

Criminal Sentence Task Force: Sentencing Grid Subgroup
Criminal History Score Discussion Topics
DRAFT as of 6.14.22

1) CHS Research Timeline— the SAC’s research on CHS will not be completed until September 30th?

- By this date, the Task Force will have needed to have already gone through at least one round of consensus on the full package of potential recommendations. How would you all like to proceed?

Notes from Grid Group Discussion on 5.3.22

- *Can Matt provide any interim/preliminary results?*
 - *Facilitation Team will reach out to Matt and will provide him with a list of the grid groups priority questions to see if he can provide that information more quickly.*
- *Can we create a list/identify the key questions/topics for which we’d want to see the research/numbers to inform discussions?*
 - *Correlation with recidivism or lack thereof. Validating findings from CSG.*
 - *Potential impact of collapsing CHS – are recidivism rates similar across? Are there meaningful differences between the scores?*
 - *Racial disproportionality in CHS*
- *Can we draw on the work of PCS?*
- *Is there a way to carve out some time post 9/30 to reconcile grid/full CSTF conversations/proposals with the findings of SAC?*
 - *If research proves our assumptions incorrect, there’s no way to get consensus.*
 - *Potential grid subgroup emergency meeting in early October and create a separate/minority report that discusses the findings in light of the proposed recommendations*

2) Juvenile Adjudications - Grid Group Discussion on 5.10.22

- should they ever count? If so, what/conditions?
 - i. Just felonies? Just violent/serious violent?
- should they have a separate age-based threshold for washout?
- What about offenses committed as a juvenile but that were remanded to adult court?

Potential Recommendation Option 1:

Policy as proposed in HB 1413: remove juvenile adjudications from CHS calculations. (Note, HB1413 also states: Require courts to grant a resentencing hearing upon the motion of a

person whose sentence was increased by the inclusion of prior juvenile dispositions in the person's score calculation).

Potential Recommendation Option 2:

Revert back to 1986 law, whereby after age 23, Class B/C juvenile adjudications no longer count in CHS. Prior adjudications count only if the offense was committed when the individual was 15 or older.

Note: some confusion on how this option is stated. First sentence states Class B/C no longer count but the second sentence has prior adjudications only count if the person was 15 or older. One suggestion is to instead restate the law as it was in 1986, as follows:

(3) Include class A juvenile felonies only if the offender was 15 or older at the time the juvenile offense was committed. Include class B and C juvenile felony convictions only if the offender was 15 or older at the time the juvenile offense was committed and the offender was less than 23 at the time the offense for which he or she is being sentenced was committed.

Potential Recommendation Option 3: juvenile adjudications would correspond with the state's JR-25 law. Would not count juvenile adjudications after an individual turns 30 such that in the most extreme case, where an individual is incarcerated for a juvenile offense until age 25, the juvenile adjudications would still count for 5 years post release. After age 30, CHS would be calculated based only on adult convictions regardless of whether they committed additional offenses between age 25 and 30. This means the juvenile washout is not contingent on a "crime-free" period, but purely based on age.

Potential modification: reduce to age 27 – most recidivism occurs within 3 years, so they'd count for age 25, 26, and 27.

Notes from Grid Group Discussion on 5.3.22

- *There are significant, serious offenses that perhaps should count longer or still be allowed to be considered.*
 - *The system already accounts for those most serious offenses with the auto-decline law such that those cases would be recorded as adult convictions and not apply to what we're discussing with these changes.*
- *Violent felonies potential need for exception.*
- *How are we considering recent court cases and brain science?*
 - *Setting age based thresholds where the juvenile adjudications no longer considered.*
- *Maybe tier it so that b/c count to certain age, violent A to a certain higher age, then serious violent always.*

Potential Recommendation Option 4: After age 23, non-violent Class B/C juvenile adjudications no longer count in CHS. After age 27, violent class B/C juvenile adjudications and juvenile adjudications for Class A felonies that were not serious violent offenses no longer count in CHS. Juvenile adjudications for serious violent class A felonies follow washout rules according to general adult washout rules. Prior adjudications count only if the offense was committed when the individual was 15 or older.

- Why not allow SV felonies to washout if there was presumably a discretionary decline hearing and a judge made the decision that this case should be kept in juvenile court but then that stays with them forever.
- Public safety concern for cases where they are repeating violent behaviors.
- MPC – guideline system meant to address typical or ordinary crimes. Cases that are the exceptions should be handled in a different way.

Grid Group Discussion Notes on 5.10.22

Option #4:

- *Must be sure the language says that they can't count longer than they would under the general adult washout periods. So if crime free for 5 years prior to age 27, then class C's would washout etc.*
- *Must consider the auto decline – racial disproportionality in who gets decline.*
 - *What about offenses committed as a juvenile but that were remanded to adult court?*
 - *UW report on Skagit Co looking at racial bias on decline.*
- *Could modify language to be juvenile adjudications or convictions – so even if declined to adult court, conviction is treated same as adjudications.*
- *Is there a simpler approach to the language?*
 - *E.g., juvenile non-violent no longer count after age X, juvenile violent no longer count after age Y.*
- *Some members less likely to accept a decay threshold for violent offenses. Also may be concerns about sex offenses.*

Option #1

- *A number of members indicated that their constituencies would not be able to support Option 1 (prosecutors, sheriffs and police chiefs, Senate republicans, victims).*
- *A number of member constituencies support HB 1413 and have been working on it for a long time (defense attorneys, families of incarcerated, representing incarcerated persons). Some members have been closely working with groups that work on 1413, and so can't support anything contrary to this rec.*
- *One of the main issues and reason for opposition with 1413 wasn't necessarily the prospective effects but the retroactive application especially in light of Blake overhaul.*
- *What if we bring another rec forward for consensus and it gets consensus but then that is different from what some of the constituencies are already supporting and will continue to support?*

- Do we expect constituencies to be bound by the recommendations supported by their individual representative in this group? Or no?
- Will be important that there is a clear intro to this section of report of final recommendations that recognizes there are other efforts underway with juvenile adjudications.
- See handout on research summary on juvenile adjudications – in general research does not support elimination but does support modification/alternative consideration of offenses committed as a juvenile vs. as an adult.

Since there are already outside efforts underway for developing policy and members have communicated that they would not be able to support anything contrary to HB 1413, then this is not an issue where consensus discussions and decision could take place in good faith. The conditions do not support consensus dialogue and deliberation. Perhaps instead, a similar process that was used in 2020 for recommendations that did not come forward for consensus due to similar conditions could be applied here. That what can be recommended is a general policy statement that the Legislature revisit the inclusion of juvenile adjudications and what they mean but that we do not propose a consensus recommendation on how they do that.

3) Revisit Washout Periods Discussions - Last Chance for Potential Recommendations (Grid Subgroup Discussion on 5.17.22, 5.24.22 and 5.31.22)

- a. Clarify and confirm potential recommendations developed so far [Appendix A](#)
- b. Revisit and last chance to develop potential recommendation: Are the current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout? What about some Class A offenses? A1, A2, A3 classification proposal.
- c. Should washout periods be restarted for any offense or only for an offense that is as serious or more serious than the new conviction?

Grid Subgroup Discussion Notes on 5.31.22

- [Link to meeting notes from 5.31.22 meeting](#)

Facilitator reflections from the discussion: The group has been discussing this question of whether class A felonies should have a washout period for nearly two months. For some members there is support for keeping things as is, that Class A's should not washout and their constituencies would not be able to support a change that would allow class A felonies to washout. For other members, their constituencies cannot support status quo, that class A do not washout. Washouts are an

important factor for calculation of CHS. The group has been working hard exploring whether there is a middle ground that might exist and has put forward a number of ideas (potential recommendation options) though it is unclear whether there is a middle ground or win/win solution. Therefore, all the above options that have been put forward will be presented to the Task Force to get other and all constituencies input brought into the discussion and to better inform whether there is in fact an opportunity for problem-solving and a path forward that would lend itself to consensus. Members present agreed it was time to bring in and get input from the full Task Force and to move on to discussing the next element of the grid.

The Potential Recommendation Options:

Class A Options

- Option a: Class A do not washout out – current Law
- Option b: Class A washout period of 15 years
- Option c: Offense Classification Proposal 1 (Appendix D) – Violent Class A washout after 15 years, serious violent do not.
- Option d: Allow for Class A to washout after 15 years if the new offense is not as serious or more serious than the original offense.
 - *Need clarity: How defining serious or more serious offenses?*
- Option e: If the current offense is a serious violent than all prior serious violent should be included in the CHS.

Class B Options

- Option: Class B washout period of ten years (*current law*)
- Option: Class B washout after 5 years

Class C

- Option: Class C washout period of five years (*current law*)
- Option: Class C washout after 3 years

Grid Subgroup Discussion Notes on 5.24.22

Final Potential Recommendation (*ready to go in front of the Task Force for input*):

Maintain washout period start upon release from confinement, but base that on release from confinement for the original sentence *or the final period of confinement under inmate status*. Washout periods reset upon conviction for a new criminal offense *that is a felony or gross misdemeanor*. *If an individual is convicted of three separate misdemeanor offenses, the*

washout period resets upon the third conviction. Confinement for a technical violation will not reset the washout period.

- What it means? If an individual is revoked under a sentencing alternative and they consequently return to incarceration under inmate status, washout period starts when they release. This is different from individuals who are returned to incarceration under violator status.

4) Anticipatory offenses Grid Group Discussion on 5.10.22

- a. Scored as completed offense – should they be treated as completed or have separate washout rule?
- b. Another aspect of anticipatory commission of offenses is that most that are anticipatory drop a Class. This may have implications to the Offense Classification Proposal (Appendix D). Current law does have complexities because there are exceptions to this rule, and the exceptions are not the same for the different types of anticipatory (i.e., solicitation is not treated the same as attempt). How should these be addressed?

Grid Group Discussion Notes on 5.10.22

- *Similar logic re: consideration of violent offenses as more serious than non-violent - same recognition should be applied to anticipatories such that they do not have the same level of injury as completed offenses.*
- *Case law (Moeurn) – walk through sequentially – determine if something washes out before determining how it is scored. Washout is based on the conviction class (e.g., if anticipatory drops from class A to B then the washout period is identified based on class B rules) and if it doesn't wash out, then it is scored and would be scored as completed.*
- *With the potential recommendation (potential rec # 15) to eliminate offense specific multipliers (and create repeat violent/serious violent column) then the only time where would matter is if the anticipatory drops from violent to nonviolent. But violent includes attempt, solicit, and conspire. And would still be eligible for repeat violent.*

CONCLUSION: No recommendations necessary – scoring would be the same regardless of if Class A or B. Laws already account for the lesser punishment for anticipatories (i.e., sentenced at 75% of the minimum of the range). Washout is based on the conviction class, so if anticipatory drops to Class B, the conviction will washout according to Class B washout rules.

5) Revisit Multipliers Discussion and Potential Recommendations

- Should offenses score against one another when there is more than one current offense?

Grid Subgroup Discussion Notes on 6.14.22

- **#8 in Appendix B.: Escape from community custody: Only offenses meeting the definition of Escape (see RCW 9.94A.030(25)) count in the criminal history score – other felonies are not included in the score.**

(25) "Escape" means:

(a) Sexually violent predator escape (RCW [9A.76.115](#)), escape in the first degree (RCW [9A.76.110](#)), escape in the second degree (RCW [9A.76.120](#)), willful failure to return from furlough (*RCW [72.66.060](#)), willful failure to return from work release (*RCW [72.65.070](#)), or willful failure to be available for supervision by the department while in community custody (RCW [72.09.310](#)); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

- There were 89 sentences FY 19.
- Scenario: escape and steal a car. There would be two scores – score for the car theft that would include everything. For the escape, would only count prior escape offenses. Therefore, the scoring on the offenses would be different.
 - 589 – new felony while on sentence for prior offense, presumptively consecutive to the underlying offense if still serving for that offense but concurrent to other offenses occurring during the escape.
- “Willful failure to be available for supervision by the department while in community custody.” What does this mean? How is it applied? Could this even be something like failure to be available within 72 hours after release? These instances where it is circumstantial or difficulties to check in but the person is not actually fleeing or trying to escape community custody.
 - Is there a difference between those minor behaviors vs. people who actually flee/go to another state, etc?
- Potential discussion about whether 72.09.310 should be a crime? **Instead of making the scoring exception go away, could recommend the offense itself goes away which eliminates the need/use for the exception.** Recognize that this is beyond the scope of this discussion about scoring and perhaps beyond the scope of this Task Force.
- This scoring exception seems duplicative/compounding. There is another scoring exception that adds an additional point for offenses committed while on community custody and there already are community custody hearings. Doing nothing keeps complexity in the system unnecessarily and so think there is reason to eliminate.
- If we were to recommend eliminating, would need to have a caveat that third degree escape from custody does not include community custody. Potential that eliminating this offense would just change how it is charged.
- **Alternative option: eliminate the inclusion of priors under 72.09.310. Leave the offense, but only score more serious prior escapes.**

- Public safety: What tools would be left for the court/DOC to enforce community supervision?
 - Supervision as a part of the sentence is part of accountability.

Action item: Lauren will reach out to Mac Pevey (alternate for DOC on the Task Force) to get info on any DOC policies that defines the type of conduct that would rise to the level of a charge under 72.03.310 for escape from community custody. The grid subgroup would like to better understand when DOC would say someone has willfully failed to be available for supervision as opposed to being late or making a mistake and failing to show up one day. In those instances, DOC could proceed with a violation for community custody, but when does DOC say it is more than a basic violation and is a Class C felony escape from community custody?

- **#15 in Appendix B: Community custody: Offenses committed while on community custody. Should extra point apply?**

- Not all offenses are eligible for community custody. Only individuals that commit another offense and happens to be that their previous offense was one that was eligible for community custody get this additional point. Not all individuals can be eligible for community custody, so they wouldn't be eligible for this extra point.
- When did this scoring rule start? 1988 – include additional point for while on community placement. Later changed to community custody.
 - This scoring exception was added when Community Custody was added to SRA. Presume that individuals on Community Custody still under jurisdiction of court/DOC – still under sentence. If they recidivate during that time, there's an additional culpability/blameworthiness because still actively serving sentence from the prior crime.
- About 10% of the sentences in FY21 had an additional point added for being on Community Custody at the time of current offense.
- When does it apply?
 - If multiple offenses, it applies to the scoring for all/each offense.
- When person commits a new offense on community custody, don't they already face sanction for the violation (return to incarceration)?
- Thinking about this in the context of other recommendations that may be increasing community supervision – what would the impact be with keeping this? May be increasing long-term the sentences of those individuals because this point will apply to those individuals who recidivate and are now on Community Custody who wouldn't have been so previously. Then on the second conviction, they would have a longer term of incarceration as a result. This could undermine the intended effects of other recommendations seeking to move more towards community supervision/non-incarcerative sanctions.
- Offenses that tend to get Community Custody are the offenses we know tend to be disproportionate for BIPOC defendants.

- Potential inequality associated with the application of these points.
- Can we get an early look on this from Matt Landon who is conducting the CHS research?

Potential recommendation a: Eliminate the community custody scoring exception (If the present offense was committed while the person was under community custody, 1 point is added to the criminal history score).

Potential recommendation b: Eliminate the community custody scoring exception and add an aggravating factor for committing an offense while on community custody.

- This scoring exception is redundant and additive. There already exists currently an aggravator for committing offense shortly after release from incarceration. That person is already facing a return hearing under DOC. For example, lifetime supervision for sex offenses – violation proceeding could lead to incarceration for life. The Juvenile system makes a distinction that the individual can either have violation hearing or new sanction. The Adult system doesn't make this distinction, so they get both.
- Prosecutors Association have a meeting next week and Jon/Russ will bring this to them for input and will bring back to the group. Anticipate prosecutors may initially have concerns about eliminating however, if there is a move to increase use of community supervision, then may be willing to agree to eliminating this.
- #14 in Appendix B: Domestic Violence – clarify that under Potential Rec 15, DV multipliers eliminated and addressed as part of the repeat sv/violent column.
- Clarify and confirm that potential recommendation #15 is to eliminate all offense-specific multipliers and add the repeat sv/violent column - that the repeat sv/violent column was intended to replace all offense-specific multipliers related to serious violent and/or violent offenses.
- Discuss Task Force input on misdemeanor scoring potential recommendations. (presented at 6.2.22 CSTF meeting)

6) How many CHS columns overall (PA went from 8 to 3; should WA consider having fewer levels of CHS)? Grid Subgroup Discussion on 6.7.22

Grid Subgroup Discussion Notes on 6.7.22

(bullets below capture comments made by members during the meeting related to the question of whether to collapse CHS columns)

- What is the potential impact on sentence lengths when combining ranges? If combining, for example, CHS 2 and 3, while the sentences for those with CHS 3 may decrease, would the sentences for those with CHS 2 increase?
 - Cannot say for sure. It may be more likely to decrease sentences because with a larger range there would be more options to the judge and the defense. Allows to look at the circumstances of the case itself and the characteristics of the individual so that the sentence agreed upon is really tailored to the individual.
 - State supreme court widened judicial ability to consider characteristics of an individual case vs SRA dictated by Legislature has set forth strict considerations of specific offense characteristics.
 - Prosecution does have control over how sentences/priors are considered in the court/for a particular sentence. Prosecution (executive)/judges (judicial)/legislature (Legislature) have had different approaches to interpreting guidance from WA SC and legislation leading to inconsistency in applications of the law.
 - Concern that collapsing ranges changes the risk dynamic when thinking about negotiations. Under the current grid, there is a definitive cap of risk that the defendant faces (unless exceptional sentence etc). Collapsing ranges increases the risk with wider ranges – less control and less management.
 - Seems counterintuitive where individual on one side has potential risk of higher confinement and individual on the other end has a reduced risk of higher confinement.
 - Does widening ranges actually increase judicial discretion? Negotiations will still exist between prosecution and defense prior to going before the judge. Prosecutors do support expansion of judicial discretion because it increases room in negotiation, but that already happens now with the charge bargaining but isn't that what some members have been saying they are unhappy with – this current level of prosecutorial discretion?
 - What do judges think? What's the thought process when formulating a sentence? Like to think judges and prosecutors are looking at all characteristics of a case - a wholistic approach – all the different factors that could go into the case. Some are particular characteristics of the offense, others about the type of history, the recency of history. Each case is unique and that is why it wouldn't be appropriate to have a mathematical approach to sentencing decisions. There is strong support from prosecutors to expand discretion to judges. Discussions in this task force have been that prosecutors have too much power in the current system and so we should look for ways to balance that discretion and that can come from increasing judicial discretion.
 - If columns were combined, will sentences increase? Unknown but that is not the direction the courts have been moving philosophically. An important component will be the ability for other alternatives to exist. Some other option outside of

just incarceration time to address the individual's behavior and keep them accountable. Empower judges with more discretion so that incarceration is used less esp. in lower OSLs/CHS's

- Theories that originally informed CHS/SRA/Grid were not based on empirics but rather concerns about crime at the time. What we are seeing now is a moving toward a consideration of individual characteristics and things like brain science.
- Rows (OSL) are characteristics of offense. Column (CHS) is characteristic of the individual.
- Recent research on recidivism has been on desistance – as a process. Deceleration, de-escalation, reaching a ceiling.
- If we are to consider collapsing CHS columns, which would expand the sentence ranges we need to also look at in the context of the simulated grid and other potential recommendations, in particular the additional expansion of ranges with the aggravator and/or repeat violent column.
- Judges have had discretion to mitigate on their own and they haven't done it. Part of it is the product of the appellate court shutting that system down and making it difficult to sustain review. They have complete discretion to impose mitigated sentences now – so expanding judicial discretion would do what? Only increase/make sentences harsher?
- Concerned about how this would impact disproportionality? Disproportionality affects real people – not just about seeing if it's happening but providing a way for those individuals to get relief.
- Concerned that expanding the range will increase racial disproportionality and cannot support this if it will perpetuate a system that continues to be disproportionate.
- There is a risk faced when going to trial. Actually, pleas often reduce the amount of time an individual would face if we went to trial.
 - But the dynamic at play is what is the range someone could face. The higher the range, the bigger the option. So to adjust the power dynamic, we have to reduce the number at the top.

APPENDIX A.

Grid Subgroup Potential Recommendations: Washout Rules

Potential Recommendation: Allow sex offenses to washout. Sex offenses would washout consistent with the general washout rules by offense class.

Reducing complexity and error

- Proposal eliminates exceptions and complexity that can cause confusion and inaccuracies in the calculation of CHS.

Improving the effectiveness of the sentencing system

- There is no evidence that the predictive value of prior sex offenses in determining likelihood of recidivism is any different from the predictive value of other prior offenses.
- Current exception serves as a retributive policy associated with the stigma that surrounds sex offenses.
- Reduces racial disproportionality/disparity. If there is racial bias in charging decisions or the plea bargaining process, this proposal reduces the impact of that disparity by treating sex offenses the same as other offenses for purposes of washout.

Promoting and improving public safety

- There is no evidence that the predictive value of prior sex offenses in determining likelihood of recidivism is any different from the predictive value of other prior offenses.

Grid Subgroup Discussion Notes on 5.24.22

Final Potential Recommendation (*ready to go in front of the Task Force for input*): Maintain washout period start upon release from confinement, but base that on

release from confinement for the original sentence **or the final period of confinement under inmate status**. Washout periods ~~only~~ reset upon conviction for a new criminal offense **that is a felony or gross misdemeanor. If an individual is convicted of three separate misdemeanor offenses, the washout period resets upon the third conviction**. Confinement for a technical violation will not reset the washout period.

- What it means? If an individual is revoked under a sentencing alternative and they consequently return to incarceration under inmate status, washout period starts when they release. This is different from individuals who are returned to incarceration under violator status.

Grid Subgroup Discussion Notes on 5.25.22

Revocations:

- Release after revocation – other options mean that the washout period may occur overwhelmingly during incarceration. This is not the intent of establishing a crime-free period in the community, so it should be after final release.
 - In some ways an individual is receiving a benefit on washout by having the alternative. If they revoke, should they retain that benefit?
- Concern – revocation doesn't have appeal/judicial review process. Lack of counsel during DOC revoke hearings. This is the case for Prison DOSA and Community Parenting Alternative, but other sentencing alternatives are retained jurisdiction in the court.
- Distinction between violation and revocation whereby violations are not a return to complete the original sentence, but revocations are.

Misdemeanors:

- Do M increase complexity?
 - No special rules – just looking at date of conviction and/or confinement.
 - Can be difficult to track down M due to differences in record keeping systems. But the burden is on the State to establish prior offenses, so complexity/additional work is on the prosecution.
 - Distinction between M and GM. Most serious M are GM, like DV assault or DUI.
- Some M are used as a predicate offense for some F offenses, many of those are GM.
- Minor M like fishing/game violation or potentially disproportionate offenses like DWS3 may not be appropriate for extending washout periods.
- But there are some instances when a GM or low level felony may be pled down to a M.
 - Also some M that are more serious like criminal trespassing or disorderly conduct as a plea down from DV/assault.
- Idea of washout is that someone has been in the community long enough without committing crime that we're comfortable saying they have desisted from crime. If convicted of a M, the individual is still committing crime and actual behavior may be more serious but reduced via plea.

- Change in discussion about desistance and what that looks like.
 - If an individual continues to commit M, then it would not matter because not getting scored in CHS, so only matters for those who do return to felony offense.
- Is there a way to address repeat misdemeanors?
 - Should there be a threshold for M to reset the washout period?
- Is there another way to account for these cases where there is a lapse in felony offending but subsequent M offending in between.
 - Aggravating factors/change in language on 9.94A.535 2.b?
 - Agg sentences are open to appeal
 - Agg sentences change discretion and potential wide range in sentence outcomes.
 - Model Penal Code some do include criminal history as aggravating factor. Could say that Prior M do not impact CH score but may be considered by the judge.

~~**Potential Recommendation:** Only conviction for a new criminal felony offense should reset washout periods. Confinement for a technical violation or revocation of a sentencing alternative (that is not due to commission of a new crime) will not reset the washout period.~~

Grid Group Discussion Notes on 5.17.22

- Could allow serious violent to washout with an exception that it doesn't washout for subsequent serious violent offenses. That is the asterisk on the grid exercise.
- Members interested in knowing more about Pennsylvania's Sentencing Commission's new policy changes: PA recommendation is 10 year crime free period for lower offenses, 15 for all offenses except violent. 25 years for violent. The washout period start at conviction.
- Prosecutors view revocation of a sentencing alternative as imposition of the original sentence which is different from swift and certain incarceration which is punishment for subsequent behavior that was a violation of the court orders. Comparable to half of the sentence being suspended and if the individual does not comply, the suspension is lifted, so it is an original order.
- Revocation doesn't have the same administrative standards as the courts. Some members questions whether the group should use the opinion of DOC to determine whether or not washout period resets and explained how individuals have less rights – counsel, appeal, cross-examine, call witnesses, etc.
- Revocations by DOC have been repeatedly overturned by the courts – calls into question the reliability of that process.
- Potential disproportionality/disparity in likelihood of revocations?

Grid Group Discussion Notes on 5.17.22: At the end of the meeting the Subgroup had crafted the following potential recommendation to further discuss at the 5.24.22 meeting. *(note, at 5.24.22 meeting the group developed a final rec which is on page 4 and also on page 7)*

~~**Proposed Recommendation:** Maintain washout period start upon release from confinement, but base that on release from confinement for the original sentence. Washout periods only reset upon conviction for a new criminal offense. Confinement for a technical violation will not reset the washout period.~~

~~— Remaining questions~~

- ~~○ Revocations — should washout start at original release on the sentencing alternative (regardless of whether or not the sentencing alternative is revoked and the person returns to prison) or should it start at the release for the final confinement sentence after the revocation?~~
- ~~○ Misdemeanors — should conviction for a misdemeanor offense reset the washout period or only felony convictions?~~

Previous Grid Subgroup Discussion Points:

- Increased surveillance for community custody
- Technical violations are not actually criminal behavior so should not reset crime free period.
- Keeps individuals trapped in the system if washout reset for short-term incarceration from things like “swift and certain”
- Eliminate the ability for misdemeanor offenses to reset the crime-free period
 - Consistent with superior court/SRA jurisdiction over felonies)
 - **Grid Group Discussion Notes on 5.17.22:** May be some offenses where lower level/initial offenses are a misdemeanor but subsequent would be a felony. For example, if there is a VHOM and then DUI charged as a misdemeanor, that DUI wouldn’t affect the VHOM washout.
- Revocation of a sentencing alternative for reasons other than the commission and conviction of a new felony offense should not reset washout period.

Note: While the Subgroup generally supported having technical violations not reset a person’s washout periods, revocation of a sentencing alternative, such as DOSA needs further discussion.

Reducing complexity and error

- Under current system – courts must know about all periods of confinement, including short confinement stays associated with swift and certain violations. This information may not always be available especially when swift and certain sanctions are served in a local jail facility and not DOC.
- Current statutory language about “crime free period in the community” is confusing because a technical violation is not a new crime, but it is treated as a violation of the “crime free period.”

Improving the effectiveness of the sentencing system

- More effective calculation of CHS ensures more effective and appropriate sentencing.
- Reduces racial disproportionality/disparity. If there is racial disproportionality in the application of swift and certain sanctions, then this proposal eliminates the impact of that disproportionality on future sentences. That is, if people of color are more likely to be incarcerated for a swift and certain violation, that also means they're less likely to have their criminal history washout. Consequently, if they recidivate in the future, it is more likely they will have a higher CHS and receive a harsher sentence.

Promoting and improving public safety

- No impact either way on direct risk to community.
- May lessen collateral consequences of incarceration.

~~Proposed Recommendation:~~ Washout period starts with Judgment & Sentencing Form rather than release to community.

Grid Group Discussion Notes on 5.17.22

- A number of members indicated their constituency would be unlikely to support a system where the washout credit comes from time while incarcerated.
- A number of members commented on how having washouts start at either J&S or at time of release would be less complex than the potential alternative described below that essentially allows for both "Washout periods are X years from the J and S or Y years after release from incarceration, whichever is longer".
- What would happen with revocation? Revocations wouldn't matter here.
- If moving with this proposal, would have to expand the washout periods to be longer than the stat max for incarceration. So for example, Class C would need to be 7-10, Class B 15ish, Class A 25 years?
 - This could result in washout periods that are actually longer than they are currently for many individuals.
 - Particularly problematic if expanding community sentencing alternatives, those individuals will have expanded requirements for crime-free time in the community.

Previous Grid Subgroup Discussion Points:

- Research on criminal history and relationship to recidivism is about behavior occurring in the most recent past. If long sentences, requiring an additional long period of crime-free time in the community may not be necessary.

Potential Alternative:

Washout periods are X years from the J and S or Y years after release from incarceration, whichever is longer. For example, it could be a 10 year washout period for class B offenses starting from the J and S or 3 years after release from incarceration. If an individual had a 5 year prison sentence, their conviction would washout 5 years after release (10 years after J and S). If an individual was sentenced to 9 years incarceration, their conviction would washout 3 years after release from incarceration (12 years after J and S).

Grid Group Discussion Notes on 5.17.22

- Member commented about how some do not see washout policy being about risk – it only matters for people who do recidivate. Question is whether the sanction for their current recidivistic behavior is influenced at all by their past criminal history. So really is about culpability and not risk.

Reducing complexity and error

- Under current system – courts must know about all periods of confinement, including short confinement stays associated with swift and certain violations. This information may not always be available especially when swift and certain sanctions are served in a local jail facility and not DOC.
- This proposal establishes consistency in the calculation of CHS regardless of what the sanction was for prior offenses. Allows for determination of whether prior offenses count based solely on the court data rather than jail or DOC data.

Improving the effectiveness of the sentencing system

- If washout periods were based on the judgment and sentence date, the state could theoretically create an automated system to calculate criminal history scores for the courts based only on AOC data. Under the status quo, the same type of system would require integration of jail and DOC data which is far more complex.
- May reduce racial disproportionality/disparity. If there is racial disproportionality in length of stay for prison or jail sentences, then people of color may be affected by prior convictions for a longer amount of time than other defendants.

Promoting and improving public safety

- The best predictor of future behavior is *recent* past behavior. Studies indicate that the likelihood of recidivism greatly declines as the time from last conviction increases regardless of the time spent in incarceration.

APPENDIX B.

Criminal History Scoring

The general rule for scoring is that prior felony convictions count as:

- Adult offenses count as 1 point
- ~~Juvenile Violent offenses count as 1 point~~
- Juvenile non-violent (NV) offenses count as 1/2 point (rounded down)

Exceptions to “standard” scoring:

- 1. Burglary 1°** (violent offense):
 - ~~a. Adult NV Burglary offenses count as 2 points~~
 - ~~b. Juvenile NV Burglary offenses count as 1 point~~
 - ~~c. Adult and Juvenile Violent & Serious Violent (SV) offenses count as 2 points~~
 - d. Any other felony offenses count standard
- 2. Violent** (defined in RCW 9.94A.030) offense (not Sex, SV, Burglary 1°, Felony Traffic, or Homicide/Assault by Watercraft or Manufacture Meth):
 - ~~a. Adult and Juvenile Violent & SV offenses count as 2 points~~
 - b. Any other felony offenses count standard
- 3. Serious Violent** (defined in RCW 9.94A.030) offenses:
 - ~~a. Adult and Juvenile Serious Violent (SV) offenses count as 3 points (convictions existing before the date of sentencing. If there are multiple current SV offenses, only the most serious offense is scored – all other SV offenses get a score of 0 and the sentences for each are served consecutively (RCW 9.94A.589(1)(b))~~
 - ~~b. Adult and Juvenile Violent offenses count as 2 points~~
 - c. Any other felony offenses count standard
- 4. Felony Traffic** (defined in RCW 9.94A.030) offenses:
 - ~~a. Adult and Juvenile Vehicular Homicide or Vehicular Assault offenses count as 2 points~~
 - ~~b. Certain adult Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1 point~~
 - ~~c. Certain juvenile Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1/2 point~~
 - ~~d. Adult convictions of Operation of a Vessel under the Influence offenses count as 1 point and juvenile offenses for Operation of a Vessel offenses under the Influence count as ½ point.~~
 - e. Any other felony offenses count standard

5. **Homicide or Assault by Watercraft** offenses:
 - ~~a. Adult and Juvenile Homicide or Assault by Watercraft offenses count as 2 points~~
 - ~~b. Certain adult Traffic Misd/Gross Misd offenses count as 1 point~~
 - ~~c. Certain juvenile Traffic Misd/Gross Misd offenses count as 1/2 point~~
 - d. Any other felony offenses count standard

6. **Manufacture Methamphetamine** offense(NV):
 - ~~a. Adult Manufacture Meth offenses count as 3 points~~
 - ~~b. Juvenile Manufacture Meth offenses count as 2 points~~
 - c. Any other felony offenses count standard

7. **Drug** offense (definition of Drug offense excludes simple possession) with history of a sex or serious violent offense (NV):
 - ~~a. Adult drug offenses count as 3 points~~
 - ~~b. Juvenile drug offenses count cores as 2 points~~
 - e. Any other felony offenses count standard (unless current Drug offense is violent, than prior Adult and Juvenile violent/serious violent offenses count as 2 points)

8. **Escape from Community Custody** offense (NV):
 - ~~a. Adult Escape offenses count as 1 point~~
 - ~~b. Juvenile Escape offenses count as ½ point~~
 - c. Only offenses meeting the definition of Escape (see RCW 9.94A.030(25)) count in the criminal history score – other felonies are not included in the score.**

9. **Escape 1° or 2°** offenses (NV):
 - a. Adult offenses count as 1 point
 - b. Juvenile offenses count as ½ point (violent or NV)

10. **Burglary 2° or Residential Burglary** offenses (NV):
 - ~~a. Adult and Juvenile Burglary 1° offenses count as 2 points~~
 - ~~b. Adult Burglary 2° or Residential Burglary offenses count as 2 points~~
 - ~~c. Juvenile Burglary 2° or Residential Burglary offenses count as 1 point~~
 - d. Any other felony offenses count standard

11. **Sex** Offense, other than Failure to Register as a Sex Offender (defined in RCW 9.94A.030):
 - a. Adult and Juvenile Sex offenses count as 3 points
 - ~~b. If the current is a Violent Sex offense, prior adult & juvenile non-Sex Violent offenses score as 2 points.~~

- c. ~~If the current is a SV Sex offense, prior adult & juvenile non-Sex SV offenses score as 3 points (if they are not other current SV offenses).~~
 - d. Any other felony offenses count standard
12. **Failure to Register as a Sex Offender (FTR) offenses** (ranked FTR are defined as Sex offenses):
- a. ~~Adult and Juvenile Sex offenses that **are not** FTR are score as 3 points~~
 - b. ~~Adult and Juvenile Sex offenses that **are** FTR score as 1 point~~
 - c. Any other felony offenses count standard
13. **Theft of a Motor Vehicle, Possession of a Motor Vehicle, Possession of a Stolen Vehicle, or Taking a Motor Vehicle without the Owner's Permission 1° or 2°:**
- a. ~~Misdemeanor offense of Vehicular Prowling 2° counts as 1 point~~
 - b. ~~Adult and Juvenile offenses of Theft 1° or 2° of a Motor Vehicle, Possession of Stolen Property 1° or 2° of a Motor Vehicle, Theft of a Motor Vehicle, Possession of a Stolen Vehicle, or Taking a Motor Vehicle without the Owner's Permission 1° or 2°, count as 3 points~~
 - c. Any other felony offenses count standard
14. Felony **Domestic Violence** (defined in 9.94A.030) where DV was pleaded and proven:
- a. Count 2 points for each Adult offense where DV was pleaded/proven after 8/1/2011 for any of the following offenses: Violation of a No Contact or Protection Order, felony Harassment, felony Stalking, Burglary 1°, Kidnapping 1° or 2°, Unlawful Imprisonment, Robbery 1° or 2°, Assault 1°, 2° or 3°, or Arson 1° or 2°.
 - b. Count 2 points for each Adult offense where DV was pleaded/proven after 7/23/2017 for any of the following offenses: Assault of a Child 1°, 2° or 3°, or Criminal Mistreatment 1° or 2°.
 - c. Count 1 point for each 2nd and subsequent Juvenile offense with DV was pleaded/proven after 8/1/2011 for the list of offenses under (a) above.
 - d. Count one point for each adult offense for a repetitive domestic violence offense (misd/GMs), where domestic violence was pleaded/proven after 8/1/2011
 - e. Any other felony offenses count standard
- 15. Community Custody Point:** If the present offense was committed while the person was under community custody, 1 point is added to the criminal history score.

Other Scoring Considerations:

- Only “ranked” offenses (those assigned a seriousness level) receive a score

- If there is more than one current offenses, offenses score against one another (with some exceptions) as though they were criminal history.
- A finding of Sexual Motivation changes the categorization of any felony non-sex offense into a sex offense and as such, the offense is scored as a sex offense
- Class B Violent offenses that are anticipatory are not considered Violent offenses but still score as though it was a Violent offense
- For Class B and Class C offenses in criminal history can “washout” if conditions of crime-free behavior are met (with some exceptions)
- Offenses ruled as same criminal conduct do not score against one another
- Offenses committed prior to 7/1/1986 and served concurrently count as one offense for scoring purposes
- Some offenses in history may not be included in the criminal history score if they also resulted in an enhancement

Note: Original SRA had multipliers for the following offense types: Serious Violent, Burglary 1°, Violent, Vehicular Homicide, Escape, Burglary 2, and Drug offenses. Also, Juvenile offenses were only scored if the person was 15 year or older at the time the offense was committed and was less than 23 at sentencing.

APPENDIX C.

Grid Subgroup Potential Recommendations: Misdemeanor Scoring in Criminal History Score

Background:

Prior Misdemeanor convictions count in the criminal history score in four unique situations. These scoring exceptions depend on the type of current offense and the types of prior misdemeanor convictions. As the SRA and Superior Courts primarily handle felony offenses, it

may be argued that the criminal history score calculations should be limited to the same jurisdiction – felony offenses. The current misdemeanor scoring exceptions create substantial confusion for courts and other agencies who use the CHS (e.g., Caseload Forecast Council, Department of Corrections).

The Grid subgroup has been discussing the logic behind the four scoring exceptions and exploring ways that the same goals can be achieved through alternative means while increasing transparency, simplifying the CHS calculation process (increasing efficiency), and reducing errors in calculating CHS.

Below are draft potential recommendations discussed by the Grid Subgroup on 1/25/22 and 2.1.22.

Scoring exception 1: Felony Traffic (Felony DUI, veh assault/homicide)

Status Quo:

Certain adult Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1/2 point

Potential Recommendation:

Eliminate the special misdemeanor scoring exceptions for felony traffic and reclassify felony DUI from OSL 4 to OSL 6.

Justification:

- Prior misdemeanor DUIs are themselves an element of felony DUI. Thus, in the status quo, the prior convictions both increase the seriousness of offense in the court and increase a person's criminal history score. This means that individuals charged with felony DUI should never have a CHS of 0 or 1.
 - Individuals are essentially double punished for their prior record.
- Eliminating the scoring exceptions without changing the offense seriousness level would create a situation where individuals may have a lesser sentence for the felony DUI than the mandatory minimum for a 3rd misdemeanor DUI which is 180 days.
- Felony is a class B felony. Reclassifying it as OSL 6 would put it in the middle of the grid where Class B offenses are generally concentrated. For an individual in OSL 6 with a CHS of 0, the recommended sentence range would be highly similar to the recommended sentence range of individuals in OSL 4 with a CHS of 3. Thus, the prosecutors and judges would still be able to seek similar sentences, but without the unnecessary complication in the Criminal History Score.
- Achieves TF goals of reducing complexity and error and increasing efficiency of the sentencing system.
- DUI unique because of the gradual increase in severity that specifically starts with M offenses.

Scoring exception 2: Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree – Vehicular Prowling Misdemeanor Priors

Status Quo:

Misdemeanor offense of Vehicular Prowling 2^o counts as 1 point

Potential Recommendation A:

Eliminate the special misdemeanor scoring exceptions for vehicular prowling and create a new subsection on Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree for individuals with two prior misdemeanor convictions of vehicle prowl. Make this new subsection OSL 4.

Justification:

- The idea behind the M scoring is that stealing a car is a continuation of or escalation of previous vehicle prowl behaviors.
- For individuals with their third vehicle prowl conviction, it is a felony offense at OSL 4
- For individuals with their first theft of a motor vehicle, it is a felony offense at OSL 2, but the prior prowls increase criminal history score.
- Not all vehicle prowls are with the intent to steal a car – thus theft of a motor vehicle may not always reflect increasing intensity of behaviors – it may be a change in behavior. However, for those who are prowling with intent to steal a car, it doesn't make sense that the third time they're caught for prowl (i.e., they are stopped before they steal the car) the sentence is greater than the individual who successfully steals the car on the third try.
- Creating a new offense for theft of a MV with two prior vehicle prowls and making that OSL 4 makes it consistent with the third and subsequent vehicle prowl convictions. However, it should be considered whether it makes sense to have these MV theft offense at OSL 4, given the other offense in this OSL.
- Eliminating the special scoring rules increases transparency, increases defense flexibility in plea bargaining process, and significantly reduces complexity and error in the calculation of CHS.

Potential Recommendation B:

Eliminate the special exception misdemeanor scoring for vehicle prowl.

- Doesn't make sense to have MV theft offenses at OSL 4 when looking at the other offenses.
- This is the result of the crime-of-the-day logic. Represents an expansion of the authority under the SRA which is otherwise focused on felony offenses.

Scoring exception 3: Homicide or Assault by Watercraft Offenses

Status Quo:

Certain adult Traffic Misd/Gross Misd count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses count as 1/2 point

Potential Recommendation:

Mirror the recommendation for felony traffic offenses: Eliminate the special misdemeanor scoring exceptions for homicide or assault by watercraft offenses and reclassify to the same OSL as the felony traffic offense.

Justification:

- These offenses should mirror traffic offenses. Committing the same offense in a boat vs. a car is really about a different affluence of the individual committing the offense.
- Felony traffic offenses for which misdemeanors count should be limited to offenses that can be committed by vehicle and boat.
- Felony traffic does include things that you wouldn't have in a boat, for example, eluding. We apply these priors to a broader classification of traffic offenses as boating.

Scoring exception 4: Felony Domestic Violence

Status Quo:

Count one point for each adult offense for a repetitive domestic violence offense (misd/GMs), where domestic violence was pleaded/proven after 8/1/2011

Potential Recommendation:

- Eliminate the misdemeanor scoring exception and instead create an aggravated factor or enhancement.
 - Maintain a way for judges to consider prior misdemeanor DV at sentencing.
 - Aggravating factor would then be constrained under the potential recommendation for limiting increases in sentences as a result of aggravating factor.
 - Potentially limited to offenses involving the same victim/same relationship.
 - Potentially an option similar to the repeat violent column approach.

Justification:

- Prior DV is a high predictor of lethality in DV.
- Doesn't require that the priors be against the same person. But still allowed to be introduced in court.

Additional Potential Recommendations

Potential Recommendation:

Include language in the SRA that would define the scope of the CHS as limited to prior felony convictions.

Justification:

- This would increase the likelihood of lasting change and prevent the slippery slope of continued misdemeanor scoring exceptions.

- SRA was not originally intended to cover M and should not include M except for where there is an explicit step up of the same offense (e.g., DUI).
- Inclusion of M leads to significant complexity and uncertainty. Full discretion of the legislature to decide when they should or should not count.
- Inherent issues with reliability and accuracy of prior M because reliance on municipal court data.
 - Some of the hardest work in prosecutors offices because they have the burden of proof to provide evidence of priors that fit under scoring exceptions.

DRAFT

APPENDIX D.

Proposal 1													
In Years													
	Class	Stat Max	Washout#	Vacation##	SO Registration	Attempt/ Solicitation	Conspiracy	Violent Prop 1A	Violent Prop 1B	Most Serious Offense^	Mandatory Remand^^	Agg Departure Cap	Repeat SV/Violent
18	A1	Life	Life	NA	Life					Any Class A	Any Class A w/Sex Mot		
17	A2	40	15/SV*	NA	Life	A/B	A/B	SV	SV	Any Class A	Any Class A w/Sex Mot	48 mos	60 mos
16	A2	40	15/SV*	NA	Life	A	B	SV	SV	Any Class A	Any Class A w/Sex Mot	48 mos	48 mos
15	A2	40	15/SV*	NA	Life	A/B	B	SV	SV	Any Class A	Any Class A w/Sex Mot	36 mos	48 mos
14	A2	40	15/SV*	NA	Life	B	B	SV	SV	Any Class A	Any Class A w/Sex Mot	36 mos	36 mos
13	A3	20	10	NA	Life	A/B	B	V	V	Any Class A	Any Class A w/Sex Mot	24 mos	36 mos
12	A3	20	10	NA	Life	A/B	B	V	V	Any Class A	Any Class A w/Sex Mot	24 mos	24 mos
11	A3	20	10	NA	Life	A/B	B	V	V	Any Class A	Any Class A w/Sex Mot	24 mos	24 mos
10	A3	20	10	NA	Life	A/B	B	V	V	Any Class A	Any Class A w/Sex Mot	24 mos	12 mos
9	B	10	8	8	15	C	C	NV	V/NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	12 mos	12 mos
8	B	10	8	8	15	C	C	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	12 mos	12 mos
7	A/B**	10	8	8	Life/15	B/C	B/C	NV	NV	Any Class A/B w/Sex Mot	Any Class A/B w/Sex Mot	12 mos	12 mos
6	B	10	8	8	15	C	C	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	12 mos	12 mos
5	B/C	10/5	8/3	8/3	15/10	C/GM	C/GM	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	6 mos	6 mos
4	B/C	10/5	8/3	8/3	15/10	C/GM	C/GM	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	6 mos	6 mos
3	B/C	10/5	8/3	8/3	15/10	C/GM	C/GM	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	6 mos	6 mos
2	B/C	10/5	8/3	8/3	15/10	C/GM	C/GM	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	6 mos	6 mos
1	B/C	10/5	8/3	8/3	15/10	C/GM	C/GM	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot	6 mos	6 mos
Unr	D	3	2	2	***	?	?	NV	NV	Any Class B w/Sex Mot	Any Class B w/Sex Mot		

9A.28.020-.040		Attempt		Solicitation		Conspiracy	
		Class	SV/V	Class	SV/V	Class	SV/V
V	Arson 1	A	V	A	V	B	V
SV	Assault 1	B	SV	B	SV	B	SV
SV	Assault of a Child 1	B	SV	B	SV	B	SV
V	Child Mol 1	A	V	A	V	B	V
SV	Homicide by Abuse	B	SV	B	SV	B	SV
V	Indecent Lib w/force	A	V	A	V	B	V
SV	Kidnapping 1	B	SV	B	SV	B	SV
SV	Manslaughter 1	B	SV	B	SV	B	SV
SV	Murder 1	A	SV	A	SV	A	SV
SV	Murder 2	A	SV	A	SV	B	SV
SV	Rape 1	A	SV	A	SV	B	SV
V	Rape 2	A	V	A	V	B	V
V	Rape of a Child 1	A	V	A	V	B	V
V	Rape of a Child 2	A	V	A	V	B	V
V	Other Class A	B	V	B	V	B	V

Red offenses are SV offenses.

Black offenses are offenses specified in RCW 9A.28.020 as remaining class A for attempt/solicitation