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HOUSE BILL 1061

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State of Washington

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By Representative Goodman

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1 AN ACT Relating to sentences involving aggravating circumstances;  
2 amending RCW 9.94A.537 and 9.94A.535; and prescribing penalties.

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

4 **Sec. 1.** RCW 9.94A.537 and 2007 c 205 s 2 are each amended to read  
5 as follows:

6 (1) At any time prior to trial or entry of the guilty plea if  
7 substantial rights of the defendant are not prejudiced, the state may  
8 give notice that it is seeking a sentence above the standard sentencing  
9 range. The notice shall state aggravating circumstances upon which the  
10 requested sentence will be based.

11 (2) In any case where an exceptional sentence above the standard  
12 range was imposed and where a new sentencing hearing is required, the  
13 superior court may impanel a jury to consider any alleged aggravating  
14 circumstances listed in RCW 9.94A.535(3), that were relied upon by the  
15 superior court in imposing the previous sentence, at the new sentencing  
16 hearing.

17 (3) The facts supporting aggravating circumstances shall be proved  
18 to a jury beyond a reasonable doubt. The jury's verdict on the

1 aggravating factor must be unanimous, and by special interrogatory. If  
2 a jury is waived, proof shall be to the court beyond a reasonable  
3 doubt, unless the defendant stipulates to the aggravating facts.

4 (4) Evidence regarding any facts supporting aggravating  
5 circumstances under RCW 9.94A.535(3) (~~((a) through (y))~~) shall be  
6 presented to the jury during the trial of the alleged crime, unless the  
7 jury has been impaneled solely for resentencing, or unless the state  
8 alleges the aggravating circumstances listed in RCW 9.94A.535(3)  
9 (e)(iv), (h)(i), (o), or (t). If one of these aggravating  
10 circumstances is alleged, the trial court may conduct a separate  
11 proceeding if the evidence supporting the aggravating fact is not part  
12 of the res geste of the charged crime, if the evidence is not otherwise  
13 admissible in trial of the charged crime, and if the court finds that  
14 the probative value of the evidence to the aggravated fact is  
15 substantially outweighed by its prejudicial effect on the jury's  
16 ability to determine guilt or innocence for the underlying crime.

17 (5) If the superior court conducts a separate proceeding to  
18 determine the existence of aggravating circumstances listed in RCW  
19 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall  
20 immediately follow the trial on the underlying conviction, if possible.  
21 If any person who served on the jury is unable to continue, the court  
22 shall substitute an alternate juror.

23 (6) If the jury finds, unanimously and beyond a reasonable doubt,  
24 one or more of the facts alleged by the state in support of an  
25 aggravated sentence, the court may sentence the offender pursuant to  
26 RCW 9.94A.535 to a term of confinement up to the maximum allowed under  
27 RCW 9A.20.021 for the underlying conviction if it finds, considering  
28 the purposes of this chapter, that the facts found are substantial and  
29 compelling reasons justifying an exceptional sentence.

30 **Sec. 2.** RCW 9.94A.535 and 2011 c 87 s 1 are each amended to read  
31 as follows:

32 The court may impose a sentence outside the standard sentence range  
33 for an offense if it finds, considering the purpose of this chapter,  
34 that there are substantial and compelling reasons justifying an  
35 exceptional sentence. Facts supporting aggravated sentences, other  
36 than the fact of a prior conviction, shall be determined pursuant to  
37 the provisions of RCW 9.94A.537.

1           Whenever a sentence outside the standard sentence range is imposed,  
2 the court shall set forth the reasons for its decision in written  
3 findings of fact and conclusions of law. A sentence outside the  
4 standard sentence range shall be a determinate sentence.

5           If the sentencing court finds that an exceptional sentence outside  
6 the standard sentence range should be imposed, the sentence is subject  
7 to review only as provided for in RCW 9.94A.585(4).

8           A departure from the standards in RCW 9.94A.589 (1) and (2)  
9 governing whether sentences are to be served consecutively or  
10 concurrently is an exceptional sentence subject to the limitations in  
11 this section, and may be appealed by the offender or the state as set  
12 forth in RCW 9.94A.585 (2) through (6).

13           (1) Mitigating Circumstances - Court to Consider

14           The court may impose an exceptional sentence below the standard  
15 range if it finds that mitigating circumstances are established by a  
16 preponderance of the evidence. The following are illustrative only and  
17 are not intended to be exclusive reasons for exceptional sentences.

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

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

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

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

28           (e) The defendant's capacity to appreciate the wrongfulness of his  
29 or her conduct, or to conform his or her conduct to the requirements of  
30 the law, was significantly impaired. Voluntary use of drugs or alcohol  
31 is excluded.

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

35           (g) The operation of the multiple offense policy of RCW 9.94A.589  
36 results in a presumptive sentence that is clearly excessive in light of  
37 the purpose of this chapter, as expressed in RCW 9.94A.010.

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

4 (i) The defendant was making a good faith effort to obtain or  
5 provide medical assistance for someone who is experiencing a drug-  
6 related overdose.

7 (j) The current offense involved domestic violence, as defined in  
8 RCW 10.99.020, and the defendant suffered a continuing pattern of  
9 coercion, control, or abuse by the victim of the offense and the  
10 offense is a response to that coercion, control, or abuse.

11 (2) Aggravating Circumstances - Considered and Imposed by the Court

12 The trial court may impose an aggravated exceptional sentence  
13 without a finding of fact by a jury under the following circumstances:

14 (a) The defendant and the state both stipulate that justice is best  
15 served by the imposition of an exceptional sentence outside the  
16 standard range, and the court finds the exceptional sentence to be  
17 consistent with and in furtherance of the interests of justice and the  
18 purposes of the sentencing reform act.

19 (b) ~~The ((defendant's))~~ defendant has three or more prior unscored  
20 misdemeanor or prior unscored foreign criminal ~~((history results in a~~  
21 ~~presumptive sentence that is clearly too lenient in light of the~~  
22 ~~purpose of this chapter, as expressed in RCW 9.94A.010))~~ convictions.

23 (c) The defendant has committed multiple current offenses and the  
24 defendant's high offender score results in some of the current offenses  
25 going unpunished.

26 ~~((d) The failure to consider the defendant's prior criminal~~  
27 ~~history which was omitted from the offender score calculation pursuant~~  
28 ~~to RCW 9.94A.525 results in a presumptive sentence that is clearly too~~  
29 ~~lenient.))~~

30 (3) Aggravating Circumstances - Considered by a Jury - Imposed by  
31 the Court

32 Except for circumstances listed in subsection (2) of this section,  
33 the following circumstances are an exclusive list of factors that can  
34 support a sentence above the standard range. Such facts should be  
35 determined by procedures specified in RCW 9.94A.537.

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

1 (b) The defendant knew or should have known that the victim of the  
2 current offense was particularly vulnerable or incapable of resistance.

3 (c) The current offense was a violent offense, and the defendant  
4 knew that the victim of the current offense was pregnant.

5 (d) The current offense was a major economic offense or series of  
6 offenses, so identified by a consideration of any of the following  
7 factors:

8 (i) The current offense involved multiple victims or multiple  
9 incidents per victim;

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

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

14 (iv) The defendant used his or her position of trust, confidence,  
15 or fiduciary responsibility to facilitate the commission of the current  
16 offense.

17 (e) The current offense was a major violation of the Uniform  
18 Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to  
19 trafficking in controlled substances, which was more onerous than the  
20 typical offense of its statutory definition: The presence of ANY of  
21 the following may identify a current offense as a major VUCSA:

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

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

28 (iii) The current offense involved the manufacture of controlled  
29 substances for use by other parties;

30 (iv) The circumstances of the current offense reveal the offender  
31 to have occupied a high position in the drug distribution hierarchy;

32 (v) The current offense involved a high degree of sophistication or  
33 planning, occurred over a lengthy period of time, or involved a broad  
34 geographic area of disbursement; or

35 (vi) The offender used his or her position or status to facilitate  
36 the commission of the current offense, including positions of trust,  
37 confidence or fiduciary responsibility (e.g., pharmacist, physician, or  
38 other medical professional).

1 (f) The current offense included a finding of sexual motivation  
2 pursuant to RCW 9.94A.835.

3 (g) The offense was part of an ongoing pattern of sexual abuse of  
4 the same victim under the age of eighteen years manifested by multiple  
5 incidents over a prolonged period of time.

6 (h) The current offense involved domestic violence, as defined in  
7 RCW 10.99.020, and one or more of the following was present:

8 (i) The offense was part of an ongoing pattern of psychological,  
9 physical, or sexual abuse of a victim or multiple victims manifested by  
10 multiple incidents over a prolonged period of time;

11 (ii) The offense occurred within sight or sound of the victim's or  
12 the offender's minor children under the age of eighteen years; or

13 (iii) The offender's conduct during the commission of the current  
14 offense manifested deliberate cruelty or intimidation of the victim.

15 (i) The offense resulted in the pregnancy of a child victim of  
16 rape.

17 (j) The defendant knew that the victim of the current offense was  
18 a youth who was not residing with a legal custodian and the defendant  
19 established or promoted the relationship for the primary purpose of  
20 victimization.

21 (k) The offense was committed with the intent to obstruct or impair  
22 human or animal health care or agricultural or forestry research or  
23 commercial production.

24 (l) The current offense is trafficking in the first degree or  
25 trafficking in the second degree and any victim was a minor at the time  
26 of the offense.

27 (m) The offense involved a high degree of sophistication or  
28 planning.

29 (n) The defendant used his or her position of trust, confidence, or  
30 fiduciary responsibility to facilitate the commission of the current  
31 offense.

32 (o) The defendant committed a current sex offense, has a history of  
33 sex offenses, and is not amenable to treatment.

34 (p) The offense involved an invasion of the victim's privacy.

35 (q) The defendant demonstrated or displayed an egregious lack of  
36 remorse.

37 (r) The offense involved a destructive and foreseeable impact on  
38 persons other than the victim.

1 (s) The defendant committed the offense to obtain or maintain his  
2 or her membership or to advance his or her position in the hierarchy of  
3 an organization, association, or identifiable group.

4 (t) The defendant committed the current offense shortly after being  
5 released from incarceration.

6 (u) The current offense is a burglary and the victim of the  
7 burglary was present in the building or residence when the crime was  
8 committed.

9 (v) The offense was committed against a law enforcement officer who  
10 was performing his or her official duties at the time of the offense,  
11 the offender knew that the victim was a law enforcement officer, and  
12 the victim's status as a law enforcement officer is not an element of  
13 the offense.

14 (w) The defendant committed the offense against a victim who was  
15 acting as a good samaritan.

16 (x) The defendant committed the offense against a public official  
17 or officer of the court in retaliation of the public official's  
18 performance of his or her duty to the criminal justice system.

19 (y) The victim's injuries substantially exceed the level of bodily  
20 harm necessary to satisfy the elements of the offense. This aggravator  
21 is not an exception to RCW 9.94A.530(2).

22 (z)(i)(A) The current offense is theft in the first degree, theft  
23 in the second degree, possession of stolen property in the first  
24 degree, or possession of stolen property in the second degree; (B) the  
25 stolen property involved is metal property; and (C) the property damage  
26 to the victim caused in the course of the theft of metal property is  
27 more than three times the value of the stolen metal property, or the  
28 theft of the metal property creates a public hazard.

29 (ii) For purposes of this subsection, "metal property" means  
30 commercial metal property, private metal property, or nonferrous metal  
31 property, as defined in RCW 19.290.010.

32 (aa) The defendant committed the offense with the intent to  
33 directly or indirectly cause any benefit, aggrandizement, gain, profit,  
34 or other advantage to or for a criminal street gang as defined in RCW  
35 9.94A.030, its reputation, influence, or membership.

36 (bb) The current offense involved paying to view, over the internet  
37 in violation of RCW 9.68A.075, depictions of a minor engaged in an act

1 of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through  
2 (g).

3 (cc) The offense was intentionally committed because the defendant  
4 perceived the victim to be homeless, as defined in RCW 9.94A.030.

5 (dd) The failure to consider the defendant's prior criminal history  
6 which was omitted from the offender score calculation pursuant to RCW  
7 9.94A.525 results in a presumptive sentence that is clearly too  
8 lenient.

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