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RECENT WASHINGTON CASES
EXCERPTED FOR LEGISLATIVE INTENT AND HISTORY

Many recent Bill Reports and Bill Analyses contain the following or similar language:

> *This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Legislative Intent Service, Inc. has gathered legislative intent materials for the Revised Code of Washington in the past; older Bill Reports and Bill Analyses from the Washington State Legislature did not appear to contain the language noted above. Brief research did not reveal exactly when this language began to be added to Bill Reports and Bill Analyses, but there does appear to be case law that speaks upon the usage of Bill Reports in determining legislative intent. You may wish to research the case law in Washington on this point.

For example, you may wish to review what the court said about bill reports and/or analyses in the following cases. Please note: The above language may not have appeared in the reports and/or analyses at issue in these cases, this list is not exhaustive, and ***you must review the entire court opinion to determine its applicability to your case.***

LOEFFELHOLZ V. UNIVERSITY OF WASHINGTON
285 P.3D 854
WASH., 2012. SEPT. 13, 2012

BORTHERTON V. KRALMAN STEEL SRUCTUES, INC.,
269 P.3D 307
WASH. APP. DIV. 3, 2011. DECEMBER 29, 2011

The following cases relating to Washington law are not exhaustive on the issue of legislative intent and history. These are a few examples of recent court decisions excerpted for this topic in the state. ***You must review the entire court opinion to determine its applicability to your case.***

10 The goal of statutory interpretation is to carry out the legislature's intent. *Burns,* 161 Wash.2d at 140, 164 P.3d 475. If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words. *Id.* Susceptibility to more than one reasonable interpretation renders the statute ambiguous and allows the court to employ tools of statutory construction such as **legislative history** to interpret the statute.[FN3] *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 12, 43 P.3d 4 (2002). The mere fact that two interpretations are conceivable does not make a statute ambiguous. *Agrilink,* 153 Wash.2d at 396, 103 P.3d 1226.

FN3. Contrary to our established rules of statutory construction, the dissent relies on the **legislative history** of the HST to determine the HST is ambiguous. Dissent at 36-37. The problem with this approach is that it puts the proverbial cart before the horse. Our rules of statutory construction dictate we must look first to the plain meaning of the statute to determine whether it is ambiguous. *Cerrillo v. Esparza,* 158 Wash.2d 194, 201, 142 P.3d 155 (2006). Only after we determine the statute is ambiguous may we resort to tools of statutory construction like legislative history. *Id.* at 202, 142 P.3d 155. Resorting to such tools of statutory construction without first finding the statute is ambiguous is error. *Id.* (holding the Court of Appeals erred when it looked beyond the statutory language and related statutes to determine legislative intent "without first determining that the statute was ambiguous"). The dissent departs from this long-standing rule by first looking to the HST's **legislative history** to determine the plain language is ambiguous. Consequently, the dissent repeats the same error committed by the Court of Appeals in *Cerrillo.* The dissent's inverted analysis leads it to conclude the HST is ambiguous and, therefore, it erroneously construes the HST in Tesoro's favor. The dissent also relies on the definition of "hazardous substance" and the statute heading to determine legislative intent. Neither of these sources indicates the legislature intended to tax only individuals who actually pollute. The dissent maintains, " '[h]azardous substance' is defined by four categories, each of which are substances and products that present a threat to human health or the environment *if released into the environment.*" Dissent at 37 (emphasis added). The language to which the dissent refers can be found in RCW 82.21.010(1)(d), not RCW 82.21.010(1)(b), which is the pertinent provision here. RCW 82.21.010(1)(b) categorizes petroleum products such as refinery gas as hazardous substances regardless of whether the product is released into the environment.

The dissent also relies on the title of RCW 82.21.030-"Pollution Tax"-to conclude the HST targets polluters. Dissent at 37. However, "[h]eadings are added by the code reviser subsequent to enactment, as part of codification. RCW 44.20.050. They are of little use as a guide to the intent of the legislature." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 149 Wash.2d 660, 684 n. 10, 72 P.3d 151 (2003). Similarly here, we should not rely on the title of the HST to override the intent of the legislature manifest in the plain language of the HST.

…

12 Tesoro labors under a misapprehension of the rule from *Keller.* The court recognized the propriety of substituting the word "and" with the word "or" where doing so furthers legislative intent. *Id.* As a default rule, the word "or" does not mean "and" unless legislative intent clearly indicates to the contrary. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.,* 148 Wash.2d 451, 473 n. 95, 61 P.3d 1141 (2003). We assess the plain meaning of a statute "viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Burns,* 161 Wash.2d at 140, 164 P.3d 475 (citing *Campbell & Gwinn,* 146 Wash.2d at 11, 43 P.3d 4). We also consider the subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another. *Id.* at 146, 164 P.3d 475.

…

15 Neither Rule 252(7)(b) nor the purpose of the HST compels the court to read the word "or" in the definition of " '[c]ontrol' " as conjunctive, and, therefore, we do not strain to do so. The fact Tesoro conceived of an alternative interpretation of RCW 82.21.020 fails to render the statute ambiguous. The word "or" in the definition of " '[c]ontrol' " is not susceptible to multiple reasonable interpretations-it is clearly disjunctive. We hold RCW 82.21.030 is plain on its face and therefore the Court of Appeals did not err because the statute lacked any ambiguity to construe in Tesoro's favor.

…

19 The rules of statutory construction apply to agency regulations as well as statutes. *Mader v. Health Care Auth.*, 149 Wash.2d 458, 472, 70 P.3d 931 (2003). The language of an unambiguous regulation is given its plain and ordinary meaning unless legislative intent indicates to the contrary. *Stevens v. Brink's Home Sec., Inc.*, 162 Wash.2d 42, 47, 169 P.3d 473 (2007). The court may consider statutes related to the regulation to discern the regulation's plain meaning. *Mader*, 149 Wash.2d at 473, 70 P.3d 931.

STATE V. FLORES
164 WASH.2D 1, 186 P.3D 1038
WASH., 2008. JUNE 26, 2008

34 Three principles of statutory construction are germane to our analysis. First, a single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words. *State v. Roggenkamp*, 153 Wash.2d 614, 623, 106 P.3d 196 (2005) (applying the doctrine of *noscitur a sociis); State v. Van Woerden*, 93 Wash.App. 110, 117, 967 P.2d 14 (1998). In applying this principle to determine the meaning of a word in a series, a court should " ' "take into consideration***1044** the meaning naturally attaching to them from the context, and ... adopt the sense of the words which best harmonizes with the context." ' " *Roggenkamp*, 153 Wash.2d at 623, 106 P.3d 196 (quoting ***13** *State v. Jackson*, 137 Wash.2d 712, 729, 976 P.2d 1229 (1999) (quoting 50 AM.JUR. STATUTES § 247 (1944))).

35 A closely related and equally well-established principle of statutory interpretation is that specific words modify and restrict the meaning of general words when they occur in a sequence. *State v. Roadhs*, 71 Wash.2d 705, 708, 430 P.2d 586 (1967), *superseded by statute as stated in State v. Wentz*, 149 Wash.2d 342, 349, 68 P.3d 282 (2003) (applying the doctrine of ejusdem generis); *Port of Seattle v. Dep't of Revenue*, 101 Wash.App. 106, 113, 1 P.3d 607 (2000). "The ejusdem generis rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as '[specific], [specific], or [general]' or '[general], including [specific] and [specific].' " *Sw. Wash. Chapter v. Pierce County*, 100 Wash.2d 109, 116, 667 P.2d 1092 (1983) (alterations in original).

…

38 Another fundamental principle of statutory interpretation is that when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings. *Roggenkamp*, 153 Wash.2d at 625, 106 P.3d 196. The legislature enacted a mandatory sentence enhancement for unlawfully manufacturing methamphetamine when a minor "*was present in or upon the premises of manufacture.*" RCW 9.94A.605(2) (emphasis added). The purpose of the statute is to protect children from the risk of injury resulting from chemical toxicity, explosions, and fires, which are commonly associated with methamphetamine labs. Accordingly, it targets the act of exposing children to such risks of harm. In contrast, the plain language of former RCW 69.50.401(f), "compensate, threaten, solicit, or in any other manner involve," indicates a legislative purpose to protect children from being induced by adults to participate in unlawful drug transactions. Unlike RCW 9.94A.605(2), the statute targets conduct that actively seeks to engage the minor in unlawful activity. Had the legislature intended RCW 69.50.401(f) to encompass the act of merely exposing a minor to unlawful drug activity, it could have chosen language similar to that in RCW 9.94A.605(2), making it unlawful to conduct such activity in the presence of a minor.

…

¶ 39 RCW 69.50.401(f) is similar to federal laws that penalize adults who involve children in drug transactions. Similar to Washington's law, 21 U.S.C. § 861(a)(1), (2) makes it unlawful for any adult to "employ, hire, use, persuade, induce, entice, or coerce" a minor to either participate in a drug offense or "to assist in avoiding detection or apprehension" for a drug offense. And the federal sentencing guidelines provide a sentence enhancement for "using a minor to commit a crime," which is defined as "directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting." *U.S. Sentencing Guidelines Manual* § 3B1.4 (2000); *see also* Anti-Drug Abuse Act of 1988, ***15** Pub.L. No. 100-690, § 6454, 102 Stat. 4181 (1988) (directing the sentencing ****1045** commission to promulgate a sentencing enhancement for "involving" a minor in a drug offense). [FN7]

FN7. Although no **legislative history** exists explaining our legislature's intent in promulgating RCW 69.50.401(f), the **legislative history** of the federal provisions indicates Congress was responding to the problem of adults conscripting children to carry out drug transactions or drawing them into dangerous situations by using them as decoys. *United States v. Ramsey*, 237 F.3d 853, 858 (7th Cir.2001) (citing 103d Cong., 139 Cong. Rec. S1,5638 (1993)). It is reasonable to infer our legislature was similarly concerned with punishing the exploitation of children by adults who commit drug offenses.

SPAIN V. EMPLOYMENT SEC. DEPT.
185 P.3D 1188
WASH., 2008. JUNE 19, 2008

7 This statute is not a model of clarity and both sides propose tenable interpretations. Statutes that can be reasonably interpreted multiple ways are ambiguous. *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wash.2d 394, 405, 842 P.2d 938 (1992) (citing *Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wash.2d 655, 669, 818 P.2d 1076 (1991)). In such cases, courts may turn to extrinsic evidence of legislative intent, such as **legislative history**. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808, 16 P.3d 583 (2001) (citing *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wash.2d 523, 530, 951 P.2d 770 (1998)).[FN4]

FN4. For most of the history of the Employment Security Act, ch. 50.01 RCW, the legislature directed that it "be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. This language was removed by the 2003 legislature and returned by the 2005 legislature. LAWS OF 2003, 2d Spec. Sess., ch. 4, § 1; LAWS OF 2005, ch. 133, § 2. Since these cases began during the interregnum, application is arguably retroactive and improper, unless it was clarifying, curative, or remedial. *See In re F.D. Processing, Inc.*, 119 Wash.2d 452, 832 P.2d 1303 (1992). We need not decide whether the 2005 amendment qualifies for retroactive application because we do not rest our opinion upon it.

***1191** ¶ 8 The difficulty with the State's position is that the legislature did *not* say that "good cause *is* " the 10 (now 11) listed categories. This is not a classic case of expressio unius est exclusio alterius, as it would be if the statute had simply said "good cause is" those legislatively blessed reasons for voluntarily leaving a job. *Cf. Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969) ("Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature...."). Instead the statute says that employees "shall be disqualified" if they "[leave] work voluntarily without good cause" and are "not disqualified" if they leave work for the specified reasons. Former RCW 50.20.050(2)(a), (b). That can be read very naturally to mean either that only those listed reasons are sufficient or that a worker is disqualified if she left her work voluntarily without good cause *and* is not disqualified if she left for certain statutory reasons.

[5] 9 We can also see how this awkward statutory phrasing could be intended to accomplish what the State contends it did accomplish. Originally, the disqualification statute did not attempt to define "good cause" in any way, leaving it to Employment Security to decide on a case by case basis. LAWS OF 1937, ch. 162, § 5. Then, for a time, the disqualification statute effectively created two categories of good cause: good cause per se and good cause arising out of compelling personal reasons. LAWS OF 1977, 1 st Ex.Sess., ch. 33, § 4 (creating subsections 2-4 of the statute) (codified as former RCW 50.20.050 (1977)).[FN5] But this 1977 statute certainly did not create the Department's power to find good cause; instead, it merely limited its preexisting discretion to determine it existed. Former RCW 50.20.050(3) (1977); *see generally Ayers v. Dep't of Employment Sec.*, 85 Wash.2d 550, 553, 536 P.2d 610 (1975); *In re Bale*, 63 Wash.2d 83, 385 P.2d 545 (1963). The 2003 amendments amended language that had served various purposes over the years, rather than use new language to serve a new purpose. Viewed historically, and given how easy it would have been for the legislature to say "good cause means," we are persuaded the legislature did not intend to create an exclusive list of good cause reasons to voluntarily quit.

FN5. That former provision read: In determining whether an individual has left work voluntarily without good cause, the commissioner shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, the individual's ability to perform the work, and such other work connected factors as the commissioner may deem pertinent, including state and national emergencies. Good cause shall not be established for voluntarily leaving work because of its distance from an individual's residence where the distance was known to the individual at the time he or she accepted the employment, nor because of any other significant work factor which was generally known and present at the time he or she accepted employment unless the related circumstances have so changed as to amount to a substantial involuntary deterioration of the work factor or unless the commissioner determines that other related circumstances would work an unconscionable hardship on the individual were he or she required to continue in the employment.

Former RCW 50.20.050(3) (1977); *cf.* RCW 50.20.050(1)(c).

¶ 10 Amicus Association of Washington Business contends that the statutory list was intended to be exclusive and that exclusivity was "the finishing stroke of a multi-year public policy compromise between business and labor over the nature of the Unemployment Insurance system ... and the eligibility for unemployment benefits for persons who voluntarily leave their job[s]." Amicus Br. at 1. This may well be true. Unfortunately, we have not been presented with compelling evidence of this underlying legislative purpose by either of the parties.

¶ 11 Instead, we discern no clear intent from the **legislative history**. Illustratively, the State draws our attention to a 2003 bill report as evidence the legislature intended to eliminate the commissioner's discretion. One page reports that the bill "[n]arrows the reasons for 'good cause' quits," among other things. H.B. REP. on Second Engrossed S.B. 6097, at 1, 58th Leg., 2d Spec. Sess. (Wash.2003). That supports the State's position. But later, the bill report elaborates that:

Good cause, as specified in the Act, means leaving work: (1) to accept other work; (2) because of illness or disability, after taking ***1192** precautions to preserve employment status with the employer; (3) to relocate for the spouse's employer-initiated mandatory job transfer; and (4) to protect the claimant or immediate family member from domestic violence. *In addition, the Commissioner may determine that other work-related factors are good cause for leaving work.*

Id. at 3 (emphasis added). The final sentence supports Spain's contention that at least some compelling personal circumstances could qualify as "good cause." We do not find this, or the other on-line bill reports we reviewed, particularly helpful in resolving this issue.[FN6]

FN6. For example, the house bill report on the 2006 amendment, which reenacted the amendments to RCW 50.20.050 in the face of a constitutional subject-in-title challenge, supports the State's position. H.B. REP. on Engrossed H.B. 3278, at 2, 59th Leg. (Wash.2006) ("The 'good cause quit' section enumerates reasons for leaving work that are considered to be good cause and not disqualifying."). Contrarily, the senate bill report indicates the bill was intended to extend the reporting deadline for the Joint Legislative Task Force on Unemployment Insurance Benefit Equity. S.B. REP. on Engrossed H.B. 3278, at 2, 59th Leg. (Wash.2006). No deadline extensions

are mentioned in the enacted bill. Governor Locke's veto message also arguably supports both parties' interpretation. Veto Message on Second Engrossed S.B. 6097, 58th Leg., 2d Spec. Sess. (Wash.2003) ("I am not vetoing section 4, which establishes a list of personal and work-related reasons that an individual may quit for 'good cause' and receive UI benefits while searching for other work.").

¶ 12 Time and time again, we are compelled to return to the words of the statute itself. It declares that "(a) [a]n individual shall be *disqualified* from benefits [if] he or she has left work *voluntarily without good* cause [but] (b) ... is *not disqualified* from benefits under (a) of this subsection when" he or she has voluntarily left work for listed reasons. Former RCW 50.20.050(2) (emphasis added). There are two key terms here, "good cause," and "disqualified." It is an "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *United Parcel Serv., Inc. v. Dep't of Revenue,* 102 Wash.2d 355, 362, 687 P.2d 186 (1984) (citing *Seeber v. Pub. Disclosure Comm'n,* 96 Wash.2d 135, 139, 634 P.2d 303 (1981)). Such different language is used here. We find this outweighs the agency's interpretation and conclude that the statutory list of nondisqualifying reasons for voluntarily leaving a job does not do double duty as an exclusive list of good cause reasons to leave a job.[FN7] Accordingly, we need not reach whether the 2003 and 2006 bill titles were adequate under article II, section 19 of the Washington Constitution or whether Division One of the Court of Appeals exceeded its authority by taking a hard look at the floor history of the amendatory acts.[FN8]

FN7. We note that Division Two of the Court of Appeals found that the statutory list was exclusive based on the principle of expressio unius est exclusio alterius in *Starr v. Employment Security Department,* 130 Wash.App. 541, 123 P.3d 513 (2005). We respectfully disagree, and to the extent this opinion is inconsistent with *Starr,* it is overruled.

FN8. We thank the parties and the Washington State Legislature for their excellent briefing on *City of Fircrest v. Jensen,* 158 Wash.2d 384, 143 P.3d 776 (2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007).

STATE V. BECKLIN
163 WASH.2D 519, 182 P.3D 944
WASH., 2008. MAY 01, 2008

While the criminal stalking statutory scheme does not explicitly refer to harassment through third parties, the plain language of the definition of "course of conduct" seems to contemplate a broad range of harassing activities, which may include all types of communication, contact, or conduct that do not amount to activity protected by the constitution. *Id.* In sum, the plain language of the statute is broad enough to encompass the act of directing third parties to follow and intimidate a victim.

***948** ¶ 17 Moreover, the legislature has indicated that it intended a broad definition of the type of conduct that could ***528** constitute stalking or harassment. When it added electronic communications to the types of communications, contact, or conduct that could be considered stalking or harassment, it included the following statement of intent:

It is the intent of this act to clarify that electronic communications are included in the types of conduct and actions that can constitute the crimes of harassment and stalking. *It is not the intent of the legislature, by adoption of this act, to restrict in any way the types of conduct or actions that can constitute harassment or stalking.*

LAWS OF 1999, ch. 27, § 1 (emphasis added).[FN3] Thus both the plain language defining course of conduct and the **legislative history** suggest that the definition of conduct amounting to harassment is very broad and could include the manipulation or direction of third parties to achieve the intended emotional distress.

FN3. The term "course of conduct" was originally defined in 1987 as an amendment to the unlawful harassment statute. LAWS OF 1987, ch. 280, § 2. The final bill report on the 1987 legislation explains that law enforcement had been frustrated with its inability to make arrests in many cases because prior law made only express threats illegal. FINAL BILL REP. ON SUBSTITUTE S.B. 5142, 50th Leg., Reg. Sess. at 1 (Wash.1987). The 1987 legislation (which included the "course of conduct" definition) was intended to protect victims from a wider range of conduct. *Id.*

STATE V. CHAVEZ
163 WASH.2D 262, 180 P.3D 1250
WASH., 2008. MARCH 20, 2008

¶ 19 The state constitution divides the political powers into legislative authority, executive power, and judicial power. *State v. Moreno,* 147 Wash.2d 500, 506, 58 P.3d 265 (2002). Each branch wields only the power given, and a violation of the separation of powers occurs when the activity of one branch of government invades the province of another branch of government. *Moreno,* 147 Wash.2d at 506, 58 P.3d 265. However, the separation of powers doctrine allows for ***1255** some interplay between the branches of government. *Spokane County v. State,* 136 Wash.2d 663, 672, 966 P.2d 314 (1998).

…

***274** ¶ 23 Courts are of course legitimately the source of the common law, and when the legislature adopted the current criminal code in 1975, it made the common law supplemental to the code. RCW 9A.04.060.[FN10] Long before then, the common law provided for the definition of assault in criminal cases. *See, e.g., State v. Rush,* 14 Wash.2d 138, 127 P.2d 411 (1942). The legislature can be deemed to have acquiesced in the definition when it supplemented the criminal code with the common law in 1975. Chavez cites no authority suggesting that the Court of Appeals erred on this point; thus, we affirm the Court of Appeals and hold there is no separation of powers violation.

FN10. RCW 9A.04.060 states: "The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense."

STATE V. MINOR
162 WASH.2D 796, 174 P.3D 1162
WASH., 2008. JANUARY 17, 2008

***1166** in the conditions, requirements and instructions from the Department of Corrections, left blank the box next to the paragraph explaining the firearms prohibition, thereby suggesting that this particular condition did not apply to him. The court concluded such combined actions and inactions misled Leavitt to reasonably understand the prohibition to be limited to one year and, thus, reversed his firearms convictions. *Leavitt,* 107 Wash.App. at 363, 372, 27 P.3d 622.

***803** ¶ 14 In contrast, in *State v. Carter,* 127 Wash.App. 713, 720-21, 112 P.3d 561 (2005), the Court of Appeals, Division Three, concluded that while the predicate offense court failed to inform Carter according to statute, Carter was not "affirmatively misled." The court considered the absence of a notification provision in the order upon which the unlawful firearms possession charge was based in rejecting Carter's due process claim. *Carter,* 127 Wash.App. at 720-21, 112 P.3d 561.

¶ 15 Though the State argues that Minor has provided no evidence of being misled by the predicate offense court, by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required by former RCW 9.41.047(1) but, we

conclude, affirmatively represented to Minor that those paragraphs did not apply to him. Had the order omitted any language regarding the firearms prohibition, as in *Carter,* the State's argument would be more persuasive.

¶ 16 The **legislative history** behind the notice requirement contained in RCW 9.41.047(1) shows that the requirement was one provision in a bill aimed at violence prevention, implying the legislature's concern with addressing the problem of violence without interfering with a citizen's right to possess and use firearms. Engrossed Second Substitute H.B. (ESSHB) 2319, 53d Leg., Reg. Sess. (Wash.1994). Indeed, in enacting this statute, the legislature balanced the concern with escalating violence, which some commentators blamed on the "ready availability of firearms," with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms. Final Bill Report on ESHB at 2.

SOTER V. COWLES PUB. CO.
162 WASH.2D 716, 174 P.3D 60
WASH., 2007. DECEMBER 27, 2007

¶ 30 In 1970, in response to lower courts' inconsistent application of *Hickman's* work product rule, the United States Supreme Court adopted Federal Rule of Civil Procedure (Fed.R.Civ.P.) 26(b)(3), which codified and clarified the *Hickman* rule. Lewis H. Orland, *Observations on the Work Product Rule,* 29 Gonz. L.Rev. 281, 282 (1994). The federal rule provides in relevant part:

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials***71** in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed.R.Civ.P. 26(b)(3). The 1970 advisory committee notes accompanying Fed.R.Civ.P. 26(b)(3) explained a " 'basic standard,' " under which ordinary work product may be revealed to opposing counsel: the party seeking access to the documents must make a special showing of substantial need and a showing that he or she cannot elsewhere obtain the substantial equivalent of the materials without undue hardship. Orland, *supra,* at 282. Distinguished from the basic standard, is the "'Treatment of Lawyers; Special ***736** Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.' " *Id.* Orland explained:
The Notes recognize that the text of 26(b)(3) is intended to protect the lawyer's "mental impressions, conclusions, opinions, or legal theories," but in the midst of the discussion, the Notes interject this statement: " *The* Hickman *opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection or oral interviews.*"

Orland, *supra,* at 282-83 (quoting Fed.R.Civ.P. 26(b)(3) Notes of Advisory Comm. on 1970 amends. (emphasis added)). Thus, the 1970 notes accompanying the federal rule suggest that notes and memoranda prepared to memorialize an attorney's interview of a witness should be treated as materials that reveal the attorney's mental impressions, conclusions, opinions, and legal theories. *See* Orland, *supra,* at 282-83. [discusses US Sp court case that used Advisory Comm Notes re Fed Rules of Civ Prod]

…

[11] ***739** ¶ 34 Turning to Washington, the language of our CR 26(b)(4) is nearly identical to Fed.R.Civ.P. 26(b)(3).[FN8] … Under CR 26(b)(1), privileged materials are not otherwise discoverable, and CR 26(b)(4), like the federal rule, provides that, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of *an attorney or*

other representative of a party concerning the litigation." [FN9] (Emphasis added.) *****73*** Thus, privileged information and a legal team's mental impressions, conclusions, opinions, or theories are almost always exempt from discovery, regardless of the level of need. CR 26(b)(1), (4). Where a state rule is identical to its federal counterpart, analyses of the federal rule provides persuasive guidance as to the application of our comparable state rule. *E.g., Beal v. City of Seattle,* 134 Wash.2d 769, 777, 954 P.2d 237 (1998).

FN8. The only difference is that Fed.R.Civ.P. 26(b)(3) refers to "party," while Washington's CR 26(b)(4) uses the pronoun "he."

FN9. *The Spokesman-Review* and the dissent argue that CR 26(b)(4) should not apply where the notes were created by the legal team's investigator, rather than an attorney. By its plain language, CR 26(b) applies equally to the impressions, conclusions, opinions of other representatives of a party. Prescott was a member of the legal team and he labored with the benefit of detailed discussions regarding the factual and legal strategies that the attorneys intended to pursue. CP at 536-37. The United States Supreme Court has acknowledged that under the nearly identical federal rule, the work product doctrine protects "material[s] prepared by agents for the attorney as well as those prepared by the attorney himself." *United States v. Nobles,* 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Therefore, we conclude that Prescott's handwritten notes should be treated no differently from the attorneys'.

****740*** ¶ 35 Like the federal rule, the text of our rule does not conclusively establish whether an attorney's or a member of the legal team's notes from oral interviews constitute opinion work product that is almost always exempt from discovery. As discussed above, at least one Washington commentator, however, has studied this issue with regard to the federal rule. Orland, *supra,* at 283-84. Based on the advisory committee notes accompanying the federal rule, the analyses of other prominent commentators, and an analysis of the underlying rationale for the United States Supreme Court's holdings in *Hickman* and *Upjohn,* Orland proposed a comprehensive articulation of the work product rule. Orland, *supra,* at 294, 300-01. He concluded that the mental impressions of an attorney or other representative of a party *and* notes or memoranda prepared by the lawyer from oral communications should be absolutely protected unless the lawyer's mental impressions are at issue. *Id.*

…

¶ 58 The plain language of RCW 42.56.540 allows " *an agency or* its representative *or* a person who is named in the record *or* to whom the record specifically pertains" to file a motion or affidavit asking the superior court to enjoin disclosure of a public record. (Emphasis added.) Therefore, it is clear that either agencies or persons named in the record may seek a determination from the superior court as to whether an exemption applies, with the remedy being an injunction.

¶ 59 But even if we were to find the language ambiguous, the **legislative history** supports the school district's reading. Prior to 1992, former RCW 42.17.330 allowed a superior court to enjoin the examination of a public record upon motion or affidavit, but the statute did not specify who could seek such relief. *See* Laws of 1992, ch. 139, § 7. Then in 1992, the following amendment to the first sentence of former RCW 42.17.330 was proposed:

The examination of any specific public record may be enjoined if, upon motion and affidavit *by a person, other than an agency or its representative, who is named in the record or to whom the record specifically pertains,* the superior court ... finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.

SUBSTITUTE H.B. 2876, 52d Leg., Reg. Sess., § 7 (Wash.1992) (emphasis added); *see also* ENGROSSED SUBSTITUTE H.B. 2876, 52d Leg., Reg. Sess., § 7 (Wash.1992). Then, pursuant to a recommendation from the Senate Committee on Governmental Operations, the senate amended the first sentence of section 7:

****753*** The examination of any specific public record may be enjoined if, upon motion and affidavit *by an agency or its representative or a person who is named in the record or to whom the*

record specifically pertains, the superior court ... finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

***80** 1 SENATE JOURNAL, 52d Leg., Reg. Sess., at 1146 (Wash.1992). The house then concurred with the senate's amendments and the bill passed as amended. 2 HOUSE JOURNAL, 52d Leg., Reg. Sess., at 2181-83 (Wash.1992). The senate bill report summarized this amendment and concluded its effect was "[t]he right of agencies to request judicial review of disputed requests for disclosure is restored." S.B. REP. ON ENGROSSED SUBSTITUTE H.B. 2876, at 6, 52d Leg., Reg. Sess. (Wash 1992). Thus, the **legislative history** shows that the legislature specifically rejected a provision that would have barred agencies from seeking a judicial determination as to whether a document is exempt from public disclosure.[FN16] In addition, the attorney general's model rules on public disclosure explain that agencies can seek injunctive relief. WAC 44-14-08004(5)(c).[FN17]

FN16. *The Spokesman-Review* offers several policy arguments as to why it believes agencies should not be permitted to initiate review by a superior court. *E.g.*, Pet. for Review at 9-10. For example, *The Spokesman-Review* asserts that agencies will be encouraged to haul records requesters, who are unable to afford to defend themselves, into court. However, a public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency's action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public record. CR 41(a). Withdrawing the record request is not significantly different from deciding to no longer pursue access to the record. Thus, we perceive no chilling effect on record requesters. And the Court of Appeals noted, if a record requester chooses to move forward and prevails, he or she would recover all costs and reasonable attorney fees. RCW 42.56.550(4). More importantly, these are arguments more properly presented to the legislature, which is the entity charged with balancing these policy decisions. We cannot ignore the plain language or the **legislative history** of RCW 42.56.540.

FN17. *The Spokesman-Review* relies in part on *City of Burlington v. Boney Publishers, Inc.*, 166 N.C.App. 186, 600 S.E.2d 872 (2004). But the plain language of the North Carolina statute at issue in that case allows only persons denied access to a public record to seek a court order compelling disclosure. *Id.* At 876 (quoting N.C. Gen.Stat. § 132-9(a) (2003)).

***754** ¶ 60 *The Spokesman-Review* argues that RCW 42.56.540's reference to agencies does not include the agency denying the record, but instead refers only to *other* agencies that would be impacted by disclosure. *E.g.*, Answer to Amici at 5-6. In other words, *The Spokesman-Review* reads RCW 42.56.540 to allow agencies "named in the record or to whom the record specifically pertains" to seek judicial review, and *The Spokesman-Review* limits this category to those agencies collaterally impacted, but not denying the record themselves. Yet the attorney general's model rules do not coincide with this reading, instead declaring that "[a]n action under this statute can be initiated by *the* agency, a person named in the disputed record, or a person to whom the record 'specifically pertains.' " WAC 44-14-08004(5)(c) (emphasis added). The attorney general's reading is consistent with the plain language of the statute and the **legislative history**, as well as the last antecedent rule: unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent, absent a comma before the qualifying phrase. *City of Spokane v. Spokane County*, 158 Wash.2d 661, 673, 146 P.3d 893 (2006). Application of the last antecedent rule to this statute means that the limiting phrase "who is named in the record or to whom the record specifically pertains" applies only to "a person," but not to "an agency or its representative." *See* RCW 42.56.540. In sum, nothing in the plain language of the statute or the **legislative history** supports limiting the term "agency" as *The Spokesman-Review* suggests. Had the legislature intended to prohibit the agency denying the record from seeking judicial review, it would have adopted the proposed provision that said so expressly. The legislature chose otherwise.

…

If an agency-initiated action were possible only when the agency claimed an exemption under RCW 42.56.540, but pursuant to *PAWS*, an independent exemption does not exist under RCW 42.56.540, then agencies would *never* be able to initiate an action, a result clearly contrary to the

plain language and the **legislative history** of RCW 42.56.540. We acknowledge the plain language and conclude that an agency can initiate court action pursuant to RCW 42.56.540, but to prevail, the agency must show that one of the Public Records Act's exemptions applies.[FN18]

FN18. *The Spokesman-Review* asserts that the Court of Appeals in this case treated RCW 42.56.540 as an independent exemption from disclosure, ignoring our holding in *PAWS*. A more fair characterization of the Court of Appeals opinion is that it failed to make it clear that RCW 42.56.540 "merely creates an injunctive remedy, and is not a separate substantive exemption." *PAWS*, 125 Wash.2d at 257, 884 P.2d 592. *The Spokesman-Review* is correct that to warrant an injunction preventing disclosure, a public record must fall within a specific exemption under the Public Records Act. *Id.*

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12 We interpret a court rule as though it were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent. *State v. Greenwood*, 120 Wash.2d 585, 592, 845 P.2d 971 (1993). Plain meaning is discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule. *State v. Williams*, 158 Wash.2d 904, 908, 148 P.3d 993 (2006).

¶ 13 When interpreting a court rule, this court has eschewed a literal reading of the language where such a reading fails to effectuate the intent of the rule. In ***459** *Hardesty*, 149 Wash.2d 230, 66 P.3d 621, we interpreted ****238** the language "detained in jail" in CrR 3.3(c)(2)(ii). The Court of Appeals had determined that "[t]he plain language of the definition of time elapsed in district court is not restricted to those defendants in jail on the offense charged." *State v. Hardesty*, 110 Wash.App. 702, 710, 713, 42 P.3d 450 (2002). On review, the State argued that the Court of Appeals erred in interpreting the phrase "detained in jail" in CrR 3.3(c)(2)(ii) to mean, literally, "detained in any Washington jail on any charge." *Hardesty*, 149 Wash.2d at 234, 66 P.3d 621.

¶ 14 We agreed that the phrase "detained in jail," as the Court of Appeals held, literally meant "detained in any Washington jail on any charge." However, we also reasoned that a literal reading did not comport with a logical reading of the rule or with the rule's intent. Instead, we held that " *the language and intent of CrR 3.3(c)(2)(ii) is best effectuated by reading 'detained in jail' for purposes of determining 'time elapsed in district court' as meaning detention on the current charge at the time of filing.*" *Id.* at 235-36, 66 P.3d 621 (emphasis added).

¶ 15 As in *Hardesty*, common sense and the intent underlying the rules compel us to reject a literal interpretation of former CrRLJ 3.3(g)(5). For the reasons discussed below, we agree with the defendants that the phrase "detained ... outside the county" in former CrRLJ 3.3(g)(5) means detained *by* another county or one of its political subdivisions, not simply "in" another county.

¶ 16 In interpreting CrRLJ 3.3(g)(5), as referring solely to the geographical location of the detention facility, the Court of Appeals considered the words "detained ... outside the county" in isolation. In focusing so narrowly, the court ignored the parallel phrases, "in a federal jail or prison" and "subjected to conditions of release not imposed by a court of the State of Washington." Former CrRLJ 3.3(g)(5). Reading these phrases together as a whole, it is apparent that former CrRLJ 3.3(g)(5) applies to circumstances when the defendant is under the control of a "foreign" jurisdiction. The rule recognizes that bringing to ***460** court a defendant who is under the jurisdiction of another county or state or the federal government may present unreasonable obstacles to the requesting court.

¶ 17 The jurisdictional focus of this rule is now explicit in the rule as amended in 2003. In the amendment, the court added a subheading to the rule, making it clear that the exemption applies to a " *Defendant Subject to Foreign or Federal Custody or Conditions.*" [FN3] CrRLJ 3.3(e)(6). The addition of the subheading is the only difference between the former and current rule.

FN3. In contrast to captions generated by the Washington State Code Reviser, section headings which are adopted as part of a statute may be referred to as a source of legislative intent. *Covell v. City of Seattle*, 127 Wash.2d 874, 887-88, 905 P.2d 324 (1995); *State v. Lundell*, 7 Wash.App. 779, 782 n. 1, 503 P.2d 774 (1972).

…

***463** ¶ 24 The situation changed in 2002, when the legislature amended the City and ****240** County Jails Act. The previous year, King County announced its intent not to renew contracts with the cities to house misdemeanant defendants in the county jail, due to an existing and projected shortage in jail capacity. *See* Final B. Rep. on Substitute H.B. 2541, 59th Leg., Reg. Sess., at 2 (Wash.2002). In response, the legislature adopted a statute allowing cities to contract for jail services with any city or county within the state. Laws of 2002, ch. 125, § 1; RCW 70.48.090(1) ("Contracts for jail services may be made between a county and a city, and among counties and cities."). Following the 2002 amendment, a defendant may be confined in the jail of any city or county within the state that contracts with the prosecuting city or county for jail services. RCW 70.48.220.

…

¶ 26 There is no indication that the legislature intended to alter the operation of the time-for-trial rule when it amended RCW 70.48.220. The senate and house bill reports indicate that the legislature was aware that addressing the shortage in jail capacity by allowing cities to incarcerate defendants outside the county would give rise to the new challenge of transporting defendants from regional jails to court. Testimony in opposition to the bill focused on the logistical difficulties of transporting defendants to proceedings***464** and providing adequate access to defense counsel. *See* Final B. Rep. on Substitute H.B. 2541, *supra*, at 3. The legislation requires prosecuting jurisdictions that incarcerate defendants in another county to provide adequate access to defense counsel via videoconferencing equipment. RCW 70.48.095(2). The legislature appears to have assumed that the cities would be required to take into account their responsibilities to provide adequate access to court and defense counsel in contracting for jail services outside the county.

27 Another rule of statutory construction is also important here: when interpreting a court rule we must avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. *State v. Watson*, 146 Wash.2d 947, 955, 51 P.3d 66 (2002). The absurdity of interpreting "detained ... outside the county" as referring solely to the defendant's geographical location, without regard to which court issued the warrant of commitment, becomes apparent by considering the parallel law, which authorizes the State to incarcerate felony offenders in out-of-state jail facilities.

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[1] 7 Whether the unlawful detainer notice requirement is calculated in accordance with the timing provisions of the civil rules is ****231** a matter of statutory interpretation to be reviewed de novo. *See Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wash.2d 345, 350, 111 P.3d 1173 (2005).

…

12 A court's objective in construing a statute is to determine the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of ***373** legislative intent." *Id.* at 9-10, 43 P.3d 4. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* at 9-12, 43 P.3d 4. An undefined statutory term

should be given its usual and ordinary meaning. *Burton v. Lehman,* 153 Wash.2d 416, 422-23, 103 P.3d 1230 (2005). Statutory provisions and rules should be harmonized whenever possible. *Emwright v. King County,* 96 Wash.2d 538, 543, 637 P.2d 656 (1981). If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, **legislative history**, and relevant case law for assistance in discerning legislative intent. *Cockle v. Dep't of Labor & Indus.,* 142 Wash.2d 801, 808, 16 P.3d 583 (2001).

¶ 13 The three day notice provision explicitly requires a three "day" waiting period. RCW 59.12.030(3). The statute does not specify whether "day" means a business day, court day, or calendar day. There are no time calculation provisions in chapter 59.12 RCW. The ordinary meaning of "day" is a 24 hour period beginning at midnight. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 578 (2002) (defining "day" as a "CIVIL DAY [] *among most modern nations:* the mean solar day of 24 hours beginning at mean midnight"); *id.* at 316 (defining "calendar day" as "a civil day: the time from midnight to midnight"); *see also* 74 AM.JUR.2D *Time* § 10 (2001) ("[a] 'day' generally means a calendar day"). Using the ordinary meaning of day, weekends and holidays would be included in the calculation of the three day notice period.

¶ 14 Ellsworth argues that RCW 59.12.180 explicitly adopts the civil rules time calculation provisions.[FN2] The civil rules apply to the *proceedings* mentioned in ****374*** chapter 59.12 RCW. RCW 59.12.180. A "proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." BLACK'S LAW DICTIONARY 1241 (8th ed.2004). The three day notice is an element of the definition of unlawful detainer. *See* RCW 59.12.030(3). It is not a proceeding and, as such, the civil rules are not explicitly adopted by chapter 59.12 RCW with respect to RCW 59.12.030(3).

FN2. RCW 59.12.180 provides: Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this chapter, shall be held to apply to the proceedings mentioned in this chapter.

7 The goal of statutory interpretation is to discern and implement the legislature's intent. *J.P.*, 149 Wash.2d at 450, 69 P.3d 318. In interpreting a statute, this court looks first to its plain language. *Id.* If the plain language of the statute is unambiguous, then this court's inquiry is at an end. *Id.* The statute is to be enforced in accordance with its plain meaning. *Id.*

¶ 8 Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808, 16 P.3d 583 (2001). This court may attempt to discern the legislative intent underlying an ambiguous statute from ****111*** its **legislative history**. *Id.* Likewise, this court may look to authoritative agency interpretations of disputed statutory language. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 593, 90 P.3d 659 (2004).

…

1. The plain language of the SRA authorizes trial courts to impose crime-related prohibitions, including no-contact orders, under the independent authority of RCW 9.94A.505(8)

…

13 The plain language of RCW 9.94A.505(8), read together with the definitional provision RCW 9.94A.030(13), further supports the conclusion that trial courts possess authority to impose crime-related prohibitions under RCW 9.94A.505(8), independent of any other SRA provision. As noted above, RCW 9.94A.505(8) provides: "As a part of *any sentence*, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8) (emphasis added). RCW 9.94A.030(13) defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...." RCW 9.94A.030(13). Together, these provisions plainly authorize trial courts, as part of any sentence, to impose orders prohibiting conduct directly relating to the circumstances of an offender's crime. Such orders reasonably include no-contact orders regarding witnesses like the order at issue in this case.

¶ 14 Several Court of Appeals decisions support the conclusion that RCW 9.94A.505(8) constitutes an independent grant of authority to impose crime-related prohibitions. *See State v. Acrey*, 135 Wash.App. 938, 146 P.3d 1215 (2006); *State v. Winston*, 135 Wash.App. 400, 144 P.3d 363 (2006); *State v. Warren*, 134 Wash.App. 44, 138 P.3d 1081 (2006). In *Acrey*, the Court of Appeals engaged in an express analysis of trial court authority under RCW 9.94A.505(8).

*****205*** ¶ 15 Focusing on the plain language of the statute, the *Acrey* court asserted that there is "no ambiguity in the phrase 'as part of any sentence.' 'Any' means 'one, no matter what one: every ... without restriction or limitation in ****114*** choice.' " 135 Wash.App. at 943, 146 P.3d 1215 (alteration in original) (quoting Webster's Third New International Dictionary 97 (1993)). The court then asserted that the definition of "RCW 9.94A.030(13) controls imposition of sentence conditions." *Id.* Quoting RCW 9.94A.030(13) in full, the court concluded that "[c]rime-related conduct may be prohibited in any sentence, so long as the prohibition is directly related to the crime." *Id.* at 944, 146 P.3d 1215.

…

¶ 16 In accordance with the structure and plain language of the SRA, as well as the Court of Appeals decision in *Acrey*, we conclude that RCW 9.94A.505(8) constitutes an independent source of trial court authority to impose no-contact orders like the one at issue in this case. Our conclusion is confirmed by the SRA's **legislative history**, as well as its interpretation by the Sentencing Guidelines Commission (SGC).

115** *2.* **Legislative history** *and agency interpretation confirm that RCW 9.94A.505(8) independently authorizes the imposition of crime-related prohibitions, including no-contact or**116 The legislature does not intend chapter 28, Laws of 2000 to make, and no provision of chapter 28, Laws of 2000 shall be construed as making, a substantive change in the sentencing reform act.

RCW 9.94A.015; *see also* S.B. Rep. on S.B. 6223, 56th Leg., Reg. Sess., at 1 (Wash.2000) (describing bill as, "[r]eorganizing sentencing provisions"); H.B. Rep. on S.B. 6223, 56th Leg., Reg. Sess., at 1 (Wash.2000) (summarizing bill as follows: "Reorganizes the sentencing provisions in statute for clarity. Makes no changes to current law.").*ders, as part of defendants' sentences.*…