

Washington State Criminal Sentencing Task Force
DRAFT Meeting Summary: April 16, 2020
Virtual Meeting via ZOOM

Task Force Attendees:

- Judge Veronica Alicea-Galvan
- Lydia Flora Barlow
- DeVitta Briscoe
- Suzanne Cook
- Lew Cox
- Elaine Deschamps
- Rep. Roger Goodman
- Russ Hauge
- Rep. Brad Klippert
- Gregory Link
- Rafael Padilla
- Mac Pevey (attended in the afternoon on behalf of Sec. Sinclair)
- Judge Roger Rogoff
- Chief James Schrimpsner
- Tarra Simmons
- Clela Steelhammer
- Jon Tunheim
- Councilmember Derek Young

Presenting Attendees: Lauren Knoth, Clela Steelhammer

Facilitation Team: Amanda Murphy, Chris Page, Molly Stenovec, Hannah Kennedy, Maggie Counihan – William D. Ruckelshaus Center

WELCOME, INTRODUCTIONS, REVIEW AGENDA and GROUNDRULES

Facilitators Chris Page and Amanda Murphy welcomed the Criminal Sentencing Task Force (Task Force), briefly reviewed the agenda, and suggested virtual meeting best practices. Chris reviewed the Task Force's agreed-upon ground rules and asked folks to join with video when possible to maximize engagement and quality.

TASK FORCE MEMBER UPDATES

Amanda called roll to identify all participants and asked each Task Force member (or alternates) to give a brief update on how they are doing personally and to share any pertinent information or news with the Task Force. The following summarizes the information and updates shared with the group:

- Governor Inslee issued [Proclamation 2050](#) on 4/15 with his administration's strategy to reduce the spread of Coronavirus among incarcerated individuals. The plan aims to reduce the DOC prison population by up to 950 people by releasing individuals convicted of nonviolent offenses and those already due to be released within 75 days. Sonja Hallum (Governor's Office representative) invited follow-up questions via email.
- Several Task Force members expressed concern for individuals currently incarcerated in Washington state, citing crowded conditions at some facilities that limit the ability to properly social distance.
- Some members also voiced concern for the disproportionate impact of the current pandemic on communities of color.
- A Task Force member expressed concern about a possible increase in crime rates during the Covid-19 pandemic.
- Legislative members provided an update on the most recent Legislative session including the passage of three bills related to recommendations developed and discussed by the Task Force. Of the bills discussed, the Task Force developed consensus support for:
 - HB 2394 concerning community custody (concurrent terms of supervision)
 - HB 2393 earning credit for complying with community custody conditions

The Task Force also discussed recommending swift and certain counts, but did not reach consensus recommending the following legislation:

- HB 2417 concerning individuals serving community custody terms (swift and certain count)

- In an effort to reduce re-incarceration for minor sanction violations during the Coronavirus pandemic, the Governor put the Swift & Certain bill into immediate effect.
- Several members discussed current efforts to safely release incarcerated people during the ongoing public health crisis. These include funding and resources to ensure no individuals gets released into homelessness and providing cell phones and/or additional financial support upon exit. There is a new coalition of service providers in Kitsap County working to reduce the local jail population and coordinating housing and other resources for individuals returning to the community from incarceration.
- Other members described recent changes and adaptations to court systems that aim to strike a balance between protecting individuals' constitutional rights and complying with current public health directives and social distancing orders.
- Many members highlighted the current and future economic challenges posed by Coronavirus. Given projected revenue shortfalls, it appears that law enforcements, counties, correctional facilities, and other parties in the criminal justice system will have fewer resources when quarantine and social distancing orders are lifted.

Members said they appreciated hearing different perspectives and experiences feeling that doing so has helped to strengthen the group, helping members identify where there is common ground and build trust.

FACILITATION TEAM and CO-CHAIR UPDATES

The Facilitation Team provided a few updates on the Task Force process:

- The Team's efforts to improve the accessibility of Task Force materials, working with DOC to distribute meeting materials in prison libraries and resource centers.
- Postponing the prison tour to a future date TBD.
- The Team's plan to conduct mid-project check-in interviews, similar to the initial assessment process.

Sentencing Effectiveness Working Group (SEWG) Update

Amanda and Chris provided a brief update on the SEWG process.

- The Group has met twice since the last full Task Force meeting in February, focusing on reviewing various grid options and considerations after agreeing upon a list of desired outcomes to serve as criteria when analyzing potential grid options.
- The Working Group created a small sub-group to review potential grid options. The sub-group met and asked Lauren Knoth (Washington State Institute for Public Policy, or WSIPP) to design a decision tree to help guide the discussion and evaluation of potential grid options.
- The Working Group is scheduled to report back to the full Task Force in June or July.

Reentry and Reducing Recidivism Working Group Update

Molly briefly described the Reentry Working Group's progress. The Legislature addressed several priorities discussed by this Working Group during the most recent session. The Working Group also identified subject matter experts to begin populating the Working Group's summary table. The Group will report back to the full Task Force in May or June.

All materials of the working groups including meeting notes are being provided to all members and are publicly available on the Task Force's webpage on the Ruckelshaus Center's website.

DISPROPORTIONALITY IN SENTENCING PRESENTATIONS

Lauren Knoth, WSIPP

Lauren presented an overview of disproportionality, racial disparity, and how judicial discretion and sentencing guidelines relate in the U.S. She clarified the difference between racial disproportionality as a state of being versus racial disparity as a question of equality of treatment. Lauren noted the multiple decision points within

the criminal justice system, all comprising areas of discretion, any one or more of which can combine to produce disproportionate outcomes. She discussed how federal sentencing has changed over time and several studies examining disparity following changes in judicial discretion. To review her presentation in full, please see Appendix A.

Clela Steelhammer, Caseload Forecast Council (CFC)

Clela gave an overview of disproportionality in Washington state. She reviewed the FY 2019 General Disproportionality Report prepared by CFC at the direction of the state Legislature. Clela explained the Adult Sentencing Disproportionality Ratio and its calculation ($\% \text{ racial group in sentencing} / \% \text{ racial group in Washington state population}$). She then summarized the data, which show Caucasians are sentenced at proportional rates, while African Americans and Native Americans are sentenced at disproportionately higher rates, and Asians/Native Hawaiian and Other Pacific Islanders and Hispanics¹ have Sentencing Disproportionality Ratios less than 1. To review her presentation in full, please see Appendix B.

After the presentations, Task Force members provided questions and comments:

Comment: The Nordic Model focuses on a humane response to incarceration. To ensure people succeed, we need to address the underlying trauma and other factors impacting individuals in the system. If we want someone to succeed upon reentry, we need to prepare them for success before release.

Comment: What government chooses to criminalize may also introduce bias into the system. For example, the difference in sentencing for crack versus powder cocaine.

Response: Lauren agreed the Legislature is an important point of discretion not discussed in the presentation.

Question: The presentations underscore the need for research when laws change to evaluate the impact. Could the Legislature be more proactive in supporting such research?

Response: Yes. And WISPP was created to help provide studies based on data and research to the Legislature in a non-partisan way.

Comment: Disparities exist at every step of the process. It is important to have implicit bias training. Language in pre-sentence investigations could cause bias.

Response: To decrease disparity based on pre-sentence investigations (PSIs) the PSI guidance could be crafted specifically to limit discretion. The [criminal justice dashboard](#) in Oregon has interactive data for every county and shows the value of that type of data transparency.

Question: There is a high rate of interaction between various systems (e.g., low educational outcomes and criminal justice interaction). What literature studies such cross-sector interactions?

Response: Lauren referred to the life course criminology field and also offered to send several Washington-specific reports to the Facilitation Team to share with the Task Force and wider listserv.

Comment: Support an equity lens to be applied to all criminal justice legislation. HB 1783 created the Washington State Office of Equity.

Comment: Concerned about the practical implications of limiting the information included in PSIs; restricting the information law enforcement can provide may impact public safety and lead to dangerous individuals falling through the cracks. For example, if police officers can only select from a drop-down menu when providing input on sentencing, they may be frustrated by the narrow options and not participate at all.

¹ Note Hispanic is categorized as a race in CFC data, not as an ethnicity as elsewhere.

Response: It is less about reducing information than about ensuring uniformity in the presentation of information, to avoid linguistic bias that might lead to different interpretations of the same information. There is a need for practitioner input on system designs and feedback after implementation. Based on the limited drop-down menu example, perhaps an appeals process be added to allow officers to submit additional information when deemed necessary.

REFLECTION/FEEDBACK and NEXT STEPS

Members shared reflections and feedback on the virtual meeting format. The following summarizes key notes:

- Many members were glad to not have to commute to meetings.
- While some observed that it is not possible to replace every aspect of in-person interactions (e.g., hallway conversations, body language), most felt Zoom worked well and agreed it was the best way to move the Task Force's work forward while unable to meet in person.
- A few members suggested amending the Task Force schedule to meet via Zoom more frequently but for shorter periods of time.

The Facilitation Team then addressed a few housing keeping items:

- Chris and Amanda emphasized that if participants would like to disseminate information to the full Task Force, it would be best to send it to the Facilitators for distribution to the full group.
- To comply with new Zoom and WSU security policies, the Facilitation Team asked folks to contact them directly if they or others would like to join future Zoom meetings.

OPEN TIME FOR MEMBERS TO SHARE UPDATES/INFO & ENGAGE WITH PUBLIC IN ATTENDANCE

- **Q:** An interested member of the public asked Lauren if studies have shown where disparities occur upstream in the process. **R:** Lauren responded noting that in academia, it is difficult to access criminal history records. With barriers to getting information from all organizations involved, studies looking at all the steps are rare.
- Other members of the public also expressed their general support for the Task Force's efforts and were glad to be able to track the Task Force's important work.

ADJOURN

Sentencing Discretion and Disparity

WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY

Lauren Knoth, Ph.D.

Criminal
Sentencing
Task Force

April 16, 2020

WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY

Non-partisan research at legislative/board direction

WSIPP Board of Directors

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Senator Mark Schoesler

Senator Hans Zeiger

Curt Gavigan, Senate Staff Dir.

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Representative Morgan Irwin,
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Representative Chris Gildon

Representative Timm Ormsby

Representative Larry Springer

Jill Reinmuth, House Staff Dir.

Keith Phillips, Gov. Policy Dir.

Katherine Frank, CWU

Bidisha Mandal, WSU

PURPOSE

The Criminal Sentencing Task Force has had many conversations about discretion at sentencing (both judicial and prosecutorial) and disproportionality in sentencing outcomes.

Two main questions:

- 1. What do we mean when we talk about racial disparity or racial disproportionality at sentencing?**
- 2. How are judicial discretion and sentencing guidelines related to racial disparity in sentencing?**

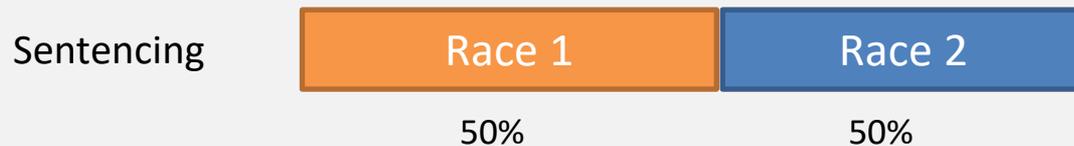
KEY TERMS

- ✓ Discretion: freedom/leeway an individual or an organization has to make decisions
- ✓ Racial disproportionality: when the proportion of a racial/ethnic group within the control of the system is greater than the proportion of such groups in the general population. This is a state of being.
- ✓ Racial disparity: when the ratio of one racial/ethnic group experiencing an event is not equal to the ratio of another racial or ethnic group who experienced the same event. Question of equality in treatment.

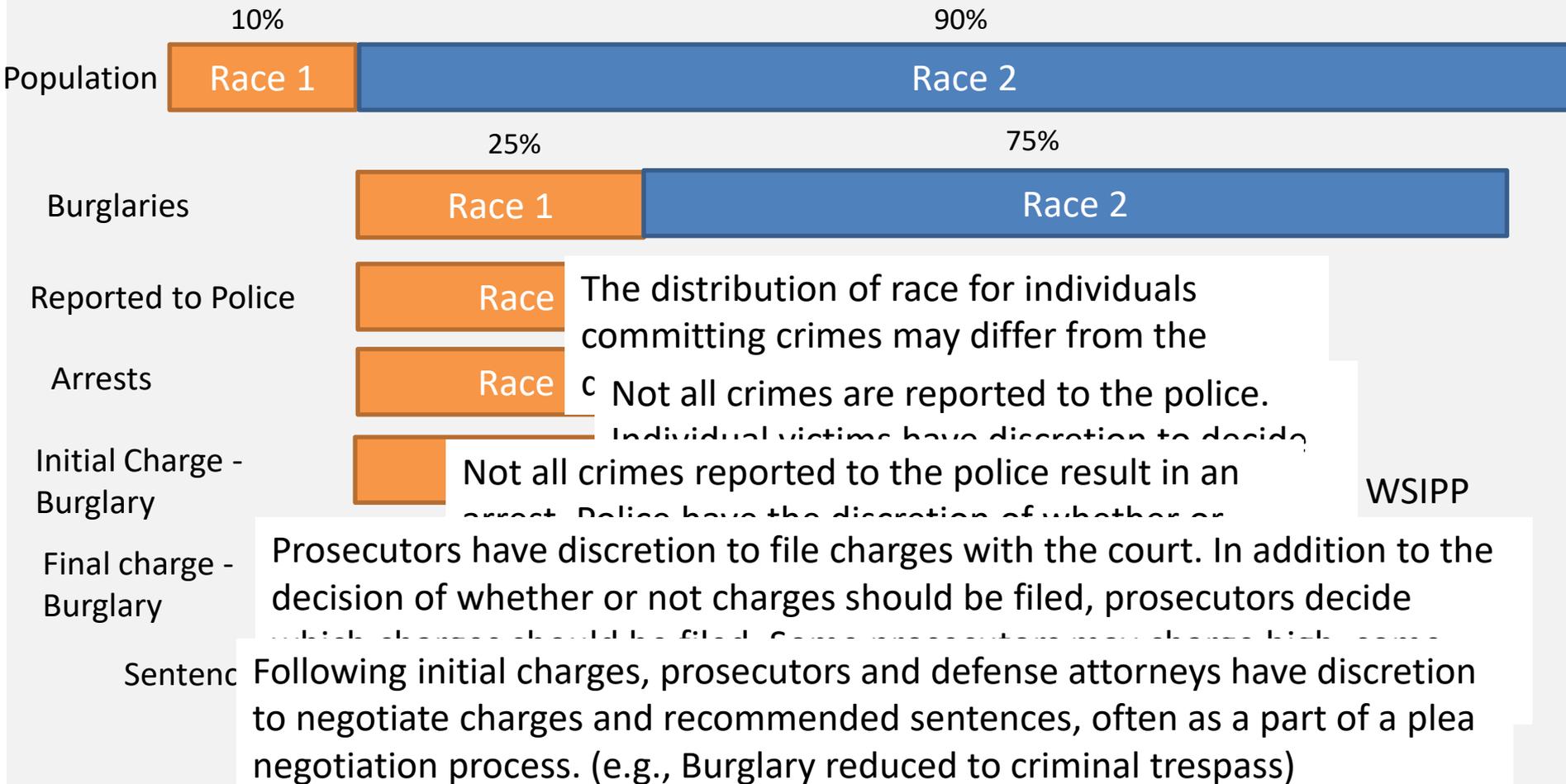
UNDERSTANDING DISPARITY



Comparing sentencing outcomes to population percentages may indicate significant disproportionality at sentencing. But is it representative of disparity at sentencing?



UNDERSTANDING DISPARITY



WSIPP

FEDERAL SENTENCING CHANGES OVER TIME

1987	USSC	Passage of presumptive sentencing guidelines grid for federal courts	Judicial Discretion harshly restrained
1996	<i>Koon v. U.S.</i>	Established abuse of discretion standard for appellate review of departures	Judicial discretion increases slightly
2003	PROTECT Act	de novo appellate review of sentences, increase prosecutor discretion, directed USSC to reduce departure mechanisms	Judicial discretion restrained
2005	<i>US v. Booker/US. V Fanfan</i>	rendered sentencing guidelines advisory; move to a "reasonableness" standard	Judicial discretion increases significantly
2007	<i>Rita v. U.S.</i>	Federal appellate courts may but are not required to presume guidelines sentences to be reasonable	Affirms judicial discretion
2007	<i>Gall v. U.S.</i>	District judges may not automatically presume the guidelines range to be reasonable and must make an individualized assessment	Affirms judicial discretion

DISPARITY FOLLOWING INCREASE IN JUDICIAL DISCRETION

Ulmer, Light, and Kramer 2011

- Compared disparity during mandatory guidelines (prior to *Koon v U.S.*) to post-*Booker/Gall* disparity (advisory guidelines).
- Incarceration vs. no incarceration: general stability in disparity.
 - Slight increase in black male incarceration disparity post-*Gall*, but black male sentence length disparity reduced considerably.
 - All other gender x race combinations had slight (not significant) reductions in disparity post-*Booker/Gall*
- Sentence length: Post-*Booker/Gall* disparities are considerably less than those found prior to *Koon*.
 - Disparities for white females, black males, and Hispanic females were significantly less than pre-*Koon*.
- Criminal history accounts for a large portion of disproportionality for Black males.

DISPARITY DESPITE GUIDELINES

Changes to sentencing guidelines are neither the sole cause of significant racial disparity nor the solution for eliminating racial disparity at sentencing.

- Mandatory guidelines do not eliminate disparity.
 - During initial years of federal mandatory guidelines, research found significant disparity in sentencing for race/ethnicity, gender, education level, and citizenship – all of which were defined by guidelines as legally irrelevant (Albonetti, 1997)
 - Largely driven by differences in substantial assistance departures.

DISPARITY DESPITE GUIDELINES

Changes to sentencing guidelines are neither the sole cause of significant racial disparity nor the solution for eliminating racial disparity at sentencing.

- Disparity changes over time and in response to different characteristics.
 - A new study (Ulmer and Parker, 2019) found variation in disparity in sentencing in federal courts between Hispanic citizens and Hispanic non-citizens based on whether the court was located in a traditional Hispanic immigration destination or a new/emerging Hispanic immigration destination.
 - Court communities establish a negotiated order that leads to differences in procedures between courts.

DISPARITY DESPITE GUIDELINES

Changes to sentencing guidelines are neither the sole cause of significant racial disparity nor the solution for eliminating racial disparity at sentencing.

- Even in the face of advisory guidelines, other sentencing policies and practices may inform disparity.
 - A study of Pennsylvania's structured sentencing alternatives found significant racial disparity in guideline decision-making – whether conformity or departures – when the sentence involved an intermediate punishment (Painter-Davis and Ulmer, 2019).
 - “From their inception, a key goal of guidelines was to reduce disparity. Others note that though this remains a core goal there is a growing focus on crafting effective sentences that reduce recidivism, are cost-effective, and mitigate unwanted consequences of punishment. These goals can conflict. Considering offender needs and rehabilitation requires individualization, a consideration of nonlegal factors, and discretion, but such discretion can lead to disparity.”

WHAT EXPLAINS THE FINDINGS?

Hydraulic Displacement of Discretion

- ✓ Underlying premise: a certain amount of discretion exists in the sentencing process and is distributed between different court actors (e.g., prosecutors and judges)
 - ✓ When you decrease discretion in one area, you increase it in another area.
- ✓ Key question to keep in mind: Where does discretion go when it is constrained in a given area?
- ✓ Source: Miethe 1987; Walker 1993

HYDRAULIC DISPLACEMENT OF DISCRETION

Example NY Drug Laws:

- 1973, NY legislature thought prosecutorial discretion was undermining tough sentences on drug crimes. In response they restricted prosecutorial discretion by passing a ban on pleas to lower charges for anyone charged with a Class A1 drug offense (mandatory sentence of 15-25 years to life). Charges for lesser felonies could not plea to Misdemeanor. Championed as one of toughest laws on drug crimes.
- Real effects:
 - Drug arrests resulting in indictment dropped from 39% to 25% (**prosecutors less likely to file initial charges**)
 - Convictions fell from 86% to 80% (**judges and juries less likely to convict**)
 - Net result: overall percentage of drug arrests resulting in convictions fell from 33.5% to 20%. Cases that were previously plea bargained down were either dismissed or beaten through acquittal.

DISPARITY FOLLOWING CHANGES IN WA

- Engen, Gainey, Crutchfield, and Weis (2003)
 - Sample of adult felony sentences from July 1989 through June 1992
 - Examined discretionary departures and structured sentencing alternatives (Alternative Sentence Conversion, FTOW, and SSOSA)
- Findings:
 - 85% of sentences fell within presumptive range
 - Legal, offense-related characteristics increased the use of upward departures, but less so for downward departures
 - White defendants, females, older defendants, and those who plead guilty were substantially more likely to receive downward departures
 - Hispanic defendants and those convicted in trials were more likely to receive upward departures

SO WHAT?

- Research finds there isn't a silver bullet to eliminating sentencing disparity.
- We cannot predict exactly how policies will be interpreted and used in different court communities. Impacts will likely vary between courts, even within the same state.
- Ongoing, quality research is critical to monitor post-policy implementation changes and to identify whether policies are serving the intended goals.
 - Identifying the "why" is just as important as identifying the "what"

THANK YOU

Questions?



ADULT GENERAL DISPROPORTIONALITY REPORT FISCAL YEAR 2019

CASELOAD FORECAST COUNCIL



Washington State Criminal Sentencing Task Force
April 16, 2020

Report Overview

- Required by Engrossed Substitute Senate Bill 6032, the 2018 Legislature directed the CFC to submit an annual General Disproportionality Report containing the following information:
 - Percentages based on total number of adult felony sentences by each crime category, distributed by race;
 - Percentages based on total number of adult felony sentences reduced to misdemeanors in each crime category, distributed by race;
 - Percentages of Washington State at-risk population (ages 18-54) by race;
 - A list of felony offenses in each crime forecasting category; and
 - Limitations in the data

Data Sources

- Caseload Forecast Council's Sentencing Database
 - Race as contained in the CFC's Adult Felony Sentence Database
 - State-wide felony sentences imposed in Fiscal Year 2019
 - An individual's race is recorded as it is listed on the county's Judgment and Sentence form

- Administrative Office of the Courts
 - Gross misdemeanor and misdemeanor data imposed in Fiscal Year 2019 was used to calculate percentages of reduced adult felony sentences

- Office of Financial Management
 - Washington State Race Distribution information is data from the 2019 OFM Population Forecast for 2018, excluding the category for two or more races as there is not a comparable group in the sentencing data

Report Overview

- Disproportionality – The degree to which the demographic composition of adults who have been convicted of a felony differ from that of the general population.

- Adult Sentencing Disproportionality Ratio Calculation:

$$\text{Ratio} = \frac{\% \text{ racial group in sentencing}}{\% \text{ racial group in the Washington state population}}$$

- A ratio lower than one means that a racial group's proportion of the total felony sentences is lower than the racial group's proportion of total WA state population.
- A ratio higher than one means that a racial group's proportion of the total felony sentences is higher than the racial group's proportion of total WA state population.
- A ratio equal to one means that the proportion of sentences to the total population is equal.

Summary Data

- Total FY 2019 adult felony sentences imposed: 24,257
- By Offense Type:
 - Property – 32.6%
 - Drugs – 27.9%
 - Assaults – 20.2%
 - Other felonies – 10.9%
 - Sex – 4.4%
 - Robbery – 1.9%
 - Fail to Register, Sex offense – 1.1%
 - Manslaughter – 0.4%
 - Murder 1 & 2 – 0.5%
- Racial Distribution: Adult Felony Sentences/[State Population \(OFM\)](#):
 - Caucasian – 73% (72%)
 - African American – 13% (3%)
 - Hispanic* – 8% (14%)
 - Native American – 3% (1%)
 - Asian/Native Hawaiian/Other Pacific Islander – 3% (9%)

**Hispanic is categorized as a race in CFC data, not as ethnicity*

Trends in Disproportionality in Felony Sentencing Data

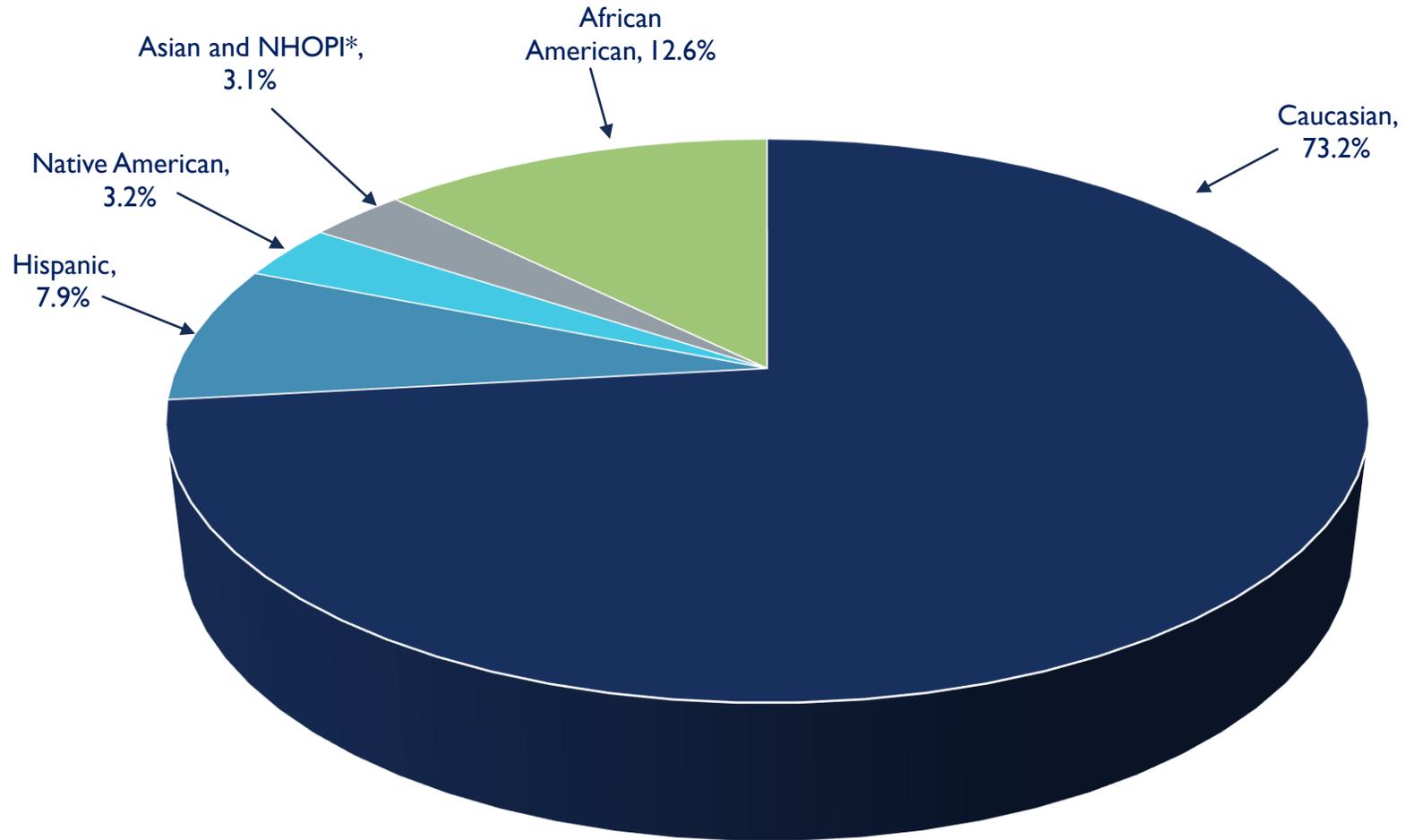
- African American/Native American:
 - Ratios higher than one in all categories

- Asian/Native Hawaiian/Other Pacific Islander & Hispanic
 - Ratios lower than one in all categories

- Caucasian:
 - Ratios close to one for all categories

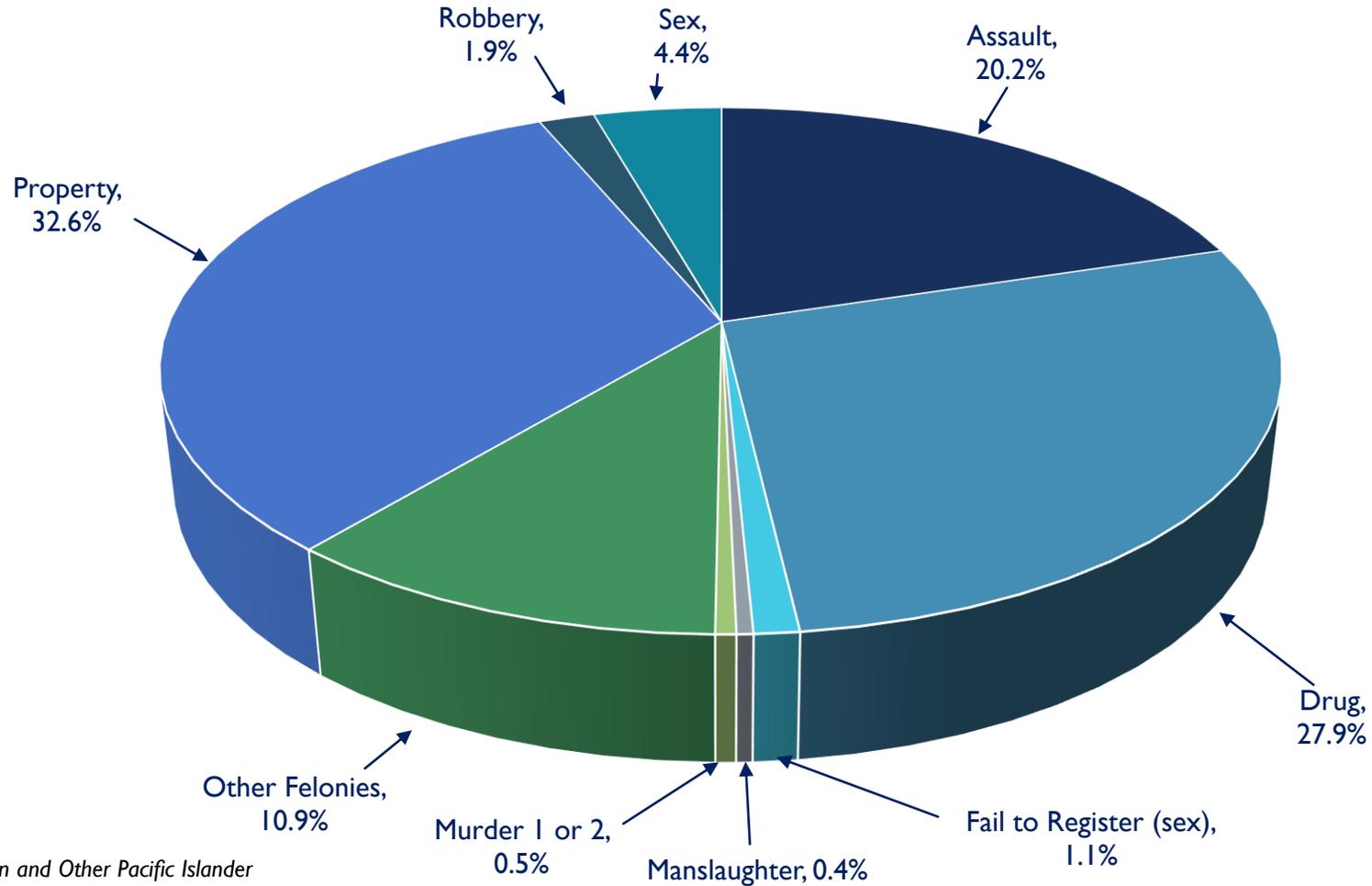
* *Categories: adult sentences vs. population, adult sentences vs. at-risk-age population, and felonies reduced to misdemeanor/gross misdemeanors*

Racial Distribution - Adult Felony Sentences (all ages)



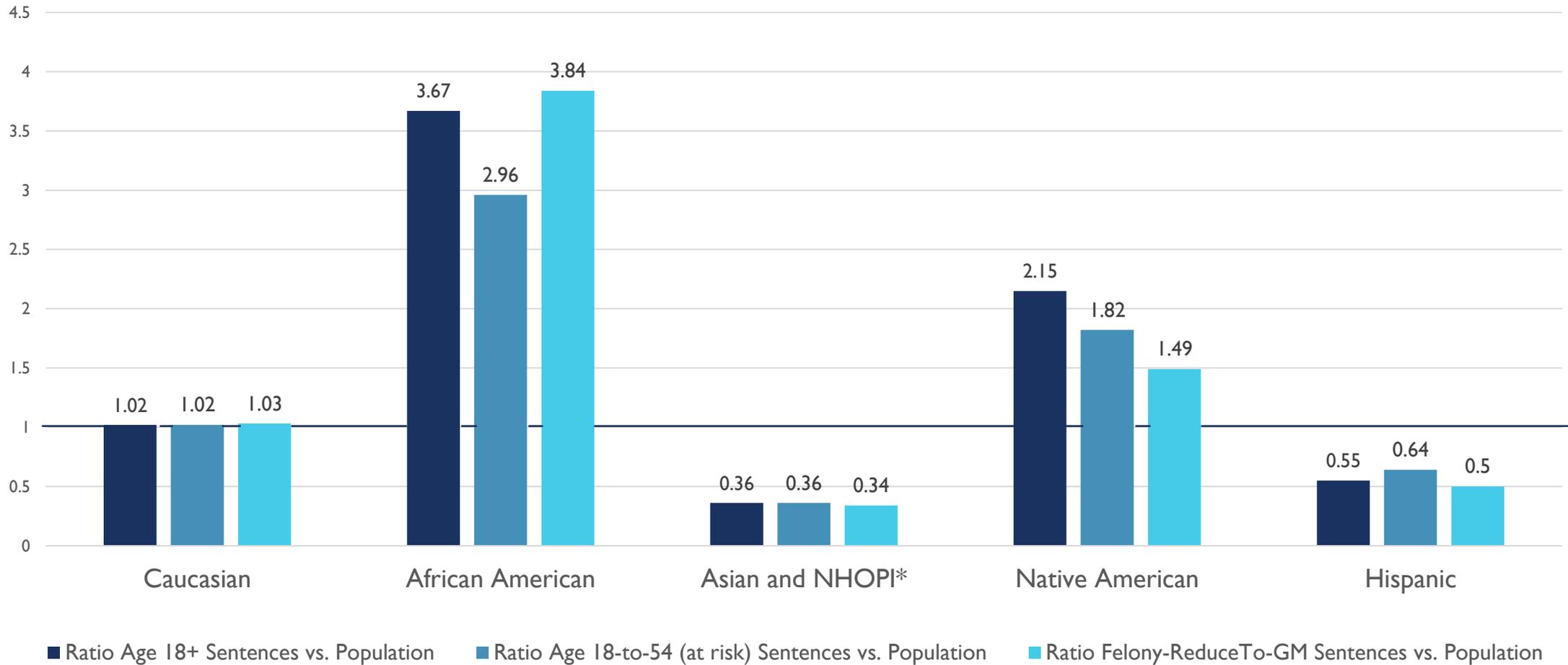
* Including Native Hawaiian and Other Pacific Islander

Crime Categories- Adult Felony Sentences (all ages)



* Including Native Hawaiian and Other Pacific Islander

Comparison of all Ratios



* Including Native Hawaiian and Other Pacific Islander