

ESHB 2424 - S COMM AMD
By Committee on Judiciary

ADOPTED AND ENGROSSED 03/04/2010

1 Strike everything after the enacting clause and insert the
2 following:

3 "Sec. 1. RCW 9.68A.001 and 2007 c 368 s 1 are each amended to read
4 as follows:

5 The legislature finds that the prevention of sexual exploitation
6 and abuse of children constitutes a government objective of surpassing
7 importance. The care of children is a sacred trust and should not be
8 abused by those who seek commercial gain or personal gratification
9 based on the exploitation of children.

10 The legislature further finds that the protection of children from
11 sexual exploitation can be accomplished without infringing on a
12 constitutionally protected activity. The definition of "sexually
13 explicit conduct" and other operative definitions demarcate a line
14 between protected and prohibited conduct and should not inhibit
15 legitimate scientific, medical, or educational activities.

16 The legislature further finds that children engaged in sexual
17 conduct for financial compensation are frequently the victims of sexual
18 abuse. Approximately eighty to ninety percent of children engaged in
19 sexual activity for financial compensation have a history of sexual
20 abuse victimization. It is the intent of the legislature to encourage
21 these children to engage in prevention and intervention services and to
22 hold those who pay to engage in the sexual abuse of children
23 accountable for the trauma they inflict on children.

24 The legislature further finds that due to the changing nature of
25 technology, offenders are now able to access child pornography in
26 different ways and in increasing quantities. By amending current
27 statutes governing depictions of a minor engaged in sexually explicit
28 conduct, it is the intent of the legislature to ensure that intentional
29 viewing of and dealing in child pornography over the internet is
30 subject to a criminal penalty without limiting the scope of existing

1 prohibitions on the possession of or dealing in child pornography,
2 including the possession of electronic depictions of a minor engaged in
3 sexually explicit conduct. It is also the intent of the legislature to
4 clarify, in response to *State v. Sutherby*, 204 P.3d 916 (2009), the
5 unit of prosecution for the statutes governing possession of and
6 dealing in depictions of a minor engaged in sexually explicit conduct.
7 It is the intent of the legislature that the first degree offenses
8 under RCW 9.68A.050, 9.68A.060, and 9.68A.070 have a per depiction or
9 image unit of prosecution, while the second degree offenses under RCW
10 9.68A.050, 9.68A.060, and 9.68A.070 have a per incident unit of
11 prosecution as established in *State v. Sutherby*, 204 P.3d 916 (2009).
12 Furthermore, it is the intent of the legislature to set a different
13 unit of prosecution for the new offense of viewing of depictions of a
14 minor engaged in sexually explicit conduct such that each separate
15 session of intentionally viewing over the internet of visual depictions
16 or images of a minor engaged in sexually explicit conduct constitutes
17 a separate offense.

18 NEW SECTION. Sec. 2. A new section is added to chapter 9.68A RCW
19 to read as follows:

20 This chapter does not apply to lawful conduct between spouses.

21 **Sec. 3.** RCW 9.68A.011 and 2002 c 70 s 1 are each amended to read
22 as follows:

23 Unless the context clearly indicates otherwise, the definitions in
24 this section apply throughout this chapter.

25 (1) An "internet session" means a period of time during which an
26 internet user, using a specific internet protocol address, visits or is
27 logged into an internet site for an uninterrupted period of time.

28 (2) To "photograph" means to make a print, negative, slide, digital
29 image, motion picture, or videotape. A "photograph" means anything
30 tangible or intangible produced by photographing.

31 ((+2)) (3) "Visual or printed matter" means any photograph or
32 other material that contains a reproduction of a photograph.

33 ((+3)) (4) "Sexually explicit conduct" means actual or simulated:

34 (a) Sexual intercourse, including genital-genital, oral-genital,
35 anal-genital, or oral-anal, whether between persons of the same or
36 opposite sex or between humans and animals;

- 1 (b) Penetration of the vagina or rectum by any object;
2 (c) Masturbation;
3 (d) ~~Sadomasochistic abuse ((for the purpose of sexual stimulation~~
4 ~~of the viewer))~~;
5 (e) ~~((Exhibition of the genitals or unclothed pubic or rectal areas~~
6 ~~of any minor, or the unclothed breast of a female minor, for the~~
7 ~~purpose of sexual stimulation of the viewer;~~
8 ~~(f))~~ Defecation or urination for the purpose of sexual stimulation
9 of the viewer;
10 (f) Depiction of the genitals or unclothed pubic or rectal areas of
11 any minor, or the unclothed breast of a female minor, for the purpose
12 of sexual stimulation of the viewer. For the purposes of this
13 subsection (4)(f), it is not necessary that the minor know that he or
14 she is participating in the described conduct, or any aspect of it; and
15 (g) Touching of a person's clothed or unclothed genitals, pubic
16 area, buttocks, or breast area for the purpose of sexual stimulation of
17 the viewer.
18 ~~((4))~~ (5) "Minor" means any person under eighteen years of age.
19 ~~((5))~~ (6) "Live performance" means any play, show, skit, dance,
20 or other exhibition performed or presented to or before an audience of
21 one or more, with or without consideration.

22 **Sec. 4.** RCW 9.68A.050 and 1989 c 32 s 3 are each amended to read
23 as follows:

24 ~~((A person who:))~~

25 (1)(a) A person commits the crime of dealing in depictions of a
26 minor engaged in sexually explicit conduct in the first degree when he
27 or she:

28 (i) Knowingly develops, duplicates, publishes, prints,
29 disseminates, exchanges, finances, attempts to finance, or sells
30 ~~((any))~~ a visual or printed matter that depicts a minor engaged in an
31 act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a)
32 through (e); or

33 ~~((2))~~ (ii) Possesses with intent to develop, duplicate, publish,
34 print, disseminate, exchange, or sell any visual or printed matter that
35 depicts a minor engaged in an act of sexually explicit conduct as
36 defined in RCW 9.68A.011(4) (a) through (e).

1 (b) Dealing in depictions of a minor engaged in sexually explicit
2 conduct in the first degree is ((guilty of)) a class ((C)) B felony
3 punishable under chapter 9A.20 RCW.

4 (c) For the purposes of determining the unit of prosecution under
5 this subsection, each depiction or image of visual or printed matter
6 constitutes a separate offense.

7 (2)(a) A person commits the crime of dealing in depictions of a
8 minor engaged in sexually explicit conduct in the second degree when he
9 or she:

10 (i) Knowingly develops, duplicates, publishes, prints,
11 disseminates, exchanges, finances, attempts to finance, or sells any
12 visual or printed matter that depicts a minor engaged in an act of
13 sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g); or

14 (ii) Possesses with intent to develop, duplicate, publish, print,
15 disseminate, exchange, or sell any visual or printed matter that
16 depicts a minor engaged in an act of sexually explicit conduct as
17 defined in RCW 9.68A.011(4) (f) or (g).

18 (b) Dealing in depictions of a minor engaged in sexually explicit
19 conduct in the second degree is a class C felony punishable under
20 chapter 9A.20 RCW.

21 (c) For the purposes of determining the unit of prosecution under
22 this subsection, each incident of dealing in one or more depictions or
23 images of visual or printed matter constitutes a separate offense.

24 **Sec. 5.** RCW 9.68A.060 and 1989 c 32 s 4 are each amended to read
25 as follows:

26 (1)(a) A person ((who)) commits the crime of sending or bringing
27 into the state depictions of a minor engaged in sexually explicit
28 conduct in the first degree when he or she knowingly sends or causes to
29 be sent, or brings or causes to be brought, into this state for sale or
30 distribution, ((any)) a visual or printed matter that depicts a minor
31 engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a)
32 through (e).

33 (b) Sending or bringing into the state depictions of a minor
34 engaged in sexually explicit conduct in the first degree is ((guilty
35 of)) a class ((C)) B felony punishable under chapter 9A.20 RCW.

36 (c) For the purposes of determining the unit of prosecution under

1 this subsection, each depiction or image of visual or printed matter
2 constitutes a separate offense.

3 (2)(a) A person commits the crime of sending or bringing into the
4 state depictions of a minor engaged in sexually explicit conduct in the
5 second degree when he or she knowingly sends or causes to be sent, or
6 brings or causes to be brought, into this state for sale or
7 distribution, any visual or printed matter that depicts a minor engaged
8 in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

9 (b) Sending or bringing into the state depictions of a minor
10 engaged in sexually explicit conduct in the second degree is a class C
11 felony punishable under chapter 9A.20 RCW.

12 (c) For the purposes of determining the unit of prosecution under
13 this subsection, each incident of sending or bringing into the state
14 one or more depictions or images of visual or printed matter
15 constitutes a separate offense.

16 **Sec. 6.** RCW 9.68A.070 and 2006 c 139 s 3 are each amended to read
17 as follows:

18 (1)(a) A person (~~who~~) commits the crime of possession of
19 depictions of a minor engaged in sexually explicit conduct in the first
20 degree when he or she knowingly possesses a visual or printed matter
21 depicting a minor engaged in sexually explicit conduct as defined in
22 RCW 9.68A.011(4) (a) through (e).

23 (b) Possession of depictions of a minor engaged in sexually
24 explicit conduct in the first degree is (~~guilty of~~) a class B felony
25 punishable under chapter 9A.20 RCW.

26 (c) For the purposes of determining the unit of prosecution under
27 this subsection, each depiction or image of visual or printed matter
28 constitutes a separate offense.

29 (2)(a) A person commits the crime of possession of depictions of a
30 minor engaged in sexually explicit conduct in the second degree when he
31 or she knowingly possesses any visual or printed matter depicting a
32 minor engaged in sexually explicit conduct as defined in RCW
33 9.68A.011(4) (f) or (g).

34 (b) Possession of depictions of a minor engaged in sexually
35 explicit conduct in the second degree is a class C felony punishable
36 under chapter 9A.20 RCW.

1 (c) For the purposes of determining the unit of prosecution under
2 this subsection, each incident of possession of one or more depictions
3 or images of visual or printed matter constitutes a separate offense.

4 **NEW SECTION.** **Sec. 7.** A new section is added to chapter 9.68A RCW
5 to read as follows:

6 (1) A person who intentionally views over the internet visual or
7 printed matter depicting a minor engaged in sexually explicit conduct
8 as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing
9 depictions of a minor engaged in sexually explicit conduct in the first
10 degree, a class B felony punishable under chapter 9A.20 RCW.

11 (2) A person who intentionally views over the internet visual or
12 printed matter depicting a minor engaged in sexually explicit conduct
13 as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing
14 depictions of a minor engaged in sexually explicit conduct in the
15 second degree, a class C felony punishable under chapter 9A.20 RCW.

16 (3) For the purposes of determining whether a person intentionally
17 viewed over the internet a visual or printed matter depicting a minor
18 engaged in sexually explicit conduct in subsection (1) or (2) of this
19 section, the trier of fact shall consider the title, text, and content
20 of the visual or printed matter, as well as the internet history,
21 search terms, thumbnail images, downloading activity, expert computer
22 forensic testimony, number of visual or printed matter depicting minors
23 engaged in sexually explicit conduct, defendant's access to and control
24 over the electronic device and its contents upon which the visual or
25 printed matter was found, or any other relevant evidence. The state
26 must prove beyond a reasonable doubt that the viewing was initiated by
27 the user of the computer where the viewing occurred.

28 (4) For the purposes of this section, each separate internet
29 session of intentionally viewing over the internet visual or printed
30 matter depicting a minor engaged in sexually explicit conduct
31 constitutes a separate offense.

32 **Sec. 8.** RCW 9.68A.110 and 2007 c 368 s 3 are each amended to read
33 as follows:

34 (1) In a prosecution under RCW 9.68A.040, it is not a defense that
35 the defendant was involved in activities of law enforcement and
36 prosecution agencies in the investigation and prosecution of criminal

1 offenses. Law enforcement and prosecution agencies shall not employ
2 minors to aid in the investigation of a violation of RCW 9.68A.090 or
3 9.68A.100. (~~This chapter does not apply to lawful conduct between~~
4 ~~spouses.~~)

5 (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
6 9.68A.080, it is not a defense that the defendant did not know the age
7 of the child depicted in the visual or printed matter: PROVIDED, That
8 it is a defense, which the defendant must prove by a preponderance of
9 the evidence, that at the time of the offense the defendant was not in
10 possession of any facts on the basis of which he or she should
11 reasonably have known that the person depicted was a minor.

12 (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.101, or
13 9.68A.102, it is not a defense that the defendant did not know the
14 alleged victim's age: PROVIDED, That it is a defense, which the
15 defendant must prove by a preponderance of the evidence, that at the
16 time of the offense, the defendant made a reasonable bona fide attempt
17 to ascertain the true age of the minor by requiring production of a
18 driver's license, marriage license, birth certificate, or other
19 governmental or educational identification card or paper and did not
20 rely solely on the oral allegations or apparent age of the minor.

21 (4) In a prosecution under RCW 9.68A.050, 9.68A.060, (~~or~~)
22 9.68A.070, or section 7 of this act, it shall be an affirmative defense
23 that the defendant was a law enforcement officer or a person
24 specifically authorized, in writing, to assist a law enforcement
25 officer and acting at the direction of a law enforcement officer in the
26 process of conducting an official investigation of a sex-related crime
27 against a minor, or that the defendant was providing individual case
28 treatment as a recognized medical facility or as a psychiatrist or
29 psychologist licensed under Title 18 RCW. Nothing in this act is
30 intended to in any way affect or diminish the immunity afforded an
31 electronic communication service provider, remote computing service
32 provider, or domain name registrar acting in the performance of its
33 reporting or preservation responsibilities under 18 U.S.C. Secs. 2258a,
34 2258b, or 2258c.

35 (5) In a prosecution under RCW 9.68A.050, 9.68A.060, (~~or~~)
36 9.68A.070, or section 7 of this act, the state is not required to
37 establish the identity of the alleged victim.

1 (6) In a prosecution under RCW 9.68A.070 or section 7 of this act,
2 it shall be an affirmative defense that:

3 (a) The defendant was employed at or conducting research in
4 partnership or in cooperation with any institution of higher education
5 as defined in RCW 28B.07.020 or 28B.10.016, and:

6 (i) He or she was engaged in a research activity;

7 (ii) The research activity was specifically approved prior to the
8 possession or viewing activity being conducted in writing by a person,
9 or other such entity vested with the authority to grant such approval
10 by the institution of higher learning; and

11 (iii) Viewing or possessing the visual or printed matter is an
12 essential component of the authorized research; or

13 (b) The defendant was an employee of the Washington state
14 legislature engaged in research at the request of a member of the
15 legislature and:

16 (i) The request for research is made prior to the possession or
17 viewing activity being conducted in writing by a member of the
18 legislature;

19 (ii) The research is directly related to a legislative activity;
20 and

21 (iii) Viewing or possessing the visual or printed matter is an
22 essential component of the requested research and legislative activity.

23 (c) Nothing in this section authorizes otherwise unlawful viewing
24 or possession of visual or printed matter depicting a minor engaged in
25 sexually explicit conduct.

26 **Sec. 9.** RCW 9.94A.515 and 2008 c 108 s 23 and 2008 c 38 s 1 are
27 each reenacted and amended to read as follows:

28
29 TABLE 2

	CRIMES INCLUDED WITHIN
	EACH SERIOUSNESS LEVEL
XVI	Aggravated Murder 1 (RCW 10.95.020)
XV	Homicide by abuse (RCW 9A.32.055) Malicious explosion 1 (RCW 70.74.280(1))

1 Murder 1 (RCW 9A.32.030)
2 XIV Murder 2 (RCW 9A.32.050)
3 Trafficking 1 (RCW 9A.40.100(1))
4 XIII Malicious explosion 2 (RCW
5 70.74.280(2))
6 Malicious placement of an explosive 1
7 (RCW 70.74.270(1))
8 XII Assault 1 (RCW 9A.36.011)
9 Assault of a Child 1 (RCW 9A.36.120)
10 Malicious placement of an imitation
11 device 1 (RCW 70.74.272(1)(a))
12 Rape 1 (RCW 9A.44.040)
13 Rape of a Child 1 (RCW 9A.44.073)
14 Trafficking 2 (RCW 9A.40.100(2))
15 XI Manslaughter 1 (RCW 9A.32.060)
16 Rape 2 (RCW 9A.44.050)
17 Rape of a Child 2 (RCW 9A.44.076)
18 X Child Molestation 1 (RCW 9A.44.083)
19 Criminal Mistreatment 1 (RCW
20 9A.42.020)
21 Indecent Liberties (with forcible
22 compulsion) (RCW
23 9A.44.100(1)(a))
24 Kidnapping 1 (RCW 9A.40.020)
25 Leading Organized Crime (RCW
26 9A.82.060(1)(a))
27 Malicious explosion 3 (RCW
28 70.74.280(3))
29 Sexually Violent Predator Escape
30 (RCW 9A.76.115)
31 IX Abandonment of Dependent Person 1
32 (RCW 9A.42.060)
33 Assault of a Child 2 (RCW 9A.36.130)
34 Explosive devices prohibited (RCW
35 70.74.180)
36 Hit and Run--Death (RCW
37 46.52.020(4)(a))

1 Homicide by Watercraft, by being
2 under the influence of intoxicating
3 liquor or any drug (RCW
4 79A.60.050)
5 Inciting Criminal Profiteering (RCW
6 9A.82.060(1)(b))
7 Malicious placement of an explosive 2
8 (RCW 70.74.270(2))
9 Robbery 1 (RCW 9A.56.200)
10 Sexual Exploitation (RCW 9.68A.040)
11 Vehicular Homicide, by being under
12 the influence of intoxicating liquor
13 or any drug (RCW 46.61.520)
14 VIII Arson 1 (RCW 9A.48.020)
15 Homicide by Watercraft, by the
16 operation of any vessel in a
17 reckless manner (RCW
18 79A.60.050)
19 Manslaughter 2 (RCW 9A.32.070)
20 Promoting Commercial Sexual Abuse
21 of a Minor (RCW 9.68A.101)
22 Promoting Prostitution 1 (RCW
23 9A.88.070)
24 Theft of Ammonia (RCW 69.55.010)
25 Vehicular Homicide, by the operation
26 of any vehicle in a reckless manner
27 (RCW 46.61.520)
28 VII Burglary 1 (RCW 9A.52.020)
29 Child Molestation 2 (RCW 9A.44.086)
30 Civil Disorder Training (RCW
31 9A.48.120)
32 Dealing in depictions of minor engaged
33 in sexually explicit conduct 1
34 (RCW 9.68A.050(1))
35 Drive-by Shooting (RCW 9A.36.045)

1 Homicide by Watercraft, by disregard
2 for the safety of others (RCW
3 79A.60.050)
4 Indecent Liberties (without forcible
5 compulsion) (RCW 9A.44.100(1)
6 (b) and (c))
7 Introducing Contraband 1 (RCW
8 9A.76.140)
9 Malicious placement of an explosive 3
10 (RCW 70.74.270(3))
11 Negligently Causing Death By Use of a
12 Signal Preemption Device (RCW
13 46.37.675)
14 Sending, bringing into state depictions
15 of minor engaged in sexually
16 explicit conduct 1 (RCW
17 9.68A.060(1))
18 Unlawful Possession of a Firearm in
19 the first degree (RCW 9.41.040(1))
20 Use of a Machine Gun in Commission
21 of a Felony (RCW 9.41.225)
22 Vehicular Homicide, by disregard for
23 the safety of others (RCW
24 46.61.520)
25 VI Bail Jumping with Murder 1 (RCW
26 9A.76.170(3)(a))
27 Bribery (RCW 9A.68.010)
28 Incest 1 (RCW 9A.64.020(1))
29 Intimidating a Judge (RCW 9A.72.160)
30 Intimidating a Juror/Witness (RCW
31 9A.72.110, 9A.72.130)
32 Malicious placement of an imitation
33 device 2 (RCW 70.74.272(1)(b))
34 Possession of Depictions of a Minor
35 Engaged in Sexually Explicit
36 Conduct 1 (RCW 9.68A.070(1))
37 Rape of a Child 3 (RCW 9A.44.079)

1 Theft of a Firearm (RCW 9A.56.300)
2 Unlawful Storage of Ammonia (RCW
3 69.55.020)
4 V Abandonment of Dependent Person 2
5 (RCW 9A.42.070)
6 Advancing money or property for
7 extortionate extension of credit
8 (RCW 9A.82.030)
9 Bail Jumping with class A Felony
10 (RCW 9A.76.170(3)(b))
11 Child Molestation 3 (RCW 9A.44.089)
12 Criminal Mistreatment 2 (RCW
13 9A.42.030)
14 Custodial Sexual Misconduct 1 (RCW
15 9A.44.160)
16 Dealing in Depictions of Minor
17 Engaged in Sexually Explicit
18 Conduct 2 (RCW 9.68A.050(2))
19 Domestic Violence Court Order
20 Violation (RCW 10.99.040,
21 10.99.050, 26.09.300, 26.10.220,
22 26.26.138, 26.50.110, 26.52.070,
23 or 74.34.145)
24 Driving While Under the Influence
25 (RCW 46.61.502(6))
26 Extortion 1 (RCW 9A.56.120)
27 Extortionate Extension of Credit (RCW
28 9A.82.020)
29 Extortionate Means to Collect
30 Extensions of Credit (RCW
31 9A.82.040)
32 Incest 2 (RCW 9A.64.020(2))
33 Kidnapping 2 (RCW 9A.40.030)
34 Perjury 1 (RCW 9A.72.020)
35 Persistent prison misbehavior (RCW
36 9.94.070)

1 Physical Control of a Vehicle While
2 Under the Influence (RCW
3 46.61.504(6))
4 Possession of a Stolen Firearm (RCW
5 9A.56.310)
6 Rape 3 (RCW 9A.44.060)
7 Rendering Criminal Assistance 1
8 (RCW 9A.76.070)
9 Sending, Bringing into State Depictions
10 of Minor Engaged in Sexually
11 Explicit Conduct 2 (RCW
12 9.68A.060(2))
13 Sexual Misconduct with a Minor 1
14 (RCW 9A.44.093)
15 Sexually Violating Human Remains
16 (RCW 9A.44.105)
17 Stalking (RCW 9A.46.110)
18 Taking Motor Vehicle Without
19 Permission 1 (RCW 9A.56.070)
20 IV Arson 2 (RCW 9A.48.030)
21 Assault 2 (RCW 9A.36.021)
22 Assault 3 (of a Peace Officer with a
23 Projectile Stun Gun) (RCW
24 9A.36.031(1)(h))
25 Assault by Watercraft (RCW
26 79A.60.060)
27 Bribing a Witness/Bribe Received by
28 Witness (RCW 9A.72.090,
29 9A.72.100)
30 Cheating 1 (RCW 9.46.1961)
31 Commercial Bribery (RCW 9A.68.060)
32 Counterfeiting (RCW 9.16.035(4))
33 Endangerment with a Controlled
34 Substance (RCW 9A.42.100)
35 Escape 1 (RCW 9A.76.110)
36 Hit and Run--Injury (RCW
37 46.52.020(4)(b))

1 Hit and Run with Vessel--Injury
2 Accident (RCW 79A.60.200(3))
3 Identity Theft 1 (RCW 9.35.020(2))
4 Indecent Exposure to Person Under
5 Age Fourteen (subsequent sex
6 offense) (RCW 9A.88.010)
7 Influencing Outcome of Sporting Event
8 (RCW 9A.82.070)
9 Malicious Harassment (RCW
10 9A.36.080)
11 Possession of Depictions of a Minor
12 Engaged in Sexually Explicit
13 Conduct 2 (RCW 9.68.070(2))
14 Residential Burglary (RCW
15 9A.52.025)
16 Robbery 2 (RCW 9A.56.210)
17 Theft of Livestock 1 (RCW 9A.56.080)
18 Threats to Bomb (RCW 9.61.160)
19 Trafficking in Stolen Property 1 (RCW
20 9A.82.050)
21 Unlawful factoring of a credit card or
22 payment card transaction (RCW
23 9A.56.290(4)(b))
24 Unlawful transaction of health
25 coverage as a health care service
26 contractor (RCW 48.44.016(3))
27 Unlawful transaction of health
28 coverage as a health maintenance
29 organization (RCW 48.46.033(3))
30 Unlawful transaction of insurance
31 business (RCW 48.15.023(3))
32 Unlicensed practice as an insurance
33 professional (RCW
34 48.17.063(~~(3)~~)(2))
35 Use of Proceeds of Criminal
36 Profiteering (RCW 9A.82.080 (1)
37 and (2))

1 Vehicular Assault, by being under the
2 influence of intoxicating liquor or
3 any drug, or by the operation or
4 driving of a vehicle in a reckless
5 manner (RCW 46.61.522)
6 Viewing of Depictions of a Minor
7 Engaged in Sexually Explicit
8 Conduct 1 (section 7(1) of this act)
9 Willful Failure to Return from
10 Furlough (RCW 72.66.060)
11 III Animal Cruelty 1 (Sexual Conduct or
12 Contact) (RCW 16.52.205(3))
13 Assault 3 (Except Assault 3 of a Peace
14 Officer With a Projectile Stun
15 Gun) (RCW 9A.36.031 except
16 subsection (1)(h))
17 Assault of a Child 3 (RCW 9A.36.140)
18 Bail Jumping with class B or C Felony
19 (RCW 9A.76.170(3)(c))
20 Burglary 2 (RCW 9A.52.030)
21 Commercial Sexual Abuse of a Minor
22 (RCW 9.68A.100)
23 Communication with a Minor for
24 Immoral Purposes (RCW
25 9.68A.090)
26 Criminal Gang Intimidation (RCW
27 9A.46.120)
28 Custodial Assault (RCW 9A.36.100)
29 Cyberstalking (subsequent conviction
30 or threat of death) (RCW
31 9.61.260(3))
32 Escape 2 (RCW 9A.76.120)
33 Extortion 2 (RCW 9A.56.130)
34 Harassment (RCW 9A.46.020)
35 Intimidating a Public Servant (RCW
36 9A.76.180)

1 Introducing Contraband 2 (RCW
2 9A.76.150)
3 Malicious Injury to Railroad Property
4 (RCW 81.60.070)
5 Mortgage Fraud (RCW 19.144.080)
6 Negligently Causing Substantial Bodily
7 Harm By Use of a Signal
8 Preemption Device (RCW
9 46.37.674)
10 Organized Retail Theft 1 (RCW
11 9A.56.350(2))
12 Perjury 2 (RCW 9A.72.030)
13 Possession of Incendiary Device (RCW
14 9.40.120)
15 Possession of Machine Gun or Short-
16 Barreled Shotgun or Rifle (RCW
17 9.41.190)
18 Promoting Prostitution 2 (RCW
19 9A.88.080)
20 Retail Theft with Extenuating
21 Circumstances 1 (RCW
22 9A.56.360(2))
23 Securities Act violation (RCW
24 21.20.400)
25 Tampering with a Witness (RCW
26 9A.72.120)
27 Telephone Harassment (subsequent
28 conviction or threat of death)
29 (RCW 9.61.230(2))
30 Theft of Livestock 2 (RCW 9A.56.083)
31 Theft with the Intent to Resell 1 (RCW
32 9A.56.340(2))
33 Trafficking in Stolen Property 2 (RCW
34 9A.82.055)
35 Unlawful Imprisonment (RCW
36 9A.40.040)

1 Unlawful possession of firearm in the
2 second degree (RCW 9A.41.040(2))
3 Vehicular Assault, by the operation or
4 driving of a vehicle with disregard
5 for the safety of others (RCW
6 46.61.522)
7 Willful Failure to Return from Work
8 Release (RCW 72.65.070)
9 II Computer Trespass 1 (RCW
10 9A.52.110)
11 Counterfeiting (RCW 9.16.035(3))
12 Escape from Community Custody
13 (RCW 72.09.310)
14 Failure to Register as a Sex Offender
15 (second or subsequent offense)
16 (RCW 9A.44.130(11)(a))
17 Health Care False Claims (RCW
18 48.80.030)
19 Identity Theft 2 (RCW 9.35.020(3))
20 Improperly Obtaining Financial
21 Information (RCW 9.35.010)
22 Malicious Mischief 1 (RCW
23 9A.48.070)
24 Organized Retail Theft 2 (RCW
25 9A.56.350(3))
26 Possession of Stolen Property 1 (RCW
27 9A.56.150)
28 Possession of a Stolen Vehicle (RCW
29 9A.56.068)
30 Retail Theft with Extenuating
31 Circumstances 2 (RCW
32 9A.56.360(3))
33 Theft 1 (RCW 9A.56.030)
34 Theft of a Motor Vehicle (RCW
35 9A.56.065)

1 Theft of Rental, Leased, or Lease-
2 purchased Property (valued at one
3 thousand five hundred dollars or
4 more) (RCW 9A.56.096(5)(a))
5 Theft with the Intent to Resell 2 (RCW
6 9A.56.340(3))
7 Trafficking in Insurance Claims (RCW
8 48.30A.015)
9 Unlawful factoring of a credit card or
10 payment card transaction (RCW
11 9A.56.290(4)(a))
12 Unlawful Practice of Law (RCW
13 2.48.180)
14 Unlicensed Practice of a Profession or
15 Business (RCW 18.130.190(7))
16 Voyeurism (RCW 9A.44.115)
17 I Attempting to Elude a Pursuing Police
18 Vehicle (RCW 46.61.024)
19 False Verification for Welfare (RCW
20 74.08.055)
21 Forgery (RCW 9A.60.020)
22 Fraudulent Creation or Revocation of a
23 Mental Health Advance Directive
24 (RCW 9A.60.060)
25 Malicious Mischief 2 (RCW
26 9A.48.080)
27 Mineral Trespass (RCW 78.44.330)
28 Possession of Stolen Property 2 (RCW
29 9A.56.160)
30 Reckless Burning 1 (RCW 9A.48.040)
31 Taking Motor Vehicle Without
32 Permission 2 (RCW 9A.56.075)
33 Theft 2 (RCW 9A.56.040)

1 Theft of Rental, Leased, or Lease-
2 purchased Property (valued at two
3 hundred fifty dollars or more but
4 less than one thousand five
5 hundred dollars) (RCW
6 9A.56.096(5)(b))
7 Transaction of insurance business
8 beyond the scope of licensure
9 (RCW 48.17.063(((4))))
10 Unlawful Issuance of Checks or Drafts
11 (RCW 9A.56.060)
12 Unlawful Possession of Fictitious
13 Identification (RCW 9A.56.320)
14 Unlawful Possession of Instruments of
15 Financial Fraud (RCW 9A.56.320)
16 Unlawful Possession of Payment
17 Instruments (RCW 9A.56.320)
18 Unlawful Possession of a Personal
19 Identification Device (RCW
20 9A.56.320)
21 Unlawful Production of Payment
22 Instruments (RCW 9A.56.320)
23 Unlawful Trafficking in Food Stamps
24 (RCW 9.91.142)
25 Unlawful Use of Food Stamps (RCW
26 9.91.144)
27 Vehicle Prowl 1 (RCW 9A.52.095)

28 **Sec. 10.** RCW 9.94A.535 and 2008 c 276 s 303 and 2008 c 233 s 9 are
29 each reenacted and amended to read as follows:

30 The court may impose a sentence outside the standard sentence range
31 for an offense if it finds, considering the purpose of this chapter,
32 that there are substantial and compelling reasons justifying an
33 exceptional sentence. Facts supporting aggravated sentences, other
34 than the fact of a prior conviction, shall be determined pursuant to
35 the provisions of RCW 9.94A.537.

36 Whenever a sentence outside the standard sentence range is imposed,

1 the court shall set forth the reasons for its decision in written
2 findings of fact and conclusions of law. A sentence outside the
3 standard sentence range shall be a determinate sentence.

4 If the sentencing court finds that an exceptional sentence outside
5 the standard sentence range should be imposed, the sentence is subject
6 to review only as provided for in RCW 9.94A.585(4).

7 A departure from the standards in RCW 9.94A.589 (1) and (2)
8 governing whether sentences are to be served consecutively or
9 concurrently is an exceptional sentence subject to the limitations in
10 this section, and may be appealed by the offender or the state as set
11 forth in RCW 9.94A.585 (2) through (6).

12 (1) Mitigating Circumstances - Court to Consider

13 The court may impose an exceptional sentence below the standard
14 range if it finds that mitigating circumstances are established by a
15 preponderance of the evidence. The following are illustrative only and
16 are not intended to be exclusive reasons for exceptional sentences.

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

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

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

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

27 (e) The defendant's capacity to appreciate the wrongfulness of his
28 or her conduct, or to conform his or her conduct to the requirements of
29 the law, was significantly impaired. Voluntary use of drugs or alcohol
30 is excluded.

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

34 (g) The operation of the multiple offense policy of RCW 9.94A.589
35 results in a presumptive sentence that is clearly excessive in light of
36 the purpose of this chapter, as expressed in RCW 9.94A.010.

37 (h) The defendant or the defendant's children suffered a continuing

1 pattern of physical or sexual abuse by the victim of the offense and
2 the offense is a response to that abuse.

3 (2) Aggravating Circumstances - Considered and Imposed by the Court

4 The trial court may impose an aggravated exceptional sentence
5 without a finding of fact by a jury under the following circumstances:

6 (a) The defendant and the state both stipulate that justice is best
7 served by the imposition of an exceptional sentence outside the
8 standard range, and the court finds the exceptional sentence to be
9 consistent with and in furtherance of the interests of justice and the
10 purposes of the sentencing reform act.

11 (b) The defendant's prior unscored misdemeanor or prior unscored
12 foreign criminal history results in a presumptive sentence that is
13 clearly too lenient in light of the purpose of this chapter, as
14 expressed in RCW 9.94A.010.

15 (c) The defendant has committed multiple current offenses and the
16 defendant's high offender score results in some of the current offenses
17 going unpunished.

18 (d) The failure to consider the defendant's prior criminal history
19 which was omitted from the offender score calculation pursuant to RCW
20 9.94A.525 results in a presumptive sentence that is clearly too
21 lenient.

22 (3) Aggravating Circumstances - Considered by a Jury -Imposed by
23 the Court

24 Except for circumstances listed in subsection (2) of this section,
25 the following circumstances are an exclusive list of factors that can
26 support a sentence above the standard range. Such facts should be
27 determined by procedures specified in RCW 9.94A.537.

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

30 (b) The defendant knew or should have known that the victim of the
31 current offense was particularly vulnerable or incapable of resistance.

32 (c) The current offense was a violent offense, and the defendant
33 knew that the victim of the current offense was pregnant.

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

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

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

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

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

8 (e) The current offense was a major violation of the Uniform
9 Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to
10 trafficking in controlled substances, which was more onerous than the
11 typical offense of its statutory definition: The presence of ANY of
12 the following may identify a current offense as a major VUCSA:

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

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

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

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

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

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

30 (f) The current offense included a finding of sexual motivation
31 pursuant to RCW 9.94A.835.

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

35 (h) The current offense involved domestic violence, as defined in
36 RCW 10.99.020, and one or more of the following was present:

37 (i) The offense was part of an ongoing pattern of psychological,

1 physical, or sexual abuse of the victim manifested by multiple
2 incidents over a prolonged period of time;

3 (ii) The offense occurred within sight or sound of the victim's or
4 the offender's minor children under the age of eighteen years; or

5 (iii) The offender's conduct during the commission of the current
6 offense manifested deliberate cruelty or intimidation of the victim.

7 (i) The offense resulted in the pregnancy of a child victim of
8 rape.

9 (j) The defendant knew that the victim of the current offense was
10 a youth who was not residing with a legal custodian and the defendant
11 established or promoted the relationship for the primary purpose of
12 victimization.

13 (k) The offense was committed with the intent to obstruct or impair
14 human or animal health care or agricultural or forestry research or
15 commercial production.

16 (l) The current offense is trafficking in the first degree or
17 trafficking in the second degree and any victim was a minor at the time
18 of the offense.

19 (m) The offense involved a high degree of sophistication or
20 planning.

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

24 (o) The defendant committed a current sex offense, has a history of
25 sex offenses, and is not amenable to treatment.

26 (p) The offense involved an invasion of the victim's privacy.

27 (q) The defendant demonstrated or displayed an egregious lack of
28 remorse.

29 (r) The offense involved a destructive and foreseeable impact on
30 persons other than the victim.

31 (s) The defendant committed the offense to obtain or maintain his
32 or her membership or to advance his or her position in the hierarchy of
33 an organization, association, or identifiable group.

34 (t) The defendant committed the current offense shortly after being
35 released from incarceration.

36 (u) The current offense is a burglary and the victim of the
37 burglary was present in the building or residence when the crime was
38 committed.

1 (v) The offense was committed against a law enforcement officer who
2 was performing his or her official duties at the time of the offense,
3 the offender knew that the victim was a law enforcement officer, and
4 the victim's status as a law enforcement officer is not an element of
5 the offense.

6 (w) The defendant committed the offense against a victim who was
7 acting as a good samaritan.

8 (x) The defendant committed the offense against a public official
9 or officer of the court in retaliation of the public official's
10 performance of his or her duty to the criminal justice system.

11 (y) The victim's injuries substantially exceed the level of bodily
12 harm necessary to satisfy the elements of the offense. This aggravator
13 is not an exception to RCW 9.94A.530(2).

14 (z)(i)(A) The current offense is theft in the first degree, theft
15 in the second degree, possession of stolen property in the first
16 degree, or possession of stolen property in the second degree; (B) the
17 stolen property involved is metal property; and (C) the property damage
18 to the victim caused in the course of the theft of metal property is
19 more than three times the value of the stolen metal property, or the
20 theft of the metal property creates a public hazard.

21 (ii) For purposes of this subsection, "metal property" means
22 commercial metal property, private metal property, or nonferrous metal
23 property, as defined in RCW 19.290.010.

24 (aa) The defendant committed the offense with the intent to
25 directly or indirectly cause any benefit, aggrandizement, gain, profit,
26 or other advantage to or for a criminal street gang as defined in RCW
27 9.94A.030, its reputation, influence, or membership.

28 (bb) The current offense involved paying to view, over the internet
29 in violation of section 7 of this act, depictions of a minor engaged in
30 an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a)
31 through (g)."

ADOPTED AND ENGROSSED 03/04/2010

1 On page 1, line 2 of the title, after "abuse;" strike the remainder
2 of the title and insert "amending RCW 9.68A.001, 9.68A.011, 9.68A.050,
3 9.68A.060, 9.68A.070, and 9.68A.110; reenacting and amending RCW
4 9.94A.515 and 9.94A.535; adding new sections to chapter 9.68A RCW; and
5 prescribing penalties."

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