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HOUSE BILL 2838

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By Representatives Tate, Dorn, Padden, Horn, Chandler, Sheahan, Lisk, Schoesler, Van Luven, B. Thomas, Long, Talcott, Dyer, Brough, Mielke, L. Thomas, Sheldon, Ballasiotes, Brumsickle, Campbell, Johanson and Quall

Read first time 01/26/94. Referred to Committee on Corrections.

1 AN ACT Relating to aggravating factors; amending RCW 9.94A.390 and  
2 13.40.150; and creating a new section.

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

4 NEW SECTION. **Sec. 1.** The legislature finds that gang-related  
5 criminal activity and violence against rival gang members is an  
6 aggravating factor that is a basis for imposition of an exceptional  
7 sentence or disposition. Recent appellate court decisions have noted  
8 that gang-related criminal activity is often motivated by: (1) A gang  
9 member's desire to retaliate against members of a particular rival gang  
10 as a result of a prior incident; (2) a gang member's desire to elevate  
11 his or her position in the gang hierarchy and enhance the member's  
12 status by committing violent acts; (3) the gang's attempt to assert  
13 dominance over other gangs in a particular area to further the gang's  
14 criminal enterprise that may include narcotics trafficking and other  
15 violent acts; and (4) the gang's attempt to project its power and  
16 criminal enterprise through terrorist acts.

17 Gang-related criminal activity is often committed in a random  
18 manner towards members of the public or other gangs who were not  
19 involved in a prior incident but are attacked solely because of their

1 gang affiliation. The violence frequently occurs in public places and  
2 in complete disregard for others' safety. Unpredictable, irrational  
3 violence committed without warning is particularly insidious and is  
4 especially destructive of society's sense of security. Gang violence  
5 has an impact far beyond intended victims and may invade a community's  
6 zone of safety not normally associated with an offense. Organized  
7 criminal enterprises pose a great challenge to law enforcement and the  
8 general public feels that it is held hostage by gang activity.  
9 Therefore, the legislature intends to codify the appellate court's  
10 rulings that gang-related criminal activity is a basis for an  
11 exceptional sentence or disposition.

12 **Sec. 2.** RCW 9.94A.390 and 1990 c 3 s 603 are each amended to read  
13 as follows:

14 If the sentencing court finds that an exceptional sentence outside  
15 the standard range should be imposed in accordance with RCW  
16 9.94A.120(2), the sentence is subject to review only as provided for in  
17 RCW 9.94A.210(4).

18 The following are illustrative factors which the court may consider  
19 in the exercise of its discretion to impose an exceptional sentence.  
20 The following are illustrative only and are not intended to be  
21 exclusive reasons for exceptional sentences.

22 (1) Mitigating Circumstances

23 (a) To a significant degree, the victim was an initiator, willing  
24 participant, aggressor, or provoker of the incident.

25 (b) Before detection, the defendant compensated, or made a good  
26 faith effort to compensate, the victim of the criminal conduct for any  
27 damage or injury sustained.

28 (c) The defendant committed the crime under duress, coercion,  
29 threat, or compulsion insufficient to constitute a complete defense but  
30 which significantly affected his or her conduct.

31 (d) The defendant, with no apparent predisposition to do so, was  
32 induced by others to participate in the crime.

33 (e) The defendant's capacity to appreciate the wrongfulness of his  
34 or her conduct or to conform his or her conduct to the requirements of  
35 the law, was significantly impaired ((+)). The voluntary use of drugs  
36 or alcohol is excluded((+)).

1 (f) The offense was principally accomplished by another person and  
2 the defendant manifested extreme caution or sincere concern for the  
3 safety or well-being of the victim.

4 (g) The operation of the multiple offense policy of RCW 9.94A.400  
5 results in a presumptive sentence that is clearly excessive in light of  
6 the purpose of this chapter, as expressed in RCW 9.94A.010.

7 (h) The defendant or the defendant's children suffered a continuing  
8 pattern of physical or sexual abuse by the victim of the offense and  
9 the offense is a response to that abuse.

10 (2) Aggravating Circumstances

11 (a) The defendant's conduct during the commission of the current  
12 offense manifested deliberate cruelty to the victim.

13 (b) The defendant knew or should have known that the victim of the  
14 current offense was particularly vulnerable or incapable of resistance  
15 due to extreme youth, advanced age, disability, or ill health.

16 (c) The current offense was a major economic offense or series of  
17 offenses, so identified by a consideration of any of the following  
18 factors:

19 (i) The current offense involved multiple victims or multiple  
20 incidents per victim;

21 (ii) The current offense involved attempted or actual monetary loss  
22 substantially greater than typical for the offense;

23 (iii) The current offense involved a high degree of sophistication  
24 or planning or occurred over a lengthy period of time;

25 (iv) The defendant used his or her position of trust, confidence,  
26 or fiduciary responsibility to facilitate the commission of the current  
27 offense.

28 (d) The current offense was a major violation of the Uniform  
29 Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to  
30 trafficking in controlled substances, which was more onerous than the  
31 typical offense of its statutory definition: The presence of ANY of  
32 the following may identify a current offense as a major VUCSA:

33 (i) The current offense involved at least three separate  
34 transactions in which controlled substances were sold, transferred, or  
35 possessed with intent to do so; or

36 (ii) The current offense involved an attempted or actual sale or  
37 transfer of controlled substances in quantities substantially larger  
38 than for personal use; or

- 1 (iii) The current offense involved the manufacture of controlled  
2 substances for use by other parties; or
- 3 (iv) The circumstances of the current offense reveal the offender  
4 to have occupied a high position in the drug distribution hierarchy; or
- 5 (v) The current offense involved a high degree of sophistication or  
6 planning or occurred over a lengthy period of time or involved a broad  
7 geographic area of disbursement; or
- 8 (vi) The offender used his or her position or status to facilitate  
9 the commission of the current offense, including positions of trust,  
10 confidence or fiduciary responsibility (e.g., pharmacist, physician, or  
11 other medical professional); or
- 12 (e) The current offense included a finding of sexual motivation  
13 pursuant to RCW 9.94A.127;
- 14 (f) The offense was part of an ongoing pattern of sexual abuse of  
15 the same victim under the age of eighteen years manifested by multiple  
16 incidents over a prolonged period of time; (~~(or)~~)
- 17 (g) The operation of the multiple offense policy of RCW 9.94A.400  
18 results in a presumptive sentence that is clearly too lenient in light  
19 of the purpose of this chapter, as expressed in RCW 9.94A.010; or
- 20 (h) The offense was a gang-related criminal activity that:
- 21 (i) Was motivated by the defendant's desire to further the gang's  
22 illegal activities or to enhance his or her status within the gang; or
- 23 (ii) Was committed in a random manner associated with gang  
24 violence; or
- 25 (iii) Invaded the community's zone of safety.

26 **Sec. 3.** RCW 13.40.150 and 1992 c 205 s 109 are each amended to  
27 read as follows:

28 (1) In disposition hearings all relevant and material evidence,  
29 including oral and written reports, may be received by the court and  
30 may be relied upon to the extent of its probative value, even though  
31 such evidence may not be admissible in a hearing on the information.  
32 The youth or the youth's counsel and the prosecuting attorney shall be  
33 afforded an opportunity to examine and controvert written reports so  
34 received and to cross-examine individuals making reports when such  
35 individuals are reasonably available, but sources of confidential  
36 information need not be disclosed. The prosecutor and counsel for the  
37 juvenile may submit recommendations for disposition.

38 (2) For purposes of disposition:

1 (a) Violations which are current offenses count as misdemeanors;  
2 (b) Violations may not count as part of the offender's criminal  
3 history;

4 (c) In no event may a disposition for a violation include  
5 confinement.

6 (3) Before entering a dispositional order as to a respondent found  
7 to have committed an offense, the court shall hold a disposition  
8 hearing, at which the court shall:

9 (a) Consider the facts supporting the allegations of criminal  
10 conduct by the respondent;

11 (b) Consider information and arguments offered by parties and their  
12 counsel;

13 (c) Consider any predisposition reports;

14 (d) Consult with the respondent's parent, guardian, or custodian on  
15 the appropriateness of dispositional options under consideration and  
16 afford the respondent and the respondent's parent, guardian, or  
17 custodian an opportunity to speak in the respondent's behalf;

18 (e) Allow the victim or a representative of the victim and an  
19 investigative law enforcement officer to speak;

20 (f) Determine the amount of restitution owing to the victim, if  
21 any;

22 (g) Determine whether the respondent is a serious offender, a  
23 middle offender, or a minor or first offender;

24 (h) Consider whether or not any of the following mitigating factors  
25 exist:

26 (i) The respondent's conduct neither caused nor threatened serious  
27 bodily injury or the respondent did not contemplate that his or her  
28 conduct would cause or threaten serious bodily injury;

29 (ii) The respondent acted under strong and immediate provocation;

30 (iii) The respondent was suffering from a mental or physical  
31 condition that significantly reduced his or her culpability for the  
32 offense though failing to establish a defense;

33 (iv) Prior to his or her detection, the respondent compensated or  
34 made a good faith attempt to compensate the victim for the injury or  
35 loss sustained; and

36 (v) There has been at least one year between the respondent's  
37 current offense and any prior criminal offense;

38 (i) Consider whether or not any of the following aggravating  
39 factors exist:

1 (i) In the commission of the offense, or in flight therefrom, the  
2 respondent inflicted or attempted to inflict serious bodily injury to  
3 another;

4 (ii) The offense was committed in an especially heinous, cruel, or  
5 depraved manner;

6 (iii) The victim or victims were particularly vulnerable;

7 (iv) The respondent has a recent criminal history or has failed to  
8 comply with conditions of a recent dispositional order or diversion  
9 agreement;

10 (v) The current offense included a finding of sexual motivation  
11 pursuant to RCW 9.94A.127;

12 (vi) The respondent was the leader of a criminal enterprise  
13 involving several persons; and

14 (vii) There are other complaints which have resulted in diversion  
15 or a finding or plea of guilty but which are not included as criminal  
16 history;

17 (j) The offense was a gang-related criminal activity that:

18 (i) Was motivated by the defendant's desire to further the gang's  
19 illegal activities or to enhance his or her status within the gang; or  
20 (ii) Was committed in a random manner associated with gang  
21 violence; or

22 (iii) Invaded the community's zone of safety.

23 (4) The following factors may not be considered in determining the  
24 punishment to be imposed:

25 (a) The sex of the respondent;

26 (b) The race or color of the respondent or the respondent's family;

27 (c) The creed or religion of the respondent or the respondent's  
28 family;

29 (d) The economic or social class of the respondent or the  
30 respondent's family; and

31 (e) Factors indicating that the respondent may be or is a dependent  
32 child within the meaning of this chapter.

33 (5) A court may not commit a juvenile to a state institution solely  
34 because of the lack of facilities, including treatment facilities,  
35 existing in the community.

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