

---

HOUSE BILL 1623

---

State of Washington                      62nd Legislature                      2011 Regular Session

By Representatives Ahern, McCune, Hope, Pearson, Hurst, Johnson, Nealey, Kristiansen, and Miloscia

Read first time 01/27/11. 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; prescribing penalties; providing an effective date; and  
6 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 years as defined in RCW  
28 46.61.5055; or (b) the person has ever previously been convicted of (i)  
29 vehicular homicide while under the influence of intoxicating liquor or  
30 any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the  
31 influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or  
32 (iii) an out-of-state offense comparable to the offense specified in  
33 (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 2010 c 269 s 4 are each amended to read  
11 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 a violation  
28 of RCW 46.61.502 or 46.61.504 or an equivalent local ordinance to apply  
29 for an ignition interlock driver's license from the department and to  
30 have a functioning ignition interlock device installed on all motor  
31 vehicles operated by the person.

32 (b) The installation of an ignition interlock device is not  
33 necessary on vehicles owned, leased, or rented by a person's employer  
34 and on those vehicles whose care and/or maintenance is the temporary  
35 responsibility of the employer, and driven at the direction of a  
36 person's employer as a requirement of employment during working hours.  
37 The person must provide the department with a declaration pursuant to

1 RCW 9A.72.085 from his or her employer stating that the person's  
2 employment requires the person to operate a vehicle owned by the  
3 employer or other persons during working hours.

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

7 (d) The court may waive the requirement that a person apply for an  
8 ignition interlock driver's license if the court makes a specific  
9 finding in writing that:

10 (i) The person lives out-of-state and the devices are not  
11 reasonably available in the person's local area;

12 (ii) The person does not operate a vehicle; or

13 (iii) The person is not eligible to receive an ignition interlock  
14 driver's license under RCW 46.20.385 because the person is not a  
15 resident of Washington, is a habitual traffic offender, has already  
16 applied for or is already in possession of an ignition interlock  
17 driver's license, has never had a driver's license, has been certified  
18 under chapter 74.20A RCW as noncompliant with a child support order, or  
19 is subject to any other condition or circumstance that makes the person  
20 ineligible to obtain an ignition interlock driver's license.

21 (e) If a court finds that a person is not eligible to receive an  
22 ignition interlock driver's license under this section, the court is  
23 not required to make any further subsequent inquiry or determination as  
24 to the person's eligibility.

25 (f) If the court orders that a person refrain from consuming any  
26 alcohol and requires the person to apply for an ignition interlock  
27 driver's license, and the person states that he or she does not operate  
28 a motor vehicle or the person is ineligible to obtain an ignition  
29 interlock driver's license, the court shall order the person to submit  
30 to alcohol monitoring through an alcohol detection breathalyzer device,  
31 transdermal sensor device, or other technology designed to detect  
32 alcohol in a person's system. The person shall pay for the cost of the  
33 monitoring. The county or municipality where the penalty is being  
34 imposed shall determine the cost.

35 (g) The period of time for which ignition interlock use or alcohol  
36 monitoring is required will be as follows:

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

1 (ii) For a person who has previously been restricted under (g)(i)  
2 of this subsection, a period of five years;

3 (iii) For a person who has previously been restricted under (g)(ii)  
4 of this subsection, a period of ten years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 (11)(a) In addition to any nonsuspendable and nondeferrable jail  
28 sentence required by this section, whenever the court imposes less than  
29 one year in jail, the court shall also suspend but shall not defer a  
30 period of confinement for a period not exceeding five years. The court  
31 shall impose conditions of probation that include: (i) Not driving a  
32 motor vehicle within this state without a valid license to drive and  
33 proof of financial responsibility for the future; (ii) not driving a  
34 motor vehicle within this state while having an alcohol concentration  
35 of 0.08 or more within two hours after driving; and (iii) not refusing  
36 to submit to a test of his or her breath or blood to determine alcohol  
37 concentration upon request of a law enforcement officer who has  
38 reasonable grounds to believe the person was driving or was in actual

1 physical control of a motor vehicle within this state while under the  
2 influence of intoxicating liquor. The court may impose conditions of  
3 probation that include nonrepetition, installation of an ignition  
4 interlock device on the probationer's motor vehicle, alcohol or drug  
5 treatment, supervised probation, or other conditions that may be  
6 appropriate. The sentence may be imposed in whole or in part upon  
7 violation of a condition of probation during the suspension period.

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

12 (c) For each incident involving a violation of a mandatory  
13 condition of probation imposed under this subsection, the license,  
14 permit, or privilege to drive of the person shall be suspended by the  
15 court for thirty days or, if such license, permit, or privilege to  
16 drive already is suspended, revoked, or denied at the time the finding  
17 of probation violation is made, the suspension, revocation, or denial  
18 then in effect shall be extended by thirty days. The court shall  
19 notify the department of any suspension, revocation, or denial or any  
20 extension of a suspension, revocation, or denial imposed under this  
21 subsection.

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

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

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

27 (c) The court determines that there is reason to believe that the  
28 offender would violate the conditions of the electronic home monitoring  
29 penalty.

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

36 Whenever the combination of jail time and electronic home  
37 monitoring or alternative sentence would exceed three hundred sixty-  
38 five days, the offender shall serve the jail portion of the sentence

1 first, and the electronic home monitoring or alternative portion of the  
2 sentence shall be reduced so that the combination does not exceed three  
3 hundred sixty-five days.

4 (13) An offender serving a sentence under this section, whether or  
5 not a mandatory minimum term has expired, may be granted an  
6 extraordinary medical placement by the jail administrator subject to  
7 the standards and limitations set forth in RCW 9.94A.728(3).

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

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

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

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

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

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

18 (v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or  
19 9A.36.050 or an equivalent local ordinance, if the conviction is the  
20 result of a charge that was originally filed as a violation of RCW  
21 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW  
22 46.61.520 or 46.61.522;

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

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

29 (viii) A deferred prosecution under chapter 10.05 RCW granted in a  
30 prosecution for a violation of RCW 46.61.5249, or an equivalent local  
31 ordinance, if the charge under which the deferred prosecution was  
32 granted was originally filed as a violation of RCW 46.61.502 or  
33 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or  
34 46.61.522;

35 If a deferred prosecution is revoked based on a subsequent  
36 conviction for an offense listed in this subsection (14)(a), the  
37 subsequent conviction shall not be treated as a prior offense of the  
38 revoked deferred prosecution for the purposes of sentencing;

1 (b) "Within seven years" means that the arrest for a prior offense  
2 occurred within seven years before or after the arrest for the current  
3 offense; and

4 (c) "Within ten years" means that the arrest for a prior offense  
5 occurred within ten years before or after the arrest for the current  
6 offense.

7 **Sec. 4.** RCW 9.94A.525 and 2010 c 274 s 403 are each amended to  
8 read as follows:

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

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

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

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

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

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

33 (d) Except as provided in (e) of this subsection, serious traffic  
34 convictions shall not be included in the offender score if, since the  
35 last date of release from confinement (including full-time residential  
36 treatment) pursuant to a felony conviction, if any, or entry of

1 judgment and sentence, the offender spent five years in the community  
2 without committing any crime that subsequently results in a conviction.

3 (e) If the present conviction is felony driving while under the  
4 influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or  
5 felony physical control of a vehicle while under the influence of  
6 intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions  
7 of felony driving while under the influence of intoxicating liquor or  
8 any drug, felony physical control of a vehicle while under the  
9 influence of intoxicating liquor or any drug, and serious traffic  
10 offenses shall be included in the offender score if: (i) The prior  
11 convictions were committed within five years since the last date of  
12 release from confinement (including full-time residential treatment) or  
13 entry of judgment and sentence; or (ii) the prior convictions would be  
14 considered "prior offenses within (~~ten~~) seven years" as those terms  
15 are defined in RCW 46.61.5055.

16 (f) This subsection applies to both adult and juvenile prior  
17 convictions.

18 (3) Out-of-state convictions for offenses shall be classified  
19 according to the comparable offense definitions and sentences provided  
20 by Washington law. Federal convictions for offenses shall be  
21 classified according to the comparable offense definitions and  
22 sentences provided by Washington law. If there is no clearly  
23 comparable offense under Washington law or the offense is one that is  
24 usually considered subject to exclusive federal jurisdiction, the  
25 offense shall be scored as a class C felony equivalent if it was a  
26 felony under the relevant federal statute.

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

30 (5)(a) In the case of multiple prior convictions, for the purpose  
31 of computing the offender score, count all convictions separately,  
32 except:

33 (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to  
34 encompass the same criminal conduct, shall be counted as one offense,  
35 the offense that yields the highest offender score. The current  
36 sentencing court shall determine with respect to other prior adult  
37 offenses for which sentences were served concurrently or prior juvenile  
38 offenses for which sentences were served consecutively, whether those

1 offenses shall be counted as one offense or as separate offenses using  
2 the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and  
3 if the court finds that they shall be counted as one offense, then the  
4 offense that yields the highest offender score shall be used. The  
5 current sentencing court may presume that such other prior offenses  
6 were not the same criminal conduct from sentences imposed on separate  
7 dates, or in separate counties or jurisdictions, or in separate  
8 complaints, indictments, or informations;

9 (ii) In the case of multiple prior convictions for offenses  
10 committed before July 1, 1986, for the purpose of computing the  
11 offender score, count all adult convictions served concurrently as one  
12 offense, and count all juvenile convictions entered on the same date as  
13 one offense. Use the conviction for the offense that yields the  
14 highest offender score.

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

21 (6) If the present conviction is one of the anticipatory offenses  
22 of criminal attempt, solicitation, or conspiracy, count each prior  
23 conviction as if the present conviction were for a completed offense.  
24 When these convictions are used as criminal history, score them the  
25 same as a completed crime.

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

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

37 (9) If the present conviction is for a serious violent offense,  
38 count three points for prior adult and juvenile convictions for crimes

1 in this category, two points for each prior adult and juvenile violent  
2 conviction (not already counted), one point for each prior adult  
3 nonviolent felony conviction, and 1/2 point for each prior juvenile  
4 nonviolent felony conviction.

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

10 (11) If the present conviction is for a felony traffic offense  
11 count two points for each adult or juvenile prior conviction for  
12 Vehicular Homicide or Vehicular Assault; for each felony offense count  
13 one point for each adult and 1/2 point for each juvenile prior  
14 conviction; for each serious traffic offense, other than those used for  
15 an enhancement pursuant to RCW 46.61.520(2), count one point for each  
16 adult and 1/2 point for each juvenile prior conviction; count one point  
17 for each adult and 1/2 point for each juvenile prior conviction for  
18 operation of a vessel while under the influence of intoxicating liquor  
19 or any drug.

20 (12) If the present conviction is for homicide by watercraft or  
21 assault by watercraft count two points for each adult or juvenile prior  
22 conviction for homicide by watercraft or assault by watercraft; for  
23 each felony offense count one point for each adult and 1/2 point for  
24 each juvenile prior conviction; count one point for each adult and 1/2  
25 point for each juvenile prior conviction for driving under the  
26 influence of intoxicating liquor or any drug, actual physical control  
27 of a motor vehicle while under the influence of intoxicating liquor or  
28 any drug, or operation of a vessel while under the influence of  
29 intoxicating liquor or any drug.

30 (13) If the present conviction is for manufacture of  
31 methamphetamine count three points for each adult prior manufacture of  
32 methamphetamine conviction and two points for each juvenile manufacture  
33 of methamphetamine offense. If the present conviction is for a drug  
34 offense and the offender has a criminal history that includes a sex  
35 offense or serious violent offense, count three points for each adult  
36 prior felony drug offense conviction and two points for each juvenile  
37 drug offense. All other adult and juvenile felonies are scored as in

1 subsection (8) of this section if the current drug offense is violent,  
2 or as in subsection (7) of this section if the current drug offense is  
3 nonviolent.

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

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

11 (16) If the present conviction is for Burglary 2 or residential  
12 burglary, count priors as in subsection (7) of this section; however,  
13 count two points for each adult and juvenile prior Burglary 1  
14 conviction, two points for each adult prior Burglary 2 or residential  
15 burglary conviction, and one point for each juvenile prior Burglary 2  
16 or residential burglary conviction.

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

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

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

31 (20) If the present conviction is for Theft of a Motor Vehicle,  
32 Possession of a Stolen Vehicle, Taking a Motor Vehicle Without  
33 Permission 1, or Taking a Motor Vehicle Without Permission 2, count  
34 priors as in subsections (7) through (18) of this section; however  
35 count one point for prior convictions of Vehicle Prowling 2, and three  
36 points for each adult and juvenile prior Theft 1 (of a motor vehicle),  
37 Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a  
38 motor vehicle), Possession of Stolen Property 2 (of a motor vehicle),

1 Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a  
2 Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without  
3 Permission 2 conviction.

4 (21) If the present conviction is for a felony domestic violence  
5 offense where domestic violence as defined in RCW 9.94A.030 was plead  
6 and proven, count priors as in subsections (7) through (20) of this  
7 section; however, count points as follows:

8 (a) Count two points for each adult prior conviction where domestic  
9 violence as defined in RCW 9.94A.030 was plead and proven after August  
10 1, 2011, for the following offenses: A violation of a no-contact order  
11 that is a felony offense, a violation of a protection order that is a  
12 felony offense, a felony domestic violence harassment offense, a felony  
13 domestic violence stalking offense, a domestic violence Burglary 1  
14 offense, a domestic violence Kidnapping 1 offense, a domestic violence  
15 Kidnapping 2 offense, a domestic violence unlawful imprisonment  
16 offense, a domestic violence Robbery 1 offense, a domestic violence  
17 Robbery 2 offense, a domestic violence Assault 1 offense, a domestic  
18 violence Assault 2 offense, a domestic violence Assault 3 offense, a  
19 domestic violence Arson 1 offense, or a domestic violence Arson 2  
20 offense; (~~and~~)

21 (b) Count one point for each second and subsequent juvenile  
22 conviction where domestic violence as defined in RCW 9.94A.030 was  
23 plead and proven after August 1, 2011, for the offenses listed in (a)  
24 of this subsection; and

25 (c) Count one point for each adult prior conviction for a  
26 repetitive domestic violence offense as defined in RCW 9.94A.030, where  
27 domestic violence as defined in RCW 9.94A.030, was plead and proven  
28 after August 1, 2011.

29 (22) The fact that a prior conviction was not included in an  
30 offender's offender score or criminal history at a previous sentencing  
31 shall have no bearing on whether it is included in the criminal history  
32 or offender score for the current offense. Prior convictions that were  
33 not counted in the offender score or included in criminal history under  
34 repealed or previous versions of the sentencing reform act shall be  
35 included in criminal history and shall count in the offender score if  
36 the current version of the sentencing reform act requires including or  
37 counting those convictions. Prior convictions that were not included

1 in criminal history or in the offender score shall be included upon any  
2 resentencing to ensure imposition of an accurate sentence.

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

5 (1) Every offender who has been discharged under RCW 9.94A.637 may  
6 apply to the sentencing court for a vacation of the offender's record  
7 of conviction. If the court finds the offender meets the tests  
8 prescribed in subsection (2) of this section, the court may clear the  
9 record of conviction by: (a) Permitting the offender to withdraw the  
10 offender's plea of guilty and to enter a plea of not guilty; or (b) if  
11 the offender has been convicted after a plea of not guilty, by the  
12 court setting aside the verdict of guilty; and (c) by the court  
13 dismissing the information or indictment against the offender.

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

29 (3) Once the court vacates a record of conviction under subsection  
30 (1) of this section, the fact that the offender has been convicted of  
31 the offense shall not be included in the offender's criminal history  
32 for purposes of determining a sentence in any subsequent conviction,  
33 and the offender shall be released from all penalties and disabilities  
34 resulting from the offense. For all purposes, including responding to  
35 questions on employment applications, an offender whose conviction has  
36 been vacated may state that the offender has never been convicted of

1 that crime. Nothing in this section affects or prevents the use of an  
2 offender's prior conviction in a later criminal prosecution.

3 NEW SECTION. **Sec. 6.** This act is necessary for the immediate  
4 preservation of the public peace, health, or safety, or support of the  
5 state government and its existing public institutions, and takes effect  
6 July 1, 2011.

--- END ---