CHAPTER 4
CRIMINAL PRE-TRIAL ISSUES

This chapter covers those pre-trial issues that frequently arise in cases in which the defendant is charged with a crime related to domestic violence. Pre-trial dispositions and diversions are covered in Chapter 8. Matters of general criminal procedure that are covered in the criminal benchbooks are not repeated here. This chapter supplements the criminal benchbooks by including more detailed coverage of the issues that tend to arise in domestic violence cases.

I. Arrest: Warrantless

A. Permissive Warrantless Arrests

A police officer having probable cause to believe that a felony has been committed may arrest the perpetrator without a warrant. RCW 10.31.100(1). Likewise, a police officer may arrest a person without a warrant if the police officer observed the commission of any misdemeanor or gross misdemeanor. Finally, an officer may arrest without a warrant if the officer has probable cause to believe that the person has committed certain misdemeanors specified by RCW 10.31.100(1). These include any misdemeanor or gross misdemeanor involving "physical harm or threats of harm to any person or property or the unlawful taking of property" and involving acts of criminal trespass. RCW 10.31.100(1).

B. Mandatory Warrantless Arrests

An officer must arrest a person whom the officer has probable cause to believe violated an order which restrains the person from contact with the victim or whom the officer believes has committed an assault against a family or household member within four hours of the time that police make contact with the alleged perpetrator. RCW 10.31.100(2)(a)-(c).

RCW 10.31.100(2) provides:

> A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:
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> 1. An order has been issued of which the person has knowledge under, 26.44.063, or Chapter 7.92, 7.90, 9A.46, 10.99, 26.09, 26.10, 26.26, 26.50, 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or daycare, or

prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

2. A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

3. The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved, including whether the conduct was part of an ongoing pattern of abuse.

C. Comparison of Mandatory vs. Permissive Arrest Situations

The situations in which a police officer is required to arrest a perpetrator of a domestic violence offense are rather limited. These include situations where the officer has probable cause to believe that one of a variety of domestic violence

orders has been violated or where the officer has probable cause to believe that specified forms of assault between family or household members have occurred.

On the other hand, an officer, in the exercise of his or her discretion, may arrest a defendant without a warrant in virtually any domestic violence situation because under RCW 10.31.100(1) warrantless arrests are authorized for all felonies and for misdemeanors which involve violence or threats of violence to persons or property, the wrongful taking of property, and acts of criminal trespass.

D. Warrantless Entry Into Victim's Home

A person subject to a domestic violence no-contact order has no standing to challenge his warrantless arrest in the victim's home, even where the victim has specifically declined to authorize the entry. *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000). *See also, State v. Johnson*, 104 Wn. App. 409, 420, 16 P.3d 680, 686 (2001) (defendant in custody; warrantless entry into home to search for other victims permitted; recognition that victims of domestic violence may be uncooperative with police because they may fear retribution from their batterer). *But see, State v. Schultz*, 170 Wn. 3d 746, 248 P.3d 484 (2011) (Mere acquiescence to an officer's entry is not consent; raised voices heard from outside the home did not justify warrantless entry based on the emergency aid exception to requirement for a warrant.)

E. Victim's Consent to Search Home

Consent searches are permissible and reasonable under the Fourth Amendment when consent comes from the occupant or occupants of the premises that are present at the time that consent is requested. The police need not obtain consent from an absent occupant. *Fernandez v. California*, 134 S.Ct. 1126 (2014).

II. Pretrial Release

A. Introduction

In Washington, the law governing personal recognizance, bail, conditions of release, and related matters is the same in domestic violence cases as it is in other criminal prosecutions.

Washington's General Rules are covered in other benchbooks, and the discussion need not be repeated here. In superior court, see Washington State Judges Benchbook, Criminal Procedure, Superior Court. In courts of limited jurisdiction, see Washington State Judges Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. These benchbooks cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and State

- Personal recognizance
- Bail
- Conditions of release
- Factors to be considered by court
- Delay of release
- Release in capital cases
- Violation of conditions
- Failure to appear

In this domestic violence manual, the discussion focuses on the special considerations that should be taken into account in domestic violence cases. Attention is also given to no-contact orders and other special procedures that are available in such cases. The principal rules of court, CrR 3.2 and CrRLJ 3.2, can be found at http://www.courts.wa.gov/court_rules.

B. Research on Danger to Victim During Pretrial Period

1. The lethal potential of domestic violence is well documented.

Across the United States, intimate partner homicides consisted of 11% of all homicides between 1976 and 2005. Intimate partner homicides made up approximately one third of all female homicides, and 3% of all male homicides.[1]

From 1997 to June 2010,[2] 566 people were killed in Washington State domestic violence–related fatalities. These include the children, friends, co-workers, and family of the abused women, as well as four law enforcement officers who intervened.

2. The risk of reabuse pending trial is high.

The victim is especially vulnerable to retaliation or threats by the defendant during the pretrial period.[3] Multiple prosecution and arrest studies broadly concur that abusers who come to the attention of the criminal justice system who reabuse are likely to do so sooner rather than

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[1] S. Catalano, *Intimate Partner Violence in the United States*, Washington DC.: U.S. Department of Justice, Bureau of Justice Statistics (2007).

[2] Jake Fawcett, "Up to Us-Lessons Learned and Goals for Change After Thirteen Years of the Washington State Domestic Violence Fatality Review," *Washington State Domestic Violence Fatality Review 2010* (Washington State Coalition against Domestic Violence, 2010), available at : http://dvfatalityreview.org/

[3] E. Buzawa, G. Hotaling, A. Klein, & J. Byrnes. *Response to Domestic Violence in a Pro-Active Court Setting, Final Report*, Washington DC: U.S. Department of Justice, 95-IJ-CX-0027, National Institute of Justice, NCJ 181427 (1999).

later.[4] The Washington State Institute for Public Policy found that compared to other offenders, domestic violence offenders have higher rates of domestic violence recidivism than non-domestic violence offenders. For example, for offenders with a current domestic violence offense, 18% were convicted for a new domestic violence felony or misdemeanor within 36 months compared to 4% of non-domestic violence offenders.[5]

One study in an urban specialized domestic violence court, where it took on average six and a half to seven months for cases to be disposed, 51% of defendants charged with domestic felonies other than violation of protective orders were rearrested pre-disposition, 14% for a crime of violence and 16% for violation of a protection order. Among those charged with order violations, a felony in New York, the rearrest rate was 47%, including 37% for violating the protective order again.[6]

3. Research also suggests that domestic violence tends to escalate when the victim leaves the relationship.

The research demonstrates that a history of domestic violence may be a reliable indicator that further violence will occur. In addition, the victim may be particularly vulnerable to reassault during attempts to leave or to sever the relationship. Data from the U.S. Department of Justice indicates divorced or separated persons were subjected to the highest rates of intimate partner violence.[7] According to one report, separation from an abuser increased the risk of fatality seven times.[8] Factors to consider in determining risk of reabuse, or homicide, to victims or the public.

Various studies have found that women's perception of risk is important in determining risk of reassault by an intimate partner, and in particular, that victims' prediction of reassault was the strongest single predictor of reassault.[9]

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[4] *Id*; C. Hartley & L. Frohmann, *Cook County Target Abuser Call (TAC): An Evaluation of a Specialized Domestic Violence Court*. Washington D.C.: U.S. Department of Justice (2003), 2000-WT-VX-0003, National Institute of Justice, NCJ 202944.; D. Ford & J. Regoli, *The Indianapolis Domestic Violence Prosecution Experiment, Final Report*. Washington D.C.: U.S. Department of Justice, National Institute of Justice (1993).

[5] E. Drake, L. Harmon, & M. Miller, "*Recidivism Trends of Domestic Violence Offenders in Washington State*, Washington State Institute for Public Policy, Report No. 13-11-1901, November 2013, available at:http://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf.

[6] C. M. Rennison, Ph.D. and Sara Welchans, "Intimate Partner Violence," *Bureau of Justice Statistics Special Report* (United States Department of Justice, May 2000) (NCJ 178247).

[7] S. Catalano, *Intimate Partner Violence in the United States*, supra, at note 1.

[8] J. Campbell et al., "Assessing Risk Factors for Intimate Partner Homicide," *NIJ Journal* 250 (2003).

[9] E.W. Gondolf & D.A. Heckert, *Determinants of women's perceptions of risk in battering relationships*. Violence & Victims 18 (4):371-386, (2003); L. Goodman, M.A. Dutton, & Bennett, L., Predicting repeat abuse among

Prior domestic violence and access to firearms are the strongest and most consistent risk factors for domestic violence homicide, with estrangement, a stepchild living in the home, and unemployment also strongly implicated. Although violence outside of the home and alcohol abuse are also implicated in male-perpetrated domestic violence homicide, they seem to be less strong risk factors than for other types of homicide. Female perpetrators are far less likely to have had a history of perpetrating any kind of violence. Firearms, estrangement, and prior mental health problems in the form of depression or suicidality are particular risk factors for domestic violence murder-suicide.[10] Other aspects of the intimate partner relationship, such as abuse during pregnancy and stalking, have also been implicated as risk factors.

Although there is overlap between the risk factors for reassault by an intimate partner and the risk factors for domestic violence homicide, there seems to be a difference of degree and some differential patterns. For instance, substance abuse is more of a risk factor in domestic violence assault and reassault than in domestic violence homicide, while perpetrator suicidality is more of a risk factor in murder of intimate partners by men (because of the large proportion of murder-suicides) than in murder of intimate partners by women or in domestic violence re-offending. Child abuse victimization and witnessing domestic violence in childhood are well documented as risk factors for domestic violence perpetration and therefore are presumed to be risk factors for reassault[11] However, neither has been implicated in intimate partner lethality, perhaps because this history generally is not part of homicide records.

4. Information to be Provided by the Prosecutor At First Appearance

Several studies have found that basic information typically available provides as accurate of a prediction of abuser risk to the victim as more extensive and time-consuming investigations and assessments.[12] In Washington a great deal of relevant information should be provided to the court by the prosecutor. Some courts have charged pretrial staff with collecting information relating to risk.

RCW 10.99.045 states a defendant arrested for domestic violence shall be required to appear in person before a magistrate within one judicial day after the arrest. RCW 10.99.045(3)(b) requires the prosecutor to provide the following information to the court at first appearance after arrest and arraignment:

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arrested batterers: Use of the danger assessment scale in the criminal justice system. Journal of Interpersonal Violence 10, 63-74 (2000).

[10] J.C. Campbell et al., *Assessing risk factors for intimate partner homicide.* National Institute of Justice Journal, 250, 14-19 (2003).

[11] N.Z. Hilton, et. al., *A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment*. Psychological Assessment, Vol 16(3), Sep 2004, 267-275

[12] D. Heckert & E. Gondolf, *Assessing Assault Self-reports by Batterer Program Participants and their Partners,* Journal of Family Violence 15, (2), 181-197 (2004); J. Roehl & K. Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, The Justice System Journal, 21, (2), 171-198.

- The defendant's criminal history, if any, that occurred in Washington or any other state.
- If available, the defendant's criminal history that occurred in any tribal jurisdiction.
- The defendant's individual (protective) order history, which lists all civil and criminal domestic violence orders the defendant has been subject to.

5. Bail Prior to Court Appearance

In *Westerman v. Cary*, 125 Wn. 2d 277 (1994), the Washington Supreme Court upheld a Spokane District Court Rule which requires all defendants arrested for domestic violence crimes be held without bail "pending their first court appearance." The Court found that the "right" to bail under Washington State Constitution Article 1, §20, does not attach until the time of the preliminary hearing when the court will review probable cause and make individualized determinations as to bail and conditions of release.

C. Applying CrR 3.2(a) in Domestic Violence Cases

1. Legal standard

CrR 3.2(a) states that an accused, "other than a person charged with a capital offense" shall "be ordered released on the accused's personal recognizance" unless the court is satisfied that:

(a) "[R]ecognizance will not reasonably assure the accused's appearance;" CrR 3.2 (a)(1) or

(b) It is shown that there is a "likely danger that the accused will commit a violent crime;" CrR 3.2 (a)(2)(a) or

(c) It is shown that there is a "likely danger . . . that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice." CrR 3.2 (a)(2)(b).

The text of CrR 3.2 is virtually identical to that of CrRLJ 3.2. For ease of reference all cites will be to the Superior Court Rule.

2. Making a finding of future dangerousness

In evaluating the CrR3.2(a) factors, the court should be sensitive to the concerns outlined above. Factors to be considered in making a finding of future dangerousness, pursuant to CrR 3.2(d), (e), include:

(a) The accused's history of response to legal process, particularly court orders to personally appear;

(b) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;

(c) The accused's family ties and relationships;

(d) The accused's reputation, character, and mental condition;

(e) The length of the accused's residence in the community;

(f) The accused's criminal history under CrR 3.2(C)(6); CrR 3.2(e)(1); RCW 10.99.045 (3)(b); and CrRLJ 3.2 as provided by the prosecutor;

(g) The accused's history of domestic violence orders in Washington;

(h) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;

(i) The nature of the current charge if relevant to the risk of nonappearance;

(j) The presence of lethality factors as determined by accepted research; and

(k) Any other factors indicating the accused's ties to the community.

3. No contact with the victim (or others) as a condition of release

a. Authority to condition release upon no contact

In any domestic violence case, the court should consider imposing a requirement of "no contact" with the victim as a condition of release. CrR 3.2(d). A no-contact order imposed pursuant to court rule may also prohibit (where supported by the record) the defendant from contacting or otherwise intimidating the non-victim witnesses to the incident. This is particularly important when children are the witnesses to an incident of domestic violence.

b. Comparison of no-contact orders issued pursuant to RCW 10.99.040(2) with no-contact orders issued pursuant to CrR 3.2(k)

It must be emphasized that an order barring the accused from having contact with the victim and/or other witnesses is different from an order of no contact imposed pursuant to RCW 10.99.040(2). Violation of a no-contact order issued pursuant to CrR 3.2 will result in revocation of release pursuant to CrR 3.2(k)(2) or CrR 3.2(l). In contrast, as discussed at Chapter 3, Section IV, A, 3, violation of a Chapter 10.99 RCW order is a separate crime.

Because of the lower standard of proof required for revoking release upon conditions, additional protection is afforded the victim when both types of no-contact orders are entered. See CrR 3.2(k)(1). In practice, most courts simply issue the written no contact pursuant to RCW 10.99.040(2) and either in an oral or written order setting terms of release requires compliance of the condition of no contact.

c. Notice to the victim

Under the Washington State Constitution, victims of crimes charged as felonies have the right to be informed of all proceedings that the accused has the right to attend. Const. art. I, § 35. Subject to the court's discretion, victims of crimes charged as felonies also have the right to attend all proceedings that the accused has the right to attend.

In addition, to help protect the victim during the pretrial period, some states mandate notice to victims of the defendant's arrest, arraignment, and pretrial release if the victim has requested this information and provided an address.[13] Although such notice is not required under Washington law, this procedure is recommended when possible. Washington has provided an automated notification system for victims that they can access at their request.[14]

4. Other release provisions

Provisions prohibiting the defendant from possessing a firearm or other dangerous weapon

a. Authority under RCW 9.41.800

[13] *See, e.g.*, Conn. Gen. Stat. § 51-286c.

[14] The Department of Corrections and Washington Association of Sheriffs and Police Chiefs operate a Statewide Automated Victim Information and Notification system. See http://www.doc.wa.gov/victims/registerautomated.asp

When issuing a no-contact order pursuant to RCW 10.99, the court may restrict the authority of a defendant to possess a firearm or other dangerous weapon if the court finds either that the defendant previously used or displayed a firearm or other dangerous weapon in a serious offense or that the defendant previously committed an offense (such as assault against a family member) that makes the defendant ineligible to possess a firearm. RCW 9.41.800(2). Under certain circumstances, the court ***must*** bar a defendant from possessing a firearm or other dangerous weapon. RCW 9.41.800(1).

RCW 9.41.800 is discussed more fully in Chapter 3 at Section III.

b. Authority under CrR 3.2

In addition to the authority granted the court pursuant to RCW 9.41.800, a court may issue orders restricting the right of a defendant to possess a firearm in conjunction with an order setting bail or releasing a defendant on personal recognizance. CrR 3.2(d) provides:

Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following conditions:

- Prohibit the accused from possessing any dangerous weapons or firearms . . .

In addition, CrR 3.2(d)(10) authorizes the court to "[i]mpose any condition other than detention to assure administration of justice and reduce danger to others in the community."

c. Revocation of Release under CrR3.2 (k) and (l)

As defendants may violate conditions of release, the court may hear violations upon motion, or by arrest with warrant upon "the court's own motion or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused's release." A court may order an offender to appear for reconsideration of conditions of release pursuant to CrR 3.2(k) or issue a warrant directing the arrest of the accused for immediate hearing.

III. No-Contact Orders

One of the most significant aspects of a criminal case involving domestic violence is the court's authority to enter a no-contact order. Such an order does just what the name implies—it prohibits contact with the victim. A no-contact order is typically entered as a part of the defendant's pretrial release. In addition, such orders may be entered at other stages of a proceeding, including sentencing and disposition.

A court has the authority to enter a no-contact order whenever a criminal domestic violence prosecution is pending. RCW 10.99.040(2)-(3). Such orders may also be entered as a condition of sentence following conviction. RCW 10.99.050(1).

A. Jurisdiction and Procedure

1. No-contact orders may properly be entered by superior, district, or municipal trial courts

The court with jurisdiction over the criminal case is the proper court to enter the no-contact order. RCW 10.99.040(2).

2. Time of entry

a. The determination should be made at the defendant's first court appearance. Normally, the first appearance is the day after arrest, or if the defendant has been charged but not arrested, the day of arraignment. These court appearances are mandatory and cannot be waived. RCW 10.99.045.

b. RCW 10.99.040 (3) provides that "[a]t the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed. If a no-contact order is issued or extended, the court may also include in the conditions of release a requirement that the defendant submit to electronic monitoring. If electronic monitoring is ordered, the court shall specify who shall provide the monitoring services, and the terms under which the monitoring shall be performed. Upon conviction, the court may require as a condition of the sentence that the defendant reimburse the providing agency for the costs of the electronic monitoring."

If a no-contact order has previously been entered, the court, at arraignment, must determine whether the order should be extended. RCW 10.99.040(3).

3. Factors to consider

a. Although the entry of a no-contact order is discretionary with the court, the court must at least consider the possibility of such an order and determine whether a no-contact order is needed. RCW 10.99.040(2).

A no-contact order should be considered irrespective of the defendant's custodial status. It is not uncommon for an incarcerated defendant to continue contacting or tampering with the victim by mail, telephone, or through third parties.[15]

To assist the court in its decision, the prosecutor must provide the following for the court's review:

- The defendant's criminal history in any state;
- If available, the defendant's tribal jurisdiction criminal history;
- And, the defendant's individual order history.

RCW 10.99.045(3)(b).

"Criminal history" includes all previous convictions and orders of deferred prosecution, as available to the court or prosecutor. This history must be current within (i) one working day, in the case of previous actions of courts that fully participate in the state judicial information system; and (ii) seven calendar days, in the case of previous actions of courts that do not fully participate in the judicial information system, meaning they do not regularly provide records to or receive records from the system on a daily basis. *See* RCW 10.99.045(c)-(d).

b. Telephonic orders

The order may be issued by telephone if there is no outstanding restraining or protective order already prohibiting the defendant from contacting the victim. A telephone order must be reduced to writing as soon thereafter as possible. RCW 10.99.040(2).

c. Form of order

[15] Allison, C. J., et al. "Love as a battlefield: Dynamics in couples identified for male partner violence." *Journal of Family Issues* 20.1 (2008): 125-150.

Under RCW 10.99.040(2)(c), all no-contact orders issued must comply with the pattern form developed by the administrative office of the courts. The AOC form contains the warnings mandated by RCW 10.99.040(4)(b), and alerts the accused that the order does not modify or terminate an order issued in any other case. The AOC form also informs the accused that the order is entitled to full faith and credit in all 50 states, the District of Columbia, Puerto Rico, any U.S. territory, and any tribal land within the United States.

B. Content of Order

1. Who is protected?

Generally, a no-contact order pursuant to Chapter 10.99 RCW protects only the victim. A court may enter no-contact orders covering children who may not have been the direct victim of the domestic violence at the time of filing and in pretrial proceedings. CrR 3.2(d)(1). A sentencing court can issue no-contact orders only with explicit findings by the trial court that the restriction is "reasonably necessary to prevent harm to the children." *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). The court must also justify the duration of the no-contact order relating to a defendant's children, with an increased showing of necessity with orders that are more extensive in duration. *In re personal Restraint of Rainey*, 168 Wn. 2d 367, 381-382, 229P.3d 686 (2010).

Victims of domestic violence or child abuse who are minors may be protected under a no-contact order in some situations. The definition of family or household member includes persons "who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren." RCW 10.99.020(3). In addition, children over sixteen years of age who otherwise meet the definition of "family or household members" can be included in a no-contact order in dating violence situations. Children who do not meet this definition may need to be protected by an anti-harassment, stalking, sexual assault, or other restraining order.

Witnesses may not be incorporated into no-contact orders but must be protected by an order issued pursuant to CrR 3.2(d). Release orders are discussed more fully above at Section II, C.

2. Scope of the order

A no-contact order prohibits the person charged with or convicted of a domestic violence offense from contacting the victim or from "knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 10.99.040(2)(a).

RCW 10.99.050 for post-conviction orders does not continue the language quoted above regarding coming near a specified location, which was added by Laws of 2000, ch. 119, §18.

A victim who needed further protection, such as provisions for temporary custody of a child, would need to obtain a civil protection order or restraining order.

In *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 229 P. 3d 696 (2010)**,** a lifetime no-contact order with the defendant's ex-wife (telephone harassment victim) and his daughter (first degree kidnapping victim) was vacated because the court failed to consider whether a lifetime order was reasonably necessary to serve the State's interests with respect to the victims. In order to prohibit a defendant's contact with his children, the court must find that the prohibition is reasonably necessary to protect the children or to prevent further harassment of the custodial parent. The duration of any prohibition must also be reasonably necessary. *See also, State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246, 1249 (2001), (under the facts presented, a provision in a criminal no-contact barring the defendant from having any contact with his non-victim children violated his fundamental right to parent).

3. Surrender of weapons

An order requiring the surrender of a firearm or other dangerous weapon may be issued if the court finds by a preponderance of the evidence that the defendant either (1) used, displayed or threatened to use a weapon in a felony or (2) that the defendant has previously committed an offense which makes him or her ineligible to possess a firearm. RCW 9.41.800(2). Presumably, the requirement that the court find that the defendant previously committed a disqualifying offense would be satisfied if the currently charged offense meets the statutory criteria. RCW 10.99.040(2)(b) requires the court to consider RCW 9.41.800 when issuing a pretrial no-contact order.

Under some circumstances, a court is required to order surrender of weapons. RCW 9.41.800(1), RCW 9.41.800 (2)(a).

Issues concerning surrender of a firearm are discussed more fully in Chapter 3, III.

4. Global Positioning System (GPS) Monitoring

RCW 10.99.040(3) permits the court, when issuing or extending a no-contact order, to "include in the conditions of release a requirement that the defendant submit to electronic monitoring."

C. Duration of Orders

1. Pretrial orders

A pretrial no-contact order remains in effect until the expiration date specified in the order or until dismissal or acquittal. RCW 10.99.040(3). Where a written valid pretrial domestic violence order is incorporated by reference into the judgment and sentence, it is enforceable up until the expiration date on the order, even if the court has not entered a formal post-conviction order. *State v. Schulz*, 146 Wn.2d 541, 560-1, 48 P.3d 301, 310 (2002).

In contrast, a pretrial no-contact order cannot serve as the basis for a conviction for violating a no-contact order where the act is alleged to be a violation which occurred after dismissal of the underlying charge. RCW 10.99.040(3); *State v. Anaya*, 95 Wn.2d 751, 754, 976 P.2d 1251 (1999) (Discussing prior version of RCW 10.99.040(3)).

2. Post-conviction orders

A no-contact order issued in a felony case may be imposed for the maximum possible sentence, regardless of the standard range. Unless otherwise ordered by the sentencing court, the order remains in effect even after a certificate of discharge has been issued. RCW 9.94A.637(5). A post-discharge violation remains completely enforceable.

NOTE: *State v. Miniken*, 100 Wn. App. 925, 927, 999 P.2d 1289, 1290 (2000), which held that a certificate of discharge would render a no-contact order unenforceable, was decided under a prior version of RCW 9.94A.637. Its continuing validity is doubtful. See RCW 9.94A.637(5) (no-contact order entered pursuant to RCW 10.99 remains enforceable and in full effect following entry of a certificate of discharge).

In a misdemeanor or gross misdemeanor domestic violence case, the maximum term is five years from the date of conviction. RCW 3.66.067; RCW 3.66.068; RCW 35.20.255

3. Changes to no-contact orders

> As of January 1, 2011, all courts are required to grant victims a process to modify or rescind a no-contact order. RCW 10.99.040(7). The Administrative Office of the Courts has developed a model policy, available at https://www.courts.wa.gov/programs_orgs/pos_genderandjustice/ModelPolicyForVictims.pdf.

4. Mandatory Language

RCW 10.99.040(4)(b) requires that the face of the order bear the legend:

> Violation of this order is a criminal offense under Chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibition. *You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.* (Emphasis added).

In *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), the court held that an order without the italicized language was invalid. The conviction for willfully violating the order was thus reversed for insufficient evidence. However, placement of the language is not required to be on the front side of the order. *State v. Turner*, 156 Wn. App. 707 (Div 1, 2010).

This italicized language is not required on a post-conviction no-contact order. Such orders, however, must indicate that "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony." RCW 10.99.050.

NOTE: Courts are not required to continually update orders to reflect all statutory changes in penalties for no-contact orders so long as the orders accurately reflect statutory notice requirements and do not mislead the defendant. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

5. Entry in Computer-Based Intelligence Information System and the Domestic Violence Database

The clerk of the court is to forward a copy of an order issued under RCW 10.99.040 or 10.99.050 to the appropriate law enforcement agency on or before the next judicial day following issuance of the order. Upon receipt, the agency shall enter the order into any computer-based criminal intelligence information system available in the state used by law enforcement agencies to list outstanding

warrants. In Washington State, the system is called the Washington State Crime Information Center (WACIC). Entry into such a system constitutes notice to all law enforcement agencies of the existence of the order. The order may be enforced statewide. See Chapter 3, Section IV, B.

All Washington State no-contact orders are included in the Judicial Information System Domestic Violence Database. The Domestic Violence Database is discussed in Chapter 9.

D. Relationship to Other Proceedings

1. Criminal proceedings

If criminal charges have been filed against the abuser, the no-contact order may provide the victim with all the protection he or she needs, eliminating the need to commence a separate civil proceeding to obtain a protection order or a restraining order.

A no-contact order provides protection at no cost to the victim, and since the prosecuting attorney and the court are responsible for entry of the order, the victim need not retain counsel or bear other expenses.

2. Civil proceedings

If other civil proceedings have been commenced, a no-contact order may nevertheless be entered. Moreover, the underlying criminal proceeding may not be dismissed simply on the basis that civil proceedings are pending. RCW 10.99.040(1)(a) states that in a domestic violence case, the court "shall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings."

3.Violations and Enforcement

NOTE: The Supreme Court has determined that the validity of a no-contact order is not an element of the offense of violating an order entered for the protection of a domestic violence victim. *State v. Miller*, 156 Wn. 2d 23, 123 P.3d 827 (December 1, 2005). Furthermore, the defendant may not litigate the validity of a no-contact order in a prosecution for violation of the order unless the order is void on its face. *City of Seattle v. May*, 171 Wn.2d 847, 256 P.3d 1161 (2011). A more detailed discussion is found in Chapter 5, Section X.

4. Jurisdiction

No-contact orders are fully enforceable in any court in the state. RCW 10.99.040(6).

When any peace officer in the state has probable cause to believe that the defendant has violated a no-contact order, arrest is mandatory. RCW 10.99.055; RCW 10.31.100(2)(a).

5. Violation as a separate crime

(a) Information or Complaint

The charging document must, at a minimum, include the date the order was issued, an identification of what court issued the order and the name of the person protected or such other information to specifically identify the order that forms the basis for the criminal prosecution. *City of Seattle v. Termaine,* 124 Wn. App. 798 at 805, 103 P.3d 209 (2004).

(b) Penalties

Any knowing violation of a domestic violence no-contact order is a separate crime. The State must prove violation of the no-contact order was "knowing" as to both the order and contact. *State v. Sisemore,* 114 Wn. App. 75 (Div.2, 2002). However, personal service of the order is not required. *Auburn v. Solis-Marcial.* 119 Wn. App 398 (Div 1, 2003). The penalties for violation are established by RCW 26.50.110. Absent the circumstances discussed below, violation of a no-contact order is a gross misdemeanor.

A violation of a no-contact order is a felony under certain circumstances:

The defendant has had two prior convictions for violating orders issued under any of the following provisions: RCW 10.99; RCW 26.09; RCW 26.10; RCW 26.26; RCW 26.50; RCW 74.34 or any valid foreign protection order as defined in RCW 26.52.020. The previous convictions need not involve the same person as is the victim in the current offense. RCW 26.50.110(5).

For purposes of RCW 26.50.110(5), a conviction occurs once a finding of guilt is entered, regardless of whether the defendant has yet to be sentenced. *State v. Rice*, 116 Wn. App. 96, 105-6, 601 P.3d 651, 655 (2003).

Division I and Division III disagree as to whether the nature of the prior conviction presents a question of fact for the jury. Compare *State v. Arthur,* 126 Wn. App. 243, 244, 108 P.3d 169 (2005) (Division III) (jury must make determination of whether prior conviction was for violating

a domestic violence order) and *State v. Carmen*, 118 Wn. App. 655, 77 P.3d. 368 (2003), review denied 151 Wn.2d. 1039 (2004) (Division I) (court may make determination; jury need only determine whether prior convictions refer to the defendant currently on trial). The State has the burden of proving the validity of a prior conviction only after a specific substantive challenge has been made. *State v. Snapp*, 119 Wn. App. 614 at 625, 82 P.3d 252 (2004).

The act which violates the order issued under RCW 10.99; RCW 26.09; RCW 26.10; RCW 26.26; RCW 26.50; RCW 74.34 or any valid foreign protection order as defined in RCW 26.52.020, is an assault (not amounting to an assault in the first or second degree) or is an act which "is reckless and creates a substantial risk of death or serious physical injury." RCW 26.50.110(4).

A felony violation of a no-contact order has been classified as a seriousness level five offense. RCW 9.94A.515. A felony violation of a no-contact order is included within the definition of "crime against person" and subject to the filing standards of RCW 9.94A.411. The new penalties apply to offenses, which occur on or after July 1, 2000, regardless of when the original order was issued. RCW 9.94A.515, RCW 26.50.021. Designation of this crime as a seriousness level five has been held to be within the authority of the legislature and not a due process violation. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

(c) Effect of victim's consent to the contact

A victim's consent to the violation of a protection or no-contact order is not a defense to a subsequent criminal prosecution. *State v. Dejarlais*, 136 Wn.2d 939, 943-4, 969 P.2d 90, 92 (1998) (violation of a 26.50 protection order); *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000) (violation of a 10.99 no-contact order). In fact, RCW 10.99.040(4)(b) and RCW 26.50.035(1)(c) require that the order prohibiting contact indicate on its face that the person restrained is subject to arrest even if the victim consents to the contact. Continued reliance on *Reed v. Reed*, 149 Wash. 352, 270 P. 1028 (1928), which held that a victim who consented to a violation of a restraining order could not enforce that order appears to be unwarranted. *State v. Dejarlais*, 136 Wn.2d at 943-44 (rationale of Reed severely criticized, but case not specifically overruled).

6. Violation of a no-contact order imposed as a condition of probation

Violation of a no-contact order entered pursuant to RCW 10.99.050 (post-conviction order) is also a violation of probation (including community supervision, community placement, or community custody) on the underlying offense. As such, it may result in the imposition of additional jail time. An order requiring the defendant to serve additional time for a violation of a no-contact probation condition does not bar a subsequent trial on a new criminal charge for violating RCW 10.99.050. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609, 615 (1996). *Accord, State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, 639 *review denied*, 133 Wash.2d 1008 (1997); *United States v. Soto-Olivas*, 44 F.3d 788, 789 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

7. Violation as contempt of court

Violation of a no-contact order also constitutes contempt of court and is punishable as such. Certainly, under most scenarios, violation of a no-contact order would be punishable as criminal—and not remedial—contempt pursuant to RCW 7.21.010. Criminal contempt requires that the prosecuting attorney file a complaint or information. The maximum penalty is $5,000 and 364 days in jail. RCW 7.21.040. A defendant charged with criminal contempt is entitled to the full panoply of rights afforded any other criminal defendant. *In re M.B.*, 101 Wn. App. 425, 439-40, 3 P.3d 780, 788 (2000).

8. Punishment as both a separate crime and contempt

(a) Double jeopardy

After some vacillation, the United States Supreme Court in *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993) reestablished the "same elements" test for determining whether successive prosecutions violate the double jeopardy clause of the Fifth Amendment. The Washington Supreme Court has also readopted the "same elements" test. *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d. 1267, 1270 (1995). *See also State v. Calle*, 125 Wn.2d 769, 778 n. 4, 888 P.2d 155, 159 (1995).

Dixon involved a consolidated appeal of two cases, one of which was a defendant's appeal from an order denying a motion to dismiss a criminal indictment which was based on the same conduct for which he previously had been found in contempt of court. The court concluded that some of the counts were barred by conviction of criminal contempt and some were not and that an analysis of both the specific statutory elements and the evidence to be adduced at each trial is necessary to resolve the double jeopardy

issue. *Accord*, *State v. Buckley*, 83 Wn. App. 707, 713-14, 924 P.2d 40, 43 (1996) ("At Risk Youth" case). See generally Annotation: Contempt Finding as Precluding Substantive Charge Relating to Same Transaction, 26 A.L.R.4th 950 (2004).

NOTE: As discussed above in Section III, G, 3, an order imposing an additional period of confinement for violation of a probation condition of no-contact does not bar trial on a new criminal charge for violating RCW 10.99.050. *State v. Grant*, *supra*. *See also*, *State v. Prado*, *supra.*

9. Equal protection

The mere existence of these two remedies does not violate a defendant's right to equal protection. *State v. Horton*, 54 Wn. App. 837, 840, 776 P.2d 703, 704-5 (1989).

10. Alternatives to Confinement

RCW 10.99.040(4) refers to RCW 26.50.110 which provides that the court, "in addition to any other penalties provided by law," may order the defendant to submit to electronic monitoring following a conviction for violation of a no-contact order.

Under RCW 9.94A.680, presentence time served in a "county supervised community option" may be credited against the offender's sentence. This credit is discretionary. *State v. Medina*, No. 89147-8, slip op., at 11. (Wash. April 17, 2014). However, offenders convicted of a violent or sex offense may not be credited with time served in a county supervised community option before sentencing though RCW 9.94.680. *Id.*, at 9-10. In *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096, 1097 (1992), the court concluded that, under the provisions of the Sentencing Reform Act (SRA), a defendant who had been ordered to submit to electronic home detention as a condition of pretrial release must be afforded credit for such time against the sentence that was ultimately imposed.

IV. Discovery in Domestic Violence Cases

A. Limited Protection of Victim's Address

The general discovery rules of CrR 4.7 apply in domestic violence cases with one important exception. RCW 10.99.040(1)(c) provides that the court:

> Shall waive any requirement that the victim's location be disclosed to any person other than the attorney of a criminal defendant, upon a showing that there is a possibility of further violence: PROVIDED, That the court may order a criminal defense attorney not to disclose to his client the victim's location[.]

In addition, under RCW 26.50.250, courts are prohibited from ordering that the confidential addresses of domestic violence programs be disclosed in court proceedings unless the court finds by clear and convincing evidence that disclosure is necessary, after considering the safety and confidentiality concerns of other residents of the program, as well as the victim before the court, and other alternatives to disclosure.

It should be noted that a defendant does have a right under the confrontation clause to receive background information—including the addresses—of potential government witnesses. This is to permit the defense to interview persons in the witness's community to determine the witness's reputation for veracity. *Alford v. United States*, 282 U.S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931); *State v. Mannhalt*, 68 Wn. App. 757, 764-67, 845 P.2d 1023, 1027-8 (1992)(the court notes the right to confront is "not absolute" but may be subject to a "personal safety" exception, though the court acknowledges Washington has not clearly adopted this standard.). Even in a non-domestic violence case, the court may issue a protective order to safeguard witnesses who may be at risk from disclosure of such information. CrR 4.7(h)(4). Presumably, so long as the defense attorney is provided with the necessary background information, the defendant's confrontation rights will be adequately protected, even if an order barring the attorney from disclosing the victim's address to the defendant is entered.

1. Access to Witnesses

It is misconduct for a prosecutor to instruct a witness not to speak to defense counsel or to a defense investigator or to instruct a witness not to grant the defense an interview unless the prosecutor is present. This rule applies equally to the defense, except with regards to access to the defendant. However, a prosecutor or defense lawyer may inform witnesses that they may choose whether to provide an interview and that they have a right to determine who shall be present at such an interview. *State v. Hofstetter*, 75 Wn. App. 390, 402, 878 P.2d 474, 482 (1994).

2. Witness Statements and Work Product

The defense is entitled to receive the "written or recorded statements and the substance of any oral statements" of witnesses that the prosecuting attorney intends to call. CrR 4.7(a)(1)(i). The prosecution, however, cannot be required to disclose work product—that is, material which contains "the opinions, theories or conclusions of investigating or prosecuting agencies . . ." CrR 4.7(f)(1).The fact that the interview of the victim or witness was conducted by a prosecuting

attorney does not, in itself, establish that the statement is work product. *State v. Garcia*, 45 Wn. App. 132, 138, 724 P.2d 412, 416 (1986).

3. Records of a Domestic Violence Program

Communications between domestic violence victim advocates and victims are privileged. RCW 5.60.060 (8). Those client records maintained by domestic violence programs which are not covered by privilege are non-discoverable absent a court order. RCW 70.123.075. Prior to ordering disclosure, the court must conduct an in camera review to determine whether the "records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records." RCW 70.123.075(1)(c).

Domestic violence program means an agency that provides shelter, advocacy, and counseling for domestic violence victims. RCW 70.123.020(7).

In 2006, the Legislature added a section regarding disclosure of recipient information. RCW 70.123.076(3) provides if disclosure of a recipient's information is required by statute or court order, the domestic violence program shall make reasonable attempts to provide notice to the recipient affected by the disclosure of information. If personally identifying information is or will be disclosed, the domestic violence program shall take steps necessary to protect the privacy and safety of the persons affected by the disclosure of the information. RCW 70.123.076(3).

B. Depositions

1. Authorization

Unlike in civil cases, the parties to a criminal case must secure the permission of court before noting a deposition. CrR 4.6 sets forth the circumstances under which a deposition may be ordered.

The court may order a deposition when:

(a) The court finds that a prospective witness may be unable to attend or prevented from attending a trial or hearing;

(b) A witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary; or

(c) There is good cause shown to take the deposition.

CrR 4.6(a). CrR 4.10(c) specifically requires the court to release a material witness from custody "unless the court determines that the testimony of such witness cannot be secured adequately by deposition." *State v. Mankin,* 158 Wn. App. 111 (2010)**(**Court lacks authority to order deposition when witnesses, including police, agree to give pretrial defense interviews but refuse to allow defense counsel to tape record the interview).

C. Procedure

1. Reasonable notice as to the time and place of the taking of the deposition shall be given by the "party at whose instance a deposition is to be taken" to all other parties. CrR 4.6(b).

Significantly, CrR 4.6(c) provides that:

> No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

The deposition shall be taken as prescribed in civil rules. CrR 4.6(e) provides that objections shall be made pursuant to the civil rules. CR 32(d)(3)(A) provides:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Other, more formal objections are waived if not made at the time of the taking of the deposition. CR 32(d)(3)(B)(C).

Objections to admissibility of the deposition or part thereof are governed by CR 32(b), which provides that objections may be made at the trial or at a pretrial hearing for any reason which "would require the exclusion of the evidence if the witness were then present and testifying."

In practice, the trial court normally rules on objections made pursuant to CR 32(b) in a pretrial hearing.

The deposition itself is not physically admitted into evidence at the trial (although it may be admitted at the time of the pretrial hearing

to preserve the record on matters excluded by the court). Deposition testimony is normally admitted at trial in what amounts to a "staged reading." The proponent of the testimony secures the services of a reader who will sit in the witness box and read the answers of the declarant (the person deposed) while the attorney for the proponent reads the questions. Matters excluded in the pretrial hearing are not read to the jury.

2. Admissibility of deposition testimony

If the deponent is unavailable for trial, deposition testimony is admissible under the Former Testimony Hearsay Exceptions of ER 804(b)(1). A discussion of what constitutes "unavailable" is found at Chapter 6, Section VI.

3. Medical Records

Medical records may be obtained either with a waiver of confidentiality from the patient or through compliance with RCW 70.02.060(1), which requires advance notice to the health care provider and to the patient or the patient's attorney. Notice must be provided at least fourteen days before the "service of a discovery request or compulsory process" is served on the health care provider so that the patient may seek a protective order.

Without written consent of the patient, a health care provider may not disclose health care information unless the provisions of RCW 70.02.060(1) have been satisfied. RCW 70.02.060(2).

Privilege issues are discussed in Chapter 6, Section II.

V. Challenges to the Charging Documents

A. Domestic Violence Designation

Because the Legislature, by enacting RCW 10.99, did not create new crimes, the failure to include the "elements" of domestic violence in an information did not render the information insufficient. *State v. Goodman,* 108 Wn. App. 355, 359, 30 P.3d 516, 519 (2001). In *State v. Hagle, 150 Wn. App 196,* 208 P.3d 32 (2009), the court found that the domestic violence designation under chapter 10.99 RCW was neither an element of nor evidence relevant to the underlying charge and determined that designating such elements might result in prejudice to the defendant. In 2010, the legislature amended the Sentencing Reform Act to

consider domestic violence that was pled and proven in determining the offender's score for sentencing. RCW 9.94A.525(21).

B. Violation of court orders

An information or complaint for violation of a court order is required to include "identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, or sufficient other facts" to permit the defendant to be prepared to meet the charges against him. *City of Seattle v. Termain*, 124 Wn. App. 798, at 805, 103 P.3d 204 (2004).

C. Definition of Restraint

When "restraint" is an element of the crime charged, the definition of restraint does not need to be in the charging document. *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2015).

D. Multiple assaultive acts

By strangling and otherwise assaulting his girlfriend in one short, continuous episode at one location, the defendant committed a single act of assault. His two convictions for second degree assault and fourth degree assault violate double jeopardy principles. Assault should be treated as a course of conduct crime. Whether multiple assaultive acts constitute a single course of conduct depends on time frame, location, defendant's motivation, and the presence of intervening events or acts. *State v. Villanueva-Gonzalez*, 180 Wn. 2d. 975, 329 P.3d 78 (2014).