

**Washington State Criminal Sentencing Task Force
Sentencing Alternatives Subgroup
Meeting Notes: November 2, 2021
Meeting via Zoom**

ATTENDEES

Task Force Members/Alternates:

- Nick Allen, *Interests of Incarcerated Persons*
- Tiffany Attrill, *Interests of Victims*
- Keri-Anne Jetzer, (Alt. for Judge St. Clair), *Sentencing Guidelines Commission*
- Mac Pevey, (Alt. for Julie Martin) *Dept. of Corrections*
- Judge St. Clair, *Sentencing Guidelines Commission*
- Clela Steelhammer (research & data support), *Caseload Forecast Council*
- Jon Tunheim, *Washington Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Interests of Incarcerated Persons*

Research/Technical Support: Lauren Knoth, *Washington State Institute for Public Policy*

Guests: Joanne Smieja, Bruce Glant, Dan W.

Ruckelshaus Center: Chris Page, Molly Stenovec, Amanda Murphy, Maggie Counihan

Meeting Purpose: Review & Discuss Eligibility Criteria for First Time Offense Waiver (FTOW)

WELCOME & AGENDA REVIEW

Amanda welcomed attendees and reviewed the meeting agenda, which focuses on eligibility criteria for the First Time Offense Waiver (FTOW), including the history of the alternative. She reminded the Subgroup that the Task Force would review the potential recommendations for the vertical axis of the grid at its meeting later this week.

PRESENTATION: Review & Discussion of FTOW

The Subgroup reviewed a spreadsheet from Keri-Anne Jetzer and Clela Steelhammer. It included an overview of the FTOW program, its intended purpose, current convictions/characteristics, prior record, and prior program participation (See Appendix B).

Keri-Anne shared research findings from looking at old legislative bill reports (See Appendix C - First-Time Offender Waiver History). She noted the difficulty of finding the legislation's intended purpose in old bill reports, partly because this alternative was in the original SRA and not separated out. The SGC had provided an analysis of FTOW sentences in FY 2000 and found that the original estimation of 50% of eligible sentences getting a waiver fell very short. She also noted that the impact on recidivism was a positive one for individuals who received the waiver, regardless of it was a jail or prison sentence.

Member and Alternate Questions/Comments during Discussion:

- Prosecution often pursues the FTOW. Sometimes benefit of supervision is to provide treatment and enforce an individual's participation, typically in a substance use treatment, but could also be a way to provide non-confinement accountability. Specifically, if an individual could
- Several members described a lack of clarity about whether or not an individual would "risk into supervision," so sentencing alternatives have been seen as a way to provide some certainty about whether an individual would receive supervision.
- Helpful to have context regarding the exclusions—those exclusions seem to be tied to high profile cases and political trends, such as the war on drugs.
- How effective is the FTOW right now? What changes could be made to make it more effective?

Amanda asked: what was the intended purpose of the alternative? How is the FTOW meeting that intended purpose?

Member and Alternate Questions/Comments during Discussion:

- Because the FTOW excluded serious violent offenses, perceive that the original intent of providing a sentencing alternative for individuals with non-violent offenses. Wonder if there have been so many changes to eligibility and sentencing that the alternative no longer meets the original, intended purpose. Another member noted that emergence of drug courts and other sentencing alternatives could contribute to the decreased use and utility of the FTOW.
- A bill report estimated that FTOW would be utilized in approximately 50% of sentencing.
- SGC and WSIPP analysis
- FTOW range is 0-90 days, but the most SW corner of the grid has a range of 0-60 days.
- Utility of the FTOW depends in part on some of the discussions in the grid subgroup. If the SW corner adopts 0 as the minimum range for more cells and increases opportunities for the court to issue community supervision, then the FTOW could become obsolete.
- A member suggested that the group rethink "first-time" – an individual who commits more than one offense with a low OSL may still benefit more from additional treatment or programming rather than confinement.
- FTOW sometimes perceived as the first time "discount" as a way to bring accountability for an individual, while still giving a warning. Individuals with a second conviction could be seen as more culpable of their behavior.
- Expressed support for folding the FTOW into county intermediate sanctions or programming. This would provide a mechanism for tailoring programs and requirements based on individual needs, provide incentive and support for counties to further develop local programs. Additional county programs and resources could benefit individuals bound for local prison, and for the local community as a whole. Such a change would need to be paired with shift from surveillance to support model of supervision. Also noted importance of consideration of programs and supports that may be needed by victims and survivors.

After some discussion, the group decided to pause further conversations on the FTOW in order to allow the Grid Group to continue discussions on the lower portion of the grid, specifically to increase

the number of cells with 0 as the minimum sentencing range (potential recommendation 7) and for increasing eligibility to supervision.

If the Task Force does not move forward with those changes to the grid, the Alternatives group will pick up the conversation on FTOW. Specifically, to consider increasing eligibility for individuals with a prior felony conviction or deferred prosecution and expanding eligible offenses.

Could the FTOW apply to an individual with unranked offenses?

- In FY19, there were 43 sentences for FTOW for individuals with unranked offense.
- There are class A, B, and C offenses that are unranked—as long as offense is not classified as sex or violent.

Where to go next—for FTOW? For other Alternatives?

- Need to see where the Task Force goes with the grid...if more cells have 0 as a minimum, or supervision only is more available.
- How aspirational can we be? If expanding eligibility to individuals with sex or violent offenses would meet the needs of individuals, of the survivors and community, then does the group still want to make that recommendation even though it may not be politically feasible currently.
- Expressed support for continuing to look at the criteria and disqualifiers for other alternatives, since those could contribute to racial disproportionality.
 - Suggestion to look at DOSA, residential and prison.

Next Steps & Action Items:

Action item: Mac Pevey will see if Dr. Karl Jones at DOC would be able to provide information on DOSA study, including revocations, at next meeting on November 30.

Action item: Keri-Anne will provide information on history and intent of DOSA to the facilitation team.

RESOURCES SHARED:

[Presentation by The Council of State Governments, Justice Center](#)

- This presentation was given to the SGC and slide 14 shows changes in supervision

[SGC 20 Years in Sentencing Report](#)

- Page 46 shows a table with the decline in use of FTOW sentences.

Clela shared that FY 20 had 54.6% below the range, 45.0% within, and 0.5% above. She also shared that in FY19, 218 sentences of 1,623 were FTOW sentences that faced a prison sentence. The balance were presumptive jail sentences.

APPENDIX A: COMMENTS AND QUESTIONS SUBMITTED BY PUBLIC VIA ZOOM CHAT

Due to limited time, the public may submit questions via the zoom chat and the Facilitation Team includes with the meeting notes. The following questions and comments were sent during this meeting:

Joanne Smieja: Brad Meryhew and the Sex Offender Policy Board recommended that people convicted of a non-contact sex offense be eligible for a sentencing alternative. Can the FTOW program be expanded to include these offenders?

Up until 2006, offenses involving illegal depictions (i.e. those offenses now considered non-contact sex offenses) were not classified as sex offenses and therefore were eligible for the FTOW program. As I've said in the past, the task force really needs to add someone impacted by our current sex offense laws. Our laws treat that group of offenders as unique.

Bruce Glant: Are there any studies on the affect of lifetime or long term supervision (community custody), AND it's effectiveness versus 3 to 5 to 10 year periods of supervision

APPENDIX B: Overview of FTOW and eligibility criteria

	Program Overview	Intended Purpose	Eligibility: Current Offense	Eligibility: Prior Record	Eligibility: Prior Program Participation
FTOW	FTOW is a sentencing alternative available for individuals convicted of their first felony offense. If imposed, the court waives the standard range and may sentence the individual up to 90 days confinement AND 6 months community custody, OR 12 months community custody if treatment is ordered.	Sentencing alternative for first-time, non-violent defendants	Current offense is not categorized as:	No prior felony offense	No deferred prosecution
			a violent offense		
		Provides incentives to first time offenders so they will not commit additional crimes.	a sex offense		
			Manufacture, Delivery, or Possession with intent to Manufacture or Deliver a Controlled Substance Classified in Schedule I or II		
			Manufacture, Delivery, or Possession with intent to Deliver Methamphetamine,		
		FTOW offered sentencing options more inline with traditional probationary sentences.	Selling for Profit any Controlled Substance or Counterfeit Controlled Substance Classified in Schedule 1 (except for leaves or flowering tops of marijuana),		
Original estimation was that 57% of convicted persons would receive a FTOW	Felony Driving while Under the Influence or Physical Control of a Vehicle while under the Influence				

APPENDIX C: First-Time Offender Waiver History

First-Time Offender Waiver was created by the Legislature in the Sentencing Reform Act of 1981 (2SHB 440; Laws 1981, Ch 137).

1981 – RCW 9.94A.030(10)

"First-time offender" means any person convicted of a felony not classified as a violent offense under this chapter, who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

1981 – RCW 9.94A.120(5)

In sentencing a first-time offender, the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender:

- (a) Devote time to a specific employment or occupation;
- (b) Undergo available outpatient treatment or inpatient treatment not to exceed the standard range of confinement for that offense;
- (c) Pursue a prescribed, secular course of study or vocational training;
- (d) Remain within prescribed geographical boundaries and notify the court or the probation officer of any change in the offender's address or employment;
- (e) Report as directed to the court and a probation officer; or
- (f) Pay a fine, make restitution, and/or accomplish some community service work.

History of FTOW Modifications:

1982 – excluded from eligibility those with a violent offense

1986 – excluded from eligibility those with a sex offense

1987 – excluded from eligibility those with manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV offense

1990 – excluded from eligibility selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana offense

1995 – excluded from eligibility manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers offense

2006 – excluded from eligibility felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug

2011 – reduced term of community custody without treatment from 12 months to 6 months; reduced maximum term of community custody with treatment from 24 months to 12 months

SGC Analysis of FTOW sentences in FY1990 – the alternative “succeeded in providing an avenue for treatment and supervision, it has failed as an alternative to incarceration.”¹

- Over 2,000 people were sentenced under FTOW since its inception
- In FY1990:
 - o 75% of those eligible for FTOW had a standard sentence of 0-60 or 0-90 days, making the purpose of imposing FTOW was not mitigation. Of those, 35% still received a FTOW sentence.
 - o For those with a presumptive sentence of 90 days or less, there was no difference in the frequency (85%) or average length of jail sentences (1 month) between those who received it and those who did not.
 - o 130 people with a presumptive prison sentence were eligible for FTOW. Of those, about 1/3 received the alternative.
 - o Of eligible persons with a presumptive sentence greater than 90 days, 18% received FTOW. The average jail sentence for FTOW sentences was only 1 month less than that of those who received a standard sentence.

SGC Analysis of FTOW sentences in FY2000 – “FTOW sentences would not be imposed because the waiver involves a greater sanction than time served.”²

- Approximately 2,500 FTOW sentences were issued in FY2000.
- Racial distribution was
 - o 78% white
 - o 10% Black
 - o 7% Hispanic
 - o 3% Asian
 - o 2% Native American
- The 1987 elimination of drug dealing from FTOW eligibility “significantly reduced its application”.
- The remaining eligible persons would presumably have minimal presumptive jail sentences and because confinement is often served while awaiting sentencing, there was often no time remaining to apply to the waiver.

WSIPP Analysis of FTOW sentences between 2000 and 2003 – “FTOW functions not as an alternative to prison. Instead, it is an enhancement to standard community supervision.”³

- 91% of FTOWs had a guidelines sentence other than prison.
- Analysis showed a declining trend since 1986 in the percentage of sentences that resulted in a FTOW.
- 24-month felony recidivism rate was lower for those sentenced to FTOW than those who received a prison or non-prison sentence.

Other Considerations

Changes in pretrial release policies

¹ Sentencing Guidelines Commission. (1991). Decade of Sentencing Reform. Located at [A Decade of Sentencing Reform \(wa.gov\)](#).

² Sentencing Guidelines Commission. (2001). A Comprehensive Review and Evaluation of Sentencing Policy in Washington State. Located at [A Comprehensive Review and Evaluation of Sentencing Policy in Washington State, 2000-2001](#).

³ Barnoski, R. (2004). Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding – Part II (Recidivism Analyses). WSIPP: Olympia, WA. Found at [Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding – Part II \(Recidivism Analyses\) - Full Report](#).

- There is a movement to reduce the reliance of pretrial confinement as many studies have shown that pretrial detention increases the likelihood of the person to become involved in the criminal justice system post release.^{4 5}
- The application of FTOW is somewhat based on the amount of credit for time served a person has accrued pretrial. A decrease in the use of pretrial detention could change the frequency in which the FTOW is applied.

Probation alternative

- FTOW requires a term of confinement up to 90 days.
- CSG analysis on community supervision.⁶
 - o “People sentenced to community supervision have lower recidivism rates than those sentenced to prison.”

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“Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.”

—Daniel Nagin (2013)

- Smith, Goggin, and Gendreau (2002):
- Meta-analysis of 57 studies
 - Total of 268,806 individuals
 - **7% higher recidivism rates** for people sentenced to prison

Source: Psychology of Criminal Conduct 6th edition, p284; <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>

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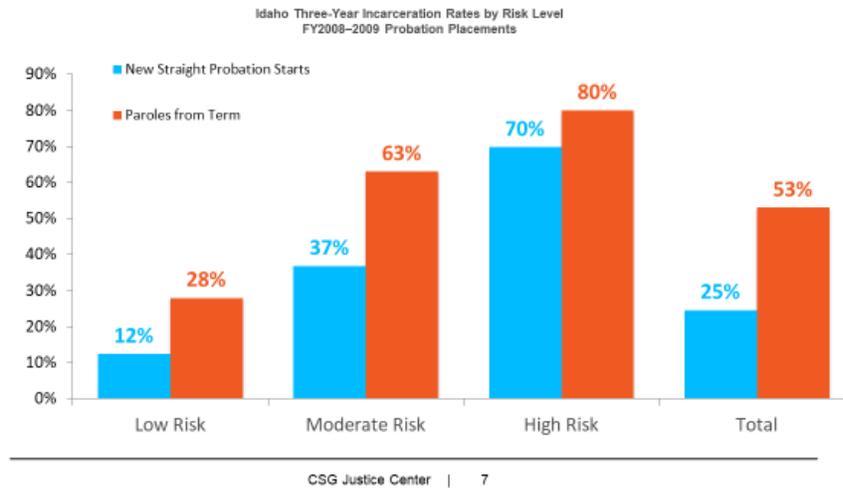
⁴ Loeffler, C. E., and Nagin, D. S. (2021). The Impact of Incarceration on Recidivism. (Review in Advance). *Annual Review of Criminology*. Found at [The Impact of Incarceration on Recidivism | Annual Review of Criminology \(annualreviews.org\)](https://www.annualreviews.org/).

⁵ Léon Digard and Elizabeth Swavola. Justice Denied: The Harmful and Lasting Effects of Pretrial Detention. New York: Vera Institute of Justice, 2019. Found at [Justice-Denied-Evidence-Brief.pdf \(vera.org\)](https://www.vera.org/justice-denied-evidence-brief).

⁶ Derrick, B. E. (2018, October 12). *Community Supervision: An Effective Tool to Change Behavior* [PowerPoint slides]. Council of State Governments – Justice Center. [Community Supervision: An Effective Tool to Change Behavior \(wa.gov\)](https://www.csg-justicecenter.org/comm-supervision)

- “Across all risk levels, people sentenced directly to probation do better than those sentenced to prison followed by a term of supervision.”

Across all risk levels, people sentenced directly to probation do better than those sentenced to prison followed by a term of supervision.



- “National trends are reflected in Washington: People who committed less serious offenses had much higher recidivism rates than those who committed more serious offenses.” Due to eligibility requirements, FTOW sentences are more likely to be issued for lower level offenses.

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Source: Justice Center analysis of DOC and WSP data.

