

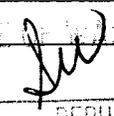
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COURT OF APPEALS
DIVISION II

NO. 39621-1

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

FRAZIER, ZACHARY LYN

Appeal from the Superior Court of Pierce County
The Honorable Judge Frank E. Cuthbertson

No. 05-1-03395-1

BRIEF OF RESPONDENT

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

1. Whether the 2008 amendment to RCW 9.94A.530 is remedial in nature, and thus applies retroactively.
2. Whether the legislative intent behind the 2008 amendment to RCW 9.94A.530 is that it be applied retroactively.
3. Whether the parties fully argued the defendant's criminal history during sentencing in 2006.

B. STATEMENT OF THE CASE.

On July 12, 2005, the Pierce County Prosecutor charged Zachary Frazier, hereafter defendant, with two counts of robbery in the first degree, robbery in the second degree, burglary in the first degree, assault in the third degree, and a misdemeanor drug count in cause number 05-1-03395-

1. CP 1-5. An amended information was filed on October 25, 2005, alleging robbery in the first degree, two counts of assault in the second degree, burglary in the first degree, assault in the third degree, and the misdemeanor drug charge. CP 134-137. Defendant's jury trial began on April 19, 2006. The jury convicted defendant of the five felonies on May 16, 2006. CP 10-22.

Defendant was sentenced on June 2, 2006. CP 10-22. The parties agreed that defendant had three prior felonies in Washington State which counted in his offender score. 1 RP 4. The prosecutor presented prior Washington State judgments and sentences to show that defendant had

five prior California convictions.¹ CP 101. Defendant did not deny that the California convictions existed or that they were comparable to Washington crimes. He objected to the inclusion of the California convictions from the 1980's based on his belief they had "washed out." CP102-103. Defendant then acknowledged that the issue was irrelevant since his offender score would be over nine with or without the challenged California convictions. CP 103.

Defendant and his attorney signed the State's Stipulation On Prior Record And Offender Score, in which he stipulates that his correct offender score is nine. CP 138-140. The trial court accepted the State's calculation of defendant's offender score as nine + and sentenced defendant with an offender score of 9, resulting in 156 months on the robbery in the first degree, 84 months on the two assaults in the third degree, 116 months on the burglary in the second degree, and 60 months on the assault in the third degree. CP 16, 105.

Defendant timely appealed the June 2, 2006, sentence, arguing that the assault and robbery charges should merge. The Court of Appeals agreed and vacated both of the defendant's assault two convictions. CP

¹ A review of defendant's Stipulation On Prior Record And Offender Score, shows one count of UPCS from California in 1985, and three two counts in 1987, and one count of UPCS in 1989. He also has a UPCS from 1993. CP 138-140.

23-53. The Court of Appeals remanded the case for re-sentencing on March 17, 2009. The re-sentencing was scheduled for July 1, 2009. 1 RP 3.

On July 1, 2009, the Prosecutor provided the trial judge with certified copies of defendant's California convictions. 1 RP 4, 7. Defendant objected to the Prosecutor supplementing the 2006 sentencing record with new evidence. 1 RP 4. Defense argued that RCW 9.94A.530(2), which was in effect at the time of defendant's 2006 sentencing, prohibited the inclusion of supplemental documents at subsequent sentence hearings. 1 RP 4. The prosecutor asked the court to sentence defendant pursuant to the 2008 amendment to RCW 9.94A.530(2), which does allow the prosecutor to present supplemental documents at a re-sentencing. 1 RP 4. CP 87-98, 121-128. The case was recessed to July 31, 2009, for the judge to consider whether to accept the prosecutor's supplemental evidence. 1 RP 5, 10.

When the case reconvened on July 31, 2009, the judge determined that *State v. Pillatos* applied to this case and allowed him to accept supplemental documents at sentencing. 1 RP 16. He then reviewed the supplemental documents from the Prosecutor, and found that defendant's contested California convictions did not wash. 1 RP 17 - 23. The trial court re-sentenced defendant in conformity with the appellate court's mandate that his two felony assault convictions merge with the robbery count. 1 RP 25-16. Even with the merger of these counts, defendant's

offender score remained at nine. 1 RP 23. Defendant was re-sentenced to 156 months on the robbery in the first degree, 116 months for the burglary in the second degree, and 60 months for the assault in the third degree. 1 RP 26, CP 62.

Defendant filed a timely notice of appeal following his re-sentence. CP 68-77.

C. ARGUMENT.

1. THE 2008 AMENDMENT TO RCW 9.94A.530 IS REMEDIAL AND SO SHOULD BE APPLIED RETROACTIVELY.

Statutes are generally presumed to apply prospectively, but when a statutory change is remedial in nature and not substantive, case law has established that it is to be applied retroactively. *Johnston v. Beneficial Management*, 85 Wn. 2d 637, 538 P.2d 510 (1975); *Macumber v. Shafer*, 96 Wn. 2d 568, 570, 637 P.2d 645 (1981); *Miebach v. Colasurdo*, 102 Wn. 2d 170, 180-1, 685 P.2d 1074 (1984).

The Washington Supreme Court in *State v. T.K.*, 139 Wn.2d 320, 333, 987 P.2d 63 (1999) stated that the “presumption of prospectivity can be overcome if: (1) the Legislature explicitly provides for retroactivity *Landgraf v. USI Film Products*, 511 U.S. 244, 270, 278; (2) the

amendment is “curative,” *In re F.D. Food Processing, Inc.*, 119 Wn.2d 452, 461-62, 832 P.2d 1303 (1992); or (3) the statute is “remedial,” *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997).

In *Johnson*, the Washington Supreme Court defines a remedial statute as one which “relates to practice, procedures, or remedies, and does not affect a substantive or vested right.” *Johnston supra* 641. See also *In re Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990); (An exception is recognized, however, if a statute is remedial in nature and retroactive application would further its remedial purpose.) *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

An example of a procedural change in the law is found in *State v. Rodriguez*, 61 Wn. App. 812, 814-815, 812 P.2d 868 (1991). Division Two of the Court of Appeals held that an amendment to the Rules of Appellate Procedure 2.2(b), which authorized the State to appeal a miscalculation of the offender score, applied retroactively because “the amendment was procedural, and the presumption is that procedural enactments apply retroactively.” The *Rodriguez* analysis is consistent with the case at bar, which warrants retroactive application of new legislation on a procedural issue, correcting an offender score after sentencing.

Another example of the application of a procedural change in the law is the Washington Supreme Court's decision in *State v. Blank*, 131 Wn.2d 230, 250, 930 P.2d 1213 (1997). Appellate costs were imposed against the defendant after he had lost an appeal. The defendant appealed the imposition of these costs arguing that RCW 10.73.160, which allows the imposition of the appellate costs, was enacted after his underlying conviction. The court did not agree that the imposition of costs against the defendant was a retroactive application of the statute. The court then went on to find that the statute was a procedural statute which "does not affect vested or substantive rights, and thus could be applied retroactively in any event." *Id.* at 248.

Defense argues that the 2008 amendment to RCW 9.94A.530 is substantive, not merely procedural. This argument is misguided since no new rights or obligations vested in defendant as a result of the amendment. The Washington State Supreme Court recently decided *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), which confirmed that statutory changes generally operate prospectively to give fair warning that a violation carries specific consequences. *Id.* at 470, citing *In re Estate of Burns*, 313 Wn.2d 104, 110, 928 P.2d 1094 (1997). But if the changes to the statute do not alter the consequences of the crime, then there is likely no relevant lack of notice. *Id.* citing *Accord In Pers. Restraint of Mota*, 114 Wn.2d 465, 788 P.2d 538 (1990).

Pillatos does contain an analysis of what constitutes a retroactive statute.

A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Pape v. Dep’t of Labor & Industry*, 43 Wash.2d 736, 740-41, 264 P.2d 241 (1953) (citing 50 Am.Jur. 492, Statutes § 476 (1944)). *Supra* at 471.

As Justice Stevens noted:

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates “retroactively” comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id.

Citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994) (citation and footnote omitted).

The *Pillatos* court pointed out that the *ex post facto* rule is a prohibition designed to ensure fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated, not to preserve an individual’s right to less

punishment. *Supra.* at. 475.² When the court considered the prosecutor's supplemental evidence at the 2009 sentencing, the defendant was held accountable for his true criminal history and offender score. Had the court excluded the supplemental evidence, defendant would have received the unwarranted windfall of a shorter sentence.

Defendant would have the trial court in this case disregard several of his California convictions at his re-sentencing defendant, despite Section 5 of the Chapter 231, which states that the 2008 amendment to RCW 9.94A.530 applies retroactively. To accomplish this, he parses the various sections of Chapter 231 of the 2008 Laws, to argue that the amendment to RCW 9.94A.520(2) is excluded from retroactive application. The result of this construction would be in direct opposition to the legislative intent that the 2008 amendment apply retroactively, and that it ensures that the punishment for a crime is proportionate to the offender's criminal history.

Defense also argues that the trial court mistakenly relied on *State v. Pillatos* in applying the 2008 amendment to RCW 9.94A.530(2) to re-

² ...the mere risk that an offender could receive a higher sentence under new procedures does not violate the ex post facto clause.... Instead, we must determine whether the new law is (1) is substantive or merely procedural; (2) is retrospective (applies to events before its enactment; and (3) disadvantages the person affected by it.... In the context of an act already criminally punished or punishable, "disadvantage" means the statute alters the standard of punishment which existed under the prior law. *Id.* at 476.

sentence defendant. When defendant was sentenced in 2006, the existing statute did not allow for supplemental evidence to be presented at re-sentencing. Because his initial sentence in 2006 predated the 2008 amendment, use of the current RCW 9.94A.530(2) would constitute a retroactive application of the 2008 amendment to his 2006 sentence. This argument is incorrect since the 2008 amendment would not change the result of the 2006 sentencing. If defendant's prior California convictions washed in 2006, they would still wash. What does change is the fact that after defendant's appeal, when he was re-sentenced, the State was able to present evidence of his prior criminal convictions. Due process still requires that the prosecutor fulfill his obligation to prove the convictions. Defendant's argument that the 2008 amendment can not be applied to him at time of re-sentencing is not well founded.

Defendant asks this Court to interpret RCW 9.94A.345 as prohibiting the retroactive application of RCW 9.94A.530 as amended in 2008.

RCW 9.94A.345 Timing. Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

This statute was enacted as a result of the Washington State Legislature's dissatisfaction with the Washington Supreme Court's decision in *State v. Cruz*, 139 Wn.2d, 186, 985 P.2d 384 (1999). In *Cruz* the issue was whether a prior conviction washed or should be included in the defendant's current offender score. Because the legislative change

was to the length of crime-free time required for a prior conviction to wash, the court held that **Cruz** involved a substantive issue, not a procedural one. Therefore, it is not analogous to this case.

To use any justification to disregard the 2008 amendment to RCW 9.94A.530(2) would be to defeat the clear intent of the legislature, to ensure that a defendant's sentence is based on his true criminal history. The 2008 amendment to RCW 9.94A.530 is a procedural change to a statute. Procedural changes may be retroactively applied to defendant's case, even though the statutory enactment occurred after the defendant had been sentenced, as **Rodriguez**, **Blank** and **Pillatos** show. Defendant was properly sentenced on July 31, 2009.

2. THE LEGISLATIVE INTENT BEHIND THE 2008 AMENDMENT TO RCW 9.94A.530 IS THAT SENTENCINGS AND RE-SENTENCINGS REFLECT TRUE OFFENDER SCORES BASED ON ACCURATE CRIMINAL HISTORIES.

Analysis of legislative intent regarding retroactivity is not restricted to the statute's express language. Intent may also be gleaned from other sources, including from legislative history. **In Re F.D. Processing, Inc**, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). **In re Marriage of MacDonald**, 104 Wn.2d 745, 748, 709 P.2d 1196 (1985); *see also* **Howell v. Spokane & Inland Empire Blood Bank**, 114 Wn.2d at 47, 785 P.2d 815 (1990) (the court looks not only to the statute's language, but

also to its purpose). *But see Miebach v. Colasurdo*, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984) (holding that retroactivity generally must be expressed).

RCW 9.94A.530, as amended in 2008, took effect on June 12, 2008. It addressed the Washington State Legislature's desire for accuracy in defendants' criminal histories, which act as the basis for their sentences. The statement of legislative intent found in the Laws of 2008, Chapter 231, section 1 provides the purpose of the amendment: (1) ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) ensuring that punishment is just; and (3) ensuring that sentences are commensurate with the punishment imposed on others for committing similar offenses. *See* Appendix 1.

Section 4, Chapter 231 of the 2008 Laws, amended RCW 9.94A.530(2) to include the following language:

On remand for re-sentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding the criminal history, including criminal history not previously presented. *See* Appendix 1.

Section 5 of the 2008 amendment states:

Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after the effective date of sections 1 through 4 of this act. *See* Appendix 1.

Based on a clear reading of Section 5, the Legislative intent is that the 2008 amendment applies retroactively. Thus, the logical conclusion would be that Section 4, which amends RCW 9.94A.530(2), should also be applied retroactively. This reading is squarely in line with the intent of the 2008 amendment. Appendix 1.

The Legislature deemed the 2008 amendment was necessary, because RCW 9.94A.530(2) was interpreted by courts as prohibiting prosecutors from introducing new or supplemental evidence regarding criminal history at re-sentencing hearings. Thus, defendants' sentences did not always reflect their true criminal histories. *See: In Re Caldwell*, 155 Wn.2d 867, 123 P.3d 456 (2005), *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), and *State v. McCorkle*, 137 Wn.2d 490, 973 P.2d 461 (1999).

The stated legislative intent in the 2008 amendment to RCW 9.94A.530 was to ensure accurate criminal histories at sentencings and re-sentencings. To apply the amendment to RCW 9.94A.530(2) prospectively only would result in some appeals, like defendant's, from the Legislative intent. There could not be a more absurd result.

Defendant cites *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), to support his assertion that he was denied due process when supplemental evidence of his criminal history was provided in 2009. The

Lopez prosecutor recounted, but did not provide evidence of defendant's prior convictions at sentencing. *Id.* at 518. Lopez objected to the inclusion of unproven convictions in his offender score. The sentencing court did not recess for the prosecutor to get evidence of the convictions, but included them in the offender score. *Id.* Lopez appealed the inclusion of the asserted priors, and the state cross-appealed, asking to be allowed an opportunity to prove the prior convictions. *Id.* at 519.

The Washington State Supreme Court remanded *Lopez* for re-sentencing, denying the prosecution an opportunity to prove defendant's convictions at re-sentencing, because "that would send the wrong message." *Id.* at 523. The *Lopez* opinion does not cite any authority for barring the State an opportunity to provide evidence of Lopez's prior convictions at re-sentencing. Historically, the United States Supreme Court has found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense". *Monge v. California*, 524 U.S. 721, 730, 118 S. Ct. 2246 (1998). The Washington State Legislature cites *Lopez* as one of the court decisions it seeks to remedy in the 2008 legislative amendment to RCW 9.94A.530. Therefore, *Lopez* should not be treated as controlling law in this case.

RCW 9.94A.530 as amended in 2008 applies fairly in this case. The amendment does not alter the standard of punishment which existed under the prior law; it does not change the sentencing grid that applies to

defendant, he is subject to the same punishment he would have received had the prosecutor initially proven in 2006 that his California criminal convictions did not wash. The amendment does not put the defendant at a disadvantage, except that the court will consider his true criminal history, which is the same risk he faced at the time of his original sentencing in 2006. Defendant has no vested right to a prior, more lenient offender score calculation, which his interpretation of the Laws of 2008, Chapter 231 would give him. Defendant has not been denied due process by the application of RCW 9.94A.530 as amended in 2008 at his re-sentencing. Defendant's request for re-sentencing should be denied.

3. THE PARTIES DID NOT FULLY ARGUE THE DEFENDANT'S CRIMINAL HISTORY DURING SENTENCING IN 2006.

To establish a defendant's criminal history for sentencing purposes, the State must prove the existence of prior foreign convictions by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 185-186, 713 P.2d 719718, *cert. denied*. 479 U.S. 930, 107 S. Ct. 398, 93 L.Ed. 2d 351 (1986), RCW 9.94A.110. If a defendant disputes a material fact at sentencing, the court must either not consider the fact or conduct an evidentiary hearing on the point. RCW 9.94A.307(2). But if no timely and specific objection is made, the information is considered to be

acknowledged. RCW 9.94A.370(2). RCW 9.94A.370(2); *State v. Mail*, 121 Wn.2d. 707, 713, 854 P.2d 1042 (1993). The court must now consider what constitutes a timely and specific objection.

During defendant's 2006 sentencing, his attorney stated:

Your honor, initially, it was my client's belief that because some of the offenses occurred in the '80's, that there would be an applicable washout period. Given the fact that he was convicted of other current offenses which make his score six I believe. [Schacht] Seven. [Defense counsel continues] we do acknowledge that there are three additional felonies in Washington that occurred in '01, '03 and '04. So that being the case even if the prior convictions did wash, we still believe there would be nine points. I tried explaining that to Mr. Frazier, and initially I told him we would argue his points because I really felt like there was an applicable washout period, but I didn't know how many other current offenses obviously.... So saying those things, Your Honor, I do acknowledge that it's nine points. My client wishes to put on the record that the feels like some of his prior history does wash out. CP 102 - 103.

This is not a clear objection by defendant to inclusion of his prior criminal history. Defendant has never contested that he had the five prior California felonies. He objected to the inclusion of the California felonies in his offender score based on his belief that they washed. However, defendant signed the Stipulation On Prior Record And Offender Score which agrees that these are his prior convictions, and that his offender score is nine. CP 138-140. Defendant went ahead with the sentencing. He did not request an evidentiary hearing for the State to prove the California priors by a preponderance of the evidence. Defendant could be

construed to have waived his objection in 2006, by proceeding to sentencing without requesting a hearing to clarify his offender score.

At the 2006 sentencing, neither party needed to fully argue whether the convictions washed because defendant conceded that the issue was moot. It was only after defendant appealed the merger issue and his offender score was lowered that he became interested in arguing that the California convictions washed.

Defendant now argues that on June 2, 2006, he raised a specific objection to the inclusion of his California convictions, and the disputed issues were fully argued to the sentencing court. Defendant relies on *Lopez* to support its argument that the State cannot now provide supplemental evidence of the defendant's prior convictions. Lopez did not object to the inclusion of his prior convictions and then equivocate as to whether evidence of the priors was necessary. Defendant did. The *Lopez* decision allowed the State to supplement the documents it presented at sentencing because, like here, the offender score had not been fully argued at the initial sentencing. *Id.*

Defense also cites *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2008). Like defendant, Mendoza was convicted by a jury in 2006. Mendoza did not confirm or dispute his offender score of nine at sentencing. Thus, the State provided no evidence of his prior convictions.

Mendoza then challenged his offender score on appeal. *Id.* at 920. The Washington Supreme Court remanded the case on April 16, 2009, for re-sentencing, which included new argument and evidence by the state. *Id.* at 930. The Supreme Court stated that it allows belated challenges to criminal history relied on by sentencing courts to preserve the integrity of sentencing laws. *Id.* at 920. To allow a review of criminal history used in a prior sentencing tends to bring sentences in conformity and compliance with existing sentencing statutes. *Id.* The ***Mendoza*** decision also stated that if the issue of prior criminal history had been fully argued, then no more evidence would be introduced at re-sentencing. *Id.* at 930

The defendant in this case did not pursue his 2006 objection to the criminal history because he assumed that it was irrelevant based on his high number of prior offenses. His criminal history has not been fully argued by either party. To foreclose that clarification of his true offender score would be to defeat the purpose of the 2008 amendment to RCW 9.94A.530. The legislative intent that additional evidence be introduced at subsequent sentence hearings in order to ensure accurate sentences can only be served by allowing additional proof of the defendant's California convictions. Defendant's motion to exclude this evidence should be denied.

D. CONCLUSION

The 2008 amendment to RCW 9.94A.539(2) is a remedial change enacted to ensure that an offender's full criminal history is considered when he is sentenced. The "procedural" nature of the amendment allows it to be applied retroactively. Defendant's interpretation of Section 5 of the amendment would lead each section of RCW 9.94A.530 to be applied retroactively except (2). This leads to a result which is contrary to the legislative intent of chapter 231 of the 2008 Laws. Finally, since the merits of defendant's California convictions were not fully argued at sentencing in 2006, the parties are now allowed to put the State to the burden of proving all of defendant's criminal history by a preponderance of the evidence. Defendant's appeal that the State is precluded from supplementing the 2006 evidence at the 2009 re-sentencing should be denied.

DATED: March 30, 2010.

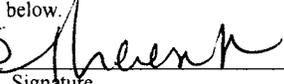
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Certificate of Service:

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

3-31-09 
Date Signature

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APPENDIX

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WA LEGIS 231 (2008)
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 (Publication page references are not available for this document.)

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WASHINGTON 2008 LEGISLATIVE SERVICE
 60th Legislature, 2008 Regular Session

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CHAPTER 231

H.B. No. 2719

CONVICTION OF CRIME--CRIMINAL HISTORY RECORD INFORMATION--SENTENCING GUIDELINES
 AN ACT Relating to ensuring that offenders receive accurate sentences; amending
 RCW 9.94A.500, 9.94A.530, 9.94A.737, 9.94A.740, 9.94A.501, 9.94A.505, 9.94A.610,
 9.94A.612, 9.94A.625, 9.94A.650, 9.94A.670, 9.94A.690, 9.94A.728, 9.94A.760,
 9.94A.775, 9.94A.780, 9.94A.820, 4.24.556, 9.95.017, 9.95.064, 9.95.110, 9.95.123,
 9.95.420, 9.95.440, 46.61.524, 72.09.015, 72.09.270, 72.09.345, and 72.09.580;
 reenacting and amending RCW 9.94A.525, 9.94A.030, 9.94A.660, and 9.94A.712;
 adding new sections to chapter 9.94A RCW; adding new sections to chapter 72.09
 RCW; adding a new chapter to Title 9 RCW; creating new sections; recodifying
 RCW 9.94A.628, 9.94A.634, 9.94A.700, 9.94A.705, 9.94A.710, 9.94A.610, 9.94A.612,
 9.94A.614, 9.94A.616, 9.94A.618, and 9.94A.620; repealing RCW 9.94A.545,
 9.94A.713, 9.94A.715, 9.94A.720, 9.94A.800, 9.94A.830, and 79A.60.070; providing
 an effective date; and providing an expiration date.

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

NEW SECTION. **Sec. 1.** It is the legislature's intent to ensure that offenders
 receive accurate sentences that are based on their actual, complete criminal his-
 tory. Accurate sentences further the sentencing reform act's goals of:

- (1) Ensuring that the punishment for a criminal offense is proportionate to the
 seriousness of the offense and the offender's criminal history;
- (2) Ensuring punishment that is just; and
- (3) Ensuring that sentences are commensurate with the punishment imposed on oth-
 ers for committing similar offenses.

Given the decisions in *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*,
 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); and *State v. Mc-*
Corkle, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the
 provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sen-
 tences imposed accurately reflect the offender's actual, complete criminal his-
 tory, whether imposed at sentencing or upon resentencing. These amendments are

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consistent with the United States supreme court holding in *Monge v. California*, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.

Sec. 2. RCW 9.94A.500 and 2006 c 339 s 303 are each amended to read as follows:

<< WA ST 9.94A.500 >>

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, the court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court.

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. In addition, the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. If the court is satisfied by a preponderance of the evidence that the defendant has a

criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all risk assessment reports and presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

(2) To prevent wrongful disclosure of information related to mental health services, as defined in RCW 71.05.445 and 71.34.345, a court may take only those steps necessary during a sentencing hearing or any hearing in which the department presents information related to mental health services to the court. The steps may be taken on motion of the defendant, the prosecuting attorney, or on the court's own motion. The court may seal the portion of the record relating to information relating to mental health services, exclude the public from the hearing during presentation or discussion of information relating to mental health services, or grant other relief to achieve the result intended by this subsection, but nothing in this subsection shall be construed to prevent the subsequent release of information related to mental health services as authorized by RCW 71.05.445, 71.34.345, or 72.09.585. Any person who otherwise is permitted to attend any hearing pursuant to chapter 7.69 or 7.69A RCW shall not be excluded from the hearing solely because the department intends to disclose or discloses information related to mental health services.

Sec. 3. RCW 9.94A.525 and 2007 c 199 s 8 and 2007 c 116 s 1 are each reenacted and amended to read as follows:

<< WA ST 9.94A.525 >>

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

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

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be in-

cluded in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

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

(5)(a) In the case of multiple prior convictions, for the purpose of computing

the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

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

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for

each prior juvenile nonviolent felony conviction.

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

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

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

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior

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Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130~~(10)~~ **(11)**, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW 9A.44.130~~(10)~~ **(11)**, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community placement custody, add one point. **For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.--RCW (the new chapter created in section 56 of this act).**

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. **Accordingly, Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.**

Sec. 4. RCW 9.94A.530 and 2005 c 68 s 2 are each amended to read as follows:

<< WA ST 9.94A.530 >>

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time

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for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports **and not objecting to criminal history presented at the time of sentencing**. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. **On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.**

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) **(3)** (d), (e), (g), and (h).

<< Note: WA ST 9.94A.500, 9.94A.525 >>

NEW SECTION. **Sec. 5.** Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after the effective date of sections 1 through 4 of this act.

NEW SECTION. **Sec. 6.** The existing sentencing reform act contains numerous provisions for supervision of different types of offenders. This duplication has caused great confusion for judges, lawyers, offenders, and the department of corrections, and often results in inaccurate sentences. The clarifications in this act are intended to support continued discussions by the sentencing guidelines commission with the courts and the criminal justice community to identify and propose policy changes that will further simplify and improve the sentencing reform act relating to the supervision of offenders. The sentencing guidelines commission shall submit policy change proposals to the legislature on or before December 1, 2008.

Sections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community

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custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to the effective date of this section to the extent that such application is constitutionally permissible.

This will effect a change for offenders who committed their crimes prior to the offender accountability act, chapter 196, Laws of 1999. These offenders will be ordered to a term of community custody rather than community placement or community supervision. To the extent constitutionally permissible, the terms of the offender's supervision will be as provided in current law. With the exception of this change, the legislature does not intend to make, and no provision of sections 7 through 58 of this act may be construed as making, a substantive change to the supervision provisions of the sentencing reform act.

It is the intent of the legislature to reaffirm that section 3, chapter 379, Laws of 2003, expires July 1, 2010.

NEW SECTION. **Sec. 7.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall impose a term of community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer:

- (a) A sex offense not sentenced under RCW 9.94A.712;
- (b) A violent offense;
- (c) A crime against persons under RCW 9.94A.411(2);
- (d) A felony offender under chapter 69.50 or 69.52 RCW.

(2) If an offender is sentenced to a term of confinement of one year or less for a violation of RCW 9A.44.130(11)(a), the court shall impose a term of community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer.

(3) If an offender is sentenced under the drug offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.660.

(4) If an offender is sentenced under the special sexual offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.670.

(5) If an offender is sentenced to a work ethic camp, the court shall impose community custody as provided in RCW 9.94A.690.

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(6) If a sex offender is sentenced as a nonpersistent offender pursuant to RCW 9.94A.712, the court shall impose community custody as provided in that section.

NEW SECTION. **Sec. 8.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of community custody:

- (a) A sex offense, other than failure to register under RCW 9A.44.130(1);
- (b) A violent offense;
- (c) A crime against a person under RCW 9.94A.411; or
- (d) A felony violation of chapter 69.50 or 69.52 RCW, or an attempt, conspiracy, or solicitation to commit such a crime.

(2) If an offender is sentenced to a first-time offender waiver, the court may impose community custody as provided in RCW 9.94A.650.

NEW SECTION. **Sec. 9.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

- (a) Require the offender to inform the department of court-ordered treatment upon request by the department;
- (b) Require the offender to comply with any conditions imposed by the department under section 10 of this act;
- (c) If the offender was sentenced under RCW 9.94A.712 for an offense listed in RCW 9.94A.712(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

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- (a) Report to and be available for contact with the assigned community corrections officer as directed;
 - (b) Work at department-approved education, employment, or community restitution, or any combination thereof;
 - (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
 - (d) Pay supervision fees as determined by the department; and
 - (e) Obtain prior approval of the department for the offender's residence location and living arrangements.
- (3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:
- (a) Remain within, or outside of, a specified geographical boundary;
 - (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
 - (c) Participate in crime-related treatment or counseling services;
 - (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
 - (e) Refrain from consuming alcohol; or
 - (f) Comply with any crime-related prohibitions.
- (4) **Special conditions.**
- (a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.
 - (b) (i) In sentencing an offender convicted of an alcohol or drug related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a pro-

gram approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

NEW SECTION. **Sec. 10.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.

(b) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (2)(b).

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

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

(b) Remain within prescribed geographical boundaries;

(c) Notify the community corrections officer of any change in the offender's address or employment;

- (d) Pay the supervision fee assessment; and
- (e) Disclose the fact of supervision to any mental health or chemical dependency treatment provider, as required by RCW 9.94A.722.
- (4) The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.
- (5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.
- (6) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions.
- (7)(a) The department shall notify the offender in writing of any additional conditions or modifications.
- (b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.
- (8) The department may require offenders to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, dependent on the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.
- (9)(a) When a sex offender has been sentenced pursuant to RCW 9.94A.712, the board shall exercise the authority prescribed in RCW 9.95.420 through 9.95.435.
- (b) The department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions based upon the risk to community safety. The board must consider and may impose department-recommended conditions.
- (c) If the department finds that an emergency exists requiring the immediate imposition of additional conditions in order to prevent the offender from committing a crime, the department may impose such conditions. The department may not impose conditions that are contrary to those set by the board or the court and may not

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contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board.

(10) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

NEW SECTION. **Sec. 11.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

No offender sentenced to a term of community custody under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under sections 15 and 21 of this act and RCW 9.94A.737.

"Constructive possession" as used in this section means the power and intent to control the firearm or ammunition. "Firearm" as used in this section has the same definition as in RCW 9.41.010.

NEW SECTION. **Sec. 12.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) Community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) or (2); or (c) at the time of sentencing if no term of confinement is ordered.

(2) When an offender is sentenced to community custody, the offender is subject to the conditions of community custody as of the date of sentencing, unless otherwise ordered by the court.

(3) When an offender is sentenced to a community custody range pursuant to section 7 (1) or (2) of this act, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

NEW SECTION. **Sec. 13.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

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(1) When an offender is under community custody, the community corrections officer may obtain information from the offender's mental health treatment provider on the offender's status with respect to evaluation, application for services, registration for services, and compliance with the supervision plan, without the offender's consent, as described under RCW 71.05.630.

(2) An offender under community custody who is civilly detained under chapter 71.05 RCW, and subsequently discharged or conditionally released to the community, shall be under the supervision of the department for the duration of his or her period of community custody. During any period of inpatient mental health treatment that falls within the period of community custody, the inpatient treatment provider and the supervising community corrections officer shall notify each other about the offender's discharge, release, and legal status, and shall share other relevant information.

NEW SECTION. **Sec. 14.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions of community custody for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody.

(2) If a violation of a condition extended under this section occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040.

(3) If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

NEW SECTION. **Sec. 15.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1)(a) An offender who violates any condition or requirement of a sentence may be sanctioned with up to sixty days' confinement for each violation.

(b) In lieu of confinement, an offender may be sanctioned with work release, home detention with electronic monitoring, work crew, community restitution, inpatient

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treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community.

(2) If an offender was under community custody pursuant to one of the following statutes, the offender may be sanctioned as follows:

(a) If the offender was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728(2), the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

(b) If the offender was sentenced under the drug offender sentencing alternative set out in RCW 9.94A.660, the offender may be sanctioned in accordance with that section.

(c) If the offender was sentenced under the special sexual offender sentencing alternative set out in RCW 9.94A.670, the suspended sentence may be revoked and the offender committed to serve the original sentence of confinement.

(d) If the offender was sentenced to a work ethic camp pursuant to RCW 9.94A.690, the offender may be reclassified to serve the unexpired term of his or her sentence in total confinement.

(e) If a sex offender was sentenced pursuant to RCW 9.94A.712, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.

NEW SECTION. **Sec. 16.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing pursuant to RCW 9.94A.737 for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending.

(2) The department may work with the Washington association of sheriffs and police chiefs to establish and operate an electronic monitoring program for low-risk

offenders who violate the terms of their community custody.

(3) Local governments, their subdivisions and employees, the department and its employees, and the Washington association of sheriffs and police chiefs and its employees are immune from civil liability for damages arising from incidents involving low-risk offenders who are placed on electronic monitoring unless it is shown that an employee acted with gross negligence or bad faith.

NEW SECTION. **Sec. 17.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) If a sanction of confinement is imposed by the court, the following applies:

(a) If the sanction was imposed pursuant to section 15(1) of this act, the sanction shall be served in a county facility.

(b) If the sanction was imposed pursuant to section 15(2) of this act, the sanction shall be served in a state facility.

(2) If a sanction of confinement is imposed by the department, and if the offender is an inmate as defined by RCW 72.09.015, no more than eight days of the sanction, including any credit for time served, may be served in a county facility. The balance of the sanction shall be served in a state facility. In computing the eight-day period, weekends and holidays shall be excluded. The department may negotiate with local correctional authorities for an additional period of detention.

(3) If a sanction of confinement is imposed by the board, it shall be served in a state facility.

(4) Sanctions imposed pursuant to RCW 9.94A.670(3) shall be served in a county facility.

(5) As used in this section, "county facility" means a facility operated, licensed, or utilized under contract by the county, and "state facility" means a facility operated, licensed, or utilized under contract by the state.

NEW SECTION. **Sec. 18.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

The procedure for imposing sanctions for violations of sentence conditions or requirements is as follows:

(1) If the offender was sentenced under the drug offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW

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9.94A.660.

(2) If the offender was sentenced under the special sexual offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.670.

(3) If a sex offender was sentenced pursuant to RCW 9.94A.712, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(4) In any other case, if the offender is being supervised by the department, any sanctions shall be imposed by the department pursuant to RCW 9.94A.737.

(5) If the offender is not being supervised by the department, any sanctions shall be imposed by the court pursuant to section 19 of this act.

NEW SECTION. **Sec. 19.** A new section is added to chapter 9.94A RCW to read as follows:

<< WA ST 9.94A >>

(1) If an offender violates any condition or requirement of a sentence, and the offender is not being supervised by the department, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

(2) If an offender fails to comply with any of the conditions or requirements of a sentence the following provisions apply:

(a) The court, upon the motion of the state, or upon its own motion, shall require the offender to show cause why the offender should not be punished for the noncompliance. The court may issue a summons or a warrant of arrest for the offender's appearance;

(b) The state has the burden of showing noncompliance by a preponderance of the evidence;

(c) If the court finds that a violation has been proved, it may impose the sanctions specified in section 15(1) of this act. Alternatively, the court may:

(i) Convert a term of partial confinement to total confinement;

(ii) Convert community restitution obligation to total or partial confinement; or

(iii) Convert monetary obligations, except restitution and the crime victim penalty assessment, to community restitution hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community restitution;

(d) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations and regarding community restitution obligations; and

(e) If the violation involves a failure to undergo or comply with a mental health status evaluation and/or outpatient mental health treatment, the court shall seek a recommendation from the treatment provider or proposed treatment provider. Enforcement of orders concerning outpatient mental health treatment must reflect the availability of treatment and must pursue the least restrictive means of promoting participation in treatment. If the offender's failure to receive care essential for health and safety presents a risk of serious physical harm or probable harmful consequences, the civil detention and commitment procedures of chapter 71.05 RCW shall be considered in preference to incarceration in a local or state correctional facility.

(3) Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement ordered by the court.

(4) Nothing in this section prohibits the filing of escape charges if appropriate.

Sec. 20. RCW 9.94A.737 and 2007 c 483 s 305 are each amended to read as follows:

~~<< WA ST 9.94A.737 >>~~

~~(1) If an offender violates any condition or requirement of community custody, the department may transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation and subject to the limitations of subsection (3) of this section.~~

~~(2) If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending.~~

~~(3)(a) For a sex offender sentenced to a term of community custody under RCW 9.94A.670 who violates any condition of community custody, the department may impose a sanction of up to sixty days' confinement in a local correctional facility for each violation. If the department imposes a sanction, the department shall submit within seventy-two hours a report to the court and the prosecuting attorney outlining the violation or violations and the sanctions imposed.~~

~~(b) For a sex offender sentenced to a term of community custody under RCW 9.94A.710 who violates any condition of community custody after having completed his or her maximum term of total confinement, including time served on community custody in lieu of earned release, the department may impose a sanction of up to sixty days in a local correctional facility for each violation.~~

~~(c) For an offender sentenced to a term of community custody under RCW 9.94A.505(2)(b), 9.94A.650, or 9.94A.715, or under RCW 9.94A.545, for a crime committed on or after July 1, 2000, who violates any condition of community custody after having completed his or her maximum term of total confinement, including time served on community custody in lieu of earned release, the department may impose a sanction of up to sixty days in total confinement for each violation. The department may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community.~~

~~(d) For an offender sentenced to a term of community placement under RCW 9.94A.705 who violates any condition of community placement after having completed his or her maximum term of total confinement, including time served on community custody in lieu of earned release, the department may impose a sanction of up to sixty days in total confinement for each violation. The department may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community.~~

~~(4) If an offender has been arrested for a new felony offense while under community supervision, community custody, or community placement, the department shall hold the offender in total confinement until a hearing before the department as provided in this section or until the offender has been formally charged for the new felony offense, whichever is earlier. Nothing in this subsection shall be construed as to permit the department to hold an offender past his or her maximum term of total confinement if the offender has not completed the maximum term of total confinement or to permit the department to hold an offender past the offender's term of community supervision, community custody, or community placement.~~

~~(5) The department shall be financially responsible for any portion of the sanctions authorized by this section that are served in a local correctional facility as the result of action by the department.~~

~~(6) If an offender is accused of violating any condition or requirement of community custody, he or she is entitled to a hearing before the department prior to the imposition of sanctions. The hearing shall be considered as offender disciplinary proceedings and shall not be subject to chapter 34.05 RCW. The department shall develop hearing procedures and a structure of graduated sanctions.~~

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~~(7)~~ ~~(2)~~ The hearing procedures required under subsection ~~(6)~~ ~~(1)~~ of this section shall be developed by rule and include the following:

(a) Hearing officers shall report through a chain of command separate from that of community corrections officers;

(b) The department shall provide the offender with written notice of the violation, the evidence relied upon, and the reasons the particular sanction was imposed. The notice shall include a statement of the rights specified in this subsection, and the offender's right to file a personal restraint petition under court rules after the final decision of the department;

(c) The hearing shall be held unless waived by the offender, and shall be electronically recorded. For offenders not in total confinement, the hearing shall be held within fifteen working days, but not less than twenty-four hours, after notice of the violation. For offenders in total confinement, the hearing shall be held within five working days, but not less than twenty-four hours, after notice of the violation;

(d) The offender shall have the right to: (i) Be present at the hearing; (ii) have the assistance of a person qualified to assist the offender in the hearing, appointed by the hearing officer if the offender has a language or communications barrier; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; and (v) question witnesses who appear and testify; and

(e) The sanction shall take effect if affirmed by the hearing officer. Within seven days after the hearing officer's decision, the offender may appeal the decision to a panel of three reviewing officers designated by the secretary or by the secretary's designee. The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to any of the following: (i) The crime of conviction; (ii) the violation committed; (iii) the offender's risk of reoffending; or (iv) the safety of the community.

~~(8)~~ ~~(3)~~ For purposes of this section, no finding of a violation of conditions may be based on unconfirmed or unconfirmable allegations.

~~(9)~~ The department shall work with the Washington association of sheriffs and police chiefs to establish and operate an electronic monitoring program for low-risk offenders who violate the terms of their community custody. Between January 1, 2006, and December 31, 2006, the department shall endeavor to place at least one hundred low-risk community custody violators on the electronic monitoring program per day if there are at least that many low-risk offenders who qualify for the electronic monitoring program.

~~(10)~~ Local governments, their subdivisions and employees, the department and its employees, and the Washington association of sheriffs and police chiefs and its employees shall be immune from civil liability for damages arising from incidents

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~~involving low-risk offenders who are placed on electronic monitoring unless it is shown that an employee acted with gross negligence or bad faith.~~

NEW SECTION. **Sec. 21.** (1) The secretary may issue warrants for the arrest of any offender who violates a condition of community custody. The arrest warrants shall authorize any law enforcement or peace officer or community corrections officer of this state or any other state where such offender may be located, to arrest the offender and place him or her in total confinement pending disposition of the alleged violation.

(2) A community corrections officer, if he or she has reasonable cause to believe an offender has violated a condition of community custody, may suspend the person's community custody status and arrest or cause the arrest and detention in total confinement of the offender, pending the determination of the secretary as to whether the violation has occurred. The community corrections officer shall report to the secretary all facts and circumstances and the reasons for the action of suspending community custody status.

(3) If an offender has been arrested for a new felony offense while under community custody the department shall hold the offender in total confinement until a hearing before the department as provided in this section or until the offender has been formally charged for the new felony offense, whichever is earlier. Nothing in this subsection shall be construed as to permit the department to hold an offender past his or her maximum term of total confinement if the offender has not completed the maximum term of total confinement or to permit the department to hold an offender past the offender's term of community custody.

(4) A violation of a condition of community custody shall be deemed a violation of the sentence for purposes of RCW 9.94A.631. The authority granted to community corrections officers under this section shall be in addition to that set forth in RCW 9.94A.631.

Sec. 22. RCW 9.94A.740 and 1999 c 196 s 9 are each amended to read as follows:

<< WA ST 9.94A.740 >>

(1) ~~The secretary may issue warrants for the arrest of any offender who violates a condition of community placement or community custody. The arrest warrants shall authorize any law enforcement or peace officer or community corrections officer of this state or any other state where such offender may be located, to arrest the offender and place him or her in total confinement pending disposition of the alleged violation.~~ **When an offender is arrested pursuant to section 21 of this act,** the department shall compensate the local jurisdiction at the office of financial management's adjudicated rate, in accordance with RCW 70.48.440. ~~A community corrections officer, if he or she has reasonable cause to believe an offender in community placement or community custody has violated a condition of~~

community placement or community custody, may suspend the person's community placement or community custody status and arrest or cause the arrest and detention in total confinement of the offender, pending the determination of the secretary as to whether the violation has occurred. The community corrections officer shall report to the secretary all facts and circumstances and the reasons for the action of suspending community placement or community custody status. A violation of a condition of community placement or community custody shall be deemed a violation of the sentence for purposes of RCW 9.94A.631. The authority granted to community corrections officers under this section shall be in addition to that set forth in RCW 9.94A.631.

(2) Inmates, as defined in RCW 72.09.015, who have been transferred to community custody and who are detained in a local correctional facility are the financial responsibility of the department of corrections, except as provided in subsection (3) of this section. The community custody inmate shall be removed from the local correctional facility, except as provided in subsection (3) of this section, not later than eight days, excluding weekends and holidays, following admittance to the local correctional facility and notification that the inmate is available for movement to a state correctional institution.

(3) The department may negotiate with local correctional authorities for an additional period of detention, however, sex offenders sanctioned for community custody violations under RCW 9.94A.737(2) to a term of confinement shall remain in the local correctional facility for the complete term of the sanction. For confinement sanctions imposed by the department under RCW 9.94A.737(2)(a) 9.94A.670, the local correctional facility shall be financially responsible. For confinement sanctions imposed under RCW 9.94A.737(2)(b), the department of corrections shall be financially responsible for that portion of the sanction served during the time in which the sex offender is on community custody in lieu of earned release, and the local correctional facility shall be financially responsible for that portion of the sanction served by the sex offender after the time in which the sex offender is on community custody in lieu of earned release.

(4) The department, in consultation with the Washington association of sheriffs and police chiefs and those counties in which the sheriff does not operate a correctional facility, shall establish a methodology for determining the department's local correctional facilities bed utilization rate, for each county in calendar year 1998, for offenders being held for violations of conditions of community custody, community placement, or community supervision. For confinement sanctions imposed under RCW 9.94A.737(2) (c) or (d)

(5) Except as provided in subsections (1) and (2) of this section, the local correctional facility shall continue to be financially responsible to the extent of the calendar year 1998 bed utilization rate for confinement sanctions imposed by the department pursuant to RCW 9.94A.737. If the department's use of bed space in local correctional facilities of any county for such confinement sanctions imposed

~~on offenders sentenced to a term of community custody under RCW 9.94A.737(2) (c) or (d) exceeds the 1998 bed utilization rate for the county, the department shall compensate the county for the excess use at the per diem rate equal to the lowest rate charged by the county under its contract with a municipal government during the year in which the use occurs.~~

Sec. 23. RCW 9.94A.030 and 2006 c 139 s 5, 2006 c 124 s 1, 2006 c 122 s 7, 2006 c 73 s 5, and 2005 c 436 s 1 are each reenacted and amended to read as follows:

<< WA ST 9.94A.030 >>

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

- (1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.
- (2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.
- (3) "Commission" means the sentencing guidelines commission.
- (4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.
- (5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to ~~RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545,~~ **as part of a sentence and served in the community subject to controls placed on the offender's movement and activities by the department. For offenders placed on community custody for crimes committed on or after July 1, 2000, the department shall assess the offender's risk of reoffense and may establish and modify conditions of community custody, in addition to those imposed by the court, based upon the risk to community safety.**
- (6) "Community custody range" means the minimum and maximum period of community custody included as part of a sentence under RCW 9.94A.715, as established by the commission or the legislature under RCW 9.94A.850 ~~for crimes committed on or after July 1, 2000.~~
- (7) ~~"Community placement" means that period during which the offender is subject~~

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

~~(8)~~ **(9)** "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.

~~(9)~~ **(8)** "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.

~~(10)~~ **(9)** "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter or RCW 16.52.200(6) or 46.61.524. Where the court finds that any offender has a chemical dependency that has contributed to his or her offense, the conditions of supervision may, subject to available resources, include treatment. For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

~~(11)~~ **(9)** "Confinement" means total or partial confinement.

~~(12)~~ **(10)** "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

~~(13)~~ **(11)** "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

~~(14)~~ **(12)** "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the de-

termination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

~~(15)~~ **(13)** "Day fine" means a fine imposed by the sentencing court that equals the difference between the offender's net daily income and the reasonable obligations that the offender has for the support of the offender and any dependents.

~~(16)~~ **(14)** "Day reporting" means a program of enhanced supervision designed to monitor the offender's daily activities and compliance with sentence conditions, and in which the offender is required to report daily to a specific location designated by the department or the sentencing court.

~~(17)~~ **(15)** "Department" means the department of corrections.

~~(18)~~ **(16)** "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community ~~supervision~~ **custody**, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

~~(19)~~ **(17)** "Disposable earnings" means that part of the earnings of an offender remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

~~(20)~~ **(18)** "Drug offender sentencing alternative" is a sentencing option available to persons convicted of a felony offense other than a violent offense or a sex offense and who are eligible for the option under RCW 9.94A.660.

~~(21)~~ **(19)** "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403);

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

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

~~(22)~~ **(20)** "Earned release" means earned release from confinement as provided in RCW 9.94A.728.

~~(23)~~ **(21)** "Escape" means:

(a) Sexually violent predator escape (RCW 9A.76.115), escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (RCW 72.66.060), willful failure to return from work release (RCW 72.65.070), or willful failure to be available for supervision by the department while in community custody (RCW 72.09.310); or

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

~~(24)~~ **(22)** "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)); or

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

~~(25)~~ **(23)** "Fine" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specific period of time.

~~(26)~~ **(24)** "First-time offender" means any person who has no prior convictions for a felony and is eligible for the first-time offender waiver under RCW 9.94A.650.

~~(27)~~ **(25)** "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.

~~(28)~~ **(26)** "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW

46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

~~(29)~~ **(27)** "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:

- (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree;
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;
- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;
- (q) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- (r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (s) Any other class B felony offense with a finding of sexual motivation;

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(t) Any other felony with a deadly weapon verdict under RCW 9.94A.602;

(u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

(v) (i) A prior conviction for indecent liberties under RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1) (c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1) (c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997.

~~(30)~~ (28) "Nonviolent offense" means an offense which is not a violent offense.

~~(31)~~ (29) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

~~(32)~~ (30) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

~~(33)~~ (31) "Persistent offender" is an offender who:

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

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one

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conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

(b) (i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection ~~(33)~~ **(31)** (b) (i); and

(ii) Has, before the commission of the offense under (b) (i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b) (i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b) (i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b) (i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b) (i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

~~(34) "Postrelease supervision" is that portion of an offender's community placement that is not community custody.~~

~~(35)~~ **(32)** "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority.

~~(36)~~ **(33)** "Private school" means a school regulated under chapter 28A.195 or 28A.205 RCW.

~~(37)~~ **(34)** "Public school" has the same meaning as in RCW 28A.150.010.

~~(38)~~ **(35)** "Restitution" means a specific sum of money ordered by the sentencing

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court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

~~(39)~~(36) "Risk assessment" means the application of an objective instrument supported by research and adopted by the department for the purpose of assessing an offender's risk of reoffense, taking into consideration the nature of the harm done by the offender, place and circumstances of the offender related to risk, the offender's relationship to any victim, and any information provided to the department by victims. The results of a risk assessment shall not be based on unconfirmed or unconfirmable allegations.

~~(40)~~(37) "Serious traffic offense" means:

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

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

~~(41)~~(38) "Serious violent offense" is a subcategory of violent offense and means:

(a) (i) Murder in the first degree;

(ii) Homicide by abuse;

(iii) Murder in the second degree;

(iv) Manslaughter in the first degree;

(v) Assault in the first degree;

(vi) Kidnapping in the first degree;

(vii) Rape in the first degree;

(viii) Assault of a child in the first degree; or

(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

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

~~(42)~~(39) "Sex offense" means:

(a) (i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130
~~(11)~~ ~~(12)~~;

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

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

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

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

~~(43)~~ ~~(40)~~ "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

~~(44)~~ ~~(41)~~ "Standard sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

~~(45)~~ ~~(42)~~ "Statutory maximum sentence" means the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the crime, or other statute defining the maximum penalty for a crime.

~~(46)~~ ~~(43)~~ "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

~~(47)~~ ~~(44)~~ "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

~~(48)~~ ~~(45)~~ "Transition training" means written and verbal instructions and assistance provided by the department to the offender during the two weeks prior to the offender's successful completion of the work ethic camp program. The transition training shall include instructions in the offender's requirements and obligations during the offender's period of community custody.

~~(49)~~ ~~(46)~~ "Victim" means any person who has sustained emotional, psychological,

physical, or financial injury to person or property as a direct result of the crime charged.

~~(50)~~ ~~(47)~~ "Violent offense" means:

(a) Any of the following felonies:

- (i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;
- (ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;
- (iii) Manslaughter in the first degree;
- (iv) Manslaughter in the second degree;
- (v) Indecent liberties if committed by forcible compulsion;
- (vi) Kidnapping in the second degree;
- (vii) Arson in the second degree;
- (viii) Assault in the second degree;
- (ix) Assault of a child in the second degree;
- (x) Extortion in the first degree;
- (xi) Robbery in the second degree;
- (xii) Drive-by shooting;
- (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
- (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

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

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

~~(51)~~ ~~(48)~~ "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW

9.94A.725.

~~(52)~~ (49) "Work ethic camp" means an alternative incarceration program as provided in RCW 9.94A.690 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.

~~(53)~~ (50) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

Sec. 24. RCW 9.94A.501 and 2005 c 362 s 1 are each amended to read as follows:

<< WA ST 9.94A.501 >>

(1) When the department performs a risk assessment pursuant to RCW 9.94A.500, or to determine a person's conditions of supervision, the risk assessment shall classify the offender or a probationer sentenced in superior court into one of at least four risk categories.

(2) The department shall supervise every offender sentenced to a term of community custody, ~~community placement, or community supervision~~ and every misdemeanor and gross misdemeanor probationer ordered by a superior court to probation under the supervision of the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210:

(a) Whose risk assessment places that offender or probationer in one of the two highest risk categories; or

(b) Regardless of the offender's or probationer's risk category if:

(i) The offender's or probationer's current conviction is for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or