



WASHINGTON STATE  
MINORITY AND JUSTICE COMMISSION

**THE IMPACT OF RACE AND ETHNICITY ON  
CHARGING AND SENTENCING PROCESSES FOR  
DRUG OFFENDERS IN THREE COUNTIES OF  
WASHINGTON STATE**

*FINAL REPORT*

Rodney L. Engen, Ph.D.  
Randy R. Gainey, Ph.D.  
Sara Steen, Ph.D.

December 1999



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Washington State Minority and Justice Commission  
Washington State Supreme Court  
Temple of Justice  
Post Office Box 41174  
Olympia, Washington 98504-1174

(360) 705-5327

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***EXECUTIVE SUMMARY***

## **EXECUTIVE SUMMARY**

There has been a great deal of research in recent years examining racial and ethnic disparities in sentencing outcomes under sentencing guidelines. This research has generally concluded that, where racial and ethnic differences exist, they are largely if not entirely explained by legal factors such as the seriousness of the offense committed. There are, however, important reasons to question whether offenders who have committed similar crimes are receiving similar sentences, and whether racial disparities in punishment are due simply to differences in criminal behavior. A fundamental criticism of sentencing guidelines, like those in Washington, is that while they effectively limit judicial discretion, they simultaneously increase prosecutorial discretion over sentencing outcomes (Tonry 1996). By establishing sentence ranges based on the statutorily-defined seriousness level of the convicted offense, and the offender score, and by requiring that judges in most cases sentence within those ranges, much of the control over sentencing shifts to the prosecutor. Because the offenses charged and convicted determine, to a great extent, the sentencing options available to the courts, the exercise of discretion in charging has the potential to undermine the uniformity that is the primary objective of Washington's Sentencing Reform Act.

The current study extends previous research by examining the role of race and ethnicity in the case processing and sentencing of felony drug offenders in three counties in Washington State. The study addresses whether, and how, offenders' race or ethnicity is related to charging decisions, and how those decisions, as well as offenders' race or ethnicity, may affect courts' use of sentencing options for drug offenders, including the use of treatment-based alternatives to standard prison sentences. We also explore factors

that influence charging and sentencing decisions generally, and that may contribute to disparate charging or sentencing outcomes by race or ethnicity.

To address these questions, we collected and analyzed two types of data on factors relevant to charging and sentencing decisions. First, we conducted in-depth interviews with court officials involved in the case processing of felony drug offenders including judges, prosecuting attorneys, and public defenders. Second, we gathered information from prosecutors' case files on characteristics of offenders, their actual offending behavior, and processing decisions from arrest through sentencing for a random sample of convicted drug offenders.

Two central findings emerge from this study. First, this study demonstrates that charges are routinely changed between initial filing and conviction, suggesting that the decision-making that occurs prior to sentencing often has a greater impact on the punishment that offenders receive than does the exercise of discretion in sentencing. If there are differences in the way these decisions are made for different racial and ethnic groups, such differences could contribute to sentencing disparities that would be masked by "legal" factors (i.e., attributed to differences in offending behavior) at the sentencing stage. The second finding central to this report is that these changes in the severity of charges are, for the most part, *not* related to race or ethnicity. While we found some small differences in charging decisions, those did not consistently advantage or disadvantage any particular group of offenders. We conclude, therefore, that the data provide no evidence that race and ethnicity are important factors affecting charging decisions for drug offenders.



## *INTRODUCTION*



## **INTRODUCTION**

Criminal justice professionals, policy makers, and the general public have long been concerned with the treatment of racial and ethnic minorities within the criminal justice system. Many have questioned whether the over-representation of racial and ethnic minorities among incarcerated populations results from differential involvement in crime, or from discriminatory practices by agents working in the criminal justice system. Numerous researchers have explored this question. Research, though, has focused largely on the role of race and ethnicity in sentencing decisions. Much less is known about the role that defendants' race or ethnicity may play in charging decisions; specifically the decisions to file, amend, or dismiss charges, and decisions involving plea agreements. Research exploring these issues is critical to a better understanding of the relationship between offenders' race or ethnicity and the punishment they receive. This is especially true in the context of sentencing guidelines, where sentences are determined mainly by the offenses for which an offender is convicted.

Nowhere are the questions of disparity and minority overrepresentation more pressing than with respect to the sentencing and incarceration of drug offenders. Public concern over drugs and drug-related crime, combined with sentencing reforms designed to wage a "war on drugs," have resulted in tremendous changes in the administration of justice in Washington State. Changes include intensified law enforcement efforts and increasingly punitive sentencing guidelines, both of which have had a dramatic impact on the composition of prison populations. For instance, in 1987, drug offenders accounted for 14% of offenders sentenced to prison in Washington State, but by 1997, 36% of those sentenced to prison were drug offenders. Along with changes in the criminality of those

sentenced to prison came changes in the racial and ethnic composition of those sentenced to prison. In 1987, 38% of drug offenders sentenced to prison were racial or ethnic minorities; by 1997 the percentage was approximately 50%.

Concern over the disproportionate numbers of racial and ethnic minorities being punished by the criminal justice system for drug crimes, and the potential for racial disparities, led to a study funded by the Washington State Minority and Justice Commission (Engen, Gainey and Steen, 1999). Using data collected by the Sentencing Guidelines Commission (SGC), the study assessed the extent of racial and/or ethnic disparities in the severity of sentencing, and in the use of sentencing alternatives, for drug offenders in Washington State between July 1995 and December 1998. The study found that, on average, minority offenders do receive longer sentences than white offenders, but that those differences are mostly due to legally-relevant case characteristics. Analyses of the type of sentence ordered (incarceration versus supervision; WEC; DOSA; FTOW) showed larger differences by race and ethnicity, differences that remain statistically significant even after other extra-legal and legal variables are held constant. The study lends support to the concerns of many that racial and ethnic minorities are disadvantaged even in a state that has attempted to minimize disparities through sentencing guidelines, while at the same time confirming that sentencing outcomes are principally determined by legal factors.

That study, however, is limited in three important ways. First, like virtually all studies of sentencing decisions, it is limited to analyzing official records of convictions and sentences. Thus, while that stage of the process was examined carefully, the study was not able to examine decisions made at earlier stages. Second, the data analyzed there

are recorded from the judgment and sentence forms that county superior courts submit. Judgement and sentence forms are essentially limited to factors that determine the sentencing options legally available (the specific crimes convicted; prior relevant criminal history; the standard range), the sentence ordered, and offender demographic characteristics. The study was therefore unable to take into account other characteristics of the crimes committed, or of the offenders, that might be important in explaining judges' use of those sentencing ranges and options. Third, the study was limited to official records, so it can describe the overall patterns that appear in the data for drug offenders statewide, but cannot offer explanations or rationales for those patterns that exist.

The current study extends the previous research by examining the case processing and sentencing of felony drug offenders in greater depth in three counties in Washington State. The study addresses whether, and how, offenders' race or ethnicity is related to charging decisions, and how those decisions, as well as offenders' race or ethnicity, may affect courts' use of sentencing options for drug offenders. We also explore factors that influence charging and sentencing decisions generally, including details about the crimes committed and differences among counties in case processing, which may help to explain disparities in sentencing outcomes by race or ethnicity.

To address these questions, we collected and analyzed two types of data on factors relevant to charging and sentencing decisions. First, we conducted in-depth interviews with court officials involved in the case processing of felony drug offenders including judges, prosecuting attorneys, and public defenders. Second, we gathered information from prosecutors' case files on characteristics of offenders, their actual

offending behavior, and processing decisions from arrest through sentencing for a random sample of convicted drug offenders.

The current study goes beyond the earlier report in at least three important ways. First, the data collected from the case files allow us to examine the charging decisions that determine the available sentencing options, as well as the impact that those decisions may have on sentencing. Second, the case files include information not available in the SGC data on the crimes committed (e.g., quantity of drug, reasons for arrest), better information regarding plea agreements, and extra-legal factors (e.g., more complete and accurate indicators of ethnicity), thus allowing us to examine the effects of differences in actual offending behavior that may affect charging and sentencing, and to more reliably estimate the effects of ethnicity. Third, the qualitative information gathered through interviews provide a more complete description of the process and of the factors that criminal justice professionals take into account, and inform the analysis and interpretation of the quantitative data gathered. Such qualitative information also highlights the organizational context in which these decisions are made, and the organizational concerns of the actors involved in producing those outcomes (Schwartz and Jacobs, 1979).

Research that combines multiple data collection methods is relatively rare in the social sciences and specifically in the field of criminal justice. It is difficult to find researchers trained in multiple methods of data collection and analysis, and the costs, in terms of time and money, of conducting such research ordinarily make such projects prohibitive (Looker, Denton, and Davis, 1989). However, the “natural integration” of these two sources of data (Schwartz and Jacobs, 1979) provides a more complete understanding of whether and how race and ethnicity may continue to affect legal

outcomes as well as the lives of both majority and minority residents of the State of Washington.

This report is organized as follows. First, we discuss the nature of discretion under sentencing guidelines and the importance of examining charging decisions as an integral part of the sentencing process. Second, we describe the specific charging and sentencing options for drug offenders in Washington State. Third, we present the analysis of interview data describing the charging and sentencing process generally, and examining the role of race. Fourth, we present the analysis of case-file data on charging and sentencing outcomes and differences by race. Finally, we summarize and discuss the



***DISCRETION IN THE CONTEXT OF  
SENTENCING GUIDELINES***

## **DISCRETION IN THE CONTEXT OF SENTENCING GUIDELINES**

When the Washington State legislature enacted the Sentencing Reform Act (1981) it was, in part, a response to concerns about the differential sentencing of offenders based on factors other than their criminal behavior. Specifically, according to the Washington State Sentencing Guidelines Commission:

“The goal of the sentencing guidelines system is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Presumptive sentencing schedules are structured so that offenses involving greater harm to a victim and society result in greater punishment. The guidelines apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or a defendant’s previous record (1996, p.I-vi).”

To a large extent, it would seem that that goal has been achieved. Compliance with the guidelines is extremely high, with more than 90% of felony offenders in Washington being sentenced within the prescribed standard ranges. Furthermore, research on sentencing decisions in guidelines states typically finds that differences in sentence severity between white and racial or ethnic minority offenders are almost entirely explained by legal factors—the offense seriousness level and the offender criminal history score (Miethe and Moore 1986; Crutchfield, Weis, Engen and Gainey 1993; Engen and Gainey forthcoming).

There are, however, important reasons to question whether offenders who have committed similar crimes are receiving similar sentences, and whether racial disparities in punishment are due simply to differences in criminal behavior. A fundamental criticism of sentencing guidelines, like those in Washington, is that while they effectively limit judicial discretion, they simultaneously increase prosecutorial discretion over

sentencing outcomes (Tonry 1996). By establishing sentence ranges based on the statutorily-defined seriousness level of the convicted offense, and the offender score, and by requiring that judges in most cases sentence within those ranges, much of the control over sentencing shifts to the prosecutor. Because the offenses charged and convicted determine, to a great extent, the sentencing options available to the courts, the exercise of discretion in charging has the potential to undermine the uniformity that is the primary objective of the SRA. In other words, sentences might be uniformly based upon the offense of conviction, but that does not ensure that offenders who have committed similar crimes are in fact receiving similar punishments. If offenders who have committed similar crimes, and who have similar criminal histories, are charged and convicted of *different* crimes, then uniformity in sentencing may be more apparent than real. If those charging decisions are related to race, racial disparities in punishment may be larger than they appear to be in research based solely on sentencing outcomes.

For this reason, research that examines the role of race in charging decisions is critical to a more complete understanding of race and sentencing under guidelines. In fact, in its comprehensive review and assessment of structured sentencing, the U.S. Department of Justice Bureau of Justice Assistance (1996) concluded that:

“...One of the key issues involved in the attempts to control sentencing discretion is the displacement of discretion from the court to the prosecutor. One must be concerned that guidelines have merely shifted discretion from parole boards, prison officials, and judges to prosecutors. Unfortunately, little systematic evidence exists to document the extent to which this has occurred. Clearly, research is needed in this area of sentencing reform... More research is needed to assess whether guidelines and other forms of structured sentencing are reducing sentencing disparity. Topics to be addressed include... the effect of guidelines on shifting discretion from the courts to the front end of the system (arrest, charging, and plea-bargaining). Such studies will help



clarify how best to correct undesirable and unequal sentencing practices.”  
(Pp.126-128)

Research examining these issues is therefore relevant not only to policy makers and practitioners in Washington State, but can inform policy discussions nationwide.



***DRUG OFFENDER CHARGING AND  
SENTENCING OPTIONS IN WASHINGTON STATE***

## **DRUG OFFENDER CHARGING AND SENTENCING OPTIONS IN WASHINGTON STATE**

### **A. The Sentencing Reform Act**

In 1984, Washington State implemented its Sentencing Reform Act (SRA), which established specific rules for the sentencing of persons convicted of felony crimes in Washington State (RCW 9.94A). The SRA provides a determinate sentencing model, with presumptive ranges determined by the Offense Seriousness Level and the Offender Score, which represents both prior and concurrent convictions. With a few exceptions, which we discuss below as they pertain to drug offenders, judges must order a specific term of incarceration within the presumptive or “standard” range.

The offenses relevant to this report (all felony drug offenses) include: Manufacture, Deliver, Possess with Intent to Manufacture or Deliver, and Possession of Narcotics and Non-narcotics listed in Schedules I-V of the Uniform Controlled Substances Act (RCW 69.50). Most commonly, these crimes involve heroin, cocaine, methamphetamine, and marijuana. Offense seriousness levels range from Level I for a Forged Prescription for a Controlled Substance up to Level X for Delivery of Schedule I or II Narcotics to someone under the age of 18 (see Appendix A).

There are several ways in which the SRA differs for drug offenses compared to other crimes. Three of those differences are especially important for understanding the impact of charging decisions on sentencing outcomes. First, in calculating an individual’s offender score for crimes involving drug delivery, prior and concurrent drug deliveries count as three points each, compared to one point for non-drug offenses. Thus, while a first-time offender convicted of one delivery charge has an Offender Score of 0,

the same offender has a score of 3 if convicted of two deliveries, and a score of 6 if convicted of three deliveries. Because of these scoring rules, the relative increase in the standard range for multiple or repeat drug deliveries is greater than for most other types of offenses.<sup>1</sup>

The second difference in sentencing drug offenders is that the Legislature has also added a number of enhancements that can increase the standard range sentence. Up to 24 months are added to the standard range if the offender possessed a *deadly weapon* at the time of the crime. The *protected zone* enhancement, often referred to simply as the *school zone* enhancement, adds 24 months to the standard range sentence for drug offenses if the crime occurred in an area defined as a protected area. Protected areas include school zones (within 1,000 feet of a school or school bus route), public parks, transit vehicles, transit stop shelters, and other areas designated by local government. Enhancements of between 12 and 18 months may also be imposed for drug offenses committed in county jails and state correctional facilities (see Appendix B).

Third, the SRA does not specify an Offense Seriousness Level for all felony crimes. Some anticipatory drug offenses (*attempt* and *conspiracy* to commit a felony drug offense) are unranked offenses (*State v. Mendoza*, 63 Wn. App. 373). For sentencing purposes, these *unranked* offenses have a standard range of 0 to 12 months, regardless of the number of prior or current convictions. *Solicitation* to commit a drug offense, however, receives a standard range sentence that is 75% of that for a completed

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<sup>1</sup> There is one other difference affecting the sentencing of repeat drug offenders that may have implications for case processing, but that we did not explore here. RCW 69.50.408 automatically doubles the statutory maximum penalty for an offender convicted of a violation of that act (other than simple possession) if the offender has previously been convicted of violating the act. While this provision does not change the standard range, it does allow the possibility of a much longer sentence than would ordinarily be the case.

offense, following the general rule for the sentencing of anticipatory offenses (see Appendix C).

## **B. Charging Options for Drug Offenders**

While experts have argued that sentencing guidelines “increase prosecutorial discretion,” that is not literally the case. To the contrary, sentencing guidelines increase the importance of charging decisions in determining the sentences that can result, but the discretion available to prosecutors continues to be structured and limited by the facts of the case. Prosecutors’ discretion is, essentially, the discretion to decide if and when to *not* file charges where there is sufficient evidence to do so, or to charge fewer, or less serious, crimes than the evidence would support. They also have the discretion to file or not file facts that, according to the guidelines, would require an increased sentence. Prosecutors in Washington State do not, however, have the discretion to withhold relevant information pertaining to criminal history that would affect the standard sentence range.

Because the seriousness of the primary charge, the number of counts filed, and facts pertaining to deadly weapon or school-zone enhancements can each dramatically affect the applicable sentence range in a case, charging decisions can exert substantial influence over the punishment that results (or does not result). Some examples here are instructive. With respect to drug crimes (specifically, violations of the Uniform Controlled Substances Act, RCW69.50), in cases where there is legally sufficient evidence of delivery of a controlled substance prosecutors might charge a less serious but necessarily included offense (i.e., where the legal elements of the less serious crime are

implicit in the more serious crime). For example, *delivery of a controlled substance* or *possession with intent to deliver* could be charged as an anticipatory delivery (*attempt, conspiracy or solicitation to deliver*) or, less serious still, as simply *possession of a controlled substance*.<sup>2</sup> In cases involving cocaine, heroin, or methamphetamine (which are the majority of felony drug cases in Washington), a reduction from *delivery* or *possession with intent to deliver* to *conspiracy* would reduce the standard range (for a first time offender) from 21-27 months to 0-12 months. A reduction to simple *possession* would reduce the sentence range to three months or less.

Similarly, given the scoring rules for computing criminal history with drug crimes, the decision to file or not file all legally sufficient counts can also have a substantial effect on the standard sentencing range. In cases involving delivery of heroin, cocaine or methamphetamine, the filing of one additional count (e.g., one count of delivery plus an additional charge of possession with intent) increases the standard range for a first-time offender from 21-27 months to 36-48 months. In that type of case, the decision to file or not file allegations that the crime was committed in a protected zone (school zone) or that the defendant possessed a deadly weapon can add (or subtract) up to 24 months from the standard range, virtually doubling the applicable sentence for a first-time offender.

Recognizing the importance of these decisions, the legislature included in the *SRA Recommended Prosecuting Standards for Charging and Plea Dispositions* (see Appendix D for the full text). These standards are not enforceable, but rather are intended “for the guidance of prosecutors in the state of Washington” and help to

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<sup>2</sup> A delivery offense might also be charged as possession with intent to deliver, a crime for which the evidentiary requirement would necessarily be lower, but which, for the purposes of sentencing, is equal in seriousness to delivery.

illustrate the nature of prosecutorial discretion. The standards in the SRA include guidelines regarding evidentiary sufficiency in the decision to prosecute, plea dispositions, sentence recommendations, and armed offenders. Prosecuting Attorneys in some counties have adopted even more detailed standards. Regarding the decision to prosecute “All Other Unclassified Felonies” (which includes drug offenses), the SRA states that:

“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.” (RCW 9.94A.430)

The SRA also explicitly addresses the use of charge reductions in exchange for pleading guilty:

“(1) Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial.

(2) In certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest.” (RCW 9.94A.450)

One of the primary objectives of this study is to assess whether or not this type of discretion, which is both necessary to the functioning of the courts and is recognized by the SRA, is used in ways that result in differentially severe charging and sentencing of racial or ethnic minorities in Washington State.

### **C. Sentencing Options for Drug Offenders**

Currently in Washington, judges sentencing felony drug offenders have a number of options to choose from as alternatives to a simple standard range sentence in prison or

jail. These alternatives include *Exceptional* sentences, the *Drug Offender Sentencing Alternative (DOSA)*, the *First-time Offender Waiver (FTOW)*, and *Work Ethic Camp (WEC)*. While some of those alternatives apply to all types of offenders, others are available only for certain types of drug offenders. While little is known about the effectiveness of various alternatives, the impact that they have on the amount of time someone spends either in confinement or under supervision of the state creates the potential for substantial sentencing disparities among drug offenders.

### ***Exceptional Sentences***

For any type of offender, judges may, under “substantial and compelling circumstances,” order an *exceptional sentence* outside the presumptive range. If a judge imposes an exceptional sentence, he or she must justify in writing the reasons for the exception. Mitigating factors (that might justify a sentence below the presumptive range) include factors such as the defendant’s capacity to understand his or her wrongdoing, and the defendant’s peripheral involvement in the crime (i.e., someone else was the primary actor). Aggravating factors related specifically to drug offenses (that might justify a sentence above the presumptive range) include factors such as the quantity of drugs involved, repeat offending, and the defendant’s position in the hierarchy of the drug trade.

### ***The Drug Offender Sentencing Alternative***

The Drug Offender Sentencing Alternative (DOSA), effective April 1995, gives judges the ability to order drug treatment, along with a reduced prison sentence, to certain first-time drug offenders. Specifically, an offender sentenced prior to July 1999 was



eligible for DOSA if he or she was convicted of delivery of schedule I or II narcotics (e.g., heroin or cocaine, but *not* methamphetamine), had no prior felony convictions or deadly weapon enhancement, and when the midpoint of the standard range was greater than one year. The requirement that the midpoint of the standard range be greater than one year precludes the use of DOSA for offenders convicted of unranked anticipatory drug deliveries. Offenders convicted of solicitation to deliver heroin or cocaine, however, are eligible.

If those legal criteria are met, and the judge determines both that the offense involved a small quantity of drugs, and that the offender and the community will benefit from the use of DOSA, the judge has the option of waiving the standard range sentence and ordering a DOSA sentence. That sentence includes: total confinement in a state facility for a period equal to one-half the midpoint of the standard range; comprehensive substance abuse assessment and appropriate treatment while in the state facility; and one year community placement and supervision, following release (see Appendix E).

### ***First-time Offender Waiver***

According to the SRA, offenders are eligible for the First-time Offender Waiver (FTOW) if they have no prior felony convictions, have never received deferred prosecution for a felony, and are not convicted of a violent offense, a sex offense, or Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver a Schedule I or II Narcotic or Methamphetamine. An FTOW sentence may include up to 90 days confinement, plus 2 years community supervision, with additional sentencing requirements optional (see Appendix F).

While the FTOW definition excludes most of the offenders who would be eligible to receive DOSA, it does *not* specifically exclude first-time offenders convicted of *anticipatory* delivery of narcotics. Therefore, an offender with no prior felonies who is convicted of an attempt or conspiracy to commit a drug offense is currently eligible for the First-time Offender Waiver. The same offender convicted of solicitation is also eligible for DOSA.

### ***Work Ethic Camp***

During the period examined in this report, many drug offenders, including most of those who are eligible for DOSA, were also eligible for Work Ethic Camp (WEC) as an alternative to a straight standard range sentence. Prior to July 1999, WEC was available for any offender with no current or prior convictions for violent or sex offenses, and whose sentence is from 16 to 36 months. Offenders sentenced to WEC receive a standard range sentence, but if they complete all requirements successfully they are credited with 3 days for each day in WEC, and are released to community custody upon completion of the 120- to 180-day program. Participation in WEC is contingent upon the offender's custody level, physical and mental capacity and agreement to participate. For that reason, judges can only *recommend* that the offender's sentence be served in WEC. Ultimately, admission to the program is determined by the Department of Corrections (see Appendix G). Therefore, while a WEC recommendation most often results in a substantially reduced prison term, that reduction is by no means guaranteed.



***ANALYSIS PART A: ANALYSIS OF INTERVIEW DATA***

## **ANALYSIS PART A: ANALYSIS OF INTERVIEW DATA**

### **A. Methods of Data Collection and Analysis**

The authors interviewed superior court judges, prosecuting attorneys, and public defenders in each of three study counties. King, Pierce and Yakima counties were chosen for this study because, collectively, they sentence roughly half of the felony drug offenders in the state and because those counties sentence nearly three-fourths of the African American and Hispanic drug offenders sentenced in Washington (Engen et al., 1999). To increase the validity of our findings, we interviewed at least two, and sometimes three, individuals in each position in each county. In addition, we interviewed one DOC chemical dependency counselor. The total number of interviews conducted for this study was 23. Judges were selected and invited to participate based on the total number of drug cases that they sentenced in FY1999. Deputy prosecuting attorneys were identified by senior staff in the Office of the Prosecuting Attorney in each county based on their current and/or past experience with drug cases. Similarly, defense attorneys were contacted in each county after having been identified as persons experienced in representing defendants in drug cases.

To conduct the interviews, and to ensure accuracy, we asked the interviewees for permission to tape record the interview. In those cases in which permission was granted (all but two interviews), the tape recording of the interview did not include the interviewee's name or any identifying information. After transcribing these interviews, the original tapes were destroyed. Each interviewee is identified in the transcriptions only by their county and position. In the two cases in which permission to tape record the

interview was denied, the interviewer took careful notes (again not identifying the subject) and transcribed the notes immediately following the interview.

Each interview lasted approximately one hour and addressed the following issues: what are the characteristics of typical drug crimes and drug offenders in that county; what factors influence charging decisions about drug offenders; how do court actors interpret the content, purpose, and application of various sentencing options for drug offenders; and what factors influence sentencing decisions about drug offenders generally. Questions varied somewhat among interviews, depending on the specific interviewee's position (judge, prosecutor or public defender) and depending on the responses provided to previous questions. The interview protocol used for the study is included as Appendix H.

The primary tasks involved in analyzing the interview data collected were identifying themes and quantifying the number and courtroom positions of individuals who held a particular position or belief. A computer program for qualitative data analysis, Atlas-ti, was utilized for these purposes.

The first stage in analysis involved reading through a sample of the interviews (N=10) and developing a preliminary coding scheme. In this coding scheme, the main things we were looking for were statements about what factors influence charging decisions about drug offenders; how court actors interpret the content, purpose, and application of various sentencing options for drug offenders; and what factors influence sentencing decisions about drug offenders generally. We were also looking for explicit references concerning the role of race/ethnicity in all of these areas.

The second analysis stage involved coding the interviews. At this stage, we read through each interview, identifying places in the interviews where a particular theme or question was touched on, and marking those passages using the appropriate code. For example, if a respondent said “The majority of the people who are arrested in undercover buy/bust operations involving cocaine or heroin are probably either Hispanic or African-American,” this statement would be coded as a “Reason for race differences,” as well as a statement that “Drug type varies by race.” The results of this analysis were coded interviews, which we could then analyze in a broader sense using the entire set of interviews (e.g., we could retrieve all instances in which someone gave a reason for race differences in case processing, and could further see what kinds of reasons were being offered).

These coded interviews were then analyzed based on the series of themes identified above. For each theme, quotations marked with codes corresponding to that theme (codes were organized in “networks” according to each of the main themes—an example of such a network would be “Reasons for race differences”) were retrieved. These grouped quotations were then examined to identify what the main responses were to the questions we had about each theme. For example, for “Reasons for race differences,” the quotations associated with that network were also coded with items such as “Race varies by drug type,” “Arrests patterns are racially biased,” and simply “Racism.” By collecting all of these quotations into one place, we were able to assess how often actors in various positions (judges, prosecutors, and defense attorneys) were asserting various reasons for race differences. The results were therefore written up based on an examination of each set of coded quotations. Throughout the sections

describing the qualitative results, appropriate quotes have been inserted. Each quote was chosen carefully, as we balanced concerns about reliability (specifically, whether the quote chosen was representative) and illustration.

In describing the results of this study, we first use the qualitative data obtained through interviews to describe the process by which drug offenders are charged, convicted, and sentenced for their crimes. The primary results contained in this section include the determinants of decisions made at each stage as described by the decision-makers themselves. We then move into a discussion of whether or not criminal justice professionals perceive differences by race or ethnicity in case processing, and, where the perception of differential treatment exists, what the reasons are for it.

## **B. Describing the Process: Qualitative Results**

One of the primary goals of this project was to explore the possible complexities of the relationship between race/ethnicity and criminal justice outcomes. To do this, we have looked at the decision-making processes that occur within the criminal justice system in a broader sense than has often been done. Numerous researchers have suggested that the sentencing decision (the stage that is most often explored in research) is strongly influenced by decisions made at earlier stages, including arrest, filing, and conviction. In particular, some have suggested that, if race or ethnicity plays into the decision-making process, it is more likely to affect earlier decisions where discretion is less limited, particularly in states operating under sentencing guidelines. Furthermore, it is clear that decisions made at one stage in the process (e.g., filing of charges) will affect decisions made at other stages in the process (e.g., charges at conviction). The goal of

this section is to familiarize readers with the various decisions that must be made about drug offenders in Washington State and to identify those factors indicated by decision-makers as being important at each stage.

In our analyses of interview data and of the information coded from case files, we focus on a series of decision-making stages in an effort to determine whether or not race or ethnicity plays a significant role. Using information gathered from interviews, this section provides an overview of the decision-making process that typifies the handling of drug cases. One of the central foci of the interview process was to inquire about which factors influence courtroom actors' decisions at each stage. In this section, we identify the major decision-making stages affecting case outcomes, and discuss those factors that interviewees identified as determinants of decisions at each stage.

### ***Initial Charging Decision***

The first decision that a prosecutor must make is whether or not to file charges in a case. Prosecutors described this as a decision based almost entirely on the strength of the evidence in the case. "Legal sufficiency" of evidence was identified by most of the prosecutors as being the sole criterion used to decide whether to file charges or decline prosecution on a case. Because this is not a decision that we focus on in the report (in part because we do not have information on negative cases—that is, cases in which charges were *not* filed), we will not go into this decision in any greater depth. With legal sufficiency as the primary consideration in the decision to prosecute, it is unlikely that decisions at this stage will be an important source of racial disparities.



The next decision involves a determination of what the initial charge should be in a given instance. This involves not only a decision about what particular offense will be charged (e.g., delivery, possession with intent to deliver, possession), but also decisions about whether to charge enhancements (school zone and/or deadly weapon), and whether to charge multiple counts. Prosecutors talked about three general issues that affect their decision-making at this stage. The first and most frequently mentioned, is simply the nature of the evidence—what do the facts suggest the charge(s) should be? The second issue is interagency concerns, specifically, ties to the police department and resultant agreements about how things will be done. The third issue is related to charging standards, either personal standards (e.g., different prosecutors do things differently), informal standards followed by prosecutors in the same office, or formal standards adopted by the Prosecuting Attorney for the county.

Prosecutors in each county generally said that they would file charges that represent “an appropriate description of the offense.” Cases in which the facts clearly pointed to either delivery or possession are generally filed as such. Some cases, however, fall between possession and delivery. In such cases, the prosecutor generally looks for indicators of intent to deliver. Indicators of intent mentioned by prosecutors and others include: a relatively large amount of drugs (although quantity alone is not sufficient evidence), multiple packages of drugs, pagers, a large amount of cash, unused packaging materials (e.g., baggies), scales, electronic organizers, and in some cases verbal statements by defendants that they intended to sell the drugs. The decision about whether to charge possession or possession with intent is clearly a complicated one, requiring the exercise of professional judgment on the part of the prosecutor in deciding when

something constitutes evidence of intent (e.g., what amount of money, how much packaging materials, when does a pager constitute evidence of intent).

In cases involving more than one count per the police report, prosecutors describe choosing among counts to find the ones for which the evidence is the strongest. One prosecutor described the process as follows: “It depends on how the cops set it up. They can go out and do multiple buys from the individual. And we’ve got multiple counts to pick and choose with. Find out which ones are the good ones, which ones are the bad ones.” Here, the prosecutor describes a process by which he or she has the ability in certain cases to select particular charges in which the evidence is strong, while ignoring what would be additional charges in which the evidence is weaker.

The prosecutors’ units in the three counties we visited differed in the degree to which they felt tied to the police department. Prosecutors in one county in particular described close ties to the police department, ties that affect the amount of leeway they have in charging decisions. Specifically, prosecutors in this county described the necessity of filing school zone or deadly weapons enhancements when they were clearly indicated in police reports. This was described as a “matter of policy,” and as such dictated the filing of enhancements in this county.

Finally, individual prosecutors in some counties have more leeway in the original charging decision than those in other counties. Written charging standards designed to standardize charging decisions between individual prosecutors guide the initial decisions in one of the counties. These standards were described as “fairly regimented” and “set in stone” by prosecutors working in this county. Those prosecutors indicated that the standards require that they initially file charges “conservatively,” and that exceptions to

the standards require the approval of a senior deputy. In other counties, prosecutors described themselves and were described by others as having their own individual standards that guide the charging process. One prosecutor described being “restricted by my own standards” in terms of how to file charges in a particular case. A public defender describing this process said: “To some degree it depends on the individual prosecutor. Some prosecutors will charge everything available. Others will charge part of it, and then use the other stuff—the other uncharged conduct—as a bargaining chip.” This defender is essentially describing different strategies adopted by different individual prosecutors.

In each of the three counties, prosecutors talked about a standard of “trial sufficiency” that guided their initial charging decisions. In one county, written standards explicitly state this as the primary criterion in decision-making at this stage. In other counties, prosecutors said that they “only file what [they] can prove.” While legal sufficiency may be the standard by which the initial decision is made of whether to file or to decline charges, prosecutors all reported using this higher (i.e., more restrictive) standard in deciding *what* to charge.

The decision of what to charge initially constitutes the beginning of a process of negotiation, and as such, has the potential to have a significant impact on later charging decisions and sentencing recommendations. The strategies adopted at the earliest stages will affect decision-making throughout the negotiation process.

### ***Charges at Conviction***

The offense(s) with which an individual is charged may change between filing and conviction. Some of the ways the charge may change include amending the charge

itself to a (generally lesser) offense, adding or dropping an enhancement, and/or adding or dropping additional charges. While some of the same factors that determined filing decisions affect this decision, there are other factors that play a role at this stage as well. It is at this stage that the process of negotiation between the state (represented by the prosecutor) and the defendant (represented by a defense attorney) truly begins. The desire (indeed, the necessity) to resolve a majority of cases through plea agreements rather than trials drives this process. The defendant's first decision about whether to plead guilty or take his or her case to trial, then, appears to be one of the primary determinants of decisions made at this stage.

The offender's decision to take a case to trial often results in what are variously referred to as "trial penalties," "threats," and "sanctions." These penalties generally consist of amending charges upward, adding enhancements, and/or adding multiple charges. In describing the prosecutors' typical practices, one public defender says: "If you go to trial, we will add another drug charge if we can find one, like possession with intent or something like that, which will increase your standard range substantially, and we will add a school bus stop zone." These kinds of decisions are justified in terms of resources, something that everyone in the system agrees are lacking. A prosecutor says: "We have thousands of these cases a year. We can't try them all. We have to set up a system where... most of them plead." This assessment (that there are not enough resources, either in the prosecutors' office, on the bench, or in the jails) drives the process of negotiation whereby factors such as the facts of the case, the strength of the evidence and witnesses, and an offender's prior history are regularly considered as potential reasons for altering charges between filing and conviction.

The facts of the case clearly play a critical role throughout the decision-making process. At this stage, the prosecutors make an assessment of the strength of the case overall, including the strength of the evidence and the witnesses. The perception by either the prosecutor or the public defender that the evidence and/or the witness in a particular case is weak may lead to a reduction of charges in one form or another. When asked under what circumstances the primary charge might be reduced, one judge said: “If there’s a problem with the case. There’s a problem with the search. Then a conspiracy could be offered.” In looking for ways to have their client’s charges reduced, a public defender said that, if there is some kind of proof problem, “you can negotiate for a conspiracy or solicitation.”

Beyond the strength of the physical evidence, the strength of the witnesses is also important at this stage in negotiations. Two of the most common types of arrests in drug cases, especially in cases of delivery or possession with intent to deliver, are buy/busts involving undercover police officers and the use of confidential informants to purchase drugs. These two types of arrests illustrate the importance of the perceived strength of witnesses in charging decisions. In buy/bust cases, prosecutors often do not need to lower the charges because “they’re like slam dunks for the prosecutors. It’s all cop witnesses. You don’t have to worry about people not showing up, or changing their stories.” Confidential informants, on the other hand, are generally not perceived as great witnesses. One prosecutor, when asked what kinds of cases might be offered a conspiracy charge, said: “Where their CI has a very bad criminal record. And he’s going to make a terrible witness.” At other times, the desire by law enforcement to maintain the confidentiality of the informant precludes their appearing as a witness. This suggests that

the type of arrest made in a particular case may have an important effect on conviction charges.

Delivery cases are often differentiated at this stage, depending primarily on the defendant's role in the offense. Charges such as attempted delivery, conspiracy to deliver, and solicitation to deliver often arise at this stage for defendants who may have played a supporting role in an offense. One public defender described the decision-making process as follows: "Did he touch the drugs or the money? If he doesn't touch the drugs or the money, they know they may have problems proving it. And if so then maybe you get the conspiracy." A number of people interviewed said that these middle offenses were essentially "made up offenses," used during the negotiation phase in part to distinguish between individuals centrally involved in an offense and those more peripherally involved. One prosecutor said: "We almost never charge an attempt or conspiracy or solicitation up front. They're almost all the completed offense. But that's where the facilitator... comes in. The person who is just an addict trying to get something will often be offered a conspiracy... The middle person will be offered a solicitation... And then the dealer has to plead out as charged."

Prosecutors also take the defendant's prior criminal history into consideration when deciding whether or not to amend charges, and are frequently more willing to negotiate charges for first-time offenders. A judge described the effects of prior history as follows: "If they've got a zero offender score or only one prior offense, then they—there's a likelihood they'd get the offer of conspiracy." One prosecutor explained the reasoning behind such a decision: "If somebody has no criminal history, and if there's a small amount of drugs, then we'll give them an attempted possession, which is a

misdemeanor, rather than having them plead guilty to a felony. But if they have a lengthy history, our interest in... keeping someone who is otherwise a law-abiding citizen out of the criminal justice system and everything is pretty diminished. So they usually aren't given that opportunity." On the other end of the spectrum, a public defender said that criminal history could also work in the other direction: "Sometimes you get a conspiracy or solicitation just because your client has so much history. It's the only way they can give them any incentive to plead." This statement implies that, because extensive criminal history produces a very long standard range sentence (in some cases requiring a minimum of 8 or 9 years), a sentencing recommendation at the low-end of the range is not sufficient incentive. In that case, the only way to entice the defendant to plead guilty is by reducing the charge to one that carries a much shorter sentence. Once again, the necessity of clearing cases through the plea process clearly influences the way other factors, such as criminal history, play into decision making.

Finally, ties to the police continue to be important at this stage, particularly when prosecutors are working with enhancements. In the county described above, where ties to the police are more evident, prosecutors are described as not being "free to negotiate the enhancement away, as a matter of policy." These ties thus potentially limit the ability of the prosecutors' office to freely negotiate with this particular tool.

### ***Sentencing Recommendations***

Both the prosecutor and the defense attorney involved in a case make sentencing recommendations to the judge. The decisions being made at this stage include: whether to recommend a standard range sentence (and, if so, where in the standard range that

recommendation should fall), whether to recommend a sentence of credit for time served (for individuals who have been detained prior to sentencing), and whether to recommend the use of a sentencing alternative such as WEC or DOSA. In most cases, the recommendation that goes before the judge is one that both parties have agreed to in advance.

While the two parties have different reasons for coming to a particular agreement, the determinants of the sentencing recommendations are essentially the same for both groups. The most important determinant of sentencing recommendations is the sentencing guidelines, and, by extension, the decision made earlier in the process about conviction charges. The defendant's decision about whether to plead guilty or to take his or her case to trial continues to play a critical role in decision-making. In making decisions about sentencing alternatives, the prosecutor and defense attorney take into account the defendant's willingness or desire to engage in treatment. The defendant's prior criminal history also affects decisions at this stage. Finally, ethnicity comes into play because of the importance of an individual's status as an U.S. citizen.

Because the guidelines play a crucial role in sentencing recommendations (all of the individuals interviewed said that the guidelines were the primary determinant of recommendations and sentencing decisions), decisions made earlier in the process are especially important. The negotiations described as taking place during the decision about conviction charges take on particular importance when considered in this light. To some extent, one can view the charging decision and the sentencing recommendation as virtually inseparable. Charging decisions in many cases may be as much a *consequence* of the recommendation that a particular charge allows (given the standard ranges that



apply) as they are a determinant of the sentencing recommendation. In that way, the guidelines themselves not only determine the sentencing recommendation, they may in some cases determine the charge that is ultimately filed.

Working within the sentencing guidelines, a defendant's decision to plead guilty or to go to trial also affects where within the range sentencing recommendations will fall. In one county, a public defender described sentencing recommendations as follows: "In most of these cases, we are agreed on the low end of the standard range—it's pretty pro forma." When asked whether there were times when this was not the case, the public defender replied "Only if they are trials." A judge in another county agreed with this assessment, saying that, "when you have a plea, the prosecutor, probably because the person is willing to plead, recommends the lower end of the scale." Making a recommendation at the low end of the standard range appears to be another plea benefit, one that appears to be standard practice in each county we studied, and is an explicit policy in one. A judge explains that if, on the other hand, a defendant decides to go to trial, "it tends to be that the prosecutor might recommend the higher end of the range." This too appears to be standard in each county, and is an explicit policy in one county. The negotiating strategy at work here is clearly to develop sentencing recommendations that the defendants will accept and that will therefore encourage them to plead guilty. For defendants who originally decide to go to trial and subsequently change their mind (perhaps because of the addition of a school zone enhancement, for example), a prosecutor says, "He's probably going to want to accept my original offer. Instead of maybe getting low-end, I'll get him the high-end on the original offer, and we'll call it quits there."

Criminal history also appears to affect sentencing recommendations. First time offenders generally get a recommendation for the bottom of the standard range, while offenders with more lengthy criminal histories may get a harsher recommendation. One public defender says: “I have had... offers at the pretrial conference that are mid-range, but it’s usually because the guy’s criminal record is [lengthy].” A prosecutor concurs: “If they’ve got a bunch of [priors] we might ask for more time on somebody like that.”

In one of the counties studied, ethnicity appears to play a complex role in decisions about sentencing. The perception of those individuals interviewed in this county was that many of the Hispanics in this county are illegal aliens. Furthermore, for those who are legally residing in the state, but who are not U.S. citizens, a conviction for drug charges results in their residency being revoked. Because illegal aliens who are caught by law enforcement are generally deported following criminal proceedings and penalties, and because legal aliens are subject to deportation as a result of drug convictions, the equation is altered in these cases. A judge explains the reasoning of prosecutors in this county: “In imposing a sentence [I will consider] the fact that the prosecutor will say we’re recommending the bottom of the range because, judge, he’s going to be deported. As soon as they’re out. There’s no reason to keep them here for a longer period of time.” Once again, several respondents cited concerns about resources, suggesting that these are cases on which local and state resources would not be particularly well spent, given that they will be leaving the county (and indeed the country) after they serve their sentences.

Finally, in considering the use of sentencing alternatives such as WEC and DOSA, a few individuals said that they take into account the defendant’s willingness to

participate in treatment or the work ethic camp program. A public defender says: “There are a lot of defendants who say ‘I don’t want WEC. I don’t want to work... I’m not going to work eight hours a day when I don’t have to.’” In this case, the public defender said that he would not recommend WEC based on the defendant’s own wishes. Willingness on the part of prosecuting attorneys to recommend a WEC sentence also seems to vary by county.

### ***Sentencing Decision***

The final decision we examine is the sentence imposed by the judge. Our results suggest that this decision is based almost entirely on the other decisions made up to this point. The two primary determinants of the sentencing decision appear to be the recommendations made by the prosecutor and defense attorney, and the sentencing guidelines themselves. Most judges described themselves and were described by others as having very little discretion in the process. There were, however, two additional issues that judges said they sometimes considered in making sentencing decisions: the defendant’s demeanor or attitude, and his or her prior criminal history.

Most of our interviewees agreed that the guidelines dominate the sentencing process, and that exceptional sentences (sentences that go outside the standard range) are virtually never used for drug offenders. Furthermore, most agreed that, because of the guidelines, by the time a case reaches the sentencing stage, decision-making is fairly automatic. One public defender argued that “the standard range process has removed much of the discretion of the judge.” Not only do the guidelines limit the potential sentence an individual can receive, the ranges are viewed as too narrow to really

differentiate within offense categories. Several individuals argued that the guidelines don't allow for decision-makers to make distinctions between offenses that may fall under the same legal category. One judge explained that the guidelines allow for "little flexibility to make adjustments for what are the substantial facts of the case, rather than the legal facts." The guidelines thus appear to dictate decision-making during sentencing both by setting a particular sentencing range, and also by making the range fairly narrow, thereby limiting the ability of the judge to make distinctions between offenses in sentencing decisions.

Judges' attitudes towards the guidelines seem to affect decisions about where within the standard range a sentence should fall. Many of the judges interviewed felt that the guidelines were too harsh for drug offenders, particularly when compared to other types of offenders. This attitude appears to have a significant impact on sentencing decisions. One judge said: "Probably the overwhelming majority of judges in [this] county superior court will always—almost always—sentence to the lowest end of the range we can, on the grounds that it's always too high." This sense that the sentences prescribed by the guidelines are unreasonable seems to foster a standard reaction in drug cases to impose a sentence falling at the low end of the range.

Beyond the guidelines themselves, most judges said that they generally follow the sentencing recommendations presented to them by the prosecutor and public defender. One judge explained it this way: "The volume of cases that we see... really sort of precludes coming up for each defendant with your own sort of individual recommendation. So you really do rely on what is being recommended by the parties who generally have a better sense of the case." This participation by the judge in the

recommendation process is seen by the other players in the courtroom workgroup as critical to their ability to negotiate plea agreements. In describing judges' actions, one public defender said: "They simply offer great deference to the negotiation process. And I think they understand that that's a necessity... A significant number of cases plead. And if there's a chance that the judge isn't going to follow the deal, then that sort of has a chilling effect on the plea process."

The two other issues that were described as playing a role in the sentencing decision were the defendant's demeanor and attitude, and his or her criminal record. One judge said that: "How an individual can present himself to the judge can, I think, have a lot of impact." This judge argued that race/ethnicity may affect sentencing decisions through offender demeanor in the following way: "One thing I think happens is that often minorities and it also happens, I think, with white folks, but less often. They feel a need to be aggressive in terms of protecting themselves, and so they come in very much with what appears to you as the judge to be an attitude or a chip on their shoulder. And if you talk to that person for a long time, you might start understanding more about where the person is coming from. But in the fifteen minutes that you have to deal with that person at sentencing, he looks like a real jerk... In the fifteen minutes that you have to react to that... I think you're going to respond by increasing the severity of the punishment and denying any options to incarceration because the person—you get the idea that he's a danger and if you let him out, he's going to commit another crime." Once again, the limited resources of the court appear to have an important impact on decision-making processes.

Finally, prior history is sometimes used to determine where within the standard range a sentence will fall. Two judges in one county said that they consider prior history in this decision. For offenders with no criminal history, one judge said: “If it is a first-time or second-time offender, I go to the lower end of the standard [range].” While official criminal history scores are calculated using only felony offenses, another judge said: “I would consider misdemeanors for the purposes of going from the low end of the range to the high end of the range.”

### **C. Perceptions of Racial and Ethnic Differences: Qualitative Results**

One of the questions we asked our respondents was whether they personally had detected any differences in case processing by race or ethnicity, or if they were aware of ways that race or ethnicity might influence the process. In this section, we summarize responses to this question. The most common response from individuals working with drug offenders was that they did not perceive any differential treatment by race. Many respondents provided specific reasons why race differences do not exist, and those reasons are discussed below. While, for the most part, respondents argued that differential treatment did not exist, many said that there were differences in offending behavior by race and ethnicity—both in the types of drugs involved in an offense, and in the type of offense committed. Further, many respondents felt that there was differential treatment at earlier stages in the process (in part because of the differences in offending behavior), specifically at arrest. Again, these responses are discussed below, along with respondents’ explanations for such differences. Finally, some respondents argued that

race and ethnicity do affect case processing. These responses conclude the section below.

***Perception that Racial and Ethnic Differences Do Not Exist***

The most typical response to the question of whether racial and ethnic groups are treated differently throughout case processing was a definitive “no.” This response came from judges, public defenders, and prosecutors. One prosecutor said: “I will tell you that I have never seen an example, or even overheard or suspected any of my colleagues, negotiating with race in mind.” A public defender agrees: “I haven’t really seen where that [race/ethnicity] has become a factor... Not even an undercurrent.” A judge concurs that race does not play a significant role in decision-making: “I don’t know that I could identify anything from the prosecution, as far as differences in... their recommendations. I haven’t noticed anything that has caused me a concern.”

Prosecutors stated that they rarely even knew the race of the defendant when they were making charging decisions or even sentencing recommendations: “Virtually none of us know the race or sometimes even the sex of the defendant that we’re dealing with... Oftentimes the first time we would see them would be at sentencing. And by then the offer has been made and accepted, and it’s in writing, and we can’t change it.” One of the main reasons for this appears to be (once again) the perceived shortage of resources. Prosecutors in particular suggested that they simply didn’t have the time to take into consideration individual factors such as race.

Another reason given for the perceived absence of race differences is the structure of the guidelines themselves. One judge stated: “It’s hard to show any kind of racial or

ethnic bias in sentencing if you're pretty much always within the guidelines." This rationale supports one of the driving forces behind the development of guidelines historically, which was in fact the elimination of individual factors, such as race, as potential factors in decision-making.

### ***Perceptions of Differences in Offending Behavior***

Most of those interviewed said that, while they did not see differences in the way minority defendants were treated, they did see differences between white and minority defendants in offending behavior. Specifically, they told us that there were significant racial and ethnic differences in the kinds of offenses and the types of drugs involved in those offenses that individuals were most likely to be committing and for which they were being apprehended. In terms of drug type, most respondents told us that, while offenders apprehended with methamphetamine and marijuana were typically white, African-Americans were most often apprehended with cocaine (crack), and Hispanics with heroin. Several respondents reported that these differences have become less obvious over the past few years. Specifically, they reported that methamphetamine has become more popular with racial and ethnic minorities, and that the gap in usage of cocaine and heroin between Hispanics and African-Americans has narrowed (people told us that both groups are now regularly apprehended for both drugs).

There is also a perception that white and minority defendants commit and are apprehended for different types of offenses. Deliveries (or, more specifically, the types of deliveries for which defendants are likely to be apprehended) are generally perceived to be minority offenses, while possession is perceived as being an offense committed



equally by white and minority offenders. Manufacture (methamphetamine) cases are generally perceived to be “white” offenses.

In one county, where buy/bust operations represent one of the primary forms of arrests, the perception is that street dealers who are vulnerable to these arrests are primarily minorities: “The majority of the people who are arrested in undercover buy/bust operations involving cocaine or heroin are probably either Hispanic or African-American.” In contrast, a judge stated that defendants apprehended for manufacture are most often white: “The manufacturers [of methamphetamine] are generally white.” While differences in offense type are described here, both descriptions also include different drug types.

While many people said that there was a fairly clear distinction between minorities and white vis-à-vis delivery and manufacture offenses, no one claimed that possession cases were easily classified by race. One judge stated: “The possession cases... I think are more varied in the race of the people who are picked up as part of possessions. I don’t think that’s nearly as clear a pattern. But the delivery and facilitation have a very clear racial pattern.”

### ***Perception that Differences Do Exist: Arrest Decisions***

A majority of our respondents said that they believed that, while race and ethnicity do not matter in case processing stages such as charging and sentencing, they do matter in arrest decisions. Specifically, respondents argued that arrest patterns generally affect racial and ethnic minorities disproportionately harshly. In explaining these

differences, most respondents focused on the differential visibility of offending behavior, while a few respondents also pointed to racial profiling by law enforcement.

In discussing racial differences in the apprehension of street dealers, the explanation most often proffered was related to the high visibility of the offending behavior. One judge said: “The result is that, since blacks and Hispanics are involved in street dealing, they get a... disproportionate impact in terms of enforcement. However, the word disproportionate—what it is is that people care more. They want enforcement, to get people off the streets... So I’m not sure that it’s racist per se. It clearly has a consequence for those races that are more involved in that kind of drug dealing.” The judge explains this enforcement pattern (focusing on street dealers) in terms of the visibility, and therefore public nuisance, of the behavior. He argues that the behavior is not racist, but has important effects on different racial groups. One prosecutor explains the focus on street dealers: “I know from living in the city that the type of dealing that impacts me is the crack cocaine that’s sold, and the heroin that’s sold on the street corners. If I want, I can buy it between here and my bus stop. And when my kids come home to work with me, they get scared. And business owners around here complain. The police department reacts to that, and tries to keep a lid on that. And that’s where they concentrate their [efforts]. So there’s a very good reason why it’s done that way.”

Beyond the public nuisance aspect of high visibility offending, one public defender talked about the relative ease that comes with apprehending people engaged in highly visible offenses: “I have my opinions why we see more black [dealers]... I think that since we deal with people in downtown... and that’s where more African American people live... These guys are out on the street. They live on the street. And it’s much

easier—the enforcement effort concentrates there... So, it seems like the enforcement efforts, where it's easiest to arrest people, are more concentrated downtown. And other kinds of enforcement effort for crime that require more work just don't seem to go into narcotics activity." This individual argues that the relatively high visibility of this behavior makes it an easier target for law enforcement. On the other end of the visibility spectrum, a public defender stated that she had never had a case involving powder cocaine: "I've never seen powder cocaine... I assume that's what they use [in the suburbs]. But you don't see any of it." It is clear from these statements that differential enforcement patterns, patterns that are easily understandable in terms of resources and public concerns about highly visible drug dealing, may play a significant role in determining which individuals ever come before the court in the first place.

A few individuals asserted that differential law enforcement occurs because of racial profiling by police. In talking about traffic stops, one public defender stated: "I think that in many instances the police view Hispanic people differently... with a certain amount of disdain, and a certain amount of inherent suspicion. They refer to cars as being Hispanic in origin... They profile... They refer to them as 'warrant wagons' also." Another public defender continued that: "They're not going to stop me in my Pathfinder—a white guy, with a collared shirt—for no headlights [during daylight hours]. They're gonna stop the Mexicans; the warrant wagon." This explanation assumes that police officers hold certain stereotypes of ethnic minorities, and that those stereotypes encourage differential enforcement of the law.

Because the focus of this study is on charging and sentencing decisions, we did not purposively collect information on arrest patterns. These assertions by various

officials, then, cannot be verified through the use of quantitative data. They are important, however, in part because so many court officials claim to see the same patterns, and in part because decisions made at the stage of arrest, and the circumstances under which the arrest takes place, have a continuing impact throughout criminal justice processing. Judges can only impose sentences in cases where prosecutors have filed charges, and prosecutors can only file charges in cases that are apprehended by law enforcement. Furthermore, in the case of more serious drug crimes (manufacture, delivery, and possession with intent), the charges filed will be limited by the strength of the available evidence. Thus, if differences by race and ethnicity *are* manifested in decisions made by law enforcement, or in the nature of the evidence they provide, these differences will have important ramifications throughout the criminal justice system.

### ***Perception that Differences Do Exist: Charging and Sentencing***

A few respondents argued that race and ethnicity, in addition to affecting arrest decisions, also affect both charging and sentencing decisions. The perceived reasons for these race differences include variation among offenders in how well they present themselves to the court (and differences in the *perceptions* of court officials about this), differences in attitudes offenders hold towards the criminal justice system, the importance of citizenship status, and racism on the part of court officials and/or jurors.

A public defender talked at length about a fabricated comparison between a white offender and a black offender. She used this comparison to raise issues about the importance of perceptions and also the importance of social class: “I’d say if you had a white guy in his car with three rocks in his briefcase, and a black guy down on

[downtown intersection] with three rocks in the lining to his coat, I think the black guy would get charged with possession with intent [as opposed to simple possession] more likely than the white guy. And I think part of it is because... the prosecutor thinks people are going to believe more that the white guy, when he gets up to testify, 'I'm an addict, I'm sorry, it was for my personal use,' they'll believe that more than the black guy who testifies." Here the public defender points not only to public perceptions of white and black defendants, but also to the *prosecutor's* perception of how a particular defendant will come across. It is clear that social class plays an important element in her argument, both in terms of the kinds of perceptions described above, and in terms of evidentiary issues: "I think the way they look at a case, they look at proof problems and decide how to file it, and they are going to have more proof problems with Joe briefcase. And his, you know, probably private lawyer. And his suit and tie presentation... Than your black guy who's going to be wearing something from the Goodwill you picked up for him the night before to wear." This public defender argues that this issue of how individuals are perceived both by court officials and by potential jurors is a crucial one in producing differential outcomes by race.

Another individual talks about the importance of attitude, and specifically, the attitude of a defendant towards the criminal justice system. This judge states that: "I think that a lot of African-Americans are suspicious of the criminal justice system... Have no confidence that they're going to get a fair deal... And they have a sense that because they are black, they are going to be punished more severely. And they approach the justice system that way. And it shows... And when you see somebody approach you in that way, there's a certain tendency to respond in a way that arguably protects the

community from further malicious acts by this defendant.” He states explicitly that, as a judge, this kind of attitude can affect the decisions he makes about sentencing.

Many individuals also perceive citizenship status as an important contributor to ethnic differences in charging and sentencing. Specifically, a number of respondents argued that, because non-citizens convicted of drug offenses are subject to deportation, some might be less likely to plead guilty. Particularly for defendants who have been residents (though not citizens) of the United States for most of their lives, many of whom have jobs and families to support, no amount of incentive can induce them to plead guilty. For such individuals, the threat of deportation “changes the equation” and may lead them to fight their conviction, and end up being charged and sentenced more severely as a result.

Finally, a small group of respondents talked about direct racism as a cause of differential outcomes by race. A judge says: “All of us who grew up in this country are infected with [racism]... we carry around in our heads stereotypes of people that impact how we judge them and make decisions about them.” This judgment can come either from professional courtroom actors, or from temporary actors such as jurors. A public defender says: “I think that jurors in this town are inherently racist.”

Through the interviews, we have explored two central issues, identifying first a number of factors that courtroom actors take into account when making decisions, and second a number of reasons why race and ethnicity may or may not be important factors in these decisions. The results from the first section of the qualitative analyses suggest that, if the factors identified by criminal justice professionals as important in the decision-making process vary by race, they may contribute to different outcomes by race. The

results from the second section of the qualitative analyses provide some ideas about when and how we might expect race and ethnicity to be particularly important. In the next section, we use quantitative analyses to explore whether there are quantifiable differences by race at these various stages. The analyses will control for some (though not all) of the factors mentioned here to see whether race and ethnicity are important once important legal factors have been statistically controlled.



***ANALYSIS PART B: ANALYSIS OF OFFENDER CASE FILES***



## **ANALYSIS PART B: ANALYSIS OF OFFENDER CASE FILES**

### **A. Methods of Quantitative Data Collection and Analysis**

Using SGC data from FY1998-99, we randomly sampled 200 drug related cases each from King and Pierce Counties and 100 cases from Yakima, and requested from the county prosecutors offices these case files for review. In the limited time available for data collection in each of the counties (2 days in each of Pierce and Yakima counties; 3 days in King County), we were able to code information from a total of 301 cases: 104 cases in King County (88 sentenced at the King County Court House in Seattle and 16 at the Regional Justice Center in Kent), 101 in Pierce County, and 96 in Yakima County. That original sample included 5 Native American offenders and 3 Asian American offenders. Because meaningful analyses are impossible with so few members of those groups, we excluded those cases for a final sample of 294 White (non-Hispanic), African American and Hispanic convicted felony drug offenders.

A survey instrument previously developed for a study of Prosecutorial Discretion in King County for the Washington State Minority and Justice Commission (Crutchfield, Weis, Engen and Gainey, 1995) was modified and used as the primary data collection instrument for the quantitative information. The instrument is provided in Appendix I. The information available in the case files, especially information about the offenders, varies considerably both within and across counties, so statistical analyses must be limited to the types of information that are routinely present. Our description of the data will therefore be limited to items that we were able to code for most cases. We collected basic demographic information from the case files including date of birth, gender, and race/ethnicity. Because some counties do not report Hispanic ethnicity in the judgement

and sentence forms submitted to SGC, instead reporting those offenders as white or Caucasian, we also looked for evidence of Hispanic origin (e.g., place of birth indicated as Mexico; Spanish speaking defendant). This information was generally provided in the police report. In addition, because several of the respondents interviewed indicated the importance of non-citizenship in sentencing decisions, we also looked for evidence of non-citizenship (e.g., evidence of involvement of INS, or of an INS hold). In addition, we attempted to gather information on offenders' economic and social characteristics (employment status, marital status, residential stability), evidence of chemical dependency or substance abuse problems (i.e., evidence other than the fact they were arrested for a drug crime) and evidence of mental health problems. However, those data were not consistently available, so are excluded from analyses.

Information about the offense committed and alleged by law enforcement was recorded primarily from arrest reports and in some cases from the affidavit or certification for determination of probable cause. The information typically available and coded includes: the type of drugs involved, the arrest offense (e.g., possession; delivery; possession with intent to deliver), the amount and/or estimated worth of drugs, circumstances of the arrest, and evidence of peripheral involvement of the offender.

When available, we recorded drug quantities precisely by weight. Because the actual weight is not always available, and because different substances are not directly comparable by weight (i.e., in terms of typical dosages and typical units for sale, 1gram of cocaine is "more" than 1gram of marijuana), we categorized quantities as *small* (most likely for personal use), *medium* (a larger quantity, but one that might reasonably be for personal use), and *large* (a quantity considerably more than might reasonably be

considered for personal use). We attempted to categorize quantities in ways that reflected, approximately, interview respondents' descriptions of what they considered to be "small" and "large" quantities of drugs in their county, and based on the frequency with which different quantities appeared in the data. For instance, less than 3.5 grams (1/8 ounce) of cocaine, methamphetamine or heroin was defined as "small" (most quantities are much less than that); up to 14g (1/2 ounce) is "medium"; more than 14g is "large". For marijuana, less than 40g is "small", more than 100g (approximately 1/4 lb.) is "large".

We coded the circumstances of the arrest as being one of 5 types, based on the nature of the contact made between the suspect and the arresting officers and in accordance with interview respondents descriptions of "typical" drug cases in each county. Our categories, however, do not necessarily reflect the terminology used by respondents in each county. Arrests are coded as: 1) *Active Investigation* if the arrest was pursuant to the execution of a search warrant specifically investigating drug activity, or if it involved the use of a confidential informant to purchase or arrange the purchase of drugs from a suspected/known drug dealer; 2) *Buy-Bust* if the arrest was pursuant to a purchase or attempted drug purchase by undercover police officers, and where there was no evidence that law enforcement officers were actively investigating that person prior to the initial contact; 3) *Stop-Search* if the arrest was pursuant to a traffic stop (typically for a moving violation, defective equipment, or expired registration) and subsequent search of the vehicle, the operator and/or passengers in the vehicle; 4) *Officer Observed* if the initial contact and subsequent arrest were pursuant to officers observing behavior consistent with drug use or delivery; 5) *Other* if the initial contact that lead to the arrest

(and typically to the discovery of controlled substances) stemmed from some other suspected illegal activity (e.g., suspected prostitution; check forgery).

Defendants were coded as having peripheral involvement if police described them as being in the role of facilitator or go-between in a street-level sale, and also cases where the officers indicated that the defendant was present but not the principal offender. For example, a woman whose “boyfriend’s friend” was making methamphetamine in the garage was coded as having peripheral involvement.

In addition to this detailed arrest information, we also recorded charging and sentencing decisions. This information included: the initial charges filed (the primary or most serious crime charged; total counts filed; deadly weapon or school-zone enhancements filed); whether charges were ever amended and the nature of that amendment; the final charges for which the offender was convicted (the primary charge convicted, total conviction counts, enhancements); the mode of conviction (guilty plea versus trial); the recommendations of the prosecution and defense regarding sentencing; and the sentence (total confinement) handed down by the court. Information on initial filings, amended charges, plea agreements, and the State’s sentencing recommendation were obtained from standardized forms that were generally available in each county. The final charges (at conviction) are coded from the judgement and sentence form. Additional details regarding the sentence ordered in each case were obtained from the SGC database.

## **B. Determinants of Charging and Sentencing Decisions: Quantitative Results**

### ***Sample Characteristics: Offenders, Offenses, and Charges Filed***

Information on the following offender and offense characteristics were available for most cases in the counties we visited and will be the focus of the quantitative analysis: 1) demographic information, 2) the type of drugs involved, 3) quantity of drugs, 4) reason for or type of arrest situation, 5) evidence of peripheral involvement, 6) number of prior felonies, 7) initial charging decisions, 8) final charges at conviction, 9) prosecutors' recommendations regarding sentencing, and 10) judges' sentences. The following provides descriptive information concerning the sample. These statistics are based on relatively small samples of only three counties, so direct comparisons with state level analyses (e.g., Engen et al., 1999) should not be made.

Table 1 presents descriptive statistics on the characteristics of offenders in our sample and the crimes for which they were arrested, charged and convicted. Most of the offenders were male (77%) and white (45%). Twenty-nine percent of the sample were African American and 26% were Hispanic. In nine percent of cases there was evidence that the offender was not an U.S. citizen. Offenders appeared to have only peripheral involvement in about 11% of cases. We coded up to four drug types involved in each offense. Cocaine was involved in the majority of cases (56%) and was most often cited as the primary drug involved. Methamphetamine was involved in 31%, and heroin was involved in 18% of cases. Marijuana was rarely the primary drug in question, but it was present in approximately 14% of all cases.

Arrests were most often made following traffic stops (31%), but were also commonly made through buy-bust operations (19%), active investigations (22%), and

officers simply observing drug use or distribution (13%). Sixteen percent of the cases were coded as other types of arrests. The arresting offense was most often possession (47%), followed by delivery (27%) and possession with intent to deliver (22%). Only a few arrests involved the manufacture of a controlled substance (2.4%), an anticipatory crime (.7%), or any other offense (.7%). The charges initially filed reflect a similar pattern (57% possession, 24% delivery, 16% possession with intent, 2.4% manufacture, and 1.4% other). Multiple counts were charged in about 27% of cases and school zone and weapon enhancements were filed in 13% of cases.

Given the relative frequencies of the different types of drug offenses for which defendants were arrested and initially charged, and because many of those crimes are either identical or very similar in seriousness (as it is legally defined by the SRA), we collapsed offense categories at filing and initial charging into two groups: “Delivery Offenses” include manufacture, delivery, possession with intent to manufacture or deliver, and anticipatory delivery offenses (attempt, conspiracy and solicitation); “Simple Possession” offenses include possession of controlled substances and other drug offenses (e.g., forged prescriptions). The analyses of charges at conviction treat “Anticipatory Delivery” as a third, intermediate category. We use these offense categories for the remainder of the analyses.

### ***Differences by County: Offenders, Offenses, and Charges Filed***

Basic crosstabular analyses were conducted to explore county level differences in offender and offense types, police activity, and charging practices. These analyses are presented in Table 2. There are clearly vast differences in the racial/ethnic composition

of drug offenders across counties. In King County, drug offenders were mostly African American (54%) with about equal proportions of whites (25%) and Hispanics (22%). Most drug offenders in Yakima County are Hispanic (53%) with a sizable proportion white (41%), but very few African Americans (7%). In Pierce County most of the drug offenders are white (70%), but with a sizable proportion African American (25%) and a very small proportion Hispanic (5%). There were no substantial differences in gender composition across counties (the gender composition ranges from 73% male in Pierce County to 84% male in Yakima County).

The types of drugs involved, the types of arrests, and the particular charges filed also varied considerably across counties. In particular, cocaine was the primary drug involved in cases in King County (74%) and Yakima County (56%). In Pierce County, methamphetamine was the primary drug involved (51%). There was also a relatively large amount of methamphetamine cases in Yakima County (39%). Heroin was involved more often in King County (27%) than in Pierce (15%) or Yakima (13%). The vast majority of arrests in both Yakima and Pierce County were for possession (63% and 59%, respectively), while the highest percentage in King County was for delivery related crimes (78%). The quantity of drugs did not vary significantly across counties; most arrests were for relatively small amounts (ranging from 64% of arrests in Pierce County to 78% in King County). Buy/bust operations and officer observations were the key forces behind arrests in King County (44% and 24%, respectively), while routine stop and search cases were the most common types of arrests in Yakima (41%) and Pierce counties (40%).

The type of offenses initially charged varied significantly across counties, reflecting the pattern in the arrest offenses described above. The percentage of cases charged with multiple counts varied significantly across counties as well. In King County virtually all offenders were charged with a single count, with multiple counts charged in only 6% of cases. Multiple counts were much more common in Yakima (26%) and even more common in Pierce (50%). School zone and weapon enhancements were rarely charged; percentages across counties are fairly equal (ranging from 11% in King County to 15% in Pierce County).

### ***Differences by Race: Offenders, Offenses, and Charges Filed***

Results of the bivariate analyses by race are presented in Table 3. Females represent a substantial minority of the white (30%) and black drug offenders (28%), but represent a very small proportion of the Hispanic offenders (7%). There are important differences by race in the types and quantities of drugs for which offenders were arrested. Most white offenders were involved with methamphetamine (58%), with a substantial minority involved with cocaine (30%) and marijuana (21%). The vast majority of African-American offenders were involved with cocaine (84%), but there was some heroin involvement (11%). The majority of Hispanics were also involved with cocaine (71%), with a sizable proportion involved with heroin (31%). A majority of all offenders were arrested with small amounts of drugs, with Hispanics being most likely to have medium or large amounts (22% as compared to 15% of whites and 10% of African-Americans). The reasons for arrest also varied significantly across groups. Whites were most likely to have been arrested in routine stops (41%), African Americans in buy-bust



operations (38%), and Hispanics in active investigations (28%) or routine stop and searches (26%). These arrest differences largely reflect the differences across counties in minority representation and in the types of arrests that are most common in those counties.

Given the differences in the types and quantities of drugs with which each group was primarily involved, and the strategies by which they were arrested, it makes sense that the arresting offense and charges would differ across groups. This is clearly the case. Whites were far more likely to be arrested for possession (63%), while African American and Hispanic offenders were more likely to be arrested for delivery type offenses (72% and 58% respectively). At charging, the percentages change slightly with whites still most likely to be charged with possession, but with more African American and Hispanic offenders moving into that lesser charge of possession (45% and 53%, respectively). Whites are most likely to be charged with multiple counts (36%), Hispanics are next most likely (25%), and African Americans are least likely to be charged with multiple counts (15%). School zone and weapons enhancements are rare and do not vary significantly across groups.

### ***Analyses of Charging Decisions: Severity of Crimes Charged and Convicted***

In this section, we examine whether charging decisions in drug cases vary by race or ethnicity of the defendant. We first describe the overall charging patterns in our sample (the type and severity of charges filed) and differences observed in charge severity by race. We then present multivariate analyses to determine whether race or ethnicity are related to the severity of charges filed, once the arresting offense and other

case characteristics are taken into account. Specifically, we examine three measures indicating the severity of charges filed: 1) the primary (i.e., most serious) offense charged; 2) the filing of multiple charges; and 3) the filing of deadly weapon or school-zone enhancements. The charges of which defendants are ultimately convicted frequently differ from those initially filed, so we examine charge severity both at the initial filing and at the time of conviction.

### ***Primary Offense Charged and Convicted***

Table 4 presents the type of offense initially charged, and that convicted, along with that alleged by law enforcement at the time of arrest. Clearly, the primary charge initially filed by prosecutors closely reflects the type of arrest offense. Of the 139 offenders arrested for simple possession or other non-delivery offenses, all but one offender were charged with that same crime.<sup>3</sup> There is more variation, however, in the charges filed when the arrests involved delivery of controlled substances. Of 155 offenders arrested for crimes involving delivery (including 2 arrested for attempt or conspiracy), 78% were initially charged with a delivery offense, while the remaining 22% were charged with simple possession. None were initially charged with an anticipatory delivery offense. Comparing the initial charges filed to the final charges (at conviction) reveals a pattern of increasing variation. Defendants charged initially with drug possession were virtually all convicted of possession (94%). However, the seriousness of the primary charge decreases again for most defendants who were initially charged with delivery. Of the 123 defendants initially charged with delivery offenses, slightly more than one-third (37%) were ultimately convicted of a delivery offense. The majority of

offenders were convicted of less serious crimes, either anticipatory delivery (29%), or simple possession (34%). This downward shift in offense seriousness across stages is statistically significant.

This pattern of decreasing seriousness of charges varies by race and ethnicity, but only slightly. Among those arrested for delivery offenses (see Table 5), 74% of African American defendants were charged initially with a delivery offense, compared to 82% of White and Hispanic offenders. These small differences by race increase slightly again from the initial charge to the offense of conviction, but remain statistically non-significant. Among those arrested initially for delivery offenses, 47% of White defendants were also convicted of delivery offenses, compared to 29% of African American and 36% of Hispanic defendants. Conversely, White defendants were slightly *less* likely (18) to be convicted of an anticipatory delivery offense than were African American (37%) or Hispanic defendants (30%). Because the differences by race observed in our sample are not statistically significant, they may not be representative of all cases charged and convicted in the counties studied.

### ***Additional Counts Charged and Convicted***

Prosecutors initially filed multiple charges in 79 (27%) of the cases examined here, a substantial minority of cases. Because prosecutors rarely filed more than two counts initially (12 cases), we simply examine the filing and conviction of multiple offenses (i.e. 2 or more) versus a single charge. Multiple charges were filed more often in cases charged with delivery (39%) than in possession cases (18%). Among our sample, multiple charges were most often filed in cases involving a White defendant (36%).

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3 In part, this is because defendants whose charges were reduced to non-felony crimes, or whose cases were dismissed on all counts, do not appear in these data. The data and findings presented here must be interpreted as descriptive only of cases that resulted in a felony drug conviction of some sort.

Among White defendants initially charged with delivery offenses, prosecutors filed multiple counts in 54% of cases, compared to 20% of similarly situated African American defendants and 36% of Hispanic defendants. Among those charged with delivery, this difference is statistically significant – the probability of finding a difference of this magnitude, if none existed in the population from which we drew our sample, is less than 1% ( $p < .01$ ). By conviction, however, most of these additional counts were either dismissed or removed through an amended information. Ultimately, only 13 defendants were convicted of multiple counts. The difference by race remained, though, and remained statistically significant, with conviction of multiple counts being more common among White defendants (23%), than among African American (2%) or Hispanic defendants (8%).

#### ***Sentence Enhancements Charged and Convicted***

Enhancement allegations were filed initially in only 34 cases (13%), with most (28) being filed in delivery cases. Among the defendants charged with delivery offenses, prosecutors filed 22 “school-zone” enhancements and 6 deadly weapon enhancements (in 2 cases, both enhancements were filed). Because enhancements for possession of a deadly weapon or selling drugs in a school zone were uncommon, we combine the two and examine whether facts alleging any enhancement were filed initially, or are filed later and result in a finding by the court at sentencing.

While the percentage of cases in which enhancements were filed varies by race of the defendant, those differences are not statistically significant, owing, perhaps, to the small number of cases involved. Among our sample of offenders charged with delivery offenses, enhancements were filed in 34% of cases involving a White defendant,

compared to 18% and 29% of African American and Hispanic defendants, respectively. By conviction, however, all but 5 of these enhancements had been dismissed, so that no racial differences remained in the actual application of those penalties.

### ***Multivariate Analyses of Charging Decisions***

Next, we use multivariate logistic regression to test whether the race or ethnicity of the defendant is related to the charging outcomes described above, controlling for a number of other potentially important case and offender characteristics. Given that there is almost no variation in the severity of charges filed when defendants were arrested for simple possession (they are almost always charged and convicted of possession), we limit these analyses to offenders who were arrested for delivery offenses. In these analyses we control for a number of legal and extra-legal factors that might influence charging decisions. Extra-legal factors include the following: the defendant's race and ethnicity (African American or Hispanic, compared to White non-Hispanic); evidence of non-citizenship; defendant's age and sex; the county of conviction (Pierce County or Yakima County, compared to King County); and whether the defendant pled guilty or was convicted in a trial. Legal factors that we are able to take into account include: whether the arrest was pursuant to an undercover "buy-bust", a vehicle "stop-search", police officers observing drug activity, or other reasons (compared to an active investigation targeting a particular person or persons); whether the defendant is described as having peripheral involvement; a defendant's prior felony convictions; and the quantity of drugs involved (medium or large quantity, compared to small quantity).

Table 6 presents the finding of analyses predicting whether the initial charge is a delivery offense (versus possession), and whether the primary charge at conviction is a delivery offense or an anticipatory offense (versus possession). For each measure of charge severity, effects are reported only for statistically significant predictors. Results presented there indicate the proportional change, associated with each predictor variable, in the odds of a particular charge being filed or convicted.<sup>4</sup> The results indicate that the odds that a case will be charged with delivery initially (recall that all were arrested for delivery) increases with age, and are high for males than for females, but are not related to a defendant's race, ethnicity, citizenship status, or to the county of conviction. The arrest reason/type and quantity of drugs are also important predictors. The odds of a delivery charge are significantly higher for defendants arrested in a buy-bust, and lower for other cases (compared to an active investigation). Delivery charges are also more likely when large quantities of drugs are involved, but less likely when medium quantities are involved (relative to small quantities).

Several other factors are relevant to predicting the severity of the primary conviction charge. Conviction of a delivery offense is significantly related to the type of conviction (trial), peripheral involvement in the delivery, race and ethnicity, county of conviction, and arrest reason. Consistent with the descriptions offered by criminal justice professionals, a trial conviction is an extremely strong predictor differentiating cases that are convicted of delivery from those convicted of less serious offenses. Net of other factors in the model, our analysis suggests that the odds than an offender arrested for drug

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4 Specifically, the values presented in Table 6 and 7 indicate the proportional change in the odds ratio  $[P/(1-P)]$  of the predicted outcome that results from a unit change in the predictor variable. For instance, the odds of being charged with delivery  $[\text{probability of delivery}/(1-\text{probability of delivery})]$  are about 200% greater for males than for females. The odds of a delivery charge are about 84% less in "stop-search" cases than when the arrest results from an active investigation.

delivery will also be convicted of delivery are about 70 times greater if the offender is convicted at trial than if he or she had pled guilty. Conversely, a trial conviction *decreases* the odds of being convicted of an anticipatory delivery by nearly 100%. In other words, offenders arrested for drug delivery are almost always charged and convicted of delivery when they are convicted in a trial, but if they plead guilty, they are likely to be pleading to a less serious offense.<sup>5</sup>

Race and ethnicity are also significantly related to the odds of a delivery conviction. Net of the influence of trial conviction, arrest reason, involvement, and county of conviction, African American and Hispanic defendants are significantly *less likely* than White defendants to be convicted of delivery, but there is no significant difference in the odds of an anticipatory delivery conviction. This is consistent with the bivariate data presented above although in that of analyses the difference was not significant. Offenders who had minimal, or peripheral, involvement in the crime were also much less likely to be convicted of delivery, and significantly more likely to be convicted of an anticipatory delivery. Drug quantity does not appear to play a significant role in determining the conviction charge, but, as with the initial charge, arrest reasons are important predictors. Finally, the odds of conviction of delivery offenses differ among the counties studied as well, and net of the other factors. Relative to King County, delivery convictions were less likely in Yakima County, but more likely in Pierce County.

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<sup>5</sup> In this sample, there were no convictions of anticipatory drug deliveries in trials. This is consistent with recent research by the authors that found virtually no anticipatory delivery convictions in trials, statewide, from FYI96 to FY99 (Engen et al., 1999).

Table 7 presents the results of similar analysis predicting whether multiple charges or sentence enhancements were charged at the initial filing. Because very few cases were actually convicted of multiple counts, or with sentence enhancements, we do not attempt to analyze those outcomes at conviction. Again the results indicate some differences associated with race, as well as differences related to non-citizen status, age, county, and quantity of drugs. The results suggest that, compared to White defendants, African American defendants are *less likely*, while Hispanic defendants are slightly *more likely* to be charged with additional counts. Defendants for whom there was evidence of non-U.S. citizenship (who were all of Hispanic origin) were also less likely to be charged with additional counts. No differences by race, ethnicity or citizenship status appear with respect to the filing of enhancements. Most of our measures of offending activity (i.e. Legal Factors) are unrelated to these charging outcomes, but the quantity of drugs does predict additional charges. As with delivery charges, large quantities increase the odds of additional counts, while medium quantities decrease the odds, compared to small quantities.<sup>6</sup> Finally, these charging measures appear to be related to the county of conviction, with multiple counts and enhancements being significantly more likely in Yakima and Pierce counties than in King County.

### ***Summary and Discussion of Charging Analyses***

The finding that nearly 80% of delivery arrestees were initially charged with delivery offenses, but that only about one-third were later convicted of delivery, is consistent with the interview data presented above. The findings suggest that while

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<sup>6</sup> This seemingly non-intuitive finding – that medium quantity cases are less likely than small quantity cases to result in a delivery charge or multiple counts – may be an artifact of our classification scheme, so should be interpreted with caution.



prosecutors' initial filing decisions tend to reflect the nature of the most serious crime committed, the seriousness of those charges is routinely reduced. After the arresting offense, the strongest predictor of the primary conviction charge appears to be whether defendants plead guilty or are convicted at trial, with the latter group much more likely to be convicted of the most serious charges. This is also consistent with the information provided by interview respondents.

The nature or circumstances of the original arrest is also significantly related to the initial charge, and to the charge of conviction, even when the analysis is limited to those who were arrested for delivery offenses. Offenders arrested in undercover buy-bust operations were more likely to be charged, and convicted, on the most serious charge. While we would not expect the circumstances of the arrest to have any inherent relationship to charging decisions, interviews with prosecutors and public defenders suggest at least two explanations for that relationship. First, the arrest reasons and circumstances may be related to the strength of evidence in a case. For example, delivery, or intent to deliver, may be more easily established, and proved, when police officers participate in a drug delivery, than when drugs and evidence of intent are discovered subsequent to a traffic stop or some other citizen encounter. Similarly, evidence of intent may be stronger when the arrest is made pursuant to an undercover investigation, or when a search warrant has been ordered, than when evidence is obtained without a search warrant. Second, interviews with prosecutors and public defenders also suggested that charging decisions, in some cases, are influenced by the importance placed on those cases by local law enforcement. To the extent that local law enforcement agencies' (or individual officers') investment of resources and interest in a case might

influence prosecutors' decisions, the arrest reason (i.e., "buy-bust" or "active investigation") may reflect that influence in our analyses.

The findings of greatest importance to this study are those regarding the effects of race and ethnicity. Controlling for the arresting offense, and other legal and non-legal factors, we have found no significant differences between white, African American and Hispanic defendants in the seriousness of the initial charge filed, or in the filing of deadly-weapon and school-zone enhancements. While race and ethnic differences do appear in the initial filing of multiple counts, there are no differences in the likelihood of conviction on multiple counts. The one measure of charging severity for which significant race and ethnic differences appear, and that should substantially impact offenders' sentences, is the likelihood that offenders arrested for drug delivery will also be convicted of delivery. On that measure, we find that both African American and Hispanic defendants are significantly *less likely* than white, non-Hispanic, defendants to be convicted of the most serious charges. The reason for these differences is not clear.

### ***Multivariate Analyses of State's Sentencing Recommendations and Judges' Sentences***

Table 8 presents multivariate regression analyses predicting the state's sentencing recommendation and judges' sentences in months. In the first stage of each model we include only extra-legal variables, and in the second stage we add in legally relevant factors. The first column indicates that on average prosecutors recommend significantly longer sentences for blacks (on average, 12 months longer) than for whites. Prosecutors in Pierce and Yakima counties tend to recommend shorter sentences than do King County

prosecutors (approximately 12 and 10 months, respectively). Finally, prosecutors recommend much longer sentences in cases that went to trial vs. those that were pled (more than a 2-year difference). This tells us that the differences in sentencing recommendations, overall, for white and minority offenders are not simply a reflection of county differences, or differences related to the mode of conviction. The next question then, is whether or not those differences are explained by legally relevant case characteristics.

The second column in Table 8 reveals that, in fact, these differences are largely due to the legally relevant factors that prosecutors take into account. Once legally relevant factors are accounted for, the only extra-legal coefficients that remain statistically significant are age (about 2 years for each additional 10 years of age) and trial cases, in which prosecutors recommend, on average, about seven months more than they do for cases that are pled. Of the legally relevant factors, we find that prosecutors recommend longer sentences for those offenders convicted of delivery and anticipatory offenses as opposed to those convicted of simple possession (about 5 months longer than possession cases). Clearly, the strongest variable affecting prosecutors' recommendation is the low point of the standard range. With each monthly increase in the standard range, prosecutors on average increase their recommendation approximately .84 months (about 25 days). This supports the finding, based on interviews with criminal justice professionals, that prosecutors rely heavily on the sentencing guidelines in making their recommendations. In fact the model explains 88% of the variation in the state's sentencing recommendation and the majority of the variation is accounted for by the sentencing guidelines.

Column three of Table 8 shows that judges, on average, sentence African Americans to longer sentences than whites (6 months) and they also sentence men to longer sentences than women (also a 6 month difference). Judges in Yakima and Pierce counties tend to impose shorter sentences than do those in King County (11 and 8 months shorter, respectively). However, as in the analysis of sentencing recommendations, these differences disappear once legally relevant factors are included in the model. That is, these differences in sentence length appear to be due almost entirely to differences in legal factors rather than to race or ethnicity. Again, the strongest factor affecting judges' sentences are the guidelines. For each additional month the guidelines suggest, judges' match those with sentences nearly one month in sentence length (.90 months = 27 days).

We should note that because prosecutors so reliably use the state sentencing guidelines to make recommendations we could not include both the low-point of the standard range and the state's sentencing recommendation in the same analysis. As a result, we cannot statistically test whether judges' rely more directly on the state's recommendation or the sentencing guidelines when imposing sentences—they are usually very similar. Alternatively, it is interesting to note that while the prosecution, on average, recommends much longer sentences for offenders who take their case to trial, there is no significant direct effect of a trial (vs. pleading guilty) on judges' decisions regarding sentence length. Delivery was also not a significant factor in the final model. This can be explained by its strong association with the low point of the standard range. Once the prescribed sentence is taken into account, it makes little difference whether an offender was convicted of delivery or possession.

In summary, it appears that on average prosecutors recommend, and judges sentence, African American offenders to longer periods of incarceration than they do whites, but that this can be entirely explained by the types of drug offenses that offenders are convicted of, their prior criminal history, and the guidelines recommended by the State of Washington. Once legal factors are controlled, the only extra-legal factors affecting prosecutor's recommended sentence length is whether the case was convicted at trial. Because sentencing recommendations, and the guidelines, determine the sentence ordered, trial conviction has little or no independent effect on the actual sentence length imposed.



## *DISCUSSION AND CONCLUSIONS*

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The central question driving this report is whether or not racial and ethnic minorities receive differential treatment at stages in case processing prior to sentencing. If so, such differences could result in the disparate sentencing of similar offenders, but those disparities would be “masked” by legal factors (i.e., offense seriousness and offender score) at the time of sentencing. That is, if charging practices or plea negotiations are different for minority and White offenders, this could contribute to differences in conviction offenses, and consequently differences in sentencing, that are not attributable to actual offending behavior. In this report we have presented both quantitative and qualitative data in an effort to assess whether race and ethnicity impact charging and sentencing practices in three counties in Washington State. Two central findings emerge pertaining to this issue. First, this study finds that charges are routinely changed between initial filing and conviction. Second, and more importantly, this study finds that these changes are, for the most part, not related to race or ethnicity.

Both the interview data and the case file data clearly document the widespread practice of changing charges between filing and conviction. The quantitative data show that, while 80% of those arrested for delivery or possession with intent are initially charged with delivery offenses, only about one-third are eventually convicted of delivery or possession with intent. The qualitative data suggest that this process is driven largely by concerns about resources. Specifically, there is a common belief that resources are scarce, and that, because of this, it is necessary to resolve a majority of the cases through pleas. Prosecutors regularly reduce the primary charge, (from delivery to an anticipatory offense or a simple possession), drop enhancements, and drop multiple additional charges

to induce a plea. This finding is critical to this report, as it raises the question of whether these changes are being made in a uniform fashion for minority and White defendants.

The second finding central to this study is that this process is largely uniform across racial and ethnic groups in the three counties studied. Controlling for the arresting offense and other legal and extra-legal factors, we find no significant differences in a variety of measures of charging practices. The one measure of charging severity for which significant differences do appear is the likelihood that offenders arrested for drug delivery will also be convicted of delivery. Here we find that White offenders are more likely than either African American or Hispanic defendants to be convicted of the delivery charge. While we do not offer, and the data do not suggest, an explanation for this difference, it is compelling and may warrant further study. Our interviews further support the finding that practices do not differ significantly across racial or ethnic groups. Most of those interviewed said that they did not perceive important differences by race in either charging or sentencing decisions.

While the focus of this study was primarily on charging decisions, we also collected and analyzed data about both arrests and sentencing outcomes. Here, two findings seem noteworthy. First, arrests have an important effect on charging decisions throughout case processing. Specifically, the type of arrest involved in a case affected the likelihood that an individual arrested for delivery would also be convicted of that offense. Offenders arrested in buy/bust operations were more likely than offenders arrested in other ways to be convicted of the most serious charge. While many respondents told us that they felt that decisions made by law enforcement about where to focus their enforcement efforts contributed to important race differences (justifiably or



not), this assertion could not be tested using the limited data we collected. Specifically, because we only collected data on cases in which arrests were actually made, we were unable to make comparisons with offenses that were being committed but for which no arrest was made. Those data would, of course, be extremely complicated to collect, but, combined with the interview data, the findings here suggest that further study should be done of law enforcement practices and their potential effect on case processing decisions.

Second, our analyses of the impact of charging decisions on sentencing suggest that, although racial and ethnic minorities do receive somewhat longer sentences than do Whites, this appears to be primarily due to legal factors related to the types of drug offenses for which minority members are involved, arrested, charged, and convicted and to evidentiary factors related to the types of arrests. These findings seemingly contrast in important ways from the earlier sentencing study of drug offenders, which found that, while legal factors explained much of the racial differences, they could not account for all racial and ethnic differences in the type of sentence received or the use of rehabilitative alternative sanctions (Engen et al., 1999). There are a number of idiosyncratic differences between the two studies, however, that may help to explain these apparent discrepancies. First, the earlier study was based on a very large sample of cases where even small differences were often statistically significant. Second, the most pronounced differences found in that study were related to the use of sentencing alternatives that were simply too infrequent in the current sample to allow comparisons. Furthermore, the legal control variables included in the first study, while important, were limited largely to the offender's criminal history score, the offense severity, and the presumptive guidelines. The current study focused on a smaller sample within only three counties in the state, but

included better measures of the legal factors associated with the case and earlier decisions in the criminal justice process. While some racial and ethnic differences in sentencing may exist at the state level, the data presented do not offer a ready explanation for those differences.

Overall, the findings of this study present little evidence that race or ethnicity play an important role in the case processing of drug offenders in Washington State. There are, however, at least two limitations of the current research that should be noted. First and foremost, the case file data consisted of a sample of cases that ultimately resulted in felony convictions. Arrests that were not filed or convicted, or that were filed as misdemeanor offenses were not included in the sample. Thus we do not know whether those kinds of charging decisions are related to race and/or ethnicity. Second, because of the small sample size, we could not conduct rigorous analyses concerning the use of alternative sanctions where relatively strong race and ethnic differences were found in the previous study. In part, this is because relatively few of the 300 cases that we examined resulted in a conviction and standard sentence range where those alternatives would apply. Additional analyses with a larger sample of cases convicted of more serious crimes may shed light on the reasons for the differences observed in the earlier statewide analyses.



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## *TABLES*

**Table 1. Descriptive Statistics. Demographics, Drug Types, Arrest Characteristics and Charging Practices** (based on 294 White, Black and Hispanic offenders, n varies slightly because of missing data) .

	% or Mean (s.e.)	Recoded Variable	%
% Black	29.3		
% Hispanic	25.9		
Non Citizen	8.5		
% Male	76.9		
Mean Age (s.e.)	32.1 (8.23)		
Drugs Involved			
% Marijuana	13.9		
% Cocaine	56.1		
% methamphetamine	31.3		
% Heroin	18.4		
Drug Quantity			
% Small	69.8		
% Medium	14.6		
% Large	15.7		
Peripheral Involvement	10.9		
Arrest Pursuant to			
% Active Investigation	21.8		
% Buy/Bust Operation	18.7		
% Routine Stop- Search	30.6		
% Officer Observed	12.9		
% Other	16.0		
Arresting Offense		Severity of Offense	
% Other	.7		
% Possession	46.6	% Possession/other	47.3
% Anticipatory	.7		
% Possession w/ Intent	22.4	% Mfg/Del/PWI	52.7
% Delivery	27.2		
% Manufacture	2.4		
Mean Prior Felonies (s.e.)	2.0 (2.5)		
Primary Charged Offense		Severity of Offense	
% Other	1.4		
% Possession	56.7	% Possession/other	58.2
% Anticipatory	0.0		
% Possession w/ Intent	15.7	% Mfg/Del/PWI	41.8
% Delivery	23.9		
% Manufacture	2.4		
% Multiple Charges	26.9		
% Charged Enhancement (School Zone or Weapon)	13.0		
% Cases Going to Trial	6.1		
Convicted Offense		Severity of Offense	
% Other	1.0	% Possession/other	65.0
% Possession	63.7		
% Anticipatory	15.8	% Anticipatory	15.6
% Possession with Intent	4.8		
% Delivery	13.0	% Mfg/Del/PWI	19.4
% Manufacture	1.7		
% Multiple Convictions	5.4		

**Table 2. Bivariate County Level Analysis of Demographics, Drug Types, Arrest Characteristics and Charging Practices** (based on 294 White, Black and Hispanic offenders, n varies slightly because of missing data).

	<u>King</u>	<u>Yakima</u>	<u>Pierce</u>
<b>Race</b>			
% White **	24.5	40.9	69.7
% Black	53.9	6.5	25.3
% Hispanic	21.6	52.7	5.1
<b>Sex</b>			
% Female	25.5	16.1	27.3
% Male	74.5	83.9	72.7
<b>Drugs Involved</b>			
% Marijuana	8.8	17.2	16.2
% Cocaine **	73.5	55.9	38.4
% Methamphetamine **	5.8	38.7	50.5
% Heroin *	26.5	12.9	15.2
<b>Drug Quantity</b>			
% Small	77.8	66.9	64.2
% Medium	12.1	17.0	14.8
% Large	10.1	17.0	21.0
<b>Arrest Pursuant to</b>			
% Active Investigation **	12.7	28.0	25.3
% Buy/Bust Operation	44.1	3.2	7.1
% Routine Stop- Search	11.8	40.9	40.4
% Officer Observed	23.5	5.4	9.1
% Other	7.8	22.6	18.2
<b>Primary Arresting Offense</b>			
% Possession/Other	21.6	63.4	58.6
% Delivery	78.4	36.6	41.4
<b>Primary Charged Offense</b>			
% Possession/Other	39.2	72.0	64.6
% Delivery	60.8	28.0	35.4
% Multiple Counts	5.9	25.8	49.5
<b>Charged Enhancement (School Zone or Weapon)</b>	11.4	12.9	14.9

\* Statistically significant difference across counties, Chi-square  $p < .05$

\*\* Statistically significant difference across counties, Chi-square  $p < .01$

**Table 3. Analysis by Race and Ethnicity: Demographics, Drug Types, Arrest Characteristics and Charging Practices** (based on 294 White, Black and Hispanic offenders, n varies slightly because of missing data) .

	White	Black	Hispanic
Sex			
% Female **	29.5	27.9	6.6
% Male	70.5	72.1	93.4
Drugs Involved			
% Marijuana **	21.2	4.7	11.8
% Cocaine **	29.5	83.7	71.1
% methamphetamine **	58.3	3.5	15.8
% Heroin **	16.7	10.5	30.3
Drug Quantity			
% Small *	70.8	80.3	56.9
% Medium	14.2	9.2	20.8
% Large	15.0	10.5	22.2
Arrest Pursuant to			
% Active Investigation **	22.7	15.1	27.6
% Buy/Bust Operation	3.3	38.4	19.7
% Routine Stop- Search	40.9	18.6	26.3
% Officer Observed	9.1	16.3	15.8
% Other	22.0	11.6	10.5
Primary Arresting Offense			
% Possession/Other **	62.9	27.9	42.1
% Delivery	37.1	72.1	57.9
Primary Charged Offense			
% Possession/Other **	69.7	45.3	52.6
% Delivery	30.3	54.7	47.4
% Multiple Counts **	35.6	15.1	25.0
Charged Enhancement (School Zone or Weapon)	13.6	11.3	13.6

\* Statistically significant differences by race, Chi-square  $p < .05$

\*\* Statistically significant differences by race, Chi-square  $p < .01$



**Table 4. Primary Offense Charged and Convicted by Offense at Arrest**

Primary Offense at Arrest	Primary Offense Charged		Primary Offense Convicted		
	Possession	Delivery	Possession	Anticipatory Delivery	Delivery /Mfg.
Possession/Other n=139 (47%)	138 (99%)	1 (<1%)	138 (99%)	1 (<1%)	0
Delivery n=155 (53%)	33 (21%)	122 (79%)	53 (34%)	45 (29%)	54 (37%)
Total n=294 (100%)	171 (58%)	123 (42%)	191 (65%)	46 (16%)	54 (19%)

**Table 5. Primary Offense Charged and Convicted by Race and Ethnicity (Delivery Arrests only, N=155)**

Race / Ethnicity	Primary Offense Charged		Primary Offense Convicted		
	Possession	Delivery	Possession	Anticipatory Delivery	Delivery /Mfg.
White non-Hispanic N = 49 (32%)	9 (18%)	40 (82%)	17 (35%)	9 (18%)	23 (47%)
African American N = 62 (40%)	16 (26%)	46 (74%)	21 (34%)	23 (37%)	18 (29%)
Hispanic N = 44 (28%)	8 (18%)	36 (82%)	15 (34%)	13 (30%)	16 (36%)
Total N = 155 (100%)	33 (21%)	122 (79%)	53 (34%)	45 (29%)	57 (37%)

**Table 6. Stepwise Logistic Regression Model Predicting the Severity of Initial Charges and Conviction Charges.\***

Extra-Legal Factors	Proportional Change in Odds Ratio (Exp(B) - 1)		
	Charged <u>Delivery (vs. Poss)</u>	Convicted <u>Delivery</u>	<u>Anticipatory Delivery</u>
Race (Reference = White)			
Black		-.80	
Hispanic		-.71	
Noncitizen			
Age	.06		
Male	2.01		
County (Ref. = King Co.)			
Yakima Co.		-.65	
Pierce Co.		.58	
Trial Conviction		69.99	-.99
Legal Factors			
Arrest Reason (Ref. = Active Investigation)			
Buy-Bust	1.34	2.03	-.53
Stop-Search	-.84	-.92	-.58
Officer Observed	-.82	-.90	-.75
Other Arrest Reason	-.81	.31	-.92
Peripheral Involvement		-.93	10.61
Prior Felonies			
Drug Quantity (Ref.= Small)			
Medium	-.39		
Large	3.53		
Nagelkerke r-square	.38	.46	.34
N	145	145	145

\* Effects shown here are all statistically significant (p<.05).

**Table 7. Stepwise Logistic Regression Model Predicting Multiple Counts Charged and Convicted.\***

	Proportional Change in Odds Ratio (Exp(B) - 1)	
	Charged Multiple Counts	Charged Enhancements
<b>Extra-Legal Factors</b>		
Race (Reference = White)		
Black	-.87	
Hispanic	1.49	
Noncitizen	-.96	
Age		.08
Male		
County (Ref. = King Co.)		
Yakima Co.	7.20	6.47
Pierce Co.	267.61	2.22
Trial Conviction		
<b>Legal Factors</b>		
Delivery Offense		
Arrest Reason		
(Ref. = Active Investigation)		
Buy-Bust		
Stop-Search		
Officer Observed		
Other Arrest Reason		
Peripheral Involvement		
Prior Felonies		
Drug Quantity (Ref.= Small)		
Medium	-.26	
Large	2.72	
Nagelkerke r-square	.69	.16
N	145	145

\* Effects shown here are all statistically significant (p<.05).

**Table 8. Regression Models of the State’s Sentencing Recommendation and Judges Sentence on Extra-Legal and Legal Factors.**

	State’s Sentencing Recommendation		Judge’s Sentence	
	b (s.e.)	b (s.e.)	b (s.e.)	b (s.e.)
<b>Extra-Legal Factors</b>				
Black	12.32 (3.83)**	1.04 (1.63)	8.28 (3.14)**	-1.25 (1.06)
Hispanic	4.91 (4.92)	1.71 (1.07)	2.37 (3.74)	-.05 (1.24)
Noncitizen	.26 (5.87)	3.52 (2.44)	- 2.37 (4.90)	-.43 (1.61)
Age	.32 (0.19)	.15 (0.08)+	.05 (0.15)	-.02 (0.05)
Male	6.43 (3.61)	-.71 (1.52)	6.83 (2.86)*	.87 (0.96)
Yakima	-12.20 (4.08)**	-2.07 (1.71)	-11.57 (3.19)**	-.66 (1.07)
Pierce	-7.49 (3.79)*	-1.51 (1.59)	-5.57 (3.17)+	.34 (1.06)
Trial	26.34 (6.48)**	6.90 (2.76)*	12.22 (4.86)*	-2.23 (1.63)
<b>Legal Factors</b>				
Peripheral Involvement		-2.15 (2.19)		1.37 (1.46)
Prior Felonies		.52 (0.33)		.25 (0.21)
Convicted of Delivery		5.42 (1.98)**		1.19 (1.37)
Convicted of Anticipatory		4.70 (1.98)*		4.02 (1.29)**
Medium Quantity		-.20 (1.81)		-.13 (1.13)
Large Quantity		1.12 (1.79)		.12 (1.22)
Low Point of Standard Range		.84 (0.04)**		.90 (0.03)**
r-square	.26	.88	.17	.92
N		199		264

+ significant at .10  
 \* significant at .05  
 \*\* significant at .01



*APPENDICES*

**Appendix A:  
Classification of Drug Offenses**

<b>Drug Offense</b>	<b>Delivery</b>	<b>Non-Delivery</b>	<b>Hard Drug</b>	<b>Seriousness Level</b>
Over 18 and Deliver Heroin or Narcotic from Schedule I or II to Someone Under 18 (RCW 69.50.406)	<b>X</b>		<b>X</b>	<b>X (10)</b>
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)	<b>X</b>		<b>X</b>	<b>IX (9)</b>
Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture Methamphetamine (RCW 69.50.440)		<b>X</b>	<b>X</b>	<b>VIII (8)</b>
Selling for Profit (Controlled or Counterfeit) Any Controlled Substance (RCW 69.50.410)	<b>X</b>			<b>VIII (8)</b>
Manufacture, Deliver, or Possess with Intent to Deliver Heroin or Cocaine (RCW 69.50.401(a)(1)(i))	<b>X</b>		<b>X</b>	<b>VIII (8)</b>
Manufacture, Deliver, or Possess with Intent to Deliver Methamphetamine (RCW 69.50.401(a)(1)(ii))	<b>X</b>		<b>X</b>	<b>VIII (8)</b>
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))	<b>X</b>		<b>X</b>	<b>VI (6)</b>

Delivery of Imitation Controlled Substance by Person Eighteen or Over to Person Under Eighteen (RCW 69.52.030(2))	<b>X</b>		<b>X</b>	<b>V (5)</b>
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)(iii) through (v))	<b>X</b>		<b>X</b>	<b>IV (4)</b>
Manufacture, Deliver, or Possess with Intent to Deliver Marijuana (RCW 69.50.401(a)(1)(iii))	<b>X</b>			<b>III (3)</b>
Delivery of a Material in Lieu of a Controlled Substance (RCW 69.50.401(c))	<b>X</b>			<b>III (3)</b>
Manufacture, Distribute, or Possess with Intent to Distribute an Imitation Controlled Substance (RCW 69.52.030(1))	<b>X</b>			<b>III (3)</b>
Possession of Controlled Substance that is Either Heroin or Narcotics from Schedule I or II (RCW 69.50.401(d))		<b>X</b>	<b>X</b>	<b>II (2)</b>
Possession of Phencyclidine (PCP) (RCW 69.50.401(d))		<b>X</b>	<b>X</b>	<b>II (2)</b>
Create, Deliver, or Possess a Counterfeit Controlled Substance (RCW 69.50.401(b))	<b>X</b>			<b>II (2)</b>
Forged Prescription for a Controlled Substance (RCW 69.50.403)		<b>X</b>		<b>I (1)</b>

Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Nonnarcotic from Schedule I-V (Except Phencyclidine) (RCW 69.50.401(d))		<b>X</b>	<b>X</b>	<b>I (1)</b>
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**Appendix B:  
Drug Related Enhancements<sup>7</sup>**

Enhancements to the presumptive range are required for certain drug offenses that occur in correctional facilities (RCW 9.94A.310(5)) or in a protected zone (RCW 9.94A.310(6)). These enhancements are as follows:

Correctional Facility: If the offender or an accomplice committed certain drug offenses while in a county jail or state correctional facility, the following additional time is added to the presumptive sentence range:

**Figure 3. Drug-related Enhancements**

Crime	Enhancement
Manufacture, Deliver, Possess with Intent to Deliver Heroin or Cocaine	18 Months
Manufacture, Deliver, Possess with Intent to Deliver Schedule I or II Narcotics (Except Heroin or Cocaine)	18 Months
Selling for Profit (Controlled or Counterfeit) Any Controlled Substance	18 Months
Manufacture, Deliver, Possess with Intent to Deliver Methamphetamine	18 Months
Manufacture, Deliver, Possess with Intent to Deliver Schedule III-V Narcotics or Schedule I-V Non Narcotics (Except Marijuana or Methamphetamine)	15 Months
Manufacture, Deliver, Possess with Intent to Deliver Marijuana	15 Months
Possession of Controlled Substance that is Either Heroin or Narcotics from Schedule I or II	12 Months
Possession of Phencyclidine (PCP)	12 Months
Possession of a Controlled Substance that is a Narcotic from Schedule III-V or Nonnarcotic from Schedule I-V (Except Phencyclidine)	12 Months

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<sup>7</sup> *Adult Sentencing Guidelines Manual, 1996*, Sentencing Guidelines Commission.

Protected Zone: If the offender is sentenced for committing certain drug offenses<sup>8</sup> in a protected zone, 24 months are added to the presumptive sentence, and the maximum imprisonment and fine are doubled (RCW 69.50.435). These protected zones are as follows:

- In a school or on a school bus;
- Within 1,000 feet of a school bus route stop or a school ground perimeter;
- In a public park;
- On a public transit vehicle or in a public transit stop;
- At a civic center designated as a drug-free zone by the local governing authority;
- Within 1,000 feet of the perimeter of a facility designated as a civic center, if the local governing authority specifically designates the 1,000-foot perimeter.

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<sup>8</sup> RCW 69.50.435(a) "[A violation of:]...RCW 69.50.401(a) by manufacturing, selling, delivering, or possessing with intent to manufacture, sell or deliver a controlled substance listed under that subsection or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana..."

**Appendix C:<sup>9</sup>**  
**Sentence Ranges for Anticipatory Drug Offenses**

The appropriate sentence ranges for anticipatory offenses (attempts, solicitations, and conspiracies) involving violations of the Uniform Controlled Substances Act (VUCSA) have been clarified through a series of court decisions and legislative actions. Table 6 presents the current status of statute and case law on appropriate sentence ranges for anticipatory violations of the Uniform Controlled Substances Act.

**Table 6. Sentence Ranges for Anticipatory Drug Offenses**

	SENTENCE RANGE	STATUTE
<b>Attempt Delivery</b>	Unranked (0 to 12 mos.)	RCW 69.50.407
<b>Possession</b>	Unranked (0 to 12 mos.)	RCW 69.50.407
<b>Solicitation* Delivery</b>	75% of Standard Range	RCW 9A.28.030
<b>Possession</b>	75% of Standard Range	RCW 9A.28.030
<b>Conspiracy Delivery</b>	Unranked (0 to 12 mos.)	RCW 69.50.407
<b>Possession</b>	Unranked (0 to 12 mos.)	RCW 69.50.407

\*Solicitations drop one class from the underlying offense (e.g., a solicitation to commit a Class B felony is a Class C felony). Solicitations to commit Class C felonies are gross misdemeanors.

An attempt or conspiracy to commit a drug offense is specifically addressed in RCW 69.50.407, which states that such offenses are punishable by "...imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense..." The appellate courts have consistently held that for VUCSA offenses, RCW 69.50.407 takes precedence over RCW 9A.28. The following reflects current sentencing practices; current statute and case law should be reviewed for definitive guidance in this area.

An attempt or conspiracy to commit a drug offense is typically sentenced as an unranked offense (0-12 months) following state case law. In State v. Mendoza (63 Wn. App. 373),

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<sup>9</sup> *Adult Sentencing Guidelines Manual, 1996*, Sentencing Guidelines Commission.

Division One, the Court of Appeals, held that “inasmuch as a conspiracy conviction under RCW 69.50.407 has no sentencing directions from the Legislature, it is punished under the unspecified crimes provisions of RCW 9.94A.120(7).”

Solicitation to commit a drug offense is not specifically addressed in RCW 69.50. It is typically charged under RCW 9A.28 and sentenced under RCW 9.94A.310(2) at 75 percent of the standard range. Solicitation to commit a Class C felony is a gross misdemeanor under RCW 9A.28.

## RELEVANT STATUTES

**RCW 9A.28.020 Criminal attempt.** (1) A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree or arson in the first degree;

(b) Class B felony when the crime attempted is a Class A felony other than murder in the first degree or arson in the first degree;

(c) Class C felony when the crime attempted is a Class B felony;

(d) Gross misdemeanor when the crime attempted is a Class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

**RCW 9A.28.030 Criminal solicitation.** (1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

(2) Criminal solicitation shall be punished in the same manner as criminal attempt under RCW 9A.28.020.

**RCW 9A.28.040 Criminal conspiracy.** (1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

(2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:

(a) Has not been prosecuted or convicted; or

(b) Has been convicted of a different offense; or

(c) Is not amenable to justice; or

(d) Has been acquitted; or

(e) Lacked the capacity to commit an offense.

(3) Criminal conspiracy is a:

(a) Class A felony when an object of the conspiratorial agreement is murder in the first degree;

(b) Class B felony when an object of the conspiratorial agreement is a Class A

felony other than murder in the first degree;

- (c) Class C felony when an object of the conspiratorial agreement is a Class B felony;
- (d) Gross misdemeanor when an object of the conspiratorial agreement is a Class C felony;
- (e) Misdemeanor when an object of the conspiratorial agreement is a gross misdemeanor or misdemeanor.

**RCW 9.94A.410 Anticipatory offenses.** 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 crime, and multiplying the range by 75 percent.

In calculating an offender score, count each prior conviction as if the present conviction were for the completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

**RCW 69.50.101(f)** “Deliver” or “delivery” means the actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

**RCW 69.50.407 Conspiracy.** Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

**Appendix D:  
Recommended Prosecuting Standards for Charging and Plea Dispositions**

**RCW 9.94A.430 Introduction.** These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state. [1983 c 115 § 14.]

*Comment:*

*These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.*

**RCW 9.94A.440 Evidentiary sufficiency.**

(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 RCW9A.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(8).

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 Kidnapping  
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 Kidnapping  
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  
Escape from Community Custody  
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.

##### Pre-Filing Discussions with Victim(s)

Discussions with the victim(s) or victims' representatives regarding the selection or disposition of charges may occur before the filing of charges. The discussions may be considered by the prosecutor in charging and disposition decisions, and should be considered before reaching any agreement with the defendant regarding these decisions. [1996 c 93 § 2; 1995 c 288 § 3. Prior: 1992 c 145 § 11; 1992 c 75 § 5; 1989 c 332 § 2; 1988 c 145 § 13; 1986 c 257 § 30; 1983 c 115 § 15.]

*Comment:*

*Decision Not to Prosecute: This standard and the examples previously listed were taken in large measure from the 1980 Washington Association of Prosecuting Attorneys' Standards for Charging and Plea-Bargaining.*

*The 1995 Legislature added a guideline calling for prosecutors to consult with victims or their representatives about the selection or disposition of charges, and to consider those discussions before reaching any agreement with a defendant about charging or disposition.*

**RCW 9.94A.450 Plea dispositions.**

**STANDARD:**

(1) Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial.

(2) In certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest. Such situations may include the following: (a) Evidentiary problems which make conviction on the original charges doubtful; (b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat; (c) A request by the victim when it is not the result of pressure from the defendant; (d) The discovery of facts which mitigate the seriousness of the defendant's conduct; (e) The correction of errors in the initial charging decision; (f) The defendant's history with respect to criminal activity; (g) The nature and seriousness of the offense or offenses charged; (h) The probable effect on witnesses. [1983 c 115 § 16.]

**RCW 9.94A.460 Sentence recommendations.** STANDARD: The prosecutor may reach an agreement regarding sentence recommendations. The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement. [1983 c 115 § 17.]

**RCW 9.94A.470 Armed offenders.** Notwithstanding the current placement or listing of crimes in categories or classifications of prosecuting standards for deciding to prosecute under RCW 9.94A.440(2), any and all felony crimes involving any deadly weapon special verdict under RCW 9.94A.125, any deadly weapon enhancements under RCW 9.94A.310 (3) or (4), or both, and any and all felony crimes as defined in RCW 9.94A.310 (3)(f) or (4)(f), or both, which are excluded from the deadly weapon enhancements shall all be treated as crimes against a person and subject to the prosecuting standards for deciding to prosecute under RCW 9.94A.440(2) as crimes against persons. [1995 c 129 § 4 (Initiative Measure No. 159).]

## **Appendix E: The Drug Offender Sentencing Alternative**

### **RCW 9.94A.120**

(6)(a) An offender is eligible for the special drug offender sentencing alternative if:

(i) The offender is convicted of 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 a felony that is, under chapter 9A.28 RCW or RCW 69.50.407, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes, and the violation does not involve a sentence enhancement under RCW 9.94A.310 (3) or (4);

(ii) The offender has no prior convictions for a felony in this state, another state, or the United States; and

(iii) The offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance.

(b) If the midpoint of the standard range is greater than one year and the sentencing judge determines that the offender is eligible for this option and that the offender and the community will benefit from the use of the special drug offender sentencing alternative, the judge may waive imposition of a sentence within the standard range and impose a sentence that must include a period of total confinement in a state facility for one-half of the midpoint of the standard range. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections. If the midpoint of the standard range is twenty-four months or less, no more than three months of the sentence may be served in a work release status. The court shall also impose one year of concurrent community custody and community supervision that must include appropriate outpatient substance abuse treatment, crime-related prohibitions including a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. The court may require that the monitoring for controlled substances be conducted by the department or by a treatment alternative to street crime program or a comparable court or agency-referred program. The offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring. In addition, the court shall impose three or more of the following conditions:

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

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

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

(iv) Pay all court-ordered legal financial obligations;

(v) Perform community service work;

(vi) Stay out of areas designated by the sentencing judge.

(c) If the offender violates any of the sentence conditions in (b) of this subsection, the department shall impose sanctions administratively, with notice to the prosecuting attorney and the sentencing court. Upon motion of the court or the prosecuting attorney, a

violation hearing shall be held by the court. If the court finds that conditions have been willfully violated, the court may impose confinement consisting of up to the remaining one-half of the midpoint of the standard range. All total confinement served during the period of community custody shall be credited to the offender, regardless of whether the total confinement is served as a result of the original sentence, as a result of a sanction imposed by the department, or as a result of a violation found by the court. The term of community supervision shall be tolled by any period of time served in total confinement as a result of a violation found by the court.

(d) The department shall determine the rules for calculating the value of a day fine based on the offender's income and reasonable obligations which the offender has for the support of the offender and any dependents. These rules shall be developed in consultation with the administrator for the courts, the office of financial management, and the commission.

**Appendix F:  
First-Time Offender Waiver**

**RCW 9.94A.120**

(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.

**RCW 9.94A.030 Definitions.**

(22)(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, nor the manufacture, delivery, or possession with intent to deliver methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2), nor 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.

## **Appendix G: Work Ethic Camp**

### **RCW 9.94A.030-DEFINITION**

(40) "Work ethic camp" means an alternative incarceration program designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive array of real-world job and vocational experiences, character-building work ethics training, life management skills development, substance abuse rehabilitation, counseling, literacy training, and basic adult education.

### **RCW 9.94A.137-ELIGIBILITY**

Work ethic camp program—Eligibility—Sentencing. (1)(a) An offender is eligible to be sentenced to a work ethic camp if the offender:

(i) Is sentenced to a term of total confinement of not less than sixteen months or more than thirty-six months; and

(ii) Has no current or prior convictions for any sex offenses or for violent offenses other than drug offenses for manufacturing, possession, delivery, or intent to deliver a controlled substance.

(b) The length of the work ethic camp shall be at least one hundred twenty days and not more than one hundred eighty days. Because of the conversion ratio, earned early release time shall not accrue to offenders who successfully complete the program.

(2) If the sentencing judge determines that the offender is eligible for the work ethic camp and is likely to qualify under subsection (3) of this section, the judge shall impose a sentence within the standard range and may recommend that the offender serve the sentence at a work ethic camp. The sentence shall provide that if the offender successfully completes the program, the department shall convert the period of work ethic camp confinement at the rate of one day of work ethic camp confinement to three days of total standard confinement. In sentencing an offender to the work ethic camp, the court shall specify: (a) That upon completion of the work ethic camp the offender shall be released on community custody for any remaining time of total confinement; (b) the applicable conditions of supervision on community custody status as required by RCW 9.94A.120(9)(b) and authorized by RCW 9.94A.120(9)(c); and (c) that violation of the conditions may result in a return to total confinement for the balance of the offender's remaining time of confinement.

(3) The department shall place the offender in the work ethic camp program, subject to capacity, unless: (a) The department determines that the offender has physical or mental impairments that would prevent participation and completion of the program; (b) the department determines that the offender's custody level prevents placement in the program; or (c) the offender refuses to agree to the terms and conditions of the program.

(4) An offender who fails to complete the work ethic camp program, who is administratively terminated from the program, or who otherwise violates any conditions of supervision, as defined by the department, shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing judge and shall be subject to all rules relating to earned early release time.

(5) During the last two weeks prior to release from the work ethic camp program the department shall provide the offender with comprehensive transition training. [1995 1st sp.s. c 19 § 20; 1993 c 338 § 4.]



## **Appendix H: Interview Protocol**

### **Interview subjects:**

Individuals to be interviewed in each of three counties in Washington State include: 2 judges, 2 prosecutors, 2 defense attorneys, and 2 chemical dependency counselors.

Individuals will be selected based on involvement with case processing of drug offenders. We will identify, through conversations with court clerks in each county, those individuals who work most directly with drug offender cases. We will compile a list of potential interviewees based on these conversations. After identifying those individuals, we will contact them to request interviews. Individuals who decline the interviews will simply be removed from the list, and we will move to the next person on our list.

### **Confidentiality:**

Interviews will be tape recorded and subsequently transcribed. Individuals will not be identified by name in the transcriptions. Following transcription, the tapes will be destroyed. Demographic characteristics of subjects (sex and race/ethnicity) will be documented separately from the interviews, for the purpose of describing the sample of persons interviewed.

### **Interview questions:**

1. Could you describe your background for me? How long have you held your current position? What other positions have you held in criminal justice, and for how long?
2. How do cases get assigned to you? Is there any specialization in terms of which cases get assigned? Specifically, what happens with cases involving drug offenders?
3. How much of your time do you spend working on cases involving drug offenders? How much time on average do people in your office spend on drug cases?
4. Could you describe the makeup of drug offenses in this county? What kinds of offenses do you typically see? What kinds of offenders? Has the makeup of offenders and offenses changed over the last (five/ten) years?
5. How much leeway do you have in decisions about drug offender cases? Are individuals typically charged with the same offenses for which they are arrested? If not, how and why do the charges change?
6. Do you have a good sense of what a particular drug offense is worth in terms of a plea or sentence? Can you provide an example of an offense and its worth? Are the

guidelines consistent with what most people in your office think drug crimes are worth? If not, how do you resolve this?

7. Do the prosecution and defense ever bargain about specific guidelines issues like the offense seriousness score or the prior record score? How often? If there is disagreement over a guidelines issue, how is it usually resolved?
8. How often does the prosecution ask that guidelines enhancements be applied? Are the enhancements used to influence plea agreements?
9. What are the key elements in the decision to (recommend/sentence) an offender to DOSA (treatment option)? How (has this changed/do you foresee this changing) with the new sentencing reforms?
10. How does jail or prison capacity affect sentencing? How (has this changed/do you foresee this changing) with the new sentencing reforms?
11. How do individual characteristics, specifically admission of a drug problem, affect sentencing? Are there other individual characteristics that affect sentencing decisions? How does an individual's prior record affect sentencing? How (has this changed/do you foresee this changing) with the new sentencing reforms?

**Appendix I:  
Coding Form for Case Files**

County: (King=1, Pierce=2, Yakima=3) \_\_\_\_\_

CAUSE NUMBER:   9   -    -    -    -    -    -    -   

CCN NUMBER: \_\_\_\_\_

NUMBER OF DEFENDANTS NAMED ON CASE FILE: \_\_\_\_\_

**I. Offender Information: Demographic**

Date of Birth \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Sex (Male = 0 / Female = 1) \_\_\_\_\_

Race \_\_\_\_\_  
White = 0  
Black = 1

N. Am. = 2  
Asian = 3  
Hispanic=4 Specify \_\_\_\_\_  
Other = 5 Specify \_\_\_\_\_

Evidence of Hispanic origin (n=0,y=1) \_\_\_\_\_ (Surname or place of birth/residence)

**II. Arrest Information**

Arresting Offense (most serious) \_\_\_\_\_

NCIC Crime Code \_\_\_\_\_

Date of Arrest (booking, on police form) \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Detention recommended? (n=0, y=1) \_\_\_\_\_

Deadly weapon used/present? (n=0, y=1) \_\_\_\_\_

Drug Zone violation? (n=0, y=1, 8=na) \_\_\_\_\_

Cooperative witnesses present? (n=0, y=1) \_\_\_\_\_

Co-offenders? (n=0, y=1) \_\_\_\_\_ How many?      

Type of drugs \_\_\_\_\_

Quantity of drugs (amnt/number) \_\_\_\_\_ units (e.g. grams; ounces) \_\_\_\_\_

Est. value of drugs \$ \_\_\_\_\_ , \_\_\_\_\_ , \_\_\_\_\_ . 0 0

Evidence of Intent to deliver? (y/n) \_\_\_\_\_ describe: \_\_\_\_\_

Arrest pursuant to: (y=1; n=0)

active investigation \_\_\_\_\_ (e.g., targeted, w/ informant undercover)

buy/bust unit \_\_\_\_\_ (e.g., street operations in Seattle)

officer observed \_\_\_\_\_

routine stop/search \_\_\_\_\_ (e.g. traffic stops)

other \_\_\_\_\_ describe: \_\_\_\_\_

Evidence of peripheral involvement? \_\_\_\_\_ describe: \_\_\_\_\_

**III. Filing Decisions**

Initial Primary Charge name \_\_\_\_\_

RCW # \_\_\_\_\_

Number of counts (# all offenses) \_\_\_\_ \_\_\_\_

Were charges ever amended (n=0,y=1) \_\_\_\_ (if no, skip to V)

Were the charges reduced or increased \_\_\_\_ (1 = increased, 2 = reduced, 7 = dk)

Amended counts (total offenses) \_\_\_\_

Amended charge name \_\_\_\_\_

RCW # \_\_\_\_\_

**IV. Conditions of early release:**

Prosecutor's recommendation \_\_\_\_\_

- unconditional release 0 \_\_\_\_\_
- conditional release 1 \_\_\_\_\_
- personal recog. 2 \_\_\_\_\_
- bail 3 \_\_\_\_\_
- no early release 4 \_\_\_\_\_
- Recommended bail amount (\$) \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.
- 0 0

Judge's order \_\_\_\_\_

- unconditional release 0 \_\_\_\_\_
- conditional release 1 \_\_\_\_\_
- personal recog. 2 \_\_\_\_\_
- bail 3 \_\_\_\_\_
- no early release 4 \_\_\_\_\_
- Bail amount ordered (\$) \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.
- 0 0

**V. State's Sentencing Recommendation (SSR)**

A. SSR for initial charge (1=present, 0 if not) \_\_\_\_ (if no, skip to B)  
(code each of the following 1 if ordered, 0 if not)

1. \_\_\_\_ Alternative Sentence conversion  
if "yes" \_\_\_\_ Alternative sentence total confinement to be converted \_\_\_\_\_  
if "no" \_\_\_\_ Reasons for not recommending conversion  
\_\_\_\_ Criminal history  
\_\_\_\_ Failure to appear history  
\_\_\_\_ other specify
2. \_\_\_\_ Total Confinement \_\_\_\_\_ days / weeks / months / years (circle one)
3. \_\_\_\_ Sentence Modification \_\_\_\_\_
4. \_\_\_\_ Community Service, amount of time \_\_\_\_\_ days / weeks / months / years
5. \_\_\_\_ Community Supervision, amount of time \_\_\_\_\_ days / weeks / months / years
6. \_\_\_\_ Community Placement, amount of time \_\_\_\_\_ days / weeks / months / years
7. \_\_\_\_ Monetary payments ordered

8. \_\_\_\_ Exceptional sentence ordered.

B. Sentencing Recommendation, Amend. Charge (present=1, no=0) \_\_\_\_ (if no, skip to VII)

- 1. \_\_\_\_ Alternative Sentence conversion  
 if "yes" \_\_\_\_ Alternative sentence total confinement to be converted \_\_\_\_\_  
 if "no" \_\_\_\_ Reasons for not recommending conversion  
     \_\_\_\_ Criminal history  
     \_\_\_\_ Failure to appear history  
     \_\_\_\_ other specify
- 2. \_\_\_\_ Total Confinement \_\_\_\_\_ days / weeks / months / years (circle one)
- 3. \_\_\_\_ Sentence Modification \_\_\_\_\_
- 4. \_\_\_\_ Community Service, amount of time \_\_\_\_\_ days / weeks / months / years
- 5. \_\_\_\_ Community Supervision, amount of time \_\_\_\_\_ days / weeks / months / years
- 6. \_\_\_\_ Community Placement, amount of time \_\_\_\_\_ days / weeks / months / years
- 7. \_\_\_\_ Monetary payments (any) ordered
- 8. \_\_\_\_ Exceptional sentence ordered—Above or Below standard range.

**VI. Conviction and Sentencing (J&S or Plea/trial form) On primary charge**

Offense Seriousness Level \_\_\_\_\_  
 Offender Score \_\_\_\_\_  
 Standard Range \_\_\_\_\_ to \_\_\_\_\_ days, weeks, months, years.  
 (circle one)

Conviction type \_\_\_\_ (1=plea; 2=bench; 3=jury)

On plea to: AS CHARGED (0=no, 1 = yes, 8 if trial) \_\_\_\_\_  
 Lesser Charge pled (0=no, 1 = yes, 8 if trial) \_\_\_\_\_  
 Lesser Charge convicted (if at trial) (0=no, 1 = yes, 8 if plea) \_\_\_\_\_

Code Special Findings (1 if apply; 0 if don't apply)

- \_\_\_\_ deadly weapon;
- \_\_\_\_ school zone, on counts \_\_\_\_\_
- \_\_\_\_ uncharged offenses

- \_\_\_\_ *DISMISS*
- \_\_\_\_ *REAL FACTS*
- \_\_\_\_ *RESTITUTION*
- \_\_\_\_ *STATE RECOMMENDATION*  
     \_\_\_\_ *DEFENDANT AGREES*  
     \_\_\_\_ *DEFENDANT DISPUTES*

Maximum on count \_\_\_\_\_ not more \_\_\_\_\_ years and/or fine \_\_\_\_\_





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WASHINGTON STATE MINORITY AND JUSTICE COMMISSION

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