	
Wash. Const. art. 1 § 3.....	27
Wash. Const. art. 1 § 7.....	27
Wash. Const. art. 1, § 14 .....	27
Wash. Const. art. 1 § 21.....	27
<b><u>Additional Authorities</u></b>	
<u>The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit</u> , 68 FORDHAM L.REV. 1695,1715 (April 2000)..	21
<u>“Three Strikes and You’re Out” Legislation: A National Assessment</u> , Michael G. Turner et al., 59 Fed Probation 16, 25 (Sept.1995).....	69
<u>Why Sould Prosecutors Seek Justice?</u> , Bruce A. Green, 26 FORDHAM URB. L.J. 607,623 (March 1999).....	22
<u>Cases and Readings on Criminal Law and Procedure</u> , 663 (2d ed. Bobbs Merrill 1965).....	51

**A. ASSIGNMENTS OF ERROR**

1. The State's decision to charge Mr. Shegog with Robbery constituted a abuse of discretion under RCW 9.94A.411(1) and (2), because it undermined the legislature's directive to charge in a manner which adequately describes the nature of the defendant's conduct.

2. The State's decision to charge Mr. Shegog with Robbery denied Mr. Shegog his due process rights, and impermissibly shifted the burden of proof, because it effectively precluded Mr. Shegog from availing himself of a self-defense theory, or a theory that the use of force by the complaining witnesses was unlawful.

3. The decision by the State to overcharge Mr. Shegog under the Robbery rather than Theft statute(s) led to an absurd result that was contrary to the legislature's intent.

4. There was a reasonable likelihood that the State's decision to amend the Information from second to first degree robbery was vindictive, because the increased charge was filed after Mr. Shegog decided to exercise his right to trial, the State provided no explanation for the increased charge at the time of re-filing, and the belated new

information the State provided was not only acquired three months prior to the re-filing, but it did not comport with the trial testimony.

5. The State failed to prove beyond a reasonable doubt that Mr. Shegog was guilty of any crime greater than theft.

6. Assuming, as a matter of law, that a self-defense claim is available to a person charged with robbery, Mr. Shegog presented a sufficient factual basis for self-defense instructions.

7. The trial court committed reversible error by failing to instruct the jury on the lesser included offense of first degree theft, because Mr. Shegog satisfied both the legal and factual prongs of *Workman*.

8. The trial court committed reversible error when it held that, as a matter of law, it did not have the authority to apply a proportionality test to determine whether a life without the possibility of parole sentence constitutes cruel and unusual punishment in Mr. Shegog's case.

9. A life without the possibility of parole sentence constitutes cruel and unusual punishment in Mr. Shegog's case.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the State's decision to charge Mr. Shegog with Robbery violate the directives of RCW 9.94A.411 (1) and (2), where the charge failed to properly describe the nature of Mr. Shegog's conduct, and was contrary to the prosecutor's duties to act impartially, serve justice, and seek the fairest outcome? (Assignment of Error Number One.)

2. Did the State's decision to charge Mr. Shegog with Robbery impermissibly shift the burden of proof, and deny Mr. Shegog his right to present and have the jury instructed upon his theory of the case, where the effect of the charging decision was to preclude a self-defense/lawful use of force claim? (Assignment of Error Number Two.)

3. Did the State's decision to charge Mr. Shegog with Robbery circumvent the intent and purpose of the Robbery statute(s)? (Assignment of Error Number Three.)

4. Was there a reasonable likelihood that the State's charging decision was vindictive, where it increased the charge from second to

first degree robbery after Mr. Shegog decided to exercise his right to a jury trial, where the State provided no explanation for the re-filing at the time of the re-filing, and where the purported new information was not only three months old, but was of questionable veracity? (Assignment of Error Number Four.)

5. Did the State fail to prove beyond a reasonable doubt that Mr. Shegog was guilty of the crime of second degree robbery, where the evidence showed that the groceries were not taken from or in the presence of another person or against another person's will, and where the moderate amount of force employed by Mr. Shegog was only intended to prevent the group of employees and shoppers from causing physical harm to him? (Assignment of Error Number Five.)

6. Did the trial court commit reversible error by failing to instruct the jury on self-defense, assuming a self-defense claim is available to a person charged with robbery? (Assignment of Error Number Six.)

7. Did the trial court commit reversible error by failing to instruct Mr. Shegog's jury on the lesser included offense of first degree

theft where he satisfied both the legal and factual prongs of *Workman*?

(Assignment of Error Number Seven.)

8. Did the trial court commit reversible error when it concluded that, as a matter of law, it was prohibited from applying the *Fain* factors to Mr. Shegog's case? (Assignment of Error Number 8.)

9. Did the imposition of a Life Without the Possibility of Parole Sentence constitute cruel and unusual punishment in Mr. Shegog's case? (Assignment of Error Number Nine.)

## **C. STATEMENT OF THE CASE**

### **1. Procedural History**

On January 10, 2005, appellant/defendant, Cornell Shegog, was charged by Information with one count of Robbery in the Second Degree, in violation of RCW 9A.56.190 and 9A.56.210, and one count of Making a False or Misleading Statement to a Public Servant, in violation of RCW 9A.76.175. The acts alleged to have constituted the offenses occurred on January 8, 2005. CP 1-3. Also on January 10, 2005, the State filed a Persistent Offender Notice which notified Mr.

Shegog that, if convicted at trial of a second degree robbery,<sup>1</sup> he would be subject to the sentence of life without the possibility of parole as provided in RCW 9.94A.570 and RCW 9.94A.030(32). CP 10.

On June 22, 2005, a status conference was held wherein Mr. Shegog declined to plead guilty. The State withdrew its plea offer, and notified Mr. Shegog that an amended Information would be filed.<sup>2</sup> CP\_\_\_\_. On July 5, 2005, an Amended Information was filed which amended the charge in count one from Robbery in the Second Degree to Robbery in the First Degree. CP 6-7. In response to defense counsel's Motion for Bill of Particulars, filed on July 12, 2005, the State filed a Supplemental Declaration for Determination of Probable Cause on July 13, 2005. CP 8-10; CP 5.

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1

Second degree robbery is a "most serious offense" as defined under Former RCW 9.94A.030(28).

2

The "Status Conference" form is included in appellant's Supplemental Designation of Clerk's Papers which is being filed contemporaneous to appellant's opening brief. (See also Appendix C.)

On July 14<sup>th</sup> and 18<sup>th</sup>, 2005, pretrial motions were heard. RP 1, RP2.<sup>3</sup> The trial court's written Order Regarding Motions in Limine was filed on July 19, 2005. CP 92-94. The case proceeded to trial by jury on July 19, 2005. RP 3. On July 21, 2005, the jury returned a verdict of guilt on the lesser included offense of Robbery in the Second Degree, and a verdict of guilt on the charge of Making a False or Misleading Statement to a Public Servant. RP 5; CP 95-98.

On November 18, 2005, the trial court imposed a sentence of life without the possibility of parole for count one, Robbery in the Second Degree. RP 6; CP 380-391. A suspended sentence was imposed for count two, making a False or Misleading Statement to a Public Servant.<sup>4</sup> RP 6 22; CP 392-393.

A timely Notice of Appeal was filed on November 23, 2005. CP

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3

RP Volumes 1-5 are sequentially numbered and represent the dates of 07-14-05, 07-18-05, 07-19-05, 07-20-05, and 07-21-05, respectively. Two additional RPs are unnumbered. For purposes of appellant's opening brief the RP dated 10-21-05 is designated RP6 and the RP dated 11-18-05 is designated RP 7.

4

Mr. Shegog is not appealing his conviction or sentence for Making a False or Misleading Statement to a Public Servant.

394-397.

### **3. Statement of the Facts**

This case arises from a shoplifting incident wherein, after taking about \$40.00 worth of food without paying for it, Mr. Shegog resisted being physically assaulted by several store employees and two shoppers. The store employees declined to await the arrival of the police, and instead opted to physically take Mr. Shegog down.

On January 8, 2005, Spanaway Albertsons store director, Kathy Cox, observed Mr. Shegog with a package of meat in his coat pocket. After purchasing bath tissue Mr. Shegog headed toward the store's exit door without paying for the meat. A store employee telephoned 911. RP 3 101-104.

After the police were called, four store employees stopped Mr. Shegog from exiting the store by barricading the doors, and taking Mr. Shegog down to the floor. Two shoppers assisted the store employees in the physical attack upon Mr. Shegog. Mr. Shegog threw the package of meat he had in his pocket. As he attempted to push through the employees, Mr. Shegog pushed Kathy Cox. During the altercation

minor bumps and bruises were sustained, but the jury determined that Mr. Shegog did not cause bodily injury to anyone. The only person treated for injuries was Mr. Shegog.

The police arrived “very quickly.” RP 3 110, 178. Additional packages of meat were confiscated from Mr. Shegog’s person. The total amount of food taken was \$46.52. RP 3 130.

#### **4. Summary of Trial Testimony**

- ***Kathy Renee Cox***

Ms. Cox is the store director of the Spanaway Albertson’s grocery store. She testified that on January 8, 2005, she observed Mr. Shegog in the meat area of the store. RP 3 101-102. A few minutes later she saw Mr. Shegog at the self-checkout stand. Ms. Cox testified that while Mr. Shegog was at the self-checkout station she observed a package of meat in the right pocket of his coat. RP 3 102. Mr. Shegog scanned and paid for bath tissue, but not the meat. Ms. Cox proceeded to the front exit doors “to confront him.” RP 3 103. Gary Dains, Eric Visser, and Dustin Cooper, who are also Alberston employees, joined her near the exit doors. RP 3 104; RP 4 228-232.

As Mr. Shegog headed toward the doors Ms. Cox “stood right in the doorway and confronted him.” All parties were inside the doorway , and inside the store. RP3 107. Ms. Cox testified that Gary Dains was standing to the right side of her, while Eric Visser was standing behind her. RP 3 108-109. After being confronted, Mr. Shegog threw the package of meat and attempted to “get through” the Albertson employees. RP 3 131. Ms. Cox testified that Mr. Shegog walked toward them in a “normal fashion” but placed his forearms up in front of him when he tried to leave. Consequently, Mr. Shegog pushed her in the chest area with his forearms. RP 3 108-109, 137. Eric Visser had already telephoned 911 at this point. The sheriff arrived “very quickly.” RP 3 110. The store employees and two shoppers, nonetheless, attempted to take Mr. Shegog down to the floor. RP 3 110. Ms. Cox testified that at no time did Mr. Shegog attempt to “throw punches” at anyone, nor was he armed in any manner. RP 3 135.

In addition to the meat in his pocket Mr. Shegog had taken other meat items without paying for them. The total amount of the items

taken was \$46.52. RP 3 130.

- ***Gary Lee Alexander Dains***

Gary Dains is a store manager at the Spanaway Albertsons. RP 3 144-145. He testified that on January 8, 2005 he observed Mr. Shegog purchase toilet paper in the self-checkout station. As Mr. Shegog walked toward the door he and Kathy Cox “confronted” him. RP 3 147. Mr. Shegog “pushed through” Ms. Cox. Mr. Dains “grabbed” Mr. Shegog from behind. RP 3 162, RP 3 147, 149. He grabbed Mr. Shegog’s arm and neck. Mr. Dains testified that two other male employees, “Dustin and Eric,” assisted him in taking Mr. Shegog to the ground. RP 3 161. Additionally, two male non-employees also held Mr. Shegog down. RP 3 161. Mr. Dains head was bumped during the altercation. At no time did Mr. Shegog attempt to “punch” anyone, nor was he armed. RP 3 161. He testified that Mr. Shegog was “rolling over, trying to get away.” RP 3 160.

- ***Eric Visser***

Eric Visser is a grocery manager at Spanaway Albertsons. Mr. Visser testified that on January 8, 2005 he was called to the front doors

Shegog, Cornell Brief 34141-7-II

of the store to join Gary Dains and Dustin Cooper. Kathy Cox was walking from the self-checkout stations toward them. Ms. Cox stood in front of the three men. Mr. Shegog walked toward the group smiling. Ms. Cox then confronted Mr. Shegog concerning the suspected shoplifting. RP 3 170-172. Mr. Shegog tried to “get through” the group, and consequently shoved Ms. Cox back. Ms. Cox “took a step back and instantly stepped right back to the point where she was.” RP 3 172.

Mr. Visser testified that after he called 911 he assisted Mr. Dains in pinning Mr. Shegog down. Two shoppers, who are paramedics, immediately joined in, and held Mr. Shegog’s arms. RP 3 177. Mr. Shegog was “struggling,” “his legs were flying around a lot.” RP 3 177. Mr. Visser grabbed Mr. Shegog’s legs and placed him in a “bear hug” position. The police arrived “within a minute.” RP 3 178. Mr. Visser testified that Mr. Shegog’s “leg struck mine or his shoe, I don’t know.” Afterwards Mr. Visser’s shin had a “red mark” on it. RP 3 179. During the struggle Mr. Shegog was face down on his stomach “rolling to his side and back on to his stomach and back and forth.”

RP 3 182.

- ***Matthew David Hunt***

Matthew Hunt is a firefighter/paramedic who works for Central Pierce Fire and Rescue. On January 8, 2005, he was on duty, but taking a meal break with his partner, Jason Brown, when the two went into the Spanaway Albertsons. RP 3 183-185.

As Mr. Hunt and Mr. Brown were exiting the store the altercation between Mr. Shegog and the Albertsons employees was in progress. Ms. Cox asked the men for help. Mr. Hunt advised Ms. Cox to “just sort of relax and settle down, and then it just sort of continued from there.” RP 3 185.

Mr. Hunt testified that Albertsons employees had taken Mr. Shegog to the ground, and Mr. Hunt “helped out to hold him on the ground.” RP 3 185. Mr. Shegog “was trying to get away from us.” RP 3 187. At no time, however, did Mr. Shegog “throw any punches.” RP 3 187. Mr. Hunt testified that he really “had no idea what was going on.” RP 3 186. His partner called their radio dispatch “to let Pierce

County Sheriffs Office know.” RP 3 185.

- ***Jason Keo Brown***

Jason Brown is an Emergency Medical Technician (EMT) with Central Pierce Fire and Rescue. On January 8, 2005, while partnered with Matthew Hunt, he was shopping at the Spanaway Albertsons. RP 3 188-189. As the two men were leaving the store, Mr. Brown observed “a confrontation going on at the exit door.” RP 3 189. He recognized Kathy Cox, whom he had known from previous medical calls at the store, as the Albertsons’ employee who was “standing at the door confronting someone.” RP 3 189. She “actually grabbed his coat, opened his coat.” RP 3 192.

Mr. Brown testified that “he was looking at [his] partner wondering what do we do, because we’re not trained for this, you know, we’re not police officers.” RP 3 190. Mr. Brown “called on the radio for the Pierce County Sheriffs to come.” While Mr. Brown made the radio call his partner helped the employees physically restrain Mr. Shegog. Ms. Cox told Mr. Shegog “you’re not leaving.” “And as he was trying to walk past them is when he was wrestled to the

ground.” RP 3 191. Mr. Shegog was just “trying to get out of there.” RP 3 191.

Mr. Brown decided to join the physical altercation by grabbing Mr. Shegog’s right arm and putting it behind his back. RP 3 191. The police arrived in “less than a minute,” and told the group that they would take over. RP 3 192. Mr. Brown recalled that four Albertson employees had wrestled Mr. Shegog to the ground. He testified that [t]here was people on his legs and one around the head.” RP 3 193. Mr. Shegog was not “throwing any punches.” RP 3 194. After the police arrived, Mr. Brown rendered emergency medical assistance to Mr. Shegog including treating his injured shoulder. RP 3 195. Neither he nor his partner needed to treat anyone else at the scene. RP 3 196.

- ***Jason Christopher Smith***

Jason Smith is a Pierce County Sheriff’s patrol deputy. On January 8, 2005, at about 4:30 p.m., he was dispatched to the Spanaway Albertsons for a “possible shoplift incident.” RP 4 212-213. Officer Smith testified that the suspect originally claimed his name was Diondre Burr. Later, the shoplifting suspect’s name was confirmed to

be Cornell Shegog. RP 4 215-218. Officer Smith observed packages of meat that had previously been concealed on Mr. Shegog's person. The meat had been "stuffed down the front of his pants." RP 4 215.

- ***Dustin William Cooper***

Dustin Cooper is a helper clerk at Spanaway Albertsons. On January 8, 2005, Mr. Copper was waiting at the front doors of the store with Kathy Cox, Gary Dains, and Eric Visser when Mr. Shegog approached. RP 4 228-232. Kathy Cox confronted Mr. Shegog, insisting on seeing what was in his pockets. Mr. Shegog denied doing anything wrong, and "they were just pretty much at a stalemate right at the door." "And then she just kept asking to see a receipt and asking if he stole anything, and then he was just trying to get out pretty much." RP 4 233.

Mr. Shegog eventually pushed through Ms. Cox. Mr. Dains immediately "swept him off of his feet and brought him to the floor." Mr. Cooper recalled that there were two people on Mr. Shegog including Mr. Dains, "and then Eric jumped on top and then I got on him, too." RP 4 234. Five people were on Mr. Shegog, when Mr.

Shegog completely “gave in.” RP 4 234. Prior to completely surrendering to the mass of people, Mr. Shegog was “sort of” giving in, but resisting “a little bit.” RP 4 234,236. Mr. Cooper testified that Mr. Dains had a hold of Mr. Shegog in a “head and arm” wrestling position, but that this is not something that store employees are taught to do. RP 4 237. Meanwhile, Mr. Cooper “had both [his] knees on his legs and then I was trying to grab his arm and put it behind his back.” RP 4 238. Mr. Shegog was on his stomach during this time. RP 4 238.

#### **4. POAA Hearing and Ruling**

Prior to sentencing, the State presented testimony concerning Mr. Shegog’s identity via Alan Johnson, who is a forensic and fingerprint technician for the Pierce County Sheriffs Department. Mr. Johnson fingerprinted Mr. Shegog in open court. RP 6 11. He then compared the present fingerprints taken to those taken of Mr. Shegog in two previous King County Superior Court cases, King County Judgment and Sentence Numbers 90-1-07769-8 and 91-1-075600. RP 6 11-12. Mr. Johnson testified that the fingerprints in the prior cases matched those of Mr. Shegog’s taken in court. RP 6 12. The two

certified copies of previous convictions were also admitted as evidence of prior crimes for purposes of determining persistent offender status. RP 6 14-15.

Prior to imposing sentence the trial judge expressed his concerns about a life without the possibility of parole sentence in Mr. Shegog's case. Before giving the State more time to respond to defense counsel's briefing on this issue Judge Fleming commented:

**THE COURT:** This is a tough situation, you know. There's lots of things and, you know, I heard this case, and Washington has tough laws, and other states, he wouldn't be facing the same thing as he's facing here.

**MR. LANE:** Well, it depends on the state, your Honor.

**THE COURT:** I said in other states. That's true. That's what I meant, in other states. So I don't want to say a whole lot, but the cruel and unusual consequences of what occurred here, and then for a person to go to prison for the rest of their life - - what was it one of the Supreme Court justices said one time about pornography, I think it was? "I know it when I see it." which

may be analogous to cruel and unusual. One might say you know it when you see it.

**MR. LANE:** Your Honor, if we're - -

**THE COURT:** But I'm not - - you know, I'm on the periphery of prejudging, and I don't want to do that, but I sure would like to suggest that the State and the defense look at this thing and look at the law with fairness and justice in mind, and I'll give you a month. RP 6 15-16.

On November 18, 2005, Judge Fleming made the following statements when he imposed the sentence of life without the possibility of parole:

**THE COURT:** Mr. Shegog, this case presents an issue that your attorney, Mr. McNeish, has indicated. He's represented you very well and very persuasively. He's not arguing that the Persistent Offender Statute is unconstitutional. He's arguing, if I understand him right, that the imposition of what statute in your case would be unconstitutional, that is, that it would be cruel as to you and therefore unconstitutional as to you.

But the legislature and the law that they have enacted and the decision of the jury causes me to be compelled to follow the law. I don't think I have any choice under these circumstances, considering the history of the legislation itself, your criminal history, the decision of the jury. I'm going to find that it's not cruel and is part of the law of the State of Washington that I have to uphold. So it's the judgment of the Court that you be sentenced under the Persistent Offender Statute to the Department of Corrections for life without the possibility of parole. RP 7 19-20.....

And you can also use as part of your appeal that the Court has concluded and entered this sentence based on the law, both the statute and the case law interpreting the statute, and has concluded that because of that law the discretion has been removed from this Court. And you can tell that to the appellate court.

**MR. McNEISH:** Okay. So, Your Honor, are you saying you don't believe you have the authority to find it unconstitutional

as applied?

**THE COURT:** I think the discretion under these circumstances for this case, based upon the case law and the statute itself, has left this Court without discretion.

**D. ARGUMENT**

**1. THE STATE’S INITIAL CHARGING DECISION CONSTITUTED AN ABUSE OF DISCRETION UNDER RCW 9.94A.411.**

“[A] public prosecutor is a quasi-judicial officer” who represents the State and must “act impartially.” *State v. Korum*, 120 Wn. App. 686,700,86 P.3d 166 (2004) (quoting *State v. Huson*, 73 Wn.2d 660,663,440 P.2d 192 (1968), cert.denied 393 U.S. 1096,89 S.Ct. 886 (1996)). A prosecutor’s duty to do justice on behalf of the public transcends mere advocacy of the state’s case. *Korum*, 120 Wn.App. at 702 (citing H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 FORDHAM L. REV. 1695, 1715 (April, 2000)).

“[T]he prosecutors ethical duty is to seek the fairest rather than necessarily the most severe outcome.” *Korum*, at 701 (quoting *United*

States v. Jones, 983 F.2d 1425,1433 (7<sup>th</sup> Cir. 1993)). The fairest outcome may include refraining from filing criminal charges legally supported by the evidence if filing those charges will result in statutorily-authorized punishment disproportionate to the particular offense or offender. Korum, at 701 (citing Bruce A. Green, Why Should Prosecutors Seek Justice? 26 FORDHAM URB.L.J. 607,623 (March, 1999)).

Although our Legislature has given prosecutors wide latitude in determining what charges to file against a defendant, it did not leave the prosecutor's discretion unbridled. Korum, at 701. Under the Sentencing Reform Act of 1981 (SRA), the Legislature has limited prosecutorial discretion as follows:

- (1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:
  - (A) Will significantly enhance the strength of the state's case at trial; or
  - (B) Will result in restitution to all victims.
- (ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

(A) Charging at higher degrees;

(B) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not such an indication. Crimes which do not merge as a matter of law, but which arise from the same conduct, do not all have to be charged.

*State v. Korum*, 120 Wn. App. at 701-02 (quoting Former RCW 9.94A.440(2) (1997), recodified as RCW 9.94A.411(2), sub-captioned "Decision to Prosecute").

Additionally, RCW 9.94A.411(1) provides a standard for the decision not to prosecute which reads:

**STANDARD:** A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

Factors listed in RCW 9.94A.411 (1) for declining to prosecute a specific crime include (1) that the prosecution would be contrary to legislative intent, (2) that the violation is de minimis, (3) that the cost of prosecution would be high and disproportionate to the offense in question, (4) that the complainant may have improper motives, (5)

that in assault cases the victim has suffered little or no injury, and (6) that in property crimes, not involving violence, no major loss was suffered. RCW 9.94A.411(1). (Statute provides additional examples not listed here.) In addition to providing examples for reasons to decline specific prosecutions, the statute further provides that “[t]he presence of these factors may also justify the decision to dismiss a prosecution which has been commended.” RCW 9.94A.411(1).

As noted above, the legislature has specifically directed prosecutors to charge crimes in a manner that reflects the actual “nature and seriousness of a defendant’s criminal conduct, but to decline to charge crimes which are not necessary to such an indication.” *State v. Korum, Supra* at 676 citing RCW 9.94A.411(2). Moreover, the legislature has enumerated specific factors that, if present, must weigh against prosecuting a specific crime.

In Mr. Shegog’s case the State violated RCW 9.94A.411(1) and (2) because the charge of Robbery (in either the first or second degree) does not reflect the actual nature and seriousness of Mr. Shegog’s conduct. Mr. Shegog’s conduct is more accurately reflected in the

misdemeanor charge of third degree theft<sup>5</sup> which possibly, but not necessarily, could be combined with a gross misdemeanor or class C felony charge of fourth or third degree assault,<sup>6</sup> none of which would have qualified as a serious offense for purposes of the Persistent Offender Accountability Act.

Numerous enumerated statutory factors weighed heavily against charging Mr. Shegog with Robbery, including but not limited to, the following: (1) The charge of Robbery was contrary to legislative intent (see Argument 3 below); (2) In the context of a Robbery charge the actual violation was de minimus; (3) The cost of prosecuting a “3 strikes” offense is exorbitant, particularly with respect to the appellate costs that will invariably flow from a life without the possibility of parole sentence, and the costs are entirely disproportionate to the actual

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Third degree theft is defined as theft of property or services that does not exceed two hundred and fifty dollars in value. RCW 9A.56.050.

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Fourth degree assault is defined as any assault not amounting to first, second, or third degree, or custodial assault. RCW 9A.36.041. Third degree assault is defined, in pertinent part, as assaulting another with intent to prevent or resist the lawful apprehension or detention of himself, herself, or another person. RCW 9A.36.031(a), *State v. Johnston*, 85 Wash.App.549,933 P.2d 448 (1997).

conduct of Mr. Shegog that gave rise to the charge; (4) That the motives of the employees and shoppers involved are questionable, in light of the amount of force used against Mr. Shegog, and possible civil lawsuits that could potentially arise; (5) That little or no injury was sustained to anyone except Mr. Shegog; and (6) That no major loss was suffered by Albertsons or its employees.

The legislative directives under RCW 9.94A.411 (1) and (2) directed against the filing of a Robbery charge under the facts of Mr. Shegog's case. Such overcharging clearly contradicts a prosecutor's duty to act impartially, do justice on behalf of the public, and seek the fairest outcome. This Court should not condone the prosecutor's overzealous conduct.

**2. THE STATE'S INITIAL CHARGING DECISION DENIED MR. SHEGOG HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS.**

As noted by this Court in *State v. Korum*: "In addition to ... legislative limitations, there are constitutional constraints on a prosecutor's exercise of discretion in charging crimes." *Supra* at 696.

The constitutional right to due process of law provides all defendants

the right to a fair trial. U.S. Const. amend. 5,14; Wash. Const. art. 1 § 3<sup>7</sup> State v. Antwerp, 22 Wn.App. 674,591 P.2d 844(1979, reversed on other grounds, 93 Wn.2d 510,610 P.2d 1322(1980). Defendants are also constitutionally entitled to a trial by jury. U.S. Const. amend. 6; Wash.Const. art. 1 § 21.<sup>8</sup>

Mr. Shegog was denied his right to due process and to a fair trial by a jury, because the State's decision to charge him with Robbery precluded his presentation of the complete defense theory of the case. Specifically, Mr. Shegog was not able to avail himself of certain defenses and jury instructions that would have been available had he

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U.S. Const. amend 6: “(N)or be deprived of life, liberty, or property, without due process of law.”

U.S. Const. amend 14: “(N)or shall any State deprive any person of life, liberty, or property, without due process of law.”

Wash. Const. art. 1 § 3: “No person shall be deprived of life, liberty, or property, without due process of law.”

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U.S. Const. amend. 6: “(T)he accused shall enjoy the right to a speedy and public trial, by an impartial jury....”

Wash.Const.art. 1 § 21: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.”

properly been charged under the third degree theft, and fourth or third degree assault statutes.

At trial Mr. Shegog conceded guilt to to the crime of third degree theft. RP 4 267-268. The “use of force” element of the crime charged, Robbery, however, was a disputed fact. By charging Mr. Shegog with Robbery rather than third degree theft and assault, the State effectively precluded him from arguing that his own use of force was justifiable. The strategic charging decision employed by the State prevented Mr. Shegog from utilizing a legally supportable self-defense theory, or a theory that the use of force by the Albertsons employees was unreasonable, and therefore unlawful, either of which claim, could have defeated an assault charge. RCW 9A.16.080, RCW 4.24.220. (See Appendix A and B.)<sup>9</sup>

Washington’s general self-defense statute, RCW 9A.16.020, is available to a person charged with the crime of assault as long as the

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Mercantile employees can be civilly or criminally liable if the detention is not reasonable in time or manner, or if reasonable grounds for detaining a person do not exist. See *State v. Miller*, 103 Wn.2d 792,698 P.2d 554(1985.)

factual requirement is met. A plea of self-defense, if established, constitutes a complete justification and does not merely serve to mitigate or reduce the crime charged. State v. Rodrigues, 21 Wn.2d 667,668,152 P.2d 970 (1944). A defendant charged with assault is justified in defending himself if, acting as a reasonably prudent man, he believed himself in actual danger, even if he was mistaken about the extent of danger. State v. Miller, 141 Wash. 104,105-06,250 P.645 (1926). To raise the claim of self-defense, the defendant must first offer some evidence tending to prove self-defense; the burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Graves, 97 Wn.App.55,982 P.2d (1999).

A self-defense instruction, however, has never been approved in Washington where the defendant is charged with Robbery. Whether self-defense is available to a person charged with Robbery, as a matter of law, has never squarely been addressed. (Self-defense statute may be applicable to a charge of malicious mischief when the property damaged was used to threaten the accused with bodily harm, State v. Arth, 121 Wash.App. 205,87 P.3d 1206 (2004); but see State v.

Dennison, 54 Wn.App.577,581-82,744 P.2d 1237 (1989), aff'd, 115 Wn.2d 809,614-16,801 P.2d 193(1990) holding that self-defense is not available to a person who is charged with felony murder in the first degree based on the predicate felony of burglary in the first degree, as a matter of law.)

Likewise, while a jury instruction that Mr. Shegog had a right to use lawful force to resist the employees, because they used unreasonable force to detain him, would have been available to Mr. Shegog had he been charged with third degree assault, such an instruction has never been approved where the defendant is charged with Robbery. (Jury instructions that comport with RCW 9A.16.080 and RCW 4.24.220 may be available where defendant is charged with third degree assault and satisfies factual requirement for instruction. State v. Jones, 63 Wn. App.703,821 P.2d 543 (1992); State v. Johnston, 85 Wash.App.549,933 P.2d 448 (1997). )

Mr. Shegog made a sufficient showing to warrant a self-defense instruction, had he been properly charged. In Washington, a defendant's right to act in self-defense is determined from the

defendant's subjective, reasonable belief that he or she is in imminent harm from the person assaulted. *State v. LeFaber*, 128 Wn.2d 896,899,913 P.2d 369(1996). This self-defense standard incorporates both subjective and objective elements. *State v. Walden*, 131 Wn.2d 469,474,932 P.2d 1237 (1997). The subjective portion requires the jury to "stand in the shoes of the defendant and consider all the facts and circumstances known to him or her." *Walden*, 131 Wn.2d at 474.

In Mr. Shegog's case the testimony demonstrated that Mr. Shegog could reasonably have believed he was in imminent harm. The conduct of the Albertsons employees was plainly threatening. Ms. Cox began by grabbing Mr. Shegog's coat and opening it. RP 3 192. Not only did four employees block the doors, effectively imprisoning him from moving in any manner except "through" them, but they actually assaulted him. His fear that he was in imminent harm was more than a reasonable belief; he actually was physically harmed. RP 3 195. In total six people were accosting Mr. Shegog, determined to take him down. All parties testified that a mutual struggle occurred, but that at no time did Mr. Shegog attempt to throw any punches or

do anything more than attempt to free himself from the mob that had descended upon him. RP 3 194. During a significant portion of the altercation Mr. Shegog was lying face down on his stomach, while the mass of people grabbed his arms, legs, and neck, and employed various wrestling techniques that the store had neither approved nor trained them for. RP 3 182; RP 4 237. The evidence plainly supported a self-defense instructions, as well as an instruction concerning the use of force permitted by store personnel to detain someone.

By charging Mr. Shegog with Robbery rather than assault, the State impermissibly shifted the burden of proof to Mr. Shegog.

When any evidence of self-defense is presented, the State must disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 683 Wn.2d 1069 (1984); see *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). Where a prosecutor shifts the burden of proof, and a case warrants the giving of a self-defense instruction but none is given, the errors are of constitutional magnitude and can be raised for the first time on appeal. *State v. Redwine*, 72 Wn.App.

625,865 P.2d 552 (1994), State v. McCullum, *Supra* at 488; RAP 2.5(a)(3).

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A criminal defendant is entitled to have the jury instructed on his theory of the case when there is evidence to support that theory. State v. Hughes, 106 Wn. 2d 176, 191, 721 P.2d 902 (1986). Failure to so instruct constitutes reversible error. State v. Landiges, 66 Wn.2d 273, 277, 401 P.2d 977 (1965).

The State's improper charging decision prevented Mr. Shegog from fully presenting, and having the jury instructed upon, his theory of the case. Mr. Shegog presented a sufficient factual basis for both self-defense and unlawful use of force by mercantile employees instructions. Because of the State's improper charging decisions, however, he was denied due process of law.

**3. APPLICATION OF THE ROBBERY STATUTE TO THE FACTS OF THIS CASE LEAD TO AN**

Shegog, Cornell Brief 34141-7-II

**ABSURD RESULT, VIOLATING PRINCIPLES OF  
STATUTORY CONSTRUCTION.**

Shoplifting, where the value of the merchandise does not exceed two hundred and fifty dollars, is proscribed by the gross misdemeanor offense of "Theft in the Third Degree." RCW 9A.56.050. That statute provides:

A person is guilty of theft in the third degree if he or she commits theft of property or services that does not exceed two hundred and fifty dollars in value.

The general Theft statute defines "theft" in the following manner:

To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

Contrastly, Robbery in the second degree, a class B felony and "most serious offense" under Former RCW 9.94A.030(28), is defined thusly under RCW 9A.56.190 and RCW 9A.56.210:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery

whenever it appears that, although the taking was fully completed without the knowledge of the person from who taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190

(1) A person is guilty of robbery in the second degree if he commits robbery.

RCW 9A.56.210.

Mr. Shegog asks this Court to carefully review the Legislature's intent in enacting the above statutes. The general and second degree Robbery statutes elevate the crime of theft to a Class B felony, and a most serious offense, because Robbery is a property crime against a person. It requires a forcible taking against the will of another person; that is, it requires an amount of violence.

The Washington Supreme Court recently considered the legislature's intent in enacting the Robbery statute:

Initially, the language of the statute clearly shows that the legislature was concerned with the offense as a property crime, as noted....Moreover, the legislature classified robbery with other property offenses. Laws of 1975, 1<sup>st</sup> Ex. Sess., ch. 260 at 841,846 (Sec. 9A.56.200)....

But it is equally apparent that the legislature intended that the unit of prosecution for robbery encompass its character as a

crime against the person. The plain language of RCW 9A.56.180 shows that the legislature was concerned with the risks that actual and threatened force, violence, and injury entail, and with the nature of the defendant's conduct in achieving a taking. (Emphasis added.)

*State v. Tvedt*, 153 Wash. 2d 705, 107 P.3d 728 (2005).

As our State Supreme Court has also noted:

Where the application of a statute is challenged on appeal, the court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.

*Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001)). The *Campbell* Court recognized divergent decisions regarding the "plain meaning" rule, but ultimately concluded the plain meaning of a statute "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11-12.

Another basic tenet of statutory construction seeks to avoid interpreting statutes in a way that leads to absurd results. *State v. J.P.*,

149 Wn.2d 444,450,69 P.3d 318(2003). An application of Campbell's "plain meaning" rule to Mr. Shegog's case reveals the absurdity of charging any degree of robbery under the circumstances of his case. Given the explicit legislative intent behind the creation of the robbery statute(s) it must be assumed that Mr. Shegog's conduct would fall under the theft statute(s) which prohibit obtaining the property of another with the intent to deprive him or her of that property. (See also RCW 9A.56.030(1) (b) Theft in the First Degree - which includes the element of taking from a person, but excludes the violent, forcible, components.<sup>10</sup>) Reading the robbery statute(s) so broadly as to encompass the facts of this case leads to an absurd result "[which] must be avoided because it will not be presumed the Legislature intended absurd results." 149 Wn. 2d at 450.

**4. THE PROSECUTOR'S DECISION TO AMEND THE SECOND DEGREE ROBBERY CHARGE TO FIRST DEGREE ROBBERY AFTER MR. SHEGOG DECLINED TO ACCEPT A PLEA OFFER WAS VINDICTIVE, AND PREJUDICIAL**

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"A person is guilty of theft in the first degree if he or she commits theft of:  
(b) Property of any value other than a firearm....taken from the person of another."

**TO MR. SHEGOG.**

In addition to statutory limitations, there are federal and state constitutional constraints on a prosecutor's exercise of discretion in charging and re-charging crimes. As this Court has recently stated:

[A] prosecutors discretion to reindict a defendant is constrained by the due process clause....[O]nce a prosecutor exercises his discretion to bring certain charges against a defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendants assertion of statutory or constitutional rights.

*Korum*, at 702 (quoting *Hardwick v. Doolittle*, 558 F.2d,301 (5<sup>th</sup> Cir. 1977) (emphasis added), cert. denied, 434 U.S. 1049 (1978).

A prosecutor may not act vindictively when a defendant exercises a constitutional right. *United State v. Goodwin*, 457 U.S. 368,78 L.Ed.2d 74 102 S.Ct. 2485 (1982). “To punish a person because he had done what the law plainly allows him to do is a due process violation of the most basic sort[.]” *Bordenhircher v. Hayes*, 434 U.S. 357,358,365,54 L.Ed.2d 604,98 S.Ct. 663, rev. denied, 435 U.S. 918 (1978) (finding no due process violation stemming from the “give and take” of plea bargaining). Prosecutorial vindictiveness is the

“intentional filing of a more serious crime in retaliation for a defendant’s lawful exercise of a procedural right.” *State v. Bockman*, 37 Wn.App.477,488,682 P.2d 925, rev.denied, 102 Wn.2d 1002 (1984), quoting *State v. McKenzie*, 31 Wn.App.450,642 P.2d 760 (1981).

In certain circumstances, such as after a successful appeal or after a request for a de novo trial, the court will presume vindictiveness based on the filing of additional or more serious charges. *State v. McDowell*, 102 Wn.2d 341,344,685 P.2d 595 (1984). By contrast, the courts do not apply that presumption to charging decisions that are made prior to trial as part of the plea bargaining process. *Goodwin*, 457 U.S. at 384. Instead, a showing of a “reasonable likelihood of vindictiveness” is required. *Korum*, at 701.

In *State v. Korum, Supra*, this Court held “as a matter of law that the prosecutor acted vindictively in adding charges following Korum’s exercise of his right to trial.” *Korum*, at 687. This Court’s holding was based on the State having added charges after the defendant withdrew his guilty plea. The new charges combined with

the original charges resulted in a sentence that was ten times longer than the first sentence imposed after Mr. Korum had pleaded guilty. This Court dismissed the new counts the State added, and remanded “to the trial court to determine any additional remedy for prosecutorial vindictiveness; including dismissal of other charges, and resentencing....” Id.

The Korum Court rejected the State’s argument that it could have pursued the increased charges initially, so it should be allowed to do so later. The Court determined that the State had not only engaged in charging conduct that was contrary to the directives of RCW 9.94A.440(2) (1997) recodified as RCW 9.94A.411(2), but had also violated Mr. Korum’s due process rights. The Korum Court explained:

An increase in the severity or number of charges if done without vindictiveness may be easily explained. For example, evidence of the additional crimes may not have been obtained until after the first indictment or information is filed, or the additional crime may not be complete at the time charges are first brought.

Korum at 699, citing Hardwick, 558 F.2d at 301.

The Korum Court elaborated that the State was initially aware

of the number and severity of the charges, and had threatened to file additional counts in the event the plea offer was not accepted. Id. at 700. Applying the “reasonable likelihood of vindictiveness” test, the Korum Court determined that “no actual vindictiveness or retaliation motive was required to be shown.” Korum at 700, citing with approval Miracle v. Estelle, 592 F.2d 1269,12-72-73 (5<sup>th</sup> Cir 1979).

Like Korum, in the case at bar, the record shows that the State was not only aware of the nature of the case, and any or all possible charges it could bring at the time the original Information was filed, but it also expressly stated that it would file an Amended Information as soon as Mr. Shegog declined its plea offer. CP \_\_\_\_\_. Appendix C. When the Amended Information was filed, which increased the already inflated charge of second degree robbery to first degree robbery, the State offered no explanation. No new facts that would support the increased charge were given.<sup>11</sup> It was not until after Mr. Shegog filed

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The original Information and declaration for determination of probable cause was filed on January 10, 2005. CP 1-3. The Amended Information was filed on July 5, 2005. CP 6-7. The Motion for Bill of Particulars was filed on July 12, 2005. CP 8-10. The supplemental declaration for determination of probable cause was filed on July 13, 2005. CP 5.

Shegog, Cornell Brief 34141-7-II

a Motion for a Bill of Particulars that the State filed a supplemental declaration for determination of probable cause. CP 5.

The supplemental declaration recited the identical information contained in the original declaration, but included a sole paragraph of purported “additional information.” The additional information, however, had been available since April 15, 2005. It was not acted upon until after Mr. Shegog indicated that he wanted to go to trial, and refused the plea offer, at the June 22, 2005 status conference. Additionally, the purported “ additional information” included statements allegedly made by the store employees to defense counsel, and the alleged statements were clearly embellished upon as compared to the actual sworn testimony of the same employees at trial. For example, Mr. Dains did not testify that he “lost consciousness.” Nor did Mr. Visser testify that Mr. Shegog “[k]icked him in the shin,” but rather that Mr. Shegog was “struggling,” “his legs were flying around a lot,” “and his leg struck mine or his shoe, I don’t know.” RP 3 179, CP 5.

Not only was the charge amended to first degree robbery after

Mr. Shegog decided to go to trial, but the decision to amend upwards was highly prejudicial at trial, because it resulted in a compromise verdict of the lesser included charge of second degree robbery. (A showing of prejudice is not required where a prosecutor acts vindictively.)

**5. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. SHEGOG OF SECOND DEGREE ROBBERY BECAUSE MR. SHEGOG DID NOT TAKE FROM OR IN THE PRESENCE OF A PERSON AND HIS MODERATE USE OF FORCE WAS EMPLOYED FOR THE PURPOSE OF PREVENTING PHYSICAL HARM TO HIMSELF.**

The applicable standard of review for determining whether the evidence is sufficient is whether any rational trier of fact could have found guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Green*, 54 Wn. 2d 216, 616 P.2d 628 (1960). The evidence is not sufficient if no rational trier of fact could have found all of the essential elements of the crime were proved beyond a reasonable doubt. *State v. Steele*, 58 Wn. App. 169, 791 P.2d 921 (1990), *State v. Maupen*, 63 Wn. App. 887, 822 P. 2d 355 (1992).

The opinion in State v. Green, marked a departure from the Washington Supreme Court's earlier view that the proper test was for the reviewing Court to be satisfied only that the record contains substantial evidence to support the finding of guilt. State v. Green, was decided in response to Jackson v. Virginia, 443 U. S. 306, 61 L.Ed 2d 560, 99 S. Ct. 2871 (1974), where the United States Supreme Court held that the proper test is whether there was sufficient evidence to justify a finding of guilt beyond a reasonable doubt (reasonable doubt thus replacing the substantial evidence standard). State v. Green, Supra.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and reasonable inferences that can be drawn from it. State v. Salinas, 119 Wn. 2d 192, 829 P.2d 1068 (1992). Moreover, in considering the evidence, credibility determinations are reserved for the trier of fact. State v. Camarillo, 115 Wn. 2d 60, 794 P.2d 850 (1990). Due process requires that the state bear the burden of proving every element of the crime charge beyond a reasonable doubt. Seattle v. Gellein, 112 Wn. 2d 58, 768, P.2d 470 (1989).

To convict Mr. Shegog of the crime of Robbery in the Second Degree the State was required to prove that on January 8, 2005, in Pierce County Washington, Mr. Shegog unlawfully took “personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.” RCW 9A.56.190; *State v. Tvedt, Supra*.

The accused’s use of or the threat of force must be intended to instill sufficient fear of immediate injury to overcome the victim’s will and coerce the victim into parting with their personal property. For example, in 1922 the State Supreme Court wrote:

It is generally held that if the taking of property be attended with such circumstances of terror, or such threatening by

menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a man to depart with property for the safety of his person, it is robbery....

State v. Redmond, 122 Wash. 392,392,210 Pac. 772 (1922). This casual relationship between an accused's intent to put a victim in fear of immediate injury and the victim's relinquishing their personal property to avoid the threatened use of force is embodied in the Pattern Jury Instruction for robbery. See WPIC 37.04 and CP 62-91.

Mr. Shegog's jury was instructed as follows on the elements:

**INSTRUCTION NO. 11**

To convict the defendant of the crime of Robbery in the Second Degree, the less degree of the crime charge in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 8<sup>th</sup> day of January 2005, the defendant unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person of another;

(4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That the acts occurred in the State of Washington....CP 62-91.

Mr. Shegog concedes that the State proved elements (2) and (5) (that the defendant intended to commit theft of the property, and that the acts occurred in the State of Washington). Elements (1), (3) and (4), however, were not proved beyond a reasonable doubt. Specifically, the property was not personal but was the property of Albertsons grocery chain, and it was taken neither from nor in the presence of another.(Emphasis added). Ms. Cox testified that she saw what appeared to be a package of meat in Mr. Shegog's coat pocket, but she did not see him take the meat. None of the witnesses saw Mr. Shegog shoplift the meat, hence, the taking was neither from nor in the

presence of anyone. Furthermore, the taking was not against any person's will.

Finally, the moderate amount of force employed by Mr. Shegog, when he shoved through the store employees with his forearms, and consequently pushed Kathy Cox, was not an act intended to achieve any of the purposes listed in RCW 9A.56.190, but rather his primary purpose was to attempt to prevent physical harm to himself. The record shows that Ms. Cox and her subordinates "confronted" Mr. Shegog. The initial confrontation included the unwanted touching of Mr. Shegog by means of grabbing and opening his coat. The group physically barricaded the exit doors so that Mr. Shegog had no way to escape them except to go "through" them. Mr. Shegog threw the meat that was within his reach, the meat in his coat pocket. As quickly as he attempted to break through, he was "taken down" by the group of employees who were joined by two shoppers who, incidentally, testified that they were not trained for such actions. Nor were the store employees trained to engage in physical altercations with suspected shoplifters.

Clearly the physical confrontation was initiated by the store employees who escalated a simple shoplifting into a physical melee, rather than wait the “minute” it took for the police to arrive. The only person treated for injuries was Mr. Shegog, who had six people piled on top of him grabbing his arms, legs, neck, etc.

Mr. Shegog is guilty of third degree theft; the State proved it. He is not, however, guilty of second degree robbery, and the State failed to prove such charge beyond a reasonable doubt.

**6. IN THE EVENT THIS COURT DETERMINES THAT A SELF-DEFENSE CLAIM IS AVAILABLE TO A DEFENDANT CHARGED WITH A ROBBERY, AS A MATTER OF LAW, THE TRIAL COURT COMMITTED REVERSIBLE ERROR OF CONSTITUTIONAL MAGNITUDE, BECAUSE IT FAILED TO SO INSTRUCT THE JURY.**

As noted in appellant’s argument Number 3, Mr. Shegog presented a sufficient factual basis for self-defense instructions, assuming such instructions are available as a matter of law, to a person charged with second degree robbery. This point of law is not settled.

An argument can be made that self-defense instructions are available to an accused charged with the crime of robbery. The

general self-defense statute does not specifically exclude such application. RCW 9A.16.020. Additionally, in *State v. Arth*, 121 Wash.App. 205,207-08, P.3d 1206 (2004) the Court held that a self-defense claim is available to a person charged with the property crime of malicious mischief. At trial, *Arth* requested the following self-defense instruction:

It is a defense to a charge of malicious mischief in the first degree that the force used was lawful as defined in this instruction. The use of force upon or toward the person or property of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

*Arth*, 121 Wn.App. at 208. The trial court denied the instruction, and the Court of Appeals reversed. The Court reasoned that under the plain language of RCW 9A.16.020(3) the lawful “use of force” instruction may be required when ever a defendant claims he or she used force toward another person in an attempt to prevent an offense against himself or herself. *Arth*, 121 Wn.App. at 210.

Because the statute suggests the use of force in this situation may be lawful, a defendant must be allowed to defend against criminal liability for the results of the force- - whether it is damage to property or to a person.

Arth, 121 Wn.App. at 210. Because Arth's theory of defense was that he reasonably believed he had to commit the property crime in order to defend against a person he believed was going to try and hurt him, he was entitled to assert the statutory defense of justifiable force. Arth, 121 Wn.App. at 211-13 (citing Boget v. State, 74 S.W.3d 23 (Tex.2002); United States v. Young, 464 F.2d 160,164n6(5th Cir.1972) (analogizing an intentional act of damage or destruction to assault in that it may be justified by necessity or self-defense, stating that "[s]uch justification for the act of destruction would negate the criminal mens rea"); Seabold v. State, 959 P.2d 780,781-82 (Alaska Ct.App. 1998) (defendant charged with malicious mischief for destroying a handgun he took from a woman arguing with her husband was entitled to jury instruction of necessity)). Arth shows that self-defense can be a defense to a property crime such as robbery.<sup>12</sup> See also Jerome Hall & Gerhard Mueller, Cases and Readings on Criminal Law and Procedure, 663 (2d ed. Bobbs Merrill 1965)(suggesting that a person

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As noted previously, however, Robbery is both a property crime and a crime against persons. State v. Tvedt, 153 Wash.2d 705,107 P.3d 728 (2005).

can claim self-defense to justify other offenses, including property crimes).

Although *Arth* is the first Washington Appellate Court decision to apply a self-defense claim to the charge of malicious mischief, the underlying principle, that the use of force toward another person is not unlawful “whenever used by a party about to be injured,” is well established. RCW 9A.16.020(3). See also *State v. Brightman*, 155 Wash. 2d 506, 122 P.3d 150 (2005). (But see *State v. Dennison*, 54 Wash.App. 577, 581-82, 744 P.2d 1237 (1989), aff’d, 115 Wn.2d 609, 614-16, 801 P.2d 193 (1990), holding that, as a matter of law, a self-defense instruction is not available to a defendant charged with first-degree felony murder based on the predicate felony of first-degree burglary.)

A defendant may raise a claimed instructional error for the first time on appeal when it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Once a defendant introduces some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d

469,474,932 P.2d 1237 (1997). Jury instructions that improperly shift the burden of proof to the defendant violate due process and are constitutional error that may be raised for the first time on appeal. State v. Redwine, 72 Wn.App. 625,865 P.2d 552 (1994).

Because Mr. Shegog presented some evidence of self-defense, the failure to include self-defense instructions improperly relieved the State of its burden to disprove self-defense. Assuming a self-defense claim is available to a defendant charged with second degree robbery, the error here is of constitutional magnitude, and reversal is required.

**7. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE THEFT PREJUDICED MR. SHEGOG AND REQUIRES REVERSAL**

Generally an accused may only be convicted of offenses contained in the indictment or information. Schmuck v. United States, 489 U.S. 705,717-18,109 S.Ct. 2091,103 L.Ed. 734 (1989). Pursuant to statute, however, an accused "may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006.

A party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin* 133 Wn. 2d 541,548,947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727,912 P.2d 483 (1996)); *State v. Workman*, 90 Wn.2d 443,447-48,584 P.2d 382 (1978).

First degree theft is legally a lesser included offense of second-degree robbery. RCW 9A.56.190; RCW 9A.56.030(b), *Supra*. Indeed, in jury instruction Number 11 the first element contained in the second degree robbery “to convict” instruction provided the precise definition of first degree theft, but the jury was not instructed that it could find Mr. Shegog guilty of that charge. CP 62-91. (See p. 46 of appellant’s brief.)

The factual prong of the *Workman* test is satisfied as well. In applying the factual prong of the *Workman* test, a court must view the supporting evidence in the light most favorable to the party claiming

entitlement to the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Warden, 133 Wn.2d 559,563,947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S.625,635,100 S. Ct. 2382, 65 L.Ed.2d392 (1980)). Although affirmative evidence must support the issuance of the instruction, evidence in support of a lesser-included offense need not be produced by the defendant. Fernandez-Medina, 141 Wn.2d at 456.

Viewed in the light most favorable to Mr. Shegog the evidence supported the inference that he was guilty of only first degree theft and not second degree robbery. As the Klimes Court recently recognized, where property is taken from the immediate presence of an individual it is as if the property was taken from the person of the individual. Klimes 117 W.App. At 769 n.4. *Although it’s Mr. Shegog’s firm contention that the element of taking from or in the presence of another was not satisfied*, in the event this court concludes it was, then it must also conclude that a reasonable jury could have concluded from the

evidence adduced at trial that Mr. Shegog committed a first-degree theft by taking property from or in the presence of a store employee.

The evidence affirmatively supported the necessary inference for theft instructions. Indeed, the trial court obviously recognized that the evidence supported the inference that a theft, not a robbery, was committed because the trial court instructed the jury on third-degree theft. CP 119-121. Based on the evidence, the factual prong of the *Workman* test was satisfied.

Failure to instruct the jury on first degree theft prejudiced Mr. Shegog. The State may assert in response that because the jury did not convict Mr. Shegog of third degree theft, failure to give a first degree theft instruction was harmless. Such a claim would be incorrect. Error from the failure to give a lesser-included offense instruction may be harmless where, although the trial court wrongly fails to give a lesser-included offense instruction, a jury is instructed on an intermediate offense but convicts the defendant of the greater crime. See e.g. *State v. Guilliot*, 105 Wn.App.355,368-69,22 P.3d 1266, review denied, 145 Wn.2d 1004(2001); *State v. Hansen*, 46 Wn.App. 292,296-97,730 P.2d

706 (1986), opinion modified by 737 P.2d 670(1987). For example, if in a first degree murder prosecution , the court instructs the jury on both first and second degree murder, but declines to issue a manslaughter instruction would be harmless if the jury rejected second-degree murder and rendered a conviction on the greater crime. *Guilliot*, 105 Wn.App. at 368-69. The rationale for this rule is that if the jury had believed the accused was less culpable, it would have convicted on the intermediate offense, thus issuance of the lesser included offense instruction would not have affected the verdict. Courts have disapproved, however, under circumstances where jurors are given an all-or-nothing choice. *Beck v. Alabama*, 447 U.S. at 634; *Keeble v. United States*, 412 U.S. 205,212-13, 93 S.Ct. 1993,36 L.Ed.2d 844 (1973).

The test for whether an error in failing to instruct on a lesser included offense requires reversal is whether “the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.” *Hansen*, 46 Wn.App. at 297. (Emphasis added). First degree theft, a class B

felony, requires proof of the element of taking property from the person of another in addition to proof that the property was wrongfully obtained. Compare, RCW 9A.56.030(1)(b) (defining first degree theft) with RCW 9A.56.040 (defining third degree theft).

The jurors may well have been dissatisfied with the third-degree theft instruction because they felt the instruction better described a simple shoplift, and didn't entirely address the physical altercation that followed. Stated differently, without an instruction that more completely addressed Mr. Shegog's conduct than the third degree theft instruction, the jury may have felt that rejection of second degree robbery in favor of third degree theft amounted to an all-or-nothing choice. Thus, this Court cannot conclude that the jury's guilty verdict on second degree robbery necessarily resolves the question of whether, properly instructed on first degree theft, the jury would have not found Mr. Shegog guilty of that intermediate offense. This Court should reject any claim that failure to give a first degree theft instruction was harmless.

Because evidence in the record affirmatively established Mr.

Shegog was only guilty of first degree theft, the trial court erred in refusing to instruct the jury on the lesser offense. *Fernandez-Median*, 141 Wn.2d at 461-62. As such, this court must reverse Mr. Shegog's conviction for second degree robbery. *Id.* at 462.

**8. THE TRIAL COURT HAD THE LEGAL AUTHORITY AND DUTY TO PERFORM A PROPORTIONALITY ANALYSIS TO DETERMINE WHETHER A LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN MR. SHEGOG'S CASE.**

The Persistent Offender Statute does not grant discretion to trial court judges in the sentencing of persistent offenders.<sup>13</sup> *State v. Morley*, 134 Wash.2d 588,952 P.2d 167(1998). All criminal sentences, nonetheless, are subject to constitutional limitations. "Fixing

13

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RCW 9.94A.570 states: "Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or when authorized by RCW 10.94A.728 (1),(2),(3),(4),(6),(8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers except: (1) in the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree."

[2000 c 28 § 6. Formerly RCW 9.94A.560.]

Shegog, Cornell Brief 34141-7-II

of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions.” *State v. Varga*, 151 Wn.2d 179,86 P.3d 139 (2004), quoting *State v. Thorne*, 129 Wn. 2d 736,767,921 P. 2d 514 (1996), quoting *State v. Mulcare*, 189 Wash. 625,628,66 P.2d 360 (1937). Sentencing Courts are “required to act within [the strictures of the SRA] and principles of due process of law.” *State v. Grayson*, 154 Wash.2d 333,111 P.3d 1183 (2005). Indeed , it is a trial court’s duty to impose sentences that do not contravene the constitution. *Varga* , *Supra*. In *State v. Morley, Supra*, our State Supreme Court affirmed a POAA life sentence<sup>14</sup> where the sentencing court improperly refused to sentence the defendant to life without the possibility of parole. The trial court had forbidden the state from seeking persistent offender status *on equitable grounds*. *State v.*

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14

The *Morley* Court, however, remanded to allow the defendant “the opportunity to withdraw his guilty plea in light of his qualifying as a persistent offender.” *State v. Morley, Supra at 588*.

*Morley*, is plainly distinguishable from the case at bar. In Mr. Shegog's case the trial Court ruled that, as a matter of law, he could not consider constitutional constraints. Specifically, the trial court held that it did not have the discretion to consider the constitutional question of whether a life without the possibility of parole sentence was cruel and unusual as applied to Mr. Shegog. RP 7 19-20. The following colloquy occurred:

**DEFENSE ATTORNEY:** Okay. So, Your Honor, are you saying you don't believe you have the authority to find it unconstitutional as applied?

**THE COURT:** I think the discretion under these circumstances for this case, based upon the case law and the statute itself, has left this Court without discretion. RP 7 27.

In so ruling, the trial Court failed to fulfill its obligation to protect Mr. Shegog's constitutional rights. As discussed below the POAA sentence imposed was cruel as applied to Mr. Shegog. The trial Court not only had the authority to decide this constitutional issue, it has the absolute duty to do so.

**9. THE LIFE SENTENCE IMPOSED IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 14 OF THE WASHINGTON CONSTITUTION.**

The Eighth Amendment to the United States Constitution specifies that “cruel and unusual punishment [shall not] be allowed.” Similarly, article 1 § 14 of the Washington Constitution provides that “cruel punishment [shall not be] inflicted.” The Washington Constitution provides greater protection than its federal counterpart. *State v. Fain*, 94 Wn.2d 386,392-93,617 P.2d 720 (1980); *State v. Manussier* 129 Wn. 2d at 674; *State v. Thorne*, 129 Wn.2d at 772-73; *State v. Rivers*, 129 Wn.2d 697,712-13, 921 P.2d 495(1996).

The Washington Supreme Court has determined that the Persistent Offender Accountability Act (POAA) “does not violate the cruel punishment clause of either the Eighth Amendment to the United States Constitution or Washington article 1, section 14.” *State v. Manussier* 129 Wn. 2d 652,685,921 P.2d 473 (1996); *State v. Thorne*,

*Supra*, 129 Wn.2d 736,776; accord, *State v. Rivers*, 129 Wn.2d 697,715, 921 P.2d 495(1996). The Court’s resolution of the “cruel punishment” issue, however, was not intended to resolve all article 1, section 14 challenges to sentences imposed under POAA. The Court recognized there may be cases in which application of the Act’s sentencing provision runs afoul of the constitutional prohibition against cruel punishment. *State v. Thorne, supra*, 129 Wn.2d 736,776 fn 11. In other words, a facially constitutional statute may still be found to be unconstitutional, as applied.

No Washington case law, including the *Thorne*, *Manussier*, and *Rivers* trilogy, has concluded that the three strikes law cannot be unconstitutionally cruel as applied in a given case. *Supra*. Washington Supreme Court has referred to the four criteria set forth in *State v. Fain*, 94 Wn.2d 387,397,617 P.2d 720 (1980), commonly referred to as “the *Fain* factors” or as a “proportionality analysis.” *Manussier*, 129 Wn.2d at 674; *Thorne*, 129 Wn.2d at 773-74.

Although it is most often applied in capital cases, proportionality analysis is required for felony sentences such as Mr. Shegog's which are the product of recidivist statutes. Harmelin v. Michigan, 501 U.S. 957, 115 L.Ed.2d 836, 866, 111 S.Ct. 2680 (1991) (Kennedy, O'Connor, and Souter, J.J., concurring); Manussier, 129 Wn.2d at 676-77. Where the crime committed and the sentence imposed are grossly disproportionate, the sentence (not the statute) is unconstitutional. Harmelin, 115 L.Ed. At 871-72; Hart v. Coiner, 483 F.2d 136, 143 (4<sup>th</sup> Cir.1973); People v. Gaskins, 923 P.2d 292, 296-97 (Colo. App. 1996).

In making a determination of proportionality, a court should evaluate (1) the nature of the offense, (2) the legislative purpose behind the habitual criminal statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. Manussier, 129 Wn.2d at 674; Fain, 94 Wn.2d at 397.

a. *Nature of the Offense*

The nature of Mr. Shegog's current offense as well as his prior convictions distinguish him from others who have raised POAA "cruel punishment" claims. Mr. Shegog's current offense is second degree robbery, a class B felony. The nature of his offense has been described in detail throughout Appellant's opening brief.

To summarize, although the jury convicted Mr. Shegog of second degree robbery, the facts of this offense are arguably the least egregious of any robbery conviction that resulted in a POAA life sentence. Mr. Shegog was unarmed. The "force" component of his offense consisted of pushing an Albertsons employee, who had physically accosted him, and who was one of several people who had barricaded the doors of the store. Once the group descended upon Mr. Shegog a mutual struggle ensued. At no time during the struggle, however, did Mr. Shegog attempt to punch or harm anyone. The uncontroverted testimony was that he was simply trying to break free.

Indeed, the jury concluded that none of the store employees or shoppers involved in the altercation sustained bodily injury. Mr. Shegog, on the other hand, was injured.

The only prior offenses accepted by the trial court were two second degree robbery convictions that occurred in King County in 1991 and 1992, more than fifteen years ago.<sup>15</sup> In neither of those cases did Mr. Shegog cause physical harm to anyone.

***b. Legislative Purpose of the Persistent Offender Statute***

The legislative history reveals that the purpose behind the POAA was to impose a life sentence only on those persons convicted of three serious violent offenses. The statement for Initiate 593 provides that:

Initiative 593 brings accountability and the certainty of punishment back to our criminal justice system. In aiming at three time violent offenders, it targets the “worst of the worst” criminals who most deserve to be behind bars.

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<sup>15</sup>

The State proved no other alleged prior convictions. CP 380-391; RP 7 23-26.

While the legislative intent and the billing behind the POAA was to punish only the “worst of the worst,” its net was cast too wide. In a society where crime includes murders, rapes, and even bombings, an offender who commits his crimes without injury to anyone is not the “worst of the worst” who most deserves to be behind bars until he dies.

*c. Punishment in Other Jurisdictions for Same Offense*

A brief survey of the habitual offender provisions in some other states reveals that Mr. Shegog’s sentence of life without the possibility of early release for a second degree robbery convictions is far more severe than sentences imposed for the same offense committed in other states.

In Alaska, a defendant convicted of a class B felony is subject to imprisonment for not more than 10 years. AS 12.55.125(d). The life sentence imposed for Mr. Shegog’s class B felony is drastically more severe than the sentence imposed for a similar offense in Alaska.

In Oregon, Mr. Shegog would not have been considered a

“dangerous offender,” and therefore would not be subject to the 30-year sentence that such a classification requires. See O.R.S. § 161,725-735. Rather, in Oregon, someone convicted of a class B felony could receive a maximum sentence of 10 years regardless of the number of prior convictions. O.R.S. § 161,605.

In California, a third time offender is sentenced to “an indeterminate term of life imprisonment with a maximum term of the indeterminate sentence calculated as the greater of [three times the term otherwise provided; 25 years; or the term that would have been imposed with certain enhancement].” Cal. Penal Code § 667(e)(2)(A). This a less severe sentence than the “true life” without parole sentence Mr. Shegog has received in Washington.

Mandatory minimum sentences of life without parole have been upheld in other states only in a limited category of cases, for Class A felonies or very serious drug offenses. 27 A.L.R. Fed. 110 §§ 8 and 9; 33 A.L.R. 3d 335 § 7.

The federal “three strikes” law specifically excludes robbery as a strike/“serious violent felony” if the defendant shows no firearm, and no dangerous weapon, death, or serious bodily harm was involved. 18 U.S.C. § 3559. The Supreme court in State v. Manussier, 129 Wn.2d at 678, noted that it is a national trend to increase sentences for repeat offenders, but did not compare Washington’s sentence to life without parole against the details of other jurisdictions’ recidivist laws. Manussier therefore is not controlling authority here.

A decade ago, Justice Sanders observed the following concerning Washington’s POAA, in his eloquent dissenting opinion, in State v. Rivers:

Fifty-one separate offenses are “strikes” under this statute. It incorporates the longest list of eligible felonies of any similar legislation found in any state of the union. Michael G. Turner et. al., “Three Strikes and You’re Out” Legislation: A National Assessment, 59 Fed. Probation 16,25(Sept.1995).

In most instances this statute also imposes a much more severe sentence than would be imposed in other states. Second degree robbery in Oregon receives a standard range punishment of 13 to 18 months. State v. Lee, 110 Ore. App.528,530,823 P.2d 445,

review denied, 313 Ore. 211,830 P.2d 596 (1992). In states which factor in prior crimes to compound the sentence, the term is less than 10 years. A defendant convicted in Alaska of second degree robbery with two prior violent felonies receives a six year term with possibility of three of those years suspended. *Solomon v. State*, 730 P.2d 809,810 (Alaska Ct.App. 1987). In New Mexico, anyone convicted of a third noncapital felony receive an extra four years on the sentence for the third felony. Although comparison of this sentence with other states which have adopted a three-strikes scheme after Washington's may be appropriate (measuring Washington's against copies seems somewhat circular", the particular features of the Washington three-strikes law rank it among the harshest in the country. Many of the states with a three-strikes law do not even include second degree robbery in the list of strikes. See Del. Code Ann. tit.11, § 4214(b)(Michie 1995)(second degree robbery not a strike under Delaware three-strikes law).

*Rivers* at 713. (Footnotes Omitted.)

Compared to the sentence Mr. Shegog would have received for his offense in numerous jurisdictions, including but not limited to, Alaska, Oregon, California, or under the federal system, the life sentence imposed in this case is disproportionate and cruel.

*d. Punishment in Washington for Other Offenses*

Aside from the POAA, Washington requires a mandatory life

sentence for only one crime: aggravated first degree murder. RCW 10.95.020. The maximum presumptive sentence for non-aggravated murder is 548 months, or 45 years, eight months. RCW 9A.32.030; 9.94A.310, 320. The maximum presumptive sentence for first degree rape is 280 months, or 23 years, four months. RCW 9A.44.040,9.94A.310,320. The maximum presumptive sentence for first degree arson is 144 months, or 12 years. RCW 9A.48.020; 9.94A.310, 320.

As noted by Justice Sanders:

As the Supreme Court has aptly observed, the sentence of life without possibility of parole is exceeded by only the death sentence itself; but not by much. *Harmelin v. Michigan*, 501 U.S. 957,1028,111 S.Ct. 2680, 115 L.Ed. 2d 836(1991)(Stevens, J., Dissenting)(“mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom.”). (Emphasis added.)

Dissenting opinion, *State v. Rivers, Supra* at 714.

Although second degree robbery need not be a trivial offense, it is less serious than the offenses listed above, which are without

question representative of the most onerous crimes that exist in Washington. Where the legislature has deemed it inappropriate to impose life sentences for murder and rape, it is arbitrary and disproportionate to impose a life sentence for the offense at issue here.

Instead of a reasoned, proportioned sentence tailored to fit Mr. Shegog's criminal history and actual facts of the current crimes, or a broadly proportionate sentence of the maximum of 10 years, the POAA mandates that he forever forfeit his right to live in society.

Even among "violent" offenses, gradations of culpability should be drawn. *In re Lynch*, 105 Cal.Rptr. 217,227,503 P.2d 921 (1972); *Solem v. Helm*, 463 U.S. at 293 (noting it is an accepted principle to judge some violent offenses to more serious than others).

The *Manussier* and *Thorne* analyses are not controlling here since in both of those cases one or more "strikes" at issue were already Class A felonies with a maximum sentence of life authorized. See 129 Wn.2d at 660-661,749, 772-776. Nothing in the majority opinion in

Rivers explains how it is proportionate or constitutional to suddenly increase the sentence for class B felonies like second degree robbery to life without parole under the POAA. By contrast, Justice Sanders' dissent explains how ample Washington precedent is violated by applying the "three strikes" sentence to defendants such as Mr. Shegog. See Rivers. 129 Wn.2d at 716-735.

This Court should reject any argument that the mandatory minimum sentence of life WITHOUT POSSIBILITY of parole is no different than life WITH eligibility for parole. In severely divided opinions regarding guilty pleas and the validity of the capital murder statute, a slight majority endorsed the view that the law would treat life without parole the same as life with parole for the purpose of that legal issue. State v. Frampton, 95 Wn.2d 469,484,627 P.2d 922(1981); In re PRP of Grisby, 121 Wn.2d 419,430,853 P.2d 801(1993). The court in State v. Rivers, 129 Wn.2d at 714, treated a sentence of life without parole the same as life without possibility of parole in the context of

the POAA, citing Grisby, without discussion. It neglected to consider that in State v. Fain, the court had recognized that it was relevant to cruel and unusual punishment analysis that a habitual criminal serving a life sentence would in fact be eligible for parole in 12 years. Fain, 94 Wn.2d at 392 (citing Rummel v. Estelle, 445 U.S. 263,63 L.Ed. 2d 382,100 S.Ct. 1133(1980)). Ample federal law recognizes the significant difference between a sentence of life in prison with or without the possibility of parole. Solem v. Helm, 463 U.S. 277,77 L.Ed 637,103 S. Ct. 3001 (1983); Harmelin v. Michigan, 115 L.Ed.2d at 865; Simmons v. South Carolina, 512 U.S. 154,129 L.Ed. 2d 133,114 S.Ct. 2187 (1994); Lindsey v. Washington, 301 U.S. 397,81 L.Ed. 1182, 57 S.Ct. 797 (1936); Chatman v. Manquez, 754 F.ed 1531 (9<sup>th</sup> Cir. 1985).

Furthermore the POAA's harshness is not altered by its strictly limited retention of the Governor's pardon power. State v. Thorne, 129 Wn.2d at 728. This law only fails to eliminate this power because it

could not constitutionally do so. *In re Costello*, 22 Wn.2d 697,157 P.2d 713 (1945). Other courts have refused to find that the remote possibility of clemency or a Governor's pardon significantly lightens the burden of a mandatory minimum of life without possibility of parole. *Solem v. Helm*, 463 U.S. at 282,300-303.

Once the persistent offender punishment imposed on Mr. Shegog is properly understood as a mandatory minimum of life imprisonment without possibility of parole, the same as for aggravated first degree murder, the law can be compared to other recidivist statutes. It is far more harsh than Washington's old habitual criminal law, which imposed a life sentence with parole. Persons serving such sentences as a habitual criminal routinely were released in 15 years or less. *State v. Fain*, 94 Wn.2d at 393; *In re PRP of Eckmann*, 117 Wn.2d 678,682,818 P.2d 1350(1991). Cf., *State v. Manussier*, 129 Wn.2d at 677, *Thorne*, 129 Wn.2d at 776, and *Rivers*, 129 Wn.2d at 714 (relying on old habitual criminal cases to uphold the persisten

offender law's proportionality). Washington's old habitual criminal law also was applied much more narrowly than it would appear on its face, since case law prohibited such sentence for pure property offenders although the statute on its face included all third felony convictions. *State v. Fain, supra*. The harshness of that statute was further mitigated by the requirement that the prosecutor exercise discretion in deciding whether to file the habitual offender allegation. See *State v. Pettitt*, 93 Wn.2d 288, 296, 604 P.2d 1364 (1989).

The POAA creates far too large a category of persons who will forever lose their right to live in society, and it fails to make distinctions among degrees of violence in a defendant's present or past. After all, a person can be convicted of 25 separate fourth degree assaults, undeniably a significant amount of violence, and yet that person would receive at most a series of one-year sentences in jail.

Mr. Shegog's life sentence for his robbery conviction is cruel. The sentence is disproportionate to sentences for the same offense in

other jurisdictions and to sentences imposed for other offences in this jurisdiction. In Washington, the conduct that gave rise to Mr. Shegog's present conviction is the same conduct that usually results in a misdemeanor third degree theft conviction. Likewise, "pushing" someone generally subjects a person to the gross misdemeanor charge of fourth degree assault. Even if charged as a class C felony third degree assault, such a conviction would have resulted in a standard range sentence of 9-12 months in Mr. Shegog's case. A first degree theft conviction would have yielded a presumptive range of 4-12 months. Mr. Shegog's standard range for a second degree robbery is 33-43 months based on his proven criminal history. His statutory maximum is ten years. His sentence shocks the conscience and should be overturned.

**E. CONCLUSION**

For all of the foregoing reasons and conclusions, because of the State's improper charging decisions, the failure of the trial court to

properly instruct the jury, and the insufficiency of evidence, Mr. Shegog respectfully requests that this Court reverse and dismiss his conviction for second degree robbery. In the alternative this Court should reverse Mr. Shegog's Life Without the Possibility of Parole Sentence and remand this case to Judge Fleming to consider the proportionality factors, and to render a just decision, or this Court should reverse the Life Without the Possibility of Parole Sentence on the basis that it constitutes cruel and unusual punishment as applied to Mr. Shegog.

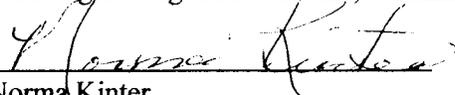
RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2006.

A handwritten signature in cursive script, reading "Sheri L. Arnold", is written over a horizontal line.

Sheri L. Arnold  
WSBA # 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on July 17 , 2006 she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave.South, Tacoma, WA. 98402, and by U.S. mail to appellant, Cornell Shegog, DOC # 975398, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, WA., 99362, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on July 17, 2006.

  
Norma Kinter

FILED  
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TACOMA  
WASHINGTON

**APPENDIX A - RCW 9A.16.080**

In any criminal action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or question by a peace officer, by the owner of the mercantile establishment, or by the owner's authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

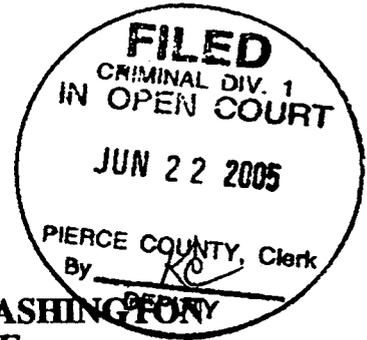
**APPENDIX B - RCW 4.24.220**

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent, had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

**APPENDIX C - STATUS CONFERENCE**



05-1-00152-8 23256950 OR5TAC 06-22-05



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

State of Washington,

Plaintiff,

No. 05-1-00152-8

v.

Status Conference

Cornell Shugas,  
Defendant.

1.  This case is expected to be a guilty plea on \_\_\_\_\_ or  Plea date will be set.
2.  The State has made a plea offer (complete and initial).  
 The defendant has been informed.  The offer has been declined.  
Defendant \_\_\_\_\_ Defense counsel \_\_\_\_\_  
 The plea offer remains valid through IS WITHDRAWN.  
Prosecuting Attorney \_\_\_\_\_
3.  An amended information will be filed on by 6/29/05
4.  A continuance will be requested by \_\_\_\_\_ and is set for \_\_\_\_\_.  
Reason: \_\_\_\_\_
5. Jury trial is set for July 13, 2005.  
 Parties are ready for trial. State:  yes  no. Defense:  yes  no.
6. Estimated trial length. State: \_\_\_\_\_. Defense: 3-4 days
7. Witness lists have been filed and all witnesses disclosed.  
State:  yes  no If no, witness list will be filed by \_\_\_\_\_, 200\_\_\_\_.  
Defense:  yes  no If no, witness list will be filed by July 6, 2005

8. There will be out-of-state witnesses:  yes  no

9. There may be witness scheduling problems: State:  yes  no  
Defense:  yes  no

Why: \_\_\_\_\_

10.  A child competency hearing is needed and  set for \_\_\_\_\_  will be set.

11. Discovery. State:  Complete  Incomplete. Defense:  Complete  Incomplete  
\_\_\_\_\_ to be provided to \_\_\_\_\_ on or before \_\_\_\_\_  
\_\_\_\_\_ to be provided to \_\_\_\_\_ on or before \_\_\_\_\_

12. The following motions will be made before the day of trial (motions of more than one hour ARE NOT to be heard on the day of trial without permission of CDPJ).

CrR 3.5  CrR 3.6  Other \_\_\_\_\_

Motions are set for: \_\_\_\_\_

Briefing Schedule: Motion(s) due: \_\_\_\_\_ Response due: \_\_\_\_\_

13. Defendant needs a competency evaluation:  yes  no

14. A juror questionnaire will be requested at the time of trial:  yes  no

Comments: \_\_\_\_\_

15. An interpreter is required:  yes  no. Language: \_\_\_\_\_

**IF YES, THE ASSIGNED DPA IS RESPONSIBLE FOR NOTIFYING THE COURT'S INTERPRETER COORDINATOR AT x 6091.**

Dated: 06/22/05 2005

[Signature]  
Defendant

**FILED**  
CRIMINAL DIV. 1 Judge  
IN OPEN COURT  
JUN 22 2005  
KATHERINE M. STOLZ  
[Signature]  
Prosecuting Attorney/Bar # 16708

[Signature]  
Defendant's Attorney/Bar # 16912

**NEITHER THE DEPUTY PROSECUTING ATTORNEY, DEFENSE COUNSEL, NOR THE DEFENDANT IS RELEASED FROM ATTENDANCE UNTIL THE COURT APPROVES THIS ORDER.**