

**Number of Sentences Where Confinement Total Increases
Under Proposed Standard Grid
By Grid Cell Location**

Seriousness Level	New Offender Score										
	0	1	2	3	4	5	6	7	8	9	10
XV	0	0	0	0	0	0	0	0	0	0	4
XIV	0	0	0	0	0	0	0	0	0	0	0
XIII	0	0	0	0	0	0	0	0	0	0	0
XII	0	0	0	0	0	0	0	0	0	0	0
XI	0	0	0	0	0	0	0	0	0	0	2
X	0	0	0	0	0	0	0	0	0	0	0
IX	0	0	0	0	0	0	0	0	0	1	24
VIII	0	0	0	0	0	0	0	1	0	0	2
VII	0	0	0	0	0	0	0	4	0	0	26
VI	0	0	0	0	0	0	0	0	0	0	0
V	0	0	0	44	0	0	0	0	10	7	8
IV	0	0	0	0	37	0	0	13	2	6	17
III	0	0	0	0	91	1	0	0	0	0	121
II	0	0	0	0	52	47	37	13	0	3	287
I	0	0	0	0	430	356	210	67	50	103	331

**Number of Sentences Where Confinement Total Decreases
Under Proposed Standard Grid
By Grid Cell Location**

Seriousness Level	New Offender Score										
	0	1	2	3	4	5	6	7	8	9	10
XV	11	2	2	0	4	2	1	1	0	1	0
XIV	26	6	1	2	3	0	0	1	0	0	0
XIII	0	1	0	0	0	0	0	0	0	0	0
XII	9	0	4	5	5	4	3	3	0	0	0
XI	9	0	1	2	2	0	2	0	0	0	0
X	1	0	0	0	0	0	0	0	0	0	0
IX	93	20	48	18	22	17	14	13	8	8	13
VIII	10	10	1	2	0	0	2	0	0	0	0
VII	56	30	59	43	30	21	29	11	17	7	9
VI	16	14	1	0	0	0	2	0	0	0	0
V	164	79	63	0	57	30	30	10	9	12	15
IV	9	39	0	5	0	0	37	0	0	0	0
III	0	683	0	225	1	154	126	96	94	41	65
II	32	21	0	0	1	97	30	35	0	0	0
I	0	0	0	0	0	0	2	0	126	49	125



STATE OF WASHINGTON

SENTENCING GUIDELINES COMMISSION

PO Box 40927 • Olympia, Washington 98504-0927

(360) 407-1050 • FAX (360) 407-1043

October 7, 2009

MEMORANDUM

TO: SGC Ad Hoc Committee for Assault of a Child

FROM: Shannon Hinchcliffe, SGC Policy Counsel

RE: Research on State Statutes Comparable to Washington's Assault of a Child in the First Degree.

Some of the following state statutes were identified by the National Conference of State Legislatures in response to the following question posed: How many other states have statutes comparable to Washington's crime of Assault of a Child in the First Degree and is the word "torture" used or defined in those statutes? The following is a breakdown of those statutes with some commentary regarding their approach to criminalizing the behavior.

Some states choose the terms "abuse" and/or "neglect" as elements of the crime and then define them. In Nevada's statutes, they choose to separate the crimes of Child Abuse and Assault First Degree. However, Assault First Degree does have an alternative element where the child is under six years of age.

Nevada

NRS 200.508 Abuse, neglect or endangerment of child: Penalties; definitions.

1. A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect:

(a) If substantial bodily or mental harm results to the child:

(1) If the child is less than 14 years of age and the harm is the result of sexual abuse or exploitation, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or

(2) In all other such cases to which subparagraph (1) does not apply, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years..

(a) "Abuse or neglect" means physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d) and NRS 432B.070, 432B.100, 432B.110, 432B.140 and 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

Definitions include:

(d) "Physical injury" means:

- (1) Permanent or temporary disfigurement; or
- (2) Impairment of any bodily function or organ of the body.

(e) "Substantial mental harm" means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his normal range of performance or behavior.

163.185 Assault in the first degree. (1) A person commits the crime of assault in the first degree if the person: (b) *Intentionally or knowingly causes serious physical injury to a child under six years of age.*

Maryland, also uses the term "child abuse" which can result in either death or severe physical injury to qualify for the specific penalty.

Maryland

MRS §3-601 First-degree child abuse (1) *A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause abuse to the minor that: (i) results in the death of the minor; or (ii) causes severe physical injury to the minor.* Except as provided in subsection (c) of this section, a person who violates paragraph (1) of this subsection is guilty of the felony of child abuse in the first degree and on conviction is subject to: (i) imprisonment not exceeding 25 years; or (ii) if the violation results in the death of the victim, imprisonment not exceeding 30 years.

(c) Repeated offense – A person who violates this section after being convicted of a previous violation of this section is guilty of a felony and on conviction is subject to: (1) imprisonment not exceeding 25 years; or (2) if the violation results in the death of the victim, imprisonment not exceeding 30 years.

Kansas also splits their punishment of children between Abuse of a Child and Criminal Abuse in the first degree. However, in both statutes, they use the term "torture," along with other more descriptive elements such as cruelly beating, or shaking which results in great bodily harm. No definition of "torture" was found.

Kansas

21-3609. Abuse of a child

Abuse of a child is intentionally torturing, cruelly beating, shaking which results in great bodily harm or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years.

Abuse of a child is a severity level 5, person felony.

KRS § 508.100 - Criminal abuse in the first degree

(1) A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby:

(a) Causes serious physical injury; or

(b) Places him in a situation that may cause him serious physical injury; or

(c) Causes torture, cruel confinement or cruel punishment;

to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

(2) Criminal abuse in the first degree is a Class C felony.

Oregon

Oregon uses the word "torture" throughout several statutes including Manslaughter First Degree, Manslaughter Second Degree, and Aggravated Murder. The word was not found in their assault statutes however, it is defined in the definitions section.

"Torture" means to intentionally inflict intense physical pain upon an unwilling victim as a separate objective apart from any other purpose.

Alabama has a crime against the torture and willful abuse of children but does not define "torture." It is otherwise not addressed in the assault statutes. Connecticut has a more general crime of cruelty to persons which includes torture but also does not define it.

Alabama

Ala.Code 1975 § 26-15-3 - Torture, willful abuse, etc., of child under 18 years of age by responsible person.

A responsible person, as defined in Section 26-15-2, who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years shall, on conviction, be guilty of a Class C felony.

Connecticut

C.G.S.A. § 53-20 - Cruelty to persons

(a) (1) Any person who intentionally tortures, torments or cruelly or unlawfully punishes

another person or intentionally deprives another person of necessary food, clothing, shelter or proper physical care shall be fined not more than five thousand dollars or imprisoned not more than five years or both.

(2) Any person who, with criminal negligence, deprives another person of necessary food, clothing, shelter or proper physical care shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

(b) (1) Any person who, having the control and custody of any child under the age of nineteen years, in any capacity whatsoever, intentionally maltreats, tortures, overworks or cruelly or unlawfully punishes such child or intentionally deprives such child of necessary food, clothing or shelter shall be fined not more than five thousand dollars or imprisoned not more than five years or both.

(2) Any person who, having the control and custody of any child under the age of nineteen years, in any capacity whatsoever, with criminal negligence, deprives such child of necessary food, clothing or shelter shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

Case law could have some interpretation of the word "torture" or law about how these terms were applied however, that research has not been conducted at this time.



16 September 2009

MEMORANDUM

TO: Sentencing Guidelines Commission

FROM: Dan Satterberg

SUBJECT: Commission Review of the crime of Assault of a Child in The First Degree

Under the Eryk Woodruff Public Safety Act of 2009 (HB 2279), the Washington State Legislature and Governor has tasked the Washington State Sentencing Guidelines Commission with conducting a comprehensive review of the crime of Assault of a Child in the First Degree and the sentencing laws related to it. The Eryk Woodruff Act was born out of the tragic beating of 15 month old Eryk Woodruff by a family friend left to babysit the toddler in Snohomish County. The man responsible for the beating received a ten year prison sentence, while Eryk, now 3 years old, faces a life time of permanent brain injury. The Legislature and Governor responded by passing Eryk's Law.

The legislation, sponsored by State Representatives Mike Hope and Chris Hurst, asks the Sentencing Guidelines Commission to review the following aspects of the crime of Assault of a Child in the First Degree:

- (1) The elements of the crime,
- (2) Sentencing for the crime under the Sentencing Reform Act grid,
- (3) All provisions providing for exceptional sentences both above and below the SRA standard sentencing ranges,
- (4) Judicial discretion in sentencing,
- (5) Earned early release allowed under the statute,
- (6) Community custody requirements allowed related to this crime

In examining these aspects the Legislature asked the Commission to consider the violence of the offense, the age of the victim, the criminal history of the offender, the mental health of the offender, the likelihood of re-offense, the use of advisory sentencing guidelines, the modification of a mandatory minimum term of confinement for the charge and the fiscal impact of any proposed recommendations.

The following is a set of potential reforms that could be enacted in order to strengthen the punishment and conditions imposed upon a person convicted under the Assault of a Child in the First Degree statute.

Potential Reform #1:

Amend the statute to change the mens rea required for committing the crime of Assault of a Child in the First Degree from a recklessness standard to a criminal negligence standard when an offender is accused of intentionally assaulting a child that results in "great bodily harm."

Under RCW 9A.36.120 a person can commit the crime of Assault of a Child in the First Degree in three different ways:

- 1) by committing the crime of Assault in the First Degree against a child under the age of 13, which requires a person to assault the child with the intent to *inflict* great bodily harm and in fact inflicts great bodily harm;
- 2) by intentionally assaulting a child and *recklessly inflicting* great bodily harm;
- 3) by intentionally assaulting a child and causing bodily harm after the person has engaged in a pattern or practice either of;
 - a) assaulting a child which has resulted in bodily harm that is greater transient physical pain or minor temporary marks or
 - b) causing the child physical pain or agony that is equivalent to that produced by torture;

"Great bodily harm" is defined as;

bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes significant permanent loss or impairment of the function of any bodily part or organ.

Next to death, "great bodily harm" is the most significant physical injury defined in Washington State criminal law.

The second means of committing the crime of AOC 1, intentional assault resulting in the reckless infliction of "great bodily harm," is most often charged and prosecuted in instances where a defendant is accused of inflicting extreme disciplinary force upon a child that is so forceful that it results in severe and permanent physical injuries to the child. The injury most often manifests itself in the child's brain or still developing limbs, causing permanent brain damage and/or permanently impaired arms or legs. The most common defense put forward by defendants is that they were not "reckless" in their actions because they simply did not know of the risk of the specific "great bodily harm" that they caused, so therefore they could not have recklessly caused the injury.

As currently written, the statute requires a person to "recklessly inflict" great bodily harm. To meet this standard prosecutors have to prove that the defendant knew of the risk of the specific injury they caused (most often subdural hemorrhaging in the brain, or damage to a child's still developing skeletal structure) and disregarded that risk. When combined with the requirement

that the prosecutor prove the assault itself was intentional, jurors are often left confused over what the defendant needed to intend vs. what he needed to know of and disregard. This confusion occurs all while the child under 13 is left with permanent, debilitating physical injuries and disabilities directly caused at the hands of the defendant.

The Commission and Legislature can fix this confusion by proposing an amendment to this particular prong of Assault of a Child in the First Degree to change the mens rea required for the infliction of "great bodily harm" from a reckless standard to a "criminal negligence" standard.

The required elements that the State must prove would now read, "intentionally assaults a child and *negligently inflicts* great bodily harm."

A person acts with criminal negligence when;

he fails to be aware of substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

By making this change, the Legislature would remove the requirement that a defendant know of the specific harm he may inflict by assaulting the child and causing "great bodily harm," the highest level of harm in criminal law short of causing death.

Instead, a criminal negligence standard would impose a "standard of care" requirement on defendants who assault a child causing such severe injury. Put another way, any defendant charged with this particular prong of AOC 1, will face the "reasonable person" standard in their treatment of a child under the age of 13. If the defendant is accused of shaking or hitting a child so severely that "great bodily harm" results, then the jury will be asked to determine whether or not the defendant deviated from a standard that a reasonable person would use in caring for or interacting with a child. Severe shaking of an infant, using a weapon, or hand or foot to hit or strike a child, which then results in "great bodily harm," would then fall under this proposed negligence standard analysis, making it easier for a jury to determine whether the defendant deviated from a reasonable care standard.

Potential Reform #2:

The Commission could also clarify the third alternative means of committing the crime of Assault of a Child in the First Degree. That prong now reads:

- 3) by intentionally assaulting a child and causing bodily harm after the person has engaged in a pattern or practice either of;
 - a) assaulting a child which has resulted in bodily harm that is greater transient physical pain or minor temporary marks or
 - b) causing the child physical pain or agony that is equivalent to that produced by torture;

Because the two alternatives for engaging in a pattern or practice, 1) assaulting a child resulting in physical pain, and 2) causing a child physical pain equivalent to torture, are grouped together as sub-points under the Pattern and Practice prong of the statute, a jury is often instructed on both means by which a pattern can be proven, whether the prosecutor is alleging both means or not.

As a result, jurors are often left wondering if they have to find that a defendant both assaulted a child resulting in physical pain and caused pain tantamount to torture, in order to find that defendant guilty of engaging in a pattern or practice of abuse. If the two were separated out into a third and fourth means of committing the crime of AOC 1, the charging of a defendant and the providing of legal instructions to the jury would be easier to understand.

Potential Reform #3:

Amend the statute so that it applies to 16 and 17 year old offenders in order to eliminate a gap in the application of the statute that does not exist in other serious violent offenses committed against children.

Under RCW 9A.36.120 a person must be 18 years or older in order to commit the crime of Assault of a Child in the First Degree. The crime can only be committed against a child who is under 13 years of age. In circumstances where the crime of Assault in the First Degree can be proven, i.e. an intent to inflict "great bodily harm" and then the infliction of it, the 18 years or older requirement is not relevant because an offender aged 16 or 17 could be charged simply with Assault in the First Degree.

However, in situations where a 16 or 17 year old parent of a young child, or sibling, family friend, babysitter or stranger of a young child, intentionally assaults the young child and recklessly inflicts "great bodily harm," prosecutors are left without an appropriate criminal charge to pursue. Despite the fact that a 16 to 17 year old may have caused permanent brain damage to a child under 13, caused the loss of a body part or created permanent impairment of an organ, the 16 to 17 year old does not face the serious consequences of an Assault of a Child in the First Degree charge, a "serious violent offense" as defined under the SRA. This gap in the statute is troubling when considering the number of now 16 to 17 year old parents of young children that our found in our community, let alone the number of 16 to 17 year old babysitters and caregivers who are give the responsibility to watch over and provide a standard of care to young children.

One might challenge the need to increase the possibility of punishment on this class of offenders, however, one need only look at the wide array of serious violent offenses that 16 to 17 years olds already face under Washington State criminal law, including the crimes of Rape of a Child in the First Degree, Rape in the First Degree, Robbery in the First Degree, Kidnapping in the First Degree, Drive by Shooting, Manslaughter in the First Degree and Assault in the First Degree, to see that 16 to 17 year olds are required to abide by our most serious criminal offenses or face adult consequences. Not only do 16 to 17 year olds face criminal charges for committing these "serious violent offenses," but 16 to 17 year olds face these charges in Adult Court under the State's Automatic Adult Jurisdiction Statute, RCW 13.04.030(e)(v).

Meanwhile, because of the "18 years or older" requirement found in the AOC 1 statute, a 16 to 17 year old not only avoids prosecution as an adult for inflicting such extremely serious injury, they instead face only an Assault 2 charge, carrying with it a sentence of a mere 15 to 36 weeks in Juvenile Detention. 16 to 17 year old offenders face this charge because it is the most serious assault available that closely mirrors the conduct prohibited under the Assault of a Child First Degree Statute. Because the level of injury required is significantly less under the Assault 2 statute, the perpetrator faces a potential sentence that is approximately 20 times less than the punishment facing an 18 year old that commits the same crime.

The Assault of a Child in the First Degree statute should be amended to remove this gap in jurisdiction. The statute should apply to individuals who are 16 years or older who are accused of intentionally assaulting children under the age of 13 and recklessly inflicting great bodily harm upon them.

Potential Reform #4:

Amend the Sentencing Reform Act (SRA) to move the crime of Assault of a Child in the First Degree from a Level XII offense for purposes of calculating a defendant's Offender Score to a Level XIII offense.

Under the Sentencing Reform Act, the crime of Assault of a Child in the First Degree is currently classified as a Level XII offense for purposes of scoring. This results in a Standard Range Sentence of 93 to 123 months or 7.75 years to 10.25 years in prison for an offender with no prior felony convictions. The crime of Assault of a Child in the First Degree is currently classified with the crimes of Assault in the First Degree, Rape in the First Degree and Rape of a Child in the First Degree.

The Legislature could consider moving the crime of Assault of a Child in the First Degree to a Level XIII offense, which would raise the Standard Sentence Range for a first time felon offender to 123 months to 164 months or 10.25 years to 13.6 years. Raising the crime to Level XIII would put it on par with the crimes of Malicious Explosion Second Degree and Malicious Placement of Explosives First Degree.

Raising the level of the crime of Assault of a Child in the First Degree can easily be justified when looking at the long lasting effects of the infliction of "great bodily harm" on a child victim. In the case of Eryk Woodruff, the young victim will have life long physical injuries including brain damage. Although the other crimes ranked as a Level XII are extremely serious, the potential for long lasting and even life long physical impairments is not as great as when a child under the age of 13 has "great bodily harm" inflicted upon them. The potential for permanent brain damage, impairment of limbs and other organs is only increased by the youth of the victim. An increase from Level XII to Level XIII can certainly be justified based upon the impact of committing the crime of Assault of a Child in the First Degree.

Potential Reform #5:

Amend RCW 9.94A.703 to require a condition of community custody that prohibits a person convicted of the crime of Assault of a Child in the First Degree, or any felony

offense committed against a child under 13 years of age or younger, from having any unsupervised contact with minors.

House Bill 2279 made significant progress in creating a strong, new community custody condition for offenders convicted of Assault of a Child in the First Degree. The legislation amended RCW 9.94A.703 to prohibit an offender convicted of AOC 1 from serving in any paid or volunteer capacity where they have control or supervision of minors under the age of 13.

Should the Legislature wish to go farther, it could codify a required condition of community custody for offenders convicted of the crime of Assault of a Child in the First Degree to have no contact with children under the age of 13 at all, unless they are in the presence of another adult who is knowledgeable of the offender's conviction. Such a condition could even be modified to include any and all children under the age of 16 (16 being the age of consent for crimes of a sexual nature) or 18 (18 being the age where a person is presumed to move from a juvenile to an adult for purposes of the criminal justice system). The condition could also be mandated as a community custody condition under RCW 9.94A.703 for any and all defendants convicted of a felony crime committed against a child under the age of 13, 15, or 18 depending upon how restrictive the Commission and Legislature wants to be. Such a condition would read as follows:

If the offender was convicted of a felony offense and is being sentenced under the Sentencing Reform Act for a crime against a child under the age of 13, the offender is to have no contact with an unsupervised child or children under the age of 13 unless either an adult who is knowledgeable of the offender's conviction is present or with prior approval from the offender's community corrections officer.

Such a condition is commonly asked for by prosecutors across the state as a discretionary condition for crimes committed by adults against children. The condition helps protect against putting the convicted offender in a setting with a child where re-offense is possible.

Other Considerations:

In adopting House Bill 2279, the State Legislature asked the Commission to review several other aspects of the Assault of a Child in the First Degree statute, including exploring changes to the bases for exceptional sentences above and below the standard range, judicial discretion in sentencing, earned early release, advisory sentencing guidelines and modifying the 5 year mandatory minimum term for AOC 1 set out in RCW 9.94A.540. After conducting a review of these provisions as they relate to the crime of Assault of a Child in the First Degree, the following observations can be made.

- Mitigating & Aggravating Circumstances Justifying Departure from a Standard Range Sentence

Under RCW 9.94A.535 the Legislature has articulated several mitigating and aggravating circumstances which justify a sentencing court departing from the SRA's standard sentencing range. Several of these circumstances are particularly relevant to instances in which a defendant has been convicted of the crime of Assault of a Child in the First Degree.

Several of the mitigating circumstances listed in RCW 9.94A.535 provide defendants convicted of AOC 1 with the ability to argue for a reduced sentence. Some of the most relevant mitigating circumstances include:

- The impairment of the defendant's capacity to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law.
- The defendant committed the crime under duress, coercion or threat insufficient to justify a complete defense.
- The defendant him or herself was a victim of abuse.

These circumstances allow a defendant to argue for an exceptional sentence downwards from the standard range on a variety of bases when convicted of AOC 1. The mitigating circumstances component of RCW 9.94A.535 does not need to be amended as several avenues for departure already exist.

The same conclusion can reasonably be reached when examining the aggravating circumstances applicable to the crime of Assault of a Child in the First Degree. Several aggravating circumstances contained in RCW 9.94A.535 are relevant to the AOC 1 statute including;

- the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.
- the defendant's actions resulted in deliberate cruelty towards the victim.
- the defendant used his position of trust to facilitate the commission of the crime.
- the offense was committed during the course of or related to offenses of a sexual nature

Each of these aggravating circumstances allow the prosecution to seek an exceptional sentence in the commission of the crime of Assault of a Child in the First Degree. The most commonly used circumstance is the "particular vulnerability" of victim or the "victim's incapability to defend themselves." This circumstance allows the prosecution to seek exceptional sentences in cases where the child is an infant or toddler, making them particularly vulnerable or incapable of defending themselves. As a result, amendments to RCW 9.94A.535 are not needed at this time.

- Judicial Discretion in Sentencing

The Legislature also asked the Commission to consider allowing more judicial discretion in sentencing. As noted above, Assault of a Child in the First Degree is ranked as a level XII offense, carrying with it a 93 to 123 months standard range sentence for a person with an Offender Score of Zero, with a maximum of life in prison and a mandatory minimum sentence of 5 years under RCW 9.94A.540. A sentencing judge can impose sentences ranging from 5 years up to life assuming the appropriate mitigating or aggravating circumstances exist. When viewing the potential sentences for AOC 1 in light of the desired goal of having determinate sentencing under the SRA, and the possible exceptions to that sentencing certainly allowed in fact based

mitigating and aggravating circumstances, a judge has wide discretion in imposing a sentence on a defendant guilty of AOC 1. As a result, further discretion is not warranted.

- Earned Early Release for AOC 1

Under the SRA, a defendant convicted of Assault of a Child in the First Degree is eligible to earn only up to 10% of his total sentence off for good behavior while serving his prison sentence. 10% good time is the least amount of time that can be earned for a criminal conviction under the SRA. It is important to note the value of earned early release in terms of maintaining discipline in prison. The potential of earning early release helps corrections officers maintain order in otherwise volatile prison settings. As a result, it would be prudent to keep the crime of Assault of a Child of the First Degree eligible for 10% earned early release.

- Advisory Sentencing Guidelines

The Legislature also suggested that the Commission should examine allowing advisory sentencing guidelines for judges, similar to the federal sentencing structure, which allows federal judges to depart from guidelines in a much easier fashion. The Commission could certainly consider allowing easier departures for the crime of Assault of a Child in the First Degree. However, allowing such departures would run counter to the determinate nature and purpose of the SRA to bring truth and consistency to criminal sentences in Washington State. Again, AOC 1 is ranked as a level XII offense, one of the most serious offense rankings called for under the SRA. Judges can depart downward if mitigating circumstances exist. Otherwise, the seriousness of a person's actions warranting conviction under the AOC 1 statute should carry serious consequences. As a result, advisory guidelines are not needed at this time.

- Adjusting the Mandatory Minimum Sentence for Assault of a Child in the First Degree

Under RCW 9.94A.540, an offender faces a five year mandatory minimum sentence for the crime of Assault of a Child in the First Degree if the offender used force likely to result in death or intended to kill the victim. This limits the application of the mandatory minimum to only one or two alternative means of committing the crime itself. The Commission could consider expanding the 5 year mandatory minimum sentence to all alternative means of committing Assault of a Child in the First Degree. However, the standard range sentence for the crime is 93 to 123 months on an Offender Score of Zero. A judge is bound to the standard range sentence unless an exceptional sentence downward is possible. Otherwise the mandatory minimum sentence does not come into play. Expanding the 5 year mandatory minimum to every alternative means of committing the crime would result in some certainty and consistency in sentencing but the minimum is hardly ever justified under the SRA unless already contemplated mitigating circumstances are met.

- Fiscal Impact of Proposed Changes

The number of Assault of a Child in the First Degree charges filed is relatively small. However, incarceration periods are long. Under the proposed reforms, an increase in the ranking of the Offense Level would lead to increased costs to the Department of Corrections. These costs would however be the most impactful out of all the proposals listed above. The modification of

the elements of the crime and including 16 to 17 year olds would also add to the number of AOC 1 charges filed statewide, however the impact would be minimal when viewed in the context of the rarity of this charge being brought. When compared to the injuries inflicted upon the child victims of the crime, it is a price worth paying.

Conclusion

The above recommendations and analysis constitute a complete review of the Assault of a Child in the First Degree as mandated by the Washington State Legislature. The crime of Assault of a Child in the First Degree is an extremely serious criminal charge, requiring much thought to be put into any reform of the statute. The harm that is inflicted upon children under the age of 13 by offenders who commit the crime of Assault of a Child in the First Degree must always be remembered when considering changes to the statute.

PROPOSAL
INCREASE SERIOUSNESS LEVEL OF ASSAULT OF A CHILD 1
325 – Sentencing Guidelines Commission
October 8, 2009

SUMMARY

This proposal increases the seriousness level of Assault of a Child 1 from Level 12 to Level 13

EXPENDITURES

Assumptions

The adult jail and prison bed impacts for this bill were calculated under the following assumptions:

- Sentences are based on Sentencing Guidelines Commission Fiscal Year 2008 (updated May 2009) adult felony sentencing data, and assume no changes in crime rates, filings, plea agreement practices or sentencing volumes, *etc.* (*i.e.*, there will be an identical number of sentences each year).
- Sentences are distributed evenly by month.
- Sentences are discounted by the ratio of sentences to jail or prison admissions.
- Length of stay in jail is calculated using a figure for average earned release, based on a survey of local jails by the Sentencing Guidelines Commission, the Office of Community Development and the Washington State Association of Counties.
- Bed impacts are calculated with a phase-in factor for Other Violent Child Sex offenses
- The prospective length of stay in prison factors in the amount of time served in jail prior to transferring to the Department of Corrections based on the average time served for specific offenses as reported by DOC.
- All sentence alternatives, exceptional sentences and life/death sentences were excluded.
- Assumes 50% ERT has sunset as of July 1, 2010
- DOC has provided estimates on the percentage of offenders by hierarchy who have remained at a low risk designation and received 50% ERT. In order to bring these offenders to 33% ERT, 17% of their sentence (less enhancements and credit for time served) was added back to their total confinement (17% is the difference between 50% and 33% ERT). The rest of the sentences were assumed to have received 33% ERT already.

Impact on prison and jail beds

In FY08, there were 6 sentences for Assault of a Child 1. One sentence was an exceptional sentence and was therefore excluded from the analysis, leaving 5 sentences. Two of the sentences each had two Assault of a Child 1 offenses running consecutively. Four of the 5 sentences had an offender score of 0.

- The average current sentence length is 163.4 mos
- The average current length of stay is 137.6 mos
- The average proposed sentence length is 215.5 mos
- The average proposed length of stay is 181.4 mos

**Average Monthly Population Jail and Prison Impacts
 Proposal - Increase Seriousness Level of Assault of a Child 1
 Sentencing Guidelines Commission
 October 8, 2009**

	Fiscal Year									
	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19	FY20
Jail AMP	0	0	0	0	0	0	0	0	0	0
Prison AMP (DOSAs)	0	0	0	0	0	0	0	0	0	0
Prison AMP (Non-DOSA)	0	0	0	0	0	0	0	0	0	1
Prison AMP (Total)	0	0	0	0	0	0	0	0	0	1

	Fiscal Year									
	FY21	FY22	FY23	FY24	FY25	FY26	FY27	FY28	FY29	FY30
Jail AMP	0	0	0	0	0	0	0	0	0	0
Prison AMP (DOSAs)	0	0	0	0	0	0	0	0	0	0
Prison AMP (Non-DOSA)	2	2	3	4	5	6	7	9	10	11
Prison AMP (Total)	2	2	3	4	5	6	7	9	10	11