

Washington Law Review

Volume 70 | Number 2

4-1-1995

Exceptional Sentencing in Washington after *State v. Freitag*: Pushing the Limits of the Sentencing Reform Act

Lisa K. Strom

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Lisa K. Strom, Notes and Comments, *Exceptional Sentencing in Washington after State v. Freitag: Pushing the Limits of the Sentencing Reform Act*, 70 Wash. L. Rev. 563 (1995).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol70/iss2/8>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

EXCEPTIONAL SENTENCING IN WASHINGTON AFTER *STATE V. FREITAG*: PUSHING THE LIMITS OF THE SENTENCING REFORM ACT

Lisa K. Strom

Abstract: In 1981 the Washington state legislature enacted the Sentencing Reform Act (SRA) with the intent of reducing disparity in sentencing through the implementation of presumptive sentencing ranges. The SRA authorizes judges to depart from the presumptive range by imposing an exceptional sentence if appropriate mitigating or aggravating factors exist. Since 1981, virtually all courts have determined a factor's appropriateness by considering its relation to the factual nature of the crime itself. In *State v. Freitag*, however, the Washington Court of Appeals recently held that a trial court may rely on factors which do not directly relate to the nature of the crime as the basis for an exceptional sentence below the standard range. By holding that the trial court may consider a defendant's personal qualities, the stated purposes of the SRA, and the defendant's criminal history, the court has contradicted the intent of the legislature in passing the SRA, ignored Washington case law, and created a dangerous precedent for other courts to follow.

When it comes to sentencing convicted felons, judicial discretion and legislative directive are invariably at odds. While judicial discretion is a necessary concomitant of the sentencing process in Washington state, such discretion has been expressly limited by the legislature through its implementation of the Sentencing Reform Act (SRA or Act) of 1981. The most important of these restrictions on judicial discretion is the requirement that judges consider only the objective factors apparent in each crime when deciding whether to depart from the sentencing guidelines handed down by the state legislature.

This Note examines judicial discretion in light of a recent Washington Court of Appeals case, *State v. Freitag*.¹ In *Freitag*, the Court of Appeals, Division One, upheld the trial court's imposition of an exceptional sentence below the standard range, despite the inappropriate factors upon which the trial court based its decision. The inappropriateness of these factors lies in their subjectivity, insofar as they encompass circumstances which focus upon the character of the defendant rather than relate to the nature of the crime itself. This Note argues that the trial court's application, and the appellate court's approval, of these subjective factors as justification for imposing an exceptional sentence below the standard range was improper and establishes a dangerous precedent.

1. *State v. Freitag*, 74 Wash. App. 133, 873 P.2d 548 (1994).

The Note begins with an overview of the historical background of the SRA. Then, following a review of the facts of *Freitag*, this Note critiques the appellate court's reasoning. Finally, this Note examines the dangers inherent in the *Freitag* ruling and its deleterious effect on at least one subsequent decision.

I. HISTORICAL BACKGROUND OF THE SENTENCING REFORM ACT

The SRA, enacted in 1981, standardizes sentences through the use of sentencing grids and matrixes and decreases sentence disparity throughout the state's courts. The Act creates presumptive sentencing ranges for felonies based on the seriousness of the crime itself, its seriousness compared to crimes fitting within the same statutory category, and the criminal history of the defendant.² If a trial court finds "substantial and compelling" reasons justifying an exceptional sentence, it may depart from the presumptive range either upward or downward.³ The court may decide, *sua sponte*, to impose an exceptional sentence.⁴ The only limitation on the length imposed is that it not be "clearly excessive" or "clearly too lenient."⁵

Section 210(4) of the SRA governs review of exceptional sentences. To reverse a trial court's exceptional sentence, the appellate court must make the determination that either: (a) under the clearly erroneous standard, the reasons supplied by the sentencing judge are not supported by the record; (b) under the question of law standard, those reasons are insufficiently substantial and compelling to justify a sentence outside the standard range for that offense; or (c) under the abuse of discretion standard, the sentence imposed was either clearly excessive or clearly too lenient.⁶ Considering the wide latitude of the abuse of discretion test, it is rare that an exceptional sentence will be reversed.

2. Wash. Rev. Code § 9.94A.010 (1994).

3. *Id.* § 9.94A.120(2).

4. *See, e.g., State v. Falling*, 50 Wash. App. 47, 52, 747 P.2d 1119, 1122 (1987).

5. Wash. Rev. Code § 9.94A.210(4) (1994).

6. *State v. Hutsell*, 120 Wash. 2d 913, 916, 845 P.2d 1325, 1327 (1993).

A. *Rehabilitative Ideal Abandoned in Favor of Principle of "Just Deserts"*⁷

Throughout most of the 1970s, defendants convicted of a felony offense were sentenced under an indeterminate sentencing system. Under this system, a defendant was normally sentenced for the statutory maximum; the sentence was, however, subject to reduction or termination by the parole board at any time after the defendant had served the minimum period. An indeterminate sentence was, by definition, not fixed by the trial judge but left to the determination of parole boards, prison agencies, or some other penal authority.⁸

The problem with indeterminate sentencing was its lack of public accountability.⁹ Once a defendant had been convicted, the public nature of the criminal proceedings ended. The length of a prison term was determined by parole boards, which were authorized to release prisoners upon proof of their total rehabilitation. Because the parole boards operated within broad statutory parameters and limited restrictions, sentences were based more on the personal characteristics of the offenders than on the nature of their crimes.¹⁰ The division of responsibility discouraged comprehensive publicity of a case by disconnecting the public adjudication of guilt from the determination of a defendant's sentence.¹¹

B. *Laying the Foundation for Uniformity in Sentencing*

The SRA abandoned indeterminate sentencing, parole boards, and probation. The focus was decidedly away from the idealistic goals of rehabilitation and toward the more pragmatic approach to sentencing through punishment. The Act rejected the old subjective evaluation of a criminal defendant's threat to society or amenability to reintegration into society in favor of a wholly objective approach to sentencing, tempered only by exceptional circumstances.

The most obvious change brought about by the SRA was its approach to judicial discretion. Where before the discretion of judges had been

7. The term "just deserts" as applied to purposes of the SRA was first mentioned in David Boerner, *Sentencing in Washington* § 2.5(a) (1985).

8. See *Black's Law Dictionary* 771 (6th ed. 1990).

9. Boerner, *supra* note 7, § 2.4, at 2-27.

10. Boerner, *supra* note 7, at 1-1.

11. See Boerner, *supra* note 7, § 2.4, at 2-28.

“standardless and unreview[able],”¹² the SRA established that its purpose was to develop a system that “structures, but does not eliminate”¹³ discretionary decisions affecting sentences. The intent of the legislature in passing the SRA was to ensure that criminals would be punished according to their just deserts, and that the disparity of sentences between two similarly-situated defendants be minimized as much as possible.¹⁴ Consistent with these goals is the requirement that the sentence imposed be proportionate to the seriousness of the offense and the offender’s criminal history.¹⁵

The framers of the SRA were careful to eliminate from the sentencing process consideration of factors which did not directly relate to the nature of the crime.¹⁶ The legislature specifically disapproved of taking into consideration who a person was, rather than what he or she had done.¹⁷ The framers took several steps to eliminate the possibility that a judge might consider subjective factors. One step was to limit the types of mitigating and aggravating factors available to a sentencing judge in his or her consideration of an exceptional sentence.¹⁸

Another step was to limit structurally the sentencing judges’ discretion. The legislature sought to achieve this goal by carefully delineating the language of the SRA’s statement of purpose.¹⁹ The first purpose requires, essentially, that the crime itself and the previous felony record of the defendant be the only bases for determining what information a trial court may consider.²⁰ Information that does not relate to those two factors, such as race, national origin, or religion, is not relevant to determining proper sentences.

The legislature most clearly demonstrated its intent to limit judicial consideration of subjective, nonoffense-related factors through the language of RCW § 9.94A.340. This section, which provides for equal application of the laws, states that “[t]he sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state,

12. Boerner, *supra* note 7, § 2.5, at 2-30.

13. Wash. Rev. Code § 9.94A.010 (1994).

14. Boerner, *supra* note 7, § 2.5(a), at 2-31.

15. Wash. Rev. Code § 9.94A.010(1) (1994).

16. *See* Boerner, *supra* note 7, § 9.18, at 9-56.

17. *Id.*

18. For a complete list of the SRA’s illustrative mitigating and aggravating factors, see Wash. Rev. Code §§ 9.94A.390(1) (1994) & 9.94A.390(2) (1994), respectively.

19. *See* Wash. Rev. Code § 9.94A.010 (1994).

20. *See id.* § 9.94A.010(1).

without discrimination as to any element that does not relate to the crime or the previous record of the defendant.”²¹ Thus, any case which relies upon purely subjective factors as justification for departure from the sentencing guidelines would appear to violate this core provision of the SRA.

II. OVERVIEW OF *FREITAG*

At issue in *State v. Freitag*²² was an exceptional downward sentence imposed for vehicular assault. The trial court’s justification for its sentence was based on a number of factors, including the defendant’s remorse for her crime, her good character, and her low risk of reoffense. Holding that such factors were an appropriate basis for an exceptional sentence, a panel of the Washington Court of Appeals upheld the exceptional sentence.

A. *The Facts of Freitag*

Angela Freitag was a twenty-three-year-old law school student from Georgetown University in Washington, D.C. On August 14, 1991, she flew cross-country to Seattle to attend a friend’s wedding. At the rehearsal dinner that evening, she participated in a series of ritual toasts. Upon driving home at 3:00 a.m. in an uninsured Porsche, Freitag ran through a red light and collided with a vehicle broadside, breaking the occupant’s neck. After initially refusing, Freitag submitted to a breathalyzer test which measured her blood alcohol content at 0.16 grams per 100 milliliters.²³ Freitag pled guilty to the charge of vehicular assault in violation of RCW § 46.61.522.²⁴

B. *The Sentencing of Angela Freitag*

Considered a “violent offense,”²⁵ vehicular assault is categorized as a “most serious”²⁶ Level IV felony.²⁷ The presumptive sentencing range

21. *Id.* § 9.94A.340.

22. 74 Wash. App. 133, 873 P.2d 548 (1994).

23. Under Wash. Rev. Code § 46.61.502(1) (1994), a person is guilty of driving while under the influence of intoxicating liquor if he drives a vehicle while he has 0.10 grams or more of alcohol per 210 liters of breath. This standard is equivalent to 0.10 grams per 100 milliliters.

24. *Freitag*, 74 Wash. App. at 135, 873 P.2d at 549.

25. Wash. Rev. Code § 9.94A.030(36)(a) (1994).

26. *Id.* § 9.94A.030(21)(q).

for a defendant convicted of vehicular assault with a zero offender score is three to nine months.²⁸ At Freitag's sentencing hearing the state recommended five months of incarceration, twelve months of community supervision, and restitution. The trial court imposed an exceptional sentence of ninety days in the county jail with eighty-nine of those days converted to 712 hours of community service. One-half of the community service was to be performed at a free legal clinic and one-half at a health care facility providing rehabilitation to seriously injured accident victims. Full restitution to the victim was ordered, and Freitag was placed on community supervision after serving her one day in jail.

At 90 days, the length of Freitag's sentence fit within the low end of the standard range. What made her sentence exceptional was not the duration of the sentence, however, but the fact that the imposed jail time was converted to community service. Under the SRA, such conversion is strictly limited to offenders convicted of non-violent offenses and in those circumstances is specifically limited to 30 days.²⁹ Because vehicular assault is defined as a violent offense, and thus not covered under this provision, the sentence was exceptional.

Foremost among the trial judge's reasons for the exceptional sentence was the fact that the defendant had led a crime-free life.³⁰ The judge took into consideration not only the defendant's lack of criminal convictions but also the complete absence from her record of any police contacts whatsoever. Another consideration was the quality of life the defendant had led,³¹ as evidenced by her community volunteer work.³² The trial

27. *Id.* § 9.94A.320.

28. *Id.* § 9.94A.310. Vehicular Assault is included in seriousness score level IV on Table 1 of the sentencing grid as follows:

Seriousness Score	Offender Score			
	0	1	2	3
IV	6m	9m	13m	15m
	3-	6-	12+-	13-
	9	12	14	17

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months. *Id.*

29. *Id.* § 9.94A.380.

30. *State v. Freitag*, 74 Wash. App. 133, 137-38, 873 P.2d 548, 550 (1994).

31. *Id.* at 138, 873 P.2d at 550-51.

32. During summer vacations Freitag had worked as an unpaid volunteer for different charitable organizations, such as a free medical clinic in Mexico and a social services clinic for the poor in

judge also noted that his imposition of a more lenient sentence than that represented by the standard range would benefit the defendant and make frugal use of state and local resources by alleviating the problem of jail overcrowding.³³ Yet another reason the trial judge gave for the exceptional sentence was the adequate protection of the public in view of the defendant's low risk of reoffense.³⁴

The state appealed the exceptional sentence, alleging that the reasons given by the sentencing judge were not substantial and compelling and that the sentence given was clearly too lenient. The court of appeals rejected both of the state's arguments and affirmed the sentence. After concluding that these factors were an appropriate basis for consideration of an exceptional sentence, the court of appeals refused to find that the trial judge had abused his discretion.

III. THE *FREITAG* COURT'S CONSIDERATION OF INAPPROPRIATE FACTORS TO JUSTIFY AN EXCEPTIONAL SENTENCE

In *Freitag*, the appellate court determined that, because of the defendant's family background, her remorse, and her charitable instincts, Freitag deserved a lighter sentence than other offenders accused of the same crime. Considering the clear intent of the framers of the SRA, as well as the great weight of contrary Washington case law, judicial acceptance of such factors was an abuse of discretion on the part of the trial court and a dereliction of duty on the part of the appellate court. The trial court's reliance on subjective findings of fact was improper and unsupported. The court also erroneously considered the SRA's stated purposes as a basis for imposing an exceptional sentence downward. Finally, the *Freitag* court unjustifiably sanctioned the trial court's reliance upon a defendant's criminal history as a reason for departing from the standard range.

A. *Freitag's Reliance on Subjective Findings of Fact Contradicts the Objectives of the SRA*

Frustrated with the degree to which their discretion is curtailed by the dictates of the SRA, some trial judges have begun to pay more attention

Appalachia. During school terms, she had participated in the Meals-on-Wheels program for the elderly and helped to prepare meals at Thanksgiving for the homeless. *Id.* at 136, 873 P.2d. at 550.

33. *Id.* at 138, 873 P.2d at 551.

34. *Id.*

to factors not contemplated by the SRA.³⁵ Their motivation for doing so lies in their sympathy for the defendant. However, noble judicial sympathy for a criminal defendant may be, it is an entirely inappropriate basis upon which to justify a criminal sentence, especially when the legislature has passed an act as comprehensive as the SRA.

In *Freitag*, both the trial court and the appellate court felt a great deal of sympathy for the defendant. The trial court acknowledged that "there is nothing mitigating about the crime itself, which involved a blood alcohol level of 0.16 and serious injuries to the victim."³⁶ Nevertheless, the trial court entered six findings of fact which leave little doubt that the court admired Freitag's personal qualities and sympathized with her misfortune. Likewise, the appellate court found that Freitag was entitled to an exceptional sentence because "[she] is young and was inexperienced with the adverse effects of alcohol on her sleep-deprived and jet-lagged body; showed deep remorse; . . . had demonstrated a clear pattern of civic and social responsibility and presented no risk to reoffend in this or any other manner."³⁷

1. *Freitag's Value-Based Subjective Determinations are Contrary to the SRA and the Weight of Washington Case Law*

Punishing a defendant based on who she is and not what she has done is directly adverse to the tenets of the SRA. Yet Freitag's exceptional sentence was based entirely on a subjective evaluation of her personal character. In his dissent, Judge Forrest declared that there was no effort by the trial court to relate any of its findings to the philosophy or specific provisions of the SRA.³⁸

Eliminating the element of surprise and uncertainty in sentencing was a major purpose of the SRA. In order to achieve this goal, the SRA presumes that only those factors which go to the nature of the crime

35. See, e.g., *State v. Friederich-Tibbets*, 70 Wash. App. 93, 96, 853 P.2d 457, 459 (1993) (quoting trial court findings) ("[B]ecause I'm somewhat frustrated . . . by this case . . . I'm going to make findings for purposes of the record."), *rev'd on other grounds*, 123 Wash. 2d 250, 866 P.2d 1257 (1994); see also *State v. Hutsell*, 120 Wash. 2d 913, 924, 845 P.2d 1325, 1331 (1993) (quoting *State v. Harper*, 62 Wash. App. 69, 78-79, 813 P.2d 593, 598 (1991)) ("We understand the current frustration with the dearth of sentencing options, but . . . our responsibility is to 'apply the SRA as written.'").

36. *Freitag*, 74 Wash. App. at 138, 873 P.2d at 551.

37. *Id.* at 149, 873 P.2d at 557.

38. *Id.* at 154, 873 P.2d at 559 (Forrest, J., dissenting).

itself, rather than the character of the defendant, will be used to justify departures from a legislatively-prescribed sentence.

a. Freitag Fails to Assign Sufficient Weight to Precedential Authority

The basic presumption that justification for a sentence outside the standard range must be based on the facts of the crime is supported by Washington case law. In *State v. Alexander*,³⁹ the court of appeals held that the SRA permits courts limited discretion to exceed or go below the standard range when the facts of the defendant's commission of the crime distinguish it from other violations of the same statute.⁴⁰ The appellate court drew the line, however, at nonoffense-related factors, holding that an exceptional sentence based upon the defendant's personal history or characteristics differing from those of other violators derives no authority from the SRA.⁴¹

The *Alexander* rule followed a considerable weight of precedential authority. The great majority of these cases hold that for an exceptional sentence to be upheld on review, the circumstances surrounding the crime must truly be exceptional. To be exceptional, the facts of the crime must either be so uniquely heinous or so deserving of leniency that a sentence within the standard range would offend one's sense of justice. *State v. Estrella* and *State v. Pennington* are two supreme court cases which adopt this reasoning.⁴² Both cases establish that it is the nature of the crime that determines the qualification for an exceptional sentence and not the personal traits, motive, emotions, or intent of the defendant. In addition, nearly seven years earlier, the supreme court distinguished routine offenses from those crimes committed under extraordinary circumstances, concluding that it is only the latter which deserve exceptional treatment.⁴³

39. 70 Wash. App. 608, 854 P.2d 1105 (1993), *rev'd on other grounds*, 125 Wash. 2d 717, 888 P.2d 1169 (1995). Judge Forrest wrote the majority opinion.

40. *Id.* at 616–17, 854 P.2d at 1109.

41. *Id.* On appeal, the supreme court declined to pass on the proper test for determining whether a fact not directly related to the commission of the crime constitutes a substantial and compelling reason for departure from the standard range. 125 Wash. 2d 717, 724–25 n. 13, 888 P.2d 1169, 1173 n.13 (1995).

42. *State v. Estrella*, 115 Wash. 2d 350, 359, 798 P.2d 289, 293 (1990) (concluding that nothing in the circumstances of the defendant's burglary "distinguish[es] it in any way from other second degree burglaries"); *State v. Pennington*, 112 Wash. 2d 606, 610, 772 P.2d 1009, 1012 (1989) (rejecting trial court's reliance on the defendant's drug dependency as a basis for exceptional sentence).

43. *State v. Oxborrow*, 106 Wash. 2d 525, 533, 723 P.2d 1123, 1128 (1986).

According to the supreme court, imposition of an exceptional sentence depends upon the nature of the offense committed, viewed against the backdrop of the typical offense contemplated by the particular statute. In *Freitag*, the trial court failed to make any findings of fact which explained how Freitag's act differed from all other vehicular assaults. The SRA requires that, in the absence of appropriate mitigating circumstances, a defendant must be sentenced within the confines of the guidelines. Thus, the *Freitag* court erred in imposing an exceptional sentence for what was a routine offense.

b. *The Cases Relied upon in Freitag Are Distinguishable*

The *Freitag* court could point to few cases in support of its decision. One such case is *State v. Nelson*.⁴⁴ *Nelson*, however, is distinguishable from *Freitag*. In *Nelson*, the supreme court held that a total absence of previous criminal activity justified an exceptional sentence downward.⁴⁵ This holding must be read narrowly because it concerned a failed entrapment defense, an element of which is the defendant's predisposition to commit the crime itself. Far from supporting *Freitag's* holding, *Nelson* stands for the proposition that a complete absence of police contacts may be considered where a defendant has unsuccessfully asserted an entrapment defense.

The other case cited in *Freitag*, *State v. Friederich-Tibbets*,⁴⁶ has been discounted by subsequent case law⁴⁷ and reversed by the Washington Supreme Court.⁴⁸ It thereby lacks precedential authority. *Friederich-Tibbets* involved possession of a controlled substance with intent to deliver. A panel of Division One of the court of appeals⁴⁹ reversed the

44. 108 Wash. 2d 491, 740 P.2d 835 (1987). See also *infra* text accompanying note 120.

45. *Id.* at 498, 740 P.2d at 839.

46. 70 Wash. App. 93, 853 P.2d 457 (1993), *rev'd on other grounds*, 123 Wash. 2d 250, 866 P.2d 1257 (1994).

47. See *infra* notes 58, 83-84 and accompanying text.

48. *State v. Friderich-Tibbets*, 123 Wash. 2d 250, 866 P.2d 1257 (1994). The supreme court did not address the merits of the case, but instead relied upon Wash. Rev. Code § 9.94A.210(1) which provides that "[a] sentence within the standard range for the offense shall not be appealed." *Id.* at 252, 866 P.2d at 1257.

49. A brief examination of the line-up of judges in several applicable cases demonstrates that a split of authority within the first division of the Washington Court of Appeals has arisen with regard to issues involving exceptional sentencing under the SRA. Judge Kennedy, who wrote the *Freitag* opinion, concurred in *Friederich-Tibbets*, while Judge Forrest wrote the dissenting opinion in both cases. Judge Forrest also wrote the majority opinion in *State v. Alexander*, 70 Wash. App. 608, 854 P.2d 1105 (1993), *rev'd on other grounds*, 125 Wash. 2d 717, 888 P.2d 1169 (1995), a case in which the holding directly contradicts that of *Freitag*. See *supra* text accompanying note 40. Such a split

trial court's decision and held that a judge has the discretion to impose an exceptional sentence below the standard range, even though the cited reasons are not offense-related factors. The standard range for the offense was twenty-six to thirty-four months imprisonment. The trial court imposed a twenty-six-month sentence with twelve months community placement.⁵⁰ Although the sentence imposed was within the standard range, the trial judge decided to preserve the record, ostensibly for the purpose of appellate review.⁵¹ By listing its findings, the trial court was handing the appellate court an opportunity to reverse. The findings of fact included the defendant's remorse,⁵² his lifestyle improvements,⁵³ his employer's high regard for his work,⁵⁴ and the fact that he was married and raising a family.⁵⁵ To its credit, the trial court concluded that, although it wished to impose upon the defendant a more lenient sentence than he would receive under the sentencing guidelines, "none of the above facts . . . constitute substantial and compelling mitigating factors sufficient to justify an exceptional sentence below the standard range."⁵⁶ The court also acknowledged, albeit reluctantly, that none of the listed factors related to the nature of the crime and thus were inappropriate for the court to consider in granting an exceptional sentence.⁵⁷

The trial judge obviously felt a great deal of sympathy for *Freiderich-Tibbets* and admittedly felt frustration with his limited discretion to tailor the sentence to the individual circumstances of the case. Despite these feelings, the *Friederich-Tibbets* trial court managed to exercise an admirable degree of judicial restraint: acknowledging that its sympathies lay with the defendant, yet refusing to violate outright the tenets of the SRA in the name of untrammled judicial discretion. The court of appeals, however, accepted the trial court's invitation to reverse. This

in authority necessarily weakens the relative precedential authority of the court of appeals and leads to unfairness for the defendant whose fate may well be determined by the particular panel which hears his case.

50. *Friederich-Tibbets*, 70 Wash. App. at 94, 853 P.2d at 458, *rev'd on other grounds*, 123 Wash. 2d 250, 866 P.2d 1257 (1994).

51. *Id.* at 96, 853 P.2d at 459. *See also supra* note 35.

52. *Id.* at 94, 853 P.2d at 458.

53. *Id.*

54. *Id.*

55. *Id.* at 98, 853 P.2d at 460.

56. *Id.* at 95, 853 P.2d at 458.

57. *Id.* at 96, 853 P.2d at 459.

holding has been expressly rejected as contrary to supreme court authority by another panel of the same division of the court of appeals.⁵⁸

When the same panel of the appellate court reversed the trial court's decision in *Freiderich-Tibbets* and then affirmed the *Freitag* sentence, it ignored its duty as an appellate body to recognize a trial judge's abuse of discretion. As numerous courts have held, it is the role of the legislature to change the law if justice so requires.⁵⁹ Until then, the judiciary has the sworn duty to uphold and apply the law as written.

2. *Problems That Arise When a Court Bases Its Decision on Subjective Findings of Fact*

Various dangers exist when courts are allowed to make subjective and value-based determinations. First and foremost, when a trial court relies upon subjective factors as the basis for its sentence, it runs the risk of violating constitutional guarantees of equal protection of the laws. After *Freitag*, a defendant whose case is heard before a judge who adheres to the reasoning espoused by the *Freitag* dissent and the vast weight of Washington case law will most likely be given a harsher sentence than another who is similarly situated but has the good fortune of appealing to the sympathies of a judge who wholeheartedly adopts the *Freitag* majority's reasoning. The former defendant may have a good argument that his sentence violates the guarantees of the Equal Protection Clause.⁶⁰

Another danger arising from consideration of subjective findings of fact is a court's engagement in the trial of collateral matters. As defense attorneys read *Freitag* and begin to appreciate the connection between reduced sentence lengths and judicial sympathy for the defendant, they will increasingly focus their energies upon a desirable portrayal of their client's character. Courts may soon find themselves embroiled in lengthy determinations of the "quality of life" led by the defendant, rather than concentrating on the facts of the case at hand. In the interests of judicial efficiency, it is necessary to narrow the focus of criminal trials

58. See *State v. Hodges*, 70 Wash. App. 621, 625, 855 P.2d 291, 294 (1993) (holding that because the *Freiderich-Tibbets* majority did not consider binding supreme court authority, its holding is "of questionable precedential value").

59. See, e.g., *State v. Hutsell*, 120 Wash. 2d 913, 924, 845 P.2d 1325, 1331 (1993); *Hodges*, 70 Wash. App. at 626 n.4, 855 P.2d at 294 n.4; *State v. Alexander*, 70 Wash. App. 608, 615, 854 P.2d 1105, 1108 (1993), *rev'd on other grounds*, 125 Wash. 2d 717, 888 P.2d 1169 (1995).

60. See, e.g., *State v. Clinton*, 48 Wash. App. 671, 680, 741 P.2d 52, 57 (1987) (reversing, on equal protection grounds, defendant's exceptional upward sentence for convictions of first degree rape and burglary where co-defendant had received sentence within the standard range).

to the nature of the crime itself in order to eliminate the waste of time on such collateral matters.

A third danger is the possibility that two defendants charged with violating the same statute and possessing similar criminal histories will be given disparate sentences. When a court bases its imposition of an exceptional sentence upon the type of subjective factors that the trial court considered in *Freitag*, the unpredictable nature of criminal sentencing proceedings proves unfair to the defendant who receives a harsher sentence than that prescribed under the SRA. On the other hand, consideration of subjective factors provides a windfall for lucky defendants whose good character has bought them some time.

*State v. Hodges*⁶¹ illustrates the danger of disparate sentencing. Lisa Hodges was convicted of one count of possession of a controlled substance with intent to deliver. Her presumptive sentence under the SRA sentencing guidelines was twenty-one to twenty-seven months.⁶² Noting that she was supplied with the drugs by a male source and that she herself did not use cocaine, the trial court deviated downward from the standard range and imposed an exceptional sentence of thirty days' confinement and 400 hours of community service plus twenty-four months of supervision.⁶³ The court entered various findings of fact which focused on her community support, efforts at self-improvement, and maternal obligations.⁶⁴ The Washington Court of Appeals reversed the sentence, holding that the trial court abused its discretion by considering factors not directly related to the offense.⁶⁵

Lisa Hodges was unquestionably a sympathetic figure: the facts were undisputed that she sold drugs to feed her family and that she herself was "clean." Yet the appellate court found these factors insufficient in light of the underlying precepts of the SRA to justify an exceptional sentence. While acknowledging the defendant's commendable concern for her children, the court noted that there was nothing which distinguished her crime from others of its kind.⁶⁶ In reversing Hodges' exceptional sentence, the court stated that exceptional sentences are appropriate only

61. 70 Wash. App. 621, 855 P.2d 291 (1993).

62. *Id.* at 623, 855 P.2d at 292.

63. *Id.*

64. *Id.*

65. *Id.* at 625-26, 855 P.2d at 294.

66. *Id.* at 626, 855 P.2d at 294.

when the circumstances of the crime distinguish it from other crimes of the same statutory category.⁶⁷

A comparison of *Hodges* and *Freitag* demonstrates how unauthorized judicial discretion may lead to unfair disparity in defendants' sentences. Both women committed crimes against the health and safety of society, and both struck sympathetic figures. And yet, *Hodges* was sentenced within the presumptive range while *Freitag* was given the lightest sentence in state history for her offense. The reason behind this disparity essentially boils down to judicial self-restraint. In *Hodges*, the court made a conscientious choice to follow the SRA to the letter, however disadvantageous that might be for an otherwise admirable defendant. The *Freitag* court, in contrast, allowed its sympathy for the individual defendant to outweigh the plain meaning of the SRA and the precedential authority of prior case law. The *Hodges* court recognized its duty to apply the law as written, while *Freitag* found similar self-restraint too great a burden.

B. Standing Alone, the Stated Purposes of the SRA Cannot Be Used to Justify an Exceptional Sentence

One of the issues raised by *Freitag* is whether the purposes of the SRA can be used to justify an exceptional sentence downward.⁶⁸ Finding of fact five noted that, by reducing the length of *Freitag*'s incarceration, the court was making "frugal use of state and local resources" by alleviating the problem of jail overcrowding.⁶⁹ In its finding of fact six, the trial court cited the defendant's lack of threat to society.⁷⁰ As Judge Forrest noted in his dissenting opinion, finding of fact five directly relates to RCW § 9.94A.010(5), which deals with the offender's opportunity for improvement, and to RCW § 9.94A.010(6), which advocates frugal use of the state's resources. Finding of fact six relies on

67. *Id.* at 624, 855 P.2d at 293 (citing *State v. Pennington*, 112 Wash. 2d 606, 610, 772 P.2d 1009, 1012 (1989)).

68. The purposes relied upon by the *Freitag* majority are the last three listed in Wash. Rev. Code § 9.94A.010 (1994). This provision states that the SRA was purposely designed to:

- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself; and
- (6) Make frugal use of the state's resources.

69. *State v. Freitag*, 74 Wash. App. 133, 138, 873 P.2d 548, 551 (1994).

70. *Id.*

RCW § 9.94A.010(4), contemplating protection of the public, and upon RCW § 9.94A.010(1), dealing with proportionality of punishment.⁷¹

In his dissent, Judge Forrest stated what should be the definitive rule on this issue: “The general statement of purposes cannot be relied upon directly as a basis for an exceptional sentence.”⁷² Because the SRA does not include reference to its purposes as an appropriate factor justifying an exceptional sentence, and because Washington case law rejects this use of the SRA’s purposes, it was erroneous for the *Freitag* court to rule that these findings of fact were substantial and compelling reasons for an exceptional sentence. Except for *State v. Friederich-Tibbets*,⁷³ there are no cases which have upheld exceptional sentences solely by citing the statement of purposes of the SRA.⁷⁴ In the absence of a special directive by the legislature, the stated purposes of the SRA should be guiding, theoretical examples of the types of purposes the drafters had in mind when they were writing the Sentencing Reform Act. These purposes may justify sentences within the presumptive ranges established by the Act but should not be used to deviate from them.

1. *Washington Case Law Prohibits Reliance on the SRA’s Stated Purposes in the Absence of Factors Inherent in the Commission of the Crime*

*State v. Alexander*⁷⁵ held that conformance with the SRA’s stated purposes does not warrant an exceptional sentence. In *Alexander*, the defendant was convicted of one count of delivery of a controlled substance. The defendant had two potentially mitigating circumstances on his side: his low standing in the drug hierarchy and the minute amount of illegal substance involved.⁷⁶ With one prior offense, the presumptive range for the defendant’s offense was thirty-six to forty-eight months’

71. *Id.* at 156, 873 P.2d at 560 (Forrest, J., dissenting).

72. *Id.*

73. 70 Wash. App. 93, 853 P.2d 457 (1993), *rev’d on other grounds*, 123 Wash. 2d 250, 866 P.2d 1257 (1994).

74. *Id.* at 157, 873 P.2d at 561.

75. 70 Wash. App. 608, 617, 854 P.2d 1105, 1109 (1993), *rev’d on other grounds*, 125 Wash. 2d 717, 888 P.2d 1169 (1995).

76. The Washington Supreme Court reversed the lower court’s judgment solely on the grounds that both findings of fact are proper mitigating factors under the SRA. *State v. Alexander*, 125 Wash. 2d 717, 888 P.2d 1169 (1994).

imprisonment. The trial court gave Alexander an exceptional sentence of eighteen months.⁷⁷

In justifying this departure from the standard range, the trial court relied on the SRA's first two statements of purpose.⁷⁸ A panel of the first division of the court of appeals reversed, stating that the statement of purposes prefaces the SRA sentencing scheme as a whole and is not to be imported in sections so as to support exceptional sentences.⁷⁹ The *Alexander* court granted that once a proper mitigating or aggravating factor is found, the statements of purpose may properly be considered in selecting a sentence.⁸⁰ But it is improper to allow the purposes in and of themselves to warrant going outside the standard range. Whereas *State v. Hodges*⁸¹ rejected the *Friederich-Tibbets*⁸² decision because it improperly considered subjective factors, the *Alexander* court dismissed the precedential value of *Friederich-Tibbets* because of its inappropriate reliance on the stated purposes of the SRA to justify its departure from the standard range. In a footnote, the *Alexander* court acknowledged that in *State v. Friederich-Tibbets*, a panel of the appellate court held that the SRA's statement of purposes may constitute a "substantial and compelling reason" for an exceptional sentence.⁸³ While the court professed its reluctance to disagree with another panel of the court, it concluded that the *Friederich-Tibbets* holding was unpersuasive and declined to follow it unless approved by the supreme court.⁸⁴

In *State v. Clinton*,⁸⁵ the court of appeals expressly rejected the state's reliance upon the purposes of the SRA as justification for an exceptional sentence upward.⁸⁶ In *Clinton*, the defendant was charged with a crime committed by himself and two co-defendants. The standard range for the

77. *Id.* at 610, 854 P.2d at 1106.

78. The first two purposes provide that the SRA is designed to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just.

Wash. Rev. Code § 9.94A.010 (1994).

79. *Alexander*, 70 Wash. App. at 616, 854 P.2d at 1109.

80. *Id.* at 617, 854 P.2d at 1109.

81. 70 Wash. App. 621, 855 P.2d 291 (1993).

82. 70 Wash. App. 93, 853 P.2d 457 (1993), *rev'd on other grounds*, 123 Wash. 2d 250, 866 P.2d 1257 (1994).

83. *Id.* at 617 n.12, 854 P.2d at 1109 n.12.

84. *Id.*

85. 48 Wash. App. 671, 741 P.2d 52 (1987).

86. *Id.* at 679, 741 P.2d at 56.

defendant's conviction on three counts of first degree rape was sixty-seven to eighty-nine months for the first rape conviction and fifty-one to sixty-eight months for each of the other two.⁸⁷ The trial court had followed the recommendation of the state and imposed an exceptional sentence of nine years for each rape conviction, to run consecutively to one another and concurrently with the sentences for the three burglary convictions.⁸⁸ One of the co-defendants, however, received a sentence within the standard range.⁸⁹

On appeal, the Washington Court of Appeals, Division One, rejected the state's contention that the first stated purpose of the SRA⁹⁰ could be relied upon to justify disparate sentences between two co-defendants. The court noted that the cited purpose appeared to be merely an explanation of the factors used in the establishment of standard sentence ranges themselves. It was not in itself a justification for the imposition of exceptional sentences.⁹¹

2. *Exceptional Sentences Based on the Likelihood of Reoffense Have Been Expressly Rejected by Washington Courts*

In granting Freitag her exceptional sentence, the trial court was noticeably influenced by her supposed lack of future dangerousness or propensity to reoffend.⁹² This circumstance is not an appropriate finding of fact, however, upon which to justify a sentence of one day in jail, coupled with community service. Again, established Washington case law contradicts the *Freitag* reasoning that the SRA's stated purposes in RCW § 9.94A.010 are an appropriate basis, in light of the defendant's good character and lack of prior police contacts, on which to justify an exceptional sentence.

In *State v. Allert*,⁹³ the supreme court held that a determination that a convicted person does not pose a threat to the public is not a justification for imposing a sentence less than the standard range.⁹⁴ The Washington

87. *Id.* at 674, 741 P.2d at 54.

88. *Id.*

89. *Id.* at 678, 741 P.2d at 56.

90. *See supra* note 78.

91. *Clinton*, 48 Wash. App. at 679, 741 P.2d at 56.

92. *State v. Freitag*, 74 Wash. App. 133, 138, 873 P.2d 548, 551 (1994).

93. 117 Wash. 2d 156, 815 P.2d 752 (1991).

94. *Id.* at 169, 815 P.2d at 759 (citing *State v. Pascal*, 108 Wash. 2d 125, 137, 736 P.2d 1065 (1987)). In addition to its holding that the trial court erred in relying on a finding that the defendant did not pose a future risk to the community in terms of criminal, violent, or assaultive behavior to

Court of Appeals, Division Three, attempted to narrow that ruling somewhat in *State v. McClure*⁹⁵ when it held that future dangerousness is not a basis for an exceptional sentence in a non-sexual offender case.⁹⁶ Finally, in *State v. Payne*,⁹⁷ Division Two dismissed the contention that "protecting the public," one of the SRA's avowed purposes, is a viable reason upon which to justify an exceptional sentence.⁹⁸ After all, the panel noted, "an implied purpose of all criminal statutes is to protect the public."⁹⁹ The court pointed out that relying on this one purpose of the SRA as justification for an exceptional sentence actually serves to undercut the other purposes of the SRA, most notably the objectives of proportionality and uniformity.¹⁰⁰

The offense involved in *Freitag* was an ordinary instance of vehicular assault. Conspicuously absent from this particular case were any unique or unusual circumstances differentiating this offense from any other violation of the same criminal statute. There were simply no appropriate factors that could justify the exceptional sentence. Considering this, *Freitag's* exceptional sentence should have been reversed by the court of appeals as an abuse of discretion by the trial judge.

C. *By Considering Criminal History, the Court Double-Counted Freitag's Zero Offender Score*

When sentencing a defendant under the Sentencing Reform Act, the trial court looks to the sentencing grid under RCW § 9.94A.310. Under this grid, the court determines the presumptive range by locating the seriousness score of the defendant's current offense in the vertical column and then pinpointing the defendant's offender score in the

justify an exceptional sentence, the supreme court assigned error to the lower court's consideration of the defendant's personal history. Specifically, the trial court erred in considering the defendant's depression, severe compulsive personality, and alcoholism. *Id.* at 164, 815 P.2d at 756.

95. 64 Wash. App. 528, 827 P.2d 290 (1992).

96. *Id.* at 531, 827 P.2d at 292 (citing *State v. Barnes*, 117 Wash. 2d 701, 711, 818 P.2d 1088, 1093 (1991)). See also *State v. Smith*, 64 Wash. App. 620, 825 P.2d 741 (1992) (holding that future dangerousness in non-sex offense cases was improperly considered as an aggravating factor).

97. 45 Wash. App. 528, 726 P.2d 997 (1986).

98. *Id.* at 532, 726 P.2d at 1000. See also *State v. Pennington*, 112 Wash. 2d 606, 609, 772 P.2d 1009, 1011 (1989) (holding that a trial court's finding of fact that society would be better protected by a defendant's placement in an in-patient rehabilitation program is a "legal conclusion, and not a finding of fact").

99. *Payne*, 45 Wash. App. at 532, 726 P.2d at 1000.

100. *Id.* at 533, 726 P.2d at 1000.

horizontal column.¹⁰¹ The offender score is calculated according to a series of rules located in another section of the Act.¹⁰² The purpose behind RCW § 9.94A.310 is to further the purpose behind the SRA of promoting proportionality in sentencing. The more serious the defendant's prior convictions, the harsher the presumptive sentence will be.

The supreme court has consistently held that a defendant's criminal history is one of the components used to compute the presumptive range for an offense under the SRA and therefore may not be counted again as a mitigating circumstance to justify departure from the range.¹⁰³ To do so would constitute double counting. The *Freitag* court realized that the undisputed acceptance of this rule in Washington courts prohibited its using Freitag's lack of criminal convictions as a justification for the exceptional sentence. Through a unique perversion of the language and intent of the SRA, the *Freitag* majority justified its exceptional sentence by distinguishing between the defendant's history of criminal convictions and her history of misdemeanors.

In its finding of fact number two, the trial court stated, "The defendant has no prior criminal history, not just in the statutory sense of the word, but in the real life sense of the word."¹⁰⁴ Despite the total lack of authorization from the SRA, the *Freitag* court held, in essence, that a defendant's lack of aggravating circumstances (such as the presence of recorded misdemeanors) creates in and of itself a mitigating factor that justifies departure from the standard range. As Judge Forrest noted in his dissent, "[s]uch a result is contrary to the spirit and the letter of the Sentencing Reform Act and is not supported by Washington case law."¹⁰⁵

101. See *supra* note 28.

102. See Wash. Rev. Code § 9.94A.360 (1994).

103. *State v. Rogers*, 112 Wash. 2d 180, 183, 770 P.2d 180, 181 (1989) (holding that absence of prior criminal convictions does not justify a sentence below standard range); *State v. Pascal*, 108 Wash. 2d 125, 137, 736 P.2d 1065, 1072 (1987) (determining that criminal history may not be counted again as a mitigating circumstance to justify departure from the range); *State v. Armstrong*, 106 Wash. 2d 547, 551, 723 P.2d 1111, 1114 (1986) (finding lack of criminal history not a substantial and compelling reason for exceptional sentence); *State v. Nordby*, 106 Wash. 2d 514, 518 n.4, 723 P.2d 1117, 1119 n.4 (1986) (holding that since criminal history is already one of the components used to compute the presumptive range, it may not also be used as justification for exceptional sentence).

104. *State v. Freitag*, 74 Wash. App. 133, 137, 873 P.2d 548, 550 (1994).

105. *Id.* at 149, 873 P.2d at 557 (1994) (Forrest, J., dissenting).

1. *Washington Case Law Does Not Allow Use of a Defendant's Criminal History as a Mitigating Factor*

It is true that, prior to *Freitag*, the court of appeals had already held that a trial court may consider a defendant's record of misdemeanors an appropriate aggravating circumstance.¹⁰⁶ On this basis, the *Freitag* court concluded by "some logical symmetry or corollary"¹⁰⁷ that a complete absence of police contacts amounts to a mitigating circumstance. But a holding that a history of misdemeanors may constitute an aggravating circumstance does not necessarily imply that a lack thereof imparts a mitigating circumstance. Furthermore, nothing in the language of RCW § 9.94A.390, which provides for statutory aggravating circumstances, indicates that their absence establishes a mitigating circumstance. The converse also holds true: it would be grossly unfair to defendants to allow courts to consider a defendant's lack of mitigating factors an aggravating circumstance warranting an exceptional sentence above the standard range.

Unfortunately, there is no direct holding by the supreme court stating unequivocally that a defendant's history of misdemeanors, rather than felonies, is an inappropriate basis on which to justify an exceptional sentence. The supreme court has, however, rejected every attempt made by a trial court to rely upon a defendant's criminal history as a justification for departing from the standard range.¹⁰⁸ In reviewing exceptional sentences, the supreme court has never distinguished between felony convictions and recorded misdemeanors. Instead, it has spoken only of a defendant's general criminal history. A literal reading

106. *State v. Roberts*, 55 Wash. App. 573, 779 P.2d 732, review denied, 113 Wash. 2d 1026, 782 P.2d 1069 (1989). This case should be read narrowly. The defendant in *Roberts* was convicted of two counts of vehicular homicide committed while under the influence of intoxicating liquor. Her offender score did not reflect the three negligent driving convictions she had received within 15 months of the fatal crash and her history of driving under the influence. The presumptive sentence range was 31 to 41 months; she was given an exceptional sentence of 120 months. *Id.* at 577, 779 P.2d at 734. The appellate court affirmed, noting that courts could consider uncounted misdemeanors as aggravating factors. As a justification for its holding, the court stated that the three uncounted misdemeanors established a pattern of incidents in which Roberts lost control of her vehicle. *Id.* at 579, 779 P.2d at 735.

In *Roberts*, the misdemeanors were so factually similar to the offense at issue that they could be said to constitute an aggravating circumstance in themselves. The case thus stands for the narrow rule that a history of misdemeanors may constitute an aggravating circumstance only when it is specifically related to the current offense so as to give the offender adequate notice of the danger her conduct poses to society.

107. *Freitag*, 74 Wash. App. at 152, 873 P.2d at 559 (Forrest, J., dissenting).

108. See *supra* note 103.

of this language would make it difficult to believe that criminal history specifically did not include a defendant's history of misdemeanors. To hold that felony convictions fall within a defendant's criminal history, but that misdemeanors do not, needlessly obfuscates the plain language of both the SRA and the supreme court.

Washington's state courts have repeatedly made it clear that a lack of aggravating factors fails to create a mitigating factor in and of itself. In *State v. Armstrong*,¹⁰⁹ the defendant was convicted of second degree assault. The defendant asserted that the fact that he had taken his victim to the hospital after the assault, and that his crime was not premeditated, constituted mitigating circumstances. The supreme court rejected this argument, stating that these factors simply showed the lack of an aggravating circumstance and that this fact alone does not create a mitigating circumstance.¹¹⁰

In *State v. Alexander*,¹¹¹ the trial court attempted to give the defendant an exceptional sentence downward based on the converse of the principle that the presence of aggravating circumstances in a crime warrants exceptional sentencing upward. The trial court reasoned that if the above principle was true, then its logical corollary, that the absence of aggravating factors justified an exceptional sentence downward, must also be true. The appellate court rejected the trial court's analysis,¹¹² reversed the sentence, and remanded for resentencing without the logical corollary.¹¹³

Although neither *Armstrong* nor *Alexander* dealt specifically with the issue of whether a lack of misdemeanors may be used to justify an exceptional sentence downward, the same rationale applies. The SRA authorizes a court to sentence a defendant based upon both the seriousness of the crime committed and the degree to which his record reflects a past criminal history. The *Freitag* court's consideration of acts not committed by the defendant constitutes a clear dereliction of its duty to interpret the SRA as it stands. If the SRA is to be read as authorizing consideration of a defendant's lack of mitigating or aggravating

109. 106 Wash. 2d 547, 723 P.2d 1111 (1986).

110. *Id.* at 551, 723 P.2d at 1114.

111. 70 Wash. App. 608, 854 P.2d 1105 (1993), *rev'd on other grounds*, 125 Wash. 2d 717, 888 P.2d 1169 (1995).

112. *Id.* at 613, 854 P.2d at 1107-08.

113. On appeal, the supreme court indicated its support for the appellate court's interpretation. 125 Wash. 2d 717, 724, 888 P.2d 1169, 1172 (1995).

circumstances as justification for departing from the standard range, then it is up to the legislature, not the courts, to make such a determination.

2. *Freitag Erroneously Interprets Legislative Silence on the Issue of Misdemeanor Convictions*

Had the legislature intended to afford such weight to misdemeanor convictions as to allow them to justify departures from the standard range, it would have specifically provided for this in the language of the act. Legislative silence on the relative weight of misdemeanor convictions should not be interpreted otherwise.¹¹⁴ Rather than recognize legislative silence for what it is, the *Freitag* court reasoned that the legislature intended to let the courts decide "when, whether and to what extent" the presence or absence of uncounted offenses may be considered.¹¹⁵

The *Freitag* majority repeatedly stated that it is essential to consider a defendant's misdemeanor record, or lack thereof, so as to ascertain that individual's predisposition to commit a crime.¹¹⁶ The SRA makes it unavoidably clear, however, that its primary purpose is to punish an offender for the crime committed, not for one's predisposition to commit such crimes. The majority's opinion comes dangerously close to sanctioning a higher degree of punishment for a defendant because one has a bad character or because the court speculates that one is likely to commit some crime in the future.¹¹⁷

Consideration of an offender's personality is contrary to the goal of the SRA that the sentencing guidelines apply equally to all offenders without discrimination. Yet *Freitag* asserts that all offender scores are

114. 2A Norman J. Singer, *Sutherland Statutory Construction* 577 (5th ed. 1992).

115. *State v. Freitag*, 74 Wash. App. 133, 144, 873 P.2d 548, 554 (1994).

116. "Ms. Freitag's '0' offender score did not reflect her *complete* lack of any police contacts whatsoever, a fact not otherwise accounted for under the SRA." *Id.* at 140-41, 873 P.2d at 552. "Her '0' offender score does not reflect the full degree of her reduced criminal culpability, *i.e.*, of her lack of any predisposition to drink and drive or to commit any other type of criminal or traffic offense." *Id.* at 144, 873 P.2d at 554. "[W]e conclude that in cases where the *complete* absence of criminal history, *i.e.*, of *uncounted* criminal history, reflects the total absence of predisposition to commit not only the current offense but any other type of crime whatsoever, a substantial and compelling reason exists for an exceptional sentence downward." *Id.* at 145, 873 P.2d at 554.

117. Even evidentiary rules prohibit consideration of a person's bad character. While allowing character evidence to come in under the auspices of impeachment or if the defendant puts his character at issue, the rules are clear that evidence of a defendant's character may not be used solely to prove his propensity to commit the crime in question. *See* Wash. R. Evid. 404(a).

not created equal.¹¹⁸ Applying the majority's rationale, a defendant who has no prior felony convictions but does have one recorded misdemeanor is undeserving of the same lenient treatment given to another defendant with no felony or misdemeanor convictions. As the dissent noted, it is doubtful that the legislature intended such a hair-splitting distinction to determine whether a defendant is deserving of an exceptional sentence.¹¹⁹ Consideration of misdemeanor convictions perverts the intention of the legislature to provide exceptional sentences only when warranted by exceptional circumstances.

3. *The Majority's Reliance Upon State v. Nelson Was Misplaced Considering Nelson's Narrow Holding*

In *Nelson*,¹²⁰ the supreme court approved of reliance upon a defendant's complete lack of criminal history to support departure from the standard range. This holding is, however, fact-specific. Despite the *Freitag* court's protestations otherwise, *Nelson* is narrowly restricted to situations involving failed entrapment defenses, where predisposition to commit a crime is an element of that defense. Considering the restricted scope of its holding, *Nelson* should not be interpreted to allow exceptional sentences based upon a defendant's lack of misdemeanor convictions.¹²¹

At his trial, Nelson asserted a defense of entrapment, which ultimately failed. As one scholar of the entrapment issue has noted, however, defenses which fall just short of their proof may nonetheless be used to justify an exceptional sentence.¹²² In fact, the failed entrapment defense is one of the illustrative mitigating factors provided for in the SRA.¹²³

The facts of *Nelson* show that the defendant played only a secondary role in the crime. In 1985, Nelson was persuaded by his co-defendant to hold a bag while the co-defendant robbed two service stations of money. In return for a lesser charge, Nelson agreed to cooperate with and assist

118. *Freitag*, 74 Wash. App. at 140, 873 P.2d at 552.

119. *Id.* at 152, 873 P.2d at 558 (Forrest, J., dissenting).

120. *State v. Nelson*, 108 Wash. 2d 491, 740 P.2d 835 (1987).

121. Since *Nelson*, the supreme court has decided *State v. Estrella*, 115 Wash. 2d 350, 798 P.2d 289 (1990), and *State v. Rogers*, 112 Wash. 2d 180, 770 P.2d 180 (1989), both of which have held that criminal history is not a proper basis for imposing a sentence below the standard range. In light of the timing of these two cases, *Nelson* should be limited to situations involving failed entrapment defenses.

122. Boerner, *supra* note 7, § 9.12(c).

123. Wash. Rev. Code § 9.94A.390(1)(d) (1994).

the state's prosecution of his co-defendant. His lesser offense carried a presumptive sentence of thirty-one to forty-one months. Noting that Nelson had no police record (felony, misdemeanor, or arrest), the trial judge gave him an exceptional sentence of twelve months in jail.¹²⁴

Contrary to the *Freitag* majority's opinion, the *Nelson* holding should be restricted to facts involving a failed defense of entrapment as the mitigating factor justifying an exceptional sentence below the standard range. In *Nelson*, the supreme court upheld the exceptional sentence. It found that the trial court was justified in relying upon evidence which showed that it was the codefendant who induced Nelson to commit the crime with him. Considering this failed entrapment defense, the court held that the complete absence of criminal history whatsoever is an appropriate matter for the sentencing judge to consider, insofar as it supports a finding that the defendant lacked the predisposition to commit the crimes.¹²⁵

Unlike *Nelson*, *Freitag* had no failed entrapment defense at her disposal. Thus, consideration of her complete lack of misdemeanor offenses is inappropriate. Her crime must be seen for what it is: an unfortunate episode in her life, certainly, but one which is unexceptional from every other vehicular assault committed and therefore undeserving of exceptional treatment. Although *Freitag* may be a good person and her total lack of prior police contacts may indeed indicate her lack of predisposition to commit future crimes, these are not proper bases upon which to justify a sentence of one day of incarceration plus community service. The legislature has already provided an appropriate, albeit harsher, sentence for her offense.

IV. *FREITAG* SETS A DANGEROUS PRECEDENT

As a court of appeals decision, *Freitag* carries sufficient weight to give trial courts the opportunity to depart from the tenets of the SRA when imposing exceptional sentences. This opportunity was taken advantage of in one recent, well-publicized case from the superior court of Snohomish county. In *State v. Guthrie*,¹²⁶ two Alaskan Native youths convicted of assault were given the exceptional sentence of banishment on remote islands. By relying specifically on *Freitag*, the *Guthrie* court

124. *Nelson*, 108 Wash. 2d at 494, 740 P.2d at 837-38 (1987).

125. *Id.* at 498, 740 P.2d at 839.

126. Verbatim Report of Proceedings, *State v. Guthrie*, No. 93-1-01369-2 (Wash. Super. Ct., Snohomish County) (Aug.12, 1994).

felt justified in imposing a sentence which had never before been used against persons convicted of the same statutory offense. *Guthrie* demonstrates the danger of *Freitag's* precedential authority by imposing a sentence that was clearly against the principles of the SRA and its primary goal of eliminating disparity of sentencing within Washington's state courts.

The *Guthrie* court stated that *Freitag* represented a movement away from a strict interpretation of the SRA.¹²⁷ In denying the state's motion for reconsideration, the court noted that *Freitag* allows courts to look at such things as a defendant's demonstrated clear pattern of civic and social responsibility, the risk of reoffense, age, sense of remorse, cooperation with authorities, family support, and any voluntary restitution the defendant may have made to his victim before being sentenced.¹²⁸ Probably most significant was the *Guthrie* court's following statement:

For the first time . . . a trial court has stepped forward and said to the Legislature I want more discretion, I want to look at the defendant and not just at the crime. And for the first time the Court of Appeals has said all right, we will allow that and see how it works.¹²⁹

Although it acknowledged that *Freitag* was obviously in direct conflict with Washington case law, even within its own appellate court division,¹³⁰ *Guthrie* found the appellate court's holding too convenient to ignore. As a result, it handed down a decision which amounts to discrimination against other similarly situated defendants. This holding is the exact type of result that the SRA was designed to prevent. Unfortunately, *Freitag* has allowed it to resurface.

V. CONCLUSION

Freitag represents much more than the struggle between trial judges' desire to tailor sentences to individual circumstances and the legislature's determination of proper methods of sentencing. *Freitag* represents a split of authority within the appellate court itself, and certainly within the first division. This split presents uncertainty for the defendant who

127. *Id.* at 38.

128. *Id.*

129. *Id.* at 38–39.

130. *Id.* at 39.

comes before a trial judge who may or may not side with the panel represented by Judge Forrest and his opinions. Whether subjective factors, the cited purposes of the SRA, or a complete absence of criminal history may justify exceptional sentences outside the standard range are issues that have unnecessarily created tension within the court system. Washington case law and the SRA are controlling authority: without the presence of circumstances so exceptional that the nature of the offense at hand is unavoidably distinguishable from all other offenses falling within the same statutory category, none of these factors, together or individually, justifies departure from the standard range. In the absence of specific legislative action overturning the *Freitag* decision, the Washington Supreme Court would be supported by case law and the SRA in establishing unequivocally that, in the interests of justice and fairness in criminal proceedings and to respect the spirit and letter of the SRA, the *Freitag* decision should not stand.