

**Washington State Criminal Sentencing Task Force
Sentencing Alternatives Workgroup
Meeting Notes: April 5th, 2022
Meeting via Zoom**

ATTENDEES

Task Force Members/Alternates:

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

Guests: Bruce Glant, C.J., Lydia Schoen, phone – ending 903

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

Meeting Purpose:

- Discussion on First Time Offense Waiver (FTOW)—its statutory eligibility criteria and overlay on the sentencing guidelines grid.

Welcome & Agenda Review

Facilitator Amanda Murphy welcomed everyone and reminded the group of the Task Force meeting on Thursday April 7th, noting that the May meeting will be in person, with the option for virtual attendance for those unable to come. She updated the group that its April 19th meeting would not occur due to scheduling conflicts for the facilitation team.

Amanda recapped the last workgroup meeting—a discussion on SSOSA and sex offense sentencing with representatives from the Sex Offender Policy Board (SOPB). She updated the group that Representative Goodman (Chair of the House Public Safety Committee) will request the Sex Offender Policy Board (SOPB) to develop a comprehensive set of recommendations, with research and principles underpinning each, related to the Special Sex Offender Sentencing Alternative (SSOSA). Specifically, Rep. Goodman will request the SOPB address five main topics: SSOSA (including eligibility), lifetime supervision, additional potential sentencing alternatives for individuals with sexual offense histories, washouts, and treatment (capacity, requirements, need, housing barriers, etc).

First Time Offense Waiver (FTOW)

Amanda briefly reviewed discussions in previous meetings related to FTOW, where the group reviewed that alternative's purpose and sentencing use. If imposed, the court waives the standard range and may impose a period of confinement ranging from 0 to 90 days and a 6-month term of supervision OR 12 months community custody if treatment is ordered. Unlike other alternatives, FTOW is not associated with a specific treatment or underlying need.

Amanda then reviewed discussions during various Grid, Alternatives, and Task Force meetings on the simulated grid and potential recommendations regarding sentencing guidelines ranges. She noted that the Task Force has a potential recommendation that would increase the number of cells with 0 as the minimum of the guidelines range and increase the instances where the court could consider a sentence without a period of confinement. As part of those conversations, the group has explored whether the FTOW would remain relevant.

Keri-Anne explained that the statutory eligibility criteria for FTOW include:

- No prior felony
- Never participated in deferred prosecution for a felony
- Offense specific exclusions:
 - Any violent or sex offense
 - Felony DUI
 - Felony DUI – PC (physical control)
 - Manufacturing/Delivery/Possession with intent of a Schedule I or II drug that is a narcotic drug or flunitrazepam classified in Schedule IV (offense on the drug grid)
 - Manufacturing/Delivery/Possession with intent: meth (offense on the drug grid)
 - Selling for profit any controlled substance or counterfeit substance in Schedule I (offenses on the drug grid)

Based on that criterion, she shared a visual of FTOW overlaid on top of the current and potential simulated sentencing grids.

- Current grid: available for eligible individuals/offenses with unranked offenses, in OSL 1-10 and OSL 12 with a criminal history score (CHS) of 0.
- Potential grid: available for eligible individuals/offenses with unranked offenses, in OSL 1-9

Member/Alternate Discussion:

- Could you provide more information about deferred prosecution for a felony?
 - Several members were unfamiliar with the purpose and function of deferred prosecution.
- Given criminal history score calculations on the current grid, could someone be eligible for FTOW with a CHS above 0?
 - Yes. Clela shared that of the FTOW sentences in FY2020, 297 of the 907 had a score greater than 1. She also shared that in FY2020, 167 of the 907 had a presumptive prison sentence.
- Several members discussed the purpose and components of an FTOW sentence. The components include 0-90 days incarceration and supervision. A member shared the original purpose of the FTOW: as a tool to get people a longer period of treatment than they otherwise would have received, along with supervision, in exchange for a shorter incarceration term.
- Supervision is often seen by prosecution as a way for the court to keep jurisdiction and hold individuals accountable for remaining crime-free for a certain period of time.

- A member shared that if the court orders supervision, then DOC is required to supervise that individual. The intensity and components of that supervision will be informed by a risk assessment.
- Reminded group that the current supervision model will soon be replaced by iCOACH model. DOC, with stakeholder partners, has been developing the iCOACH model. Community Custody Officers are being trained and services and implementation of iCOACH will begin in December 2022.
 - Several members expressed interest in a presentation from DOC to learn more.
- Could FTOW be used for unranked offenses?
 - Yes. Clela shared the following FY20 data: 22 of the 907 were for unranked
- Are there times where an individual is supervised when they didn't need it?
 - FTOW is a version of the old probation model: we will reduce jail time, but order supervision to keep a person under the court's jurisdiction for a time.
- The SGC did an analysis of FTOW sentences, as did the Washington Institute for Public Policy in early 2000s. Some of the findings include:
 - FTOW sentences would not be imposed because the waiver involves a greater sanction than time served.
 - FTOW functions not as an alternative to prison; instead, it is an enhancement to standard community supervision.
 - For more information, see information in Appendix B.
- Several members shared observations that many individuals would rather serve up to 90 days in jail, than 12 months of supervision.
- Several members discussed the addition of drug-related exclusions to eligibility, the creation of DOSA, and whether those have contributed to the use of FTOW.
- Have the gaps in treatment (caused by the restrictions on eligibility related to drug offenses) been filled by DOSA? Or are people falling through the cracks? Was there a point where people convicted of drug offenses were included in FTOW eligibility?
 - The three drug offenses mentioned as excluded from the FTOW happened in 1987, 1990, and 1995.
- Residential DOSA has to have a midterm of 26 months or less. The sentences that are usually offered FTOW are shorter than 26 months.
- What are options beyond incarceration that allow for some period of accountability that is greater than zero?
 - Community intermediate sanctions (CIS) could be a way to retain some form of jurisdiction after sentencing.
 - Another member asked if legal financial obligations (LFOs) could be a way to maintain jurisdiction? A member noted that the court has power to enforce payment; another wondered who would be able to monitor progress for treatment, if not part of a supervision term.
- The probation in juvenile court sounds similar to what the iCOACH model is trying to be.
- CIS could have a similar funding model of block grant programs. Example: the juvenile block grant, where the state provides resources and broad parameters to support and guide programs developed/implemented by counties.

- Drug court is specific to crimes that have a direct link to substance use disorder—this program could be broader and meet needs of individuals with addiction, regardless of nexus between the crime and substance use.
- A member shared an example of the Community Corrections Center in Washington County, Oregon that provides different types of treatment and services in one location.
- Several members expressed interest in the developing a potential recommendation to eliminate exclusions for drug offenses. A member suggested that the group also consider modifying eligibility criteria to allow individuals with a first-time drug offense.
- Could the FTOW exist in a niche place that encircles the SW corner? Potential purpose would be to reduce incarceration for individuals with a first felony offense, including individuals who may have multiple current counts.

Potential Recommendation: Eliminate eligibility exclusions to the FTOW related to current drug categorized offenses.

Next meeting – May 3rd at 1:30pm to continue discussion on Community Intermediate Sanctions and county restrictive sanctions.

Action Items:

- Facilitation Team will reach out to Dr. Lauren Knoth-Peterson to see if she can provide information on how other states have developed similar sentencing alternatives and attend May 3rd meeting.
- April 19th meeting is cancelled. Facilitation team will update the calendar invite and online meeting schedule.

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

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

Bruce Glant: Are risks based on the static score? does age and previously married, etc come into play? This skews scores for younger individuals under 25 who are going to school, or never left home yet, and never lived with a partner. Also science shows their brain wasn't fully developed to begin with.

APPENDIX B: HISTORY OF FTOW

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

¹ Sentencing Guidelines Commission. (1991). Decade of Sentencing Reform. Located at [A Decade of Sentencing Reform \(wa.gov\)](http://www.wa.gov).

- 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

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

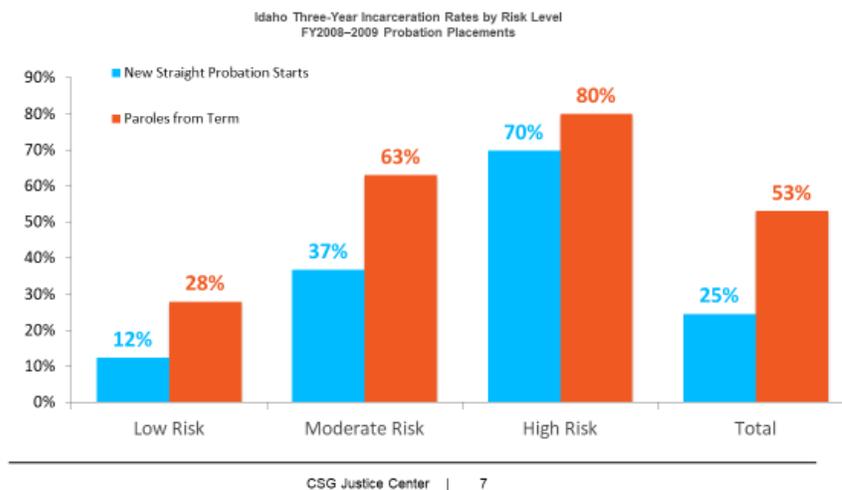
- There is a movement to reduce the reliance of pretrial confinement as many studies have shown that pretrial detention increases the likelihood of the person to become involved in the criminal justice system post release.^{4 5}
- The application of FTOW is somewhat based on the amount of credit for 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.”

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

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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://annualreviews.org/doi/10.1146/annurev-crim-080120-010001).

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)

People sentenced to community supervision have lower recidivism rates than those sentenced to prison.

“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/247358.pdf>

National trends are reflected in Washington: People who committed less serious offenses had much higher recidivism rates than those who committed more serious offenses.



Source: Justice Center analysis of DOC and WSP data.

“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.