King County Prosecuting
Attorney's Office

FILING AND DISPOSITION STANDARDS

Criminal Division
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SECTION 1: INTRODUCTION, PURPOSE, DISCUSSION PAPER AND 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 that 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.

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 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 in violation 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 the size of 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 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 counsels 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 non-evidentiary 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.*

Non-evidentiary decline. *Not every case that is technically fileable should be filed. The filing inquiry is more than a strictly legal one. There are several non-evidentiary grounds for the prosecutor to decline to prosecute, and Washington law and the King County Prosecutor's Policies each contain a nonexclusive list of non-evidentiary 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 non-enforcement.*

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, simultaneous with a trend towards sentencing reform 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" and "shall" 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 discretion and the exception standards set forth within.

SECTION 2: DECLINATION, FILING DECISION, SENTENCE RECOMMENDATIONS 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 chair of the unit or the Chief Deputy of the Criminal Division. The Prosecutor 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 following evidentiary sufficiency:

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. Crimes against persons are enumerated in RCW 9.94A.411.

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. Crimes against property /other crimes are enumerated in RCW 9.94A.411.

C. DECLINE FOR NON-EVIDENTIARY REASONS

RCW 9.94A.411 (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 that 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 that 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 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 District Court, unless otherwise indicated in Section 21.

3. Misdemeanor

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

B. STANDARDS OF EVIDENTIARY SUFFICIENCY

State-wide Prosecuting Standards (RCW 9.94A.411) provide:

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. Crimes against persons are enumerated in RCW 9.94A.411.

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. Crimes against property /other crimes are enumerated in RCW 9.94A.411.

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 that 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 crimes.

D. DEADLY WEAPON AND FIREARM ALLEGATION – **SEE WEAPON ENHANCEMENTS, SECTION 19**

E. SEXUAL MOTIVATION ALLEGATION – **SEE SEXUAL ASSAULT, SECTION 6**

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

F. AGGRAVATING CIRCUMSTANCES

The filing of an aggravating circumstance intended to support an exceptional sentence above the standard range shall be approved by a supervising senior. The standards for particular aggravating circumstances applicable to particular crimes are contained within the relevant sections herein.

G. CHARGES WITH POTENTIALLY LENGTHY SENTENCES

Prior to any plea or trial in a non-homicide case where the defendant is facing a potential prison sentence of 360 months or more, the deputy shall obtain the approval of the charges and/or plea offer by the Unit Chair and the Chief Criminal Deputy.

H. 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 early plea deputy. Appeals from the decisions of the early plea deputy may be made to the chair of the unit, who may refer the appeal to the Chief Deputy of the Criminal Division and in turn to the Prosecutor.

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 within the standard range for the crime in question unless there are mitigating factors.

b. Early Plea Process

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.

In accordance with the early plea process, 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 toward 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.

(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 that would justify a deviation outside the presumptive sentencing range, and identify whether any aggravating factors must be decided by the jury or by the judge. The filing of an aggravating circumstance intended to support an exceptional sentence above the standard range shall be approved by a supervising senior.

(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 offense encompass the same criminal conduct and the Judgment and Sentence should clearly reflect whether any current offenses are found to be the same criminal conduct. As a general rule, filing multiple counts that 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) 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 FTAs, the seriousness of the offenses underlying FTAs, 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, RCW 9.94A.650

(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:

Class C felony: 0-60 days confinement
Class B felony: 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) 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 agrees to make restitution for any uncharged offenses not prosecuted pursuant to the plea agreement pursuant to RCW 9.94A.753(5) if there is probable cause to believe the defendant committed the uncharged crimes 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 that make restitution inappropriate. RCW 9.94A.753.

(7) Other Monetary Obligation Sentence

The State's sentence recommendation normally shall include the following monetary sentence: the DNA collection fee (if not previously collected), and the victim penalty assessment. If appropriate, the State's recommendation may include: payment of extradition costs and contribution to county inter-local drug fund. While fines are not normally recommended, they may be recommended in economic crimes.

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

When appropriate, the State's sentencing recommendation may include a recommendation for a no contact order in accordance with RCW 9.94A.505(9).

(9) Blood Testing – HIV and DNA Identification System

(a) The State's sentence recommendation shall provide for blood testing for HIV and/or DNA collection 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

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

The misdemeanor qualifying offenses are:

(i) assault in the fourth degree where domestic violence was pled and proven,
(ii) assault in the fourth degree with sexual motivation,
(iii) communication with a minor for immoral purposes (CMIP),
(iv) custodial sexual misconduct in the second degree,
(v) harassment,
(vi) patronizing a prostitute,

(vii) sexual misconduct with a minor in the second degree,
(viii) stalking,
(ix) indecent exposure,
(x) violation of a sexual assault protection order.

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

(10) 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 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 a felony DUI, felony Physical Control, VUCSA offense, or Solicitation to Commit a 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. For example, a 36-month WEC sentence may result in defendant serving as little as 120 days in prison with the balance on community custody, which is nothing more than ordinary probation supervision in the community. Do not recommend WEC unless the reduced confinement is consistent with case facts and the defendant's criminal history.

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

(11) Special Drug Offender Sentence Alternative (DOSA),. See Section 18.

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. Look at the top of the form for the form description (i.e., non-sex offense; sentence over one year).

Check for: Crime category (sex, non-sex offense),
Crime date (before 7/1/00, after 7/1/00)
Recommendation (over one year, under one year, first offender waiver, DOSA, SOSA)

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. For 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 determines the presumptive standard range. 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:

> 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 risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim 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. RCW 9.94A.500.

b. Plea Agreement

(1) Defense Stipulation to Criminal History:

If the defendant stipulates to 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.

(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 the deputy prosecutor at the time of the plea shall state that the State may make a recommendation at sentencing for the full penalty allowed by law.

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 certified prior conviction documents.

III. POST-TRIAL SETTING PROCEDURES

A. COUNTS/CHARGES – AMENDMENT

If the defendant has elected to go to trial, the initial sentencing recommendation is withdrawn. It is the assigned trial deputy's responsibility to file additional offenses, enhancements or aggravating circumstances. All such amendments to the charges must be approved by a supervising senior. Additional offenses,

sentence enhancements and aggravating circumstances may be charged only if they are necessary to ensure that the charges:

1. accurately reflect the severity of the defendant's conduct, and

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

3. will result in restitution to all victims.

Additional offenses, sentence enhancement and aggravating circumstances shall not be charged if the additional offenses, enhancements or circumstances will result in an excessive sentence that is not reasonably proportionate to the defendant's conduct.

B. SENTENCING RECOMMENDATION

1. Procedure

   Once defense counsel elects to take a trial date, the initial sentencing recommendation is withdrawn. Any further plea negotiations after a trial date is received shall first be addressed to the trial deputy.

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, except for non-violent crimes resolved by an early plea. The original shall be retained in the case file and a copy forwarded to 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 the defense attorney, it shall be made clear that no proposed exception is binding until it has been approved pursuant to this section, and that the State 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.

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):

      Exceptions must be approved by the chair of the unit and the Chief Criminal Deputy.

   b. Serious Violent Crimes:

      Exceptions must be approved by the chair of the unit.

   c. Other Crimes (Violent and Non-Violent):

      Exceptions must be approved by the chair of the unit or a supervising senior.

C. 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 chair of the unit.

D. DISMISSAL OF CHARGES

The presence of factors listed herein as reasons for declining to file charges may justify the decision to dismiss a prosecution that has been commenced. When there is a conflict between the general provisions for decline and the specific crime section on dismissal, the specific crime section shall be controlling.

E. 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 that make conviction on the original charges doubtful and that 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 that 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.

F. DISCLOSURE

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

G. DEVIATION BELOW THE STANDARD RANGE

1. Stipulation and Sentencing Memorandum

a. In addition to following the above-stated exception policy, any deputy who proposes a deviation below 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 mitigating factors, and a recitation supporting the deviation. The non-exclusive statutory list of reasons for deviation below the standard range are set forth in RCW 9.94A.535(1).

b. 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.

c. 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.

H. ALTERNATIVE CONVERSION

Under RCW 9.94A.680, for sentences of 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. The deputy who proposes not to use alternatives to total confinement for non-violent offenders qualifying for alternate conversions shall justify the decision with reasons stated on the State's sentence recommendation form.

V. IMMIGRATION CONSEQUENCES

The U.S. Supreme Court held in *Padilla v. Kentucky*, 559 U. S. 356 (2010), that in light of the severity of the deportation consequence, the Sixth Amendment duty to provide effective assistance of counsel requires a criminal defense attorney to affirmatively and accurately advise the defendant about the immigration consequences of a guilty plea. In so holding, the Court recognized that it is in the State's interest to give informed consideration to immigration consequences when seeking to resolve criminal charges or fashioning sentences.

It follows, therefore, that prosecutors should consider any verified immigration consequences to a defendant from any negotiated plea or sentence recommendation. Consideration of these consequences does not require that the plea or sentence recommendation be altered, if the facts and circumstances of a case do not warrant making such an adjustment. Rather, it is required only that these consequences be considered when attempting to craft a fair resolution to every case.

Immigration law is extremely complicated and subject to change. No one can predict whether a criminal conviction will in fact lead to deportation. In considering immigration consequences, prosecutors should keep in mind that the resolution of a criminal case will likely only decrease or increase the risk of deportation or other adverse immigration consequences.

Prosecutors should be mindful of the following guidelines when weighing immigration consequences in charging decisions, plea offers, and sentence recommendations:

- Any verified immigration consequences to a defendant from a proposed resolution should be considered. Consideration of these consequences, however, does not require or mandate any alteration of the resolution. Appropriate resolutions are highly fact-specific, and judgment must be exercised when determining a just outcome to a case.

- Generally, consideration of immigration consequences is not appropriate in cases involving a serious violent felony, a repeat violent felony offender or a felony sex offender.

- In general, the less serious the crime, or the shorter the standard range, the more likely an immigration consequence will unjustly impact the fairness of a resolution.

- The decision to alter a resolution due to immigration consequences should be thoroughly documented in the case file, including defense counsel's representations as to the consequences and the verification that was received of these consequences. Consideration of immigration consequences should not result in a resolution that undermines the

purposes of the Sentencing Reform Act by resulting in a sentence that is not commensurate with others committing similar offenses. When a resolution is a departure from other KCPAO policies or standards, it should be approved by a supervisor.

VI. 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.

SECTION 3: HOMICIDE

I. FILING

A. APPROVAL

All homicides filings must be approved by a Unit Chair, or the Chief Criminal Deputy, or the Assistant Chief Criminal Deputies.

B. 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.

C. CHARGE SELECTION

1. Degree

a. Aggravated Murder

(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 Criminal Deputy and the Prosecutor. No deputy prosecuting attorney is authorized to file aggravated murder without the prior personal approval of the Prosecutor. If the Prosecutor 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 Prosecutor (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.

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

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

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

(a) Premeditated homicide cases shall be filed as murder in the first degree only if sufficient admissible evidence of "premeditation" (see RCW 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) First-degree murder based upon extreme indifference shall be charged if there is sufficient admissible evidence existing to prove that the defendant manifested an extreme indifference to human life and engaged in conduct which created a grave risk of death, and thereby caused the death of a person.

(b) Mens rea: This alternative means requires proof of "an extreme form of recklessness" which sets the crime apart from first-degree manslaughter." State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991). The facts must establish the defendant's subjective knowledge that his

or her act is extremely dangerous, and his or her indifference to the consequences. State v. Barstad, 93 Wn. App. 553 (1999).

(c) Intended victim: When the act causing the victim's death was aimed at and inflicted on the victim, and none other, extreme indifference should not be charged. State v. Anderson, 94 Wn.2d 176, 188-189 (1980); State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980)). Where the defendant targeted a particular victim, but the defendant's extreme reckless behavior placed persons in danger other than the intended victim, extreme indifference may be charged. State v. Pastrana, 94 Wn. App. 463 (1999).

(d) Non-exclusion factors to consider whether to charge extreme indifference:

a. The number of persons endangered by the defendant's conduct;
b. The number of defendant's extremely reckless acts (such as the number of shots fired);
c. Whether the death caused by the defendant's dangerous behavior was reasonably foreseeable;
d. Whether there was an intended target and a transferred intent theory would support a premeditated murder charge;
e. The defendant has a plausible self-defense claim.

(e) A Murder 1º charge under an "extreme indifference" theory should be charged only after consultation with MDOP supervisors and/or the chief criminal deputy.

c. Felony Murder in the First Degree – 9A.32.030(1)(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(1)(c) exists.

(3) Doubts as to whether the conduct establishes a requisite felony listed in 9A.32.030(1)(c) shall be resolved by charging felony murder in the second degree.

d. Homicide by Abuse – RCW 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 – RCW 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 a 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(1)(b)(i)-(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.36.021(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 may be filed as Manslaughter when: 1) the crime can be characterized as an "accidental" shooting or a "one-punch" situation, and 2) a reasonable person would not have foreseen that death or serious injury would result from the blow inflicted. See Manslaughter section below.

f. Manslaughter – RCW 9A.32.060 and 9A.32.070.

(1) Reckless or criminally negligent driving that results in the death of another person should ordinarily be filed as a vehicular homicide.

(2) A non-intentional homicide resulting from the handling of a firearm shall ordinarily be filed as Manslaughter in the First Degree.

(3) Other non-intentional homicide 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 a substantial risk that a homicide may occur to the jury, in which case Manslaughter in the First Degree (RCW 9A.32.060) shall be charged. See, State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

2. Controlled Substances Homicide – RCW 69.50.415.

a. Procedure

Controlled substances homicide shall be handled by the General Crimes Unit (Seattle) or the Violent and Economic Crime Unit (Kent), depending on the law enforcement agency referring the charge.

All controlled substance homicide filings must be approved by the Chief Criminal Deputy or an Assistant Chief Criminal Deputy.

b. Elements

The State must prove beyond a reasonable doubt:

(1) The defendant unlawfully delivered a controlled substance to the decedent;
(2) The delivery occurred in the State of Washington;
(3) The defendant knew that the substance was a controlled substance;
(4) The decedent subsequently used the substance delivered by the defendant;
(5) The use of the substance was the proximate cause of death of the decedent.

c. Intent and Aggravating Factors

Apart from the defendant's knowledge that the substance was a controlled substance, the controlled substances homicide statute requires no other mens rea; thus, the crime is subject to strict liability. The King County Prosecuting Attorney's Office recognizes mitigating circumstances where individuals addicted to controlled substances may share or sell controlled substances in order to subsidize their addiction. Additionally, the King County Prosecuting Attorney's Office recognizes mitigating circumstances where the individual who delivers the lethal controlled substance also ingested the same lethal controlled substance. Therefore, the King County Prosecuting Attorney's Office requires that certain aggravating factors be present for the filing of controlled substances homicide. The following is a non-exclusive list of such aggravating factors:

TIER 1

The King County Prosecuting Attorney's Office will typically file controlled substances homicide if one of the following aggravating factors are present:

(1) Evidence that the decedent was a minor at the time of the offense, however the nature and context of the defendant's and decedent's relationship will be considered;
(2) Evidence that the defendant engaged in manufacturing the controlled substance that led to the decedent's death. For purposes of this aggravating factor, manufacturing is not defined as diluting a controlled substance;
(3) Evidence that the defendant misled the decedent about the nature or potency of the controlled substance that led to the decedent's death;
(4) Evidence that the defendant forced the decedent to consume the controlled substance that led to the decedent's death;
(5) Evidence that the defendant used his or her position or status to facilitate the commission of the offense, including a position of trust, confidence or fiduciary responsibility. See RCW 9.94A.530;
(6) Evidence that the defendant knew that one or more of his/her prior deliveries of a similar controlled substance resulted in an overdose to themself or another that was fatal or required Narcan or other medical intervention.
(7) Evidence that the defendant continued to deliver controlled substances to individual(s) after becoming aware that his/her delivery contributed to a fatal overdose.

TIER 2

Behavior encompassed in Tier 2 would normally be filed as Delivery of a Controlled Substance; however, the King County Prosecuting Attorney's Office will assess each referral on a case by case basis and consider filing controlled substances homicide if two or more of the following aggravating factors are present:

(1) Evidence that the defendant knowingly ignored an increased risk that the controlled substance would lead to the decedent's death. Such a risk can arise from the nature or potency of the substance delivered, from a pre-existing condition of the decedent, or similar circumstances;
(2) Relevant evidence of the defendant's criminal history;
(3) Evidence that the defendant delivered to the decedent, controlled substances in quantities substantially larger than for personal use;
(4) Evidence that the defendant occupied a higher position in the drug distribution hierarchy;

(5) Evidence that the defendant delivered the controlled substance as compensation for sexual contact or sexual intercourse.

c. Evidentiary Issues

(1) Identification of the Controlled Substance

To establish the illegality of controlled substances homicide, the State must at least specify the applicable RCW 69.50.401(2) subsection ((a), (b), or (c)) or identify the schedule of the controlled substance that caused the user's death. Simply alleging that an accused person delivered a controlled substance in violation of RCW 69.50.401 does not satisfy the essential element rule because it is over inclusive; that is, it alleges both criminal and noncriminal behavior. State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013).

(2) Proximate Cause

The State must prove that the controlled substance delivered by the defendant was a proximate cause, but not the sole cause, of the decedent's death. State v. Christman, 160 Wn. App. 741, 249 P.3d 680 (2011).

(3) Compared to Federal Standard

Although the federal statute is similarly worded to Washington, federal courts require "but for" causation when more than one substance is found within the decedent's system. However, no Washington opinion has analyzed the Washington statute since Burrage. Burrage v. United States, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).

(4) Corpus Delicti

The State must produce evidence independent of the defendant's statements sufficient to support that the controlled substance that was delivered to the decedent and that the decedent's use of that substance resulted in death. State v. Bernal, 109 Wn. App. 150, 154, 33 P.3d 1106 (2001) (insufficient evidence of corpus delicti when only evidence presented was that the defendant said she delivered heroin to the decedent the night before his death and the decedent was found dead of a heroin overdose the following day). The State

must present some independent evidence that establishes a reasonable inference that the defendant provided the decedent the controlled substance resulting in death. The evidence need not be sufficient to support a conviction, but must provide prima facie corroboration of the crime. State v. Zillyette, 163 Wn. App. 124, 130-31, 256 P.3d 1288 (2011) (rev'd on other grounds, Zillyette, 178 Wn.2d 153 (2013)).

d. Law Enforcement Involvement

The King County Prosecuting Attorney's Office requests Law Enforcement follow overdose death investigation procedures recommended by the King County Medical Examiner's Office.

e. King County Medical Examiner

In order to prove a controlled substance homicide, the King County Prosecuting Attorney's Office heavily relies on the expert opinion of the King County Medical Examiner in determining whether the involved substance was a proximate cause of death.

3. Sexual Motivation Allegation. See Section 6, Sexual Assault.

4. Special Assault Unit Homicides

The following types of homicide normally shall be handled by the Special Assault Unit or Elder Abuse prosecutors:

a. homicides of infants;

b. elder abuse homicides.

5. Sentencing Enhancements. See Weapon Enhancements, Section 19.

II. DISPOSITION

A. CHARGE REDUCTION AND/OR DISMISSAL

1. A defendant will normally be expected to plead guilty to the degree or crime(s) charged, or go to trial.

2. The Chief Criminal Deputy must approve all exceptions in homicide cases. The victim's family and the investigating law enforcement agency must be consulted and allowed to provide input prior to any agreement to reduce the charges.

3. 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, that were not apparent at filing, are the only factors that 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 and law enforcement before being concluded.

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

   c. The Prosecutor 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.

B. SENTENCE RECOMMENDATION

1. 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 and law enforcement before being concluded. The requests of the next of kin of the victim shall always be considered and may justify an exception.

2. 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.540(1)(a).

3. Restitution

The State will recommend full lawful restitution.

4. Community Custody

The State will recommend community custody as required by law.

5. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 4: ASSAULT

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Assault cases will be filed if sufficient admissible evidence exists that, 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. ASSAULT DEFINITION - WPIC 35.50.

1. An assault is an intentional touching, striking, cutting, or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting or shooting is offensive if the touching striking, cutting or shooting would offend an ordinary person who is not unduly sensitive.

2. An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

3. An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension of imminent fear of bodily injury even though the actor did not actually indent to inflict bodily injury.

4. An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

C. CHARGE SELECTION

1. Degree

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

      (1) Assault in the first degree shall be filed if 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;

(b) administers, exposes, or transmits to or causes to be taken poison, the human immunodeficiency virus as defined in RCW 70.24, or any other destructive or noxious substance; or

(c) assaults another and inflicts great bodily harm.

(2) Definitions

(a) Intent - RCW 9A.08.010(1)(a).

A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) 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 function of any bodily part or organ.

(c) Deadly Weapon - RCW 9A.04.110(6).

Deadly Weapon means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

(3) Attempted Murder vs. Assault in the First 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 (e.g., multiple stab wounds) indicating intent to kill.

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

The filing deputy shall ensure that evidence exists that would justify a finding of great bodily harm and that a thorough investigation of the harm has been conducted (i.e., witness statements, medical reports have become or will become part of the prosecutor's file).

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. Determination of whether or not great bodily harm was inflicted must be made on an individual case basis.

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, may include:

(a) loss of a limb;

(b) permanent paralysis of a limb; or

(c) burn scarring that plastic surgery will not repair.

(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;

(g) Assaults another by strangulation.

(2) Definitions

(a) Recklessness - RCW 9A.08.010(1)(c).

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(b) 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.

(c) Strangulation - RCW 9A.04.110(26).

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

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.

Determination of whether substantial bodily harm exists must be made on an individual case basis.

Examples of substantial bodily harm, may 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.

(4) Assault in the Second Degree - Assault with a Deadly Weapon vs. Brandishing a Weapon

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 rise to the level of an intentional assault with a knife, may include:

(a) approaching within a short distance from the victim while armed with a knife, and pointing the knife towards the victim;

(b) making threatening gestures towards the victim with the knife;

(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.

(5) Assault in the Second Degree - Strangulation and Suffocation

Strangulation and suffocation cases shall normally be filed as Assault in the Second Degree when there is sufficient admissible evidence that the victim suffered, as a result of strangulation or suffocation, a temporary but substantial loss or impairment of the ability to breathe.

Examples of conduct by the defendant that rises to the level of strangulation, may include:

(a) loss of ability to breathe, which is more than momentary;

(b) injury to the neck including bruising or injury to the voice box;

(c) petechial hemorrhage; or

(d) temporary loss of a bodily function.

Examples of conduct by the defendant that rises to the level of suffocation, may include:

(a) smothering or drowning which results in a loss of ability to breathe, which is more than momentary

(b) injury to the mouth or face consistent with use of an object, device, or circumstance that obstructs the ability to breathe.

The filing deputy shall ensure that evidence exists that would support a finding consistent with the statutory definition of strangulation and that a thorough investigation on the issue has been conducted and documented (i.e., witness statements, photographs, or a medical release or medical reports have been submitted as part of the referral).

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 peace officer with a projectile stun gun;

(i) 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;

(j) Assaults a judicial officer, court-related employee, county clerk, or county clerk's employee, while that person is performing his or her official duties at the time of the assault or as a result of that person's employment within the judicial system; or

(k) Assaults a person located in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber when the location is being used for judicial purposes during court proceedings, and signs are posted in compliance with RCW 2.28.200 at the time of the assault.

(2) Definitions

(a) Bodily injury - RCW 9A.04.110(4)(a).

Bodily injury, physical injury or bodily harm means physical pain or injury, illness, or an impairment of physical condition.

(b) Criminal Negligence - RCW 9A.08.010(1)(d).

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

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

(c) Projectile Stun Gun - RCW 9A.04.110(21).

Projectile stun gun means an electronic device that projects wired probes attached to the device that emit an electrical charge and that is designed and primarily employed to incapacitate a person or animal.

(d) Peace Officer - RCW 9A.04.110(15).

Peace officer means a duly appointed city, county, or state law enforcement officer.

(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 a firefighter or other employee of a fire department under 9A.36.031(1)(e) shall normally be filed if the assault can be best described as an intentional attack on the officer and one of the following exist:

(a) The officer has an injury or experiences significant pain as a result of the assault;

(b) The officer is taken or forced to the ground;

(c) The defendant bites the officer, spits in the officer's face or throws urine or bodily fluid on the officer;

(d) A substantial effort is required to stop the assault;

(e) The suspect attempts to get the officer’s firearm; or

(f) The suspect uses any object, not amounting to a deadly weapon, to assault the officer.

Assaults against officers involving deadly weapons or where substantial bodily harm results should normally be filed as assault in the second degree.

Assaults against officers that are best described as either resisting or mere unwanted touching should be filed as resisting or assault in the fourth degree.

(4) Store Security

For guidance on when to file robbery versus assault see Section 11.

Assault in the third degree against store security personnel shall normally be filed where the security agent made or attempted to make a lawful detention to investigate shoplifting, if the assault can be best described as an intentional attack on store security, and one of the following exist:

(a) Store security has an injury or experiences significant pain as a result of the assault;

(b) Store security is taken or forced to the ground;

(c) The defendant bites store security, spits in the store security's face or throws urine or bodily fluid on store security;

(d) A substantial effort is required to stop the assault; or

(e) The suspect uses any object, not amounting to a deadly weapon, to assault store security.

Assaults against store security personnel that are best described as either resisting or mere unwanted touching should be filed as resisting or assault in the fourth degree.

Assaults against such store security personnel involving deadly weapons or where substantial bodily harm results should normally be filed as assault in the second degree.

(5) Transit/School Bus Drivers

Assault in the third degree against transit/bus drivers shall normally be filed if the assault can be best described as an intentional attack on the transit/bus driver and one of the following items exist.

(a) The transit/bus driver has an injury or experiences significant pain as a result of the assault;

(b) The intentional assault occurred while the bus was actually moving and thereby created a likelihood of an accident;

(c) The defendant bites the transit/bus driver, spits in the transit/bus driver's face or throws urine or bodily fluid on the transit/bus driver;

(d) A substantial effort is required to stop the assault; or

(e) The suspect uses any object, not amounting to a deadly weapon, to assault the transit/bus driver.

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

Assaults against transit/bus drivers that are best described as either resisting or mere unwanted touching should be filed as resisting or assault in the fourth degree.

(6) Nurses/Physicians/Health Care Providers

Assaults in the third degree against nurses, physicians, or health care providers shall normally be filed if the assault can be best described as an intentional attack on the health care provider and one of the following items exist.

(a) The health care provider has an injury or experiences significant pain as a result of the assault;

(b) The defendant bites the health care provider, spits in the health care provider's face or throws urine or bodily fluid on the health care provider;

(c) A substantial effort is required to stop the assault; or

(d) The suspect uses any object, not amounting to a deadly weapon, to assault the officer.

Assaults committed by patients in a hospital or psychiatric setting should be carefully reviewed to consider the degree to which the patient's mental state interferes with their competency, their ability to form the requisite intent for the underlying charge, and whether there is a foreseeable mental defense that the State is unlikely to overcome. In making this determination, consideration will be given to prior criminal history, prior history of assaultive behavior, and known mental health history.

Assaults against health care providers involving deadly weapons or where substantial bodily harm results should normally be filed as assault in the second degree.

Assaults against health care providers that are best described as either resisting or mere unwanted touching should be filed as resisting or assault in the fourth degree.

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 normally be filed if the assault can be best described as an intentional attack on the officer and one of the following items exist.

(a) The officer has an injury or experiences significant pain as a result of the assault;

(b) The officer is taken or forced to the ground;

(c) The defendant bites the officer, spits in the officer's face or throws urine or bodily fluid on the officer;

(d) A substantial effort is required to stop the assault; or

(e) The suspect uses any object, not amounting to a deadly weapon, to assault the officer.

Assaults against officers involving deadly weapons or where substantial bodily harm results should normally be filed as assault in the second degree.

Assaults against officers that are best described as either resisting or mere unwanted touching should be filed as resisting or assault in the fourth degree.

e. Drive-by Shooting – RCW 9A.36.045.

Drive-by shooting shall be filed if 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 or both to the scene of the discharge. "Immediate" has been interpreted as within a few feet or yards of the vehicle. State v. Locklear, 105 Wn. App. 555, 20 P.3d 993 (2001).

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 first degree, in addition to drive-by shooting, normally shall be charged if it can be proven that the shooting was directed at specific person(s).

2. Multiple Counts/Amendments

a. Initial Filing – Number of Counts

One count for each assault in the first degree ordinarily shall be filed in the information. One count ordinarily should be filed for each separate and distinct crime.

b. Amendments

If the defendant sets a trial date, other charges that are supported by the evidence shall be filed at the time the trial date is set or soon thereafter. In determining what additional charges should be filed, the deputy should consider adding those charges necessary to adequately hold the defendant responsible for the complete range and seriousness of the criminal conduct. See Section 2.

3. Deadly Weapon/Firearm Allegations, See Section 19.

4. Sexual Motivation Allegation, See Section 6.

5. Domestic Violence

   a. See Domestic Violence, Section 9.

   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. All other felony assaults between adult persons who are presently residing together or who have resided together in the past will be filed and prosecuted by the Violent Crimes Unit, but should be designated as domestic violence offenses.

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

6. Assault of a Child

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

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

   A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not 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 factors listed above may 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 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 and custodial assaults.

2. 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 of not less than five years. Total confinement may not be modified. RCW 9.94A.540(b).

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

3. Restitution

The State will recommend full lawful restitution.

4. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

5. Exceptional Sentence - See Section 2.

SECTION 5: 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 and the other statutory elements are met.

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

      All kidnapping cases that don't meet the elements of kidnapping in the first degree, 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 2º whenever evidence will support that charge.

2. Multiple 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. Amendment

If the defendant sets a trial date, other charges that are supported by the evidence shall be filed at the time the trial date is set or soon thereafter. In determining what additional charges should be filed, the deputy should consider adding those charges necessary to adequately hold the defendant responsible for the complete range and seriousness of the his criminal conduct. See Section 2.

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 was necessary in either time or distance to commit the underlying crime.

4. Deadly Weapon/Firearm Allegation. See Section 19.

5. Sexual Motivation Allegation. See Section 6.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may 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. 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.

2. Restitution

   The State will recommend full lawful restitution.

3. Expenses of Returning Child or Incompetent

   See RCW 9A.40.080.

4. DNA Identification

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

5. Exceptional Sentence, See Section 2.

SECTION 6: SEXUAL ASSAULT

I. 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 committed against children.

2. Sexual assaults and crimes that are sexually motivated committed against adults, with the exception of those cases handled by:

    a. The Domestic Violence Unit, in which the defendant and victim were married, living together at the time of the offense, have a dating relationship and/or have a history of domestic violence, and

    b. The District Court Unit (i.e. Assault 4 with Sexual Motivation, and misdemeanor Indecent Exposure).

3. Possession and distribution of child pornography.

4. Commercial sexual abuse of minors.

5. Child physical abuse and homicide.

6. Child kidnapping. (Custodial interference/parental kidnapping cases shall be handled by the KCPAO Family Support Unit.)

7. Failure to register as a sex offender.

II. FILING

A. EVIDENTIARY SUFFICIENCY

1. Sexual Motivation

    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.

2. Sexual Intercourse

Sexual Intercourse has its ordinary meaning and occurs upon any penetration, however slight, and also means

(a) Any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(b) Any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

3. Sexual Contact

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

B. CHARGE SELECTION – SEXUAL OFFENSES AGAINST ADULTS

1. Rape

a. Rape in the First Degree - RCW 9A.44.040 (Class A Felony)

* 5 yr. mandatory minimum – RCW 9.94A.540.

Rape in the first degree shall generally be filed if sexual intercourse was accomplished by forcible compulsion and one of the following circumstances 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 Felony, unless prior to 7-1-90 (Class B Felony)).

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. It is an *affirmative defense* that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless. (RCW 9A.44.030(1)) 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: 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, or was providing transportation to the victim within the course of employment, at the time of the offense. 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 is not married to the victim and has supervisory authority over the victim (RCW 9A.44.010). 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), or was providing transportation to the victim within the course of employment, at the time of the offense (eff. 4/10/07). RCW 9A.44.050(1)(f).

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

(Prior to 7/28/19) Rape in the third degree should generally be filed when a person engages in sexual intercourse with another person:

(1) Where the victim did not consent as defined in RCW 9A.44.010(7) to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(2) Where there is the threat of substantial unlawful harm to property rights of the victim.

(Eff. 7/28/19) Rape in the third degree should generally be filed when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person:

(1) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator, or
(2) Where there is threat of substantial unlawful harm to property rights of the victim.

Rape in the third degree is a class C felony.

Under the 2019 amendment, in order to prove Rape in the Third Degree, the State will no longer have to prove that the "lack of consent was clearly expressed by the victim's words or conduct." However, the State still needs to prove a lack of consent. The definition of consent remains the same, specifically "consent" means that "at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7)

Factors that may be considered when assessing whether there were actual words or conduct indicating freely given agreement to having sexual intercourse include any outward manifestations that, when viewed in light of the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely given authorization to have sexual intercourse.

2. Indecent Liberties

RCW 9A.44.100(1)(a), Forcible Compulsion (Class A Felony).

RCW 9A.44.100(1)(b)-(f), Class B ((b)&(c) = ranked; (d)-(f) = unranked).

Indecent liberties shall be filed when the defendant knowingly causes another person who is not his/her 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. It is an *affirmative defense* that at the time of the offense the defendant reasonably believed that the

victim was not mentally incapacitated and/or physically helpless (RCW 9A.44.030(1)).

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 71A.10.020), and the defendant was not married to the victim and had supervisory authority over the victim (RCW 9A.44.010), or was providing transportation to the victim within the course of employment, at the time of the offense.

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 is not married to the victim and 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), or was providing transportation to the victim within the course of employment, at the time of offense.

3. Custodial Sexual Misconduct

First Degree - RCW 9A.44.160 (Class C Felony).

Second Degree - RCW 9A.44.170 (Gross Misdemeanor).

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*.

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

- 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

- 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

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

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) (prior to 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 – RCW 9A.44.030(2).

- 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. Child Molestation

(Prior to 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) (Prior to 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(2).

- 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)

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*.

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

a. Significant Relationship/Supervisory Position:
   i. The victim is:
      - 16 or 17 years old, and
      - not married to the defendant, *AND*
   ii. The defendant:
      - is at least 60 months older than the victim, and
      - has (or knowingly causes another person under 18 years old to have) sexual contact with the victim, and

- is in a significant relationship (RCW 9A.44.010) with the victim, and
- abuses a supervisory position (RCW 9A.44.010) within that relationship in order to engage in (or cause another) to have sexual contact or sexual intercourse with the victim.

b. Student/School Employee

i. The victim is:

- not married to the defendant,
- an "enrolled student" defined in RCW 9A.44.090(3)(a) as any student enrolled at, or attending a program at, a common school under RCW 28A.150.020, or private school under RCW 28A.195), or any person who receives home-based instruction under RCW 28A.200.

Note: See State v. Hirschfelder, 170 Wn.2d 536, 242 P.3d 876 (2010) - includes students up to age 21.

ii. The defendant:

- is at least 60 months older than the victim,
- is a "school employee" defined in RCW 9A.44.090(3)(b) as an employee of a common school under RCW 28A.150.020, or K-12 of a private school under RCW 28A.195), who is not enrolled as a student of the common school or private school
- has (or knowingly causes another person under 18 years old to have) sexual contact or sexual intercourse with the victim.

c. Foster Child/Foster Parent

i. The victim is:

- at least 16 years old
- the foster child of the defendant

ii. The defendant is:

- the victim's foster parent
- has (or knowingly causes another person under 18 years old to have) sexual contact or sexual intercourse with the victim.

4. Incest - RCW 9A.64.020

First Degree (Class B)

Second Degree (Class C)

Note: 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.

Incest in the First Degree shall generally be charge in cased involving *sexual intercourse*.

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

The appropriate level on Incest shall generally be filed when a person engages in sexual contact or sexual intercourse with a person whom the defendant knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant (includes stepchildren and adopted children under the age of 18), brother or sister of either the whole or the half blood.

Factors to be considered in determining who to charge include, but are not limited to: age disparity, existence of a care-taking role, relative levels of sophistication, and degree of planning or preparation.

5. Communicating with a Minor for Immoral Purposes - RCW 9.68A.090, Gross Misdemeanor: all cases, except:

Felony:

a. previous conviction under RCW 9.68A.090 (CMIP)
b. previous conviction for a felony sexual offense under RCW 9.68A (Sex Exploitation/Child Pornography), RCW 9A.44 (Sex Offenses), RCW 9A.64 (Incest).
c. previous conviction for any other felony sexual offense in this or any other state
d. through the sending of an electronic communication, including the purchase or sale of commercial sex acts and sex trafficking. RCW 9.68A.090(2).

Communicating 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, ages 16 - 18, 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, 830 P.2d 674 (1992).

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.

D. CHARGE SELECTION – COMMERCIAL SEXUAL ABUSE OF MINORS

1. Commercial Sexual Abuse of a Minor - RCW 9.68A.100 (Class B) (VIII)
Prior to 6/10/10 – Class C
Prior to 7/22/07 – (formerly Patronizing a Juvenile Prostitute) Class C.

Commercial Sexual Abuse of a Minor shall generally be charged where the defendant:

a. Provides anything of value to a minor or third person as compensation for having engaged in sexual conduct (intercourse or contact) with the minor, or
b. Provides or agrees to provide anything of value to a minor or a third person pursuant to an understanding that in return the minor will engage in sexual conduct, or
c. Solicits, offers, or requests to engage in sexual conduct with a minor in return for anything of value.

"Sexual conduct" means sexual intercourse, or sexual contact as defined in chapter RCW 9A.44.

Consent of a minor to the sexual conduct does not constitute a defense. RCW 9.68A.100(4).

**Defenses* – see subsection 4.

**Mandatory Sentencing Fee Requirement* – see subsection 5.

2. Promoting Commercial Sexual Abuse of a Minor – RCW 9.68A.101
Class A (XII)
Prior to 6/10/10 - Class B

Promoting Commercial Sexual Abuse of a Minor shall generally be charged when a person knowingly:

a. *"Advances the commercial sexual abuse of a minor"* as defined by statute (i.e. causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers, provides persons or premises, operates or assists in the operation, or engages in any other conduct designed to institute, aid, cause, assist or facilitate), or

b. *"Advances a sexually explicit act of a minor"* as defined by statute (i.e. causes or aids a sexually explicit act of a minor, procures or solicits customers, provides persons or premises, or any other conduct designed to facilitate a sexually explicit act)

c. *"Profits from commercial sexual abuse of a minor"* engaged in sexual conduct or a sexually explicit act as defined by statute (i.e. accepts or receives money or anything of value pursuant to an agreement or understanding to participate in the proceeds).

"Sexual conduct" means sexual intercourse, or sexual contact as defined in chapter RCW 9A.44.

A *"sexually explicit act*" is a public, private, or live photographed, recorded, or videotaped act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons and for which anything of value is given or received.

A *"patron"* is a person who provides or agrees to provide anything of value to another person as compensation for a sexually explicit act of a minor or who solicits or requests a sexually explicit act of a minor in return for a fee.

Consent of a minor to a sexually explicit act or sexual conduct does not constitute a defense. RCW 9.68A.101(4).

**Defenses* – see subsection 4.

**Mandatory Sentencing Fee Requirement* – see subsection 5.

3. Promoting Travel for Commercial Sexual Abuse of a Minor – RCW 9.68A.102, Class C (unranked).

Promoting Travel for Commercial Sexual Abuse of a Minor shall generally be charged when a person knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in

commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor.

"Travel services" is defined by RCW 19.138.021, and includes transportation by air, sea, or ground, hotel or any lodging accommodations.

Consent of a minor to travel for commercial sexual abuse, or the sexually explicit act or sexual conduct itself, does not constitute a defense. RCW 9.68A.102(3).

**Defenses* – see subsection 4.

**Mandatory Sentencing Fee Requirement* – see subsection 5.

4. Defenses – RCW 9.68A.110

In prosecutions for Commercial Sexual Abuse of a Minor (RCW 9.68A.100), Promoting Commercial Sexual Abuse of a Minor (RCW 9.68A.101), and Promoting Travel for Sexual Abuse of a Minor (RCW 9.68A.102):

a. It is not a defense a defense that the defendant did not know the victim's age.

b. 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.

5. Mandatory Sentencing Fee Requirement - RCW 9.68A.105

An adult convicted of Commercial Sexual Abuse of a Minor (RCW 9.68A.100), Promoting Commercial Sexual Abuse of a Minor (RCW 9.68A.101), and Promoting Travel for Sexual Abuse of a Minor (RCW 9.68A.102), shall be assessed a $5,000.00 fee to be collected by the Clerk of the Court, unless the court finds on the record that the defendant is unable to pay and therefore may reduce the fee up to 2/3 of the maximum allowable fee. RCW 9.68A.105.

On the Judgment and Sentence, the DPA shall instruct the court where these funds shall be disbursed. For example, if the Seattle Police

Department conducted the investigation, then the Judgment and Sentence shall state that 98% of the funds go to the City of Seattle and the remaining 2% go to the Washington State Department of Commerce.

6. Permitting Commercial Sexual Abuse of a Minor - RCW 9.68A.103, Gross Misdemeanor.

Permitting Commercial Sexual Abuse of a Minor shall generally be charged when a person:

a. Has possession or control of premises knowing they are being used for the purpose of commercial sexual abuse of a minor, and
b. Fails, without lawful excuse, to make reasonable effort to halt or abate such use or to make a reasonable effort to notify law enforcement.

Consent of a minor to the sexually explicit act or sexual conduct does not constitute a defense. RCW 9.68A.103.

7. Trafficking - RCW 9A.40.100.

First Degree – Class A (XIV)
Second Degree – Class A (XII)

Potential areas of Trafficking include forced labor, involuntary servitude, sexually explicit acts, and commercial sex acts.

a. Trafficking in the First Degree shall generally be filed when there is sufficient evidence to prove Trafficking in the Second Degree (see below), AND the acts or venture involved:
   (1) kidnapping or attempted kidnapping,
   (2) a sexual motivation finding under RCW 9.94A.835,
   (3) resulting death, or
   (4) illegal harvesting or sale of human organs.

b. Trafficking in the Second Degree shall generally be filed when there is sufficient evidence to prove the defendant:
   (1) recruited, harbored, transported, provided or obtained, bought, purchased, or received by any means another person, *AND*
      (a) Knew, or in reckless disregard of the fact, that force, fraud, or coercion would be used to cause the person to engage in forced labor or involuntary servitude, a sexually explicit act, or a commercial sex act,
      OR

(b) Knew, or in reckless disregard of the fact, that the person is a minor and is caused to engage in a sexually explicit act or a commercial sex act, or

(2) Benefitted financially, or by receiving anything of value, from participation in a venture that has engaged in acts set forth in subsection (1)(a).

"Coercion" is defined in in RCW 9A.36.070.

"Forced labor" and *"involuntary servitude"* are defined under RCW 9A.40.010.

"Commercial sex act" and *"sexually explicit act"* are defined under RCW 9A.40.100(6).

"Force" and *"fraud"* are not legally defined. Consideration shall be given to the following factors:

(1) Psychological manipulation (degradation, conduct which is induced or obtained by significant deception, isolation – physical and emotional, alienation of family and support systems)

(2) Physical coercion (history of physical abuse, promoting drug dependence through furnishing of drugs, sexual abuse, to commit sex acts for the purpose of creating pornography)

(3) Economic coercion (withholding of legal documents establishing identification and ability to travel, prostitution in exchange for repayment of a debt, promises of security, promises of money, withholding of money, deceiving victims into debt bondage, deception regarding nature of employment)

It is not a defense that the defendant did not know the victim's age, or that the defendant believed the victim to be older. RCW 9A.40.100(4)(a).

If the victim is a minor, force, fraud, or coercion are not necessary elements of an offense, and consent to the sexually explicit act or commercial sex act does not constitute a defense. RCW 9A.40.100(5).

A person convicted of Trafficking shall be assessed a $10,000.00 fee unless the court finds on the record that the offender is unable to pay and therefore may reduce the fee up to 2/3 of the maximum amount. RCW 9A.40.100(4).

E. CHARGE SELECTION – SEXUAL EXPLOITATION OF CHILDREN AND ADULTS

Cases involving depictions of minors shall generally be filed when there is evidence that the offender knowingly created, possessed, sought out, or distributed images of minors engaged in sexually explicit conduct.

1. Relevant Definitions – RCW 9.68A.011

a. "*Sexually explicit conduct*" means actual or simulated:

First Degree definition:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
(2) penetration of the vagina or rectum by any object;
(3) masturbation;
(4) sadomasochistic abuse;
(5) defecation or urination for the purpose of sexual stimulation of the viewer;

Second Degree definition:

(1) depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer; it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it;
(2) touching of a person's unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

1st & 2nd degrees relevant to the charges of *Possession, Sending/Dealing, Viewing Depictions* below

b. *"Photograph"* means a print, negative, slide, digital image, motion picture, videotape, or anything tangible or intangible produced by photographing.

c. *"Live performance"* means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, regardless of consideration.

2. Sexual Exploitation of a Minor - RCW 9.68A.040, Class B.

Sexual exploitation of a minor shall generally be charged where:

a. the victim is under the age of 18 and is compelled by threat or force to engage in sexually explicit conduct (RCW 9.68A.011(4)) knowing that such conduct will be photographed or part of a live performance;

b. the victim is under the age of 18 and is aided, invited, employed, authorized, or caused to engage in sexually explicit conduct (RCW 9.68A.011(4)) knowing that such conduct will be photographed or part of a live performance; or

c. the defendant is the parent, legal guardian, or custodian of a child under 18, and he or she permits the minor to engage in sexually explicit conduct (RCW 9.68A.011(4)) knowing that such conduct will be photographed or part of a live performance

3. Possession of Depictions - RCW 9.68A.070.

Eff. 7/23/17: First Degree, Class B – unit of prosecution/per image
Second Degree, Class B – unit of prosecution/per image
Eff. 6/10/10: First Degree, Class B - unit of prosecution/per image
Second Degree, Class C - unit of prosecution/per incident
Eff. 6/7/06: Class B, defined as sex offense
Pre 6/7/06: Class C, not defined as a sex offense

Possession of depictions shall generally be charged 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(4)).

The degree of possession of depictions is based on the type of *"sexually explicit conduct"* defined above.

Factors to consider in assessing "knowing" possession: age, gender of images, level of organization (age, series, collections), paraphilic themes, ratio of content themes, distribution to others, production of child pornography.

4. Dealing in Depictions - RCW 9.68A.050.

Eff. 7/23/17: First Degree, Class B – unit of prosecution/per image
Second Degree, Class B – unit of prosecution/per image
Eff. 6/10/10: First Degree, Class B - unit of prosecution/per image
Second Degree, Class C - unit of prosecution/per incident
Prior to 6/10/10: Class C

Dealing in depictions shall generally be charged in those cases where the defendant is 18 years of age or older and was not involved in the creation

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

The degree of dealing depictions is based on the type of *"sexually explicit conduct"* defined above.

5. Sending, Bringing into the State Depictions - RCW 9.68A.060.
   Eff. 7/23/17: First Degree, Class B – unit of prosecution/per image
   Second Degree, Class B – unit of prosecution/per image
   Eff. 6/10/10: First Degree, Class B - unit of prosecution/per image
   Second Degree, Class C - unit of prosecution/per incident
   Prior to 6/10/10: Class C

   Sending or bringing into the state depictions shall generally be charged 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.

   The degree of sending or bringing into the state depictions is based on the type of *"sexually explicit conduct"* defined above.

6. Viewing of Depictions of Minors Engaged in Sexually Explicit Conduct - RCW 9.68A.075.
   Eff. 6/10/10: First Degree, Class B (IV) - unit of prosecution/per session
   Second Degree, Class C (unranked) - unit of prosecution/ per session
   Viewing of depictions shall generally be charged in those cases where there is insufficient evidence to prove that the defendant *possessed* visual or printed matter (any photograph or material that contains a reproduction of a photograph) depicting sexually explicit conduct (RCW 9.68A.011(4)) but sufficient evidence to prove that the defendant intentionally viewed it over the internet.

   The trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred. RCW 9.68A.075(3).

The degree of viewing depictions of minors is based on the type of *"sexually explicit conduct"* defined above.

7. Failing to Report Depictions of Minors by Processors of Depictions RCW 9.68A.080, Gross Misdemeanor.

Failure to report the existence of child pornography by those who process depictions (i.e. film, photographs, movies, etc.) shall generally be charged in those cases where a person who processes visual or printed matter (RCW 9.68A.011(3)) fails to report to authorities that such matter depicts minors engaged in what on its face is sexually explicit conduct (RCW 9.68A.011(4)).

Failing to Report by Processors of Depictions 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.

8. Voyeurism - RCW 9A.44.115
First Degree - Class C
Second Degree - Gross Misd.

Voyeurism in the First Degree shall generally be charged when the defendant:

a. for purposes of arousing or gratifying the sexual desire of any person,
b. knowingly "views," "photographs," or "films" (all defined in RCW 9A.44.115(1)) any person,
c. without that person's knowledge and consent, and
   i. while the person being viewed, photographed or filmed is in a "place where he or she would have a reasonable expectation of privacy" (as defined in RCW 9A.44.115(1)), or
   ii. the "intimate areas" of another person (as defined in RCW 9A.44.115(1)) under circumstances "where that person has a reasonable expectation of privacy" (as defined in RCW 9A.44.115(1)), whether in a public area or private.

Voyeurism in the Second Degree shall generally be charged when the defendant:

a. Intentionally "photographs" or "films" another person (as defined in RCW 9A.44.115(1)),
b . For purposes of photographing or filming the "intimate areas" of that person (as defined in RCW 9A.44.115(1)),
c. With the intent to distribute or disseminate the photograph or film,

d. Without that person's knowledge and consent, and
e. Under circumstances where the person has a "reasonable expectation of privacy" (as defined in RCW 9A.44.115(1)).

Voyeurism in the Second Degree is not a sex offense for purposes of sentencing or sex offender registration requirements.

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. RCW 9A.44.115(4).

Sentencing Consideration: The court may order the destruction of any image made in violation of this section. RCW 9A.44.115(5).

9. Indecent Exposure - RCW 9A.88.010

Class C: Prior conviction - Defendant was previously convicted of
(1) indecent exposure under RCW 9A.88.010, or
(2) a "sex offense" as defined by RCW 9.94A.030.

Note: State v. Steen, 155 Wn. App. 243, 228 P.3d 1285 (2010).
Prior + current victim under 14 = ranked (IV)
Prior + current victim over 14 = unranked

Gross Misd.: Defendant exposes to a person < 14 years of age.

Misdemeanor: All other cases.

Indecent exposure shall generally be charged where the defendant:
a. intentionally makes any open or obscene exposure of his or her person, or the person of another,
b. knowing such conduct is likely to cause reasonable affront or alarm.

Note: 1) Unit of prosecution = one per incident of exposure;
2) Indecent Exposure is 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.

10. Luring – RCW 9A.40.090

Class C - Unranked

Luring shall generally be charged 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:

a. 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
b. does not have the consent of the victim's parent or guardian, and
c. is unknown to the victim.

The word "lure" means to entice or attempt to entice the victim into a specific place. State v. Dana, 84 Wn. App. 166, 926 P.2d 344 (1996).

Defense - It is an *affirmative defense* that the defendant must prove by a preponderance of the evidence that
a. The defendant's actions were reasonable under the circumstances, and
b. The defendant did not intend to harm the health, safety, or welfare of the victim.

Note: Luring is 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.

F. CHARGE SELECTION – SPECIAL ALLEGATIONS

1. Sexual Motivation Allegation - RCW 9.94A.835.

A "sexual motivation" allegation shall generally be charged in every criminal case (felony, gross misdemeanor, or misdemeanor), other than a "sex offense" as defined in RCW 9.94A.030, 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.

Sentencing Considerations – see IV. Sentence Recommendations

2. Sexual Conduct in Return for a Fee – Enhancement - RCW 9.94A.533(9).

Available only for the underlying charges of:
Rape of a Child 1, 2 & 3
Child Molestation 1, 2 & 3
Or an attempt thereof

A one year enhancement for "sexual conduct in return for a fee" shall generally be charged 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 by a reasonable and objective fact-finder that the offender engaged, agreed, or offered to engage the victim in the sexual conduct (sexual contact or sexual intercourse) in return for a fee.

3. 25-year Mandatory Minimum Allegation – RCW 9.94A.836 - 838

PREDATOR	**VICTIM UNDER 15**	**VULNERABLE VICTIM**
RCW 9.94A.836	RCW 9.94A.837	RCW 9.94A.838
Charge must be: • Rape of a Child 1 or 2 • Child Molestation 1	Charge must be: • Rape 1 or 2 • Indecent Liberties w/ Force • Kidnapping 1 w/ SM	Charge must be: • Rape 1 • Rape 2 w/ Force • Indecent Liberties w/ Force • Kidnapping 1 w/ SM
a) Stranger: did not know victim for more than 24 hrs before the offense, or b) Victimization was a significant reason to establish or promote the relationship, or c) Relationship: i. teacher, counselor, volunteer or other person in authority in school & victim was a student, or ii. coach, trainer, volunteer or other person in authority in recreational activity & victim was a participant, or iii. pastor, elder, volunteer, or other person in authority in church/religious org. & victim was a member/participant. See definitions RCW 9.94A.030(39)	Offender = 18 years or older Victim < 15 years old at time of offense	Offender = 18 years or older Victim = at time of offense V Developmentally disabled, or Mentally disordered, or Frail Elder, or Vulnerable Adult

G. CHARGE SELECTION – EXCEPTION TO STANDARDS

1. "Over the Clothing" Sexual Contact

In cases involving sexual contact (Child Molestation, Incest 2°, 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:

a. statements of the defendant;
b. prior sexual offenses;

c. multiple incidents or multiple victims;
d. 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.

2. Youthful Offenders

a. *Statutory differential:* Rape of a Child 2 & 3, Child Molestation 2 & 3, and Sexual Misconduct with a Minor 1 & 2 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.

H. CHARGE SELECTION – FAILURE TO REGISTER AS A SEX OFFENDER – RCW 9A.44.132 Gross Misdemeanor/ Felony

1. Filing

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

a. A conviction which requires sex offender registration under RCW 9A.44.128-.145;

b. The defendant's registration period has not expired prior to the charging period;

c. The defendant knowingly failed to comply with the registration requirements contained in RCW 9A.44.130; and

d. An offender has been in violation of his registration requirements for at least 30 days. (If homeless, an offender shall generally be in violation for 4 weeks or more or checking in less than 50% of the time over the course of 4 months.)

Reasons to depart from this standard include, but are not limited to:

a. case involves a level II or III offender

b. other facts which suggest increased concern for community safety

c. history of failure to register

d. offender has more than one sex offense and/or considerable number of criminal convictions

e. defendant's stated intent to not comply with the registration laws

2. Disposition Standards

a. Reductions – Attempted Failure to Register as a Sex Offender

(gross misdemeanor) may be considered in the following circumstances:

(1) proof problems in the case
(2) mitigating circumstances explaining the failure to comply or justifying a reduced crime and sentence
(3) minimal criminal history since the underlying offense
(4) level 1 or 2 sex offender

b. Standard EPU offers will typically include 30-60 days of jail time, work release or enhanced CCAP (if amenable). Prior criminal history and prior reduced FTR cases will justify a higher jail time recommendation.

3. Sentencing

a. For Failure to Register as a Sex Offender crimes committed on or after 6/10/10:

(1) A gross misdemeanor Failure to Register as a Sex Offender has a range of 0 – 364 days.

Community custody is discretionary with the court. If ordered, the Department of Corrections must supervise the defendant. RCW 9.94A.501(a)(iv).

(2) A first Felony Failure to Register as a Sex Offender is an unranked Class C felony.

For a first felony Failure to Register as a sex Offender conviction, the community custody range is up to one year and discretionary with the court. RCW 9.94A.702(1)(e). If ordered, the Department of Corrections will only supervise a defendant who is assessed as high-risk.

(3) A second or subsequent Felony Failure to Register as a Sex Offender is a ranked Class C Felony (Level II) RCW 9.94A.515.

All second and subsequent felony offenses for Failure to Register as a Sex Offender carry mandatory 36 months of community custody. RCW 9.94A.701(1)(a); RCW 9.94A.501(4)(a).

(4) A third felony Failure to Register as a Sex Offender offense committed is a ranked Class B felony (Level II).

b. For Failure to Register as a Kidnapping Offender crimes:

(1) All Failure to Register as a Kidnapping Offender offenses are unranked felonies. RCW 9A.44.132(3)(a).

(2) Failure to Register as a Kidnapping Offender does not carry community custody.

4. Relief from Registration – RCW 9A.44.140-143.

a. Petition:

(1) Adults

In order to petition for relief of registration, the defendant is required to have spent ten consecutive years in the community without being convicted of a disqualifying offense. RCW 9A.44.142(1)(b).

(2) Out of state offenses

If an offender has been convicted of an out of state offense, the offender must spend fifteen consecutive years in the community without being convicted of a disqualifying offense in order to petition. RCW 9A.44.142(1)(c). The offender petitions in the county where s/he is registered.

(3) Juveniles

Juveniles will be eligible to petition if at least twenty-four months (sixty months for class A offenses committed at age 15 years or older) have passed since the adjudication and completion of confinement for the offense giving rise to the duty to register. The petitioner is not eligible if he has been adjudicated of any additional sex or kidnapping offenses. Further, the petitioner may not have any failure to register convictions in the previous twenty-four months (sixty months for class A offenses committed at age 15 or older) as required in RCW 9A.44.143.

b. Burden

(1) Adults

The petitioner must show by clear and convincing evidence that the petitioner is sufficiently rehabilitated to warrant removal from the registry of sex offenders and kidnapping offenders. RCW 9A.44.142(4)(a).

(2) Juveniles
The petitioner must show by a preponderance of the evidence that the petitioner is sufficiently rehabilitated to warrant removal from the registry of sex offenders and kidnapping offenders. RCW 9A.44.143(2)(c), (3)(c).

b. Factors

In determining whether the petitioner is sufficiently rehabilitated to warrant removal from the registry, the following factors are provided as guidance to assist the court in making its determination: RCW 9A.44.142(4)(b); RCW 9A.44.143(5).

(1) The nature of the registerable offense committed including the number of victims and the length of the offense history;
(2) Any subsequent criminal history;
(3) The petitioner's compliance with supervision requirements;
(4) The length of time since the charged incident(s) occurred;
(5) Any input from community corrections officers, juvenile parole or probation officers, law enforcement or treatment providers;
(6) Participation in sex offender treatment;
(7) Participation in other treatment and rehabilitative programs;
(8) The offender's stability in employment and housing;
(9) The offender's community and personal support system;
(10) Any risk assessments or evaluations prepared by a qualified professional;
(11) Any updated polygraph examination;
(12) Any input of the victim;
(13) Any other factors the court may consider relevant.

c. The court MAY NOT relieve these offenders of registration requirements:

(1) Offender has been determined to be a sexually violent predator under RCW 71.09.020. RCW 9A.44.142(2)(a)(i).

(2) Class A felonies committed as an adult on or after 6/8/00 with forcible compulsion. RCW 9A.44.142(2)(a)(ii).

d. Discharge

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

I. CHARGE SELECTION - GENERAL FILING PROVISIONS

1. Identified Victims - Multiple 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.

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 consistent with the following table (2.a.).

2. Depictions of Minors – Number of Counts

CRIME	DEGREE	CLASS	LEVEL	UNIT OF PROS
Dealing / Sending	1°	B	VII	Per image
9.68A.050 & .060	2°	B	V	Per incident
Possession	1°	B	VI	Per image
9.68A.070	2°	B	IV	Per incident
Viewing	1°	B	IV	Per internet session
9.68A.075	2°	C	Unranked	Per internet session

a. *Eff. 6/10/10*:

In cases involving possession or dealing in sexually explicit material, in accordance with the unit of prosecution outlined in the above table, one count should be filed for a small amount (e.g., 50 images or less) and up to three counts for a large quantity (e.g., 50+ images or more).

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.

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.

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 as can be realistically separately charged.

Prior to 6/10/10: State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009): The Washington Supreme Court held that a defendant may be charged with only one count of Possession of Depictions, regardless of how many images are possessed or how many different minors are depicted in such images. Therefore, one count will generally be filed unless sufficient evidence exists to reasonably establish additional possessions separated by time and/or place.

III. DISPOSITION

A. REDUCTION IN CHARGE

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 will 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.

B. DISMISSAL OF 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 will not 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.

C. 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 will not be considered. The exception policy shall be followed before a dismissal of a special allegation is offered.

D. DISMISSAL OF COUNTS TO ACCOMMODATE SSOSA

If the case meets the requirement for a SSOSA recommendation, see this section, 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. All dismissals shall be discussed with the victim before being offered, unless otherwise approved by unit supervisor.

IV. SENTENCE RECOMMENDATION

A. GENERAL PROVISIONS

1. Sentencing Provisions

   a. Offender Score

      Current offense prior to 7/1/84: sex offenses score as 1
      Current offense prior to 7/1/88: sex offenses score as 2
      Current offense prior to 7/1/90: sex offenses score as 3

   b. Community Supervision/Community Placement/Community Custody:

      i. Sentences under one year – court may impose:

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

      ii. Sentences over one year (non-SSOSA) – court must impose:

         7/1/88-6/30/90: 1 yr comm placement (RCW 9.94B.050(1)(a)).
         7/1/90-6/5/96: 2 yrs comm placement (RCW 9.94B.050(2)(a)).
         6/6/96-6/30/00: 3 yrs comm custody (RCW 9.94B.070(1)).
         After 7/1/00: 36 mos comm custody (RCW 9.94A701(1)).
         * Special extension of conditions (RCW 9.94A.709(1)).

2. Determinate Sentence – RCW 9.94A.505

   A determinate sentence within the range 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.

3. Indeterminate Sentence (*eff*. 9/1/01) – RCW 9.94A.507

   a. *Qualifying Offenses:*

      Rape 1 or 2
      Rape of a Child 1 or 2 (at least 18 yo at time of offense)
      Child Molestation 1 (at least 18 yo at time of offense)
      Indecent Liberties w/ force

      Any of the following crimes *with sexual motivation*:
         Murder 1 or 2

Homicide by Abuse
Assault 1 or 2
Assault of a Child 1 or 2
Burglary 1
Kidnap 1 or 2

Or an attempt to commit any of the above.

b. *Prior "sex offense" conviction + Current "sex offense" Conviction*

A prior conviction for a "sex offense" as defined by RCW 9.94A.030 and a current conviction for a "sex offense" other than failure to register.

An attempt, solicitation or conspiracy to commit a "sex offense."

A felony offense prior to 7/1/76, which is comparable to a "sex offense."

A felony offense with a finding of sexual motivation.

Federal or out-of-state convictions that would be a felony classified as a "sex offense."

A minimum sentence within the standard range shall be recommended. As to the maximum sentence, the court has no discretion other than to impose the statutory maximum for the crime. Community Custody is mandatory for the maximum length of the statutory maximum.

4. Sexual Motivation Enhancement - RCW 9.94A.533(8); RCW 9.94A.835.

Class A w/ SM: additional 24 months
Class B w/ SM: additional 18 months
Class C w/ SM: additional 12 months

The additional time is consecutive to the time imposed within the standard range and any other enhancements with no "good time."

Defendants that have previously been sentenced to a sexual motivation enhancement (post July 1, 2006) shall be sentenced to twice the amount of the enhancement listed above.

5. Sexual Conduct in Return for a Fee - RCW 9.94A.533(9)

12 month addition to the standard range for qualifying offenses.

More than one offense - 12 months is added to total confinement

B. PERSISTENT OFFENDERS – LIFE WITHOUT PAROLE – See Also Section 23.

1. Three Strikes - RCW 9.94A.030.

   Offenders convicted of a "most serious offense" who have previously been convicted on two separate occasions of "most serious offenses" shall be sentenced to life imprisonment.

   a. Sex offenses that are "most serious offenses":

      Any Class A felony
      Any Class B felony that includes a sexual motivation allegation
      Rape 3
      Child Molestation 2
      Incest (victim under 14)
      Indecent Liberties
      Sexual Exploitation
      Note: Promot. Prostitution not a sex offense

   b. An attempt to commit any of the above

2. Two Strikes – "most serious sex offense"

   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.

   a. Qualifying sex offenses for purposes of two strikes:

      Rape 1 or 2
      Rape of a Child 1 (at least 16 yo at time of offense)
      Rape of a Child 2 (at least 18 yo at time of offense)
      Child Molestation 1
      Indecent Liberties w/ force

   b. Any of the following crimes *with sexual motivation*:

Murder 1 or 2
Homicide by Abuse
Assault 1 or 2
Assault of a Child 1 or 2
Burglary 1
Kidnap 1 or 2

c. An attempt to commit any of the above.

C. SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE (SSOSA)

	Pre 7/1/05	**Post 7/1/05**
Confinement	Up to 6 months	Up to 12 months
Treatment	Up to 3 years	Up to 5 years
Treatment Provider	State certified	Restrictions on eval/treatment
Community Custody	Length of suspension or 3 yrs, whichever longer	Length of suspension or 3 yrs, whichever longer
Victim Input	Ct. must consider 9.94A.670(4)	Findings required if differ from V position
Quarterly Reports	Required by statute	Required by statute

1. Eligibility - RCW 9.94A.670(2) [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:

a. The current crime(s) must be a "sex offense"

b. The current crime may not be a violation of Rape 2º (RCW 9A.44.050) or 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)).

c. The defendant must enter a straight plea (no Alford plea).

d. No prior convictions for a felony sex offense.

e. No prior adult convictions for a violent offense committed within five years of the date of the current offense.

f. The offense did not result in substantial bodily harm to the victim (See (1)(b)).

g. The offender must have had an established relationship or connection to, the victim such that the sole connection with the victim was not the commission of the crime.

g. The low end of the presumptive sentencing range is:

Crimes occurring prior to 7/1/90:	less than 6 years
Crimes occurring between 7/1/90–7/26/97:	less than 8 years
Crimes occurring since 7/27/97:	less than 11 years

2. Amenability – RCW 9.94A.670(3)

a. Statutory Requirements

(1) The evaluator's report must include:
- (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).

(2) Considerations for the Court, RCW 9.94A.670(4).
- (a) benefit to offender and the community
- (b) too lenient in light of the offense
- (c) additional victims (in addition to the victim of the offense)
- (d) amenability to treatment
- (e) risk to the community
- (f) risk to the victim
- (g) risk to persons similar in age and circumstances to the victim
- (h) great weight to the victim's opinion
- (i) if the sentence imposed is contrary to the victim's opinion – the court shall enter findings stating its reasons
- (j) admission alone, does not constitute amenability

(3) Additional considerations for the State:
- (a) nature of the crime;
- (b) length of the abuse;
- (c) number of victims;

(d) employment or financial resources;
(e) history of substance abuse;
(f) acceptance of responsibility;
(g) willingness to comply with treatment and probation requirements including no contact with the victim;
(h) prior treatment history and compliance;
(i) criminal history.

3. Sentencing Recommendation

a. Jail recommendation for Special Sexual Offender Sentencing Alternative (SSOSA).

Statutory maximum: up to 12 months (no goodtime credit)

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) and the input of the victim and the victim's family.

b. Treatment Recommendation

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 five years in duration, which may be extended to the length of the suspended sentence upon order of the court.

c. Additional Conditions

The State's recommendation normally shall include crime-related prohibitions, employment or occupational requirements, 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.670(6), including conditions imposed by the Department of Corrections (RCW 9.94A.703).

d. Length of Suspension/Supervision

A State's sentencing recommendation for the Special Sexual Offender Sentencing Alternative shall be for the suspended sentence:

(1) Crimes occurring prior to 7/1/90: maximum community

supervision 24 months

(2) 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

(3) Crimes occurring on or after 6/6/96 but before 9/1/01: maximum community custody 36 months or the length of the suspended sentence, whichever is greater

(4) After 9/1/01: Rape of a Child 1º, Rape of a Child 2º, Child Molestation 1º, Community Custody for Life

RCW 9.94A.670(5)(b) authorizes the Department of Corrections (DOC) to add other conditions of supervision to the standard conditions of supervision even if not ordered by the trial court.

4. Violations of Sentence/Treatment - RCW 9.94A.670(11)

a. By agreement of DOC & KCPAO: All alleged violations of SSOSA shall be heard by the sentencing court. The Department of Corrections shall not conduct administrative hearings on SSOSA offenders. (See RCW 9.94A.670(10) for statutory provisions).

e. The court may revoke the suspended sentence at any time during the period of community custody if:

(1) The offender violates conditions, or;

(2) The court finds the offender is failing to make satisfactory progress in treatment.

V. STATUTES OF LIMITATION FOR SEX OFFENSES - RCW 9A.04.080

1. General Rules

   a. The periods of limitation do not run during any time when the person charged is not "usually and publicly" resident within the state.

   b. In any prosecution for a sex offense, the period of limitation runs from the later of - the date of commission OR one year from the date on which the identity of the suspect is conclusively established by DNA testing (eff. 6/7/06 for cases in which the statute of limitations has not previously expired) or by photograph as defined in RCW 9.68A.011 (eff. 7/28/19).

   c. The following statues of limitation apply provided the period of limitation has not expired on the effective date of the new statute.

2. **For crimes committed on or after 7/28/19 (victim's DOB on or after 7/29/89)**

Rape 1 & 2

- If Victim < 16 when committed – any time after commission
- If Victim > 16 when committed – 20 years from commission

**Note* – there is no distinction for reporting within one year to law enforcement.

Rape of a Child 1, 2, & 3 Sexual Misconduct with a Minor 1 Custodial Sexual Misconduct with a Minor 1 Child Molestation 1, 2, & 3 Sexual Exploitation of a Minor

- Any time after commission

Indecent Liberties

- 20 years from commission

Rape 3

- 10 years from the date of commission

Incest CSAM Promoting CSAM Promoting Travel of CSAM

- 10 years from the date of commission
- If V < 18 when committed – later period of 1) victim's 30th birthday, or 2) 10 years after commission

Voyeurism

- 3 years, or
- If the person being viewed, photographed, or filmed did not realize at the time that he or she was being viewed, photographed, or filmed, within 2 years of first discovering he or she was being viewed, photographed, or filmed.

All other felonies

Three years from date of commission

All Gross Misdemeanors

Two years from date of commission

All Misdemeanors

One year from date of commission

3. **For crimes committed prior to 7/28/19**

Rape 1 & 2

If reported to law enforcement within one year of its commission:

- Ten years from the date of commission
- If Victim < 14 when committed and the incident date occurred:
  - *7/28/13 – 7/27/19* – up to victim's 30th birthday if victim < 18 when committed (V's DOB on or after 7/29/83)
  - *7/26/09 – 7/27/13* – up to victim's 28th birthday (V's DOB on or after 7/27/88)
  - *Pre 7/26/09* – later period of 1) victim's 21st birthday, or 2) ten years after commission

If *not* reported to law enforcement within one year of its commission and the incident date occurred:

- *7/28/13 – 7/27/19*
  - Three years from the date of commission
  - If Victim < 18 when committed, then up to the victim's 30th birthday (V's DOB on or after 7/29/83)
- *Prior to 7/27/13*
  - if victim 14 or older when committed, no more than three years later
  - if victim < 14 when committed, later period of 1) victim's 21st birthday, or 2) seven years after commission

Rape of a Child 1& 2 Child Molestation 1 & 2 Indecent Liberties (1)(b) - incapable of consent Incest 1 & 2

The incident date occurred:

- *7/28/13 – 7/27/19* – up to the victim's 30th birthday (V's DOB on or after 7/29/83)
- *7/26/09 – 7/27/13* – up to the victim's 28th birthday (V's DOB on or after 7/27/88)

- *Prior to 7/26/09* – later period of 1) victim's 21st birthday, or 2) seven years after commission.

Rape of a Child 3 Child Molestation 3

The incident date occurred:

- *7/28/13 – 7/27/19* – up to the victim's 30th birthday (V's DOB on or after 7/29/83)
- *7/26/09 – 7/27/13* – up to the victim's 28th birthday (V's DOB on or after 7/27/88)
- *Prior to 7/26/09* – 3 years

Sexual Exploitation of a Minor

The incident date occurred:

- *After 7/27/13* – up to victim's 30th birthday (V's DOB on or after 7/29/83)
- *Prior to 7/27/13* – 3 years

Voyeurism

The incident date occurred:

- *After 7/26/09* – 3 years, or
  If the person being viewed, photographed, or filmed did not realize at the time that he or she was being viewed, photographed, or filmed, within 2 years of first discovering he or she was being viewed, photographed, or filmed.
- *Prior to 7/26/09* – 3 years

All other felonies

Three years from date of commission

All Gross Misdemeanors

Two years from date of commission

All Misdemeanors

One year from date of commission

SECTION 7: PHYSICAL ABUSE OF CHILDREN

I. FILING

A. 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:
   - 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 a 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:
   - 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:

- 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 actions are presumed unreasonable when used to correct or restraint a child:

a. Throwing, kicking, burning, or cutting a child;
b. Striking a child with a closed fist;
c. Shaking a child under age three;
d. Interfering with a child's breathing;
e. Threatening a child with a deadly weapon; or
f. 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 of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

5. "Pattern or Practice" (Assault of a Child 1º & 2º)

"Pattern or practice" means a documented history of injuries meeting definitions and examples under the "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, 848 P.2d 743 (1993).

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 & 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, 802 P.2d 803 (1990).

Examples:

- cigarettes 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 1° & 2°)

Objects that are inherent weapons – i.e. guns, knives.

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, 978 P.2d 559 (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.36.120, .130, & .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) a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;
- (b) administers, exposes, or transmits to or causes to be taken by another, poison, HIV, or any other destructive or noxious substance, or
- (c) assaults another and inflicts great bodily harm; or

(2) intentionally assaults the child and either:
- (a) recklessly inflicts great bodily harm, or
- (b) causes substantial bodily harm, and the person has engaged in a pattern or practice either of:
  - i. assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or
  - ii. causing the child physical pain or agony that is equivalent to that produced by torture.

Note: above section (2) does not 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:

(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.

Note: above section (7) does not require proof of intent to cause bodily harm.

c. Assault of a Child 3º - RCW 9A.36.140 (Class C)

The defendant with criminal negligence, causes bodily harm to another person

(1) by means of a weapon or other instrument or thing likely to produce bodily harm; or

(2) accompanied by substantial pain that extends for a period sufficient to cause considerable suffering

Examples –
"weapon or other instrument . . . "

- kitchen utensils
- electrical cords
- belts
- hairbrushes
- broomsticks
- adult hand v. child victims: State v. Carney, unpublished 1998 WL 898795

"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, & .035.

a. The appropriate degree of Criminal Mistreatment shall be charged when the defendant is:

(1) A parent, or
(2) A person entrusted with the physical custody of a child (from birth to age 18, RCW 9A.42.010) or dependent person, or
(3) 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; see also, State v. Jackson, 137 Wn. 2d 712, 976 P.2d 1229 (1999).

"child": means from birth to age 18. A fetus is not a child for purposes of this statute. State v. Dunn, 82 Wn. App. 122, 916 P.2d 952 (1996).

b. Criminal Mistreatment 1º - RCW 9A.42.020 (Class B)

Criminal Mistreatment in the First Degree shall be charged when the defendant with criminal negligence as defined in RCW 9A.08.010 causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

c. Criminal Mistreatment 2º - RCW 9A.42.030 (Class C)

Criminal Mistreatment in the Second Degree shall be charged when the defendant with criminal negligence as defined in RCW 9A.08.010 either
(1) creates an imminent and substantial risk of death or great bodily harm by withholding any of the basic necessities of life, or
(2) causes substantial bodily harm by withholding any of the basic necessities of life.

d. 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.

e. Affirmative defense to Criminal Mistreatment (RCW 9A.42.050)

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.

4. Abandonment - RCW 9A.42.060, .070, & .080.

a. The appropriate degree of Abandonment shall be charged when the defendant is:

(1) a parent, or
(2) a person entrusted with the physical custody of a child (under age 18) or dependent person, or
(3) a person employed to provide to the child or dependent person the basic necessities of life

"abandon": 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 Crim. Mistreatment.

"child": see Crim. Mistreatment, RCW 9A.42.010.

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 dependent person will suffer substantial bodily harm.

d. Affirmative Defense to Abandonment, RCW 9A.42.090:

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.

5. Reckless Endangerment - RCW 9A.36.050 (Gross Misdemeanor)

Reckless Endangerment shall be charged when the defendant recklessly engages in conduct that creates:
a. a substantial risk of death to a child, or
b. serious physical injury to a child.

II. SENTENCE RECOMMENDATION.

A. Confinement

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 – available for AOC 3, Crim. Mis.1/2/3, and Abandonment 1/2/3 RCW 9.94A.650

   Alternate conversion of total to partial confinement

3. Mandatory Minimum - Assault 1 & Assault of a Child 1 RCW 9.94A.540.

   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 - RCW 9.94A.701:

   For crimes occurring after 7/1/01, the following terms of community custody apply:

Homicide by Abuse	36 months
Assault of Child 1	36 months
Assault of Child 2	18 months
Assault of Child 3	12 months

5. Mandatory Conditions:

   DNA Identification, RCW 43.43.754.

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

6. Discretionary Conditions:
   a. no contact provisions (if no contact with biological child, the court must make an explicit finding that it is reasonably necessary to protect the child. State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001)).
   b. parenting classes
   c. state certified batterer's treatment
   d. anger management classes
   e. substance abuse evaluation and follow-up treatment
   f. mental health evaluation and follow-up treatment
   g. restitution, including counseling costs
   h. compliance with all directives of CPS and/or family court

SECTION 8: PROMOTING PROSTITUTION

I. FILING

Promoting Prostitution cases are handled by multiple units in the Criminal Division.

- The Economic Crimes Unit will prosecute any promoting prostitution cases where the primary motive appears to be profit and there is no evidence of juveniles being exploited, violence against the victims in prostitution, or a domestic relationship between the promoter and the victim in prostitution.
- The Special Assault Unit will prosecute any cases where the defendant is promoting the prostitution of a minor (see RCW 9.68A.101 and Section 6, subsection II, D, 2.)
- The Domestic Violence Unit will prosecute any promoting prostitution cases where there is a domestic relationship as defined by RCW 10.99.020(1).
- The Violent Crimes Unit will prosecute any promoting prostitution cases where there is credible evidence that violence or the threat of violence is used to further the crime.

Nonetheless, these prosecution guidelines shall remain flexible to ensure that a particular case can be most effectively prosecuted taking into consideration which units and DPAs were involved with case investigation, which units have DPAs who have experience with the crime, and other factors subject to unit leadership.

A. EVIDENTIARY SUFFICIENCY

Promoting prostitution cases will be filed if sufficient admissible evidence exists that would justify conviction by a reasonable and objective fact finder, giving appropriate consideration for the most plausible, reasonably foreseeable defense that could be raised.

Prosecution for promoting prostitution 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/Charge

   a. Promoting Prostitution in the First Degree – RCW 9A.88.070.

Promoting Prostitution in the First Degree should ordinarily be filed when there is sufficient evidence to show that the defendant knowingly profited from prostitution or advanced prostitution by threat or force. For this section, sufficient evidence of threats exist where the facts presented would meet the filing standards for harassment. (see Harassment, Stalking and Other Offenses, Section 10(I)(B)(1)(b)). Sufficient evidence of force exists if there is any assault, injury, loss of consciousness, significant pain, or a weapon was used.

b. Promoting Prostitution in the Second Degree – RCW 9A.88.080.

Promoting Prostitution in the Second Degree should ordinarily be filed when there is sufficient evidence to show the defendant knowingly profited from prostitution or advanced prostitution. Normally, at the time of filing, only one count of promoting prostitution shall be charged for each business enterprise or victim, rather than for each commercial sexual act. Consideration should be given to the following factors:

1) how long the enterprise has been in existence;
2) the defendant's criminal history;
3) allegations of force, fraud, or coercion that might not rise to the levels necessary for a Promoting first Degree charge; and
4) the degree of vulnerability for the identified victims.

The filing DPA shouls also consider whether law enforcement engaged in sexual contact as part of their investigation. If law enforcement engaged in sexual contact, the filing deputy should review whether the sexual contact was necessary to prove the intent of the enterprise and, if so, whether the contact was no more than necessary to prove the elements of the crime.

2. Multiple Counts

a. Initial Filing – Number of Counts

One count for each victim shall normally be filed for Promoting Prostitution in the First Degree. One count for each business enterprise shall normally be filed for Promoting Prostitution in the Second Degree. One count normally should be filed for each additional crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more" category.

b. Amendment

If the defendant elects to go to trial, all other charges normally shall be filed as soon as a trial date is taken

3. Deadly Weapon/Firearm Allegation. See Section 19.

4. Sexual Motivation Allegation. See Section 6.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may 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 in all cases after a trial date is set.

3. Dismissal of Deadly Weapon/Firearm Allegations

Normally firearm or deadly weapon allegations in Promoting Prostitution in the First 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 in all cases after a trial date is set.

B. SENTENCE RECOMMENDATION

1. 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.

2. Restitution

The State will recommend full lawful restitution.

3. Community Custody

Community custody is authorized for crimes against a person, which would include Promoting Prostitution in the First Degree, but not available for Promoting Prostitution in the Second Degree. RCW 9.94A.411.

4. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

5. Mandatory Fees

For a conviction of Promoting Prostitution 1st or 2nd Degree, the court must order a fee in the amount of $3,000.00 for the first offense, $6,000.00 for the 2nd offense, and $10,000.00 for the 3rd or greater offense. RCW 9A.88.120. This fee may be reduced by up to 2/3 by the court if the defendant cannot afford to pay the fee.

The sentencing DPA shall note on the Judgment and Sentence that 98% of the fee shall go to the city where the law enforcement agency conducting the investigation is based and 2% of the fee shall go to the Washington State Department of Commerce.

SECTION 9: 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. Nor does DVU handle cousin, uncle/aunt-nephew/niece, or most in-law cases.

3. The DVU may also handle cases where a domestic violence dynamic is present or where there are domestic violence overtones or issues. For example, the DVU shall handle cases involving domestic trafficking with adult victims in conjunction with SAU._The DVU may also handle cases which involve stalking, or 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 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 for serious violent or violent offenses, 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 $5000, 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 $5000, 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 $5000.

5. Malicious destruction of property where the diminution in value is less than $5000.

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.

8. Non-violent offenses where defendants have no prior DV convictions and will not be supervised after conviction in superior court may be declined for original filing in municipal or district court with the approval of the chair or vice chair.

C. CHARGE SELECTION

1. Assault. (See also Section 4, 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.

"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 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:

(i) loss of a limb; or
(ii) permanent paralysis of a limb or any body part; or
(iii) 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.

(2) 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).

(3) 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; or
(g) Assaults another by strangulation or suffocation.

(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 substantial bodily harm exists shall be made on an individual case basis. Examples of substantial bodily harm include:

(a) a broken or fractured bone (where defendant knew of and disregarded substantial risk that actions would result in injury); 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 constituting temporary but substantial disfigurement (such as a severe black eye that is swollen shut); or
(g) loss of a natural tooth (chipped or cracked teeth shall normally be considered bodily harm – substantial pain under Assault 3); or
(h) an injury requiring surgery that does not constitute "great bodily harm"; or
(i) long-term vision impairment.

(3) Strangulation and Suffocation

Domestic violence strangulation and suffocation cases shall normally be filed as Assault in the Second Degree when there is sufficient admissible evidence that the victim suffered, as a result of strangulation or suffocation, a temporary, but substantial, loss or impairment of the ability to breathe.

Examples of strangulation include:

(a) loss of ability to breathe, which is more than momentary;
(b) injury to the neck including abrasions, scratches, or bruising;
(c) neck pain, neck swelling;
(d) sore throat, difficult swallowing, raspy voice/ voice changes;
(e) tiny red spots near the mouth/ in eyes/ behind ears/ on face (petechia);

(f) temporary loss of a bodily function, such as urination, defecation, fainting, or loss of consciousness;
(g) ears ringing;
(h) nausea/ vomiting.

Examples of suffocation include:

(a) smothering or drowning which results in a loss of ability to breathe, which is more than momentary;

(b) injury to the mouth or face consistent with use of an object, device, or circumstance that obstructs the ability to breathe.

Where those injuries are not present but the elements of the crime are met, the case may still be filed if other aggravating factors exist such as a significant reported or unreported domestic violence history or the strangulation or suffocation is accomplished in the presence of the defendant's or victim's minor children. Examples include:

(a) the defendant presents a high level of risk to the victim as measured by a validated risk instrument;

(b) there is a concerning reported or unreported domestic violence history include:

(i) a history that includes recent or repeated domestic violence incidents in police reports, criminal charges, or criminal convictions;
(ii) a history that includes recent or repeated instances of domestic violence in civil protection order proceedings.

The filing deputy shall ensure that evidence exists which would support a finding consistent with the statutory definition of "strangulation" or "suffocation" and that a thorough investigation on the issue has been conducted and documented (i.e., witness statements, a medical release or medical reports have been submitted as part of the referral). RCW 9A.04.110.

(4) "Torture" Prong – RCW 9A.36.021(g).

In cases where the level of 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.

(5) 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, back injuries, and serious sprains.

d. Felony Assault in the Fourth Degree DV – RCW 9A.36.041

Felony Assault in the Fourth Degree DV shall normally be filed when there is sufficient admissible evidence that the defendant

committed an assault (misdemeanor or felony) on an intimate partner (familial DV cases are not eligible under this statute) and the defendant has two or more prior adult convictions within 10 years for any of the following offenses where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after July 23, 2017:

(1) "Repetitive domestic violence" offense as defined in RCW 9.94A.030;

(2) Crime of "harassment" as defined by RCW 9A.46.060;

(3) Any level of domestic violence assault; or

(4) An out-of-state comparable offense.

Sufficient admissible evidence for filing of Felony Assault 4 DV includes the examples of felony assault above, and misdemeanor assaults where there are clear visible injuries and the defendant presents a concerning level of risk to the victim.

Where injuries are not present but the elements of the crime are met, the case may still be filed if other aggravating factors exist:

(1) The means of assault was dangerous; strangulation or suffocation that resulted in no injury; use of a weapon; or created a high level of risk.

(2) There is a concerning reported or unreported domestic violence history. Examples of concerning domestic violence history include:

    (i) A history that includes recent or repeated domestic violence incidents in police reports, criminal charges, or criminal convictions;

    (ii) A history that includes recent or repeated instances of domestic violence in civil protection order proceedings;

(3) The victim was pregnant or otherwise especially vulnerable; or

(4) Minor children are present.

Felony Assault 4 DV cases without clear injury will be declined for original filing in municipal or district court.

2. Harassment – RCW 9A.46.020/Telephone Harassment – RCW 9.61.230, See Section 10 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, and

(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.

(3) The threat must generally be conveyed in words. Actions clearly intended to be nonverbal communication (slashing motion across the throat) may also constitute a threat. Assaultive acts alone are not sufficient to establish harassment.

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 anti-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 of the crime of telephone harassment, the filing deputy shall consider the victim's reasonable fear in the filing determination.

d. "True Threat" required. To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest, idle talk, or political argument. This First Amendment requirement applies to all harassment crimes.

e. 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.

f. 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.

Gross 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).

Felony Violation of a Court Order 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; and

(2) the respondent or person to be restrained knows of the order; and

(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); and

(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.

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.

e. 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 6.

6. Stalking, see Section 10, Harassment, Stalking and Other Offenses.

7. Domestic Sex Trafficking

a. Human Trafficking shall normally be filed if the defendant has engaged in a pattern of abuse or violence against the victim and the defendant knowingly advances prostitution by compelling a victim by threat or force to engage in prostitution or profits from prostitution that results from such threat or force.

b. Domestic Trafficking/Promoting Prostitution in the First Degree (Threat, Force) RCW 9A.88.070(1), shall normally be filed if the defendant knowingly advances prostitution by compelling a victim by threat or force to engage in prostitution or profits from prostitution that results from such threat or force.

c. Domestic Trafficking/Promoting Prostitution in the Second Degree (Advance Prostitution) RCW 9A.88.080 (1)(a)(b), shall normally be filed if the defendant knowingly profits from prostitution; or advances prostitution.

d. See Section 6, Sexual Assault, for cases involving minor victims: Promoting Travel for Commercial Sexual Abuse of A Minor, RCW 9.68A.102(1); Commercial Sexual Abuse of A Minor, RCW 9.68A.100; Permitting Commercial Sexual Abuse of A Minor, RCW 9.68A.103(1); Promoting Commercial Sexual Abuse of A Minor, RCW 9.68A.101(1).

e. Domestic Trafficking and Domestic Violence Protocol

In cases involving adult victims of domestic trafficking/promoting prostitution the prosecution will be handled by DVU in conjunction with SAU. All cases involving minor victims of domestic trafficking shall remain with SAU.

Given the need for specialized prosecutors and advocates focused on domestic trafficking and the intersection with domestic violence, the PAO will centralize domestic trafficking/promoting prostitution cases to better provide systematic coordination, staffing, and early victim advocacy to victims. The PAO recognizes that cases involving domestic trafficking/ promoting prostitution are frequently DV cases. It is common for pimps and their prostitutes to be intimate partners, and the cycle of abuse is severe. Intervention in these cases is helped greatly by domestic violence advocacy.

Under the trafficking and domestic violence protocol all adult cases of domestic trafficking shall be routed to the DVU for filing, case handling, and advocacy services. The cases will be specially labeled and tracked, DPAs will assist with prefiling investigations, specific DV advocates preassigned, and the cases then staffed between DV and SAU.

8. Custodial Interference – RCW 9A.40.060

Custodial Interference in the First Degree shall not be filed unless:

a. There is an enforceable final court order, or parenting plan, determining the right to custody or time with the child. [2];

[2] For cases prior to July 24, 2015, a domestic violence protection order that includes a child visitation provision is not a "court-ordered parenting plan." See State v. Veliz, 176 Wn.2d 849, 288 P.3d 75 (2013). The custodial interference statute was amended effective 7/24/15 to include any "court order making residential provisions for the child" in response to Veliz : "It is the intent of the legislature to address the Washington supreme court's decision in State v. Veliz, 176 Wn.2d 849 (2013). The court held that a parent cannot be charged with custodial interference under RCW 9A.40.060(2) if a parent withholds the other parent from having access to the child in violation of residential provisions of a domestic violence protection order. The legislature intends that the provisions of RCW 9A.40.060(2) and 9A.40.070(2) be applicable in cases in which a court has entered any order making residential

b. The parties have substantially complied with the final custody order or parenting plan; and

c. It appears the King County Superior Court has subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

Custodial interference/ parental kidnapping cases shall be handled by the Special Assault Unit for cases involving children under the age of 13. The Domestic Violence Unit shall handle cases involving children age 13 or older, as well as cases that involve allegations of domestic violence between the parents.

9. Multiple Counts/Stipulation to Uncharged Counts

a. Initial Filing – Number of Counts

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. 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.

10. Special Allegations

a. Firearm allegations.

"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

provisions for a child including, but not limited to, domestic violence protection orders that include such residential provisions." Laws of 2015, ch. 38, § 1.

(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. **Note**: The standard for filing a firearm enhancement in a domestic violence case differs from the standards that apply to firearm enhancements for other crimes, as outlined in Section 19, due to the unique danger that firearms pose in the domestic violence context.

b. Deadly Weapon allegation

For purposes of the special allegation, 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, 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 used 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. Use of Risk Assessment Tools During EPU (PRINS and ODARA)

The DV unit engages in ongoing risk assessment from the time a case is received until it is resolved. Questions of risk are compounded by lethality, recidivism, and the daily challenge of how to manage large volumes of DV cases while promoting dignity and respect for victims. The DV unit currently uses risk information from case reports, victim reports, advocacy, law enforcement, criminal history, if any, that occurred in Washington or any other state; criminal history that occurred in any tribal jurisdiction; and the defendant's individual order history.

Per the Washington State Gender and Justice Risk Assessment report (2018) “risk tools can be used for more than pretrial bail decisions, from improvement of police response, to enhanced triage of child abuse and neglect referrals to differentiation of treatment recommended for

offenders. Statewide integration of validated risk assessment tools in domestic violence response is overdue." The G&JC report reviewed the literature on DV risk assessment, encouraged the use of validated risk assessment in DV, as well as ongoing monitoring and re-assessment of risk and lethality factors.

To improve decision making the DV unit will aggregate risk information and perspectives by utilizing the Personal Recognizance Interview Needs Screen (PRINS), King County's validated actuarial pretrial risk and needs assessment instrument. PRINS provides risk ratings for multiple indicators that inform intervention for recidivism, domestic violence, and violent crime. The DV Unit may also consider the Ontario Domestic Assault Risk Assessment (ODARA) or other validated DV risk instruments when available. Combining risk assessment with other available information and subject matter experts will promote more informed, critical, and accurate decision making during the early plea stage.

2. 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.

3. 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.

4. 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.

5. Dismissal of DV designation

The DV designation shall not be dismissed in return for a plea of guilty on the underlying offense. If evidentiary issues prevent the proof of the DV designation at trial, then the designation may be dismissed only with approval from the Unit Chair or Vice Chair.

6. Dismissal of Aggravating Factor - see Section C.2 below

7. 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, protection orders, 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 the dynamics of the relationship between the victim and the defendant, including any information provided by community based domestic violence advocates.

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. DPAs may consider victim's wishes and needs regarding no-contact order restrictions, and will consider Victim Advocate input when appropriate.

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

The Domestic Violence Prevention Act mandates that victims of DV shall receive "the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010. Towards this end, the King County Prosecuting Attorney's Office recognizes the substantial and harmful impact upon society, families, children and the victims of offenses committed within a domestic relationship. We further recognize the continuing nature of domestic violence, and the lasting trauma caused by such violence. We find that the prevention of domestic violence and the proper punishment for such offenses is a compelling state interest that requires the recommendation of enhanced sanctions for certain domestic violence offenders who are not otherwise adequately punished by the imposition of a "Standard Sentence Range" under the Sentencing Reform Act (SRA). See PAO Domestic Violence Sentencing Position paper (2008).

a. History of Domestic Violence Aggravating Factor. The aggravating factor for history of domestic violence requires the current offense involve domestic violence, as defined in RCW 10.99.020, and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535. The following standards shall be utilized for the aggravating factor for history of domestic violence:

(1) The underlying offense is a felony assault, felony violation of a no contact order (assault), burglary, felony harassment, stalking, any sex crime, unlawful imprisonment, or other crime where the defendant used force or threats of force against the victim; and there does not appear to be a defense mitigating the crime; and

(2) There is evidence that the defendant has a significant history of domestic violence. For example, the defendant has three or more prior convictions for domestic violence assault from separate incidents, or multiple prior felony domestic violence convictions; or

(3) There is evidence that the defendant has a significant history of unreported domestic violence or significant history of arrests on domestic violence charges; or

(4) The defendant's history of domestic violence involves extremes of violence, sexual assault, or stalking behavior; or

(5) The defendant's history of domestic violence involves witness tampering or intimidation.

b. Presence of A Minor Child Aggravating Factor. The aggravating factor for domestic violence in the presence of a minor child requires the current offense involve domestic violence, as defined in RCW 10.99.020, and the offense occur within sight or sound of the victim's or the offender's minor children under the age of eighteen years. RCW 9.94A.535. The following standards shall be utilized for the aggravating factor for domestic violence in the presence of a minor child:

(1) The underlying offense is a felony assault, burglary in the first degree, felony harassment, felony violation of a no contact order, stalking, any sex crime, kidnapping, or other crime where the defendant used significant force or threats of force against the victim; and there does not appear to be a defense mitigating the crime; and

(2) There is evidence that the child saw and/or heard the underlying crime; and

(3) There is evidence the child was affected by what s/he saw e.g. child calls 911, child communicates somehow to police that s/he affected; victim describes effect on child; child interviewed and describes effect; and

(4) The child is under 18 years of age and is the biological or adopted child of either the victim or the defendant or both (grandchildren, nieces, cousins not covered by statute).

In appropriate cases, every effort shall be made by the filing deputy to arrange a child interview with the child interview

specialist as soon as possible. The detective and advocate shall be included in the arrangements and the advocate may arrange for the advocate supervisor to provide advocacy for the child in appropriate cases. Child interview DVDs shall remain in evidence and in the custody of the child interview specialist and shall be provided in discovery only under a protective order.

c. All plea paperwork to aggravating factors must be carefully reviewed to insure that the defendant waives his right to have a jury find the aggravating factor beyond a reasonable doubt at trial, that the defendant waives his right to appeal a sentencing outside the standard range, and that the plea contains a factual basis for the aggravating factor.

3. Drug Offender Sentencing Alternative (DOSA)

a. On DOSA and Residential DOSA for all domestic violence cases, a defense counsel, should make every effort to seek a presentence investigation and a chemical dependency screening report as provided in RCW 9.94A.500, in advance of sentencing.

b. DOSA and Residential DOSA recommendations involving co-occurring drug and domestic violence cases, must also include an appropriate domestic violence treatment program by a state-certified domestic violence treatment provider pursuant to chapter 26.50 RCW.

c. Residential DOSA on DV cases must have in the plea agreement that the defendant shall not be released from jail until the bed date/transportation to ADOTSA. This is because gaps between jail release and treatment offer an unnecessary risk of substance abuse binging and has resulted in multiple domestic violence homicides. Because a court does not have the authority to hold a defendant after imposing a Residential DOSA, this may be accomplished by scheduling sentencing to coincide with the bed date. Alternatively, if the defendant is being sentenced on a misdemeanor offense along with a felony, the defendant's misdemeanor sentence could be credit for time served at the time of the bed date.

4. Domestic Violence Treatment

Although the Sentencing Reform Act (SRA) encourages the wide use of affirmative conditions, community supervision to monitor compliance is simply not available in most cases. As a result, courts are routinely

imposing sentencing conditions, including treatment, that are unmonitored and unenforced.

If a DPA is considering the use of affirmative conditions in a case, either in lieu of or in addition to a standard range sentence, three fundamental questions need to be addressed:

a. Is there reason to believe this offender is well-suited to the proposed treatment? If not,we are simply guessing that an offender's risk to reoffend can be reduced through treatment. Where possible, we should avoid reliance on our own judgment regarding the suitability of treatment for an offender. Rather, we should seek to rely on competent professional assessments (typically provided by defense counsel).

b. Is the proposed program evidence-based and proven effective in addressing the issue that we seek to treat? Increasingly, it is clear that some programs are much more effective than others in reducing recidivism and achieving positive outcomes for the offenders and the community. We should not direct scarce resources at programs that do not meet basic benchmarks of effectiveness. Examples or effective programs (per WSIPP) include: DOSA, Drug Court, Mental Health Court; cognitive behavioral therapy, intensive drug treatment and supervision;

c. Assuming that an eligible offender is being placed into the right program, we must ask three questions. How will an offender's performance be monitored? How will compliance be monitored? How will failure to comply to proven and punished? In general, if it is proven that an offender scores high enough on the risk assessment tool to authorize Department of Corrections supervision, then imposing affirmative conditions may be appropriate. Without some assurance to this effect, the KCPAO will not request nor support the imposition of an affirmative condition in routine cases.

The routine use of "bench supervision" will not be requested unless there is a public safety interest. In cases of stalking and domestic violence who are not eligible for supervision the KCPAO will request affirmative treatment conditions and monitoring as such cases evidence significant concern for future harm, both to individuals and the community. DV victims (and prosecutors) often want to see defendants engage in treatment aimed at reducing future abuse. Furthermore, it is helpful for DV defendants to have clear benchmarks for what is required of them in order

to modify or lift an NCO. Finally, the PAO wants to ensure that defendants have reduced the risk of DV recidivism prior to having their convictions vacated or firearm rights restored. Therefore, the PAO will recommend treatment in DV offenses where the information available to the parties suggests that the defendant could benefit from treatment, be it behavior modification for DV, substance-use disorder, and/or mental health treatment. The PAO will generally not request bench supervision, except in rare cases, but will cover any review hearings set by the Court. In cases where a review hearing is not set, PAO will recommend that treatment proof be filed with the Court.

5. Domestic Violence Batterer Treatment (aka Batterer Intervention Program)

In 2013, the Legislature directed the Washington State Institute for Public Policy to conduct a study titled "What works to reduce recidivism by domestic violence offenders." This rigorous study called into question the efficacy of traditional batterer treatment. In response, the PAO changed sentence recommendations to include alternatives to traditional batterer treatment such as Cognitive Behavioral Treatment. In the summer of 2018, DV treatment underwent significant revision and update. The new Washington Administrative Codes now include higher standards for batterer treatment and incorporate Cognitive Behavioral Therapy and many evidence based practices including a four tiered risk and needs approach. See updated administrative codes (adopted 7/18) and list of certified providers.

The new statewide approach to batterer intervention is promising, but will take time for the field of providers to implement. With that the PAO will consider whether batterer intervention providers implement/adopt evidence based practices and training in recommending which intervention (BIP or CBT) is appropriate.

In cases involving the Department of Corrections, the PAO will continue to recommend the DOC assess the offender and decide which intervention (BIP or CBT) and which level of treatment is appropriate.

With misdemeanor cases, or cases with inactive supervision, the PAO will recommend either DV treatment or CBT to the Court based on factors listed in the Gender and Justice Commission DV Bench book (2016), and Appendix B – Court Mandated Treatment for DV Perpetrators.

Factors to be considered include:

a. Does the offender present a high risk to the victim or children, or is the offender a high risk for recidivism?

b. Has the offender previously disregarded court orders?

c. Has the offender previously been terminated for unsuccessful completion of a treatment program addressing the violent behavior?

d. Is the offender amenable?

6. No-Contact Orders

a. A no-contact order for the statutory maximum term 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. The deputy should seek and consider victim and Victim Advocate input when making this determination.

7. Restitution

The State will recommend full lawful restitution.

8. Community Custody/Probation

The State shall recommend community custody and probation as required by law.

9. DNA Identification

DNA identification is mandatory for all felony convictions, and certain enumerated misdemeanor convictions, including harassment, stalking, and

Assault 4-DV, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

10. Ineligibility to possess firearms

All felony convictions and misdemeanor convictions for domestic violence assault 4, criminal trespass 1, vnco, coercion, stalking, or reckless endangerment make the offender ineligible to possess firearms. RCW 9.41.040.

SECTION 10: HARASSMENT, STALKING AND RELATED 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. Misdemeanor Harassment – RCW 9A.46.020.

   b. Felony Harassment – RCW 9A.46.020.

      (1) Felony Harassment - When Filed. Felony harassment shall normally be filed only when one or more of the following factors are present:

      (a) the threat is part of a pattern of threats to the current victim;

      (b) a history of violence, reported or unreported, with the current victim;

      (c) a prior violent history by the defendant, known to the victim.

      Absent one or more of these factors, misdemeanor harassment shall normally be filed.

(2) Isolated Incidents

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.

(3) 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.

(4) "True Threat Doctrine"

In order to punish speech, harassment must meet the "true threat" standard: the statement must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest, idle talk, or political argument.

c. Telephone Harassment – Gross Misdemeanor - RCW 9.61.230.

d. Telephone Harassment – Felony - RCW 9.61.230.

(1) Felony Telephone Harassment - When Filed.

Felony telephone harassment shall normally be filed only when one or more of the following factors are 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 violence with the current victim;

(iv) a prior violent history by the defendant, known to the victim.

Absent one or more of these factors, misdemeanor telephone harassment shall normally be filed.

(2) Isolated Incidents

Where the threat appears to be an isolated incident, the filing deputy shall normally file Misdemeanor Telephone Harassment charges. However, an isolated incident of telephone 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.

(3) Reasonableness of the Victim's Fear

While reasonable fear on the part of the victim is not an element of the crime of telephone harassment, the filing deputy shall consider the victim's reasonable fear in the filing determination. 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.

(4) Formation of Intent

In State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686 (2008), the Washington State Supreme Court held that a conviction

under the telephone-harassment statute requires proof that the defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim, not later after the call has begun.

e. Hate Crime Offense – 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 expression or identity, sexual orientation, or mental, physical or sensory disabilities.

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 a hate crime 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 identity or expression, sexual orientation, or mental, physical or sensory disability, 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) "True Threat Doctrine" In order to punish speech, harassment must meet the "true threat" standard: the statement must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest, idle talk, or political argument.

(d) Specific Conduct – Jury may infer intent from these acts. RCW 9A.36.080(2).

(i) Cross burning on property of a victim who is or whom the actor perceives to be of African-American heritage;.

(ii) Defacing property of Jewish victim, or whom the actor perceives to be Jewish, with a swastika;

(iii) Defacing religious real property with words, symbols, or items that are derogatory to persons of the faith associated with the property;

(iv) Placing a vandalized or defaced religious item or scripture on the property of a victim who is or whom the actor perceives to be of the faith with which that item or scripture is associated;

(v) Damaging, destroying, or defacing religious garb or other faith-based attire belonging to the victim, or attempts to or successfully removes religious garb or other faith-based attire from the victim's person without the victim's authorization; or

(vi) Placing a noose on the property of a victim who is or whom the actor perceives to be of a racial or ethnic minority group.

(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 hate crime offense may

be prosecuted and punished separately. RCW 9A.36.080(5).

However, see State v. Lynch, 93 Wn. App. 716, 970 P.2d 769 (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 additional elements. See State v Robertson, 88 Wn. App. 836, 947 P.2d 765 (1997). (Assault 2º).

Note: You still can charge both a hate crime offense and assault in the fourth degree but treat the assault in the fourth degree the same as a "lesser included" when instructing jury.

(g) Penalty. A Hate Crime Offense is a Class C felony and currently has a seriousness level of IV in the sentencing guidelines.

f. Stalking – RCW 9A.46.110 - All stalking cases will be handled by the Domestic Violence unit, regardless of the relationship between the defendant and the victim, in order to take full advantage of victim advocacy resources.

(1) Definitions

(a) "Follows" RCW 9A.46.110(6)(b).

(b) "Harasses" RCW 10.14.020. RCW 9A.46.110(6)(c).

(c) "Protective order" RCW 9A.46.110(6)(d).

(d) "Repeatedly" RCW 9A.46.110(6)(e).

(e) "Contact" 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. RCW 9A.46.110(1)(b).

(2) Elements of Crime – RCW 9A.46.110(1).

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.

(3) Stalking is a gross misdemeanor unless one or more of the following special circumstances applies in which case it is a Class "B" felony:

(a) 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;

(b) the stalking violates any protective order protecting the person being stalked;

(c) the stalker has previously been convicted of stalking under this section for stalking another person;

(d) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.825, while stalking the person;

(e) victim is or was law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community corrections officer, court employee, court clerk, 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;

(f) victim is current, former, or prospective witness in an adjudicative proceeding, and the stalking is in retaliation as a result of the testimony or potential testimony.

(4) Merger Provision. Other crimes committed during the commission of the crime of stalking may be prosecuted and punished separately, however may merge with stalking for sentencing purposes.

See State v. Parmelee, 108 Wn. App. 702, 32 P.2d 1029 (2001). The defendant was convicted of felony stalking and 3 misdemeanor violations of a No Contact Order. The court held that 2 violations of the protective order were essential to proof of felony stalking, so they merged with the felony stalking for sentencing.

(5) 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 frighten, intimidate, or harass prong. RCW 9A.46.110(2)(a).

(b) Lack of intent to frighten, intimidate or harass is not a defense under the knows or reasonably should know the person is afraid, intimidated, or harassed prong. RCW 9A.46.110(2)(b).

(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).

(6) 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).

C. MULTIPLE COUNTS

1. 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.

2. 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 19.

4. Sexual Motivation Allegation. See Section 6.

5. 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.46.030.

6. No Contact Provisions - Weapons – Arraignment procedures. The court at arraignment must determine the necessity of issuing a no contact order. If the court issues a no contact 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.

7. Enforcement of No Contact Provisions. Violation of a no contact provision entered either as a condition of release prior to conviction or as a condition of the sentence (i.e. not a Domestic Violence No Contact Order) is enforced only as a condition of sentence or contempt of court. See RCW 9A.46.040(2) and 9A.46.080.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

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. 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.

2. Restitution

The State will recommend full lawful restitution.

3. Community Custody.

The State will request community custody as required by law.

4. 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 information from the defendant, defense counsel or others related to the defendant regarding the victim's desire or lack thereof for a no contact order.

DV No Contact Orders shall be requested in all cases where an order is sought and the relationship between the defendant and the protected party meets the statutory definition, RCW 10.99.020. In all other cases in which protection is sought, the no contact provision shall be a condition of sentence.

5. DNA Identification

DNA identification is mandatory for all felony convictions, and certain enumerated misdemeanor convictions, including harassment, stalking, and Assault 4-DV, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 11: ROBBERY

I. FILING

A. EVIDENTIARY SUFFICIENCY

Robbery cases will be filed if sufficient admissible evidence exists that, 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.

(1) Armed with or Displays a Deadly Weapon – Robbery in the first degree should be filed when a deadly weapon is used to commit the robbery. A deadly weapon is "used" when (1) the suspect's actions manifest a specific intent to use the deadly weapon to further the robbery, regardless of whether physical contact with the victim occurs, and (2) the suspect is in actual possession of a deadly weapon, a firearm, or what appears to be a firearm, at the time of the robbery.

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.

(3) Financial Institution RCW 7.88.010 and RCW 35.38.060.

a. Robbery of a financial institution should be filed as robbery in the first degree if:

(i) any physical force is used,
(ii) a deadly weapon is used,

(iii) the suspect displays "what appears to be" a deadly weapon that is actually visible to the victim,
(iv) the loss exceeds $2,500, or
(v) the suspect's criminal history includes robbery (including referrals, convictions, reduced or declined robbery charges).

All other robberies of a financial institution should ordinarily be filed as robbery in the second degree. For example, if the only threat of force was verbal or contained in a written note, then it should ordinarily be filed as robbery in the second degree.

b. Robbery in the Second Degree – 9A.56.210.

(1) Force Used to Obtain Property

Except where otherwise noted, all other robbery cases, shall be filed as robbery in the second degree where it appears that the defendant initiated contact with the victim with the intent to commit robbery (e.g., hold up of a convenience store, stranger robbery, mugging).

a. Theft in the First Degree - Taking from the Person (e.g., purse-snatching) RCW 9A.56.030(1)(b).

Theft in the first degree should be filed when the property is obtained without injury, threat, or significant struggle.

(1) Force Used to Retain Property

A person who initially unlawfully but peaceably takes property commits robbery under RCW 9A.56.190 by retaining the property through the use of force, violence or fear of injury.
Robbery should be charged in these situations only where there is clear evidence that (1) the force was used to retain the property, not simply to effectuate an escape after abandoning the property, and (2) a significant use of force or threat occurred. A significant use of force or threat includes, but is not limited to:

1. Use of a weapon. A weapon is "used" when (1) the suspect's actions manifest a specific intent to use the weapon to further the robbery, regardless of whether physical contact with the victim occurs,

and (2) the suspect is in actual possession of the weapon at the time of the robbery;

2. The defendant verbally threatens to use a weapon and is in actual possession of a weapon;

3. Infliction of injury that requires aid and is more significant than transitory pain;

A verbal threat of force alone is generally insufficient to satisfy "a significant threat of force."

In circumstances that do not meet the above criteria in section (2), robbery in the second degree charges may still be filed where:

1. The value of the stolen or damaged property is over $1000; or
2. The criminal history of the defendant includes a robbery (including a reduced or declined robbery), other violent crime, or a significant history of thefts (including shoplifting).

Robberies that do not meet the above criteria may be reviewed for filing of other felonies such as Burglary, Theft, Organized Retail Theft, Assault, and Harassment.

B. SENTENCE RECOMMENDATION

1. 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.

2. Restitution

The State will recommend full lawful restitution.

3. Community Custody

The State will recommend community custody as required by law.

4. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 12: BURGLARY

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Burglary in the first degree cases and cases involving HIPRO offenders will be filed if sufficient admissible evidence exists that, 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. All other burglary 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. 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(s) against a person or property within, sufficient to satisfy a reasonable and objective fact-finder of that conclusion.

B. CHARGE SELECTION

1. Degree

   a. Burglary in the First Degree – RCW 9A.52.020.

      (1) Definitions

         (a) Enter - RCW 9A.52.010(1).

         (b) Enter or remains unlawfully - RCW 9A.52.010(2).

      (2) Burglary in the First Degree - Armed with a Deadly Weapon

         Burglary in the First Degree should only be filed under the armed with a deadly weapon prong if there is some evidence that the weapon was intended to be used as a weapon rather than as a burglary tool.

         Weapons that are obtained during the course of the burglary shall only serve as a basis for filing burglary in the first degree where there is evidence that the offender took

the item to use as a weapon and not just for its monetary value.

(3) Burglary in the First Degree - Assaults Any Person

Any assault during a burglary or immediate flight from the building may be a basis for first degree burglary.

b. Residential Burglary – RCW 9A.52.025.

(1) Definitions

Dwelling - RCW 9A.04.110(7).

The definition of dwelling includes all areas of shared housing such as a tool or laundry room, hallway, attached garages and other common areas. State v. Neal, 161 Wn. App. 111, 249 P.3d 211 (2011).

(2) Residential Burglary - When Filed

All entries into areas meeting the definition of dwelling noted above, coupled with sufficient proof of intent, shall normally be filed as residential burglary, except apartment building common areas (such as a garage, laundry room, storage room, and mailroom) shall be initially filed as Burglary in the Second Degree. Nonetheless, hallways that are adjacent to apartments shall be filed as Residential Burglary.

(3) Occupied Burglaries – Aggravator. RCW 9.94A.535(3)(u).

For burglaries of occupied residences that occur at a time and place when residents are likely present, or there is other evidence that the defendant knew or should have know that the residence was occupied, an Occupied Residence Aggravator shall typically be included at time of filing.

c. Burglary in the Second Degree – RCW 9A.52.030

(1) Definitions

Building - RCW 9A.04.110(5).

The definition of building includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other

structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods. Each unit of a building consisting of two or more units separately secured or occupied is a separate building.

(2) Burglary in the Second Degree – When Filed.

All entries into areas meeting the definition of a building other than a vehicle or dwelling, coupled with sufficient proof of intent, shall normally be filed as burglary in the second degree.

d. Storage Lockers

Entries into storage lockers and other secure storage areas shall be filed as burglary in the second degree unless the area meets the statutory definition of dwelling in which case it may be filed as residential burglary.

e. Motor Homes and Boats

Entries into motor homes and boats equipped with permanent sleeping or cooking facilities shall be charged as vehicle prowling in the first degree.

f. Fenced Areas, Carports, Detached Garages and Similar Structures

A private yard that is partially enclosed by a fence and partially bordered by sloping terrain is not a fenced area, as required to support a conviction. State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009).

Entries into fenced areas, carports, detached garages, or similar structures shall ordinarily be directed for original filing in municipal or district court except in the following situations.

(1) The total value damaged, taken or attempted to be taken is more than $2000;

(2) The defendant's criminal history or police intelligence indicates the defendant is part of organized illegal activity, is a prolific offender, or is otherwise a significant problem in the community; or

(3) The entry was for a purpose other than theft or damage to property.

g. Trespassed Shoplifters

Where a person receives a written trespass from a merchant, then returns to the same merchant within the period of trespass and is detained for shoplifting, that person shall ordinarily be directed for original filing in municipal or district court for theft and/or trespass charges if the amount of the theft is less than or equal to $2,000.

Where a person receives a written trespass from a merchant, then returns to the same merchant within the period of trespass and is detained for shoplifting, that person shall ordinarily be directed for expedited filing for theft charges if the amount of the theft is between $2,000 and $7,500.

Notwithstanding the above, felony charges may be filed where the defendant's criminal history or police intelligence indicates the defendant is part of organized illegal activity, is a prolific offender, or is otherwise a significant problem in the community. There must be sufficient proof of identity for both the initial trespass and the subsequent trespass violation.

h. Burglary Arising Out of Public Assembly

(1) Definition and General Considerations

The King County Prosecuting Attorney's Office (PAO) recognizes and supports the rights guaranteed by the First Amendment to free speech, peaceful assembly, demonstrations, and protest. Nonviolent demonstrators are distinguished from offenders who commit crimes during a public assembly, such as the widespread stealing of goods and property damage to businesses. In determining whether to prosecute these offenders, the PAO will carefully consider the offender's actions, the extent of the victim's loss, the offender's criminal history, and the unique circumstances in which the crime arose. Public assembly includes, but is not limited to, instances where a group of people gather together for the following purposes: social, recreational, religious or political activities.

Public assemblies are dynamic, fluid situations that can be emotionally charged and tense. Crimes committed during public assemblies are frequently captured on video from multiple vantage points, including officers' body-worn and in-car video, citizens' phones, and security cameras. The

PAO will review all available video evidence from law enforcement and any other known sources prior to filing charges. The PAO will consider the actions of everyone involved, including the offender, law enforcement, fellow demonstrators, and onlookers to ensure fair and just prosecution.

(2) Specific Considerations

While recognizing that there are multiple factual scenarios arising out of public assembly cases, we have identified the following specific considerations to guide our charging decisions. These standards do not apply to instances far from the center of a public assembly event. An instance is considered far from the center of a public assembly event if there appears to be no legitimate nexus to the public assembly.

(a) Breached Business - If there is sufficient evidence that the suspect was the person who breached the closed business by breaking down the door, shattering the window, tearing down plywood, or other means of initiating the unlawful entry, then the State should file Burglary in the Second Degree (RCW 9A.52.030). The suspect need not be in possession of property from the business if there is sufficient evidence that the suspect, or their accomplice, intended to commit a crime inside of the business.

(b) Suspect Inside Business and Unknown Entry– If there is sufficient evidence that the suspect entered the closed business after a non-accomplice breached it, or it is unknown how the suspect gained entry, then the next consideration is whether the suspect is in possession of property taken from that business or caused damage to that business:

i. No Property and no damage – If the suspect is inside the closed business, does not possess any property from the business, and there is no evidence that the suspect caused any damage to the business, then the State should decline the case to municipal or district court for consideration of filing

Criminal Trespass in the First Degree (RCW 9A.52.070).

ii. De Minimis property theft/damage – If the suspect is inside the closed business and possesses a de minimis amount of property taken from the business, or caused a de minimis amount of damage to the business, then the State should decline the case to municipal or district court for consideration of filing Criminal Trespass in the First Degree (RCW 9A.52.070), Theft in the Third Degree (RCW 9A.56.050), or Possession of Stolen Property in the Third Degree (RCW 9A.56.170).

iii. More than de minimis theft/damage – The State will file Burglary in the Second Degree (RCW 9A.52.030) if the offender committed any of the following acts:

1. Unlawfully entered one business and took or possessed property valued over $1,000;
2. Unlawfully took or possessed property from more than one business, valued over $1,000;
3. Unlawfully entered the business in order to resell or traffic in stolen property, where the total fair market value of property taken is over $1,000. Intent to resell or traffic in stolen property should be demonstrated by evidence of an attempt to re-sell items, or where the suspect's criminal history indicates a pattern of Organized Retail Theft;
4. Caused intentional damage to the business, beyond that involved in gaining access or entry into the closed business, valued at more than $1,000;

5. Unlawfully took or caused intentional damage to a small business causing substantial financial hardship to the business. Substantial financial hardship will be determined on a case by case basis, primarily in regard to small business owners;

6. Attempted to commit or committed arson against the business;

7. Committed the current offense shortly after committing another similar offense, whether charged or in review and had previously been released from jail. If the similar offense is currently uncharged, the case must meet KCPAO Filing and Disposition Standards;

iv. Notwithstanding the above, the State may file burglary charges if the defendant's criminal history or police intelligence indicates the defendant is part of organized illegal activity, is a prolific offender, or is otherwise a significant problem in the community.

(c) Suspect Outside the Business

i. Evidence Suspect Was Inside Business – If the suspect is outside the business and in possession of property taken from the business, and evidence exists that the suspect was inside the business (such as surveillance video, cell phone video, cell phone evidence, or eye-witness testimony), then the State should either file charges, or decline felony charges and refer for misdemeanor prosecution, consistent with the above criteria set forth in section (b)(ii)-(iv).

ii. No Evidence Suspect Was Inside Business – If the suspect is outside the business and in

possession of property taken from the business, but there is no evidence that the suspect was inside the business, then there is insufficient proof for a burglary charge and the appropriate degree of Theft and/or Possession of Stolen Property shall be charged consistent with our FADS.

(3) Additional Considerations

(a) Value means the market value at the time and place of the theft.RCW 9A.56.010(21). In the case of goods offered for sale at retail, the retail price should be used.

2. Multiple Counts/Amendments

a. Initial Filing - Number of Counts

One count ordinarily 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. Amendment

If the defendant sets a trial date, other charges that are supported by the evidence shall be filed at the time the trial date is set or soon thereafter. In determining what additional charges should be filed, the deputy should consider adding those charges necessary to adequately hold the defendant responsible for the complete range and seriousness of the criminal conduct.

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 unlawful entry or remaining by the defendant under at least an accomplice liability theory.

c. Malicious mischief in the first or second degree may be appropriately added where there is extensive and gratuitous vandalism, that meets the definition of "maliciously" in RCW 9A.04.110.

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). These additional charges may not merge with the burglary in the first degree charge. See RCW 9A.52.050.

4. Deadly Weapon/Firearm Allegations - See Section 19.

5. Sexual Motivation Allegation - See Section 6.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

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 factors listed above may be considered in determining whether a count shall be

dismissed. Caseload pressures or the cost of prosecution may not 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 Allegations - See Section 6.

B. SENTENCE RECOMMENDATION

1. 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 residential burglary and burglary in the second degree.

2. Restitution -

   The State will recommend full lawful restitution.

3. Community Custody

   The State will recommend community custody as required by law.

4. DNA Identification

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

5. Exceptional Sentence

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 may be proposed to file an aggravating circumstance in order to seek an exceptional sentence above the presumptive sentencing range. Exceptional sentences shall be considered in all cases involving high-impact offenders where a potential aggravating factor exists. The filing of aggravating circumstances must be approved by a supervising senior.

An exceptional burglary offense is more serious than the typical offense and is identifiable by consideration of the following factors:

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

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

(c) The victim of the burglary was present in the building residence when the crime was committed.

SECTION 13: ARSON

I. FILING

A. EVIDENTIARY SUFFICIENCY

1. Arson in the first degree will be filed if sufficient admissible evidence exists that, 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 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. CHARGE SELECTION

1. Degree

   a. Arson in the First Degree – RCW 9A.48.020.

      (1) Definitions
         (a) Knowingly - RCW 9A.08.010(1)(b).

         (b) Maliciously - RCW 9A.04.110(12).

         (c) Dwelling - RCW 9A.04.110(7).

      (2) Arson in the First Degree - Manifestly Dangerous to Human Life

         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.

(3) Arson in the First Degree - Dwelling

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.

(4) Arson in the First Degree - Custodial Setting

All arsons which occur in a jail or work/education release, shall be filed as first degree.

(5) Arson in the First Degree - Insurance Fraud

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) Arson in the Second Degree - Dwelling

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) Arson in the Second Degree vs. Reckless Burning or Malicious Mischief

An intentional fire not involving an actual building where the damage is less than $5,000 shall be charged as a felony reckless burning or malicious mischief in superior court.

c. Reckless Burning in the First Degree - RCW 9A.48.040.

(1) Definitions

(a) Recklessness - RCW 9A.08.010(1)(c).

2. Multiple Counts/Amendments

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, one count should be filed for each crime based on separate and distinct criminal conduct.

b. Amendment

If the defendant sets a trial date, other charges that are supported by the evidence shall be filed at the time the trial date is set or soon thereafter. In determining what additional charges should be filed, the deputy should consider adding those charges necessary to adequately hold the defendant responsible for the complete range and seriousness of the his criminal conduct.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of

prosecution may not normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

B. SENTENCE RECOMMENDATION

1. 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 offered.

   b. Alternative conversion of total to partial confinement and first offender policies apply to specific crimes as indicated in Section 2.

2. Restitution

   The State will recommend full lawful restitution.

3. Community Custody

   The State will recommend community custody as required by law.

4. DNA Identification

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 14: 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. Felony-DUI & Felony-Physical Control will be filed if there is sufficient admissible evidence of the DUI/physical control which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction of the DUI/physical control by a reasonable and objective fact-finder and there exists admissible evidence of the predicate offense(s) 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.

4. 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 DUI or a Reckless Manner theory shall be filed if sufficient admissible evidence exists to take the DUI 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, 896 P.2d 57 (1995).

   b. 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.

c. Vehicular Homicide under all three theories (prongs) is a violent, strike offense. RCW 9.94A.030(33)(r) and (55)(a)(xiv). Vehicular Homicide under the DSO prong prior to 1996 was a non-strike offense. However, Div. 3 has found Vehicular Homicide under the DSO prong to be a non-violent offense, eligible for alternative sentences, including FTOW. State v. Stately, 152 Wn. App. 604 216 P.3d 1102 (2009), rev. denied, 168 Wn.2d 1015 (2010).

2. Vehicular Assault – RCW 46.61.520.

a. Vehicular Assault cases based on a DUI or a Reckless Manner theory shall be filed if sufficient admissible evidence exists to take the DUI or Reckless Manner issue to the jury. (A causal connection between the victim's injury and the defendant's intoxication is not an element of the crime).

b. 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.

c. Vehicular Assault under the DUI and Reckless Manner prongs are violent, strike offenses. RCW 9.94A.030(33)(q) and (55)(a)(xiv). Vehicular Assault under the DSO prong is a violent, non-strike offense. FTOW eligibility is available under the DSO prong only.

"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. Attempt 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. Although the definition of "vehicle" includes a bicycle under RCW 46.04.670, filing attempt to elude based on a bicycle requires an unusual and rare set of facts. Per RCW 79A.60.090,

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, 673 P.2d 185 (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. Felony- DUI - RCW 46.61.502(6) & Felony-Physical Control - RCW 46.61.504(6).

Felony-DUI & Felony-Physical Control charges shall be filed when a defendant has at least three or more "prior offenses" as defined in RCW 46.61.5055 and at the time of the current felony-DUI/physical control arrest, the defendant had three or more DUI convictions wherein each arrest was within ten years of the arrest for the current offense.

Charges shall also be filed when the defendant has been previously convicted of vehicular assault (DUI) or vehicular homicide (DUI) in Washington, or a comparable offense in another state, or convicted in Washington of Felony-DUI or Felony-Physical Control, at any time in the defendant's history.

6. 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). 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 crimes, those charges normally shall be filed as soon as a trial date is taken.

7. 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 use or possession of alcohol, marijuana, or non-prescribed drugs, no entering any business where alcohol or marijuana is the primary commodity for sale, no driving without a valid license and insurance and no moving violations (for alcohol cases and required for all repeat DUI offenders). Under RCW 10.21.055, the defendant shall be ordered to drive with an IID and within 5 days of release, file proof of installation or affidavit of not driving. Additionally, the defendant should enroll in alcohol monitoring within 24 hours of release through transdermal device (e.g. SCRAM) or portable breath monitor (e.g. IN-HOM). All reports to the Court.

b. Special Verdict/Interrogatories - Vehicular Homicide/Assault

Each prong of Vehicular Homicide/Assault corresponds to different sentencing consequences (e.g., DUI and Reckless Manner and DSO have separate seriousness levels, DUI prongs mean future eligibility for Felony DUI). 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) In a guilty plea specify which prong(s) the defendant is pleading guilty to.

(3) In the Judgement and Sentence, specify under the Findings section, which prong(s) the conviction is based upon.

(4) If the jury is not unanimous on a prong, use the lowest prong.

(5) The sentencing deputy shall make sure the judgment and sentence reflects the specific verdict or finding.

c. Aggravating Circumstances for Exceptional Sentences

The aggravating circumstances that may constitute an exceptional sentence and require a jury interrogatory or verdict, may be filed up front or may be further developed for filing before or after a trial date is taken.

(1) Vehicular assault:

The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. RCW 9.94A.535(3)(y). At trial the definition of "serious bodily injury" may be used to define injuries that *substantially exceed*. Generally, the aggravator is charged when the injury resulted in loss of a body part (e.g., amputation), permanent brain damage, spinal cord damage (e.g., paralysis), or other extensive multiple trauma, whether or not permanent.

(2) Attempt to Elude:

The State may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle. The allegation shall be filed at the initial filing when the person(s) endangered is not a passenger in the defendant's vehicle and any injury was done to the person and/or her/his property as a result of the defendant's driving. In all other circumstances, the allegation may be filed when sufficient evidence is developed. This is a 12-month and one-day enhancement, added to the standard

range. Note that it is not consecutive to other standard ranges. RCW 9.94A.533(11).

(3) Vehicular homicide, vehicular assault, Felony-DUI/Physical control, or Att. to Elude Wrong-Way on Highway aggravator. RCW 9.94A.535(3)(ee). This aggravating circumstance is *not limited* to felony traffic crimes.

During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

This is filed when the defendant was driving the wrong-way on a limited access freeway.

8. Sentencing Enhancement for Vehicular Homicide (DUI) only. Prior Offense Enhancement – RCW 9.94A.533(7).

Serious traffic offenses (DUI, physical control, reckless driving, and hit & run (attended)) are treated similar to Class "C" felonies for scoring purposes, in felony traffic cases. See RCW 9.94A.030(45)(a). The exception is when a person is convicted of Vehicular Homicide (DUI). In those cases, each "prior offense" as defined in RCW 46.61.5055, serves as a 24-month, consecutive enhancement to the standard range. Good time is available. There is no washout provision. The prior offense 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.

9. Sentencing Enhancement for Vehicular Homicide (DUI), Vehicular Assault (DUI), and Felony-DUI/Physical Control. Minor Child in Vehicle – RCW 9.94A.533(13).

A 12-month enhancement shall be added to the standard range for each child under 16 years old in the defendant's vehicle. The enhancement is subject to good time.

11. Mitigating Circumstances

Vehicular Homicide (reckless manner) only, RCW 9.94A.535(1)(k) permits a mitigating circumstance below the standard range when the defendant "has committed no other previous serious traffic offenses as defined in RCW 9.94A.030, and the sentence is clearly excessive in light

of the purpose of this chapter, as expressed in RCW 9.94A.010." This was added in 2016 when the seriousness level for vehicular homicide (reckless manner) was raised. It has not yet been requested or considered in King County. It may be appropriate for a first-time offender when the victim's family supports mitigation.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree, generally

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 survivor, before being concluded.

a. Vehicular Homicide, Charge Reduction

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 minimums

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. Additionally note that the minimum

fines and fees are slightly different in Superior Court than in Courts of Lower Jurisdiction.

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 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. At the time of the plea hearing or guilty verdict, the defendant shall complete the "Affidavit for Lost/Stolen License."

4. Restitution

The State will recommend full lawful restitution.

5. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

6. Community Custody - RCW 9.94A.701, 702.

Violent offenses will have 18 months community custody, non-violent offenses and crimes against persons will have 12 months community custody. All jail ranges will have 12 months community custody. There is no community custody for hit & run cases. In all cases, the DOC shall supervise the defendant. DOC will use its "risk assessment tool" to determine the level of minimum supervision. Since DUI crimes score low, this may result in the lowest level of supervision.

7. Mandatory Conditions

There are two quasi-mandatory legal financial obligations:

a. RCW 46.61.5054 - $250 State Toxicology Laboratory Fee for all DUI-related crimes (this may be waived with a written petition of indigence).

b. RCW 46.64.055(1) - $50 Title 46 fee on all Title 46 crimes (this may be waived if the Court finds the defendant indigent)

8. Discretionary Conditions

a. The following discretionary conditions should be considered in felony traffic crimes: No driving without valid license and insurance, no moving violations, and for alcohol impairment cases an ignition interlock device (IID) (set at .025). Under RCW 46.20.720(1), the sentencing court may order an IID for the duration of the Court's jurisdiction (after the period of suspension or revocation).

b. The following additional discretionary conditions are recommended: Complete aggressive driving school, obtain a substance abuse evaluation and follow all treatment recommendations, no possession or consumption of alcohol, marijuana, or non-prescribed drugs, no entering a business where alcohol is the primary commodity for sale, attend a DUI-Victims Panel, alcohol monitoring through a transdermal alcohol sensing device (e.g. SCRAM bracelet) or a portable breath monitor (e.g.,

IN-HOM), no driving with a minor child under 16 years old in vehicle, no driving with a mobile electronic device in the passenger compartment of the vehicle, pay the emergency response costs (if DUI related crime).

SECTION 15: THEFT, MALICIOUS MISCHIEF AND RELATED OFFENSES

I. FILING

A. EVIDENTIARY SUFFICIENCY

Theft and related property offenses 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 AND EXPEDITED OFFENSES

In certain property crimes cases that legally qualify as felonies, but that involve relatively minor losses, the State may conclude that the ends of justice are better served by having the case prosecuted as a misdemeanor rather than a felony. When such a case takes place in a jurisdiction with an independent municipal court, such cases will be declined back to law enforcement with instructions to refer the case to the relevant municipal prosecutor to be reviewed for possible misdemeanor filing in municipal court. When such a case takes place in unincorporated King County or where the case involves crimes investigated by certain statewide investigative agencies, the case will be internally referred to the District Court Unit to be reviewed for possible misdemeanor filing in King County District Court.

An Expedited Offense is a crime that legally qualifies as a felony, but the prosecutor's office files in District Court as an attempted Class C felony to expedite the case's resolution.

The following offenses should ordinarily be directed for original filing in municipal or district court or be filed as expedited offenses, even if the defendant already has a pending case, whether in Superior Court or as an expedited in District Court.

In the appropriate case, the State may exercise its discretion to file a case into Superior Court as a felony or to dismiss a case previously filed into District Court as an expedited and refile the case as a felony in Superior Court. In making such a decision, the State may consider factors including but not limited to a defendant's criminal history, high impact offenders, other pending criminal cases or the nature of the current offense. Filing and trial deputies should consult with their supervisors if they believe they have identified a case in which such discretion should be exercised.

1. Theft, Theft of Leased/Rental Property, Failure to Return Leased/Rental Property, and Defrauding an Innkeeper.

   a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property or services taken or attempted to be taken is less than $2,000 (excluding Theft in the First Degree from a person, see Section 15, I.C.2).

   b. The case should be filed as an Expedited Offense where the total fair market value of the property or services taken or attempted to be taken is between $2,000 and $7,500 (excluding Theft in the First Degree from a person, see Section 15, I.C.2).

   See Section C.1 (below) for the definition/discussion of "market value" for these purposes.

   Further, the KCPAO does not charge Failure to Return Leased Property for rental cars in most cases. Exceptions to this standard include cases involving fraud or deception (e.g., the renter provides a false identity to the car rental agency). In all other cases, the victim rental car company should pursue its civil remedies.

2. Theft with Intent to Resell, Organized Retail Theft, and Retail Theft with Special Circumstances.

   a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property taken or attempted to be taken is less than $2,000.

   b. The case should be filed as an Expedited Offense where the total fair market value of the property taken or attempted to be taken is between $2,000 and $7,500.

   See Section C.1 (below) for the definition/discussion of "market value" for these purposes.

   Regardless of the above, if an Organized Retail Theft involves three or more aggregated incidents, the KCPAO will charge it as a felony so long as it legally qualifies as one.

3. Forgery and Unlawful Issuance of Bank Checks.

   a. The case should be directly referred for misdemeanor prosecution where the total face value of the written instruments is less than $2,000.

   b. The case should be filed as an Expedited Offense where the total value of the written instruments is between $2,000 and $7,500.

4. Possession of Stolen Property and Trafficking in Stolen Property.

a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property possessed, attempted to be possessed, trafficked, or attempted to be trafficked is less than $2,000.

b. The case should be filed as an Expedited Offense where the total fair market value of the property possessed, attempted to be possessed, trafficked, or attempted to be trafficked is between $2,000 and $7,500.

See Section C.1 (below) for the definition/discussion of "market value" for these purposes.

5. Malicious Mischief

a. The case should be directly referred for misdemeanor prosecution where the total value of the property damage is less than $2,000.

b. The case should be filed as an Expedited Offense where the total value of the property damage is between $2,000 and $7,500.

6. Identity Theft

a. The case should be directly referred for misdemeanor prosecution where the total value taken or attempted to be taken is less than $2,000.

b. The case should be filed as an Expedited Offense where the total value taken or attempted to be taken is between $2,000 and $7,500.

Regardless of the above, if an Identity Theft involves one or more of the following circumstances, the KCPAO will file it as a felony so long as it legally qualifies as one: (1) use or possession of three or more different victims' financial information; (2) evidence of manufacturing personal identifications; (3) evidence that the suspect targeted a vulnerable victim; (4) evidence that the victim's information was stolen in a residential burglary, robbery, or theft from a person; (5) evidence that the defendant opened financial accounts in a victim's name and/or took over an account belonging to a victim; or (6) the identity theft led to the incorrect filing of criminal charges against the victim and/or the entry of false information in the public record.

7. Burglary in the Second Degree Involving Trespassed Shoplifters

a. The case should be directly referred for misdemeanor prosecution where the total value of the theft is less than $2,000.

b. The case should be filed as an Expedited Offense where the total value of the theft is between $2,000 and $7,500. These cases will typically be expedited as Theft in the Second Degree (Burglary in the Second Degree is a Class B felony and, therefore, cannot be expedited merely by charging attempted Burglary 2).

See Section C.1 (below) for the definition/discussion of "market value" for these purposes.

If the case is one that would be directly referred as a Burglary, but would be filed as an expedited as an Organized Retail Theft, it should be treated as the latter. If the case is one that would be directly referred or expedited as a Burglary, but would be filed as a felony as an Organized Retail Theft, it should be treated as the latter.

8. Burglary in the Second Degree of Fenced Areas, Carports, Detached Garages, and Similar Structures

   a. The case should be directly referred for misdemeanor prosecution where the total value of the theft is less than $2,000.

   b. The case should be filed as an Expedited Offense where the total value of the theft is between $2,000 and $7,500. These cases will typically be expedited as Theft in the Second Degree (Burglary in the Second Degree is a Class B felony and, therefore, cannot be expedited merely by charging attempted Burglary 2).

   See Section C.1 (below) for the definition/discussion of "market value" for these purposes.

   Regardless of the above, if the Burglary involves one or more of the following circumstances, the KCPAO will file it as a felony so long as it legally qualifies as one: (1) The defendant's criminal history or police intelligence indicates the defendant is part of organized illegal activity, (2) the defendant's criminal history or police intelligence indicates that the defendant is especially prolific or that his or her criminal activities are escalating, (3) the defendant's entry was with the intent to commit a crime against a person or to commit another violent crime, or (4) the defendant is classified as a High Priority Repeat Offender pursuant to Section 22 of these FADS.

9. The total value of property, as stated above, controls the appropriate jurisdiction for filing, even if multiple accomplices were involved.

10. A DUI may be filed with any of the above noted expedited crimes.

11. Exceptions for Property Offenses.

    a. A defendant who has received 3 or more direct misdemeanor referrals or expedited felonies in an 18-month period is not eligible for either a direct misdemeanor referral or an expedited filing. The case should be filed into Superior Court as a felony or into Drug Diversion Court if otherwise eligible.

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 ensure 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(21). In the case of goods offered for sale at retail, the retail price should be used. In situations other than retail, 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 evaluated with the most conservative value controlling, even if that means the case is declined to municipal court, expedited, or filed at a lower degree.

2. Theft from a Person - RCW 9A.56.030(b).

   Theft in the first degree shall be filed as a felony into Superior Court when property is obtained without significant struggle or injury. Robbery in the second degree 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.) - RCW 9A.56.060.

   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) knew that there were insufficient funds or credit to cover the instrument drawn or delivered and (b) acted with intent to defraud. Examples of sufficient proof include certified letters to a defendant's address, deposit of a small amount of money to open an account and checks written for amount far in excess of the initial deposit, or inculpatory statements by the defendant.

4. Access Device (credit cards, etc.) - RCW 9A.56.010(3).

   Access device means any card, plate, code, account number, or other means of account access that can be used alone or 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. The fact that the access device was not yet activated or was closed by the true owner does not negate its status as an access device under this statute.

Where a defendant possesses, uses, or attempts to use stolen access devices, normally identity theft charges pursuant to RCW 9.35.020 should be filed, rather than possession of stolen property in the second degree or theft in the second degree. See subsection 7. Identity Theft below; see also subsection 10.b. Aggregation and Unit of Prosecution below. If the defendant elects to go to trial, sufficient additional counts may be added to characterize the defendant's conduct, to ensure restitution to all victims, and to enhance the strength of the State's case at trial.

5. Forgery - RCW 9A.60.020.

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 of identity may support the filing of additional counts such as multiple checks to the defendant where identity is established with the other checks, inculpatory statements by the defendant, or the defendant's fingerprints are on the check.

Evidence to show the defendant knew the written instrument was forged is also required. Presentation of a forged check without more is ordinarily insufficient to prove knowledge. Examples of such evidence may include leaving the bank or business without the written instrument, running from police, using a false identity, admissions or implausible statements regarding knowledge, prior theft related convictions, etc.

6. Malicious Mischief - RCW 9A.48.070 and 9A.48.080.

a. 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.

b. Cases involving damages of less than $7,500 in value shall be filed as second degree and expedited (see Section 21).

7. Identity Theft - RCW 9.35.020.

One count normally should be filed for each victim. However, if sufficient aggravating circumstances exist so that one count per victim does not adequately label the conduct or results in an insufficient presumptive standard range, then one count per use of financial information or identifying information may be filed. See RCW 9.35.001. Examples of aggravating circumstances may include amount of loss, abuse of trust, or a vulnerable victim.

8. Money Laundering - RCW 9A.83.020.

Money laundering charges should be filed only when there is sufficient evidence that a person conducted or attempted to conduct a financial transaction involving the proceeds of a specified unlawful activity, knowing the proceeds were from a specified unlawful activity, and when one of the following is present:

a. The actor knows that the transaction is designed in whole or in part to:
   (1) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or
   (2) avoid a transaction reporting requirement under federal law.

OR

b. The standard range for the specified unlawful activity charged alone is clearly too lenient in light of the purposes of the Sentencing Reform Act. When money laundering charges are filed together with another crime, charge a sufficient number of money laundering counts so that the resulting standard range adequately represents the seriousness of the criminal activity.

9. Mail Theft RCW 9A.56.370 and Possession of Stolen Mail RCW 9A.56.380.

One count of mail theft or possession of stolen mail should be filed for every incident involving 10 pieces of stolen mail with three different addresses if sufficient evidence exists that the defendant knew the mail was stolen or took the mail without a lawful purpose. Careful consideration should be given to whether the volume of mail possessed or taken is sufficient to support a charge of identity theft. The definition of mail does not include junk mail, and pictures of the stolen mail will usually be needed to prove the definition of mail.

10. Multiple Counts

a. Initial Filing – Number of Counts

(1) One count normally should be filed for each crime/victim 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 RCW 9.94A.535(3)(d) then the number of counts filed to adequately label the conduct shall be as follows:

(a) loss of between $20,000 - $50,000, normally files all chargeable counts up to four counts,
(b) loss between $50,000 and $100,000, normally file up to seven counts, and
(c) loss in excess of $100,000, normally file all chargeable counts up to ten counts.

(2) Other considerations when determining the number of charges to file include the statute of limitations (see subsection 5. Statute of Limitations below), multiple victims, and the presence of aggravating factors such as abuse of trust or a vulnerable victim (such as an elderly or mentally disabled victim). Additionally, in major economic offenses over $100,000, it may be necessary to file all chargeable counts, even in excess of ten counts, to adequately label the criminal conduct.

(3) Ordinarily theft by embezzlement should be charged rather than forgery when the method of theft is by writing/altering checks that were lawfully possessed.

(4) Crimes ancillary to the principal theft, such as perjury, forgery, possession of stolen property, money laundering, etc. should not be filed initially unless there are insufficient available counts to result in an offender score consistent with the disposition standards, or helpful to show an element of the offense, or there are statute of limitations issues.

(5) The statute of limitations may be considered in the initial charging decision. If the statute of limitations will run within 6 months of filing charges, normally all charges that are supported by the evidence should be filed to ensure that the State does not lose the ability to pursue all the appropriate charges.

b. Aggregation and Unit of Prosecution

Multiple thefts committed as part of a common scheme or plan may be aggregated in order to charge a higher degree pursuant to RCW 9A.56.010(21)(c). Similarly, multiple counts of UIBC may be aggregated under RCW 9A.56.060(3).

The State must elect whether to charge each separate theft as an individual count or aggregate all thefts into one count of theft. State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003); State

v. Carosa, 83 Wn. App. 380, 921 P.2d 593 (1996); State v. Turner, 102 Wn. App. 202, 6 P.3d 1226 (2000) (prohibiting separating out counts from the same victim based on different schemes of theft); and State v. Hoyt, 79 Wn. App. 494, 904 P.2d 779 (1995) (prohibiting separating out counts from the same victim based on different ranges of time only). Essentially, the State must elect to charge each separate act as an individual count, or charge one aggregate count.

Simultaneous possession of stolen property belonging to more than one victim must be aggregated into a single count pursuant to the unit of prosecution rule. State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003). Every possession of a stolen access device, however, is a separate crime, State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (although if the access devices belong to the same victim, they are the same criminal conduct).

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

Where a case was filed into Superior Court but due to a change in FADS would now be expedited, the felony should ordinarily be reduced to a misdemeanor.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may 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 in all cases after a trial date is set.

B. SENTENCE RECOMMENDATION

1. 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.

2. Restitution

   The State will recommend full lawful restitution.

3. Community Custody

   The State will recommend Community custody as required by law.

4. DNA Identification

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 16: AUTO THEFT AND VEHICLE-RELATED PROPERTY OFFENSE

I. FILING

A. EVIDENTIARY SUFFICIENCY

Car theft cases will be filed if sufficient admissible evidence exists that, 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.

This aggressive standard has been adopted as part of Washington's coordinated effort to curb auto theft.

B. CHARGE SELECTION

1. Auto-Theft Related Crimes

a. Theft of Motor Vehicle – RCW 9A.56.065

(1) Theft of a motor vehicle shall be filed if the defendant stole a motor vehicle.

(2) Theft of Motor Vehicle versus Taking Motor Vehicle

Theft by embezzlement ordinarily shall be charged, rather than taking motor vehicle in the second degree, 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, 879 P.2d 957 (1994); State v. Clark, 96 Wn.2d 686,638 P.2d 572 (1981).

b. Possession of Stolen Vehicle - RCW 9A.56.068.

(1) Possession of stolen vehicle shall be filed if a defendant possesses a stolen vehicle.

(2) Possession of Stolen Vehicle versus Theft of Motor Vehicle

Possession of stolen vehicle shall be charged when a defendant can be shown to have been exercising dominion and control with knowledge that the vehicle was stolen. If it is clear that the defendant actually stole the vehicle, then theft of a motor vehicle shall be charged.

(3) Passengers - Possession of Motor Vehicle may be charged if there is sufficient evidence to prove that the passenger was either responsible for stealing the vehicle or that, before the arrest, the passenger drove the stolen vehicle with knowledge that it was stolen.

c. Taking Motor Vehicle Without Permission in the First Degree - RCW 9A.56.070.

(1) Taking Motor Vehicle Without Permission in the First Degree should generally not be charged if the sole alteration is the removal or replacement of the vehicle's license plates.

(2) Passengers - Taking Motor Vehicle Without Permission in the First Degree may be charged if there is sufficient evidence to prove that the passenger was either responsible for stealing the vehicle or that, before the arrest, the passenger drove the stolen vehicle with knowledge that it was stolen.

d. Taking Motor Vehicle Without Permission in the Second Degree - RCW 9A.56.075.

Passengers: Taking Motor Vehicle Without Permission in the Second Degree shall be filed if a defendant is a passenger and riding in a vehicle with knowledge that the vehicle was stolen.

e. Malicious Mischief in the First Degree - RCW 9A.48.070.

Malicious mischief in the first degree shall be filed if:

(1) The defendant prowls a motor vehicle;

(2) The defendant damages the vehicle as stated in the certification and supported in the police reports in excess of $5000; and

(3) The damage is extensive, gratuitous, or more than necessary (to gain access to the car or render it operable without keys) to meet the definition of "maliciously" in RCW 9A.04.110.

f. Malicious Mischief in the Second Degree - RCW 9A.48.080.

Malicious mischief in the second degree shall be filed if:

(1) The defendant prowls a motor vehicle;

(2) The defendant damages the vehicle as stated in the certification and supported in the police reports in excess of $750; and

(3) The damage is extensive, gratuitous, or more than necessary (to gain access to the car or render it operable without keys) to meet the definition of "maliciously" in RCW 9A.04.110.

g. Theft in the First Degree

Theft in first degree shall be filed if:

(1) The defendant prowls a motor vehicle;

(2) The defendant steals property from the vehicle;

(3) The fair market value of the property stolen as stated in the certification and supported in the police report exceeds $5000; and

h. Theft in the Second Degree

Theft in second degree shall be filed if:

(1) The defendant prowls a motor vehicle;

(2) The defendant steals property from inside the vehicle;

(3) The fair market value of the property stolen as stated in the certification and supported in the police report exceeds $750; and

i. Failure to Return Leased Property

The KCPAO does not charge Failure to Return Leased Property for rental cars in most cases. Exceptions to this standard include cases involving fraud or deception (e.g., the renter provides a false identity to the car rental agency). In all other cases, the victim rental car company should pursue its civil remedies.

2. Aggregation

Incidents should be aggregated in order to charge a higher degree when possible pursuant to RCW 9A.56.010(21)(c) and (d).

3. Expedited Crimes

Car theft related offenses shall not be expedited.

4. Multiple Counts/Amendments

a. Initial Filing – Number of Counts

One count ordinarily should be filed for each car theft related crime up to a maximum of four counts; this includes any charges for vehicle prowl in the second degree that meet the filing standard for auto theft in this section. If there are other potential felony charges (e.g. VUCSA, Attempting to Elude, etc.) they should be charged according to the standards for those offenses.

However, if the offender has committed a large number of car theft related crimes in a relatively short period of time, then all chargeable counts shall be filed up to ten counts.

b. Amendment

If the defendant sets a trial date, other charges that are supported by the evidence shall be filed at the time the trial date is set or soon thereafter. In determining what additional charges should be filed, the deputy should consider adding those charges necessary to adequately hold the defendant responsible for the complete range and seriousness of the criminal conduct.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the

correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

If an auto theft charge is reduced to a gross misdemeanor, the preferred charge shall be Vehicle Prowl 2 with agreed restitution.

2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered.

B. SENTENCE RECOMMENDATION

1. Determinate Sentence

a. Determinate Sentence

A determinate sentence within the standard range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy.

b. Alternative conversion of total to partial confinement and first offender policies apply to auto theft cases.

2. Restitution

If the crime is of possession of a stolen vehicle, as part of the plea agreement the defendant shall agree to pay for all damage to the vehicle from the date that it was stolen and if there is a causal connection, the defendant shall agree to pay for any substantiated items of personal property that were stolen from the vehicle.

3. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

4. Exceptional Sentence - See Section 2.

A defendant whose criminal history is composed largely of car theft related crimes, whose offender score exceeds 9, and whose multiple current charges will result in unpunished offenses shall be considered for an exceptional sentence up to the statutory maximum. A request for an exceptional sentence must be approved by a supervising senior.

SECTION 17: ESCAPE AND 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. Escape in the First Degree – RCW 9A.76.110.

   a. Definitions

      (1) Custody RCW 9A.76.010(2).
      (2) Detention facility RCW 9A.76.010(3).

   b. When Filed

      A prisoner who walks away from or fails to return to WER, EHD, or Work Crew shall not be charged if he/she voluntarily returns within 72 hours and has not committed another offense during that period.

   c. Affirmative Defense

      RCW 9A.76.110(2) provides an affirmative defense to escape in the first degree for "uncontrollable circumstances". "Uncontrollable circumstances" is defined at RCW 9A.76.010(4).

2. Escape in the Second Degree – RCW 9A.76.120.

   a. When Filed

      A prisoner who walks away from or fails to return to WER, EHD, or Work Crew shall not be charged if he/she voluntarily returns within 72 hours and has not committed another offense during that period.

   b. Affirmative Defense

      RCW 9A.76.120(2) provides an affirmative defense to escape in the second degree for "uncontrollable circumstances". "Uncontrollable circumstances" is defined at RCW 9A.76.010(4).

3. Bail Jumping – RCW 9A.76.170.

a. When Filed

Bail jumping will only be charged where the State is able to prove the defendant received actual notice of the required court appearance.

Bail jumping should not be ordinarily filed when the defendant turned themselves in within six weeks of missing court and did not commit any new offenses while on FTA status.

b. Joinder

For joinder purposes, a charge of bail jumping is sufficiently connected to the underlying charge if the two offenses are related in time and the bail jumping charge stems directly from the underlying charge. See, e.g., State v. Nation, 110 Wn. App. 651, 41 P.3d 1204 (2002); State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998).

c. Affirmative Defense

RCW 9A.76.170 provides an affirmative defense to bail jumping for "uncontrollable circumstances." "Uncontrollable circumstances" is defined at RCW 9A.76.010(4).

d. Classification

The penalty classification for bail is based on the classification of the offense is pending at the time the offender jumps bail. RCW 9A.76.170(3).

4. Community Custody Violator – RCW 72.09.310.

Community Custody Violator shall be charged under the following circumstances:

a. when the offender has not been returned to custody supervision within 30 days of his/her violation date (if after 30 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, felony domestic violence, 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.

5. Multiple Counts/Stipulation to Uncharged Counts

One count normally should be filed for each crime up to a maximum of three counts for any crime covered by this section.

6. Deadly Weapon Allegations

See Weapon Enhancements, Section 19.

II. DISPOSITION

A. CHARGE REDUCTION

1. Degree

A defendant will normally be expected to plead guilty to the degree charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

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.

B. SENTENCE RECOMMENDATION

1. 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 subsection of Section 2.

2. DNA Identification.

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

SECTION 18: DRUG OFFENSES

I. HANDLING BY FELONY TRIAL UNIT

A. GENERALLY

Controlled substances cases (except misdemeanors) shall be prosecuted by the Felony Trial Unit.

Expedited felonies will be filed by the Felony Trial Unit, then referred to the District Court Unit for disposition.

B. EXCEPTIONS TO STANDARDS

The exceptions policy outlined in Section 2.IV.A shall apply to all exceptions to standards on controlled substances cases or resolutions of cases below the offer made at EPU. In particular, exceptions must be in writing and signed by a senior.

II. FILING

A. EVIDENTIARY SUFFICIENCY

1. Generally

For all VUCSA cases, charges 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.

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. Disclosure should not be required unless the defendant shows that the identity of the informant is either relevant and helpful to the defense or essential to a fair determination of the action. Rovario v. United States, 353 U.S. 53, 77 S .Ct. 623, 1 L. Ed. 2d 639 (1957); State v. Harris, 91 Wn.2d 145, 588 P.2d 720 (1978). The defendant bears the burden of proof and disclosure should not be ordered if another source of evidence or similar testimony is available. State v. Salazar, 59 Wn. App. 202, 796 P.2d 773 (1990). Further, the defendant's

showing must not be speculative, that is, the defendant must show that the information sought will be found and is essential, not merely that the identity of the informant might lead to helpful or discoverable information. State v. Redd, 51 Wn. App. 597, 606, 754 P.2d 1041 (1988). For a further overview of when disclosure is required, see State v. Casal, 103 Wn.2d 812 (1985), and State v. Wolken, 103 Wn.2d 823, 700 P.2d 319 (1985). Disclosure will ordinarily be required where the informant or witness was present for the crime upon which the charge is based, e.g. an order up take down operation where the witness makes the phone call, or a buy-bust or buy and slide operation in which the witness acts as the buyer. In these cases, a packet of information about the informant or witness (the CI packet) must be provided to us before charges will be filed. CI packets will be maintained in the manner set forth in the **Protocol for the Storage of CI Packets**.

If the disclosure of the CI packet is required, the law enforcement agency must be contacted before the disclosure is made and afforded the opportunity to request dismissal rather than disclosure, even where the agency has already provided a CI packet.

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.

5. Cases Involving Drugs Weighed With Packaging

Drugs must be weighed without any kind of packaging. Any referral submitted for review or filing where the drugs are weighed with packaging, or where the Certification for Determination of Probable Cause does not specify, shall be returned to the referring police agency.

B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTION

1. Possession of Less Than 1 Gram, 5 Pills, or a Single Syringe

For cases involving possession of less than 1 gram, 5 pills or a single syringe full of a controlled substance, the case will be declined for prosecution unless the possession is committed with another felony crime (which may be expedited), or a DUI (a DUI with a VUCSA Possession of under 1 gram, 5 pills or one syringe could still be filed as an expedited offense).

2. Possession of Drug Paraphernalia Containing Only Narcotic Residue

The King County Prosecutor's Office will decline to file felony VUCSA charges for cases involving only drug residue. Drug residue is defined as the minute substance found in paraphernalia such as pipes, syringes, baggies, tins, or other instances where the substance is characterized as "trace," or "much less than 0.01 grams" or other unusable form. Based on the minute amount of the illegal substance, residue cases are particularly vulnerable to an unwitting possession defense because the drug is barely visible and/or often in a condition/amount that is unusable. The likelihood of this successful defense combined with resource restrictions on the King County Prosecutor's Office and the State Crime Lab dictates that we limit our felony prosecutions of residue cases.

There is one exception to this rule. The King County Prosecutor's Office will consider filing a residue case when referred by a jurisdiction whose municipality has developed a SODA (Stay out of Drug Area) diversion program for prosecuting a charge for Possession of a Controlled Substance. In such instances, the defendant is told by the City Attorney that if they reject the diversion program they will be subject to the potential for felony prosecution. In order to encourage and support such programs, the King County Prosecutor's Office will consider filing these limited referrals. If the defendant is otherwise eligible, the case shall initially be filed as an expedited felony. If the defendant does not plead guilty to the expedited felony, the case will be considered for felony filing.

C. CHARGE SELECTION

1. Possession with Intent to Deliver – RCW 69.50.401.

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 include quantity far in excess of personal use amounts, multiple packages, presence of paraphernalia associated with dealing such as scales or multiple empty packages,

possession of large amounts of currency, customer records or observations by the police of hand-to-hand transactions between the suspect and others. Pursuant to State v. Brown, 68 Wn.App. 480, 840 P.2d 1098 (1993), an amount of drugs in excess of a quantity typically associated with personal use, standing alone, is insufficient as a matter of law to support a conviction for Possession with Intent to Deliver.

2. Minors

a. Distribution to minors – RCW 69.50.406.

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. Except when significant problems of proof develop after filing, a charge of Distribution to Minors shall not ordinarily be reduced.

b. Any other way involve a minor – RCW 69.50.4015.

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 69.50.4015 will be added as a separate count for trial if the statutory elements can be proven.

3. 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 RCW 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.

A person who knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances, for the purpose of using these controlled substances, or which is used for keeping or selling them is guilty of a violation of RCW 69.50.402(1)(f). The maximum sentence is 2 years and $2,000.

These crimes shall be charged initially in the original Information if the investigation was conducted in response to citizen complaints. Otherwise,

the crime will be added as a separate count for trial if the statutory elements can be proven.

4. Deadly Weapon/Firearm Allegations – Sentence Enhancements

a. See Section 19.

b. Deadly weapon/firearm allegations shall be included in the original Information 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. "Armed" means having a weapon which is readily available and accessible for use for either offensive or defensive purposes and there is a nexus between the defendant, the crime and the weapon. State v. Schelin, 147 Wn.2d. 562, 55 P.3d 632 (2002). "Drug offense" means every violation of RCW 69.50 other than possession and forged prescription cases. RCW 9.94A.030(22)(a).

5. Protected Areas – Sentence Enhancements. RCW 69.50.435.

The purpose of "zone enhancements" is to protect the public in general, and children in particular, by discouraging the development of a violent and destructive culture where children and adults may be present.

a. Enhancements filed in an Original Information

A zone enhancement shall be filed in an original Information, and the defendant will be expected to plead guilty as charged, for each count of Delivery, Manufacturing, or Possession with Intent to Deliver or Manufacture, when sufficient admissible evidence exists to persuade a jury that the offense occurred within one of the following areas:

(1) On school grounds, regardless of the time;
(2) Within sight of the school grounds during school hours or when school-related activities are occurring;
(3) On a school bus, regardless of the time;
(4) On a public transit vehicle; or
(5) In circumstances where the defendant's conduct, in either delivering a controlled substance, manufacturing a controlled substance, or possessing with intent to deliver or manufacture a controlled substance occurs in the immediate presence of any child and any enhancement applies. See RCW 69.50.435; RCW 9.94A.827.

b. Enhancements Added for Trial

A zone enhancement will not be filed in an original charging document, but will be added for trial, for each count of Delivery, Manufacturing, or Possession with Intent to Deliver or Manufacture a Controlled Substance, when sufficient evidence exists to persuade a jury that the offense occurred within one of the following areas:

(1) Within 1000 feet of a school bus route stop;
(2) Within 1000 feet of a school;
(3) At a public housing project designated as a drug-free zone by the local government authority;
(4) At a civic center;
(5) Within a Metro bus shelter;
(6) In a public park, other than those described in subsection (c)(3) below; or
(7) In a county jail or state correctional facility, RCW 9.94A.533(5).

c. Enhancements Not Added for Trial

A zone enhancement shall not be filed in an original Information or amended Information if the defendant's conduct falls into any of the following categories:

(1) A law enforcement officer, cooperating witness, or informant selected the location of the crime;
(2) The defendant possessed with the intent to deliver or manufacture a controlled substance and was merely "fortuitously present" within the protected zone (e.g. there is no nexus between the defendant's intent to deliver the controlled substance and the location of the arrest, as when a defendant is pulled over for a traffic infraction and evidence of possession with intent to deliver or manufacture is found in the car);
(3) The conduct occurred in a non-traditional public park, defined as one that a family with children would not ordinarily frequent;
(4) The conduct occurred within 1000 feet of a school bus stop, but either between the hours of 6:00 p.m. and 7:00 a.m. or on non-school days, except when:

(a) The charge is one of Manufacturing Methamphetamine, or

(b) The charge is Possession with Intent to Deliver or Manufacture a Controlled Substance and the evidence is sufficient to lead a reasonable person to believe that the crime was occurring during school hours on school days.

6. Expedited Crimes - see also Section 21.

Expedited crimes shall be filed if sufficient admissible evidence exists that would justify conviction by a reasonable and objective fact-finder, giving appropriate consideration for the most plausible, reasonably foreseeable defense that could be raised.

a. Expedited Offenses

An expedited offense is a crime that legally qualifies as a felony, but the prosecutor's office files in District Court as an attempted Class C felony to expedite the case's resolution. The following offenses should ordinarily be filed as expedited offenses, even if the defendant already has a pending case, whether in Superior Court or as an expedited in District Court.

In the appropriate case, the State may exercise its discretion to file a case into Superior Court as a felony rather than as an expedited, or to dismiss a case previously filed into District Court as an expedited and refile the case as a felony in Superior Court. In making such a decision, the State may consider factors including but not limited to a defendant's criminal history, high impact offenders, other pending criminal cases or the nature of the current offense. Filing and trial deputies should consult with their supervisors if they believe they have identified a case in which such discretion should be exercised.

For cases involving possession of less than 1 gram, 5 pills or a single syringe full of a controlled substance, the case will be declined for prosecution unless the possession is committed with another felony crime (which may be expedited), or a DUI (a DUI with a VUCSA Possession of under 1 gram, 5 pills or one syringe could still be filed as an expedited offense).

The drugs must be weighed without any kind of packaging. Any referral submitted for review or filing where the drugs were weighed with packaging, or where the Certification for Determination of Probable Cause does not specify, shall be returned to the referring police agency.

(1) Forged Prescription

a. The amount of pills obtained or attempted to be obtained is fewer than 50 pills.

(2) VUCSA Possession

a. For cocaine, heroin, methamphetamine, the amount possessed is between 1 and 3 grams

b. For marijuana, the amount possessed is less than 100 grams or fewer than 12 plants

c. For MDMA (ecstasy), the amount possessed is between 5 and 20 pills

d. For prescription medication or any other type of pills, the amount possessed is between 5 and 50 pills

e. Possession of any other substance not listed above will be reviewed on a case by case basis

The King County Prosecuting Attorney's Office recognizes that Law Enforcement is in the best position to assess an individual's dangerousness in the community. Law Enforcement may submit a case involving the possession of less than one gram, 5 pills, or one syringe and ask that the KCPAO deviate from the filing standards. Factors that should be outlined in this request include a defendant's violent criminal history and history of dealing narcotics. Those cases will be reviewed by the Filing Supervisor or the Unit Chair to determine whether charges should be filed, and Law Enforcement will be notified of the decision.

The link to the exemption request form is below.

exemption request.docx

b. A DUI may be filed with any of the above noted expedited crimes.

c. Exceptions to Expedited Filing Standards

(1) A defendant who has received 3 or more expedited felonies in an 18 month period is not eligible for expedited filing. The case should be filed into Superior Court as a felony. The case may be filed into Drug Diversion Court, if otherwise eligible.

7. Drug Diversion Court - see March 2022 Drug Diversion Court: Screening, Referral, and Eligibility

To be eligible to participate in King County's Drug Diversion Court program, an offender must meet the eligibility criteria adopted by the King County Drug Diversion Court Executive Committee.

8. KCPAO Marijuana Filing Standards Post I-502

After the passage of I-502 the King County Prosecuting Attorney's Office has reviewed our existing filing and disposition standards for felony and misdemeanor marijuana prosecutions. While I-502 has legalized the possession of up to one ounce of marijuana produced through the State's licensing process, as well as the possession of up to 16 ounces of marijuana infused solid product or 72 ounces of marijuana-liquid-infused products, the Initiative did not legalize the manufacturing, distribution and possession of marijuana outside the regulatory licensing scheme. Nor did it legalize the possession of marijuana for minors under the age of 21. Although these standards are meant to guide the filing and disposition of cases, they are subject to exception. Should an individual assert legal protection under our State's Medical Marijuana Act, DPAs should refer to the medical marijuana filing and disposition standards, and evaluate the legitimacy the medical marijuana claim.
The KCPAO has developed the following guidelines in light of the passage of I-502:

a. Manufacturing Marijuana

If a person is found to be manufacturing marijuana, the person should be charged in accordance with the below tiers only where (1) specific independent evidence exists to clearly and convincingly establish the requisite intent, and (2) significant evidence exists that establishes the defendant was operating, or preparing to operate, a ***commercial marijuana enterprise*** outside of Washington State's legal, statutory scheme for the production, distribution and sale of marijuana.

Tier 1: For defendants who are engaged in the highest level of involvement in marijuana manufacturing, the defendants are charged with Leading Organized Crime.

Examples of evidence of the defendant's involvement for Tier 1 include, but are not limited to, prior criminal convictions for marijuana manufacturing, financial or operational records showing the managing and directing of others to manufacture marijuana at multiple locations, statements of others indicating the managing and directing of others to manufacture marijuana at multiple locations, and hiding ownership of assets related to manufacturing

marijuana (i.e. executing quit claim deeds on real property, transferring customer names on utility bills).

This charge is expected to be reserved for only the most egregious offenders who are identified as being central to the operations of an extensive marijuana manufacturing network. The decision to file this charge must be cleared by the head of the Criminal Division and the elected prosecutor. Prior to filing of charges, the US Attorney's Office will be consulted for the filing of federal charges.

Tier 2: For defendants whose involvement is greater than those of Tier 3, the defendants are charged with VUCSA – Manufacturing Marijuana or VUCSA – Unlawful use of a building for drug purposes and the aggravators of Major Economic Offense or Major Violation of the Uniform Controlled Substances Act.

Specifically, for MEO aggravator, we would charge subsection (iii) the current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time. For Major VUCSA aggravator, we would charge subsections (v) the current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement, (iv) the circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy, and/or (iii) the current offense involve the manufacture of controlled substances for use by other parties.

Examples of evidence of the defendant's greater involvement for Tier 2 include, but are not limited to, owning 3 or more marijuana manufacturing locations, being the named utility bill customer for 3 or more marijuana manufacturing locations, involvement in the shipping and distribution of processed marijuana, obtaining significant financial gain from marijuana manufacturing.

Tier 3: For defendants who (1) are tending marijuana and have prior criminal convictions related to the manufacturing of marijuana or previously received a marijuana manufacturing letter from KCPAO where the filing of charges was declined, or (2) whose involvement in the manufacturing of marijuana is greater than merely tending marijuana, but does not rise to the level of involvement of Tier 1 and 2, the defendants are charged with VUCSA – Manufacturing Marijuana or VUCSA – Unlawful use of a building for drug purposes.

Examples of evidence of the defendant's involvement for Tier 3 include, but are not limited to, owning 1-2 marijuana manufacturing locations and being the named utility bill customer for 1-2 marijuana manufacturing locations.

Tier 4: For defendants who (1) have no prior criminal convictions related to the manufacturing of marijuana, (2) whose involvement with the manufacturing of marijuana is limited to tending the marijuana grow, and (3) where there is no evidence that the defendant is obtaining a significant financial gain from the marijuana grow, the KCPAO will provide a notice letter to the defendant and the charge is declined.

A "tender" is a defendant who cultivates marijuana through watering, pruning, and maintaining a growing environment for marijuana plants.

Evidence of wages paid to a defendant and evidence of a defendant purchasing growing materials and equipment for marijuana cultivation is, on its own, insufficient evidence that the defendant is obtaining a significant financial gain from the marijuana grow unless evidence shows that the defendant was also financing the purchase of growing materials and equipment.

Number of Charges and Plea Agreements:
The KCPAO will initially file a single count for each defendant. If the defendant sets the case for trial, additional counts based on separate marijuana manufacturing locations shall be added by amendment.

All plea agreements for charges related to the manufacturing of marijuana shall include all uncharged marijuana manufacturing locations as part of real facts.

Decline:

The KCPAO will decline charges:

(1) For any defendant where credible evidence exists that the defendant is a victim of labor trafficking or whose situation is can be considered that of an indentured servitude where the defendant did not have a reasonable alternative choice,

(2) For any defendant who owns real property where manufacturing marijuana is occurring where knowledge of the growing operation cannot be proved,

(3) For any defendant who is operating a single marijuana manufacturing location with a valid medical marijuana authorization where the defendant is no more than 15 plants over allowed number of plants and where no evidence of selling or distributing the marijuana exists.

The KCPAO may consider declining charges related to manufacturing marijuana if the size of the growing operation is small enough that the KCPAO would not be able to overcome a defense that the defendant was operating a lawful marijuana grow under Washington law.

b. Delivery of Marijuana

I-502 legalized the possession of up to one ounce of marijuana produced through the State's licensing process, as well as the possession of up to 16 ounces of marijuana infused solid product or 72 ounces of marijuana-liquid-infused products. While the Initiative did not legalize the manufacturing, distribution and possession of marijuana outside the regulatory licensing scheme, the KCPAO will not, ordinarily, prosecute cases where the conduct is the very same that the State is engaged in lawfully. Depending on the jurisdiction and applicable municipal code, Law Enforcement may elect to refer the cases for misdemeanor prosecution. However, the existence of some aggravating circumstance, such as delivering to minors, transactions involving weapons, or clear commercial marijuana enterprises may result in criminal charges involving marijuana.

(1) Ordinarily, where an individual aged 21 or over delivers marijuana to another adult, the KCPAO will decline to file any felony criminal charges unless the amount of marijuana delivered exceeded the now legal limit of what will be sold in state licensed stores, e.g., 1 ounce.

The KCPAO recognizes that persistent and concentrated low-level drug dealing can have a detrimental impact on businesses and community safety. As a result, charges may be filed (a) as a part of a coordinated police operation designed to curb concentrated drug sales in a particularized area, (b) in response to citizen complaints, (c) by individuals engaged in repeated deliveries of marijuana; however, individuals who commit one delivery of small amounts of marijuana during these operations will not result in filed charges.

The KCPAO seeks to work with police and community stake-holders to develop long-term strategies that help business owners, and that do not employ felony criminal sanctions as a first response.

(2) If the individual is found to have delivered an amount over 1 ounce but under 5 ounces, the KCPAO will file an expedited charge. If the person is found to have delivered over 5 ounces of marijuana the PAO will consider filing a felony charge.

(3) In instances where an individual over the age of 21 delivers any amount of marijuana to someone under the age of 18, charges will be filed regardless of the amount of marijuana sold.

(4) Should an individual 18-20 years old deliver marijuana to someone 20 years old or younger, charges will be filed. The charges will be expedited or the defendant will be referred to a diversionary program.

(5) Felony charges will be filed if the amount of marijuana delivered indicates participation in a large commercial enterprise. Factors to consider are stated in Section 1.

(6) If a minor (under 18) delivers to another minor or to an adult, cases will be handled in accordance with our Juvenile Filing and Disposition Standards.

c. Possession with Intent to Deliver Marijuana

Factors to consider when determining whether charges should be filed are (a) if specific independent evidence exists to clearly and convincingly establish the requisite intent, and (b) if significant evidence exists that establishes the defendant was operating, or preparing to operate, a ***commercial marijuana enterprise*** outside of Washington State's legal, statutory scheme for the production, distribution and sale of marijuana.

Examples of such evidence include: quantity far in excess of personal use amounts; packaging; scales; the presence of multiple new packages; formal or informal ledgers showing receipts or debts; customer records; significant amounts of US currency on hand; direct observations by the police that confirm the existence of a commercial enterprise.

(1) If an individual is found in possession with intent to sell an amount of marijuana under 1 ounce, the KCPAO will not file charges.

(2) If the above factors are satisfied and an individual is found in possession with intent to deliver an amount over 1 ounce but under 5 ounces of marijuana, the KCPAO will file expedited charges with a recommendation for Work Crew.

(3) If the above factors are satisfied and an individual is found in possession with intent to deliver over 5 ounces of marijuana, felony charges will be filed.

Pursuant to State v. Brown, 68 Wn. App. 480, 840 P.2d 1098 (1993), an amount of marijuana in excess of a quantity typically associated with personal use, standing alone, is insufficient as a matter of law to support a conviction of possession of marijuana with intent to deliver.

(4) If a minor (under 18) is found in possession with intent to sell any amount of marijuana, cases will be handled in accordance with our Juvenile Filing and Disposition Standards.

(5) If possession with intent charges are referred following an investigation related to the manufacturing of marijuana or use of a building for drug purposes, please refer to the FADS for manufacturing marijuana for guidance.

d. Possession of Marijuana

The State will decline to file charges when there is evidence that the individual possessed marijuana that was lawfully purchased, regulated, and taxed.

(1) If an adult is found in possession of marijuana over 16 ounces, expedited felony charges will be filed.

(2) If a minor under the age of 18 is found in possession of marijuana in any amount, they will be diverted in accordance with Juvenile Filing and Disposition Standards.

(3) The Legislature permits the possession of 72 ounces of

marijuana-infused products, which includes hash oil. The KCPAO will file charges for individuals found in possession of over 72 ounces of hash oil. The use of invisible explosive gases such as butane causes the unlawful production of hash oil to be dangerous to the public. The KCPAO will file charges for individuals unlawfully manufacturing hash oil.

9. 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 a supervisor of Felony Trial 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 the recommendations of the Health Department for a 60 day supply (normally less than twenty-four ounces of useable marijuana in a residential setting and no more than fifteen marijuana plants);

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.

10. 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 pseudoephedrine.) 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 pseudoephedrine with intent to manufacture methamphetamine should be considered.

10. Bail Jumping

See Section 17. Bail Jump should be filed as an additional charge for trial only where the defendant received actual notice of the hearing at which he failed to appear (either orally on the record or in writing), and the defendant was either returned to court through a booking on the bench warrant or the defendant was absent for at least six weeks. Where a defendant returns to court and successfully quashes the warrant within six weeks, Bail Jump charges shall not be filed.

III. DISPOSITION

A. CHARGE REDUCTION

1. Change of Degree or Dismissal of Charges

A defendant will normally be expected to plead guilty to the crime(s) charged 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. See RCW 9.94A.411 (Statewide Prosecuting Standards). Additionally, evidentiary problems which make

conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct and the correction of errors in the initial charging decision may also require a reduction in the original charge in exchange for a guilty plea.

When a felony possession charge is being reduced to a gross misdemeanor, the amended charge shall be filed as a Solicitation to Possess pursuant to RCW 9A.28.030 and 69.50.4013. Attempted Possession should no longer be filed when the intention is to charge a gross misdemeanor.

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 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 in all cases after a trial date is set.

B. SENTENCE RECOMMENDATION

1. Maximum Term

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

(1) 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(2)(a).

(2) The maximum sentence for a violation of RCW 69.50.403 relating to false or forged prescriptions is 2 years and $2,000.

b. A second or subsequent RCW 69.50 offense doubles the maximum term and fine; the doubling statute does not apply to possession or solicitation cases. RCW 69.50.408.

c. Conviction of an enhancement under RCW 69.50.435 doubles the maximum term and fine for that offense, but cannot operate to more than double what would be authorized for a first offense (i.e. there is no redoubling). RCW 69.50.435(1)(j).

d. A conviction for Distribution to Persons Under Age Eighteen doubles the maximum term, but not the maximum fine. RCW 69.50.406(2).

e. Attempt/conspiracy. Attempt or conspiracy to violate RCW 69.50 carries same maximum term as the completed offense, and is not chargeable under the general anticipatory offense statutes in RCW 9A.28, except pursuant to negotiations. 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, 976 P.2d 616 (1999). Solicitation reduces the offense classification by one (e.g. from a Class B to a Class C felony), and is not a drug offense.

2. Alternative Sentences

a. Recommendations for Electronic Home Detention or a First Time Offender Waiver will be consistent with the guidelines set forth in Section 2 as it relates to sentencing recommendations.

b. Electronic Home Detention shall only be recommended if:

(1) The crime of conviction is Possession of a Controlled Substance under RCW 69.50.4013 or Forged Prescription under RCW 69.50.403. RCW 9.94A.734(1); and

(2) The defendant is in substance abuse treatment with a requirement of frequent and random UAs; and

(3) The defendant obtains or maintains employment or regularly attends school, or the defendant is performing parental duties, or the defendant has medical or health-related conditions that would be better addressed in the home detention program. RCW 9.94A.734(5).

(4) The defendant's current offense does not involve possession of a firearm, intimidation or tampering with a witness, or bail jumping.

(5) The defendant's criminal history does not include convictions for any Class A felony, intimidation or

tampering with a witness, Escape, Failure to Register as a Sex Offender, or Bail Jump.

(6) The defendant does not have a history of failing to respond to legal process.

c. The First Offender Waiver option is not legally available for manufacture, delivery, or possession with intent to manufacture or deliver a Schedule I or II narcotic, flunitrazepam, or methamphetamine. RCW 9.94A.030(28), RCW 9.94A.650. The State will only recommend this alternative if:

(1) The defendant is eligible;
(2) The defendant requests the FTOW;
(3) The defendant's criminal conduct appears to be an isolated incident; and
(4) The lesser punishment is in accord with the seriousness of the criminal conduct, and the standard sentencing range does not involve a sentence of more than a year in custody.

d. DOSA Recommendation RCW 9.94A.660.

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 significant history of escapes, failures to appear, or extensive misdemeanor history; and
(2) The defendant states his willingness to participate in the program; and
(3) The defendant is not a poor risk for community supervision or outpatient treatment; and
(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 5 grams of cocaine, heroin or methamphetamine, or 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.
(6) The defendant has no convictions for serious violent offenses, absent extenuating circumstances.

(7) If the defendant has a conviction for a violent offense, at least ten years have elapsed since the defendant was released from custody and completed serving his sentence for that offense.

3. Fines and Fees

a. Victim Penalty Assessment

For any conviction in superior court of one or more felonies or gross misdemeanors, the court must impose a $500 victim penalty assessment. For convictions of one or more misdemeanors only, the amount of the assessment is $250. RCW 7.68.035.

b. Restitution

The State shall recommend that the defendant pay restitution for any damages caused by his offenses. In particular, the State shall recommend that a defendant convicted of Manufacturing Methamphetamine or a related crime pay the costs of clean up and decontamination of the manufacturing site.

4. Sentence Recommendation for Expedited Controlled Substances Offenses

a. Limitations on Sentence Recommendations

Ordinarily, the sentence recommendation for the expedited crime should not 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, probation, or affirmative conditions of sentence shall be recommended, with the exception of a DUI. Cases involving a fileable DUI or Physical Control should still be expedited, but all the mandatory conditions of probation must be requested. This is the only type of expedited that will request probation because it is mandatory.

b. Recommended Sanctions

An offer of an expedited case shall be a reduction of the original charge to a charge of solicitation to commit the original felony. The recommendation shall be for a straight sentence, without probation except as indicated above. That offer shall be recorded in the file and made by the expedited deputy.

SECTION 19: WEAPON ENHANCEMENTS

I. FILING.

A. EVIDENTIARY SUFFICIENCY

A weapon enhancement will be filed if (1) sufficient admissible evidence exists that 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 and (2) the case meets the criteria under subsection I(C)(4) of this section.

In determining whether there is sufficient evidence to prove an enhancement, it is not necessary that the weapon was recovered as long as there is other evidence that the weapon is indeed real (witnesses can describe knife or other weapon in detail, witness saw offender load or rack firearm, etc.).

B. LENGTH OF ENHANCEMENT

1. The following additional enhancement time shall be added to the presumptive range:

   a. Firearm Sentence Enhancements – RCW 9.94A.533(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.533(3)(d).

   b. Deadly Weapons Enhancements – RCW 9.94A.533(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

2. Good time does not apply to any weapons enhancement time.

   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; RCW 9.94A.729.

3. Firearm and other deadly weapon enhancements run consecutive to the underlying offense and to each other.

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.533(3)(e) and (4)(e).

The "mandatory" provision places enhancement time in the 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.

4. 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.533(3)(g) and (4)(g).

C. CHARGE SELECTION

1. General Provision

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.

2. Deadly Weapon - RCW 9.94A.825.

a. 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, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other razor with an unguarded blade, any mental pipe or bar used or intended to be used as a club, any explosive, and other weapon containing poisonous or injurious gas.

b. 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, 882 P.2d 195 (1994).

c. A motor vehicle is not a deadly weapon for purposes of an enhancement. State v. Ross, 20 Wn. App. 448, 580 P.2d 1110 (1978).

d. 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, 776 P.2d 153 (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 (1985).

3. Firearm - RCW 9.41.010.

A firearm is 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."

A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1). Similarly, an unloaded gun is still a "firearm," because it can be rendered operational merely by inserting ammunition. State v. Releford, 148 Wn. App. 478, 490-91, 200 P.3d 729, 735 (2009).

4. Charge Decision

The following grid determines which enhancement policy ordinarily applies to the crime being charged.

Category of Crime	"Most Serious Offense"	Assault 2º (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 below. 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.

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, 858 P.2d 199 (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.

d. "Most Serious Offense" is defined in RCW 9.94A.030(33). These are the crimes which may qualify (now or in the future) an offender for persistent offender (two/three strikes) status. For the purpose of these enhancement standards only, assault 2º, with a deadly weapon, 9A.36.021(1)(c), is not included.

e. "Drug Offense" is defined in RCW 9.94A.030(22) 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.

f. "Other Offenses" under these enhancement standards include any other felony which does not fall under definition of Most Serious Offense or Drug Offense and is not one of the excluded possessory crimes listed below.

5. 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.533(3)(f) and (4)(f).

The following felony possession of weapons offenses are not excluded 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 9.41.171.

6. Multiple counts.

a. 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.

b. 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).

SECTION 20: FIREARM OFFENSES

I. FIREARM OFFENSES

A. EVIDENTIARY SUFFICIENCY

1. General Considerations

   Weapon cases will be filed if sufficient admissible evidence exists that, 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.

   In determining whether there is sufficient admissible evidence to prove a firearm offense, it is not necessary that the firearm was recovered as long as there is other evidence the firearm was indeed real (ammunition recovered, witness saw offender load or rack weapon, etc.).

2. Regional Domestic Violence Firearms Enforcement Unit

   DV firearm cases will be filed if sufficient admissible evidence exists that, 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.

   In determining whether there is sufficient admissible evidence to prove a firearm offense, it is not necessary that the firearm was recovered as long as there is other evidence the firearm was indeed real (firearm purchase history, CPL records, Fish and Wildlife records, ammunition recovered, victim has personal knowledge of the firearm, e.g. specific knowledge about the location of the firearm(s), saw offender load or rack weapon, the victim has been threatened with the firearm, the victim was aware of when the offender obtained the firearm, social media postings/ photos of the firearm).

   The Regional Domestic Violence Firearm Enforcement Unit will give priority to all firearm cases and felony filings should be reviewed with the filing DPA within 48 hours (out of custody cases) and same day filing decisions for all in custody cases.

B. CHARGE SELECTION

1. Theft of a Firearm -RCW 9A.56.300.

   a. Theft of a firearm shall be charged if there is sufficient admissible evidence proving the defendant committed theft of a firearm.

b. "Theft" is defined in RCW 9A.56.020 and .010 and applies to this offense.

c. “Firearm” means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder. RCW 9.41.010.

d. Each firearm taken in the theft is a separate offense, RCW 9A.56.300(3); however, multiple firearms taken from the same victim in the same incident shall normally be filed as a single count. Multiple firearms taken from separate victims or in separate incidents 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 - RCW 9A.56.310.

a. Possessing a stolen firearm shall be charged 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.

b. The definition of "possessing stolen property” and the defense allowed in RCW 9A.56.140 applies to this offense, thus supplying the additional knowledge element.

c. 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 shall normally be filed as a single count. Multiple firearms possessed and belonging to separate victims initially 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 uncharged counts shall be added by amendment.

3. Unlawful Possession of a Firearm by Prohibited Persons

a. Unlawful Possession of a Firearm in the First Degree – RCW 9.41.040(1)(a).

(1) Unlawful Possession of a Firearm in the First Degree shall be charged where there is sufficient admissible evidence proving that the defendant knowingly owns, or has in his/her possession or control any firearm and previously has been convicted in this state or out-of-state (if comparable) of a "serious offense" as defined in RCW 9.41.010(24).

(2) "Serious Offense" includes the following crimes:

Any Class A felony
Any Attempt to Commit a Class A felony
Any 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
Extortion 1º	Child Molestation 2º
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 Homicide and Assault (except no DSO)
Felony violations of RCW 69.50 with a maximum sentence of at least 10 years. These include:

(a) Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver:
  i. A schedule I or schedule II narcotic (e.g. cocaine, heroin)
  ii. Methamphetamine or amphetamine
  iii. Flunitrazepam (Rohypnol)
(b) Conspiracy to commit offense listed above
(c) Delivery of a Controlled Substance to a Minor
(d) Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine

b. Unlawful Possession of a Firearm in the Second Degree – RCW 9.41.040(2).

(1) Unlawful Possession of a Firearm in the Second Degree shall be charged where there is sufficient admissible evidence proving that the defendant owned or knowingly had in possession or control any firearm and who:

(a) previously has been convicted in this state or out-of-state (if comparable) of any other felony not listed as a serious offense;

(b) previously has been convicted in this state or elsewhere of 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
Violation of the provision of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, 10.99.040)

(c) previously has been convicted or found NGRI in Washington or elsewhere of harassment when committed by one family or household member against another, and committed on or after June 7, 2018

(d) previously has been involuntarily committed for mental health treatment under RCW 71.05.240, RCW 71.05.320, RCW 71.34.740, RCW 71.34.750, RCW 10.77, or equivalent statute of another jurisdiction. RCW 9.41.040(2)(a)(iv); unless his or her right to possess a firearm has been restored as provided by RCW 9.41.047.

(e) 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. RCW 9.41.040(2)(a)(v);

(f) is free on bond or personal recognizance pending trial, appeal or sentencing for a "serious offense" as defined above.

(g) was subject to a court order that restrained the person from harassing, stalking, or threatening the person protected under the order or child of the person or protected person, or engaging in other conduct that would place the protected person in reasonable fear of bodily injury to the protected person or child, if:

i. the order was issued after a hearing of which the person had actual notice and at which the person had an opportunity to participate, and

ii. the order contains a finding that the person either represents a credible threat to the physical safety of the protected person or child and explicitly prohibits the use, attempted use or threatened use of physical force against the protected person or child that would reasonably be expected to cause bodily injury, *or* includes an order under RCW 9.41.800 requiring the person to surrender all firearms and prohibiting the person from accessing, obtaining, or possessing firearms.

(2) The following non-statutory guidelines apply to UPFA 2º only filing decisions because this law prohibits firearms possession for persons who, subsequent to their felony conviction, formerly were allowed to possess firearms lawfully.

(a) If the person, after submitting a complete and candid application, has been issued a valid concealed weapons permit, filing will be declined and a warning letter sent unless the person had notice he/she was prohibited from possessing a firearm prior to their application for the concealed weapons permit.

(b) UPFA 2 charges will still be filed where the predicate offense would "wash" under RCW 9.94A.525(2). However, consideration may be given in these circumstances during case

negotiation where the evidence does not suggest any criminal intent and the weapon was discovered incidentally and not part of any other criminal investigation.

c. 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.

d. Proof of Priors – Non-Statutory Guidelines

(1) Notice: Since 1994, Washington courts have been required to provide oral and written notice to offenders who are no longer eligible to possess firearms. RCW 9.41.047(1). State v. Breitung, 173 Wn.2d 393, 267 P.3d 1012 (2011) held that lack of notice under RCW 9.41.047(1) is an affirmative defense, which the offender must establish by a preponderance of the evidence.

(2) Filing Considerations for Mainstream Cases

(a) Non-Rush Filing: 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. Where the predicate offense lies outside of the King County Court system and is dated July 1, 1994 or later, filers should also require evidence of notification.

(b) Rush Filing: In a rush filing situation, proof of Washington or out-of-state 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. In most rush situations there will not be sufficient time to obtain evidence of notification. However, filers should request evidence of notification for inclusion in the discovery as soon as practicable.

(4) Filing Considerations for Regional DV Firearm Enforcement Unit Cases

(a) Non-Rush and Rush Filing: For firearm cases submitted to the Regional Domestic Violence Firearm Enforcement Unit, the unit will make a filing decision on UPFA 2 charges based on a criminal history check that could include (PROMIS, WASIS, SCOMIS, NCIC, NICS, III, JABS,), if there is sufficient evidence of a prior disqualifying firearm conviction, or a valid court order of protection that prohibits the offender from possessing a firearm. The unit will rely on the criminal history check/ Individual Order History (at filing) and not delay a decision to wait for out of state criminal history if there is sufficient evidence of the conviction. The exception is if the conviction is before July 1, 1994. This guideline makes the distinction between DV offenders that are in possession of a firearm and other mainstream offenders (non DV) that are illegally in possession of a firearm. The Unit recognizes the high lethality associated with firearms and domestic violence offenders and departs from the mainstream filing standards. Where the predicate offense lies outside of King County Court system and is dated July 1, 1994 or later, filers should also require evidence of notification.

(5) Comparability: When filing based on an out-of-state conviction, the filing deputy shall research and document if the conviction is the legal equivalent of the qualifying Washington offense. This applies to both the definition of "serious offense" for UPFA 1 and "felony" for UPFA 2. RCW 9.41.010.

(6) If the predicate felony is 20 years or older or from a jurisdiction that is known not to keep adequate records, the case shall not ordinarily be filed until a certified copy of the prior conviction is obtained.

(7) Prior convictions are subject to attack for constitutional invalidity in an UPFA prosecution. State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (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 due to constitutional deficiencies in the plea forms.

(8) More than one conviction may be charged 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).

e. 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. If convicted of unlawful possession of a firearm in the first or second degree, and either theft of a firearm or possession of a stolen firearm, the sentences must run consecutively. Please read RCW 9.94A.589 carefully to determine how to score each offense in this situation. RCW 9.41.040(6) and 9.94A.589(1)(c).

f. Multiple Firearms

Each firearm possessed by the prohibited person may be charged as a separate offense. RCW 9.41.040. 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.

g. Alien in Possession of a Firearm - RCW 9.41.171.

Alien in possession of a firearm shall be charged where there is sufficient admissible evidence proving that the defendant owned or knowingly had in their possession or control any firearm and where sufficient evidence exists to prove the person is an alien and not otherwise permitted to possess a firearm by RCW 9.41.173 or RCW 9.41.175.

Given the potential proof issues that exist in proving a person's immigration status, the appropriate Federal witness or other proof of alien status (e.g. prior deportation or similar conviction) ordinarily must be identified prior to charges being filed.

h. 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 possessing a firearm under the law is not an element. See State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000); State v. Krzeszowski, 106 Wn. App. 638, 24 P.3d 485 (2001).

SECTION 21: EXPEDITED CRIMES

I. FILING

A. EVIDENTIARY SUFFICIENCY

Expedited crimes shall be filed if sufficient admissible evidence exists that would justify conviction by a reasonable and objective fact-finder, giving appropriate consideration for the most plausible, reasonably foreseeable defense that could be raised.

B. EXPEDITABLE OFFENSES

An Expedited Offense is a crime that legally qualifies as a felony, but the prosecutor's office files in District Court as an attempted Class C felony to expedite the case's resolution. Eligible offenses should ordinarily be filed as expedited offenses, even if the defendant already has a pending case, whether in Superior Court or as an expedited in District Court.

In the appropriate case, the State may exercise its discretion to file a case into Superior Court as a felony rather than as an expedited, or to dismiss a case previously filed into District Court as an expedited and refile the case as a felony in Superior Court. In making such a decision, the State may consider factors including but not limited to a defendant's criminal history, high impact offenders, other pending criminal cases or the nature of the current offense. Filing and trial deputies should consult with their supervisors if they believe they have identified a case in which such discretion should be exercised.

1. <u>Property Offenses</u>

The following property crimes should be filed as Expedited Offenses under the conditions set forth in Section 15.B:

a. Burglary in the Second Degree
   (1) Case involving Fenced Areas, Carports, Detached Garages, and Similar Structures
   (2) Cases involving Trespassed Shoplifters

b. Defrauding an Innkeeper

c. Failure to Return Leased/Rental Property

d. Forgery

e. Identity Theft

f. Malicious Mischief

g. Organized Retail Theft

h. Possession of Stolen Property

i. Retail Theft with Special Circumstances

j. Theft

k. Theft of Leased/Rental Property

l. Theft with Intent to Resell

m. Trafficking in Stolen Property

n. Unlawful Issuance of Bank Checks

2. Drug offenses

For cases involving less than 1 gram, 5 pills or a single syringe full of a controlled substance, the case will be declined for prosecution unless the possession is committed with another felony crime (which may be expedited), or a DUI (a DUI with a VUCSA Possession of under 1 gram, 5 pills or one syringe could still be filed as an expedited offense).

The drugs must be weighed without any kind of packaging. Any referral submitted for review or filing where the drugs were weighed with packaging, or where the Certification for Determination of Probable Cause does not specify, shall be returned to the referring police agency.

a. Forged Prescription

(1) The amount of pills obtained or attempted to be obtained is fewer than 50 pills.

b. VUCSA Possession

(1) For cocaine, heroin, methamphetamine, the amount possessed is between 1 and 3 grams
(2) For marijuana, the amount possessed is less than 100 grams or fewer than 12 plants
(3) For MDMA (ecstasy), the amount possessed is between 5 and 20 pills
(4) For prescription medication or any other type of pills, the amount possessed is between 5 and 50 pills
(5) Possession of any other substance not listed above will be reviewed on a case by case basis

The King County Prosecuting Attorney's Office recognizes that Law Enforcement is in the best position to assess an individual's dangerousness in the community. Law Enforcement may submit a case involving the

possession of less than one gram, 5 pills, or one syringe and ask that the KCPAO deviate from the filing standards. Factors that should be outlined in this request include a defendant's violent criminal history and history of dealing narcotics. Those cases will be reviewed by the Filing Supervisor or the Unit Chair to determine whether charges should be filed, and Law Enforcement will be notified of the decision.

The link to the exemption request form is below.

exemption request.docx

3. A DUI may be filed with any of the above noted expedited crimes.

4. Exceptions for Property Offenses

   a. A defendant who has received 3 or more expedited felonies in a 18 month period is not eligible for expedited filing. The case should be filed into Superior Court as a felony or into Drug Diversion Court if otherwise eligible.

C. CHARGE SELECTION

1. Degree

   Expedited crimes should be charged as a Class C felony in District Court.

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 District Court.

E. WITNESSES AND 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

Copies of all discoverable material shall be delivered to the defense attorney as soon as the identity of the defense attorney can be determined. The defense attorney shall be advised of the offer as promptly as possible. 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

Ordinarily, the sentence recommendation for the expedited crime should not 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, probation, or affirmative conditions of sentence shall be recommended, with the exception of a DUI. Cases involving a fileable DUI or Physical Control should still be expedited, but all the mandatory conditions of a DUI probation must be requested. This is the only type of expedited that will request probation because it is mandatory under the DUI statute. If the case arises from a municipal court, the DUI should be referred to the appropriate municipal agency. Only cases with a King County District Court DUI should be filed with an expedited felony.

C. RECOMMENDED SANCTIONS

Ordinarily, an offer of an expedited case shall be a reduction of the original charge to an attempted commission of the original felony. When a felony VUCSA possession charge is being reduced to a gross misdemeanor, the amended charge shall be filed as a Solicitation to Possess contrary to RCW 9A.28.030 and 69.50.4013. Attempted Possession should no longer be filed when the intention is to charge a gross misdemeanor.

The recommendation shall be for a straight sentence, without probation (with the exception of a case with a DUI as noted above), and shall include an agreement that the defendant make full restitution for all losses (the amount shall be calculated and specified by VAU), and pay court costs and the VPA. That offer shall be recorded in the file and made by the expedited deputy.

SECTION 22: HIGH PRIORITY REPEAT OFFENDER (HIPRO)

I. FILING

A. EVIDENTIARY SUFFICIENCY

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

B. CASE HANDLING

The High Priority Repeat Offender unit, HIPRO, is a specialized unit dedicated to the prosecution of prolific offenders who primarily commit the crimes of car theft, burglary, and identity theft stemming from burglaries and/or vehicle prowls/thefts.

C. ELIGIBILITY CRITERIA

A defendant who is referred to the King County Prosecuting Attorney's Office for property crimes, will be classified as a High Priority Repeat Offender if one or more of the following criteria are present:

1. The defendant has been sentenced to a prison term at least twice for crimes related to car theft, and/or burglary.

2. The defendant has a total of five convictions for car thefts and/or burglaries combined.

3. The defendant committed the referred offense(s) (burglary or car theft) while on community custody for a Drug Offender Sentencing Alternative (DOSA) for a burglary or car theft related crime.

4. The defendant committed a new car theft or burglary offense while on pre-trial release for a car theft or burglary offense, and has at least one prior felony conviction for a similar offense.

HIPRO may accept cases, within its discretion, if one or more of the following criteria are present:

1. The defendant's offender score, not including any concurrent offenses,

starts at 9 or higher.

2. The defendant has three or more pending burglary or car theft cases, regardless of whether there are prior convictions, the nature of any prior convictions, or whether the new crimes were committed while the prior crimes were filed and pending.

D. FILING STANDARDS

1. Counts

One count should be filed for each car related crime up to ten counts.

One count should be filed for each burglary up to ten counts (attempted burglaries would generally not be filed up front when charging five or more completed burglaries).

Any new offense committed while the defendant is on pre-trial release will be filed as a felony even if the offense is eligible for expedited filing.

2. Aggravating Circumstances

The aggravating circumstance of the victim present during the commission of a burglary, RCW 9.94A.535(2)(u), will be filed in every instance where the defendant knew or should have known a victim was in the residence at the time of the crime, i.e. the defendant committed a residential burglary in the middle of the night.

The rapid recidivism aggravator, RCW 9.94A.535(2)(t), will be filed up front if the offense was committed within 30 days of the defendant's release from custody.

II. DISPOSITION

A. CHARGE REDUCTION

A defendant will be expected to plead guilty as charged, absent proof problems.

B. SENTENCE RECOMMENDATIONS

2. Determinate Sentence

A determinate sentence within the standard range shall be recommended.

Recommendations outside the specified range shall be made only pursuant to the exception policy.

3. Drug Offender Sentencing Alternative (DOSA)

   a. The State will only agree to a DOSA sentence if:
      (1) The defendant has not had the benefit of a DOSA or substance abuse treatment;
      (2) The defendant did not re-offend while on pre-trial release; and
      (3) It is clear that the defendant has a substance abuse problem, i.e. the defendant has prior VUCSA arrests/ convictions, narcotics were recovered at the time of arrest. Self-reporting alone is not sufficient.

   b. A recommendation for a second DOSA in 10 years may be considered with supervisor approval.

   c. If the defendant is eligible for a DOSA, but the defendant does not meet the above described criteria, the State will recommend between the mid-range and the high end of the defendant's standard range.

4. Restitution

   The State will recommend full lawful restitution.

4. DNA Identification

   A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. RCW 43.43.754.

5. Exceptional Sentence - See Section 2.

   A defendant whose criminal history is composed largely of car theft and burglary related crimes, whose offender score exceeds 9, and whose multiple current charges will result in unpunished offenses shall be considered for an exceptional sentence pursuant to RCW 9.94A.535(2)(c). A request for an exceptional sentence must be approved by a supervising senior.

SECTION 23: PERSISTENT OFFENDERS

I. STATUTORY PROVISIONS

A. PURSUANT TO RCW 9.94A.570,

A persistent offender shall be sentenced to life without the possibility of release. A "Persistent Offender" under RCW 9.94A.030(38) 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 (38)(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: Section (a) is the “Three Strikes” provision of the POAA. Section (b) is the “Two Strikes” provisions of the POAA.

B. “MOST SERIOUS OFFENSE” DEFINED.

"Most Serious Offense" as used in Section (a)(i), (ii) above is defined in RCW 9.94A.030(33) 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) Sexual exploitation;
(p) Vehicular assault, under DUI and reckless prongs;
(q) Vehicular homicide, under DUI and reckless prongs;
(r) Any other class B felony offense with a finding of sexual motivation;
(s) Any other felony with a deadly weapon verdict;
(t) Any prior Washington, out-of-state or federal offense that is comparable to any offense listed above;
(u) see RCW 9.44.100(1)(a-d) regarding prior convictions for Indecent Liberties and effective dates.

(Note: Effective 7/28/19, Robbery in the second degree is no longer a “most serious” offense. Laws of 2019, ch. 187).

C. JUVENILE CONVICTIONS NOT INCLUDED.

Juvenile adjudications are not included within the above. A conviction is included if the offender was a juvenile convicted as an adult pursuant to the discretionary or mandatory decline provisions of RCW 13.40. State v. Knippling, 166 Wn.2d 93, 206 P.3d 372 (2009).

D. EFFECT OF "WASH-OUT" PROVISIONS

Prior most serious offense that do not count towards a defendant's offender score due to the operation of the "wash-out" provisions of the SRA do not constitute most serious offenses for the purpose of "striking out" a defendant. State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001).

E. PARDON OR CLEMENCY AVAILABLE.

The pardon and clemency powers of the governor are not restricted, but the statute "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.

II. FILING AND PRE-SENTENCING PROCEDURE.

A. 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 as soon as possible.

2. Whenever a “most serious offense” is filed, and when the offender appears to have two or more prior “most serious offenses,” the filing deputy shall complete a persistent offender alert/notice worksheet and give notice via PbK to the Criminal Operations Specialist. (The Criminal Operations Specialist is responsible for maintaining a master log of all third strike cases as well as notifying the jail of the offender's status.)

3. A minimum bail amount of $500,000 should be requested in all cases where the filer believes that the current offense may constitute a third strike.

B. RESPONSIBILITY OF THE EARLY PLEA DEPUTY.

1. The early plea deputy shall be responsible for any continuing investigation necessary to determine whether the defendant's criminal history meets the criteria for most serious offenses.

2. Once the early plea deputy has gathered and summarized all of the defendant's relevant criminal history, that deputy shall schedule a meeting with the unit chair and the Chief Criminal Deputy. At the meeting, the early plea deputy should present a detailed summary of the offender's criminal history and the facts underlying all significant prior convictions. A similar summary of the current offense should be presented.

3. Any resolutions to a non-persistent offender sentence must be documented in a written exception and approved by the Chief Criminal Deputy. The Criminal Operations Specialist must also be notified.

C. RESPONSIBILITIES OF THE TRIAL DPA

1. The trial deputy shall be responsible for any continuing investigation that is necessary to determine whether the prosecutor's understanding of the defendant's criminal history is correct. The deputy shall review the offender's rap sheets and criminal history to verify that all "most serious offenses" have been verified. 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.

2. The trial deputy is also responsible for ensuring that sufficient evidence exists to adequately prove up the prior most serious offenses at a sentencing hearing. In addition to certified copies of Judgment and Sentences, felony "pen packs" must be ordered for all prior most serious offenses.

3. Any resolutions by the trial deputy to a non-persistent offender sentence must be documented in a written exception and approved by the Chief Criminal Deputy. The Criminal Operations Specialist must also be notified.

4. If the defendant is convicted of a most serious offense, the trial deputy shall be responsible for setting a briefing schedule and for coordinating with the deputy's trial paralegal (not the Criminal Operations Specialist) to obtain a set of the defendant's fingerprints. This must be done several weeks prior to the sentencing hearing for adequate time for comparison. The sentencing hearing shall be special set – not on the typical afternoon sentencing calendar. The trial deputy is expected to conduct the sentencing hearing.

5. Upon completion of the sentencing, the Chief Criminal Deputy, the unit chair and the Criminal Operations Specialist should be notified.