
HOUSE BILL 2027

State of Washington

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2009 Regular Session

By Representatives Smith, O'Brien, Bailey, Pearson, Hope, Warnick, Sullivan, Johnson, Takko, Short, Klippert, Kristiansen, Blake, Priest, McCune, Kretz, Orcutt, Kelley, and Angel

Read first time 02/06/09. Referred to Committee on Judiciary.

1 AN ACT Relating to making it a felony to drive or be in physical
2 control of a vehicle while under the influence of intoxicating liquor
3 or any drug when the person has two or more prior offenses within seven
4 years; amending RCW 46.61.502, 46.61.504, 46.61.5055, 9.94A.525, and
5 9.94A.640; creating a new section; prescribing penalties; providing an
6 effective date; and declaring an emergency.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 **Sec. 1.** RCW 46.61.502 and 2008 c 282 s 20 are each amended to read
9 as follows:

10 (1) A person is guilty of driving while under the influence of
11 intoxicating liquor or any drug if the person drives a vehicle within
12 this state:

13 (a) And the person has, within two hours after driving, an alcohol
14 concentration of 0.08 or higher as shown by analysis of the person's
15 breath or blood made under RCW 46.61.506; or

16 (b) While the person is under the influence of or affected by
17 intoxicating liquor or any drug; or

18 (c) While the person is under the combined influence of or affected
19 by intoxicating liquor and any drug.

1 (2) The fact that a person charged with a violation of this section
2 is or has been entitled to use a drug under the laws of this state
3 shall not constitute a defense against a charge of violating this
4 section.

5 (3) It is an affirmative defense to a violation of subsection
6 (1)(a) of this section which the defendant must prove by a
7 preponderance of the evidence that the defendant consumed a sufficient
8 quantity of alcohol after the time of driving and before the
9 administration of an analysis of the person's breath or blood to cause
10 the defendant's alcohol concentration to be 0.08 or more within two
11 hours after driving. The court shall not admit evidence of this
12 defense unless the defendant notifies the prosecution prior to the
13 omnibus or pretrial hearing in the case of the defendant's intent to
14 assert the affirmative defense.

15 (4) Analyses of blood or breath samples obtained more than two
16 hours after the alleged driving may be used as evidence that within two
17 hours of the alleged driving, a person had an alcohol concentration of
18 0.08 or more in violation of subsection (1)(a) of this section, and in
19 any case in which the analysis shows an alcohol concentration above
20 0.00 may be used as evidence that a person was under the influence of
21 or affected by intoxicating liquor or any drug in violation of
22 subsection (1)(b) or (c) of this section.

23 (5) Except as provided in subsection (6) of this section, a
24 violation of this section is a gross misdemeanor.

25 (6) It is a class C felony punishable under chapter 9.94A RCW, or
26 chapter 13.40 RCW if the person is a juvenile, if: (a) The person has
27 (~~four~~) two or more prior offenses within (~~ten~~) seven years as
28 defined in RCW 46.61.5055; or (b) the person has ever previously been
29 convicted of (i) vehicular homicide while under the influence of
30 intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular
31 assault while under the influence of intoxicating liquor or any drug,
32 RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the
33 offense specified in (b)(i) or (ii) of this subsection.

34 **Sec. 2.** RCW 46.61.504 and 2008 c 282 s 21 are each amended to read
35 as follows:

36 (1) A person is guilty of being in actual physical control of a

1 motor vehicle while under the influence of intoxicating liquor or any
2 drug if the person has actual physical control of a vehicle within this
3 state:

4 (a) And the person has, within two hours after being in actual
5 physical control of the vehicle, an alcohol concentration of 0.08 or
6 higher as shown by analysis of the person's breath or blood made under
7 RCW 46.61.506; or

8 (b) While the person is under the influence of or affected by
9 intoxicating liquor or any drug; or

10 (c) While the person is under the combined influence of or affected
11 by intoxicating liquor and any drug.

12 (2) The fact that a person charged with a violation of this section
13 is or has been entitled to use a drug under the laws of this state does
14 not constitute a defense against any charge of violating this section.
15 No person may be convicted under this section if, prior to being
16 pursued by a law enforcement officer, the person has moved the vehicle
17 safely off the roadway.

18 (3) It is an affirmative defense to a violation of subsection
19 (1)(a) of this section which the defendant must prove by a
20 preponderance of the evidence that the defendant consumed a sufficient
21 quantity of alcohol after the time of being in actual physical control
22 of the vehicle and before the administration of an analysis of the
23 person's breath or blood to cause the defendant's alcohol concentration
24 to be 0.08 or more within two hours after being in such control. The
25 court shall not admit evidence of this defense unless the defendant
26 notifies the prosecution prior to the omnibus or pretrial hearing in
27 the case of the defendant's intent to assert the affirmative defense.

28 (4) Analyses of blood or breath samples obtained more than two
29 hours after the alleged being in actual physical control of a vehicle
30 may be used as evidence that within two hours of the alleged being in
31 such control, a person had an alcohol concentration of 0.08 or more in
32 violation of subsection (1)(a) of this section, and in any case in
33 which the analysis shows an alcohol concentration above 0.00 may be
34 used as evidence that a person was under the influence of or affected
35 by intoxicating liquor or any drug in violation of subsection (1)(b) or
36 (c) of this section.

37 (5) Except as provided in subsection (6) of this section, a
38 violation of this section is a gross misdemeanor.

1 (6) It is a class C felony punishable under chapter 9.94A RCW, or
2 chapter 13.40 RCW if the person is a juvenile, if: (a) The person has
3 (~~four~~) two or more prior offenses within (~~ten~~) seven years as
4 defined in RCW 46.61.5055; or (b) the person has ever previously been
5 convicted of (i) vehicular homicide while under the influence of
6 intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular
7 assault while under the influence of intoxicating liquor or any drug,
8 RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the
9 offense specified in (b)(i) or (ii) of this subsection.

10 **Sec. 3.** RCW 46.61.5055 and 2008 c 282 s 14 are each amended to
11 read as follows:

12 (1) Except as provided in RCW 46.61.502(6) or 46.61.504(6), a
13 person who is convicted of a violation of RCW 46.61.502 or 46.61.504
14 and who has no prior offense within seven years shall be punished as
15 follows:

16 (a) In the case of a person whose alcohol concentration was less
17 than 0.15, or for whom for reasons other than the person's refusal to
18 take a test offered pursuant to RCW 46.20.308 there is no test result
19 indicating the person's alcohol concentration:

20 (i) By imprisonment for not less than one day nor more than one
21 year. Twenty-four consecutive hours of the imprisonment may not be
22 suspended or deferred unless the court finds that the imposition of
23 this mandatory minimum sentence would impose a substantial risk to the
24 offender's physical or mental well-being. Whenever the mandatory
25 minimum sentence is suspended or deferred, the court shall state in
26 writing the reason for granting the suspension or deferral and the
27 facts upon which the suspension or deferral is based. In lieu of the
28 mandatory minimum term of imprisonment required under this subsection
29 (1)(a)(i), the court may order not less than fifteen days of electronic
30 home monitoring. The offender shall pay the cost of electronic home
31 monitoring. The county or municipality in which the penalty is being
32 imposed shall determine the cost. The court may also require the
33 offender's electronic home monitoring device to include an alcohol
34 detection breathalyzer, and the court may restrict the amount of
35 alcohol the offender may consume during the time the offender is on
36 electronic home monitoring; and

1 (ii) By a fine of not less than three hundred fifty dollars nor
2 more than five thousand dollars. Three hundred fifty dollars of the
3 fine may not be suspended or deferred unless the court finds the
4 offender to be indigent; or

5 (b) In the case of a person whose alcohol concentration was at
6 least 0.15, or for whom by reason of the person's refusal to take a
7 test offered pursuant to RCW 46.20.308 there is no test result
8 indicating the person's alcohol concentration:

9 (i) By imprisonment for not less than two days nor more than one
10 year. Two consecutive days of the imprisonment may not be suspended or
11 deferred unless the court finds that the imposition of this mandatory
12 minimum sentence would impose a substantial risk to the offender's
13 physical or mental well-being. Whenever the mandatory minimum sentence
14 is suspended or deferred, the court shall state in writing the reason
15 for granting the suspension or deferral and the facts upon which the
16 suspension or deferral is based. In lieu of the mandatory minimum term
17 of imprisonment required under this subsection (1)(b)(i), the court may
18 order not less than thirty days of electronic home monitoring. The
19 offender shall pay the cost of electronic home monitoring. The county
20 or municipality in which the penalty is being imposed shall determine
21 the cost. The court may also require the offender's electronic home
22 monitoring device to include an alcohol detection breathalyzer, and the
23 court may restrict the amount of alcohol the offender may consume
24 during the time the offender is on electronic home monitoring; and

25 (ii) By a fine of not less than five hundred dollars nor more than
26 five thousand dollars. Five hundred dollars of the fine may not be
27 suspended or deferred unless the court finds the offender to be
28 indigent.

29 (2) Except as provided in RCW 46.61.502(6) or 46.61.504(6), a
30 person who is convicted of a violation of RCW 46.61.502 or 46.61.504
31 and who has one prior offense within seven years shall be punished as
32 follows:

33 (a) In the case of a person whose alcohol concentration was less
34 than 0.15, or for whom for reasons other than the person's refusal to
35 take a test offered pursuant to RCW 46.20.308 there is no test result
36 indicating the person's alcohol concentration:

37 (i) By imprisonment for not less than thirty days nor more than one
38 year and sixty days of electronic home monitoring. The offender shall

1 pay for the cost of the electronic monitoring. The county or
2 municipality where the penalty is being imposed shall determine the
3 cost. The court may also require the offender's electronic home
4 monitoring device include an alcohol detection breathalyzer, and may
5 restrict the amount of alcohol the offender may consume during the time
6 the offender is on electronic home monitoring. Thirty days of
7 imprisonment and sixty days of electronic home monitoring may not be
8 suspended or deferred unless the court finds that the imposition of
9 this mandatory minimum sentence would impose a substantial risk to the
10 offender's physical or mental well-being. Whenever the mandatory
11 minimum sentence is suspended or deferred, the court shall state in
12 writing the reason for granting the suspension or deferral and the
13 facts upon which the suspension or deferral is based; and

14 (ii) By a fine of not less than five hundred dollars nor more than
15 five thousand dollars. Five hundred dollars of the fine may not be
16 suspended or deferred unless the court finds the offender to be
17 indigent; or

18 (b) In the case of a person whose alcohol concentration was at
19 least 0.15, or for whom by reason of the person's refusal to take a
20 test offered pursuant to RCW 46.20.308 there is no test result
21 indicating the person's alcohol concentration:

22 (i) By imprisonment for not less than forty-five days nor more than
23 one year and ninety days of electronic home monitoring. The offender
24 shall pay for the cost of the electronic monitoring. The county or
25 municipality where the penalty is being imposed shall determine the
26 cost. The court may also require the offender's electronic home
27 monitoring device include an alcohol detection breathalyzer, and may
28 restrict the amount of alcohol the offender may consume during the time
29 the offender is on electronic home monitoring. Forty-five days of
30 imprisonment and ninety days of electronic home monitoring may not be
31 suspended or deferred unless the court finds that the imposition of
32 this mandatory minimum sentence would impose a substantial risk to the
33 offender's physical or mental well-being. Whenever the mandatory
34 minimum sentence is suspended or deferred, the court shall state in
35 writing the reason for granting the suspension or deferral and the
36 facts upon which the suspension or deferral is based; and

37 (ii) By a fine of not less than seven hundred fifty dollars nor

1 more than five thousand dollars. Seven hundred fifty dollars of the
2 fine may not be suspended or deferred unless the court finds the
3 offender to be indigent.

4 (3) (~~Except as provided in RCW 46.61.502(6) or 46.61.504(6),~~) A
5 person who is convicted of a violation of RCW 46.61.502 or 46.61.504
6 and who has two or (~~three prior~~) more offenses within seven years
7 shall be punished (~~as follows:~~

8 ~~(a) In the case of a person whose alcohol concentration was less~~
9 ~~than 0.15, or for whom for reasons other than the person's refusal to~~
10 ~~take a test offered pursuant to RCW 46.20.308 there is no test result~~
11 ~~indicating the person's alcohol concentration:~~

12 ~~(i) By imprisonment for not less than ninety days nor more than one~~
13 ~~year and one hundred twenty days of electronic home monitoring. The~~
14 ~~offender shall pay for the cost of the electronic monitoring. The~~
15 ~~county or municipality where the penalty is being imposed shall~~
16 ~~determine the cost. The court may also require the offender's~~
17 ~~electronic home monitoring device include an alcohol detection~~
18 ~~breathalyzer, and may restrict the amount of alcohol the offender may~~
19 ~~consume during the time the offender is on electronic home monitoring.~~
20 ~~Ninety days of imprisonment and one hundred twenty days of electronic~~
21 ~~home monitoring may not be suspended or deferred unless the court finds~~
22 ~~that the imposition of this mandatory minimum sentence would impose a~~
23 ~~substantial risk to the offender's physical or mental well-being.~~
24 ~~Whenever the mandatory minimum sentence is suspended or deferred, the~~
25 ~~court shall state in writing the reason for granting the suspension or~~
26 ~~deferral and the facts upon which the suspension or deferral is based;~~
27 ~~and~~

28 ~~(ii) By a fine of not less than one thousand dollars nor more than~~
29 ~~five thousand dollars. One thousand dollars of the fine may not be~~
30 ~~suspended or deferred unless the court finds the offender to be~~
31 ~~indigent; or~~

32 ~~(b) In the case of a person whose alcohol concentration was at~~
33 ~~least 0.15, or for whom by reason of the person's refusal to take a~~
34 ~~test offered pursuant to RCW 46.20.308 there is no test result~~
35 ~~indicating the person's alcohol concentration:~~

36 ~~(i) By imprisonment for not less than one hundred twenty days nor~~
37 ~~more than one year and one hundred fifty days of electronic home~~
38 ~~monitoring. The offender shall pay for the cost of the electronic~~

1 monitoring. ~~The county or municipality where the penalty is being~~
2 ~~imposed shall determine the cost. The court may also require the~~
3 ~~offender's electronic home monitoring device include an alcohol~~
4 ~~detection breathalyzer, and may restrict the amount of alcohol the~~
5 ~~offender may consume during the time the offender is on electronic home~~
6 ~~monitoring. One hundred twenty days of imprisonment and one hundred~~
7 ~~fifty days of electronic home monitoring may not be suspended or~~
8 ~~deferred unless the court finds that the imposition of this mandatory~~
9 ~~minimum sentence would impose a substantial risk to the offender's~~
10 ~~physical or mental well being. Whenever the mandatory minimum sentence~~
11 ~~is suspended or deferred, the court shall state in writing the reason~~
12 ~~for granting the suspension or deferral and the facts upon which the~~
13 ~~suspension or deferral is based; and~~

14 ~~(ii) By a fine of not less than one thousand five hundred dollars~~
15 ~~nor more than five thousand dollars. One thousand five hundred dollars~~
16 ~~of the fine may not be suspended or deferred unless the court finds the~~
17 ~~offender to be indigent)) in accordance with chapter 9.94A RCW.~~

18 (4) A person who is convicted of a violation of RCW 46.61.502 or
19 46.61.504 shall be punished under chapter 9.94A RCW if: (a) The person
20 has ~~((four))~~ two or more prior offenses within ~~((ten))~~ seven years; or
21 (b) the person has ever previously been convicted of: (i) A violation
22 of RCW 46.61.520 committed while under the influence of intoxicating
23 liquor or any drug; (ii) a violation of RCW 46.61.522 committed while
24 under the influence of intoxicating liquor or any drug; or (iii) an
25 out-of-state offense comparable to the offense specified in (b)(i) or
26 (ii) of this subsection.

27 (5)(a) The court shall require any person convicted of an
28 alcohol-related violation of RCW 46.61.502 or 46.61.504 to apply for an
29 ignition interlock driver's license from the department under RCW
30 ~~((46.20.385))~~ 46.20.720 and to have a functioning ignition interlock
31 device installed on all motor vehicles operated by the person.

32 (b) The installation of an ignition interlock device is not
33 necessary on vehicles owned by a person's employer and driven as a
34 requirement of employment during working hours. The person must
35 provide the department with a declaration pursuant to RCW 9A.72.085
36 from his or her employer stating that the person's employment requires
37 the person to operate a vehicle owned by the employer during working
38 hours.

1 (c) An ignition interlock device imposed under this section shall
2 be calibrated to prevent a motor vehicle from being started when the
3 breath sample provided has an alcohol concentration of 0.025 or more.

4 (d) The court may waive the requirement that a person obtain an
5 ignition interlock driver's license and operate only vehicles equipped
6 with a functioning ignition interlock device if the court makes a
7 specific finding in writing that the devices are not reasonably
8 available in the local area, that the person does not operate a
9 vehicle, or the person is not eligible to receive an ignition interlock
10 driver's license under RCW 46.20.385.

11 (e) When the requirement that a person obtain an ignition interlock
12 driver's license and operate only vehicles equipped with a functioning
13 ignition interlock device is waived by the court, the court shall order
14 the person to submit to alcohol monitoring through an alcohol detection
15 breathalyzer device, transdermal sensor device, or other technology
16 designed to detect alcohol in a person's system. The person shall pay
17 for the cost of the monitoring. The county or municipality where the
18 penalty is being imposed shall determine the cost.

19 (f) The period of time for which ignition interlock use or alcohol
20 monitoring is required will be as follows:

21 (i) For a person who has not previously been restricted under this
22 section, a period of one year;

23 (ii) For a person who has previously been restricted under (f)(i)
24 of this subsection, a period of five years;

25 (iii) For a person who has previously been restricted under (f)(ii)
26 of this subsection, a period of ten years.

27 (6) If a person who is convicted of a violation of RCW 46.61.502 or
28 46.61.504 committed the offense while a passenger under the age of
29 sixteen was in the vehicle, the court shall:

30 (a) In any case in which the installation and use of an interlock
31 or other device is not mandatory under RCW 46.20.720 or other law,
32 order the use of such a device for not less than sixty days following
33 the restoration of the person's license, permit, or nonresident driving
34 privileges; and

35 (b) In any case in which the installation and use of such a device
36 is otherwise mandatory, order the use of such a device for an
37 additional sixty days.

1 (7) In exercising its discretion in setting penalties within the
2 limits allowed by this section, the court shall particularly consider
3 the following:

4 (a) Whether the person's driving at the time of the offense was
5 responsible for injury or damage to another or another's property; and

6 (b) Whether at the time of the offense the person was driving or in
7 physical control of a vehicle with one or more passengers.

8 (8) An offender punishable under this section is subject to the
9 alcohol assessment and treatment provisions of RCW 46.61.5056.

10 (9) The license, permit, or nonresident privilege of a person
11 convicted of driving or being in physical control of a motor vehicle
12 while under the influence of intoxicating liquor or drugs must:

13 (a) If the person's alcohol concentration was less than 0.15, or if
14 for reasons other than the person's refusal to take a test offered
15 under RCW 46.20.308 there is no test result indicating the person's
16 alcohol concentration:

17 (i) Where there has been no prior offense within seven years, be
18 suspended or denied by the department for ninety days;

19 (ii) Where there has been one prior offense within seven years, be
20 revoked or denied by the department for two years; or

21 (iii) Where there have been two or more prior offenses within seven
22 years, be revoked or denied by the department for three years;

23 (b) If the person's alcohol concentration was at least 0.15:

24 (i) Where there has been no prior offense within seven years, be
25 revoked or denied by the department for one year;

26 (ii) Where there has been one prior offense within seven years, be
27 revoked or denied by the department for nine hundred days; or

28 (iii) Where there have been two or more prior offenses within seven
29 years, be revoked or denied by the department for four years; or

30 (c) If by reason of the person's refusal to take a test offered
31 under RCW 46.20.308, there is no test result indicating the person's
32 alcohol concentration:

33 (i) Where there have been no prior offenses within seven years, be
34 revoked or denied by the department for two years;

35 (ii) Where there has been one prior offense within seven years, be
36 revoked or denied by the department for three years; or

37 (iii) Where there have been two or more previous offenses within
38 seven years, be revoked or denied by the department for four years.

1 The department shall grant credit on a day-for-day basis for any
2 portion of a suspension, revocation, or denial already served under
3 this subsection for a suspension, revocation, or denial imposed under
4 RCW 46.20.3101 arising out of the same incident.

5 For purposes of this subsection (9), the department shall refer to
6 the driver's record maintained under RCW 46.52.120 when determining the
7 existence of prior offenses.

8 (10) After expiration of any period of suspension, revocation, or
9 denial of the offender's license, permit, or privilege to drive
10 required by this section, the department shall place the offender's
11 driving privilege in probationary status pursuant to RCW 46.20.355.

12 (11)(a) In addition to any nonsuspendable and nondeferrable jail
13 sentence required by this section, whenever the court imposes less than
14 one year in jail, the court shall also suspend but shall not defer a
15 period of confinement for a period not exceeding five years. The court
16 shall impose conditions of probation that include: (i) Not driving a
17 motor vehicle within this state without a valid license to drive and
18 proof of financial responsibility for the future; (ii) not driving a
19 motor vehicle within this state while having an alcohol concentration
20 of 0.08 or more within two hours after driving; and (iii) not refusing
21 to submit to a test of his or her breath or blood to determine alcohol
22 concentration upon request of a law enforcement officer who has
23 reasonable grounds to believe the person was driving or was in actual
24 physical control of a motor vehicle within this state while under the
25 influence of intoxicating liquor. The court may impose conditions of
26 probation that include nonrepetition, installation of an ignition
27 interlock device on the probationer's motor vehicle, alcohol or drug
28 treatment, supervised probation, or other conditions that may be
29 appropriate. The sentence may be imposed in whole or in part upon
30 violation of a condition of probation during the suspension period.

31 (b) For each violation of mandatory conditions of probation under
32 (a)(i), (ii), or (iii) of this subsection, the court shall order the
33 convicted person to be confined for thirty days, which shall not be
34 suspended or deferred.

35 (c) For each incident involving a violation of a mandatory
36 condition of probation imposed under this subsection, the license,
37 permit, or privilege to drive of the person shall be suspended by the
38 court for thirty days or, if such license, permit, or privilege to

1 drive already is suspended, revoked, or denied at the time the finding
2 of probation violation is made, the suspension, revocation, or denial
3 then in effect shall be extended by thirty days. The court shall
4 notify the department of any suspension, revocation, or denial or any
5 extension of a suspension, revocation, or denial imposed under this
6 subsection.

7 (12) A court may waive the electronic home monitoring requirements
8 of this chapter when:

9 (a) The offender does not have a dwelling, telephone service, or
10 any other necessity to operate an electronic home monitoring system;

11 (b) The offender does not reside in the state of Washington; or

12 (c) The court determines that there is reason to believe that the
13 offender would violate the conditions of the electronic home monitoring
14 penalty.

15 Whenever the mandatory minimum term of electronic home monitoring
16 is waived, the court shall state in writing the reason for granting the
17 waiver and the facts upon which the waiver is based, and shall impose
18 an alternative sentence with similar punitive consequences. The
19 alternative sentence may include, but is not limited to, additional
20 jail time, work crew, or work camp.

21 Whenever the combination of jail time and electronic home
22 monitoring or alternative sentence would exceed three hundred sixty-
23 five days, the offender shall serve the jail portion of the sentence
24 first, and the electronic home monitoring or alternative portion of the
25 sentence shall be reduced so that the combination does not exceed three
26 hundred sixty-five days.

27 (13) An offender serving a sentence under this section, whether or
28 not a mandatory minimum term has expired, may be granted an
29 extraordinary medical placement by the jail administrator subject to
30 the standards and limitations set forth in RCW 9.94A.728(4).

31 (14) For purposes of this section and RCW 46.61.502 and 46.61.504:

32 (a) A "prior offense" means any of the following:

33 (i) A conviction for a violation of RCW 46.61.502 or an equivalent
34 local ordinance;

35 (ii) A conviction for a violation of RCW 46.61.504 or an equivalent
36 local ordinance;

37 (iii) A conviction for a violation of RCW 46.61.520 committed while
38 under the influence of intoxicating liquor or any drug;

1 (iv) A conviction for a violation of RCW 46.61.522 committed while
2 under the influence of intoxicating liquor or any drug;

3 (v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or
4 9A.36.050 or an equivalent local ordinance, if the conviction is the
5 result of a charge that was originally filed as a violation of RCW
6 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW
7 46.61.520 or 46.61.522;

8 (vi) An out-of-state conviction for a violation that would have
9 been a violation of (a)(i), (ii), (iii), (iv), or (v) of this
10 subsection if committed in this state;

11 (vii) A deferred prosecution under chapter 10.05 RCW granted in a
12 prosecution for a violation of RCW 46.61.502, 46.61.504, or an
13 equivalent local ordinance; or

14 (viii) A deferred prosecution under chapter 10.05 RCW granted in a
15 prosecution for a violation of RCW 46.61.5249, or an equivalent local
16 ordinance, if the charge under which the deferred prosecution was
17 granted was originally filed as a violation of RCW 46.61.502 or
18 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or
19 46.61.522; and

20 (b) "Within seven years" means that the arrest for a prior offense
21 occurred within seven years of the arrest for the current offense(
22 and

23 ~~(c) "Within ten years" means that the arrest for a prior offense~~
24 ~~occurred within ten years of the arrest for the current offense)).~~

25 **Sec. 4.** RCW 9.94A.525 and 2008 c 231 s 3 are each amended to read
26 as follows:

27 The offender score is measured on the horizontal axis of the
28 sentencing grid. The offender score rules are as follows:

29 The offender score is the sum of points accrued under this section
30 rounded down to the nearest whole number.

31 (1) A prior conviction is a conviction which exists before the date
32 of sentencing for the offense for which the offender score is being
33 computed. Convictions entered or sentenced on the same date as the
34 conviction for which the offender score is being computed shall be
35 deemed "other current offenses" within the meaning of RCW 9.94A.589.

36 (2)(a) Class A and sex prior felony convictions shall always be
37 included in the offender score.

1 (b) Class B prior felony convictions other than sex offenses shall
2 not be included in the offender score, if since the last date of
3 release from confinement (including full-time residential treatment)
4 pursuant to a felony conviction, if any, or entry of judgment and
5 sentence, the offender had spent ten consecutive years in the community
6 without committing any crime that subsequently results in a conviction.

7 (c) Except as provided in (e) of this subsection, class C prior
8 felony convictions other than sex offenses shall not be included in the
9 offender score if, since the last date of release from confinement
10 (including full-time residential treatment) pursuant to a felony
11 conviction, if any, or entry of judgment and sentence, the offender had
12 spent five consecutive years in the community without committing any
13 crime that subsequently results in a conviction.

14 (d) Except as provided in (e) of this subsection, serious traffic
15 convictions shall not be included in the offender score if, since the
16 last date of release from confinement (including full-time residential
17 treatment) pursuant to a felony conviction, if any, or entry of
18 judgment and sentence, the offender spent five years in the community
19 without committing any crime that subsequently results in a conviction.

20 (e) If the present conviction is felony driving while under the
21 influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or
22 felony physical control of a vehicle while under the influence of
23 intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions
24 of felony driving while under the influence of intoxicating liquor or
25 any drug, felony physical control of a vehicle while under the
26 influence of intoxicating liquor or any drug, and serious traffic
27 offenses shall be included in the offender score if: (i) The prior
28 convictions were committed within five years since the last date of
29 release from confinement (including full-time residential treatment) or
30 entry of judgment and sentence; or (ii) the prior convictions would be
31 considered "prior offenses within (~~ten~~) seven years" as those terms
32 are defined in RCW 46.61.5055.

33 (f) This subsection applies to both adult and juvenile prior
34 convictions.

35 (3) Out-of-state convictions for offenses shall be classified
36 according to the comparable offense definitions and sentences provided
37 by Washington law. Federal convictions for offenses shall be
38 classified according to the comparable offense definitions and

1 sentences provided by Washington law. If there is no clearly
2 comparable offense under Washington law or the offense is one that is
3 usually considered subject to exclusive federal jurisdiction, the
4 offense shall be scored as a class C felony equivalent if it was a
5 felony under the relevant federal statute.

6 (4) Score prior convictions for felony anticipatory offenses
7 (attempts, criminal solicitations, and criminal conspiracies) the same
8 as if they were convictions for completed offenses.

9 (5)(a) In the case of multiple prior convictions, for the purpose
10 of computing the offender score, count all convictions separately,
11 except:

12 (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to
13 encompass the same criminal conduct, shall be counted as one offense,
14 the offense that yields the highest offender score. The current
15 sentencing court shall determine with respect to other prior adult
16 offenses for which sentences were served concurrently or prior juvenile
17 offenses for which sentences were served consecutively, whether those
18 offenses shall be counted as one offense or as separate offenses using
19 the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and
20 if the court finds that they shall be counted as one offense, then the
21 offense that yields the highest offender score shall be used. The
22 current sentencing court may presume that such other prior offenses
23 were not the same criminal conduct from sentences imposed on separate
24 dates, or in separate counties or jurisdictions, or in separate
25 complaints, indictments, or informations;

26 (ii) In the case of multiple prior convictions for offenses
27 committed before July 1, 1986, for the purpose of computing the
28 offender score, count all adult convictions served concurrently as one
29 offense, and count all juvenile convictions entered on the same date as
30 one offense. Use the conviction for the offense that yields the
31 highest offender score.

32 (b) As used in this subsection (5), "served concurrently" means
33 that: (i) The latter sentence was imposed with specific reference to
34 the former; (ii) the concurrent relationship of the sentences was
35 judicially imposed; and (iii) the concurrent timing of the sentences
36 was not the result of a probation or parole revocation on the former
37 offense.

1 (6) If the present conviction is one of the anticipatory offenses
2 of criminal attempt, solicitation, or conspiracy, count each prior
3 conviction as if the present conviction were for a completed offense.
4 When these convictions are used as criminal history, score them the
5 same as a completed crime.

6 (7) If the present conviction is for a nonviolent offense and not
7 covered by subsection (11), (12), or (13) of this section, count one
8 point for each adult prior felony conviction and one point for each
9 juvenile prior violent felony conviction and 1/2 point for each
10 juvenile prior nonviolent felony conviction.

11 (8) If the present conviction is for a violent offense and not
12 covered in subsection (9), (10), (11), (12), or (13) of this section,
13 count two points for each prior adult and juvenile violent felony
14 conviction, one point for each prior adult nonviolent felony
15 conviction, and 1/2 point for each prior juvenile nonviolent felony
16 conviction.

17 (9) If the present conviction is for a serious violent offense,
18 count three points for prior adult and juvenile convictions for crimes
19 in this category, two points for each prior adult and juvenile violent
20 conviction (not already counted), one point for each prior adult
21 nonviolent felony conviction, and 1/2 point for each prior juvenile
22 nonviolent felony conviction.

23 (10) If the present conviction is for Burglary 1, count prior
24 convictions as in subsection (8) of this section; however count two
25 points for each prior adult Burglary 2 or residential burglary
26 conviction, and one point for each prior juvenile Burglary 2 or
27 residential burglary conviction.

28 (11) If the present conviction is for a felony traffic offense
29 count two points for each adult or juvenile prior conviction for
30 Vehicular Homicide or Vehicular Assault; for each felony offense count
31 one point for each adult and 1/2 point for each juvenile prior
32 conviction; for each serious traffic offense, other than those used for
33 an enhancement pursuant to RCW 46.61.520(2), count one point for each
34 adult and 1/2 point for each juvenile prior conviction; count one point
35 for each adult and 1/2 point for each juvenile prior conviction for
36 operation of a vessel while under the influence of intoxicating liquor
37 or any drug.

1 (12) If the present conviction is for homicide by watercraft or
2 assault by watercraft count two points for each adult or juvenile prior
3 conviction for homicide by watercraft or assault by watercraft; for
4 each felony offense count one point for each adult and 1/2 point for
5 each juvenile prior conviction; count one point for each adult and 1/2
6 point for each juvenile prior conviction for driving under the
7 influence of intoxicating liquor or any drug, actual physical control
8 of a motor vehicle while under the influence of intoxicating liquor or
9 any drug, or operation of a vessel while under the influence of
10 intoxicating liquor or any drug.

11 (13) If the present conviction is for manufacture of
12 methamphetamine count three points for each adult prior manufacture of
13 methamphetamine conviction and two points for each juvenile manufacture
14 of methamphetamine offense. If the present conviction is for a drug
15 offense and the offender has a criminal history that includes a sex
16 offense or serious violent offense, count three points for each adult
17 prior felony drug offense conviction and two points for each juvenile
18 drug offense. All other adult and juvenile felonies are scored as in
19 subsection (8) of this section if the current drug offense is violent,
20 or as in subsection (7) of this section if the current drug offense is
21 nonviolent.

22 (14) If the present conviction is for Escape from Community
23 Custody, RCW 72.09.310, count only prior escape convictions in the
24 offender score. Count adult prior escape convictions as one point and
25 juvenile prior escape convictions as 1/2 point.

26 (15) If the present conviction is for Escape 1, RCW 9A.76.110, or
27 Escape 2, RCW 9A.76.120, count adult prior convictions as one point and
28 juvenile prior convictions as 1/2 point.

29 (16) If the present conviction is for Burglary 2 or residential
30 burglary, count priors as in subsection (7) of this section; however,
31 count two points for each adult and juvenile prior Burglary 1
32 conviction, two points for each adult prior Burglary 2 or residential
33 burglary conviction, and one point for each juvenile prior Burglary 2
34 or residential burglary conviction.

35 (17) If the present conviction is for a sex offense, count priors
36 as in subsections (7) through (11) and (13) through (16) of this
37 section; however count three points for each adult and juvenile prior
38 sex offense conviction.

1 (18) If the present conviction is for failure to register as a sex
2 offender under RCW 9A.44.130(11), count priors as in subsections (7)
3 through (11) and (13) through (16) of this section; however count three
4 points for each adult and juvenile prior sex offense conviction,
5 excluding prior convictions for failure to register as a sex offender
6 under RCW 9A.44.130(11), which shall count as one point.

7 (19) If the present conviction is for an offense committed while
8 the offender was under community custody, add one point. For purposes
9 of this subsection, community custody includes community placement or
10 postrelease supervision, as defined in chapter 9.94B RCW.

11 (20) If the present conviction is for Theft of a Motor Vehicle,
12 Possession of a Stolen Vehicle, Taking a Motor Vehicle Without
13 Permission 1, or Taking a Motor Vehicle Without Permission 2, count
14 priors as in subsections (7) through (18) of this section; however
15 count one point for prior convictions of Vehicle Prowling 2, and three
16 points for each adult and juvenile prior Theft 1 (of a motor vehicle),
17 Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a
18 motor vehicle), Possession of Stolen Property 2 (of a motor vehicle),
19 Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a
20 Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without
21 Permission 2 conviction.

22 (21) The fact that a prior conviction was not included in an
23 offender's offender score or criminal history at a previous sentencing
24 shall have no bearing on whether it is included in the criminal history
25 or offender score for the current offense. Prior convictions that were
26 not counted in the offender score or included in criminal history under
27 repealed or previous versions of the sentencing reform act shall be
28 included in criminal history and shall count in the offender score if
29 the current version of the sentencing reform act requires including or
30 counting those convictions. Prior convictions that were not included
31 in criminal history or in the offender score shall be included upon any
32 resentencing to ensure imposition of an accurate sentence.

33 **Sec. 5.** RCW 9.94A.640 and 2006 c 73 s 8 are each amended to read
34 as follows:

35 (1) Every offender who has been discharged under RCW 9.94A.637 may
36 apply to the sentencing court for a vacation of the offender's record
37 of conviction. If the court finds the offender meets the tests

1 prescribed in subsection (2) of this section, the court may clear the
2 record of conviction by: (a) Permitting the offender to withdraw the
3 offender's plea of guilty and to enter a plea of not guilty; or (b) if
4 the offender has been convicted after a plea of not guilty, by the
5 court setting aside the verdict of guilty; and (c) by the court
6 dismissing the information or indictment against the offender.

7 (2) An offender may not have the record of conviction cleared if:
8 (a) There are any criminal charges against the offender pending in any
9 court of this state or another state, or in any federal court; (b) the
10 offense was a violent offense as defined in RCW 9.94A.030; (c) the
11 offense was a crime against persons as defined in RCW 43.43.830; (d)
12 the offender has been convicted of a new crime in this state, another
13 state, or federal court since the date of the offender's discharge
14 under RCW 9.94A.637; (e) the offense is a class B felony and less than
15 ten years have passed since the date the applicant was discharged under
16 RCW 9.94A.637; (f) the offense was a class C felony, other than a class
17 C felony described in RCW 46.61.502(6) or 46.61.504(6), and less than
18 five years have passed since the date the applicant was discharged
19 under RCW 9.94A.637; or (g) the offense was a class C felony described
20 in RCW 46.61.502(6) or 46.61.504(6) and less than (~~ten~~) seven years
21 have passed since the applicant was discharged under RCW 9.94A.637.

22 (3) Once the court vacates a record of conviction under subsection
23 (1) of this section, the fact that the offender has been convicted of
24 the offense shall not be included in the offender's criminal history
25 for purposes of determining a sentence in any subsequent conviction,
26 and the offender shall be released from all penalties and disabilities
27 resulting from the offense. For all purposes, including responding to
28 questions on employment applications, an offender whose conviction has
29 been vacated may state that the offender has never been convicted of
30 that crime. Nothing in this section affects or prevents the use of an
31 offender's prior conviction in a later criminal prosecution.

32 NEW SECTION. **Sec. 6.** If specific funding for the purposes of this
33 act, referencing this act by bill or chapter number, is not provided by
34 June 30, 2009, in the omnibus appropriations act, this act is null and
35 void.

1 NEW SECTION. **Sec. 7.** This act is necessary for the immediate
2 preservation of the public peace, health, or safety, or support of the
3 state government and its existing public institutions, and takes effect
4 July 1, 2009.

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