

**ESHB 2424 - S AMD 356**

By Senators Kline, Hargrove, Brandland, Carrell

ADOPTED 03/10/2010

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).

32 **Sec. 11.** RCW 9.94A.030 and 2009 c 375 s 4 are each amended to read  
33 as follows:

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

36 (1) "Board" means the indeterminate sentence review board created  
37 under chapter 9.95 RCW.



1 (2) "Collect," or any derivative thereof, "collect and remit," or  
2 "collect and deliver," when used with reference to the department,  
3 means that the department, either directly or through a collection  
4 agreement authorized by RCW 9.94A.760, is responsible for monitoring  
5 and enforcing the offender's sentence with regard to the legal  
6 financial obligation, receiving payment thereof from the offender, and,  
7 consistent with current law, delivering daily the entire payment to the  
8 superior court clerk without depositing it in a departmental account.

9 (3) "Commission" means the sentencing guidelines commission.

10 (4) "Community corrections officer" means an employee of the  
11 department who is responsible for carrying out specific duties in  
12 supervision of sentenced offenders and monitoring of sentence  
13 conditions.

14 (5) "Community custody" means that portion of an offender's  
15 sentence of confinement in lieu of earned release time or imposed as  
16 part of a sentence under this chapter and served in the community  
17 subject to controls placed on the offender's movement and activities by  
18 the department.

19 (6) "Community protection zone" means the area within eight hundred  
20 eighty feet of the facilities and grounds of a public or private  
21 school.

22 (7) "Community restitution" means compulsory service, without  
23 compensation, performed for the benefit of the community by the  
24 offender.

25 (8) "Confinement" means total or partial confinement.

26 (9) "Conviction" means an adjudication of guilt pursuant to Title  
27 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and  
28 acceptance of a plea of guilty.

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

36 (11) "Criminal history" means the list of a defendant's prior  
37 convictions and juvenile adjudications, whether in this state, in  
38 federal court, or elsewhere.

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

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

9 (c) The determination of a defendant's criminal history is distinct  
10 from the determination of an offender score. A prior conviction that  
11 was not included in an offender score calculated pursuant to a former  
12 version of the sentencing reform act remains part of the defendant's  
13 criminal history.

14 (12) "Criminal street gang" means any ongoing organization,  
15 association, or group of three or more persons, whether formal or  
16 informal, having a common name or common identifying sign or symbol,  
17 having as one of its primary activities the commission of criminal  
18 acts, and whose members or associates individually or collectively  
19 engage in or have engaged in a pattern of criminal street gang  
20 activity. This definition does not apply to employees engaged in  
21 concerted activities for their mutual aid and protection, or to the  
22 activities of labor and bona fide nonprofit organizations or their  
23 members or agents.

24 (13) "Criminal street gang associate or member" means any person  
25 who actively participates in any criminal street gang and who  
26 intentionally promotes, furthers, or assists in any criminal act by the  
27 criminal street gang.

28 (14) "Criminal street gang-related offense" means any felony or  
29 misdemeanor offense, whether in this state or elsewhere, that is  
30 committed for the benefit of, at the direction of, or in association  
31 with any criminal street gang, or is committed with the intent to  
32 promote, further, or assist in any criminal conduct by the gang, or is  
33 committed for one or more of the following reasons:

34 (a) To gain admission, prestige, or promotion within the gang;

35 (b) To increase or maintain the gang's size, membership, prestige,  
36 dominance, or control in any geographical area;

37 (c) To exact revenge or retribution for the gang or any member of  
38 the gang;

1 (d) To obstruct justice, or intimidate or eliminate any witness  
2 against the gang or any member of the gang;

3 (e) To directly or indirectly cause any benefit, aggrandizement,  
4 gain, profit, or other advantage for the gang, its reputation,  
5 influence, or membership; or

6 (f) To provide the gang with any advantage in, or any control or  
7 dominance over any criminal market sector, including, but not limited  
8 to, manufacturing, delivering, or selling any controlled substance  
9 (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen  
10 property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88  
11 RCW); human trafficking (RCW 9A.40.100); or promoting pornography  
12 (chapter 9.68 RCW).

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

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

22 (17) "Department" means the department of corrections.

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

31 (19) "Disposable earnings" means that part of the earnings of an  
32 offender remaining after the deduction from those earnings of any  
33 amount required by law to be withheld. For the purposes of this  
34 definition, "earnings" means compensation paid or payable for personal  
35 services, whether denominated as wages, salary, commission, bonuses, or  
36 otherwise, and, notwithstanding any other provision of law making the  
37 payments exempt from garnishment, attachment, or other process to  
38 satisfy a court-ordered legal financial obligation, specifically

1 includes periodic payments pursuant to pension or retirement programs,  
2 or insurance policies of any type, but does not include payments made  
3 under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050,  
4 or Title 74 RCW.

5 (20) "Drug offender sentencing alternative" is a sentencing option  
6 available to persons convicted of a felony offense other than a violent  
7 offense or a sex offense and who are eligible for the option under RCW  
8 9.94A.660.

9 (21) "Drug offense" means:

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

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

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

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

21 (23) "Escape" means:

22 (a) Sexually violent predator escape (RCW 9A.76.115), escape in the  
23 first degree (RCW 9A.76.110), escape in the second degree (RCW  
24 9A.76.120), willful failure to return from furlough (RCW 72.66.060),  
25 willful failure to return from work release (RCW 72.65.070), or willful  
26 failure to be available for supervision by the department while in  
27 community custody (RCW 72.09.310); or

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

31 (24) "Felony traffic offense" means:

32 (a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW  
33 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-  
34 run injury-accident (RCW 46.52.020(4)), felony driving while under the  
35 influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or  
36 felony physical control of a vehicle while under the influence of  
37 intoxicating liquor or any drug (RCW 46.61.504(6)); or

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

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

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

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

13 (28) "Legal financial obligation" means a sum of money that is  
14 ordered by a superior court of the state of Washington for legal  
15 financial obligations which may include restitution to the victim,  
16 statutorily imposed crime victims' compensation fees as assessed  
17 pursuant to RCW 7.68.035, court costs, county or interlocal drug funds,  
18 court-appointed attorneys' fees, and costs of defense, fines, and any  
19 other financial obligation that is assessed to the offender as a result  
20 of a felony conviction. Upon conviction for vehicular assault while  
21 under the influence of intoxicating liquor or any drug, RCW  
22 46.61.522(1)(b), or vehicular homicide while under the influence of  
23 intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial  
24 obligations may also include payment to a public agency of the expense  
25 of an emergency response to the incident resulting in the conviction,  
26 subject to RCW 38.52.430.

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

29 (a) Any felony defined under any law as a class A felony or  
30 criminal solicitation of or criminal conspiracy to commit a class A  
31 felony;

32 (b) Assault in the second degree;

33 (c) Assault of a child in the second degree;

34 (d) Child molestation in the second degree;

35 (e) Controlled substance homicide;

36 (f) Extortion in the first degree;

37 (g) Incest when committed against a child under age fourteen;

38 (h) Indecent liberties;

- 1 (i) Kidnapping in the second degree;
- 2 (j) Leading organized crime;
- 3 (k) Manslaughter in the first degree;
- 4 (l) Manslaughter in the second degree;
- 5 (m) Promoting prostitution in the first degree;
- 6 (n) Rape in the third degree;
- 7 (o) Robbery in the second degree;
- 8 (p) Sexual exploitation;
- 9 (q) Vehicular assault, when caused by the operation or driving of  
10 a vehicle by a person while under the influence of intoxicating liquor  
11 or any drug or by the operation or driving of a vehicle in a reckless  
12 manner;
- 13 (r) Vehicular homicide, when proximately caused by the driving of  
14 any vehicle by any person while under the influence of intoxicating  
15 liquor or any drug as defined by RCW 46.61.502, or by the operation of  
16 any vehicle in a reckless manner;
- 17 (s) Any other class B felony offense with a finding of sexual  
18 motivation;
- 19 (t) Any other felony with a deadly weapon verdict under RCW  
20 9.94A.825;
- 21 (u) Any felony offense in effect at any time prior to December 2,  
22 1993, that is comparable to a most serious offense under this  
23 subsection, or any federal or out-of-state conviction for an offense  
24 that under the laws of this state would be a felony classified as a  
25 most serious offense under this subsection;
- 26 (v)(i) A prior conviction for indecent liberties under RCW  
27 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess.  
28 as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as  
29 it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1)  
30 (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;
- 31 (ii) A prior conviction for indecent liberties under RCW  
32 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988,  
33 if: (A) The crime was committed against a child under the age of  
34 fourteen; or (B) the relationship between the victim and perpetrator is  
35 included in the definition of indecent liberties under RCW  
36 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997,  
37 or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993,  
38 through July 27, 1997;

1 (w) Any out-of-state conviction for a felony offense with a finding  
2 of sexual motivation if the minimum sentence imposed was ten years or  
3 more; provided that the out-of-state felony offense must be comparable  
4 to a felony offense under Title 9 or 9A RCW and the out-of-state  
5 definition of sexual motivation must be comparable to the definition of  
6 sexual motivation contained in this section.

7 (30) "Nonviolent offense" means an offense which is not a violent  
8 offense.

9 (31) "Offender" means a person who has committed a felony  
10 established by state law and is eighteen years of age or older or is  
11 less than eighteen years of age but whose case is under superior court  
12 jurisdiction under RCW 13.04.030 or has been transferred by the  
13 appropriate juvenile court to a criminal court pursuant to RCW  
14 13.40.110. In addition, for the purpose of community custody  
15 requirements under this chapter, "offender" also means a misdemeanor or  
16 gross misdemeanor probationer convicted of an offense included in RCW  
17 9.94A.501(1) and ordered by a superior court to probation under the  
18 supervision of the department pursuant to RCW 9.92.060, 9.95.204, or  
19 9.95.210. Throughout this chapter, the terms "offender" and  
20 "defendant" are used interchangeably.

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

29 (33) "Pattern of criminal street gang activity" means:

30 (a) The commission, attempt, conspiracy, or solicitation of, or any  
31 prior juvenile adjudication of or adult conviction of, two or more of  
32 the following criminal street gang-related offenses:

33 (i) Any "serious violent" felony offense as defined in this  
34 section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a  
35 Child 1 (RCW 9A.36.120);

36 (ii) Any "violent" offense as defined by this section, excluding  
37 Assault of a Child 2 (RCW 9A.36.130);

1 (iii) Deliver or Possession with Intent to Deliver a Controlled  
2 Substance (chapter 69.50 RCW);  
3 (iv) Any violation of the firearms and dangerous weapon act  
4 (chapter 9.41 RCW);  
5 (v) Theft of a Firearm (RCW 9A.56.300);  
6 (vi) Possession of a Stolen Firearm (RCW 9A.56.310);  
7 (vii) Malicious Harassment (RCW 9A.36.080);  
8 (viii) Harassment where a subsequent violation or deadly threat is  
9 made (RCW 9A.46.020(2)(b));  
10 (ix) Criminal Gang Intimidation (RCW 9A.46.120);  
11 (x) Any felony conviction by a person eighteen years of age or  
12 older with a special finding of involving a juvenile in a felony  
13 offense under RCW 9.94A.833;  
14 (xi) Residential Burglary (RCW 9A.52.025);  
15 (xii) Burglary 2 (RCW 9A.52.030);  
16 (xiii) Malicious Mischief 1 (RCW 9A.48.070);  
17 (xiv) Malicious Mischief 2 (RCW 9A.48.080);  
18 (xv) Theft of a Motor Vehicle (RCW 9A.56.065);  
19 (xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);  
20 (xvii) Taking a Motor Vehicle Without Permission 1 (RCW 9A.56.070);  
21 (xviii) Taking a Motor Vehicle Without Permission 2 (RCW  
22 9A.56.075);  
23 (xix) Extortion 1 (RCW 9A.56.120);  
24 (xx) Extortion 2 (RCW 9A.56.130);  
25 (xxi) Intimidating a Witness (RCW 9A.72.110);  
26 (xxii) Tampering with a Witness (RCW 9A.72.120);  
27 (xxiii) Reckless Endangerment (RCW 9A.36.050);  
28 (xxiv) Coercion (RCW 9A.36.070);  
29 (xxv) Harassment (RCW 9A.46.020); or  
30 (xxvi) Malicious Mischief 3 (RCW 9A.48.090);  
31 (b) That at least one of the offenses listed in (a) of this  
32 subsection shall have occurred after July 1, 2008;  
33 (c) That the most recent committed offense listed in (a) of this  
34 subsection occurred within three years of a prior offense listed in (a)  
35 of this subsection; and  
36 (d) Of the offenses that were committed in (a) of this subsection,  
37 the offenses occurred on separate occasions or were committed by two or  
38 more persons.



1 (34) "Persistent offender" is an offender who:

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

4 (ii) Has, before the commission of the offense under (a) of this  
5 subsection, been convicted as an offender on at least two separate  
6 occasions, whether in this state or elsewhere, of felonies that under  
7 the laws of this state would be considered most serious offenses and  
8 would be included in the offender score under RCW 9.94A.525; provided  
9 that of the two or more previous convictions, at least one conviction  
10 must have occurred before the commission of any of the other most  
11 serious offenses for which the offender was previously convicted; or

12 (b)(i) Has been convicted of: (A) Rape in the first degree, rape  
13 of a child in the first degree, child molestation in the first degree,  
14 rape in the second degree, rape of a child in the second degree, or  
15 indecent liberties by forcible compulsion; (B) any of the following  
16 offenses with a finding of sexual motivation: Murder in the first  
17 degree, murder in the second degree, homicide by abuse, kidnapping in  
18 the first degree, kidnapping in the second degree, assault in the first  
19 degree, assault in the second degree, assault of a child in the first  
20 degree, assault of a child in the second degree, or burglary in the  
21 first degree; or (C) an attempt to commit any crime listed in this  
22 subsection (34)(b)(i); and

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

35 (35) "Predatory" means: (a) The perpetrator of the crime was a  
36 stranger to the victim, as defined in this section; (b) the perpetrator  
37 established or promoted a relationship with the victim prior to the  
38 offense and the victimization of the victim was a significant reason

1 the perpetrator established or promoted the relationship; or (c) the  
2 perpetrator was: (i) A teacher, counselor, volunteer, or other person  
3 in authority in any public or private school and the victim was a  
4 student of the school under his or her authority or supervision. For  
5 purposes of this subsection, "school" does not include home-based  
6 instruction as defined in RCW 28A.225.010; (ii) a coach, trainer,  
7 volunteer, or other person in authority in any recreational activity  
8 and the victim was a participant in the activity under his or her  
9 authority or supervision; ~~((or))~~ (iii) a pastor, elder, volunteer, or  
10 other person in authority in any church or religious organization, and  
11 the victim was a member or participant of the organization under his or  
12 her authority; or (iv) a teacher, counselor, volunteer, or other person  
13 in authority providing home-based instruction and the victim was a  
14 student receiving home-based instruction while under his or her  
15 authority or supervision. For purposes of this subsection: (A) "Home-  
16 based instruction" has the same meaning as defined in RCW 28A.225.010;  
17 and (B) "teacher, counselor, volunteer, or other person in authority"  
18 does not include the parent or legal guardian of the victim.

19 (36) "Private school" means a school regulated under chapter  
20 28A.195 or 28A.205 RCW.

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

22 (38) "Restitution" means a specific sum of money ordered by the  
23 sentencing court to be paid by the offender to the court over a  
24 specified period of time as payment of damages. The sum may include  
25 both public and private costs.

26 (39) "Risk assessment" means the application of the risk instrument  
27 recommended to the department by the Washington state institute for  
28 public policy as having the highest degree of predictive accuracy for  
29 assessing an offender's risk of reoffense.

30 (40) "Serious traffic offense" means:

31 (a) Nonfelony driving while under the influence of intoxicating  
32 liquor or any drug (RCW 46.61.502), nonfelony actual physical control  
33 while under the influence of intoxicating liquor or any drug (RCW  
34 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an  
35 attended vehicle (RCW 46.52.020(5)); or

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

1 (41) "Serious violent offense" is a subcategory of violent offense  
2 and means:  
3 (a)(i) Murder in the first degree;  
4 (ii) Homicide by abuse;  
5 (iii) Murder in the second degree;  
6 (iv) Manslaughter in the first degree;  
7 (v) Assault in the first degree;  
8 (vi) Kidnapping in the first degree;  
9 (vii) Rape in the first degree;  
10 (viii) Assault of a child in the first degree; or  
11 (ix) An attempt, criminal solicitation, or criminal conspiracy to  
12 commit one of these felonies; or  
13 (b) Any federal or out-of-state conviction for an offense that  
14 under the laws of this state would be a felony classified as a serious  
15 violent offense under (a) of this subsection.  
16 (42) "Sex offense" means:  
17 (a)(i) A felony that is a violation of chapter 9A.44 RCW other than  
18 RCW 9A.44.130(12);  
19 (ii) A violation of RCW 9A.64.020;  
20 (iii) A felony that is a violation of chapter 9.68A RCW other than  
21 RCW 9.68A.080; or  
22 (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt,  
23 criminal solicitation, or criminal conspiracy to commit such crimes;  
24 (b) Any conviction for a felony offense in effect at any time prior  
25 to July 1, 1976, that is comparable to a felony classified as a sex  
26 offense in (a) of this subsection;  
27 (c) A felony with a finding of sexual motivation under RCW  
28 9.94A.835 or 13.40.135; or  
29 (d) Any federal or out-of-state conviction for an offense that  
30 under the laws of this state would be a felony classified as a sex  
31 offense under (a) of this subsection.  
32 (43) "Sexual motivation" means that one of the purposes for which  
33 the defendant committed the crime was for the purpose of his or her  
34 sexual gratification.  
35 (44) "Standard sentence range" means the sentencing court's  
36 discretionary range in imposing a nonappealable sentence.  
37 (45) "Statutory maximum sentence" means the maximum length of time

1 for which an offender may be confined as punishment for a crime as  
2 prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the  
3 crime, or other statute defining the maximum penalty for a crime.

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

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

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

16 (49) "Victim" means any person who has sustained emotional,  
17 psychological, physical, or financial injury to person or property as  
18 a direct result of the crime charged.

19 (50) "Violent offense" means:

20 (a) Any of the following felonies:

21 (i) Any felony defined under any law as a class A felony or an  
22 attempt to commit a class A felony;

23 (ii) Criminal solicitation of or criminal conspiracy to commit a  
24 class A felony;

25 (iii) Manslaughter in the first degree;

26 (iv) Manslaughter in the second degree;

27 (v) Indecent liberties if committed by forcible compulsion;

28 (vi) Kidnapping in the second degree;

29 (vii) Arson in the second degree;

30 (viii) Assault in the second degree;

31 (ix) Assault of a child in the second degree;

32 (x) Extortion in the first degree;

33 (xi) Robbery in the second degree;

34 (xii) Drive-by shooting;

35 (xiii) Vehicular assault, when caused by the operation or driving  
36 of a vehicle by a person while under the influence of intoxicating  
37 liquor or any drug or by the operation or driving of a vehicle in a  
38 reckless manner; and

1 (xiv) Vehicular homicide, when proximately caused by the driving of  
2 any vehicle by any person while under the influence of intoxicating  
3 liquor or any drug as defined by RCW 46.61.502, or by the operation of  
4 any vehicle in a reckless manner;

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

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

11 (51) "Work crew" means a program of partial confinement consisting  
12 of civic improvement tasks for the benefit of the community that  
13 complies with RCW 9.94A.725.

14 (52) "Work ethic camp" means an alternative incarceration program  
15 as provided in RCW 9.94A.690 designed to reduce recidivism and lower  
16 the cost of corrections by requiring offenders to complete a  
17 comprehensive array of real-world job and vocational experiences,  
18 character-building work ethics training, life management skills  
19 development, substance abuse rehabilitation, counseling, literacy  
20 training, and basic adult education.

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

**ESHB 2424** - S AMD

By Senators Kline, Hargrove, Brandland, Carrell

**ADOPTED 03/10/2010**

24 On page 1, line 2 of the title, after "abuse;" strike the remainder  
25 of the title and insert "amending RCW 9.68A.001, 9.68A.011, 9.68A.050,  
26 9.68A.060, 9.68A.070, 9.68A.110, and 9.94A.030; reenacting and amending  
27 RCW 9.94A.515 and 9.94A.535; adding new sections to chapter 9.68A RCW;  
28 and prescribing penalties."

EFFECT: The definition of predatory is amended to include a

perpetrator who is a teacher, counselor, volunteer, or other person in authority providing home-based instruction when the victim was a student receiving home-based instruction under his or her authority or supervision. For purposes of home-based instruction a "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.

--- END ---