

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/25/2019 9:24 AM  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 95263-9  
(consolidated with 95510-7 and 96061-5)  
Court of Appeals No. 34729-0-III

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

FREDERICK DEL ORR

Defendant/Appellant/Petitioner.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable John O. Cooney, Judge

---

SUPPLEMENTAL BRIEF OF PETITIONER FREDERICK ORR

---

SUSAN MARIE GASCH  
WSBA No. 16485  
Gasch Law Office  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149

Attorney for Defendant/Petitioner Frederick Del Orr

**TABLE OF CONTENTS**

A. ISSUE PRESENTED ON REVIEW.....1  
B. OVERVIEW OF RELEVANT FACTS.....1  
C. SUPPLEMENTAL ARGUMENT.....5  
D. CONCLUSION.....21

APPENDIX A, Strike One, Spokane County No. 93-1-02067-9.....1, 2, 11  
Statement of Defendant on Plea of Guilty; Information; Affidavit  
of Facts; Motion and Order Dismissing Count II

APPENDIX B, Strike Two, King County No. 95-1-033343-8.....1, 2, 11  
Statement of Defendant on Plea of Guilty; Information;  
Certification for Determination of Probable Cause

APPENDIX C, Engrossed Substitute Senate Bill 5288.....6  
AN ACT Relating to removing robbery in the second degree from  
the list of offenses that qualify an individual as a persistent  
offender, and amending RCW 9.4A.030

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010).....	<i>passim</i> , 7, 8, 11
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012).....	<i>passim</i> , 7, 8
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	<i>passim</i> , 1
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d I (2005).....	<i>passim</i> , 6, 7, 8, 10
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	16
<i>ETCO, Inc. v. Dep't of Labor &amp; Indus.</i> , 66 Wn. App. 302, 831 P.2d 1133 (1992).....	17
<i>Grisby v. Herzog</i> , 190 Wn. App. 786, 362 P.3d 763 (2015).....	17, 18
<i>In re Elec. Lightwave, Inc.</i> , 123 Wn.2d 530, 869 P.2d 1045 (1994).....	16
<i>In re Pers. Restraint of Stockwell</i> , 179 Wn.2d 588, 316 P.3d 1007 (2014).....	16–17
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P. 3d 343 (2018). <i>passim</i> , 9, 18, 19, 20	
<i>State v. Bassett</i> , 198 Wn. App. 714, 394 P.3d 430 (2017), <i>aff' d</i> , 192 Wn.2d 67, 428 P.3d 343 (2018).....	18
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	<i>passim</i> , 4, 15
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	19
<i>State v. Hart</i> , 188 Wn. App. 453, 353 P.3d 253 (2015).....	<i>passim</i> , 5, 17, 18

<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	<i>passim</i> , 8, 9
<i>State v. Lee</i> , 87 Wn.2d 932, 937, 558 P.2d 236 (1976).....	13
<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	<i>passim</i> , 4, 6, 10, 11, 13, 14, 20
<i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996).....	13
<i>State v. Witherspoon</i> , 180 Wn.2d 875, 329 P.3d 888 (2014).....	<i>passim</i> , 5, 15, 19
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	15–16

### **Statutes**

U.S. Const., Eighth Amendment.....	<i>passim</i>
Wash. Const. article I, section 14.....	<i>passim</i>
Laws of 1994 c 1 § 3 (Initiative Measure No. 593, approved November 2, 1993).....	5
former RCW 9.94A.030(21)(o).....	5–6
9.94A.030(38)(a)(i).....	5
RCW 9.94A.570.....	4, 5
RCW 10.95.030(3)(a)(ii).....	9

### Other Resources

- Buss, *The Role of Lawyers in Promoting Juveniles Competence as Defendants*, in Youth on Trial (University of Chicago Press) (2000) (Grisso and Schwartz eds.).....12
- Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel & Unusual Punishment*, 46 U.S.F. L. Rev. 581, 636 (2012).....12, 13
- Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004).....11
- Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice (Harvard University Press) (2008).....12, 13
- A. Rae Simpson, MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech. (2008).....10–11
- Tobey, Grisso, and Schwartz, *Youth's Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in Youth on Trial (University of Chicago Press) (2000).....12

**A. ISSUE PRESENTED ON REVIEW**

Whether the Persistent Offender Accountability Act’s mandatory sentence of life without the possibility of parole, allowing no discretion to consider Orr’s youthfulness at the ages of 19 and then 21 years old when he committed the two predicate “strike” offenses, amounts to cruel and unusual punishment in violation of the federal and state constitutions.

**B. OVERVIEW OF RELEVANT FACTS**

Frederick Orr was born April 8, 1974, and completed only the 10<sup>th</sup> grade. CP 219; App. A and B at page 1. At age 19<sup>1</sup>, Orr entered an *Alford*<sup>2</sup> plea of guilty to second-degree robbery of a man walking his dog in downtown Spokane, and served 4<sup>3</sup> months in county jail. CP 197. Upon demand, the man gave Orr a \$5 bill, a \$1 bill, 8 quarters, 4 nickels and 9 pennies. App. A at page 9. As part of the plea agreement count II, attempted second degree robbery of a second man occurring moments later, was dismissed and Orr agreed to pay restitution of \$1,000 for smashing out the front window of the man’s car.<sup>4</sup> Orr did not remember committing the robbery but wished to plead guilty because of the plea bargain. App. A at page 5.

---

<sup>1</sup> These crimes occurred on December 7, 1993. CP 197.

<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

<sup>3</sup> Based on a standard range of 3 to 9 months, Orr was sentenced to 6 months confinement (CP 198, 203) and was given credit for time served of 58 days (CP 203).

At age 21<sup>5</sup>, Orr entered an *Alford* plea of guilty to first-degree robbery of a stranger he met at a Seattle nightclub who had invited Orr over to his place for a few beers, and served 47 and one-half months in confinement.<sup>6</sup> During a brief altercation involving the brandishment of a paring knife he grabbed from the kitchen, Orr walked out of the apartment with the man's Toshiba portable stereo. App. B at pages 14–15. Orr wished to plead guilty solely to take advantage of the sentencing recommendation of the State. App. B at page 6.

At age 41<sup>7</sup>, Orr entered what turned out to be an unoccupied house at 2620 West Gardner Avenue in Spokane while holding a metal leg from a camp stove. RP 193, 293–294, 301, 305–06, 312. Deeply upset because of abuse he himself had suffered while a child, and having heard in prison sex offenders discuss their treatment of children, he was investigating a friend's claim that children were being held there against their will. RP 282–83, 285–86, 288–90, 318. After realizing no one was in the home, he returned to the backyard where neighbors had gathered after observing Mr. Orr's actions. One of them, Dale Wills, had armed himself with a gun. An argument ensued between Wills and Orr, with Orr several times swinging

---

<sup>4</sup> CP 197; App. A at pages 3, 7, 8, 9, 10.

<sup>5</sup> This crime occurred on May 3, 1995. CP 208

<sup>6</sup> Based on a standard range of 46 to 61 months, Mr. Orr was sentenced to 50 months confinement (CP 209, 210) and was given credit for time served of 73 days (CP 210).

his metal pipe at Wills' head while challenging Wills to "just shoot" him. RP 148–49, 158, 168–71, 174, 176–79, 181–82, 208, 214, 243–44, 296, 298. Eventually acknowledging that he had the wrong house, Orr dropped the metal pipe. RP 159–60, 181, 209, 215–16, 299.

Police found Orr at a nearby church parking lot, waiting to be taken into custody. RP 162, 170–71, 208, 215, 300–01. By then, things had de-escalated, and Orr continued saying that he "had the wrong house." RP 170, 172, 181–82, 215. Witnesses agreed Orr had not been hiding his actions or trying to be sneaky. RP 154, 210, 212, 233. Mr. Wills' son didn't blame Orr for doing what he was doing because if what he thought was actually true, the son would have done the same thing. RP 157, 162–62. "In all honesty," Mr. Wills said, "I don't want to see anything happen to him other than get him counselling or something. He's probably a nice guy." RP 180.

Nevertheless, the jury found Orr guilty of first degree burglary and second degree assault, both committed while armed with a deadly weapon other than a firearm. CP 38, 180, 181, 183, 184. Recognizing it as the "only option" available, the trial court sentenced Orr to life in prison

---

<sup>7</sup> These crimes occurred on April 7, 2016. CP 38.

without the possibility of parole under the mandatory “3 strikes” statute.

RP 463–65; RCW 9.94A.570.

On appeal, Orr argued, *inter alia*, that his sentence constituted cruel punishment in violation of article I, section 14 of the Washington Constitution. He pointed out that in the absence of the Persistent Offender Accountability Act his standard range was only 87 to 111 months. He argued that his sentence was comparatively disproportionate because it is the same sentence other defendants receive for multiple counts of aggravated murder. Orr emphasized that he was very young at the time of both prior strike offenses, ages at which this Court has acknowledged his mental and emotional development was far from complete (*citing State v. O’Dell*, 183 Wn.2d 680, 691–92, 358 P.3d 359 (2015)). Br. of Appellant at 24–30.

The Court of Appeals affirmed. The court did not address Orr’s young age at the time of his predicate offenses, apparently believing there was no room to consider the defendant’s relevant characteristics under *State v. Fain*<sup>8</sup>. Summarily concluding that “the age at which Orr committed his earlier offenses is of no concern in this case,” the court held he “was not a youthful offender at age 41 and he is not now being

---

<sup>8</sup> 94 Wn.2d 387, 617 P.2d 720 (1980).

punished once again for those earlier offenses” (citation omitted). *Slip Op.*

at 9–10. The court continued,

This court previously rejected this argument in *State v. Hart*, 188 Wn. App. 453, 462–65, 353 P.3d 253 (2015). Similarly, the Washington Supreme court has consistently rejected a somewhat similar challenge to the persistent offender statute. *State v. Witherspoon*, 180 Wn.2d 875, 887–891, 329 P.3d 888 (2014). ...

*Slip Op.* at 10.

### **C. SUPPLEMENTAL ARGUMENT**

Under the Sentencing Reform Act, the Eighth Amendment, and article I, section 14, the trial court had discretion to sentence Orr to a non-POAA sentence.

Under the POAA, a "persistent offender" shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A person is a "persistent offender" if he has been convicted in Washington of a "most serious offense," and has on at least two other prior occasions been convicted of a most serious offense. RCW 9.94A.030(38)(a)(i).

Mr. Orr’s first strike offense, committed December 7, 1993, at age 19, was a second-degree robbery. CP 197. With passage of the POAA effective six days earlier, second-degree robbery was a most serious offense. Laws of 1994 c 1 § 3 (Initiative Measure No. 593, approved November 2, 1993, effective December 1, 1993); former RCW

9.94A.030(21)(o). For the Court's information, although not directly bearing on the current issue, there is pending legislation that if enacted would remove second-degree robbery from the list of offenses that qualify an individual as a persistent offender. *See* Appendix C, Engrossed Substitute Senate Bill 5288, State of Washington 66<sup>th</sup> Legislature 2019 Regular Session.

Orr was sentenced as an adult to life imprisonment. However, he committed the two "strike" offenses that were essential to this sentence when he was 19 and 21 years old, within the age at which this Court has recognized the characteristics of youth persist. *State v. O'Dell*, 183 Wn.2d 680, 692 n.5, 358 P.3d 359 (2015). Consistent with case law and the prohibition against cruel and unusual punishment, the sentencing court must have discretion to consider the characteristics of youth in deciding whether to impose a life sentence in this circumstance.

The Eighth Amendment extends special protection to juveniles. For example, the death penalty for juveniles is unconstitutional. *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In so holding, the Supreme Court recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* Further, life-without-parole sentences for juveniles convicted of non-

homicide offenses are unconstitutional. *Graham v. Florida*, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010). "[C]riminal proceedings that fail to take defendants' youthfulness into account at all would be [constitutionally] flawed." *Id.* at 76. More recently, the Supreme Court held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012). "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.*

*Miller* relied on the characteristics of youth summarized in *Roper*. *Miller*, 567 U.S. at 472. In *Roper*, the Court identified three general differences between adults and juveniles central to an Eighth Amendment analysis. First, juveniles more often display "' [ a] lack of maturity and an underdeveloped sense of responsibility,'" often resulting in "' impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (citation omitted). This susceptibility means that their "' irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (citation omitted). Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* at

569. This "vulnerability and comparative lack of control over their immediate surroundings" give juveniles "a greater claim than adults to be forgiven for failing to escape negative influences." *Id.* at 570. Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are ... less fixed." *Id.* Thus, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.*

*Roper, Graham, and Miller* relied on developments in psychology and neuroscience showing " 'fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' " *Miller*, 567 U.S. at 471–72 (quoting *Graham*, 560 U.S. at 68). These differences both lessened a juvenile's moral culpability, *Roper*, 543 U.S. at 571, and enhanced the prospect of reformation, *Miller*, 567 U.S. at 472. With these differences, the penological justifications for imposing the harshest sentences were diminished for juveniles. *Id.*

Drawing from these sources, this Court has held that sentencing courts have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). In *Houston-Sconiers*, defendants who committed non-homicide crimes when they were less than

18 years old appealed their respective sentences of 31 and 26 years on ground that the differences between children and adults rendered their mandatory firearm enhancements unlawful. *Id.* at 13, 18. The Court held "[t]he mandatory nature of these enhancements violates the Eighth Amendment protections." *Id.* at 25–26. The Court also held that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court." *Id.* at 9.

Most recently, this Court (affirming the Court of Appeals) held that the state constitution barred a sentence of life without possibility of release for *all* juveniles. *State v. Bassett*, 192 Wn.2d 67, 428 P. 3d 343 (2018) (holding *Miller*-fix statute, RCW 10.95.030(3)(a)(ii), unconstitutional under article I, section 14 insofar as statute still permitted court to impose "life without" sentence; holding, moreover, that state constitutional prohibition on cruel punishment provided broader protection than federal constitutional counterpart).

*Roper*, *Graham*, *Miller*, *Houston-Sconiers*, and, most recently, *Bassett*, all dealt with crimes committed while the defendant was a juvenile. Orr's previous strike offenses were committed while *technically* an adult, the first at age 19 and the second at age 21. But "[t]he qualities

that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574.

Embracing this proposition, this Court held "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." *O'Dell*, 183 Wn.2d at 698–99. The scientific studies underlying *Miller*, *Roper*, and *Graham* established a "clear connection between youth and decreased moral culpability for criminal conduct" and "this connection may persist well past an individual's 18<sup>th</sup> birthday." *Id.* at 695. *O'Dell* reasoned that the same characteristics of youth, based on the same scientific findings relied on by *Miller*, *Roper*, and *Graham*, require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the SRA, even if the defendant was over the age of 18 at the time of offense. *O'Dell*, 183 Wn.2d at 689, 691–92, 695.

In reaching this holding, *O'Dell* quoted from one study that " '[t]he brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.' " *Id.* at 692 n.5 (quoting A. Rae Simpson, [MIT Young Adult](#)

Development Project: Brain Changes, Mass. Inst. of Tech. (2008)). The Court quoted another finding that "[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s." *O'Dell*, 183 Wn.2d at 692 n.5 (quoting Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

At age 19 Orr pleaded guilty to a "strike" offense slightly more than two months after being charged despite having no felony criminal history and agreed to pay restitution of \$1,000 as to count II in return for the prosecuting attorney's dismissal of count II and recommendation of the low end of the standard range of 3 to 9 months. CP 197–98; App. A at pages 3, 8. At age 21 he pleaded guilty to a second "strike" offense slightly more than one month after being charged "solely to take advantage of" the prosecutor's recommendation of 46 months based on a standard range of 46 to 61 months. CP 208–09; App. B at pages 4, 13. In *Graham*, the court explained that "[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." *Graham*, 130 S.Ct. at 2032.

Juveniles tend “to discount and undervalue risk, overvalue short-as compared to long-term consequences, and are more subject than adults to peer influences.” Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel & Unusual Punishment*, 46 U.S.F. L. Rev. 581, 636 (2012) (citing Buss, *The Role of Lawyers in Promoting Juveniles Competence as Defendants*, in Youth on Trial (University of Chicago Press (2000) (Grisso and Schwartz eds.) at 243, 249). In studies, youth “were driven by the desire to ‘get it over with’ or avoid the negative consequences of the immediate moment, with little regard for long-term issues.” *Id.* (citing Tobey, Grisso, and Schwartz, *Youth's Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in Youth on Trial, *supra*, n. 325 at 234).

Adolescents are not only less likely to think through long-term consequences than adults, they are “likely to assign relatively less weight to them than to more immediate ramifications.” *Id.* (citing Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice (Harvard University Press) (2008), n. 5 at 39). Scott and Steinberg conclude, based upon their extensive research regarding adolescent development, that “youths who do not meet adult competence standards cannot be subject to sanctions that approximate adult punishment or carry consequences into

adulthood.” *Id.* at 637 (citing *Id.* at 178). They argue “the use of juvenile records in adult sentencing, including sentencing under three strikes laws” as one of the practices that should be forbidden. *Id.*

In sum, “[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond.” *O’Dell*, 183 Wn.2d at 693 (quoting amicus with approval). *O’Dell* teaches that the neurological characteristics that underlie *Miller* and *Houston-Sconiers* may persist into one’s 20s.

Addressing the three strikes law, this Court has stated “[t]he repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.” *State v. Rivers*, 129 Wn.2d 697, 714–15, 921 P.2d 495 (1996) (quoting *State v. Lee*, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)). From the premise that youth must be considered at sentencing, it follows that repetitive criminal conduct committed when the defendant had youthful characteristics should be considered in determining whether the heavier penalty is justified.

*Miller* holds the mandatory imposition of such punishment for crimes committed while an offender is a juvenile conflicts with the Eighth Amendment. *Houston-Sconiers* holds the Eighth Amendment requires that

the characteristics of youth be considered in sentencing for crimes committed while a juvenile, whether or not the sentence is mandatory. *O'Dell* requires that the same characteristics of youth that underlie *Miller* and *Houston-Sconiers* be considered in sentencing for crimes committed at an age these characteristics generally persist. The studies on which *O'Dell* relied show that range extends to ages 19, 21, and beyond. *O'Dell*, 183 Wn.2d at 689, 691–92, 695.

Orr was sentenced at age 42 (RP 219, 224) to life imprisonment without the possibility of release, a sentence that punished his strike offenses at ages 19 and 21 as much as it did his current strike offense. His sentence rested equally on all three convictions, his first and second indispensable as the third to the POAA sentence. Without the first and second strike convictions, Orr could not have been sentenced under the POAA. His mandatory life sentence involved no judicial discretion. The trial court paid no heed to the characteristics of youth at the time of Orr's prior offenses. *O'Dell* recognized that the same characteristics of youth that led to *Miller's* condemnation of mandatory life without parole and *Houston-Sconiers'* requirement that youth be considered in sentencing generally are also present in young adulthood. *O'Dell* thus demands the

same conclusions as in *Miller* and *Houston-Sconiers* for crimes committed at ages 19 and 21.

Division III of the Court of Appeals concluded the mandatory life sentence does not constitute cruel and unusual punishment, relying on *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014). *Witherspoon* does not control. The focus in *Witherspoon* was whether a life sentence for a second degree robbery conviction was cruel and unusual punishment. The defendant relied on *Graham* and *Miller* to argue by analogy that a second degree robbery conviction cannot give rise to a mandatory life sentence, as the sentencing court must be able to reject such a sentence when warranted by the pettiness of the offense or the characteristics of the offender. *Id.* at 890. This Court rejected the argument because those cases "rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release. *Witherspoon* was an adult when he committed all three of his strike offenses." *Id.* The Court rejected the claim by employing the four-factor proportionality test from *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). *Witherspoon*, 180 Wn.2d at 887–89.

"By necessity, judicial opinions focus on the case, facts, and parties at hand, and any opinion reflects that focus." *Washburn v. City of Federal*

*Way*, 178 Wn.2d 732, 751–52, 310 P.3d 1275 (2013). Significantly, Witherspoon did *not* argue that the sentence was unconstitutional because his youthful characteristics needed to be considered. Rather, he argued that the second degree robbery conviction categorically did not warrant such a draconian punishment, citing *Graham* and *Miller* as examples of a categorical test for constitutionality under the Eighth Amendment.<sup>9</sup>

Courts "do not rely on cases that fail to specifically raise or decide an issue." *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994). "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Thus, "[w]here the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 599–

---

<sup>9</sup> See Witherspoon's briefing under No. 88118-9, available at: [www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtID=A08](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtID=A08).

600, 316 P.3d 1007 (2014) (quoting *ETCO, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)).

This Court did not have before it the legal argument that the youthful characteristics of an adult offender must be considered before imposing a life sentence. For this reason, *Witherspoon* is not controlling authority and does not defeat Orr's argument.

In rejecting Orr's argument, Division III also relied on its prior decision in *State v. Hart*, 188 Wn. App. 453, 462, 353 P.3d 253 (2015). There, the court rejected an argument that a mandatory life sentence was cruel and unusual punishment where Hart committed his first two strike offenses when he was 20 and 22 years old. *Hart* does not bind this Court. See *Grisby v. Herzog*, 190 Wn. App. 786, 808-811, 362 P.3d 763 (2015) (doctrine of stare decisis does not preclude one panel from the court of appeals from stating a holding that is inconsistent with another panel). The analysis in *Hart* is flawed and should not be followed.

*Hart* applied the *Fain* factors under article I, section 14 to find no cruel punishment under the state constitution. Operating from the premise that the state Constitution provides greater protection than the Eighth Amendment, the Court found the Eighth Amendment challenge necessarily failed because the article I, section 14 challenge failed. *Hart*,

188 Wn. App. at 460–62. The problem, unacknowledged by *Hart*, is that the *Fain* factors do not consider youthfulness as a characteristic to be considered at sentencing. *See State v. Bassett*, 198 Wn. App. 714, 738, 394 P.3d 430 (2017) ("the *Fain* analysis does not adequately address the special concerns inherent to juvenile sentencing"), *aff'd*, 192 Wn.2d 67, 428 P.3d 343 (2018). But, as of the time *Hart* was decided, evolving jurisprudence in this area had resulted in the Eighth Amendment providing greater protection than the traditional analysis employed under article I, section 14. Contrary to *Hart*, an Eighth Amendment challenge therefore cannot be dispensed with by simply relying on the traditional *Fain* analysis. *See Bassett*, 192 Wn.2d at 80–85 (affirming Court of Appeals in rejecting use of *Fain* analysis and holding "categorical" analysis applies when considering whether a juvenile may be sentenced to life without possibility of release).

*Hart* also opted to draw an absolute line at the chronological age of 18, beyond which there is no need to consider youth in sentencing under the Eighth Amendment. *Hart*, 188 Wn. App. at 462–64. This position is no longer tenable. *Hart* was decided before *O'Dell*, which recognizes the characteristics of youth may persist well past age 18.

Consistent with this Court's recent *Bassett* decision, moreover, the state constitution independently requires that the trial court be given the authority to sentence Orr to a non-persistent offender sentence.

Washington courts broadly hold that article I, section 14 of the state constitution is more protective than the Eighth Amendment. *Witherspoon*, 180 Wn.2d at 887. Courts of this state use the six nonexclusive criteria from *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) to determine whether, in a specific context, the state constitution's ban on cruel punishment should be considered as extending broader rights to its citizens than the Eighth Amendment's ban on cruel *and* unusual punishment. Only two of the *Gunwall* factors relate to the specific interpretation of the State ban on cruel punishment, factors four and six, which are related.<sup>10</sup>

In *Bassett*, this Court noted that, as for the sixth factor, the analysis depended upon the Court's analysis as to the fourth factor. *Bassett*, 192 Wn.2d at 82 (*citing Gunwall*, 106 Wn.2d at 67 (explaining that the discussion of the fourth factor may pertain to the sixth factor)). The fourth factor, "preexisting state law"<sup>11</sup>, asks a reviewing court "to consider how

---

<sup>10</sup> Factors one through three all focus on textual differences in the constitutional language and always support broader state protection. *Bassett*, 192 Wn.2d at 80. The fifth factor points to an independent state analysis in every case. *Id.* at 82.

<sup>11</sup> *Gunwall*, 106 Wn.2d at 61–62.

‘established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights.’” *Bassett*, 192 Wn.2d at 80 (quoting *Gunwall*, 106 Wn.2d at 61 ). The *Bassett* Court concluded that the fourth factor also weighed in favor of broader interpretation:

This court has consistently applied the *Miller* principle that "children are different." *Miller*, 567 U.S. at 481. In *O'Dell*, we used the psychological and neurological studies discussed in *Miller*, *Roper*, and *Graham* to hold that age may well mitigate a defendant's culpability, even if the defendant is slightly older than 18. [*O'Dell*, 183 Wn.2d at 691–96] .... This court has also applied *Miller*'s reasoning to hold that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant" and ‘must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements. [*Houston-Sconiers*, 188 Wn.2d at 21].

*Bassett*, 192 Wn.2d at 81. The Court concluded sentencing juvenile offenders to life without the possibility of parole or early release constituted cruel punishment under article I, section 14. *Id.* at 90–91.

The result under the fourth factor is no different in this case. Based on the same characteristics of youth and the same scientific findings relied on by *Miller*, *Roper*, and *Graham*, the *O'Dell* case held that a young adult offender's youth must be considered in sentencing under the SRA. 183 Wn.2d at 689, 691–92, 695–97. Those characteristics in juvenile offenders compelled *Miller*'s holding that mandatory life imprisonment without possibility of release for crimes committed while under the age of 18

violated the Eighth Amendment. With this Court's recognition in *O'Dell* that those characteristics may persist past age 18, the rationale of *Miller* would also condemn mandatory sentences for crimes committed during the early years of technical "adulthood."

If, consistent with *Bassett* and *Witherspoon*, article I, section 14 is more protective than the Eighth Amendment, then it should be interpreted parallel to *O'Dell* to require consideration of an offender's youth during the years during which, according to scientific studies, the characteristics of youth may persist. Because the strike offenses, occurring during those years, form the basis for Orr's sentence, mandatory POAA sentencing violates the state prohibition on cruel punishment. Thus, the state constitution independently requires that this case be remanded for the trial court to exercise its discretion to impose a non-POAA sentence.

#### **D. CONCLUSION**

For the reasons stated here and in prior briefing, this Court should remand for the trial court to exercise its discretion in sentencing.

Respectfully submitted on March 22, 2019.

---

s/Susan Marie Gasch, WSBA #16485  
Attorney for Mr. Orr  
Gasch Law Office, P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149; FAX: None  
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 22, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant and Appendices A, B and C:

Frederick Del Orr (#718288)  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay WA 98326

**E-mail:**  
SCPAAppeals@spokanecounty.org  
Brian Clayton O'Brien/Larry D. Steinmetz  
Deputy Prosecuting Attorneys

---

s/Susan Marie Gasch, WSBA #16485

# APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 Frederick ORR, )  
 Defendant. )

NO. 93-1-02067-9

STATEMENT OF DEFENDANT ON  
PLEA OF GUILTY TO A FELONY

Alford Plea

STATEMENT OF DEFENDANT

1. My true name is: Frederick D. Orr

I am also known as \_\_\_\_\_

2. My age is: 19 yrs. Date of birth 4 - 8 - 74

3. I went through the 10<sup>th</sup> grade.

( ) I have received my GED.

I have completed \_\_\_\_\_ year(s) of college.

4 I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is:

Dary Henry

(b) I am charged with the crime(s) of:

(1) 2<sup>nd</sup> Degree Robbery

(2) \_\_\_\_\_

(3) \_\_\_\_\_

(4) \_\_\_\_\_

and the elements of the crime(s) (is) (are):

(1) see information

- (2) \_\_\_\_\_
- (3) \_\_\_\_\_
- (4) \_\_\_\_\_

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal certain pretrial court decisions and any determination of guilt after trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

- (a) The crime with which I am charged carries a maximum sentence of 10 years imprisonment and a \$ 20,000 fine. The standard sentence range is from 3 (~~days~~) (months) to 7 (~~days~~) (months) confinement, based on the prosecuting attorney's understanding of my criminal history.
- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions in juvenile court for felonies or serious traffic offenses that were committed when I was 15 years of age or older. Juvenile convictions, except those for class A felonies, count only if I was less than 23 years old when I committed the crime to which I am now pleading guilty.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is

STATEMENT OF DEFENDANT ON PLEA  
OF GUILTY TO A FELONY  
(CrR 4.2(g) (Rev. 9-91) -2-

*Appendix A - 2*  
RICHARD L. CEASE  
SPOKANE COUNTY PUBLIC DEFENDER  
SPOKANE COUNTY COURTHOUSE  
SPOKANE, WASHINGTON 99260-0280

correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase.

(e) In addition to sentencing me to confinement for the standard range, the judge will order me to pay \$ 1000 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, and attorney fees. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(f) The prosecuting attorney will make the following recommendation to the court:

at low end of Standard Range and  
dismiss count II of information  
def agrees to pay Restitution on dismissed count

(g) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence determination.

(h) The crime(s) of \_\_\_\_\_ has a mandatory minimum sentence of at least \_\_\_\_\_ years of total confinement. The law does not allow any reduction of this sentence. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].

(i) The sentence imposed on counts \_\_\_\_\_ will run concurrently unless the judge finds substantial and compelling reasons to do otherwise. [If not applicable, this paragraph should be stricken and initialed by the

defendant and the judge].

- (j) In addition to confinement, the judge will sentence me to community placement for at least [ ] 1 year, [ ] 2 years. During the period of community placement, I will be under the supervision of the Department of Corrections, and I will have restrictions placed on my activities. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].
- (k) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(2)). This sentence could include as much as 90 days confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].
- (l) This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].
- (m) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
- (n) If this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].
- (o) If this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].
- (p) If this crime involves a sex offense, I will be required to register with the sheriff of the county where I reside. I must do this within (a) twenty four (24) hours of release from confinement, or (b) if not sentenced to confinement, immediately upon completion of being sentenced. If I do not now reside in Washington, I must register within 45 days after I establish residence in this

state. If I subsequently move within the county, I must notify the sheriff within 10 days after I establish my new residence. If I move to a new county, I must, within 10 days, notify the sheriff of both counties. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge].

7. I plead Guilty to the crime(s) of 2nd Deg  
Robbery.

as charged in the Amended Information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement:

I do not remember committing this crime. I know what the prosecution has for evidence, I believe a jury could find me guilty based on that evidence. Because of the Plea Bargain I wish to plead guilty.

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

Frederick D. Overt  
DEFENDANT

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

Stump Tucker  
DEPUTY PROSECUTING ATTORNEY  
WA State Bar ID #: 16505

Sam L. Hendry  
DEFENDANT'S LAWYER  
WA State Bar ID #: 6170

1. The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that Check appropriate box:

- (a) The defendant had previously read; or
- (b) The defendant's lawyer had previously read to him or her; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

DATED this 03 day of Feb, 1994.

[Signature]

KATHLEEN M. O'CONNOR JUDGE

I am fluent in the \_\_\_\_\_ language, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his/her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: \_\_\_\_\_

INTERPRETER

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

**FILED**

**MAR 23 1994**

STATE OF WASHINGTON )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FREDERICK DEL ORR, )  
 WM 040874 )  
 )  
 Defendant(s) )

NO. 93-1-02067-9  
PA# 93-9-86407-0  
RPT# 02-93-99760-0  
RCW CT I: 9A.56.210-F(#68313)  
CT II: 9A.56.210AT-F  
(9A.28.020(1)) (#68314)

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

APPENDIX "E"  
SCHEDULE OF RESTITUTION

*PAY TO: MICHAEL BEVAN  
19319 194<sup>th</sup> AVE N.E.  
WOODINVILLE, WA 98072*

*-\$1,000*

*18*

TOTAL: *\$1,000*

DATED this *22<sup>ND</sup>* day of *MARCH*, 19*94*.

JUDGE  
KATHLEEN M. O'CONNOR  
Approved for entry:

Presented by:

STEVEN J. TUCKER  
Deputy Prosecuting Attorney  
WA State Bar ID #: *16505*

*(TELEPHONIC 3-21-94)*

Gary L. Hemingway  
Attorney for Defendant  
WA State Bar ID #: \_\_\_\_\_

*Appendix A - 7*

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

**FILED**  
DEC 27 1993  
THOMAS R. FALLQUIST  
SPOKANE COUNTY  
CLERK

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 )  
 FREDERICK DEL ORR )  
 WM 040874 )  
 )  
 Defendant (s) )

INFORMATION

NO. **93102067-9**

STEVEN J. TUCKER  
Deputy Prosecuting Attorney

PA# 93-9-86407-0  
RPT# 02-93-99760-0  
RCW CT I: 9A.56.210-F (#68313)  
CT II: 9A.56.210AT-F  
(9A.28.020(1)) (#68314)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: SECOND DEGREE ROBBERY, committed as follows: That the defendant, FREDERICK DEL ORR, in Spokane County, Washington, on or about December 7, 1993, did unlawfully, with intent to deprive, take and retain personal property, lawful money of the United States, from the person and in the presence of Earl Wilson, against such person's will, by use or threatened use of immediate force, violence and fear of injury to Earl Wilson,

COUNT II: And the Prosecuting Attorney, as aforesaid, further charges the defendant, FREDERICK DEL ORR, with the crime of ATTEMPTED SECOND DEGREE ROBBERY, committed as follows: That the defendant, FREDERICK DEL ORR, in Spokane County, Washington, on or about December 7, 1993, with intent to commit the crime of Second Degree Robbery as set out in RCW 9A.56.210, committed an act which was a substantial step toward that crime, by attempting to unlawfully, with intent to deprive, take and retain personal property, lawful money of the United States, from the person and in the presence of Michael Bevan, against such person's will, by use or threatened use of immediate force, violence and fear of injury to Michael Bevan,

  
Deputy Prosecuting Attorney

16505  
WA St. Bar ID#

Appendix A - 8

**JASS**

ST. NT OF INVESTIGATING OFF.  
AFFIDAVIT OF FACTS

F932734

93102067-9

STATE OF WASHINGTON)  
COUNTY OF SPOKANE)

REPORT NUMBER: 93-99760

FILED

DEFENDANT: FREDERICK DELL ORR  
W/M 4/8/74

EC 27 1993

TOMAS R. FALLOUIS  
SPOKANE COUNTY  
CLERK

The undersigned, a law enforcement officer, competent to testify, states as follows: That he/she believes a crime was committed by the above-named defendant/defendants in the City and County of Spokane, State of Washington, because:

On 12/7/93 in the City and County of Spokane, State of Washington, the victim EARL WILSON who is disabled was walking his dog in the area of Riverside and Division. Mr. WILSON was confronted by a subject who demanded that he give him money. When he began to take out his money, he gave the subject a five dollar bill and a one dollar bill and all the change that he had. The subject became upset when that was all the money that he had and demanded that he give him his bank card so he could get more money out of the bank. When WILSON refused to give him the bank card or the code, the subject became very upset and struck WILSON with a broken beer bottle in the face. Suspect then grabbed WILSON's crutch striking him. The blows from the broken bottle and crutch caused bleeding of the lower lip and injury to his right arm. The subject then fled from the scene. Mr. WILSON's disability is due to the fact that he only has one leg and that is the reason for him having the crutches.

Moments after the first incident, the defendant approached a 1994 Ford Tempo, which was parked in the area of W. 20 Riverside. Inside the vehicle was MICHAEL BEVAN who had just left a local restaurant. The suspect started yelling at BEVAN, demanding money and when BEVAN said he didn't have any and would not get out of the vehicle, the suspect grabbed a large piece of concrete and smashed the front window of the vehicle. The suspect then went to the driver's side and smashed the driver's window of the vehicle, at which time BEVAN did exit, grabbed the suspect and detained him until police arrived.

While police were at the scene with BEVAN, victim WILSON was brought by and positively identified ORR as the subject who had struck him and taken his money. After being handcuffed and advised of his rights, the defendant's pockets were searched and in his right front pocket officers found a \$5 bill, a \$1 bill, 8 quarters, 4 nickels and 9 pennies, which corresponded with the amount taken from WILSON.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (9A.72.085)

Appendix A - 9

DATE 12/08/93 PLACE Spokane SIGNATURE James P. [Signature]

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

STATE OF WASHINGTON,  
Plaintiff,

v.

FREDERICK DEL ORR,  
Defendant.

NO. 93102067-9  
P.A. NO. 86407  
REPORT NO. 029399760

MOTION AND ORDER  
DISMISSING COUNT II OF THE  
INFORMATION

**FILED**

**FEB 04 1994**

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

**I. BASIS**

The parties moved the court for: an order dismissing Count II of the Information in this cause number.

**II. FINDING**

After reviewing the case record to date and the basis for the motion, the Court finds that : good cause exists pursuant to the plea agreement between the parties and the defendant's having pled guilty to Count I of the Information.

**III. ORDER**

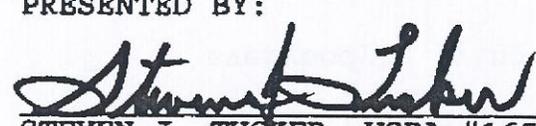
15 IT IS ORDERED that: Count II of the Information on file in this cause number is hereby dismissed.

Dated this 3rd day of February, 1994.

  
\_\_\_\_\_  
JUDGE

PRESENTED BY:

KATHLEEN M. O'CONNOR

  
\_\_\_\_\_  
STEVEN J. TUCKER, WSBA #16505  
DEPUTY PROSECUTING ATTORNEY

Appendix A - 10

# APPENDIX B

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY**

55 JUN 15 PM 3:15

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

Accelerated  
 Non Accelerated  
 DPA  Defense

STATE OF WASHINGTON,

Plaintiff,

v.

Frederick D. Orr

Defendant,

NO. 95-1-03343-8

**STATEMENT OF DEFENDANT  
ON PLEA OF GUILTY  
(Felony)**

1. My true name is Frederick D. Orr

2. My age is 21 Date of Birth 4/8/74

3. I went through the 10<sup>th</sup> grade.

4. **I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:**

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is Amita Paulsen.

(b) I am charged with the crime(s) of Robbery in the First Degree.  
The elements of this crime(s) are Information attached

5. **I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:**

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

STATEMENT OF DEFENDANT ON  
PLEA OF GUILTY 1 of 8

Appendix B - 1  
SC FORM CLD 100 Rev. 5/13/94

WP - A JUD Statement Fel  
DELETED

(c) The right at trial to hear and question the witnesses who testify against me;

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me:

(e) The right to be presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty;

(f) The right to appeal a determination of guilt after a trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA(S), I UNDERSTAND THAT:

(a) The crime with which I am charged carries a maximum sentence of life years imprisonment and a \$ 50,000 fine.

RCW 9.94A.030(21), provides that for a third conviction for a "most serious offense" as defined in that statute, I may be found to be a Persistent Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence of life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.120(4). The law does not allow any reduction of this sentence.

(b) The standard sentence range is from 46 (days) months to ~~61~~ 61 (days) months confinement, based on the prosecuting attorney's understanding of my criminal history. The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history always includes juvenile convictions for sex offenses and also for Class A felonies that were committed when I was 15 years of age or older. Criminal history also may include convictions in juvenile court for felonies or serious traffic offenses that were committed when I was 15 years of age or older. Juvenile convictions, except those for sex offenses and Class A felonies, count only if I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete.

If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if I was on community placement at the time of the offense to which I am now pleading guilty, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendations may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase.

If the current offense to which I am pleading guilty is a most serious offense as defined by RCW 9.94A.030(21), and additional criminal history is discovered, not only do the conditions of the prior paragraph apply, but also if my discovered criminal history contains two prior convictions, whether in this state, in federal court, or elsewhere, of most serious offense crimes, I may be found to be a Persistent Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence of life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.120(4).

Even so, my plea of guilty to this charge may be binding on me. I may not be able to change my mind if additional criminal history is discovered, even though it will result in the mandatory sentence that the law does not allow to be reduced.

(e) In addition to sentencing me to confinement for the standard range, the judge will order me to pay \$ 100 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damages to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs and attorney fees. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(f) The prosecuting attorney will make the following recommendation to the judge: 46 months  
Confinement, no contact victim, restitution, costs,  
\$100 UPA, recoupment of defense attorney fees, DNA  
testing - concurrent, time with 95-1-03556-2  
no additional charges will be filed out of PIN 95-196796

(g) The judge does not have to follow anyone's recommendation as to the sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(h) The crime of \_\_\_\_\_ has a mandatory minimum sentence of at least \_\_\_\_\_ years of total confinement. The law does not allow any reduction of this sentence. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

The crime of Robbery in the First Degree is a most serious offense as defined by RCW 9.94A.030(21), and if a fact finder determines that I have at least two prior convictions on separate occasions whether in this state, in federal court, or elsewhere, of most serious offense crimes, I may be found to be a Persistent Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence of life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.120(4).

(i) The sentence imposed on counts \_\_\_\_\_ will run concurrently unless the judge finds substantial and compelling reason to do otherwise. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(j) In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement, I will be under the supervision of the Department of Corrections, and I will have restrictions placed on my activities. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(k) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(20). This sentence could include as much as 90 days' confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(l) This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(m) If this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(n) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(o) If this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge.]

(p) If this crime involves a sex offense, I will be required to register with the sheriff of the county in this state where I reside. I must register immediately upon completion of being sentenced if I am not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, I must register within 24 hours of the time of my release if I am sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.

If I do not now reside, in Washington, but I subsequently move to this state, I must register within 24

hours of the time I begin to reside in this state, if at the time of my move I am under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services. If at the time I move to this state I am not under the jurisdiction of one of those agencies, then I must register within 30 days of the time I begin to reside in this state.

If I subsequently change residences with a county in this state, I must notify the county sheriff of that change of residence in writing within 10 days of my change of residence. If I subsequently move to a new county within this state, I must register all over again with the sheriff of my new county, and I must notify my former county sheriff (that is, the county sheriff of my former residence) of that change of residence in writing, and I must complete both acts within 10 days of my change of residence. [If none of the above three paragraphs is applicable, they should all be stricken and initialed by the defendant and the judge.]

7. I plead guilty to the crime of robbery in the first degree as charged in the original information. I have received a copy of that information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this (these) crime(s). This is my statement:

I am entering this plea solely to take advantage of the sentencing recommendation of the state. I have reviewed the police reports with my attorney and I believe there is a substantial likelihood that I would be found guilty should this case go to trial. The court may read the certificate of probable cause to make a determination of guilty.

and for sentencing  
free

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

Frederick P. Orr  
DEFENDANT

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

[Signature] 22566  
PROSECUTING ATTORNEY

Amita Paulsen  
DEFENDANT'S LAWYER 15854

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriated box]:

- (a) The defendant had previously read; or
- (b) The defendant's lawyer had previously read to him or her; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

DATED this 14 day of June, 1995

[Signature]  
JUDGE

I am fluent in the \_\_\_\_\_ language and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
INTERPRETER

PLEA AGREEMENT /  TRIAL

Date: 6/13/95

Defendant: Frederick D Orr Cause No: 95-105347-8

On Plea To:  As Charged

95-105347-2

Special Finding/Verdict;  Deadly Weapon (RCW 9.94.125);  School Zone-VUCSA (RCW 69.50) on Count(s) \_\_\_\_\_

The State of Washington and the defendant enter into this PLEA AGREEMENT which is accepted only by a guilty plea. This agreement may be withdrawn at any time prior to entry of the guilty plea. The PLEA AGREEMENT is indicated above and as follows:

- 1.  DISMISS: Upon disposition of Count(s) \_\_\_\_\_, the State moves to dismiss Count(s): \_\_\_\_\_
- 2.  REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with RCW 9.94A.370, the parties have stipulated that the court, in sentencing, may consider as real and material facts information as follows:
  - as set forth in the certification(s) of probable cause filed herein.
  - as set forth in the attached Appendix C.
- 3.  RESTITUTION: Pursuant to RCW 9.94A.140(2), the defendant agrees to pay restitution as follows:
  - in full to the victim(s) on charged counts.
  - as set forth in attached Appendix C.
- 4.  OTHER: \_\_\_\_\_

5.  SENTENCE RECOMMENDATION:

- a.  The defendant agrees to the foregoing Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A) and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation.
- b.  The defendant disputes the Prosecutor's Statement of the Defendant's Criminal History, and the State makes no agreement with regards to a sentencing recommendation and may make a sentencing recommendation for the full penalty allowed by law.

Maximum on Count I is not more than 1 1/2 years and/or \$ 50,000 fine.  
 Maximum on Count \_\_\_\_\_ is not more than \_\_\_\_\_ years and /or \$ \_\_\_\_\_ fine.  
 Mandatory Minimum Term (RCW 9.94A.120(4) only): \_\_\_\_\_  
 Mandatory license revocation RCW 46.20.285  
 Ten years jurisdiction and supervision for monetary payments. RCW 9.94A.120d(9).

The State's recommendation will increase in severity if additional criminal convictions are found or if the defendant commits any new crimes, fails to appear for sentencing or violates the conditions of his release.

Frederick D. Orr  
Defendant

Jim MARNEA  
Deputy Prosecuting Attorney

Christopher Ross  
Attorney for Defendant

BR  
Judge, King County Superior Court

APPENDIX B TO PLEA AGREEMENT  
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY  
(SENTENCING REFORM ACT)

Defendant: FREDERICKS Del ORR Date: 8 MAY 1995

CRIME	DATE OF CONVICTION	PLACE OF CONVICTION	DISPOSITION (Probation and/or incarceration and length) SRA — Counts as Prior
-------	--------------------	---------------------	---

ADULT FELONIES:

2-3-94 Rob BB ORR 500 King OR 93-1-02067-9 12 months supervision 6 months  
 — vehicle providing 95-1-03556-2  
 concurrent offense

ADULT MISDEMEANORS:

4-9-94 ASSAULT SPD GUILTY  
9-9-94 ASSAULT KCB GUILTY

\* net count of under 150 is

JUVENILE FELONIES:

† 8-2-86 TAKING MOTOR VEHICLE King 86-8-01878-8 PG  
 † 8-15-86 THEFT King 86-8-02405-2 PG  
 † 7-16-87 THEFT King 86-8-03529-8 PG  
 † 9-12-89 BURGLARY King 89-8-03086-3 PG  
 † 9-12-89 TAKING MOTOR VEHICLE King 89-8-04282-9 PG

JUVENILE MISDEMEANORS:

4-4-80 MISHANDLING PG mal mech? no rec'd as on transmittal PG  
11-19-81 mal mech? PG  
11-19-81 PROSTITUTION PG  
11-19-81 mal mech? PG

† net count as one

Deputy Prosecuting Attorney

King County Prosecuting Attorney

STATE'S SENTENCE RECOMMENDATION  
(CONFINEMENT OF OVER ONE YEAR)

Date:

Cause No:

*OM*

*8/8/95*

*95-1-03343-8*

State recommends that the sentence of this defendant be as follows:

**TOTAL CONFINEMENT:** State recommends that the defendant be sentenced to a term of total confinement in the custody of the Department of Corrections as follows:

Count I <del>_____</del> <i>46</i> months/years.	Count IV _____ months/years.
Count II _____ months/years.	Count V _____ months/years.
Count III _____ months/years.	Count VI _____ months/years.

Terms on each count to run concurrently/consecutively with each other.

Terms to be served concurrently/consecutively with: *95-1-03556-2*

Terms to be consecutive to any other terms(s) not specifically referred to in this form.

**SENTENCE MODIFICATION:** State recommends modification of community supervision on King County Cause Number(s) \_\_\_\_\_ and recommends that terms be run concurrently/consecutively.

**NO CONTACT:** For the maximum term, defendant have no contact with *Michael Garren*

**MONETARY PAYMENTS:** The defendant shall make the following monetary payments under the supervision of the Department of Corrections (RCW 9.94A.120(11)) within 10 years:

- a.  Restitution as set forth on attached page entitled "Plea Agreement/Trial" and  Appendix C.
- b.  Pay Costs, mandatory \$100 Victims Penalty Assessment, recoupment of cost of defense attorney fees, if appointed.
- c.  Pay to King County Local Drug Fund \$ \_\_\_\_\_
- d.  Pay a fine of \$ \_\_\_\_\_;  \$1000, fine for VUCSA;  \$2000, fine for subsequent VUCSA.
- e.  Other \_\_\_\_\_

**COMMUNITY PLACEMENT:** For any sex offense, serious violent offense; assault 2°; deadly weapon finding or drug offense under 69.50 or 69.52 RCW (committed after 1 July 1988) defendant be on community placement on conditions set forth in RCW 9.94A.120 8(b) and the following conditions under 8(c) (crime-related prohibitions only): \_\_\_\_\_

**OFF-LIMITS ORDER:** The defendant is a "known drug trafficker" and the state recommends defendant shall neither enter nor remain in the protected against drug trafficking area (described in the attachment) during the term of community placement.

**HIV TESTING:** State recommends HIV testing and counseling.

**EXCEPTIONAL SENTENCE:** This is an exceptional sentence, and the substantial and compelling reasons for departing from the presumptive sentence range are set forth on the attached form.

Approved by:

*[Signature]*

Deputy Prosecuting Attorney

## GENERAL SCORING FORM Violent Offenses

Use this form only for the following offenses: Arson 1; Arson 2; Assault 2; Assault of a Child 2; Bail Jumping with Murder 1; Damaging Building, etc., by Explosion with Threat to Human Being; Endangering Life and Property by Explosives with Threat to Human Being; Explosive Devices Prohibited; Extortion 1; Kidnapping 2; Leading Organized Crime; Manslaughter 1; Manslaughter 2; Robbery 1 and 2.

OFFENDER'S NAME <i>FREDERICK Del ORL</i>	OFFENDER'S DOB <i>4-8-24</i>	STATE ID# <i>WA 14603 662</i>
JUDGE	CAUSE# <i>95-1-03749-8</i>	FBI ID# <i>612 121 PAS</i>

**ADULT HISTORY:** (If the prior offense was committed before 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed after 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of serious violent and violent felony convictions ..... 1 x 2 = 2  
 Enter number of other nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:** (Adjudications entered on the same date count as one offense, except for violent offenses with separate victims)

Enter number of serious violent and violent felony adjudications ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony adjudications ..... 1 x 1/2 = 1/2

**OTHER CURRENT OFFENSES:** (Those offenses not encompassing the same criminal conduct)

Enter number of other serious violent and violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony convictions ..... 1 x 1 = 1

**STATUS AT TIME OF CURRENT OFFENSES:**

If on community placement at time of current offense, add 1 point ..... + 1 = \_\_\_\_\_

Add the scores in each category ..... **TOTAL OFFENDER SCORE** 3  
 (round down to the nearest whole number)

STANDARD RANGE CALCULATION*					
<i>Robbery 1</i>	<i>14</i>	<i>3</i>	<i>46</i>	TO	<i>61</i>
CURRENT OFFENSE BEING SCORED	SERIOUSNESS LEVEL	OFFENDER SCORE	LOW STANDARD SENTENCE RANGE		HIGH STANDARD SENTENCE RANGE

- \* Multiply the range by .75 if the current offense is an attempt, conspiracy, or solicitation.
- \* Add 24 months to the standard range if the current offense is Robbery 1 and includes a deadly weapon finding.
- \* Add 12 months to the standard range if the current offense is Assault 2 or Kidnapping 2 and includes a deadly weapon finding.

*Appendix B - 12*

FILED

1995 MAY -5 PM 4: 13

WARRANT ISSUED  
CHARGE COUNTY \$110.00

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

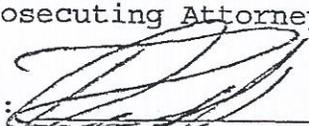
1 THE STATE OF WASHINGTON, )  
 2 )  
 3 Plaintiff, ) No. 95-1-03343-8  
 4 )  
 5 v. ) INFORMATION  
 6 FREDERICK DEL ORR )  
 7 )  
 8 )  
 9 Defendant. )  
 10 )

11 I, Norm Maleng, Prosecuting Attorney for King County in the  
 12 name and by the authority of the State of Washington, do accuse  
 13 FREDERICK DEL ORR of the crime of Robbery in the First Degree,  
 committed as follows:

14 That the defendant FREDERICK DEL ORR in King County, Washington  
 15 on or about May 3, 1995, did unlawfully and with intent to commit  
 16 theft take personal property of another, to-wit: a Toshiba portable  
 17 stereo, from the person and in the presence of Michael Garren,  
 18 against his will, by the use or threatened use of immediate force,  
 19 violence and fear of injury to such person or his property and in  
 the commission of and in immediate flight therefrom, the defendant  
 displayed what appeared to be a deadly weapon, to-wit: a knife;

18 Contrary to RCW 9A.56.200(1)(B) and 9A.56.190, and against the  
 19 peace and dignity of the State of Washington.

20 NORM MALENG  
 21 Prosecuting Attorney

22 By:   
 23 Rene Cespedes, WSBA #91002  
 24 Deputy Prosecuting Attorney  
 25

INFORMATION- 1

Norm Maleng  
 Prosecuting Attorney  
 W 554 King County Courthouse  
 Seattle, Washington 98104-2312  
 (206) 296-9000



Appendix B - 13

1 CAUSE NO. 95-1-03343-8

2 CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

3 That Rene Cespedes is a Deputy Prosecuting Attorney for King  
4 County and is familiar with the police report and investigation  
conducted in Seattle Police Department case No. 95-196796;

5 That this case contains the following upon which this motion  
6 for the determination of probable cause is made;

7 On May 3, 1995, the victim, Michael G. Garren, was in downtown  
8 Seattle with a friend and met the defendant, Frederick D. Orr, at a  
9 nightclub. Mr. Garren invited the defendant over to his house for  
10 a few beers and they went to the victim's apartment, located at  
11 11300 Third Avenue Northeast, No. 312, Seattle, King County,  
Washington. The victim and the defendant had drunk a few beers when  
the defendant started acting strangely and started talking about  
being in prison. Mr. Garren asked the defendant to leave. When the  
defendant struck the victim in the side of the head, the victim hit  
him back and told him to leave.

12 The defendant then walked into the kitchen and grabbed a knife:  
13 a paring knife with a dark brown handle and a three-inch fixed  
14 blade. The defendant went after Mr. Garren, telling him he was  
15 going to kill him. The victim ran into the bedroom, shutting and  
holding the bedroom door. The defendant ran after him, stabbing and  
kicking at the door, yelling that he was going to kill him.

16 The victim's roommate, Anthony Elliot, had been asleep on the  
17 couch and woke up when he heard all of the commotion. He left the  
18 apartment and was standing on the patio. The defendant came back  
19 into the living room and told Mr. Elliot to get back inside because  
20 he was making him "nervous." Mr. Elliot came in, and the defendant  
21 told him that he didn't know where he was and that he needed money.  
Mr. Elliot told him he did not have any money. The defendant then  
asked him for his wallet. Mr. Elliot told him he didn't have a  
wallet. The defendant then told Mr. Elliot to get on his hands and  
knees and when the victim refused, the defendant raised the knife in  
the air. Mr. Elliot screamed for his friend Mike (Garren) to come  
out because the defendant was going to stab him.

22 Mr. Garren came out and the defendant ran after him. Mr.  
23 Garren ran out the door and down the hallway, where he told his  
24 neighbor what was going on. Mr. Garren and the neighbor went back  
to the apartment to check on Mr. Elliot.

25 When Mr. Garren returned, he saw the defendant walking out of  
his apartment with the knife and the victim's Toshiba portable

Certification for Determination  
of Probable Cause - 1

Norm Maleng  
Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

Appendix B - 14

1 stereo. The victim tried to stop the defendant from taking his  
2 stereo and told him to put it down. The defendant raised the knife  
3 and chased the victim down the hallway. The defendant left with  
4 the stereo.

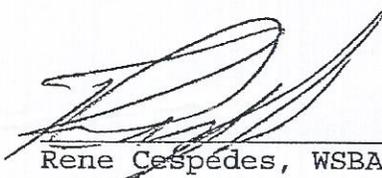
5 In the meantime, Mr. Elliot had jumped off the patio to the  
6 apartment, ran to a nearby Park and Ride lot, and called 911. The  
7 defendant saw Mr. Elliot at the Park and Ride lot, and with a raised  
8 knife chased him away from the phone, yelling, "I'm going to kill  
9 you."

10 Officers responded to the 911 call and found the defendant--  
11 who matched the suspect description--carrying a portable stereo.  
12 When they approached the defendant, they observed him retrieve  
13 something from his waist band, drop it to the ground and kick it  
14 under the cab the defendant had contacted. The defendant was  
15 detained and a knife was recovered from underneath the cab.

16 Mr. Garren and Mr. Elliot responded to the scene and positively  
17 identified the defendant.

18 The State requests bail in the amount of \$100,000. The  
19 defendant has prior juvenile convictions for Taking Motor Vehicle  
20 Without Permission (1986), Theft 1° (1987), Burglary 2° (1989),  
21 Menacing (1990), Reckless Endangerment and Malicious Mischief  
22 (1990), and Prostitution (1991). According to Court Services, the  
23 defendant has several prior assault-related arrests and is under  
24 Department of Corrections supervision for a Robbery 2° in Spokane.  
25 The defendant poses a significant threat to the community.

Under penalty of perjury under the laws of the State of Washington,  
I certify that the foregoing is true and correct. Signed and dated  
by me this 5<sup>th</sup> day of May, 1995, at Seattle, Washington.

  
Rene Cespedes, WSBA #91002

Certification for Determination  
of Probable Cause - 2

Norm Maleng  
Prosecuting Attorney  
W 554 King County Courthouse  
Seattle, Washington 98104-2312  
(206) 296-9000

Appendix B - 15

# **APPENDIX C**

## ENGROSSED SUBSTITUTE SENATE BILL 5288

## State of Washington 66th Legislature 2019 Regular Session

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

READ FIRST TIME 02/22/19.

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

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

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

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

- (1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.
- (2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.
- (3) "Commission" means the sentencing guidelines commission.
- (4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.
- (5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.
- (6) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.
- (7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.
- (8) "Confinement" means total or partial confinement.
- (9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.
- (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.
- (11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere, and any issued certificates of restoration of opportunity pursuant to RCW 9.97.020.
  - (a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been

*Appendix C - 1*

incarcerated and the length of incarceration.

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

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

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

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

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

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

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

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

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

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

(f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); promoting commercial sexual abuse of a minor (RCW 9.68A.101); or promoting pornography (chapter 9.68 RCW).

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

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

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

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

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

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

(21) "Drug offender sentencing alternative" is a sentencing option available to persons convicted

of a felony offense other than a violent offense or a sex offense and who are eligible for the option under RCW 9.94A.660.

(22) "Drug offense" means:

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

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

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

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

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

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

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

(25) "Escape" means:

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

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

(26) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)); or

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

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

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

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

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

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

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

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

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

response to the incident resulting in the conviction, subject to RCW 38.52.430.

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

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

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

(b) Assault in the second degree;

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

(d) Child molestation in the second degree;

(e) Controlled substance homicide;

(f) Extortion in the first degree;

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

(h) Indecent liberties;

(i) Kidnapping in the second degree;

(j) Leading organized crime;

(k) Manslaughter in the first degree;

(l) Manslaughter in the second degree;

(m) Promoting prostitution in the first degree;

(n) Rape in the third degree;

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

~~(p))~~ Sexual exploitation;

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

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

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

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

~~((+))~~~~(t)~~ Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

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

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

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

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

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

(36) "Partial confinement" means confinement for no more than one year in a facility or institution

operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program or the graduated reentry program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xx) Extortion 2 (RCW 9A.56.130);

(xxi) Intimidating a Witness (RCW 9A.72.110);

(xxii) Tampering with a Witness (RCW 9A.72.120);

(xxiii) Reckless Endangerment (RCW 9A.36.050);

(xxiv) Coercion (RCW 9A.36.070);

(xxv) Harassment (RCW 9A.46.020); or

(xxvi) Malicious Mischief 3 (RCW 9A.48.090);

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

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

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

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

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

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

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first

degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (38)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

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

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

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

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

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

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

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

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

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

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

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

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

(45) "Serious traffic offense" means:

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

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

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

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

(ii) Homicide by abuse;

(iii) Murder in the second degree;

(iv) Manslaughter in the first degree;  
(v) Assault in the first degree;  
(vi) Kidnapping in the first degree;  
(vii) Rape in the first degree;  
(viii) Assault of a child in the first degree; or  
(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or  
(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

(47) "Sex offense" means:  
(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;  
(ii) A violation of RCW 9A.64.020;  
(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;  
(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or

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

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

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

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

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

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

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

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

(52) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

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

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

(55) "Violent offense" means:

(a) Any of the following felonies:

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

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

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

(vi) Kidnapping in the second degree;

(vii) Arson in the second degree;

(viii) Assault in the second degree;

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

(x) Extortion in the first degree;

(xi) Robbery in the second degree;

(xii) Drive-by shooting;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a

reckless manner; and

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

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

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

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

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

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

--- END ---

**GASCH LAW OFFICE**

**March 25, 2019 - 9:24 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95263-9  
**Appellate Court Case Title:** State of Washington v. Anthony Allen Moretti  
**Superior Court Case Number:** 15-1-00005-8

**The following documents have been uploaded:**

- 952639\_Briefs\_20190325091737SC894297\_5623.pdf  
This File Contains:  
Briefs - Petitioners Supplemental  
*The Original File Name was Orr suppl brf MERGED of petitioner 2019 03 22 and App A and B and C Orr Frederick Del 960615.pdf*
- 952639\_Motion\_20190325091737SC894297\_2050.pdf  
This File Contains:  
Motion 1 - Overlength Brief  
*The Original File Name was mtn 2 file overlength suppl brief 2019 03 22 SuprCt Orr Frederick Del 960615.pdf*

**A copy of the uploaded files will be sent to:**

- EJany@co.grays-harbor.wa.us
- KARSdroit@gmail.com
- Valerie.kathrynrussellselk@gmail.com
- appeals@co.grays-harbor.wa.us
- bobrien@spokanecounty.org
- donna.wise@kingcounty.gov
- lsteinmetz@spokanecounty.org
- maureen@washapp.org
- paoappellateunitmail@kingcounty.gov
- scpaappeals@spokanecounty.org
- wapofficemail@washapp.org

**Comments:**

Being re-filed today into anchor case. Was originally filed 3-22-2019 into Mr. Orr's WSSC number.

---

Sender Name: Susan Gasch - Email: gaschlaw@msn.com  
Address:  
PO BOX 30339  
SPOKANE, WA, 99223-3005  
Phone: 509-443-9149

**Note: The Filing Id is 20190325091737SC894297**