FILING AND DISPOSITION STANDARDS

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SECTION 1: INTRODUCTION/PURPOSE/DISCUSSION PAPER/LIMITATIONS

I. INTRODUCTION

The King County Prosecutor has been committed to written filing and disposition standards since 1975. The discussion paper authored by Norm Maleng in 1987 is incorporated in this section to provide historical perspective and to underscore the Prosecutor's commitment to prosecutorial standards to control the exercise of discretionary power in making filing and disposition decisions in criminal cases.

II. PURPOSE

The purposes of the Sentencing Reform Act (and these Filing and Disposition Policies) are stated in RCW 9.94A.010 as follows:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

1. Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

2. Promote respect for the law by providing punishment which is just;

3. Be commensurate with the punishment imposed on others committing similar offenses;

4. Protect the public;

5. Offer the offender an opportunity to improve him or herself;

6. Make frugal use of state and local governments' resources, and

7. Reduce the risk of reoffending by offenders in the community (1999 laws).

III. DISCUSSION PAPER – Charging and Sentencing, Where Prosecutors' Guidelines Help Both Sides by Norm Maleng[1]

When prosecutors decide who should be prosecuted and for what crimes, they are making some of the criminal justice system's most important decisions. How that discretion is exercised affects the quality of prosecution, the administration of justice, and the community as a whole. Explicit prosecutorial filing and disposition policies structure and guide the exercise of that discretion.

[1] Criminal Justice, Winter 1987 at page 6.

In the early 1970s, a national movement pressed for the adoption of prosecutorial standards to control the exercise of discretionary power in making filing and disposition decisions. As a part of that movement, the King County Prosecuting Attorney's Office in Seattle, Washington developed written policies covering the vast majority of filing and disposition issues. Of even greater significance, the Washington State legislature in 1983 enacted statutory standards guiding the exercise of prosecutorial discretion in filing and disposing of cases. This new law was the first of its kind in the nation.

Experience has shown that express prosecutorial filing and disposition policies accomplish several worthwhile objectives. First, the policies result in consistent practices in filing criminal charges. Second, they set priorities for handling criminal cases. Third, policies guide the exercise of discretion in reducing or dismissing criminal charges. Fourth, they assist the prosecutor in formulating sentencing recommendations, which are proportionate to the seriousness of the offender's current offense and prior criminal history, and which correspond to sentencing recommendations on offenders similarly situated. Finally, they create a system of open accountability which ensures the policies will be enforced and the interested participants in the criminal justice system (i.e., law enforcement, victims, defense attorneys) have an opportunity for input on prosecutorial decisions.

Adoption of Filing and Disposition Policies by the Criminal Division of the King County Prosecutor's Office had a noticeable impact on both sentences imposed on offenders and office resources. According to independent research, the standards which were instituted in September 1975 increased the percentage of convictions to crimes as charged. Before the standards were adopted, 36.2 percent of those charged with high impact crimes (e.g., rape, robbery, residential burglary) were convicted of the charged crime. After standards were adopted, 69 percent were convicted as charged. Moreover, the percentage of defendants charged with high impact crime who were sentenced to prison rose by 57 percent. There is some evidence that these standards, which normally require a plea as charged, resulted in more trials. After an initial increase in trials of 55 percent this impact moderated and leveled off at about 21 percent above pre-standards trial rates. This was indeed an increase in the trial deputy workload, and certain measures were taken to address this problem. During this same period six trial deputies were added to the Criminal Division (a 25 percent increase) and other efficiency measures were taken to conserve resources.

Historical perspective

The concept of wide prosecutorial discretion in determining who to prosecute and for what crimes had its genesis in the common law. The prosecuting attorney, as a member of the executive branch of government, could exercise that discretion unfettered by judicial intervention. Under American jurisprudence, the only constitutional limitation placed upon that discretion was that the prosecutor could not base the decision on race, religion, or other arbitrary classification violative of the Equal Protection Clause.

In 1971, the American Bar Association published its Standards Relating to The Prosecution Function, recommending that prosecutors develop statements of general policies designed to guide the exercise of prosecutorial discretion. Similarly, the National Advisory Commission on Criminal Justice Standards and Goals proposed that a prosecutor's office should formulate written guidelines to be applied in the screening of cases. The Commission noted dramatic variations in screening practices between prosecutors' offices in different jurisdictions and suggested that the guidelines were a protection against arbitrariness and more in line with the concept of equal justice. In 1977, the National District Attorneys Association issued National Prosecution Standards also recommending that prosecutors adopt written policies.

The gradual unfolding of standards in King County during the 1970s paralleled the activity on the national scene. In the early 1970s, the King County Prosecutor adopted filing and disposition standards, limited solely to the crimes of rape, robbery and residential burglary. As the office gained more experience, these written policies were modified and augmented. By 1978, the Criminal Division's Filing and Disposition Policies were the most detailed standards of any prosecutor's office in the country. Because of this, the Criminal Division was selected as one of six offices in the nation for study on the subject by the prestigious Institute for Criminal Law and Procedure in Washington, D.C. Today, the King County Prosecutor's Office Filing and Disposition Policies are even more comprehensive in their coverage, extending to over 200 pages.

In 1981, the Washington state legislature enacted Washington's Sentencing Reform Act, which completely overhauled the state's sentencing law. The Sentencing Reform Act established a presumptive, determinate sentencing system, providing for sentences proportionate to the seriousness of the current offense and criminal history of the offender. One criticism of prior, similar sentencing reform had been that while it restricted judicial discretion, it correspondingly elevated the importance of the initial charging decision and thereby increased the discretionary power of the prosecutor. In response, the Sentencing Reform Act acknowledged that prosecutorial judgments as to what should be charged and how charges are disposed of needed to be addressed. The legislature then directed the Sentencing Guidelines Commission to devise prosecuting standards and to consider the guidelines promulgated in 1980 by the Washington Association of Prosecuting Attorneys. After receiving its report from the Sentencing Guidelines Commission, the 1983 legislature enacted statewide prosecuting standards for charging and plea dispositions. RCW 9.94A.401-460.

Setting priorities

Like all governmental agencies, a prosecutor does not have unlimited resources; priorities must be set. A primary reason for allowing prosecutorial discretion in the charging process is that realistically all crimes cannot be prosecuted to the fullest extent possible. The prosecutor must select for prosecution those cases that warrant the expenditure of available resources. Written filing and disposition policies serve as an excellent means of expressing the prosecutor's priorities.

Ideally, priorities should be set after a dialogue between the prosecutor and other interested participants in the criminal justice system including law enforcement, victim advocacy groups, citizens, the defense bar and the judiciary. Most importantly, deputy prosecuting attorneys should be involved, for they ultimately will implement the policies and procedures.

A broad spectrum of filing and disposition issues are suitable for prioritization. For example, if the prosecutor considers crimes against persons to be of paramount importance, and wishes to allocate prosecutorial resources accordingly, the prosecutor may establish a lower evidentiary standard for crimes against persons than for other crimes. The prosecutor may decide that the office has insufficient means to prosecute all felony cases at a felony level. In those situations the prosecutor may decide that relatively minor felony property offenses committed by first time offenders should be disposed of as misdemeanor offenses. The prosecutor also may decide that certain high profile offenses, such as child abuse and sexual assaults, should be assigned to a special unit for vertical handling by one prosecutor from intake through appeal. If the prosecutor decides to stress victim contact and input in serious cases, the written policies may make this a prerequisite of any exceptional disposition.

The filing system

While office size and types of cases received are significant factors in determining how the caseload should be managed at the filing stage, there are certain techniques which may be adapted to almost any situation. They include: adopting written policies, fashioning a suitable intake and screening system, requiring a record of filing decisions, and having a mechanism for appeal for filing decisions.

Written policies. *Written guidelines for charging and disposition decisions promote consistency in case handling — helpful no matter what size the prosecutor's office. For large offices, written policies are imperative because the filing responsibility must be delegated to deputy prosecutors. Without written standards, it is only natural that there will be a lack of uniformity in filing decisions and a breakdown in the implementation of prosecutor's decisions. The manual should be constantly reexamined and revised, so it not only continues to serve the public but also reflects changes in the law.*

Organization. *Because the filing decision is so consequential, the prosecutor needs to pay special attention to who is assigned this responsibility. In small offices, a select few or the prosecutor perform this function. However, in larger offices, the prosecutor is faced with the questions of who should file and how to organize the office. As a general principle, only deputy prosecutors with felony trial experience should be delegated the responsibility of screening delegated the responsibility of screening and filing felony charges. In the King County Prosecutor's Office, normally an experienced trial attorney makes filing decisions, which must be approved by a supervising senior deputy prosecuting attorney.*

A centralized filing unit for intake and screening is the best way to process a large volume of police referrals uniformly, promptly and properly. Because deputy prosecutors in a centralized unit specialize in filing, they become familiar with the filing policies and procedures and are thus best able to screen cases proficiently. In addition, centralizing the filing responsibilities relieves trial deputies of interruptions and allows them to more efficiently prepare for trial. Finally, rotational assignments to the filing unit provide deputy prosecutors with variety as well as relief from the stress of trial practice.

Accountability mechanisms. *To assure the policies are implemented, and as a check against incorrect filing assessments, the policies should provide for written records of all decisions declining to file charges and for appeal of charging decisions. Under the King County Prosecutor's policies, every decision to file or decline charges must be approved by a senior deputy prosecuting attorney. Police agencies or victims who disagree with the decision not to file may appeal through the chain of command in the Criminal Division and ultimately to the Prosecuting Attorney. This appellate procedure is intended to benefit citizens or law enforcement officials who feel that an incorrect filing decision has been reached.*

Deputy prosecutors are urged to note on the decline form the detective's position on any proposed action. Because the written declines show reasons for the decision, and because the existence of the appellate procedure promotes a dialogue with law enforcement, the appellate procedure is seldom used.

These policies recognize that exceptions will be necessary; an individual case may present facts which make the application of the general policy unjust. However, a departure from policies must be approved by a senior deputy prosecuting attorney and recorded in a written exception stating the reasons for the variance. Variances from standards for filed cases occur rather frequently because not only does defense counsel often present new information or grounds for deviation from standards, but also the trial prosecutor, in preparing his or her case, may discover reasons for variance not apparent at filing. The policies include a nonexclusive list of reasons justifying acceptance of a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct.

The King County Prosecutor's Office has found that when defense counsel argue that the office should take a particular course of action which would deviate from standards, they point out that in another case the prosecutor varied from standards for reasons similar to those presented in the case under discussion. This is one of the ramifications of a policy of public accountability and compliance with standards. When this situation arises, the prior written exception can be reviewed and compared with the case under discussion. This process, together with the internal safeguards of written exceptions and senior deputy prosecutor approval, not only fosters compliance with the policies, but also provides a check on judgments made in any specific case.

The filing decision

Filing policies should answer at least three fundamental questions. First, what evidentiary standard should be met before criminal charges are filed? Second, assuming that the evidentiary test is satisfied, what nonevidentiary reasons justify declining to prosecute? Third, specifically what should be filed — how many charges and what type of charges should be filed?

In the state of Washington, these questions are answered by the legislature's statewide prosecutorial standards. While these state standards provide broad criteria, the King County Prosecutor's policies, which are compatible with state law, enunciate the answers with greater specificity.

Evidentiary sufficiency. *In Washington state, cases are subjected to one of two evidentiary sufficiency tests to determine whether charges should be filed: one applies to crimes of violence and the second applies to other cases. The distinction between these two tests reflects the policy that crimes against persons are more serious than other crimes and deserve higher priority in the criminal justice system. The evidentiary sufficiency standard for crimes against persons directs prosecutors to aggressively file those cases; it states that crimes against persons will be prosecuted if available evidence is sufficient to take the case to the jury for decision. By contrast, other crimes are to be prosecuted only when there is sufficient evidence to make convictions probable. Through these standards; the prosecutor's discretion is guided into dedicating greater emphasis and staff to crimes against persons. Furthermore, both tests require a higher standard than the mere existence of probable cause. If the probable cause test were utilized, time and effort would be needlessly wasted on cases that could not be proven at trial.*

Nonevidentiary decline. *Not every case that is technically fileable should be filed. The filing inquiry is more than a strictly legal one. There are several nonevidentiary grounds for the prosecutor to decline to prosecute, and Washington law and the King County Prosecutor's Policies each contain a nonexclusive list of nonevidentiary reasons not to prosecute. Examples of these reasons include: when the violation of law is only technical or insubstantial and no public interest or deterrent purpose would be served by prosecution; when a minor case may be declined because the cost of prosecution is highly disproportionate to the importance of prosecuting the offense; or when the offender is given immunity in order to obtain testimony or information reasonably leading to the conviction of more culpable individuals. Retaining this discretion at the filing stage guards against an inflexible policy of filing all legally sufficient charges despite valid circumstances crying out for nonenforcement.*

Nature and number of charges. *The prosecutor must decide how many charges and what charges to file. It is a well settled principle that the prosecuting attorney should not overcharge to obtain a guilty plea to lesser or fewer charges. But, should a prosecutor charge every crime that is legally and factually supportable?*

National prosecution standards adopted by the National District Attorneys Association acknowledge that a prosecutor should not file every possible charge. Standard 9.2 provides: "The prosecutor has the responsibility to see that the charge selected adequately describes the offense or offenses committed and provides for an adequate sentence for the offense or offenses." Likewise, Washington's law clearly expresses the tenet that prosecutors should not file all charges, rather they should file those charges which adequately label the gravamen of the defendant's conduct. The statute states:

> *(1) The prosecutor should file charges which adequately describe the nature of the defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:*
>
> > *(a) will significantly enhance the strength of the state's case at trial; or*
> > *(b) will result in restitution to all victims.*
>
> *(2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:*
>
> > *(a) charging a higher degree;*
> > *(b) charging additional counts.*

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

This law is crucial because, under Washington's Sentencing Reform Act, the crime and conviction together with the offender's criminal history determines the presumptive, determinate sentence to be imposed.

The King County Prosecutor's policies reiterate the state standards on adequately describing criminal conduct and specifically state what charges and degree of crime should be initially filed. For example, the number of counts initially filed in a theft case normally is limited to one count for each crime up to a maximum of three counts, unless the offender has committed a major economic offense or series of offenses, in which case all chargeable counts shall be filed. The standards describe the criteria for classifying a case as involving a major economic offense or series of offenses. Moreover, the policies state that the counts and degree of charges initially filed shall be charged conservatively, and the defendant normally will be expected to plead guilty to those initial charges or go to trial.

The disposition decision

Reduction or dismissal of charges. *There will be cases where proof problems or other circumstances come to light after filing and the appropriate course of action will be to dismiss charges or to reduce charges in exchange for a plea of guilty. Just as the exercise of discretion at filing needs to be regulated, so too does the exercise of discretion at the disposition stage. Without policies guiding discretion at the disposition stage, inappropriate plea bargains, contrary to the initial filing decision, may be entered. Further, disposition policies restricting dismissals or reductions to unusual cases reemphasizes the principles that charges should only be filed in accordance with the evidentiary standard and in contemplation of either a plea as charged or a trial.*

Both the statewide prosecutorial standards and those of the King County Prosecutor recognize that charges may need to be dismissed or reduced after filing. However, these policies, for the most part, sanction dismissal or reduction based on circumstances arising only after the initial filing decision has been made. Illustrative factors which may justify charge reduction in return for a plea of guilty include:

(a) Evidentiary problems which make conviction on the original charges doubtful which were not apparent at filing;
(b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;
(c) A request by the victim when it is not the result of pressure from the defendant;
(d) The discovery of facts which mitigate the seriousness of the defendant's conduct;
(e) The correction of errors in the initial charging decision;
(f) The defendant's history with respect to criminal activity;
(g) The nature and seriousness of the offense or offenses charged;
(h) The probable effect on witnesses.

Caseload pressures or the cost of prosecution normally may not be considered.

Absence of ample resources commonly compels prosecutors to dispose of some felonies as misdemeanors. The King County Prosecutor's Office has developed an innovative expedited crime program which realistically recognizes that prosecutorial resources need to be conserved. Under this program, relatively minor felony crimes committed by first time offenders are filed in district court and resolved as misdemeanors. These subordinate crimes can be dealt with adequately by the district court sentences, thus saving scarce superior court judicial and prosecutorial resources for more serious felony cases. However, the King County Prosecutor's Policies prohibit the consideration of caseload pressures or the expense of prosecution in deciding whether charges should be reduced or counts dismissed pursuant to a plea agreement on felony cases filed in

superior court. It is expected that felonies filed in superior court will never be reduced or dismissed based upon a lack of resources.

Sentencing recommendation. *Should the prosecutor make a sentencing recommendation to the court? While some offices make sentencing recommendations, others do not. The King County Prosecutor's Office has a policy making sentencing recommendations in every felony case.*

Beginning in 1975, the King County Prosecutor's Office promulgated a "just desserts" sentencing philosophy which it adhered to in formulating sentencing recommendations. Recommended sentences were always to entail the following ingredients: certainty of punishment, persons who commit similar crimes should receive similar punishments, and the sanctions imposed should be proportionate to the seriousness of the crime and criminal history. Discretionary decisions as to what sentences should be imposed were governed by rational, justifiable standards. Specific disposition standards were pronounced in the King County Prosecutor's Filing and Disposition Policies. For example, the policies provided that defendants who committed robbery in the first degree and had a criminal history of one prior felony conviction normally would receive a prosecutor's sentencing recommendation of between three to five years minimum term in prison. Deviation from this presumptive sentencing recommendation required written reasons in accordance with standards.

In the late 1970s, the King County Prosecutor engaged in public debate and lobbied for legislative reform of Washington's sentencing law. Simultaneously, a trend towards sentencing reform was occurring in other states and on the federal level. In 1981, Washington's Sentencing Reform Act was enacted. It provided for presumptive, determinate sentencing, and contained all of the major principles expressed in the Filing and Disposition Policies of the King County Prosecutor.

Victim input

Because filing and disposition decisions affect victims, the prosecutor's written standards should require consideration of victim needs in these decisions and provide for victim involvement whenever possible. If filing and disposition standards focus on the victim, it is only natural they will increase citizen support for and confidence in the prosecutor's action.

The King County policies are designed to involve victims in the deliberative process and to consider the impact of prosecutor judgments upon victims. For example, the policies direct the filing deputy prosecutor to notify the victim or next of kin when charges are not filed, as follows:

> *The victim or victim's family, if the victim is deceased, normally shall be notified of any decline of a violent crime. When practical, other victims should be notified of declines.*

Regarding child victims, the law requires special notice. Therefore, the filing deputy prosecuting attorney shall have the ultimate responsibility to insure that within five (5) days of the decision to charge or decline, notify the following of the decision: victim, any person the victim requests and the Department of Social and Health Services. Where an interview was conducted, the deputy prosecutor who conducted the interview normally shall personally contact the victim. In all other instances, the Victim Assistance person designated to provide notice shall provide notice.

The policies also require victim contact and opportunity to be heard before charges may be reduced or dismissed. Sentence recommendations made under the policies provide for restitution to the victim as well as imposition of a victim penalty assessment. In essence, the policies are part of a comprehensive program of victim services afforded by the King County Prosecutor's Office.

The prosecutor can shape the justice system by implementing filing and disposition policies. Those policies will touch the lives of all citizens in the community, especially witnesses and victims. They give new meaning to the criminal law. They directly result in stiffer sentences for violent offenders, while conserving precious criminal justice resources. Ultimately, by structuring and guiding the exercise of prosecutorial discretionary power, the policies will create a more consistent, accountable and equitable administration of justice.

IV. LIMITATIONS

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

The words will be, shall be, normally or generally will be or shall be as used in these standards are interchangeable. Since these filing and disposition standards are intended to structure and guide discretionary decisions, the use of mandatory language in whatever format is subject to the exception standards set forth within. However, mandatory statutory provisions are not subject to the same interpretation and should be referenced and interpreted accordingly.

SECTION 2: DEFINITIONS AND INTERRELATION OF FELONY SENTENCING PROVISIONS

The following definitions shall apply to all filing and disposition policies:

I. "ALTERNATIVE CONVERSIONS"

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community service may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community service hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.129.

For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

RCW 9.94A.680 [formerly .380]

II. "COMMUNITY CORRECTIONS OFFICER"

"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.

RCW 9.94A.030(4)

III. "COMMUNITY CUSTODY"

"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, served in the community subject to controls placed on the offender's movement and activities by the Department

of Corrections. 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.

"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 sentencing guidelines commission or the legislature under RCW 9.94A.850, for crimes committed on or after July 1, 2000.

RCW 9.94A.030(5), (6)

IV. "COMMUNITY PLACEMENT"

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

(Note: Replaced by "Community Custody" for crimes on or after 7-1-00.)

RCW 9.94A.030(7)

V. "COMMUNITY RESTITUTION"

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

RCW 9.94A.030(8)

Community restitution hours must be completed within the period of community supervision or within a time period set by the court, which shall not exceed 24 months.

RCW 9.94A.680

VI. "COMMUNITY SUPERVISION"

"Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other conditions imposed pursuant to this chapter or RCW 46.61.524 or 16.52.200(6). 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.

(Note: Replaced by "Community Custody" for crimes on or after 7-1-00.)

RCW 9.94A.030(9)

VII. "CONFINEMENT"

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

RCW 9.94A.030(10)

VIII. "CONVICTION" (see also Criminal History)

"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.

RCW 9.94A.030(11)

IX. "COURT-ORDERED LEGAL FINANCIAL OBLIGATION" (see "Monetary Obligations – this section)

X. "CRIME-RELATED PROHIBITION"

"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 court's order may be required by the department.

RCW 9.94A.030(12)

XI. "CRIMINAL HISTORY"

A. "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 determination 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.

RCW 9.94A.030(13)

B. "Conviction"

"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.

RCW 9.94A.030(11)

C. Prior Conviction for Sentencing Reform Act Purposes

1. Prior Conviction

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

RCW 9.94A.525 (1) [formerly .360]

2. Wash Out Policy

This comment applies to both juvenile and adult prior convictions.

a. Under the Sentencing Reform Act, some prior convictions ceased to be counted in adult sentencings because a period of time had passed since entry of that prior conviction. This practice was colloquially known as "wash out." The legislature has, over the years, changed the wash out rules such that crimes previously ignored were counted.

In State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (9-6-01), the Washington Supreme Court reaffirmed its holding from State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), effectively terminating the legislature's decision to count these previously ignored

convictions. The basic principle set forth in Cruz and Smith may be summarized as follows: "Once washed, always washed."

The 2002 Legislature has attempted to cure the Smith-Cruz problem by adding to RCW 9.94A.525 the following subsection:

> (18) 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.

b. Class A and Sex Offenses

Except as provided in (f) of this section, class A and sex prior felony convictions shall always be included in the offender score.

RCW 9.94A.525(2) [formerly .360]

c. Non-sex Class B

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies.*

RCW 9.94A.525(2) [formerly .360]

*Effective 7-23-95, must be ten crime free years (including misdemeanors) from last date of confinement . . . to date of commission of subsequent crime. Ch. 316, §1, 1995 Wn. Laws.

d. Non-sex Class C

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and

sentence, the offender had spent five consecutive years in the community without being convicted of any felonies.*

RCW 9.94A.525(2)

*Effective 7-23-95, must be five crime free years (including misdemeanors) from last date of confinement . . . to date of commission of subsequent crime.

e. Serious Traffic

Serious traffic convictions shall not be included in the offender score if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without being convicted of any serious traffic or felony traffic offenses.*

RCW 9.94A.525(2)

*Effective 7-23-95, must be five crime free years (including misdemeanors) counted from last date of confinement . . . to date of commission of subsequent crime.

f. Juvenile Offenses

Effective 7-1-97, "criminal history" includes all juvenile adjudications of guilt regardless of the class of crime or the age of the offender. Juvenile offenses now "wash" under the same rules as adult convictions. Prior to 7-1-97, a series of legislative amendments gradually expanded the number of juvenile prior offenses included for SRA scoring purposes. In 1984, no prior juvenile offenses were scored unless the defendant was 15 or older at time of that offense and under 23 at time of current offense being scored.

- A 1986 amendment added Class A priors if defendant was over 15.
- A 1988 amendment added all prior juvenile "serious traffic" offenses.
- A 1990 amendment added all prior juvenile sex offenses, regardless of age.
- A 1995 amendment added all prior juvenile "serious violent" offenses, regardless of age.

Use special care and refer to the most current available charts when scoring prior juvenile offenses committed prior to the above dates.

3. Multiple Prior Convictions

a. Prior Convictions On and After July 1, 1986

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

(1) Adult

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

*RCW 9.94A.525(5)(a)(i), as amended by Ch. 316, 1995 Wn. Laws, effective 7-23-95 [formerly .360]

(2) Juvenile

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

RCW 9.94A.360(6)(a) and (b)

*Effective 7-1-97, RCW 9.94A.360(6) was repealed. Score multiple juvenile priors the same way multiple adult priors are scored.

b. Prior Convictions – Pre-July 1, 1986

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 day as one offense. Use the conviction for the offense that yields the highest offender score.

As used in RCW 9.94A.360(5), "served concurrently" means that: (i) the latter sentence was imposed with specific reference to the former; (ii) the concurrent sentences were judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation of the former offenses.

RCW 9.94A.525(5)(a)(i) and (iii), (Amend 1995)

4. Prior Out-of-State and Federal Convictions

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law; federal convictions 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 the subject of exclusive federal jurisdiction, the offense shall be scored as a Class "C" felony equivalent if it was a felony under federal law.

RCW 9.94A.525(3), as amended by Ch. 316, 1995 Wn. Laws [formerly .360]

5. Anticipatory Offenses

Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses. ("Felony anticipatory crime" is read to mean that the anticipatory crime is a felony, not an attempted Class C felony.)

RCW 9.94A.525(4) [formerly .360]

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.

RCW 9.94A.525(6) [formerly .360]

XII. "DAY REPORTING"

"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.

XIII. "DEPARTMENT"

"Department" means the Department of Corrections.

RCW 9.94A.030(16)

XIV. "DETERMINATE SENTENCE"

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

RCW 9.94A.030(17)

XV. "DRUG OFFENSE"

"Drug offense" means:

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

B. Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance, or

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

RCW 9.94A.030(20)

D. Drug offender sentencing alternative – see Section 14.

XVI. "ESCAPE"

"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), wilful failure to return from furlough (RCW 72.66.060), or willful failure to return from work release (RCW 72.65.070) or 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.

RCW 9.94A.030(22)

XVII. "EXPEDITED CRIMES"

The term "expedited crime" defines a non-statutory procedure relating to the exercise of filing discretion in the King County Prosecutor's Office for specified nonviolent offenses. See Section 18 for specifics.

XVIII. "FELONY TRAFFIC OFFENSE"

"Felony traffic offense" means:

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

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

RCW 9.94A.030(23)

XIX. "FINES" (see Monetary Obligations)

A. Defined

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

RCW 9.94A.030(24)

B. Amount

On all sentences under the Sentencing Reform Act, the court may impose fines and fines may be recommended by the state, according to the following ranges:

Class A felonies	$0-50,000
Class B felonies	$0-20,000
Class C felonies	$0-10,000

RCW 9.94A.550

XX. "FIRST-TIME OFFENDER"

A. "First-time offenders" means any person:

1. who is convicted of a felony not classified as:

a. violent

b. a sex offense; or

c. the manufacture, delivery, or possession with intent to manufacture or delivery of methamphetamine or a controlled substance in schedule I or II that is a narcotic drug or the selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana, and

2. who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

RCW 9.94A.030(25)

B. Special Sentencing Provisions for "First-Time Offenders":

1. Waiver of Sentence Within Range

In sentencing a first-time offender, the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to 90 days of total or partial confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may include a term of "community custody" ("community supervision" for crimes prior to 7-1-00). The period of supervision is limited to one year but up to two years if treatment is ordered. The sentence may prohibit any

new offenses, include any crime-related prohibitions and one or more of the following:

a. Devote time to a specific employment or occupation;

b. Undergo available outpatient treatment for up to two years or inpatient treatment not to exceed the standard range of confinement for that offense;

c. Pursue a prescribed, secular course of study or vocational training;

d. Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change of address or employment;

e. Report as directed to the court and a community corrections officer;

f. Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

RCW 9.94A.650 [formerly 120(5)]

XXI. "HOME DETENTION" (see "Partial Confinement")

XXII. "MONETARY OBLIGATIONS" – Costs and Fines (see also "Fines" and "Restitution")

A. What May Be Ordered

"Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or inter-local 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.

RCW 9.94A.030(27)

B. Authority for Imposition

Whenever a person is convicted of a felony, the court may order the payment of a legal financial obligation as part of the sentence.

RCW 9.94A.760 [formerly .145]

C. Ability to Pay Requirement

The court should consider defendant's present or future ability to pay, taking into account defendant's financial resources and the likelihood that indigence will end. However, formal findings of present or future ability to pay financial obligations are unnecessary. State v. Curry, 118 Wn.2d 911 (1992).

D. Drafting the Order/Judgment and Sentence

Either on the Judgment and Sentence or subsequent order, the court shall:

1. Designate the total amount and segregate assessments;

2. On the same order, indicate amount to be paid monthly and if the court does not set the amount, the department will; and

3. If the court determines the defendant has the means to pay, the court may order the defendant to pay the cost of incarceration.

RCW 9.94A.760

E. Time to Pay

All monetary payments shall be ordered paid by no later than ten years after the most recent of either the last day of release from confinement pursuant to a felony conviction or the date the sentence was entered. For crimes committed after 7-1-00, the court retains jurisdiction until paid.

RCW 9.94A.760 [formerly .120(12)]

F. Supervision

Offenders sentenced to terms involving community supervision, community service, community placement, community custody, or legal financial obligation may be under the supervision of the Department of Corrections and, if so, shall follow explicitly the conditions and instructions of the department. The department may only supervise the offender's compliance with legal financial obligations during the term of their supervision. The county clerk is authorized to collect legal financial obligations while the offender is under the jurisdiction of the court.

RCW 9.94A.720; RCW 9.94A.753(4)

G. Enforcement

1. Department of Corrections criteria for collecting legal financial obligations and available remedies are covered by RCW 9.94A.760-.7709.

2. Legal financial obligation constitutes a condition of sentence and offender is subject to penalties as provided in RCW 9.94.200 for noncompliance.

RCW 9.94A.760

XXIII. MULTIPLE CURRENT OFFENSES – CONCURRENT/CONSECUTIVE

A. Multiple Current Offenses – Concurrent

1. General Rule

Except as provided in (B) or (C) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589

"Other current offenses" are those sentenced on the same day. RCW 9.94A.525(1)

2. Two or More Serious Violent Offenses

Whenever a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct, the sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the sentence range for other serious violent offenses shall be determined by using an offender score of zero. The sentence range for any offenses that are not serious violent offenses

shall be determined according to RCW 9.94A.589(1)(a). All sentences imposed under RCW 9.94A.589(1)(b) shall be served consecutively to each other and concurrently with sentences imposed under RCW 9.94A.400(a).

RCW 9.94A.589(1)(b) [formerly .400]

B. Already Sentenced for a Felony – Consecutive Sentences

Whenever a person while under sentence of felony commits a felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

RCW 9.94A.589(2)(a)

C. Multiple Offense – other than A and B above

Subject to RCW 9.94A.589(1) and (2), whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3)

Second or subsequent sentencing court has complete discretion to impose concurrent or consecutive sentence. See State v. Long, 117 Wn.2d 292.

D. Probation Revocation – Pre-SRA Felony Only

Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to SRA unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

RCW 9.94A.589(4)

E. Serving Consecutive Sentences

However, in the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community service, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.120(2), if two or more sentences that run consecutively include periods of community

supervision, the aggregate of the community supervision shall not exceed 24 months.

RCW 9.94A.589(5)

XXIV. "NON-VIOLENT OFFENSE"

"Non-violent offense" means an offense which is not a violent offense.

RCW 9.94A.030(29)

XXV. "OFFENDER"

"Offender" means a person who has committed a felony established by state law and is 18 years of age or older or is less than 18 years of age but whose case has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout SRA, the terms "offender" and "defendant" are used interchangeably.

RCW 9.94A.030(30)

XXVI. "PARTIAL CONFINEMENT"

A. Alternative Conversion

See "Alternative Conversions" for conversion of total to partial confinement.

B. Partial Confinement

"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.

RCW 9.94A.030(31)

An offender sentenced to partial confinement shall be confined for at least eight hours per day or, if serving a work crew, sentence shall comply with the conditions of that sentence as set forth in RCW 9.94A.030(31) and 9.94A.725. As a condition of partial confinement, the offender may be required to report at designated times, and may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the department.

RCW 9.94A.731

C. Home Detention

1. "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance (RCW 9.94A.030(26)). Home detention may not be imposed for offenders convicted of a violent offense, any sex offense, and drug offense, reckless burning in the first or second degree as defined in RCW 9A.48.040 or 9A.48.050, assault in the third degree as defined in RCW 9A.36.031, assault of a child in the third degree, unlawful imprisonment as defined in RCW 9A.40.040, or harassment as defined in RCW 9A.46.020. Home detention may be imposed for offenders convicted of possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403) if the offender fulfills the participation conditions set forth in this subsection and is monitored for drug use by treatment alternatives to street crime (TASC) or a comparable court or agency-referred program.

2. Home detention may be imposed for offenders convicted of burglary in the second degree as defined in RCW 9A.52.030 or residential burglary conditioned upon the offender: (a) successfully completing 21 days in a work release program, (b) having no convictions for burglary in the second degree or residential burglary during the preceding two years and not more than two prior convictions for burglary or residential burglary, (c) having no convictions for a violent felony offense during the preceding two years and not more than to prior convictions for a violent felony offense, (d) having no prior charges of escape, and (e) fulfilling the other conditions of the home detention program.

3. Participation in a home detention program shall be conditioned upon: (a) the offender obtaining or maintaining current employment or attending a regular course of school study at regularly defined hours, or the offender performing parental duties to offspring or minors normally in the custody of the offender, (b) abiding by the rules of the home detention program, and (c) compliance with court-ordered legal financial obligations.

4. The home detention program may also be made available to offenders whose charges and convictions do not otherwise disqualify them if medical or health-related conditions, concerns or treatment would be better addressed under the home detention program, or where the health and welfare of the offender, other inmates, or staff would be jeopardized by the offender's incarceration. Participation in the home detention program for medical or health-related reasons is conditioned on the offender abiding by the rules of the home detention program and complying with court-ordered restitution.

RCW 9.94A.734

D. Authority for Imposition

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

RCW 9.94A.505

E. "Work Crew"

"Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community of not less than 35 hours per week that complies with RCW 9.94A.135. The civic improvement tasks shall be performed on public property or on private property owned or operated by nonprofit entities, except that, for emergency purposes only, work crews may perform snow removal on any private property. The civic improvement tasks shall have minimal negative impact on existing private industries or the labor force in the labor force in the county where the service or labor is performed. The improvement tasks shall not affect employment opportunities for people with developmental disabilities contracted through sheltered workshops as defined in RCW 82.04.385. Only those offenders sentenced to a facility operated or utilized under contract by a county are eligible to participate on a work crew. Offenders sentenced for a sex offense as defined in RCW 9.94A.030(29) of this section are not eligible for the work crew program.

RCW 9.94A.030(46)

F. Place of Confinement

1. General Rule

A sentence that includes a term or terms of confinement totaling more than one year shall be served in a facility or institution operated, or utilized under contract, by the state. Except as provided for in RCW 9.94A.190(3), a sentence of not more than one year of confinement shall be served in a facility operated, licensed or utilized under contract, by the county, or if home detention or work crew has been ordered by the court, in the residence of either the defendant or a member of the defendant's immediate family.

RCW 9.94A.190(1)

(Note: The county may use a state partial confinement facility.)

RCW 9.94A.190(2)

2. Multiple Sentences of Confinement – Over and Under One Year

A person who is sentenced for a felony to a term of not more than one year and who is committed or returned to incarceration in a state facility on another felony conviction, either under the indeterminate sentencing laws, chapter 9.95 RCW, or under this chapter shall serve all terms of confinement, including a sentence of not more than one year, in a facility or institution operated, or utilized under contract, by the state, consistent with the provisions of RCW 9.94A.589.

RCW 9.94A.190(3), RCW 9.94A.589

3. "Special detention facility" is defined in RCW 70.48.020(3). At the present time, King County neither operates nor has under contract any such facility. Sea Dru Nar, Conquest House and other similar drug and/or alcohol programs are not "detention facilities" and do not qualify as a place for any confinement under RCW 9.94A.030(23), (31) and 9.94A.190(1). State v. Bernhard, 108 Wn.2d 527 (1987) is often cited for the proposition that a determinate sentence may be served in a "drug program," however, that decision clearly holds that to qualify the program must meet the definition of RCW 70.48. They simply do not. Bernhard still stands for the proposition that a drug treatment requirement may be imposed as exceptional condition of Community Supervision under RCW 9.94A.383. See State v. Gaines, 122 Wn.2d 502 (1993) (10-7-93). Community Supervision and its conditions are separate and distinct from the determinate sentence of confinement imposed. If a judge orders a defendant to serve all or part of determinate sentence in one of these "programs," follow the procedures set forth herein for State's Appeal of Sentencing.

XXVII. "POST RELEASE SUPERVISION"

"Post release supervision" is that portion of an offender's community placement that is not community custody.

RCW 9.94A.030(33)

XXVIII. "RESTITUTION"

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

RCW 9.94A.030(34)

B. Special Sentencing Provisions for "Restitution"

1. Legal Authority for Restitution Order

a. Basis – Offenses Committed After July 1, 1985

Restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment of injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the cost of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

RCW 9.94A.753 [formerly .142]

b. Charged Crimes and by Agreement Uncharged Crimes

If the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement, restitution shall be ordered for an injury, loss, or damage.

RCW 9.94A.735(5)

2. Court Directed to Order Restitution

The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

RCW 9.94A.753(5)

3. Time Deadline

If restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days and shall set a minimum monthly payment that the offender is required to make towards restitution.

RCW 9.94A.753(1)

State v. Krall, 125 Wn.2d 146 (1994), held that the 60-day rule is mandatory. Ch. 231, Laws of Wn., effective 7-23-95, changed 60 to 180 and allows the court to continue the restitution hearing for good cause.

4. Enforcement of Restitution

   a. For offenses prior to July 1, 2000, the court retains jurisdiction for ten years from the date of sentence or release from total confinement, whichever ends later. See State v. Sappenfield, 138 Wn.2d 588 (1999). Court can extend an additional ten years but must do so prior to expiration of first ten years.

   b. For offenses after July 1, 2000, the court retains jurisdiction until the obligation is satisfied, regardless of the statutory maximum for the crime.

   c. Supervision of the offender/monitoring compliance is the responsibility of the Department of Corrections but only during any period which the department is authorized to supervise the offender in the community or in confinement. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of legal financial obligations.

      RCW 9.94A.753(4)

5. Fraud or Deceptive Practices

   In addition to any sentence that may be imposed, a defendant who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

6. Civil Remedies/Bankruptcy

   Ordering restitution does not limit civil remedies or defenses available to the victim or defendant. A restitution obligation is generally "non-dischargeable" in any bankruptcy proceeding.

7. Sentence

If an offender is ordered to pay restitution, the court must specify the total amount, and a specified monthly sum. Restitution to victims shall be paid prior to any other payments of monetary obligations.

RCW 9.94A.750, .760(10)

8. Alternative to Fine – RCW 9A.20.030

The court has the authority to impose restitution as an alternative to a fine for any crime separate from the sentencing court's authority to impose it under 9.94A.753.

Under this provision, the court may set the amounts at up to double the amount of the victim's loss or the defendant's gain.

XXIX. "STANDARD SENTENCE RANGE"

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

RCW 9.94A.030(40)

XXX. "SERIOUS TRAFFIC OFFENSE"

"Serious traffic offense" means:

A. Driving while intoxicated (RCW 46.61.502), actual physical control while intoxicated (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.

RCW 9.94A.030(36)

XXXI. "SERIOUS VIOLENT OFFENSE"

"Serious violent offense" is a subcategory of violent offense and means:

A. Murder in the first degree, homicide by abuse, murder in the second degree, manslaughter in the first degree, assault in the first degree, kidnapping in the first degree, rape in the first degree, assault of a child in

the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies, or

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

RCW 9.94A.030(37)

XXXII. "SEX OFFENSE"

"Sex offense" means:

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

B. A felony with a finding of sexual motivation under RCW 9.94A.127; or

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

RCW 9.94A.030(38)

XXXIII. "SEXUAL MOTIVATION"

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

RCW 9.94A.030(39)

XXXIV. "TOTAL CONFINEMENT"

"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.

RCW 9.94A.030(42)

XXXV. "VICTIM"

"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.

RCW 9.94A.030(44)

XXXVI. "VIOLENT OFFENSE"

"Violent offenses" are:

A. Murder in the first or second degree;

B. Manslaughter in the first or second degree;

C. Assault in the first or second degree;

D. Assault of a child in the first or second degree;

E. Rape in the first or second degree;

F. Rape of a child in the first degree;

G. Indecent liberties (if committed by forcible compulsion);

H. Robbery in the first or second degree;

I. Kidnapping in the first or second degree;

J. Burglary in the first degree;

K. Arson in the first or second degree;

L. Extortion in the first degree;

M. 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.

N. Vehicular assault (DUI and Reckless only)

O. Child molestation in the first degree;

P. Drive-by shooting

Q. Attempt to commit a Class A felony, criminal solicitation of or criminal conspiracy to commit a Class A felony;

R. 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" above;

S. Any federal or out-of-state conviction for an offense comparable to a felony classified as a "violent offense" above.

RCW 9.94A.030(45)

XXXVII. "WORK RELEASE"

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

RCW 9.94A.030(48)

An offender in a county jail ordered to serve all or part of a term of less than one year in work release work crew, or program of home detention who violates the rules of the work release facility work crew, or program of home detention or fails to remain employed or enrolled in school may be transferred to the appropriate county detention facility without further court order but shall, upon request, be notified of the right to request an administrative hearing on the issue of whether or not the offender failed to comply with the order and relevant conditions. Pending such hearing, or in the absence of a request for the hearing, the offender shall serve the remainder of the term of confinement as total confinement. This subsection shall not affect transfer or placement of offenders committed to the state Department of Corrections.

RCW 9.94A.180(2)

XXXVIII. "WORK ETHIC CAMP" (1994)

A. "Work ethic camp" means an alternative incarceration program designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive array of real work job and vocational experiences,…, substance abuse rehabilitation, counseling,…, basic adult ed."

RCW 9.94A.030(47)

B. Eligibility: Offender is eligible for work ethic camp who:

1. is being sentenced to Department of Corrections and the standard range is between 12 months plus one day and 36 months;

2. has no prior convictions for a "sex offense" or a "violent offense"'

3. current offense is not a "violent" or "sex offense";

4. effective for crimes after 7-25-99, current offense is not a VUCSA offense (1999 legislature wanted drug law violators pushed into "D.O.S.A." alternative and out of W.E.C.).

XXXIX. "OTHER"

A. Alien Deportation (1994)

Subject to important limitations the secretary of the Department of Corrections may conditionally release an offender, who has a final order of deportation from I.N.S., prior to completion of the determinate sentence.

The limitations:

1. Does not apply to violent offenses, sex offenses, or crimes against the person.

2. The secretary must find that release is in the "State's best interests." (undefined)

3. Release requires approval of both the prosecuting attorney and sentencing judge. RCW 9.94A.280.

B. Drug Offender Sentencing Alternative (D.O.S.A.)

RCW 9.94A.030(19), RCW 9.94.120(6), effective date 4-19-95; see Section 14, II., B., 9 (p. 12)

C. "Persistent offender" is an offender convicted of a "most serious offense" who has twice previously been convicted of a most serious offense or who has been convicted of a "most serious offense" which is also a "sex offense" who has once previously been convicted of a most serious sex offense.

See Section 21 of these standards and RCW 9.94.030(28), (32), 9.94A.120(4), recodified 9.94A.560, 7-1-01

SECTION 3: DECLINATION, THE FILING DECISION AND SENTENCE RECOMMENDATION AND EXCEPTIONS TO STANDARDS

I. DECLINATION OF CASES

A. PROCEDURE – APPEAL OF DECLINE

The specific reasons for declining a case shall be set forth on the decline form. A copy of the reasons shall be given to the detective who presents the case and the detective shall be advised that the decision may be appealed to the senior deputy in charge of the filing unit or the chief of the criminal division. The prosecuting attorney will personally review any decline at the request of a chief of police.

B. DECLINE FOR EVIDENTIARY REASONS

A case may be declined for failure to meet the evidentiary sufficiency standards stated in subsection II B.

C. DECLINE FOR NON-EVIDENTIARY REASONS

RCW 9.94A.440 (state-wide Prosecuting Standards) provides:

A case may be declined for prosecution, even though the standard of evidentiary sufficiency has been satisfied, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the statute in question or would result in decreased respect for the law. The following are examples of reasons not to prosecute which could satisfy this standard:

1. Contrary to Legislative Intent – It is proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

2. Antiquated Statute – It is proper to decline to charge where the statute in question is antiquated in that:

    a. it has not been enforced for many years;

    b. most members of society act as if it were no longer in existence;

    c. it serves no deterrent or protective purpose in today's society, and

    d. the statute has not been recently reconsidered by the legislature. This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

3. De Minimis Violation

It is proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

4. Confinement on Other Charges

It is proper to decline to charge because the accused has been sentenced on another charge to a lengthy period confinement and:

a. conviction of the new offense would not merit any additional direct or collateral punishment;

b. the new offense is either a misdemeanor or a felony which is not particularly aggravated, and

c. conviction of the new offense would not serve any significant deterrent purpose.

5. Pending Conviction on Another Charge

It is proper to decline to charge because the accused is facing a pending prosecution in the same or another county and;

a. conviction of the new offense would not merit any additional direct or collateral punishment;

b. conviction in the pending prosecution is imminent;

c. the new offense is either a misdemeanor or a felony which is not particularly aggravated, and

d. conviction of the new offense would not serve any significant deterrent purpose.

6. High Disproportionate Cost of Prosecution

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

7. Improper Motives of Complainant

It is proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the

underlying purpose of the law in question or would result in decreased respect for the law.

8. Immunity

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

9. Victim Request

It is proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

a. Assault cases where the victim is an adult and has suffered little or no injury;

b. Crimes against property, not involving violence, where no major loss was suffered;

c. Where doing so would not jeopardize the safety of society.

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

D. NOTICE TO VICTIM

The victim or victim's family, if the victim is deceased, normally shall be notified of any decline of a violent crime. When practical, other victims should be notified of declines.

Regarding child victims, the law requires special notice. Therefore, the filing deputy prosecuting attorney shall have the ultimate responsibility to ensure that within five (5) days of the decision to charge or decline, the following people and agency are notified: victim, any person the victim requests and the Department of Social and Health Services. Where an interview was conducted, the deputy prosecutor who conducted the interview normally shall personally contact the victim. In all other instances, the Victim Assistance person designated to provide notice shall provide notice.

II. FILING

A. WHERE TO FILE

1. Felonies

All felonies except expedited ones will be filed direct in superior court in the designated SEA or RJC location as set forth in LCrR 5.1 unless there are specific evidentiary reasons for a preliminary hearing.

2. Expedited Cases

All expedited cases will be filed in Seattle District Court as the applicable felony.

3. Misdemeanor

Misdemeanor and gross misdemeanor case which occur in incorporated areas shall normally be declined in favor of municipal prosecution where there exists a municipal ordinance which covers the conduct involved. Misdemeanors and gross misdemeanors which occur in unincorporated areas shall be filed in the district court for the district in which they occur.

B. STANDARDS OF EVIDENTIARY SUFFICIENCY

RCW 9.94A.440 (State-wide Prosecuting Standards) provides:

1. Crimes Against Persons

Crimes again persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

The following shall be considered to be crime against persons:

Aggravated Murder
1st Degree Murder
2nd Degree Murder
Homicide by Abuse
1st Degree Kidnapping
1st Degree Assault
1st Degree Assault of a Child
1st Degree Rape
Rape of a Child
1st Degree Robbery
1st Degree Arson
2nd Degree Kidnapping
2nd Degree Assault

2nd Degree Assault of a Child
2nd Degree Rape
2nd Degree Robbery
1st Degree Burglary
1st Degree Manslaughter
2nd Degree Manslaughter
1st Degree Extortion
Indecent Liberties
2nd Degree Rape of a Child
Incest
Vehicular Homicide
Vehicular Assault
3rd Degree Rape
3rd Degree Rape of a Child
1st Degree Child Molestation
2nd Degree Child Molestation
3rd Degree Child Molestation
2nd Degree Extortion
1st Degree Promoting Prostitution
Intimidating a Juror
Communication with a Minor
Intimidating a Witness
Intimidating a Public Servant
Bomb Threat (if against person)
3rd Degree Assault
3rd Degree Assault of a Child
Unlawful Imprisonment
Promoting a Suicide Attempt
Riot (if against person)
Stalking
Custodial Assault
Violation of No Contact Order (DV)
Counterfeiting (which violates public safety)

2. Crimes Against Property/Other Crimes

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

The following shall be considered crimes against property/other crimes:

2nd Degree Arson
1st Degree Escape
2nd Degree Burglary

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

C. COUNTS/CHARGES

1. Filing Standard – Counts/Degree

The counts and degree of charges initially filed shall adequately reflect the nature of the defendant's criminal conduct.

Counts and degrees of charges initially shall be filed conservatively, and the defendant normally will be expected to plead guilty to the initial charges or go to trial. The case shall not be overcharged (e.g., charging higher degree or counts) to gain a guilty plea.

2. The number of counts which normally shall be initially filed is determined by the provision on this subject in the applicable specific crime section of these policies. If the number of counts has not been established by these

policies, one count normally shall be filed for each crime up to a maximum of three counts.

D. DEADLY WEAPON AND FIREARM ALLEGATION – SEE ENHANCEMENTS, SECTION 17

E. SEXUAL MOTIVATION ALLEGATION – SEE SEXUAL ASSAULT, SECTION 7

1. Any case involving a special allegation of sexual motivation shall be handled by the Special Assault Unit.

F. INITIAL SENTENCE RECOMMENDATION

1. Procedure

The initial sentencing recommendation shall generally be made at the time of filing if criminal history, real facts and charges are complete. Any plea negotiation prior to the taking of a trial date shall be addressed to a designated member of the Early Plea Unit for drug and mainstream cases or to a designated senior deputy in the special assault and domestic violence units. Any exception to these standards shall be approved according to the exception policy and procedures in Section 3 (IV). Appeals from the decisions of the member of the early plea unit or special assault unit senior may be made to the chair of the appropriate practice group who may refer the appeal to the chief deputy of the criminal division and in turn to the prosecuting attorney.

2. Sentence Recommendation

a. Standard – General

In every felony case, a sentencing recommendation shall be made pursuant to the Sentencing Reform Act and these policies regardless of the method of conviction. These standards contemplate that the state's sentencing recommendation normally shall be for a determinate sentence near the top of the standard range for the crime in question unless there are mitigating factors.

b. Early Plea Project

Under these policies, an early plea (not later than the trial setting hearing) is considered a significant mitigating factor. An early plea reduces the impact upon the criminal justice system with its limited resources. Moreover, it avoids the adverse impact of further hearings and a trial upon the victim and witnesses. An

initial sentencing recommendation should reflect the benefits to all concerned of an early plea. Therefore, the initial sentence recommendation shall be conservative, in compliance with these policies and the Sentencing Reform Act, and one to which the defendant will be expected to plead guilty. However, Early Plea Project normally will not apply to special assault and domestic violence cases. Early Plea units may be required to adjust early plea cut-off dates to correspond with changes in the court's trial setting procedures.

In accordance with the early plea project, the following policies shall be utilized in deciding upon an initial sentencing recommendation:

(1) Recommendation within Standard Range

The initial sentencing recommendation for a determinate sentence shall contemplate an early plea which is a major mitigating factor and therefore, the State's recommendation normally shall be for a determinate sentence near the bottom of the standard range for the crime in question. The initial sentencing recommendation shall be increased towards the top of the standard range if there are any significant aggravating factors. Aggravating factors that may be considered include vulnerable victim, crime circumstances, unscored criminal history, etc.

The State normally shall recommend punishment for every felony offense in the form of confinement or community service even though the bottom of the range is zero. When the bottom of the standard range is zero (0), the State's minimum recommendation in the absence of aggravating factor normally shall be as follows: 0-60 days, 15 days total confinement converted to 10 days partial confinement and 5 days community service; 0-90 days, 30 days total converted to 20 days partial confinement and 10 days community service. However, thirty (30) days total confinement shall be the minimum punishment when the bottom of the range is zero for the following: theft in the first degree from the person and any case where the offender has a prior felony conviction, scored or not. The exception policy including the use of form 119 shall be followed if the initial sentencing recommendation goes below the minimum recommendation of punishment (see IV this section).

(2) Deviation from Standard Range

At the time of filing and/or when the initial sentencing recommendation is made, the filing or early plea deputy prosecutor shall make a concerted effort to identify aggravating and mitigating factors which would justify a deviation outside the presumptive sentencing range. Recommendations for deviation normally shall be made based upon aggravating and mitigating factors specified by these standards and any other identifiable grounds for deviation. Deviation above the presumptive sentencing range shall be allowed only when a reasonable and objective fact finder would find that there are substantial and compelling reasons which justify the exception. The exception policy shall be followed if there is a deviation from the standard sentencing range and exceptional sentences shall be approved by the chief criminal deputy or the chair of the appropriate practice group.

(3) Multiple Victims and Same Conduct Issue

RCW 9.94A.589(1)(a) provides that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be scored as one crime. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The State's criminal history scoring form shall indicate when current offenses are encompassed and the Judgment and Sentence should clearly reflect whether any current offenses are encompassed. As a general rule, filing multiple counts which encompass the "same criminal conduct" is not common, however, sometimes is necessary for trial purposes. Filers should note this in the sentencing packet scoring forms.

(4) Electronic Home Detention (RCW 9.94A.734)

Electronic home detention normally shall be considered in all cases provided the defendant is statutorily eligible and meets the technical requirements of the program, unless any of the following circumstances exist –

(a) Charged Offense

(i) The charged offense involved a firearm;
(ii) the charged offense is intimidating a witness, tampering with a witness, escape or bail jumping;
(iii) the standard range for the charged offense is more than 12 months.

(b) Prior Criminal Record

(i) The suspect has any conviction for a Class A offense, intimidating a witness, tampering with a witness, or comparable out-of-state or federal offense.

(c) History of Response to Legal Process

(i) The suspect has any conviction for escape, failure to return to work release or bail jumping.
(ii) If the suspect has a history of failures to respond to legal process (i.e., FTAs), deputies should consider the following factors before recommending a jail alternative: the number of FTAs, the recency of the FTAs, and the seriousness of the offenses underlying the FTA; and the seriousness of the current offense. (Deputies should be mindful that warrants may issue at the time of the filing of charges so certain warrants may not be indicative of a defendant's lack of response to the legal process.)

(5) First-Time Offenders

(a) A defendant shall normally receive a state's initial sentence recommendation for a determinate sentence within the standard range, rather than for a first-time offender waiver. However, at any time prior to the setting of a trial date, this initial sentencing recommendation may be modified to a first-time offender waiver normally under the following circumstances;

– the defendant meets the statutory definition of a first-time offender

– the defense requests a first-time offender waiver

– the criminal conduct is isolated in terms of time period and character of offense and

– lesser punishment is in accord with the seriousness of the criminal conduct. When the top of the sentencing range exceeds (12) months, a first-time offender waiver normally shall not be made and if made, the exception policy shall be followed.

(b) If the State's recommendation is for a first-time offender waiver, the State normally shall recommend punishment as follows: for a class C felony, the recommendation shall be between 0-60 days confinement and for a class B felony, the recommendation shall be between 30-90 days confinement. Community service may be substituted for up to 30 days of confinement.

(c) A defendant who otherwise qualifies for first-time offender waiver, but with multiple current offenses, may receive a recommendation for consecutive sentences including terms of confinement, community service and community supervision.

(6) Post-Sentence Supervision

(a) For determinate sentences of one year or less the court may order state D.O.C. supervision for a specific period of up to 12 months. For crimes prior to 7/1/00 this is called "Community Supervision" and is defined in RCW 9.94A.030(8). Under "Community Supervision" the court has control over imposition of sanctions. Under the Offender Accountability Act (O.A.A.), effective for crimes after 7/2/00, this supervision is called "Community Custody" as defined in RCW 9.94A.030(4). The important distinction to remember is that "Community Custody" provides D.O.C. administrative control over supervision and sanctions for non-compliance. In addition, "Community Custody" allows for a broader range of controls and affirmative conduct requirements. RCW 9.94A.700(4), (5); RCW 9.94A.715, and RCW 9.94A.720.

Effective 7/1/03, DOC is no longer authorized to supervise certain "lower risk" defendants. See RCW 9.94A.728; RCW 9.94A.700.

(b) For determinate sentences over one year, committed between 1988 and 7/1/00, which involve commitment to D.O.C. (prison), the court has been required to impose a form of post-release supervision, but not for all offenses. This mandatory supervision called "Community Placement" is defined in RCW 9.94A.030(6). "Community Placement" is a composition of "Community Custody," in which D.O.C. retains control of both supervision and sanctions for non-compliance, followed by "post-release supervision" where the court imposes sanctions. The Community Placement laws are codified in RCW 9.94A.700, 705, 720. In any prison sentence recommendation for crimes prior to 7/1/00 you must be aware and incorporate into the plea agreement whether or not Community Placement is required and for how long. Failure to do so correctly may render a plea vulnerable upon appeal or collateral attack.

For determinate sentences over one year for crimes committed on or after 7/1/00, "Community Custody" replaces "Community Placement." Community Custody, as indicated above, gives D.O.C. complete administrative control over both supervision and sanctions. It is mandatory, but not for all offenses. RCW 9.94A.120(11), now recodified as RCW 9.94A.710/715, describes which crimes are subject to this provision. As with Community Placement, failure to recognize and include Community Custody requirements in your plea agreement may render the plea vulnerable upon later review.

(c) See also Section 3 for Standards for Sentencing Recommendations Involving Supervision in the Community.

(7) Payment of Restitution

Every initial sentencing recommendation shall request full restitution to victims. The initial sentencing recommendation shall provide for a plea agreement whereby the defendant will make restitution on a plea to a lesser offense or fewer offenses pursuant to RCW 9.94A.140(2) if there is probable cause to believe the defendant committed the crime and a reasonable expectation a case could be fully developed. It is the filing deputy's duty to ascertain what restitution is due to the extent possible. It is the prosecutor's policy to seek full lawful restitution. The burden is on a convicted defendant to justify to the court that there are extraordinary circumstances which make restitution inappropriate. RCW 9.94A.753/760.

(8) Other Monetary Obligation Sentence

The State's sentence recommendation normally shall include the following monetary sentence: recoupment of defense attorney costs, court costs, and, in all cases, the crime victims' compensation assessment. If appropriate, the State's recommendation may include: payment of extradition costs and contribution to county interlocal drug fund. While fines are not normally recommended, they may be recommended in economic crimes.

(9) Order Relating to Circumstances of Crime – No Contact

When appropriate, the State's sentencing recommendation may include recommendation for a no contact order in accordance with RCW 9.94A.120(8).

(10) Blood Testing – HIV and DNA Identification System

(a) The State's sentence recommendation shall provide for blood testing for HIV and/or the DNA identification system as set forth in the next two subsections.

(b) HIV Blood Testing and Counseling

Under RCW 70.24.340, the sentencing court shall order that HIV testing be conducted as soon as possible after sentencing for offenders whose crimes were committed after March 23, 1988, and who have been

(i) convicted of sexual offense under chapter 9A.44 RCW;

(ii) convicted of prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or

(iii) convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.

(c) DNA Identification System

Under RCW 43.43.754, a biological sample for DNA purposes shall be taken from every offender who has been convicted of any felony offense as well as misdemeanor stalking, harassment and communicating with a minor (CMIP).

(11) Work Ethic Camp – RCW 9.94A.690

A defendant will normally receive a state's initial sentence recommendation for a determinate sentence within the standard range, however, prior to setting of a trial date this

initial recommendation may be amended to include a recommendation that the defendant serve this sentence in a work ethic camp (see definition in Section 2, XXXVII of these standards) under the following circumstances:

(a) The defendant meets the statutory eligibility criteria (no current or prior violent or sex offenses, and a standard range sentence is 12+ to 36 months and the current offense is not VUCSA offense or Solicitation to Commit drug offense)

(b) The lesser punishment is in accord with the seriousness of the criminal conduct in that there are no particular aggravating factors inherent in the current offense and is in accord with the defendant's overall prior criminal history. Example, a 36-month WEC sentence may result in defendant serving as little as 120 days in prison with the balance in "Community Custody" upon graduation from Drug Court's WEC program. Remember "Community Custody" is now nothing more than ordinary probation supervision in the community. So do not recommend WEC unless the reduced confinement is consistent with case facts and criminal history of defendant.

(c) Reasons for not recommending work ethic camp should be articulated on the sentence recommendation form.

(12) Special Drug Offender Sentence Alternative (D.O.S.A.), effective 4/19/95. See Drug Offense Standards §16.

c. Sentence Recommendation and Sentencing Forms

A concerted effort has been made to create a form for all categories of sentence recommendations. If you are familiar with and use the correct sentence recommendation form, the form will set out for you the correct sentencing options. If you use the wrong form it is likely that you will recommend the wrong post-sentence supervision option. Look at the top of the form for the form description (i.e., non-sex offense, committed after 7/1/00; sentence <u>over</u> one year).

Check for: Crime category (sex, non-sex offense), crime date (<u>before</u> 7/1/00, after 7/1/00)

Recommendation (over one year, under one year, first offender waiver, D.O.S.A., S.O.S.A.)

Use of the correct sentence recommendation form will ensure that the sentencing unit creates the correct J&S form. The J&S forms also are tailored in the same manner as the sentence recommendation forms. Example, do not use a J&S form for sentences over one year when the court imposes a sentence of less than one year.

3. Criminal History

a. Early Identification of Criminal History

Under the Sentencing Reform Act, a determination of criminal history is crucial to the sentencing decision for it coupled with the current offense determines the presumptive standard range and classification of the offender. Early identification of the offender's criminal history is necessary to make early plea discussions meaningful and to avoid unnecessary disputes over the offender's criminal history.

Relevant portions of the Sentencing Reform Act are as follows:

(1) The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be decided at the sentencing hearing. RCW 9.94A.441.

In no instance may the prosecutor agree not to allege prior convictions. RCW 9.94A.460.

. . . The court shall consider the presentence reports, if any, and a criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim or a representative of the victim, and an investigative law enforcement officer as to the sentence to be imposed. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. . . . RCW9.94A.500.

b. Plea Agreement

(1) Defense Stipulation to Criminal History:

If the defendant stipulates to his/her criminal history, as well as any restitution and real facts, the State at the time of plea normally shall make a recommendation for a determinate sentence and as to disposition of count(s), uncharged crime(s) and degree of crime(s).

(2) Defense Dispute of Criminal History:

If the defendant disputes criminal history, the State normally shall not make a recommendation for a determinate sentence, but rather the deputy prosecutor representing the State at the time of the plea shall state that the State may make a recommendation for the full penalty allowed by law. However, when there is a dispute over criminal history, but the defendant wishes to enter a plea and enters into agreement regarding restitution and real facts, if any, the State normally shall make a recommendation as to disposition of count(s), uncharged crime(s) and degree of crime(s).

c. Obtaining Authenticated Documents – Trial or Disputed Criminal History

If a case is set for trial, it is the responsibility of the trial deputy to immediately obtain all authenticated prior conviction documents.

III. POST-TRIAL SETTING PROCEDURES

A. COUNTS/CHARGES – AMENDMENT

If the defendant has elected to go to trial, the defendant shall be notified at the trial setting hearing that the initial sentencing recommendation is canceled. It is the assigned trial deputy's responsibility with the trial team senior deputy's approval to file additional offenses. Additional offenses may be charged only if they are necessary to ensure that the charges:

1. will significantly enhance the strength of the State's case at trial, or

2. will result in restitution to all victims. Additional offenses shall not be charged to obtain a guilty plea.

B. SENTENCING RECOMMENDATION

1. Procedure

Once defense counsel elects to take a trial date, the initial sentencing recommendation is canceled and the defendant is given notification of the cancellation. A new recommendation in accordance with these policies and the Sentencing Reform Act shall then be made by Early Plea Unit or by a trial team senior.

Any further plea negotiations after a trial date is received shall first be addressed to the trial deputy. Any exception to the new sentencing recommendation shall follow the exception policy in Sec. 3 (IV).

2. Recommendation

The post trial setting sentencing recommendation shall be in compliance with the Sentencing Reform Act and normally will be at or near the top of the applicable range. If there is a deviation from the standard sentencing range, the exception policy shall be followed.

IV. EXCEPTIONS TO STANDARDS

A. EXCEPTION POLICY

1. Exceptions must be in writing: Any exception and the specific reasons for the exception must be explained in writing (KCPA form 119), except as stated below for EPU as to non-violent crimes. The original shall be retained in the case file and a copy filed with the Chief Criminal Deputy.

2. No exception is binding until approval secured: An exception must be approved in writing, before it is offered to the defense attorney. In any discussions with defendant attorney, it shall be made clear that no proposed exception is binding until it has been approved pursuant to this section, and that the prosecutor reserves the right to change the recommendation prior to acceptance by entry of a guilty plea by the defendant.

3. Exception requests should be processed as quickly as possible: All exceptions, especially those submitted for approval when a trial date is imminent, shall be reviewed promptly; approval should be granted or denied within one working day. Exceptions should be submitted for review as soon as the problems with the case become manifest; exceptions submitted on or near the date of trial will be subjected to particularly rigorous scrutiny when they are based upon reasons apparent at the time of filing, early plea negotiation, or assignment to the trial deputy.

4. Exception policies apply equally to all deputies: Any deputy, including a senior deputy, seeking an exception in any case assigned to that deputy must follow the exception policy, and may not give final approval to his or her own exception.

B. EXCEPTION PROCEDURE APPLICABLE TO THE DISPOSITION OF ADULT FELONY CASES

1. When Allowed:

Exceptions to filing and disposition policies may be considered in any case; however, the supervisor approval necessary to secure a proposed exception varies depending upon the nature of the crime charged, and in some instances the unit that is responsible for the disposition of the case.

2. Exception Approval Protocol:

a. High-Profile Cases and Homicides (high-profile cases include all homicides, cases involving public officials or law enforcement as victims or defendants, cases that have received media coverage or inquiry, or are likely to generate public interest):

(1) All units: Exceptions must be approved by the Chair of the Unit, the Chief Criminal Deputy, and the Prosecutor.

b. Serious Violent Crimes:

(1) EPU: Exceptions must be approved by a senior deputy negotiator and the chairperson or his/her designee.

(2) TRIAL UNIT: Exceptions must be approved by the chairperson and one supervising senior deputy on the Unit.

(3) SDU: Exceptions must be approved by the chairperson and the Trial Team Supervisor.

(4) SAU and DV: Exceptions must be approved by the chairperson.

(5) All Units: In cases where the victim or police object to the exception, the exception must be approved by the Chief Criminal Deputy and the Prosecutor.

c. Violent Crimes:

(1) EPU: Exceptions may be approved by the negotiator, if the negotiator is a senior. If the negotiator is a non-senior, a senior negotiator must also approve the exception.

(2) Trial Unit: Exceptions must be approved by the chairperson and one supervising senior deputy on the Unit.

(3) SDU: Exceptions must be approved by the chairperson and the Trial Team Supervisor.

(4) SAU and DV: Exceptions must be approved by a senior deputy designated by the chairperson. Also, all SSOSA recommendations must be approved by the chairperson or his or her designee.

d. Non-violent Crimes:

(1) EPU: Exceptions may be approved by a senior negotiator. A designated non-senior negotiator may also approve exceptions if the lead senior on the Early Plea Unit is satisfied that a non-senior negotiator is properly trained on early Plea Unit procedures. Written exceptions, as well as police and victim contact, are not required on property crimes and drug possession cases. However, the circumstances of a particular case may require a written exception and victim/police contact as the EPU deputy sees fit. In cases where a written exception is not used, blue sheet comments should clearly state the basis for any reduction.

(2) Trial Unit: Exceptions must be approved by two senior deputies on the unit.

(3) SDU: Exceptions must be approved by a trial supervisor and a senior deputy.

(4) SAU and DV: Exceptions must be approved by a designated senior appointed by the chairperson. In addition, all SSOSA recommendations must be approved by the chairperson or his or her designee.

(5) All Units: In cases where the victim or police object to the exception, or in cases involving major economic offenses the exception must be approved by the chairperson or his or her designee.

C. APPEALS: CONCESSION OF ERROR POLICY

1. The chairperson of the appellate unit must approve all concessions or error that effect disposition (i.e., that will result in reversal, dismissal or remand).

2. The chairperson or his or her designee may approve a concession or error that is harmless error.

3. The chairperson, in consultation with the Executive Committee, will review all petitions for review on cases the State lost at the Court of Appeals.

4. The chairperson, in consultation with the Executive Committee, must approve any abandonment or dismissal of a State's appeal.

D. RETRIALS

1. High profile cases: Retrial decisions, on high profile cases, must be approved by the Chief Criminal Deputy, in consultation with the Executive Committee, and the Prosecutor.

2. All other cases: Retrial decisions shall be approved by the practice group chairperson.

E. DISMISSAL OF CHARGES

The presence of factors listed in I. B or C of this Section may justify the decision to dismiss a prosecution which has been commenced. When there is a conflict between the general provisions stated in I. B. or C., and the specific crime section on dismissal, the specific crime section shall be controlling.

F. CHARGE REDUCTION

Although a defendant will normally be expected to plead guilty to the degree of charge and number of counts filed or go to trial, in certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest. Such situations may include the following:

1. Evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing;

2. The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;

3. A request by the victim when it is not the result of pressure from the defendant;

4. The discovery of facts which mitigate the seriousness of the defendant's conduct;

5. The correction of errors in the initial charging decision;
6. The defendant's history with respect to criminal activity;

7. The nature and seriousness of the offense or offenses charged.

8. The probable effect on witnesses.

RCW 9.94A.411 (Statewide Prosecuting Standards).

Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before any reduction is offered.

When there is a conflict between this general provision and the specific crime section, the specific crime section is controlling.

G. DISCLOSURE

The prosecutor shall not agree to withhold relevant information from the court concerning a plea agreement. RCW 9.94A.460 (Statewide Prosecuting Standards).

H. DEVIATION FROM STANDARD RANGE

1. Stipulation and Sentencing Memorandum

a. In addition to following the above stated exception policy, any deputy who proposes a deviation from the standard sentencing range for recommendation of an exceptional sentence shall prepare a "Justification for Exceptional Sentence" form citing the basis for the deviation, citation to the appropriate provision of the Sentencing Reform Act on the pertinent aggravating or mitigating factors, and a recitation of any facts which the court should find at the sentencing hearing to support the deviation. Exceptional Sentence recommendations shall be approved by either the Chief Deputy, his designee, or the chair of the practice group.

The following portion of the Sentencing Reform Act is of particular importance regarding the facts the court may consider in going outside the sentencing range:

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535.

b. "Real Facts" Provision

Because a stipulation is required in order for the sentencing judge to be able to consider facts which establish elements of a higher crime, a more serious crime or additional crimes, a stipulation shall be prepared and statement of real facts agreed to by the defendant in the plea agreement before a plea shall be accepted. RCW 9.94A.530(2)

2. Grounds for Deviation

a. Non-exclusive statutory list of reasons for deviation from the standard range

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident;

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained;

(c) The defendant committed the crime under duress, coercion, threat or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct;

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;

(e) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded);

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(g) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purposes of the Sentencing Reform Act as expressed in RCW 9.94A.010 (i.e., punishment proportionate to just sentences, punishment commensurate with punishment of other who commit similar offenses, offer rehabilitation and frugal use of State resources);

(h) The defendant or the defendant's children suffered physical or sexual abuse by a victim of the offense and the offense is a response to that abuse;

RCW 9.94A.535(1).

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim;

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health;

(c) The current offense was a violent offense and victim was pregnant;

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors;

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The offense was a major violation of the Uniform Controlled Substances Act, Chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The

presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for person use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication and planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement;

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation;

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen (18) years manifested by multiple incidents over a prolonged period of time;

(h) Current offense is a DV offense under RCW 10.99.020 and

(i) ongoing pattern of psychological, physical., or sex abuse of victim manifested by

multiple incidents over prolonged period of time; or

(ii) occurred within sight or sound of victim's minor children under 18; or

(iii) manifested deliberate cruelty or intimidation of victim.

(i) Operation of the multiple offender policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this Chapter, as expressed in 9.94A.010.

(j) Prior unscored misdemeanor or foreign convictions results in sentences clearly too lenient.

(k) Offense results in pregnancy of child victim of rape.

(l) The defendant knew that the victim was a youth not residing with a legal custodian and defendant established or promoted a relationship for primary purpose of victimization.

The above considerations are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

b. Furtherance of a Gang Enterprise

Normally an exceptional sentence above the standard range shall be recommended if evidence shows the defendant's conduct in the current offense furthers the criminal enterprise, the gang, in its aims. It is the motivation, to further the illegal activities of the gang, that is an aggravating factor, not the mere fact of gang membership. State v. Smith, 64 Wn.App. 620 (1992).

c. Prohibited Factors

The following facts shall never be considered in determining the recommendation to be made:

(1) the sex or marital status of the defendant;

(2) the race or color of the defendant;

(3) the creed or religion of the defendant;

(4) the economic or social class of the defendant; and

(5) sexual orientation.

d. Conviction of Lesser Crime

If the defendant goes to trial and is convicted of a lesser offense, the State's sentence recommendation normally shall be proportionate to the seriousness of the crime(s) for which the defendant was convicted and the defendant's criminal history as well as any aggravating and/or mitigating factors.

I. ALTERNATIVE CONVERSION

Under RCW 9.94A.680, for sentences of non-violent offenders for one year or less, the court shall consider and give priority to alternatives to total confinement and shall state its reasons if they are not used. Therefore, in addition to following the above-stated exception policy, the deputy who proposes not to use alternatives to total confinement for non-violent offenders qualifying for alternate conversions shall justify with reasons stated on the State's sentence recommendation form.

V. CASES NOT COVERED BY POLICIES

Cases involving crimes not covered by these standards shall be filed and handled in such a manner as to carry out the general principles inherent in these policies and the Sentencing Reform Act. Reference should be made to these policies for crimes analogous in seriousness and impact upon the community for guidance in determining the appropriate method of filing or disposition.

VI. STANDARDS FOR SENTENCING RECOMMENDATIONS INVOLVING SUPERVISION IN THE COMMUNITY

A. FELONY SENTENCES OVER ONE YEAR

1. In General

"Community Custody" is a form of post-release supervision [see RCW 9.94A.030(5)] which must be imposed by the court for qualifying crimes when the defendant is sentenced to the Department of Corrections for

more than one year. Crimes for which community custody is mandatory include:

a. all "sex offenses" defined in RCW 9.94A.030(38);

b. all "violent" or "serious violent" offenses as defined in RCW 9.94A.030(37) and (45);

c. all "crimes against persons" as defined in RCW 9.94A.411(2);

d. all "drug offenses" under RCW 69.50/52 (note: this does not include "criminal solicitation" to commit a drug offense).

The legislature has not authorized the court to impose community custody for any other offenses. Following release from confinement, these offenders are required to report to Department of Corrections only for compliance with legal financial obligations (restitution, V.P.A., etc.).

2. Community Custody Range

The court is required to impose community custody for the "community custody range or up to the period of earned early release, whichever is longer." See RCW 9.94A.715, 728; RCW 9.94A.030(6); Ch. 437.20 WAC. The current ranges are:

Sex offenses	36-48 months	(but see Section 7 for sex offenses after 9-1-01)
Serious violent	24-48 months	
Violent offenses	18-37 months	
Crimes against persons	9-18 months	
Drug offenses	9-12 months	

3. Community Custody Requirements and Enforcement

a. Mandatory community custody requirements are set forth in RCW 9.94A.715, 720, and 700(4), (5).

b. Special conditions of community custody may be imposed by the court per 9.94A.715(2)(a) and 9.94A.700(5).

c. Enforcement of community custody requirements is an administrative function of the Department of Corrections, and does not involve the court or the Prosecuting Attorney. See RCW 9.94A.715(3), 737 and 740.

4. Sentence Recommendation

The State's sentencing recommendation shall include community custody for all qualifying offenses for the appropriate range.

The State's recommendation may include any appropriate special conditions of supervision within the framework of RCW 9.94A.715(2)(a) or 9.94A.700(5), which are reasonably related to the real facts of the offense.

5. Effective Date:

The above provisions relate to felony offenses committed on or after 7-1-00. For crimes prior to that date, see RCW 9.94A.700/705, "Community Placement," and sentence recommendation forms specific to crimes prior to 7-1-00.

B. FELONY SENTENCES ONE YEAR OR LESS

1. In General

Whenever the court imposes a sentence of one year or less, the court in addition has the discretionary option of imposing up to one year of community custody. RCW 9.94A.545. The terms and conditions and enforcement of community custody under this statute are the same for sentences over one year.

The court's option is not restricted by the underlying offense. Therefore, the court has the statutory discretion to impose community custody for all offenses which result in a jail term but not for many of the same offense committed by an offender with a long criminal history sentenced to prison for more than one year.

2. Purpose

As a general rule, the legislative standard limiting community custody to offenders sentenced to prison for certain crimes should likewise be applied to most offenders sentenced to jail.

3. Sentence Recommendation – Community Custody

a. The State will normally recommend that the court impose community custody for a specific period up to 12 months for the following offenses only:

(1) all domestic violence offenses

(2) all sex offenses

(3) any crime against persons as defined in RCW 9.94A.411

(4) Residential Burglary

(5) Theft 1^{o} (from the person) or any theft involving vulnerable adults

b. The State will normally not recommend the community custody option for other offenses.

c. The State's determinate sentence recommendation within the standard range should be based upon the real facts of the offense and the defendant's scored and unscored criminal history. It should not be influenced by predictions of success (or future sanctions) for community custody performance.

d. The Department of Corrections is required to supervise offenders for compliance with legal financial obligations during the term of the DOC supervision only (i.e., restitution, fines, V.P.A.). See RCW 9.94A.720.

The same is true for community service hours imposed under RCW 9.94A.680 as an alternative to confinement.

Non-compliance with the legal financial obligations and community service requirements will continue to be enforced by the court and Prosecuting Attorney following notice of violations received from the Department of Corrections or the county clerk. RCW 9.94A.720, RCW 9.94.760.

C. MISDEMEANOR SENTENCE RECOMMENDATIONS – SUPERIOR COURT ONLY – SUPERVISION IN THE COMMUNITY

1. Scope

This subsection applies to all Superior Court sentencing recommendations for all gross misdemeanor and misdemeanor offenses.

2. Purpose

To limit the use of traditional probation supervision in the community for Superior Court misdemeanant sentencings to the most serious offenders. This policy is intended to be consistent with the policy of limiting community custody to the most serious felony offenders.

3. Definitions

a. Traditional Probation generally involves the court suspending either the imposition of sentence (i.e., deferred sentence – RCW 9.95.200/210); or the execution of sentence under RCW 9.92.060 or 9.95.200/210. The period of probation may be up to two years when imposed under 9.95.200/210 and must be supervised by the State Department of Corrections.

Traditional probation conditions include jail time, community service, substance abuse treatment and monitoring, no law violations, and no contact orders.

Violation of probation may result in imposition or execution of the entire sentence, or parts of it in increments until the probation period expires or the defendant has served the maximum sentence.

b. Summary Sentence. For the purpose of this subsection, a summary misdemeanor sentence is one in which the court imposes jail term and mandatory costs only. The sentence requires only that the defendant complete the jail sentence imposed whether in total or partial confinement. The sentence is neither suspended or deferred. The State will enforce the confinement sanction through traditional measures.

c. Limited Probation. For the purpose of this subsection means the use of suspended or deferred sentence for the limited purpose of enforcing compliance with the jail sentence, community service hours, and a restitution obligation. Probation may be terminated upon completion of these terms. Traditional noncompliance enforcement measures will be limited to these specific sentence requirements.

4. Sentence Recommendations – Misdemeanors – Superior Court

a. Traditional Probation will be recommended for the following misdemeanor offenses only:

(1) Domestic violence cases;

(2) Special assault cases;

(3) Crimes against persons;

(4) Aggravated traffic (e.g., DUI's have mandatory statutory probation provisions.

b. Limited probation will be recommended in cases in which traditional probation is not allowed but where restitution obligation or community service alternative is recommended. Probation conditions and enforcement are limited to these requirements.

c. Summary Sentence. Traditional or limited probation will not be recommended for:

(1) Misdemeanor drug offenses (e.g., Attempted Violation of the Uniform Controlled Substances Act);

(2) Mainstream property offenses when there is no restitution obligation and no community service requirement;

(3) Traffic offenses which do not have a restitution requirement and/or statutory probation requirement.

Under these circumstances, the State's sentence recommendation shall only include an appropriate jail term in either total or partial jail confinement and the mandatory victim penalty and costs.

The exception policy shall be followed if there is a deviation from these standards and exceptional sentences shall be approved by the chair of the appropriate practice group.

SECTION 4: HOMICIDE

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Homicide cases will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

2. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

B. CHARGE SELECTION

1. Degree

a. Aggravated Murder, Death Penalty

(1) Procedure

Any filing deputy who becomes aware of a potential aggravated murder case, i.e., there is some evidence of premeditation and an aggravating factor (RCW 10.95.020), shall immediately notify the Chief Deputy and the Prosecuting Attorney. No deputy prosecuting attorney is authorized to file aggravated murder or a notice of Special (Death Penalty) Sentencing Proceedings without the prior personal approval of the Prosecuting Attorney. If the Prosecuting Attorney is unavailable, the prior personal approval of the Chief Deputy shall be obtained.

(2) Aggravated Murder in the First Degree

Aggravated murder shall be filed when the Prosecuting Attorney (or in his absence the Chief Deputy) is satisfied to a high degree of probability that:

(a) substantial evidence exists to establish that the homicide was, in fact, premeditated, and

(b) substantial evidence exists to establish the aggravating factor.

If it is decided that the aggravating factor shall be filed, it preferably will be filed at the same time as the first degree murder charge.

(3) Notice of Special Death Penalty Sentencing Proceedings

(a) Procedure: In aggravated murder cases, the assigned deputy under the direction of the Chief Deputy shall compile available information for review by the Prosecutor.

(b) Decision to File: Notice of special (death penalty) sentencing proceedings shall be filed in accordance with RCW 10.95.040 when the Prosecuting Attorney has personally decided that there is not sufficient evidence of mitigation to warrant less than the death penalty. In the absence of the Prosecutor, the decision may be made by the Chief Deputy. Notice MUST be filed and legally served on the defendant or his attorney within 30 days of arraignment unless the court extends time for good cause shown. State v. Dearbone, 125 Wn.2d 173 (11/3/94).

(4) Prosecutor's Death Penalty Decision Procedures

(a) Files

(i) When Created: Whenever it is decided that aggravated murder in the first degree charges are to be filed, two files shall be created by the chief paralegal. One file is for the prosecutor and the other for the Chief Deputy.

(ii) Contents: The contents of the files shall be prepared and gathered by the assigned deputy under the direction of the Chief Deputy. The following shall be placed in the files:

Aggravated Murder - Death Penalty Report

The assigned deputy shall prepare a report, without making a specific recommendation, containing the following information in summary form:

(A) Case Status;
(B) Factual Statement;
(C) Case Problems and Solutions;
(D) Aggravating Factors and Any Proof Problems;
(E) Mitigating Factors Existing Under 10.95.040(1);
(F) Other Mitigating Factors;
(G) Prior Convictions;
(H) Significant Statements from the Police Report.

Defense Input: When directed by the Chief Criminal Deputy, the assigned deputy shall request defense counsel to immediately submit material and the deputy shall note in the file when the request was made. The deputy shall keep a record of any verbal communications with defense counsel as well as any written correspondence.

(b) Decision Making Process

(i) Conference: The Prosecutor may consult with the Chief Deputy and assigned deputy in a group meeting.

(ii) Record: The final decision of the Prosecutor shall be reported in a written document.

b. Murder in the First Degree – 9A.32.030

(1) Premeditated Murder in the First Degree – 9A.32.030

(a) Premeditated homicide cases shall be filed as murder in the first degree only if sufficient admissible evidence of "premeditation" (see 9A.32.020) exists to take that issue to the jury.

(2) Murder 1º under an "extreme indifference" theory, RCW 9A.32.030(1)(b).

(a) This subsection of the Murder 1º statute covers those situations indicating a recklessness and extreme indifference to human life. (See generally, State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980)). It does not apply where the alleged acts were aimed at or intended and inflicted upon a specific individual and no other. State v. Anderson, 94 Wn.2d 176, 188-189 (1980). Extreme indifference murder requires "aggravated recklessness," a mental state below that required for premeditated murder. State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991).

In a case where extreme indifference murder is charged and the facts also support Murder 2º under alternate means, Count I should charge Murder 1º, extreme indifference. Count II should charge, in the alternative, Murder 2º, both theories – intentional murder and felony murder (assault, etc.). Where there are alternate ways to commit a single crime it is permissible to charge both alternatives in the same count. State v. Bowerman, 115 Wn.2d 794, 800, 802 P.2d 116 (1990).

c. Felony Murder in the First Degree – 9A.32.030(c)

(1) Felony murder in the first degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in furtherance of the requisite felony or in immediate flight therefrom.

(2) Felony murder shall not be charged if sufficient admissible evidence exists to raise a reasonable question as to whether the defense set forth in 9A.32.030(c)(i) through (iv) exists.

(3) Doubts as to whether the requisite felony is one of those listed in 9A.32.030(c) shall be resolved by charging felony murder in the second degree.

d. Homicide by Abuse – 9A.32.055

Homicide by abuse shall be charged if there is sufficient admissible evidence existing to prove that under circumstances manifesting an extreme indifference to human life, the person caused the death of a child or person under 16 years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern or practice of assault or torture of said child, person under 16 years of age, developmentally disabled person, or dependent person.

"Dependent adult" means a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. Homicide by abuse is a class A felony.

e. Murder in the Second Degree – 9A.32.050

(1) All intentional homicides other than those covered in a. - d. above shall be charged as murder in the second degree.

(2) Felony Murder in the Second Degree

(a) Felony murder in the second degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in furtherance of the requisite felony or in immediate flight therefrom.

(b) Felony murder shall not be charged if sufficient admissible evidence exists to raise a reasonable question as to whether the defense set forth in 9A.32.050(b)(i) through (iv) exists.

(c) Prior to filing felony murder predicated on assault in the second degree based on an intentional assault that recklessly inflicts substantial bodily harm [9A.36.020(1)(a)] the approval of the Chief Criminal Deputy shall be obtained.

(d) Felony murder predicated on assault in the second degree based on an intentional assault that recklessly inflicts substantial bodily harm shall be filed as Manslaughter 1º when: 1) the crime can be characterized as a typical "one-punch" situation, and 2) a reasonable person would not have foreseen

that death or serious injury would result from the blow inflicted. Factors unique to the defendant, such as a history of assaultive behavior, whether resulting in convictions or not; the size and strength of the defendant; any particular vulnerability of the victim which is known to the defendant; and any special ability to render a life-threatening blow by fist, should be considered in determining whether to file a Murder charge instead of Manslaughter 1º. Adopted 8/30/94 NKM.

Also consider State v. Andress, 147 Wn.2d 602 (October 24, 2002).

f. Controlled Substance Homicide – 69.50.415

A person who unlawfully delivers a controlled substance in violation of RCW 69.50.401(a)(i) or (ii), which controlled substance is subsequently used by the person to whom it was delivered, resulting in the death of the user, shall normally be charged with controlled substances homicide. Controlled substances homicide is a class B felony punishable according to RCW 9A.20.021.

g. Manslaughter – 9A.32.060 and 9A.32.070

Non-intentional homicide not resulting from the operation of a motor vehicle shall be charged as manslaughter in the second degree (9A.32.070) unless sufficient specific admissible evidence exists to take the issue of the defendant's actual knowledge of the risk to the jury, in which case manslaughter in the first degree (9A.32.060) shall be charged.

h. Where Doubt Exists as to Degree

Cases where a question exists as to the proper degree to be charged should be resolved by filing the lower degree and including a notification to the trial deputy to consider an amendment upward if this is justified by the facts as developed during trial preparation. It should not be assumed that cases will be reduced in degree upon a plea of guilty.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count for each murder in the first or second degree or homicide by abuse normally shall be filed in the Information. One count normally should be filed for each other crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more category." For example, six (6) counts of manslaughter in the second degree (separate and distinct criminal conduct) would be the maximum number of counts filed because additional counts after the first one are counted as prior convictions worth 2 points and the "9 or more category" is reached if six (6) counts are alleged. RCW 9.94A.400.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.370, additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for each one for which there is probable cause and a case has been developed or there is a reasonable expectation one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects to go to trial rather than to enter into a stipulation on uncharged crimes, those other charges normally shall be filed as soon as possible after a trial date is taken.

3. Sexual Motivation Allegation

See "General Provisions" Section 3.

4. Special Assault Unit Homicides

The following types of homicide normally shall be handled by the Special Assault Unit:

a. baby homicides;
b. homicide by abuse;
c. elder abuse homicides.

5. Sentencing Enhancements

See "Firearm Offenses and Weapon Enhancements", Section 17.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

a. A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems, which were not apparent at filing, are the only factors which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not be considered. The exception policy shall be followed before any reduction is offered. All reductions shall be discussed with the victim's next of kin before being concluded.

b. A charge of aggravated murder in the first degree shall not be reduced without the prior personal approval of the Prosecuting Attorney.

c. The Prosecuting Attorney and the Chief Deputy shall be notified of all proposed reductions prior to the time the reduction is offered.

2. Dismissal of Counts

a. Normally counts representing separate homicides will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems, which were not apparent at filing, are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not be considered. The exception policy shall be followed before a dismissal of counts is offered. All dismissals shall be discussed with the victim's next of kin before being concluded.

b. A count alleging aggravated murder in the first degree shall not be dismissed without the prior personal approval of the Prosecuting Attorney.

c. The Prosecuting Attorney and the Chief Deputy shall be notified of any offer to dismiss a count representing a separate homicide prior to the time the dismissal is offered.

3. Dismissal of Sexual Motivation Allegation

See “General Provisions,” Section 3.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

A determinate sentence within the presumptive sentencing range shall be recommended. Recommendations outside the specific range shall be made only pursuant to the exception policy and all exceptions in homicide cases must be discussed with the victim’s next of kin before being concluded. The requests of the next of kin of the victim shall always be considered and may justify an exception.

3. Murder in the First Degree

An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than 20 years (mandatory minimum). Total confinement may not be modified. RCW 9.94A.120(4).

4. Restitution

See “Payment of Restitution,” Section 3.

5. Community Custody

On murder in the first or second degree, homicide by abuse, manslaughter, or where a deadly weapon was charged, community custody shall be recommended and the State recommends total confinement in the Department of Corrections. See Section 3.

6. Exceptional Sentence - Sexual Motivation

See “General Provisions” Section 3.

7. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 5: ASSAULT

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Assault cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

2. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such a nature that, if established, it would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

B. CHARGE SELECTION

1. Degree

a. Assault in the First Degree – RCW 9A.36.011

(1) Assault in the first degree shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant with intent to inflict great bodily harm**:** (a) assaulted another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death or (b) administers, exposes, or transmits to or causes to be taken poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance or (c) assaults another and inflicts great bodily harm.

(2) "Great bodily harm" – RCW 9A.04.110(4)(c)

"Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition. RCW 9.04.110(4)(a). "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

(3) Attempted Murder in the First or Second Degree

Attempted murder in the first degree or attempted murder in the second degree normally shall be filed only if there is sufficient admissible evidence on the required mental element to take the issue to the jury. For attempted murder in the first degree, evidence of premeditation should be noted in the file by the filing deputy. For attempted murder in the second degree, evidence of intent to cause death should be noted in the file.

Assault in the first degree, rather than attempted murder in the first or second degree, normally should be initially filed under the conservative filing policy unless there are significant words (e.g., statement of intent to kill by the defendant) or acts indicating intent to kill (e.g., multiple stab wounds). Note that attempted murder 2º is now a Class A felony (maximum term life) effective 7-1-94. RCW 9A.28.020(3)(a). Attempted murder 2º committed prior to 7-1-94 is a Class B felony (maximum term ten years).

If the case is scheduled for trial, consideration shall be given to amending to attempted murder in the first degree as well as assault in the first degree.

(4) Assault in the First Degree Causing Great Bodily Harm

The filing deputy shall ensure that evidence exists which would justify a finding of great bodily harm and that a thorough investigation on the harm issue has been conducted (i.e., witness statements, medical reports have become or will become part of the prosecutor's file). Determination of whether or not great bodily harm was inflicted must be made on an individual case basis. However, examples of great bodily harm constituting "significant, serious permanent disfigurement" or constituting "significant permanent loss or impairment of the function of any bodily part or organ" include (this is a non-exclusive list):

(a) loss of a limb;
(b) permanent paralysis of a limb,
(c) burn scarring which plastic surgery will not repair.

Great bodily injury of the type creating a probability of death normally are those requiring significant medical intervention to prevent death and an injury about which a medical expert would testify there was a probability of death from the bodily injury.

(5) Assault in the First Degree – Discharging a Firearm at Another

Notwithstanding any other provision of this section, the intentional discharge of a firearm at or toward another person shall normally result in a charge of assault in the first degree, or attempted murder where appropriate. For filing purposes it shall be presumed that the defendant intends to inflict "great bodily harm" when he or she intentionally shoots at, toward or into another person. Evidence that the defendant possessed some lesser intent resulting in a lesser charge than assault in the first degree shall be clearly outlined on the blue comment sheet.

b. Assault in the Second Degree – RCW 9A.36.021

(1) Assault in the second degree shall be filed if the defendant:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm;

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child;

(c) Assaults another with a deadly weapon;

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison, or any other destructive or noxious substance;

(e) With intent to commit a felony assaults another;

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2) "Substantial Bodily Harm"

"Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b)

(3) Assault in the Second Degree Recklessly Inflicts Substantial Bodily Injury

(a) Recklessly Inflicts Substantial Bodily Harm

Assault in the second degree shall only be filed if sufficient evidence of recklessness (defendant's awareness of the risk of substantial bodily harm and disregard of the risk) exists to take the issue to a jury. The filing deputy shall note the evidence of this issue in the file.

(b) Substantial Bodily Harm

Determination of whether or not substantial bodily harm exists must be made on an individual case basis. However, examples of substantial bodily harm include (this is a non-exclusive list):

(i) a broken limb or rib;

(ii) a scar (even though it may be fixed with plastic surgery); or

(iii) a significant number of stitches.

c. Assault in the Third Degree – RCW 9A.36.031

(1) Assault in the third degree shall be filed if the defendant:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another;

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit services provider, while that person is performing his or her official duties at the time of the assault;

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district or a private company under contract for transportation services with a school district while the person is performing his or her official duties at the time of the assault;

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm;

(e) Assaults a firefighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault;

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering;

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

(h) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault.

(2) "Bodily injury" defined

"Bodily injury," "physical injury" or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition. RCW 9A.04.110(4)(a).

(3) Law Enforcement and Firefighter

Assault in the third degree against a law enforcement officer under RCW 9A.36.031(1) subsection (a) or (g) or "firefighter or other employee of a fire department" under 9A.36.030(1)(e) shall be charged if the assault either (a) results in any injury, loss of consciousness or significant pain; (b) requires assistance or substantial effort by the officer to stop the assault; (c) involves an attempt to get the officer's firearm, or (d) involves the use of any object, not amounting to a deadly weapon.

When third degree assault charges are filed under RCW 9A.36.031, subsection (a), the filing deputy shall indicate in the file the evidence which exists to establish the required specific intent.

Assaults against law enforcement officers or firefighters that are best described as either resisting or mere unwanted touching should be labeled as resisting or assault in the fourth degree. Assault in the third degree should be filed where the assault can be characterized as an attack on the officer.

(4) Store Security

Assault in the third degree against store security personnel shall be filed where the security agent made a lawful detention to investigate shoplifting and the assault resulted in either an injury requiring medical treatment or involved the use of any weapon or object not amounting to a deadly weapon. Assaults against store security personnel involving deadly weapons or where grievous bodily harm results should normally be filed as an assault in the second degree if the facts support that filing under the assault in the second degree standards.

State v. Miller, 103 Wn.2d 792 (1985).

(5) Transit/School Bus Drivers

Assault in the third degree against transit drivers shall be charged if the assault (a) resulted in an injury or (b) involved the use of any object, not amounting to a deadly weapon or (c) occurred while the bus was actually moving and thereby created a likelihood of an accident.

Assaults against transit drivers involving weapons or where grievous bodily harm results should normally be filed as assault in the second degree.

(6) Criminal Negligence

When charging assault in the third degree based upon a "criminal negligence" theory, the filing deputy shall indicate in the file the evidence which exists to establish gross negligence.

d. Custodial Assault – RCW 9A.36.100

An assault against a full- or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any juvenile or adult corrections institution or local detention facility or any full- or part-time community corrections officer, employee in community corrections office or volunteer assisting a community corrections officer who was performing official duties at the time of the assault shall be charged as custodial assault if the assault (a) resulted in any injury; (b) involved the use of an object, not amounting to a deadly weapon or (c) required assistance or substantial effort by the person assaulted to stop it. Assaults against such custodial personnel involving weapons or where substantial bodily harm results should normally be filed as assault in the second degree. Custodial assault is a class C felony.

e. Assault of a Child – Also see Section 7A, Physical Abuse of Children

(1) Assault of a Child in the First Degree – RCW 9A.36.120

(a) Assault of a child in the first degree, a class A felony, shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant was eighteen (18) years of age or older and the victim was under thirteen (13) years of age and that the defendant: (i) committed the crime of assault in the first degree, as defined in RCW 9A.36.011, against the child; or (ii) intentionally assaulted the child and either: (A) recklessly inflicted great bodily harm; or (B) caused substantial bodily harm, and the person has previously engaged in a pattern or practice either of (1) assaulting the child which has resulted in bodily

harm that is greater than transient physical pain or minor temporary marks, or (2) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a Child in the Second Degree – RCW 9A.36.130

(a) Assault of a child in the second degree, a class B felony, shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant was eighteen (18) years of age or older and the victim was under thirteen (13) years of age and that the defendant: (i) committed the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or (ii) intentionally assaulted the child and caused bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture.

(3) Assault of a Child in the Third Degree – RCW 9A.36.140

(a) Assault of a child in the third degree, a class C felony, shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant was eighteen (18) years of age or older and the victim was under thirteen (13) years of age and that the defendant committed assault in the third degree as defined in RCW 9A.36.031(1)(d) (criminal negligence and weapon) or (f) (criminal negligence and pain) against the child.

f. Drive-by Shooting – RCW 9A.36.045
(name of crime changed in 1997 from Reckless Endangerment in the First Degree)

Drive-by shooting shall be filed if there is sufficient admissible evidence to take to the jury that the defendant recklessly discharged a firearm in a manner that creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a

motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge. Discharging a firearm in an occupied area such as a busy street or residential neighborhood normally meets the requirement of creating a substantial risk of death or serious physical injury.

Assault in the second degree, rather than drive-by shooting, normally shall be charged if it can be proven that the shooting was directed at specific person(s).

g. Unlawful Discharge of a Laser in the First Degree – RCW 9A.49.020

(1) A person shall be charged with unlawful discharge of a laser in the first degree if he or she knowingly and maliciously discharges a laser, under circumstances not amounting to malicious mischief in the first degree;

(a) At a law enforcement officer or other employee of a law enforcement agency who is performing official duties in uniform or exhibiting evidence of his or her authority, and in a manner that would support that person's reasonable belief that he or she is targeted with a laser sighting device or system;

(b) At a law enforcement officer or other employee of a law enforcement agency who is performing official duties, causing an impairment of the safety or operation of a law enforcement vehicle or causing an interruption or impairment of service rendered to the public by negatively affecting that person;

(c) At a pilot, causing an impairment of the safety or operation of an aircraft or causing an interruption or impairment of service rendered to the public by negatively affecting the pilot;

(d) At a firefighter or other employee of a fire department or fire prevention bureau or district who is performing official duties, causing an impairment of the safety or operation of an emergency vehicle or causing an interruption or impairment of service rendered to the public by negatively affecting the fire fighter or employee;

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(e) At a transit operator or driver of a public or private transit company while that person is performing official duties, causing an impairment of the safety or operation of a transit vehicle or causing an interruption or impairment of service rendered to the public by negatively affecting the operator or driver

(f) At a school bus driver while the driver is performing official duties, causing an impairment of the safety or operation of a school bus or causing an interruption or impairment of service by negatively affecting the bus driver.

h. Animal Cruelty in the First Degree – RCW 16.52.205

A person shall be charged with animal cruelty in the first degree if the person intentionally caused substantial pain to an animal, caused physical injury, or in the case of death, caused undue suffering to the animal, or if the person forced a minor to inflict unnecessary pain, injury, or death on an animal. The Chief Criminal Deputy or the Chief of Staff shall be consulted prior to filing Animal Cruelty in the First Degree.

(1) Cases based upon causing substantial pain or causing undue suffering in causing the animal's death shall be filed if a veterinarian or other experienced animal caregiver opines that the animal suffered in that way.

(2) Charges will be filed based on intentionally causing physical injury where the injury is physically observable and more than superficial.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count for each assault in the first degree normally shall be filed in the information. One count normally should be filed for each other crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category: For example, six counts of assault in the second degree based on separate and distinct conduct would be the maximum number of counts filed because each count after the first one counts as prior convictions worth 2 points resulting in an offender score in the "9 or more" category. RCW 9.94A.525, 9.94A.589.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects to go to trial rather than to enter into a stipulation on uncharged crimes, those other charges normally shall be filed as soon as possible after a trial date is taken.

3. Deadly Weapon/Firearm Allegations – See Section 3 and Section 17

4. Sexual Motivation Allegation – see "General Provisions," Section 3, II., E.

5. Domestic Violence

a. See Section 8, Domestic Violence

b. Domestic violence felony assaults will be filed and prosecuted by the Domestic Violence Unit. "Domestic violence felony assaults" mean those between family members, individuals who have a child in common, or individuals who have had a romantic relationship currently or in the past.

c. Felony assaults between adult persons who are presently residing together or who have resided together in the past will be prosecuted by mainstream Trial Teams, but should be designated as domestic violence offenses.

d. Domestic Violence Unit: Domestic violence felony violations of court orders will be filed and prosecuted by the Domestic Violence Unit.

6. Child Battering

Felony assaults involving child victims will be prosecuted by the Special Assault Unit. See Section 7 and 7A.

7. Elderly Victims

Familial felony assaults involving elderly victims will be prosecuted by the Special Assault Unit.

8. General Note: There is substantial overlapping coverage of "Assault" in this section, Section 8 – Domestic Violence, and Section 7A – Physical Abuse of Children. In some situations, the filing standard may differ because of victim vulnerability from section to section. However, reference to the other sections where this section is silent or incomplete may be required.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally, deadly weapon allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The

exception policy shall be followed before a dismissal of a deadly weapon firearm allegation is offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

a. In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

a. A determinate sentence within the standard range shall be recommended for assault in the first or second degree. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

b. Alternate conversion of total to partial confinement and first offender policies apply to third degree assault, except that Electronic Home Detention is not available.

3. Mandatory Minimum – Assault in the First Degree and Assault of a Child in the First Degree

An offender convicted of the crime of assault in the first degree or assault of a child in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a total confinement not less than five years. Total confinement may not be modified.

RCW 9.94A.120(4) Sec. 7, Chap 145, Laws 1992 (6-11-92), recodified RCW 9.94A.540(b)

4. Restitution

See "Payment of Restitution," Section 3.

5. Community Placement/Community Custody

a. Sentences over one year.

Post-release supervision in the form of Community Placement (crimes before July 1, 2000) or Community Custody (crimes on or after July 1, 2000) is mandatory for any felony assault conviction in which the defendant is sentenced to a term of confinement in prison (D.O.C.). The period of supervision varies according to the

crime and has been set by the Sentencing Guidelines Commission. See RCW 9.94A.715.

b. Sentences one year or less

Post-release supervision in the form of community supervision supervision (crimes before July 1, 2000) or community custody (for crimes on or after July 1, 2000) may be ordered for certain offenses by the sentencing court for a period not to exceed one year. RCW 9.94A.545. See also Section 3.

6. DNA Identification

a. DNA identification is mandatory for all felony convictions. RCW 43.43.754.

7. Exceptional Sentence

a. Sexual Motivation

See "General Provisions," Section 3.

b. Furthering Gang Enterprise

See "General Provisions," Section 3.

SECTION 6: KIDNAPPING

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Kidnapping and unlawful imprisonment cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.

Prosecution for kidnapping and unlawful imprisonment should not be declined because of an affirmative defense unless the affirmative defense is of such a nature that, if established, it would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

2. Custodial interference will be filed if the admissible evidence would make it probable that a reasonable and objective fact finder would convict after hearing all of the admissible evidence and the most plausible defense that could be raised.

B. CHARGE SELECTION

1. Degree/Charge

a. Kidnapping in the First Degree – RCW 9A.40.020

Kidnapping in the first degree shall not be filed unless the abduction involves an actual or planned substantial transportation of the victim from the scene of the original restraint in addition to the statutory aggravating factor.

b. Kidnapping in the Second Degree – RCW 9A.40.030

All kidnapping cases where an aggravating factor is not present, but where the abduction involved a substantial transportation from the scene of the original restraint shall be filed as kidnapping in the second degree.

c. Unlawful Imprisonment – RCW 9A.40.040

Unlawful imprisonment shall not be filed unless the restraint is substantial, either as to the degree of force used or as to the time

involved. Momentary restraints shall be filed as the appropriate degree of assault or as an attempt to commit the intended crime.

d. Custodial Interference in the First Degree – RCW 9A.40.060

Custodial Interference in the First Degree shall not be filed unless: 1) there is an enforceable final court order or parenting plan determining the right to custody or time with the child; 2) the parties have substantially complied with the final custody order or parenting plan; and 3) it appears that the King County Superior Court has subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

e. Luring - RCW 9A.40.090 (a class C felony)

Child or developmentally disabled luring cases are filed and prosecuted by the Special Assault Unit. Normally this offense should be filed as attempted kidnapping 2^{o} whenever evidence will support that charge.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count for each kidnapping in the first degree normally shall be filed in the Information. One count normally should be filed for each other crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category. For example, six (6) counts of kidnapping in the second degree based on separate and distinct conduct would be the maximum number of counts filed because additional counts after the first one are counted as prior convictions worth two points each. RCW 9.94A.400.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.370, additional uncharged crimes cannot be used to go outside the presumptive range except under stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation on uncharged crimes those charges normally shall be filed as soon as a trial date is taken.

3. Relation To Other Crimes

A kidnapping count should not be added to other crimes arising from a single criminal episode unless the abduction of the victim extended beyond what is necessary in either time or distance to commit the underlying crime.

4. Deadly Weapon/Firearm Allegation. See Section 17

5. Sexual Motivation Allegation. See Section 3

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. Factors which shall be considered in determining whether a reduction in degree is appropriate are the correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing or the request of the victim. Any reduction shall be pursuant to the exception policy and shall be discussed with the victim before being concluded.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally firearm or deadly weapon allegations in kidnapping in the first or second degree will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems, which were not apparent at filing, or the request of the victim are the only factors which may normally be considered in determining whether to dismiss a special allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a special allegation is offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

Normally, a determinate sentence within the standard range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being finalized.

3. Restitution

See "Payment of Restitution," Section 3.

4. Expenses of Returning Child or Incompetent

See RCW 9A.40.080.

5. Community Custody

On kidnapping in the first or second degree, and the State recommends total confinement in the Department of Corrections, community custody shall be recommended. See Section 3.

6. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 7: SEXUAL ASSAULT

I. SPECIAL ASSAULT UNIT

A. CASE HANDLING

The following categories of offenses are handled by the Special Assault Unit (SAU) and are subject to these standards:

1. Sexual assaults and crimes that are sexually motivated (with the exception of those cases handled by the Domestic Violence Unit, in which the defendant and victim were living together at the time of the offense and/or have a history of domestic violence).

2. Child physical abuse and homicide.

3. Child kidnapping, including custodial interference/parental kidnapping cases which shall be handled by either the Special Assault Unit or Domestic Violence Unit, as determined by the Chief Deputy.

4. Homicides involving –
   a. Sexual assault
   b. Child victims
   c. Child witness(es) as a principal witness

5. Failure to register as a sex offender.

6. Sexually violent predators – civil proceedings.

7. Elder physical abuse and homicide.

II. FILING

A. EVIDENTIARY SUFFICIENCY

Sexual assault and child abuse including cases involving the special allegation of "sexual motivation" shall generally be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would support conviction by a reasonable and objective fact-finder.

B. CHARGE SELECTION – SEXUAL OFFENSES AGAINST ADULTS

1. Rape

a. Rape in the First Degree – RCW 9A.44.040
Class A

Rape in the first degree shall generally be filed if sexual intercourse was accomplished by forcible compulsion and one of the following aggravating factors applies:

(1) Deadly Weapon – where the defendant uses or threatens to use a deadly weapon or what appears to be a deadly weapon. The "threatens to use" prong should be filed if the weapon is actually visible to the victim or a weapon is recovered from the defendant.
RCW 9A.44.040(1)(a)

(2) Kidnapping – where the victim is transported an appreciable distance or restrained for a period of time longer than necessary to commit the rape.
RCW 9A.44.040(1)(b)

(3) Serious Physical Injury – where the injury is sufficiently serious to require medical treatment of more than a first aid nature.
RCW 9A.44.040(1)(c)

(4) Feloniously Enters – where the defendant unlawfully enters a building or vehicle (RCW 9A.04.110) to gain access to the victim.
RCW 9A.44.040(1)(d)

b. Rape in the Second Degree – RCW 9A.44.050
Class A (pre – 7-1-90, Class B)

Rape in the second degree shall generally be filed where sexual intercourse occurs under one of the following circumstances:

(1) Forcible Compulsion – for purposes of these standards means physical force beyond the minimal restraint inherent in commission of the act or where there were explicit threats of harm. RCW 9A.44.010(6).
RCW 9A.44.050(1)(a)

(2) Incapable of Consent – due to physical helplessness or mental incapacity, provided the condition would be readily apparent to a reasonable person.
RCW 9A.44.050(1)(b)

Developmentally Disabled – cases where the victim is developmentally disabled shall generally be filed where the condition precludes the victim's ability to consent and such disability is readily apparent to the reasonable person. Factors to be considered when assessing ability to consent include the victim's: outward manifestations, ability to live independently, ability to make decisions, ability to hold a job, understanding of the consequences of sexual activity, prior sexual knowledge.

Intoxication – "physical helplessness or mental incapacity" cases involving voluntary intoxication by the victim shall generally be filed when the extent of intoxication is extreme (unconsciousness or nearly so) and that condition would be readily apparent to a reasonable person. Factors to be considered when assessing the victim's ability to consent include the victim's: outward manifestations, ability to engage in conversation, physical mobility, and ability to distinguish or make decisions.

(3) Developmentally Disabled – where the victim is developmentally disabled (RCW 9A.44.010 and 71A.10.020) and the defendant was not married to the victim and had supervisory authority (RCW 9A.44.010) over the victim.
RCW 9A.44.050(1)(c)

(4) Health Care Provider – where the defendant is a health care provider (RCW 9A.44.010), the victim is a client or patient, and the sexual intercourse occurs during the course of a treatment session, consultation, interview, or examination. It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that the client or patient consented to intercourse with the knowledge the intercourse was not for the purpose of treatment.
RCW 9A.44.050(1)(d)

(5) Resident of Facility for Mental Disordered or Chemically Dependent Persons – where the victim is a resident of a facility for mentally disordered or chemically dependent persons (RCW 9A.44.010) and the defendant has supervisory authority over the victim (RCW 9A.44.010) and is not married to the victim.
RCW 9A.44.050(1)(e)

(6) Frail Elder or Vulnerable Adult – where the victim is a frail elder or vulnerable adult (RCW 9A.44.010) and the defendant is a person who is not married to the victim and who has a significant relationship with the victim (RCW 9A.44.010).
RCW 9A.44.050(1)(f)

c. Rape in the Third Degree – RCW 9A.44.060
Class C

Rape in the third degree should be filed in those cases where sexual intercourse occurs, and:

(1) the victim is not married to the defendant, and
(2) lack of consent was clearly expressed (9A.44.060(1)(a), or
(3) there was a threat of substantial unlawful harm to property rights of the victim.

2. Indecent Liberties – RCW 9A.44.100
Class B

Indecent liberties shall be filed when the defendant knowingly causes another person who is not his spouse to have sexual contact with the defendant or another under the following circumstances:

a. Forcible Compulsion (see Rape 2º);

b. Incapable of Consent – where sexual contact occurs and the victim was incapable of consent due to mental defect, mental incapacity or physical helplessness.

Developmentally Disabled – cases where the victim is developmentally disabled shall generally be filed where the condition precludes the victim's ability to consent and such disability is readily apparent to the reasonable person. Factors to be considered when assessing ability to consent include outward manifestations, ability to live

independently, ability to make decisions, ability to hold a job, understanding of the consequences of sexual activity, prior sexual activity.

Intoxication – "physical helplessness or mental incapacity" cases involving voluntary intoxication by the victim shall generally be filed when the extent of intoxication is extreme (unconsciousness or nearly so) and that condition would be readily apparent to a reasonable person. Factors to be considered when assessing the victim's ability to consent include: outward manifestations, the victim's ability to engage in conversation, the victim's physical mobility, and his/her ability to distinguish or made decisions.

c. Developmentally Disabled – where the victim was developmentally disabled (RCW 9A.44.010), and the defendant had supervisory authority over the victim (RCW 9A.44.010) and was not married to the victim.

d. Health Care Provider – where sexual contact occurs and when the defendant is a health care provider (RCW 9A.44.010), the victim is a client or patient, and the sexual contact occurs during the course of a treatment session, consultation, interview, or examination. It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that the client or patient consented to contact with the knowledge the contact was not for the purpose of treatment.

e. Resident of a Facility for Mentally Disordered or Chemically Dependent Persons – where sexual contact occurs and the victim was a resident of a facility for mentally disordered or chemically dependent persons (RCW 9A.44.010) and the defendant has supervisory authority over the victim (RCW 9A.44.010).

f. Frail Elder or Vulnerable Adult – where the victim is a frail elder or vulnerable adult (RCW 9A.44.010) and the defendant is a person who is not married to the victim and who has a significant relationship with the victim (RCW 9A.44.010).
RCW 9A.44.050(1)(f)

3. Custodial Sexual Misconduct –
First Degree - RCW 9A.44.160, Class C;
Second Degree - RCW 9A.44.170, Gross Misdemeanor

The appropriate level of custodial sexual misconduct shall generally be filed when:

a. 1) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to: jails, prisons, detention centers, or work release facilities, or is under correctional supervision; *and*
2) the defendant is an employee or contract personnel of a correctional agency and the defendant has, or the victim reasonably believes the defendant has the ability to influence the terms, conditions, length or fact of incarceration or correctional supervision;
OR

b. The victim is being detained, under arrest, or in the custody of a law enforcement officer and the defendant is a law enforcement officer.

Custodial sexual misconduct in the first degree (RCW 9A.44.160) shall generally be charged in cases involving sexual intercourse.

Custodial sexual misconduct in the second degree (RCW 9A.44.170) shall generally be charged in cases involving sexual contact.

Defenses:

- Consent is not a defense, RCW 9A.44.160 and .170.
- It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that the act resulted from forcible compulsion by the other person. RCW 9A.44.180.

C. CHARGE SELECTION – SEXUAL OFFENSES AGAINST CHILDREN

1. Rape of a Child – (pre-7/1/88, codified as Statutory Rape)

Rape of a child shall generally be filed if the defendant had sexual intercourse with the child to whom the defendant was not married. The degree of the crime depends upon the ages of the defendant and victim at the time of the crime. (See special "Youthful Offender" provision.)

a. Rape of a Child in the First Degree – RCW 9A.44.073
Class A

Applicable if victim was less than twelve and defendant was at least twenty-four months older than the victim.

b. Rape of a Child in the Second Degree – RCW 9A.44.076
Class A (pre–7-1-90, Class B)

Applicable if victim was twelve or thirteen and the defendant was at least thirty-six months older than the victim.

c. Rape of a Child in the Third Degree – RCW 9A.44.079
Class C

Applicable if victim was fourteen or fifteen and defendant was at least forty-eight months older than the victim.

Defenses – 9A.44.030:

- It is not a defense that the defendant didn't know the victim's age or believed the victim was older.
- It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that the defendant reasonably believed the conduct was legal based upon what the victim represented her age to be.

2. Child Molestation – (pre–7/1/88, codified as Indecent Liberties without force)

Child molestation shall generally be filed if the defendant had sexual contact with the child to whom the defendant was not married or caused another minor to have such contact. The degree of crime depends upon the age of the victim and defendant at the time of the crime. (See "over the clothing" contact.)

a. Child Molestation in the First Degree – RCW 9A.44.083
Class A (pre–7/1/90, Class B)

Applicable if victim was less than twelve and defendant was at least thirty-six months older than the victim.

b. Child Molestation in the Second Degree – RCW 9A.44.086
Class B

Applicable if victim was twelve or thirteen years old and the defendant was at least thirty-six months older than the victim.

c. Child Molestation in the Third Degree – RCW 9A.44.089
Class C

Applicable if victim was fourteen or fifteen years old and the defendant was at least forty-eight months older than the victim.

Defenses – RCW 9A.44.030:

- It is not a defense that the defendant didn't know the victim's age or believed the victim was older.
- It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that the defendant reasonably believed the conduct was legal based upon what the victim represented her age to be.

3. Sexual Misconduct with a Minor –
First Degree: RCW 9A.44.093, Class C;
Second Degree: RCW 9A.44.096, Gross Misdemeanor

The appropriate level of sexual misconduct with a minor shall generally be filed when:

Pre-9/1/01:

a. The victim is:
   1) 16 or 17 years old,
   2) not married to the defendant, and

b. The defendant:
   1) is at least 60 months older than the victim,
   2) has (or knowingly causes another person under 18 years old to have) sexual contact with the victim,
   3) is in a significant relationship (RCW 9A.44.010) with the victim,
   4) abuses a supervisory position (RCW 9A.44.010) within that relationship in order to engage in (or cause another) to have sexual contact with the victim.

As of 9/1/01:

a. The victim is:
   1) 16 or 17 years old,
   2) not married to the defendant,
   3) is a registered student of the school

b. The defendant:
   1) is at least 60 months older than the victim,
   2) is an employee of the school (RCW 9A.44.093 and .096),

3) has (or knowingly causes another person under 18 years old to have) sexual contact with the victim.

Sexual misconduct in the first degree (RCW 9A.44.093, Class C) shall generally be filed in cases involving sexual intercourse.

Sexual misconduct in the second degree (RCW 9A.44.096, Gross Misdemeanor) shall generally be filed in cases involving sexual contact.

4. Incest – RCW 9A.64.020 (First Degree, Class B; Second Degree, Class C)

The appropriate degree of rape of a child and/or child molestation shall generally be charged in any case where the victim is under the age of sixteen and the offender meets the statutory age differential and there is sufficient evidence to take the case to the jury.

The necessary relationship for the crime of incest occurs with a person whom the defendant knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother or sister of either the whole or the half blood.

Note: "Descendant" does *not* include step or adopted children 18 years or older.

a. Incest in the First Degree shall generally be charged in cases involving sexual intercourse.

b. Incest in the Second Degree shall generally be charged in cases involving sexual contact.

c. Factors to be considered in determining who to charge include: age disparity, existence of a care-taking role, relative levels of sophistication, and degree of planning or preparation.

5. Communication with a Minor for Immoral Purposes – RCW 9.68A.090 Gross Misdemeanor/Class C (see below)

The appropriate level of rape of a child and/or child molestation shall generally be charged when sufficient evidence exists to support the charge.

Communication with a minor for immoral purposes shall generally be charged in those cases where there is insufficient evidence to prove the appropriate degree of rape of a child or child molestation, and the defendant has made sexual overtures to the child, by either words or

conduct. Offenses against minors 16 years and older will not be charged under this statute unless the defendant is requesting that the victim engage in illegal conduct. State v. Luther, 65 Wn. App. 424 (1992).

Felony offense – the defendant is guilty of felony communicating with a minor if he/she has been previously convicted:

- under this section, *or*
- of a felony sex offense under RCW 9.68A, 9A.44 or 9A.64, or
- any other felony sexual offense in this or any other state.

Defenses – RCW 9.68A.110:

- It is not a defense that the defendant did not know the victim's age.
- It is an affirmative defense that the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant made a reasonable bonafide attempt to ascertain the true age of the victim by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the victim.

6. Patronizing a Juvenile Prostitute – RCW 9.68A.100
Class C (as of 9/1/01, defined as a sex offense)

Patronizing a juvenile prostitute shall generally be charged in those cases where the defendant engages, agrees or offers to engage in sexual conduct with a minor (under 18) in return for a fee.

Mandatory conditions of sentence (RCW 9A.88.130), include:

1) no subsequent arrests for patronizing a prostitute or patronizing a juvenile prostitute, and
2) a requirement that the defendant remain outside the geographical area, proscribed by the court, in which the person was arrested for the offense, unless such a requirement would interfere with the person's legitimate employment or residence or is otherwise infeasible.

D. CHARGE SELECTION – SEXUAL EXPLOITATION OF CHILDREN AND ADULTS

Cases involving depictions of minors engaged in what on its face is readily apparent as hard core pornography shall generally be filed pursuant to these standards. Depictions which are not as readily classified should be evaluated more critically considering such factors as the content of the depiction, the age of the child, the circumstances in which the depiction was found, the explanation for

possession of the depiction, and content of other material found with the depiction.

Number of counts: Cases involving multiple acts or images shall generally be charged consistent with sub-section F relating to multiple counts and possession of depictions. In addition, factors to be considered in determining the number of counts to be charged for trial shall be consistent with the considerations set forth in State v. Root, 141 Wn.2d 701 (2000) (unit of prosecution in sexual exploitation of a minor case is per photo session per child involved in each session (i.e., per occasion)). Defendant may be charged with multiple counts if more than one child is involved in each session or a child is involved in more than one session. To determine what constitutes a "session," look to whether the child is involved in distinctly different activities in each photograph, whether the setting of the photographs is different, etc.

1. Sexual Exploitation of a Minor – RCW 9.68A.040
   Class B

   Sexual exploitation of a minor shall generally be filed where:

   a. the victim is under the age of 16 and is compelled, threatened, caused, aided, etc., to engage in sexually explicit conduct (RCW 9.68A.011)(3)) that will be photographed or otherwise recorded, or part of a live performance, regardless of whether the sexually exploitative material is created for personal or commercial purpose.

   b. the victim is 16 or 17 years old and the purpose underlying creation of the image or the live performance is commercial gain or other consideration.

2. Dealing in Depictions – RCW 9.68A.050
   Class C

   Dealing in depictions shall generally be filed in those cases where the defendant was not involved in the creation of the image, but who in any manner disseminates the image for any reason, including but not limited to, commercial gain, as part of a group that trades in such material, etc.

3. Sending, Bringing into the State Depictions – RCW 9.68A.060
   Class B

   Sending, bringing into the state depictions shall generally be filed in those cases where the defendant was not involved in the creation of an image originating outside the state, but who in any manner disseminates such

image for any reason, including but not limited to, commercial gain, as part of a group that trades in such material, etc.

4. Possession of Depictions – RCW 9.68A.070
Class C

Possession of depictions shall generally be filed in those cases where the defendant merely possesses a visual or printed matter (any photograph or material that contains a reproduction of a photograph) depicting sexually explicit conduct (RCW 9.68A.011(3)).

Note: Possession of depictions (RCW 9.94A.070) is not defined as a "sex offense" for purposes of RCW 9.94A.030. A sexual motivation enhancement may be filed when the evidence supports a finding that the crime was sexually motivated. Such an enhancement is a prerequisite for a defendant who otherwise qualifies for the Special Sexual Offender Sentencing Alternative (SSOSA), RCW 9.94A.670, to be eligible for such consideration under this section.

5. Processors of Depictions – RCW 9.68A.080
Class C

Processors of depictions shall generally be filed in those cases where a person processes visual or printed matter (RCW 9.68A.011(2)) and such matter depicts minors engaged in what on its face is sexually explicit conduct (RCW 9.68A.011(3)).

Note: Processors of depictions (RCW 9.94A.080) is not defined as a "sex offense" for purposes of RCW 9.94A.030. A sexual motivation enhancement may be filed when the evidence supports a finding that the crime was sexually motivated. Such an enhancement is a prerequisite for a defendant who otherwise qualifies for the Special Sexual Offender Sentencing Alternative (SSOSA), RCW 9.94A.670, to be eligible for such consideration under this section.

6. Voyeurism – RCW 9A.44.115
Class C

Voyeurism shall generally be charged when the defendant,
1) for purposes of arousing or gratifying the sexual desire of any person;
2) knowingly views (RCW 9A.44.115(1)(a)) photographs or films (RCW 9A.44.115(1)(b)) any person or intimate parts of another person (RCW 9A.44.115(1)(a), and
3) without that person's knowledge and consent, and
4) the person being viewed is in a place where he or she would have a reasonable expectation of privacy (RCW 9A.44.115(1)(c)). Note: In

the case of intimate parts, the expectation of privacy may be in either a public or private place.

Voyeurism is not applicable to viewing, photographing or filming by DOC, jail, or correctional facility personnel for security purposes or investigation of alleged misconduct by a person in custody.

Destruction of Evidence:
In the event of conviction, the court may order the destruction of any photograph, motion picture film, digital image, videotape, or any other recording of an image made in violation of the statute.

7. Indecent Exposure – RCW 9A.88.010
Misdemeanor/Gross Misdemeanor/Class C

Note: Not defined as a sex offense – a sexual motivation enhancement shall generally be filed when the evidence supports a finding that the crime was sexually motivated.

Indecent exposure shall generally be charged where the defendant:

1) intentionally makes any open or obscene exposure of themselves or another, and
2) knowing such conduct is likely to cause reasonable affront or alarm.

Indecent exposure is a *misdemeanor* in all cases, except where the defendant exposes to a person:

Gross misdemeanor:	1) under 14 years of age.
Class C:	1) under 14 years of age, and 2) was previously convicted under this section or a sex offense as defined by RCW 9.94A.030.

8. Kidnapping

Note: Registration requirement, when:
1) victim is a minor, and
2) defendant is a noncustodial parent.

a. Kidnapping – see Section 6

b. Luring

Luring shall generally be filed in those cases where the victim is a person under the age of 16 years or a person who suffers from a developmental disability (RCW 71A.10.020), and the defendant:

1) orders, lures, or attempts to lure the victim into any area or structure that is obscured from or inaccessible to the public or a motor vehicle, and
2) does not have the consent of the victim's parent or guardian, and
3) is unknown to the victim.

See State v. Dana, 84 Wn. App. 166 (1996)

It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that:

1) the defendant's actions were reasonable under the circumstances, and
2) the defendant did not intend to harm the health, safety or welfare of the victim.

c. Custodial Interference – see Section 6

E. CHARGE SELECTION – FAILURE TO REGISTER AS A SEX OFFENDER – RCW 9A.44.130

Charges for failure to register as a sex offender shall generally be filed when the defendant has:

1. Previously been found guilty of a:
   a. sex offense, occurring after 7/28/91, defined as:
      - any offense as a sex offense by RCW 9.94A.030
      - any violation under RCW 9A.44.096 (sexual misconduct with a minor)
      - any violation under RCW 9.68A.090 (communication with a minor)
      - any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense
      - any gross misdemeanor that is an attempt, solicitation or conspiracy to commit an offense classified as a sex offense.

      RCW 9A.44.130(9)(a)
      or

b. kidnapping offense (kidnapping 1º, kidnapping 2º, and unlawful imprisonment or attempt to commit same), *occurring after 7/27/97*, where the:
   - victim of the underlying offense was a minor
   - defendant was not a parent of the victim of the underlying offense, or

c. has been found not guilty by reason of insanity of a sex offense or kidnapping offense (as defined above). RCW 9A.44.130(9)(b)

2. If the sex offense *occurred prior to 7/28/91*, the defendant must have been in custody or on community supervision for the underlying sex offense on 7/28/91;

AND

3. Never registered (defendant is required to register within 24 hours of release from confinement); or

4. Moved without giving notice (defendant is required to register within 72 hours of moving); or

5. If homeless, failed to register weekly (defendant is required to register within 48 hours of ceasing to have a fixed residence).

Length of registration – RCW 9A.44.140(1):
Class A – life
Class B – 15 years
Class C – 10 years

Reductions:
Attempted failure to register as a sex offender (gross misdemeanor) will be considered where the defendant satisfies the following criteria:
- Level I offender;
- First time failure to register offender; and
- The defendant shows proof of current registration since time of filing

Relief from registration – RCW 9A.44.140(3):
To petition for relief from registration, the defendant is required to have spent ten consecutive years in the community without being convicted of any new offenses.
- Exception: No petition for relief is allowed for Class A felonies committed after 6-8-00 and "aggravated offenses" committed after 7/22/01 with forcible compulsion.
  See RCW 9A.44.140(3)(b)(i) and 9A.44.140(5)(a)(i) (definition of aggravated offense)

- *Note*: Discharge does not relieve a defendant of the obligation to register. RCW 9A.44.140(7).

Considerations pertaining to a petition for relief from registration:

- Nature of the offense;
- Criminal and non-criminal behavior both before and after conviction;
- Defendant's proof, by clear and convincing evidence, that future registration will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, 72.09.330.

Significant dates:

7-28-91 For crimes occurring prior to 7-28-91, the defendant must have been in custody or on community supervision for the underlying sex offense on 7-28-91.

7-27-97 Kidnapping offenses (kidnapping 1º, kidnapping 2º, or unlawful imprisonment or an attempt) become registerable.

8-01-97 In all cases, failure to register is a felony (except where the underlying offense is a gross misdemeanor).

7-01-01 All homeless defendants are required to register weekly *(pre 7-1-01,* level one offender required to register monthly).

7-01-01 Offenders convicted of communication with a minor of immoral purposes relieved of registration requirements.

3-12-02 Offenders convicted of communication with a minor for immoral purposes again required to register (legislation is retroactive, but must show proof of notification of duty to register, *post 3-12-02,* in order to file failure to register).

F. GENERAL FILING PROVISIONS

1. Multiple Counts/Stipulation to Uncharged Counts

a. One count of any sexual assault should be filed for each individual victim even if more than one person was a victim during the same incident.

b. In cases involving multiple abusive incidents against the same victim by the defendant, counts shall be filed to reflect the nature and extent of contact with the victim. Three counts involving the same victim normally should be filed if the abuse was chronic (greater than ten incidents), two counts, if multiple (three to ten), and one count if isolated or up to two times.

c. In cases involving multiple abusive incidents against multiple victims, counts shall be filed to reflect the nature and extent of contact with each victim and all victims.

d. In the event the case proceeds to trial, the deputy shall review the evidence and file all separately provable counts to generally a maximum of four counts per victim.

e. In cases involving possession or dealing in sexually explicit material, one count should be filed for a small amount (e.g., ten images or less) and up to three counts for a large quantity (e.g., 50 images or more). In the event the case proceeds to trial, the deputy shall review the evidence and file all separately provable counts to a maximum of as many counts should be filed as can be realistically separately charged. If different kinds of materials are possessed or dealt, separate counts should be filed to reflect the various kinds of material, i.e., videos, magazines, photographs, etc. In addition, factors to be considered in determining the number of counts to be charged for trial shall be consistent with the considerations set forth in State v. Root, 141 Wn.2d 701 (2000) (unit of prosecution in sexual exploitation of minor case is per photo session per child involved in each session (i.e., per occasion)). Defendant may be charged with multiple counts if more than one child is involved in each session or a child is involved in more than one session. To determine what constitutes a "session," look to whether the child is involved in distinctly different activities in each photograph, whether the setting of the photographs is different, etc.

2. "Over the Clothing" Sexual Contact

In cases involving sexual contact (child molestation, incest 2º, etc.) that is over the clothing, the felony will be charged only when there is clear evidence that the touching was for sexual gratification.

Indicators of such intent are:
1) statements of the defendant;
2) prior sexual offenses;
3) multiple incidents or multiple victims;
4) duration of the contact.

Absent such clear evidence of sexual intent, and in the instance of an isolated, over the clothes touching, communicating with a minor for immoral purposes, a gross misdemeanor, should be filed in superior court and amended up for trial.

3. Youthful Offenders

a. *Statutory differential:* rape of a child 2º, rape of a child 3º, child molestation 2º, and child molestation 3º involving youthful offenders.

If the suspect is over the statutory age differential, but under an additional 24 months added to the differential, consideration should be given to the filing of a lesser charge, regardless of the existence of proof problems.

Factors to be considered include:

1) age of the defendant and developmental disability;
2) similar acts by the defendant with other underage people;
3) coercion or lack thereof, deliberate playing with alcohol or drugs to take advantage of victim versus voluntary consumption of same;
4) victim sophistication or lack thereof;
5) duration of relationship;
6) defendant's culpability regarding the age of the victim (incidents at a party where age is unknown versus continuing to develop a relationship with a minor in spite of parents' warnings to end the relationship);
7) any degree of authority the defendant has, such as assistant coach, teaching assistant, volunteer coach, etc.;
8) victim's input regarding disposition and testifying;
9) secondary victim issues (parents' concerns, pregnancy, STDs).

b. *Adults Charged with Offenses Committed as Juveniles*

In cases where the defendant was a juvenile when the crime was committed, but an adult when it is reported and prosecuted, the fact of the offender's age at the time of commission will be considered as a reason to file a lesser charge for plea purposes, regardless of the existence of proof problems.

Factors to be considered include:

1) the results of a sexual deviancy evaluation, most specifically, whether sexual abuse has been an ongoing issue for the defendant and whether lengthy treatment is indicated;
2) the age of the defendant and victim at the time of the crime;
3) nature and extent of abuse;
4) victim's wishes.

4. Special Allegations

a. See deadly weapons/firearms enhancements, Section 17.

b. Deadly weapon allegations in rape in the first degree cases shall generally be included in each count if sufficient admissible evidence exists to take to the jury the issue of whether the defendant was armed with a deadly weapon and the weapon was used or there was some overt act by the defendant indicating that the weapon might be used during the commission of the crime.

c. Sexual Motivation – RCW 9.94A.835 [formerly RCW 9.94A.127(1)]

(1) Special Assault Unit Handling
Any case involving a special allegation of sexual motivation shall be handled by the Special Assault Unit.

(2) Evidentiary Sufficiency

(a) The Sentencing Reform Act provides:
The prosecuting attorney shall generally file a special allegation of sexual motivation in every criminal case other than sex offenses as defined in RCW 9.94A.030(38) when sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact-finder.

(b) The filing deputy shall ensure that evidence exists to justify a finding of sexual motivation and that a thorough investigation of this special allegation has been completed. The filing deputy shall indicate in the file those specific facts existing at filing that justify the filing of the sexual motivation allegation.

(3) Finding of Fact/Special Verdict

The Sentencing Reform Act provides:
In a criminal case wherein there has been a special allegation, the State shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030(38).
RCW 9.94A.835

(4) Limitations on Dismissal of Sexual Motivation Allegation

(a) The Sentencing Reform Act provides:
The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.
RCW 9.94A.835

(b) Requests to dismiss the sexual motivation allegation shall be made to the unit supervisor in accordance with unit exception/declination provisions.

(5) Effect on Sentencing Recommendation: Exceptional Sentence Recommendation – Sexual Motivation

RCW 9.94A.535(2)(f) provides that the sentencing court may find as an aggravating factor that the "current offense included a finding of sexual motivation." Also, when a finding of "sexual motivation" is made, the defendant may become eligible under RCW 9.94A.670 for the Special Sexual Offender Sentencing Alternative. Sexual motivation allegations should be added to charges not otherwise sexual offenses, when the evidence supports the aggravating factor.

III. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser charge will be offered. Caseload pressure or the expense of prosecution may not be considered. The exception policy shall be followed before any reduction is offered. All reductions shall be discussed with the victim before being offered, unless otherwise approved by unit supervisor.

2. Dismissal of Counts

Normally counts representing separate rapes or molestations will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered. Caseload pressures or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of counts is offered. All dismissals shall be discussed with the victim before being offered, unless otherwise approved by unit supervisor.

3. Dismissal of Special Allegations

Normally, special allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a special allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a special allegation is offered.

4. Dismissal of Counts to Accommodate SSOSA

If the case meets the requirement for a SSOSA recommendation (see this section IV, C), counts may be dismissed to make the defendant SSOSA-eligible. The charges should be adjusted in a manner to reflect all victims and all behavior, and stipulations to real facts added to the plea agreement.

B. SENTENCE RECOMMENDATION (sentencing guidelines for crimes occurring after 9/1/01 are reserved, see RCW 9.94.712)

1. General Provisions

a. Attempts or Conspiracy
The penalty for attempts and conspiracy should be calculated at 75% of the presumptive sentence.

b. Maximum Term
In all cases, the statutory maximum term shall apply.

c. Determinate Sentence
A determinate sentence within the range set forth below shall be recommended. Recommendations outside the specific range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

d. Mandatory Minimum
An offender convicted of rape in the first degree shall be sentenced to a term of total confinement not less than five years. RCW 9.94A.540.

e. Community Supervision/Community Placement/Community Custody

Determinate sentences under one year:

Prior to 7/1/00:	12 months community supervision
As of 7/1/00:	12 months community custody

Determinate sentences over one year (non-SSOSA):

7/1/88 – 6/30/90:	1 year community placement (RCW 9.94A.700(1))
7/1/90 – 6/5/96:	2 years community placement (RCW 9.94A.700(2))
6/6/96 – 6/30/00:	3 years community custody (RCW 9.94A.710)
7/1/00:	36-48 months community custody (RCW 9.94A.715) (see also condition allowing for extension of condition 5)

f. Exceptional Sentence
Requests for an exceptional sentence must be approved by the Chair of the unit or the Chair's designee.

g. DNA Identification and HIV Blood Testing
DNA identification is mandated for all felony convictions and misdemeanor CMIP. RCW 43.43.754. HIV blood testing is

mandatory for any "sex offense" as defined by RCW 9.94A.030. RCW 70.24.340.

h. Restitution

See "Payment of Restitution," Section 3.

i. Sex Offender Registration

All defendants convicted of a "sex offense" as defined by RCW 9.94A.030 shall be required to register as a sex offender.

Note: Possession of depictions and processors of depictions do not carry registration requirements. See below for length of registration.

2. PERSISTENT OFFENDERS – LIFE WITHOUT PAROLE – RCW 9.94A.030(32)

a. Three Strikes law was enacted in November 1993 and applies to offenders convicted of a "most serious offense" (defined in RCW 9.94A.030(28)) who have previously been convicted on two separate occasions of most serious offenses. RCW 9.94A.030(32)(a), see Section 19 of these standards for procedures

b. Two Strikes law was enacted by the 1996 legislature and is effective for crimes committed on or after 6/6/96. Ch. 289 WA Laws. The new law applies to offenders convicted of the following list of crimes and who have been previously convicted as an adult at least **once** of an offense from the same list. RCW 9.94A.030(32)(b)

(1) Rape 1º, rape 2º, indecent liberties (forcible compulsion)
(2) Murder 1º, murder 2º, kidnapping 1º, kidnapping 2º, assault 1º, assault 2º or burglary 1º **and** with sexual motivation finding for (b) crimes.
(3) An attempt to commit any of the above crimes.

c. Procedures in Section 19 apply to both provisions.

3. RECOMMENDATION FOR SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE (SSOSA)

a. *Statutory Requirements* – RCW 9.94A.670 [formerly RCW 9.94A.120(8)(a)]

The following *statutory requirements* must be met before the defendant qualifies for the Special Sexual Offender Sentencing Alternative:

(1) The current crime(s) must be a "sex offense" (as defined by RCW 9.94A.030. Ineligible: rape 2º (RCW 9A.44.050), a sex offense that is also a serious violent offense (i.e., rape 1º or attempted rape 1º, or other serious violent crime with sexual motivation finding)).

(2) The defendant has no prior convictions for a felony sex offense.

(3) Some portion of the presumptive sentencing range is:
- crimes occurring prior to 7/1/90: less than six years
- crimes occurring between 7/1/90 – 7/26/97: less than eight years
- crimes occurring since 7/27/97: less than 11 years

(4) The court has considered whether the defendant and the community would benefit from SSOSA and has considered the opinion of the victim whether the defendant should receive a treatment disposition under SSOSA.

b. *Additional considerations* when considering a sentence recommendation under the Special Sexual Offender Sentencing Alternative.

(1) The current crime was not aggravated by use of a weapon or significant physical injury to the victim or sadistic behavior.

(2) The evaluator's report satisfies the statutory requirements of RCW 9.94A.670(3)(a) and (b), which includes at a minimum:
(a) the official version of the facts;
(b) the defendant's version of the facts;
(c) the defendant's offense history;
(d) an assessment of problems in addition to alleged deviant behaviors;
(e) the defendant's social and employment situation;
(f) other evaluation measures used;
(g) an assessment of the defendant's amenability to treatment and relative risk to the community;
(h) a proposed treatment plan (see statute).

(3) Factors to be considered include:
   (a) nature of the crime;
   (b) length of the abuse;
   (c) number of victims;
   (d) danger to the community;
   (e) defendant's employment or financial resources;
   (f) defendant's history of substance abuse;
   (g) defendant's acceptance of responsibility;
   (h) defendant's willingness to comply with treatment and probation requirements including no contact with the victim;
   (i) defendant's prior treatment history and compliance;
   (j) defendant's criminal history.

c. In all cases, the victim and/or victim's family will be consulted regarding this option.

d. *Sentencing Recommendation*

(1) *Jail recommendation* for Special Sexual Offender Sentencing Alternative (SSOSA). RCW 9.94A.670(5)(a)
   (a) Statutory maximum: six months (goodtime eligible)
   (b) Factors to be considered in determining the length of jail recommendation include: charge, number of incidents, number of victims, prior criminal history, abuse of trust, vulnerability of victim(s).

(2) *Treatment Recommendation.* RCW 9.94A.670(4)(b) The State's sentence recommendation shall include a recommendation for treatment, with a named state-certified sexual deviancy treatment provider, for any period up to three years in duration, which may be extended to the length of the suspended sentence upon order of the court.

(3) *Additional Conditions.* RCW 9.94A.670(5) The State's recommendation normally shall include: crime-related prohibitions' legal financial obligations, recoupment to the victim for the cost of any counseling as a result of the defendant's crime, and no contact orders with the victim and other appropriate classes of people, i.e., minors. Additional conditions may be included as permitted by RCW 9.94A.120, including conditions imposed by the Department of Corrections (RCW 9.94A.120(15)).

(4) *Length of Suspension/Supervision*
The State's sentencing recommendation for the Special Sexual Offender Sentencing Alternative shall be for the length of the suspended sentence:

- crimes occurring prior to 7/1/90: maximum community supervision 24 months
- crimes occurring on or after 7/1/90 but before 6/6/96: maximum community supervision 36 months or the length of the suspended sentence, whichever is greater
- crimes occurring on or after 6/6/96: maximum community custody 36 months or the length of the suspended sentence, whichever is greater, RCW 9.94A.670(4)(a)
- after 9/1/01: rape of a child 1º. rape of a child 2º, child molestation 1º, community custody for life

RCW 9.94A.720 authorizes the Department of Corrections (DOC) to add other "appropriate conditions of supervision" to the standard conditions of supervision even if not ordered by the trial court.

(5) *Violation Hearings.* RCW 9.94A.670(a)
All alleged violations of SSOSA shall be heard by the sentencing court (by agreement of the Department of Corrections). The Department of Corrections shall not conduct administrative hearings on SSOSA offenders.

4. SEXUALLY VIOLENT PREDATORS – CIVIL PROCEEDINGS

IV. STATUTES OF LIMITATION FOR SEX OFFENSES – RCW 9A.04.080

A. Rape 1º, Rape 2º

If reported to law enforcement within one year of its commission:

- ten years from the date of commission
- if victim is less than 14 when committed, later period of 1) victim turns 21 years old, or 2) ten years after commission

If not reported to law enforcement within one year of its commission:

- if victim 14 or older when committed, no more than three years later
- if victim is less than 14 when committed, later period of 1) victim turns 21 years old, or 2) seven years after commission

B. Rape of a Child 1º and 2º
Child Molestation 1º and 2º
Indecent Liberties (1)(b) when person incapable of consent
Incest 1º and 2º

Later period of 1) victim's 21st birthday, or 2) seven years after commission

C. Bigamy

See 9A.64.010(3)

D. Voyeurism

Three years or, *if person being viewed, photographed, or filmed did not realize at the time that he or she was being viewed, photographed or filmed,* within two years of first discovering he or she was being viewed, photographed, or filmed.

E. All other felonies

Three years from date of commission.

F. All Gross Misdemeanors

Two years from date of commission.

G. All Misdemeanors

One year from date of commission.

SECTION 7A: PHYSICAL ABUSE OF CHILDREN

I. FILING

A. EVIDENTIARY STANDARD

Child physical abuse cases shall generally be filed if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would support conviction by a reasonable and objective fact-finder.

B. CHARGE SELECTION

1. Homicide by Abuse – RCW 9A.32.055
Class A

Homicide by abuse shall be charged if there is sufficient admissible evidence existing to prove that:

a. under circumstances manifesting an extreme indifference to human life (see State v. Edwards, 96 Wn. App. 156 (1998) (extreme indifference to *victim's* life);

b. the person causes the death of:

(1) a child or person under 16 years of age,
(2) a developmentally disabled person, or a dependent adult, and;

c. the person has previously engaged in a pattern or practice of assault or torture of said child, person under 16 years of age, developmentally disabled person, or dependent person.

2. Assault of a Child – RCW 9A.36.102, .130 and .140

Assault of a child shall generally be charged where the defendant is over 18 and the victim is under 13. The degree of charge shall be determined as follows:

a. Assault of a Child 1º – RCW 9A.36.120
Class A

(1) The defendant assaults the child with intent to inflict great bodily harm with:
- a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

- administers, exposes, or transmits to or causes to be taken by another, poison, HIV, or any other destructive or noxious substance; or
- assaults another and inflicts great bodily harm; or

(2) intentionally assaults the child and either:
- recklessly inflicts great bodily harm; or
- causes substantial bodily harm; and

(3) the person has engaged in a pattern or practice either of:
- assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks; or
- causing the child physical pain or agony that is equivalent to that produced by torture.

Note: Prong (2) does <u>not</u> require proof of intent to inflict great bodily harm.

b. Assault of a Child 2º – RCW 9A.36.130
Class B

The defendant:
(1) intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
(2) intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting injury on the mother of the child; or
(3) assaults with a deadly weapon; or
(4) with intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
(5) assaults with intent to commit a felony; or
(6) knowingly inflicts bodily harm which by design causes such pain or agony as to be equivalent of that produced by torture; or
(7) intentionally assaults and causes bodily harm that is greater than transient physical pain or minor temporary marks; and the person has previously engaged in a pattern or practice of:
- assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks; or
- causing the child physical pain or agony that is equivalent to that produced by torture.

Note: Prong (7) does not require proof of intent to cause bodily harm.

c. Assault of a Child 3º – RCW 9A.36.130
Class C

The defendant, with criminal negligence, causes bodily harm to another person:

- by means of a weapon or other instrument or thing likely to produce bodily harm; or
- accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

Examples:

(1) "Weapon or other instrument ...":
- kitchen utensils
- electrical cords
- belts
- hairbrushes
- broomsticks
- adult hand v. adult victims:
  see State v. Walden, 131 Wn.2d 469 (1997)
  see State v. Painter, 27 Wn. App. 708 (1980)
- adult hand v. child victims:
  see State v. Carney, unpublished (1998)

(2) "Accompanied by substantial pain …":
- headache that lasts for two weeks
- split lip, requiring stitches
- blows resulting in significant bruising to face or body

3. Criminal Mistreatment – RCW 9A.42.020, .030 and .035

The appropriate degree of criminal mistreatment shall be charged when the defendant is:

- a parent; or
- a person entrusted with the physical custody of a child (from birth to age 18, RCW 9A.42.010) or dependent person; or
- a person employed to provide to the child or dependent person the basic necessities of life.

"Basic necessities of life" means food, water, shelter, clothing and medically necessary health care, including but not limited to, health care, including but not limited to, health-related treatment or activities,

hygiene, oxygen, and medication. RCW 9A.42.010(1). See also, State v. Jackson, 137 Wn.2d 712 (1999).

"Child" means from birth to age 18. A fetus is not a child for purposes of this statute. RCW 9A.42.010(3). See State v. Dunn, 82 Wn. App. (1996).

a. Criminal Mistreatment 1º – RCW 9A.42.020
Class B

Criminal mistreatment in the first degree shall be charged when the defendant recklessly (RCW 9A.08.010) causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

b. Criminal Mistreatment 2º – RCW 9A.42.030
Class C

Criminal mistreatment in the second degree shall be charged when the defendant recklessly:

- creates an imminent and substantial risk of death or great bodily harm; or
- causes substantial bodily harm; or
- by withholding any of the basic necessities of life.

c. Criminal Mistreatment 3º – RCW 9A.42.035
Gross Misdemeanor

Criminal mistreatment in the third degree shall be charged when the defendant, with criminal negligence:

- creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life; or
- causes substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Affirmative defense to criminal mistreatment:
It shall be a defense that withholding the basic necessities of life is due to financial inability, only if the defendant has made a reasonable effort to obtain adequate assistance. This defense is available to a defendant employed to provide the basic necessities of life, only when the agreed-upon payment has been made. RCW 9A.42.050

4. Abandonment – RCW 9A.42.060, .070 and .080

The appropriate degree of abandonment shall be charged when the defendant is:

- a parent; or
- a person entrusted with the physical custody of a child (under age 18) or dependent person; or
- a person employed to provide to the child or dependent person the basic necessities of life.

Definitions, RCW 9A.42.010(1):

- *"Abandonment"* means leaving a child or other dependent person without the means or ability to obtain one or more of the basic necessities of life.
- "*Basic necessities of life"*: see criminal mistreatment.
- *"Child"*: see criminal mistreatment.

a. Abandonment 1º – RCW 9A.42.060
Class B

Abandonment in the first degree shall be charged when the defendant:

(1) recklessly abandons the child or dependent person; and
(2) as a result of being abandoned, the child or dependent person suffers great bodily harm.

b. Abandonment 2º – RCW 9A.42.070
Class C

Abandonment in the second degree shall be charged when the defendant:

(1) recklessly abandons the child or dependent person, and
  (a) as a result of being abandoned, the child or dependent person suffers substantial bodily harm; or
  (b) abandoning the child or dependent person creates an imminent and substantial risk that the child or other dependent person will die or suffer great bodily harm.

c. Abandonment 3º – RCW 9A.42.080
Gross Misdemeanor

Abandonment in the third degree shall be charged when the defendant:

(1) recklessly abandons the child or dependent person, and
   (a) as a result of being abandoned, the child or dependent person suffers bodily harm; or
   (b) abandoning the child or dependent person creates an imminent and substantial risk that the child or other dependent person will suffer substantial bodily harm.

Affirmative defense to abandonment:
It is a defense that the defendant gave reasonable notice of termination of services and the services were not terminated until after the termination date specified in the notice. The notice must be given to the child or dependent person, and to other persons or organizations that have requested notice of termination of services furnished to the child or dependent person.
RCW 9A.42.090.

5. Reckless Endangerment – RCW 9A.36.050
Gross Misdemeanor

Reckless endangerment shall be charged when the defendant recklessly engages in conduct that creates:
- a substantial risk of death to a child; or
- serious physical injury to a child.

C. DEFINITIONS

1. Bodily Injury, Bodily Harm, or Physical Injury
RCW 9A.04.110(4)(a)

Bodily injury, bodily harm, or physical injury means physical pain or injury, illness, or an impairment of physical condition.

Examples (non-statutory):
- more than transient pain or minor temporary marks (see discipline defense)
- split lip, requiring stitches
- belt or electrical cord whip marks

- blows resulting in significant bruising to the face or body (consideration should be given to the age of the child and their motor skills)
- abdominal injuries, not rising to "great" or "substantial" injury (i.e., bruising to internal organs not affecting their function)
- single cigarette burn (depending on location and severity of injury)
- blow to the head resulting in headache that lasts for more than one day

2. Substantial Bodily Harm
RCW 9A.04.110(4)(b)

Substantial bodily harm means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

Examples (non-statutory):
- broken bones (rib fractures, legs, arms)
- head injuries (not resulting in permanent impairment, i.e., skull fractures, subdurals, that will likely not impair child long-term)
- ear injuries (ruptured eardrums)

3. Great Bodily Harm
RCW 9A.04.110(4)(c)

Great bodily harm means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the functions of any bodily part or organ.

Examples (non-statutory):
- head injuries likely to result in permanent injury
- scalding burns causing significant permanent injuries
- internal injuries amounting to risk of death

4. The Discipline Defense
RCW 9A.16.100

The physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher or guardian for purposes of restraining or correcting the child.

Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following list of actions are presumed unreasonable when used to correct or restrain a child (list is non-exclusive):

- throwing, kicking, burning, or cutting a child;
- striking a child with a closed fist;
- shaking a child under age three;
- interfering with a child's breathing;
- threatening a child with a deadly weapon; or
- doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.

The age, size, and condition of the child and the location and size of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. In addition, the following factors should be considered:

- history of physical injury or other abuse;
- circumstances surrounding the event;
- whether injury inflicted by use of hand or weapon;
- victim/family wishes;
- defendant's willingness to accept services

The Chief Criminal Deputy shall be consulted prior to the filing of any physical abuse case involving allegations of parental discipline.

5. Pattern or Practice – (*Assault of a Child 1º* and *Assault of a Child 2º*)

Pattern or practice means a documented history of injuries meeting definitions and examples in "bodily harm" definition, and having resulted from distinct episodes of abuse separated by a period of time of reflection by defendant. See State v. Russell, 69 Wn. App. 237 (1993), review denied, 122 Wn.2d 1003.

Three or more separate and distinct episodes shall be required to satisfy the definition of "pattern or practice."

6. Torture – (*Assault of a Child 1º* and *Assault of a Child 2º*)

Other injuries which are not defined or which are inflicted over a period of time and are not accepted in any degree as appropriate discipline evidence deliberate intent solely to cause pain, sadistic quality. See State v. Brown, 60 Wn. App. 60 (1990).

Examples:

- cigarette burns
- bite marks
- excessive cold or hot water
- harm to genitals
- multiple whip marks which break the skin, resulting from a single event

7. Deadly Weapon – (*Assault of a Child 1º* and *Assault of a Child 2º*)

Deadly weapons are objects that are inherent weapons – i.e., guns, knives. See RCW 9A.04.110(6) for elements of crime definitions as distinguished from weapons enhancement definitions. See Section 17.

D. GENERAL FILING PROVISIONS

1. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count of any assault should be filed for each individual victim even if more than one person was a victim during the same incident. In cases involving multiple abusive incidents against the same victim by the defendant, counts shall be filed to reflect the nature and extent of contact with the victim. Three counts involving the same victim normally should be filed if the abuse was chronic (greater than ten incidents), two counts, if multiple (three to ten), and one count if isolated or up to two times. In cases involving multiple abusive incidents against multiple victims, counts shall be filed to reflect the nature and extent of contact with each victim and all victims.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation for uncharged crime, those charges normally shall be filed as soon as a trial date is taken.

2. Sentencing Enhancements

a. Deadly weapon/firearms enhancements. See Section 17.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally, deadly weapon and firearm allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon or firearm allegation is offered.

B. SENTENCE RECOMMENDATION

1. Determinate/Indeterminate Sentence

A determinate sentence recommendation shall be made for all felony charges. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

2. First Offender Waiver – RCW 9.94A.650

Crimes eligible for a first offender waiver include:
Assault of a Child 3º
Criminal Mistreatment 1º, 2º, 3º
Abandonment 1º, 2º, 3º

3. Mandatory Minimum – RCW 9.94A.540
Assault 1º and Assault of a Child 1º

If force or means likely to result in death was used or the defendant intended to kill the victim, confinement may not be less than five years. Total confinement may not be modified.

4. Community Custody

For crimes occurring after 7/1/01, the following terms of community custody apply:

Homicide by Abuse	24-48 months
Assault of a Child 1º	24-48 months
Assault of a Child 2º	If DOC, 18-36 months
Assault of a Child 3º	If less than one year – 12 months
Criminal Mistreatment 1º	If less than one year – 12 months
Criminal Mistreatment 2º	If less than one year – 12 months
Abandonment 1º	If less than one year – 12 months
Abandonment 2	If less than one year – 12 months

5. DNA Identification

DNA identification is mandatory for all felony convictions.
RCW 43.43.754

6. Restitution

See “Payment of Restitution,” Section 3.

7. Other conditions

- No contact provisions
- Parenting classes
- Parent/Child Interactive training
- State certified batterer’s treatment
- Anger management classes
- Substance abuse evaluation and follow-up treatment
- Mental health evaluation and follow-up treatment
- No physical discipline of children
- Compliance with all directives of CPS and/or family court

SECTION 8: DOMESTIC VIOLENCE

I. DOMESTIC VIOLENCE UNIT

A. CASE HANDLING

The following categories of offenses are handled by the Domestic Violence Unit (DVU) and are subject to these standards:

1. All crimes against persons and property crimes involving family or household members as set forth in RCW 10.99.020(1), including spouses, former spouses, persons who have a child in common, adults related by blood or marriage, persons who have or have had a dating relationship, persons who have a biological or legal parent-child relationship, including stepparents and grandparents.

2. Notwithstanding the above, the DVU does not handle cases where there is no past or present intimate relationship, dating relationship, or familial relationship between the household members ("roommate" cases), child sexual abuse cases, or child physical abuses cases where the child is under twelve (12) years of age.

3. The DVU may also handle cases where a domestic violence dynamic is present or where there are domestic violence overtones or issues. The DVU may also handle cases, which involve a felony or misdemeanor domestic violence case and other non-domestic violence charges.

II. FILING

A. EVIDENTIARY SUFFICIENCY

1. Crimes Against Persons

   Domestic violence crimes against persons shall be filed if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

   Prosecution for domestic violence crimes against persons should not be declined because of an affirmative defense unless the affirmative defense is of such a nature that, if established, it would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

2. Crimes Against Property/Other Crimes

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

B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTON

The following cases ordinarily will be declined for original filing in municipal or district court, when committed by a person who has no pending charged felony case or uncharged felony referral and who has no prior adult or juvenile felony conviction for serious violent or violent offenses, and for whom there is no concerning reported or unreported domestic violence history.

Theft and Theft of Rental Property where the total value of property taken does not exceed $500.

Forgery involving only one instrument with a face value less than or equal to $500.

Possession of Stolen Property 2 involving possession of only one access device

Possession of Stolen Property 2 involving property of only one victim and with a fair market value that does not exceed $500.

Unlawful Issuance of Bank Checks involving no more than three checks with a total face value that does not exceed $500.

Malicious Mischief where the total damage does not exceed $500. See "Arson and Malicious Mischief," Section 12.

C. CHARGE SELECTION

1. Assault. Also see Section 5 "Assault"

a. Assault in the First Degree – RCW 9A.36.011

(1) Assault in the First Degree shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant, with intent to inflict great bodily harm:

(a) assaulted another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm; or
(b) administers, exposes, transmits, or causes to be taken…noxious substances, HIV virus; or
(c) assaults another and inflicts great bodily harm.

(2) Assault in the First Degree Causing Great Bodily Harm

"Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c)

The filing deputy shall ensure that evidence exists which would support a finding consistent with the statutory definition of "great bodily harm" and that a thorough investigation on the harm issue has been conducted and documented (i.e., witness statements, medical reports have become or will become part of the prosecutor's file). Determination of whether or not great bodily harm was inflicted must be made on an individual case basis.

Examples of "significant, serious permanent disfigurement" or "significant permanent loss or impairment of the function of any bodily part or organ" as set forth in RCW 9A.04.110 includes the following:

(a) loss of a limb; or
(b) permanent paralysis of a limb or any body part; or
(c) significant burn scars.

Great bodily harm of the type creating a probability of death normally are those requiring significant medical intervention to prevent death and an injury about which a medical expert would testify there was a probability of death from the bodily injury.

(3) Attempted Murder in the First or Second Degree

Attempted Murder in the First Degree or Attempted Murder in the Second Degree normally shall be filed only if there is sufficient admissible evidence on the required mental element to take the issue to the jury. For Attempted Murder in the First Degree, evidence of premeditation should be noted in the file, by the filing deputy. For Attempted Murder in the Second Degree, evidence of intent to cause death should be noted in the file. The filing deputy shall consult with the unit chair prior to filing Attempted Murder in the First Degree or Murder in the Second Degree.

Assault in the First Degree, rather than Attempted Murder in the First or Second Degree, shall normally be initially filed unless there are significant words (e.g., statement of

intent to kill by the defendant) or acts indicating intent to kill (e.g., multiple stab wounds).

(4) Assault in the First Degree – Discharging a Firearm at Another

Notwithstanding any other provision of these standards, the intentional discharge of a firearm at or toward another person shall normally result in a charge of Assault in the First Degree, or Attempted Murder; where appropriate. For filing purposes, it shall be presumed that the defendant intends to inflict "great bodily harm" when he or she intentionally shoots at, toward or into another person. Evidence that the defendant possessed some lesser intent, resulting in a lesser charge than Assault in the First Degree, shall be clearly outlined in the file.

b. Assault in the Second Degree – RCW 9A.36.021

(1) Assault in the Second Degree shall normally be filed if, under circumstances not amounting to Assault in the First Degree, the defendant:

(a) intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
(b) intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
(c) assaults another with a deadly weapon; or
(d) with intent to inflict bodily harm, administers to or causes to be taken by another, poison, or any other destructive or noxious substance; or
(e) with intent to commit a felony, assaults another; or
(f) knowingly inflicts bodily harm, which by design, causes such pain or agony as to be the equivalent of that produced by torture.

(2) Substantial Bodily Harm

"Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.110(4)(b)

The filing deputy shall ensure that evidence exists which would support a finding consistent with the statutory definition of "substantial bodily harm" and that a thorough investigation on the harm issue has been conducted and documented (i.e., witness statements, medical reports have become or will become part of the prosecutor's file). Determination of whether or not substantial bodily harm exists shall be made on an individual case basis. Examples of substantial bodily harm include:

(a) a broken or fractured bone; or
(b) a significant scar (even if fixed with plastic surgery); or
(c) an injury requiring a significant number of stitches or staples; or
(d) loss of consciousness (more than momentary); or
(e) a ruptured ear drum; or
(f) substantial and extensive bruising; or
(g) loss of a natural tooth (chipped or cracked teeth shall normally be considered substantial bodily injury); or
(h) an injury requiring surgery that does not constitute "great bodily harm"; or
(i) long-term vision impairment.

Strangulation cases shall normally be filed as Assault in the Second Degree, when there is sufficient admissible evidence that the injuries inflicted, as a result of the strangulation, resulted in a temporary, but substantial, loss or impairment of the function of any bodily part or organ. Examples of these injuries include: loss of consciousness; which is more than momentary, damage to the structures of the neck: including the larynx and the hyoid bone, or to the voice box.

(3) "Torture" Prong – RCW 9A.36.021(g)

In case where the level or harm does not rise to the level of substantial bodily injury, the filing deputy should assess whether the case may be filed under the "torture" prong. Cases shall normally be filed under the "torture" prong where there are a number of injuries inflicted over a period of time within one episode, each of which separately do not amount to "substantial bodily harm" but the injuries are collectively serious; or where there is evidence that the

defendant acted with intent to cause pain or agony, and where the bodily harm caused pain or agony which constitute the equivalent of that produces by torture. Example of injuries which may constitute the equivalent of torture include:

(a) numerous cigarette burns; or
(b) electrical cord whippings; or
(c) bite marks or bruises in combination with each other; or
(d) forced ingestion of offensive or unknown substances.

(4) Assault with a Deadly Weapon

Assaults with a firearm, including an unloaded firearm, wherein the defendant did not discharge the firearm, but intentionally caused a reasonable apprehension and imminent fear of bodily injury, shall normally be filed as Assault in the Second Degree. If the defendant aimed a firearm at another, but the victim did not have any reasonable apprehension and imminent fear of bodily injury, the filing deputy shall normally file aiming or discharging a weapon charge. RCW 9.41.230

If the defendant possessed a firearm, but did not point the firearm at another, did not make a threat to harm the victim, and did not make threatening gestures with the firearm, and where the defendant did not commit an intentional assault, the filing deputy shall normally file Unlawful Display of a Weapon rather than Assault in the Second Degree. The filing deputy shall note, however, that unlawful display of a weapon may not be filed if the display occurred in the defendant's place of abode or place of business.

Assaults with a knife with a blade three inches or longer shall normally be filed as Assault in the Second Degree where there is sufficient admissible evidence that the defendant committed an intentional assault with the knife rather than simply brandishing the knife or displaying it. Examples of conduct by the defendant, which may rise to the level of an intentional assault with a knife, include:

(a) approaching within a short distance from the victim while armed with a knife, and pointing the knife towards the victim; or

(b) making threatening gestures towards the victim with the knife; or

(c) holding the knife in a threatening manner including, but not limited to, holding the knife over the head; or

(d) attempting to strike the victim with the knife, including swinging towards the victim.

c. Assault in the Third Degree – RCW 9A.36.031

(1) Assault in the Third Degree shall be charged if there is sufficient admissible evidence to take to the jury showing the defendant:

(a) with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm [RCW 9A.36.031(d)]; or

(b) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering [RCW 9A.36.031(f)].

(2) Bodily Harm – Substantial Pain Prong

Assault in the Third Degree shall normally be filed under this prong if there is admissible evidence of criminal negligence, and if the injuries inflicted interfere with normal life functioning for a significant number of days. Examples of injuries which interfere with normal life functioning for a number of days include: chipped teeth, black eyes that are swollen shut, back injuries and serious sprains.

(3) Strangulation cases shall normally be filed as Assault in the Third Degree where there is admissible evidence that the neck compression resulting from strangulation resulted in substantial pain that extended for a period of time sufficient to cause considerable suffering. Examples of such injuries resulting from strangulation include: a hoarse or raspy voice that lasted for 2 or more days, headaches and dizziness that lasts for 2 or more days, substantial bruising and extensive difficulty swallowing or breathing.

2. Harassment – RCW 9A.46.020/Telephone Harassment – RCW 9.61.230
See Section 9 Harassment, Stalking and Other Offenses

a. Harassment – Misdemeanor

(1) A person is guilty of the gross misdemeanor of harassment if the person knowingly threatens to:

(a) cause bodily injury immediately or in the future to the person threatened or to any other person; or
(b) cause physical damage to the property of a person other than the actor; or
(c) subject the person threatened or any other person to physical confinement or restraint; or
(d) maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical health or safety.

(2) The person, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of electronic communication.

b. Felony Harassment

(1) A person is guilty of Felony Harassment if the person knowingly threatens to:

(a) kill immediately, or in the future, the person threatened or another person; or
(b) cause bodily injury immediately, or in the future, to the person threatened, or to any other person, and the person has previously been convicted of any crime of harassment as defined by RCW 9A.46.060, of the same victim or member of the victim's household or to any person named in a no contact order or no harassment order.

(2) The person, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of electronic communication.

c. Telephone Harassment – RCW 9.61.230

(1) Gross misdemeanor. A person is guilty of the gross misdemeanor of telephone harassment if, with intent to harass, intimidate, torment or embarrass any other person, the person makes a telephone call to such other person:

(a) using any lewd, lascivious, profane, indecent or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
(b) anonymously or repeatedly, or at any extremely inconvenient hour, whether or not conversation ensues; or
(c) threatens to inflict injury on the person or property of the person called, or any member of his or her family or household.

(2) Felony Telephone Harassment. A person is guilty of felony telephone harassment if, with intent to harass, intimidate, torment or embarrass any other person, the person:

(a) makes a telephone call to such other person:
  (i) using any lewd, lascivious, profane, indecent or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
  (ii) anonymously or repeatedly, or at an extremely inconvenient hour, whether or not conversation ensues; or
  (iii) threatens to inflict injury on the person or property of the person called or any member of his or her family or household; and
(b) the defendant has previously been convicted for any crime of harassment, as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household or any person specifically names in a no contact order or harassment order; or
(c) the defendant harasses another person by threatening to kill the person threatened or any other person.

Felony telephone harassment shall normally be filed only when one of the following factors is present: (i) the threat is part of a pattern of threats to the current victim; (ii) the victim is experiencing reasonable fear that the threat will be carried out on the part of the victim; (iii) a reported or unreported history of domestic violence with the current

victim; (iv) a prior violent history by the defendant, known to the victim. Absent one of these factors, misdemeanor telephone harassment shall normally be filed.

While reasonable fear on the part of the victim is not an element or the crime of telephone harassment, the filing deputy shall consider the victim's reasonable fear in the filing determination.

d. Pattern of Conduct

Felony Harassment and Telephone Harassment, based on a threat to kill theory, shall normally be charged if (i) the defendant, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out, and (ii) the defendant's current threat to kill is part of a pattern of repeated words and/or conduct against the same victim which constitutes a pattern of harassment designed to coerce, intimidate or humiliate the victim, or if there is a reported or unreported history of domestic violence.

Where the threat appears to be an isolated incident, the filing deputy shall normally file Misdemeanor Harassment charges. However, an isolated incident of harassment may be filed in an aggravated case, including cases where the defendant has an extensive pattern or prior harassment against persons other than the victim, where there is a belief the defendant intends to act upon the threat, or where the defendant is armed with a deadly weapon while making the threat.

e. Reasonableness of the Victim's Fear

Factors to consider in determining whether there is sufficient evidence of the victim's reasonable fear include: his or her immediate response to that threat, whether the victim took steps to protect herself or himself from the defendant, whether the police were called and whether the victim sought refuge with others or in a shelter. The defendant's actions should also be considered; did the defendant brandish a weapon or have one in his possession; did the defendant interfere with the victim's reporting the incident to the police, did the defendant engage in prior verbal, emotional or physical abuse of the victim.

3. Violation of Court Orders

a. Violation of Domestic Violence Court Order – RCW 26.50.110

Misdemeanor Violation of a Domestic Violence Court Order charges shall normally be filed when sufficient admissible evidence exists which would justify conviction by a reasonable and objective fact-finder. Violation of domestic violence court order charges shall be filed, if there is sufficient evidence of a misdemeanor VNCO, regardless of what other charges are filed.

b. Felony Violation of a Court Order – RCW 26.50.110(1)

Violation of a Court Order, a gross misdemeanor, shall normally be filed if there is sufficient admissible evidence to take to the jury proving the following:

(1) there is a valid order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26 or 74.34, or a valid foreign protection order as defined in RCW 26.52.020; or

(2) the respondent or person to be restrained knows of the order; or

(3) the respondent or person to be restrained willfully committed a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school or daycare, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance or a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime for which an arrest is required under RCW 10.31.100(2)(a) or (b); or

(4) the respondent or person to be restrained has either:

(a) committed an assault; or
(b) engaged in conduct constituting of a violation of the court order; which was reckless and created a substantial risk of death or serious physical injury to another; or
(c) has twice been previously convicted for violating the provisions of a no contact or protection order and does not otherwise qualify for an expedited disposition under subsection (d) "Invited Contact."

c. Notice – Prior to filing a charge for violation of a domestic violence court order, there must be competent evidence that the defendant was aware of the court order, and that the court order is valid.

d. Invited Contact – It is not a defense that the victim invited, permitted or acquiesced in the defendant's violation of the domestic violence court order. However, cases that are referred for felony filing because the defendant has twice been previously convicted for violating the provisions of a no contact or protection order may be filed as expedited crimes if:

(1) The contact occurred with the consent of the victim;

(2) The charge would be the defendant's third or fourth conviction for violation of a no contact or protective order;

(3) There is no indication that any assaultive behavior occurred during the contact;

(4) The defendant does not have any felony convictions for serious violent or violent offenses; and

(5) There is no concerning reported or unreported domestic violence history. Examples of concerning domestic violence history include:

(a) A history that includes felony level domestic violence convictions with the same victim;

(b) A history that includes recent or repeated convictions for felony level domestic violence;

(c) Recent misdemeanor domestic violence assaults.

4. Burglary

a. Burglary in the First Degree – RCW 9A.52.020

Burglary in the First Degree shall normally be filed if, with intent to commit a crime therein, the defendant entered or remained unlawfully in a building, and that the defendant was armed with a deadly weapon or assaults a person during the entry, or in the immediate flight therefrom.

b. Residential Burglary – RCW 9A.52.025

Residential Burglary shall normally be filed if, with intent to commit a crime therein, the defendants entered or remained unlawfully in a dwelling, other than a vehicle.

c. Unlawful entry or remaining

Where tacit permission exists for the defendant to be present, there must be substantial evidence that the entry or remaining was unlawful before Burglary in the First Degree or Residential Burglary charges can be filed. Substantial evidence includes, but is not limited to, evidence of forced entry, the clear revocation of permission to enter or remain or the existence of a no contact order.

d. Assault prong

When the defendant enters unlawfully, Burglary in the First Degree shall normally be filed in lieu of Residential Burglary, if, during the commission of, or in immediate flight therefrom, the defendant assaults any person, and there is evidence that the assault was separate and distinct from the force used to gain entry into the residence.

e. Unlawfully Remaining

Residential Burglary shall normally be field in lieu of Burglary in the First Degree if there is evidence that the defendant initially had permission to enter the residence, and that during the course of remaining unlawfully, the defendant committed an assault. However, if the assault committed rises to the level of a felony assault, then Burglary in the First Degree, shall normally be filed.

f. Deadly Weapon Prong

Burglary in the First Degree shall normally be charged if the defendant was armed with a firearm or a deadly weapon, and if there is some evidence that the weapon was intended to be used as a weapon rather than as a burglary tool, or if there is some evidence that the weapon was intended to be used to assist in the commission of the burglary.

5. Sexual Assaults

Domestic Violence Sexual Assaults shall normally be filed consistent with the sexual assault filing standards set forth in Section 7.

6. Stalking, see Section 9 Harassment, Stalking and Other Offenses

7. Expedited Crimes

a. Evidentiary Sufficiency

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

b. Definition

Expedited cases are the following crimes, when committed by a person who has not had an expedited crime within the past five (5) years and who does not have a pending charged or uncharged felony case for which there is probable cause and who does not have a prior adult or juvenile felony conviction for a serious violent or violent offense, and for whom there is no concerning reported or unreported domestic violence history:

(1) Theft or Possession of Stolen Property of any type, where the total value of all property taken or possessed, pursuant to a common scheme, is less than $1000, except

(a) from the person, or

(b) as part of a business enterprise, or

(c) where the property possessed was stolen in a Robbery or Residential Burglary and circumstances exist which give probable cause to believe that the defendant committed the Robbery or Burglary, or

(d) where the property possessed was stolen in more than one criminal incident, or

(e) where the stolen property is a gun, or

(f) where the victim was particularly vulnerable because of age, illness or relationship to the defendant.

2. Forgery when the total face value of all instruments forged is less than $1000, unless two or more different identities are involved or more than three instruments are tendered.

3. Credit card theft where the possession involves the cards or

identification of one person only.

4. Unlawful issuance of a bank check in an amount less than $1000.

5. Malicious destruction of property where the diminution in value is less than $1000.

6. Joyriding where the vehicle was abandoned within 24 hours of the theft, where no stripping occurred, where there is no evidence of intent to permanently deprive and where no substantial damage to the vehicle has occurred.

7. Felony Violation of a No Contact Order as defined in this Section under subsection II B3b(d).

8. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count of any assault should be filed for each individual victim even if more than one person was a victim during the same incident. In cases involving multiple abusive incidents against the same victim by the defendant, counts shall be filed to reflect the nature and extent of contact with the victim.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation for uncharged crime, those charges normally shall be filed as soon as a trial date is taken.

7. Special Allegations

a. Firearm allegation, see Section 17

"Firearm" is defined as a weapon or device from which a projectile or projectiles may be fired or by explosive such as gunpowder. Firearm allegations shall normally be filed if sufficient admissible evidence exists that the defendant was armed with a firearm at the time of the commission of the offense, and one of the following factors is present:

(1) The firearm was used; or

(2) There was some overt act by the defendant indicating that the firearm might be used during the commission of the crime. Examples of overt acts by the defendant indicating that the firearm might be used include: pointing the firearm at a person or threatening to point the firearm at a person, displaying the firearm or making an express or implied threat to use the firearm.

b. Deadly Weapon allegation, see Section 17

For purposes of the special allegation, a deadly weapon is an implement or instrument which has the capacity to inflict death and form the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: blackjack, slingshot, billy, sand club, sandbag, metal knuckles, any dirk, dagger or pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be sued as a club, any explosive, and any weapon containing poisonous or injurious gas.

Deadly weapon allegations shall normally be filed for each count charged if sufficient admissible evidence exists that the defendant was armed with the deadly weapon at the time of the commission of the offense, and one of the following factors is present:

(1) The weapon was used; or

(2) There was some overt act by the defendant indicating that the weapon might be used during the commission of the crime. Examples of overt acts by the defendant indicating that the weapon might be used include: pointing or threatening the weapon at a person, displaying the weapon to a person or making an express or implied threat to use the weapon.

c. Filing Standards for Special Allegations

A deadly weapon or firearm allegation shall normally be filed only against a defendant who actually possessed the weapon or firearm, or against the accomplice who actively participated in the crime and was present during its use, or who supplied the weapon or firearm.

In determining whether there is sufficient evidence to prove the allegation, it is not necessary that the weapon or firearm be recovered, as long as witnesses can describe in detail what appeared to be a real firearm, a knife with a blade over three inches, or other deadly weapon. Firearms need not be operable in order to file the firearm allegation, but firearms must be capable of being operable with reasonable effort and within a reasonable time period.

d. Multiple counts

Generally, a deadly weapon or firearm allegation shall be filed with only one count, when the same incident results in multiple counts. The deadly weapon or firearm allegation shall be filed for the count which carries the highest seriousness level. When multiple counts involve the same seriousness level, choose the count with the best evidence.

For purposes of the standards, the same incident includes multiple victims, unless the weapon was used to inflict injury upon separate victims. Separate special allegations shall normally be filed for each separate incident. Separate incidents means separate victims and a different time and place or the same incident where injury was inflicted on more than one victim.

III. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant shall normally be expected to plead guilty to the degree charged or to go to trial. The corrections of errors in the initial charging decision or the development of proof problems, which were not apparent at filing, are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not be considered. The exception policy shall be followed before any reduction is offered.

Prior to offering a reduction, the deputy prosecutor shall attempt to contact the victim, to discuss the offer.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon and Firearm Allegations

Special allegations in domestic violence cases shall not normally be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems, which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a special allegation. Caseload pressure or the cost of prosecution may not be considered. The exception policy shall be followed before a dismissal of a special allegation is offered.

4. Self-Defense Claim

A claim of self defense, battered woman's defense and battered child defense normally requires consideration of the following sources of information to assess the validity of the claim:

a. Input from the victim, the victim's family and friends, and the defendant's family and friends.

b. Documentation of prior abuse through medical records, police reports, witness statements, CPS reports or photographs of old injuries.

c. Mental health evaluations of the defendant.

d. A review of the relative size of the defendant and the victim.

e. A review of he dynamics of the relationship between the victim and the defendant.

B. NO CONTACT ORDERS

At the time of filing, a pretrial no contact order shall normally be requested pursuant to RCW 10.99.040 for all victims, and conditions of release that preclude contact with all victims and witnesses.

C. SENTENCING RECOMMENDATION

1. Determinate Sentence

The deputy shall normally review a case to determine whether there are statutory or non-statutory grounds for an exceptional sentence. When there do not appear to be grounds for an exceptional sentence, the deputy shall recommend a sentence within the standard range. Recommendations outside the specified range shall be made only upon approval of the chair or vice-chair of the unit.

2. Exceptional Sentence

Pursuant to RCW 9.94A.535, consideration shall be given to requesting an exceptional sentence when any of the statutory or non-statutory aggravating or mitigating factors are present. In domestic violence cases, the deputy shall review the case prior to sentencing to determine if any of the following factors are present, pursuant to RCW 9.94A.535(2)(h):

a. offense was part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a period of time; or

b. offense occurred within sight or sound of the victim's, or the offender's, minor children, under the age of eighteen; or

c. The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim; or

d. The operation of the multiple offense policy of RCW 94A.589 results in a presumptive sentence that is clearly too lenient, in light of the purposes of the chapter, as expressed in RCW 9.94A.010; or

e. The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in the presumptive sentence that is clearly too lenient in light of the purposes of this chapter, as expressed in RCW 9.94A.010.

Consideration shall be given to requesting an exceptional sentence when a non-statutory aggravating factor is present. All requests for exceptional

sentences must be approved by the unit chair or vice-chairs. Exceptional sentences shall be requested only when a reasonable and objective fact-finder would find that there are substantial and compelling reasons which justify the exception.

(1) History of Domestic Violence

In cases where the defendants has a history of domestic violence, whether reported or unreported, the deputy shall assess whether the offense was part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time as set forth in RCW 9.94A.535 (h)(1). If the deputy determines that an exceptional sentence is not appropriate, the deputy shall normally request a higher sentence within the standard range, if there is a history of domestic violence.

(2) Presence of Children

If children are present when a crime is committed, the deputy shall normally evaluate the case to determine if there is sufficient evidence to request an exceptional sentence, pursuant to RCW 9.94A(h)(ii). If the deputy determines that there are insufficient grounds for an exceptional sentence, the deputy shall normally request a higher sentence within the standard range.

(3) Rapid Recidivism

Where the defendant engages in criminal conduct shortly after being arrested, charged, prosecuted, sentenced or incarcerated for prior domestic violence conduct, the deputy shall normally request a higher sentence.

(4) Pregnant Victim

If the victim of a crime against persons is pregnant, and the defendant knew or should have known of her condition, the deputy prosecutor shall normally seek a higher sentence.

3. No Contact Orders

a. A no contact order for the maximum allowable period should always be entered when the victim requests a no contact order.

b. No deputy should ever rely upon phone contact or expressions of the victim's wishes regarding a no contact order from the defendant, defense counsel or others related to the defendant.

c. If the victim appears at sentencing and does not want a no contact order, the deputy should consider the history of violence, both reported and unreported. If there is a history of domestic violence, or if there is any indication that the victim is being coerced, intimidated or influenced on the issue of the no contact order, the deputy should request a no contact order over the victim and defendant's objection.

4. Restitution

See "Payment of Restitution," Section 3.

5. Community Custody/Probation

Community custody/probation on all eligible crimes shall be recommended. See Section 3.

6. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754

SECTION 9: HARASSMENT, STALKING AND OTHER OFFENSES

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. RCW 9.94A.411(2)(a). Harassment and stalking offenses in this section are considered crimes against persons.

2. Crimes against property will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised. RCW 9.94A.411(2)(a).

3. When a crime is not listed in RCW 9.94A.411(2)(a) and is also not specifically covered in another section of these standards, the filer should use the filing standard which most accurately characterizes the crime as "against property" or "against person."

B. CHARGE SELECTION

1. Degree/Charge

a. Harassment – RCW 9A.46.020

(1) The filing standards for harassment (RCW 9A.46.020) are set forth in Section 8: Domestic Violence. The filing standards are the same for domestic violence and non-domestic violence situations.

(2) Venue. Any harassment offense committed as set forth in RCW 9A.46.020 or 9A.46.110 (stalking) may be deemed to have been committed where the conduct occurred or at the place from which the threat or threats were made or at the place where the threats were received. RCW 9A.46.03.

(3) No Contact Provisions – Weapons – Arraignment Procedures. The court at arraignment must determine the necessity of issuing a no contact order, a protection order, or an anti-harassment order. If the court issues a no harassment order or protection order, the order may include home, business, school, etc. The court further may order

the surrender of firearms or other dangerous weapons pursuant to RCW 9.41.800. See RCW 9A.46.040-050.

(4) Sentencing Procedures

Upon conviction, the sentencing recommendation should include no contact provisions unless the victim personally has expressed opposition to such an order. Such expression of opposition should be made a part of the court record or, if the victim is not present in court, noted in detail in the prosecutor's file.

(5) Enforcement

Violation of a no contact provision entered either as a condition of release prior to conviction or civil judgment or as part of the sentence or judgment can be a misdemeanor, a felony, or contempt of court. See RCW 9A.46.040(2) and 9A.46.080.

b. Telephone Harassment – RCW 9.61.230

(1) The filing standards for this offense are set forth in Section 8: Domestic Violence, and apply equally in non-domestic violence cases.

(2) Venue. The offense may be deemed committed at the place the call was made or at the place where the call was received. RCW 9.61.240

(3) Accomplice. Any person who knowingly permits a telephone under his/her control to be used in violation of RCW 9.61.230 is guilty of a misdemeanor. RCW 9.61.250. This statute would appear to preclude charging an accomplice whose conduct meets the definition of RCW 9.61.250 with the more serious crime of telephone harassment (gross misdemeanor or felony).

c. Malicious Harassment – RCW 9A.36.078/080

(1) Legislative Purpose – Findings. RCW 9A.36.078 is a lengthy statement of the legislature's findings relating to conduct which threatens persons because of their race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicaps.

This section further sets forth a strong State interest in preventing crimes and threats motivated by bigotry and bias beyond such conduct not similarly motivated.

This section also specifically identifies certain conduct that historically has been used to threaten harm to certain classes of people (e.g., swastikas, cross burnings …).

(2) Definitions – Elements of Crime – RCW 9A.36.080(1)

(a) A person will be charged with malicious harassment if the admissible evidence is sufficient to prove that the defendant maliciously and intentionally because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicap, commits one of the following:

(i) causes physical injury to the victim or another person;

(ii) causes physical damage to or destruction of the property of the victim or another person; or

(iii) threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property.

(b) Fear is further defined as fear that a reasonable person would have under all the circumstances. A reasonable person is one who is a member of the offended class (victim's race, color, etc.). RCW 9A.36.080(1)(c)

(c) Words alone do not constitute malicious harassment unless surrounding conduct/circumstances indicate that the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat. RCW 9A.36.080(1)(c)

(d) Specific Conduct – Inference. RCW 9A.36.080(a)

(i) Cross burning where victim is of African-American heritage or the actor perceives victim to be.

(ii) Defacing property of Jewish victim, or whom after actor perceives to be Jewish, with a swastika.

(e) Mistake as to victim's class membership is not a defense. RCW 9A.36.080(3)

(f) Anti-Merger Provision. Other crimes committed during the commission of the crime of malicious harassment may be prosecuted and punished separately. RCW 9A.36.080(5)

However, see State v. Lynch, 93 Wn. App. 716 (1999). Division I held that when malicious harassment is charged under the physical injury prong, assault in the fourth degree conviction for the same conduct violated the double jeopardy clause, the anti-merger statute notwithstanding. The court, however, distinguishes felony assaults containing other elements. See State v Robertson, 88 Wn. App. 836 (1997) (Assault 2º).

Note: You still can charge both malicious harassment and assault 4º but treat the assault 4º the same as a "lesser included" when instructing jury.

(g) Penalty. Malicious harassment is a Class C felony and currently has a seriousness level of IV in the sentencing guidelines.

d. Stalking – RCW 9A.46.110

(1) Definitions

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary that

the alleged stalker follows the person while in transit from one location to another. RCW 9A.46.110(6)(a); see State v. Lee, 82 Wn. App. 298, affirmed, 135 Wn.2d 369.

(b) "Harasses" means unlawful harassment defined in RCW 10.14.020. RCW 9A.46.110(6)(b).

RCW 10.14.020 defines "unlawful harassment" as follows:

> Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.
>
> (1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.
>
> (2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

(c) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person. RCW 9A.46.110(6)(c)

(d) "Repeatedly" means on two or more separate occasions. RCW 9A.46.110(6)(d)

(e) "Contact" includes, in addition to any other form of contact or communication, the sending of an

electronic communication to the person. RCW 9A.46.110(4)

(f) "Fear" is the feeling of fear that a reasonable person in the same situation would experience under all the circumstances.

2. Elements of Crime – RCW 9A.46.110(1)

(a) A person shall be charged with the crime of stalking if there is sufficient admissible evidence to meet the filing standard that the person without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(i) intentionally and repeatedly harasses or repeatedly follows another person; and

(ii) the person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or another person; and

(iii) the stalker either:

(A) intends to frighten, intimidate or harass the person; or

(B) knows or reasonably should know that the person is afraid, intimidated or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(b) Stalking is a gross misdemeanor unless one or more of the following special circumstances applies in which case it is a Class "C" felony:

(i) The stalker has previously been convicted in this or any other state of any crime of harassment as defined in RCW 9A.46.060 with the same victim or member of victim's family, household or person named as a protective order;

(ii) the stalking violates any protective order protecting the person being stalked;

(iii) the stalker has previously been convicted of stalking under this section for stalking another person;

(iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.125, while stalking the person;

(v) victim is or was law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community corrections officer, and the stalking was to retaliate against the victim for acts performed during the course of official duties or to influence the performance of official duties;

(vi) victim is current, former, or prospective witness in an adjudicative proceeding, and …

(3) Defenses

(a) Lack of actual notice to the stalker that the victim did not want to be contacted or followed is not a defense under the (c)(i) prong.

(b) Lack of intent to frighten, intimidate or harass is not a defense under (c)(ii) prong. RCW 9A.46.110(2)

(c) That actor is a licensed private investigator acting within the capacity of his/her license as provided in RCW 18.165 is a defense. RCW 9A.46.110(3)

(4) Proof. Attempts to contact or follow a victim after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence of intent to intimidate or harass. RCW 9A.46.110(4)

2. MULTIPLE COUNTS/STIPULATION TO UNCHARGED COUNTS

a. Initial Filing – Number of Counts

One count normally should be filed for each crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category if the most serious crime is either

seriousness level VIII, IX or X. One count should be filed for each count up to a maximum of five counts for any other crime covered by this section.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial. In the alternative, uncharged crimes may be included in filing certification or prosecuting attorney statement and incorporated as real facts in any plea agreement.

c. Amendment

If the defendant elects not to enter into a stipulation on uncharged crimes, those charges normally shall be filed as soon as a trial date is taken.

3. Deadly Weapon/Firearm Allegation. See "Firearms Offenses and Weapon Enhancements," Section 17.

4. Sexual Motivation Allegation. See "General Provisions," Section 3.II.E.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally, deadly weapon allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon firearm allegation is offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

A determinate sentence within the standard sentencing range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

3. Restitution

See "Payment of Restitution," Section 3.

4. Community Custody/Probation

Community custody/probation on all eligible crimes shall be recommended. See Section 3.

5. No Contact Orders

A no contact order for the maximum allowable period shall be requested when the victim requests a no contact order. No deputy should rely upon phone contact or expressions of the victim's wishes regarding a no contact order from the defendant, defense counsel or others related to the defendant.

6. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 10: ROBBERY

I. FILING

A. EVIDENTIARY SUFFICIENCY

Robbery cases will be filed if sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

B. CHARGE SELECTION

1. Degree

a. Robbery in the First Degree – 9A.56.200

Robbery in the first degree shall be charged if there is sufficient evidence to take the deadly weapon or bodily injury issue to the jury.

(1) Deadly Weapon – Robbery in the first degree based upon a "display what appears to be" theory should not ordinarily be filed unless the weapon is actually visible to the victim. A finger in the pocket should be charged as robbery in the second degree.

(2) Bodily Injury – Robbery in the first degree based upon a "bodily injury" theory should not ordinarily be filed unless the injury is sufficiently serious to require medical treatment of more than a first aid nature. However, vulnerability of victim shall be considered in determining whether robbery in the first degree should be filed on a "bodily injury" theory.

(3) Financial Institution –

Effective June 13, 2002, robbery within or against a financial institution as defined in RCW 7.88.010 or 35.38.060 is Robbery in the First Degree.

RCW 7.88.010 defines financial institution as a bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.

RCW 35.38.060 defines financial institution as a branch of a bank engaged in banking in this state in accordance with RCW 30.04.300, any state bank or trust company, national banking association, stock savings bank, mutual savings bank, or savings and loan association, which institution is located in this state and lawfully engaged in business.

b. Robbery in the Second Degree – 9A.56.210

(1) All other robbery cases, including those involving feigned weapons and minor injuries, shall be filed as robbery in the second degree.

(2) Taking from the Person (e.g., purse-snatching): Theft in the first degree shall be filed when the property is obtained without significant struggle or injury. Vulnerability of victim shall be considered in assessing force or threat of force to justify filing robbery.

(3) Force Used to Retain Property

A person who initially unlawfully takes property peaceably commits robbery under RCW 9A.56.190 by retaining the property through the use of force, violence and fear of injury. See State v. Handburgh, 119 Wn.2d 284 (1992). Robbery should be charged in these situations only when the suspect still has possession of the property at the time of the confrontation and a significant use of force occurred. Threats or force used simply to effect an escape after the property has been abandoned should be charged under the appropriate theft and/or assault standard. Where only threat of force is used to retain property, the threat should be more than a momentary or fleeting comment where no weapon is involved. Where robbery is to be charged, the degree is determined by standards set forth in a(1) and (2) and b(1) above.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count normally should be filed for each other crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category. For example, six counts of robbery in the first degree based on separate and distinct criminal conduct would be the maximum number of counts filed because

additional counts after the first one count as prior convictions worth 2 points. RCW 9.94A.589

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter a stipulation for uncharged crimes, those charges normally shall be filed as soon as a trial date is taken.

3. Deadly Weapon/Firearm Allegation. See Section 17.

4. Sexual Motivation Allegation. See "General Provisions," Section 3.II.E.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of

prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally, deadly weapon allegations will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon firearm allegation is offered.

SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

A determinate sentence within the standard sentencing range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

3. Bank Robbery

For all bank robberies committed prior to June 13, 2002, charged as Robbery in the Second Degree, the State's sentence recommendation normally shall be the high end of the standard sentencing range. Recommendations below the high end shall be made only pursuant to the exception policy.

4. Restitution

See "Payment of Restitution," Section 3

5. Community Custody

On any robbery, community custody also shall be recommended.

6. Exceptional Sentence – Sexual Motivation

See “General Provisions,” Section 3.

7. Exceptional Sentence – Further Gang Enterprise

See “General Provisions,” Section 3.

8. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 11: BURGLARY

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Burglary in the first degree cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence would justify conviction by a reasonable and objective fact-finder.

2. Burglary in the second degree, residential burglary, criminal trespass in the first and second degree, and vehicle prowl will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

3. As to either first or second degree burglary or residential burglary, there must then be sufficient admissible evidence that the defendant intended to commit a crime or crimes within, sufficient to satisfy a reasonable and objective fact-finder of that conclusion.

B. CHARGE SELECTION

1. Degree

a. Burglary in the First Degree – 9A.52.020

Burglary in the first degree shall be charged if the defendant was armed with a firearm, or if he was armed with a deadly weapon and there is some evidence that the weapon was intended to be used as a weapon rather than as a burglary tool, or if the defendant assaults any person therein.

Burglary 1º was broadened to include all "buildings" effective 7-23-95. Prior to that date it covered only "dwellings."

Effective 6-6-96 the aggravating factor "assaults any person therein" was amended to eliminate "therein." As a result any assault during immediate flight from the building may be a basis for first degree burglary.

b. Burglary in the Second Degree – 9A.52.030

All other legally sufficient burglary cases shall be filed as burglary in the second degree with the exception of those involving dwellings, garages, or fenced areas.

c. Residential Burglary – 9A.52.025

Residential burglary shall be filed in all legally sufficient cases which involve a dwelling as defined in RCW 9A.04.110(7). The separate crime of residential burglary was created in 1990.

d. Garage Entries

Entries into open garages or carports shall be charged as criminal trespass 1º except in situations where (a) property in excess of $600 in value is (attempted to be) taken or damaged or (b) the entry was for a purpose other than theft or injury to property.

e. Fenced Areas

Entries into fenced areas shall be charged as criminal trespass 2º except in situations where property in excess of $600 in value is (attempted to be) taken or where the defendant's criminal history or police intelligence indicates the defendant is part of an organized activity and/or commits repeated fenced area thefts.

f. Storage Lockers

Entries into storage lockers and other secure storage areas shall be filed as burglary.

g. Entries into motor homes and boats equipped with permanent sleeping or cooking facilities shall be charged as vehicle prowling in the first degree (class C felony).

h. Vehicle prowl 2º (9A.52.100) shall be charged in entries of other vehicles.

i. Trespassed Shoplifters

Where a person receives a written revocation from a merchant, then returns to the same merchant within the period of revocation and is detained for shoplifting, that person may be charged with Burglary in the Second Degree. State v. Kuntz, 90 Wn. App. 244 (1998). Burglary in the Second Degree should be charged in these

situations only when: (1) the suspect has been revoked by a merchant within one year of his or her detention for shoplifting by the same merchant; (2) the suspect's picture is attached to that written notice of revocation; and (3) the suspect was detained for shoplifting merchandise valued over $100.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing - Number of Counts

One count normally should be filed for each crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category if the most serious crime is burglary in the first or second degree or residential burglary. One count should be filed for each crime up to a maximum of five counts for any other crime covered by this section. For example, six counts of burglary in the second degree based on separate and distinct criminal conduct would be the maximum number of counts filed because additional counts after the first one will count as prior convictions worth 2 points. RCW 9.94A.589

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation for uncharged crimes, those charges normally shall be filed as soon as a trial date is taken.

3. Other Chargeable Counts

a. Different and separately secured offices or businesses in the same building or structure are separate "buildings" and should be separately charged.

b. A theft or possession of stolen property count normally should not be added unless there is a substantial question as to the sufficiency

of the evidence to prove the entry by the defendant under at least an accomplice liability theory.

c. Malicious mischief in the first or second degree may be appropriately added where extensive vandalism, in addition to theft, occurs.

d. The appropriate assault charge may be added to burglary in the first degree to most accurately reflect the nature of the crime (i.e., assault, rape). There is no merger under RCW 9A.52.050.

4. Deadly Weapon/Firearm Allegations

See "General Provisions," Section 3, and Sentencing Enhancements, Section 17.

5. Sexual Motivation Allegation

See "General Provisions," Section 3, and Sexual Assault, Section 7A.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

Normally, counts representing six or less separate burglaries will not be dismissed in return for a plea of guilty to other counts. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally, deadly weapon allegations in burglary in the first or second degree cases will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon firearm allegation is offered.

4. Dismissal of Sexual Motivation Allegation, Dismissal of Deadly Weapon/Firearm Allegations, see "General Provisions," Section 3.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

a. A determinate sentence within the standard sentencing range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being concluded.

b. Alternative conversion of total to partial confinement and first offender policies apply to specific crimes as indicated on the Sentencing Recommendation pages.

3. Restitution

See "Payment of Restitution," Section 3.

4. Community Custody

On any first degree burglary or other burglary where the deadly weapon or firearm is alleged by special pleading, community custody shall be recommended. See Section 3.

5. Exceptional Sentence – Sexual Motivation

See "General Provisions," Section 3.

6. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754

SECTION 12: ARSON AND MALICIOUS MISCHIEF

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Arson in the first degree will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

2. Arson in the second degree and malicious mischief cases will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

3. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such a nature that, if established, it would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTION

The following cases ordinarily will be declined for original filing in municipal or district court, when committed by a person who has no pending charged felony case or uncharged felony referral and who has no prior adult or juvenile felony conviction.

Malicious Mischief where the total damage does not exceed $500.

C. CHARGE SELECTION

1. Degree

a. Arson in the First Degree – RCW 9A.48.020 Felony

(1) Arson in the first degree based on a manifestly dangerous to human life theory should not be filed unless the danger is actual as opposed to potential. If there is evidence that meets the evidentiary sufficiency test of a design or specific intent to kill the occupant(s), a separate crime in addition to arson in the first degree shall be filed.

(2) Arson in the first degree based on a dwelling theory shall always be filed if the dwelling is a multiple occupancy structure such as a hotel, apartment, house, or jail. Arson

in a single unit dwelling where the dwelling was unoccupied and it is clear the suspect knew it was unoccupied shall be filed as second degree. All other dwelling fires shall be filed as first degree.

(3) All arsons which occur in a jail shall be filed as first degree.

(4) Arson in the first degree based on an insurance fraud theory should not be filed unless there is evidence which meets the evidentiary sufficiency test of a specific intent to collect insurance proceeds. RCW 9A.48.020(1)(d)

b. Arson in the Second Degree – RCW 9A.48.030

(1) All arsons other than those where human beings are present or actually endangered or multiple units dwellings shall be filed as arson in the second degree.

(2) An intentional fire not involving an actual building where the damage is less than $5,000 shall be charged as malicious mischief.

c. Malicious Mischief in the First Degree – RCW 9A.48.070

(1) Cases based upon an "interruption or impairment" of public service shall not be filed as first degree unless the interruption or impairment is substantial in its impact upon the public. All other cases shall be filed as second degree.

(2) Cases involving damages of less than $2,000 in value shall be filed as second degree.

d. Malicious Mischief in the Second Degree – RCW 9A.48.080

(1) Cases involving a risk of interruption or impairment of public service shall not be filed unless the interruption or impairment which is threatened is immediate and substantial in its potential impact on the public.

(2) Cases involving damages of less than $1000 shall be handled as expedited crimes if otherwise eligible.

2. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count normally should be filed for each crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category. If the most serious crime is arson in first or second degree based on separate and distinct criminal conduct, one count should be filed for each crime up to a maximum of five counts for any other crime covered by this section.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes (real facts) cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation for uncharged crimes those charges normally shall be filed as soon as a trial date is taken.

3. Expedited Crimes, see Section 18

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. Factors which shall be considered in determining whether a reduction in degree is appropriate are the correction of errors in the initial charging decision, the development of proof problems which were not apparent at filing and the request of the victim.

2. Dismissal of Counts

Normally counts representing five or less separate incidents of arson or malicious mischief will not be dismissed in return for a plea of guilty. The exception policy shall be followed before any dismissal of a count is

offered. All dismissals shall be discussed with the victim in that count before being offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

a. All other cases shall receive a determinate sentence recommendation with the specified range. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being offered.

b. Alternative conversion of total to partial confinement and first offender policies apply to specific crimes as indicated in Section 3.

3. Restitution

See "Payment of Restitution," Section 3.

4. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 13: FELONY TRAFFIC OFFENSES.

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Vehicular Assault and homicide cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

2. Attempting to Elude and felony Hit and Run will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

3. Prosecution should not be declined because of an affirmative defense unless the affirmative defense is of such a nature that, if established, would result in complete freedom for the accused and there is no substantial evidence to refute the affirmative defense.

B. CHARGE SELECTION

1. Vehicular Homicide - RCW 46.61.520

a. Vehicular Homicide cases based on a DWI or a Reckless Manner theory shall be filed if sufficient admissible evidence exists to take the DWI or Reckless Manner issue to the jury. (A causal connection between the victim's death and the defendant's intoxication is not an element of the crime.) See State v. Rivas, 126 Wn.2d 443 (1995). The Chief Criminal Deputy shall be consulted prior to filing Vehicular Homicide.

b. Effective 6-6-96 Vehicular Homicide is a Class "A" Felony. Crimes prior to that date are Class "B".

c. Vehicular Homicide cases based on a disregard for the safety of others (DSO) theory shall not be filed unless the disregard is a gross deviation from the care a reasonable person would exercise in the same situation.

d. Vehicular Homicide under the DUI and Reckless Manner prongs are violent, strike offenses. RCW 9.94A.030(28)(r) and (45)(a)(xiv). Vehicular Homicide under the DSO prong is a violent, non-strike offense. There is no First Offender eligibility for Vehicular Homicide.

2. Vehicular Assault - RCW 46.61.520

a. Vehicular Assault cased based on a DWI or a Reckless Manner theory shall be filed if sufficient admissible evidence exists to take the DWI or Reckless Manner issue to the jury. (A causal connection between the victim's death and the defendant's intoxication is not an element of the crime.) See 7-22-01 amendments to the Vehicular Assault statute. Note: Prior to 7-22-01, the state was required to prove a causal connection between the DUI and the driving that caused the injuries. Charging language is available for crimes committed after, as well as before 7-22-01.

b. Effective 6-6-96, Vehicular Assault is a Class "B" Felony. Crimes prior to that date are Class "C".

c. Vehicular Assault cases based on a disregard for the safety of others (DSO) theory shall not be filed unless the disregard is a gross deviation from the care a reasonable person would exercise in the same situation. This prong is only available for crimes committed after 7-22-01.

d. Vehicular Assault under the DUI and Reckless Manner prongs are violent, strike offenses. RCW 9.94A.030(28)(q) and (45)(a)(xiii). Vehicular Assault under the DSO prong is a violent, non-strike offense. First Offender eligibility is available under the DSO prong only.

e. Beginning 7-22-01, the injury element in Vehicular Assault was lowered from "Serious Bodily Injury" to "Substantial Bodily Harm."

"Serious Bodily Injury" includes one that involves a substantial risk of death (risk of death is to be determined at the time of the accident and it is the severity of the injury, not the accident that determines the risk), one that will result in serious permanent disfigurement or that will cause protracted loss or impairment of the function of any part or organ of the body. "Protracted" is to be read conservatively, i.e., broken bones, casts, traction, cervical collars or hospitalization do not, of themselves, make a case sufficient.

"Substantial Bodily Harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

Determination of whether or not "Substantial Bodily Harm" exists must be made on an individual case basis. Examples of Substantial Bodily Harm may include broken limbs, most traumatic brain injuries, a significant number of stitches, and significant scarring, even if temporary.

3. Attempting to Elude - RCW 46.61.024

Attempting to elude charges shall be filed in all cases where it is clear that the suspect knew he was eluding a police officer and where the driving is of such a nature as to constitute driving in a reckless manner. The police vehicle must have lights and sirens. In addition, by 1991 amendment RCW 46.04.670, definition of vehicles includes a bicycle, so, Eluding a bike officer is technically a possibility under an unusual and rare set of facts. Per RCW 88.12.045 Eluding a Law Enforcement Vessel is a class "C" felony. The elements are virtually identical to RCW 46.61.024.

4. Hit and Run (Injury or Death) - RCW 46.52.020

Hit and Run (injury or death) charges shall be filed in all cases where the accident resulted in death or a substantial injury and it is clear that the suspect was aware that he had been involved in an accident. A substantial injury is one that requires hospitalization for treatment or one that involves disfigurement, fractures or the equivalent. Foreseeability of such an injury is a factor to be considered by the filing deputy. However, State v. Vela, 100 Wn.2d 636 (1983), makes it clear that neither actual nor constructive knowledge of the injury is required.

Hit and Run (injury) is a seriousness level IV; Hit and Run (death) is a seriousness level IX. Be sure to omit the "injury" language when filing a Hit and Run (death) charge. Also, be careful to ensure jury instructions reflect only the death option when Hit and Run (death) goes to trial.

5. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing - Number of Counts

One count normally should be filed, for each crime victim, if the crime is either Vehicular Homicide or Assault. One count should be filed for any other crime covered by this section (amended 1994). Prior to January 1, 1999, in cases of Vehicular Assault or Vehicular Homicide, where multiple victims occupied the same vehicle, the multiple victims were not counted at all in determining the offender score, but could constitute an aggravating factor for an exceptional sentence. The "Same Criminal Conduct" statute was amended 1-1-99 and explicitly recognizes that "[t]his definition

applies in cases involving Vehicular Assault or Vehicular Homicide **even if the victims occupied the same vehicle**." RCW 9.94A.589(1)(a)(emphasis added). Multiple counts, arising out of the same vehicle, count against each other as other current offenses.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530(2), additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation for uncharged crime, those charges normally shall be filed as soon as a trial date is taken.

6. Other Filing Considerations

a. Prosecuting Attorney's Case Summary and Bail Recommendation

In all felony traffic cases, the filing DPA shall consider writing a brief summary of the crime in addition to the police Certification for Determination of Probable Cause. The filing DPA shall consider imposing the following conditions: no possession or consumption of alcohol or drugs; no entering a business where alcohol is the primary commodity for sale; no driving a motor vehicle; no contact with the victim.

b. Special Verdict/Interrogatories - Vehicular Homicide/Assault

Each prong of Vehicular Homicide corresponds to a different seriousness level, for sentencing purposes. Vehicular Assault (DUI and Reckless Manner) and (DS0) have separate seriousness levels. Therefore, if more than one prong is charged, the DPA must do the following:

(1) In a jury trial, the jury must answer interrogatories specifying upon which prong the conviction rests.

(2) If a charge alleges both violent and non-violent crime theories, the trial deputy shall ensure that the conviction indicates which theory or theories is proven (e.g., special interrogatories in a jury trial or a verdict form that specifies the theory of conviction).

(3) The sentencing deputy shall make sure the judgment and sentence reflects the specific verdict or finding.

7. Sentencing Enhancement for Vehicular Homicide (DUI). - RCW 9.94A.510(7).

DUI/Physical Control convictions are generally treated the same as Class "C" felonies for scoring purposes, in felony traffic cases. See RCW 9.94A.030(36)(a). The exception is when a person is convicted of Vehicular Homicide (DUI). In those cases, every prior DUI and Physical Control, whether resulting in conviction or successfully completed deferred prosecution, serves as a 24-month, consecutive enhancement to the standard range. There is no washout provision. The prior must be proved by a preponderance of the evidence at sentencing. The DPA should seek a specific stipulation to any prior DUI offense, in any plea agreement.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision, or the development of proof problems, which were not apparent at filing, are the only factors which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure, or the expense of prosecution, may not be considered. The exception policy shall be followed, before any reduction is offered. All reductions in Vehicular Homicides shall be discussed with the victim's next of kin, before being concluded.

a. Vehicular Homicide

The felony traffic prosecuting attorney and the Chief Deputy shall be notified of all proposed reductions, prior to the time the reduction is offered.

b. Attempting to Elude

Attempting to Elude charges shall not normally be reduced, in exchange for a guilty plea. If the flight took place in connection with another felony crime, the charge may be dismissed, upon a plea to the more serious charge.

c. DUI

Mandatory minimum sentences exist for DUI. RCW 46.61.5055. A defendant must be advised of the mandatory minimum, however, the minimum sentence is rarely the State's recommendation when a plea to DUI is a reduction from a more serious charge. See Felony Traffic DPA, the Chair of the District Court Unit or a District Court Unit Supervisor for an appropriate sentence recommendation.

2. Dismissal of Counts

Normally, counts representing separate Vehicular Homicides or Assaults, or separate victims, will not be dismissed, in return for a plea of guilty to other counts. The correction of errors, in the initial charging decision or the development of proof problems, which were not apparent at filing, are the only factors which may normally be considered in determining whether a count shall be dismissed. Caseload pressures, or the cost of prosecution, may not be considered. The exception policy shall be followed. Before an offer to dismiss a count of Vehicular Homicide is made, the traffic prosecuting attorney and the Chief Criminal Deputy shall be notified.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum shall apply.

2. Determinate Sentence

a. A determinate sentence, within the range, shall be recommended. Recommendations outside the specific range shall be made only pursuant to the exceptional policy and all exceptions in homicide cases must be discussed with the victim's next of kin, before being concluded. A mitigating factor, which may be considered in Vehicular Homicide and Assault, is whether the deceased or injured person was a participant with the defendant, in the conduct that caused the death or injury (e.g., racing, drinking). The requests, of the next of kin of the victim, shall always be

considered and may justify an exception from the stated minimum recommendation.

3. License Forfeiture

All sentence recommendations in felony traffic violations shall include revocation of driver's license pursuant to RCW 46.20.285 and forfeiture of the license upon plea or verdict of guilty.

4. Restitution

See "Payment of Restitution," Section 3.

5. Multiple Victims/Single Vehicle

The term "Same Criminal Conduct" is to be narrowly construed. State v. Hernandez, 95 Wn. App. 480 (1999). "Under the SRA, two or more crimes may be considered the same criminal conduct if they (1) require the same criminal intent, (2) are committed at the same time and place, **and** (3) involve the same victim." Hernandez, 95 Wn. App. at 483; RCW 9.94A.400(1)(a)(emphasis added). "This definition applies in cases involving Vehicular Assault or Vehicular Homicide **even if the victims occupied the same vehicle**." RCW 9.94A.589(1)(a)(emphasis added).

6. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

7. Community Placement/Community Custody - RCW 9.94A.120(9)(b)

The 1996 Legislature required that persons sentenced to prison for Vehicular Assault or Vehicular Homicide also be sentenced to "Community Placement" for two years or up to the period or earned early release (good time credit), whichever is longer.

For crimes committed on or after 7-1-00, "community custody" replaces "community placement." See Section 3. Under the current law, the court must order a "range" of community custody of: 18 to 36 months for Vehicular Homicide (DUI, reckless and DSO) and for Vehicular Assault (DUI and reckless only), assuming the court has sentenced the defendant to DOC custody. Vehicular Assault on a DSO theory is a "crime against person" and subject to a mandatory community custody range of 9 to 18 months when a prison term is ordered.

8. Mandatory Conditions

Vehicular Homicide and Vehicular Assault (DUI) shall complete a drug/alcohol evaluation and complete all treatment recommendations. If no treatment is recommended, the recommendation shall be to complete Alcohol Information School. RCW 46.61.524(1).

8. Discretionary Conditions

a. The following discretionary conditions are recommended in all felony traffic cases: No driving without valid license and insurance, no contact with victims.

b. The following additional discretionary conditions are recommended in all felony traffic cases with Reckless Manner or DSO: Complete aggressive driving school (formerly known as defensive driving school).

c. The following additional discretionary conditions are recommended in all felony traffic cases with drug or alcohol involved. Obtain a substance abuse evaluation and follow all treatment recommendations, no possession or consumption of alcohol or drugs, no entering a business where alcohol is the primary commodity for sale, when licensed use an ignition interlock device for 12 months, attend a DUI-Victims Panel. (See the Mandatory Conditions listed above for DUI.)

SECTION 14: THEFT AND RELATED OFFENSES

I. FILING

A. EVIDENTIARY SUFFICIENCY

Theft and related offenses (possession of stolen property, forgery, unlawful issuance of checks, taking and riding) will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTION

The following cases ordinarily will be declined for original filing in municipal or district court, when committed by a person who has no pending charged felony case or uncharged felony referral and who has no prior adult or juvenile felony conviction.

Theft and Theft of Rental Property where the total value of property taken does not exceed $500.

Forgery involving only one instrument with a face value less than or equal to $500.

Possession of Stolen Property 2 involving possession of only one access device

Possession of Stolen Property 2 involving property of only one victim and with a fair market value that does not exceed $500.

Unlawful Issuance of Bank Checks involving no more than three checks with a total face value that does not exceed $500.

Malicious Mischief where the total damage does not exceed $500. See "Arson and Malicious Mischief," Section 12.

C. CHARGE SELECTION

1. Degree – Value for Theft and related offenses

Where the degree is determined by the value of the property caution should be used to insure that adequate proof of the requisite value is present before a charge is filed. Value means the market value at the time and place of the theft. 9A.56.010(18). In the case of goods offered for sale at retail, the retail price should be used. In other situations, testimony from someone who can be qualified as an expert in the value of the particular item is generally necessary. The measure of "value" is not the cost to the original owner or the replacement value.

If a reasonable issue exists as to the value of the property the case should be filed as the lower degree. Ordinarily cases where the value is under $1000

should be dealt with as expedited cases if otherwise eligible. Cases where the value is less than $2,000 should be filed as second degree. Cases where the value is less than $250 and which occurred within a city shall be referred to that city attorney for prosecution.

2. Purse-snatching

Theft 1º shall be filed when property is obtained without significant struggle or injury. Robbery 2º shall be filed if there was a significant struggle or injury to the victim. The vulnerability of the victim shall be considered in assessing the amount of force or threat of force used.

3. Unlawful Issuance of Bank Checks (U.I.B.C.)

Unlawful issuance of bank checks or drafts (RCW 9A.56.060) charges shall be filed only if there is clear and convincing evidence that the defendant (a) actually knew or was placed on constructive notice that there were insufficient funds or credit to cover the instrument drawn or delivered and (b) acted with intent to defraud.

4. Motor Vehicle Theft / Joyriding

Prior to June 13, 2002, the crime of motor vehicle theft or joyriding (9A.56.070) was labeled Taking Motor Vehicle Without Permission (TMV). For thefts occurring on or after June 13, 2002, TMV was split into two crimes: TMV 1º and TMV 2º. TMV 1º was created to address trafficking in stolen cars and stolen car parts. TMV 2º is the equivalent of the former TMV.

Generally, TMV 2º shall be charged rather than Theft 2º or PSP 2º. If there are multiple chargeable suspects in the vehicle, TMV 2º shall be charged initially even if the certification for determination of probable cause states a value for the vehicle. If the driver is the only chargeable suspect, Theft 1º of PSP 1º shall be filed when the vehicle's value, as stated in the certification or discovery, exceeds $3,000.

Theft by embezzlement normally shall be charged, not TMV 2º, if the defendant obtained permission to use the motor vehicle and exceeded the scope of the permission given. State v. Walker, 75 Wn. App. 101 (1994); State v. Clark, 96 Wn.2d 686 (1981).

Expedited felony: If the defendant is otherwise eligible (no scorable history, no pending felonies, no expediteds in the last five years), then regardless of the vehicle's value, an expedited felony shall be filed if the vehicle was abandoned within 24 hours of the theft, if no stripping occurred,

if there is no evidence of intent to permanently deprive, and if there is no substantial damage to the car.

TMV 1º shall be charged against a defendant who takes or drives away a motor vehicle AND who:

a. alters motor vehicle for the purpose of changing its appearance or primary identification,

b. removes or participates in the removal of parts from the motor vehicle with the intent to sell the parts,

c. exports or attempts to export the motor vehicle across state lines or out of the U.S. for profit,

d. intends to sell the motor vehicle, or

e. is engaged in a conspiracy and the central object of the conspiratorial agreement is the theft of motor vehicles for sale to others for profit.

5. "Access Device" (credit cards, etc.)

"Access device" means any card, plate, code, account number, or other means of account access that can be used alone as in conjunction with another access device to obtain money, goods, services, or anything else of value or that can be used to initiate a transfer of funds other than a transfer originated solely by paper instrument. RCW 9A.56.010(3).

Where a defendant uses or attempts to use a stolen access device normally only one count of possessing stolen property 2º, or forgery, or theft, or attempted theft will be filed. If the defendant elects to go to trial, sufficient additional counts to characterize the defendant's conduct, to ensure restitution to all victims and to enhance the strength of the State's case at trial may be added by amended information.

6. Forgery

Every case of forgery requires identification of the defendant by a witness to the specific act (makes, completes, alters, possesses, utters, offers or puts off as true). Other circumstantial evidence may support the filing of such additional counts.

7. Aggregation

Incidents should be aggregated when they can be pursuant to RCW's 9A.56.010(18)(c) and (d) and 9A.56.060(3).

8. Expedited Crimes, see Section 18

9. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count normally should be filed for each crime up to a maximum of three counts. However, if the offender has committed a current major economic offense or series of current offenses as described in B., 3., then the number of counts filed to adequately label the conduct shall be as follows:

(1) loss of between $20,000 - $50,000, normally file all chargeable counts up to four counts,
(2) loss between $50,000 and $100,000, normally file up to seven counts, and

(3) loss in excess of $100,000, normally file all chargeable counts up to ten counts.

The unit of prosecution rule prohibits filing multiple counts of theft over the same period of time by different schemes or plans.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530, additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation on uncharged crimes those charges normally shall be filed as soon as a trial date is taken.

II. DISPOSITION

A. CHARGE REDUCTION

1. Reduction in Degree

A defendant will normally be expected to plead guilty to the degree charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally justify a reduction in degree. Any reduction must be supported by written reasons in the file.

2. Dismissal of Counts

A defendant will normally be expected to plead guilty to all the incidents charged. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only other reasons which may normally justify the dismissal of counts. Any dismissal of counts must be supported by written reasons in the file.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum shall apply.

2. Determinate Sentence

a. Determinate Sentence

A determinate sentence within the standard range set forth below shall be recommended. Recommendations outside the specified range shall be made only by exception.

b. Alternative conversion of total to partial confinement and first offender policies apply to specific crimes as indicated on the Sentencing Recommendation pages of Section 3.

3. Exceptional Sentence – Major Economic Offense or Series of Offenses

a. Aggravating Factors (RCW 9.94A.535(2))

At the time of filing or as soon thereafter as full information is obtained, an exception in accordance with the prosecutor's exception policy shall be proposed to recommend an exceptional sentence outside the presumptive sentencing range, if the offense is a major economic offense or series of offenses.

A major offense or series of offenses is more serious than the typical offense under the statutory offense and is identifiable by consideration of the following factors:

(1) The current offense involved multiple victims or multiple incidents per victim;

(2) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(3) The current offense involved a high degree of sophistication, planning or occurred over a lengthy period of time;

(4) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

b. Sentence Recommendation

(1) Substantially Greater Monetary Loss

(a) Neither Prior Convictions Nor Other Aggravating Factors

The State's sentence recommendation in a major economic crime where the monetary loss is substantially greater than normal shall be in accordance with the following schedule. This schedule assumes the defendant has no criminal history and that no other aggravating factors exist in the case.

Provable Monetary Loss	State's Sentence Recommendation
$20,000 - $50,000	4 - 12
$50,000 - $100,000	17 - 22
$100,000 - +	43 - 57

In developing the State's recommendation for punishment that fits the loss as indicated in this schedule, reliance may be placed upon:

(i) the number of charged counts (e.g., four counts charged for loss of $20,000 - $50,000 with no prior convictions results in a range of 4 - 12 months), or

(ii) an exceptional sentence recommendation (e.g., only one chargeable count but the loss is $20,000 - $50,000 with no prior convictions results in a 0 - 90 range, and therefore recommend an exceptional sentence of between 4 - 12 months).

(b) Prior Convictions

If the defendant has a countable prior conviction under SRA then: (1) determine the number of chargeable counts; (2) calculate the presumptive standard range under the SRA, and then (3) normally recommend an exceptional sentence above the standard range in an amount equal to the number of months outlined in sentencing schedule above in Section 14, II., B., 3., b. (1) (a) for the appropriate monetary loss.

(2) Other Aggravating Factors

The State's recommendation above the presumptive range normally shall be for the equivalent of an increase of the offender score by one point for each aggravating factor (e.g., loss of $20,000 - $50,000 normally would result in 4 - 12 months but with an additional aggravating factor of breach of trust, the State's recommendation rises to 12+ to 14 months).

4. Restitution

See "Payment of Restitution," Section 3.

5. DNA Identification

DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 15: ESCAPE/FAILURE TO RETURN/BAIL JUMPING

I. FILING

A. EVIDENTIARY SUFFICIENCY

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

B. CHARGE SELECTION

1. Failure to Return

a. Failure to return to a Department of Corrections work release facility (RCW 72.65.070) or from furlough (72.66.060) shall be filed for offenses prior to 7-1-01 where the prisoner had permission to leave but willfully failed to return.

Actual escapes (i.e., unauthorized departures) by a defendant in a work release facility will continue to be charged as escape. State v. Thompson, 85 Wn. App. 766 (1983).

RCW 72.65.070 and RCW 72.66.060 were repealed effective 7-1-01. This conduct by DOC prisoners shall now be charged under the general escape statutes. See Ch. 264, 2001 Wn. Laws, RCW 9A.76.160/120.

Failure to return to work release by a county jail prisoner will continue to be charged as escape. See State v. Danforth, 97 Wn.2d 255 (1983); State v. Hall, 104 Wn.2d 486 (1985).

b. Non-Evidentiary Standard

A prisoner who walks away from or fails to return to a work release facility shall not be charged if he/she voluntarily returns within 24 hours and has not reoffended.

c. Mens Rea

(1) For offenses committed before 7-1-01, RCW 72.65.070 and RCW 72.66.060 each require proof of willful failure to return. However, the general escape statutes contained no statutory mens rea requirement prior to the 7-1-01 amendments. In failure to return cases from county work

release facilities charged under RCW 9A.76.110/120, the courts imposed the mens rea requirements of "knowledge that the defendant's actions would result in leaving confinement without permission" (State v. Ammons, 126 Wn.2d 453 (1998)), "and willfully failing to return..."(State v. Hall, 104 Wn.2d 486 (1985)).

(2) For offenses committed after 7-1-01, all failure to returns are charged under the general escape statutes which requires proof that the defendant "knowingly escapes from custody or detention facility while being detained …". RCW 9A.76.110/120 as amended Ch. 264, 2001 Wn. Laws, effective 7-1-01.

"Knowingly" is defined in RCW 9A.08.010(b), Title 9A's general culpability requirements. It is not clear if courts will define knowledge in these situations under RCW 9A.08.010(b) or the case law requirements referred to above or both.

d. Affirmative Defense

The statutory amendments effective 7-1-01 create an "affirmative" defense that "uncontrollable circumstances" prevented the person from returning to custody if the person did not contribute to the creation of the circumstances and that the person returned to custody as soon as the circumstances ceased to exist. "Uncontrollable circumstances" is defined in the statute as acts of nature, medical condition, acts of man, etc. See RCW 9A.76.010(4) for complete definition.

2. Escape in the First Degree – RCW 9A.76.110

Escape in the first degree shall be charged in all cases where a person knowingly escapes from custody or from a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense. The terms custody and "detention facility" are defined in RCW 9A.76.010(1), (2).

3. Escape in the Second Degree – RCW 9A.76.120

a. Escape in the second degree shall be charged where a person charged with but not convicted of a felony escapes from any jail or work release facility.
b. Expedited Escape in the Second Degree

Where a charged or convicted misdemeanant escapes from any facility, escape in the second degree charges shall be filed in Seattle District Court and the charge shall be reduced to escape in the third degree upon a plea of guilty. Provided no escape involving use of force or an immediate threat to the public safety shall be expedited. See "Expedited Crimes," Section 18.

4. Escape in the Third Degree – RCW 9A.76.120

Escape in the third degree shall be charged if an individual has been arrested but not charged at the time of the arrest and if the escape results in more than momentary freedom.

Third degree escapes in incorporated areas of King County shall generally be declined in favor of prosecution in the appropriate municipal court.

5. Failure to Comply with Community Custody – RCW 72.09.310

An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW.

RCW 72.09.310 (1992)

Failure to comply with community custody shall be charged under the following circumstances:

a. when the offender has not been returned to custody supervision within 24 days of his/her violation date (if after 24 days but before filing the offender has been returned to custody or resumed compliance with community custody requirements, this fact shall be considered in the filing decision); and

b. when the underlying offense for which the offender was placed in community custody is a serious violent offense or sex offense as defined in RCW 9.94A.030 (VUCSA offenses are not violent offenses for the purpose of this section); and

c. when there is sufficient evidence through the records of DOC and the testimony of a community corrections officer of the offender's willful non-compliance to satisfy the evidentiary sufficiency standard in this section.

6. Bail Jumping – RCW 9A.76.170

a. Bail jumping may be charged when a person has been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state and who knowingly fails to appear as required.

Because this crime's classification is dependent upon the nature of the crime for which the defendant was being held for, charged with, or convicted, that is an element of the crime which must be included in the charging language and jury instructions. See State v. Pope, 100 Wn. App. 624 (2000).

b. Bail jumping may be filed as an additional count of an amended information in the cause wherein the defendant failed to appear if, prior to conviction, there is sufficient time to amend prior to trial to satisfy procedural requirements. If the defendant fails to appear after conviction, charges may be filed by separate filing.

c. Bail jumping charges may be declined or dismissed pursuant to plea agreement in the underlying cause.

7. Validity of Priority Conviction

Under State v. Gonzales, 103 Wn.2d 564 (1985) and State v. Hickok, 39 Wn. App. 664 (1985), the State does not have to prove the constitutional validity of the underlying prior conviction in either escape or failure to return to work release cases.

8. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

One count normally should be filed for each crime up to a maximum of three counts for any crime covered by this section.

b. Stipulation to Uncharged Counts

Under RCW 9.94A.530, additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation. Therefore, at the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation on uncharged crimes, those charges normally shall be filed as soon as a trial date is taken.

9 Deadly Weapon Allegations

See "Firearms Offenses and Weapon Enhancements", Section 17.

II. DISPOSITION

A. CHARGE REDUCTION

1. Escape

Charges of escape shall not normally be reduced in return for a plea of guilty. If special circumstances warrant reduction or dismissal, the reasons shall be specified pursuant to the exception policy.

2. Dismissal of Deadly Weapon or Firearm Allegations

Normally deadly weapon or firearm allegations in an escape in the first degree case will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or firearm allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon or firearm allegation is offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

In all cases, the statutory maximum term shall apply.

2. Determinate Sentence

   a. A determinate sentence within the standard range shall be recommended. Recommendations outside the specified range shall be made only by exception.

   b. Alternative conversion of total to partial confinement and first offender policies apply to specific crimes as indicated in the Sentencing Recommendation section of Section 3.

3. Community Custody

   On any escape where the deadly weapon or firearm has been alleged and the State recommends total confinement in the Department of Corrections, community custody also shall be recommended.

4. DNA Identification

   DNA identification is mandatory for all felony convictions. RCW 43.43.754.

SECTION 16: DRUG OFFENSES

I. HANDLING BY SPECIAL DRUG UNIT

A. GENERALLY

All controlled substances cases (except misdemeanors) shall be prosecuted by the Special Drug Unit.

Expedited felonies will be filed by the Special Drug Unit, then referred to the District Court Unit for disposition.

B. EXCEPTIONS TO STANDARDS

Exceptions to standards on controlled substances cases under RCW 69.50.401 (manufacture, delivery or possession with intent) and where the State's initial sentencing recommendation exceeds one year shall be covered by the same policies governing exceptions in "violent crime" cases. See Section 3.

II. FILING

A. EVIDENTIARY SUFFICIENCY

1. Generally

a. For cases involving manufacture, delivery or possession with intent of a Schedule I or II narcotic, charges will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

b. On other controlled substances cases, charges will be filed if the available admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

2. Cases Involving Informants

The possibility of disclosing the identity of an informant should be considered in every case where an informant was used. If the law enforcement agency indicates that identity may not be disclosed the case should not be filed unless it appears reasonably certain that disclosure will not be ordered. It should be assumed that disclosure may be required where the informant was present at the sale upon which the charge is

based. For a discussion of when disclosure will be required, see State v. Harris, 91 Wn.2d 145 (1978), State v. Casal, 103 Wn.2d 812 (1985), and State v. Wolken, 103 Wn.2d 823 (1985). The court should not order disclosure unless there is a showing of why the identity is "relevant and helpful" to guilt by either affidavit or statement on the record. If disclosure is ordered the law enforcement agency should be contacted before disclosure is made and afforded the opportunity to request dismissal rather than disclosure.

3. Cases Based on Search Warrants

Cases based on search warrants approved before issuance by this office will be filed and the validity of the warrant defended. Warrants not approved before issuance will be independently reviewed and cases filed only if the validity of the warrant is probable.

4. Cases Involving Consent Searches

Cases based on written consent by a person with authority to consent provided on an approved police department consent form normally will be filed. Verbal consent or consent given in a written manner not in conformance with an approved police department form will be independently reviewed and cases filed only if the validity of the consent is clear.

B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTION

The following cases ordinarily will be declined for original filing in municipal or district court:

Possession of a smoking device containing only narcotic residue.

"Residue" is a term describing the trace amount of narcotics typically remaining in or on the device after use. It is an amount that either cannot be further ingested, or, to be ingested, would require significant effort to extract the trace amount from the device. Residue is typically described by the Washington State Patrol Crime Lab as either "less than" or "much less than" .01 grams.

C. CHARGE SELECTION

1. Possession with Intent to Deliver

Possession with intent to deliver should be charged only where specific independent evidence exists to clearly and convincingly establish the requisite intent. Examples of such evidence are quantity far in excess of personal use amounts, multiple packages, presence of paraphernalia associated with dealing such as scales or multiple empty packages, **and** possession of large amounts of currency or customer records.

2. Violation of the Uniform Firearms Act (VUFA) – RCW 9.41.040. See other offenses, Section 17.

3. Minors

a. Distribution to minors – RCW 69.50.406(a)

Distribution to persons under age 18 charges, rather than the more general VUCSA charges, normally shall be filed if the statutory elements can be proven.

b. Any other way involve a minor – RCW 69.50.401(f)

It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of 18 years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021. The crime of Involving a Minor in a Drug Transaction pursuant to RCW 69.50.401(f) will be added as a separate count for trial if the statutory elements can be proven.

4. Persons Who Manage or Control Premises – RCW 69.53.010/.020

A person who has under his management or control any building, room space, etc., normally shall be charged under chapter 69.53 for criminal conduct such as making space available for selling drugs, knowingly allowing fortification to suppress law enforcement entry or having the space designed to suppress law enforcement entry. Such conduct constitutes a class C felony.

5. Multiple Counts/Stipulation to Uncharged Counts

a. Initial filing – number of counts

One count normally shall be filed for each drug crime committed up to the number of counts necessary for the offender's score to

reach the "9 or more" score, if the offender committed a major VUCSA (see below for further detail on filing and disposition of major VUCSAs).

In other situations, initially one count normally shall be filed.

b. Stipulation to uncharged counts

Under RCW 9.94A.530, additional uncharged crimes cannot be used to go outside the presumptive range except upon stipulation or when the current offense qualifies as a major VUCSA under RCW 9.94A.535(2)(d). Although uncharged crimes qualifying the current offense as a major VUCSA may be proven at sentencing, i.e., stipulation is not required. At the time of filing, a stipulation shall be prepared for uncharged crimes for which there is probable cause and a case has been developed or there is a reasonable expectation that one could be developed. The defendant will be expected to enter into the stipulation or go to trial.

c. Amendment

If the defendant elects not to enter into a stipulation on uncharged crimes, those charges normally shall be filed as soon as a trial date is taken, and in no event later than the Omnibus hearing. Also, if the defendant decides to set a trial date, initial charges may be amended in accordance with Section 3, and normally those charges shall be filed as soon as a trial date is taken.

6. Deadly Weapon/Firearm Allegations – Sentence Enhancements

a. See Section 17.

b. Deadly weapon/firearm allegations shall be included in each "drug offense" if sufficient admissible evidence exists to take to the jury the issue of whether the defendant or an accomplice was armed with a deadly weapon. RCW 9.94A.510. "Armed" means having a weapon which is readily available and accessible for use for either offensive or defensive purposes. State v. Sabola, 44 Wn. App. 444 (1986). "Drug offense" means every violation of RCW 69.50 other than possession and forged prescription cases. RCW 9.94A.030(20).

7. Protected Areas – Sentence Enhancements. RCW 69.50.435

a. School zone/park/bus allegation

The special allegation shall be initially filed in an original information for each count of (1) delivery, (2) manufacture, or (3) possession with intent to manufacture or deliver, if sufficient admissible evidence exists to take to the jury the issue of whether the offense took place (1) in a school, or (2) on a school bus, or (3) within one thousand feet of the perimeter of the school, unless the school is excluded under State v. Grant and State v. Becker, or (4) in a public park, unless the park involved is Occidental Park or some other non-traditional park, or (5) in a public transit stop shelter, or (6) a public transit vehicle, or (7) in a civic center. A zone allegation normally shall not be filed if (1) a law enforcement officer, cooperating witness, or informant selected the location of the delivery, or (2) the defendant was merely "fortuitously present" within the zone, e.g., there is no nexus between the defendant's "intent to deliver" the controlled substance and the location of the arrest.

b. School bus route stop allegation

The special allegation shall be initially included in an original information, in each count of delivery, manufacture or possession with intent, if sufficient admissible evidence exists to take to the jury the issue of whether the offense took place within one thousand feet of a school bus route stop between the weekday hours of 7:00 a.m. and 6:00 p.m.

A school bus zone allegation shall not be filed if (1) a law enforcement officer, cooperating witness or informant selects the location of the delivery, or (2) the defendant was merely "fortuitously present" within the zone, e.g., there is no nexus between the defendant's "intent to deliver" the controlled substance and the location of the arrest.

8. Expedited Crimes

For VUCSA offenders who meet the following conditions, the prosecutor will forego felony charges in Superior Court, and file the case into King County District Court, with the expectation that the offender plead guilty as charged. In the event the offender declines to plead guilty as charged, the case will be dismissed in District Court and refiled into Superior Court. Defendants who are otherwise eligible to participate in Drug Court will be provided the opportunity to pursue this option.

"Expedited" charges will be filed if the following conditions are met:

a. The charge is VUCSA seriousness level I or II; and

b. For drugs other than marijuana, the amount possessed is under 2.5 grams; and
c. For marijuana, the amount possessed is less than 80 grams or six plants or less; and
d. There is no reliable indicia of dealing; and
e. The defendant has no prior sex or violent offenses, as defined by RCW 9.94A.030(36) and (41), no matter how old; and
f. No prior VUCSA expedited within the past three years (except for defendants who possess "residue" amounts of controlled substances, e.g. crumbs in a pocket); and
g. No other pending felonies; and
h. For forged prescription cases, an expedited will be offered if it appears from the facts that the defendant committed the crime(s) to obtain personal use amounts of controlled substances, and none of the above limitations apply.

9. Drug Court Eligibility Requirements

To be eligible to participate in King County's Drug Court program, an offender must meet the following conditions:

a. Charged in Superior Court with a Violation of the Uniform Controlled Substances Act level I or II offense (possession), or Solicitation to Deliver a Controlled Substance, e.g., the suspect is a "facilitator" pursuant to subsection 10 below.

b. For VUCSA level I or II offenses, no reliable indicia of dealing, including, among other things: possession of more than 2.5 grams of the controlled substance; possession of over $250 worth of a controlled substance (including marijuana); police observations indicative of dealing activity (other than as a facilitator).

c. No other pending felony charges that are not in Drug Court.

d. No prior adult sex or violent offenses, as defined in RCW 9.94A.030(36) and (41), no matter how old.

e. No significant domestic violence or driving under the influence history.

f. Cases filed in District Court as expedited misdemeanors will be considered for transfer to Drug Court at the defendant's request. Once a request for transfer to Drug Court is approved, the case will be resolved as a felony. The District Court complaint will be dismissed and an Information filed in Superior Court.

g. Juvenile history may be considered according to the above standards at the discretion of the prosecutor and court.

10. Solicitation Charges for Drug Delivery Facilitators

Facilitators of small, street-level drug deliveries will be charged with solicitation to deliver and, provided the defendant is otherwise eligible to participate in Drug Court, given the opportunity to enroll in Drug Court (see subsection 9 above).

A "facilitator" is a defendant who is an accomplice to a drug delivery, whose motivation is to obtain drugs for personal use. A facilitator does not have the resources, foresight, or connections to obtain drugs to resell them for a profit.

A non-exclusive list of factors that will be considered in determining whether a defendant is a "facilitator" or a dealer includes:

a. Whether, considering all of the facts, the defendant was assisting another who was dealing in controlled substances;
b. Whether, considering all of the facts, the defendant's motivation was to obtain controlled substances for personal use;
c. No indicia of an ongoing relationship with the dealer;
d. Whether the drug deal was for a personal use amount;
e. Absence, upon arrest, of controlled substances not associated with the underlying delivery;
f. Possession of drug paraphernalia;
g. Possession of under $30 not associated with the underlying delivery;
h. Possession of less than .3 grams of controlled substances.

Facilitators not eligible for Drug Court will be charged with Delivery of a Controlled Substance in Superior Court, and during plea negotiations offered the opportunity to plead guilty to Solicitation to Deliver a Controlled Substance. Defendants in this position will normally be required to execute a plea agreement in which they agree not to seek a First Time Offender Waiver or an exception down from the standard range sentence.

11. Medical Marijuana

In cases where a suspect in a criminal investigation, or defendant in a charged case, claims that he or she possessed marijuana exclusively for "medical" purposes, either as a patient or caregiver, charging and disposition decisions shall be reviewed for all plausible defenses, by the

Chair of Special Drug Unit in consultation with the Chief Criminal Deputy and/or Chief of Staff.

When determining whether to file charges, or otherwise resolve a filed case, factors that shall be considered include, but are not limited to, the following:

a. Whether the suspect or defendant possessed, prior to arrest, a diagnosis from a licensed physician that states in part that, in the physician's professional opinion, the potential benefits of medical marijuana would likely outweigh the health risks for the patient, and whether the patient suffers from a terminal or debilitating illness as defined by state law;

b. Where the suspect or defendant is under 18 years of age, qualifying medical marijuana may only be possessed by the minor suspect's or defendant's parent or legal guardian;

c. Where the suspect or defendant is a caregiver, that person must be 18 years of age or older; be responsible for the housing, health, or care of the qualifying patient; possess a written document signed by the patient designating that person as the primary caregiver; be the primary caregiver to only one patient at a time; and not consume marijuana obtained for the personal medical use of the patient;

d. Whether the suspect or defendant (whether a patient or caregiver) possessed an amount of marijuana consistent with personal use (a personal use amount is normally less than two ounces of useable marijuana in a residential setting, or no more than nine marijuana plants, provided that no more than three are budding; and the remaining plants are immature);

e. Whether the suspect or defendant (whether a patient or caregiver) possessed items consistent with sales of marijuana, e.g., scales, packaging materials, records of sales, possession of currency in a quantity and denominations associated with sales; or a statement from a confidential and reliable informant indicating that the suspect/defendant had engaged in the sale of marijuana.

12. Methamphetamine Manufacturing

Manufacturing methamphetamine should be filed in those cases where the combination, partial or complete, of chemical components and/or equipment, in the opinion of an expert, could be used to produce methamphetamine, and no other explanation for the combined presence of such

chemicals and/or equipment exists. Manufacturing methamphetamine should be limited to those cases where the combination of chemicals, present and not present, could produce methamphetamine in excess of one ounce. (Examples include: more than 14 blister packs or 28 grams of pseudophedrine.) Where the combination of chemicals, present and not present, could produce no more than one ounce, charges such as attempted manufacturing of methamphetamine or possession of pseudophedrine with intent to manufacture methamphetamine should be considered.

III. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the crime(s) charged or go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only reasons which may normally justify a reduction. The exception policy shall be followed before any reduction is offered.

2. Dismissal of Counts

A defendant will normally be expected to plead guilty to all the incidents charged. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only other reasons which may normally justify the dismissal of counts. The exception policy shall be followed before any reduction is offered.

3. Dismissal of Deadly Weapon or School Zone/Park Allegation

Normally deadly weapon or school zone/park allegations in delivery, manufacture, or possession with intent cases will not be dismissed in return for a plea of guilty. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether to dismiss a deadly weapon or school zone allegation. Caseload pressure or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of a deadly weapon or school zone allegation is offered.

B. SENTENCE RECOMMENDATION

1. Maximum Term

a. In all cases, the statutory maximum shall apply. The maximum fine for manufacture, delivery or possession with intent of a Schedule I or II narcotic is not more than $25,000 if the crime involved less than two kilograms but for two or more kilograms not more than $100,000 for the first two kilograms and not more than $50 for each gram in excess of the first two kilograms. RCW 69.50.401(a)(1)(i)

b. Second or subsequent RCW 65.50 offense doubles the maximum term but not for possession only cases. RCW 69.50.408.

c. Attempt/conspiracy. Attempt or conspiracy to violate RCW 69.50 carry same maximum term and are not chargeable under the general anticipatory offense statutes in RCW 9A.28. See RCW 69.50.407. Criminal Solicitation (RCW 9A.28.030) does apply to violations of RCW 69.50. See In Re Hopkins, 137 Wn.2d 897 (1999).

2. Determinate Sentence

a. A determinate sentence within the standard range shall be recommended. Recommendations outside the specified range shall be made only by exception. For general sentencing range information see the Sentencing Range Chart appended to this Section.

b. Alternative conversion of total to partial confinement and First Offender Waiver policies apply to specific crimes as indicated on the Sentencing Recommendation Section 3.

c. When the top of the sentencing range exceeds six months, a recommendation for a First Offender Waiver normally shall not be made and if made, the exception policy shall be followed.

d. The First Offender Waiver option is not legally available for manufacture, delivery, possession with intent to deliver, and for a Schedule I or II narcotic. RCW 9.94A.030(25), RCW 9.94A.650. The State will not recommend this alternative sentence for any "drug offense" or criminal solicitation of the same.

e. Major Violation of the Uniform Controlled Substances Act (SRA provisions are noted in quotation marks).

Aggravating factors (RCW 9.94A.390). At the time of filing or as soon thereafter as full information is obtained, an exception in accordance with the prosecutor's exception policy shall be

proposed to recommend an exceptional sentence outside the presumptive sentencing range if the offense is a major VUCSA.

"A major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, is more onerous than the typical offense of its statutory definition: the presence of ANY of the following may identify an offense as a major VUCSA":

(1) Multiple transactions

"The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so, or when the number of drug crimes committed is three or more, all counts up to a score of '9 or more' normally shall be charged and normally an exceptional sentence shall not be recommended if the sole basis for a major VUCSA is this factor. For the transactions to constitute 'separate transactions' under this provision, they normally shall be required to have been separated by at least twenty-four hours."

(2) Excessive quantity

"The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use…"

Additionally, possession and possession with intent drug crimes shall be governed by a similar policy which recognizes that drug crimes involving excessive quantities of drugs deserve exceptional sentences.

Normally, multiple counts up to a score of "9 or more" initially shall be filed if this aggravating factor is present and further an exceptional sentence shall be recommended.

In determining whether or not the requisite excessive quantity of controlled substances is involved, the following guidelines shall apply and the aggregate quantity of all known and provable substances shall be considered:

Controlled substances – quantity:

Cocaine and methamphetamine – 250 grams

Heroin –	75 grams
Marijuana –	75 plants
Other substances –	value in excess of $10,000

(3) Manufacture

"The current offense involved the manufacture of controlled substances for use by other parties…"

Filing and disposition policies in the preceding section (2) shall apply to marijuana grow farms and further, all counts normally shall be filed up to the "9 or more" score.

In methamphetamine laboratory cases an exceptional sentence recommendation may be made if, among other things, children were in the vicinity of the laboratory or otherwise might be exposed to chemicals used in the production process.

(4) High position in hierarchy

"The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy…"

(5) Sophistication

"The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement…"

(6) Position of trust

"The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility" (e.g., pharmacist, physician, or other medical professional).

(7) Further gang enterprise

See "General Provisions," Section 3.

3. Monetary Payment to Drug Fund

a. Statutory Authorization, RCW 9.94A.120(9) provides in part as follows:

. . . In any sentence under this chapter the court may also require the offender to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary . . . (c) to contribute to a county or interlocal drug fund. All monetary payments shall be ordered paid by no later than ten years after the date of judgment and conviction.

b. King County drug fund

A drug fund has been established in King County-entitled and King County Interlocal Drug Fund. The monies in this drug fund are utilized for drug investigations.

c. Sentence recommendation

In addition to other penalties and their payment of any unrecovered buy money, the State's recommendation in any violation of the Uniform Controlled Substances Act normally shall include a recommendation that the defendant be required to make a monetary payment to the King County Interlocal Drug Fund. Whenever the defendant possessed or delivered controlled substances of an estimated street value of less than $500, the State's recommendation normally shall be that the offender pay one hundred ($100) into the fund. If the street value exceeds $500, the extent of the State's recommendation normally shall be based upon the following schedule:

Estimated Street Value	Monetary Payment
$ 0 - 500	$ 100
$ 500 - 5,000	$ 100 - 500
$ 5,000 - 20,000	$ 500 - 2,000
$20,000+	$2,000 - 5,000

The above schedule is designed to cover the normal situation; the facts of a particular case may justify a payment different from that stated on the schedule. The filing deputy shall indicate in the file the information that supports the variance from the schedule.

4. Fine

The State normally shall recommend the defendant pay the following additional fine for a felony violation of RCW 69.50.401, .402, .403, .406, .407, .410 or .415:

a. First violation - $1,000, or

b. Subsequent conviction of listed crime - $2,000

This fine is mandatory unless the court finds the defendant is indigent. RCW 69.50.430.

5. Off Limits Order

For a known drug trafficker, the State normally shall recommend the court enter an off-limits order prohibiting the defendant from entering or remaining in an area that the court finds to be a PADT area ("Protected Against Drug Trafficking"). "Known drug traffickers" subject to PADT orders are those persons with prior VUCSA convictions for delivery, possession with intent or burn, who are subsequently arrested (i.e., not for first offenders).

6. Unlawful Possession of Firearms

See Section 17.

7. Community Custody

On any felony offense under 69.50 or 69.52 RCW when the State recommends total confinement in the Department of Corrections, community custody also shall be recommended for a period of between 9-12 months. See Section 3.

8. DNA Identification and HIV testing

a. DNA identification is mandatory for all felony convictions. RCW 43.43.754.

b. HIV blood testing and counseling.

Under RCW 70.24.340, the sentencing court shall order that HIV testing be conducted as soon as possible after sentencing for offenders whose crimes were committed after March 23, 1988 and who have been convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic

needles. The State will ordinarily request such test for all VUCSA crimes where the real facts support such a finding by the court.

9. DOSA Recommendation

a. Under RCW 9.94A.660(1), the following statutory requirements must be met before the defendant qualifies for the special Drug Offender Sentencing Alternative (DOSA):

(1) The offender is convicted of a felony that is not a violent offense or sex offense;

(2) The violation does not involve a weapons sentence enhancement under RCW 9.94A.510(3) or (4);

(3) The offender has no current or prior convictions in adult or juvenile court, for a sex offense or violent offense in this state, another state, or the United States;

(4) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(5) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as weight, purity, packaging, sale price, and street value of the controlled substance;

(6) The standard sentencing range is greater than one year; and

(7) The sentencing court makes a finding that a DOSA sentence will benefit the community and the defendant.

b. Prosecutor's recommendation for Drug Offender Sentencing Alternative

A State's pretrial sentencing recommendation for a special Drug Offender Sentencing Alternative may be made only under the following circumstances:

(1) The defendant does not have a history of escapes, failures to appear, or extensive misdemeanor history;

(2) The defendant states his willingness to participate in the program;

(3) The defendant is not a poor risk for community supervision or outpatient treatment;

(4) The offense involved only a small quantity of the particular controlled substance, consistent with "personal use," based upon consideration of such factors as weight, purity, packaging, sale price, and street value of the controlled substance. By way of example, this will normally involve no more than 2.5 grams of cocaine, heroin or methamphetamine, and less than 80 grams of marijuana or ten marijuana plants.

(5) The defendant has not had a prior DOSA sentence in the past three years since release from confinement and/or was not in community custody at the time of the current offense.

10. Sentence Recommendation for Expedited Controlled Substances Offenses

The following recommendations are guidelines only. Individual facts from any specific case may affect the State's recommendation. The State will recommend jail time and mandatory costs only. The State will not recommend probation or treatment. The State will not recommend a Victim Penalty Assessment for VUCSA cases filed directly into District Court. These guidelines assume most of the defendant's criminal history is from RCW 69.50 offenses or other drug-related offenses. If this is not the case, the State may increase the recommendation.

a. With no scorable felonies: 5 days.
b. With 1 scorable felony: 10 days.
c. With 2 or 3 scorable felonies: 20 days.
d. With 4 scorable felonies: 60 days.
e. With more than 4 scorable felonies: case-by-case recommendation.
f. Misdemeanor criminal history will be factored in at a rate of 10 misdemeanors = 1 felony.

C. EVIDENCE HANDLING – DRUGS AND MONEY

1. Generally

The Superior Court has experienced courtroom security problems involving drugs and money returned in the courtroom overnight. A concern exists regarding the clerk's safety when transporting such evidence to the clerk's evidence room in the basement. For these reasons, the procedures outlined below should be followed in handling drugs and money as evidence.

2. Procedures for Evidence Handling

a. Money

Money normally should be retained by law enforcement. The law enforcement agency should reproduce the buy money both before and after the transaction.

b. Drugs

Only miniscule amounts of drugs should be offered into evidence.

For large amounts of drugs, ten pounds or more, photographs/video normally should be offered and the large amount normally shall not be brought to court. A sample from the large amount may be brought to court and used as described below.

When the amount is between a small and a large amount, the normal procedure for handling the evidence is as follows:

Offer State's Exhibit 1-A, the substance, and State's Exhibit 1-B, a photograph of 1-A. The photograph should clearly show the container's markings so later witnesses can identify (chain).

Once both 1-A and 1-B are in evidence work with the evidence as usual. However, by no later than the end of the court day, move the court for removal of 1-A from evidence and release to the law enforcement agency to be returned to its evidence room.

c. Drugs Destruction Order

At the conclusion of the trial, present an order to the court that allows the law enforcement agency to retain a sample of the drugs and to destroy the remainder.

SECTION 17: FIREARMS OFFENSES AND WEAPONS ENHANCEMENTS

I. FIREARMS OFFENSES

A. EVIDENTIARY SUFFICIENCY

1. The filing standard for firearm crimes is the same as for other crimes against property herein and as codified in RCW 9.94A.411(2)(a).

2. Legislative note: In 1994 and 1995, the Legislature made substantial changes in this state's firearms law found in RCW 9.41. The Youth Violence bill, Ch. 7, 1994 Wn. Law, and the "Hard Time for Armed Crime" law, Ch. 129, 1995 Wn. Laws, substantially increased penalties for crimes committed with weapons (see Enhancements, this section), increased the scope of persons prohibited from possessing firearms, and toughened the penalties for theft of firearms and possession of stolen firearms. In filing charges for crimes in this category you must use care in noting the crime date and using the appropriate statutory provision. The charge language manual retains charge language for crimes before 7-1-94, between 7-1-94 and 7-23-95, and between 7-23-95 and 6-6-96. The 1996 Legislature again revised firearm policy (Ch. 295, 1996 Wn. Laws) particularly with respect to unlawful possession of firearms by certain persons (effective date 6-6-96). Use caution in selecting the correct crime code.

   The 2002 revision of this section eliminates the pre-1996 statutory provisions. See a prior version of these standards for pre-1996 law.

B. CHARGE SELECTION

1. Theft of a Firearm

   a. Prior to 6-30-94, this offense was charged under RCW 9A.56.040, as theft in the second degree.

   b. After 6-30-94, this offense is charged as theft of a firearm, RCW 9A.56.300, and increased the seriousness level from I to V. The "Hard Time" law, effective 7-23-95, increased the crime from a Class "C" to a Class "B" felony and seriousness level from V to VI.

   c. Theft of a firearm shall be charged if there is sufficient admissible evidence proving the defendant committed theft of a firearm. The theft definition found in RCW 9A.56.020 and .010 applies to this offense so there are several options. "Firearm" is defined in RCW 9.41.010. RCW 9A.56.300.

d. Each firearm taken in the theft is a separate offense, RCW 9A.56.300(3); however, multiple firearms taken in a single incident or from the same victim shall be initially charged as a single count. Multiple firearms taken from separate victims shall normally be filed separately up to three counts. Any plea agreement shall include all uncharged firearms as real facts. If the case is set for trial, the additional separate counts shall be added by amendment.

e. Theft of a firearm is a "separate offense" from possession of a stolen firearm and a separate offense from unlawful possession of a firearm (by a prohibited person).

2. Possessing a Stolen Firearm

a. For crimes after 7-22-95, this offense is charged under 9A.56.310, Ch. 129, § 13, 1995 Wn. Laws, as possession a stolen firearm. Possessing a stolen firearm shall be filed where there is sufficient admissible evidence proving that the defendant knowingly possessed, carried, delivered, sold or was in control of a stolen firearm and that the defendant acted knowing the firearm was stolen. The definition of "possessing stolen property" found in 9A.56.140 also applies to this offense thus supplying the additional knowledge element. Firearm is defined in RCW 9.41.040.

b. Each stolen firearm possessed, delivered, etc., is a separate offense per RCW 9A.56.310(3); however, multiple firearms possessed, belonging to the same victim initially shall be filed as a single count. Multiple firearms possessed and belonging to separate victims initially shall be filed separately up to three counts. Any plea agreement shall include all uncharged firearms as real facts. If the case is set for trial, the additional uncharged counts shall be added by amendment.

c. Possessing a stolen firearm is now a Class "B" felony with a seriousness level of V.

3. Unlawful Possession of a Firearm by Prohibited Persons

a. Background note: RCW 9.41 was initially enacted in 1935 as the Uniform Firearms Act and felony violations colloquially have been characterized as "VUFA" offenses. RCW 9.41.040 initially prohibited possession of only "short barrel" firearms by felons previously convicted of crimes of "violence" as defined in former RCW 9.41.010. The scope of the prohibition was expanded in

1983 to include a broader range of convicted felons, the biggest new group being VUCSA convictions. The Youth Violence Act (Ch. 7, 1994 Wn. Laws, effective 7-1-94) expanded the prohibitions of RCW 9.41.040 to include all firearms and further expanded the list of persons prohibited to a much broader range of convictions including some domestic violence misdemeanors. The Hard Times for Armed Crime Law, Ch. 129, 1995 Wn. Laws, effective 7-23-95, created two degrees of this offense and increased the punishment level.

Effective 6-6-96, the predicate prior convictions for UPFA was again revised by the legislature. Ch. 295, 1996 Wn. Laws.

Note: See a prior version of these standards for pre-1996 laws.

b. Unlawful Possession of a Firearm in the First Degree – RCW 9.41.040(1)(a)

For crimes after 6-5-96, charge unlawful possession of a firearm in the first degree when the admissible evidence proves that the defendant knowingly owns, has in possession or control any firearm and previously has been convicted in this state or elsewhere of a "serious offense" as defined in RCW 9.41.010(11)(12). The list of predicate crimes is found at the end of this section. At this time, the 69.50 violations with ten-year maximum terms are limited to RCW 69.50.401(a)(1)(i), manufacturing, possession with intent, and delivering a narcotic drug; and methamphetamine committed after 6-6-96. Do not include maximum terms "doubled" under RCW 69.50.408 or 69.50.435 in this category. Other felony drug violations drop into UPFA 2º category.

UPFA 1º is a Class B felony and currently a seriousness level VII.

c. Unlawful Possession of a Firearm in the Second Degree – RCW 9.41.040(1)(b)

For crimes after 6-5-96, charge unlawful possession of a firearm in the second degree, subject to non-statutory standards set out below, when the admissible evidence proves the defendant owned or knowingly had in possession or control any firearm and who:

(1) previously has been convicted in this state or elsewhere of any other felony not listed as a serious offense;

(2) previously has been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, Ch. 10.77, or equivalent statute of another jurisdiction. RCW 9.41.040(1)(b)(ii);

(3) is under 18 and is not exempt under RCW 9.41.042. Charge under this subsection only where facts support strong inference that defendant was not exempt. Burden of proof issue not decided. RCW 9.41.040(1)(b)(iii);

(4) is free on bond or personal recognizance pending trial, appeal or sentencing for a "serious offense" as defined above. This is a new provision, effective date 6-6-96, and partially conflicts with the definition of "convicted" in RCW 9.41.040(3). Since the definition of convicted includes after guilty plea or verdict or pending appeal situations, UPFA 1º could have been charged if the predicate offense was a serious offense. The new provision new places this conduct in the UPFA 2º category and this more specific statute probably controls. We should continue to file non-"serious offense" predicate crimes pending sentencing or appeal under (1) or (2) above. RCW 9.41.040(1)(b)(iv).

(5) Unlawful possession of a firearm in the second degree is a Class "C" felony with a current seriousness level III.

(6) The following non-statutory guidelines apply to <u>UPFA 2º only</u> filing decisions because this law now prohibits firearms possession for persons who, subsequent to their felony conviction, formerly were allowed to possess firearms lawfully.

(a) If the person has been issued a valid concealed weapons permit, filing will be declined and a warning letter sent.

(b) If the predicate offense would "wash" under RCW 9.94A.525(2) [these people would be eligible for reinstatement under RCW 9.41.040(4)], filing will be declined.

(c) Expedited procedures per section 18 of these standards will apply to any UPFA 2º filing unless the person has been previously charged with UPFA

or previously notified under (a) above or by other official action.

d. A person "has been convicted" at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceeding, including, but not limited to, sentencing or disposition, post trial or post fact-finding motions and appeals. Any conviction which has been the subject of a "pardon, annulment or other equivalent procedure …" does not preclude the possession of a firearm. RCW 9.41.040(3).

In addition, a person may petition a court of record to have his/her right to possess a firearm restored if that person:

(1) has not been convicted of a sex offense;

(2) has not been convicted of a Class "A" felony or a crime with a maximum term of 20 years or more;

(3) has 5+ years in the community without being convicted or currently charged with any crime;

(4) has no prior convictions that have not washed (see RCW 9.94A.360(2)) and that would prohibit the possession of a firearm. RCW 9.41.040(4).

Refer to Section 21, Restoration of Firearm Rights, for more detailed discussion of this subject.

e. Proof of Priors – Non-Statutory Guidelines

(1) Proving a prior conviction as an element of a crime is significantly more difficult than proving a prior conviction for general sentencing purposes. As with most other evidentiary issues we have generally required the evidence of the prior conviction in advance of filing. In a rush filing situation proof of Washington predicate prior felony conviction based on computer criminal history records may be sufficient. Computer history includes computer checks with PROMIS, WASIS, SCOMIS, and DISCIS, and can generally provide a sufficient basis to determine the existence and current legal status of the conviction, plus we can generally be assured that the court record will be available for trial. When the prior conviction is out-of-state or a Washington conviction prior to 1981, the relevant court records should generally be received and reviewed

for sufficiency prior to filing. In the case of out-of-state convictions you must also determine if the conviction is the legal equivalent of a qualifying Washington offense.

(2) You can charge more than one conviction as a predicate prior offense as long as they are each in the same category (e.g., both are prior serious offenses, both are prior non-serious felony convictions).

(3) Prior convictions may be subject to collateral attack in an UPFA prosecution. State v Summers, 120 Wn.2d 801 (1993). As a result, we generally do not file when the only predicate prior is prior to January 1981. Guilty pleas prior to that time are particularly problematic when collaterally attacked.

(4) Juvenile prior "adjudications." The definition of "convicted" has been legislatively modified three times. The 1996 legislature has now reinstated the phrase "or adjudicated in a Juvenile Court."

f. Multiple Violations – Consecutive Sentences

A person who commits theft of a firearm or who commits possession of a stolen firearm may also be charged with unlawful possession of a firearm in the first or second degree as a separate offense and, if convicted, is required to serve consecutive sentences. RCW 9.41.040(6).

g. Multiple Firearms

Each firearm possessed by the prohibited person may be charged as a separate offense. RCW 9.41.040(7). However, at initial filing a single count shall normally be charged where multiple firearms are recovered as a result of a single arrest or search.

h. Alien in Possession of a Firearm

Alien in possession of a firearm is prohibited without a license. RCW 9.41.170. Filing standard reserved until determination of constitutional validity of statute when applied to registered aliens and determination of our ability to prove status of non-registered aliens.

i. Knowledge

The courts have added a non-statutory knowledge element to the UPFA laws. Knowledge refers only to the own, possess or control element. Knowledge that the defendant was legally prohibited from … under the law is not an element. See State v. Anderson, 141 Wn.2d 357 (2000); State v. Krzeszowski, 106 Wn. App. 638 (2001).

II. SENTENCING ENHANCEMENTS FOR FIREARMS AND OTHER DEADLY WEAPONS

A. SCOPE

1. This section is intended to provide filing and disposition standards for weapons sentence enhancements. It is intended to supersede any previous standards for crimes subject to Hard Time legislation effective 7-23-95.

2. Other sentencing enhancement provisions:

   a. Special protected area or zone enhancements for drug trafficking, see Section 16; RCW 69.50.435 and 9.94A.510(6).

   b. Persistent offenders ("three strikes" law), see Section 21; RCW 9.94A.570 and 9.94A.030(32)(a).

   c. Persistent violent sex offenders ("two strikes" law, effective 6-6-96), see Section 7 – Sexual Assault, and Section 19 – Persistent Offenders. RCW 9.94A.030(32)(b).

B. SENTENCING REFORM ACT PROVISIONS

1. Evidence – Deadly Weapons – Special Finding by Court or Jury

   In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

   For the purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: blackjack, slingshot, billy club, sand club, sandbag, metal knuckles, any

dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas. RCW 9.94A.602 [formerly .125]

2. Additional Time for Crimes prior to 7-23-95

Additional time shall be added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon as defined by this chapter and the offender is being sentenced for one of the crimes or an anticipatory crime for one listed in this subsection. The following times shall be added to the presumptive range determined under subsection (2) of this section:

Twenty-four months (rape 1º, robbery 1º, kidnapping 1º); 18 months (burglary 1º); 12 months (any violent offense except as above noted, burglary 2º of a building other than a dwelling, theft of livestock 1º or 2º or any drug offense). RCW 9.94A.310 (7-1-94)

3. Additional Time for Crimes after 7-22-95

Hard Time for Armed Crime Provisions. RCW 9.94A.510 [formerly .310] as amended by Ch. 129, 1995 Wn. Laws.

Effective for crimes committed after 7-22-95, the following additional enhancement time shall be added to the presumptive range:

a. Firearm Sentence Enhancements – RCW 9.94A.510(3)

5 years for Class A crimes
3 years for Class B crimes
18 months for Class C crimes

Offenders being sentenced for their second or subsequent crime with a firearm enhancement after the effective date of the law will receive double the enhancement time up to the statutory maximum sentence. RCW 9.94A.510(3)(d).

b. Other Deadly Weapons Enhancements – RCW 9.94A.510(4)

2 years for Class A crimes
1 year for Class B crimes
6 months for Class C crimes
Double enhancements apply to repeat offenders

4. Good time does not apply to any weapons enhancement time (crimes after 7-22-95 only).

   No "earned early release" time may be credited toward the sentence enhancement, but may be earned toward the portion of the sentence that is the underlying felony. RCW 9.94A.728.

5. Firearm and other deadly weapon enhancements time (crimes after 7-22-95) is MANDATORY and NOT CONCURRENT.

   Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions. RCW 9.94A.510(3)(e) and (4)(e)

   The "mandatory" provision places enhancement time in same category as the other mandatory minimum term provisions of RCW 9.94A.540 which are not subject to imposition of an exceptional sentence below the mandatory term.

   The "not concurrent" language in the hard time law was the subject of much litigation culminating in the case of In Re Charles, 135 Wn.2d 239 (1998), which held that multiple weapons enhancements ran consecutively only if the underlying offenses were run consecutively. Therefore, if you're reviewing a multiple enhancement case between 7-23-95 and 6-11-98, see the Charles case. Effective 6-11-98, the legislature "clarified" the law's intent that multiple weapons enhancements must be run consecutively with each other and with any other sentence including the underlying crimes, even though the sentences for the underlying offenses must be concurrent. This necessarily results in a bifurcation between the base term(s) and the enhancement terms.

   The "not concurrent" provision must be addressed in each multiple count or multiple cause plea agreement and sentencing situation where more than one count includes a special weapons allegation. In addition, care must be exercised when negotiating a plea agreement involving other sentencing (federal, other county or other state, etc.) when your case(s) includes a special weapon allegation or other county sentence might include weapons enhancement time.

   Illusory plea promises result in sentences which are subject to vacation and plea withdrawal.

6. Maximum term controls over presumptive range. If the presumptive sentence (which results from enhancement time) exceeds the statutory

maximum, the statutory maximum shall be the presumptive sentence. RCW 9.94A.510(3)(g) and (4)(g)

7. Excluded crimes. Firearms and deadly weapon enhancements apply to all felony crimes except: theft of a firearm, possession of stolen firearm, possession of machine gun, drive-by shooting, unlawful possession of a fire arm 1º or 2º, use of a machine gun in a felony. RCW 9.94A.510(3)(f) and (4)(f)

   The following felony possession of weapons offenses are <u>not excluded</u> from the enhancements provisions. Considering the timing of the various enactments, it is likely these were oversights. An enhancement allegation should not be filed for these offenses as a matter of policy.

   - Unlawful possession of short-barreled rifle or shotgun – RCW 9.41.190
   - Alien possession of firearm – RCW 9.41.170

C. WHEN ALLEGED

1. General Provisions

   a. A deadly weapon or firearm allegation shall be filed, subject to other limitations below, only against a defendant who actually possessed the weapon or an accomplice who actively participated in the crime and was present during its use, or who supplied the weapon.

   b. In determining whether there is sufficient evidence to prove the allegation, it is not necessary that the weapon was recovered as long as witnesses can describe in detail what appeared to be a real firearm (or knife with blade over three inches, etc.).

c. Multiple counts.

(1) Generally a special weapons allegation should be filed with only one count when the same incident results in multiple counts. The special weapons allegation shall be filed for the count which carries the highest seriousness level. When multiple counts involve the same seriousness level choose the count with the primary victim or the count with the best evidence if there is any difference.

For the purposes of this enhancement filing policy, same incident includes multiple victims unless the weapon was used to inflict injury upon separate victims. Example: defendant robs multiple victims in same home or business. If the defendant did not inflict injury with the weapon, charge a single special allegation with the primary and strongest count. If the weapon was used to inflict injury to a victim or victims, special allegations would be filed with each count involving injury.

(2) Separate incidents. Generally special weapon allegations shall be filed for each separate incident. Separate incidents mean separate victims at different place and time (e.g., multiple businesses robbed even if on the same day).

2. Definitions

a. Deadly Weapon. The definition in RCW 9.94A.602 remains in effect. It is cited in full above.

A few notable cases pertaining to deadly weapons are cited here. There is no reason to believe that the case law is changed by the enactment of the "hard time" amendments.

A motor vehicle is not a deadly weapon. State v. Ross, 20 Wn. App. 448 (1978). While a knife longer than three inches is a deadly weapon as a matter of law, a shorter knife may be a deadly weapon depending upon the circumstances of its use. State v. Samaniego, 76 Wn. App. 76 (1994). Possession of a deadly weapon must be proven beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751 (1980).

Accomplice Liability. Case law prior to the SRA required proof beyond a reasonable doubt that unarmed accomplice knew that the principal was armed. However, Division I ruled in State v. Bilal, 54 Wn. App. 778 (1988) that the SRA reference to "or an

accomplice" creates strict liability for an unarmed accomplice for enhancement time; disagreeing with D. Boerner, Sentencing in Washington, § 5.19.

b. Firearms. Firearm is defined in RCW 9.41.010 as a weapon or device from which a projectile may be fired by an explosive such as gunpowder. Case law has consistently held that a firearm need not be loaded to qualify for enhancement, however, it must be "operable."

c. "Most Serious Offense" is defined in RCW 9.94A.030(28). These are the crimes which may qualify (now or in the future) an offender for persistent offender (three strikes) status. The crimes are specifically listed in the appendix attached to Section 19. For the purpose of these enhancement standards only, assault 2º, with a deadly weapon, 9A.36.021(1)(c), is not included.

d. "Drug Offense" is defined in RCW 9.94A.030(20) and includes any felony violation of RCW 69.50 except simple possession and forged prescription cases. Manufacture, delivery, possession with intent and burn cases are included.

e. "Other Offenses" under these enhancement standards include any other felony which does not fall under definition c or d above and is not one of the excluded possessory crimes listed above (B, 7).

3. Enhancement Policies

a. "Armed with" means the defendant or an accomplice had a qualifying weapon easily accessible and readily available for use. State v. Valbodinos, 122 Wn.2d 270 (1993). This is the minimal legal requirement and the most aggressive policy.

However, with any Class "C" or property offense felony, a special weapons allegation should not be filed when the presence of the weapon did not significantly enhance the seriousness or dangerousness of the underlying offense. The deputy should balance various factors including, but not limited to, the following:

(1) whether the underlying offense was particularly aggravated or inherently dangerous;

(2) whether the defendant was involved in a professional, commercial or organized criminal venture;

(3) the weapon itself, e.g., if a firearm, was it loaded, was it a particularly offense-oriented weapon like an assault rifle;

(4) whether the defendant had a valid permit to carry a concealed weapon;

(5) whether the defendant has prior convictions for violent crimes and/or firearms violations.

b. "Armed with plus use" means the defendant or an accomplice was "armed with" a qualifying weapon and in fact either used the weapon in some fashion to commit or escape from the crime or by some act of statement threatened to use the weapon.

c. "Armed with plus aggravated use" means that the defendant or an accomplice was "armed with" and used a qualifying weapon in a manner beyond that necessary to simply commit the crime. Examples of aggravated use include, but are not limited to, the following conduct or circumstance:

(1) weapon was used to inflict injury;

(2) only defensive action by victim or third party prevented injury;

(3) use over prolonged period, as in hostage situation, or in a manner that is deliberately cruel, or torturous;

(4) weapon was used in an attempt to commit a separate crime;

(5) defendant has prior criminal history of felonious assaults or "most serious offenses";

(6) discharge of a firearm in an attempt to injure or in the direction of another.

4. The following grid determines which enhancement policy applies to the crime being charged.

Category of Crime	"Most Serious Offense"	Assault 2^{o} (DW) RCW 9A.36.021(1)(c)	"Drug Offense"	"Other Offense"
Firearm	a	c	a	a
Deadly Weapon	b	c	c	c

First determine the category of the charged offense by referring to the definitions above. Then determine the appropriate enhancement charging policy to be applied from the above grid.

Example: Robbery 1º is a "most serious offense." If the deadly weapon was a "firearm," file the special allegation if the defendant or an accomplice was "armed with" a firearm per enhancement policy in subsection C, 3, a above.

APPENDIX FOR UNLAWFUL POSSESSION OF A FIREARM – RCW 9.41.040 (VUFA) PREDICATE CRIMES

Revised 6-6-96

For UPFA committed after June 5, 1996 – :

A. Unlawful Possession of a Firearm 1º

Any Class A felony
Any Attempt, Solicitation or Conspiracy to Commit a Class A felony
Any Class B felony with a Sexual Motivation finding
Any felony with a Deadly Weapon finding
Assault 2º
Assault of a Child 2º
Arson 2º
Burglary 2º
Child Molestation 2º
Extortion 1º
Indecent Liberties
Incest with victim under 14
Kidnapping 2º
Leading Organized Crime
Manslaughter 1º and 2º
Promoting Prostitution 1º
Rape 3º
Drive-by Shooting
Residential Burglary
Robbery 2º
Sexual Exploitation
Vehicular Assault
Vehicular Homicide (except no DSO)
VUCSA Delivery or Possession with Intent – must have been maximum ten-year term – see RCW 69.50.401(a)(i)(ii)

B. Unlawful Possession of a Firearm 2º

Any other felony

The following (misdemeanor) crimes when committed by one family or household member against another, and committed on or after July 1, 1993:

Assault 4º
Coercion
Stalking
Reckless Endangerment
Criminal Trespass 1º
VNCO
VPO

Having previously been involuntarily committed
Defendant under 18
Defendant is free on bond or personal recognizance pending trial, appeal or sentencing for a serious offense

SECTION 18: EXPEDITED CRIMES

I. FILING

A. EVIDENTIARY SUFFICIENCY

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

B. DEFINITION

Expedited cases are the following crimes, when committed by a person who has not had an expedited crime within the past five (5) years and who does not have a pending charged or uncharged felony case for which there is probable cause and who does not have a prior adult or juvenile felony conviction which may be considered under the Sentencing Reform Act washout policy on prior convictions:

1. Theft or Possession of Stolen Property of any type, where the total value of all property taken or possessed, pursuant to a common scheme, is less than $1000, except

   a. from the person, or

   b. as part of a business enterprise, or

   c. where the property possessed was stolen in a Robbery or Residential Burglary and circumstances exist which give probable cause to believe that the defendant committed the Robbery or Burglary, or

   d. where the property possessed was stolen in more than one criminal incident, or

   e. where the stolen property is a gun, or

   f. where the victim was particularly vulnerable because of age, illness or relationship to the defendant.

2. Forgery when the total face value of all instruments forged is less than $1000, unless two or more different identities are involved or more than three instruments are tendered.

3. Credit card theft where the possession involves the cards or identification of one person only.

4. Unlawful issuance of a bank check in an amount less than $1000.

5. Malicious destruction of property where the diminution in value is less than $1000.

6. Joyriding where the vehicle was abandoned within 24 hours of the theft, where no stripping occurred, where there is no evidence of intent to permanently deprive and where no substantial damage to the vehicle has occurred.

7. Forged prescriptions where the purpose was personal use rather than resale. Cases involving over three transactions shall not be expedited.

8. Escape from custody by misdemeanants where no force was used and the escape posed no risk to public safety, unless the defendant has prior escape convictions.

9. Drug offenses, see "Drug Offenses," Section 16.

C. CHARGE SELECTION

1. Degree

Expedited crimes should be charged as the applicable felony. If the conduct involved does not constitute a felony the case should be declined in favor of municipal prosecution or filed in the district court, where the conduct occurred as the misdemeanor.

2. Counts

Ordinarily, only one count should be filed in district court. If more than one count is filed, the filing deputy shall indicate the reason therefore on the case analysis sheet.

D. LOCATION AND LIMITATION

All expedited crimes, except as indicated here, shall be filed in Seattle District Court.

E. WITNESS - PRELIMINARY HEARINGS

Witnesses shall not be subpoenaed for preliminary hearings and no preliminary hearings shall be conducted for expedited crime cases.

II. DISPOSITION

A. COMMUNICATION WITH DEFENSE ATTORNEY

1. Discovery

Copies of all discoverable material shall be delivered to the defense attorney as soon as the identity of the defense attorney can be determined.

2. Disposition

The filing deputy shall determine, by reference to these policies, what offer shall be made to the defendant, in return for a plea of guilty in district court. That offer shall be recorded in the file and approved by a supervisor of the filing unit. The defense attorney shall be advised, as promptly as possible, of the offer. The defense attorney shall be further advised that, if the defendant does not enter a plea of guilty to the indicated gross misdemeanor by the date indicated, the case will be dismissed in district court, filed in superior court and disposed of there as a felony.

B. LIMITATIONS ON SENTENCE RECOMMENDATIONS

In no situation, should the sentence recommendation for the expedited crime exceed the presumptive sentencing range that the offender would have received under the Sentencing Reform Act if the crime had been handled as a felony. No community service or affirmative conditions of sentence shall be recommended.

C. CHARGE REDUCTION

1. The following charge reductions shall be made upon a plea of guilty in district court.

Theft 2º	Attempted Theft 2º
Forgery	Attempted Forgery
Unlawful Issuance of Bank Checks	Attempted Unlawful Issuance of Bank Checks
Taking and Riding 2º	Attempted Taking and Riding 2º
Escape 2º (misdemeanant)	Escape 3º

2. Probation

a. If the defendant has no previous adult or juvenile convictions, a deferred sentence shall be recommended. If the defendant has a previous adult or juvenile conviction, a suspended sentence shall be recommended.

b. All recommendations shall include the requirement that the defendant make full restitution for all losses and the specific amount of restitution must be agreed by the defendant, as a condition of the plea agreement.

NUMBER OF PRIOR CONVICTIONS (not including driver's license offenses)

0-1 misdemeanor (or washed felony)	= A
2 misdemeanors (or washed felonies)	= B
3-3+ misdemeanors (or washed felonies)	= C

Amount Under $250	*Amount* from $250 to $1000 and Taking and Riding 2º
A. $100 - $500 fine	A. $500 fine - 10 days
B. $500 - 10 days	B. 10 - 20 days
C. 10 - 20 days	C. 20 - 180 days

Escape 2º (while incarcerated on misdemeanor charge or conviction)

A. 0 - 60 days
B. 15 - 60 days
C. 60 - 180 days

SECTION 19: PERSISTENT OFFENDERS

I. GENERAL

The Persistent Offender Accountability Act (POAA), Initiative 593, was passed in November 1993 and became effective on December 2, 1993. Originally known as the "three strikes and you're out" law, the POAA amended provisions of the SRA (RCW 9.94A) and provides that offenders convicted of three "most serious offenses" on three separate occasions be sentenced to life in prison without the possibility of parole.

In 1996, the Legislature adopted a "Two Strikes" amendment to the POAA for offenders twice convicted of certain sex offenses, again on two separate occasions. The effective date for the amendment was June 6, 1996.

The sentencing authorization for persistent offenders, RCW 9.94A.570, now provides:

> Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender 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. In addition, no offender subject to this section may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as defined under RCW 9.94A.728(1), (2), (3), (4), (6), (8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers, except: (1) in the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

Most procedural and constitutional challenges to the POAA were rejected in three state Supreme Court opinions dated August 8, 1996. **S**ee State v. Manussier, 129 Wn.2d 652, State v. Thorne, 129 Wn.2d 736, and State v. Rivers, 129 Wn.2d 697. In those opinions, the Court concluded that the POAA is simply a part of the Sentencing Reform Act, and the SRA rules and procedures govern and provide adequate constitutional protections for the sentencing of persistent offenders.

Specifically, the Court has rejected challenges to the POAA on the following issues:

- Unconstitutional initiative for failure to comply with the requirements of Wash. Const. Art. II, sec. 19 and 37
- Bill of attainder
- Separation of powers
- Republican form of government
- Equal Protection
- Cruel and unusual punishment

- Due Process (substantive and procedural)
- Conflict with RCW 9.94A.120(12) – "a court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW."
- Vagueness
- Lack of specific charging document declaring defendant a "persistent offender"
- Right to jury trial on existence of prior convictions
- Applicability of preponderance standard at sentencing

II. STATUTORY PROVISIONS

A. "Persistent Offender" under RCW 9.94A.030(32) is an offender who:

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

(a)(ii) has, before the commission of a felony considered a most serious offense, 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 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) 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, or burglary in the first degree, with a finding of sexual motivation; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(b)(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 16 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 18 years of age or older when the offender committed the offense.

NOTE: Sections (a)(i) and (a)(ii) refer to the "Three Strikes" provisions of the POAA. Section (b)(i) and (b)(ii) refers to the "Two Strikes" provisions of the POAA.

B. "Most Serious Offense" as used in Section (a)(i), (ii) above is defined in RCW 9.94A.030(28) as any of the felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended;

(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
(b) Assault in the second degree;
(c) Assault of a child in the second degree;
(d) Child molestation in the second degree;
(e) Controlled substance homicide;
(f) Extortion in the first degree;
(g) Incest when committed against a child under age 14;
(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, under DUI and reckless prongs;
(r) Vehicular homicide, under DUI and reckless prongs;
(s) Any other class B felony offense with a finding of sexual motivation;
(t) Any other felony with a deadly weapon verdict;
(u) Any prior Washington, out-of-state or federal offense that is comparable to any offense listed above;
(v) (see statute regarding prior convictions for Indecent Liberties and effective dates).

C. Juvenile convictions are not included within the above, unless the juvenile was convicted as an adult pursuant to the discretionary or mandatory decline provisions of RCW 13.40. State v. Ollens, 89 Wn. App. 437, 949 P.2d 407 (1998).

D. Pardon or Clemency powers of the governor are not restricted, but the legislature recommends that no offender be released by pardon or clemency until the age of 60 and adjudged no longer a threat to society. Sex offenders should be given special scrutiny under this section. See RCW 9.94A.565.

III. PROCEDURE IN GENERAL

The prosecuting attorney does not have the discretion to seek or not seek the persistent offender penalty in any particular case. The only discretion the prosecutor has is in determining what charges to file. Thorne, 129 Wn.2d at 765, 768.

No special charging document is required under the Persistent Offender Accountability Act because no additional crime is being charged. Thorne, at 779. However, the filing of a "Most Serious Offense Notice" or other similar document is favored by the court. Thorne, at 780-81. In most cases, the filing deputy will recognize that the defendant may qualify as a persistent offender while reviewing the defendant's criminal history. In those circumstances, the filing deputy shall provide notice in the bail request that the State believes the defendant is a "persistent offender." The filing deputy shall also indicate whether or not the defendant is subject to the "three strikes" statute, the "two strikes" statute for sex offenses, or both.

A prosecutor must provide the judge with a list of the prior offenses of the defendant so that the seriousness level of the crimes may be determined. In no instance may the prosecutor agree not to allege prior convictions of a defendant as part of a plea agreement. RCW 9.94A.080(6). Thorne, at 764.

The sentencing judge, not a jury, determines whether the priors exist and whether the defendant was the subject of the prior convictions. Manussier, 129 Wn.2d at 683, 658. The production of certified copies of judgment and sentences is highly favored. Thorne, at 782-3.

The State must prove the prior convictions and that the defendant was the subject of the prior convictions by a preponderance of the evidence. Thorne, at 783-4; Manussier, at 683-95. Typically, a sentencing hearing is conducted wherein the deputy presents a series of certified copies of documents demonstrating the defendant's prior criminal convictions. Usually, these documents take the form of judgments and sentences, prison inmate records, and criminal history documents maintained by law enforcement, including any fingerprint or photographic evidence that establishes the defendant's identity.

The only challenges to the defendant's prior convictions that may be considered are claims of facial invalidity. Manussier, at 682-85. "Facially invalid" means a conviction that evidences infirmities of a constitutional magnitude without further elaboration – in other words, without reviewing more than the conviction document itself. State v. Ammons, 105 Wn.2d 175 (1986). "To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing." Ammons, 105 Wn.2d at 187.

Judges do not have the discretion to impose any sentence upon a person deemed to be a persistent offender other than life in prison without the possibility of parole. Thorne, at 768.

IV. SPECIFIC KING COUNTY PROSECUTOR'S PROCEDURES

Responsibilities of the Filing DPA

1. When a case is received and screened sufficient for filing as a "Most Serious Offense," the offender's criminal history should be carefully reviewed for prior convictions that might qualify the defendant for persistent offender status. If the criminal history has not been received by the time a charging decision is made, it should be requested (MI'd) as soon as possible.

2. Whenever a "most serious offense" is filed, and when the offender appears to have one or more prior "most serious offenses," the filing deputy shall complete a persistent offender alert/notice worksheet and forward the file to the unit paralegal. All persistent offender cases shall be pre-assigned.

Responsibilities of the Trial DPA

3. The trial deputy shall be responsible for any continuing investigation that is necessary to determine whether the original filing decision was appropriate.

4. Once the investigation is completed, the trial deputy shall meet with the Unit chair and Chief Criminal Deputy to discuss the case and the defendant's prior criminal history. Any amendments to the charges must be approved by the Chief Criminal Deputy.

5. If the defendant is convicted of a charge that would make him or her subject to the Persistent Offender Accountability Act, the trial deputy shall notify the paralegal of the sentencing hearing date immediately. The trial deputy shall be responsible for setting a briefing schedule and for coordinating with the paralegal to obtain a set of the defendant's fingerprints. The sentencing hearing shall be special set – not on the typical afternoon sentencing calendar. The trial deputy is expected to conduct the sentencing hearing.

6. Once alerted by the filing deputy, the paralegal shall docket the alert/notice, verify that the defendant's criminal history summary (Appendix B) has been prepared, and forward the file to the deputy for review.

7. The deputy shall review the offender's rap sheets and criminal history to verify that all "most serious offenses" have been identified. This is particularly important in the case of out-of-state convictions, which may use different nomenclature than Washington crimes, but are otherwise comparable offenses.

The deputy shall indicate whether the case shall be designated a persistent offender case and then return the file and alert/notice to the paralegal.

8. If designated a persistent offender case, the paralegal will begin compiling all records related to the offender's criminal history, including judgments and sentences, penal institutional records, and other necessary documents. The file shall than be returned to the deputy that would otherwise be responsible for prosecuting the case (i.e., SAU, DV, MDOP or trial teams).

9. The deputy shall review the materials collected regarding the defendant's criminal record for identity and comparability issues. Those records shall remain with the file until the sentencing hearing. Once collected, copies of these records shall be forwarded to the defendant's attorney.

10. When the defendant is convicted, the deputy shall prepare a sentencing memorandum that addresses the various sentencing issues of the POAA as well as the defendant's individual case. The deputy shall also be responsible for responding to any briefing filed by the defendant regarding the sentencing hearing or statute. (The trial deputy also is responsible for handling any trial-specific issues – i.e., motions for new trial, findings and conclusions, etc.)

11. The deputy shall conduct the sentencing hearing. At the conclusion of the sentencing hearing, the DPA file for the current offense (and any other files from prior offenses), copies of the exhibits used at the hearing, and all other information related to the offense shall be placed in a box marked "persistent offender" for storage or appellate purposes.

SECTION 20: STATE'S APPEALS

I. SHOULD WE APPEAL?

The following criteria and procedures will be applied in determining whether to appeal a trial court decision.

1. Legal considerations

   a. Does the case fit the criteria for an appeal as of right under RAP 2.2(b)?

      - A final decision "which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information."
      - Pretrial order suppressing evidence if the practical effect of the order is to terminate the state's case.
      - An order arresting or vacating judgment.
      - An order granting a new trial.
      - Sentences in adult or juvenile proceedings that depart from the standard range or that involve a miscalculation of the standard range.

   b. Did the trial court incorrectly apply the procedures of the Sentencing Reform Act? State v. Williams, 149 Wash.2d 143, 65 P.3d 1214 (2003).

   c. If it is not an appeal as of right, does the case fit the criteria for discretionary review under RAP 2.3?

   d. Was the error preserved in the trial court? RAP 2.5(a).

   e. Are there any double jeopardy problems with retrial after appeal?

2. Discretionary considerations.

   Assuming that the above legal criteria are met, the following considerations must be weighed in deciding how to use the prosecutor's discretion in a given case:

   a. Is the law settled? If so, is it settled for us or against our position?

   b. If it is settled against our position, do we have a good faith argument, supported by persuasive authority, to change the law? Do the facts and equities of this case call for a change in the law?

   c. If the law is unsettled, is this a good case, based on the facts and equities, in which to persuade the court to settle it in our favor?

   d. What is the probability that we can win this appeal?

e. If we win this appeal, what will be the impact on other cases? More importantly, if we lose this appeal in a published opinion, what will be the impact on future cases?

f. Is this an issue that has broad ramifications, or just a minor passing problem? If we choose not to appeal, is it likely that trial courts will repeat the error?

g. Is it likely that a subsequent case with better facts on which to argue our position will come along soon? Or does this issue need resolution as soon as possible?

h. How great is the trial court's deviation from the law? For instance, did the court impose an illegal sentence that was a gross deviation from the standard range or a slight deviation from the standard range?

II. PROCEDURE FOR STATE'S APPEAL

A deputy believing she has a basis for a State's appeal shall review the case with her supervising Senior Deputy. If the supervising Senior Deputy decides that a State's appeal should be considered, the case shall be referred to the Appellate Unit Chair, for review. The referral to the Appellate Unit Chair should be accompanied by a memorandum analyzing the appropriateness of appeal in light of the above criteria. Only the Appellate Unit Chair, his/her designee, the Chief Criminal Deputy, or the Assistant Chief Criminal Deputy has authority to authorize a State's appeal.

SECTION 21: SENTENCE ENFORCEMENT AND RESTORATION OF RIGHTS

I. ENFORCEMENT OF SENTENCES

A. Determinate Sentences – Confinement

1. Prison Terms

a. When the court imposes a prison term in the Department of Corrections (DOC), the sentence should commence immediately and the defendant remanded to custody. There is no legal authority for delaying commencement. See State v. Hale, 94 Wn. App. 46, 54 (1999). However, should the court delay the commitment and the defendant fail to report when required, the jail commitment office will forward the warrant of commitment to our office legal services manager or warrants paralegal who in turn forwards it to the King County Sheriff's Office for service.

A "no show" letter accompanying the warrant of commitment is filed in the court file and copies sent to the defense attorney, bonding company, and the sentencing court. Bond or cash bail forfeiture proceedings are then commenced when appropriate. Upon arrest, the defendant is transferred directly to DOC custody on the commitment.

b. Deputy prosecuting attorneys should not agree at sentencing to delay commencement of a prison sentence once the Judgment is signed by the court.

2. Jail Terms

a. Felony sentences of one year or less and all misdemeanor sentences must be served in a county detention facility. It is common to delay jail reporting to allow the defendant time to apply for work release or home detention. The delay generally should not be longer than the necessary jail processing time (e.g., 14-30 days) and should be clearly expressed in the sentence order.

b. The court has no authority to require that the jail term be served in another county's jail; however, some counties and cities will often accept a work release or home detention inmate on a space-available basis. The inmate has to be able to pay the fees and otherwise qualify.

c. When a defendant fails to report to serve a jail sentence, the King County Jail commitment office will forward the unserved

commitment papers to our office warrants paralegal, generally ten days after the report date. Our warrants paralegal follows set procedures and prepares a bench warrant request for review by the designated deputy prosecuting attorney and presentation to the sentencing court.

B. Supervision in the Community (see also Section 3)

1. Felony Sentences of One Year or Less

a. Community Supervision – for crimes committed prior to July 1, 2000, the court has the discretion to impose (or not) 12 months of "community supervision." Former RCW 9.94A.383. Community supervision is defined in RCW 9.94A.030(9).

b. Community Custody – for crimes committed on or after July 1, 2000, the court has the discretion to impose (or not) up to 12 months of "community custody." RCW 9.94A.545.

> On all sentences of confinement for one year or less, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and RCW 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time in which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

"Community custody" is defined in RCW 9.94A.030(5). The important difference between community custody and community supervision and misdemeanor probation is that enforcement of the terms of community custody is within the jurisdiction of DOC, not the sentencing court. See RCW 9.94A.737.

2. Felony Sentences of Over One Year – DOC sentences

a. "Community Placement" was/is a hybrid approach to post-release supervision combining the concept of community custody and community supervision. First adopted in 1988 for a limited number of offenders committed to the Department of Corrections, it combined "Community Custody" in lieu of earned early release (good time) followed by a period of post-release supervision. Community custody is enforced by DOC not the court. Once "released" to post-release supervision, enforcement (violation hearings and sanctions) reverts back to the court and our office. RCW 9.94A.700.

b. "Community Custody" has replaced "community placement" for qualifying crimes committed after July 1, 2000. It is entitled "The Offender Accountability Act." Its purpose was to provide DOC with maximum administration control over enforcement of the terms and requirements of community custody. RCW 9.94A.715, .720, .737, and .740.

The court and our office retains authority to enforce terms of the Judgment and Sentence other than the community custody provisions (i.e., legal financial obligations, no contact provisions).

One exception to the above rule is that in S.S.O.S.A. cases (sex offender sentence alternative), community custody violations will be addressed to the sentencing court because of the possibility of revocation of the suspended sentence by the court. SAU deputies handle these violation hearings.

c. In 2003, the Washington legislature limited DOC's authority to supervise low-risk defendants. The new law also shifted the responsibility for supervision of legal financial obligations from DOC to the court clerk's offices.

3. Felony Sentence Modification Hearings

a. Timeframe – the trial court retains jurisdiction to impose sanctions for sentence violations on Sentencing Reform Act (SRA) cases until a Certificate of Discharge is obtained pursuant to RCW 9.94A.637; or until the defendant's time served reaches the maximum term for the crime. Expiration of a supervision period does not terminate the court's jurisdiction. State v. Raines, 83 Wn. App. 312 (1996), State v. Neal, 54 Wn. App. 760 (1989). However, if the alleged violations are of community supervision, community placement or community custody, the violations themselves must have occurred during the supervision period, though the hearing may be conducted later.

b. Burden of Proof – preponderance of evidence. See RCW 9.94A.634(3)(C) (formerly .220). The State has the burden of proving non-compliance by a preponderance of the evidence. The defendant has the burden of establishing to the court's satisfaction that the violation was not willful. State v. Campbell, 84 Wn. App. 596 (1997), State v. Gropper, 76 Wn. App. 882 (1995).

c. Sanctions – RCW 9.94A.634(3)(C) places a per-violation limit of 60 days, but the court may impose up to 60 days consecutively for each violation found. State v. McDougal, 120 Wn.2d 334 (1992).

The court may not suspend or defer any sentence, including a sentence imposed for sentencing violation. State v. DeBello, 92 Wn. App. 723 (1998), RCW 9.94A.575.

4. Misdemeanor Probations – Superior Courts Only

a. In general – The Sentencing Reform Act (RCW 9.94A) applies only to felony sentences. The Legislature has not addressed standards, grids, etc., for misdemeanors and gross misdemeanors. The power to grant probation for Superior Court is found in RCW 9.92.060 (Suspended Sentence Act) and RCW 9.95.200/.210 (the Probation Act).

The legislative authority for District Court sentencing is found in RCW 3.66.

b. Supervision of Misdemeanor Offenders. DOC is legally required to supervise Superior Court misdemeanors under RCW 9.92 and 9.95.

c. Probation Violation Hearings.

(1) Jurisdiction. The trial court retains jurisdiction over the defendant until an express order of termination has been entered by the court. RCW 9.95.230; State v. Hoffman, 67 Wn. App. 132, rev. denied, 120 Wn.2d 1014 (1992). However, the violation must have occurred during the probation period. State v. Holmberg, 53 Wn. App. 609 (1989).

The best practice is to note the hearing prior to the expiration of the probation period whenever possible.

(2) Maximum Term. The maximum term for the offense is the statutory limit. Once the defendant has served the maximum term, whether imposed all at once or in "installments" for violations, the court's jurisdiction expires.

d. Probation Periods

(1) Probations imposed under RCW 9.95.200/.210, generally referred to as "deferred" sentences, may be for up to two years. RCW 9.95.210(1).

(2) Probation imposed under RCW 9.92.060, the Suspended Sentence Act, is limited by the maximum term for the offense, generally one year for gross misdemeanors and 90 days for misdemeanors. See RCW 9.92.062. The court is required to set a date of termination "no later than the date the original sentence would have expired." See Avlonitis v. Sea. Dis. Ct., 97 Wn.2d 131 (1982).

(3) Historically, the Office referred to RCW 9.95.200/210 for deferred sentences and RCW 9.92.06 for suspended sentences. That practice changed in 2003 so that RCW 9.95.200/210 is used for both.

(4) Anti-Stacking Rule.

The court is not allowed to increase the total probation period beyond two years by changing the probation from "deferred" sentence under RCW 9.95.200 to a suspended sentence under RCW 9.92.060. State v. Parsley, 73 Wn. App. 666 (1994).

e. Evidence

The Rules of Evidence (ER) are not applicable to sentence modification hearings or probation hearings. ER 1101(C)(3). Hearsay is generally admissible at probation or sentence violation hearings if the court considers it reliable. Probation officer reports are generally admissible, however unreliable hearsay contained in a report cannot be the sole basis for revocation. State v. Nelson, 103 Wn.2d 760 (1985); State v. Anderson, 88 Wn. App. 541 (1997); State v. Badger, 64 Wn. App. 904 (1992).

f. Defendant's Rights

CrR 7.6(b) (Probation) provides:

The court shall not revoke probation except after a hearing in which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant is entitled to be represented by counsel. . . .

5. Procedures for Covering Sentence Violation (SRA) and Probation Violation Court Hearings.

a. In general in those cases requiring hearings before the sentencing judge (as opposed to administrative community custody hearings)

a violation report is submitted to the court and our office by the DOC Community Corrections Officer or King County probation officer listing and detailing the violations. Our office post-conviction hearing coordinator reviews the report and schedules a hearing if he/she agrees that a hearing is required. However, in Domestic Violence (DV) and Special Assault (SAU) cases the report is sent to the DV or SAU unit coordinator to review and schedule.

In mainstream cases the hearing is generally noted on the "Out-of-Custody Calendar" for limited violations or before the sentencing court for violations beyond the scope of the calendar.

b. SAU and DV deputies generally handle SAU/DV sentence violation hearings before the sentencing court. In mainstream cases the deputy prosecuting attorney(s) assigned as the "morning court deputy" for a particular court is responsible for covering all non-SAU/DV cases for that court.

c. The "morning court deputy" protocol.

Historically, this office assigns a deputy prosecuting attorney to all Superior Court judges for coverage of a variety of matters not pre-assigned to another deputy. The term "morning court" is no longer accurate as many judges now schedule these matters at various time other than 8:30 to 9:00 a.m. Morning matters hearings generally includes restitution, sentence/probation violation sentencing, and miscellaneous post-conviction motions. Deputy prosecuting attorneys assigned to a judge are responsible for communicating with the court's bailiff to ensure coverage of matters scheduled by the court involving our office as a party.

d. The deputy prosecuting attorney's role at any sentence or probation violation hearing is ultimately to enforce the court's sentence. Specifically, the deputy prosecuting attorney should make every effort to ensure a fair hearing on the violations alleged and a just result. While the deputy prosecuting attorney generally will be making a record (presenting evidence usually in the form of the violation report, the testimony of the CCO or PO, etc.) the deputy prosecuting attorney is not obliged to advocate the sentence recommendation of the CCO or PO contained in the written report or expressed by the CCO/PO at the hearing. The deputy prosecuting attorney may make an independent recommendation for disposition, however, the CCO or PO should be given an equal opportunity to advocate the DOC's position.

II. RESTORATION OF RIGHTS

A. Discharge From Sentence

1. Felony – Sentence Reform Act cases RCW 9.94A.637(1)

When an offender has completed the requirements of the sentence, the secretary of the Department or the secretary's designee shall notify the sentencing court, which shall discharge the offender with a certificate of discharge.

The above provision applies only to felons sentenced for crimes after June 30, 1984. RCW 9.94A.900

a. Effect of discharge is to terminate the court's jurisdiction to further enforce the sentencing requirements and to restore all civil rights lost by operation of law upon conviction.

b. Discharge does not restore firearms rights. See AGO opinions 1988, No. 10.

c. Discharge does not eliminate a RCW 10.99 DV no contact order contained in the underlying Judgment unless the discharge specifically says it does. RCW 9.94A.637(5). A certificate of discharge will discharge a no contact order that is a condition of sentence. State v. Minikin, 100 Wn. App. 925 (2000).

d. Discharge does not "wash" the conviction for scoring purposes and is not a finding of rehabilitation. RCW 9.94A.637(4).

e. Discharge does not relieve a defendant of a statutory duty to register as a sex offender.

2. Felony – Prior to the SRA

a. Prison Terms. Prior to the Sentencing Reform Act anyone committed to prison for an indeterminate sentence is subject to the jurisdiction of the Indeterminate Sentence Review (formerly Parole) Board upon release from prison.

Upon completion of the "sentence," the Board has the jurisdiction to make a final order of discharge and to issue a certificate of discharge to the prisoner/parolee, which has the effect of restoring all civil rights, except firearms. See RCW 9.96.050.

b. Probation Sentences.

(1) Suspended Sentences.

Upon termination of any suspended sentence under RCW 9.92.060 or 9.95.210, such person may apply to the court for restoration of his civil rights. Thereupon the court in its discretion may enter an order directing . . . be released from all penalties and disabilities resulting from the offense. RCW 9.92.066.

Does not restore firearms rights. See State v. Thomas, 35 Wn. App. 161 (1983).

(2) Sentences imposed under RCW 9.95.200/.210. Where imposition of sentence (deferreds) or execution of sentence is suspended specifically under RCW 9.95.200/.210, the defendant who has fulfilled the conditions of probation may, in the discretion of the court, "be permitted to withdraw his plea of guilty . . . set aside verdict of guilty . . .; the court may thereupon dismiss the Information . . . who shall thereupon be released from all penalties and disabilities . . . RCW 9.95.240.

(3) The modern practice of using RCW 9.95 for deferred and suspended sentences has the consequence that a suspended sentence may be dismissed pursuant to RCW 9.95.240.

3. Discharge Procedures

Generally, upon completion of the sentencing requirement, the CCO or probation officer will submit a report and proposed order for discharge, termination, or dismissal addressed to the sentencing judge, but forwarded initially to our office to review and sign off. In most cases this is a quick summary review of the report and approval of the proposed order for presentation to the court.

B. Vacation of Conviction Record

1. SRA Felony Sentences – RCW 9.94A.640

a. Statutory Authority

RCW 9.94A.640 provides that a defendant convicted of a class B or C felony that is not defined as a "violent offense" in RCW 9.94A.030 or a crimes against persons in RCW 43.43.380, may

petition the court for vacation of the record of conviction if he/she has been discharged under RCW 9.94A.637 (see above).

b. Requirements

(1) Conviction may not be a violent crime as defined in RCW 9.94A.030(45) (this excludes all class A felonies or attempts, solicitations or conspiracies to commit same, and a long list of class B felonies);

(2) conviction may not be a "crime against person" as defined in RCW 43.43.380;

(3) defendant must be conviction-free for five years following discharge if class C felony, ten years if class B; and,

(4) may not have a criminal charge pending in any court anywhere.

c. Impact/Effect of Vacation. RCW 9.94A.640(3).

(1) Once the court vacates the conviction record the statute provides that:

> … the conviction … shall not be included in the offenders criminal history…, and the offender shall be released from all penalties and disabilities resulting from the offense, for all purposes including responding to questions on employment applications and offender . . . may state that the offender has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in later criminal prosecution.

(2) While the above language is extremely broad, the last sentence would appear to allow the use of a vacated conviction for some purposes in a later criminal prosecution, presumably Unlawful Possession of a Firearm. The court has not directly ruled on this issue with respect to RCW 9.94A.640.

(3) The Washington State Patrol treats a conviction vacated under this provision as "non-conviction" data for purposes of RCW 10.97, Criminal Records Privacy Act. It is removed from public access. It is not "expunged," destroyed or deleted and is available/accessible to law enforcement agencies.

See State v. Breazeale, 144 Wn.2d 828 (2001), for general discussion and for comparison with RCW 9.95.240 (dismissal of deferred sentences).

Also see discussion of RCW 9.96 below.

d. Mandatory or Discretionary.

Since this statute provides that the court " . . . may clear the record of conviction . . ." The court presumably is not required to vacate the conviction record even if the court finds that the defendant otherwise satisfied the requirements for vacation. The court presumably should at least state some reason for denying the petition (i.e., the facts of the underlying offense).

e. Procedural Policy

(1) When a petition to vacate is presented to this office for review, the deputy prosecuting attorney should make sure that the petitioner has satisfied the requirements of RCW 9.94A.640. The petition should, at a minimum, be supported by the defendant's declaration under penalty of perjury (or affidavit) that he/she satisfies the requirements of the law (i.e., five/ten years conviction free; no criminal charges pending, etc).

Petition should also include a copy of the Judgment and Sentence and Certificate of Discharge.

(2) Records Check. Even though a defendant declares under penalty of perjury . . . in most cases a complete criminal records check should be requested from our records office. This should include a WASIC (Washington State Patrol Criminal History), NCIC (National Crime Information Center), Discis (Washington municipal and district court index) check at a minimum. The WASIC printout defendants receive from the Washington State Patrol (WSP) is not a complete record of convictions.

(3) Policy. Generally, if the petitioner meets the statutory requirements and our record check confirms the defendant's declaration, the deputy prosecuting attorney may sign off on a vacation order drafted according to the language of RCW 9.94A.640; no more, no less. Oftentimes the petitioner or his attorney will include extra language

like firearms restoration, sealing, expungement, etc. These are separate remedies with separate requirements.

2. Misdemeanors and Gross Misdemeanors

a. In General. The 2001 Legislature adopted a new law that permits the court to vacate some misdemeanor or gross misdemeanor convictions. See RCW 9.96.060, effective July 1, 2001. Vacation under this statute should be addressed by the court where the conviction occurred. There is a forms packet created by the court administrator (OAC) which accurately and comprehensively covers the statutory requirements, including eligibility. Form CrRLJ 09.0300 (July 2001) RCW 9.96.

b. Deferred Sentences. RCW 9.95.200 - .240.

A "deferred" sentence is one in which the court suspends the imposition of sentence pursuant to RCW 9.95.200/.210 subject to probation conditions. Following the successful completion of probation, the court may simply terminate probation (RCW 9.95.220) or may permit plea withdrawal or set aside the conviction and dismiss the case. In State v. Breazealle, 144 Wn.2d 29 (2001), the court held that a dismissal of a deferred sentence under RCW 9.95.240 is analogous to a vacated SRA felony, and that the Legislature intended they be interpreted accordingly. Therefore the court held that the Superior Court has the statutory authority under RCW 9.95.240 to "vacate" a conviction record following dismissal of the charge and that the State Patrol may not disseminate the information to the public.

The Prosecuting Attorney's policy is that the legislative standards for vacating misdemeanor sentences found in RCW 9.96.060 should apply to petitions to vacate dismissed deferred (misdemeanor) sentences.

c. Procedure.

When a petition to vacate a misdemeanor sentence is presented to this office for approval, the deputy prosecuting attorney should ensure that the defendant's petition and declaration satisfies all of the requirements of RCW 9.96.060. If satisfied, the deputy prosecuting attorney may sign off (waive notice and approve for entry) on the appropriate order. A record check may be necessary to verify or confirm the defendant's declaration with respect to criminal history.

C. Restoration of Firearms Rights

1. In General

This State's firearms policy is codified in RCW 9.41. The State has pre-empted regulation of firearms within its borders. RCW 9.41.290.

A person's ability to legally possess a firearm in Washington state is limited by the criminal provisions found in RCW 9.41.040(1) and (2), (i.e., conviction of any felony, some domestic violence misdemeanors, involuntary mental health commitment, under 18). RCW 9.41.040(3) and (4) describes when a person's right to possess a firearm, lost as a result of a criminal conviction, is or may be restored. See also Section 17.

2. Automatically Restored

a. RCW 9.41.030(3) provides in part:

A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, Certificate of Rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

While the term pardon clearly refers to executive pardoning powers, the courts have only recently begun to deal with the meaning of "Certificate of Rehabilitation or other equivalent procedure . . ."

(1) The first issue pertains to what is or is not an equivalent procedure based on a finding of rehabilitation. State v. Radan, 143 Wn.2d 323 (2001), holds that it must be more than an automatic restoration based on passage of time or compliance with the sentence. While Montana's automatic restoration of civil rights did not satisfy Washington's statutory requirement for a "finding of rehabilitation," the court held that the Montana Department of Correction's finding relevant to his early discharge was an "equivalent procedure" based on a "finding of rehabilitation."

See also State v. Nakatani, 109 Wn. App. 622 (2001), citing Radan. Division I held that dismissal of a deferred sentence for Robbery (pre-SRA) following a completion of probation conditions was not a finding of rehabilitation. In Forster v. Pierce County, 99 Wn. App. 168 (2000),

Division II held that the Washington Parole Board's final discharge and restoration of civil rights was not based on a finding of rehabilitation.

Based on the above case law, neither a final discharge of an SRA felony sentence under RCW 9.94A.637 nor a subsequent vacation of record under RCW 9.94A.640 should be considered an "equivalent procedure" based on a "finding of rehabilitation" unless the court conducts a hearing and enters findings to that effect.

Since a person who qualifies for vacation of a felony record under RCW 9.94A.640 necessarily is eligible for firearms restoration under RCW 9.41.040(4) (see subsection 3 below), there would never be a necessity for such a finding in that situation.

(2) The other issue relates to whether the Washington Legislature has created a legal remedy for obtaining a "Certification of Rehabilitation" following conviction. There is a growing body of "common-law" suggesting that courts have jurisdiction to grant a motion or petition for such a certificate based on the legislative references found in RCW 9.41.040(3), RCW 43.43.380 (loss of employment rights) and ER 609(c). Superior Courts throughout the state, including King County, have adopted local procedures for assigning Petitions for Certificates of Rehabilitation. They are filed by convicted persons who are otherwise ineligible for relief under RCW 9.41.040(4) or whose employment rights have been restricted by virtue of RCW 43.43.380 and are ineligible for statutory vacation of record described in subsection B above. In King County, currently, these petitions are filed with Civil cause numbers and are assigned to the chief civil department judge in employment restoration cases and to the chief criminal department judge in firearms restoration cases.

Currently our office does not appear in these "civil" matters as we do not represent any party nor do we necessarily agree that the courts have statutory jurisdiction to grant such a petition. No one clearly can answer the questions of whether the Legislature intended such remedy to be Judicial or Executive in nature or even what definitions or standards should be considered in deciding such a petition. See also Smith v. State of Washington, 2003 WL 22146011 (Sep 18, 2003, Wash.App. Div. 3) (The court notes that

currently, "there is no provision in Washington statutes for the issuance of a certificate of rehabilitation.")

b. RCW 9.41.030(4) first sentence states that persons who received a sentencing under RCW 9.95.200 (deferred) and a subsequent dismissal under RCW 9.95.240 are not prohibited from possessing firearms unless the conviction was for Indecent Liberties, Arson, Assault, Kidnapping, Extortion, Burglary, or violations of RCW 69.50.401(a).

This portion of the statute has not been reviewed by the Legislature since its adoption (1963), which was prior to the adoption of RCW 9.94A in 1984. Therefore it has limited modern application, requiring most people to petition a court for a restoration order described below or a "Certificate of Rehabilitation" described above.

3. Statutory Procedure for Restoration

a. In 1995, the Legislature greatly expanded Washington's firearms prohibition policy (e.g., all felons), however, also established a specific procedure for Restoration of Firearm Rights and specifically gave jurisdiction to Washington's "Courts of Record" (which excludes courts of limited jurisdiction) and set the legislative standards for such judicial restoration. This procedure presumably applies not only to Washington convictions, but also to Washington residents previously convicted of prohibiting crimes in other states or federal courts, who wish to legally possess a firearm in Washington state.

b. Pursuant to RCW 9.41.040(4), firearms restoration is permitted for any person prohibited from possessing a firearm who:

(1) has not been convicted of a sex offense;

(2) has not been convicted of a class A felony or any offense with a maximum sentence of 20 years or more;

(3) is not currently charged with any crime;

(4) if the prior conviction was for a felony offense, the person has been "five or more consecutive years in the community without being convicted or currently charged with any felony, gross misdemeanor or misdemeanor, if the individual has no prior felony conviction that prohibits the

possession of a firearm counted as part of the offender score RCW 9.94A.360."

This last provision is somewhat confusing, however, the only logical interpretation is that the individual must have been conviction free for five years for a prior class C felony and ten years for a prior class B felony, the SRA's wash-out policy.

(5) for a non-felony offense, after three or more consecutive years in the community without being . . . same language as in 4 above. Therefore, he/she must be conviction free for three years and not have any felony conviction, which does not wash.

c. RCW 9.41.047(3) provides standards and procedures for restoration of firearms rights lost as a result of an involuntary mental health commitment.

d. RCW 9.41.040(4) does not specifically say whether the court has discretion to grant or deny a restoration petition which otherwise complies with the legislative standard. However it would appear that the Legislature did not intend any other requirement beyond those listed. Deputy prosecuting attorneys may sign off/approve petitions for firearms restoration once satisfied that the petition satisfied the statutory requirement and a record check confirms the petitioner's sworn declaration under penalty of perjury that he/she has been crime free for the required period.

Remember that there is no perfect "records check" for conviction data, therefore, any petition should be supported by the <u>defendant's</u> (not his attorney's) sworn declaration of compliance.

SECTION 22: CONDITIONS OF RELEASE: PRETRIAL, PENDING SENTENCING, APPEAL

I. GENERALLY

These policies apply to all recommendations of conditions of release pending charging, trial, sentencing or appeal. Recommendations that vary from these policies shall be made only with the prior approval of a supervisor. Any variations shall be supported by a written statement of reasons in the file.

II. PRELIMINARY APPEARANCE CALENDAR

A. RELEASE WITHOUT CONDITIONS OR ON PERSONAL RECOGNIZANCE

1. Because information available at the preliminary appearance will be limited, caution must be exercised in recommending or not opposing release without conditions or on PR. Particular attention must be given to the nature of the crime and any information provided by the law enforcement agency on the Superform or on the Arresting Agency Detainee Information Sheet. Doubts should be resolved by opposition, to release without conditions or on PR.

2. If the suspect would qualify for release on PR and the arresting police agency has indicated that it will not present its investigative report to our filing unit within the 72-hour period from booking allowed by CrRLJ 3.2.1, the state should not oppose release without conditions. If the investigative report will be received and the suspect qualifies for release on PR, then release shall be recommended, with a return date on the Preliminary Appearance calendar. This will insure the suspect received notice of charging and the arraignment date.

B. OBJECTION TO RELEASE

1. Release without conditions or on PR shall be opposed, if any of the following circumstances exist:

   a. Nature of the Crime:

      (1) Crimes against the person involving actual or threatened violence;

      (2) Crimes involving weapons;

      (3) Crimes involving large actual or threatened losses;

(4) Crimes involving sophisticated methods which indicate they are part of a continuous scheme;

(5) Drug crimes involving a drug trafficker: A "drug trafficker" is an offender booked into the jail for Violation of the Uniform Controlled Substance Act and meets one or more of the following criteria:

(a) delivered any amount of a controlled substance to another; or

(b) was observed delivering suspected controlled substances to another and was found in possession of controlled substances; or

(c) possessed with intent to deliver or manufacture a controlling substance; or

(d) a member of a criminal organization involved in drug trafficking; or

(e) possessed less than $250 worth of controlled substances and (i) the suspect's true identity is in question and/or (ii) the suspect lacks a verified King County address and the cooperation of a responsible third person who will always know how to reach the detainee; or

(f) prior felony conviction within five years or pending charges of violating the Uniform Controlled Substances Act, or five or more prior failures to appear in court.

(6) Crimes involving a member of a criminal organization.

(7) Rationale - The nature of the crime is specifically made relevant to conditions of release by CrRLJ 3.2 (b) and (c) and CrR 3.2 (b) and (c). This is because the seriousness of the crime is related to the severity of the potential sentence and thus to the defendant's interest in avoiding its imposition. Further, these court rules stress that the court, in determining conditions of release, should consider which ones will reduce danger to others or the community and that a relevant factor in this regard is nature of the charge.

b. Prior Criminal Record:

(1) The suspect's prior criminal record is sufficiently serious as to justify a sentence recommendation of over six months in jail or a prison sentence.

(2) The suspect is on community custody, community placement, community supervision or parole or has pending criminal charges.

(3) Rationale - The prior criminal record of the subject is made relevant to conditions of release by CrRLJ 3.2 (b) and (c) and CrR 3.2 (b) for the same reasons as the nature of the crime.

c. History of Response to Legal Process

If any prior instances of failure to respond to legal process, in other than minor traffic offenses, exist. This shall include convictions for escape, bail jumping, eluding and prior instances where bench warrants were issued because of the defendant's non-appearance, or prior failure to appear on misdemeanor or serious traffic charges.

d. Prior Specific Misconduct

Defendant has a history of verbal or physical acts indicating he or she presents a danger to specific others or to the community generally, such as of verbal or physical acts indicating interference with the administration of justice. CrR 3.2 (b) and CrRLJ 3.2 (b) provide these illustrations: past or present record of threats to victims or witnesses, record of community offenses while on pretrial release and use or threatened use of deadly weapons, especially to victims or witnesses.

e. Ties to the Community

If a defendant is not disqualified from release on PR by the above four (4) policies, then PR shall be recommended, unless the defendant lacks substantial ties to the community. In determining whether ties to the community exist, reliance shall be placed on the reports of the investigating police agency and of the Court Services Unit.

f. Additional Conditions on Release

If release is granted, and if appropriate, the deputy shall recommend that any release be conditioned, upon no contact by the defendant with the victim or witnesses.

C. AMOUNT OF BAIL

1. If these policies require opposition to release without conditions or on PR, bail in the form of cash or surety, within the following ranges, normally shall be recommended. These ranges assume no significant factors such as those listed under II.B. above and bail should be increased due to factors listed above under II. B. (e.g., extensive criminal history, threats to victim, etc.).

Crime Alleged	Amount
Capital Offense (see CrR 3.2 (e))	No Bail
Any Intentional Homicide	$250,000 - +
Crime Qualifying Df as Persistent Offender	$500,000 - +
Class A Felony	$100,000 - +
Class B Felony (against persons)	$ 20,000 - $250,000
Class B Felony (against property/other)	PR - $100,000
Class C Felony	PR - $ 25,000
Drug Crimes	
Major Drug Offender (see Sec. 3, IV., E., 2., (2), (d) major VUCSA under SRA)	$ 50,000 - +
Drug Trafficker as defined in this section - See Sec. 19, II. B., 1., a., (5).	$ 5,000 - $ 50,000
Simple possession of any controlled substance.	PR - $ 10,000

2. Posting of cash in the amount of 10% (appearance bond) of the amount of the bond shall be opposed, because it amounts to a 90% reduction of bond.

3. The posting of property in lieu of a surety bond shall be opposed without approval of Assistant Chief or Chief Deputy. A property bond presents a multitude of problems.

D. SECOND APPEARANCE

1. If these policies require the opposition to release without conditions, or on PR, we will also oppose release, at any time, prior to the expiration of the full 72-hour period allowed by CrRLJ 3.2.1.

2. If there is any indication that the investigating police agency will not present the case within the 72-hour period, the Deputy or the Legal Assistant handling the preliminary appearance calendar shall call the police agency and notify them of when the suspect will be released, if their reports are not received.

3. The 72-hour period allowed by CrRLJ 3.2.1 begins upon a suspect's booking in jail, not at the actual arrest. It never includes any part of Saturday, Sunday or a holiday.

III. FORMAL CHARGING

A. The policies stated above shall be applied in determining what conditions of release to request at filing.

B. If the defendant has previously had conditions of release set on the same criminal incident, our recommendation, upon filing, should be for the conditions originally recommended, unless specific factors exist which justify additional conditions.

C. King County Local CrR2.2(g) provides that:

"When a charge is filed in Superior Court and a warrant is requested, the court shall be provided with the following information about the person charged:…"

"(2) By the prosecuting attorney, insofar as possible.
(A) A brief summary of the alleged facts of the charge;
(B) Information concerning other known pending or potential charges;
(C) A summary of any known criminal record;
(D) Any other facts deemed material to the issue of pretrial release;
(E) Any ruling of a magistrate at a preliminary appearance."

D. In any crime of violence or crime against a person, the filing DPA shall request that any release be conditional upon no contact with the victim, victim's family or lay witnesses.

IV. COMMUNITY CORRECTIONS ALTERNATIVES IN LIEU OF TOTAL CONFINEMENT

A. GENERALLY

Defendants requesting community corrections alternatives must be appropriately screened by Community Corrections Program personnel to determine that they meet the technical requirements of the programs and to review the placement information. Review of the placement information is expected to include a review of the criminal record of any resident of the defendant's placement if the placement is not the defendant's own residence. The continuum of more restrictive to least restrictive alternatives are as follows: jail confinement, work/educational release (WER), electronic home detention--level II or "enhanced EHD," and electronic home detention—level I or "basic EHD."

B. CONSIDERATION OF ALTERNATIVES

1. Placement on community based corrections alternative programs should be considered in all cases, unless any of the following circumstances exist:

   a. Current Offense

      (1) The charged offense is statutorily prohibited from Electronic Home Detention by RCW 9.94A.734;
      (2) The charged offense involved a firearm;
      (3) The charged offense is intimidating a witness, tampering with a witness, escape or bail jumping;
      (4) The standard range for the charged offense is more than 12 months (However, if the charged offense is possession of a controlled substance under RCW 69.50.401(d) or forged prescription for a controlled substance under RCW 69.50.403, EHD and WER may be considered as per RCW 9.94A.734.);
      (5) Rationale. The nature of the crime is specifically made relevant to a determination of the defendant's eligibility for community corrections alternatives by RCW 9.94A.734. Although RCW 9.94A.734 is part of the SRA and it is not applicable pre-sentencing, the decision of the legislature that certain crimes are not eligible for less restrictive alternatives after conviction is persuasive authority for opposing imposition of less restrictive alternatives for these crimes before a finding of guilt. Further, the only crimes eligible for community corrections alternatives are crimes that have a jail sentence not a prison sentence, except in the case of certain drug offenses.

   b. Prior Criminal Record

(1) The suspect has any conviction for a Class A offense, intimidating a witness, tampering with a witness, or comparable out-of-state or federal offense.
(2) Rationale. The court should consider the defendant's danger to others including the victim, witnesses and to the community in determining placement in a less restrictive environment.

c. History of Response to Legal Process

(1) The suspect has any conviction for escape, failure to return to work release or bail jumping.
(2) If the suspect has a history of failures to respond to legal process (i.e.: FTAs), deputies should consider the following factors before recommending a jail alternative: the number of FTAs, the recency of the FTAs, and the seriousness of the offenses underlying the FTA; and the seriousness of the current offense. (Deputies should be mindful that warrants may issue at the time of the filing of charges so certain warrants may not be indicative of a defendant's lack of response to the legal process.)
(3) Rationale. A defendant convicted of escape, failure to return to work release or bail jumping has demonstrated a disregard for abiding by placement rules and regulations and should not be placed in a less restrictive environment. Unlike the above crimes, a decision regarding recommending a jail alternative for defendants with a history of failing to respond to the legal process requires a balancing of various factors.

C. COMMUNITY ALTERNATIVES FOR POST-SENTENCING MODIFICATIONS

1. Placement on community based corrections alternative programs should be considered in all cases, except when sanctions for post-sentence modifications are imposed under the following circumstances:

a. If any of the above stated circumstances apply.
b. Each time sanctions for post-sentencing modifications are imposed, a more restrictive placement should be recommended (i.e.: basic EHD, then enhanced EHD, then WER). For defendants with lengthy histories of sentence modifications, community corrections alternative programs shall be opposed.

V. BAIL PENDING SENTENCING

A. APPLICABLE RULES AND STATUTES

1. CrR 3.2 (f) provides:

"After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered."

2. RCW 10.64.025 provides:

a. "A defendant who has been found guilty of a felony, and is waiting sentencing, shall be detained, unless the court finds, by clear and convincing evidence, that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community, if released. Any bail bond that was posted on behalf of a defendant shall, upon the defendant's conviction, be exonerated."

b. A defendant who has been found guilty of one of the following offenses shall be detained, pending sentencing: Rape in the First or Second Degree (RCW 9A.44.040 and 9A.44.050); Rape of a Child in the First, Second, or Third Degree (RCW 9A.44.073, 9A.44.076, and 9A.44.079); Child Molestation in the First, Second, or the Third Degree (RCW 9A.44.083, 9A.44.086, and 9A.44.089); Sexual Misconduct with a Minor in the First or Second Degree (RCW 9A.44.093 and 9A.44.096); Indecent Liberties (RCW 9A.44.100); Incest (RCW 9A.64.020); Luring (RCW 9A.40.090); any Class "A" or "B" felony that is a sexually motivated offense, as defined in RCW 9.94A.030; a felony violation of RCW 9.68A.090; or any offense that is, under chapter 9A.28 RCW, a criminal attempt, solicitation, or conspiracy to commit one of those offenses."

3. RCW 10.64.027 provides:

"In order to minimize the trauma to the victim, the court may attach conditions on release of a defendant under section 2 of this act, regarding the whereabouts of the defendant, contact with the victim or other conditions."

B. GENERAL

Following conviction by plea, the state shall move to revoke PR, or other conditions of release, pending sentencing in any case where the circumstances described in RCW 10.64.025 are present. Following conviction at trial, the state shall move to revoke PR, or other conditions of release, pending sentencing in any case where the circumstances described in RCW 10.64.025 are present and in any case in which the standard range exceeds one year. The statute requires that those convicted of the sex offenses listed in RCW 10.64.025(2) be detained upon conviction.

Practical Notes: A surety bond posted to ensure defendant's appearance for trial is automatically exonerated upon conviction. It is not valid to ensure appearance for sentencing. A new bond (or rider) must be posted prior to, or at the time of, conviction or the defendant remanded to custody until one is posted.

VI. Bail on Appeal

A. APPLICABLE RULES AND STATUTES:

1. RCW 9.95.062 and CrR 3.2 (f)

CrR 3.2 (f), see IV.A. above, is consistent with RCW 9.95.062.

RCW 9.95.062(1) provides:

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

a. the defendant is likely to flee or to pose a danger to the safety of any other person or the community, if the judgment is stayed; or

b. the delay resulting from the stay will unduly diminish the deterrent effect of the punishment; or

c. a stay of the judgment will cause unreasonable trauma to the victims of the crime or their families; or

d. the defendant has not undertaken, to the extent of the defendant's financial ability, to pay the financial obligations under the judgment or has not posted an adequate performance bond to assure payment.

RCW 9.95.062(2) provides:

An appeal by a defendant convicted of one of the following offenses shall not stay execution of the judgment of conviction: Rape in the First or Second Degree (RCW 9A.44.040 and 9A.44.050); Rape of a Child in the First, Second, or Third Degree (RCW 9A.44.073, 9A.44.076, and 9A.44.079); Child Molestation in the First, Second, or the Third Degree (RCW 9A.44.083, 9A.44.086, and 9A.44.089); Sexual Misconduct with a Minor in the First or Second Degree (RCW 9A.44.093 and 9A.44.096); Indecent Liberties (RCW 9A.44.100); Incest (RCW 9A.64.020); Luring (RCW 9A.40.090); any Class "A" or "B" felony that is a sexually motivated offense, as defined in RCW 9.94A.030; a felony violation of RCW 9.68A.090; or any offense that is, under chapter 9A.28 RCW, a criminal attempt, solicitation, or conspiracy to commit one of those offenses.

RCW 9.95.062(3) provides:

In case the defendant has been convicted of a felony, and has been unable to obtain release pending the appeal by posting an appeal bond, cash adequate security, release on personal recognizance, or any other conditions imposed by the court, the time the defendant has been imprisoned, pending the appeal, shall be deducted from the term for which the defendant was sentenced, if the judgment is confirmed."

2. RCW 9.95.064 provides:

"In order to minimize the trauma to the victim, the court may attach conditions on release of a defendant under section 1 of this act, regarding the whereabouts of the defendant, contact with the victim, or other conditions."

B. GENERAL

Generally, the state shall move the court to deny stay of execution of any sentence in excess of one year of confinement in the Department of Corrections or that falls within RCW 9.95.062(2). In any other case, the state shall not object to reasonable bail being set by the court, if none of the circumstances set forth in RCW 9.95.062(1) are present. The statute prohibits a stay of execution for those convicted of the sex offenses listed in RCW 9.95.025(2). The state will not agree to release on personal recognizance, pending appeal in any case.

C. PROCEDURE

At sentencing (verdict at trial), the defendant should be remanded to custody immediately, unless the sentence is to the King County Jail for less than one year and the court has allowed a delayed entry to qualify for work release.

While a defendant has 30 days to file notice of appeal from a judgment (trial), if defendant is not in custody, there generally is no defense interest in having conditions of release set at a later date and no calendared event to remind the prosecutor's office.

There is no legal reason to delay execution of the judgment, beyond the moment of sentencing, other than appeal. Execution of the judgment and sentence is not legally stayed until the defendant has filed written Notice of Appeal and satisfied conditions of release, pending appeal.

Practical Notes: A surety bond posted to ensure defendant's appearance for sentencing is not valid as an appeal bond. A new bond must be posted.

King County Department of Adult Detention, Court Services, will not supervise defendants on appeal. At the present time, Department of Corrections Division of Community Services will supervise conditions of release on appeal, if ordered. Any such order should be forwarded along, with a copy of the judgment, to the Department immediately.

D. ORDER

An appropriate order (setting conditions, denying bail, etc.) shall be entered. A copy of the order must be forwarded to D.O.C., particularly if the court has ordered supervision during the appeal. There is a stock PAO form for "conditions of release and stay pending appeal" along with instructions for use.