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NO. 59741-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

TERRANCE J. IRBY,

Appellant.

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STATE OF WASHINGTON

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

The Honorable John M. Meyer, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Skagit County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Mayorsky 1-31-2008
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a public trial.
2. Appellant was denied his constitutional right to be present at all critical stages of trial.
3. The sentencing court erroneously concluded that appellant is a persistent offender.
4. In its findings and conclusions regarding appellant's status as a persistent offender, the sentencing court erred when it entered findings of fact 9-11 and conclusions of law 1 and 3-6.¹

Issues Pertaining to Assignments of Error

1. The trial judge conducted a portion of jury voir dire by e-mail from his chambers. Where the trial court did not analyze the Bone-Club² factors before conducting this private hearing, did the chosen procedure violate appellant's constitutional right to public trial?
2. Voir dire is a critical stage of trial and appellant had a constitutional right to attend and participate. When the court

¹ The court's findings and conclusions are attached to this brief as appendix A.

² State v. Bone-Club, 128 Wn.2d 254, 926 P.2d 325 (1995).

conducted voir dire by e-mail, only defense counsel and the prosecuting attorney participated in the process. There is no indication appellant was present or consulted in any way. Did this violate appellant's due process rights?

3. At sentencing, the court treated a 1976 conviction as a strike under the Persistent Offender Accountability Act ("POAA"). That conviction, however, is not legally comparable to any POAA offense. Moreover, the State failed to prove factual comparability to a jury beyond a reasonable doubt. Does this violate Washington law and appellant's Sixth Amendment right to trial by jury?

4. Appellant also has a 1984 assault conviction that was treated as a strike offense. For that offense to wash out, appellant had to remain crime free in the community for ten years. In an attempt to prove appellant did not do so, the State submitted unsigned docket sheets from Skagit County District Court purporting to show appellant had several misdemeanor convictions in the 1990s. The State had destroyed the actual files in these cases, including copies of the judgments. Where the State chose to destroy the best evidence of criminal convictions, were unsigned docket sheets sufficient to satisfy the State's burden to prove appellant's criminal history?

5. Despite the State's failure to prove that either the 1976 or the 1984 conviction should be counted as a strike, the court entered findings and conclusions treating them as strike offenses. Where the record does not support these findings and conclusions, are they erroneous?

B. STATEMENT OF THE CASE

1. Pretrial Proceedings

The Skagit County Prosecutor's Office charged Terrance Irby with eight offenses:

- Count 1: Burglary in the Second Degree;
- Count 2: Aggravated Murder and, alternatively, First-degree Felony Murder;
- Count 3: Burglary in the First Degree;
- Count 4: Robbery in the First Degree;
- Count 5: Unlawful Possession of a Firearm in the First Degree;
- Count 6: Unlawful Possession of a Firearm in the First Degree;
- Count 7: Unlawful Possession of a Firearm in the First Degree; and
- Count 8: Attempting to Elude a Pursuing Police Vehicle.

CP 1-4.

Several of these charges were disposed of prior to trial. The court dismissed the robbery charge in count 4 on a Knapstad³ motion. CP 1092. The court transferred venue on the charges in counts 1, 6, and 8 to other counties. Supp. CP ____ (sub no. 109, Order); 19RP⁴ 8-11. The court also severed the firearm charges in counts 5 and 7. CP 1119. Ultimately, Irby was only tried on the murder charges in count 2 and the burglary charge in count 3, plus lesser included offenses for each of these charges. CP 1156-1175.

2. Jury Voir Dire

Jury selection began on Tuesday, January 2, 2007. The parties and Judge Meyer agreed that on that day, prospective jurors would be provided with a written questionnaire and given the

³ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁴ This brief refers to the verbatim report of proceedings as follows: 1RP – 4/21/05; 2RP – 4/28/05; 3RP – 7/21/05; 4RP – 8/19/05; 5RP – 8/22/05; 6RP – 9/1/05; 7RP – 9/8/05; 8RP – 9/16/05; 9RP – 9/22/05; 10RP – 9/30/05; 11RP – 10/7/05; 12RP – 10/14/05; 13RP – 10/21/05; 14RP – 10/31/05; 15RP – 11/10/05; 16RP – 1/10/06; 17RP – 1/26/06; 18RP – 3/29/06; 19RP – 5/5/06; 20RP – 6/14/06; 21RP – 8/2/06; 22RP – 8/9/06; 23RP – 9/20/06; 24RP – 9/21/06; 25RP – 10/4/06; 26RP – 10/18/06; 27RP – 10/25/06; 28RP – 10/26/06; 29RP – 10/27/06; 30RP – 10/30/06; 31RP – 10/31/06; 32RP – 11/9/06; 33RP – 11/14/06; 34RP – 12/27/06; 35RP – 1/3/07; 36RP – 1/3-5/07 and 1/8-9/07; 37RP – 1/10-12/07; 38RP – 1/16-18/07; 39RP – 1/19/07 and 1/22/07; 40RP – 1/23/07; 41RP – 2/23/07; 42RP – 3/6/07; 43RP – 3/8/07; 44RP – 3/12/07.

necessary oath without the attorneys being present. The parties would then question the jurors on Wednesday, January 3. 34RP 14-16, 30.

Jurors were provided the questionnaire on January 2. Supp. CP ____ (sub no. 182, Questionnaire). Copies were then apparently distributed to counsel for review back at their respective offices. Just after 1:00 p.m., Judge Meyer sent an e-mail message to counsel suggesting that certain potential jurors be removed from the panel:

I note that 3, 23, 42 and 59 were excused after one week by the Court Administrator.

17 home schools, and 3 weeks is a long time.
77 has a business hardship.
36, 48, 49, and 53 had a parent murdered.

Any thoughts? If we're going to let any go, I'd like to do it today.

John M. Meyer, Judge
Skagit County Superior Court

Supp. CP ____ (sub no. 183, e-mail exchange).

Defense counsel indicated he had no objection to releasing some or all of these jurors. The prosecutor's response is not part of the record, but a subsequent message from Judge Meyer indicates the State objected to releasing jurors 36, 48, and 49. Supp. CP ____ (sub no. 183, e-mail exchange).

The court released seven jurors from the panel. The clerk's minutes indicate, "In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: #7, 17, 23, 42, 53, 59 & 77."⁵ The minutes also indicate Irby was in custody and not present in court on January 2. Supp. CP ____ (sub no. 182.1, minutes (1/2/07)).

3. Verdicts and Sentencing

Jurors found Irby guilty of aggravated first-degree murder, felony murder in the first degree, and burglary in the first degree. CP 1181-83, 1185, 1188. By special verdict, jurors also found Irby was armed with a deadly weapon. CP 1187.

The court found Irby to be a persistent offender based on his felony murder conviction and two prior offenses – a 1976 conviction for statutory rape and a 1984 conviction for assault in the second degree. 42RP 43-49; 43RP 2-8; CP 1204-1207. Irby objected to this finding, arguing that the 1976 conviction was not comparable to a current strike offense. He also argued the assault 2 conviction had washed out based on the State's failure to prove a subsequent

⁵ While Judge Meyer's initial e-mail message proposed that juror 3 be dismissed, a later message indicates he had intended to propose dismissal of juror 7. Supp. CP ____ (sub no. 183, e-mail exchange).

conviction within ten years of his release on that charge. 42RP 9-10, 25-31. Despite these objections, the court sentenced Irby to life in prison without the possibility of parole, and he timely filed his Notice of Appeal. CP 1193, 1209-1217.

C. ARGUMENT

1. IRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In Orange, the Supreme Court held that before a trial judge can close any part of jury voir dire from the public, it must analyze the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Orange, 152 Wn.2d at 806-07, 809; see also

State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005)

(a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

The Bone-Club requirements are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In Brightman, the trial court sua sponte told counsel that for reasons of security "we can't have any observers while we are selecting the jury." Brightman, 155 Wn.2d at 511. The court,

however, failed to analyze the five Bone-Club factors. The Supreme Court held because the record lacked “any hint that the trial court considered Brightman’s public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.” Id. at 518. The Court remanded for a new trial. Id.

The State had argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and, if it was closed, the closure was de minimis. Brightman, 155 Wn.2d at 515-17. The Brightman Court rejected both arguments. It ruled, “once the plain language of the trial court’s ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.” Id. at 516. It also ruled that where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. Id. at 517.

Brightman was decided on direct appeal. In Orange, the same issue was raised in a personal restraint petition. In 1995, Orange was tried for murder, attempted murder, and assault. Orange, 152 Wn.2d at 799. During part of the jury selection process the trial court closed the courtroom. Orange was convicted and appealed. Appellate counsel did not raise the closed jury

selection issue. *Id.* at 814. Orange's convictions were affirmed. *Id.* at 803.

Orange filed a personal restraint petition in 2001, six years after his trial. *Id.* at 803. The Court of Appeals denied the petition but the Supreme Court granted discretionary review and ordered a reference hearing. *Id.* Findings from the reference hearing showed, due to limited courtroom space and security reasons, the trial court closed the courtroom for a portion of jury voir dire. *Id.* at 808-10. The Orange Court held the trial court's failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange's right to a public trial. *Id.* at 812.

The Orange Court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange's direct appeal. *Id.* at 814 (citing Bone-Club, 128 Wn.2d at 261-262). It reasoned that because there was no legitimate tactical or strategic reason for appellate counsel's failure to raise the issue, Orange was denied his right to effective assistance of counsel on appeal and was entitled to a new trial, the same remedy he would have received had counsel raised the issue on appeal. *Id.*

Here, the trial judge conducted a portion of jury voir dire from his chambers through an e-mail exchange.⁶ This exchange was obviously closed to the public. Not even Irby was present. As in Brightman, the record here lacks “any hint” the court considered, much less analyzed, the Bone-Club factors. Instead, it appears the court chose this process merely for the sake of expediency. Judge Meyer sought to expedite the process for the jurors’ convenience, hoping to avoid the necessity of their attendance the following day. But expediting the process in this fashion runs afoul of constitutional requirements. See People v. Harris, 10 Cal. App. 4th 672, 676-689, 12 Cal. Rptr.2d 758 (Cal. App. 1992) (interest in expediting process does not outweigh public trial right; “chamber striking” is per se reversible error). By employing this procedure, the court violated Irby’s right to public trial.

The State may try to argue that because defense counsel did not object to voir dire by e-mail, the issue is waived. That argument

⁶ Our office did not initially seek a transcript of the remainder of voir dire since the e-mail exchange and clerk’s minutes should be sufficient to address the issues arising from the jurors’ removal. Out of an abundance of caution, however – to make absolutely certain the record is complete for appeal – our office will be obtaining a transcript of voir dire following the filing of this brief. It should be ready by the time the State files its brief.

fails. Defense counsel in both Orange and Brightman also failed to object. Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517. In Brightman, the Court specifically held, "the defendant's failure to lodge a contemporaneous objection at trial did not effect a waiver of the public right to trial." 155 Wn.2d at 517-18 (citing Bone-Club, 128 Wn.2d at 257).

The State may also try to argue this case is somehow distinguishable from Brightman and Orange because only a portion of jury voir dire was closed to the public. But that argument fails as well. In Orange, the courtroom was only closed for a portion of the jury selection process. 152 Wn.2d at 808. In Brightman, the Court ruled that where jury selection, or a part of the jury selection is closed, the closure is not de minimis or trivial. 155 Wn.2d at 517; see also State v. Frawley, 140 Wn. App. 713, 718-722, 167 P.3d 593 (2007) (even where general voir dire is conducted in the public eye, reversal required if portion of process conducted in chambers).

The constitutional public trial right is the right to have a trial open to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly

condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ." Bone-Club, 128 Wn.2d at 259 (citing In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 506 n. 25, 92 L. Ed. 682 (1948) (quoting Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927))). The public was not present to see that Irby was fairly dealt with.

Irby's constitutional right to a public trial was violated. His convictions must be reversed and the case remanded for a new trial.

2. THE FAILURE TO INCLUDE IRBY IN THE PROCESS OF STRIKING JURORS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT FOR TRIAL.

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington Constitution also specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

The defendant has the right to be present whenever the court is considering factual questions and whenever "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (quoting Gagnon, 470 U.S. at 526); cert. denied, 513 U.S. 849 (1994); State v. Bremer, 98 Wn. App. 832, 834-35, 991 P.2d 118 (2000); State v. Berrysmith, 87 Wn. App. 268, 273, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998).

"Jury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (citations omitted). It has long been recognized as a critical stage of any criminal proceeding. Gomez, 490 U.S. at 873; United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors). And the right to be present attaches "from the time when the work of empanelling the jury begins." Gomez, 490 U.S. at 873 (quoting Lewis v. United States, 146 U.S. 370, 374, 13 S. Ct. 136, 36 L. Ed.

1011 (1892)); see also CrR 3.4(a) (requiring the defendant's presence for "the empaneling of the jury").

Violation of the defendant's right to be present at a critical stage of the criminal proceedings requires reversal unless the State can demonstrate the constitutional violation was harmless beyond any reasonable doubt. See Campbell v. Rice, 408 F.3d 1166, 1171-72 (9th Cir.), cert. denied, 546 U.S. 1036 (2005); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). The State cannot make the necessary showing in this case.

Without Irby's knowledge or consent, the attorneys and Judge Meyer dismissed seven jurors from his panel. It is far from clear that Irby would have concurred with this decision. As to jurors 7, 23, 42, and 59, Judge Meyer noted they "were excused after one week by the Court Administrator." Supp. CP ____ (sub no. 182.1, clerk's minutes).

It is not apparent what this means. It may mean the administrator planned to excuse these jurors after one additional week of service. But one, several, or all of these jurors may have been desirable in Irby's eyes. Moreover, one, several, or all of

these jurors may have been willing to serve beyond the additional week envisioned by the administrator.

Defense counsel's response to Judge Meyer's suggestion these individuals simply be removed from the process indicates he did not have strong feelings one way or the other. He simply replied, "No objection from the defense to letting some or all go."

Id. In other words, it does not appear counsel considered the individual characteristics of these jurors in agreeing they could be released. But whatever counsel's mindset, the attorneys and trial judge had no right to simply dismiss them from the panel without Irby's knowledge, presence, and input.

Judge Meyer also indicated, "17 home schools, and 3 weeks is a long time" and "77 has a business hardship." *Id.* As with jurors 7, 23, 42, and 59, however, neither the attorneys nor the court had any right to dismiss these jurors in Irby's absence. Both jurors may have been attractive to Irby and, at his behest, questioning may have revealed both were fully willing to serve.

Finally, Judge Meyer noted that "36, 48, 49 and 53 had a parent murdered." *Id.* Defense counsel's response – he did not object to some or all being released – applied to these individuals as well. The prosecutor objected to releasing jurors 36, 48, and 49,

but did not lodge an objection to releasing juror 53. As a result, 36, 48, and 49 were retained and only juror 53 was released. *Id.* Irby may have wanted this juror on his panel. The fact an individual was a crime victim (or a parent was a victim) does not automatically disqualify a juror from service. Juror 53 may have possessed attributes that made him or her a very attractive juror in Irby's eyes. And the fact the prosecutor felt there was no need to keep juror 53 certainly heightens the prospect this juror possessed certain characteristics beneficial to the defense. Yet, Irby played no role in juror 53's removal from the panel.

Ultimately, Irby does not have to prove he would have wanted one, several, or all of these individuals on his jury. There is a presumption of prejudice, which the State must overcome beyond a reasonable doubt. And there is simply no way to accomplish that feat under these circumstances.

On this alternative ground, Irby's convictions must be reversed and his case remanded for a new trial.

3. IRBY'S 1976 CONVICTION FOR STATUTORY RAPE IS NOT LEGALLY COMPARABLE TO A STRIKE OFFENSE AND HAS NOT BEEN PROVED FACTUALLY COMPARABLE.

The POAA requires the sentencing judge to impose a sentence of life without parole regardless of the standard range if the defendant is found to be a persistent offender. RCW 9.94A.570. Under the "three strikes" provision, a persistent offender is an offender who has been convicted of a "most serious offense" and has "before the commission of the offense . . . been convicted as an offender on at least two occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses" RCW 9.94A.030(33)(a)(i)-(ii).

RCW 9.94A.030(29) contains a list of qualifying offenses. Statutory rape in the second degree is not included on that list. The sentencing court found it to be a qualifying offense anyway based on its determination, by a preponderance of the evidence, that the former statutory rape offense is comparable to a current conviction for child rape in the second degree. CP 1205. This was error.

The Washington Supreme Court has established a two-part test for determining whether prior offenses not listed in the three

strikes statute are comparable to strike offenses. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (citing State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)). The same test applies whether the prior conviction is from a foreign jurisdiction or Washington. State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

Under the first prong of the test, the court must compare the elements of the crimes to determine if the offenses are legally comparable. In cases where the elements of the prior offense are not substantially similar to a strike offense, or the prior statute prohibited a broader range of conduct, the offenses are not legally comparable. Lavery, 154 Wn.2d at 255-56.

Under the second prong of the test – used when the offenses are not legally comparable – the court determines whether the offenses are factually comparable. The sentencing court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction for a current strike offense. Lavery, 154 Wn.2d at 255-256. However, because the defendant has a Sixth Amendment right to a jury determination of the facts necessary to increase punishment beyond the standard

range; this factual examination is limited to facts admitted, stipulated to, or proven to a jury beyond a reasonable doubt. *Id.* at 258.

a. Irby's Conviction For Statutory Rape Is Not Legally Comparable To A Strike Offense.

Whether two offenses share comparable elements is a purely legal question this Court reviews *de novo*. *Stockwell*, 159 Wn.2d at 397. Irby was convicted in 1976 of statutory rape under a statute that provided:

A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210.

The sentencing judge found this was legally comparable to a conviction for rape of a child in the second degree. CP 1206. Under the current statutory scheme:

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1).

As defense counsel pointed out below, the two offenses are not legally comparable based on differing age elements. *See* 42RP

25-27, 33. While statutory rape in the second degree included 11-year-old victims, rape of a child in the second degree only includes victims that are 12 or 13 years old. Moreover, statutory rape merely required the perpetrator be "over sixteen years of age." In comparison, rape of a child in the second degree requires the perpetrator be "at least thirty-six months older than the victim."⁷

Because the elements of the two offenses differ, statutory rape is not legally comparable to rape of a child in the second degree. The sentencing court erred when it found otherwise (conclusions 1 and 4-6). CP 1206.

b. Irby's Conviction Has Not Been Proved Factually Comparable To A Strike Offense.

The Sixth Amendment jury trial guarantee includes the right to have any fact "which increases the penalty for a crime beyond the prescribed statutory maximum submitted to a jury and proved

⁷ In response, the State may point out that the former statute for statutory rape in the *first* degree also contained a lower victim age and did not have language expressly requiring a necessary age disparity. Yet, in State v. Stockwell, the Washington Supreme Court found the former offense legally comparable to rape of a child in the first degree. In Stockwell, however, the Court was never asked to compare these particular elements. Rather, the only element at issue was nonmarriage. See Stockwell, 159 Wn.2d at 397 ("Only one element concerns us here."). Cf. Stockwell, 159 Wn.2d at 400 (Sanders, J., dissenting) (noting difference in age elements).

beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). “Statutory maximum” is not the maximum authorized by the Legislature. Rather, it is the maximum sentence a judge is authorized to impose without finding any additional facts. State v. Evans, 154 Wn.2d 438, 441, 114 P.3d 627 (citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)), cert. denied, 546 U.S. 983 (2005).

As an initial matter, it should be noted that the maximum authorized penalty for aggravated first-degree murder is life in prison without the possibility of parole. RCW 10.95.030(1). The sentencing judge specifically declined, however, to impose sentence under this provision. 42RP 43-49; 43RP 2-8; CP 1193 (striking language imposing sentence for aggravated murder); CP 1207 (expressly indicating no sentence imposed based on aggravating circumstances). Instead, the court imposed a sentence of life in prison without parole under the POAA using the felony murder conviction, which carried a standard range of 398 to 510 months – the maximum authorized penalty in this case.⁸ CP 1191, 1207.

⁸ Irby cannot now be sentenced for aggravated murder because his conviction for that offense must be reversed based on

As previously noted, the Sixth Amendment limits any determination as to whether a prior offense is factually comparable to a strike offense. The court may not, in a comparability analysis, rely on facts that were neither admitted, stipulated, nor proven to a jury beyond a reasonable doubt. Lavery, 154 Wn.2d at 258. In fact, where the prior statute prohibits a broader range of conduct than the strike offense, examining the record for factual comparability may not be possible because there may have been no incentive for the accused to attempt to prove he did not commit the narrower offense. It was for this reason the Lavery Court concluded that where the statutory elements of the prior conviction are broader, the prior conviction "cannot truly be said to be comparable." Id. at 257-58.

In concluding otherwise, the sentencing court in Irby's case looked to paperwork from the 1976 case. Specifically, the prosecutor submitted the affidavit of probable cause, information, verdict, judgment, and other documents from the court file.

the violations of his right to public trial and to be present at all critical stages. There is no guarantee he will be tried and/or convicted of that offense again. But whether he qualifies as a persistent offender is important should he again be convicted of felony murder. And his status in this regard will certainly be important for any plea discussions between the parties.

Sentencing Exhibit 8.⁹ These documents indicate the offense occurred on May 13, 1976, he was charged in July 1976, and he was convicted at a jury trial on October 15, 1976. *Id.* The information alleges:

That the said defendant in the County of Chelan, State of Washington, did then and there willfully, unlawfully, and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age, contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and against the peace and dignity of the State of Washington.

Id. The judgment parrots this language. *Id.*

Notably, neither this document, nor any other document relied upon by the sentencing court, indicates that the jury was specifically asked to find that Irby was at least 36 months older than the victim or that the victim was 12 or 13 as opposed to 11. It would be surprising if such a document existed because these more narrow requirements were not elements of statutory rape. The sentencing court nonetheless found the elements met by simply entering its own findings of fact, which state "[a]ccording to certified court records the defendant was about one (1) week short of his 18th birthday at the

⁹ Exhibit 8 is attached to this brief as appendix B.

time of the commission of the offense. The victim at the time of the offense was 13 years of age.” CP 1206 (conclusion of law 1); see also 42RP 38 (similar oral finding).

This is precisely the type of judicial fact finding Lavery prohibits. In order to find comparability, the sentencing judge had to evaluate the allegations in the information and other accompanying documents and enter additional findings of fact regarding age – elements not included in the crime for which Irby was convicted in 1976. Reliance on these judicially determined facts to impose sentence under the POAA violated Irby’s Sixth Amendment right to jury trial. See Apprendi, 530 U.S. at 490; Lavery, 154 Wn.2d at 257-58.

The court erred when it treated the statutory rape conviction as a strike offense. Its supportive findings and conclusions are erroneous. CP 1206-07 (conclusions of law 1 and 4-6). The resulting sentence of life in prison without parole must be vacated.

4. THE STATE FAILED TO PROVE THAT INTERVENING MISDEMEANOR CONVICTIONS PREVENTED IRBY'S ASSAULT CONVICTION FROM WASHING OUT.

In addition to treating Irby's conviction for statutory rape as a prior strike, the court also found that his 1984 conviction for assault in the second degree counted as a strike offense. CP 1205. The date of this crime was September 10, 1984. Irby pled guilty to the offense on October 17, 1984, and was sentenced on November 13, 1984, to 24 months with credit for time served. CP 1205; sentencing exhibits 9-10.

In order to count as a strike under the POAA, the offense must be one that counts in the defendant's offender score under RCW 9.94A.525. See RCW 9.94A.030(33)(a)(ii). Assault in the second degree is a class B felony. RCW 9A.36.021(2)(a); former RCW 9A.36.020(2). As such, it "shall not be included in the offender score, if since the last date of release from confinement . . . pursuant to a felony conviction . . . the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b).

Since Irby was sentenced on the assault in 1984, the State had to prove he had intervening convictions interrupting any

subsequent ten-year period in the community. It failed to properly do so.

The State is required to prove criminal history by a preponderance of the evidence. RCW 9.94A.500(1). "The best evidence of a prior conviction is a certified copy of the judgment." State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Where the State fails to produce a certified judgment, "[t]he state may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent." State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002)(citing State v. Ericks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)); State v. Rivers, 130 Wn. App. 689, 701, 704, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006).

In Irby's case, the State alleged he had convictions for driving with license suspended in the third degree from August 1994, April 1995, and July 1996. However, the State did not have certified judgments for any of these alleged offenses. Instead, the State merely submitted certified copies of the court docket sheets for each case. Sentencing exhibits 1-3. Over a defense objection, the court

found these convictions had been proved by a preponderance of the evidence.¹⁰ 42RP 9-13, 28-31; CP 1205. This was error.

To explain why it was not able to submit certified judgments on these cases, at sentencing the State called Deannie Nelson, Assistant Court Administrator for Skagit County District Court. 42RP 5. Nelson explained that once law enforcement files a criminal citation, a computer court docket lists each case event, including the ultimate disposition. 42RP 5-6. Clerk's manually enter the information in court or sometime thereafter. The dockets do not contain a judge's signature, the defendant's signature, or fingerprint information. 41RP 9. The court is authorized to destroy files after five years. Thereafter, the computer docket is the only remaining record. 42RP 6. The court had destroyed the files associated with the 1994, 1995, and 1996 cases. 42RP 7.

As previously noted, the state may introduce something other than the certified judgment only where it can show the writing is unavailable "for some reason other than the serious fault of the

¹⁰ The State did submit certified copies of judgments for misdemeanor convictions in 2004. Sentencing exhibits 4-7; CP 1205-06. But if the State failed to prove convictions from the 1990s, these later convictions are irrelevant because the 1984 assault conviction would have washed out well before 2004.

proponent.” Lopez, 147 Wn.2d at 519; Rivers, 130 Wn. App. at 704. Had a fire destroyed the records, this standard would be met. Similarly, if the records had been stolen, this standard would be met. And there are likely other scenarios where it would be unreasonable to place blame on the State.

Here, however, the records were destroyed merely because the Skagit County clerk had been given the discretion to do so after a five-year period. There is no indication they had to be destroyed. Moreover, the State presented no evidence as to why – at the very least – the records were not scanned, thereby ensuring an electronic record of the original file. Where Skagit County *chose* not to retain valuable court records, Skagit County should not be heard to complain that it cannot produce those records. Destruction of the files is due to the serious fault of the proponent.

Even if the State could demonstrate that destruction of the records was attributable to some other cause, it would still be required to submit evidence comparable to a certified judgment. Lopez, 147 Wn.2d at 519. While the permitted means of proof have not been fully and clearly defined, certain materials have been deemed adequate. See, e.g., State v. Morley, 134 Wn.2d 588, 611, 952 P.2d 167 (1998) (complete court martial record); State v.

Winings, 126 Wn. App. 75, 91-93, 107 P.3d 141 (2005) (criminal complaint, statement on plea of guilty, minute order, and abstract of judgment); State v. Reinhart, 77 Wn. App. 454, 456-57, 891 P.2d 735 (combination of FBI RAP sheet, certified copies of unsigned judgments and sentences, presentence reports from alleged convictions, and penitentiary "Sentence Data Record"), review denied, 127 Wn.2d 1014 (1995).

This Court has indicated the State can prove prior convictions with "documents of record" from a court file. See State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). But it has never approved use of an unsigned docket. In State v. Vickers, 148 Wn.2d 91, 120, 59 P.3d 58 (2002), the Supreme Court upheld the use of a docket sheet indicating the defendant pled guilty to the crime at issue. But in that case, the certified docket sheet "was acknowledged by signature of a Massachusetts judge." Id.

The docket sheets submitted in Irby's case do not contain a judge's signature ensuring the accuracy of their content. Presumably, this Court would not accept certified copies of judgments – considered the best evidence of criminal history – if they were unsigned by the court and the defendant without additional evidence of conviction. Likewise, it should not accept certified

docket sheets without any signatures or other supporting evidence of conviction. The docket sheets are not comparable to certified judgments and should have been excluded. The court erred when it included these crimes in Irby's criminal history, when it found the 1984 assault conviction did not wash out, and when it treated the assault conviction as a strike offense (findings 9-11; conclusions 3-6). CP 1205-07.

Where, as here, the State offered some supporting evidence in an attempt to prove criminal history, and the defendant specifically objected to that evidence, the State is not offered a second opportunity to prove that history on remand. Rather, it is held to the existing record. Rivers, 130 Wn. App. at 705-707. As the Supreme Court said in In re Pers. Restraint of Cadwallader:

"remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the state's evidence of the existence or classification of a prior conviction." If the defendant has objected, and the disputed issues have been fully argued at sentencing, the State will be held to the existing record, the unlawful portion of the sentence will be excised, and the case will be remanded for resentencing without allowing the State to produce furthered evidence.

In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005) (citations omitted).

Because the State failed to prove Irby had misdemeanor convictions in 1994, 1995, or 1996, his 1984 assault conviction washed out and should not have been treated as a second strike. Consequently, Irby is not a persistent offender.

D. CONCLUSION

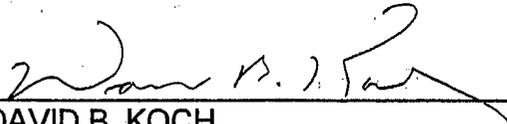
By conducting voir dire outside the public's presence and Irby's presence, the trial court violated Irby's right to a public trial and his right to be present for all critical stages of the case. These violations require that his convictions be reversed and the case remanded for a new trial.

Irby's sentence is unlawful. His 1976 conviction is not comparable to a current strike offense. Moreover, his 1984 conviction washed out. This Court should find Irby is not a persistent offender.

DATED this 31st day of January, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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5 SUPERIOR COURT OF WASHINGTON
6 COUNTY OF SKAGIT

7 STATE OF WASHINGTON, 8 9 Plaintiff, 10 11 v. 12 TERRANCE IRBY, 13 14 Defendant.	NO. 05-1-00276-9 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PERSISTENT OFFENDER SENTENCING
--	--

15 Comes now the Honorable John M. Meyer and having heard
16 arguments of counsel and examined the exhibits and records and
17 files herein makes and enters the following findings, conclusions
18 and order:

19 I. FINDINGS OF FACT

- 20 1. The defendant in this case is Terrance J. Irby. His date
21 of birth is June 10, 1958.
- 22 2. On January 25, 2007, a jury found the defendant guilty of
23 Burglary in the First Degree occurring on or about March 8,
24 2005. The jury returned a special verdict finding that the
25 defendant was armed with a deadly weapon: to wit a knife.
- 26 3. On January 25, 2007, a jury found the defendant guilty of
27 Felony Murder in the First Degree occurring on or about March 8,
28 2005. The jury returned a special verdict finding that the
defendant was armed with a deadly weapon: to wit a knife.
4. The jury made the following findings of aggravating
circumstances that existed at the time of the crime.
(a) While committing Murder in the First Degree the
defendant did intend to conceal the commission of the
crime;

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1 (b) While committing the crime of Murder in the First
2 Degree the defendant intended to protect or conceal the
3 identity of any person committing the crime, and;

4 (c) That the murder was committed in the course of, or in
5 the furtherance of, or in immediate flight from Burglary in
6 the First Degree.

7 5. On October 15, 1976, the defendant, Terrance Irby, was
8 convicted of the crime of Statutory Rape in Second Degree under
9 Chelan county cause # 5029. On December 22, 1976, the defendant
10 was sentenced on that case.

11 6. On October 17, 1984, the defendant, Terrance Irby, pled
12 guilty to Assault in the Second Degree in King County cause #
13 84-1-2641-0. On November 13, 1984, was sentenced on that case
14 to a term of 24 months of confinement. There was also a special
15 finding entered that the defendant was armed with a deadly
16 weapon to wit: a handgun. The judgment and sentence from this
17 King County case specifically lists the defendant's prior Chelan
18 County conviction among the criminal history.

19 8. By a strong preponderance of evidence based upon the
20 records from the two (2) convictions, Statutory Rape in the
21 Second Degree from Chelan County cause #5029 and Assault in the
22 Second Degree from King County cause #84-1-2641-0, that the
23 defendant in those two (2) cases is the same Terrance Irby who
24 committed the present crimes in the present case wherein James
25 Rock was murdered.

26 9. On August 2, 1994, the defendant, Terrance Irby, was
27 sentenced in Skagit County District Court on the crime of
28 Driving While License Suspended in the Third Degree in case
#7729630 occurring on May 26, 1994.

10. On April 11, 1995, the defendant, Terrance Irby, was
sentenced in Skagit County District Court of the crime of
Driving While License Suspended in the Third Degree in case
#24666 occurring on August 28, 1994.

11. On July 17, 1996, the defendant, Terrance Irby, was
sentenced in Skagit County District Court of the crime of
Driving While License Suspended in the Third Degree in case
#C31767 occurring on April 8, 1996.

12. On February 4, 2004, the defendant, Terrance Irby, was
sentenced in Skagit County District Court of the crimes of
Driving While Under the Influence of Intoxicants and Reckless
Driving in case #C43861, occurring on December 18, 2003.

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1
2 13. On February 9, 2004, the defendant, Terrance Irby, was
3 sentenced in Skagit County District Court of the crime of
4 Violation of a Protection Order in case #C44068, occurring on
5 January 12, 2004.

6 14. On March 5, 2004, the defendant, Terrance Irby, pled guilty
7 and was sentenced in Skagit County Superior Court to the felony
8 crime of Malicious Mischief in the Second Degree occurring on
9 January 12, 2004.

10 II. CONCLUSIONS OF LAW

11 NOW, THEREFORE, the Court finds that.

12 1. The Court finds that the defendant's prior conviction for
13 Statutory Rape in the Second Degree is comparable to the crime
14 of Rape of a Child in the Second Degree. According to certified
15 court records the defendant was about one (1) week short of his
16 18th birthday at the time of the commission of the offense. The
17 victim at the time of the offense was 13 years of age.

18 2. Rape of a Child in the Second Degree is a Class A felony
19 and codified under RCW 9A.44.076. Before being changed the
20 crime of Statutory Rape in the Second Degree was codified under
21 RCW 9.79.210.

22 3. The State has adequately proven that the defendant has
23 prior misdemeanor convictions, which prevent the defendant's
24 prior conviction(s) from washing out under RCW 9.94A.525(2).

25 4. The Court finds that the two (2) prior convictions
26 (Statutory Rape in the Second Degree and Assault in the Second
27 Degree) are "most serious offenses" pursuant to RCW
28 9.94.030(28)¹.

29 5. Prior to the commission of the two (2) current convictions
30 in the present case of Burglary in the First Degree and Murder
31 in the First Degree (by Felony Murder), the defendant had
32 previously been convicted of two (2) predicate three (3) strike
33 offenses (most serious offenses as defined by RCW
34 9.94A.030(28)).

35
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37 ¹ The numbering of RCW 9.94.030 is based upon the numbers at the time of the
38 commission of the offense by the defendant herein.

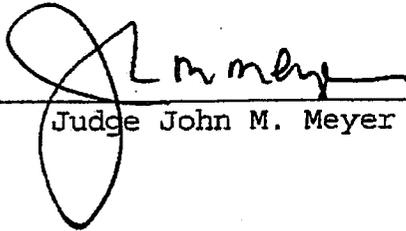
1 6. That the defendant, Terrance Irby, is a Persistent Offender
2 pursuant to RCW 9.94A.030(32) under the statutory laws of the
State of Washington.

3 7. Because the Court has *finds it unnecessary to Jmm.* sentenced the defendant as a
4 persistent offender, the Court ~~is not entering~~ a sentence at
5 this time based upon the aggravating factors found by the jury
6 pursuant which could result in a sentence pursuant to RCW
7 10.95.030. ~~Should the conviction and/or persistent offender~~
8 ~~sentencing herein not be upheld upon appellate review, the trial~~
9 ~~court would enter a finding that the defendant is subject to a~~
10 ~~sentence of life imprisonment without the possibility of parole~~
11 ~~based upon the aggravating factors found by the jury and RCW~~
12 ~~10.95.030(1).~~ *Jmm.*

10 III. ORDER

11 NOW, THEREFORE, it is hereby ordered that the defendant be
12 sentenced to life imprisonment without the possibility of release
13 pursuant to RCW 9.94A.570.

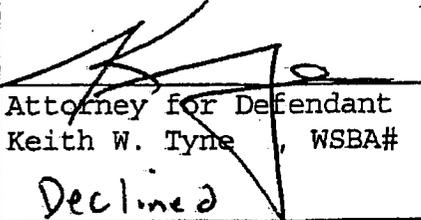
14 Dated this 8 day of March, 2007.

15
16
17 
18 _____
19 Judge John M. Meyer

19 Presented by:

20 
21 Richard A. Weyrich, WSBA# 799
22 Prosecuting Attorney

23 Approved as to Form only (KT)

24 
25 _____
26 Attorney for Defendant
Keith W. Tyne, WSBA#

27 Declined
28 Terrance Irby
Defendant

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APPENDIX B

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

THE STATE OF WASHINGTON, Plaintiff,

vs. TERENCE IRBY

Defendant.

FILED AND RECORDED ON
INDEX - FILM
Roll 5129

OCT 15 1976

MURIEL E. ROATH, Co. Clerk

No. 5129 By [Signature] Deputy

VERDICT
Criminal

We, the Jury in the case of the State of Washington, Plaintiff, against

Terrence Irby Defendant, find
the Defendant, Terrence Irby

Guilty as charged in the Information.

Dated at Wenatchee, Washington, this _____ day of
October 19 76

[Signature] Foreman.

In the Superior Court of the State of Washington
FOR CHELAN COUNTY

THE STATE OF WASHINGTON

Plaintiff,

vs.

TERRANCE IRBY

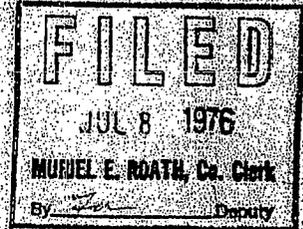
Defendant.

No. 5029

INFORMATION

Comes now E. R. Whitmore, Jr., Prosecuting Attorney for Chelan County, State of Washington, and by
his information accuses TERRANCE IRBY
of the crime of STATUTORY RAPE, SECOND DEGREE
committed as follows, to-wit:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day
of May, 1976, did then and there wilfully, unlawfully, and feloniously
then and there being over sixteen years of age, did then and there
engage in sexual intercourse with Kori Fogelstrom, not being married
to the said Kori Fogelstrom, who was thirteen years of age.



contrary to the form of the Statute R.C.W. 9A.02.020 in such cases made and provided, and against
the peace and dignity of the State of Washington.

Dated at Wenatchee, Washington this 8th day of July, 1976

E. R. WHITMORE, JR.

Prosecuting Attorney in and for said County.

By: [Signature]
Deputy

STATE OF WASHINGTON

County of Chelan

ss.

The undersigned, being first duly sworn on oath, says: He is the duly elected (appointed) Deputy Prosecuting Attorney in and for said County, that he has read the foregoing information, knows the contents thereof and believes the same to be true.

Subscribed and Sworn To before me this 8th day of July, 1976

MUEL E. ROATH
County Clerk and Clerk of the Superior Court

By: [Signature]

CHELAN COUNTY DISTRICT COURT

CHELAN COUNTY, STATE OF WASHINGTON
COMMITTING MAGISTRATE

THE STATE OF WASHINGTON

Plaintiff,

v.

TERRANCE IRBY,

Defendant.

No. K261-708
COMMITTING MAGISTRATE'S
Criminal Complaint
For RAPE, SECOND DEGREE

STATE OF WASHINGTON

County of Chelan

ss.

Comes now E. R. WHITMORE, JR. who, being first
duly sworn, by this complaint accuses TERRANCE IRBY
of the crime of RAPE, SECOND DEGREE committed as follows,
to-wit:

That the said defendant, in the County of Chelan, State of Washington, on or about the
31st day of May, 1976, did then and there wilfully and
unlawfully and feloniously by forcible compulsion perpetrate an act
of sexual intercourse with one Kori Fogelstrom, then and there a
female person not the wife of said Terrance Irby;

contrary to the form of the Statute in such cases made and provided, and against the peace
and dignity of the State of Washington. ^{RCW 9A 79 180}

Wherefore, said complainant prays that the said defendant may be arrested and dealt
with according to law.

Subscribed and Sworn to before me this 7th day of June, 1976

THE CHARTERMAN

CCSO

Judge/Notary Public
COMMITTING MAGISTRATE

STATE OF WASHINGTON
County of Chelan

I, GARDYN E. ALLEN, Clerk of Chelan County District
Court, do hereby certify that the foregoing is a true and
correct copy of the original as the same now appears on the record of
the office.
IN TESTIMONY WHEREOF, I have hereunto set my hand
this 7th day of June, 1976.

GARDYN E. ALLEN, Clerk

Clerk

CHELAN COUNTY DISTRICT JUSTICE COURT
CHELAN COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

TERRANCE IRBY,

Defendant.

NO. 1-96/708

AFFIDAVIT OF
PROBABLE CAUSE

STATE OF WASHINGTON)

) ss.

County of Chelan)

E. R. WHITMORE, JR., being first duly sworn on oath,
deposes and says: That he is the duly elected Prosecuting Attorney
for Chelan County and is authorized to make this affidavit on behalf
of the plaintiff; that the affiant has been provided with the report
of Detective Don Danner of the Chelan County Sheriff's Department,
including the signed statement taken from Kori Fogelstrom, wherein
said Kori Fogelstrom states that on the 31st day of May, 1976,
Terrance Irby did force himself upon her and have sexual intercourse
with her; that Dr. Ronald Wick will testify that an examination
he made of slides prepared from a Tampax he removed from said
Kori Fogelstrom's vagina shortly after the alleged sexual intercourse
was found to contain male sperm and semen; all incidents occurring
in Chelan County, Washington.

E. R. Whitmore, Jr.
E. R. WHITMORE, JR.
Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 7th day of June
1976.

AFFIDAVIT OF
PROBABLE CAUSE

Caroly G. Jullien
Notary Public in and for the State of
Washington, residing at Wenatchee
CHWLAN COUNTY
PROSECUTING ATTORNEY
Post Office Box 1622
Wenatchee, Washington 98801
209/832-5175
STATE OF WASHINGTON
County of Chelan
I, CAROLYN G. JULLIEN, Notary Public in and for the State of Washington, do hereby certify that the foregoing is a true and correct copy of the affidavit of E. R. Whitmore, Jr., as it appears on the file of my office.
IN WITNESS WHEREOF, I have hereunto set my hand
this 7th day of June, 1976
CAROLYN G. JULLIEN
By *Caroly G. Jullien*
Clerk

CHELAN COUNTY DISTRICT JUSTICE COURT
CHELAN COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 TERRANCE IRBY,)
)
 Defendant.)

NO. *K 767 208*

ORDER FOR WARRANT
ON PROBABLE CAUSE

Based upon the complaint and supporting affidavit of
E. R. WHITMORE, JR. the court finds probable cause
for the issuance of a warrant for the arrest of the above
defendant,

IT IS HEREBY ORDERED that a warrant be issued for the
arrest of TERRANCE IRBY upon the
charge of RAPE, SECOND DEGREE
and bail is fixed in the amount of \$2500 pending the
defendant's first appearance in court. Transmission by teletype
is hereby authorized.

DATED this 7th day of June, 1976.

[Signature]
JUDGE - COURT COMMISSIONER

ORDER FOR WARRANT
ON PROBABLE CAUSE

E. R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
Post Office Box 1622
Wenatchee, Washington 98801
(509) 642-5170

STATE OF WASHINGTON)
County of Chelan)
I, CAROLYN G. ALLEN, duly appointed Clerk of Chelan County District
Justice Court, do hereby certify that this is a true and
correct copy of the original as the same now appears on file and of
record in my office.
IN TESTIMONY WHEREOF, I have hereunto set my hand
this 7th day of June, 1976.
CAROLYN G. ALLEN, Clerk
By *[Signature]*
Clerk

CHELAN COUNTY DISTRICT COURT
CHELAN COUNTY, STATE OF WASHINGTON

FILED
JUL 19 1976
MURIEL E. ROATH, Co. Clerk
By *[Signature]* Deputy

STATE OF WASHINGTON,
Plaintiff,

No. K76-708 #5029

vs.
TERRANCE IRBY

ORDER OF TRANSFER
TO SUPERIOR COURT

THIS MATTER having come on regularly for Preliminary Hearing on the 17th day of June, 1976, the State of Washington being represented by Grant Mueller, Deputy Prosecuting Attorney and the Defendant being represented by James Hill, an attorney at law, and the court having heard the testimony and considered the evidence presented and it appearing to the court that there is probable cause to believe that the offense as charged in the complaint was committed and that the same was committed by the Defendant; and it further appearing that said offense is within the exclusive jurisdiction of Superior Court, NOW THEREFORE,

IT IS ORDERED that all proceedings herein be bound over to the Superior Court of the State of Washington for Chelan County;

IT IS FURTHER ORDERED that all papers in the above proceedings, including an abstract of costs, and any bail taken by this court shall forthwith be transferred to the Chelan County Clerk.

DONE IN OPEN this 18th day of June, 1976

cc: Def. Atty.
Pros. Atty.
Bondsman
Chelan County Sheriffs Office
District Court File

[Signature]
JUDGE

CHELAN COUNTY DISTRICT JUSTICE COURT

CHELAN COUNTY, STATE OF WASHINGTON
COMMITTING MAGISTRATE

THE STATE OF WASHINGTON

Plaintiff,

vs.

TERRANCE IRBY,

Defendant.

No. _____

COMMITTING MAGISTRATE'S
Warrant

CHELAN COUNTY
DISTRICT JUSTICE COURT

JUN 11 1976

ROBERT E. GRAHAM
DISTRICT COURT JUDGE

STATE OF WASHINGTON }
COUNTY OF CHELAN } ss.

To the Sheriff or any Peace Officer of said County or any County in the State of Washington:

E. R. WHITMORE, JR. has this day complained in writing, under oath, to the undersigned, Judge of the Chelan County District Justice Court, that on or about the 31st day of May, 1976, in said County and State, TERRANCE IRBY then and there being, did then and there unlawfully and willfully and feloniously commit the crime: RARE, SECOND DEGREE and the court finding probable cause for the issuance of a warrant herein.

THEREFORE, in the name of the State of Washington, you are commanded forthwith to apprehend the said TERRANCE IRBY

and bring him before me to be dealt with according to law. Endorsed for transmission by teletype.

Given under my hand this 7th day of June, 1976



Judge - Court Commissioner
COMMITTING MAGISTRATE

Bail \$ 2500
CCSO

STATE OF WASHINGTON }
County of Chelan } ss.
I, CAROLYN G. ALLEN, with appointment as Clerk of Chelan County District Justice Court, do hereby certify that this instrument is a true and correct copy of the original as the same now appears on file and of record in my office.
IN TESTIMONY WHEREOF, I have hereunto set my hand this 18 day of June, 1976
CAROLYN G. ALLEN, CLERK
By [Signature]
Clerk

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

THE STATE OF WASHINGTON
Platiff,

TERRANCE IRBY

Defendant.

No. 5029

WARRANT OF ARREST

ON INFORMATION

State of Washington

TO THE SHERIFF OF SAID CHELAN COUNTY, GREETING:

WHEREAS, In the Superior Court for said County, held at Wenatchee, the Prosecuting Attorney for said Chelan County, did present and file an information on the part of the State of Washington, charging the above named TERRANCE IRBY

with the crime of STATUTORY RAPE, SECOND DEGREE

FILED
JUL 15 1976
MURIEL E. ROATH, C. L. K.
BY [Signature]

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, You are commanded forthwith to apprehend and arrest the said TERRANCE IRBY

and bring him before this Court to answer said charge, and abide such further order as the Court may make in the premises.

WITNESS the Hon. Laurence Leahy, Judge of the said Superior Court, and the seal of said Court hereto affixed, this 15th day of July, 1976.

MURIEL E. ROATH,
Clerk of said Superior Court.

By [Signature] Deputy.

Bail fixed at \$ _____

DEC 22 1976

MURIEL E. ROATH, Co. Clerk

By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 TERRANCE IRBY,)
)
 Defendant.)

NO. 5029

JUDGMENT AND SENTENCE

On the 21st day of July, 1976 this cause came on regularly for arraignment and hearing, plaintiff, State of Washington, appearing by J. Kirk Bromiley, Deputy Prosecuting Attorney for Chelan County and the defendant appearing in person and by counsel James R. Blinn, Jr. Defendant waived reading of the Information charging him with the crime of Statutory Rape, Second Degree. Defendant was advised that in the event he did not have funds of his own with which to employ legal counsel that the Court would appoint counsel for him and that said counsel would be compensated for his services from county funds. Asked if he desired the aid of counsel, defendant stated he had counsel and was advised of his rights by his said counsel to his satisfaction. Asked if he was ready to be arraigned and answer to the Information, the defendant stated that he was and entered a plea of not guilty to the Information charging him with Statutory Rape, Second Degree.

On the 14th day of October, 1976 this matter was brought on for a jury trial, plaintiff appearing by E. R. Whitmore, Jr., Prosecuting Attorney, and the defendant appearing in person and by counsel, James R. Blinn, Jr. On the 15th day of October, 1976, the jury returned a verdict of guilty.

On the 22nd day of December, 1976 the defendant was brought before the Court for sentencing, the defendant appearing in person and by counsel, James R. Blinn, Jr. The defendant was asked if he had any legal cause to show why judgment and sentence should not be pronounced against him and the defendant stated he had none. Now, Therefore, the Court being fully advised,

IT IS ORDERED AND ADJUDGED by the Court that the defendant TERRANCE IRBY is guilty of the crime of Statutory Rape, Second Degree, committed as follows, to-wit:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there wilfully, unlawfully and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age; contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and

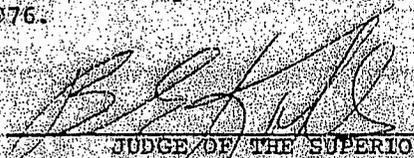
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against the peace and dignity of the State of Washington.

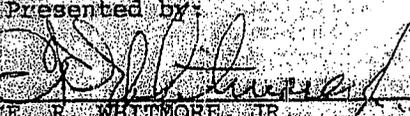
And that he be punished, therefore, by imprisonment in a Washington State penal institution and be committed to the Washington Corrections Center for classification, confinement and placement in such correctional facility under the supervision of the Department of Social and Health Services as said department shall deem appropriate for a period of not more than ten (10) years and the defendant is hereby remanded to the custody of the Sheriff of Chelan County, to be by him detained and delivered into the custody of the proper officers for transportation to the proper institution.

IT IS FURTHER ORDERED that the bond filed herein is hereby exonerated.

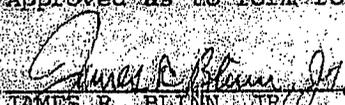
27th DONE IN OPEN COURT in the presence of the defendant this day of December, 1976.



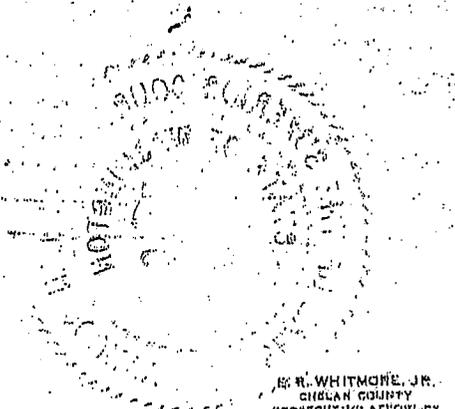
JUDGE OF THE SUPERIOR COURT
FOR CHELAN COUNTY

Presented by:


E. R. WHITMORE, JR.
Chelan County Prosecuting Attorney

Approved as to form for entry:


JAMES R. BLINN, JR.
Attorney for Defendant



E. R. WHITMORE, JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
P. O. Box 1622
Wenatchee, Washington 98801
Telephone 509/662-3174

STATE OF WASHINGTON
BOARD OF PRISON TERMS AND PAROLES
SENTENCE FIXED BY BOARD

FILED
MAY 19 1977
MURIEL E. ROATH, Co. Clerk
By JF Deputy

No. 011794

EZ 5029

HERNANDEZ IRBY having been by the Superior Court
of Chelan County, Washington, in case No 5029 convicted of the crime
of INFLUENZA VIRUS, POLYMERIZATION
and sentenced for a maximum term of THREE (3)
years of confinement in a Washington Correctional Facility; and

The Board of Prison Terms and Paroles, having fully considered the Prosecuting Attorney's
and Judge's statements of the facts surrounding said convicted person's crime and other information
relative to such convicted person, and having interviewed said convicted person, NOW THEREFORE,
By virtue of the authority in it vested by the laws of the State of Washington, and within six months
after the admission of such convicted person to a Washington Correctional Facility, the Board of
Prison Terms and Paroles fixes the duration of his confinement as follows, to wit:

That said HERNANDEZ IRBY he and he is hereby ordered to be confined
in a Washington Correctional Facility, for a period of SIX (6) years.

and he is hereby required to perform as many hours of faithful labor in each and every day during
said term of imprisonment as shall be prescribed by the rules and regulations of said institution.

Done at Olympia, Washington, this 16th day of February, 1977

BOARD OF PRISON TERMS AND PAROLES

By _____