# WASHINGTON STATE SENTENCING GUIDELINES COMMISSION
## ADULT SENTENCING MANUAL
## 2009 SUPPLEMENT

Dear Criminal Justice Practitioners,

These materials are created to supplement the 2008 Adult Sentencing Manual.*

The Sentencing Guidelines Commission is operating within a very limited budget due to the state revenue crisis, but we wanted to give you an update of 2009 legislation affecting sentencing. In addition we purchased the usual expert compilation of cases related to the Sentencing Reform Act from the Office of Attorney General.

The materials in the supplement include:

1. Table 6: Sentencing Statutes Affected by the 2009 Legislative Session
2. Impact of the 2009 Legislation on Scoring Forms
3. A Summary of Community Custody Changes
4. Digest of Court Cases Interpreting The Sentencing Reform Act.

NOTE: The latest version of The Revised Code of Washington is available by linking to http://apps.leg.wa.gov/RCW/default.aspx?cite=9.94A

* The 2008 Adult Sentencing Manual is available for purchase from the Washington State Department of Printing by calling (**360) 570-3062**. You can also order it on their web site at https://fortress.wa.gov/prt/printwa/wsprt/default.asp. Be sure to include your mailing address with your order. The cost of the 2008 Adult Sentencing Manual is $46.75, postage included.

# Table 6: Sentencing Statutes Affected by 2009 Legislative Session
## Compiled in RCW Order

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 19.310 | Exchange Facilitators | 7/26/2009 | c. 70 § 1-18<br><br>c. 70 § 13 | ♦ A new chapter is added to Title 19.<br><br>♦ New chapter created a new unranked class B offense for violations of certain provision of this act for Exchange Facilitators. | HB 1078 |
| Title 48 | Guaranteed Asset Protection Waiver Act | 7/26/2009 | c.344 § 1-13 | ♦ New section is added to Title 48; *Guaranteed Asset Protection Waiver Act, RCW 48.160.*<br>♦ A new unranked class B offense is created for violations of the *Guaranteed Asset Protection Waiver Act, RCW 48.160.080.* | EHB 1530 |
| RCW 9.41.010<br><br>RCW 9.41.171 | Possessing Firearms by Non-Citizen Residents of Washington State | 7/26/2009 | c. 216 § 1<br><br>c. 216 § 2 | ♦ Amended "Terns Defined" under RCW 9.41.010 to include "nonimmigrant aliens" and "permanent resident"<br>♦ New Section added to RCW 9.41<br>♦ A new unranked class C felony is created for a violation of RCW 9.41.171. | 2SHB 1052 |
| RCW 9A.44.093 | Sexual Misconduct with a Minor 1st Degree | 7/26/2009 | c. 324 § 1 | ♦ Created a new definition for an "enrolled student" victim under this chapter.<br>♦ Established the eligible age of an enrolled student victim as "at least 16 years old and no more than twenty-one years old". | EHB 1385 |
| RCW 9A.48.070<br>RCW 9A.48.080<br>RCW 9A.56.030<br>RCW 9A.56.040<br>RCW 9A.56.096<br>RCW 9A.56.150<br>RCW 9A.56.160<br>RCW 9A.56.350 | Crimes Against Property<br><br>*(9.94A.863 Monetary Threshold Review/study due 11/1/2014 and every five years thereafter)* | 8/01/2009 | c. 431 § 4-15 | ♦ New Section added - RCW 9.94A.863, *Monetary Threshold Amounts for Property Crimes – SGC Review – Report.*<br>♦ Increases to the dollar values for property crimes under RCW 9.56 for Theft 1° and 2°; Possession of Stolen Property 1° and 2° (for non-vehicle or firearm); Theft of Rental or leased Property and Organized Retail Theft 1°.<br>♦ Increased the dollar values under RCW 9A.48 for Malicious Mischief 1° and 2°.<br>♦ This act applies to crimes committed on or 19 after September 1, 2009. | SB 6167 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 35.20 | Crimes Against Property – Process - Determining offender score | 8/01/2009 | c. 431 § 16-18 | ♦ Three new sections are created that require the court or prosecuting authority to check the existing judicial information systems to determine the criminal history of the defendant before a sentence is imposed. | SB 6167 |
| Chapter 9.94A | Technical Corrections;<br>Community Custody Statutes for Non- Persistent Offenders | 8/01/2009 | c.28 § 5- 12 | ♦ Re-codifies RCW 9.94A.712 to RCW 9.94A.507. Amends statutes throughout chapter 9.94A for references to *Non-Persistent Offenders.* | SSB 5190 |
| RCW 9.94A.030<br>2008 c 276 § 309<br>2008 c 7 § 1 | Definitions RCW chapter 9.94A | 7/26/2009 | c. 375 § 1 | Amends the definitions for;<br>✓ Community Custody (5)<br>✓ Pattern of Criminal Street Gang Activity (36)<br>✓ Risk Assessment (43) | EESB 5288(1) |
| RCW 9.94A.030<br>2009 c 28 § 4 | Definitions RCW chapter 9.94A | 8/1/2009 | c. 375 § 4 | Reenacts and amends definitions for;<br>✓ Offender (31)<br>✓ Pattern of Criminal Street Gang Activity (33)<br>✓ Risk Assessment (39)<br>✓ Removes definition for "Community Custody ranges" | EESB 5288 (4) |
| RCW 9.94A.501<br>2005 c. 362 § 1<br>2009 c.28 § 10 | Community Custody Offenders sentenced to the custody of DOC | Effective 07/26/2009 Expires 08/01/2009 | c. 375 § 1 | ♦ Adds a new section to RCW 9.94A.501(1)(a) to include supervision by the department for offenders who are convicted of Assault in the Fourth Degree or a Violation of a Domestic Court Order under and who have a prior conviction for a one or more violent offense, sex offense, a crime against a person, Assault in the Fourth Degree or a Violation of a Domestic Violence Court Order.<br>♦ Amends RCW 9.94A.501(1)(b) to include a new section that imposes supervision by the department for a conviction of a select group of misdemeanor or gross misdemeanor sex offenses.<br>♦ New section under RCW 9.94A.501(3). The department will supervise every felony offender sentenced to community custody whose risk assessment places them in one of the two highest risk categories (effective July 26, 2009 until August 1, 2009.) | ESSB 5288 (1) |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW .94A.501(3)<br>2008 c.231 § 24 | Community Custody Offenders sentenced to the custody of DOC | 8/01/2009 | c. 376 § 2 | ♦ RCW 9.94A.501(3) reenacts and amends community custody provisions and provides a new effective date August 1, 2009.<br>♦ The department will supervise every felony offender sentenced to community custody whose risk assessment places them in the "highest" risk category.<br>♦ Amends section (4) under RCW 9.94A.501 to include the department responsibility to supervise an offender sentenced to community custody, regardless of the offender's risk classification, if the offender has a current conviction for;<br>✓ A sex offense;<br>✓ Identified by the department as a dangerous mentally ill offender (per RCW 72.09.370);<br>✓ Indeterminate sentence and is subject to parole (per RCW 9.95.017) or,<br>✓ Was sentenced under RCW 9.94A.650, 9.94.660, or 9.94A.670 (Sentencing Alternatives) or is subject to supervision per RCW 9.94A.745.<br>♦ *More specific information on community custody changes, see the "Summary of Community Custody Changes as a Result of ESSB 5288 and SSB 6162" included as part of the 2009 Adult Sentencing Manual Supplement.* | ESSB 5288 (2) |
| RCW .94A.501(6)<br>2005 c. 362 § 1<br>2009 c.28 § 10 | Community Custody Offenders sentenced to the custody of DOC | 8/01/2009 | c. 375 § 2 | ♦ Adds a new section under RCW 9.94A.501(6).<br>♦ The department shall conduct a risk assessment for every felony offender sentenced to a term of community custody under this section. | ESSB 5288 |
| RCW 9.94A.501 (4)(a)<br>2009 c.375 § 2 | Community Custody Serious Violent Offenses | 8/01/2009 | c. 376 § 2 | ♦ Reenacts and amends RCW 9.94A.501 (4).<br>♦ New rule for a current conviction of a serious violent offense (as defined under RCW 9.94A.030) as an eligible offense for supervision by the department, regardless of the offender's risk classification. | SSB 6162 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 9.94A.505 (2)(b)<br>2009 c 28. § 6 | Technical Corrections;<br>Community Custody Alternatives | 8/01/2009 | c. 389 § 1 | ♦ Sentences for unranked offenses of one year or less, community custody is imposed under RCW 9.94A.702.<br>♦ If the court justifies a sentence of more than one year per RCW 9.94A.535, community custody is imposed under RCW 9.94A.701 | SHB 1791 & SB 5702 |
| RCW 9.94A.533 (12) | Adjustment to the Standard Sentencing Range | 7/26/2009 | c. 141 § 1& 2 | ♦ A new section is added to RCW 9.94A. Creates a special allegation for offenders who commit Assault against a Police Officer, while performing her/his official duties that is intentionally committed with what appears to be a firearm.<br>♦ A new section is added to RCW 9.94A.533. Creates a new 12-month enhancement period for offenders who intentionally commit Assault against a Police Officer while performing her/his official duties, with what appears to be a firearm. | SB 5413 & SB1440 |
| RCW 9.94A.545 | Community Custody Provisions | 8/01/2009 | c.28 §42 | ♦ Repealed statute that imposed community custody for specific categories of offenses. | SSB 5190 |
| RCW 9.94A.602 | Deadly Weapons Special Verdicts – Definition | 8/01/2009 | c.28 § 41 | ♦ Recodified as RCW 9.94A.825 | SSB 5190 |
| RCW 9.94A.605 | Special Allegation; Methamphetamine - *"Manufacturing with Child on Premises"* | 8/01/2009 | c. 28 § 42 | ♦ Recodified as RCW 9.94A.827 | SSB 5190 |
| RCW 9.94 A.633<br>2009 c. 28 § 7 | Community Custody<br>Violation of Conditions or Requirements - Sanctions | 8/01/2009 | c. 375 §12 | ♦ Adds a new subsection to RCW 9.94A.633<br>♦ Amends DOC jurisdiction to impose sanctions for community custody or probation violators supervised by DOC. | ESSB 5288 |
| RCW 9.94A.6332<br>2009 c. 28 § 8 | Community Custody<br>Sanctions – Which Entity Imposes | Effective 7/26/2009<br>Expires 8/01/2009 | c. 375 §14 | ♦ Amends jurisdiction of entities to impose sanctions for community custody or probation violators. | ESSB 5288 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 9.94A.660 | Drug Offender's Sentencing Alternative | Effective 7/26/2009<br>Expires 8/01/2009 | c. 389 § 2 | ♦ RCW 9.94A.660 is amended several times during 2009 session and provides two different effective dates.<br>♦ **Effective 7/26/2009 to 8/01/2009.**<br>♦ Eligibility rules for DOSA sentences are amended to require "that the end of the standard range be greater than twelve months".<br>♦ The court <u>may order</u> a chemical dependency examination for offenders being considered for the Residential Chemical Dependency treatment based DOSA. Prison Based DOSA is now exempt from this type of examination.<br>♦ Clarifies that for a Prison based DOSA Alternatives "one half" of the established mid-point of the standard range shall be served in community custody. | SHB 1791 |
| RCW 9.94A.660<br><br>RCW 9.94A.662 (new)<br><br>RCW 9.94A.664 (new) | Drug Offender's Sentencing Alternative | 8/01/2009 | <br>c. 389 § 3(1)<br><br>c. 389 § 3(3)<br><br>c. 389 § 3(3) | ♦ Further amendments to RCW for DOSA Sentences; **Effective 8/01/2009**<br>♦ Amends RCW 9.94A.660 to provide DOSA eligibility rules, conditions and sanctions for all DOSA sentences.<br>♦ Prison based DOSA sentencing rules are recodified under RCW 9.94A.662.<br>♦ Residential Chemical Dependency treatment based DOSA sentencing rules are recodified under RCW 9.94A.664. | SHB 1791 |
| RCW 9.94A.680 (3) | Alternatives to Total Confinement | 7/26/2009 | 227 §1 | ♦ Amends RCW9.94A.680.<br>♦ For non-violent and non-sex offenses, the court may credit "time served" by the offender (before sentencing) in county supervised county community option to be reduced by earned early release credit, per local facility standards. | HB 1361 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 9.94A.701<br>2009 c. 28 § 10 | Community Custody Terms for Offenders sentenced to the custody of DOC | 7/26/2009 | c. 375 §5 | ♦ Creates Community Custody Terms and an effective date implementation of community custody terms, replacing ranges set by SGC.<br>♦ **Imposes a term of 36 months** of community custody for:<br>✓ Eligible sex offenses,<br>✓ Serious violent offenses or,<br>✓ Violations of Failure to Register, occurring on or after 6/7/2006, where the sentence is one year or less.<br>♦ **Imposes a term of 18 months** of community custody for:<br>✓ Violent offenses that are not considered a serious violent offense.<br>♦ **Imposes a term of 12 months** of community custody for:<br>✓ An offense that is a "crime against a person,"<br>✓ An offense involving a unlawful possession of a firearm where the offender is a criminal gang member or associate or,<br>✓ A felony offense under chapter 69.50 or 69.52 committed on or after 7/01/2000.<br>♦ New Community Custody terms apply retroactively and prospectively.<br>♦ In addition, the term of community custody will be reduced by the court if it finds that the offender's combined sentence of total confinement and community custody exceeds the statutory maximum for the crime. | ESSB 5288 |
| RCW 9.94A.703 | Assault of a Child in The First Degree | 8/01/2009 | c.214 § 3 | ♦ New section is added to RCW 9.94A.703;<br>♦ Prohibits an offender convicted of Assault of a Child in the First Degree form serving in any paid or volunteer capacity where offender has control or supervision of minors under the age of 13. | EHB 2279 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 9.94A.704 & 2009c. 28 § 12 | Community Custody - Supervision by the Department - Conditions | 7/26/2009 | c.375 § 6 | ♦ Amends RCW to remove DOC responsibility to determine an offender's duration of community custody based on risk k to community safety. | ESSB 5288 |
| RCW 9.94A.707 | Community custody provisions | 7/26/2009 | c.375 § 7 | ♦ Amends language in regards to when community custody shall begin and removes the language from this section regarding an offender's discharged from community custody. | ESSB 5288 |
| RCW 9.94A.715 | Community Custody - Specific Offenders - Conditions | 8/01/2009 | c.28 § 42 | ♦ Repealed Section | SSB 5190 |
| RCW 9.94A.728(1)-(3) | Earned Early Release - Offender Release Prior to Expiration of Sentence | 7/26/2009 | c. 455 § 2 | ♦ Amends and moves subsections (1) and (2) EER statutes from RCW 9.94A.728 to RCW 9.94A.729.<br>♦ RCW 9.94A.728 (3) is amended to reflect only Extraordinary Medical Leave rules and eligibility statutes.<br>♦ Recodified statute for Persistent Offenders eligibility to subsection (3)(e). | SB 5525 |
| RCW 9.94A.728 (1) | Earned Early Release - Offender Release Prior to Expiration of Sentence | 8/01/2009 | c.399 § 1 | ♦ Amends statute to include the department's approval of jail certification of calculated EER based on actual confinement served before sentencing when erroneous calculation appears on J & S. | HB 1789 |
| RCW 9.94A.729 | Earned Early Release – Risk Assessments | 5/11/2009 | c. 455 § 3 | ♦ New Section added to chapter 9.94A.<br>♦ Earned Early Release eligibility, rules and requirements formally found under RCW 9.94A.728 (1) and (2) are now under RCW 9.94A.728. | SB 5525 |
| RCW 9.94A.737<br>2007 c. 483 s 305 | Community Custody Violations | Effective 7/26/2009<br>Expires 8/01/2009 | c. 375 § 13 | ♦ Adds new subsection to RCW 9.94A.737.<br>♦ Provides procedures for sanctioning probationers under DOC supervision who violate conditions of their community custody. | ESSB 5288 |
| RCW 9.94A.771 | Supervision of Offenders | 8/01/2009 | c. 28 § 41 | ♦ Recodified as RCW 9.94B.100 | SSB 5190 |
| RCW 9.94A.829 | Special allegation - Offense committed by a Criminal Street Gang Member or Associate | 8/01/2009 | c.28 § 16 | ♦ Chapter 9.94A is amended to include a new section for;<br>♦ Special Allegation – Offense committed by a Criminal Street Gang Member or Associate under RCW 9.41.040, Unlawful Possession of Firearms. | SSB 5190 |

| Amendments per each RCW | Chapter/RCW Title | Effective Dates | Law Reference | Summary of 2009 Session Updates | Bill Number |
|---|---|---|---|---|---|
| RCW 9.94A.831 | Special allegation - Assault of Law enforcement Personnel with a Firearm | 7/26/2009 | c.141 § 16 | ♦ New section is added to RCW 9.94A;<br>♦ Special Allegation – Assault of Law enforcement Personnel with a Firearm - Procedures. | SB 5413 |
| RCW 9.94A.835 | Special Allegation – Sexual Motivation - Procedures | 8/01/2009 | c. 28 § | ♦ Technical Corrections.<br>♦ Special Allegation – Sexual Motivation. | SSB 5190 |
| RCW 9.94A.850<br>c. 28 § 17 | Community custody provisions | 7/26/2009 | c. 375 § 8 | ♦ Amends the Sentencing Guideline Commission's responsibility to propose future modification to community custody "ranges" to the Legislature. | ESSB 5288 |

STATE OF WASHINGTON

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## IMPACT OF THE 2009 LEGISLATION ON SCORING FORMS

General Scoring Forms are usually updated and provided at the beginning of every manual. The 2009 legislature made several changes to the Sentencing Reform Act (SRA); however, they did not add any ranked felony offenses. Therefore, the scoring worksheets provided in the 2008 Adult Sentencing Manual will continue to apply to offenses sentenced in 2009 with some exceptions.

- Scoring sheets were not created for the new unranked felony offenses such as Possession of a Firearm by Non-Residents, Violation of the Guaranteed Asset Protection Waiver Act and Violation of Exchange Facilitators Act, See Table 6.

- SSB 5190 (2009) and SHB (2008) made several technical corrections to community custody provisions and many of the RCW's which refer to community custody have been re-arranged or re-codified. No substantive changes were enacted in these bills.

- ESSB 5288 and SSB 6162 made significant changes to community custody terms imposed on offenders depending on the category of conviction and risk level.

    - Removed the Sentencing Guidelines Authority to set community custody ranges.
    - Instead of community custody ranges, specific 12, 18, or 36 month terms are assigned. These changes are retroactive and prospective for offenders sentenced on or after July 26, 2009, The Summary of Community Custody Changes as a Result of ESSB 5288 and SSB 6162 shows a summary of the changes. Please refer to RCW 9.94A.701 for the applicable term when sentencing.
    - Also clarified that the term of community custody will be reduced by the court if it finds that the offender's combined sentence of total conferment and community custody exceeds the statutory maximum for the crime.

- SB 5413 created a special allegation and standard sentence range enhancement for offenders who intentionally commit an Assault against a Police Officer, while performing their official duties, with what appears to be a firearm.

- HB 1361 authorizes counties to give credit for time served to nonviolent and nonsex offenders for time served prior to sentencing and allows counties to authorize time spent in the community option to be reduced by earned release credit.

- Community Custody for Prison-Based Drug Offender's Sentencing Alternative (DOSA) was clarified in SHB 1791. Upon completion of a term of one-half of the midpoint or 12 months (whichever is greater) in total confinement, the offender must serve one-half of the midpoint of the standard range as a term of community custody.

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## A SUMMARY OF COMMUNITY CUSTODY CHANGES AS A RESULT OF ESSB 5288 AND SSB 6162.

This summary describes the 2009 changes in community custody sentencing and has been reviewed by the Office of the Attorney General. Shannon Hinchcliffe, SGC Policy Counsel

| **Determination for Community Custody Ranges prior to ESSB 5288/SSB 6162** | **Determination for Community Custody Now[1]** | **Summary of the Changes** |
|---|---|---|
| Sentencing Guidelines Commission had the duty to set community custody ranges. Ranges were as follows (in months):<br>• Sex Offenses 36-48<br>• Serious Violent Offenses 24-48<br>• Violent Offenses 18-36<br>• Crimes Against a Person 9-18<br>• Drug Offenses: 9-12<br><br>DOC supervises during the period the offender is released to community custody in lieu of earned early release. RCW 9.94A.728(2). If the offender has a long prison term and gets 50% time, this period may be much longer than the above terms. | Community custody terms are now set out in RCW 9.94A.501. Terms are as follows:<br>• Sex offenses 36 months<br>• Serious Violent Offenses 36 months<br>• Violent Offenses 18 months<br>• Crimes Against A Person 12 months<br>• Drug Offenses 12 months<br><br>DOC still supervises during the period the offender is released to community custody in lieu of earned early release. RCW 9.94A.728(2). | • SGC has been relieved of its duty to set ranges.<br>• Ranges have been converted to terms.<br>• Removes DOC's authority to alter the duration of the offender's community custody based on risk and performance of the offender.<br>• Non prison offenders have no change on supervision length, they will be supervised for 12 months, if eligible.<br>• These community custody terms are to be applied retrospectively and prospectively, DOC will have to recalculate all community custody terms. |
| **DOC previously supervised:** | **DOC currently supervises:** | **Summary of the Changes** |
| Any felony offender sentenced to community custody and any misdemeanant or gross misdemeanant offender sentenced | Every felony offender whose risk assessment places the offender in the two highest risk categories until July 26, 2009 and then the | • Removes supervision of low to moderate risk offenders of:<br>▪ violent offenses,<br>▪ crimes against persons, |

[1] SHB 1791 allows the court to add a community custody term in addition to more than one year of confinement when a sentencing range has not been established for the current offense and the court finds reasons to justify an exceptional sentence under RCW 9.94A.535.

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|---|---|---|
| to probation in Superior Court whose:<br>• Risk assessment places the offender in one of two highest categories or<br>• Regardless of risk, they have a conviction for:<br>▪ Sex offense;<br>▪ Violent offense;<br>▪ Crime against persons;<br>▪ Felony that is domestic violence;<br>▪ Residential burglary;<br>▪ Manufacture, delivery, or possession of Methamphetamine; or<br>▪ Delivery of a controlled substance to a minor;<br>▪ Offender has a prior conviction for any of the above.<br>▪ Conditions of supervision include chemical dependency treatment<br>▪ Offender was sentenced to a First Time Offender Waiver (FTOW) or Special Sex Offender Sentencing Alternative (SSOSA);<br>▪ Or supervision is required by Interstate Compact or Adult Offender Supervision. | highest category after July 26, 2009[2] or regardless of risk if they:<br>• Have a current conviction for a sex offense or serious violent offense;<br>• Are a dangerous mentally ill offender pursuant to RCW 72.09.370;<br>• Have an indeterminate sentence and are subject to parole;<br>• Offender was sentenced to a First Time Offender Waiver (FTOW) or Special Sex Offender Sentencing Alternative (SSOSA) or Drug Offender Sentencing Alternative (DOSA);<br>• Or supervision is required by Interstate Compact for Adult Offender Supervision.<br>Every misdemeanant and gross misdemeanant offender whose offense is sentenced to probation in Superior Court. The Court shall order probation for offenders convicted of:<br>• Sexual Misconduct with a Minor 2nd Degree; or<br>• Custodial Sexual Misconduct 2nd Degree; or<br>• Communication with a Minor for Immoral Purposes; or<br>• Failure to Register as a Sex or Kidnapping Offender or<br>• Assault 4th Degree or Violation of a Protection Order (VPO) if they have one or more convictions for the following:<br>▪ Violent offense;<br>▪ Sex offense;<br>▪ Crime against persons;<br>▪ Fourth Degree Assault;<br>▪ VPO | ▪ felony domestic violence,<br>▪ residential burglary,<br>▪ convictions pursuant to RCW 69.50 and 69.52 and<br>▪ those ordered to chemical dependency treatment (changes to offenders with DOSAs see note below.)<br><br>• Clarifies DOSA offenders to be included in the offenders who are supervised regardless of risk. (This is not a substantive change, this type of offender was included previously under those who had "conditions of supervision including dependency treatment.)<br><br>• Removes the "highest risk" filter for misdemeanants and gross misdemeanants and replaces it with strictly offense-based criteria.<br><br>• Adds gross misdemeanant and misdemeanants who commit Assault Fourth Degree and Violation of a Protection Order (with certain prior offenses) to offenders who are supervised regardless of risk.<br><br>• The term of community custody shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021. However, DOC is still required under RCW 9.94A.728(2) to supervise during release to community custody in lieu of earned early release (up to the statutory maximum).<br><br>• Removes the July 1, 2010 sunset clause from community custody (RCW 9.94A.501). |

[2] This change is reflective of the use of the risk-assessment tool approved by WSIPP. ESSB 5288.

# DIGEST OF COURT CASES INTERPRETING THE SENTENCING REFORM ACT

*The following is a digest of the 2008-2009 Washington Supreme Court and Washington Court of Appeals' cases interpreting the Sentencing Reform Act (SRA) of 1981 (RCW Chapter 9.94A). This digest only includes cases decided up to June 30, 2009. There is a possibility that some cases decided after June 30, 2009 might have changed or affected in some way the courts' previous interpretations of the SRA.*

*The digest was prepared by the Corrections Division of the Office of the Attorney General of Washington and not by the Sentencing Guidelines Commission. The Commission does not endorse nor necessarily agree with the interpretations of the court cases set forth in this digest. Any questions or concerns regarding this digest should be directed to the Corrections Division of the Office of the Attorney General of Washington.*

## WASHINGTON SUPREME COURT

### State v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (April 30, 2009)

**FACTS:** Defendant was convicted in the Spokane County Superior Court of Robbery and Burglary, but the trial court determined that the defendant could not be sentenced as a persistent offender. The State appealed. The Washington Court of Appeals affirmed. Review was granted by the Washington Supreme Court.

**ISSUE:** For purposes of the Persistent Offender Accountability Act (POAA), is a defendant an "offender" when the defendant's prior conviction in the Superior Court for Second-Degree Robbery was at the age of 16?

**HOLDING:** Yes. A juvenile defendant is potentially an "offender" for purposes of the POAA when the Superior Court has jurisdiction over the juvenile by means of an automatic decline, based on the nature of the crime, or as a result of a declination hearing where the juvenile court waives its jurisdiction.

However, in this case, the State did not meet its burden of showing that the defendant was convicted as an "offender" for purposes of the POAA. The juvenile court had jurisdiction over the second degree robbery charge and there was no evidence before the sentencing judge in 2005 indicating that a declination hearing occurred. By failing to establish the existence of a declination hearing in juvenile court, the State cannot show that the defendant was convicted as an "offender" in 1999. Therefore, the Washington Supreme Court concurred with the Court of Appeals and the trial court that the defendant could not be sentenced as a persistent offender because he was not "convicted as an *offender* on at least two separate occasions" prior to the 2005 sentencing.

### State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (April 16, 2009)

**FACTS:** Defendant was convicted in the Grays Harbor County Superior Court of Robbery in the Second Degree and Unlawful Imprisonment. Defendant appealed. The Washington Court of Appeals affirmed the convictions, but remanded for resentencing because the defendant had not acknowledged his prior convictions, nor had the State provided any evidence of their existence. The State appealed.

**ISSUE:** Is a defendant's failure to object to criminal history in the prosecutor's statement an acknowledgment of that history?

**HOLDING:** No. The defendant did not stipulate to his criminal history for purposes of sentencing, which was based on prior convictions which the State had not proven by either acknowledging the statement of the prosecutor summarizing that history, or by recommending a sentence in the range calculated by the prosecuting attorney, where the defendant did nothing affirmative or in writing regarding criminal histories or the proper sentencing range.

The defendant's failure to object to his prior criminal history, as contained in the statement of the prosecutor summarizing that history, did not serve as an acknowledgment of that history and thus did not relieve the State of the burden to establish the criminal history by a preponderance of the evidence. The prosecutor's statement is not a "presentence report" under former RCW 9.94A.500(1) and former RCW 9.94A.530(2). The Supreme Court emphasized the need for an *affirmative* acknowledgment by the defendant of the *facts* and *information* introduced for purposes of sentencing. See State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999) and State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). The mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment. Ford, 137 Wn.2d at 483 and n. 3.

**State v. Failey, 165 Wn.2d 673, 201 P.3d 328 (February 12, 2009)**

**FACTS:** The defendant was convicted in the Pierce County Superior Court of First Degree Robbery and received a standard range sentence of 51 to 68 months' imprisonment. The State appealed. The Washington Court of Appeals reversed and remanded for resentencing.

**ISSUE:** Can a prior 1974 robbery conviction count as a "strike" offense for purposes of persistent offender sentencing?

**HOLDING:** No. The provision of the statute (RCW 9.94A. 030(32)(u)) specifically governing the question of whether an earlier offense counted as strike offense, rather than the statute (RCW 9.94A.035) generally concerned with categorizing state felonies not listed in the criminal code into classes based on sentence length, applied to determine whether defendant's prior robbery conviction was a most serious offense that currently counted as a strike offense for persistent offender purposes. The statute generally concerned with categorizing state felonies was ambiguous in its applicability to past crimes, and given that ambiguity, the rule of lenity barred classification of the defendant's prior robbery offense pursuant to RCW 9.94A.035.

Additionally, the prior robbery conviction was not a most serious offense that counted as a "strike" offense for purposes of persistent offender sentencing under the comparability analysis of RCW 9.94A.030(32)(u). The prior robbery was most comparable to the current offense of second degree robbery, and second degree robbery was a class B felony. However, the prior robbery conviction "washed out" of defendant's offender score under RCW 9.94A.525(2)(b) since the defendant spent 10 consecutive years in the community before committing his next crime after his release from confinement on the robbery. Therefore, the prior 1974 robbery conviction did not count as a strike offense.

**State v. Doney, 165 Wn.2d 400, 198 P.3d 483 (December 11, 2008)**

**FACTS:** Defendant, convicted by guilty plea of First-Degree Murder, filed a motion to withdraw his plea and to vacate sentence. The motion to withdraw plea was denied, but the motion to vacate was granted. The Spokane County Superior Court convened a new sentencing jury, and

imposed an exceptional sentence. Defendant appealed. The Washington Court of Appeals affirmed. Defendant appealed to the Washington Supreme Court.

**ISSUES:**

1. Did the trial court lack statutory authority to empanel a sentencing jury to consider aggravating factors after the defendant entered a guilty plea to first-degree murder?

2. Was the error harmless?

**HOLDING:**

1. Yes. The trial court lacked statutory authority to empanel sentencing jury to consider aggravating factors after defendant entered guilty plea to first-degree murder. See State v. Pillatos, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007), which held that the 2005 legislation (which was passed in response to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403) (2004), at Laws of 2005, ch. 68)), did not authorize trial courts to empanel sentencing juries in cases where the defendant was tried or pleaded guilty before the legislation's effective date of April 15, 2005.

2. No. The error in empanelling the sentencing jury without statutory authorization to consider aggravating factors after defendant pleaded guilty to first-degree murder was not harmless based on subsequent amendment to statute providing such authority, when exceptional sentence was overturned or vacated, and where no attempt had been made to invoke amended statute. The proper remedy in this circumstance is to vacate the sentence and remand for resentencing. See State v. Davis, 163 Wn.2d 606, 617, 184 P.3d 639 (2008).

**In re Tobin, 165 Wn.2d 172, 196 P.3d 670 (November 26, 2008)**

**FACTS:** Defendant, who had been sentenced in the Pierce County Superior Court on convictions for First-Degree Unlawful Possession of a Firearm, First-Degree Theft, and 35 fish and wildlife felonies, filed a personal restraint petition in the Washington Court of Appeals which challenged his sentence for Unlawful Possession of a Firearm. The Court of Appeals denied the petition.

**ISSUES:**

1. Were the 35 fish and wildlife Class C felonies to which defendant had pled guilty properly included in the defendant's offender score for purposes of sentencing him on the firearm conviction?

2. Was the sentence of 168 months on defendant's firearm conviction invalid on its face?

**HOLDING:**

1. Yes. The 35 fish and wildlife Class C felonies to which the defendant had pled guilty were properly included in the defendant's offender score for purposes of sentencing him on his conviction for first-degree unlawful possession of a firearm, pursuant to the offender score statute, RCW 9.94A.525(a)-(c) which explicitly provided for inclusion of class A, B and C felonies.

2. Yes. The sentence of 168 months on defendant's conviction for first-degree unlawful possession of a firearm exceeded the statutory limit, and, thus was invalid on its face. The sentencing court had actually sentenced defendant to 116 months on the firearm charge and 52 months on the first-degree theft conviction for a total of 168 months, but the

sentencing court mistakenly listed the total months of confinement for the two cases on the line meant to indicate the total months of confinement for just one case. Therefore, the total months of confinement ordered on the firearm charge exceeded the statutory limit. The case was remanded to the trial court to correct the error by providing that the total months of confinement ordered for the firearm charge should be listed as 116 months, not 168 months.

**State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (November 20, 2008)**

**FACTS:** Defendant was convicted in two successive trials in the King County Superior Court of First Degree Child Molestation of one stepdaughter, and three counts of Second Degree Rape of a second stepdaughter. The Washington Court of Appeals affirmed.

**ISSUES:**

1. Is a sentencing condition prohibiting the defendant from contact with his wife reasonably crime-related, even though his wife was not the direct victim of the crime?

2. Does a sentencing condition prohibiting the defendant from contact with his wife violate his fundamental right to marriage?

**HOLDING:**

1. Yes. Trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. See State v. Armendariz, 160 Wn.2d 106, 112, 156 P.3d 201 (2007). Sentencing conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. See State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). In this case, whether the sentencing condition prohibiting the defendant from contact with his wife for life was reasonably related to the defendant's convictions for the sexual abuse of his step-daughters, even though his wife was not the direct victim of the crime, is a question of first impression in Washington. The Washington Supreme Court held such a condition was an authorized crime-related prohibition. Although the defendant's wife was not a victim of the crimes, his wife was the mother of two child victims of sexual abuse; the defendant attempted to induce his wife not to cooperate with his prosecution; his wife testified against the defendant; and the defendant's criminal history included convictions for murder and for beating his wife. Therefore, protecting the wife [with an order prohibiting the defendant from contact with his wife]] was reasonably related to the crime.

2. No. The rights to marriage and to the care, custody and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny. See Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Although the defendant's ability to engage in marital activity is necessarily limited by his imprisonment and no-contact order with his step-daughters, there remain certain aspects of marriage which may not be denied absent a compelling state interest. See Turner v. Safley, 482 U.S. 78, 95-96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (married inmate still entitled to benefits of marriage such as emotional support, spiritual commitment, eligibility for government benefits, and inheritance and property rights). Here, a sentencing condition prohibiting the defendant from contact with his wife for life, following convictions for the sexual abuse of the defendant's step-daughters, did not violate the defendant's fundamental constitutional right to marriage, as preventing all contact was reasonably necessary to achieve a compelling state interest, namely, the protection of the defendant's wife and her daughters.

**State v. Cayenne, 165 Wn.2d 10, 195 P.3d 521 (November 13, 2008)**

**FACTS:** Following a jury trial, the defendant, a member of an Indian tribe, was convicted in the Grays Harbor County Superior Court of Unlawful Use of Nets to take fish and, as part of his sentence, was prohibited from owning gillnets during the term of his sentence, on and off reservation. Defendant appealed. The Washington Court of Appeals affirmed in part and vacated in part. The State filed a petition for review, which was granted.

**ISSUE:** Does a state trial court have the authority to impose crime-related sentence conditions regulating the activities of a tribal member on tribal land when the condition relates to fishing?

**HOLDING:** Yes. Here, the defendant committed his felony offense outside the Chehalis Indian Reservation boundaries. In imposing the sentence on the defendant, the trial court could extend the crime-related prohibition on owning gillnets during the term of the sentence to within the boundaries of the reservation. The State had interest in imposing sentence for off-reservation crime, the defendant was personally before trial court and was subject to its full authority, which included crime-related prohibitions, and limiting sentencing authority would have created unwanted result of permitting tribal lands to be havens for criminals avoiding justice after violating state laws. Thus, the Supreme Court held that when sentencing a tribal member for an off-reservation crime, the trial court may impose crime-related prohibitions to the extent they serve the purpose of sentencing and the crime-related prohibitions follow the individual during the prohibition's validity.

**State v. Gossage, 165 Wn.2d 1, 195 P.3d 525 (November 13, 2008)**

**FACTS:** A convicted sex offender filed a petition for discharge, for early termination of sex offender registration requirements, and for restoration of civil rights. The King County Superior Court, denied the petition. The sex offender appealed. The Washington Court of Appeals affirmed. Review was granted by the Washington Supreme Court.

**ISSUE:** Do legal financial obligations (LFOs) imposed on a convicted sex offender for offenses committed before July 1, 2000 expire and become void by statute after 10 years, even if they are not fully paid, unless the Superior Court extends them for another 10 years prior to expiration of the first ten-year period?

**HOLDING:** Yes. Legal financial obligations imposed on a convicted sex offender, for offenses committed before July 1, 2000, expire and become void, by statute, after 10 years, even if they are not fully paid, unless the Superior Court extends them for another 10 years prior to expiration of the first ten-year period. See RCW 9.94A.760(4).

**State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (November 6, 2008)**

**FACTS:** Defendant pled guilty to Second Degree Possession of Stolen Property. The Spokane County Superior Court found that the defendant was in possession of $11,500 of stolen property, and imposed restitution based on that finding. Defendant appealed. The Washington Court of Appeals affirmed and the defendant appealed.

**ISSUE:** Did substantial evidence support the trial court's finding that the defendant possessed $11,500 worth of the victim's unrecovered stolen jewelry for restitution purposes?

**HOLDING:** No. A judge must order restitution whenever a defendant is convicted of an offense which results in loss of property. See RCW9.94A.753(5). The amount of restitution must be based "on easily ascertainable damages." RCW 9.94A.753(3). "Evidence supporting restitution 'is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.'" See State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). If the State disputes the restitutional amount, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Here, substantial evidence did not support the trial court's finding that the defendant possessed $11,500 worth of the victim's unrecovered stolen jewelry for restitution purposes. Although the victim testified that the defendant possessed $11,000 worth of her jewelry, her testimony was based on what she understood owners of the coin company saw when defendant came into the coin company with plastic bags containing jewelry. The matter was remanded to the trial court to determine the value of the victim's unrecovered items from the police report that could be identified by a preponderance of the evidence to have been in the defendant's possession.

**State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (September 18, 2008)**

**FACTS:** Defendant was convicted after a jury trial in the Whatcom County Superior Court of six felonies and two gross misdemeanors. The trial court imposed standard range sentences on all counts except for one count of Residential Burglary, where the trial court imposed an exceptional sentence of 120 months confinement to run concurrently with his standard range sentences on the remaining counts. The defendant appealed, and the Washington Court of Appeals transferred the appeal to the Washington Supreme Court under Rule of Appellate Procedure (RAP) 4.4 to promote the orderly administration of justice.

**ISSUE:** Was the defendant's exceptional sentence imposed in violation of his Sixth Amendment right to a jury trial?

**HOLDING:** No. Blakely v. Washington does not require fact-finding by a jury when a sentencing provision allows an exceptional sentence to flow *automatically* from the existence of free crimes. See RCW 9.94A.535(2)(c). Thus, the trial court correctly applied RCW 9.94A.535(2)(c) when imposing an exceptional sentence, and did not offend the defendant's Sixth Amendment right to a jury trial. See also State v. Hughes, 154 Wn.2d 118, 137-140, 110 P.3d 192 (2005)(abrogated on other grounds regarding harmless error by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

**State v. Eggleston, 164 Wn.2d 61, 187 P.3d 233 (July 10, 2008)**

**FACTS:** Defendant was convicted by a jury in the Pierce County Superior Court of Second Degree Murder. Defendant appealed. The Washington Court of Appeals affirmed in part, reversed in part, and remanded.

**ISSUE:** Does the sentencing statute pertaining to aggravating sentences, RCW 9.94A.535(3)(e)(iv),(h)(i), (o) or (t), as applied to the defendant's case, create a justiciable controversy?

**HOLDING:** No. The issue of whether the sentencing statute pertaining to aggravating sentences applied to the defendant on resentencing was not ripe for the Supreme Court's review, and thus did not create a justiciable controversy, as no jury had been empaneled to determine aggravating sentence factors in the defendant's case. The court's jurisdiction over an issue cannot be invoked

unless a justiciable controversy exists. See Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

## WASHINGTON COURT OF APPEALS

**In re Crawford, 209 P.3d 507 (June 10, 2009)**

**FACTS:** Petitioner was convicted in the Pierce County Superior Court of First-Degree Robbery and Second-Degree Assault and received a life sentence without the possibility of parole under the Persistent Offender Accountability Act (POAA). The Washington Court of Appeals vacated the judgment. The Washington Supreme Court reversed and reinstated the petitioner's persistent offender status, holding that due process did not require pretrial notice of persistent offender status and that petitioner was not prejudiced by counsel's deficient performance in failing to challenge out-of-state conviction. The petitioner subsequently filed a personal restraint petition.

**ISSUES:**

1. Was the petitioner's out-of-state conviction legally or factually comparable to qualifying strike offense under state law at time out-of-state crime was committed?

2. If petitioner's out-of-state conviction was not legally or factually comparable, does it still count as a strike under the POAA?

**HOLDING:**

1. No. The petitioner's prior out-of-state sex abuse conviction was neither legally nor factually comparable to a Washington state strike offense under the POAA, thus precluding imposition of a life sentence without the possibility of parole for the instant conviction of first-degree robbery and second-degree assault.

2. No. If a previous foreign conviction is not legally or factually comparable, the conviction does not count as a strike under the POAA. See In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111, P.3d 837 (2005). Where a defendant's criminal history includes out-of-state convictions, the SRA requires that the sentencing court classify these convictions "according to the comparable offense definitions and sentences provided by Washington law." To properly classify an out-of-state conviction according to state law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes as defined on the date the out-of-state crime was committed, known as "legal comparability." See State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign conviction counts as a strike in the defendant's offender score. See Lavery, 154 Wn.2d at 255. For purposes of using an out-of-state conviction for sentencing enhancement purposes, in cases where the elements of the state crime and the foreign crime are not identical, or if the foreign statute is broader than the state definition of the comparable crime, sentencing courts may look to the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. See Morley, 134 Wn.2d at 606. However, the elements of the charged crime remain the cornerstone of the comparison, and facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial. Id.

**State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (May 27, 2009)**

**FACTS:** The defendant was convicted in the Thurston County Superior Court of Violating a Domestic-Violence No-Contact Order, and he appealed.

**ISSUES:**

1. Because the defendant did not affirmatively acknowledge three prior convictions that the State used to calculate his offender score, without offer of any proof, was resentencing required?

2. For purposes of calculating the defendant's offender score, can two violations be considered two different offenses?

**HOLDING:**

1. Yes. The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. See In re Pers. Restraint of Cadawallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). In determining a sentence, the trial court may rely on information that is admitted, acknowledged, or proved in a trial or at the time of sentencing. RCW 9.94A.530(2). Defendant, at sentencing, did not affirmatively acknowledge his criminal history, and the State did not provide sufficient evidence to establish that its description of that history was accurate. See State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113, 120 (2009) (bare assertions as to criminal history do not substitute for facts and information that a sentencing court requires.).

2. Yes. If two current offenses encompass the same criminal conduct, they count as one point in calculating the defendant's offender score. See RCW 9.94A. 589(1)(a) and State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). The same criminal conduct rule requires two or more crimes to involve the same criminal intent, the same time and place, and the same victim. RCW 9.94A.589(1)(a). If one of these elements is missing, the offenses must be counted individually toward the offender score. Haddock, 141 Wn.2d at 110. Here, the defendant's two violations of violating a domestic-violence no-contact order did not involve the same time and place, because the defendant's e-mails to the victim were sent on different dates, and thus did not constitute the same criminal conduct.

**State v. Victoria, 150 Wn. App. 63, 206 P.3d 694 (May 11, 2009)**

**FACTS:** Defendant was convicted by a jury in the King County Superior Court of two counts of Tampering With A Witness. In calculating the defendant's offender score, the sentencing court declined to treat the two crimes as constituting the same criminal conduct. Defendant appealed.

**ISSUE:** Do convictions for two counts of tampering with a witness encompass the same criminal conduct, for the purpose of calculating the defendant's offender score?

**HOLDING:** No. The defendant's convictions for two counts of tampering with a witness did not encompass the same criminal conduct for the purpose of calculating the defendant's offender score, as each conviction involved a different, identifiable victim. Multiple crimes constitute the same criminal conduct only if they involve the same victim. RCW 9.94A.589(1)(a). Because the defendant tampered with two different witnesses, each of whom was a victim of his unlawful machinations, the trial court correctly ruled that his two convictions for tampering with a witness did not encompass the same criminal conduct.

**State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (April 21, 2009)**

**FACTS:** Defendant was convicted in the Pierce County Superior Court of First-Degree Assault, First-Degree Burglary, First-Degree Unlawful Possession of a Firearm, two firearm enhancements, and was sentenced to 336 months imprisonment. Defendant appealed, and the Washington Court of Appeals remanded for resentencing. The Superior Court then imposed a total of 276 months of incarceration and up to two years of community placement. The defendant again appealed.

**ISSUE:** Did two years of community placement added to the defendant's sentences for first degree assault and first degree burglary cause the defendant's sentences to exceed the statutory maximum?

**HOLDING:** Yes. In order to impose a sentence greater than the high end of the standard range, a jury must find the facts necessary to impose a sentence greater than the high end of the standard range, but that changes only the procedure by which the maximum sentence may be imposed, not the definition of a crime's "statutory maximum." See Blakely, 542 U.S. at 303-04 and State v. Knotek, 136 Wn. App. 412, 425 149 P.3d 676 (2996), review denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007). In this case, the addition of two years of community placement to the defendant's sentences of 216 months for first degree assault, 75 months for first degree burglary, and 48 months for first degree unlawful possession of a firearm did not cause his sentences to exceed the maximum statutory sentences, which was life imprisonment for the defendant's first two offenses and 10 years for the third offense.

**State v. Monson, 149 Wn. App. 765, 205 P.3d 941 (April 20, 2009)**

**FACTS:** Defendant was convicted in the Snohomish County Superior Court of Possession of a Stolen Vehicle, for which he was sentenced based upon a one-point sentencing score increase on account of a prior juvenile adjudication. Defendant appealed.

**ISSUE:** Can a juvenile conviction be used for offender score calculation purposes?

**HOLDING:** Yes. The statute under which the defendant was sentenced for possession of a stolen vehicle, RCW 9.94A.525(20), permitted use of his prior juvenile vehicle prowling conviction for sentencing score calculation purposes, although RCW 9.94A.525(20) specifically referenced juvenile convictions associated with theft, possession of stolen property, and taking a motor vehicle, but not vehicle prowling. The SRA's definition of a prior "conviction" encompassed both adult and juvenile convictions, RCW 9.94A.525 used adult and juvenile convictions interchangeably, and the intent of the enactment of subsection (20) in RCW 9.94A.525 was to deter motor vehicle theft.

**State v. Ervin, 149 Wn. App. 561, 205 P.3d 170 (April 13, 2009)**

**FACTS:** Defendant was convicted in the King County Superior Court of Felony Violation of a No-Contact Order, and was sentenced using an offender score reflecting two prior felonies. He appealed, alleging that his two prior felonies had washed out because he spent five years in the community without committing a crime between 1999 and 2005, although his confinement in 2002 for a probation violation interrupted his time "in the community."

**ISSUE:** Can time spent in confinement for violating misdemeanor probation be considered time spent "in the community" for purposes of the SRA's wash-out provisions?

**HOLDING:** No. The defendant's time spent in confinement for violating misdemeanor probation was not time spent "in the community" for purposes of calculating, under wash-out

provisions of the SRA, whether the defendant had spent five consecutive years in the community without committing any crime resulting in a conviction. The Legislature necessarily intended to exclude those who are incarcerated pursuant to a probation violation from being considered "in the community" under RCW 9.94A.525(2)(c). Thus, for sentencing purposes, the defendant's two prior felony convictions did not wash out.

**State v. Combs, 149 Wn. App. 556, 204 P.3d 264 (April 7, 2009)**

**FACTS:** The defendant pled guilty in the Cowlitz County Superior Court to First Degree Escape. Defendant appealed his sentence, arguing that the trial court erred in calculating his offender score.

**ISSUE:** For purposes of calculating an offender score, is each prior conviction counted individually?

**HOLDING:** Yes. For purposes of calculating the defendant's offender score upon conviction for first degree escape, each of the defendant's prior convictions were to be counted individually. The relevant statute, RCW 9.94A.525, provided that all convictions counted separately, except acts encompassing the same criminal conduct and those committed before July 1, 1986. RCW 9.94A.525(15) provided that when sentencing for first degree escape, the trial court was to "count adult prior convictions as one point and juvenile prior convictions as 1/2 point." In In re Pers. Restraint of Lofton, 142 Wn.App. 412, 415-416, 174 P.3d 703 (2008), Division One of the Washington Court of Appeals held that the Legislature set forth its general intent to count all prior felonies individually when it enacted RCW 9.94A.525(5)(a), directing trial courts to "count all convictions separately." The Court of Appeals held here that RCW 9.94A.525(15) unambiguously directs trial courts to count prior offenses individually when calculating offender scores, and thus affirmed the trial court.

**In re Delgado, 149 Wn. App. 223, 204 P.3d 936 (March 10, 2009)**

**FACTS:** After convictions and sentences imposed by the Thurston County Superior Court were affirmed on direct appeal, petitioners filed personal restraint petitions,

**ISSUES:**

1. Can a special verdict finding that petitioners were "armed with a firearm," which did not match special verdict instructions that defined only "deadly weapon," support a firearm enhancement?

2. Can a judge, rather that a jury, find that criminal conduct for two crimes is "separate and distinct," for purposes of determining whether sentences for the two crimes should run consecutively?

**HOLDING:**

1. No. The jury's finding in special verdict form that defendants were "armed with a firearm" did not support imposition of firearm sentence enhancement, where jury was instructed that it must find the defendants were armed with a "deadly weapon" in order to return the special verdicts, and the jury was not instructed on the definition of "firearm" for sentencing enhancement purposes, although "deadly weapon" was defined.

2. Yes. If the sentencing court finds that two or more crimes are not the "same criminal conduct," then it has necessarily found that those crimes are "separate and distinct criminal conduct," warranting consecutive sentences. Moreover, the U.S. Supreme Court

has held that the right to jury trial does not inhibit states from allowing judges, rather than juries, to find facts necessary to impose consecutive sentences for multiple offenses. See Oregon v. Ice, -- U.S.--, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009).

**State v. King, 149 Wn. App. 96, 202 P.3d 351 (February 26, 2009)**

**FACTS:** Defendant, previously convicted of a drug possession offense, was convicted by a jury in the Spokane County Superior Court of Intimidating A Witness. He appealed, and on appeal, resentencing was ordered. Following resentencing, he appealed again.

**ISSUES:**

1. Is the imposition of a consecutive sentence an exceptional sentence that requires a finding of aggravating factors?

2. Does the imposition of a sentence to run consecutively to the sentence defendant was already serving deprive the defendant of his right to a jury?

3. Is the imposition of a sentence to run consecutively to the sentence defendant was already serving an equal protection deprivation?

**HOLDING:** No, as to all three issues. RCW 9.94A.589(3) gives a sentencing judge the discretion to impose either a concurrent or consecutive sentence for a crime that the defendant committed before he started to serve a felony sentence for a different crime. The imposition of a consecutive sentence is not, then, an exceptional sentence that would require a finding of aggravating factors. See State v. Jones, 137 Wn.App 199, 126, 151 P.3d 1056 (2007). RCW 9.94A.589(3) therefore authorized the trial court here to order the defendant to serve his standard range sentence for witness intimidation consecutively to the sentence he was already serving for drug possession.

Additionally, the defendant's sentence was not exceptional and did not increase the penalty for the underlying offense beyond the statutory maximum. A consecutive sentence does not increase the penalty for the underlying offense beyond the statutory maximum. See State v. Cubias, 155 Wn.2d 549, 554-555, 120 P.3d 929 (2005). The defendant was simply serving one sentence for drug possession and one sentence for witness intimidation. His consecutive sentences thus did not violate Blakely or Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The defendant has no right to have a jury determine whether his sentence should run concurrently or consecutively. See State v. Champion, 134 Wn.App. 483, 488, 140 P.3d 633 (2006). RCW 9.94A.589)(3) simply gives the court discretion to order consecutive sentences.

Finally, RCW 9.94A.589(3) reflected the State's legitimate interest in ensuring that a defendant's punishment fit his crime, and was a rational way to achieve that goal. RCW 9.94A.589(3) also ensures proportionate punishment by giving the court flexibility to hold a defendant accountable for each crime that he commits. As a person sentenced for a crime committed while not under a felony sentence, the defendant was not a member of a suspect or semi-suspect class, and his interest in his physical liberty, in this sentencing context, was not a fundamental right. See State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996).

**State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (February 23, 2009)**

**FACTS:** Defendant was convicted in a jury trial in the King County Superior Court of First-Degree Assault, Second-Degree Assault, and Unlawful Possession of a Firearm. Defendant appealed.

**ISSUES:**

1. Does a person who is sentenced to first degree assault and subject to a five-year firearm enhancement have standing to challenge the enhancement statute?

2. Does RCW 9.94A.533(3) violate the state and federal guarantees of equal protection?

3. Does RCW 9.94A.533(3) run afoul of the Privileges and Immunities Clause by infringing on the fundamental right to bear arms?

**HOLDING:**

1. Yes. Defendant, whose sentence for first degree assault was subjected to the imposition of five-year firearm sentence enhancement, had standing to challenge enhancement statute on equal protection grounds because the trial court added five years to the defendant's sentence based on the enhancement and RCW 9.94A.533(3)(a). Therefore, the defendant was adversely affected by the enhancement, and had standing to challenge the statute.

2. No. The defendant's sentence for first degree assault was subjected to five-year firearm sentence enhancement was not similarly situated to class of persons committing crimes exempt from enhancement statute. See State v. Berrier, 110 Wn.App. 639, 650, 41 P.3d 1198 (2002). As a necessary element of the defendant's equal protection challenge of the statute, exempt crimes under the statute involved use of a firearm as underlying crime, whereas the defendant's underlying crime was assault. The enhancement under RCW 9.94A.533(3)(a) recognizes the additional threat that first degree assault with a firearm poses – consistent with the statute's purpose of punishing armed offenders more harshly.

3. No. The firearm sentence enhancement statute did not implicate any rights of defendant that the Privileges and Immunities Clause of the State constitution recognized as fundamental, and thus the defendant's privileges and immunities challenge to statute failed. The enhancement statute was not a regulation of right to bear arms, but rather a punishment for those who committed felonies while armed with a firearm.

**State v. C.A.E., 148 Wn. App. 720, 201 P.3d 361 (February 10, 2009)**

**FACTS:** Following a juvenile's plea of guilty to Second Degree Assault, the Kitsap County Superior Court ordered restitution for medical procedures performed and denied a claim for future medical costs. State appealed.

**ISSUE:** Can a court order restitution for future medical expenses not yet incurred?

**HOLDING:** Yes, if the offender is sentenced under the SRA. See State v. Goodrich 47 Wn.App. 114, 116-117, 733 P.2d 1000(1987), which held that under former RCW 9.94A.140(1) (recodified in 2001 as RCW 9.94A.750(4)), a trial court has the power to hold future restitution hearings to account for additional medical expenses incurred by a victim after the entry of the original restitution order. Under the Juvenile Justice Act (JJA), however, there is no statutory authorization for victims to request modification of a restitution order. The Court of Appeals concluded here by stating that "[W]e are mindful of the differing goals in the JJA and SRA, but we nonetheless call on the legislature to consider whether it should remedy these contradictory and potentially unfair results." State v. C.A.E., 148 Wn.App. at 728.

**State v. Pleasant, 148 Wn. App. 408, 200 P.3d 722 (January 22, 2009)**

**FACTS:** After the defendant's exceptional sentence for First Degree Manslaughter in the Franklin County Superior Court was affirmed, the defendant petitioned for review. The Washington Supreme Court granted the petition and remanded.

**ISSUE:** Is it harmless error when a trial court fails to submit an alleged aggravating factor to the jury and instead itself finds the existence of an aggravating factor?

**HOLDING:** No. The error when failing to submit an alleged aggravating factor to the jury, according to the preponderance of the evidence standard of proof, was not harmless error. See In re Personal Restraint of Hall, 163 Wn.2d 346, 351-352, 181 P.3d 799 (2008), which held that a sentencing court's failure to submit an aggravating factor to the jury is not harmless error when the exceptional sentencing proceedings in effect at the time of the defendant's offense directed that the trial court, not the jury, find the alleged aggravating circumstances. See also Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

**State v. Olson, 148 Wn. App. 238, 198 P.3d 1061 (January 13, 2009)**

**FACTS:** Following his conviction for unlawful imprisonment, the defendant filed a motion to terminate his legal financial obligations, asserting that the State had failed to extend restitution jurisdiction within the 10-year time limit. The Benton County Superior Court denied the motion. Defendant appealed.

**ISSUE:** Does the 10-year time limit for the State to move to extend restitution jurisdiction begin after release from the initial incarceration, or after release from subsequent periods of incarceration related to the original crime?

**HOLDING:** If the Legislature had intended that the restitution statute, RCW 9.94A.753(4), to restart the 10-year time period after subsequent periods of incarceration related to the original crime, the Legislature would have included similar language in the restitution statute – but did not do so. The 10-year time limit for the State to move to extend restitution jurisdiction over a defendant began at the time the defendant was released from total confinement for his original crime after his initial period of incarceration, not at the time of defendant's release from incarceration for probation and restitution violations related to the original crime. Therefore, the Court of Appeals here reversed the trial court and terminated the defendant's legal financial obligations.

**State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (January 13, 2009)**

**FACTS:** Following a jury trial, the defendants were convicted in the Clark County Superior Court of Possession of Marijuana With Intent To Deliver and Conspiracy To Commit Possession of Marijuana With Intent To Deliver. Defendants appealed.

**ISSUES:**

1. Is the defendants' claim that a community custody condition forbidding possession or use of drug paraphernalia is unconstitutionally vague ripe for review?

2. Is a condition forbidding a defendant from possessing drug paraphernalia, where the conviction was related to drugs or substance abuse, a "crime-related prohibition"?

3. Is a condition forbidding possession or use of cellular phones and electronic storage devices a "crime-related prohibition"?

**HOLDING:**

1. No. See State v. Motter, 139 Wn.App. 797, 804, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025, 185 P.3d 1194 (2008), in which the Court of Appeals held that challenges to community custody such as the defendants' here were not ripe for review. When appealing convictions for possession of marijuana with intent to deliver and conspiracy to commit possession of marijuana with intent to deliver, the defendants did not claim that condition implicated any First Amendment rights, and claim was premature until condition actually caused them harm based on specific facts alleged to violate condition. See City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990) and State v. Bahl, 164 Wn.2d 739, 757-759, 193 P.3d 678 (2008)

2. Yes. For purposes of the statute governing community custody conditions and authorizing sentencing courts to order defendants to comply with any crime-related prohibitions, forbidding a defendant from possessing drug paraphernalia, where the conviction was related to drugs or substance abuse, is a "crime-related prohibition" authorized under RCW 9.94A. 700(5)(e). See Motter, 139 Wn..App. at 804.

3. Yes. For purposes of the statute governing community custody conditions and authorizing sentencing courts to order defendants to comply with any crime-related prohibitions, condition forbidding possession or use of cellular phones and electronic storage devices was "crime-related prohibition" in prosecution for possession of marijuana with intent to deliver and conspiracy to commit possession of marijuana with intent to deliver. The defendants here were participants in sophisticated and extensive drug distribution ring, and police officers discovered a cache of prepaid cellular phones and walkie-talkies in the residence.

**State v. Hovig, 149 Wn. App. 1, 202 P.3d 318 (January 13, 2009)**

**FACTS:** Defendant was convicted in the Grays Harbor County Superior Court of Second-Degree Assault of a Child. Defendant appealed.

**ISSUE:** Was the trial court's imposition of an exceptional sentence for second-degree assault of a child an abuse of discretion?

**HOLDING:** No. RCW 9.94A.533 expressly permits the trial court to exceed the standard range based on the victim's vulnerability. The trial court's imposition of an exceptional sentence here for second-degree assault of a child was not an abuse of its discretion. The defendant was the father of victim, the victim was four months old at the time of the assault, the defendant was aware of the victim's vulnerability, and the defendant bit the victim's face. In light of the facts of the case, particularly the victim, who was a baby, and the victim's vulnerability, the Court of Appeals could not say that the 60 month exceptional sentence imposed in this case "shocks the conscience." See State v. Ritchie, 126 Wn.2d 388, 396, 894 P.2d 1308 (1994) review denied, 123 Wn.2d 1019, 875 P.2d 636.

**State v. Bainard, 148 Wn. App. 93, 199 P.3d 460 (January 6, 2009)**

**FACTS:** Defendant was convicted of two counts of Second-Degree Murder in the Chelan County Superior Court and was sentenced with firearm enhancements. Defendant appealed.

**ISSUES:**

1. If a jury found that a person was armed with a deadly weapon, could that person be sentenced to a five-year firearm enhancement instead of a two-year deadly weapon enhancement?

2. Can a person be charged with first degree arson if the victims burned in the fire were already dead?

**HOLDING:**

1. No. The information under which the defendant was ultimately tried charged with notice of the prosecutor's election to seek an enhancement under "the provisions of RCW 9.94A.533 and/or 9.94A.602" for being "armed with a deadly weapon." Thus, the defendant was not given notice of a firearm enhancement. See State v. Recuenco, 163 Wn.2d 428, 435-436, 180 P.3d 1276 (2008). Therefore, the Washington Court of Appeals concluded that the trial court erred in sentencing the defendant with an enhancement that was not charged by the State or found by the jury, and reversed the enhancement and remanded for correction of the sentence.

2. No. A "person is guilty of arson in the first degree if he ... [c]auses a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime." RCW 9A.48.020(1)(c) refers to a living person, rather than human remains. Therefore, the defendant could not have committed the crime of first degree arson under RCW 9A.48.020(1)(c) by causing a fire in a building "in which there shall be at the time a human being who is not a participant in the crime" when the building contained dead bodies. The Court of Appeals thus affirmed the trial court's arrest of judgment on the first degree arson charge.

**State v. Johnson, 148 Wn. App. 33, 197 P.3d 1221 (December 29, 2008)**

**FACTS:** Defendant petitioned for a certificate of discharge, requesting that the court date the certificate as the date he completed the requirements of his sentence, based on RCW 9.94A.637(1)(a). The Snohomish County Superior Court issued a certificate of discharge effective, however, as of the date of the petition. Defendant appealed.

**ISSUES:**

1. What is the effective date of the certificate of discharge?

2. Was remand necessary for a factual determination of the date the court received notice of the defendant's compliance with sentence?

**HOLDING:**

1. RCW 9.94A.637(1)(a) directs the court to issue a certificate of discharge when it receives notice that the offender has completed the terms of his or her sentence. The effective date of the certificate of discharge must be the date the court received notice that the terms of the sentence were satisfied.

2. Yes. Remand was necessary for a factual determination of the date the sentencing court received notice of the defendant's compliance with his sentence and for entry of a certificate of discharge effective as of that date, as the record did not definitively establish when the trial court received notice of the defendant's compliance with his

sentence. The Court of Appeals remanded for a factual determination of the date the sentencing court received notice of the defendant's compliance with the sentence and for entry of a certificate of discharge effective as of that date.

**State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (December 29, 2008)**

**FACTS:** Defendant was convicted in the King County Superior Court of Failure To Register as a sex offender, and sentenced to a standard range sentence which exceeded the statutory maximum, but which included a notation requiring the DOC to calculate the defendant's sentence to ensure that it did not exceed the maximum. Defendant appealed.

**ISSUE:** Was defendant's sentence indeterminate in violation of the SRA?

**HOLDING:** Yes. Under the SRA, a court may not impose a sentence in which the total time of confinement and supervision served exceeds the statutory maximum**.** See RCW 9.94A. 505(5). When the applicable standard range exceeds the statutory maximum, the sentence must comply with the maximum and may not exceed that maximum. Id. The Court of Appeals held here that a sentence is indeterminate when it puts the burden on DOC rather than the sentencing court to ensure the inmate does not serve more than the statutory maximum. Here, the defendant's standard range sentence for failure to register as a sex offender, exceeding the statutory maximum but requiring the DOC to calculate defendant's time served to ensure it did not exceed the statutory maximum, was indeterminate, in violation of the SRA.

**State v. Draxinger, 148 Wn. App. 533, 200 P.3d 251 (December 23, 2008)**

**FACTS:** Defendant was convicted in the Mason County Superior Court of felony driving while under the influence (DUI), and defendant appealed. The defendant had four prior DUI-related offenses within 10 years. At sentencing, the State asserted that his offender score was six, based on six prior DUI convictions that occurred between 1998 and 2005.

**ISSUE:** Because the defendant's four prior convictions in 10 years were elements of the crime, could they be counted in his offender score?

**HOLDING:** Yes. There is no per se prohibition against imposing additional punishment for behavior that constitutes an element of the crime being sentenced. See State v Moreno, 132 Wn.App. 663, 671, 132 P.3d 1137 (2006)(Legislature may impose additional punishment for a crime used to elevate another crime to a felony), and State v. Caldwell, 47 Wn.App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987)( deadly weapon enhancement could be imposed on conviction of first degree burglary even though possession of a deadly weapon was an element of that crime).

Additionally, the defendant's sentence of 47.5 months confinement for felony DUI, based on an offender score of six for six prior DUI convictions, was not arbitrary or grossly disproportionate, as it was based on statutory requirements and was justified by they defendant's repeated criminal misconduct. See Wahleithner v. Thompson, 134 Wn.App. 931, 940, 143 P.3d 321 (2006) (consecutive misdemeanor sentences totaling 144 months not grossly disproportionate).

**State v. Larkins, 147 Wn. App. 858, 199 P.3d 441 (December 22, 2008)**

**FACTS:** Defendant was convicted pursuant to a plea of guilty in the King County Superior Court to a Felony Violation of a No-Contact Order. Defendant appealed his sentence.

**ISSUE:** Did the defendant's Ohio burglary conviction equate to a conviction for a crime equivalent under Washington law, for purposes of calculating his offender score under the SRA?

**HOLDING:** The goal of the section of the SRA providing that out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law is to ensure that defendants with prior convictions are treated similarly, regardless of where those convictions occurred. A two-part test exists for determining whether an out-of-state conviction is comparable to a Washington crime for purposes of calculating offender score under the SRA. First, a sentencing court compares the legal elements of the out-of-state crime with those of the Washington crime, and if the crimes are so comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. See State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998), and In re Pers. Restraint of Lavery, 154 Wn.2d 249, 254-55, 111 P.3d 837 (2005). Second, if the elements of the out-of-state crime are different, then the court must examine the undisputed facts from the record of the foreign conviction to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington crime. See Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. Here, the defendant's Ohio burglary conviction did not equate to a conviction for a crime equivalent under Washington law for purposes of calculating the defendant's offender score under the SRA. The Washington crime of burglary required intent to commit a crime against a person or property therein, but defendant's Ohio burglary conviction rested on his intent to commit a misdemeanor, and misdemeanor category included crimes other than those against a person or property. The Court of Appeals reversed and remanded for resentencing.

**State v. Priest, 147 Wn. App. 662, 196 P.3d 763 (December 4, 2008)**

**FACTS:** Defendant was convicted in the Okanogan County Superior Court of First-Degree Theft and Second-Degree Theft. Defendant appealed.

**ISSUE:** Did the State establish that the defendant's prior conviction for bail jumping was a felony rather than a misdemeanor, for purposes of calculating defendant's offender score at sentencing?

**HOLDING:** Yes. The SRA only applies to the sentencing of felony offenders. See State v. Bowen, 51 Wn.App. 42, 46, 751 P.2d 1226 (1988)(citing RCW 9.94A.010). Therefore, because the bail jumping sentence was imposed pursuant to the SRA, the State proved this conviction was a felony by a preponderance of the evidence.

**State v. Werneth, 147 Wn. App. 549, 197 P.3d 1195 (November 25, 2008)**

**FACTS:** Defendant was convicted in the Spokane County Superior Court of Failing to Register as a convicted sex offender. Former RCW 9A.44.130(2006) required the State to prove, among other elements, that the defendant's Georgia conviction for child molestation would be a felony sex offense in Washington. See former RCW 9A.44.130(11)(a) (2006). Defendant appealed.

**ISSUE:** Is the defendant's child molestation conviction in Georgia comparable to the Washington felony offense of attempted second-degree child molestation?

**HOLDING:** No. The test is whether the State had produced substantial evidence to support each element of the crime charged. See State v. Huff, 64 Wn.App. 641, 655, 826 P.2d 698 (1992). The

defendant's child molestation conviction in Georgia was not comparable to the Washington State felony offense of attempted second-degree child molestation, and thus, defendant was not required, when changing residences in Washington State after having registered as a sex offender in Washington State, to change his registered address. The Georgia statute criminalizing child molestation did not include two essential elements required by the Washington State crime of attempted second-degree child molestation: (1) that the victim was not married to the perpetrator, and (2) that the perpetrator was at least 36 months older than the victim. The State's evidence did not show that the Georgia court was aware of the defendant's relationship to the victim (i.e., whether or not he was married to the victim). Thus, because the State failed to establish an essential element of the crime of failure to register as a sex offender, the Court reversed the defendant's conviction.

**State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (November 25, 2008)**

**FACTS:** Defendant was convicted after a bench trial in the Spokane County Superior Court of Third-Degree Assault and Attempting To Elude a police vehicle. Defendant appealed.

**ISSUES:**

1. Do the defendant's prior juvenile adjudications for conduct that would constitute third-degree assault and second-degree attempted robbery if committed by an adult share the same criminal intent, as element for counting them as one crime when determining defendant's offender score?

2. Do the defendant's prior convictions for second-degree robbery and second-degree assault share the same criminal intent, as element for counting them as one crime when determining defendant's offender score?

**HOLDING:**

1. No. The Washington Supreme Court first announced a test for "same criminal conduct" in State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The Legislature codified this test in former RCW 9.94A.400(1)(a) (1987). That standard remains despite the codification of the "same criminal conduct" test in RCW 9.94A.589(1)(a). Here, the defendant's prior juvenile adjudications for attempted second degree robbery and third-degree assault and second-degree attempted robbery are not the same; second degree robbery does not have an intent requirement. See RCW 9A.56.210. And the defendant did not have to act with criminal negligence to be guilty of third degree assault. See 9A.36.031(1)(f).

2. No. Defendant's prior convictions for second-degree robbery and second-degree assault also do not share the same criminal intent. The defendant and his male gang members assaulted the victim in a convenience store parking lot for disrespecting one of their members, and the defendant fled after the gang beat the victim unconscious. Viewed objectively, the purpose of the assault was not to rob the victim, while the purpose of a female gang member in robbing the victim was to deprive the victim of his money. The Court of Appeals therefore affirmed the trial court's decision, and found the trial court had correctly calculated the offender score for each of the defendant's current convictions.

**State v. Williams, 147 Wn. App. 479, 195 P.3d 578 (November 13, 2008)**

**FACTS:** The defendant was convicted by jury in the Spokane County Superior Court of Conspiracy To Commit First-Degree Robbery, Attempted First-Degree Robbery, and Felony Murder. Defendant appealed. The Washington Court of Appeals affirmed in part, reversed in part, and remanded. The Washington Supreme Court granted the State's petition for review and remanded to the Court of Appeals for reconsideration.

**ISSUE:** Does the doctrine of harmless error apply to the trial court's error of violating Blakely by imposing a firearm sentencing enhancement when jury's special verdict warranted only a deadly weapon enhancement?

**HOLDING:** No. A sentencing court may impose a firearm sentence only when the information alleges the firearm enhancement, the State produces evidence supporting the firearm enhancement, and the fact-finder returns a firearm enhancement special verdict. See State v. Recuenco, 163 Wn.2d 428, 434, 441, 180 P.3d 1276 (2008) (Recuenco II). Here, the State properly charged the firearm enhancements, but the jury was only instructed on deadly weapon enhancements. According to Recuenco II, the finder of fact here did not make the factual determinations necessary to impose firearm enhancements. See Recuenco, 163 Wn.2d at 442. The Court of Appeals remanded for resentencing using deadly weapon sentence enhancements (RCW 9.94A.533(4).

**State v. Amos, 147 Wn. App. 217, 195 P.3d 564 (October 21, 2008)**

**FACTS:** Defendant entered a guilty plea in the Lewis County Superior Court to six offenses in connection with a home invasion robbery and received a 120-month exceptional sentence. Defendant filed a personal restraint petition challenging computation of his offender score, and the Washington Court of Appeals remanded for resentencing. On remand, the Superior Court again imposed a 120-month sentence. The defendant filed a direct appeal and again filed a personal restraint petition.

**ISSUES:**

1. Was the statute defining prior conviction, former RCW 9.94A.360(1), void for vagueness as applied to the defendant?

2. Was the defendant prejudiced at resentencing by inclusion, in calculating his offender score, of conviction for assault that occurred while he was serving his initial sentence?

3. Did the re-tallying of the defendant's criminal history during resentencing violate the plea agreement?

**HOLDING:**

1. No. The test is whether men of reasonable understanding are required to guess at the meaning of the statute. See In re Pers. Restraint of Myers, 105 Wn.2d 257, 267, 714 P.2d 303 (1986) (citing City of Seattle v. Rice, 93 Wn.2d 728, 731, 612 P.2d 792 (1980). The statute providing that a prior conviction was a conviction that existed before the date of sentencing for the offense for which the offender score was being computed was not void for vagueness as applied to the defendant, whose conviction for an assault that occurred while he was serving his initial sentence was included in computing his offender score for purposes of resentencing. The plain meaning of former RCW 9.94A.360(1) (now codified as RCW 9.94A.525(1)) was that the sentencing court was required to compute a defendant's criminal history at that moment when the defendant is being sentenced.

2. No. The statute is clear and case law developed well before the defendant committed his crimes explained that the term "date of sentencing" in former RCW 9.94A.360(1)

allowed sentencing courts to include convictions committed after the crime for which he is being sentenced. See State v. Shilling, 77 Wn.App. 166, 173-74, 889 P.2d 948, review denied, 127 Wn.2d 1006, 898 P.2d 308 (1995).

3. No. Re-tallying of the defendant's criminal history during resentencing did not violate plea agreement, as agreement did not contain a clause that recited defendant's criminal history or offender score. Also, the plea's plain terms did not prohibit the State from arguing that the defendant's offender score changed between sentencing and resentencing. See State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998) (explaining that the State must adhere to the terms of the plea agreement). Finally, it was the proper role of the sentencing court, not the prosecutor, to calculate an offender score. Former RCW 9.94A.360(1).

**State v. Faagata, 147 Wn. App. 236, 193 P.3d 1132 (October 21, 2008)**

**FACTS:** Defendant was convicted following jury trial of First-Degree Murder and Second-Degree Felony Murder in the Pierce County Superior Court, was found by the jury to have manifested deliberate cruelty and to have committed offenses while armed, and received a 450-month exceptional sentence for First-Degree Murder. Defendant appealed.

**ISSUE:** Was the jury's finding that the defendant's conduct manifested extreme cruelty supported by some evidence?

**HOLDING:** Yes. The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. See RCW 9.94A.535. Deliberate cruelty during the commission of the offense is included in the list of factors that may support an exceptional sentence. RCW 9.94A.535(3)(a). The jury's finding here that the defendant's conduct manifested extreme cruelty, as a basis for the 450-month exceptional sentence for first degree murder, was supported by evidence that the defendant shot the victim twice in the back, waited a few seconds, and then shot him twice in the buttocks in close proximity to his genitals, and then waited a few more seconds before shooting him directly in the head, and by eyewitness testimony that the victim was conscious and screaming in pain after being shot twice in the back, and by other eyewitness testimony that the defendant actually repositioned himself before shooting the victim in the buttocks.

**State v. Applegate, 147 Wn. App. 166, 194 P.3d 1000 (October 20, 2008)**

**FACTS:** Defendant was convicted in the Whatcom County Superior Court of Rape of a Child. Defendant appealed.

**ISSUES:**

1. Is the section of the SRA allowing courts to empanel juries to decide aggravating factors either retroactive or retrospective?

2. Did the statute violate prohibition on ex post facto laws?

3. Should the trial court error in submitting aggravating factors to the jury without having the statutory authority to do so be held harmless?

**HOLDING:**

1. The Court of Appeals held here that "…like the 2005 Blakely fix, the 2007 amendment is procedural in nature, does not alter the legal consequences of [the defendant's] conduct, and is triggered not by the criminal act itself but by the sentencing hearing on remand. Accordingly, like the Blakely fix, it is neither retroactive nor retrospective." See State v. Applegate, 147 Wn. App. at 173, citing State v. Pillatos, 159 Wn.2d, 459, 470-71, 150 P.3d 1130 (2007). The section of the SRA allowing courts to empanel juries to decide aggravating factors in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing, could be applied on remand for resentencing to the defendant who was convicted of rape of a child before enactment of statute, since the statute, former RCW 9.94A.537(2), was neither retroactive nor retrospective, but was procedural in nature. The Court of Appeals held that the 2007 amendment is remedial because it relates only to procedure and does not affect substantive or vested rights. Ultimately, the Court of Appeals remanded for resentencing, as the trial court lacked authority to submit the aggravating factors for jury determination.

2 No. RCW 9.94A.537, which allowed courts to empanel juries to decide aggravating factors in all cases that come before the courts for trial or sentencing regardless of the date of the original trial or sentencing, did not violate prohibition on ex post facto laws, and thus could be applied on remand for resentencing to defendant who was convicted of rape of a child before enactment of statute. At the time of the defendant's offense, the SRA authorized exceptional sentences, and thus provided sufficient notice of the possibility of such a sentence in the defendant's case.

3 No. The trial court's error in child rape case in submitting aggravating factors to jury without having statutory authority to do so could not be held harmless, and thus remand for resentencing was required, even though the statutory authority to submit aggravating factors to jury had since been created.

**State v. Gamble, 146 Wn. App. 813, 192 P.3d 399 (September 22, 2008)**

**FACTS:** The State filed a petition that alleged the defendant had violated her community custody conditions of her felony sentence. The King County Superior Court determined that the defendant had violated the terms of her sentence and imposed 120 days of confinement. Defendant appealed.

**ISSUE:** Does the trial court have the authority to impose sanctions for violating community custody conditions?

**HOLDING:** Yes. The trial court had the authority to impose sanctions on defendant for violating her community custody conditions. The relevant statute, RCW 9.94A.634(1), provided that the court could modify its judgment and order of sentence and impose further punishment if an offender violated any condition or requirement of a sentence. The Court of Appeals found that this statute was unambiguous, and that the plain language of RCW 9.94A.634(1) demonstrates that the Superior Courts retain authority – and thus jurisdiction –to enforce the conditions of the sentences that they impose. The Court of Appeals thus affirmed the trial court.

**State v. Kolesnik, 146 Wn. App. 790, 192 P.3d 937 (September 16, 2008)**

**FACTS:** Defendant was convicted by jury trial in the Clark County Superior Court of First-Degree Assault, for which he received an exceptional sentence of 240 months' confinement. Defendant appealed.

**ISSUES:**

1. Does a jury's guilty finding beyond a reasonable doubt that the defendant's offense was committed against a law enforcement officer and the defendant knew the victim was a law enforcement officer provide a constitutionally valid basis to support an exceptional sentence?

2. Does applying the law enforcement enhancement statute to the defendant's conviction justify the imposition of an exceptional sentence?

3. Is an exceptional sentence of 240 months imposed on defendant for his conviction for first degree assault of a law enforcement officer a clearly excessive sentence?

4. Does the sentencing court have the statutory authority to impose as a "crime-related prohibition" on a defendant to notify his community corrections officer on the next working day when a controlled substance had been medically prescribed?

5. Does the sentencing court have the statutory authority to impose a community control condition prohibiting defendant from possessing or using any paraphernalia that could facilitate ingestion, process, or the sale of a controlled substance?

**HOLDING:**

1. Yes. Although Blakely held that a jury, not a judge, must find any aggravating fact that increases the penalty of a crime beyond a reasonable doubt, Blakely did not alter the law governing review of the length of an exceptional sentence based on properly adjudicated factors. See Blakely, 542 U.S. at 308-309, 124 S.Ct. 2531. Here, the jury found beyond a reasonable doubt that the defendant's offense was committed against a law enforcement officer who was performing his duties at the time of the offense and that the defendant knew that the victim was a law enforcement officer. The jury's finding provided a constitutionally valid basis to support an exceptional sentence above the standard range. See former RCW 9.94A.535(3)(v).

2. Yes. The law enforcement enhancement statute, former RCW 9.94A.535(3)(v), when applied to the defendant's conviction for first degree assault, justified imposition of an exceptional sentence, as the victim's status as a law enforcement officer was not a necessary element of first degree assault, the jury found that the victim was a law enforcement officer engaged in his official duties at time of offense, and that the defendant knew the victim was a law enforcement officer when he assaulted him.

3. No. Whether an exceptional sentence is clearly excessive is reviewed for an abuse of discretion. See State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The sentencing court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the jury's aggravating factor finding. See State v. Oxborrow, 106 Wn.2d 525, 530, 723 P.2d 1123, cert. denied, 493 U.S. 942, 110 S.Ct. 344, 107 L.Ed.2d 332 (1989). A "clearly excessive" sentence is one that is clearly unreasonable, "i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (quoting Oxborrow, 106 Wn.2d at 531.) Here, the defendant wielded a deadly weapon and knowingly and violently assaulted a police officer engaged in official police duties, and the officer's injuries were life threatening and resulted in permanent injury. Therefore, the sentence of 240 months, approximately twice the standard range including the deadly weapon enhancement, was neither unreasonable nor shocking.

4. Yes. The sentencing court had the statutory authority under former RCW 9.94A.715(2)(a), to impose community control condition on defendant convicted for first degree assault, requiring him to notify his community corrections officer on the next working day when a controlled substance had been medically prescribed, as this crime-related prohibition related to the defendant's risk of reoffending and community safety. See also State v. Motter, 139 Wn.App. 797, 805, 162 P.3d 1190 (2007). First, the defendant's commission of a crime was facilitated by a combination of his substance abuse and antisocial personality disorder. Second, the imposition of this condition protects the defendant from possible punishment for violating his community custody conditions for the lawful use of prescribed medications, based on his reporting his prescription drug use

5. Yes. The sentencing court had the statutory authority under RCW 9.94A.700(5)(e) to impose the community control condition on a defendant convicted for first degree assault by prohibiting him from possessing or using any paraphernalia that could facilitate ingestion, process, or sale of a controlled substance, as this condition reasonably related to circumstances of the crime, i.e., that the defendant was under the influence of methamphetamine at time he assaulted the victim. But a causal link is not necessary as long as the condition relates to the circumstances of the crime. See State v. Llamas-Villa, 67 Wn.App. 448, 456, 836 P.2d 239 (1992).

**State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (September 15, 2008)**

**FACTS:** The defendant was convicted in the Snohomish County Superior Court of Failure To Register as a sex offender, for which he was sentenced to exceptional sentence downward of 36 months' confinement and 24 months of community custody. The State appealed.

**ISSUE:** Were there substantial and compelling reasons to impose an exceptional sentence downward?

**HOLDING:** Yes. The legislative intent of the SRA's exceptional sentence provision was to authorize courts to tailor the sentence, as to both the length and the type of punishment imposed, to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid. See In re Postesentence Petition of Smith, 139 Wn.App. 600, 603, 161 P.3d 483 (2007) (citing State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987) overruled on other grounds by State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989). In reviewing an exceptional sentence, the reviewing court uses a three-pronged test, by considering the following: (1) are the reasons supported by the record under the clearly erroneous standard of review; (2) do those reasons justify a departure from the standard range as a matter of law; and (3) was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard of review? See RCW 9.94A.585(4); see also State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991). The sentencing court may consider factors other than those enumerated in the SRA so long as they are consistent with the purposes of the SRA and are supported by the evidence. RCW 9.94A.535(1). In this case, the trial court appropriately recognized substantial and compelling reasons to impose an exceptional sentence downward for conviction by guilty plea to failure to register as a sex offender, of 36 months confinement and 24 months of community custody. The bottom of the standard range was 43 months' confinement and 36 months' community custody, which together exceeded the 60-month statutory maximum by 19 months, and thus, to fit within the statutory maximum, the trial court reduced the defendant's term of confinement to 36 months and term of community custody to 24 months. Because the need to limit the defendant's total sentence to the maximum term for the crime was a substantial and compelling reason for the trial court to impose an exceptional sentence downward, the Court of Appeals held that the trial court did not abuse its discretion in apportioning the confinement and community custody terms as it did.

**In re Erickson, 146 Wn. App. 576,191 P.3d 917 (September 2, 2008)**

**FACTS:** Petitioner filed a personal restraint petition which contended that the Department of Corrections (DOC) should credit him for all good time to which he was legally entitled.

**ISSUE:** Did the DOC give the Petitioner the maximum amount of good time credit to which he was entitled?

**HOLDING:** Yes. The institution in which an offender is actually incarcerated retains complete control over the good time credits granted to offenders within its jurisdiction. See In re Pers. Restraint of Williams, 121 Wn.2d 655, 665, 853 P.2d 444 (1993). Additionally, the DOC, not the Superior Court, has statutory authority to grant good time credit to an offender. In Re Pers. Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990); State v. Pepper, 54 Wn.App. 583, 584-85, 774 P.2d 557 (1989). While early release credits must be earned, rather than credited automatically or in advance, they must be equally allocated and not arbitrarily deprived. In re Pers. Restraint of Schaupp, 66 Wn.App. 45, 51, 831 P.2d 156 (1992). The DOC, in calculating a prisoner's good time credits, is entitled to give presumptive legal effect to a county jail's certification of the amount of time spent in custody at the jail and the amount of earned release time, if the certification does not contain apparent or manifest errors of law. In re Williams, 121 Wn.2d at 664, 666. Under the "apparent or manifest error of law" standard, the DOC, in calculating a prisoners' good time credit, is not obligated to review the accuracy of the certifications provided by the county jails, nor is it required to review and approve the individual good-time policies adopted by the county jails; if a given certification does not contain apparent or manifest errors of law, the DOC is entitled to give that certification legal effect. In re Williams, 121 Wn.2d at 666. In this case, the DOC investigated the inconsistency between the certification and the judgment and sentence, the latter giving the petitioner 368 days and, ultimately gave the petitioner the maximum amount of good time credit to which he was entitled, based on the certification from the county jail that the petitioner had served 98 days in jail and had earned 49 good time days.

**State v. Mann, 146 Wn. App. 349, 189 P.3d 843 (August 7, 2008)**

**FACTS:** Defendant was convicted after a jury trial in the Spokane County Superior Court of one count of First-Degree Child Molestation and three counts of First-Degree Child Rape, and he appealed. The Washington Court of Appeals affirmed, but remanded for resentencing. On remand, the Spokane County Superior Court rejected the State's request to impanel a jury to determine whether an exceptional sentence should be imposed, and sentenced the defendant to concurrent high-end standard range sentences on all counts. The State appealed.

**ISSUES:**

1. Does the 2007 amendment to former RCW 9.94A.537 (the "Blakely–fix"), the statute authorizing trial courts to impanel juries to consider aggravating factors supporting an exceptional sentence, regardless of the date of the original trial or sentencing, violate separation of powers principles?

2. Does the amendment apply retroactively?

**HOLDING:**

1. No. Legislative action on the sentencing statute authorizing trial courts to impanel juries to consider aggravating factors supporting an exceptional sentence, regardless of the date of the original trial or sentencing, was an amendment to prior statute, not a clarification, and thus did not violate separation of powers principles, even though the legislative

action contravened prior interpretation of statute by the Washington Supreme Court. See Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 144, 744 P.2d 1032 (1987). In this case, the 2007 amendment was intended to amend the Blakely-fix statute, former RCW 9.94A.537, which was clear and unambiguous. See also State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).

2. Yes. The amendment to former RCW 9.94A.537 applied retroactively. Barring a constitutional limitation, the courts will apply a statutory amendment retroactively when it is (1) intended by the Legislature to apply retroactively, (2) curative in that it clarifies or technically corrects ambiguous statutory language, or (3) remedial in nature. See Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002). Washington courts disfavor retroactive application of a statute, absent legislative direction to the contrary. See State v. Ramirez, 140 Wn. App. 278, 287, 165 P.3d 61 (2007), review denied, 163 Wn.2d 1036, 187 P.3d 269 (2008). Here, the Washington Legislature clearly intended that the 2007 amendment operate retroactively. Moreover, the 2007 amendment, by its terms, applies to exceptional sentence cases where resentencing is required. See Laws of 2007, ch. 205, § 2. Thus, the very language of the amendment supported its retroactive application.

**State v. Hale, 146 Wn. App. 299, 189 P.3d 829 (August 5, 2008)**

**FACTS:** Following jury trial, the defendant was convicted of Second-Degree Assault and Attempting To Elude a police vehicle in the Pacific County Superior Court. Defendant appealed.

**ISSUES:**

1. Was the jury's finding that the defendant assaulted a police officer, so as to support enhancement of the defendant's sentence, clearly erroneous?

2. Were the trial court's reasons for imposing an exceptional sentence for assault of a police officer substantial and compelling?

3. Did the trial court abuse its discretion when imposing an exceptional sentence?

**HOLDING:**

1. No. The jury's finding that the defendant assaulted the police officer, so as to support enhancement of defendant's sentence, was not clearly erroneous. The relevant statute, former RCW 9.94A.535(3)(v), provided statutorily enhanced penalties for acts against police officers as a matter of public policy. Here, the officer was performing his official duties, was in a vehicle with flashing lights, was attempting to stop the defendant, and was forced to take evasive action to avoid being hit by the defendant's speeding truck.

2. Yes. The Court of Appeals reviews de novo whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling. See State v. Fowler, 145 Wn.2d 400, 405, 38 P.3d 335 (2002). Here, the trial court's reasons for imposing an exceptional sentence for assault of a police officer were substantial and compelling. The trial court carefully worded its findings to reiterate the jury's special verdict and avoided entering any additional findings that would have violated defendant's right to have a jury find beyond a reasonable doubt any factor used to increase his sentence. The Court of Appeals also noted that even before the Legislature added this enumerated aggravating circumstance, the Court of Appeals had upheld the trial court's imposition of an exceptional sentence when the defendant assaulted a police officer who was performing his or her official duties. See State v. Anderson, 72 Wn.App. 453, 465-66, 864 P.2d 1001 (1994); State v. Kidd, 57 Wn.App. 95, 104, 786 P.2d 847 (1990).

3. No. The Court of Appeals examines whether the trial court abused its discretion by imposing a sentence that is clearly excessive. See Fowler, 145 Wn.2d at 406, 38 P.3d 335. The standard range for second degree assault was 63 to 84 months. Because second degree assault is a Class B felony, the maximum sentence was 120 months. Here, the trial court imposed an exceptional sentence of 100 months, roughly the mid-range between the high end of the standard range and the maximum sentence. The Court of Appeals found that the trial court did not abuse its discretion and that the sentence was not clearly excessive.

**State v. Nason, 146 Wn. App. 744, 192 P.3d 386 (July 31, 2008)**

**FACTS:** The defendant appealed the order of the Spokane County Superior Court modifying his sentence for a burglary conviction as a sanction for the defendant's failure to pay fines and costs.

**ISSUES:**

1. Does a trial court have authority under the SRA to modify the defendant's sentencing conditions?

2. Is the defendant entitled to credit against his financial obligation for the jail time served?

**HOLDING:**

1. Yes. The SRA permits modifications of sentences only in specific, carefully delineated circumstances. See State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989). The authority for a court to increase the duration of an offender's commitment is provided by RCW 9.94A.634(1). When an offender violates any requirement of a sentence, the trial court retains broad discretion to modify the sentence or impose additional punishment. See State v. Woodward, 116 Wn. App. 697, 702-03, 67 P.3d 530 (2003). Here, the trial court had authority to modify the defendant's sentence, did not exceed that authority, and did not impose a suspended sentence. See RCW 9.94A.634 and State v. Shove, 113 Wn.2d at 86, 776 P.2d 132.

2. No. The defendant was not entitled to credit against his financial obligation for jail time served in order imposing sanctions for defendant's failure to pay legal financial obligations arising from burglary conviction, as the statute governing civil contempt, RCW 10.01.180, which provided for jail time credit, did not relate to the same subject matter, and is applied for fundamentally different purposes than RCW 9.94A.634, which allowed for sentence modification.

**Gutierrez v. DOC, 146 Wn. App. 151, 188 P.3d 546 (July 24, 2008)**

**FACTS:** Defendant was convicted in the Walla Walla County Superior Court of Delivery of a Controlled Substance with an accompanying enhancement that the offense occurred within 1,000 feet of a school bus route, and sentenced under the Drug Offender Sentencing Alternative (DOSA) statute. The Department of Corrections (DOC) filed a post-sentence petition challenging the computation of the defendant's sentence.

**ISSUE:** Can the suspended portion of a DOSA sentence include any time that arises from a sentencing enhancement?

**HOLDING:** Yes. The DOSA statute requires a trial court to impose a sentence at the middle of the sentencing range and divide that time evenly between incarceration and community custody.

See RCW 9.94A.660(4)(5); see also RCW 9.94A.533.(6). The structure of the SRA is that a sentencing court calculates a standard range sentence by applying the defendant's offender score with the seriousness level of a crime. The court then adds any enhancements to a given base sentence. See In re Post Sentencing Review of Charles, 135 Wn.2d 239, 254, 955 P.2d 798 (1998). A sentence range increased by an enhancement is still a standard range sentence. In this case, the defendant was convicted of delivery of a controlled substance and the accompanying enhancement that the offense occurred within 1,000 feet of a school bus route. Under the DOSA statute, the sentence was correctly computed by adding the 24-month enhancement to a sentence range that would otherwise have been 12 to 20 months, resulting in a range of 36 to 44 months, and then imposing a midpoint sentence of 40 months, suspending half of that time, effectively requiring defendant to serve 20 months in prison and 20 months on community custody. The Court of Appeals held that the trial court did not err when it calculated the DOSA sentence in the defendant's case, as his sentence was not to be computed by adding the full 24-month enhancement to the midpoint of the base sentence. Therefore, the Court of Appeals denied the DOC's petition and request that the entire 24 month enhancement be served in confinement.

**State v. Scott, 145 Wn. App. 884, 189 P.3d 209 (July 21, 2008)**

**FACTS:** Defendant, originally charged with Murder in the Second Degree committed by the alternative means of intentional murder or felony murder predicated on assault in the second degree, was convicted of Second Degree Murder, and he appealed. The Washington Court of Appeals vacated the conviction on grounds that the assault could not serve as a predicate crime to convict for felony murder in the second degree. On remand, the defendant, charged with manslaughter as a lesser included offense of intentional murder, was convicted in the King County Superior Court of First-Degree Manslaughter. Defendant then appealed.

**ISSUE:** Did jeopardy terminate on the alternative means of intentional murder in the second degree under RCW 9.94A.050(1)(a)?

**HOLDING:** No. By its own terms, the Double Jeopardy Clause only applies if "there has been some event, such as an acquittal, which terminates the original jeopardy." See Richardson v. United States, 468 U.S. 317, 325, 104 S.Ct. 308, 82 L.Ed.2d 242 (1984); State v. Corrado, 81 Wn.App. 640, 646-47, 915 P.2d 1121 (1996). While conviction of a charged crime terminates jeopardy, if a defendant successfully appeals the conviction on any grounds other than insufficiency of the evidence, jeopardy continues and double jeopardy does not bar retrial. See Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); North Carolina v. Pearce, 395 U.S. 711, 720, 89 S.Ct. 2072, 23 L.Ed.2d 656 (9269); State v. Ervin, 158 Wn.2d 746, 757-58, 147 P.3d 567 (2006). Here, there was no question that the jury unanimously found the defendant guilty of the crime of second degree murder. While the jury's answer to the special interrogatory provided additional information about whether the jury agreed on an alternative means, it does not affect the jury's finding of guilty or result in an implied acquittal. State v. Scott, 145 Wn.App. at 898, 189 P.3d at 216. The defendant's conviction here was reversed on legal grounds. Because double jeopardy does not bar the State from retrying the defendant on murder in the second degree predicated on intentional murder, the State could properly retry him on the lesser included charge of manslaughter in the first degree. See State v. Berlin, 133 Wn.2d 541, 550-51, 947 P.2d 700 (1997) (first and second degree manslaughter are lesser included offenses of intentional murder in the second degree). The Court of Appeals thus affirmed the defendant's conviction of manslaughter in the first degree.

**State v. Harkness, 145 Wn. App. 678, 186 P.3d 1182 (July 7, 2008)**

**FACTS:** The defendant was convicted of Delivery and Possession of Cocaine, and requested modification of sentence to one under the Drug Offender Sentencing Alternative (DOSA). The Whatcom County Superior Court granted the defendant's request and modified the sentence. The State then appealed.

**ISSUES:**

1. Is a written evaluation to determine whether the defendant was amenable to drug treatment a mandatory prerequisite for a sentence under DOSA?

2. Did the trial court lack jurisdiction to modify the defendant's sentence post-judgment to a sentence under DOSA?

**HOLDING:**

1. Yes. Here, the trial court failed to comply with the statutory requirements for imposing a DOSA, because RCW 9.94A.660(2)(3) states the court can only waive the standard sentence and grant a DOSA after receiving an examination report including information about the offender's issues and a proposed treatment plan. To regard the evaluation as optional because the court "may" order an examination fails to give effect to the language of RCW 9.94A.660(4). In order to harmonize the various portions of the DOSA statute, the court may only impose a DOSA after considering the written evaluation and determining the offender's eligibility and amenability. Here, the trial court never examined whether the defendant was amenable to treatment.

2. Yes. After final judgment and sentencing, the trial court loses jurisdiction to the Department of Corrections. "Upon the entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the [prison]." January v. Porter, 75 Wn.2d 768, 773, 453, P.2d 876, (1969); see also State v. Shove, 113 Wn.2d 83, 86, 89, 776 P.2d 132 (1989) (SRA sentences may be modified only if they meet the statutory requirements relating directly to the modification of sentences). By converting a standard sentence to a DOSA, the trial court reduced the defendant's required prison time. In this case, State v. Shove controls, thus the Court of Appeals vacated the DOSA and reinstated the defendant's original judgment and sentence.

**State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (July 1, 2008)**

**FACTS:** Defendant was convicted in the Thurston County Superior Court of a Protection Order violation and a sex offender registration violation. Defendant appealed.

**ISSUES:**

1. Does a trial court imposing community custody conditions have the authority to order polygraph testing?

2. Is a trial court authorized to order random drug testing as a community custody condition?

**HOLDING:**

1. Yes. The Court of Appeals reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition may be manifestly unreasonable if the trial court has no

authority to impose it. State v. Jones, 118 Wn. App. 199, 207-8, 76 P.3d 258 (2003). As the Court of Appeals noted, State v. Riles stated that "[T]rial courts have authority to require polygraph testing under RCW 9.94A.120(9) [recodified in July 2001 as RCW 9.94A.505(8)] to monitor compliance with other conditions of community placement." State v. Riles, 135 Wn.2d 326, 351-52, 957 P.2d 655 (1998).

2. Yes. Based on RCW 9.94A.700(4)(c), a trial court imposing community custody conditions was authorized to order random testing for controlled substances to ensure compliance with the condition prohibiting consumption of controlled substances. This condition is required unless the trial court waives it, regardless of the offense committed. See id.