

CHAPTER 4 CRIMINAL PRE-TRIAL ISSUES

This chapter covers those pre-trial issues, which frequently arise in cases in which the defendant is charged with a crime related to domestic violence. Pre-trial dispositions and diversions are covered in Chapter 8. Matters of general criminal procedure that are covered in the criminal benchbooks are not repeated here. This chapter supplements the criminal benchbooks by including more detailed coverage of the issues that tend to arise in domestic violence cases.¹

I. Arrest: Warrantless

A. Permissive Warrantless Arrests

A police officer having probable cause to believe that a felony has been committed may arrest the perpetrator without a warrant. [RCW 10.31.100\(1\)](#). Likewise, a police officer may arrest a person without a warrant if the police officer observed the commission of any misdemeanor or gross misdemeanor. Finally, an officer may arrest without a warrant if the officer has probable cause to believe that the person has committed certain misdemeanors specified by [RCW 10.31.100\(1\)](#). These include any misdemeanor or gross misdemeanor involving “physical harm or threats of harm to any person or property or the unlawful taking of property” and involving acts of criminal trespass. [RCW 10.31.100\(1\)](#).

B. Mandatory Warrantless Arrests

An officer must arrest a person whom the officer has probable cause to believe either violated an order which restrains the person from contact with the victim or whom the officer believes has committed an assault against a family or household member within four hours of the time that police make contact with the alleged perpetrator. [RCW 10.31.100\(2\)\(a\)-\(c\)](#).

[RCW 10.31.100\(2\)](#) provides:

A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

- (a) An order has been issued of which the person has knowledge under, [26.44.063](#), or [Chapter 10.99](#), [26.09](#), [26.10](#), [26.26](#), [26.50](#), [74.34 RCW](#) restraining the person and

the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or daycare, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under [RCW 26.44.063](#), imposing any other restrictions or conditions upon the person; or

- (b) A foreign protection order, as defined in [RCW 26.52.010](#), has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or
- (c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in [RCW 10.99.020](#) and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under [RCW 10.99.010](#); (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

C. Comparison of Mandatory vs. Permissive Arrest Situations

The situations in which a police officer is required to arrest a perpetrator of a domestic violence offense are rather limited. These include situations where the officer has probable cause to believe that one of a variety of domestic violence orders has been violated or where the officer has probable cause to believe that specified forms of assault between family or household members have occurred.

On the other hand, an officer, in the exercise of his or her discretion, may arrest a defendant without a warrant in virtually any domestic violence situation because under [RCW 10.31.100\(1\)](#) warrantless arrests are authorized for all felonies and for misdemeanors which involve violence or threats of violence to persons or property, the wrongful taking of property, and acts of criminal trespass.

D. Warrantless Entry Into Victim's Home

A person subject to a domestic violence no-contact order has no standing to challenge his warrantless arrest in the victim's home, even where the victim has specifically declined to authorize the entry. *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000). *See also, State v. Johnson*, 104 Wn. App. 409, 420, 16 P.3d 680, 686 (2001) (defendant in custody; warrantless entry into home to search for other victims permitted; recognition that victims of domestic violence may be uncooperative with police because they may fear retribution from their batterer).

II. Pre-Trial Release

A. Introduction

In Washington, the law governing personal recognizance, bail, conditions of release, and related matters is the same in domestic violence cases as it is in other criminal prosecutions.

Washington's General Rules are covered in other benchbooks, and the discussion need not be repeated here. In superior court, see [Washington State Judges Benchbook, Criminal Procedure, Superior Court](#). In courts of limited jurisdiction, see [Washington State Judges Benchbook, Criminal Procedure, Courts of Limited Jurisdiction](#). These benchbooks cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and State

- Personal recognizance
- Bail
- Conditions of release
- Factors to be considered by court
- Delay of release
- Release in capital cases
- Violation of conditions
- Failure to appear

In this domestic violence manual, the discussion focuses on the special considerations that should be taken into account in domestic violence cases. Attention is also given to no-contact orders and other special procedures that are available in such cases. The principal rules of court, [CrR 3.2](#) and [CrRLJ 3.2](#), can be found at http://www.courts.wa.gov/court_rules/.

B. Research on Danger to Victim During Pre-Trial Period²

1. The lethal potential of domestic violence is well documented.

In the United States, from 1993-2000, the percentage of female murder victims killed by intimate partners has remained at about 33 percent.³ Consistent with national trends, about 30 percent of female homicide victims in Washington State were killed by their intimate partners during this time period.⁴

However, it is not just women who are being killed in domestic violence homicides. From 1997-2004, an additional 138 people were killed in Washington State domestic violence related fatalities. These include the children, friends, co-workers, and family of the abused women and also three law enforcement officers who intervened.⁵

2. Studies also show that domestic violence tends to escalate in both frequency and severity over time.⁶

National Crime Statistics show that once a woman is victimized by domestic violence, her risk of being victimized again is high.⁷ Data also shows that during a six-month period approximately 32 percent of the women who were abused once were victimized again.⁸

3. Research also suggests that domestic violence tends to escalate when the victim leaves the relationship.

The research demonstrates that a history of domestic violence may be a reliable indicator that further violence will occur. In addition, the victim may be particularly vulnerable to re-assault during attempts to leave, or to sever the relationship. Data from the National Crime Victimization Survey indicate divorced or separated persons were subjected to the highest rates of intimate partner violence.⁹ According to one report, separation from an abuser increased the risk of fatality seven times.¹⁰ Washington State in-depth fatality reviews made clear that in at least 44 percent of the cases in which domestic violence abusers killed someone (most often their intimate partner, but also children, family members, and friends), the domestic violence victim had left, divorced, or separated from the abuser, or was attempting to leave.¹¹ Women are more likely to be victims of homicide when they are estranged from their husbands, especially in the first two months after separation.¹²

4. Vulnerability of victim

A report by the National Institute of Justice (NIJ) concluded that the victim is especially vulnerable to retaliation or threats by the defendant during the pre-trial period.¹³

C. Applying [CrR 3.2\(a\)](#) in Domestic Violence Cases

1. Legal standard

[CrR 3.2\(a\)](#) states that an accused, “other than a person charged with a capital offense” shall “be ordered released on the accused’s personal recognizance” unless the court is satisfied that:

- a. “[R]ecognizance will not reasonably assure the accused’s appearance;” [CrR 3.2 \(a\)\(1\)](#) or
- b. It is shown that there is a “likely danger that the accused will commit a violent crime;” [CrR 3.2 \(a\)\(2\)\(a\)](#) or
- c. It is shown that there is a “likely danger . . . that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.” [CrR 3.2 \(a\)\(2\)\(b\)](#).

The text of [CrR 3.2](#) is virtually identical to that of [CrRLJ 3.2](#). For ease of reference all cites will be to the Superior Court Rule.

2. Making a finding of future dangerousness

In evaluating the [CrR3.2\(a\)](#) factors, the court should be sensitive to the concerns outlined above. Factors to be considered in making a finding of future dangerousness, pursuant to [CrR 3.2\(c\)](#), (e), include:

- (1) The accused's history of response to legal process, particularly court orders to personally appear;
- (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused's family ties and relationships;
- (4) The accused's reputation, character, and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

3. No-contact with the victim (or others) as a condition of release

a. Authority to condition release upon no contact

In any domestic violence case, the court should consider imposing a requirement of “no contact” with the victim as a condition of release. [CrR 3.2\(d\)](#). A no-contact order imposed pursuant to court rule may also prohibit (where

supported by the record) the defendant from contacting or otherwise intimidating the non-victim witnesses to the incident. This is particularly important when children are the witnesses to an incident of domestic violence.

- b. Comparison of no-contact orders issued pursuant to [RCW 10.99.040\(2\)](#) with no-contact orders issued pursuant to [CrR 3.2\(k\)](#)

It must be emphasized that an order barring the accused from having contact with the victim and/or other witnesses is different from an order of no contact imposed pursuant to [RCW 10.99.040\(2\)](#). Violation of a no-contact order issued pursuant to [CrR 3.2](#) will result in revocation of release pursuant to [CrR 3.2\(k\)\(2\)](#). In contrast, as discussed at Chapter 3, Section III, A, 3, violation of a [Chapter 10.99 RCW](#) order is a separate crime.

Because of the lower standard of proof required for revoking release upon conditions, additional protection is afforded the victim when both types of “no-contact” orders are entered. See [CrR 3.2\(k\)\(1\)](#). In practice, most courts simply issue the written no contact pursuant to [RCW 10.99.040\(2\)](#) and either in an oral or written order setting terms of release requires compliance of the condition of no contact.

- c. Notice to the victim

To help protect the victim during the pre-trial period, some states mandate notice to victims of the defendant’s arrest, arraignment, and pre-trial release if the victim has requested this information and provided an address.¹⁴ Although such notice is not required under Washington law, this procedure is recommended when possible.

4. Other release provisions

Provisions prohibiting the defendant from possessing a firearm or other dangerous weapon

a. Authority under [RCW 9.41.800](#)

When issuing a no-contact order pursuant to [RCW 10.99](#), the court may restrict the authority of a defendant to possess a firearm or other dangerous weapon if the court finds either that the defendant previously used or displayed a firearm or other dangerous weapon in a serious offense or that the defendant previously committed an offense (such as assault against a family member) that makes the defendant ineligible to possess a firearm. Under certain circumstances, the court must bar a defendant from possessing a firearm or other dangerous weapon.

[RCW 9.41.800](#) is discussed more fully in Chapter 3 at Section II.

b. Authority under [CrR 3.2](#)

In addition to authority granted the court pursuant to [RCW 9.41.800](#), a court may issue orders restricting the right of a defendant to possess a firearm in conjunction with an order setting bail or releasing a defendant on personal recognizance. [CrR 3.2\(d\)](#) provides:

Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following conditions:

- (3) Prohibit the accused from possessing any dangerous weapons or firearms . . .

In addition, CrR 3.2(d)(10) authorizes the court to “[i]mpose any condition other than detention to assure administration of justice and reduce danger to others in the community.”

III. No-Contact Orders

One of the most significant aspects of a criminal case involving domestic violence is the court’s authority to enter a no-contact order. Such an order does just what the name implies – it prohibits contact with the victim. A no-contact order is typically entered as a part of the defendant’s pretrial release. In addition, such

orders may be entered at other stages of a proceeding, including sentencing and disposition.

A court has the authority to enter a no-contact order whenever a criminal domestic violence prosecution is pending. [RCW 10.99.040\(2\)-\(3\)](#). Such orders may also be entered as a condition of sentence following conviction. [RCW 10.99.050\(1\)](#).

A. Jurisdiction and Procedure

1. No-contact orders may properly be entered by any trial court: superior, district, or municipal

The court with jurisdiction over the criminal case is the proper court to enter the no-contact order. [RCW 10.99.040\(2\)](#).

2. Time of entry

- a. The determination should be made at the defendant's first court appearance. Normally, the first appearance is the day after arrest, or if the defendant has been charged but not arrested, the day of arraignment. These court appearances are mandatory and cannot be waived. [RCW 10.99.045](#).

NOTE: A pre-trial no-contact order may, under appropriate circumstances, be issued at a time other than arraignment as a condition of release and may not coincide precisely with the time of release. *State v. Snapp*, 82 P.3d 252, 255, 119 Wn. App. 614, 619, 82 P.3d 252, 255 (2004) (No-contact order entered after defendant arrested for new, non-domestic violence offense, while domestic violence charge was still pending).

- b. If a no-contact order has previously been entered, the court, at arraignment, must determine whether the order should be extended. [RCW 10.99.040\(3\)](#).

3. Factors to consider

- a. Although the entry of a no-contact order is discretionary with the court, the court must at least consider the possibility of such an order and determine whether a no-contact order is needed. [RCW 10.99.040\(2\)](#).

- b. A no-contact order should be considered irrespective of the defendant’s custodial status. It is not uncommon for an incarcerated defendant to continue contacting the victim by mail, telephone, or through third parties.¹⁵

4. Telephonic orders

The order may be issued by telephone if there is no outstanding restraining or protective order already prohibiting the defendant from contacting the victim. A telephone order must be reduced to writing as soon thereafter as possible. [RCW 10.99.040\(2\)](#).

B. Content of Order

1. Who is protected?

A no-contact order pursuant to [Chapter 10.99 RCW](#) protects only the victim.

Child victims may be protected in some situations. The definition of family or household member includes persons “who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.” [RCW 10.99.020\(3\)](#). In addition, children over sixteen years of age who otherwise meet the definition of “family or household members” can be included in a no-contact order. Children who do not meet this definition may need to be protected by an anti-harassment or restraining order.

Witnesses may not be incorporated into no-contact orders but must be protected by an order issued pursuant to [CrR 3.2\(d\)](#). Release orders are discussed more fully above at Section II, C.

2. Scope of the order

A no-contact order prohibits the person charged with or convicted of a domestic violence offense from contacting the victim or from “knowingly coming within, or knowingly remaining within, a specified distance of a location.” [RCW 10.99.040\(2\)\(a\)](#).

[RCW 10.99.050](#) for post-conviction orders does not continue the language quoted above regarding coming near a specified location, which was added by Laws of 2000, ch. 119, §18.

A victim who needed further protection, such as provisions for temporary custody of a child, would need to obtain a civil protection order or restraining order.

In *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246, 1249 (2001), the court concluded that, under the facts presented, a provision in a criminal no-contact which barred the defendant from having any contact with his non-victim children violated his fundamental right to parent.

3. Surrender of weapons

An order requiring the surrender of a firearm or other dangerous weapon may be issued if the court finds by a preponderance of the evidence that the defendant either (1) used, displayed or threatened to use a weapon in a felony or (2) that the defendant has previously committed an offense which makes him or her ineligible to possess a firearm. [RCW 9.41.800\(2\)](#). Presumably the requirement that the court find that the defendant previously committed a disqualifying offense would be satisfied if the currently charged offense meets the statutory criteria. [RCW 10.99.040\(2\)\(b\)](#) requires the court to consider [RCW 9.41.800](#) when issuing a pre-trial no-contact order.

Under some circumstances, a court is required to order surrender of weapons. [RCW 9.41.800\(1\)](#), [RCW 9.41.800 \(2\)\(a\)](#).

Issues concerning surrender of a firearm are discussed more fully in Chapter 3, II.

4. Electronic home detention

[RCW 10.99.040\(3\)](#) permits the court, when issuing or extending a no-contact order, to “include in the conditions of release a requirement that the defendant submit to electronic monitoring.” See Section III, G, 6 for a further discussion of electronic home detention.

C. Duration of Orders

1. Pre-trial orders

A pre-trial no-contact order remains in effect until the expiration date specified in the order or until dismissal or acquittal. [RCW 10.99.040\(3\)](#). Where a written valid pre-trial domestic violence order is incorporated by reference into the judgment and sentence, it is enforceable up until the expiration date on the order, even

though the court had not entered a formal post-conviction order. *State v. Schulz*, 146 Wn.2d 541, 560-1, 48 P.3d 301, 310 (2002).

In contrast, a pre-trial no-contact order cannot serve as basis for conviction for violating a no-contact order where the act alleged to be a violation occurred after dismissal of the underlying charge. [RCW 10.99.040\(3\)](#); *State v. Anaya*, 95 Wn.2d 751, 754, 976 P.2d 1251 (1999) (Discussing prior version of [RCW 10.99.040\(3\)](#)).

2. Post-conviction orders

A no-contact order issued in a felony case may be imposed for the maximum possible sentence, regardless of the standard range. Unless otherwise ordered by the sentencing court, the order remains in effect even after a certificate of discharge has been issued. [RCW 9.94A.637\(5\)](#). A post-discharge violation remains completely enforceable.

NOTE: *State v. Miniken*, 100 Wn. App. 925, 927, 999 P.2d 1289, 1290 (2000), which held that a certificate of discharge would render a no-contact order unenforceable, was decided under a prior version of [RCW 9.94A.637](#). Its continuing validity is doubtful. See [RCW 9.94A.637\(5\)](#) (No-contact order entered pursuant to [RCW 10.99](#) remains enforceable and in full effect following entry of a certificate of discharge).

In a misdemeanor or gross misdemeanor, the maximum term appears to be two years. [RCW 3.66.067](#); [RCW 3.66.068](#); [RCW 35.20.255](#) (jurisdiction of courts of limited jurisdiction is limited to two years).

D. Mandatory Language

[RCW 10.99.040\(4\)\(b\)](#) requires that the face of the order bear the legend:

Violation of this order is a criminal offense under [Chapter 26.50 RCW](#) and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibition. *You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.* (Emphasis added).

In *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), the court held that an order without the italicized language was invalid. The conviction for willfully violating the order was thus reversed for insufficient evidence.

This italicized language is not required on a post-conviction no-contact order. Such orders, however, must indicate that “Violation of this order is a criminal offense under chapter [26.50 RCW](#) and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. [RCW 10.99.050](#).”

NOTE: Courts are not required to continually update orders to reflect all statutory changes in penalties for no-contact orders so long as the orders accurately reflect statutory notice requirements and do not mislead the defendant. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

E. Entry in Computer-Based Intelligence Information System and the Domestic Violence Database

The clerk of the court is to forward a copy of an order issued under [RCW 10.99.040](#) or [10.99.050](#) to the appropriate law enforcement agency on or before the next judicial day following issuance of the order. Upon receipt, the agency shall enter the order into any computer-based criminal intelligence information system available in the state used by law enforcement agencies to list outstanding warrants. In Washington State, the system is called the Washington State Crime Information Center (WACIC). Entry into such a system constitutes notice to all law enforcement agencies of the existence of the order. The order may be enforced statewide. See Chapter 3, Section IV, B.

All Washington State no-contact orders are included in the Judicial Information System Domestic Violence Data Base. The Domestic Violence Data Base is discussed in Chapter 9.

F. Relationship to Other Proceedings

1. Criminal proceedings

If criminal charges have been filed against the abuser, the no-contact order may provide the victim with all the protection he or she needs, eliminating the need to commence a separate civil proceeding to obtain a protection order or a restraining order.

A no-contact order provides protection at no cost to the victim, and since the prosecuting attorney and the court are responsible for

entry of the order, the victim need not retain counsel or bear other expenses.

2. Civil proceedings

If other civil proceedings have been commenced, a no-contact order may nevertheless be entered. Moreover, the underlying criminal proceeding may not be dismissed simply on the basis that civil proceedings are pending. [RCW 10.99.040\(1\)\(a\)](#) states that in a domestic violence case, the court “shall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings.”

G. Violations and Enforcement

NOTE: The Supreme Court has determined that the validity of a no-contact order is not an element of the offense of violating an order entered for the protection of a domestic violence victim. *State v. Miller*, 156 Wn. 2d 23, 123 P.3d 827 (December 1, 2005). The court overruled a number of Court of Appeals decisions that had held to the contrary. A more detailed discussion is found in Chapter 5, Section X.

1. Jurisdiction

No-contact orders are fully enforceable in any court in the state. [RCW 10.99.040\(5\)](#).

When any peace officer in the state has probable cause to believe that the defendant has violated a no-contact order, arrest is mandatory. [RCW 10.99.055](#); [RCW 10.31.100\(2\)\(a\)](#).

2. Violation as a separate crime

a. Information or Complaint

The charging document must, at a minimum include the date the order was issued, an identification of what court issued the order and the name of the person protected or such other information to specifically identify the order that forms the basis for the criminal prosecution. *City of Seattle v. Termaine*, 124 Wn. App. 798 at 805, 103 P.3d 209 (2004).

b. Penalties

Any knowing violation of a domestic violence no-contact order is a separate crime. The penalties for violation are established by [RCW 26.50.110](#). Absent the circumstances discussed below, violation of a no-contact order is a gross misdemeanor.

A violation of a no-contact order is a felony under certain circumstances:¹⁶

- (i) The defendant has had two prior convictions for violating orders issued under any of the following provisions: [RCW 10.99](#); [RCW 26.09](#); [RCW 26.10](#); [RCW 26.26](#); [RCW 26.50](#); [RCW 74.34](#) or any valid foreign protection order as defined in [RCW 26.52.020](#). The previous convictions need not involve the same person as is the victim in the current offense. [RCW 26.50.110\(5\)](#).

For purposes of [RCW 26.50.110\(5\)](#), a conviction occurs once a finding of guilt is entered, regardless of whether the defendant has yet to be sentenced. *State v. Rice*, 116 Wn. App. 96, 105-6, 601 P.3d 651, 655 (2003).

Division I and Division III disagree as to whether the nature of the prior conviction presents a question of fact for the jury. Compare *State v. Arthur*, 126 Wn. App. 243, 244, 108 P.3d 169 (2005) (Division III) (jury must make determination of whether prior conviction was for violating a domestic violence order) and *State v. Carmen*, 118 Wn. App. 655, 77 P.3d. 368 (2003), review denied 151 Wn.2d. 1039 (2004) (Division I) (court may make determination; jury need only determine whether prior convictions refer to the defendant currently on trial). The State has the burden of proving the validity of a prior conviction only after a specific substantive challenge has been made. *State v. Snapp*, 119 Wn. App. 614 at 625, 82 P.3d 252 (2004).

- (ii) The act which violates the order issued under [RCW 10.99](#); [RCW 26.09](#); [RCW 26.10](#); [RCW 26.26](#); [RCW 26.50](#); [RCW 74.34](#) or any valid foreign protection

order as defined in [RCW 26.52.020](#), is an assault (not amounting to an assault in the first or second degree) or is an act which “creates a substantial risk of death or serious physical injury.” [RCW 26.50.110\(4\)](#).

A felony violation of a no-contact order has been classified as a seriousness level five offense. [RCW 9.94A.515](#). A felony violation of a no-contact order is included within the definition of “crime against person” and subject to the filing standards of [RCW 9.94A.411](#). The new penalties apply to offenses, which occur on or after July 1, 2000, regardless of when the original order was issued. [RCW 9.94A.515](#), [RCW 26.50.021](#). Designation of this crime as a seriousness level five has been held to be within the authority of the legislature and not a due process violation. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

c. Effect of victim’s consent to the contact

A victim’s consent to the violation of a protection or no-contact order is not a defense to a subsequent criminal prosecution. *State v. Dejarlais*, 136 Wn.2d 939, 943-4, 969 P.2d 90, 92 (1998) (violation of a 26.50 protection order); *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000) (violation of a 10.99 no-contact order). In fact, [RCW 10.99.040\(4\)\(b\)](#) and [RCW 26.50.035\(1\)\(c\)](#) require that the order prohibiting contact indicate on its face that the person restrained is subject to arrest even if the victim consents to the contact. Continued reliance on *Reed v. Reed*, 149 Wash. 352, 270 P. 1028 (1928), which held that a victim, who consented to a violation of a restraining order could not enforce that order, appears to be unwarranted. *State v. Dejarlais*, 136 Wn.2d at 943-44 (rationale of Reed severely criticized, but case not specifically overruled).

3. Violation of a no-contact order imposed as a condition of probation

Violation of a no-contact order entered pursuant to [RCW 10.99.050](#) (post-conviction order) is also a violation of probation (including community supervision, community placement, or community custody) on the underlying offense. As such, it may result in the imposition of additional jail time. An order requiring the defendant to serve additional time for a violation of a no-

contact probation condition does not bar a subsequent trial on a new criminal charge for violating [RCW 10.99.050](#). *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609, 615(1996). *Accord, State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, 639 *review denied*, 133 Wash.2d 1008 (1997); *United States v. Soto-Olivas*, 44 F.3d 788, 789 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

4. Violation as contempt of court

A violation of a no-contact order also constitutes contempt of court and is punishable as such. Certainly, under most scenarios, violation of a no-contact order would be punishable as criminal – and not remedial – contempt pursuant to [RCW 7.21.010](#). Criminal contempt requires that the prosecuting attorney file a complaint or information. The maximum penalty is \$5,000 and 365 days in jail. [RCW 7.21.040](#). A defendant charged with criminal contempt is entitled to the full panoply of rights afforded any other criminal defendant. *In re M.B.*, 101 Wn. App. 425, 439-40, 3 P.3d 780, 788 (2000).

5. Punishment as both a separate crime and contempt

a. Double jeopardy

After some vacillation, the United States Supreme Court in *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993) re-established the “same elements” test for determining whether successive prosecutions violate the double jeopardy clause of the Fifth Amendment. The Washington Supreme Court has also re-adopted the “same elements” test. *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d. 1267, 1270 (1995). *See also State v. Calle*, 125 Wn.2d 769, 778 n. 4, 888 P.2d 155, 159 (1995).

Dixon involved a consolidated appeal of two cases, one of which was a defendant’s appeal from an order denying a motion to dismiss a criminal indictment which was based on the same conduct for which he previously had been found in contempt of court. The court concluded that some of the counts were barred by conviction of criminal contempt and some were not and that an analysis of both the specific statutory elements and the evidence to be adduced at each trial is necessary to resolve the double jeopardy issue. *Accord, State v. Buckley*, 83 Wn. App. 707,

713-14, 924 P.2d 40, 43 (1996) (“At Risk Youth” case). See generally Annotation: Contempt Finding as Precluding Substantive Charge Relating to Same Transaction, 26 A.L.R.4th 950 (2004).

NOTE: As discussed above in Section III, G, 3, an order imposing an additional period of confinement for violation of a probation condition of no-contact does not bar trial on a new criminal charge for violating [RCW 10.99.050](#). *State v. Grant, supra*. See also, *State v. Prado, supra*.

b. Equal protection

The mere existence of these two remedies does not violate a defendant’s right to equal protection. *State v. Horton*, 54 Wn. App. 837, 840, 776 P.2d 703, 704-5 (1989).

6. Imposition of an order of electronic home detention

[RCW 10.99.040\(4\)](#) refers to [RCW 26.50.110](#) which provides that the court, “in addition to any other penalties provided by law,” may order the defendant to submit to electronic home detention following a conviction for violation of a no-contact order. The literal language of the statute appears to authorize the court to order electronic home detention in addition to the maximum jail term and fine. Such an interpretation, however, raises serious constitutional, statutory, and jurisdictional issues. In *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096, 1097 (1992), the court concluded that, under the provisions of the Sentencing Reform Act (SRA), a defendant who had been ordered to submit to electronic home detention as a condition of pre-trial release must be afforded credit for such time against the sentence that was ultimately imposed. Accord, *State v. Anderson*, 132 Wn.2d 203, 213, 937 P.2d 581, 586 (1997) (defendant subject to electronic home detention as condition of appeal bond entitled under the equal protection clause to credit against sentence); *State v. Ashbaker*, 82 Wn. App. 630, 633, 919 P.2d 619, 620 (1996) (juvenile offender subject to order of electronic home detention as condition of pre-trial release entitled to credit against sentence ultimately imposed).

NOTE: Where a defendant is ordered into home detention as a condition of release from custody pursuant to [CrR 3.2](#) and that release is not electronically-monitored, the defendant is not entitled to credit for such time against any sentence that is ultimately imposed. *State v. Vasquez*, 75 Wn. App. 896, 898-9,

881 P.2d. 1058, 1059 (1994), *review denied*, 126 Wn.2d 1005 (1995). *See also Reno v. Koray*, 515 U.S. 50, 52, 115 S. Ct. 2021, 2023, 132 L. Ed. 2d 46 (1995) (defendant ordered to attend in-patient treatment as condition of pre-trial release not entitled to credit against sentence).

IV. Discovery in Domestic Violence Cases

A. Limited Protection of Victim’s Address

The general discovery rules of [CrR 4.7](#) apply in domestic violence cases with one important exception. [RCW 10.99.040\(1\)\(c\)](#) provides that the court:

Shall waive any requirement that the victim’s location be disclosed to any person other than the attorney of a criminal defendant, upon a showing that there is a possibility of further violence: PROVIDED, That the court may order a criminal defense attorney not to disclose to his client the victim’s location[.]

It should be noted that a defendant does have a right under the confrontation clause to background information – including the addresses – of potential government witnesses. This is to permit the defense to interview persons in the witness’s community to determine the witness’s reputation for veracity. *Alford v. United States*, 282 U.S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931); *State v. Mannhalt*, 68 Wn. App. 757, 764-67, 845 P.2d 1023, 1027-8 (1992)(the court notes the right to confront is “not absolute” but may be subject to a “personal safety” exception, though the court acknowledges Washington has not clearly adopted this standard.). Even in a non-domestic violence case, the court may issue a protective order to safeguard witnesses who may be at risk from disclosure of such information. [CrR 4.7\(h\)\(4\)](#). Presumably, so long as the defense attorney is provided with the necessary background information, the defendant’s confrontation rights will be adequately protected, even if an order barring the attorney from disclosing the victim’s address to the defendant is entered.

B. Access to Witnesses

It is misconduct for a prosecutor to instruct a witness not to speak to defense counsel or to a defense investigator or to instruct a witness not to grant the defense an interview unless the prosecutor is present. This rule applies equally to the defense, except with regards to access to the defendant. However, a prosecutor or defense lawyer may inform witnesses that they may choose whether to provide an interview and that they have a right to determine who shall be present at such an interview. *State v. Hofstetter*, 75 Wn. App. 390, 402, 878 P.2d 474, 482.

C. Witness Statements and Work Product

The defense is entitled to receive the “written or recorded statements and the substance of any oral statements” of witnesses that the prosecuting attorney intends to call. [CrR 4.7\(a\)\(1\)\(i\)](#). The prosecution, however, cannot be required to disclose work product – that is material which contains “the opinions, theories or conclusions of investigating or prosecuting agencies . . .” [CrR 4.7\(f\)\(1\)](#). The fact that the interview of the victim or witness was conducted by a prosecuting attorney does not, in itself, establish that the statement is work product. *State v. Garcia*, 45 Wn. App. 132, 138, 724 P.2d 412, 416 (1986).

D. Records of a Domestic Violence Program

Client records maintained by domestic violence programs are non-discoverable absent a court order. [RCW 70.123.075](#). Prior to ordering disclosure, the court must conduct an in camera review to determine whether the “records are relevant and whether the probative value of the records is outweighed by the victim’s privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records.” [RCW 70.123.075\(1\)\(c\)](#).

Domestic violence program means an agency that provides shelter, advocacy, and counseling for domestic violence victims. [RCW 70.123.020\(7\)](#).

In 2006, the Legislature added a new section regarding disclosure of recipient information. [RCW 70.123.076\(3\)](#) provides if disclosure of a recipient's information is required by statute or court order, the domestic violence program shall make reasonable attempts to provide notice to the recipient affected by the disclosure of information. If personally identifying information is or will be disclosed, the domestic violence program shall take steps necessary to protect the privacy and safety of the

persons affected by the disclosure of the information. [RCW 70.123.076\(3\)](#).

E. Depositions

1. Authorization

Unlike in civil cases, the parties to a criminal case must secure the permission of court before noting a deposition. [CrR 4.6](#) sets forth the circumstances under which a deposition may be ordered.

The court may order a deposition:

Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice . . .

[CrR 4.6\(a\)](#). [CrR 4.10\(c\)](#) specifically requires the court to release a material witness from custody “unless the court determines that the testimony of such witness cannot be secured adequately by deposition.”

2. Procedure

- a. Reasonable notice as to the time and place of the taking of the deposition shall be given by the “party at whose instance a deposition is to be taken” to all other parties. [CrR 4.6\(b\)](#).

Significantly, [CrR 4.6\(c\)](#) provides that:

No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

- b. The deposition shall be taken as prescribed in civil rules. [CrR 4.6\(e\)](#) provides that objections shall be made pursuant to the civil rules. [CR 32\(d\)\(3\)\(A\)](#) provides:

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by

failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Other, more formal objections are waived if not made at the time of the taking of the deposition. [CR 32\(d\)\(3\)\(B\)\(C\)](#).

Objections to admissibility of the deposition or part thereof are governed by [CR 32\(b\)](#), which provides that objections may be made at the trial or at a pre-trial hearing for any reason which “would require the exclusion of the evidence if the witness were then present and testifying.”

- c. In practice, the trial court normally rules on objections made pursuant to [CR 32\(b\)](#) in a pre-trial hearing.

The deposition itself is not physically admitted into evidence at the trial (although it may be admitted at the time of the pre-trial hearing to preserve the record on matters excluded by the court). Deposition testimony is normally admitted at trial in what amounts to a “staged reading.” The proponent of the testimony secures the services of a reader who will sit in the witness box and read the answers of the declarant (the person deposed) while the attorney for the proponent reads the questions. Matters excluded in the pre-trial hearing are not read to the jury.

3. Admissibility of deposition testimony

If the deponent is unavailable for trial, deposition testimony is admissible under the Former Testimony Hearsay Exceptions of [ER 804\(b\)\(1\)](#). A discussion of what constitutes “unavailable” is found at Chapter 6, Section VI.

F. Medical Records

Medical records may be obtained either with a waiver of confidentiality from the patient or through compliance with [RCW 70.02.060\(1\)](#) which requires advance notice to the health care provider and to the patient or the patient’s attorney. Notice must be provided at least fourteen days before the “service of a discovery request or compulsory process” is served on the health care provider so that the patient may seek a protective order.

Without written consent of the patient, a health care provider may not disclose health care information unless the provisions of [RCW 70.02.060\(1\)](#) have been satisfied. [RCW 70.02.060\(2\)](#).

Privilege issues are discussed in Chapter 6, Section II.

V. Challenges to the Charging Documents

A. Domestic Violence Designation

Because the Legislature, by enacting [RCW 10.99](#), did not create new crimes, the failure to include the “elements” of domestic violence in an information did not render the information insufficient. *State v. Goodman*, 108 Wn. App. 355, 359, 30 P.3d 516, 519 (2001). Identification of an offense as a crime of domestic violence on an information or complaint “does not itself alter the elements of the underlying offense; rather it signals the court that the law is to be equitably and vigorously enforced.” *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111, 1112 (2000). Thus, in *O.P.*, the court concluded that the State’s decision to add a domestic violence designation to a complaint only after it had rested did not violate due process.

B. Interfering with the Report of Domestic Violence

Unlike most domestic violence prosecutions, the State is required to allege domestic violence in a prosecution for the crime of Interfering with the Report of Domestic Violence, [RCW 9A.36.150](#). In *State v. Clowes*, the court held that an information purporting to charge a defendant with the crime of Interfering with the Reporting of Domestic Violence was deficient because “there is no reference to the identity of the victim or to the underlying domestic violence crime.” *State v. Clowes*, 104 Wn. App. 935, 942, 18 P. 3d 596, 599 (2001).

C. Violation of court orders

An information or complaint for violation of a court order is required to include “identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, or sufficient other facts” to permit the defendant to be prepared to meet the charges against him. *City of Seattle v. Termain*, 124 Wn. App. 798, at 805, 103 P.3d 204 (2004).

¹ Some of the material in this chapter was originally adapted from the following sources: J. Carter, C. Heisler, and N. Lemon, *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases, A National Model for Judicial Education* (Family Violence Prevention Fund, 1991); A. Ganley, “Case Dispositions,” in *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases* (Family Violence Prevention Fund, 1991); *Family Violence: Improving Court Practice* (National Council of Juvenile and Family Court Judges, 1990).

² Adapted from Carter, Heisler, and Lemon, *supra* at note 1.

³ C. M. Rennison, Ph.D., “Intimate Partner Violence, 1993-2000,” *Bureau of Justice Statistics Crime Data Brief* (United States Department of Justice, February 2003) (NCJ 197838).

⁴ M. Hobart, “Honoring their Lives, Learning from their Deaths,” *Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (Washington State Coalition Against Domestic Violence, December 2000).

⁵ Kelly Starr, Margaret Hobart and Jake Fawcett, “Every Life Lost is a Call for Change,” *Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (Washington State Coalition Against Domestic Violence, December 2004).

⁶ G. B. Stahly, *Victim Rights and Issues: Special Problems of the Battered Woman as Victim/Witness in Partner Abuse Cases 7* (Western Society of Criminology Conference, Las Vegas, NV, February 27, 1987).

⁷ P. Langan and C. Innes, “Preventing Domestic Violence Against Women,” *Bureau of Justice Statistics Special Report 1* (1986).

⁸ *Report to the Nation on Crime and Justice: The Data* (United States Department of Justice Statistics, 1983).

⁹ C. M. Rennison, Ph.D. and Sara Welchans, “Intimate Partner Violence,” *Bureau of Justice Statistics Special Report* (United States Department of Justice, May 2000) (NCJ 178247).

¹⁰ J. Campbell et al., “Assessing Risk Factors for Intimate Partner Homicide,” *NIJ Journal* 250 (2003).

¹¹ “Every Life Lost is a Call for Change,” *Washington State Domestic Violence Fatality Review* (2004).

¹² M. Wilson and M. Daly, *Violence and Victims* (1993).

¹³ G. Goolkasian, *Confronting Domestic Violence: The Role of Criminal Court Judges* (National Institute of Justice: Research in Brief, United States Department of Justice, November 1986).

¹⁴ See, e.g., Conn. Gen. Stat. § 51-286c.

¹⁵ *Domestic Violence: Benchguide for Criminal Courts* (California Center for Judicial Education and Research, 1990).

¹⁶ Somewhat confusingly, both [RCW 10.99.040](#) and [10.99.050](#) require that the face of the order indicate that any violation of the order which is an assault, an act of reckless endangerment or a *drive-by shooting* is a felony and then refer to [RCW 26.50.110](#) for the penalty provisions. [RCW 26.50.110](#) does not include the drive-by shooting provision, presumably since any drive-by shooting is, by itself, a felony. [RCW 9A.36.045](#).