

## Criminal History Score Wash-Out Periods

### *Prepared for CSTF Grid Subgroup Discussion*

#### **Partial Summary of Criminal History Enhancements Sourcebook by Robina Institute of Criminal Law and Criminal Justice**

##### **Two types of wash-out or look-back policies:**

###### Decay policy

- Key tenet: prior convictions age out of the calculation after a certain time period.
- Makes a statement that a conviction will become old enough that it is no longer relevant in determining culpability or predicting risk to reoffend.
- Question when determining decay policy: how long to keep a prior conviction relevant?
- Easier to implement than a gap policy.

###### Gap policy

- Key tenet: prior convictions are excluded based on the time an individual is crime-free.
- makes policy declaration that efforts to remain crime-free can mitigate culpability; encourages desistance.
- Those able to remain crime-free for the time period are rewarded.
- Question when determining gap policy: how long must an individual remain crime-free in order for prior conviction to be irrelevant?

##### **Robina examined four considerations present in existing decay or gap policies**

1. Length of time period - most commonly used decay or gap time period is 10 years. Washington has 10- and 5-year gap policies.
2. When to start counting the time period – most policies start counting at release from confinement and/or when post-confinement supervision has ended. Washington uses date of release from confinement or entry date of Judgment & Sentence form.
3. Any instance for revival of prior convictions – District of Columbia has a 10-year decay policy. If prior felony conviction or any part of the sentence occurred within the 10-years, all prior felonies are revived and counted. Michigan also has 10-year decay policy. If fewer than 10 years between release date and the current offense, the prior conviction must be included. When a prior conviction is included, any conviction that occurred within 10 years of that prior conviction is also included. This 10 year look back continues until no additional priors are found. Washington does not have a revival policy.
4. Prior convictions that are always counted (i.e. excluded from the policy) – only three states exclude specific offenses from their policies - Arkansas, Delaware, and Washington. Arkansas excludes any prior convictions for offenses with a seriousness level of 6 through 10 from its

policy. Delaware excludes all Felony A and Felony B from its 10-year gap policy. Washington excludes Class A felonies, any sex offense, felony DUI offense, felony DUI-Physical Control offense and any predicate offenses related to the felony DUI and DUI-Physical Control offenses from its gap policy.

### **Justification For Criminal History Score Calculation Policy**

Many states provide language that states the overall goals of the guidelines. These usually tend to refer to public safety rather than the need to punish repeat offenders. Only a few explicitly state the justification of criminal history enhancements used in sentencing is related to risk or retribution, or a combination of both. Robina recommends states provide a clear statement as to the justification for considering criminal history in sentencing and clarify the ways that criminal history is counted at sentencing. Knowing the purpose of using criminal history enhancements in sentencing is necessary in determining the approach to a wash-out policy.

Questions for states to consider: What is the basis for using prior criminal history to enhance current sentence? Does that justification remain applicable after time has passed?

- Utilitarianism Perspective
  - a. Principle objective: legal punishment is to prevent crime through deterrence, incapacitation, and rehabilitation.
  - b. Criminal history score serves as a proxy for the individual's risk to reoffend and higher risk justifies additional punishment as a way to prevent reoffending.
  - c. Research results question the strength of these assumptions.
    - i. danger of over-prediction of risk to reoffend (many offenders deemed likely to re-offend do not do so, or their rate of prior offending declines substantially due to aging and other factors).
    - ii. prison can be criminogenic
    - iii. incarcerated individuals are quickly replaced (e.g. drug offenses)
    - iv. fear of conviction is better deterrent than length of sentence
    - v. longer prison terms are not associated with lower reoffending rates
  - d. Greater consensus and empirical evidence to support perspective.
  
- Retributive Perspective
  - a. Principle objective: recognize harm caused and the individual's level of culpability for that harm.
  - b. Severity of the sentence is proportionate to the severity of the harm and the individual's level of culpability.
  - c. Those who have prior convictions are more culpable which justifies additional punishment.
  - d. Lack of consensus of retributive theorists questions the sound basis of the perspective.
    - i. Argument A: sentencing should punish for current offense and not for previous offenses for which the individual has already served.
    - ii. Argument B: recidivists are more culpable and deserve more punishment

## Washington State

RCW 9.94A.525(1) defines a prior conviction as “a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94a.589.”

Washington counts prior adult convictions except when wash-out rules apply, a court had determined the offenses count as ‘same criminal conduct’ (RCW9.94A.589), offenses not considered ‘same criminal conduct’ but their sentences were served concurrently and a court now determines they were committed at the same time, same place and involved the same victim; or offenses were committed before 7/1/1986 and were served concurrently.

All felony juvenile adjudications are counted as part of the criminal history score except under general wash-out rules that apply to adult convictions. Juvenile convictions that were sentenced the same are counted separately unless they have been deemed ‘same criminal conduct’ or unless the date the offense was committed was before 7/1/1986.

### **Wash Out Rules** RCW 9.94A.525 (apply to both juvenile and adult prior convictions)

- Class A and felony sex convictions never wash out.
- If current conviction is a felony DUI or felony DUI-Physical Control, all predicate crimes for the offense as defined by RCW 46.61.5055(14) and prior convictions for felony DUI or felony DUI-Physical Control never wash out.
- Class B felony convictions and convictions for repetitive domestic violence offenses wash out if the individual has not been convicted in the past 10 consecutive years since date of release or entry of J&S.
- Except as noted above, Class C felony convictions and serious traffic convictions wash out if the individual has not been convicted in the past 5 consecutive years since date of release or entry of J&S.

Once a conviction is vacated, “the offense shall not be included in the offender’s criminal history for purposes of determining a sentence in any subsequent conviction...” RCW 9.94A.640.

Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009) <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>;

### Findings:

- For individuals arrested at age 18 for robbery, the probability that individuals would commit another crime was the same as the general population by age 25.7, or 7.7 years after the 1980 arrest.
- For individuals arrested at age 18 for burglary, the probability that individuals would commit another crime was the same as the general population by age 21.8, or 3.8 years after the 1980 arrest.

- For individuals arrested at age 18 for aggravated assault, the probability that individuals would commit another crime was the same as the general population by age 22.3, or 4.3 years after the 1980 arrest.
- Individuals arrested when they were 18 years old had the same arrest rate 7.7 years later as a same-aged individual in the general population. Those whose first arrest occurred at age 16 crossed the curve for a same-aged individual in the general population 8.5 years later, and
- individuals who were first arrested at age 20 crossed their curve 4.4 years after their first arrest.

Keith Soothill and Brian Francis, When Do Ex-Offenders Become Like Non-Offenders?, 48 The Howard Journal 373, 385 (2009);

Findings:

- All non-offenders have a risk of being convicted within the next year – from around 1 in 100 at the age of 21 years, around 1 in 200 at the age of 25 years, around 1 in 300 at the age of 30 years and around 1 in 700 at the age of 35 years.
- The three groups with convictions between the ages of 10 to 20 years have differential likelihoods of a further conviction in the first ten to twelve years after their 20th birthday, but then they seem to converge.
- While they get close, the three convicted groups do not finally converge with the non-offending group.
- The present study presents clear evidence that, if persons remain crime-free for a period of, say, ten years after the age of 20 years, then those with an offence record in their youth and/or early adulthood have a very similar likelihood of a further conviction compared with the non-offending population of their age.

Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 Crime & Delinquency 64, 80 (2007)

<https://archive.ilr.cornell.edu/download/57366>

Findings:

- For individuals with police contact as a juvenile, the probability of offending is about the same as those who were not contacted by age 23.
- For individuals with police contact at age 18, the probability of offending is the same as those who were not contacted becomes the same around age 32.
- For individuals with police contact at age 19, the probability of offending is the same as those who were not contacted becomes the same around age 26.
- For individuals with police contact at age 20, the probability of offending is the same as those who were not contacted becomes the same around age 29.
- For individuals with one police contact at the age of 18/19/20, the probability of offending is the same as those who were not contacted becomes the same around age 27.
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In sum,  
when criminal activity is in the recent past, we expect to see an elevated hazard rate;  
but the more distant the last evidence of criminal activity is in the past, the less likely  
there is to be a meaningful elevation in the hazard rate for new offenses.