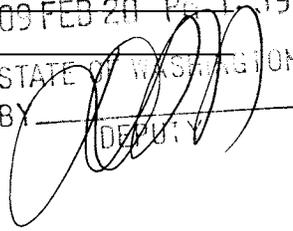


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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY ALAN DEAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable D. Gary Steiner

No. 06-1-05114-1

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**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly order restitution for amounts paid out under the crime victim's compensation act as mandated by RCW 9.94A.753(7) after finding proximate cause and easily ascertainable damages? ..... 1

B. STATEMENT OF THE CASE. .... 1

C. ARGUMENT.....5

1. THE TRIAL COURT PROPERLY RULED DEFENDANT HAD TO REIMBURSE THE CRIME VICTIM'S COMPENSATION FUND AS MANDATED BY RCW 9.94A.753(7) AFTER FINDING PROXIMATE CAUSE AND EASILY ASCERTAINABLE DAMAGES. ....5

D. CONCLUSION. .... 11

## Table of Authorities

### State Cases

<i>Bennett v. Dept. of Labor and Industries</i> , 95 Wn.2d 531, 627 P.2d 104 (1981) .....	9
<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 752, 888 P.2d 147 (1995) .....	5
<i>Dept of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 11, 43 P.3d 4 (2002) .....	6
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 87, 942 P.2d 351 (1997) .....	5
<i>Eyer v. Dept. of Labor and Industries</i> , 1 Wn.2d 553, 96 P.2d 1115 (1939) .....	9
<i>In re Post Sentencing Review of Charles</i> , 135 Wn.2d 239, 245, 249, 955 P.2d 798 (1998) .....	6
<i>State v. Cunningham</i> , 96 Wn.2d 31, 34, 633 P.2d 886 (1981) .....	5
<i>State v. Hahn</i> , 100 Wn. App. 391, 398, n. 4, 996 P.2d 1125 (2000) .....	7
<i>State v. Hennings</i> , 129 Wn.2d 512, 519, 919 P.2d 580 (1996) .....	5
<i>State v. Horner</i> , 53 Wn. App. 806, 807, 770 P.2d 1056 (1989) .....	5
<i>State v. J.M.</i> , 144 Wn.2d 472, 480, 28 P.3d 720 (2001) .....	5
<i>State v. Smith</i> , 33 Wn. App. 791, 798-99, 658 P.2d 1250, <i>review denied</i> , 99 Wn.2d 1013 (1983) .....	5

### Statutes

RCW 51.32.100 .....	9
RCW 7.68 .....	7, 8
RCW 7.68.020 .....	7

RCW 7.68.020(1) .....	7
RCW 7.68.030 .....	7
RCW 7.68.120 .....	7, 8
RCW 7.68.120(1) .....	8
RCW 7.68.300 .....	7
RCW 9.94A.753 .....	6
RCW 9.94A.753(3).....	6
RCW 9.94A.753(5).....	6
RCW 9.94A.753(7).....	1, 5, 7, 8, 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly order restitution for amounts paid out under the crime victim's compensation act as mandated by RCW 9.94A.753(7) after finding proximate cause and easily ascertainable damages?

B. STATEMENT OF THE CASE.

On October 30, 2006, Pierce County Prosecuting Attorney's Office charged Jeffrey Dean, hereinafter "defendant," with one count of first degree robbery. CP 1. On January 16, 2007, defendant entered a plea of guilty to one count second degree robbery pursuant to an amended information. CP 2; CP 3-10. CP 9.

On January 16, 2007, the Honorable Stephanie Arend sentenced defendant to 43 months confinement and 18 to 36 months of community custody, the low end of the standard sentence range. CP 13-25.

On May 17, 2007, the Honorable Katherine Stolz ordered defendant to pay \$1,537.27 in restitution jointly and severally with co-defendant. CP 30-31. The restitution was divided as follows: \$1,284 to Tanya Bates and \$252.99 to the Crime Victim's Compensation, hereinafter "CVC." *Id.* The order noted that the amount was subject to change as the "victim is still treating." *Id.* On April 18, 2008, a restitution information was filed, ordering defendant to pay \$11, 561.72 total

restitution with \$1,284 to be paid to Tanya Bates for “loss, property” and \$10, 277.72 to be paid to CVC for “loss, medical, etc.” ATT 4-18-08<sup>1</sup>. On May 21, 2008, an amended order setting restitution and disbursement was filed and a restitution hearing was held before the Honorable D. Gary Steiner. CP 54-55; RP 1.

The victim, Tonya Bates, testified at the restitution hearing. RP 15. According to Ms. Bates, on October 27, 2006, she was putting her daughter into her car when she was hit from behind with a shopping cart. RP 18. Ms. Bates fell to the ground after the man hit her, scraping her elbow and hip. *Id.* After being hit from behind she realized the man who hit her had grabbed her purse and taken off. RP 18. Ms. Bates ran after the man. *Id.* Approximately two and a half to three weeks prior to the robbery, Ms. Bates had sprained her right ankle and was put in a walking boot. RP 17, 19.

The evening of the robbery, Ms. Bates’ right ankle was throbbing and was swollen. RP 19. Following the robbery, Ms. Bates had to miss a couple days of work. *Id.* A week and a half to two weeks after the robbery, Ms. Bates went to the doctor. RP 19. Her doctor told her to leave the walking boot on another two to three weeks. RP 19. Ms. Bates’ ankle continued to get worse and a lump formed on the side of her ankle. RP 20. Ms. Bates decided to go back to the doctor after her ankle starting

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<sup>1</sup> Three restitution informations were filed as attachments and sent under separate cover 3-17-08, 4-18-08, and 5-7-08. The restitution information will be referred to as “ATT.”

giving out on her. *Id.* An MRI revealed torn ligaments and a cyst had formed in Ms. Bates' ankle. *Id.* Prior to the robbery, Ms. Bates was unaware of the torn ligaments or the cyst and she had not been diagnosed with torn ligaments or a cyst. RP 20-21.

In June, 2007, Ms. Bates had surgery to remove the torn ligaments and the cyst. RP 21. Following the surgery, Ms. Bates had to miss four and a half months of work. RP 21. Ms. Bates had been working following the first ankle injury, prior to the robbery. RP 17-18. Post surgery, Ms. Bates started having hip, back, and shoulder problems due to overcompensating on one side of her body and being on crutches for an extended amount of time. RP 22. Ms. Bates had to go to physical therapy three times a week for her ankle, in addition to getting massage therapy for her back, and cortisone shots for her shoulder. RP 22, 31, 38. On July 19, 2007, Ms. Bates went to the hospital emergency room for "sacroiliac pain." RP 32. Ms. Bates was diagnosed with musculoskeletal back pain. RP 33.

Ms. Denise Anderson, a claims manager for the CVC, testified at the restitution hearing. RP 39. Ms. Anderson has been a claims manager for 27 years and handles approximately two-thirds of restitution cases out of Pierce County. RP 39-40. In the instant case, Ms. Anderson testified that her department is seeking \$10,277.72 in restitution for time loss benefits, loss of earning power, and medical expenses. RP 40-42. Ms. Anderson testified that CVC determines whether to pay a claim based on

the police report and medical records. RP 43. For the present case, Ms. Anderson said that the CVC did not obtain prior medical records for Ms. Bates' pre-existing injury because the doctor who performed Ms. Bates' surgery said that Ms. Bates' injury was related to the robbery that occurred on October 27, 2006. RP 44. Ms. Anderson stated if the doctor says the injury is related to the crime, "we believe them." RP 43. Ms. Anderson testified that prior medical records are only obtained if there is a question of pre-existing injury, however, in this case, the prior existing injury was not an issue. RP 44, 46.

The court found there was sufficient scrutiny and proximate cause in this case. RP 55. "I think it is adequate under a CVC in a continuous sequence, unbroken by any intervening cause, produces an exacerbation or injury without which the result would not have occurred." RP 55. After finding "sufficient, reasonable, and easily ascertainable damages," the court imposed \$11,561.72 in joint and several restitution. RP 55-56; CP 54-55.

On June 18, 2008, defendant filed a timely notice of appeal to the amended order of restitution. CP 56-58.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY RULED DEFENDANT HAD TO REIMBURSE THE CRIME VICTIM'S COMPENSATION FUND AS MANDATED BY RCW 9.94A.753(7) AFTER FINDING PROXIMATE CAUSE AND EASILY ASCERTAINABLE DAMAGES.

An appellate court's review of a trial court's restitution order is limited to whether the court abused its discretion. *State v. Horner*, 53 Wn. App. 806, 807, 770 P.2d 1056 (1989). An abuse of discretion occurs when the order is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Smith*, 33 Wn. App. 791, 798-99, 658 P.2d 1250, (quoting *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)), *review denied*, 99 Wn.2d 1013 (1983).

A court's authority to order restitution is purely statutory. *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). Statutes authorizing restitution are to be broadly construed in order to carry out the Legislature's intent of providing restitution. *Id.* If, however, the language of a statute is plain and clear, the court must apply the language as written. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001); *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995). Interpretation of a statute is a question of law reviewed de novo. *In re Post Sentencing Review of*

*Charles*, 135 Wn.2d 239, 245, 249, 955 P.2d 798 (1998). Plain meaning is “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dept of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Restitution is governed by RCW 9.94A.753. *See* Appendix A for text of statute. In subsection (3) of this statute the legislature directed that “restitution ...shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury,” but that it “shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses.” RCW 9.94A.753(3). The Legislature also provided that if there were “extraordinary circumstances ... which make restitution inappropriate in the court’s judgment” that the court could refrain from imposing restitution as long as “the court sets forth such circumstances in the record.” RCW 9.94A.753(5).

However, when the victim is entitled to benefits under the Crime Victim’s Compensation Act (CVCA), the Legislature imposed a different standard regarding restitution stating “[r]egardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime

victims' compensation act, chapter 7.68 RCW (CVCA).” RCW 9.94A.753(7)(emphasis added). One Washington court has noted that this subsection of the statute is applicable “where the victim is entitled to benefits under the CVCA.” See *State v. Hahn*, 100 Wn. App. 391, 398, n. 4, 996 P.2d 1125 (2000). The language of this subsection states that restitution shall be ordered “regardless of the provisions of subsections (1) through (6) of this section.” This indicates that the terms of subsection (7) are controlling over the preceding six subsections.

In RCW 7.68 et seq (CVCA) the Legislature found that there was a compelling state interest in compensating the victims of crime and preventing criminals from profiting from their crimes. RCW 7.68.300. As such it enacted the CVCA to establish a program to benefit “innocent victims of criminal acts” under the terms set forth in the chapter. RCW 7.68.030. The CVCA defines a “victim” primarily as “a person who suffers bodily injury or death as a proximate result of a criminal act of another person.” RCW 7.68.020. This means that terms of the act limit the payment of benefits to situations where the proximate cause of bodily injury or death has been established as being the criminal act of another person. The Legislature provided that “[a]ny person who has committed a criminal act which resulted in injury compensated under this chapter may be required to make reimbursement to the department [of labor and industries] ....” RCW 7.68.020(1) and 7.68.120. The CVCA goes on to

state that “[a]ny payment of benefits to or on behalf of a victim under this chapter creates a debt due and owing to the department by any person found to have committed the criminal act in either a civil or criminal court proceeding in which he or she is a party.” RCW 7.68.120(1).

Here, it is undisputed that the CVC paid benefits to the victim. Payment of benefits to the victim “creates a debt due and owing to the department [of Labor and Industries] by any person found to have committed the criminal act in either a civil or criminal court proceeding in which he or she is a party.” RCW 7.68.120. Because sections 1 through 6 of the general restitution statute do not apply to the CVC, the CVC has its own benefits statute defining conditions, limitations, and duties in awarding compensation to crime victims. RCW 7.68. And, as noted above, the plain language of that statute mandates that trial courts order restitution “in all cases where the victim is entitled to benefits under the Crime Victim’s Compensation Act, chapter 7.68 RCW.” RCW 9.94A.753(7). Thus, the court properly ordered restitution to the fund as required by the statute.

While appellant asserts the CVC failed to consider the impact of Ms. Bates’ previous injury and points to the worker’s compensation preexisting disease statute governing CVC, the assertion is without merit. The pre-existing disease statute mandates that:

If it is determined that an injured worker had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, it

shall be ascertained, as nearly as possible, the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have caused were it not for the disease, and compensation shall be awarded only therefore.

RCW 51.32.100.

The doctor who operated on Ms. Bates' ankle determined that the injury was related to the crime. RP 44. In support of this, Washington's Supreme Court has held that "if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting weakness." *Bennett v. Dept. of Labor and Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981). In this case, the crime occurring on October 27, 2006, was the proximate cause of the injury for which compensation is sought, thus Ms. Bates' previous injury is immaterial.

In addition, once it is determined whether an existing physical condition of a claimant is attributable to a pre-existing disease or condition, the finding of fact will not be disturbed when based on "testimony on skilled and professional men, when reasonably supported." *Eyer v. Dept. of Labor and Industries*, 1 Wn.2d 553, 96 P.2d 1115 (1939). Consistent with the doctor's finding, the CVC determined that Ms. Bates' injury was not attributable to her pre-existing injury based on Ms. Bates' doctor's statement and Ms. Bates' medical records. RP 45.

Therefore, there was no need to deduct for the effect of Ms. Bates' prior injury as the court found there was proximate cause in this case. RP 55.

There is ample evidence from which the court relied in determining that defendant's actions were the proximate cause of Ms. Bates' injury. First, Ms. Bates continued to work subsequent to her original ankle injury. RP 17-18. There is no evidence that Ms. Bates was in any pain during that time or that Ms. Bates' first ankle injury was not healing. Second, there was no medical determination that Ms. Bates had a cyst or a torn ligament prior to the mugging. RP 20-21. Rather, the cyst, torn ligament, and severe pain developed after the mugging. RP 20. Third, the doctor noted that the injury to Ms. Bates' ankle was a result of the crime. RP 44. Fourth, a CVC claims manager, with 27 years of experience, testified that she only obtains prior medical records if a pre-existing injury is an issue. RP 44-45. In this case, Ms. Anderson determined that a pre-existing injury was not an issue based on the doctor's statement and medical records. RP 44-45. Finally, the court was privy to the medical records submitted into evidence during the restitution hearing. RP 14. Thus, the court had ample evidence in determining the appropriate award of restitution based on Ms. Bates' testimony, Ms. Anderson's testimony, and extensive medical records.

Because RCW 9.94A.753(7) mandates that a trial court order restitution in all cases where the victim is entitled to benefits under the CVC and because it was determined Ms. Bates' injury was not attributable

to her prior condition, the issue is moot. The trial court did not abuse its discretion in awarding restitution.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the amended restitution order.

DATED: FEBRUARY 19, 2009.

GERALD A. HORNE  
Pierce County  
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*Kathleen Proctor*  
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\_\_\_\_\_  
Alexis Taylor  
Appellate Intern

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*2/19/09* *Alexis Taylor*  
Date Signature

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# **APPENDIX “A”**

*RCW 9.94A753*

## § 9.94A.753. Restitution -- Application dates

This section applies to offenses committed after July 1, 1985.

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the crime of rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the

crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, an offender who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

**HISTORY:** 2003 c 379 § 16. Prior: 2000 c 226 § 3; 2000 c 28 § 33; prior: 1997 c 121 § 4; 1997 c 52 § 2; prior: 1995 c 231 § 2; 1995 c 33 § 4; 1994 c 271 § 602; 1989 c 252 § 6; 1987 c 281 § 4; 1985 c 443 § 10. Formerly RCW 9.94A.142.

**NOTES:**

SEVERABILITY -- EFFECTIVE DATES -- 2003 C 379: See notes following RCW 9.94A.728.

INTENT -- PURPOSE -- 2003 C 379 §§ 13-27: See note following RCW 9.94A.760.

FINDING -- INTENT -- SEVERABILITY -- 2000 C 226: See notes following RCW 9.94A.505.

TECHNICAL CORRECTION BILL -- 2000 C 28: See note following RCW 9.94A.015.

RETROACTIVE APPLICATION -- 1995 C 231 §§ 1 AND 2: See note following RCW 9.94A.750.

PURPOSE -- SEVERABILITY -- 1994 C 271: See notes following RCW 9A.28.020.

PURPOSE -- PROSPECTIVE APPLICATION -- EFFECTIVE DATES -- SEVERABILITY -- 1989 C 252: See notes following RCW 9.94A.030.

EFFECTIVE DATE -- 1987 C 281: See note following RCW 7.68.020.

SEVERABILITY -- EFFECTIVE DATE -- 1985 C 443: See notes following RCW 7.69.010.

EDITOR'S NOTES.

2001 c 10 § 6, effective July 1, 2001, recodified RCW 9.94A.142 to RCW 9.94A.753.

EFFECT OF AMENDMENTS.

2003 c 379 § 16, effective October 1, 2003, in subsection (4), deleted "for ten years following the entry of the judgment and sentence or ten years following the offender's release from total confinement" from the end of the sixth sentence, deleted the former last sentence, which read:

"The department is not responsible for supervision of the offender during any subsequent period of time the offender remains under the court's jurisdiction.";

and added the present last three sentences.

2000 c 28 § 33, effective July 1, 2001, reenacted this section; added the first sentence; redesignated (1) as (1), (2), (3), and (4) and redesignated remaining paragraphs accordingly; deleted former (7); substituted "subsection (7)" for "subsection (4)" in (1); substituted "subsection (6)" for "subsection (3)" in (3); inserted "sentence" following "maximum" and deleted "of corrections" following "department" in (4); substituted "(1) through (6)" for "(1), (2), and (3)" in (7); substituted "subsection (6)" for "subsection (3)" in (9); and substituted "offender" for "defendant" throughout.

2000 c 226 § 3, effective June 8, 2000, in (1), inserted "for an offense committed prior to July 1, 2000" and substituted "ends later" for "is longer" in the eleventh sentence, inserted the thirteenth sentence, and rewrote the fourteenth and the last sentences; and in (3), substituted "for the period provided in RCW 4.16.020" for "but not longer than" in the fifth sentence.