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

JOHN FREDRICK FLYNN III, Appellant,

v.

PIERCE COUNTY, Respondent.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

Appellant John Flynn (Flynn) appeals the order dismissing his case pursuant to Civil Rule (CR) 12(b)(6). Flynn was convicted of first-degree rape and first-degree burglary by a jury in 1994. His sentencing hearing was held on May 17, 1994, at which time the Pierce County Superior Court incorrectly determined Flynn's offender score and sentenced Flynn to 280 months for the first-degree rape charge, and 116 months served concurrently for the burglary charge. Pierce County Deputy Prosecuting Attorney Lori Kennedy represented the State of Washington at that hearing, and attorney Charles Bonet represented Flynn. Flynn's appellate attorney, Patricia Pethick, filed a notice of appeal the same day. CP 7-9.

On April 27, 2015, after an appeal and several personal restraint petitions, Flynn filed a challenge to the sentence alleging a miscalculated offender score. The State agreed, and at the subsequent resentencing hearing, Flynn was sentenced to 240 months, which at that point was 31 months less than he had already served.

Flynn filed suit in October 2018 alleging a constitutional claim and various state tort claims against attorney Charles Bonet and his former appellate counsel, Patricia Pethick, by failing to argue against the original offender score determinations and former Pierce County Deputy Prosecuting Attorney Lori Kennedy for arguing for those determinations.

All three were Pierce County employees or agents at the time, and that Pierce County is responsible for their actions pursuant to the doctrine of *respondeat superior*. *Id.*

II. COUNTER STATEMENT OF ISSUES

1. Whether there is a legal malpractice claim where the trial court had the authority to enter the original sentence.
2. Whether the trial court's order on sentencing acts as a superseding intervening cause to any negligence committed by Flynn's defense attorneys.
3. Whether the right of action accrued at the sentencing hearing thereby making this action past the date by which this action may be brought.

III. STATEMENT OF FACTS/PROCEDURE

On May 17, 1994, the trial court conducted a sentencing hearing following a jury convicting Flynn for one count of first-degree rape and one count of first-degree burglary. Prior to the sentencing hearing, the Washington State Department of Corrections (DOC) conducted a presentence investigation (PSI). Based largely on Flynn's criminal history and the nature of his crimes of conviction, Flynn was assigned an offender score of 8, which had a standard sentence range of 185 to 245 months on

the rape count; and an offender score of 7, which had a standard sentence range of 67 to 89 months on the burglary count. CP 7-9.

The trial court, however, determined Flynn's offender score was 13 on the rape conviction, and thus a standard sentence range was 210 to 280 months; and an offender score of 12 on the burglary conviction, which had a standard sentence range was 87 to 116 months. CP 91-99; 8. The trial court sentenced Flynn to 280 months in total confinement on the rape conviction, to be served concurrently with 116 months on the burglary count, for a total of 280 months in prison. *Id.*

Flynn's appellate attorney, Patricia Pethick, filed a notice of appeal the same day. CP 7-9. Flynn thereafter filed a direct appeal and then a personal restraint petition in Division Two of the Washington State Court of Appeals, which were consolidated. CP 102-109. In his direct appeal, Flynn argued (1) that there was insufficient evidence to support either conviction, and (2) that the trial court erred in "refus[ing] to instruct the jury on the law of consent." *Id.* In his Personal Restraint Petition, he argued that his trial counsel was ineffective and that the State failed to disclose exculpatory evidence. *Id.* The Court of Appeals affirmed the trial court and dismissed the petition. *Id.*

Flynn then filed four more personal restraint petitions, which were dismissed by the Court of Appeals on November 18, 2004, CP 111;

July 13, 2006, CP 115; August 29, 2006, CP 119; and July 15, 2015, respectively, CP 123. In none of those petitions did Flynn raise any issue pertaining to his offender score calculation or the length of his sentence.

Finally, on April 27, 2015, Flynn filed what was considered his sixth personal restraint petition, in which he, for the first time, argued that his offender scores were miscalculated and hence, his sentence too long. CP 126. The State admitted that the offender score for the burglary conviction was 8, but argued that the offender score for the rape conviction was 9, and hence that the sentence was still lawful under RCW 9.94A.360 (1993). CP 126.

On July 1, 2016, the Washington State Supreme Court issued an Order in Case Number 92411-2, in which it found that "whether the offender score of 9 [on count I] was correct depends on whether [Plaintiff] committed his current crimes while under Department of Corrections supervision," and remanded the case to the trial court to make this determination and re-sentence Plaintiff. *Id.* At issue was the extent to which any of Flynn's prior convictions were committed while under DOC supervision. *See* CP 126. An offender score of 9 carries with it a sentencing range that includes up to 280 months in prison.

On October 24, 2016, the Pierce County Superior Court conducted a resentencing hearing and determined that Flynn's offender score on the

rape conviction was 8, making his standard sentence range for that count 185 to 245 months, and that his offender score on the burglary conviction was 7, making his standard sentence range 67-89 months. CP 131-144; 9. The court then sentenced Flynn to 240 months for the rape conviction to be served concurrently with 89 months for the burglary conviction for a total of 240 months in confinement. *Id.* Pierce County Deputy Prosecuting Attorney Kara Sanchez represented the State at this resentencing, and Pierce County Department of Assigned Counsel attorney Laura Carnell represented Plaintiff. *Id.*; Complaint, p. 4.

A. PROCEDURAL HISTORY

On October 22, 2018, Flynn filed suit alleging a violation of the Eighth and Fourteenth Amendments to the United States Constitution, and state law tort claims of negligence and false imprisonment, by his prior defense attorney, Charles Bonet, and his former appellate counsel, Patricia Pethick, in failing to argue against the original offender score calculations and by former Pierce County Deputy Prosecuting Attorney Lori Kennedy in arguing for those calculations (collectively, "County"). On December 17, 2018, the County removed the action to the United States District Court for the Western District of Washington under 28 U.S.C. §§1331 & 1441. On December 21, 2018, the County filed a Motion to Dismiss Pursuant to FRCP 12(b)(6).

In it, the County argued (1) that because the sentencing error at issue was committed by the court rather than the named Defendants, Flynn cannot sufficiently allege or ultimately establish the required elements of his claims, and (2) given that these claims were raised over 24 years after that error occurred, they are barred by the applicable statutes of limitations. CP 150-67. Flynn responded by agreeing to dismissal of his federal claims and the false imprisonment claims against all defendants. CP 169. On February 22, 2019, the District Court remanded the case "to King County Superior court for adjudication of Plaintiff's state law claims of negligence and false imprisonment." CP 198-99. On April 3, 2019, on stipulation of the parties, the King County Superior Court ordered the transfer of venue of this matter to Pierce County. CP 202.

On July 26, 2019, the Pierce County Superior Court granted the Respondent's motion to dismiss pursuant to CR 12(b)(6). CP 246-47. This appeal followed.

IV. SUMMARY OF ARGUMENT

Flynn alleges criminal malpractice for the alleged failure to properly argue and convince the trial court to adopt the correct offender score, which resulted in Flynn serving 31 months longer in prison than his ultimate sentence required. To bring a legal malpractice claim, a plaintiff must show, among other things, they were "actually innocent" of the

criminal charge. *Piris v. Kitching*, 185 Wn.2d 856, 861, 375 P.3d 627 (2016).

Flynn does not contest he is "actually innocent" of the crimes for which he was convicted, but instead argues the application of a narrow exception to the "actual innocence" rule based on the decisions in *Powell v. Associated Counsel for the Accused*, 125 Wn. App. 773, 106 P.3d 271 (2005) (*Powell I*) and *Powell v. Associated Counsel for the Accused*, 131 Wn. App. 810, 129 P. 3d 831 (2006) (*Powell II*) (collectively *Powell*). There the Court ruled "actual innocence" is not a necessary element if the underlying trial court did not have authority to issue the sentence in the first place. *Powell* arose based on a 40-month sentence for a misdemeanor conviction which carries with it, at most, a sentence of 12 months. Flynn asserts that *Powell* is controlling. Flynn is incorrect.

First, Flynn equates a trial court error in sentencing with a lack of authority, and that is simply incorrect and based on a misunderstanding of the "actual innocence" requirement. Flynn was guilty of two Class A felonies and therefore subject to two sentencing ranges, both of which authorized a trial court to sentence for the time he served. Here, the trial court and the resentencing court had authority to adopt an offender score of 9 which carried with it a sentencing range up to 280 months. Even if a trial court's adopted offender score and sentence is determined later to be

incorrect, where the trial court had the authority to enter such score and sentence, the law is settled that a determination of "actual innocence" cannot be based on speculating as to what might have happened at a sentencing hearing or subsequent resentencing hearing. The sentence, even if incorrect, was the natural outcome of a criminal conviction.

Second, the trial court's order becomes a superseding intervening cause breaking the causal link between any potential negligence by Flynn's attorneys and the resulting harm. A court order severs liability where the trial court was presented with all material facts. Here, this case is not based on allegations of an incomplete or biased factual record.

Third, the statute of limitations has run on this matter. Flynn concedes that the accrual date was in May 1994, but requests this Court to adopt case law finding that the accrual begins when the court of appeals determines the conviction was in error.

V. LAW AND ARGUMENT

A. CIVIL RULE (CR) 12(b)(6) ANALYSIS

Under CR 12(b)(6), "[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d

322, 330, 962 P.2d 104 (1998)); *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Although "[a]ll facts alleged in the plaintiff's complaint are presumed true[,]" *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P. 3d 168 (2008), "the court is not required to accept the complaint's legal conclusions as true." *Id.* at 717-18. Hence, "[i]f a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *FutureSelect Portfolio Management, Inc.*, 180 Wn.2d at 963.

Appellate courts "review CR 12(b)(6) dismissals de novo."

FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (citing *In re Estate of Kordon*, 157 Wash.2d 206, 209, 137 P.3d 16 (2006) (citing *State v. Squally*, 132 Wash.2d 333, 340, 937 P.2d 1069 (1997))).

B. APPELLANT'S NEGLIGENCE CLAIM SHOULD BE DISMISSED BECAUSE THE SENTENCING COURT HAD AUTHORITY TO ENTER THE SENTENCE

Flynn's claim for criminal malpractice is based on the alleged failure to prevent the trial court from entering a sentence based on an incorrect and inflated offender score and subsequent failure to have that reversed in the court of appeals, which resulted in Flynn serving time in excess of his ultimate sentence. However, because Flynn is not actually innocent of the crimes of first-degree rape and first-degree burglary for

which the trial court had authority to sentence him, there is no claim for legal malpractice.

"To establish a claim for legal malpractice, generally, a plaintiff must prove '(1) [t]he existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.'" *Piris v. Kitching*, 185 Wn.2d 856, 861, 375 P.3d 627 (2016) (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)).¹

As with any negligence claim, causation consists of both "cause in fact," which is the "but for" cause that establishes a physical connection between the act and injury, and legal cause, which is a legal question about whether liability *should* attach. *Ang v. Martin*, 154 Wn. 2d 477, 482, 114 P.3d 637 (2005) citing *Hartley v. State*, 103 Wn. 2d 768, 779, 698 P.2d 77 (1985). "To determine whether the cause in fact of a plaintiff's harm should also be deemed the legal cause of that harm, a court

¹ The first element is the formation of an attorney-client relationship. Flynn offers no argument, nor could he, as to how an attorney-client relationship existed with the then Deputy Prosecutor Kennedy. As the case has winnowed down to a claim of legal malpractice, Deputy Prosecutor Kennedy's role is now essentially irrelevant. Because Kennedy was clearly not one of his attorneys, and in fact represented the opposing party in the criminal case at issue, Flynn cannot allege or prove such a relationship.

may consider, among other things, the public policy implications of holding the defendant liable." *Ang*, 154 Wn. 2d at 482.

A negligence claim in the context of alleging legal malpractice in a criminal action, "[a] plaintiff also bears the burden of proving two additional elements concerning proximate cause:" (1) "as a prerequisite, the plaintiff must have obtained postconviction relief," and (2) "the plaintiff must prove actual innocence of the underlying criminal charge by a preponderance of the evidence." *Piris*, 185 Wn.2d at 861-62. That is, this claim requires "proof the plaintiff did not commit the underlying crime." *Falkner v. Foshaug*, 108 Wn. App. 113, 118, 29 P.3d 771 (2001).

The *Piris* Court described the policy behind the "actual innocence" element as not allowing a criminal conviction to result in financial benefit where the sentencing court had the authority and discretion to enter the sentence and speculation would be required to conclude there would have been a different result had there been no negligent conduct. *Piris*, 185 Wn. 2d at 866. Put another way, "A claim for criminal malpractice cannot rise and fall based on what might of happened" when the criminal act naturally produced the sentences at issue. *Piris*, 185 Wn.2d at 866. *See also Ang*, 154 Wn. 2d at 485 *citing Falkner*, 108 Wn. App. at 123-24 ("requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from

benefiting from their own bad acts, maintain respect for our criminal justice system's procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals 'who may be guilty, [but] could have gotten a better deal', and prevent a flood of nuisance litigation").

There are two reasons why Flynn cannot prove the negligence claim against the County. First, because the trial court had authority to enter the original sentence, which flowed naturally from the criminal conviction, Flynn cannot prove actual innocence. Second, because the trial court actually did order the sentence, liability to the County is severed as the trial court's order is a superseding intervening cause.

1. **There Is No Cause Here Because the Trial Court Had the Authority to Enter a Sentence Which Covered the Duration of Flynn's Incarceration**

Flynn cannot prove actual innocence, so instead he asserts that the "very limited exception to the rule requiring proof of actual innocence" where "the trial court imposes a sentence it had no authority to order" applies. *Piris*, 185 Wn.2d at 864 *citing Powell II*, 131 Wn. App. at 815. This is incorrect.

In *Powell*, the plaintiff had been sentenced to 38.5 months and served 20 months based on a plea of guilty to a gross misdemeanor charge, which carried a maximum sentence of 12 months. In the subsequent

criminal malpractice litigation, *Powell* held that proving actual innocence was not required because the trial court simply had no authority to impose a felony sentence on a misdemeanor conviction. "Powell's situation is closer to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing." *Piris*, 185 Wn. 2d at 864 *citing Powell I*, 125 Wn. App. at 778. In essence, Powell was "actually innocent" of any felony crime with a sentence greater than 12 months and there was no need to prove actual innocence because Powell was never convicted of a felony.

This case is more like *Piris*, which rejected the application of *Powell*, where the court had authority to issue the sentence in the first place. In *Piris*, the court of appeals reversed the trial court's sentence, but the King County Public Defender's Office failed to set the matter for resentencing hearing. It was 12 years before a King County Superior Court Judge recognized the matter was lingering and set the resentencing hearing. The court adopted an offender score that resulted in a sentence that was thirteen (13) months less than the time the Piris actually served. Piris filed suit against the public defender alleging negligence based on a failure to note the resentencing hearing.

The *Piris* Court held that, unlike *Powell*, both of Piris's sentences were within the Court's authority to issue. That is, because Piris's

underlying conviction was unaffected on appeal, "Whatever sentence was imposed or served is based on Piris's conviction, and any sentencing modification remains within the court's authority and discretion to impose." Therefore, the original sentence based on an offender score was within the court's authority, and the resentence which resulted in actual time served greater than the ultimate sentence was within the court's authority.

Piris reasoned that policy implications supported the result because even though the trial court originally indicated an intent to sentence Piris at the lower end of the sentencing range – therefore, plausibly, the sentencing court would have sentenced less on a lower offender score – "it is too speculative to conclude he would have imposed anything less if provided the correct score." *Piris*, 185 Wn. 2d at 866. The Court concluded, "A claim for criminal malpractice cannot rise and fall based on what might have happened." *Piris*, 185 Wn. 2d at 866. In addition, the *Piris* court noted that because Piris committed a Class A felony, *he was subject to a maximum term of life in prison*. Two different sentencing ranges applied to Piris and, accordingly, Piris's sentences "were the natural results" of his criminal acts. *Piris*, 185 Wn. 2d at 866. Piris was not "actually innocent" of a crime for which he could have been sentenced for as long as he served.

Flynn distinguishes this case from *Piris* because, according to Flynn, the two offender scores at issue in *Piris* had overlapping sentencing ranges, so the trial court had authority to impose the same sentence that was actually served even based on the incorrect offender score. Here, according to Flynn, the adopted offender score did not carry with it a sentencing range which could have resulted in the sentence Flynn actually did serve. Flynn is incorrect, *Piris* applies.

First, Flynn ignores that the trial court had the authority to enter an offender score of 9, which carried with it a sentencing range of 280 months, the same as Flynn's original sentence. The Supreme Court remanded the matter to the trial court to determine if Flynn's prior convictions were committed under DOC supervision and therefore warranted a 9 or an 8. CP 92. The Supreme Court left it squarely within the resentencing court's authority and discretion to adopt an offender score of 9 and with it a sentencing range of 280 months. *See* CP 132. While the trial court entered an offending score of 8, this does not translate to the trial court lacking in authority let alone that Flynn was actually innocent of the underlying crime.

Accordingly, the only difference between this case and *Piris* is that the trial court reached a conclusion regarding the offender score that did not result in an overlapping sentence, but that in no way means that neither

the trial court nor the resentencing court lacked the authority to adopt an offender score of 9 and with a sentencing range of 280 months.

Second, the distinction between *Piris* and *Powell* is not the existence of overlapping sentences in *Piris*, but rather the Court's complete lack of authority to issue a 40-month sentence on a misdemeanor conviction in *Powell*. A misdemeanor conviction does not carry with it the "natural result" of a sentence far greater than the 12 months allowed by statute. A felony conviction carries with it a felony sentence, even if later determined to be incorrect, as a natural result of the felony criminal act. An error in sentencing does not translate into "no authority" to sentence in the sense that "actual innocence" requires.

In fact, Flynn asserts that our jurisprudence is filled with sentences based on incorrect offender scores and asserts, to that end, that "The incorrect sentencing was an integral part of the criminal sentencing process" and that "Flynn's incorrect sentence was foreseeable." AB, p. 19. Here, as in *Piris*, the sentences here were the natural result of Flynn's criminal activity, which Flynn essentially admits.

Flynn relies on *United States v. Valencia*, 912 F.3d 1215 (2019), and a series of similar cases addressing how courts should evaluate the severity of prior convictions and sentences in order to arrive at the correct offender score for a current conviction before the court. The *Valencia*

Court ruled that the severity of the prior conviction is based on how the case was "actually prosecuted and adjudicated" and not the maximum statutory sentence if the judge or jury did not make findings. That is, if the prior charge was not actually prosecuted and adjudicated as "exceptional", then the standard range applies in assessing the prior conviction. *Valencia*, 912 F. 3d at 1224.

Thus, according to Flynn, because his case was not prosecuted and adjudicated as an exceptional sentence case, the trial court did not have the authority to enter an offender score greater than 8 and sentence greater than 245 months. This is incorrect and misses the point.

First, per the Supreme Court order, the resentencing court had the authority to enter an offender score of 9, which carried a 280-month sentence. Second, more importantly, *Valencia* has no application here. Assessing the severity of a prior conviction to determine an offender score in a criminal matter cannot be equated with showing "actual innocence" or lack of authority regarding the causation element in a criminal malpractice negligence case. The issue here is whether the trial court had authority in the first place to issue a sentence, even if incorrect.

Applying *Valencia* misses the point because the decision not to prosecute and adjudicate Flynn's case as exceptional does not show that Flynn is "actually innocent" of the crimes for which a court had the

authority under two sentencing statutes to enter a sentence consistent with the time Flynn actually served. The decision not to pursue "exceptional" does not exonerate Flynn nor does the sentencing court's error.

The point of the *Powell* exception and *Piris* is that "no authority" is not the same as "incorrect". Here, Flynn committed two Class A felonies, both of which were subject to two sentencing ranges including life in prison. RCW 9A.20.021.² As in *Piris*, Flynn's conduct subjected him to two different statutory schemes and two sentencing ranges because Flynn was not prosecuted and adjudicated as exceptional does not translate into Flynn being actually innocent of a crime for which he could have served life in prison.

The claim here for criminal malpractice should not rise and fall based on speculating what might have happened had the trial court been alerted or had the judge (or another judge) ruled on the resentencing hearing. In short, because any term of confinement "was within the broad authority of the trial court, the argument for a *Powell* exception is inapplicable here." *Piris*, 185 Wn. 2d at 866.

² Washington courts consistently determine "statutory maximum" of a crime by looking to 9A.20.021. *State v. Toney*, 149 Wn. App. 787, 795-96, 205 P.3d 944, 948 (2009).

2. Judge's Authority Is a Superseding Intervening Cause

In assessing proximate cause, "[I]f a new, independent act breaks the chain of causation, it supersedes the original act, which thus is no longer the proximate cause of the injury." *Riojas v. Grant County Pub. Util. Dist.*, 117 Wash.App. 694, 697, 72 P.3d 1093 (2003). Here, the trial court's sentencing order severs liability to the County, even assuming there is negligence by the public defender.

When there is judicial involvement, "court intervention operates as a superseding intervening cause" that cuts off liability to the alleged negligent actor, unless the court is deprived of a material fact. *Tyner v. Dep't of Social and Health Servs.*, 141 Wn. 2d 68, 88, 1 P.3d 1148 (2000) (Juvenile Court no contact order was not a superseding intervening cause because the trial court was deprived of the material fact that the DSHS social worker did not view the parent as a risk). *See, also, Bishop v. Miche*, 137 Wn.2d 518, 531-32, 973 P.2d 465 (1999) (District Court's refusal to revoke probationer's probation after being supplied material information regarding probationary violations precluded proximate cause as a superseding intervening cause to the County for any alleged probationary supervision failures); *Petcu v. Dep't of Soc. and Health Servs.*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004) (juvenile court's order separating a father alleged to have abused his daughter severed liability to

DSHS's alleged negligence because the juvenile court had all material information when it made its ruling). As a result, Flynn cannot show "causation between the attorn[ey's] alleged] breach of the duty and the damage incurred," *Piris*, 185 Wn.2d at 861.

Flynn relies on the Restatement (Second) of Torts (1965), particularly § 442A, and a variety of cases standing for the proposition that where the alleged intervening cause was foreseeable, it does not sever liability. Flynn reasons that "the incorrect sentence based on an incorrect offender score is foreseeable and is anything but extraordinary. The incorrect sentencing was an integral part of the criminal sentencing process." AB, p. 19. However, that analysis does not apply in the context of this case.

First, the trial court sitting in its sentencing capacity is not an "intervening force" operating independently of any situation created by the actor's negligence, or not normally the result of such negligence, nor the result of a third party's act or failure to act. *See* Restatement (second) of Torts, Sec. 441, *et seq.* (1965). The trial court sentencing hearing was a mandatory outcome of a criminal conviction because judicial officers have the exclusive authority to determine the offender score and standard range sentence, and to actually sentence criminal defendants. RCW 9.94A.120 (1993); RCW 9.94A.505 (current version). Generally, this means "the

court shall impose punishment as provided in this section," and "impos[ing] a sentence within the sentence range for the offense," and hence, calculating the offender score and standard range sentence in accordance with RCW 9.94A.360 (1993) and RCW 9.94A.370 (1993), respectively.

In doing so, the trial court considered the presentence report, as required by statute, which gave the correct offender score. RCW 9.94A.110 (1993). The trial court also had discretion to "allow arguments from the prosecutor [and] the defense counsel," RCW 9.94A.110 (1993), but was not required to adopt those arguments, and was instead left with the sole authority to sentence. *See, e.g.*, RCW 9.94A.120 (1993), 9.94A.110 (1993).³ Rather than intervene, the court is the entity which sentences those convicted of crimes.

As stated in *Tyner* and other cases, judicial intervention breaking the causal link is based on application of policy and common sense when

³ It should be noted that at the time the original sentence was entered, the trial court had authority to impose an exceptional sentence up to the statutory maximum, without a jury verdict. *Blakely* and its progeny was not issued until 2004, and the courts concluded that the rule was not to be "appl[ied] retroactively on collateral review to convictions that were final when *Blakely* was announced." *State v. Evans*, 154 Wn.2d 438, 442, 114 P.3d 627, cert. denied, 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005); *see Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (holding that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, ... the judge exceeds his proper authority"). Sentences issued post-*Blakely*, or which were not final at the time *Blakely* was issued, require the pleading and proof of statutory aggravating factors before a court is authorized to issue a sentence outside the standard range; such was not the case here.

addressing the element of legal causation, and not the Restatement. A review of the policy discussions in *Tyner* and *Petcu*, for example, reveal there is no mention or reliance on the Restatement in formulating this policy driven superseding intervening cause, and the Restatement has nothing to do with this.

Furthermore, a court order essentially always has an intended and foreseeable result. That's the point. For example, a juvenile court order separating parents from their children has the foreseeable and intended result of separating the child from the parents, but the court order still serves as a superseding cause. *See Petcu*, 121 Wn. App. at 56. And the court's order is a superseding intervening cause to negligent conduct unless the court is deprived of *material facts*, not material argument. Were the latter the case, a court order could never serve as a superseding cause because a party could always assert a better argument could have or should have been made.

The role of the lawyers is to advocate and argue, but there is no suggestion that the trial court lacked material information, rather, at best, counsel simply did not argue effectively enough to prevent this from happening. The court's exercise of independent judgment is a superseding cause that breaks the chain of causation.

C. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED UNDER CR 12(b)(6) AS BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

Claims against an attorney must be brought within three years of the time that the plaintiff "discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action." *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (Div. 1 2005); *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wn.App. 903, 134 P.3d 1188 (Div. 2 2006); RCW 4.16.080(3). Flynn alleged in the complaint that his defense attorney, "failed to argue the wrong offender score during sentencing[,]" that Deputy Prosecuting Attorney Lori "Kennedy argued the wrong offender score," that his criminal appellate attorney, "Pethick[,] did not argue that the trial court imposed the wrong offender score to the Court of Appeals" in her May 17, 1994, notice of appeal, and that, "[d]uring his time in prison, [he] continued to contest his offender score[.]" CP 6-11. However, he did not commence the present action until November 13, 2018, over 24 years after the alleged injury. CP 6.

Flynn concedes that the sentencing date was the date this action accrued, and thus the statute of limitations has run. However, Flynn asks this Court to change the accrual date in a case such as this based on the

line of cases stemming from *Heck v. Humprhey*, 512 US 477, 114 S. Ct. 2364, 129 L. Ed. 2d 883 (1994). Flynn argues that engaging in civil litigation would have effectively been a collateral attack challenging his sentence, and therefore, the accrual date should be the date that his ultimate sentence was issued, which was 2016.

Accordingly, Flynn is requesting this Court adopt the reasoning set forth in *Heck* and others which preclude a defendant/plaintiff from bringing a civil action which would affect the criminal conviction if found in favor of the plaintiff. Those cases generally hold that the action does not accrue until such time as the appellate court exonerates the criminal defendant.

In asserting that this Court should adopt *Heck*, and liken correcting the sentence with exoneration, Flynn is essentially arguing that he was not wrongfully sentenced until the Court of Appeals ruled on the offender score issue. Again, asserting that the right did not accrue until the Court of Appeals set the offender score correctly is an admission that the sentence was a natural result of the conviction further demonstrating that the sentence here is wholly different than in *Powell*.

VI. CONCLUSION

Plaintiff received a sentence within the statutory maximum, and thus, his claim does not rise to the level of "actual innocence" in the

sentencing context to permit a malpractice claim to go forward. Even if it did, Plaintiff cannot show that the attorneys' actions were the proximate cause of the injury suffered. Finally, this matter was filed well outside the statute of limitations. Accordingly, the trial court's dismissal of this matter should be affirmed.

DATED this 6th day of January, 2020.

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CERTIFICATE OF SERVICE

On January 6, 2020, I hereby certify that I electronically filed the foregoing RESPONDENT'S ANSWERING BRIEF with the Clerk of the Court, and I delivered a true and correct copy by electronic mail and to ABC Legal Messengers with appropriate instruction to forward the same to the following:

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1988 Wash. Legis. Serv. 60 (West)

WASHINGTON
1988 REGULAR AND FIRST EXTRAORDINARY
SESSION LAWS, JOINT RESOLUTIONS,
AND INITIATIVE MEASURES

Fiftieth Legislature

Additions are indicated by <<+ UPPERCASE +>>

Deletions by <<- Lowercase ->>

Changes in tabular material are not indicated

CHAPTER 60

E.S.B.No. 6093

CRIMINAL SENTENCING—SEXUAL OFFENDERS—PRESENTENCE REPORTS

AN ACT Relating to presentence reports; amending RCW 9.94A.110; and declaring an emergency.

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

WA ST 9.94A.110

Sec. 1. Section 11, chapter 137, Laws of 1981 as last amended by section 34, chapter 257, Laws of 1986 and RCW 9.94A.110 are each amended to read as follows:

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. <<+THE COURT SHALL ORDER THE DEPARTMENT TO COMPLETE A PRESENTENCE REPORT BEFORE IMPOSING A SENTENCE UPON A DEFENDANT WHO HAS BEEN CONVICTED OF A FELONY SEXUAL OFFENSE. THE DEPARTMENT OF CORRECTIONS SHALL GIVE PRIORITY TO PRESENTENCE INVESTIGATIONS FOR SEXUAL OFFENDERS.+>> The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

<<+NEW SECTION.+>> Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Approved March 15, 1988.

Effective March 15, 1988.

WA LEGIS 60

End of Document

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1994 Wash. Legis. Serv. Ch. 1 (I.M. 593) (WEST)

WASHINGTON 1994 LEGISLATIVE SERVICE

CRIMES—INITIATIVE MEASURE NO. 593—PERSISTENT OFFENDER ACCOUNTABILITY ACT

1994 Wash. Legis. Serv. Ch. 1 (I.M. 593) (WEST) (Approx. 11 pages)

Additions are indicated by <<+ Text +>>;

deletions by <<- Text ->>

Changes in tables are made but not highlighted. Vetoed provisions within tabular material are not displayed.

CHAPTER 1

I.M. No. 593

CRIMES—INITIATIVE MEASURE NO. 593—PERSISTENT OFFENDER ACCOUNTABILITY ACT

AN ACT Relating to persistent offenders; reenacting and amending RCW 9.94A.120 and 9.94A.030; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

<<+NEW SECTION.+>> Sec. 1. FINDINGS AND INTENT. (1) The people of the state of Washington find and declare that:

- (a) Community protection from persistent offenders is a priority for any civilized society.
 - (b) Nearly fifty percent of the criminals convicted in Washington state have active prior criminal histories.
 - (c) Punishments for criminal offenses should be proportionate to both the seriousness of the crime and the prior criminal history.
 - (d) The public has the right and the responsibility to determine when to impose a life sentence.
- (2) By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to:
- (a) Improve public safety by placing the most dangerous criminals in prison.
 - (b) Reduce the number of serious, repeat offenders by tougher sentencing.
 - (c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand.
 - (d) Restore public trust in our criminal justice system by directly involving the people in the process.

Sec. 2. RCW 9.94A.120 and 1992 c 145 s 7, 1992 c 75 s 2, and 1992 c 45 s 5 are each reenacted and amended to read as follows:

<< WA ST 9.94A.120 >>

ENFORCEMENT OF MANDATORY MINIMUM SENTENCES. When a person is convicted of a felony, the court shall impose punishment as provided in this section.

- (1) Except as authorized in subsections (2), <<+(4),+>> (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.
- (2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.
- (3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.
- (4) <<+A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law.+>> An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first

degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years<<-, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum five year term except for the purpose of commitment to an inpatient treatment facility->>. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. <<+In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150(1), (2), (3), (5), (7), or (8), or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except in the case of an offender in need of emergency medical treatment or for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree,+>>

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

- (a) Devote time to a specific employment or occupation;
- (b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;
- (c) Pursue a prescribed, secular course of study or vocational training;
- (d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (e) Report as directed to the court and a community corrections officer; or
- (f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

(6) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(7)(a)(i) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense and has no prior convictions for a sex offense or any other felony sex offenses in this or any other state, the sentencing court, on its own motion or the motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

The report of the examination shall include at a minimum the following: The defendant's version of the facts and the official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors, the offender's social and employment situation, and other evaluation measures used. The report shall set forth the sources of the evaluator's information.

The examiner shall assess and report regarding the defendant's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

- (A) Frequency and type of contact between offender and therapist;
- (B) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (C) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;
- (D) Anticipated length of treatment; and
- (E) Recommended crime-related prohibitions.

The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The evaluator shall be selected by the party making the motion. The defendant shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(ii) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this special sexual offender sentencing alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this subsection. If the court determines that this special sex offender sentencing

alternative is appropriate, the court shall then impose a sentence within the sentence range. If this sentence is less than eight years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(A) The court shall place the defendant on community supervision for the length of the suspended sentence or three years, whichever is greater; and

(B) The court shall order treatment for any period up to three years in duration. The court in its discretion shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court, and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. In addition, as conditions of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

- (I) Devote time to a specific employment or occupation;
- (II) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (III) Report as directed to the court and a community corrections officer;
- (IV) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030, perform community service work, or any combination thereof; or
- (V) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime.

(iii) The sex offender therapist shall submit quarterly reports on the defendant's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, defendant's compliance with requirements, treatment activities, the defendant's relative progress in treatment, and any other material as specified by the court at sentencing.

(iv) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment. Prior to the treatment termination hearing, the treatment professional and community corrections officer shall submit written reports to the court and parties regarding the defendant's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community supervision conditions. Either party may request and the court may order another evaluation regarding the advisability of termination from treatment. The defendant shall pay the cost of any additional evaluation ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (A) Modify conditions of community supervision, and either (B) terminate treatment, or (C) extend treatment for up to the remaining period of community supervision.

(v) The court may revoke the suspended sentence at any time during the period of community supervision and order execution of the sentence if: (A) The defendant violates the conditions of the suspended sentence, or (B) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community supervision shall be credited to the offender if the suspended sentence is revoked.

(vi) Except as provided in (a)(vii) of this subsection, after July 1, 1991, examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW.

(vii) A sex offender therapist who examines or treats a sex offender pursuant to this subsection (7) does not have to be certified by the department of health pursuant to chapter 18.155 RCW if the court finds that: (A) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; (B) no certified providers are available for treatment within a reasonable geographical distance of the offender's home; and (C) the evaluation and treatment plan comply with this subsection (7) and the rules adopted by the department of health.

For purposes of this subsection, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(b) When an offender is convicted of any felony sex offense committed before July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, order the offender committed for up to thirty days to the custody of the secretary of

social and health services for evaluation and report to the court on the offender's amenability to treatment at these facilities. If the secretary of social and health services cannot begin the evaluation within thirty days of the court's order of commitment, the offender shall be transferred to the state for confinement pending an opportunity to be evaluated at the appropriate facility. The court shall review the reports and may order that the term of confinement imposed be served in the sexual offender treatment program at the location determined by the secretary of social and health services or the secretary's designee, only if the report indicates that the offender is amenable to the treatment program provided at these facilities. The offender shall be transferred to the state pending placement in the treatment program. Any offender who has escaped from the treatment program shall be referred back to the sentencing court.

If the offender does not comply with the conditions of the treatment program, the secretary of social and health services may refer the matter to the sentencing court. The sentencing court shall commit the offender to the department of corrections to serve the balance of the term of confinement.

If the offender successfully completes the treatment program before the expiration of the term of confinement, the court may convert the balance of confinement to community supervision and may place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sex offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his <<+or her+>> term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his <<+or her+>> community supervision, the court may order the offender to serve out the balance of his <<+or her+>> community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sex offense committed prior to July 1, 1987. This subsection (c) does not apply to any crime committed after July 1, 1990.

(d) Offenders convicted and sentenced for a sex offense committed prior to July 1, 1987, may, subject to available funds, request an evaluation by the department of corrections to determine whether they are amenable to treatment. If the offender is determined to be amenable to treatment, the offender may request placement in a treatment program within a correctional facility operated by the department. Placement in such treatment program is subject to available funds.

(8)(a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, assault of a child in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as

the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The community placement shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence. Unless a condition is waived by the court, the terms of community placement for offenders sentenced pursuant to this section shall include the following conditions:

- (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (ii) The offender shall work at department of corrections-approved education, employment, and/or community service;
- (iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;
- (iv) An offender in community custody shall not unlawfully possess controlled substances;
- (v) The offender shall pay supervision fees as determined by the department of corrections; and
- (vi) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

(c) The court may also order any of the following special conditions:

- (i) The offender shall remain within, or outside of, a specified geographical boundary;
- (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (iii) The offender shall participate in crime-related treatment or counseling services;
- (iv) The offender shall not consume alcohol; or
- (v) The offender shall comply with any crime-related prohibitions.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(9) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(10) If a sentence imposed includes payment of a legal financial obligation, the sentence shall specify the total amount of the legal financial obligation owed, and shall require the offender to pay a specified monthly sum toward that legal financial obligation. Restitution to victims shall be paid prior to any other payments of monetary obligations. Any legal financial obligation that is imposed by the court may be collected by the department, which shall deliver the amount paid to the county clerk for credit. The offender's compliance with payment of legal financial obligations shall be supervised by the department. All monetary payments ordered shall be paid no later than ten years after the last date of release from confinement pursuant to a felony conviction or the date the sentence was entered. Independent of the department, the party or entity to whom the legal financial obligation is owed shall have the authority to utilize any other remedies available to the party or entity to collect the legal financial obligation. Nothing in this section makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these legal financial obligations. If an order includes restitution as one of the monetary assessments, the county clerk shall make disbursements to victims named in the order.

(11) Except as provided under RCW 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or

community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(12) All offenders sentenced to terms involving community supervision, community service, community placement, or legal financial obligation shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow explicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(13) All offenders sentenced to terms involving community supervision, community service, or community placement under the supervision of the department of corrections shall not own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the appropriate violation process and sanctions. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(14) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(15) A departure from the standards in RCW 9.94A.400(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210(2) through (6).

(16) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(17) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

(18) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

(19) All court-ordered legal financial obligations collected by the department and remitted to the county clerk shall be credited and paid where restitution is ordered. Restitution shall be paid prior to any other payments of monetary obligations.

Sec. 3. RCW 9.94A.030 and 1992 c 145 s 6 and 1992 c 75 s 1 are each reenacted and amended to read as follows:

<< WA ST 9.94A.030 >>

DEFINITIONS. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department of corrections, means that the department is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

(2) "Commission" means the sentencing guidelines commission.

(3) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(4) "Community custody" means that portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to controls placed on the inmate's movement and activities by the department of corrections.

(5) "Community placement" means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community

placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

(6) "Community service" means compulsory service, without compensation, performed for the benefit of the community by the offender.

(7) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter or RCW 46.61.524. For first-time offenders, the supervision may include crime-related prohibitions and other conditions imposed pursuant to RCW 9.94A.120(5). For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

(8) "Confinement" means total or partial confinement as defined in this section.

(9) "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

(10) "Court-ordered legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.

(11) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.

(12)(a) "Criminal history" means the list of a defendant's prior convictions, whether in this state, in federal court, or elsewhere. The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) "Criminal history" shall always include juvenile convictions for sex offenses and shall also include a defendant's other prior convictions in juvenile court if: (i) The conviction was for an offense which is a felony or a serious traffic offense and is criminal history as defined in RCW 13.40.020(6)(a); (ii) the defendant was fifteen years of age or older at the time the offense was committed; and (iii) with respect to prior juvenile class B and C felonies or serious traffic offenses, the defendant was less than twenty-three years of age at the time the offense for which he or she is being sentenced was committed.

(13) "Department" means the department of corrections.

(14) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a legal financial obligation. The fact that an offender through "earned early release" can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

(15) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

(16) "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403);

(b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or

(c) Any out-of-state conviction for an offense that under the laws of this state would be a felony classified as a drug offense under (a) of this subsection.

(17) "Escape" means:

(a) Escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (RCW 72.66.060), willful failure to return from work release (RCW 72.65.070), or willful failure to be available for supervision by the department while in community custody (RCW 72.09.310); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

(18) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), or felony hit-and-run injury-accident (RCW 46.52.020(4)); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a felony traffic offense under (a) of this subsection.

(19) "Fines" means the requirement that the offender pay a specific sum of money over a specific period of time to the court.

(20)(a) "First-time offender" means any person who is convicted of a felony (i) not classified as a violent offense or a sex offense under this chapter, or (ii) that is not the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in schedule I or II that is a narcotic drug or the selling for profit <<-[of]->> <<+of+>> any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana, and except as provided in (b) of this subsection, who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

(b) For purposes of (a) of this subsection, a juvenile adjudication for an offense committed before the age of fifteen years is not a previous felony conviction except for adjudications of sex offenses.

(21) <<+"Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:+>>

<<+(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;+>>

<<+(b) Assault in the second degree;+>>

<<+(c) Assault of a child in the second degree;+>>

<<+(d) Child molestation in the second degree;+>>

<<+(e) Controlled substance homicide;+>>

<<+(f) Extortion in the first degree;+>>

<<+(g) Incest when committed against a child under age fourteen;+>>

<<+(h) Indecent liberties;+>>

<<+(i) Kidnapping in the second degree;+>>

<<+(j) Leading organized crime;+>>

<<+(k) Manslaughter in the first degree;+>>

<<+(l) Manslaughter in the second degree;+>>

<<+(m) Promoting prostitution in the first degree;+>>

<<+(n) Rape in the third degree;+>>

<<+(o) Robbery in the second degree;+>>

<<+(p) Sexual exploitation;+>>

<<+(q) Vehicular assault;+>>

<<+(r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;+>>

<<+(s) Any other class B felony offense with a finding of sexual motivation, as "sexual motivation" is defined under this section;+>>

<<+(t) Any other felony with a deadly weapon verdict under RCW 9.94A.125;+>>

<<+(u) Any felony offense in effect at any time prior to the effective date of this section, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection.+>>

<<+(22)+>> "Nonviolent offense" means an offense which is not a violent offense.

<<-(22)->><<+(23)+>> "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

<<-(23)->><<+(24)+>> "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention as defined in this section.

<<-(24)->><<+(25)+>> "Persistent offender" is an offender who:+>>

<<+(a) Has been convicted in this state of any felony considered a most serious offense; and+>>

<<+(b) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.+>>

<<+(26)+>> "Postrelease supervision" is that portion of an offender's community placement that is not community custody.

<<-(25)->><<+(27)+>> "Restitution" means the requirement that the offender pay a specific sum of money over a specific period of time to the court as payment of damages. The sum may include both public and private costs. The imposition of a restitution order does not preclude civil redress.

<<-(26)->><<+(28)+>> "Serious traffic offense" means:

(a) Driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

<<-(27)->><<+(29)+>> "Serious violent offense" is a subcategory of violent offense and means:

(a) Murder in the first degree, homicide by abuse, murder in the second degree, assault in the first degree, kidnapping in the first degree, or rape in the first degree, assault of a child in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

<<-(28)->><<+(30)+>> "Sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

<<-(29)->><<+(31)+>> "Sex offense" means:

(a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) A felony with a finding of sexual motivation under RCW 9.94A.127; or

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

<<-(30)->><<+(32)+>> "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

<<-(31)->><<+(33)+>> "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

<<-(32)->><<+(34)+>> "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

<<-(33)->><<+(35)+>> "Violent offense" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, assault of a child in the second degree, extortion in the first degree, robbery in the second degree, vehicular assault, and vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

<<-(34)->><<+(36)+>> "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community of not less than thirty-five hours

per week that complies with RCW 9.94A.135. The civic improvement tasks shall be performed on public property or on private property owned or operated by nonprofit entities, except that, for emergency purposes only, work crews may perform snow removal on any private property. The civic improvement tasks shall have minimal negative impact on existing private industries or the labor force in the county where the service or labor is performed. The civic improvement tasks shall not affect employment opportunities for people with developmental disabilities contracted through sheltered workshops as defined in RCW 82.04.385. Only those offenders sentenced to a facility operated or utilized under contract by a county are eligible to participate on a work crew. Offenders sentenced for a sex offense as defined in subsection <<-(29)->><<+(31)+>> of this section are not eligible for the work crew program.

<<-(35)->><<+(37)+>> "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school. Participation in work release shall be conditioned upon the offender attending work or school at regularly defined hours and abiding by the rules of the work release facility.

<<-(36)->><<+(38)+>> "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance. Home detention may not be imposed for offenders convicted of a violent offense, any sex offense, any drug offense, reckless burning in the first or second degree as defined in RCW 9A.48.040 or 9A.48.050, assault in the third degree as defined in RCW 9A.36.031, assault of a child in the third degree, unlawful imprisonment as defined in RCW 9A.40.040, or harassment as defined in RCW 9A.46.020. Home detention may be imposed for offenders convicted of possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403) if the offender fulfills the participation conditions set forth in this subsection and is monitored for drug use by treatment alternatives to street crime (TASC) or a comparable court or agency-referred program.

(a) Home detention may be imposed for offenders convicted of burglary in the second degree as defined in RCW 9A.52.030 or residential burglary conditioned upon the offender: (i) Successfully completing twenty-one days in a work release program, (ii) having no convictions for burglary in the second degree or residential burglary during the preceding two years and not more than two prior convictions for burglary or residential burglary, (iii) having no convictions for a violent felony offense during the preceding two years and not more than two prior convictions for a violent felony offense, (iv) having no prior charges of escape, and (v) fulfilling the other conditions of the home detention program.

(b) Participation in a home detention program shall be conditioned upon: (i) The offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours, or the offender performing parental duties to offspring or minors normally in the custody of the offender, (ii) abiding by the rules of the home detention program, and (iii) compliance with court-ordered legal financial obligations. The home detention program may also be made available to offenders whose charges and convictions do not otherwise disqualify them if medical or health-related conditions, concerns or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. Participation in the home detention program for medical or health-related reasons is conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

<<+NEW SECTION.+>> Sec. 4. OFFENDER NOTIFICATION AND WARNING. A sentencing judge, law enforcement agency, or state or local correctional facility may, but is not required to, give offenders who have been convicted of an offense that is a most serious offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions imposed upon persistent offenders. General notice of these sanctions and the conditions under which they may be imposed may, but need not, be given in correctional facilities maintained by state or local agencies. This section is enacted to provide authority, but not requirement, for the giving of such notice in every conceivable way without incurring liability to offenders or third parties.

<<+NEW SECTION.+>> Sec. 5. GOVERNOR'S POWERS. (1) Nothing in this act shall ever be interpreted or construed as to reduce or eliminate the power of the governor to grant a pardon or clemency to any offender on an individual case-by-case basis. However, the people recommend that any offender subject to total confinement for life without the possibility of parole not be considered for release until the offender has reached the age of at least sixty years old and has been judged to be no longer a threat to society. The people further recommend that sex offenders be held to the utmost scrutiny under this subsection regardless of age.

(2) Nothing in this section shall ever be interpreted or construed to grant any release for the purpose of reducing prison overcrowding. Furthermore, the governor shall provide twice

yearly reports on the activities and progress of offenders subject to total confinement for life without the possibility of parole who are released through executive action during his or her tenure. These reports shall continue for not less than ten years after the release of the offender or upon the death of the released offender.

<<+NEW SECTION.+>> Sec. 6. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

<<+NEW SECTION.+>> Sec. 7. SHORT TITLE. This act shall be known and may be cited as the persistent offender accountability act.

<<+NEW SECTION.+>> Sec. 8. CAPTIONS. Captions as used in this act do not constitute any part of the law.

Approved by the people November 2, 1993.

WA LEGIS 1 (1994)

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1992 Wash. Legis. Serv. Ch. 145 (S.S.B. 6104) (WEST)

WASHINGTON 1992 LEGISLATIVE SERVICE

CRIMES—ASSAULTS AGAINST CHILDREN

1992 Wash. Legis. Serv. Ch. 145 (S.S.B. 6104) (WEST) (Approx. 33 pages)

Additions are indicated by <<+ Text +>>

Deletions by <<- Text ->>

Changes in tables are made but not highlighted. Vetoed provisions within tabular material are not displayed.

CHAPTER 145

S.S.B. No. 6104

CRIMES—ASSAULTS AGAINST CHILDREN

AN ACT Relating to creating the crimes of first, second, and third degree assault against a child; amending RCW 9.94A.320, 9.41.010, 9.94A.150, 9.94A.310, 9.94A.360, 9.94A.440, 9A.46.060, 9A.82.010, 13.34.130, 13.34.190, and 71.09.020; reenacting and amending RCW 9.94A.030, 9.94A.120, and 43.43.830; adding new sections to chapter 9A.36 RCW; and prescribing penalties.

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

NEW SECTION. Sec. 1. A new section is added to chapter 9A.36 RCW to read as follows:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the first degree, as defined in RCW 9A.36.011, against the child; or

(b) Intentionally assaults the child and either:

(i) Recklessly inflicts great bodily harm; or

(ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the first degree is a class A felony.

NEW SECTION. Sec. 2. A new section is added to chapter 9A.36 RCW to read as follows:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the second degree is a class B felony.

NEW SECTION. Sec. 3. A new section is added to chapter 9A.36 RCW to read as follows:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.

(2) Assault of a child in the third degree is a class C felony.

Sec. 4. RCW 9.94A.320 and 1991 c 32 s 3 are each amended to read as follows:

<< WA ST 9.94A.320 >>

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XV Aggravated Murder 1 (RCW 10.95.020)

XIV Murder 1 (RCW 9A.32.030)

Homicide by abuse (RCW 9A.32.055)

XIII Murder 2 (RCW 9A.32.050)

XII Assault 1 (RCW 9A.36.011)

Assault of a Child 1 (RCW 9A.36.—(section 1 of this act))

XI Rape 1 (RCW 9A.44.040)

Rape of a Child 1 (RCW 9A.44.073)

X Kidnapping 1 (RCW 9A.40.020)

Rape 2 (RCW 9A.44.050)

Rape of a Child 2 (RCW 9A.44.076)

Child Molestation 1 (RCW 9A.44.083)

Damaging building, etc., by explosion with threat to human being (RCW 70.74.280(1))

Over 18 and deliver heroin or narcotic from Schedule I or II to someone under 18 (RCW 69.50.406)

Leading Organized Crime (RCW 9A.82.060(1)(a))

IX Assault of a Child 2 (RCW 9A.36.—(section 2 of this act))

Robbery 1 (RCW 9A.56.200)

Manslaughter 1 (RCW 9A.32.060)

Explosive devices prohibited (RCW 70.74.180)

Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))

Endangering life and property by explosives with threat to human being (RCW 70.74.270) ¶

Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic from Schedule I–V to someone under 18 and 3 years junior (RCW 69.50.406)

Controlled Substance Homicide (RCW 69.50.415)

Sexual Exploitation (RCW 9.68A.040)

Inciting Criminal Profiteering (RCW 9A.82.060(1)(b))

VIII Arson 1 (RCW 9A.48.020)

Promoting Prostitution 1 (RCW 9A.88.070)

Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)

Manufacture, deliver, or possess with intent to deliver heroin or cocaine (RCW 69.50.401(a)(1)(i))

Manufacture, deliver, or possess with intent to deliver methamphetamine (RCW 69.50.401(a)(1)(ii))

Vehicular Homicide, by being under the influence of intoxicating liquor or any drug or by the operation of any vehicle in a reckless manner (RCW 46.61.520)

VII Burglary 1 (RCW 9A.52.020)

Vehicular Homicide, by disregard for the safety of others (RCW 46.61.520)

Introducing Contraband 1 (RCW 9A.76.140)

Indecent Liberties (without forcible compulsion) (RCW 9A.44.100(1)(b) and (c))

Child Molestation 2 (RCW 9A.44.086)

Dealing in depictions of minor engaged in sexually explicit conduct (RCW 9.68A.050)

Sending, bringing into state depictions of minor engaged in sexually explicit conduct (RCW 9.68A.060)

Involving a minor in drug dealing (RCW 69.50.401(f))

VI Bribery (RCW 9A.68.010)

Manslaughter 2 (RCW 9A.32.070)

Rape of a Child 3 (RCW 9A.44.079)

Intimidating a Juror/Witness (RCW 9A.72.110, 9A.72.130)

Damaging building, etc., by explosion with no threat to human being (RCW 70.74.280(2))

Endangering life and property by explosives with no threat to human being (RCW 70.74.270)

Incest 1 (RCW 9A.64.020(1))

Manufacture, deliver, or possess with intent to deliver narcotics from Schedule I or II (except heroin or cocaine) (RCW 69.50.401(a)(1)(i))

Intimidating a Judge (RCW 9A.72.160)

Bail Jumping with Murder 1 (RCW 9A.76.170(2)(a))

V Criminal Mistreatment 1 (RCW 9A.42.020)

Rape 3 (RCW 9A.44.060)

Sexual Misconduct with a Minor 1 (RCW 9A.44.093)

Child Molestation 3 (RCW 9A.44.089)

Kidnapping 2 (RCW 9A.40.030)

Extortion 1 (RCW 9A.56.120)

Incest 2 (RCW 9A.64.020(2))

Perjury 1 (RCW 9A.72.020)

Extortionate Extension of Credit (RCW 9A.82.020)

Advancing money or property for extortionate extension of credit (RCW 9A.82.030)

Extortionate Means to Collect Extensions of Credit (RCW 9A.82.040)

Rendering Criminal Assistance 1 (RCW 9A.76.070)

Bail Jumping with class A Felony (RCW 9A.76.170(2)(b))

Delivery of imitation controlled substance by person eighteen or over to person under eighteen (RCW 69.52.030(2))

IV Residential Burglary (RCW 9A.52.025)

Theft of Livestock 1 (RCW 9A.56.080)

Robbery 2 (RCW 9A.56.210)

Assault 2 (RCW 9A.36.021)

Escape 1 (RCW 9A.76.110)

Arson 2 (RCW 9A.48.030)

Bribing a Witness/Bribe Received by Witness (RCW 9A.72.090, 9A.72.100)

Malicious Harassment (RCW 9A.36.080)

Threats to Bomb (RCW 9.61.160)

Willful Failure to Return from Furlough (RCW 72.66.060)

Hit and Run—Injury Accident (RCW 46.52.020(4))

Vehicular Assault (RCW 46.61.522)

Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I–V (except marijuana or methamphetamines) (RCW 69.50.401(a)(1)(ii) through (iv))

Influencing Outcome of Sporting Event (RCW 9A.82.070)

Use of Proceeds of Criminal Profiteering (RCW 9A.82.080(1) and (2))

Knowingly Trafficking in Stolen Property (RCW 9A.82.050(2))

III Criminal mistreatment 2 (RCW 9A.42.030)

Extortion 2 (RCW 9A.56.130)

Unlawful Imprisonment (RCW 9A.40.040)

Assault 3 (RCW 9A.36.031)

Assault of a Child 3 (RCW 9A.36.—(section 3 of this act))

Custodial Assault (RCW 9A.36.100)

Unlawful possession of firearm or pistol by felon (RCW 9.41.040)

Harassment (RCW 9A.46.020)

Promoting Prostitution 2 (RCW 9A.88.080)

Willful Failure to Return from Work Release (RCW 72.65.070)

Burglary 2 (RCW 9A.52.030)

Introducing Contraband 2 (RCW 9A.76.150)

Communication with a Minor for Immoral Purposes (RCW 9.68A.090)

Patronizing a Juvenile Prostitute (RCW 9.68A.100)

Escape 2 (RCW 9A.76.120)

Perjury 2 (RCW 9A.72.030)

Bail Jumping with class B or C Felony (RCW 9A.76.170(2)(c))

Intimidating a Public Servant (RCW 9A.76.180)

Tampering with a Witness (RCW 9A.72.120)

Manufacture, deliver, or possess with intent to deliver marijuana (RCW 69.50.401(a)(1)(ii))

Delivery of a material in lieu of a controlled substance (RCW 69.50.401(c))

Manufacture, distribute, or possess with intent to distribute an imitation controlled substance (RCW 69.52.030(1))

Recklessly Trafficking in Stolen Property (RCW 9A.82.050(1))
 Theft of livestock 2 (RCW 9A.56.080)
 Securities Act violation (RCW 21.20.400)
 II Malicious Mischief 1 (RCW 9A.48.070)
 Possession of Stolen Property 1 (RCW 9A.56.150)
 Theft 1 (RCW 9A.56.030)
 Possession of controlled substance that is either heroin or narcotics from Schedule I or II (RCW 69.50.401(d))
 Possession of phencyclidine (PCP) (RCW 69.50.401(d))
 Create, deliver, or possess a counterfeit controlled substance (RCW 69.50.401(b))
 Computer Trespass 1 (RCW 9A.52.110)
 Reckless Endangerment 1 (RCW 9A.36.045)
 I Theft 2 (RCW 9A.56.040)
 Possession of Stolen Property 2 (RCW 9A.56.160)
 Forgery (RCW 9A.60.020)
 Taking Motor Vehicle Without Permission (RCW 9A.56.070)
 Vehicle Prowl 1 (RCW 9A.52.095)
 Attempting to Elude a Pursuing Police Vehicle (RCW 46.61.024)
 Malicious Mischief 2 (RCW 9A.48.080)
 Reckless Burning 1 (RCW 9A.48.040)
 Unlawful Issuance of Checks or Drafts (RCW 9A.56.060)
 Unlawful Use of Food Stamps (RCW 9.91.140(2) and (3))
 False Verification for Welfare (RCW 74.08.055)
 Forged Prescription (RCW 69.41.020)
 Forged Prescription for a Controlled Substance (RCW 69.50.403)
 Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Non-narcotic from Schedule I–V (except phencyclidine) (RCW 69.50.401(d))

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XV Aggravated Murder 1 (RCW 10.95.020)
 XIV Murder 1 (RCW 9A.32.030)
 Homicide by abuse (RCW 9A.32.055)
 XIII Murder 2 (RCW 9A.32.050)
 XII Assault 1 (RCW 9A.36.011)
 Assault of a Child 1 (RCW 9A.36.--(section 1 of this act))
 XI Rape 1 (RCW 9A.44.040)
 Rape of a Child 1 (RCW 9A.44.073)
 X Kidnapping 1 (RCW 9A.40.020)
 Rape 2 (RCW 9A.44.050)
 Rape of a Child 2 (RCW 9A.44.076)
 Child Molestation 1 (RCW 9A.44.083)
 Damaging building, etc., by explosion with threat to human being (RCW 70.74.280(1))
 Over 18 and deliver heroin or narcotic from Schedule I or II to someone under 18 (RCW 69.50.406)
 Leading Organized Crime (RCW 9A.82.060(1)(a))
 IX Assault of a Child 2 (RCW 9A.36.--(section 2 of this act))
 Robbery 1 (RCW 9A.56.200)
 Manslaughter 1 (RCW 9A.32.060)
 Explosive devices prohibited (RCW 70.74.180)
 Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))
 Endangering life and property by explosives with threat to human being (RCW 70.74.270)
 Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic from Schedule I–V to someone under 18 and 3 years junior (RCW 69.50.406)
 Controlled Substance Homicide (RCW 69.50.415)
 Sexual Exploitation (RCW 9.68A.040)
 Inciting Criminal Profiteering (RCW 9A.82.060(1)(b))
 VIII Arson 1 (RCW 9A.48.020)
 Promoting Prostitution 1 (RCW 9A.88.070)

Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)
Manufacture, deliver, or possess with intent to deliver heroin or cocaine (RCW 69.50.401(a)(1)(i))
Manufacture, deliver, or possess with intent to deliver methamphetamine (RCW 69.50.401(a)(1)(ii))
Vehicular Homicide, by being under the influence of intoxicating liquor or any drug or by the operation of any vehicle in a reckless manner (RCW 46.61.520)
VII Burglary 1 (RCW 9A.52.020)
Vehicular Homicide, by disregard for the safety of others (RCW 46.61.520)
Introducing Contraband 1 (RCW 9A.76.140)
Indecent Liberties (without forcible compulsion) (RCW 9A.44.100(1)(b) and (c))
Child Molestation 2 (RCW 9A.44.086)
Dealing in depictions of minor engaged in sexually explicit conduct (RCW 9.68A.050)
Sending, bringing into state depictions of minor engaged in sexually explicit conduct (RCW 9.68A.060)
Involving a minor in drug dealing (RCW 69.50.401(f))
VI Bribery (RCW 9A.68.010)
Manslaughter 2 (RCW 9A.32.070)
Rape of a Child 3 (RCW 9A.44.079)
Intimidating a Juror/Witness (RCW 9A.72.110, 9A.72.130)
Damaging building, etc., by explosion with no threat to human being (RCW 70.74.280(2))
Endangering life and property by explosives with no threat to human being (RCW 70.74.270)
Incest 1 (RCW 9A.64.020(1))
Manufacture, deliver, or possess with intent to deliver narcotics from Schedule I or II (except heroin or cocaine) (RCW 69.50.401(a)(1)(i))
Intimidating a Judge (RCW 9A.72.160)
Bail Jumping with Murder 1 (RCW 9A.76.170(2)(a))
V Criminal Mistreatment 1 (RCW 9A.42.020)
Rape 3 (RCW 9A.44.060)
Sexual Misconduct with a Minor 1 (RCW 9A.44.093)
Child Molestation 3 (RCW 9A.44.089)
Kidnapping 2 (RCW 9A.40.030)
Extortion 1 (RCW 9A.56.120)
Incest 2 (RCW 9A.64.020(2))
Perjury 1 (RCW 9A.72.020)
Extortionate Extension of Credit (RCW 9A.82.020)
Advancing money or property for extortionate extension of credit (RCW 9A.82.030)
Extortionate Means to Collect Extensions of Credit (RCW 9A.82.040)
Rendering Criminal Assistance 1 (RCW 9A.76.070)
Bail Jumping with class A Felony (RCW 9A.76.170(2)(b))
Delivery of imitation controlled substance by person eighteen or over to person under eighteen (RCW 69.52.030(2))
IV Residential Burglary (RCW 9A.52.025)
Theft of Livestock 1 (RCW 9A.56.080)
Robbery 2 (RCW 9A.56.210)
Assault 2 (RCW 9A.36.021)
Escape 1 (RCW 9A.76.110)
Arson 2 (RCW 9A.48.030)
Bribing a Witness/Bribe Received by Witness (RCW 9A.72.090, 9A.72.100)
Malicious Harassment (RCW 9A.36.080)
Threats to Bomb (RCW 9.61.160)
Willful Failure to Return from Furlough (RCW 72.66.060)
Hit and Run--Injury Accident (RCW 46.52.020(4))
Vehicular Assault (RCW 46.61.522)
Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I-V (except marijuana or methamphetamines) (RCW 69.50.401(a)(1)(ii) through (iv))
Influencing Outcome of Sporting Event (RCW 9A.82.070)
Use of Proceeds of Criminal Profiteering (RCW 9A.82.080(1) and (2))

Knowingly Trafficking in Stolen Property (RCW 9A.82.050(2))
 III Criminal mistreatment 2 (RCW 9A.42.030)
 Extortion 2 (RCW 9A.56.130)
 Unlawful Imprisonment (RCW 9A.40.040)
 Assault 3 (RCW 9A.36.031)
 Assault of a Child 3 (RCW 9A.36.--(section 3 of this act))
 Custodial Assault (RCW 9A.36.100)
 Unlawful possession of firearm or pistol by felon (RCW 9.41.040)
 Harassment (RCW 9A.46.020)
 Promoting Prostitution 2 (RCW 9A.88.080)
 Willful Failure to Return from Work Release (RCW 72.65.070)
 Burglary 2 (RCW 9A.52.030)
 Introducing Contraband 2 (RCW 9A.76.150)
 Communication with a Minor for Immoral Purposes (RCW 9.68A.090)
 Patronizing a Juvenile Prostitute (RCW 9.68A.100)
 Escape 2 (RCW 9A.76.120)
 Perjury 2 (RCW 9A.72.030)
 Bail Jumping with class B or C Felony (RCW 9A.76.170(2)(c))
 Intimidating a Public Servant (RCW 9A.76.180)
 Tampering with a Witness (RCW 9A.72.120)
 Manufacture, deliver, or possess with intent to deliver marijuana (RCW 69.50.401(a)(1)(ii))
 Delivery of a material in lieu of a controlled substance (RCW 69.50.401(c))
 Manufacture, distribute, or possess with intent to distribute an imitation controlled substance (RCW 69.52.030(1))
 Recklessly Trafficking in Stolen Property (RCW 9A.82.050(1))
 Theft of livestock 2 (RCW 9A.56.080)
 Securities Act violation (RCW 21.20.400)
 II Malicious Mischief 1 (RCW 9A.48.070)
 Possession of Stolen Property 1 (RCW 9A.56.150)
 Theft 1 (RCW 9A.56.030)
 Possession of controlled substance that is either heroin or narcotics from Schedule I or II (RCW 69.50.401(d))
 Possession of phencyclidine (PCP) (RCW 69.50.401(d))
 Create, deliver, or possess a counterfeit controlled substance (RCW 69.50.401(b))
 Computer Trespass 1 (RCW 9A.52.110)
 Reckless Endangerment 1 (RCW 9A.36.045)
 I Theft 2 (RCW 9A.56.040)
 Possession of Stolen Property 2 (RCW 9A.56.160)
 Forgery (RCW 9A.60.020)
 Taking Motor Vehicle Without Permission (RCW 9A.56.070)
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 Malicious Mischief 2 (RCW 9A.48.080)
 Reckless Burning 1 (RCW 9A.48.040)
 Unlawful Issuance of Checks or Drafts (RCW 9A.56.060)
 Unlawful Use of Food Stamps (RCW 9.91.140(2) and (3))
 False Verification for Welfare (RCW 74.08.055)
 Forged Prescription (RCW 69.41.020)
 Forged Prescription for a Controlled Substance (RCW 69.50.403)
 Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Non-narcotic from Schedule I–V (except phencyclidine) (RCW 69.50.401(d))

Sec. 5. RCW 9.41.010 and 1983 c 232 s 1 are each amended to read as follows:

<< WA ST 9.41.010 >>

(1) "Short firearm" or "pistol" as used in this chapter means any firearm with a barrel less than twelve inches in length.

(2) "Crime of violence" as used in this chapter means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible

compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, <<+assault of a child in the second degree,+>> extortion in the first degree, burglary in the second degree, and robbery in the second degree;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, which is comparable to a felony classified as a crime of violence in subsection (2)(a) of this section; and

(c) Any federal or out-of-state conviction for an offense comparable to a felony classified as a crime of violence under subsection (2)(a) or (b) of this section.

(3) "Firearm" as used in this chapter means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(4) "Commercial seller" as used in this chapter means a person who has a federal firearms license.

Sec. 6. RCW 9.94A.030 and 1991 c 348 s 4, 1991 c 290 s 3, and 1991 c 181 s 1 are each reenacted and amended to read as follows:

<< WA ST 9.94A.030 >>

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department of corrections, means that the department is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

(2) "Commission" means the sentencing guidelines commission.

(3) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(4) "Community custody" means that portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to controls placed on the inmate's movement and activities by the department of corrections.

(5) "Community placement" means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

(6) "Community service" means compulsory service, without compensation, performed for the benefit of the community by the offender.

(7) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter or RCW 46.61.524. For first-time offenders, the supervision may include crime-related prohibitions and other conditions imposed pursuant to RCW 9.94A.120(5). For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

(8) "Confinement" means total or partial confinement as defined in this section.

(9) "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

(10) "Court-ordered legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.

(11) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.

(12)(a) "Criminal history" means the list of a defendant's prior convictions, whether in this state, in federal court, or elsewhere. The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) "Criminal history" shall always include juvenile convictions for sex offenses and shall also include a defendant's other prior convictions in juvenile court if: (i) The conviction was for an offense which is a felony or a serious traffic offense and is criminal history as defined in RCW 13.40.020(6)(a); (ii) the defendant was fifteen years of age or older at the time the offense was committed; and (iii) with respect to prior juvenile class B and C felonies or serious traffic offenses, the defendant was less than twenty-three years of age at the time the offense for which he or she is being sentenced was committed.

(13) "Department" means the department of corrections.

(14) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a legal financial obligation. The fact that an offender through "earned early release" can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

(15) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

(16) "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403);

(b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or

(c) Any out-of-state conviction for an offense that under the laws of this state would be a felony classified as a drug offense under (a) of this subsection.

(17) "Escape" means:

(a) Escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (RCW 72.66.060), willful failure to return from work release (RCW 72.65.070), or willful failure to comply with any limitations on the inmate's movements while in community custody (RCW 72.09.310); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

(18) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), or felony hit-and-run injury-accident (RCW 46.52.020(4)); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a felony traffic offense under (a) of this subsection.

(19) "Fines" means the requirement that the offender pay a specific sum of money over a specific period of time to the court.

(20)(a) "First-time offender" means any person who is convicted of a felony (i) not classified as a violent offense or a sex offense under this chapter, or (ii) that is not the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in schedule I or II that is a narcotic drug or the selling for profit [of] any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana, and except as provided in (b) of this subsection, who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

(b) For purposes of (a) of this subsection, a juvenile adjudication for an offense committed before the age of fifteen years is not a previous felony conviction except for adjudications of sex offenses.

(21) "Nonviolent offense" means an offense which is not a violent offense.

(22) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

(23) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government,

or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention as defined in this section.

(24) "Postrelease supervision" is that portion of an offender's community placement that is not community custody.

(25) "Restitution" means the requirement that the offender pay a specific sum of money over a specific period of time to the court as payment of damages. The sum may include both public and private costs. The imposition of a restitution order does not preclude civil redress.

(26) "Serious traffic offense" means:

(a) Driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

(27) "Serious violent offense" is a subcategory of violent offense and means:

(a) Murder in the first degree, homicide by abuse, murder in the second degree, assault in the first degree, kidnapping in the first degree, or rape in the first degree, <<+assault of a child in the first degree,+>> or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

(28) "Sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

(29) "Sex offense" means:

(a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) A felony with a finding of sexual motivation under RCW 9.94A.127; or

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

(30) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

(31) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

(32) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

(33) "Violent offense" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, kidnapping in the second degree, arson in the second degree, assault in the second degree, <<+assault of a child in the second degree,+>> extortion in the first degree, robbery in the second degree, vehicular assault, and vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

(34) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community of not less than thirty-five hours per week that complies with RCW 9.94A.135. The civic improvement tasks shall be performed on public property or on private property owned or operated by nonprofit entities, except that, for emergency purposes only, work crews may perform snow removal on any private property. The civic improvement tasks shall have minimal negative impact on existing private industries or the labor force in the county where the service or labor is performed. The civic improvement tasks shall not affect employment opportunities for people with developmental disabilities contracted through sheltered workshops as defined in RCW 82.04.385. Only those offenders sentenced to a facility operated or utilized under contract by a county are

eligible to participate on a work crew. Offenders sentenced for a sex offense as defined in subsection (29) of this section are not eligible for the work crew program.

(35) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school. Participation in work release shall be conditioned upon the offender attending work or school at regularly defined hours and abiding by the rules of the work release facility.

(36) "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance. Home detention may not be imposed for offenders convicted of a violent offense, any sex offense, any drug offense, reckless burning in the first or second degree as defined in RCW 9A.48.040 or 9A.48.050, assault in the third degree as defined in RCW 9A.36.031, <<+assault of a child in the third degree,+>> unlawful imprisonment as defined in RCW 9A.40.040, or harassment as defined in RCW 9A.46.020. Home detention may be imposed for offenders convicted of possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403) if the offender fulfills the participation conditions set forth in this subsection and is monitored for drug use by treatment alternatives to street crime (TASC) or a comparable court or agency-referred program.

(a) Home detention may be imposed for offenders convicted of burglary in the second degree as defined in RCW 9A.52.030 or residential burglary conditioned upon the offender:

(i) Successfully completing twenty-one days in a work release program, (ii) having no convictions for burglary in the second degree or residential burglary during the preceding two years and not more than two prior convictions for burglary or residential burglary, (iii) having no convictions for a violent felony offense during the preceding two years and not more than two prior convictions for a violent felony offense, (iv) having no prior charges of escape, and (v) fulfilling the other conditions of the home detention program.

(b) Participation in a home detention program shall be conditioned upon: (i) The offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours, or the offender performing parental duties to offspring or minors normally in the custody of the offender, (ii) abiding by the rules of the home detention program, and (iii) compliance with court-ordered legal financial obligations. The home detention program may also be made available to offenders whose charges and convictions do not otherwise disqualify them if medical or health-related conditions, concerns or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. Participation in the home detention program for medical or health-related reasons is conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

Sec. 7. RCW 9.94A.120 and 1991 c 221 s 2, 1991 c 181 s 3, and 1991 c 104 s 3 are each reenacted and amended to read as follows:

<< WA ST 9.94A.120 >>

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

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

(4) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree <<+or assault of a child in the first degree+>> where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum five-year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of

confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

- (a) Devote time to a specific employment or occupation;
- (b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;
- (c) Pursue a prescribed, secular course of study or vocational training;
- (d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (e) Report as directed to the court and a community corrections officer; or
- (f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

(6) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(7)(a)(i) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense and has no prior convictions for a sex offense or any other felony sex offenses in this or any other state, the sentencing court, on its own motion or the motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

The report of the examination shall include at a minimum the following: The defendant's version of the facts and the official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors, the offender's social and employment situation, and other evaluation measures used. The report shall set forth the sources of the evaluator's information.

The examiner shall assess and report regarding the defendant's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

- (A) Frequency and type of contact between offender and therapist;
- (B) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (C) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;
- (D) Anticipated length of treatment; and
- (E) Recommended crime-related prohibitions.

The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The evaluator shall be selected by the party making the motion. The defendant shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(ii) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this special sexual offender sentencing alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this subsection. If the court determines that this special sex offender sentencing alternative is appropriate, the court shall then impose a sentence within the sentence range. If this sentence is less than eight years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

- (A) The court shall place the defendant on community supervision for the length of the suspended sentence or three years, whichever is greater; and
- (B) The court shall order treatment for any period up to three years in duration. The court in its discretion shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court, and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. In addition, as conditions of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

- (l) Devote time to a specific employment or occupation;

(II) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(III) Report as directed to the court and a community corrections officer;

(IV) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030, perform community service work, or any combination thereof; or

(V) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime.

(iii) The sex offender therapist shall submit quarterly reports on the defendant's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, defendant's compliance with requirements, treatment activities, the defendant's relative progress in treatment, and any other material as specified by the court at sentencing.

(iv) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment. Prior to the treatment termination hearing, the treatment professional and community corrections officer shall submit written reports to the court and parties regarding the defendant's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community supervision conditions. Either party may request and the court may order another evaluation regarding the advisability of termination from treatment. The defendant shall pay the cost of any additional evaluation ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (A) Modify conditions of community supervision, and either (B) terminate treatment, or (C) extend treatment for up to the remaining period of community supervision.

(v) The court may revoke the suspended sentence at any time during the period of community supervision and order execution of the sentence if: (A) The defendant violates the conditions of the suspended sentence, or (B) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community supervision shall be credited to the offender if the suspended sentence is revoked.

(vi) After July 1, 1991, examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW.

For purposes of this subsection, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(b) When an offender is convicted of any felony sex offense committed before July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, order the offender committed for up to thirty days to the custody of the secretary of social and health services for evaluation and report to the court on the offender's amenability to treatment at these facilities. If the secretary of social and health services cannot begin the evaluation within thirty days of the court's order of commitment, the offender shall be transferred to the state for confinement pending an opportunity to be evaluated at the appropriate facility. The court shall review the reports and may order that the term of confinement imposed be served in the sexual offender treatment program at the location determined by the secretary of social and health services or the secretary's designee, only if the report indicates that the offender is amenable to the treatment program provided at these facilities. The offender shall be transferred to the state pending placement in the treatment program. Any offender who has escaped from the treatment program shall be referred back to the sentencing court.

If the offender does not comply with the conditions of the treatment program, the secretary of social and health services may refer the matter to the sentencing court. The sentencing court shall commit the offender to the department of corrections to serve the balance of the term of confinement.

If the offender successfully completes the treatment program before the expiration of the term of confinement, the court may convert the balance of confinement to community supervision and may place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sex offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sex offense committed prior to July 1, 1987. This subsection (c) does not apply to any crime committed after July 1, 1990.

(d) Offenders convicted and sentenced for a sex offense committed prior to July 1, 1987, may, subject to available funds, request an evaluation by the department of corrections to determine whether they are amenable to treatment. If the offender is determined to be amenable to treatment, the offender may request placement in a treatment program within a correctional facility operated by the department. Placement in such treatment program is subject to available funds.

(8)(a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, <<+assault of a child in the second degree,+>> any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The community placement shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence. Unless a condition is waived by the court, the terms of community placement for offenders sentenced pursuant to this section shall include the following conditions:

- (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections-approved education, employment, and/or community service;

(iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) An offender in community custody shall not unlawfully possess controlled substances; and

(v) The offender shall pay supervision fees as determined by the department of corrections.

(c) The court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol;

(v) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(vi) The offender shall comply with any crime-related prohibitions.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(9) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(10) If a sentence imposed includes payment of a legal financial obligation, the sentence shall specify the total amount of the legal financial obligation owed, and shall require the offender to pay a specified monthly sum toward that legal financial obligation. Restitution to victims shall be paid prior to any other payments of monetary obligations. Any legal financial obligation that is imposed by the court may be collected by the department, which shall deliver the amount paid to the county clerk for credit. The offender's compliance with payment of legal financial obligations shall be supervised by the department. All monetary payments ordered shall be paid no later than ten years after the last date of release from confinement pursuant to a felony conviction or the date the sentence was entered. Independent of the department, the party or entity to whom the legal financial obligation is owed shall have the authority to utilize any other remedies available to the party or entity to collect the legal financial obligation. Nothing in this section makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these legal financial obligations. If an order includes restitution as one of the monetary assessments, the county clerk shall make disbursements to victims named in the order.

(11) Except as provided under RCW 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(12) All offenders sentenced to terms involving community supervision, community service, community placement, or legal financial obligation shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow explicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(13) All offenders sentenced to terms involving community supervision, community service, or community placement under the supervision of the department of corrections shall not own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the appropriate violation process and sanctions. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(14) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(15) A departure from the standards in RCW 9.94A.400(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence

subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210(2) through (6).

(16) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(17) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

(18) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

(19) All court-ordered legal financial obligations collected by the department and remitted to the county clerk shall be credited and paid where restitution is ordered. Restitution shall be paid prior to any other payments of monetary obligations.

Sec. 8. RCW 9.94A.150 and 1990 c 3 s 202 are each amended to read as follows:

<< WA ST 9.94A.150 >>

No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

(1) Except as otherwise provided for in subsection (2) of this section, the term of the sentence of an offender committed to a correctional facility operated by the department, may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department of corrections, the county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned early release time. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence;

(2) A person convicted of a sex offense or an offense categorized as a serious violent offense, assault in the second degree, <<+assault of a child in the second degree,+>> any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW may become eligible, in accordance with a program developed by the department, for transfer to community custody status in lieu of earned early release time pursuant to subsection (1) of this section;

(3) An offender may leave a correctional facility pursuant to an authorized furlough or leave of absence. In addition, offenders may leave a correctional facility when in the custody of a corrections officer or officers;

(4) The governor, upon recommendation from the clemency and pardons board, may grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances;

(5) No more than the final six months of the sentence may be served in partial confinement designed to aid the offender in finding work and reestablishing him or herself in the community;

(6) The governor may pardon any offender;

(7) The department of corrections may release an offender from confinement any time within ten days before a release date calculated under this section; and

(8) An offender may leave a correctional facility prior to completion of his sentence if the sentence has been reduced as provided in RCW 9.94A.160.

Sec. 9. RCW 9.94A.310 and 1991 c 32 s 2 are each amended to read as follows:

<< WA ST 9.94A.310 >>

(1)

TABLE 1
Sentencing Grid

SERIOUSNESS SCORE	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XV Life Sentence without Parole/Death Penalty										
XIV 23y4m	24y4m	25y4m	26y4m	27y4m	28y4m	30y4m	32y10m	36y	40y	
	240-	250-	261-	271-	281-	291-	312-	338-	370-	411-
	320	333	347	361	374	388	416	450	493	548
XIII 12y	13y	14y	15y	16y	17y	19y	21y	25y	29y	
	123-	134-	144-	154-	165-	175-	195-	216-	257-	298-
	164	178	192	205	219	233	260	288	342	397
XII 9y	9y11m	10y9m	11y8m	12y6m	13y5m	15y9m	17y3m	20y3m	23y3m	
	93-	102-	111-	120-	129-	138-	162-	178-	209-	240-
	123	136	147	160	171	184	216	236	277	318
XI 7y6m	8y4m	9y2m	9y11m	10y9m	11y7m	14y2m	15y5m	17y11m	20y5m	
	78-	86-	95-	102-	111-	120-	146-	159-	185-	210-
	102	114	125	136	147	158	194	211	245	280
X 5y	5y6m	6y	6y6m	7y	7y6m	9y6m	10y6m	12y6m	14y6m	
	51-	57-	62-	67-	72-	77-	98-	108-	129-	149-
	68	75	82	89	96	102	130	144	171	198
IX 3y	3y6m	4y	4y6m	5y	5y6m	7y6m	8y6m	10y6m	12y6m	
	31-	36-	41-	46-	51-	57-	77-	87-	108-	129-
	41	48	54	61	68	75	102	116	144	171
VIII 2y	2y6m	3y	3y6m	4y	4y6m	6y6m	7y6m	8y6m	10y6m	
	21-	26-	31-	36-	41-	46-	67-	77-	87-	108-
	27	34	41	48	54	61	89	102	116	144
VII 18m	2y	2y6m	3y	3y6m	4y	5y6m	6y6m	7y6m	8y6m	
	15-	21-	26-	31-	36-	41-	57-	67-	77-	87-
	20	27	34	41	48	54	75	89	102	116
VI 13m	18m	2y	2y6m	3y	3y6m	4y6m	5y6m	6y6m	7y6m	
	12+-	15-	21-	26-	31-	36-	46-	57-	67-	77-
	14	20	27	34	41	48	61	75	89	102
V 9m	13m	15m	18m	2y2m	3y2m	4y	5y	6y	7y	
	6-	12+-	13-	15-	22-	33-	41-	51-	62-	72-
	12	14	17	20	29	43	54	68	82	96
IV 6m	9m	13m	15m	18m	2y2m	3y2m	4y2m	5y2m	6y2m	
	3-	6-	12+-	13-	15-	22-	33-	43-	53-	63-
	9	12	14	17	20	29	43	57	70	84
III 2m	5m	8m	11m	14m	20m	2y2m	3y2m	4y2m	5y	
	1-	3-	4-	9-	12+-	17-	22-	33-	43-	51-
	3	8	12	12	16	22	29	43	57	68
II 4m	6m	8m	13m	16m	20m	2y2m	3y2m	4y2m		
	0-90	2-	3-	4-	12+-	14-	17-	22-	33-	43-
	Days	6	9	12	14	18	22	29	43	57
I 3m	4m	5m	8m	13m	16m	20m	2y2m			
	0-60	0-90	2-	2-	3-	4-	12+-	14-	17-	22-
	Days	Days	5	6	8	12	14	18	22	29

(1)

TABLE 1
Sentencing Grid
SERIOUSNESS SCORE OFFENDER SCORE
0 1 2 3 4 5 6 7 8 9 or more

XV Life Sentence without Parole/Death Penalty

XIV 23y4m 24y4m 25y4m 26y4m 27y4m 28y4m 30y4m 32y10m 36y 40y
240– 250– 261– 271– 281– 291– 312– 338– 370– 411–
320 333 347 361 374 388 416 450 493 548

XIII 12y 13y 14y 15y 16y 17y 19y 21y 25y 29y
123– 134– 144– 154– 165– 175– 195– 216– 257– 298–
164 178 192 205 219 233 260 288 342 397

XII 9y 9y11m 10y9m 11y8m 12y6m 13y5m 15y9m 17y3m 20y3m 23y3m
93– 102– 111– 120– 129– 138– 162– 178– 209– 240–
123 136 147 160 171 184 216 236 277 318

XI 7y6m 8y4m 9y2m 9y11m 10y9m 11y7m 14y2m 15y5m 17y11m 20y5m
78– 86– 95– 102– 111– 120– 146– 159– 185– 210–
102 114 125 136 147 158 194 211 245 280

X 5y 5y6m 6y 6y6m 7y 7y6m 9y6m 10y6m 12y6m 14y6m
51– 57– 62– 67– 72– 77– 98– 108– 129– 149–
68 75 82 89 96 102 130 144 171 198

IX 3y 3y6m 4y 4y6m 5y 5y6m 7y6m 8y6m 10y6m 12y6m
31– 36– 41– 46– 51– 57– 77– 87– 108– 129–
41 48 54 61 68 75 102 116 144 171

VIII 2y 2y6m 3y 3y6m 4y 4y6m 6y6m 7y6m 8y6m 10y6m
21– 26– 31– 36– 41– 46– 67– 77– 87– 108–
27 34 41 48 54 61 89 102 116 144

VII 18m 2y 2y6m 3y 3y6m 4y 5y6m 6y6m 7y6m 8y6m
15– 21– 26– 31– 36– 41– 57– 67– 77– 87–
20 27 34 41 48 54 75 89 102 116

VI 13m 18m 2y 2y6m 3y 3y6m 4y6m 5y6m 6y6m 7y6m
12 15– 21– 26– 31– 36– 46– 57– 67– 77–
14 20 27 34 41 48 61 75 89 102

V 9m 13m 15m 18m 2y2m 3y2m 4y 5y 6y 7y
6– 12 13– 15– 22– 33– 41– 51– 62– 72–
12 14 17 20 29 43 54 68 82 96

IV 6m 9m 13m 15m 18m 2y2m 3y2m 4y2m 5y2m 6y2m
3– 6– 12 13– 15– 22– 33– 43– 53– 63–
9 12 14 17 20 29 43 57 70 84

III 2m 5m 8m 11m 14m 20m 2y2m 3y2m 4y2m 5y
1– 3– 4– 9– 12 17– 22– 33– 43– 51–
3 8 12 12 16 22 29 43 57 68

II 4m 6m 8m 13m 16m 20m 2y2m 3y2m 4y2m
0–90 2– 3– 4– 12 14– 17– 22– 33– 43–
Days 6 9 12 14 18 22 29 43 57

I 3m 4m 5m 8m 13m 16m 20m 2y2m
0–60 0–90 2– 2– 3– 4– 12 14– 17– 22–
Days Days 5 6 8 12 14 18 22 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by 75 percent.

(3) The following additional times shall be added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon as defined in this chapter and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice was armed with a deadly weapon and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following times shall be added to the presumptive range determined under subsection (2) of this section:

(a) 24 months for Rape 1 (RCW 9A.44.040), Robbery 1 (RCW 9A.56.200), or Kidnapping 1 (RCW 9A.40.020)

(b) 18 months for Burglary 1 (RCW 9A.52.020)

(c) 12 months for Assault 2 (RCW 9A.36.020 or 9A.36.021), <<+Assault of a Child 2 (RCW 9A.36.____ (section 2 of this act)),+>> Escape 1 (RCW 9A.76.110), Kidnapping 2 (RCW 9A.40.030), Burglary 2 of a building other than a dwelling (RCW 9A.52.030), Theft of Livestock 1 or 2 (RCW 9A.56.080), or any drug offense.

(4) The following additional times shall be added to the presumptive sentence if the offender or an accomplice committed the offense while in a county jail or state correctional facility as that term is defined in this chapter and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility as that term is defined in this chapter, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following times shall be added to the presumptive sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(a)(1)(i) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(a)(1)(ii), (iii), and (iv);

(c) Twelve months for offenses committed under RCW 69.50.401(d).

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(5) An additional twenty-four months shall be added to the presumptive sentence for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435.

Sec. 10. RCW 9.94A.360 and 1990 c 3 s 706 are each amended to read as follows:

<< WA ST 9.94A.360 >>

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.400.

(2) Except as provided in subsection (4) of this section, class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies. Serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without being convicted of any serious traffic or felony traffic offenses. This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

(4) Always include juvenile convictions for sex offenses. Include other class A juvenile felonies only if the offender was 15 or older at the time the juvenile offense was committed. Include other class B and C juvenile felony convictions only if the offender was 15 or older at the time the juvenile offense was committed and the offender was less than 23 at the time the offense for which he or she is being sentenced was committed.

(5) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(6) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(a) Prior adult offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses, and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used;

(b) Juvenile prior convictions entered or sentenced on the same date shall count as one offense, the offense that yields the highest offender score, except for juvenile prior convictions for violent offenses with separate victims, which shall count as separate offenses; and

(c) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(7) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense.

(8) If the present conviction is for a nonviolent offense and not covered by subsection (12) or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.

(9) If the present conviction is for a violent offense and not covered in subsection (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Murder 1 or 2, Assault 1, <<+Assault of a Child 1,+>> Kidnaping 1, Homicide by Abuse, or Rape 1, count three points for prior adult and juvenile convictions for crimes in these categories, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and ½ point for each prior juvenile nonviolent felony conviction.

(11) If the present conviction is for Burglary 1, count prior convictions as in subsection (9) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(12) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense or serious traffic offense, count one point for each adult and ½ point for each juvenile prior conviction.

(13) If the present conviction is for a drug offense count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (9) of this section if the current drug offense is violent, or as in subsection (8) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Willful Failure to Return from Furlough, RCW 72.66.060, or Willful Failure to Return from Work Release, RCW 72.65.070, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as ½ point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as ½ point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (8) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (8) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for an offense committed while the offender was under community placement, add one point.

Sec. 11, RCW 9.94A.440 and 1989 c 332 s 2 are each amended to read as follows:

(1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent—It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute—It may be proper to decline to charge where the statute in question is antiquated in that:

- (i) It has not been enforced for many years; and
- (ii) Most members of society act as if it were no longer in existence; and
- (iii) It serves no deterrent or protective purpose in today's society; and
- (iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimus Violation—It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) Confinement on Other Charges—It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iii) Conviction of the new offense would not serve any significant deterrent purpose.

(e) Pending Conviction on Another Charge—It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) Conviction in the pending prosecution is imminent;

(iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iv) Conviction of the new offense would not serve any significant deterrent purpose.

(f) High Disproportionate Cost of Prosecution—It may be proper to decline to charge where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question. This reason should be limited to minor cases and should not be relied upon in serious cases.

(g) Improper Motives of Complainant—It may be proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

(h) Immunity—It may be proper to decline to charge where immunity is to be given to an accused in order to prosecute another where the accused's information or testimony will reasonably lead to the conviction of others who are responsible for more serious criminal conduct or who represent a greater danger to the public interest.

(i) Victim Request—It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

- (i) Assault cases where the victim has suffered little or no injury;
- (ii) Crimes against property, not involving violence, where no major loss was suffered;
- (iii) Where doing so would not jeopardize the safety of society.

Care should be taken to insure that the victim's request is freely made and is not the product of threats or pressure by the accused.

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

Notification

The prosecutor is encouraged to notify the victim, when practical, and the law enforcement personnel, of the decision not to prosecute.

(2) Decision to prosecute.

STANDARD:

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. With regard to offenses prohibited by RCW 9A.44.040, 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, 9A.44.089, and 9A.64.020 the prosecutor should avoid pre-filing agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW 9.94A.120(7).

Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

See table below for the crimes within these categories.

CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

CRIMES AGAINST PERSONS

Aggravated Murder
1st Degree Murder
2nd Degree Murder
1st Degree Kidnaping
1st Degree Assault
1st Degree Assault of a Child
1st Degree Rape
1st Degree Robbery
1st Degree Rape of a Child
1st Degree Arson
2nd Degree Kidnaping
2nd Degree Assault
2nd Degree Assault of a Child
2nd Degree Rape
2nd Degree Robbery
1st Degree Burglary
1st Degree Manslaughter
2nd Degree Manslaughter
1st Degree Extortion
Indecent Liberties
Incest
2nd Degree Rape of a Child
Vehicular Homicide
Vehicular Assault
3rd Degree Rape
3rd Degree Rape of a Child
1st Degree Child Molestation
2nd Degree Child Molestation
3rd Degree Child Molestation
2nd Degree Extortion
1st Degree Promoting Prostitution
Intimidating a Juror
Communication with a Minor
Intimidating a Witness
Intimidating a Public Servant
Bomb Threat (if against person)
3rd Degree Assault
3rd Degree Assault of a Child
Unlawful Imprisonment
Promoting a Suicide Attempt
Riot (if against person)
CRIMES AGAINST PROPERTY/OTHER CRIMES
2nd Degree Arson

1st Degree Escape
2nd Degree Burglary
1st Degree Theft
1st Degree Perjury
1st Degree Introducing Contraband
1st Degree Possession of Stolen Property
Bribery
Bribing a Witness
Bribe received by a Witness
Bomb Threat (if against property)
1st Degree Malicious Mischief
2nd Degree Theft
2nd Degree Escape
2nd Degree Introducing Contraband
2nd Degree Possession of Stolen Property
2nd Degree Malicious Mischief
1st Degree Reckless Burning
Taking a Motor Vehicle without Authorization
Forgery
2nd Degree Perjury
2nd Degree Promoting Prostitution
Tampering with a Witness
Trading in Public Office
Trading in Special Influence
Receiving/Granting Unlawful Compensation
Bigamy
Eluding a Pursuing Police Vehicle
Willful Failure to Return from Furlough
Riot (if against property)
Thefts of Livestock
ALL OTHER UNCLASSIFIED FELONIES

CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

CRIMES AGAINST PERSONS

Aggravated Murder
1st Degree Murder
2nd Degree Murder
1st Degree Kidnaping
1st Degree Assault
1st Degree Assault of a Child
1st Degree Rape
1st Degree Robbery
1st Degree Rape of a Child
1st Degree Arson
2nd Degree Kidnaping
2nd Degree Assault
2nd Degree Assault of a Child
2nd Degree Rape
2nd Degree Robbery
1st Degree Burglary
1st Degree Manslaughter
2nd Degree Manslaughter
1st Degree Extortion
Indecent Liberties
Incest
2nd Degree Rape of a Child
Vehicular Homicide
Vehicular Assault
3rd Degree Rape
3rd Degree Rape of a Child
1st Degree Child Molestation

2nd Degree Child Molestation
3rd Degree Child Molestation
2nd Degree Extortion
1st Degree Promoting Prostitution
Intimidating a Juror
Communication with a Minor
Intimidating a Witness
Intimidating a Public Servant
Bomb Threat (if against person)
3rd Degree Assault
3rd Degree Assault of a Child
Unlawful Imprisonment
Promoting a Suicide Attempt
Riot (if against person)

CRIMES AGAINST PROPERTY/OTHER CRIMES

2nd Degree Arson
1st Degree Escape
2nd Degree Burglary
1st Degree Theft
1st Degree Perjury
1st Degree Introducing Contraband
1st Degree Possession of Stolen Property
Bribery
Bribing a Witness
Bribe received by a Witness
Bomb Threat (if against property)
1st Degree Malicious Mischief
2nd Degree Theft
2nd Degree Escape
2nd Degree Introducing Contraband
2nd Degree Possession of Stolen Property
2nd Degree Malicious Mischief
1st Degree Reckless Burning
Taking a Motor Vehicle without Authorization
Forgery
2nd Degree Perjury
2nd Degree Promoting Prostitution
Tampering with a Witness
Trading in Public Office
Trading in Special Influence
Receiving/Granting Unlawful Compensation
Bigamy
Eluding a Pursuing Police Vehicle
Willful Failure to Return from Furlough
Riot (if against property)
Thefts of Livestock

ALL OTHER UNCLASSIFIED FELONIES

Selection of Charges/Degree of Charge

(1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

- (a) Will significantly enhance the strength of the state's case at trial; or
- (b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

- (a) Charging a higher degree;
- (b) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

GUIDELINES/COMMENTARY:

Police Investigation

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted

before a decision to prosecute is made. In ordinary circumstances the investigation should include the following:

- (1) The interviewing of all material witnesses, together with the obtaining of written statements whenever possible;
- (2) The completion of necessary laboratory tests; and
- (3) The obtaining, in accordance with constitutional requirements, of the suspect's version of the events.

If the initial investigation is incomplete, a prosecuting attorney should insist upon further investigation before a decision to prosecute is made, and specify what the investigation needs to include.

Exceptions

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete if:

- (1) Probable cause exists to believe the suspect is guilty; and
 - (2) The suspect presents a danger to the community or is likely to flee if not apprehended;
- or
- (3) The arrest of the suspect is necessary to complete the investigation of the crime.

In the event that the exception to the standard is applied, the prosecuting attorney shall obtain a commitment from the law enforcement agency involved to complete the investigation in a timely manner. If the subsequent investigation does not produce sufficient evidence to meet the normal charging standard, the complaint should be dismissed.

Investigation Techniques

The prosecutor should be fully advised of the investigatory techniques that were used in the case investigation including:

- (1) Polygraph testing;
- (2) Hypnosis;
- (3) Electronic surveillance;
- (4) Use of informants.

Pre-Filing Discussions with Defendant

Discussions with the defendant or his/her representative regarding the selection or disposition of charges may occur prior to the filing of charges, and potential agreements can be reached.

Sec. 12. RCW 9A.46.060 and 1988 c 145 s 15 are each amended to read as follows:

<< WA ST 9A.46.060 >>

As used in this chapter, "harassment" may include but is not limited to any of the following crimes:

- (1) Harassment (RCW 9A.46.020);
- (2) Malicious harassment (RCW 9A.36.080);
- (3) Telephone harassment (RCW 9.61.230);
- (4) Assault in the first degree (RCW 9A.36.011);
- (5) <<+Assault of a child in the first degree (RCW 9A.36.____ (section 1 of this act));+>>
<<+(6)+>> Assault in the second degree (RCW 9A.36.021);
- <<-(6) Simple assault [Assault in the fourth degree]->> <<+(7) Assault of a child in the second degree (RCW 9A.36.____ (section 2 of this act));+>>
- <<+(8) Assault in the fourth degree+>> (RCW 9A.36.041);
- <<-(7)->><<+(9)+>> Reckless endangerment <<-[in the second degree]->> <<+in the second degree+>> (RCW 9A.36.050);
- <<-(8)->><<+(10)+>> Extortion in the first degree (RCW 9A.56.120);
- <<-(9)->><<+(11)+>> Extortion in the second degree (RCW 9A.56.130);
- <<-(10)->><<+(12)+>> Coercion (RCW 9A.36.070);
- <<-(11)->><<+(13)+>> Burglary in the first degree (RCW 9A.52.020);
- <<-(12)->><<+(14)+>> Burglary in the second degree (RCW 9A.52.030);
- <<-(13)->><<+(15)+>> Criminal trespass in the first degree (RCW 9A.52.070);
- <<-(14)->><<+(16)+>> Criminal trespass in the second degree (RCW 9A.52.080);
- <<-(15)->><<+(17)+>> Malicious mischief in the first degree (RCW 9A.48.070);
- <<-(16)->><<+(18)+>> Malicious mischief in the second degree (RCW 9A.48.080);
- <<-(17)->><<+(19)+>> Malicious mischief in the third degree (RCW 9A.48.090);
- <<-(18)->><<+(20)+>> Kidnapping in the first degree (RCW 9A.40.020);
- <<-(19)->><<+(21)+>> Kidnapping in the second degree (RCW 9A.40.030);
- <<-(20)->><<+(22)+>> Unlawful imprisonment (RCW 9A.40.040);
- <<-(21)->><<+(23)+>> Rape in the first degree (RCW 9A.44.040);
- <<-(22)->><<+(24)+>> Rape in the second degree (RCW 9A.44.050);
- <<-(23)->><<+(25)+>> Rape in the third degree (RCW 9A.44.060);
- <<-(24)->><<+(26)+>> Indecent liberties (RCW 9A.44.100);

<<-(25)->><<+(27)+>> Rape of a child in the first degree (RCW 9A.44.073);
<<-(26)->><<+(28)+>> Rape of a child in the second degree (RCW 9A.44.076);
<<-(27)->><<+(29)+>> Rape of a child in the third degree (RCW 9A.44.079);
<<-(28)->><<+(30)+>> Child molestation in the first degree (RCW 9A.44.083);
<<-(29)->><<+(31)+>> Child molestation in the second degree (RCW 9A.44.086); and
<<-(30)->><<+(32)+>> Child molestation in the third degree (RCW 9A.44.089).
Sec. 13. RCW 9A.82.010 and 1989 c 20 s 17 are each amended to read as follows:

<< WA ST 9A.82.010 >>

Unless the context requires the contrary, the definitions in this section apply throughout this chapter.

(1) "Creditor" means a person making an extension of credit or a person claiming by, under, or through a person making an extension of credit.

(2) "Debtor" means a person to whom an extension of credit is made or a person who guarantees the repayment of an extension of credit or in any manner undertakes to indemnify the creditor against loss resulting from the failure of a person to whom an extension is made to repay the same.

(3) "Extortionate extension of credit" means an extension of credit with respect to which it is the understanding of the creditor and the debtor at the time the extension is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(4) "Extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(5) "To collect an extension of credit" means to induce in any way a person to make repayment thereof.

(6) "To extend credit" means to make or renew a loan or to enter into an agreement, tacit or express, whereby the repayment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.

(7) "Repayment of an extension of credit" means the repayment, satisfaction, or discharge in whole or in part of a debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(8) "Dealer in property" means a person who buys and sells property as a business.

(9) "Stolen property" means property that has been obtained by theft, robbery, or extortion.

(10) "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

(11) "Control" means the possession of a sufficient interest to permit substantial direction over the affairs of an enterprise.

(12) "Enterprise" includes any individual, sole proprietorship, partnership, corporation, business trust, or other profit or nonprofit legal entity, and includes any union, association, or group of individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities.

(13) "Financial institution" means any bank, trust company, savings and loan association, savings bank, mutual savings bank, credit union, or loan company under the jurisdiction of the state or an agency of the United States.

(14) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:

- (a) Murder, as defined in RCW 9A.32.030 and 9A.32.050;
- (b) Robbery, as defined in RCW 9A.56.200 and 9A.56.210;
- (c) Kidnapping, as defined in RCW 9A.40.020 and 9A.40.030;
- (d) Forgery, as defined in RCW 9A.60.020 and 9A.60.030;
- (e) Theft, as defined in RCW 9A.56.030, 9A.56.040, 9A.56.060, and 9A.56.080;
- (f) Child selling or child buying, as defined in RCW 9A.64.030;
- (g) Bribery, as defined in RCW 9A.68.010, 9A.68.020, 9A.68.040, and 9A.68.050;
- (h) Gambling, as defined in RCW 9.46.220 and 9.46.230;
- (i) Extortion, as defined in RCW 9A.56.120 and 9A.56.130;
- (j) Extortionate extension of credit, as defined in RCW 9A.82.020;
- (k) Advancing money for use in an extortionate extension of credit, as defined in RCW 9A.82.030;
- (l) Collection of an extortionate extension of credit, as defined in RCW 9A.82.040;

- (m) Collection of an unlawful debt, as defined in RCW 9A.82.045;
- (n) Delivery or manufacture of controlled substances or possession with intent to deliver or manufacture controlled substances under chapter 69.50 RCW;
- (o) Trafficking in stolen property, as defined in RCW 9A.82.050;
- (p) Leading organized crime, as defined in RCW 9A.82.060;
- (q) Obstructing criminal investigations or prosecutions in violation of RCW 9A.72.090, 9A.72.100, 9A.72.110, 9A.72.120, 9A.72.130, 9A.76.070, or 9A.76.180;
- (r) Fraud in the purchase or sale of securities, as defined in RCW 21.20.010;
- (s) Promoting pornography, as defined in RCW 9.68.140;
- (t) Sexual exploitation of children, as defined in RCW 9.68A.040, 9.68A.050, and 9.68A.060;
- (u) Promoting prostitution, as defined in RCW 9A.88.070 and 9A.88.080;
- (v) Arson, as defined in RCW 9A.48.020 and 9A.48.030;
- (w) Assault, as defined in RCW 9A.36.011 and 9A.36.021;
- (x) <<+Assault of a child, as defined in RCW 9A.36.____ and 9A.36.____ (sections 1 and 2 of this act);+>>
- <<+(y)+>> A pattern of equity skimming, as defined in RCW 61.34.020; or
- <<-(y)->><<+(z)+>> Commercial telephone solicitation in violation of RCW 19.158.040(1).
- (15) "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events. However, in any civil proceedings brought pursuant to RCW 9A.82.100 by any person other than the attorney general or county prosecuting attorney in which one or more acts of fraud in the purchase or sale of securities are asserted as acts of criminal profiteering activity, it is a condition to civil liability under RCW 9A.82.100 that the defendant has been convicted in a criminal proceeding of fraud in the purchase or sale of securities under RCW 21.20.400 or under the laws of another state or of the United States requiring the same elements of proof, but such conviction need not relate to any act or acts asserted as acts of criminal profiteering activity in such civil action under RCW 9A.82.100.
- (16) "Records" means any book, paper, writing, record, computer program, or other material.
- (17) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonograph record, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.
- (18) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in the state in full or in part because the debt was incurred or contracted:
 - (a) In violation of any one of the following:
 - (i) Chapter 67.16 RCW relating to horse racing;
 - (ii) Chapter 9.46 RCW relating to gambling;
 - (b) In a gambling activity in violation of federal law; or
 - (c) In connection with the business of lending money or a thing of value at a rate that is at least twice the permitted rate under the applicable state or federal law relating to usury.
- (19)(a) "Beneficial interest" means:
 - (i) The interest of a person as a beneficiary under a trust established under Title 11 RCW in which the trustee for the trust holds legal or record title to real property;
 - (ii) The interest of a person as a beneficiary under any other trust arrangement under which a trustee holds legal or record title to real property for the benefit of the beneficiary; or
 - (iii) The interest of a person under any other form of express fiduciary arrangement under which one person holds legal or record title to real property for the benefit of the other person.
- (b) "Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in a general partnership or limited partnership.
- (c) A beneficial interest shall be considered to be located where the real property owned by the trustee is located.
- (20) "Real property" means any real property or interest in real property, including but not limited to a land sale contract, lease, or mortgage of real property.
- (21)(a) "Trustee" means:
 - (i) A person acting as a trustee under a trust established under Title 11 RCW in which the trustee holds legal or record title to real property;

(ii) A person who holds legal or record title to real property in which another person has a beneficial interest; or

(iii) A successor trustee to a person who is a trustee under subsection (21)(a)(i) or (ii) of this section.

(b) "Trustee" does not mean a person appointed or acting as:

(i) A personal representative under Title 11 RCW;

(ii) A trustee of any testamentary trust;

(iii) A trustee of any indenture of trust under which a bond is issued; or

(iv) A trustee under a deed of trust.

Sec. 14. RCW 13.34.130 and 1991 c 127 s 4 are each amended to read as follows:

<< WA ST 13.34.130 >>

If, after a fact-finding hearing pursuant to RCW 13.34.110, as now or hereafter amended, it has been proven by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030(2); after consideration of the predisposition report prepared pursuant to RCW 13.34.110 and after a disposition hearing has been held pursuant to RCW 13.34.110, the court shall enter an order of disposition pursuant to this section.

(1) The court shall order one of the following dispositions of the case:

(a) Order a disposition other than removal of the child from his or her home, which shall provide a program designed to alleviate the immediate danger to the child, to mitigate or cure any damage the child has already suffered, and to aid the parents so that the child will not be endangered in the future. In selecting a program, the court should choose those services that least interfere with family autonomy, provided that the services are adequate to protect the child.

(b) Order that the child be removed from his or her home and ordered into the custody, control, and care of a relative or the department of social and health services or a licensed child placing agency for placement in a foster family home or group care facility licensed pursuant to chapter 74.15 RCW or in a home not required to be licensed pursuant to chapter 74.15 RCW. Unless there is reasonable cause to believe that the safety or welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered, such child shall be placed with a grandparent, brother, sister, stepbrother, stepsister, uncle, aunt, or first cousin with whom the child has a relationship and is comfortable, and who is willing and available to care for the child. An order for out-of-home placement may be made only if the court finds that reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home, specifying the services that have been provided to the child and the child's parent, guardian, or legal custodian, and that:

(i) There is no parent or guardian available to care for such child;

(ii) The parent, guardian, or legal custodian is not willing to take custody of the child;

(iii) A manifest danger exists that the child will suffer serious abuse or neglect if the child is not removed from the home and an order under RCW 26.44.063 would not protect the child from danger; or

(iv) The extent of the child's disability is such that the parent, guardian, or legal custodian is unable to provide the necessary care for the child and the parent, guardian, or legal custodian has determined that the child would benefit from placement outside of the home.

(2) If the court has ordered a child removed from his or her home pursuant to <<-RCW 13.34.130->> <<+subsection+>> (1)(b) <<+of this section+>>, the court may order that a petition seeking termination of the parent and child relationship be filed if the court finds it is recommended by the supervising agency, that it is in the best interests of the child and that it is not reasonable to provide further services to reunify the family because the existence of aggravated circumstances make it unlikely that services will effectuate the return of the child to the child's parents in the near future. In determining whether aggravated circumstances exist, the court shall consider one or more of the following:

(a) Conviction of the parent of rape of the child in the first, second, or third degree as defined in RCW 9A.44.073, 9A.44.076, and 9A.44.079;

(b) Conviction of the parent of criminal mistreatment of the child in the first or second degree as defined in RCW 9A.42.020 and 9A.42.030;

(c) Conviction of the parent of <<+one of the following assault crimes, when the child is the victim: A+>>ssault <<-of the child->> in the first or second degree as defined in RCW 9A.36.011 and 9A.36.021 <<+or assault of a child in the first or second degree as defined in RCW 9A.36.____ or 9A.36.____ (sections 1 and 2 of this act)+>>;

(d) Conviction of the parent of murder, manslaughter, or homicide by abuse of the child's other parent, sibling, or another child;

(e) A finding by a court that a parent is a sexually violent predator as defined in RCW 71.09.020;

(f) Failure of the parent to complete available treatment ordered under this chapter or the equivalent laws of another state, where such failure has resulted in a prior termination of parental rights to another child and the parent has failed to effect significant change in the interim.

(3) Whenever a child is ordered removed from the child's home, the agency charged with his or her care shall provide the court with:

(a) A permanent plan of care that may include one of the following: Return of the child to the home of the child's parent, adoption, guardianship, or long-term placement with a relative or in foster care with a written agreement.

(b) Unless the court has ordered, pursuant to <<-RCW 13.34.130->> <<+ subsection+>> (2) <<+of this section+>>, that a termination petition be filed, a specific plan as to where the child will be placed, what steps will be taken to return the child home, and what actions the agency will take to maintain parent-child ties. All aspects of the plan shall include the goal of achieving permanence for the child.

(i) The agency plan shall specify what services the parents will be offered in order to enable them to resume custody, what requirements the parents must meet in order to resume custody, and a time limit for each service plan and parental requirement.

(ii) The agency shall be required to encourage the maximum parent-child contact possible, including regular visitation and participation by the parents in the care of the child while the child is in placement. Visitation may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child's health, safety, or welfare.

(iii) A child shall be placed as close to the child's home as possible, preferably in the child's own neighborhood, unless the court finds that placement at a greater distance is necessary to promote the child's or parents' well-being.

(iv) The agency charged with supervising a child in placement shall provide all reasonable services that are available within the agency, or within the community, or those services which the department of social and health services has existing contracts to purchase. It shall report to the court if it is unable to provide such services.

(c) If the court has ordered, pursuant to <<-RCW 13.34.130->> <<+ subsection+>> (2) <<+of this section+>>, that a termination petition be filed, a specific plan as to where the child will be placed, what steps will be taken to achieve permanency for the child, services to be offered or provided to the child, and, if visitation would be in the best interests of the child, a recommendation to the court regarding visitation between parent and child pending a fact-finding hearing on the termination petition. The agency shall not be required to develop a plan of services for the parents or provide services to the parents.

(4) If there is insufficient information at the time of the disposition hearing upon which to base a determination regarding the suitability of a proposed placement with a relative, the child shall remain in foster care and the court shall direct the supervising agency to conduct necessary background investigations as provided in chapter 74.15 RCW and report the results of such investigation to the court within thirty days. However, if such relative appears otherwise suitable and competent to provide care and treatment, the criminal history background check need not be completed before placement, but as soon as possible after placement. Any placements with relatives, pursuant to this section, shall be contingent upon cooperation by the relative with the agency case plan and compliance with court orders related to the care and supervision of the child including, but not limited to, court orders regarding parent-child contacts and any other conditions imposed by the court. Noncompliance with the case plan or court order shall be grounds for removal of the child from the relative's home, subject to review by the court.

(5) Except for children whose cases are reviewed by a citizen review board under chapter 13.70 RCW, the status of all children found to be dependent shall be reviewed by the court at least every six months from the beginning date of the placement episode or the date dependency is established, whichever is first, at a hearing in which it shall be determined whether court supervision should continue. The review shall include findings regarding the agency and parental completion of disposition plan requirements, and if necessary, revised permanency time limits.

(a) A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in this section no longer exists. The parents, guardian, or legal custodian shall report to the court the efforts they have made to correct the conditions which led to removal. If a child is returned, casework supervision shall continue for a period of six months, at which time there shall be a hearing on the need for continued intervention.

(b) If the child is not returned home, the court shall establish in writing:

(i) Whether reasonable services have been provided to or offered to the parties to facilitate reunion, specifying the services provided or offered;

(ii) Whether the child has been placed in the least-restrictive setting appropriate to the child's needs, including whether consideration has been given to placement with the child's relatives;

- (iii) Whether there is a continuing need for placement and whether the placement is appropriate;
 - (iv) Whether there has been compliance with the case plan by the child, the child's parents, and the agency supervising the placement;
 - (v) Whether progress has been made toward correcting the problems that necessitated the child's placement in out-of-home care;
 - (vi) Whether the parents have visited the child and any reasons why visitation has not occurred or has been infrequent;
 - (vii) Whether additional services are needed to facilitate the return of the child to the child's parents; if so, the court shall order that reasonable services be offered specifying such services; and
 - (viii) The projected date by which the child will be returned home or other permanent plan of care will be implemented.
- (c) The court at the review hearing may order that a petition seeking termination of the parent and child relationship be filed.

Sec. 15. RCW 13.34.190 and 1990 c 284 s 33 are each amended to read as follows:

<< WA ST 13.34.190 >>

After hearings pursuant to RCW 13.34.110, the court may enter an order terminating all parental rights to a child if the court finds that:

- (1) The allegations contained in the petition as provided in RCW 13.34.180(1) through (6) are established by clear, cogent, and convincing evidence; or
- (2) RCW 13.34.180(3) and (4) may be waived because the allegations under RCW 13.34.180(1), (2), (5), and (6) are established beyond a reasonable doubt; or
- <<-(c)[(3)]->><<+(3)+>> The allegation under RCW 13.34.180(7) is established beyond a reasonable doubt. In determining whether RCW 13.34.180(5) and (6) are established beyond a reasonable doubt, the court shall consider one or more of the following:
 - (a) Conviction of the parent of rape of the child in the first, second, or third degree as defined in RCW 9A.44.073, 9A.44.076, and 9A.44.079;
 - (b) Conviction of the parent of criminal mistreatment of the child in the first or second degree as defined in RCW 9A.42.020 or 9A.42.030;
 - (c) Conviction of the parent of <<+one of the following assault crimes, when the child is the victim: A+>>ssault <<-of the child->> in the first or second degree as defined in RCW 9A.36.011 and 9A.36.021 <<+or assault of a child in the first or second degree as defined in RCW 9A.36.— or 9A.36.— (sections 1 and 2 of this act)+>>;
 - (d) Conviction of the parent of murder, manslaughter, or homicide by abuse of the child's other parent, sibling, or another child;
 - (e) A finding by a court that a parent is a sexually violent predator as defined in RCW <<-9A.88.010->> <<+71.09.020+>>;
 - (f) Failure of the parent to complete available treatment ordered under this chapter or the equivalent laws of another state, where such failure has resulted in a prior termination of parental rights to another child and the parent has failed to effect significant change in the interim; and
- <<-(3)[(4)]->><<+(4)+>> Such an order is in the best interests of the child.

Sec. 16. RCW 43.43.830 and 1990 c 146 s 8 and 1990 c 3 s 1101 are each reenacted and amended to read as follows:

<< WA ST 43.43.830 >>

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 43.43.830 through 43.43.840.

- (1) "Applicant" means:
 - (a) Any prospective employee who will or may have unsupervised access to children under sixteen years of age or developmentally disabled persons or vulnerable adults during the course of his or her employment or involvement with the business or organization;
 - (b) Any prospective volunteer who will have regularly scheduled unsupervised access to children under sixteen years of age, developmentally disabled persons, or vulnerable adults during the course of his or her employment or involvement with the business or organization under circumstances where such access will or may involve groups of (i) five or fewer children under twelve years of age, (ii) three or fewer children between twelve and sixteen years of age, (iii) developmentally disabled persons, or (iv) vulnerable adults; or
 - (c) Any prospective adoptive parent, as defined in RCW 26.33.020.
- (2) "Business or organization" means a business or organization licensed in this state, any agency of the state, or other governmental entity, that educates, trains, treats, supervises, or provides recreation to developmentally disabled persons, vulnerable adults, or children under sixteen years of age, including school districts and educational service districts.

(3) "Civil adjudication" means a specific court finding of sexual abuse or exploitation or physical abuse in a dependency action under RCW 13.34.040 or in a domestic relations action under Title 26 RCW. In the case of vulnerable adults, civil adjudication means a specific court finding of abuse or financial exploitation in a protection proceeding under chapter 74.34 RCW. It does not include administrative proceedings. The term "civil adjudication" is further limited to court findings that identify as the perpetrator of the abuse a named individual, over the age of eighteen years, who was a party to the dependency or dissolution proceeding or was a respondent in a protection proceeding in which the finding was made and who contested the allegation of abuse or exploitation.

(4) "Conviction record" means "conviction record" information as defined in RCW 10.97.030(3) relating to a crime against children or other persons committed by either an adult or a juvenile. It does not include a conviction for an offense that has been the subject of an expungement, pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, or a conviction that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. It does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the record has been expunged according to law.

(5) "Crime against children or other persons" means a conviction of any of the following offenses: Aggravated murder; first or second degree murder; first or second degree kidnaping; first, second, or third degree assault; <<+ first, second, or third degree assault of a child;+>> first, second, or third degree rape; first, second, or third degree rape of a child; first or second degree robbery; first degree arson; first degree burglary; first or second degree manslaughter; first or second degree extortion; indecent liberties; incest; vehicular homicide; first degree promoting prostitution; communication with a minor; unlawful imprisonment; simple assault; sexual exploitation of minors; first or second degree criminal mistreatment; child abuse or neglect as defined in RCW 26.44.020; first or second degree custodial interference; malicious harassment; first, second, or third degree child molestation; first or second degree sexual misconduct with a minor; first or second degree rape of a child; patronizing a juvenile prostitute; child abandonment; promoting pornography; selling or distributing erotic material to a minor; custodial assault; violation of child abuse restraining order; child buying or selling; prostitution; felony indecent exposure; or any of these crimes as they may be renamed in the future.

(6) "Crimes relating to financial exploitation" means a conviction for first, second, or third degree extortion; first, second, or third degree theft; first or second degree robbery; forgery; or any of these crimes as they may be renamed in the future.

(7) "Disciplinary board final decision" means any final decision issued by the disciplinary board or the director of the department of licensing for the following businesses or professions:

- (a) Chiropractic;
- (b) Dentistry;
- (c) Dental hygiene;
- (d) Massage;
- (e) Midwifery;
- (f) Naturopathy;
- (g) Osteopathy;
- (h) Physical therapy;
- (i) Physicians;
- (j) Practical nursing;
- (k) Registered nursing;
- (l) Psychology; and
- (m) Real estate brokers and salesmen.

(8) "Unsupervised" means not in the presence of:

- (a) Another employee or volunteer from the same business or organization as the applicant; or
- (b) Any relative or guardian of any of the children or developmentally disabled persons to which the applicant has access during the course of his or her employment or involvement with the business or organization.

(9) "Vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself or a patient in a state hospital as defined in chapter 72.23 RCW.

(10) "Financial exploitation" means the illegal or improper use of a vulnerable adult or that adult's resources for another person's profit or advantage.

(11) "Agency" means any person, firm, partnership, association, corporation, or facility which receives, provides services to, houses or otherwise cares for vulnerable adults.

Sec. 17. RCW 71.09.020 and 1990 1st ex.s. c 12 s 2 are each amended to read as follows:

<< WA ST 71.09.020 >>

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, <<+ assault of a child in the first or second degree,+>> kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Approved April 1, 1992.

Effective June 11, 1992, 90 days after date of adjournment.

WA LEGIS 145 (1992)

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1989 Wash. Legis. Serv. 124 (West)

WASHINGTON

CRIMINAL SENTENCES—CONTROLLED SUBSTANCES OFFENSES COMMITTED IN CORRECTIONAL FACILITIES

1989 Wash. Legis. Serv. 124 (West) (Approx. 8 pages)

AND INITIATIVE MEASURES

Fifty-First Legislature

Additions are indicated by <<+ UPPERCASE +>>

Deletions by <<- Lowercase ->>

CHAPTER 124

S.B.No. 5040

CRIMINAL SENTENCES—CONTROLLED SUBSTANCES OFFENSES COMMITTED IN CORRECTIONAL FACILITIES

AN ACT Relating to controlled substances within correctional facilities; and amending RCW 9.94A.310 and 9.94A.370.

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

WA ST 9.94A.310

Sec. 1. Section 2, chapter 115, Laws of 1983 as last amended by section 1, chapter 218, Laws of 1988 and **RCW 9.94A.310** are each amended to read as follows:

(1)

TABLE 1

Sentencing Grid

	SERIOUSNESS SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XIV	Life Sentence without Parole/Death Penalty									
XIII	23y4m	24y4m	25y4m	26y4m	27y4m	28y4m	30y4m	32y10m	36y	40y
	240-	250-	261-	271-	281-	291-	312-	338-	370-	411-
	320	333	347	361	374	388	416	450	493	548
XII	12y	13y	14y	15y	16y	17y	19y	21y	25y	29y
	123-	134-	144-	154-	165-	175-	195-	216-	257-	298-
	164	178	192	205	219	233	260	288	342	397
XI	6y	6y9m	7y6m	8y3m	9y	9y9m	12y6m	13y6m	15y6m	17y6m
	62-	69-	77-	85-	93-	100-	129-	139-	159-	180-
	82	92	102	113	123	133	171	185	212	240
X	5y	5y6m	6y	6y6m	7y	7y6m	9y6m	10y6m	12y6m	14y6m
	51-	57-	62-	67-	72-	77-	98-	108-	129-	149-
	68	75	82	89	96	102	130	144	171	198
IX	3y	3y6m	4y	4y6m	5y	5y6m	7y6m	8y6m	10y6m	12y6m
	31-	36-	41-	46-	51-	57-	77-	87-	108-	129-
	41	48	54	61	68	75	102	116	144	171
VIII	2y	2y6m	3y	3y6m	4y	4y6m	6y6m	7y6m	8y6m	10y6m
	21-	26-	31-	36-	41-	46-	67-	77-	87-	108-
	27	34	41	48	54	61	89	102	116	144
VII	18m	2y	2y6m	3y	3y6m	4y	5y6m	6y6m	7y6m	8y6m

	15- 20	21- 27	26- 34	31- 41	36- 48	41- 54	57- 75	67- 89	77- 102	87- 116
VI	13m 12+- 14	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y6m 46- 61	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102
V	9m 6- 12	13m 12+- 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y 41- 54	5y 51- 68	6y 62- 82	7y 72- 96
IV	6m 3- 9	9m 6- 12	13m 12+- 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y2m 53- 70	6y2m 63- 84
III	2m 1- 3	5m 3- 8	8m 4- 12	11m 9- 12	14m 12+- 16	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y 51- 68
II		4m 0-90 Days	6m 3- 9	8m 4- 12	13m 12+- 14	16m 14- 18	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57
I		3m 0-60 Days	4m 2- 5	5m 2- 6	8m 3- 8	13m 4- 12	16m 12+- 14	20m 14- 18	2y2m 17- 22	5y 22- 29

(1) TABLE 1
Sentencing Grid
SERIOUSNESS OFFENDER SCORE
SCORE
0 1 2 3 4 5 6 7 8 9 or more

XIV Life Sentence without Parole/Death Penalty

XIII 23y4m 24y4m 25y4m 26y4m 27y4m 28y4m 30y4m 32y10m 36y 40y
240- 250- 261- 271- 281- 291- 312- 338- 370- 411-
320 333 347 361 374 388 416 450 493 548

XII 12y 13y 14y 15y 16y 17y 19y 21y 25y 29y
123- 134- 144- 154- 165- 175- 195- 216- 257- 298-
164 178 192 205 219 233 260 288 342 397

XI 6y 6y9m 7y6m 8y3m 9y 9y9m 12y6m 13y6m 15y6m 17y6m
62- 69- 77- 85- 93- 100- 129- 139- 159- 180-
82 92 102 113 123 133 171 185 212 240

X 5y 5y6m 6y 6y6m 7y 7y6m 9y6m 10y6m 12y6m 14y6m
51- 57- 62- 67- 72- 77- 98- 108- 129- 149-
68 75 82 89 96 102 130 144 171 198

IX 3y 3y6m 4y 4y6m 5y 5y6m 7y6m 8y6m 10y6m 12y6m
31- 36- 41- 46- 51- 57- 77- 87- 108- 129-
41 48 54 61 68 75 102 116 144 171

VIII 2y 2y6m 3y 3y6m 4y 4y6m 6y6m 7y6m 8y6m 10y6m
21- 26- 31- 36- 41- 46- 67- 77- 87- 108-
27 34 41 48 54 61 89 102 116 144

VII 18m 2y 2y6m 3y 3y6m 4y 5y6m 6y6m 7y6m 8y6m
15- 21- 26- 31- 36- 41- 57- 67- 77- 87-
20 27 34 41 48 54 75 89 102 116

VI 13m 18m 2y 2y6m 3y 3y6m 4y6m 5y6m 6y6m 7y6m
12- 15- 21- 26- 31- 36- 46- 57- 67- 77-
14 20 27 34 41 48 61 75 89 102

V 9m 13m 15m 18m 2y2m 3y2m 4y 5y 6y 7y
6- 12- 13- 15- 22- 33- 41- 51- 62- 72-

12 14 17 20 29 43 54 68 82 96

IV 6m 9m 13m 15m 18m 2y2m 3y2m 4y2m 5y2m 6y2m
3- 6- 12- 13- 15- 22- 33- 43- 53- 63-
9 12 14 17 20 29 43 57 70 84

III 2m 5m 8m 11m 14m 20m 2y2m 3y2m 4y2m 5y
1- 3- 4- 9- 12- 17- 22- 33- 43- 51-
3 8 12 12 16 22 29 43 57 68

II 4m 6m 8m 13m 16m 20m 2y2m 3y2m 4y2m
0-90 2- 3- 4- 12- 14- 17- 22- 33- 43-
Days 6 9 12 14 18 22 29 43 57

I 3m 4m 5m 8m 13m 16m 20m 2y2m
0-60 0-90 2- 2- 3- 4- 12- 14- 17- 22-
Days Days 5 6 8 12 14 18 22 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by 75 percent.

(3) The following additional times shall be added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon as defined in this chapter and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice was armed with a deadly weapon and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following times shall be added to the presumptive range determined under subsection (2) of this section:

(a) 24 months for Rape 1 (RCW 9A.44.040), Robbery 1 (RCW 9A.56.200), or Kidnapping 1 (RCW 9A.40.020)

(b) 18 months for Burglary 1 (RCW 9A.52.020)

(c) 12 months for Assault 2 (RCW 9A.36.020 <<+OR 9A.36.021+>>), Escape 1 (RCW 9A.76.110), Kidnapping 2 (RCW 9A.40.030), Burglary 2 of a building other than a dwelling (RCW 9A.52.030), Theft of Livestock 1 or 2 (RCW 9A.56.080), or any drug offense.

<<+(4) THE FOLLOWING ADDITIONAL TIMES SHALL BE ADDED TO THE PRESUMPTIVE SENTENCE IF THE OFFENDER OR AN ACCOMPLICE COMMITTED THE OFFENSE WHILE IN A COUNTY JAIL OR STATE CORRECTIONAL FACILITY AS THAT TERM IS DEFINED IN THIS CHAPTER AND THE OFFENDER IS BEING SENTENCED FOR ONE OF THE CRIMES LISTED IN THIS SUBSECTION. IF THE OFFENDER OR AN ACCOMPLICE COMMITTED ONE OF THE CRIMES LISTED IN THIS SUBSECTION WHILE IN A COUNTY JAIL OR STATE CORRECTIONAL FACILITY AS THAT TERM IS DEFINED IN THIS CHAPTER, AND THE OFFENDER IS BEING SENTENCED FOR AN ANTICIPATORY OFFENSE UNDER CHAPTER 9A.28 RCW TO COMMIT ONE OF THE CRIMES LISTED IN THIS SUBSECTION, THE FOLLOWING TIMES SHALL BE ADDED TO THE PRESUMPTIVE SENTENCE RANGE DETERMINED UNDER SUBSECTION (2) OF THIS SECTION:+>>

<<+(A) EIGHTEEN MONTHS FOR OFFENSES COMMITTED UNDER RCW 69.50.401(A) (1)(I);+>>

<<+(B) FIFTEEN MONTHS FOR OFFENSES COMMITTED UNDER RCW 69.50.401(A) (1)(II), (III), AND (IV);+>>

<<+(C) TWELVE MONTHS FOR OFFENSES COMMITTED UNDER RCW 69.50.401(D);+>>

<<+FOR THE PURPOSES OF THIS SUBSECTION, ALL OF THE REAL PROPERTY OF A STATE CORRECTIONAL FACILITY OR COUNTY JAIL SHALL BE DEEMED TO BE PART OF THAT FACILITY OR COUNTY JAIL.+>>

WA ST 9.94A.370

Sec. 2. Section 8, chapter 115, Laws of 1983 as last amended by section 1, chapter 131, Laws of 1987 and RCW 9.94A.370 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the presumptive sentencing range (see RCW 9.94A.310, (Table 1)). The additional time for deadly weapon findings <<+OR FOR THOSE OFFENSES ENUMERATED IN RCW 9.94A.310(4) THAT WERE COMMITTED IN A STATE CORRECTIONAL FACILITY OR COUNTY JAIL+>> shall be added to the entire presumptive sentence range. The court may impose any sentence within the range that it deems appropriate. All presumptive sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.390(2)(c), (d), and 1 (e).

Approved April 20, 1989.

Effective July 23, 1989, 90 days after date of adjournment.

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