

# CHAPTER 8

## Post-Conviction and Sentencing

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### I. Introduction

Much of the Washington law governing sentencing is the same in sex offense cases as it is in other criminal prosecutions. Washington’s general sentencing provisions are covered in the *Washington State Judges Benchbook, Criminal Procedure, Superior Court* and the *Washington Adult Sentencing Manual*, which is issued annually by the Washington Sentencing Guidelines Commission. Those two publications contain information about sentencing-related topics, including:

- constitutional provisions, statutes, and court rules
- respective rights of defendants and the state
- pre-sentence investigations and reports
- forms of sentence provisions for sentencing components and alternatives, such as imprisonment, community service, treatment, and other provisions
- credit for time served
- consecutive and concurrent sentences
- procedure at sentencing hearing
- probation, suspended sentences, and deferred sentences
- scripts for judges

In this bench guide, the discussion focuses on special considerations that should be taken into account when sentencing persons convicted of sex offenses.

### II. Sex Offender Sentencing Policy<sup>1</sup>

1984	The Sentencing Reform Act (SRA) went into effect, replacing indeterminate sentencing with determinate sentencing, using statewide sentencing guidelines. The Special Sex Offender Sentencing Alternative (SSOSA) is available as a sentencing option.
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<sup>1</sup> Lucy Berliner, “Sex Offender Sentencing Options: Views of Child Victims and Their Parents,” Washington State Institute for Public Policy Document No. 07-08-1201 (2007)  
<http://www.wsipp.wa.gov/rptfiles/07-08-1201.pdf>

1990	The Community Protection Act was enacted. This act increased prison terms for sex offenders, established registration and notification laws, authorized funds for treatment of adult and juvenile sex offenders, and provided services for victims of sexual assault. It also authorized civil commitment of sexually violent predators.
1993	Voters passed a “Three Strikes” initiative requiring life in prison without the possibility of release for offenders who have been convicted of three “most serious offenses.”
1996	Two strikes legislation passed, requiring life in prison without the possibility of release for offenders who have been convicted of two or more serious sex crimes.
2001	Determinate Plus Sentencing was adopted for sex offenders convicted of certain sex offenses who are subject to a life sentence in prison with discretionary release by the Indeterminate Sentencing Review Board (ISRB).
2005	SSOSA eligibility requirements changed for crimes committed after July 1, 2005. The changes included: no prior adult violent convictions committed within five years of the current offense; offense did not result in substantial bodily harm to the victim; and offender had prior relationship or connection to the victim. Also, the court must give “great weight” to the victim’s opinion about imposing SSOSA.
2006	Sentencing ranges are increased, failure to register penalties are increased.

### III. Post-Conviction Bail

The rules related to post-conviction release for sex offenders are discussed in this section. All other rules governing pre and post-conviction release can be found in CrR 3.2.<sup>2</sup>

#### A. Release/Detention Before Sentencing

##### 1. Presumptive detention

A defendant who has been found guilty of a felony and is awaiting sentencing shall be detained unless there is “clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if released.”<sup>3</sup> A new bond or a rider and a “French” order are required after conviction if the court believes release is appropriate.<sup>4</sup>

<sup>2</sup>[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=sup&set=CrR&ruleid=supCrR3](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3)

<sup>3</sup> RCW 10.64.025(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.025>

<sup>4</sup> *State v. French*, 88 Wn. App. 586, 945 P.2d 752 (1997)

## 2. Mandatory detention

A defendant who has been found guilty of one of the following offenses shall be detained pending sentencing:<sup>5</sup>

- child molestation in the first, second, or third degree (RCW 9A.44.083, 9A.44.068, 9A.44.079)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44>
- communication with a minor for immoral purposes (felony) (RCW 9.68A.090) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.090>
- human trafficking in the first or second degree (RCW 9A.40.100)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.100>
- incest (RCW 9A.64.020)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.64.020>
- indecent liberties (RCW 9A.44.100)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100>
- luring (RCW 9A.40.090)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.090>
- promoting commercial sexual abuse of a minor (RCW 9.68A.101)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.101>
- rape in the first or second degree (RCW 9A.44.040 and RCW 9A.44.050)
- rape of a child in the first, second, or third degree (RCW 9A.44.073, RCW 9A.44.076, and RCW 9A.44.079)
- sexual misconduct with a minor in the first or second degree (RCW 9A.44.093 and RCW 9A.44.096)
- sexual Exploitation of a minor (RCW 9.68A.040)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.040>
- any class A or B felony that is a sexually motivated offense under RCW 9.94A.030 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>
- any offense that is, under chapter RCW 9A.28, a criminal attempt, solicitation, or conspiracy to commit one of the foregoing offenses  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.28>

In order to minimize trauma to the victim, “the court may attach conditions on release of a defendant under RCW 10.64.025 regarding the whereabouts of the defendant, contact with the victim, or other conditions.”<sup>6</sup>

### B. Release After Sentencing and Pending Appeal

While there is no constitutional guarantee to bail pending an appeal,<sup>7</sup> RCW 10.73.040 provides that bail be set pending appeal in all criminal actions, except capital cases, in which the proof of guilt is clear or the presumption great.

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<sup>5</sup> RCW 10.64.025(2) <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.025> ; *State v. Blilie*, 132 Wn.2d 484, 939 P.2d 691 (1997)

<sup>6</sup> RCW 10.64.027 <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.64.027>

<sup>7</sup> *State v. Smith*, 84 Wn.2d 498, 499, 527 P.2d 674, 676 (1974)

A defendant who is found guilty of a non-capital felony and who has filed an appeal is eligible for release on bail unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community,<sup>8</sup> in which case the defendant may be detained while the appeal is pending.<sup>9</sup>

Notwithstanding CrR 3.2 or RAP 7.2, an appeal in a criminal action shall not stay the execution of the judgment of conviction if there is a preponderance of the evidence that:

- the defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed;<sup>10</sup>
- delay resulting from the stay would unduly diminish the punishment's deterrent effect;<sup>11</sup>
- a stay would cause unreasonable trauma to the victims of the crime;<sup>12</sup> or
- the defendant has not paid or posted bond or the financial obligations, according to his/her abilities, imposed under the judgment.<sup>13</sup>

An appeal by a defendant convicted of one of the offenses listed in Section III. A.2 above shall not stay execution of the judgment of conviction.<sup>14</sup>

If the defendant is convicted of a felony, and is unable to obtain release pending the appeal by posting an appeal bond, cash, adequate security, release on personal recognizance, or any other conditions imposed by the court, the time the defendant has been imprisoned pending the appeal shall be deducted from the sentence term if the judgment is affirmed.<sup>15</sup>

## IV. Sentencing Under the Sentencing Reform Act (SRA)

This section discusses the options available to the court when sentencing offenders convicted of a felony sex offense. A court imposing a misdemeanor or gross misdemeanor sentence is not bound by the SRA and may impose up to the maximum misdemeanor or gross misdemeanor sentence, subject to the Eighth Amendment prohibition on cruel and unusual punishment.<sup>16</sup>

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<sup>8</sup> *State v. Anderson*, 108 Wn.2d 188, 191, 736 P.2d 661, 663 (1987)

<sup>9</sup> CrR 3.2(g)

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=sup&set=CrR&ruleid=supCrR3.2](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.2)

<sup>10</sup> RCW 9.95.062(1)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.95.062>

<sup>11</sup> RCW 9.95.062(1)(b)

<sup>12</sup> RCW 9.95.062(1)(c)

<sup>13</sup> RCW 9.95.062(1)(d)

<sup>14</sup> RCW 9.95.062(2)

<sup>15</sup> RCW 9.95.062(3)

<sup>16</sup> *State v. Bowen*, 51 Wn. App. 42, 48, 751 P.2d 1226 (1988) review denied, 111 Wn. 2d 1017 (defendant acquitted on the felony and convicted of the lesser-included misdemeanor could be sentenced to a sentence greater than that of the presumptive range on the felony)

## A. Sentencing guidelines

### 1. Minimum-maximum sentence range required

Upon a finding that the offender is subject to sentencing under RCW 9.94A.507, the court must impose a sentence that sets a maximum term and a minimum term.<sup>17</sup> The maximum term must consist of the statutory maximum sentence for the offense.<sup>18</sup>

### 2. Mandatory minimum term for rape of a child 1 and 2, child molestation 1

If the offense that caused the offender to be sentenced under RCW 9.94A.507 was rape of a child in the first degree (RCW 9A.44.073), rape of a child in the second degree (RCW 9A.44.076), or child molestation in the first degree (RCW 9A.44.083), and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.<sup>19</sup>

Note, however, that an offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under RCW 9.94A.507.<sup>20</sup>

### 3. Mandatory minimum term for rape 1 and 2, indecent liberties by forcible compulsion, kidnapping 1 with sexual motivation

If the offense that caused the offender to be sentenced under RCW 9.94A.507 was rape in the first degree (RCW 9A.44.040), rape in the second degree (RCW 9A.44.050), indecent liberties by forcible compulsion (RCW 9A.44.100), or kidnapping in the first degree (RCW 9A.40.020) with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, or there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.<sup>21</sup>

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<sup>17</sup> “For offenders sentenced under the “determinate plus” sentencing system, the Indeterminate Sentencing Review Board (ISRB) holds a hearing several months before the earliest possible release date. This date is calculated based on the minimum term and offender earned time. A number of factors are considered before the ISRB makes a decision. If the decision is for release, a plan is made to transfer the offender to community custody. If the decision is against release, time is added, and a new minimum term is set. No more than 60 months can be added at one time.” ISRB FAQ’s located at <http://www.doc.wa.gov/isrb/faq.asp>

<sup>18</sup> RCW 9.94A.507(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507>

<sup>19</sup> RCW 9.94A.507(3)(c)(ii)

<sup>20</sup> RCW 9.94A.507(2)

<sup>21</sup> Id.

The minimum terms described above do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under RCW 9.94A.507(c) (i).<sup>22</sup>

## B. Aggravating and Mitigating Circumstances

The court may impose a sentence outside of the standard range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.<sup>23</sup>

Whenever a sentence outside the standard range is imposed, the court must set out the reasons for its decision in written findings of fact and conclusions of law. A sentence outside of the standard sentence range shall be a “determinate sentence.”<sup>24</sup>

### 1. Aggravating circumstances determined by the court

The court may impose an aggravated exceptional sentence beyond the standard sentencing range without a finding of fact by a jury in the following circumstances:

- (a) The defendant and the state stipulate that justice is best served by the imposition of an exceptional sentence beyond the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
- (b) The defendant's prior un-scored misdemeanor or prior un-scored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of the Sentencing Reform Act as expressed in RCW 9.94A.010.
- (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
- (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.<sup>25</sup>

### 2. Aggravating circumstances determined by a jury

Under *Blakely v. Washington*, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

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<sup>22</sup> RCW 9.94A.507(3)(d) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507>

<sup>23</sup> RCW 9.95A.535 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.535>

<sup>24</sup> Id.

<sup>25</sup> RCW 9.94A.535(2)

reasonable doubt.”<sup>26</sup> Additional aggravating factors to be considered by the jury are set forth in RCW 9.94A.535 (3). The following is a list of those statutory factors most likely to apply in the prosecution of a sex offense:<sup>27</sup>

- a. The defendant’s conduct during the commission of the current offense manifested deliberate cruelty to the victim.
- b. The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.
- c. The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.
- d. The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.
- e. The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.
- f. The current offense involved domestic violence, as defined in RCW10.99.020, and one or more of the following was present:
  - i. The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;<sup>28</sup>
  - ii. The offense occurred within sight or sound of the victim’s or the offender’s minor children under the age of 18 years; or
  - iii. The offender’s conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
- g. The offense resulted in the pregnancy of a child victim of rape.
- h. The offense involved a high degree of sophistication or planning.
- i. The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

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<sup>26</sup> *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see also *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). There is currently a challenge pending appeal in the First Circuit, which may alter the laws on sentencing as articulated in *Blakely* and *Booker*. See *U.S. v. Gurley*, No. 10-10310 (D. Mass. May 17, 2012)

<sup>27</sup> The letters before these listed factors correspond with the subsections of RCW 9.94A.535(3) in which they are contained.

<sup>28</sup> See *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001) (two-week period of abuse is not a prolonged period of time)

- j. The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.<sup>29</sup>
- k. The offense involved an invasion of the victim's privacy.<sup>30</sup>
- l. The defendant demonstrated or displayed an egregious lack of remorse.
- m. The offense involved a destructive and foreseeable impact on persons other than the victim.
- n. The defendant committed the current offense shortly after being released from incarceration.
- p. The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530 (2).

### 3. Mitigating circumstances

The following non-exclusive list of mitigating factors must be established by a preponderance of the evidence:<sup>31</sup>

- a. To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
- b. Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.
- c. The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
- d. The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
- e. The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

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<sup>29</sup> See also *State v. Barnes*, 117 Wn.2d 701, 712, 818 P.2d 1088 (1991); *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990)

<sup>30</sup> *State v. Falling*, 50 Wn. App. 47, 55-56, 757 P.2d 1119 (1987)

<sup>31</sup> RCW 9.94A.535(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.535>

- f. The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.
- g. The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- h. The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.
- i. The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.
- j. The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

## V. Special Sex Offender Sentencing Alternative (SSOSA)

SSOSA is a sentencing alternative that gives convicted sex offenders the opportunity to serve all or part of their sentence out of custody while they participate in a sexual deviancy treatment program. The Washington State Legislature enacted SSOSA for first-time sex offenders “in an attempt to prevent future crimes and protect society.”<sup>32</sup> This is the only instance under the Sentencing Reform Act in which a sentence can be suspended.<sup>33</sup>

This sentencing alternative has been in existence since 1984, and was re-codified in 2001 as an independent statute.<sup>34</sup> The SSOSA statute was subsequently amended in 2004, and the changes that went into effect in 2005 provide additional restrictions on a defendant’s eligibility for SSOSA, increase the term of incarceration, increase court supervision, and impose a longer term of treatment.<sup>35</sup>

### A. Eligibility Requirements

1. The offender has been convicted of a sex offense other than rape in the second degree or a sex offense that is also a serious violent offense.<sup>36</sup> A

<sup>32</sup> *State v. Young*, 125 Wn.2d 688, 693, 88P.2d 142 (1995)

<sup>33</sup> RCW 9.94A.670 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

<sup>34</sup> Laws of 2000, ch. 28, §§ 5, 20, 46; *State v. Osman*, 157 Wn.2d 474, 481 n. 6, 139 P.3d 334 (2006)

<sup>35</sup> Laws of 2004, ch. 176, § 4

<sup>36</sup> RCW 9.94A.670(2)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

person convicted of attempted rape in the second degree is eligible for SSOSA.<sup>37</sup>

**2.** If the conviction results from a guilty plea, the offender must, as part of the plea of guilty, voluntarily and affirmatively admit that he or she committed all elements of the crime.<sup>38</sup> An offender entering an Alford plea is not eligible for SSOSA.

**3.** The offender has no prior sex offense convictions as defined in RCW 9.94A.030 or prior felony sex offenses in this or any other state.<sup>39</sup> An offender cannot receive a SSOSA if he or she has a conviction in another state for a felony sex offense, even if that offense is not comparable to any Washington offense.<sup>40</sup>

**4.** The offender has no adult convictions of a violent offense within five years of the date of the current offense.<sup>41</sup>

**5.** The offense did not result in “substantial bodily harm” to the victim.<sup>42</sup> This means that there is no bodily injury that involves temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any body part or organ.<sup>43</sup>

**6.** The offender must have an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime.<sup>44</sup> An offender’s wife is not a “victim” under the SSOSA statute.<sup>45</sup> Such a literal application of the term “victim” “would allow SSOSA eligibility where anyone with whom the defendant has a prior relationship has suffered emotional or psychological injury as a result of the crime” and would render the statute meaningless.<sup>46</sup>

**7.** The offender’s standard range for the offense must include the possibility of confinement for less than 11 years.<sup>47</sup>

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<sup>37</sup> *State v. Jackson*, 61 Wn. App. 86, 809 P.2d 221 (1991)

<sup>38</sup> RCW 9.94A.670(2)(a)

<sup>39</sup> RCW 9.94A.670(2)(b)

<sup>40</sup> *State v. McInally*, 125 Wn. App. 854, 861-66, 106 P.3d 794 (2005) review denied, 155 Wn.2d 1002, 126 P.3d 1279

<sup>41</sup> RCW 9.94A.670(2)(c)

<sup>42</sup> RCW 9.94A.670(2)(d)

<sup>43</sup> RCW 9.94A.670(1)(b)

<sup>44</sup> RCW 9.94A.670(2)(e)

<sup>45</sup> *State v. Landsiedel*, 165 Wn. App. 886, 269 P.3d 347 (2012), review denied 174 Wn.2d 1003, 278 P.3d 1111

<sup>46</sup> *Id.* at 892-93

<sup>47</sup> RCW 9.94A.670(2)(f) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

## B. Evaluation for Amenability to Treatment

If the court finds that the offender meets the above-listed eligibility requirements, it may order an examination on its own motion, or on the motion of the state or the offender, to determine whether the offender is amenable to treatment.<sup>48</sup>

The decision whether to order expenditure of public funds for the evaluation is within the trial court's discretion.<sup>49</sup> However, if the offender is less than 18 years of age when the charge is filed, the state shall pay for the cost of the initial evaluation and treatment.<sup>50</sup>

Under a recent Washington State Supreme Court opinion, these SSOSA evaluations may be disclosed to the public under RCW 42.56 (The Public Records Act).<sup>51</sup>

At a minimum, under RCW 9.94A.670(3)(a)(i)-(v) the evaluation report shall include:

1. the offender's version of the facts and the official version of the facts
2. the offender's offense history
3. an assessment of problems in addition to alleged deviant behaviors
4. the offender's social and employment situation
5. other evaluation measures used

The examiner must report on the offender's amenability to treatment and relative risk to the community in a report that sets forth the sources of the information.<sup>52</sup> A proposed treatment plan must also be provided that includes:<sup>53</sup>

1. frequency and type of contact between offender and therapist
2. specific issues to be addressed in treatment and description of planned treatment modalities
3. monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others
4. anticipated length of treatment

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<sup>48</sup> RCW 9.94A.670(3)

<sup>49</sup> *State v. Young*, 125 Wn.2d 688, 88 P.2d 142 (1995)

<sup>50</sup> RCW 9.94A.670(13)

<sup>51</sup> *Koenig v. Thurston County*, No. 84840-4 (September 27, 2012)

<sup>52</sup> RCW 9.94A.680(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.680>

<sup>53</sup> RCW 9.94A.680(3)(b)

5. recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances

The court may, on its own motion, or on the motion of the state or the offender, order a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender 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.<sup>54</sup>

### C. Deciding Whether to Grant a SSOSA

When the court receives the report(s) on the offender's amenability to treatment, it must decide whether the defendant and community will benefit from SSOSA, considering the following factors set forth in RCW 9.94A.680 (4):

1. whether a SSOSA is too lenient in light of the extent and circumstances of the crime
2. whether the offender has other victims
3. whether the offender is amenable to treatment
4. the risk the offender presents to the community, the victim, or other persons of similar ages and circumstances

The court must also give "great weight" to the victim's opinion about whether the offender should receive a SSOSA. If the court grants a SSOSA against the victim's opinion, the court is required to enter written findings that state its reasons for imposing the treatment disposition.<sup>55</sup>

The decision to grant a SSOSA rests completely within the trial court's discretion.<sup>56</sup> The court may also consider such factors as the offender's social situation. For example, if the defendant is a non-citizen, the court can consider whether deportation would render SSOSA unworkable.<sup>57</sup>

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<sup>54</sup> RCW 9.94A.680(3)(c) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.680>

<sup>55</sup> *Id.*

<sup>56</sup> *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992); *State v. Ziegler*, 60 Wn. App. 529, 534, 803 P.2d 1355 (1991), review denied, 116 Wn.2d 1029, 813 P.2d 582

<sup>57</sup> *State v. Ramirez*, 140 Wn. App. 278, 165 P.3d 61 (2007)

## D. Imposing a SSOSA

As conditions of a suspended sentence under SSOSA, the court must impose the following:

### 1. Confinement<sup>58</sup>

The court must impose a term of confinement up to 12 months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than 12 months or the maximum term if there are aggravating factors as enumerated in RCW 9.94A.535(3). The term of confinement may not exceed the statutory maximum for the offense.

The court may order the offender to serve all or part of his or her term of confinement in partial confinement. Offenders sentenced under SOSSA are not eligible for earned release from confinement for good behavior under RCW 9.94A.728.

### 2. Community custody<sup>59</sup>

The term of community custody shall be equal to the length of the suspended sentence, the length of the maximum term imposed pursuant to 9.94A.507, or three years, whichever is greater, and the offender must be required to comply with any conditions imposed by the Department of Corrections under RCW 9.94A.703.

### 3. Sex offender treatment for up to five years<sup>60</sup>

The court has discretion to order outpatient or inpatient sex offender treatment. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment.

Before an offender changes sex offender treatment providers, he or she is required to notify the prosecutor, the community corrections officer, and the court. If any party or the court objects to the change, the offender may not change providers or conditions without court approval after conducting a hearing.

The offender's sex offender treatment provider may not be the same person who completed the evaluation of the offender's amenability to treatment. The treatment provider cannot employ, be employed by, or share profits with the person who completed the evaluation of the offender's amenability to treatment unless the court enters written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical.<sup>61</sup>

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<sup>58</sup> RCW 9.94A.670(5)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

<sup>59</sup> RCW 9.94A.670(5)(b)

<sup>60</sup> RCW 9.94A.670(5)(c)

<sup>61</sup> RCW 9.94A.670(13) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

Treatment may only be conducted by certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW unless the court finds:<sup>62</sup>

- a. that the offender has moved or is moving to another state for reasons other than circumventing the certification requirements; or
- b. no certified sex offender treatment providers or certified affiliate sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and the evaluation and treatment plan comply with this section and the rules adopted by the department of health.

## E. Additional Sentencing Conditions

The court may impose specific prohibitions or affirmative conditions relating to known precursor activities or behaviors identified in the proposed treatment plan.<sup>63</sup> The court may also impose crime related prohibitions and the following additional sentencing conditions requiring the offender to:<sup>64</sup>

1. devote time to specific employment or occupation
2. remain within prescribed geographical boundaries
3. report to the court and community corrections officer
4. pay all court-ordered legal financial obligations
5. perform community service
6. reimburse the victim's counseling costs for counseling required due to the crime

## F. Ensuring Compliance

### 1. Quarterly reports<sup>65</sup>

The sex offender treatment provider shall submit quarterly reports on the offender's treatment to the court and the parties to the case. The report shall reference the treatment plan and include, at a minimum, dates of attendance, offender's compliance with requirements and treatment activities, the offender's relative progress in treatment, and any other material specified at the sentencing hearing.

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<sup>62</sup> Id.

<sup>63</sup> RCW 9.94A.670(5)(d)

<sup>64</sup> RCW 9.94A.670(6)

<sup>65</sup> RCW 9.94A.670(8)(a)

## 2. Annual hearings<sup>66</sup>

Hearings shall be conducted on the offender's progress in treatment at least once per year. At least 14 days prior to the hearing, the victim shall be given notice and opportunity to make statements to the court regarding the offender's supervision and treatment.

At the annual hearing, the court may modify conditions of community custody, including but not limited to crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to, precursor activities and behaviors in the offender's offense cycle, or may revoke the suspended sentence.

## 3. DOC sanctions for violations

The Department of Corrections may impose sanctions for sentence violations pursuant to RCW 9.94A.633 (1) if:

- a. the offender violates a sentencing requirement that is not a condition of the suspended sentence,<sup>67</sup> or
- b. the offender violates the prohibitions or affirmative conditions of the suspended sentence for the first time.<sup>68</sup>

## G. SSOSA Treatment Termination or Extension

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.<sup>69</sup>

At least 14 days prior to the termination hearing, the victim shall be given notice of the hearing and the opportunity to make statements to the court about the offender's supervision and treatment.<sup>70</sup>

Prior to the termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions.<sup>71</sup>

The court may order an evaluation regarding the advisability of terminating treatment. Such an evaluation must be conducted by a sex offender treatment provider who did not treat the offender, and who does not employ, is not employed by, and does not share

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<sup>66</sup> RCW 9.94A.670(8)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

<sup>67</sup> RCW 9.94A.670(12)

<sup>68</sup> RCW 9.94A.670(10)(a)

<sup>69</sup> RCW 9.94A.670(7)

<sup>70</sup> RCW 9.94A.670(9)

<sup>71</sup> Id.

profits with the person who treated the offender, unless the court enters written findings that such an evaluation is in the best interest of the victim and that a successful evaluation of the offender would be otherwise impractical. The offender shall pay the cost of such an evaluation.<sup>72</sup>

At the termination hearing, the court may terminate treatment or extend treatment in two-year increments for up to the remaining period of community custody and/or modify the conditions of community custody.<sup>73</sup>

## H. SSOSA Revocation

The Department of Corrections **may** refer the first violation of the prohibitions or affirmative conditions of the suspended sentence to the court and recommend revocation of the suspended sentence.<sup>74</sup>

The Department of Corrections **must** refer to the court any violations of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed that occur during community custody subsequent to the first such violation and recommend revocation of the suspended sentence.<sup>75</sup>

The court may revoke the suspended sentence if, at any time during the period of community custody, the offender violates the conditions of the suspended sentence or the offender is failing to make satisfactory progress in treatment.<sup>76</sup>

An offender whose SSOSA is revoked is not entitled to credit against the maximum sentence for “non-confined time” while his or her sentence was suspended.<sup>77</sup>

## VI. Other Sentencing Conditions

### A. Community Custody/Probation<sup>78</sup>

#### 1. Department of Corrections (DOC)

Community custody must be imposed when a defendant is convicted of a “sex offense,”<sup>79</sup> a “violent offense,” or a “crime against person.”<sup>80</sup> Community custody ranges are found in WAC 437-20-010.

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> RCW 9.94A.670(10)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.670>

<sup>75</sup> RCW 9.94A.670(10)(b)

<sup>76</sup> RCW 9.94A.670(11)

<sup>77</sup> *State v. Pannell*, 173 Wn.2d 222, 234, 267 P.3d 349 (2011)

<sup>78</sup> Note: Changes in the requirements and conditions of community custody contained in both statutes and in the administrative code for the Department of Corrections periodically occur. When the court is reviewing such requirements and conditions in older cases, it should bear in mind that they may not be the same as those set forth in current statutes and WAC provisions.

Pursuant to RCW 9.92.060, 9.95.204, and 9.95.210, DOC must supervise offenders who are sentenced to probation in superior court for the following crimes:

- a. Sexual misconduct with a minor in the second degree (RCW 9A.44.096)
- b. Custodial sexual misconduct in the second degree (RCW 9A.44.170)
- c. Communication with a minor for immoral purposes (RCW 9.68A.090)
- d. Failure to register as a sex offender (RCW 9A.44.130)

Misdemeanor and gross misdemeanor offenders supervised by DOC shall be placed on community custody.<sup>81</sup>

During a sex offender's community custody term, the court may impose and enforce an order extending any of the court-imposed conditions for a period up to the maximum allowable sentence to the crime if it finds that public safety would be enhanced.<sup>82</sup> Additionally, prior to or during a sex offender's term of community custody, DOC may impose any appropriate conditions of supervision, including prohibiting the offender from having contact with specified individuals or a specific class of individuals.

## 2. Court supervision

For non-felonies that are not included in the definition of a sex offense, the maximum jurisdiction of the court is two years, and this period cannot be increased by agreement or stipulation.<sup>83</sup> If the court originally imposes a period of probation shorter than the two-year period, the defendant is entitled to notice and a hearing before the length of probation can be increased.<sup>84</sup>

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<sup>79</sup> Sexual offenses include: advertising commercial sexual abuse of a minor, allowing minor on premises of live erotic performance, child molestation, commercial sexual abuse of a minor, communication with a minor for immoral purposes (felony), criminal trespass against children, custodial sexual misconduct, dealing in depictions of a minor engaged in sexually explicit conduct, failure to register as a sex offender (felony), incest, indecent liberties, permitting commercial sexual abuse of a minor, possession of depictions of a minor engaged in sexually explicit conduct, promoting commercial sexual abuse of a minor, rape of a child, sending or bringing into state depictions of minor engaged in sexually explicit conduct, sexual exploitation of a minor, sexual misconduct with a minor, sexually violating human remains, voyeurism, any felony conviction in effect prior to 1976 that is comparable to a current sex offense, a felony crime with a finding of sexual motivation, or a felony attempt, solicitation, or conspiracy to commit such crimes

<sup>80</sup> RCW 9.94A.701 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.701>

<sup>81</sup> RCW 9.94A.501(2) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.501>

<sup>82</sup> RCW 9.94A.709(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.709>

<sup>83</sup> RCW 3.66.067, .068 <http://apps.leg.wa.gov/rcw/default.aspx?cite=3.66.067>,  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=3.66.068> RCW 35.20.255

<http://apps.leg.wa.gov/rcw/default.aspx?cite=35.20.255>; see *In re Wesley v. Schneckloth*, 55 Wn.2d 90, 94, 346 P.2d 658 (1959)

<sup>84</sup> *State v. Campbell*, 95 Wn.2d 954, 958-59, 632 P.2d 517 (1981)

## B. Restitution

Restitution must be determined at the sentencing hearing or within 180 days of the sentencing hearing unless good cause is shown.<sup>85</sup> When the court determines restitution, a minimum monthly payment must be ordered, giving consideration to the offender's economic situation.<sup>86</sup> Restitution does not limit civil remedies available to the victims, survivors, or offenders.<sup>87</sup>

### 1. Jurisdiction

Convictions prior to July, 2000, remain under the court's jurisdiction for ten years, and the court has discretion to extend its jurisdiction for an additional ten years. Convictions after July 1, 2000, remain under the court's jurisdiction until the obligation for restitution is completely satisfied. The court may modify restitution as to amount, terms, or conditions, but may not reduce the total amount based on lack of ability to pay.<sup>88</sup>

### 2. Rape of a child

Restitution for a conviction of rape of a child in the first, second or third degree, in which the victim becomes pregnant, shall include all medical and child support for the victim's child.<sup>89</sup>

### 3. Non-felony cases

In non-felony cases, restitution is imposed as a condition of probation at the discretion of the court.<sup>90</sup> As with felony cases, the restitution must be easily ascertainable and restitution for future medical expenses, future earnings, or lost retirement benefits is not appropriate.<sup>91</sup> Restitution may be up to the amount of actual loss.<sup>92</sup>

## C. Court-Initiated Sexual Assault Protection Orders

When a person has been convicted of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096 or RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, solicitation, or conspiracy to commit a sex offense, a no contact order issued at sentencing is recorded as a sexual assault protection order.<sup>93</sup>

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<sup>85</sup> RCW 9.94A.753(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.753>

<sup>86</sup> Id.

<sup>87</sup> RCW 9.94A.753(9)

<sup>88</sup> RCW 9.94A.753(4)

<sup>89</sup> RCW 9.94A.753(6)

<sup>90</sup> RCW 9.95.210 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.95.210>

<sup>91</sup> *State v. Lewis*, 52 Wn. App. 921, 926, 791 P.2d 250 (1990)

<sup>92</sup> *State v. Rogers*, 30 Wn. App. 653, 658, 638 P.2d 89 (1981)

<sup>93</sup> RCW 7.90.150(6)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90.150>

A final sexual assault protection order entered in conjunction with a criminal prosecution remains in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.<sup>94</sup>

The sexual assault protection order issued at sentencing must state the following: “Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.”<sup>95</sup>

A certified copy of the order shall be provided to the victim at no charge.<sup>96</sup> Whenever a sexual assault protection order is issued, the clerk of the court shall forward a copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order.<sup>97</sup>

#### D. Deviancy Evaluation and Treatment

Regulations concerning sex offender treatment providers can be found in Chapter 246-930 WAC. A court sentencing an offender for a non-felony crime may impose treatment or other conditions that are reasonably related to that offender’s rehabilitation.<sup>98</sup>

#### E. Sex Offender Registration

A person convicted of a sex offense is required to register as a sex offender.<sup>99</sup> This means that the offender must register with the sheriff for the county in which he or she resides.<sup>100</sup> For the purposes of the registration statute, a “sex offense” includes the following:<sup>101</sup>

1. a conviction under chapter 9A.44 RCW (sex offenses) except RCW 9A.44.132 (failure to register as a sex offender or kidnapping offender)<sup>102</sup>
2. a repeat conviction under of RCW 9A.44.132<sup>103</sup>
3. a conviction under chapter 9.68A RCW (sexual exploitation of children) except RCW 9.68A.080 (reporting of depictions of a minor engaged in sexually explicit conduct)<sup>104</sup>

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<sup>94</sup> RCW 7.90.150(6)(c)

<sup>95</sup> RCW 7.90.150(6)(b)

<sup>96</sup> RCW 7.90.150(6)(d)

<sup>97</sup> RCW 7.90.150(8)

<sup>98</sup> *State v. Barklind*, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), aff’d. 87 Wn.2d 814, 557 P.2d 314

<sup>99</sup> RCW 9A.44.130(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130>

<sup>100</sup> Id.

<sup>101</sup> RCW 9A.44.128 (10) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.128>

<sup>102</sup> RCW 9.94A.030(46) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

<sup>103</sup> Id.

<sup>104</sup> Id.

4. a conviction under RCW 9A.64.020 (incest)<sup>105</sup>
5. an attempt, solicitation, or conspiracy to commit any of the foregoing violations
6. a conviction under a statute in effect prior to July 1, 1976, that is comparable to any of the foregoing violations<sup>106</sup>
7. a felony conviction with a finding of sexual motivation<sup>107</sup>
8. a conviction under RCW 9.68A.090 (communication with a minor for immoral purposes)<sup>108</sup>
9. a repeat conviction under RCW 9A.88.070 (promoting prostitution in the first degree) or RCW 9A.88.080 (promoting prostitution in the second degree)<sup>109</sup>
10. a gross misdemeanor conviction that is an attempt, solicitation, or conspiracy to commit a sex offense<sup>110</sup>
11. an out-of-state conviction that would require registration in that state as a sex offender, or would be classified as a sex offense in this state<sup>111</sup>
12. a federal or military conviction of a sex offense<sup>112</sup>
13. a conviction of a sex offense in a foreign country obtained with safeguards for fairness and due process as prescribed in 42 U.S.C. Sec. 16912<sup>113</sup>

Juveniles who are convicted of a sex offense are required to register,<sup>114</sup> as are those who have been found not guilty by reason of insanity under chapter 10.77 RCW.<sup>115</sup> However, people found civilly liable for acts that constitute a sex offense are not required to register.<sup>116</sup>

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<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> RCW 9A.44.128 (10)

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> *State v. Acheson*, 75 Wn. App. 151, 152-55, 87 P.2d 217 (1994)

<sup>115</sup> RCW 9A.44.130(1)(a) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130>

<sup>116</sup> *Oostra v. Holstine*, 86 Wn. App. 536, 543-46, 937 P.2d 195 (1997), review denied 133 Wn.2d 1034, 950 P.2d 478

## VII. Testing and Counseling for HIV and Sexually Transmitted Diseases

### A. Testing

In general, under RCW 70.24.024 (1), “the state and local public health officers or their authorized representatives may examine and counsel or cause to be examined and counseled persons reasonably believed to be infected with or to have been exposed to a sexually transmitted disease.”<sup>117</sup>

Additionally, RCW 70.24.340, which applies only to offenses committed after March 23, 1988, states that local health departments are required to conduct pretest counseling, HIV testing, and posttest counseling of all persons convicted of a sexual offense under chapter RCW 9A.44. The provision also requires that “Such testing...be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge.”<sup>118</sup>

Mandatory testing naturally raises Fourth Amendment issues addressed by the Washington Supreme Court in *Matter of Juveniles A, B, C, D, E*, holding that the testing requirement of RCW 70.24.340 does not violate the Fourth Amendment;<sup>119</sup> the statute requiring mandatory HIV testing of sexual offenders properly applies even to offenders whose actions involve no passing of bodily fluids;<sup>120</sup> and the provision of the public health laws mandating HIV testing for all persons convicted of sexual offenses applies to juvenile sexual offenders.<sup>121</sup>

RCW 70.24.340 also provides that the sentencing judge shall order mandatory pretest counseling, HIV testing, and posttest counseling of all persons convicted of a sexual offense under RCW 9A.44, or of prostitution or related offenses under chapter RCW 9A.88.

### B. Counseling

WAC 246-100-011 provides the following definition of counseling:

AIDS counseling" means counseling directed toward: i. Increasing the individual's understanding of acquired immunodeficiency syndrome; and ii. Assessing the individual's risk of HIV acquisition and transmission; and iii. Affecting the individual's behavior in ways to reduce the risk of acquiring and transmitting HIV infection.

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<sup>117</sup> RCW 70.24.024(1) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.024>

<sup>118</sup> RCW 70.24.340(2) <http://apps.leg.wa.gov/rcw/default.aspx?cite=70.24.340>

<sup>119</sup> *Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93, 847 P.2d 455, 460 (1993)

<sup>120</sup> Id. at 95

<sup>121</sup> Id. at 87

RCW 70.24.360 provides:

Jail administrators, with the approval of the local public health officer, may order pretest counseling, HIV testing, and posttest counseling for persons detained in the jail if the local public health officer determines that actual or threatened behavior presents a possible risk to the staff, general public, or other persons. Approval of the local public health officer shall be based on RCW 70.24.024(3) and may be contested through RCW 70.24.024(4). The administrator shall establish, pursuant to RCW 70.48.071, a procedure to document the possible risk which is the basis for the HIV testing. "Possible risk," as used in this section, shall be defined by the [state] board [of health] in rule. Documentation of the behavior, or threat thereof, shall be reviewed with the person to try to assure that the person understands the basis for testing.<sup>122</sup>

WAC 246-100-207 through WAC 246-100-209 further outline standards for providers.<sup>123</sup> The Department of Corrections Policy on HIV Infections and AIDS lists WAC 246-100-207 and WAC 246-100-209 as applying to sex offenders.<sup>124</sup>

### C. Disclosure of Test Results

Although the court is not directly involved in the disclosure of test results, this section is included for general reference purposes. While the disclosure of test results is generally restricted to healthcare administrators and staff on a need-to-know basis,<sup>125</sup> *State v. Whitfield*, clarifies that prosecuting attorneys may have access to test results under certain circumstances.<sup>126</sup>

RCW 70.24.105 (2) limits the disclosure of “the identity of any person upon whom an HIV antibody test is performed, or the results of such a test, ... the result of a test for any other sexually transmitted disease when it is positive... [or] any information relating to diagnosis of or treatment for HIV infection and for any other confirmed sexually transmitted disease” to persons or entities specifically identified in that subsection.

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<sup>122</sup> For further commentary on HIV testing in correctional facilities see James Lee Pope, “HIV Testing in State Correctional Systems,” 22 *J.L. & Health* 17 (2009)

<sup>123</sup> WAC 246-100-207: Human immunodeficiency virus (HIV) testing — Ordering — Laboratory screening — Interpretation — Reporting; WAC 246-100-209: Counseling standards — Human immunodeficiency virus (HIV) pretest counseling — HIV post-test counseling

<sup>124</sup> “HIV Infection and AIDS,” State of Washington Department of Corrections, Doc 670.020 (Aug. 8, 2011)

<sup>125</sup> *Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93, 847 P.2d 455, 460 (1993) (“Distribution of the test results is strictly limited to those persons with a genuine interest.”)

<sup>126</sup> “Although prosecuting attorneys are not mentioned in the section specifically dealing with confidentiality (RCW 70.24.105), the statute as a whole makes clear that prosecutors may, at some point, have access to otherwise confidential information held by public health officers.” *State v. Whitfield*, 132 Wn. App. 878, 903, 134 P.3d 1203, 1217 (2006)

RCW 70.24.105 (3) provides: “No person to whom the results of a test for a sexually transmitted disease have been disclosed pursuant to subsection (2) of this section may disclose the test results to another person except as authorized by that subsection.”

RCW 70.24.105(4) provides:

The release of sexually transmitted disease information regarding an offender or detained person...shall be governed as follows:

(a) The sexually transmitted disease status of a Department of Corrections offender who has had a mandatory test conducted . . . shall be made available . . . to the department of corrections health care administrator or infection control coordinator of the facility in which the offender is housed. The information . . . shall be used only for disease prevention or control and for protection of the safety and security of the staff, offenders, and the public. The information may be submitted to transporting officers and receiving facilities, including facilities that are not under the department of corrections' jurisdiction according to the provisions of (d) and (e) of this subsection.

(b) The sexually transmitted disease status of a person detained in a jail who has had a mandatory test conducted...shall be made available by the local public health officer to a jail health care administrator or infection control coordinator. The information... shall be used only for disease prevention or control and for protection of the safety and security of the staff, offenders, detainees, and the public. The information may be submitted to transporting officers and receiving facilities according to the provisions of (d) and (e) of this subsection.

(c) Information regarding the sexually transmitted disease status of an offender or detained person is confidential and may be disclosed by a correctional health care administrator or infection control coordinator or local jail health care administrator or infection control coordinator only as necessary for disease prevention or control and for protection of the safety and security of the staff, offenders, and the public. Unauthorized disclosure of this information to any person may result in disciplinary action, in addition to the penalties prescribed in RCW 70.24.080 or any other penalties as may be prescribed by law.

(d) Notwithstanding disclosure limitations in subsections (a), (b), and (c), whenever any member of a jail staff or department of corrections staff has been substantially exposed to the bodily fluids of an offender or detained person, then the results of any tests conducted pursuant to RCW 70.24.340(1), 70.24.360, or 70.24.370, shall be immediately disclosed to the staff person in accordance with the Washington Administrative Code rules

governing employees' occupational exposure to blood borne pathogens. Disclosure must be accompanied by appropriate counseling for the staff member, including information regarding follow-up testing and treatment. Disclosure shall also include notice that subsequent disclosure of the information in violation of this chapter or use of the information to harass or discriminate against the offender or detainee may result in disciplinary action, in addition to the penalties prescribed in RCW 70.24.080, and imposition of other penalties prescribed by law.

(e) The staff member shall also be informed whether the offender or detained person had any other communicable disease, as defined in RCW 72.09.251(3), when the staff person was substantially exposed to the offender's or detainee's bodily fluids.

(f) The test results of voluntary and anonymous HIV testing or HIV-related condition may not be disclosed to a staff person except as provided in subsection (2)(h) of this section and RCW 70.24.340(4). A health care administrator or infection control coordinator may provide the staff member with information about how to obtain the offender's or detainee's test results under subsection (2)(h) of this section and RCW 70.24.340(4).

## VIII. DNA Testing

### A. Upon Sentencing

A biological sample must be collected for DNA identification analysis from every adult or juvenile individual who is required to register under RCW 9A.44.130<sup>127</sup> and every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):<sup>128</sup>

1. assault in the fourth degree with sexual motivation (RCW 9A.36.041, <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.041> RCW 9.94A.835 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.835>)
2. communication with a minor for immoral purposes (RCW 9.68A.090 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.090>)
3. custodial sexual misconduct in the second degree (RCW 9A.44.170 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.170>)

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<sup>127</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130>

<sup>128</sup> For further information about collection of biological samples and their validity, see RCW 43.43.754(3)-(7) <http://apps.leg.wa.gov/rcw/default.aspx?cite=43.43.754>

4. failure to register (RCW 9A.44.130  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.130>)
5. harassment (RCW 9A.46.020  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.020>)
6. patronizing a prostitute (RCW 9A.88.110  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.110>)
7. sexual misconduct with a minor in the second degree (RCW 9A.44.096  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096>)
8. stalking (RCW 9A.46.110  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.46.110>)
9. violation of a sexual assault protection order granted under chapter RCW 7.90 <http://apps.leg.wa.gov/rcw/default.aspx?cite=7.90>

If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.

## B. Post-Conviction Petition for DNA Testing

RCW 10.73.170(1)-(3) provides:

- (1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
- (2) The motion shall:
  - (a) State that
    - (i) the court ruled that DNA testing did not meet acceptable scientific standards; or
    - (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
    - (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; and
  - (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement<sup>129</sup>; and

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<sup>129</sup> RCW 10.73.170(2)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=10.73.170>

(c) Comply with all other procedural requirements established by court rule.<sup>130</sup>

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form above, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.<sup>131</sup>

### C. Court Action When DNA Testing is Requested

RCW 10.73.170(4)-(6) provides:

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington State Patrol Crime Laboratory.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

## IX. Victim Impact Statements

Victims of felony crimes have a constitutional right to make a statement at sentencing.<sup>132</sup> Pursuant to RCW 7.69.030, “There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have ... rights, which apply to any criminal court and/or juvenile court proceeding.”

While there is no constitutional or statutory mandate for judges to allow statements of victims of misdemeanor crimes, it is advisable in order “to achieve a balanced criminal justice system that treats crime victims fairly and with sensitivity.”<sup>133</sup> Moreover, the President’s Task Force on Victims of Crime in 1982 stated:

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<sup>130</sup> RCW 10.73.170(2)(c)

<sup>131</sup> RCW 10.73.170(3)

<sup>132</sup> Washington State Const., article I, § 35

<sup>133</sup> M. Hook and A. Seymour, “A Retrospective of the 1982 President’s Task Force on Victims of Crime” (Office for Victims of Crime, Office of Justice Programs, & U.S. Department of Justice, December 2004).

Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime ... [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice ... Defendants speak and are spoken for often at great length before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.<sup>134</sup>

## X. Strike Offenses

“[T]he Persistent Offender Accountability Act (POAA) is neither an exceptional sentencing statute subject to a *Blakely* analysis nor is it an enhanced sentence statute.”<sup>135</sup> Pursuant to RCW 9.94A.570,<sup>136</sup> a “persistent offender” shall be sentenced to life in prison without the possibility of release. There are two principal types of “persistent offenders” as defined in RCW 9.94A.030(37):<sup>137</sup> “three strikes” offenders and “two strikes” offenders.

### A. Three Strike Offenses

An offender will receive life in prison without the possibility of release if he or she has been convicted on at least two separate previous occasions of felonies considered a “most serious offense”<sup>138</sup> and then is convicted of a third “most serious offense,” including any of the following sex offenses:<sup>139</sup>

1. child molestation in the first or second degree (RCW 9A.44.083, .086)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.086>
2. incest in the first or second degree against a child under age 14 (RCW 9A.44.096) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.096>
3. Indecent Liberties (RCW 9A.44.100)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100>
4. promoting prostitution in the first degree (9A.88.070)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.88.070>

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<sup>134</sup> “The President’s Task Force on Victims of Crime, Final Report,” December 1982 (Washington, D.C., December 1982), [www.ojp.usdoj.gov/publications/presdntstskforcrprt/front.pdf](http://www.ojp.usdoj.gov/publications/presdntstskforcrprt/front.pdf).

<sup>135</sup> *State v. Ball*, 127 Wn. App. 956, 957, 113 P.3d 520, 521 (2005)

<sup>136</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.570>

<sup>137</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

<sup>138</sup> RCW 9.94A.030(32)

<sup>139</sup> RCW 9.94A.030(37)(a)

5. rape in the first, second, or third degree (RCW 9A.44.040, .050, .060)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.040>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.060>
6. rape of a child in the first or second degree (RCW 9A.44.073, .076)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076>
7. sexual exploitation of a minor (RCW 9.68A.040)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9.68A.040>
8. any other class B felony with a finding of sexual motivation

## B. Two Strike Offenses

An offender will receive life in prison without the possibility of release if he or she has been convicted on at least one previous separate occasion of one of the following offenses and then is convicted of a second one of the following offenses:<sup>140</sup>

1. rape in the first or second degree (RCW 9A.44.040, 050)
2. rape of a child in the first degree (**Note:** this offense counts as a first strike only if the offender was 16 years or older at time of the offense) (RCW 9A.44.073) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.073>
3. rape of a child in the second degree (**Note:** this offense counts as a first strike only if the offender was 18 years or older at time of the offense) (RCW 9A.44.076) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.076>
4. child molestation in the first degree (RCW 9A.44.083)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.083>
5. indecent liberties by forcible compulsion (RCW 9A.44.100)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.100>
6. the following offenses committed with sexual motivation:
  - a. murder in the first or second degree (RCW 9A.32.030, 050)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.030>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.050>
  - b. homicide by abuse (RCW 9A.32.055)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.32.055>

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<sup>140</sup> RCW 9.94A.030(37)(b) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

c. kidnapping in the first degree or second degree (RCW 9A.40.020 , 030) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.020>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.40.030>

d. assault in the first or second degree (RCW 9A.36.011, 021)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.011>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.021>

e. assault of a child in the first or second degree (RCW 9A.36.120, 130)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.120>  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.130>

f. burglary in the first degree (RCW 9A.52.020)  
<http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.36.130>

7. any attempt to commit any of the foregoing offenses

For both “three strike” and “two strike” convictions, out-of-state convictions for comparable sex offenses and prior Washington convictions for comparable sex offenses shall be used to determine whether an offender meets the definition of a “persistent offender.”<sup>141</sup>

## XI. Special Allegations

### A. Sexual Motivation

When the state charges a non-sex offense misdemeanor, gross misdemeanor or felony and “sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder,” RCW 9.94A.835(1)<sup>142</sup> requires the state to file a special allegation of sexual motivation. “‘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.”<sup>143</sup>

The state must prove sexual motivation beyond a reasonable doubt with evidence of identifiable conduct by the defendant while committing the offense. *State v. Vars*<sup>144</sup> A sexual motivation allegation may be withdrawn only by an order of dismissal. The court may dismiss the special allegation only if it finds it necessary to correct a charging decision or “there are evidentiary problems which make proving the special allegation doubtful.”<sup>145</sup>

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<sup>141</sup> RCW 9.94A.030 <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

<sup>142</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.835>

<sup>143</sup> RCW 9.94A.030(47) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

<sup>144</sup> 157 Wn. App. 482, 493-94, 237 P.3d 378 (2010)

<sup>145</sup> RCW 9.94A.835(3)

If the trier of fact finds that sexual motivation has been proven beyond a reasonable doubt, the finding represents an aggravating factor which permits the court to impose an exceptional sentence above the standard sentence range.<sup>146</sup> If the court imposes an exceptional sentence outside the standard sentence range, it must set forth the reasons for its decision in written findings of fact and conclusions of law.<sup>147</sup>

## B. Predatory Offenses

When the state charges first or second degree rape of a child or first degree child molestation and “sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory” RCW 9.94A.836(1)<sup>148</sup> requires the state to file a special allegation that the offense was predatory “unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.”

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are “evidentiary problems” that make proving the allegation doubtful.<sup>149</sup>

‘Predatory’ means:

- (a) The perpetrator of the crime was a stranger to the victim, as defined in this section;
- (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or
- (c) the perpetrator was:
  - (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision...
  - (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision...
  - (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and

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<sup>146</sup> RCW 9.94A.535(3)(f) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.535>

<sup>147</sup> RCW 9.9A.535

<sup>148</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.836>

<sup>149</sup> RCW 9.94A.836(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.836>

the victim was a member or participant of the organization under his or her authority...or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision.<sup>150</sup>

If the trier of fact finds that the offense was a predatory offense beyond a reasonable doubt, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years,<sup>151</sup> unless the offender was a juvenile at the time of the commission of the offense.<sup>152</sup>

### C. Victim Under the Age of Fifteen

When the state charges first or second degree rape, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation and “sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the victim was under fifteen years of age at the time of the offense” RCW 9.94A.837 (1)<sup>153</sup> requires the state to file a special allegation that that the victim was under fifteen years of age at the time of the offense “unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.”

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are “evidentiary problems” that make proving the allegation doubtful.<sup>154</sup>

If the trier of fact finds, beyond a reasonable doubt, that the victim was under age fifteen at the time of the offense, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years.<sup>155</sup>

### D. Victim With Diminished Capacity

When the state charges first rape in the degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation and “sufficient admissible evidence exists, which,

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<sup>150</sup> RCW 9.94A.030(38) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.030>

<sup>151</sup> RCW 9.94A.507(1)(c)(ii) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507>

<sup>152</sup> RCW 9.94A.507(2)

<sup>153</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.837>

<sup>154</sup> RCW 9.94A.837 (3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.837>

<sup>155</sup> RCW 9.94A.507(1)(c)(ii) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.507>

when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult” RCW 9.9A.838(1)<sup>156</sup> requires the state to file a special allegation of such diminished capacity “unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.”

The state must prove the special allegation beyond a reasonable doubt. If filed, the special allegation may be withdrawn only by an order of dismissal, and dismissal can be ordered by the court only if the court finds that it is necessary to correct a charging decision or that there are “evidentiary problems” that make proving the allegation doubtful.<sup>157</sup>

If the trier of fact finds, beyond a reasonable doubt, that the victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense, the court must sentence the offender to a minimum term of confinement that is the greater of the maximum under the standard range of sentence or 25 years.<sup>158</sup>

#### E. Sexual Conduct With a Victim in Exchange For a Fee

When the state files a charge of first, second or third degree rape of a child, first, second or third degree child molestation, or an attempt to commit one of those crimes, if “sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage the victim in the sexual conduct in return for a fee,” RCW 9.94A.839(1)<sup>159</sup> provides that the state may file a special allegation to that effect.

The state must prove the special allegation beyond a reasonable doubt. If the trier of fact finds, beyond a reasonable doubt, that the defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage the victim in the sexual conduct in return for a fee, the court must add a one-year enhancement to the standard sentence range.<sup>160</sup> “If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement.”<sup>161</sup>

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<sup>156</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.838>

<sup>157</sup> RCW 9.94A.838(3) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.838>

<sup>158</sup> RCW 9.94A.507(1)(c)(ii)

<sup>159</sup> <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.839>

<sup>160</sup> RCW 9.94A.533(9) <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.94A.533>

<sup>161</sup> Id.