

## Sentencing Alternatives

### **First-time Offender Waiver (FTOW)**

The FTOW is a sentencing alternative that is available for individuals convicted of their first felony offense. If imposed, the court waives the standard sentence range and may sentence the individual to up to 90 days confinement and 6 months of community custody, or 12 months of community custody if treatment is ordered. For individuals to be eligible for FTOW, the sentence must be a conviction that is:

- A first felony offense and have not participated in a program of deferred prosecution for a felony.
- For an offense that is not be categorized as a:
  - violent offense;
  - a sex offense;
  - Manufacture, Delivery, or Possession with intent to Manufacture or Deliver a Controlled Substance Classified in Schedule I or II Narcotic or Flunitrazepam;
  - Manufacture, Delivery, or Possession with intent to Deliver Methamphetamine;
  - Selling for Profit any Controlled Substance or Counterfeit Controlled Substance Classified in Schedule 1 (except for leaves or flowering tops of marijuana); or
  - Felony Driving while Under the Influence or Physical Control of a Vehicle while under the Influence.

With a FTOW sentence, the standard sentence is waived and may not be imposed if the individual is not compliant.

**Data:** FTOW offenses are not always imposed as a sentence with less confinement than a standard range sentence. As all FTOWs are supervised in the community as part of the sentence, this alternative may be imposed in order to have community custody as part of the sentence.

In Fiscal Year 2019, there were 1,623 sentences for FTOW imposed. Of these, 855 (53%) included a sentence below the standard range, 760 (47%) included a sentence within the standard range and 8 (.5%) included a sentence above the standard range.

See RCW 9.94A.650 for further information.

### **Drug Offender Sentencing Alternative (DOSA)**

DOSA is available for certain chemically dependent individuals. For eligible individuals, departure from the standard range sentencing is permitted and results in a reduction or elimination of confinement time combined with treatment.

Individuals are eligible for a DOSA alternative if:

- The maximum of the standard sentence range for the current offense is greater than one year (For Residential DOSA, eligibility changed in the 2020 session).
- The current offense is not a:
  - violent offense (eligibility changes in 2020 session),

- a sex offense (eligibility changes in 2020 session),
- does not include a weapon enhancement,
- a felony driving while under the influence of intoxicating liquor or any drug,
- a felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and
- if the current offense constitutes a violation under the Uniform Controlled Substance Act (drug offense), the court must determine that the offense involved a small quantity of the controlled substance.

Additionally, the individual may not:

- Have any prior sex\* offense,
- Have any prior violent\* offenses within ten years of the current offense,
- Have received a DOSA more than once in 10 years before the current offense, and
- Be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence.

There are two DOSA options available to the court for eligible individuals:

1. Prison-based DOSA alternative: The sentence under Prison DOSA consists of a period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater; and one-half the midpoint of the standard sentence range as a term of community custody, which must include appropriate substance abuse treatment. See RCW 9.94A.660 and 9.94A.662 for further information.
2. Residential DOSA alternative: If the midpoint of the standard range is twenty-four months or less, the court may impose a Residential DOSA sentence consisting of a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the offender entering and remaining in residential chemical dependency treatment for a period between three and six months. See RCW 9.94A.660 and 9.94A.664 for further information.

**Data:** In FY 2019, there were 1,522 sentences imposed for Prison DOSA (90% below the standard range, 10% within the standard range) and 1,032 sentences for Residential DOSA (100% below the standard range).

\* As of 1/1/2021, DOSA changed in the following ways (2SSB 6211, 2020):

- Rather than eliminating anyone that has a prior sex offense, eligibility is based on whether or not the person is currently required to register as a sex offender.
- For individuals with a Robbery 2<sup>o</sup> in their criminal history (a violent offense), if the offense did not involve a weapon or was not reduced from Robbery 1<sup>o</sup>, the person becomes eligible after 7 years, rather than 10 years.
- Allows individuals to receive a Residential DOSA, if meeting all other criteria, if the person has a standard sentence range of one year or less.
- Allows a Residential DOSA sentence to include an indeterminate term of jail confinement of no more than 30 days to facilitate transfer to the residential treatment facility.

- Residential DOSA eligibility was changed, allowing individuals with a standard range midpoint of 26 months, rather than 24 months.
- Upon revocation, credit for time spent while on community custody is allowed at a rate of 50% credit.
- The Washington State Institute for Public Policy is required to submit reports November of 2022 and 2028, analyzing the effectiveness of the alternative.

If a person under the DOSA alternative does not comply with the sentence requirements, the court may revoke the alternative sentence and impose a standard range sentence.

### **Parenting Alternative, also called Family and Offender Sentencing Alternative (FOSA)**

The FOSA alternative is available for individuals who have physical custody of his or her minor child, is an expectant parent, or is a legal guardian of a minor child; or, is a biological parent, adoptive parent, custodian, or stepparent with a proven, established, ongoing, and substantial relationship with the minor child that existed at the time of the offense.

A person is eligible if the high end of the standard sentence range for the current offense is greater than one year (presumptive prison sentence), and the person:

- has no prior or current conviction for a felony sex offense,
- has no prior\* or current serious violent offense,
- has no prior or current felony offense where the person was armed with a firearm or other deadly weapon in the commission of the offense,
- has no current conviction for a violent offense,
- has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence; and
- signs release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court.

Under this alternative, the sentencing judge may waive imposition of a sentence within the standard range and impose a sentence consisting of twelve months of community custody (no confinement).

If a person under the FOSA alternative does not comply with the sentence requirements, the court may revoke the alternative sentence and impose a standard range sentence.

**Data:** In FY 2019, there were 70 sentences imposed for FOSA.

\* As of 6/11/2020, eligibility for FOSA changed in the following ways (E2SSB 5291):

- Eligibility was expanded to include expectant parents, adoptive parents, stepparents, or custodians (still must have a proven, established, ongoing, and substantial relationship with the minor child existing prior to the time of the offense).
- Restriction regarding those with deportation orders or detainers was removed.
- Allows individuals with prior violent offenses to be considered for the alternative.

- Removed juvenile offenses from eligibility, other than those classified as sex, serious violent, or the offense was committed while the individual was armed with a firearm or other deadly weapon.
- Individuals are allowed right to assistance of counsel when facing a revocation hearing.

See RCW 9.94A.655 for further information.

### **Special Sex Offender Sentencing Alternative (SSOSA):**

SSOSA is the only alternative sentence available for the sentencing of sex offenders. To be eligible, the person may not have any prior felony sex convictions. The alternative is limited to individuals convicted of a current sex offense that does not include any serious violent sex offenses or Rape in the second degree.

Additionally, individuals must also have a current offense and criminal history that permits the court to impose a standard range sentence of less than eleven years confinement and may not have any adult convictions for a violent offense that was committed within five years of the date of the current offense.

A person sentenced under SSOSA receives a suspended sentence within the standard range, a jail term of up to twelve months, and conditions of the sentence that may include inpatient and/or outpatient treatment.

If a person under the SSOSA alternative does not comply with the sentence requirements, the court may revoke the alternative sentence and impose the suspended, standard range sentence.

**Data:** In FY 2019, there were 68 sentences imposed for SSOSA.

See RCW 9.94A.670 for further information.

### **Mental Health Sentencing Alternative (MHSA):**

MHSA was passed (2SSB 5293) during the 2021 Legislative Session and will be effective 7/25/2021.

The MHSA alternative is available for defendants who:

- have been convicted of a felony that is not a serious violent or sex offense;
- have been diagnosed with a serious mental health illness recognized by the diagnostic manual in use by mental health professionals at the time of sentencing;
- would benefit, along with the community, from supervision and treatment (as determined by the judge); and
- are willing to participate in the alternative.

Unless waived by the court, a report (presentence investigation) shall be provided by DOC containing:

- A proposed treatment plan for the defendant's mental illness;
- A proposed monitoring plan;
- Recommended crime-related prohibitions and affirmative conditions; and

- A release of information signed by the defendant.

In making the decision as to whether to impose the MHS, the court is required to consider whether the defendant and community will benefit from the use of the alternative and must also consider the victim's opinion on whether the defendant should receive the MHS.

If the court imposes the MHS, the court waives imposition of a sentence within the standard range and imposes a term of community custody between 12 and 24 months if the midpoint of the standard range is 36 months or less, and if over 36 months, a term of community custody between 12 and 36 months.

If a person under the MHS alternative does not comply with the sentence requirements, the court may revoke the alternative sentence and impose a standard range sentence.

### **Work Ethic Camp (WEC)**

WEC is a sentence alternative that while is still in statute, the program is not in operation. WEC allowed an individual sentenced to a prison sentence to serve 4 to 6 months in confinement while participating in a highly structured and goal-oriented work program that included such programs such as correctional industries-based work camps and/or class I and class II work projects, drug rehabilitation, and intensive life management work ethic training. Courts would recommend the program and DOC would place the individual in the program, subject to capacity. This alternative was used more often during the time when DOSA was limited to individuals convicted of drug offenses. Once DOSA was amended to allow offenses other than drug offenses, the alternative was rarely recommended, and the Department of Corrections does not have enough participants to offer the program (4 sentences with the recommendation in FY19).

Sentence Alternative Summary:

- No alternatives available to individuals with a current Serious Violent offense
- SSSOA is the only alternative available to offenses defined as a Violent or as a Sex offense (see attachment A for list of offenses by category).

**Offense by Alternative (sentences imposed for the top 5 offenses) –  
Fiscal Year 2019 Sentences (*sentences*, not individuals)**

**FTOW:**

Assault in the third degree*	280 sentences
Possession of a Controlled Substance*	225 sentences
Burglary in the second degree**	107 sentences
Domestic Violence Ct Order Violations*	102 sentences
Residential Burglary**	91 sentences

**Prison DOSA:**

Burglary in the second degree**	193 sentences
Possession of Stolen Vehicle**	160 sentences
Residential Burglary**	133 sentences
Domestic Violence Ct Order Violations*	127 sentences
Identity Theft in the second degree*	98 sentences

**Residential DOSA:**

Possession of a Controlled Substance*	376 sentences
Burglary in the second degree**	71 sentences
Possession of Stolen Vehicle**	70 sentences
Identity Theft in the second degree*	45 sentences
Residential Burglary**	43 sentences

**FOSA:**

Mfg, Deliver, Possess w/int to deliver*	12 sentences
Identity Theft in the second degree*	8 sentences
Domestic Violence Ct Order Violations*	5 sentences
Possession of a Controlled Substance*	5 sentences
Residential Burglary**	5 sentences

**SSOSA:**

Child Molestation in the first degree***	17 sentences
Rape of a Child in the first degree***	14 sentences
Child Molestation in the second degree***	10 sentences
Rape of a Child in the second degree ***	7 sentences
Rape of a Child in the third degree ***	7 sentences

\*Supervised if high risk to reoffend for standard sentences

\*\* No supervision on standard sentence

\*\*\*Supervised regardless of risk standard sentences

# Appendix A – Offense List by Serious Violent, Violent, Sex

## SERIOUS VIOLENT OFFENSES

### RCW 9.94A.030(46)

Statute (RCW)	Offense	Class	Seriousness Level
10.95.020	Aggravated Murder 1	A	XVI
9A.36.011	Assault 1	A	XII
9A.36.120	Assault of a Child 1	A	XII
9A.32.055	Homicide by Abuse	A	XV
9A.40.020	Kidnapping 1	A	X
9A.32.060	Manslaughter 1	A	XI
9A.32.030	Murder 1	A	XV
9A.32.050	Murder 2	A	XIV
9A.44.040	Rape 1	A	XII

Attempt, Solicitation or Conspiracy to commit one of these felonies.

Any federal or out-of-state conviction for an offense that, under the laws of this state, would be a felony classified as a serious violent offense.

# VIOLENT OFFENSES

RCW 9.94A.030(55)

Statute (RCW)	Offense	Class	Seriousness Level
9A.48.020	Arson 1	A	VIII
9A.48.030	Arson 2	B	IV
9A.36.021(2)(a)	Assault 2	B	IV
9A.36.021(2)(b)	Assault 2 with a Finding of Sexual Motivation	A	IV
9A.36.130	Assault of a Child 2	B	IX
9A.76.170(3)(a)	Bail Jumping with Murder 1	A	VI
9A.52.020	Burglary 1	A	VII
9A.44.083	Child Molestation 1	A	X
70.245.200(2)	Coerce Patient to Request Life-ending Medication	A	Unranked
9A.36.045	Drive-by Shooting	B	VII
70.74.180	Explosive Devices Prohibited	A	IX
9A.56.120	Extortion 1	B	V
70.245.200(1)	Forging Request for Medication	A	Unranked
79A.60.050(1)(c)	Homicide by Watercraft - Disregard for the Safety of Others	A	VII
79A.60.050(1)(b)	Homicide by Watercraft – in a Reckless Manner	A	VIII
79A.60.050(1)(a)	Homicide by Watercraft – while under the Influence of Intoxicating Liquor or any Drug	A	IX
9A.44.100(1)(a)	Indecent Liberties - with Forcible Compulsion	A	X
9A.40.030(3)(a)	Kidnapping 2	B	V
9A.40.030(3)(b)	Kidnapping 2 with a Finding of Sexual Motivation	A	V
9A.82.060(1)(a)	Leading Organized Crime – Organizing Criminal Profiteering	A	X
70.74.280(1)	Malicious Explosion of a Substance 1	A	XV
70.74.280(2)	Malicious Explosion of a Substance 2	A	XIII
70.74.270(1)	Malicious Placement of an Explosive 1	A	XIII
9A.32.070	Manslaughter 2	B	VIII
69.50.406(1)	Over 18 and Deliver Heroin, Methamphetamine, a Narcotic from Schedule I or II, or Flunitrazepam from Schedule IV to Someone under 18	A	DG-III
9.68A.101	Promoting Commercial Sexual Abuse of a Minor	A	XII
9A.44.050	Rape 2	A	XI
9A.44.073	Rape of a Child 1	A	XII
9A.44.076	Rape of a Child 2	A	XI
9A.56.200	Robbery 1	A	IX
9A.56.210	Robbery 2	B	IV

Statute (RCW)	Offense	Class	Seriousness Level
9A.76.115	Sexually Violent Predator Escape	A	X
9A.40.100(1)	Trafficking 1	A	XIV
9A.40.100(3)	Trafficking 2	A	XII
9.82.010	Treason	A	Unranked
9.41.225	Use of a Machine Gun or Bump-fire Stock in Commission of a Felony	A	VII
46.61.522(1)(a-b)	Vehicular Assault – in a Reckless Manner or while under the Influence of Intoxicating Liquor or any Drug	B	IV
46.61.520(1)(b)	Vehicular Homicide – in a Reckless Manner	A	XI
46.61.520(1)(a)	Vehicular Homicide – while under the Influence of Intoxicating Liquor or any Drug	A	XI
Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense.			
Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense.			
Criminal solicitation of or criminal conspiracy to commit a Class A felony.			
Any felony defined under any law as a Class A felony or an attempt to commit a Class A felony.			
Any offense listed as a Serious Violent offense.			

Note: Vehicular Homicide – Disregard for the Safety of Others is defined as a Class A felony offense and appears to be a violent offense under RCW 9.94A.030. However, under *State v. Stately*, 152 Wn.App. 604, 216 P.3d 1102 (2009), it is not to be considered a violent offense.

# SEX OFFENSES

## RCW 9.94A.030(47)

Statute (RCW)	Offense	Class	Seriousness Level
9A.36.021(2)(b)	Assault 2 with a Finding of Sexual Motivation	A	IV
9A.44.083	Child Molestation 1	A	X
9A.44.086	Child Molestation 2	B	VII
9A.44.089	Child Molestation 3	C	V
9.68A.100	Commercial Sexual Abuse of a Minor	B	VIII
9.68A.090(2)	Communication with Minor for Immoral Purposes (Subsequent Violation or Prior Sex Offense Conviction)	C	III
9A.44.196	Criminal Trespass Against Children	C	Unranked
9A.44.160	Custodial Sexual Misconduct 1	C	V
9.68A.050(1)	Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct 1	B	VII
9.68A.050(2)	Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct 2	B	V
9A.44.132(1)(a)	Failure to Register as a Sex Offender (Second Violation Committed on or after 6/10/2010)	C	II
9A.44.132(1)(b)	Failure to Register as a Sex Offender (Third or Subsequent Violation Committed on or after 6/10/2010)	B	II
9A.64.020(1)	Incest 1	B	VI
9A.64.020(2)	Incest 2	C	V
9A.44.100(1)(a)	Indecent Liberties - with Forcible Compulsion	A	X
9A.44.100(1)(b-c)	Indecent Liberties - without Forcible Compulsion	B	VII
9A.44.100(1)(d-f)	Indecent Liberties - without Forcible Compulsion	B	Unranked
9A.40.030(3)(b)	Kidnapping 2 with a Finding of Sexual Motivation	A	V
9.68A.053(2)	Minor Dealing in Depictions of Another Minor Twelve Years or Younger Engaged in Sexually Explicit Conduct 1	B	Unranked
9.68A.053(3)	Minor Dealing in Depictions of Another Minor Twelve Years or Younger Engaged in Sexually Explicit Conduct 2	B	Unranked
9.68A.053(4)	Minor Financing or Selling Depictions of Another Minor Engaged in Sexually Explicit Conduct	B	Unranked
9.68A.070(1)	Possession of Depictions of Minor Engaged in Sexually Explicit Conduct 1	B	VI
9.68A.070(2)	Possession of Depictions of Minor Engaged in Sexually Explicit Conduct 2	B	IV
9.68A.101	Promoting Commercial Sexual Abuse of a Minor	A	XII
9.68A.102	Promoting Travel for Commercial Sexual Abuse of a Minor	C	Unranked
9A.44.040	Rape 1	A	XII
9A.44.050	Rape 2	A	XI

Statute (RCW)	Offense	Class	Seriousness Level
9A.44.060	Rape 3	C	V
9A.44.073	Rape of a Child 1	A	XII
9A.44.076	Rape of a Child 2	A	XI
9A.44.079	Rape of a Child 3	C	VI
9.68A.060(1)	Sending, Bringing into the State Depictions of Minor Engaged in Sexually Explicit Conduct 1	B	VII
9.68A.060(2)	Sending, Bringing into the State Depictions of Minor Engaged in Sexually Explicit Conduct 2	B	V
9.68A.040	Sexual Exploitation of a Minor	B	IX
9A.44.093	Sexual Misconduct with a Minor 1	C	V
9A.44.105	Sexually Violating Human Remains	C	V
9.68A.075(1)	Viewing Depictions of Minor Engaged in Sexually Explicit Conduct 1 (Effective 6/10/2010)	B	IV
9.68A.075(2)	Viewing Depictions of Minor Engaged in Sexually Explicit Conduct 2 (Effective 6/10/2010)	C	Unranked
9A.44.115	Voyeurism 1	C	II

Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in RCW 9.94A.030(47)(a).

Any federal or out-of-state conviction for an offense that, under the laws of this state, would be a felony classified as a sex offense under 9A.44 other than 9A.44.132.

Any felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135.

Attempt, solicitation or conspiracy to commit any Class A or B felony listed above. An attempt, solicitation or conspiracy to commit a Class C felony above is a gross misdemeanor (RCW 9A.28.020-040) and, therefore, not a sex offense [RCW 9.94A.030(47) requires a crime to be a felony in order to be a sex offense].