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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY Cm
DEPUTY

No. 38103-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant,

v.

YAUNNA L. STATELY,
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY

BRIEF OF APPELLANT

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T A B L E

Table of Contents

STATEMENT OF THE CASE 1
 Procedural History 1
 Factual Background 1

ASSIGNMENTS OF ERROR 2

 (1) The trial court committed error when it determined
 that the defendant was eligible to be treated as a
 First Time Offender. 2

 (2) The trial court committed error when it imposed a
 condition of sentence not authorized by law. 2

 (3) The trial court’s Findings of Fact do not support an
 exceptional sentence below the standard range. 2

 (4) The trial court’s Conclusions of Law are not
 supported by facts in the record. 2

ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

 (1) May a defendant convicted of Vehicular Homicide by
 Disregard be sentenced as a First Time Offender? 2

 (2) May the court impose a condition of sentence that the
 defendant perform 4000 hours of community service? ... 2

 (3) Do the Findings of Fact entered by the trial court
 support imposition of a sentence below the standard
 sentence range? 2

 (4) Are the Conclusions of Law supported by facts in the
 record? 2

ARGUMENT 3

 (1) May a defendant convicted of Vehicular Homicide by
 Disregard be sentenced as a First Time Offender?
 (Assignment of Error No. 1) 3

(2)	May the court impose a condition of sentence that the defendant perform 4000 hours of community service? (Assignment of Error No. 2)	6
(3)	Do the Findings of Fact entered by the trial court support imposition of a sentence below the standard sentence range? (Assignment of Error No. 3)	7
	Lack of Criminal History. (Finding of Fact 5)	7
	Defendant’s Remorse. (Finding of Fact 7)	8
	Wishes of Victim’s Family. (Finding of Fact 6)	8
(4)	Are the Conclusions of Law supported by facts in the record? (Assignment of Error No. 4)	9
	Alleged Impairment of Mental Capacity. (Conclusion of Law 2)	9
	CONCLUSION	11

TABLE OF AUTHORITIES

Table of Cases

<u>State v. Bernhard</u> , 108 Wn.2d 527, 540-41, 741 P.2d 1 (1987)	6
<u>State v. Estrella</u> , 115 Wn.2d 350, 353-55, 798 P.2d 289 (1990)	7
<u>State v. Fowler</u> , 145 Wn.2d, 400, 404, 38 P.3d 355 (2002)	8
<u>State v. Freitag</u> 127 Wn.2d 141, 896 P.2d 1254 (1995)	8
<u>State v. Ha’ mim</u> , 132 Wn.2d 834, 845, 940 P.2d 633 (1997)	5

<u>State v. Ha'mim</u> , 82 Wn.App. 139, 916 P.2d 971, aff'd 132, Wn.App. 834, 940 P.2d 633 (1996)	10
<u>State v. Law</u> , 154 Wn.2d 85, 93-94, 110 P.3d 717 (2005)	6, 7, 8
<u>State v. McClarney</u> , 107 Wn.App. 256, 258, 26 P.3d 1013 (2001)	8
<u>State v. Rogers</u> , 112 Wn.2d 180 183, 770 P.2d 180 (1989)	8, 10
<u>State v. Sanchez</u> , 69 Wn.App. 255, 848 P.2d 208 (1993)	10
<u>State v. Schloredt</u> , 97 Wn.App. 789, 987 P.2d 647 (1994)	10

STATUTES

RCW 46.61.520	4
RCW 9.94A.030(5)	5
RCW 9.94A.030(50)	6
RCW 9.94A.505	6
RCW 46.61.520	5, 6
RCW 46.61.520(1)(a)	1
RCW 46.61.520(1)(c)	1
RCW 9.94A.030	3-5
RCW 9.94A.030(29)	4
RCW 9.94A.030(50)	3, 4

RCW 9.94A.030(50)(xiv)	4
RCW 9.94A.110(50)(a)(i)	4
RCW 9.94A.505(1)	6
RCW 9.94A.650	3, 4
RCW 9.94A.650(1)(a)	3
RCW 9.94A.680(2)	6

OTHER

Chapter 456, Section 1, Laws of 1987	5
Initiative 593	4
Laws of 1983, Chapter 163, Section 1(17)	3
Laws of 1987, Chapter 456, Section 1	3, 4
Laws of 1994, Chapter 1, § 3(21)	4
Laws of 1996, Chapter 199, Section 6, 7	4
Laws of 2001, Chapter 300, Section 1	4
Laws of Washington 1986, Chapter 257, Section 17(26)	3
Sentencing Guidelines Manual, 1995, page III - 168	5
Sentencing Guidelines Manual, 2007, p. III-215	5
Sentencing Reform Act	6

STATEMENT OF THE CASE

Procedural History

On August 17, 2007, the defendant was charged by Information with Vehicular Homicide by DUI. RCW 46.61.520(1)(a) (CP 1-2). On April 14, 2008, the defendant pled guilty to an Amended Information charging Vehicular Homicide by Disregard. RCW 46.61.520(1)(c). (CP 6) The defendant was sentenced on July 28, 2008.

Over the objection of the State, the court found that Vehicular Homicide by Disregard was a non-violent offense. The defendant was sentenced as a First Time Offender. (RP 4,8) The court imposed a sentence of 30 days total confinement. The court ordered a term of 12 months community custody and imposed a condition requiring the defendant to complete 4000 hours of community service. (CP 32-39)

The court also entered Findings of Fact and Conclusions of Law regarding what it considered to be mitigating circumstances in support of a sentence below the standard sentence range, saying “why don’t we do both, just in case.” (RP 9) (CP 28-31) The Findings of Fact and Conclusions of Law are attached as Appendix 1.

Factual Background

The pertinent facts are set forth in the declaration in support of the summons on file. (CP 3-5) On July 29, 2007, the defendant was the operator of a motor vehicle. The decedent was her passenger. The

defendant drove the vehicle into a power pole. The collision injured her friend, who died from her injuries on August 3, 2007. The defendant admitted drinking. Her blood alcohol was found to be 0.17 grams per 100 milliliters within two hours of the driving. The defendant was seventeen at the time of the collision. She turned eighteen on August 7, 2007.

ASSIGNMENTS OF ERROR

- (1) The trial court committed error when it determined that the defendant was eligible to be treated as a First Time Offender.**
- (2) The trial court committed error when it imposed a condition of sentence not authorized by law.**
- (3) The trial court's Findings of Fact do not support an exceptional sentence below the standard range.**
- (4) The trial court's Conclusions of Law are not supported by facts in the record.**

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- (1) May a defendant convicted of Vehicular Homicide by Disregard be sentenced as a First Time Offender?**
- (2) May the court impose a condition of sentence that the defendant perform 4000 hours of community service?**
- (3) Do the Findings of Fact entered by the trial court support imposition of a sentence below the standard sentence range?**
- (4) Are the Conclusions of Law supported by facts in the record?**

ARGUMENT

(1) May a defendant convicted of Vehicular Homicide by Disregard be sentenced as a First Time Offender? (Assignment of Error No. 1)

A defendant who has no prior criminal history and has been convicted of a non-violent offense is eligible to be sentenced as a First Time Offender. RCW 9.94A.650. The statute expressly precludes the court from granting First time Offender status to a person convicted of a violent offense. RCW 9.94A.650(1)(a). All Class A felonies are classified as violent offenses. RCW 9.94A.030(50).

The Vehicular Homicide statute was enacted in its current form in 1983. Laws of Washington 1983, Chapter 164. At that time it was designated as a Class B felony. In 1983, Vehicular Homicide (formerly Negligent Homicide) was classified under the Sentencing Reform Act as a violent offense. Laws of 1983, Chapter 163, Section 1(17). Vehicular Assault was subsequently added to the list of violent offenses under the Sentencing Reform Act. Laws of Washington 1986, Chapter 257, Section 17(26).

In 1987, the legislature amended RCW 9.94A.030 to provide that Vehicular Assault and Vehicular Homicide were violent offenses when committed by a person driving under the influence or operating a vehicle in a reckless manner. Laws of 1987, Chapter 456, Section 1. At that time, Vehicular Homicide was a Class B felony. Vehicular Assault was a Class C felony and encompassed only driving while under the influence and

reckless driving. It was not until 2001 that the third alternative, Driving With the Disregard for the Safety of Others, was added to the Vehicular Assault statute. Laws of 2001, Chapter 300, Section 1.

Since 1987, RCW 9.94A.030 has provided that Vehicular Assault and Vehicular Homicide are violent offenses when committed by a person driving under the influence or operating a motor vehicle in a reckless manner. Laws of 1987, Chapter 456, Section 1. This language remains in the statute even today. RCW 9.94A.030(50)(xiv). This same language has also been in RCW 9.94A.030(29), defining “most serious offense”, since the enactment of Initiative 593 in 1994. Laws of 1994, Chapter 1, § 3(21).

In 1996, the legislature amended RCW 46.61.520 to make Vehicular Homicide a Class A felony. Vehicular Assault was elevated to a Class B felony. Laws of 1996, Chapter 199, Section 6, 7. The legislature, in the same bill, increased other penalties, providing for community placement, limiting good time credit, and prohibiting the destruction of Department of Licensing records for persons convicted of Vehicular Homicide and Vehicular Assault. Once Vehicular Homicide became a Class A felony, it also became a violent offense, regardless of which alternative means a defendant was convicted.

RCW 9.94A.030(50) defines violent offense. All Class A felonies are violent offenses. RCW 9.94A.110(50)(a)(i). A person convicted of a violent offense is not eligible to be treated as a first time offender. RCW

9.94A.650. State v. Ha'mim, 132 Wn.2d 834, 845, 940 P.2d 633 (1997).

Conclusion of Law 1 as entered by the court is a misstatement of the law.

The two statutes must be read together in light of the 1996 amendment to RCW 46.61.520. When one does so, the answer is apparent. Each alternative means of committing Vehicular Homicide, which is now a Class A felony, is a violent offense under RCW 9.94A.030(5). Vehicular Assault, now a Class B felony, is a violent offense only if committed by means of DUI or reckless driving.

There is a "comment" to RCW 9.94A.030 regarding the 1987 amendment to RCW 9.94A.030 in the Sentencing Guidelines Manual. The author of the comment offers the opinion that Vehicular Homicide by Disregard is not a violent offense. That comment was correct when it first appeared in 1987, after the enactment of Chapter 456, Section 1, Laws of 1987. The comment has remained without reference to the amendment of RCW 46.61.520 in 1996 making Vehicular Homicide a Class A felony.

In light of the 1996 amendment to RCW 46.61.520, that comment is now incorrect. Interestingly enough, the Sentencing Guidelines Commission currently lists Vehicular Homicide by Disregard as a violent traffic offense in the individual offense reference sheets. Sentencing Guidelines Manual, 2007, p. III-215. Appendix 2. Prior to 1996, the offense was listed as a non-violent traffic offense and First Time Offender eligible Sentencing Guidelines Manual, 1995, page III - 168. Appendix 3.

Accordingly, RCW 46.61.520 and RCW 9.94A.030(50) should be read together to provide that Vehicle Homicide is a violent offense and Vehicular Assault by Driving Under the Influence or Operation of a Motor Vehicle in a Reckless Manner, though still a Class B felony, is a violent offense.

(2) May the court impose a condition of sentence that the defendant perform 4000 hours of community service? (Assignment of Error No. 2)

The Sentencing Reform Act is the exclusive authority for the imposition of conditions of sentence. RCW 9.94A.505(1). The only reference to community service is contained in RCW 9.94A.680(2). The court, when sentencing a non-violent offender, may convert up to 30 days of the sentence to 240 hours of “community restitution”. Otherwise, the limits of the court’s sentencing authority are governed by RCW 9.94A.505.

The Sentencing Reform Act does not provide for the imposition of community service hours as imposed herein. State v. Law, *infra*, 154 Wn.2d at page 104-5. (Trial court could not convert more than 30 days of sentence to community service without imposing a valid exceptional sentence.) Likewise, as indicated below, there is no basis for an exceptional sentence that might otherwise justify imposition of more than 240 community service hours as a condition of sentence. State v. Bernhard, 108 Wn.2d 527, 540-41, 741 P.2d 1 (1987).

(3) Do the Findings of Fact entered by the trial court support imposition of a sentence below the standard sentence range? (Assignment of Error No. 3)

The court held a sentencing hearing. No testimony was taken. The court was provided with a sentencing report by each party. The defendant's report and the remarks of counsel contain the information relied upon by the court for its Findings of Fact. The enumerated Findings of Fact are undisputed. The Findings of Fact, however, do not support an exceptional sentence. This court must review, de novo, whether the stated reasons justify an exceptional sentence. State v. Law, 154 Wn.2d 85, 93-94, 110 P.3d 717 (2005).

At best, the court found that the defendant was a young lady with no criminal history. (CP 28-31, Findings of Fact 5) She drove a motor vehicle while intoxicated and killed her friend. (CP) 28-31, Findings of Fact 1, 2,3) The defendant was sorry for what happened. (CP 28-31, Finding of Fact 7) The decedent's family was reluctant to have the defendant prosecuted. (CP 28-31, Finding of Fact 6) None of these facts can form the basis for an exceptional sentence.

Lack of Criminal History. (Finding of Fact 5)

The fact that the defendant may be a low risk to re-offend cannot form the basis for an exceptional sentence. State v. Estrella, 115 Wn.2d 350, 353-55, 798 P.2d 289 (1990). A lack of criminal history may not

support a sentence below the standard sentence range. A defendant's criminal history is one of the components used to compute the presumptive sentence range. State v. Rogers, 112 Wn.2d 180 183, 770 P.2d 180 (1989). State v. Law, supra, 154 Wn.2d at page 95. The fact that the defendant may have never had any contact with the police cannot form the basis for an exceptional sentence below the standard range. State v. Freitag 127 Wn.2d 141, 896 P.2d 1254 (1995).

Defendant's Remorse. (Finding of Fact 7)

It is commendable that the defendant feels sorrow for her conduct. This is what one would expect. This remorse, however, cannot serve as the basis for an exceptional sentence. State v. McClarney, 107 Wn.App. 256, 258, 26 P.3d 1013 (2001). The use of a factor such as remorse would "undermine the SRA's focus on meting out the appropriate punishment for a particular crime, rather than tailoring the sentence to a particular individual". McClarney, 107 Wn.App. at page 263.

Wishes of Victim's Family. (Finding of Fact 6)

The State is unaware of any authority to grant an exceptional sentence on the basis of the wishes of the victim's family. This court has, in essence, given an exceptional sentence based on factors personal in nature to this defendant. This is not permissible. State v. Law, supra, 154 Wn.2d at page 97; State v. Fowler, 145 Wn.2d, 400, 404, 38 P.3d 355

(4) Are the Conclusions of Law supported by facts in the record? (Assignment of Error No. 4)

**Alleged Impairment of Mental Capacity.
(Conclusion of Law 2)**

The court also attempted to support its exceptional sentence by a Conclusion of Law that the defendant's capacity to appreciate the wrongfulness of her conduct was significantly impaired due to her age and that her capacity to conform her conduct to the requirements of the law was significantly to impaired due to her age. (CP 28-31, Conclusion of Law 2(a)(i)(ii)) Neither of these conclusions is supported by facts in the record.

No testimony was taken concerning the defendant's mental capacity or abilities. What we know is that the defendant was seventeen years of age at the time these events took place. She turned eighteen eight days later. Beyond that, the court was told that she was a "wonderful young woman" who graduated from high school with a 3.8 grade point average. She was active in school with extracurricular activities that included sports, editor of the year book and president of the drug prevention team. (CP 24-27) None of this information suggests in the least that the defendant lacked capacity to appreciate her conduct or to conform her conduct to the requirements of the law.

The youth of a defendant is not a statutory mitigating factor. Youth does not, in and of itself, establish the statutory mitigating factor that the defendant lacked the capacity to appreciate the wrongfulness of

her conduct. State v. Ha'mim, 82 Wn.App. 139, 916 P.2d 971, aff'd 132, Wn.App. 834, 940 P.2d 633 (1996). The conduct herein is typical of many Vehicular Homicide prosecutions, regardless of the age of the defendant. Bad judgment does not mean the defendant lacked the capacity to appreciate the wrongfulness of her conduct.

Similarly, a defendant's limited education, without more, does not establish substantial and compelling reasons to impose a sentence below the standard sentence range. State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208 (1993).

Even if the defendant were able to establish some sort of mental illness or mental impairment, there has been no showing of any connection between the alleged condition and the defendant's ability to appreciate the wrongfulness of her conduct or conform her conduct to the requirement of the law. State v. Schloredt, 97 Wn.App. 789, 987 P.2d 647 (1994); State v. Rogers, 112 Wn.2d 180, 770 P.2d 180 (1989).

In short, there is absolutely nothing in the record to support the court's determination that the defendant lacked the capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law.

CONCLUSION

For the reasons set forth, the court's sentence must be vacated and the matter remanded for imposition of a sentence authorized by law within the standard sentence range.

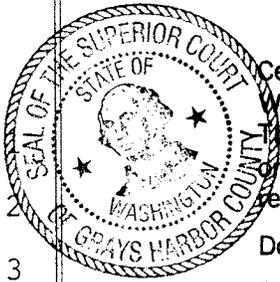
DATED this 1 day of October, 2008.

Respectfully Submitted,

By: *Gerald R. Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

APPENDIX 1



Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

FILED
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GRAYS HARBOR CO. WA

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Done this 30 day of Sept 2008
Cheryl Brown, Clerk By [Signature]
Deputy Clerk

CHERYL BROWN
COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs)
)
YAUNNA L. STATELY,)
)
Defendant.)
_____)

NO. 07-1-462-1

FINDINGS OF FACT
CONCLUSIONS OF LAW
RE: SENTENCING

THIS MATTER having come before me, the undersigned judge of the above-entitled court, the defendant appearing in person and with her attorney Wayne Hagen, the State appearing through Gerald Fuller, deputy prosecuting attorney for Grays Harbor County, and the court having considered the evidence presented enters the following:

FINDINGS OF FACT

1. On July 29, 2007, the defendant was the driver of a 1993 Mitsubishi Mirage that struck a power pole in Hoquiam, WA.

2. The defendant and her passenger, Melissa Colean, had both been drinking and decided the defendant should drive.

FINDINGS OF FACT
CONCLUSIONS OF LAW
RE: SENTENCING

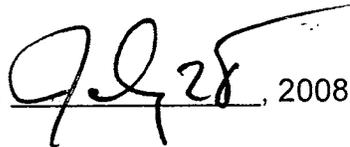
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ABBOTTSBURY, WASHINGTON 98526
TEL 360 532 6210

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- 1 a. This Court, in its discretion finds that the presumptive
2 sentence is excessive in light of purpose of the
3 sentencing guidelines and cites the following mitigating
4 factors:
5
6 i. The defendant's capacity to appreciate the
7 wrongfulness of her conduct was significantly
8 impaired, due to her age (under 18), at the time of
9 the incident. RCW 9.94A.535(1)(e).
10
11 ii. The defendant's capacity to conform her conduct
12 to the requirements of the law was significantly
13 impaired, due to her age (under 18), at the time of
14 the incident. RCW 9.94A.535(1)(e).
15
16 iii. The express desire of the victim's family that the
17 defendant not be prosecuted. 9.94A.535(1).
18
19 iv. The defendant's lack of criminal history.
20 9.94A.535(1).

21 Further, the Court is satisfied that the above factors have been established by the
22 preponderance of the evidence.

23 2. The Court imposes 30 days, to be served in Grays Harbor County Jail, and the
24 defendant is to perform 4,000 hours of community service, with documentation, within four
25 years.

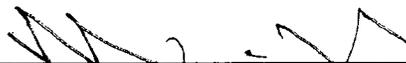
26 DATED: , 2008


JUDGE GORDON GODFREY

FINDINGS OF FACT
CONCLUSIONS OF LAW
RE: SENTENCING

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Presented by:
Hagen & Associates, P.S.
Attorneys for Defendant



WAYNE D. HAGEN, JR., WSBA #18640

Approved for Entry as to Form:
Grays Harbor County Prosecutor
Attorney for Plaintiff

GERALD FULLER, WSBA #5143

FINDINGS OF FACT
CONCLUSIONS OF LAW
RE: SENTENCING

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STATE OF WASHINGTON
BY cm
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 38103-6-II

v.

DECLARATION OF MAILING

YAUNNA L. STATELY,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 15th day of October, 2008, I mailed a copy of the Brief of Appellant to Wayne Hagen; Attorney at Law; P.O. Box 2016; Aberdeen, WA 98520 and to Yaunna L. Stately, Paul Bunyan Drive; Tokeland, WA 98590, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman

APPENDIX 2

**VEHICULAR HOMICIDE BY DISREGARD
FOR SAFETY OF OTHERS**

(RCW 46.61.520(1)(c))

CLASS A FELONY

VIOLENT TRAFFIC OFFENSE

I. OFFENDER SCORING (RCW 9.94A.525(11))

ADULT HISTORY:

Enter number of Vehicular Homicide and Vehicular Assault convictions x 2 =

Enter number of other felony convictions x 1 =

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended convictions x 1 =

JUVENILE HISTORY:

Enter number of Vehicular Homicide and Vehicular Assault dispositions x 2 =

Enter number of other felony dispositions x 1/2 =

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended dispositions x 1/2 =

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other Vehicular Homicide and Vehicular Assault convictions x 2 =

Enter number of other felony convictions x 1 =

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended convictions x 1 =

STATUS:

Was the offender on community placement on the date the current offense committed? (if yes), + 1 =

Total the last column To get the **Offender Score** (Round down To the nearest whole number)

II. SENTENCING RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL VII)	15 - 20 months	21 - 27 months	26 - 34 months	31 - 41 months	36 - 48 months	41 - 54 months	57 - 75 months	67 - 89 months	77 - 102 months	87 - 116 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-6 or III-7 to calculate the enhanced sentence.
- D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).

- The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules

APPENDIX 3

**VEHICULAR HOMICIDE BY DISREGARD
FOR SAFETY OF OTHERS**
(RCW 46.61.520(1)(c))
CLASS B FELONY
NONVIOLENT TRAFFIC OFFENSE

I. OFFENDER SCORING (RCW 9.94A.360 (12))

JLT HISTORY: (If the prior offense was committed *before* 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed *after* 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of Vehicular Homicide and Vehicular Assault convictions _____ x 2 = _____

Enter number of other felony convictions _____ x 1 = _____

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended convictions _____ x 1 = _____

VENILE HISTORY: (Adjudications entered on the same date count as one offense except for violent offenses with separate victims)

Enter number of Vehicular Homicide and Vehicular Assault adjudications _____ x 2 = _____

Enter number of other felony adjudications _____ x 1/2 = _____

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended adjudications _____ x 1/2 = _____

HER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other Vehicular Homicide and Vehicular Assault convictions _____ x 2 = _____

Enter number of other felony convictions _____ x 1 = _____

Enter number of Driving While Intoxicated, Actual Physical Control, Reckless Driving and misdemeanor Hit and Run - Attended convictions _____ x 1 = _____

ATUS: Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
Round down to the nearest whole number

II. SENTENCE RANGE

OFFENDER SCORE:

	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL VII)	15 - 20 months	21 - 27 months	26 - 34 months	31 - 41 months	36 - 48 months	41 - 54 months	57 - 75 months	67 - 89 months	77 - 102 months	87 - 116 months

The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).

If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-17 or III-18 to calculate the enhanced sentence.

III. SENTENCING OPTIONS

If "First-Time Offender" eligible: 0-90 days confinement and up to two years of community supervision with conditions (RCW 9.94A.120).

Partial confinement may be served in home detention (RCW 9.94A.030).

If eligible, Work Ethic Camp may be recommended (RCW 9.94A.137).