

Criminal Sentencing Task Force  
Proposed Recommendations: Sentencing System  
DRAFT  
9.30.22

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*Yellow highlight: will be presented as proposed at the Oct 6<sup>th</sup> meeting AND THEN will be on the November 3<sup>rd</sup>/17<sup>th</sup> agenda for consensus deliberation*

*Gray highlight: was presented on Aug 31<sup>st</sup> as proposed and will be on Nov 3<sup>rd</sup> agenda for consensus deliberation*

**A. Foundational (page 4)**

1. **Proposed Recommendation (page 4):** Require the SGC to review the state of evidence about the efficacy of reforms and publish a report every five years including recommendations for additional reforms. Research should include the impact of the reforms on:
  - Public safety (including recidivism, technical violations, violations of protection orders)
  - Racial and gendered disproportionality
  - The rate and use of incarceration and community alternatives
  - Reentry outcomes including employment, housing, participation in and completion of treatment, etc.
  - Complexity and errors in sentencing
2. **Proposed Recommendation (page 6):** Since the current supervision model based on surveillance is insufficient, changes to the grid are based on a broader paradigm shift focused on providing the appropriate treatment, resources, and mentoring for individuals placed in state custody. To sufficiently achieve those goals, changes to the grid must include concurrent changes to the DOC community custody approach to fully adopt the i-COACH model or to adopt a comparable model of community reentry practices.

**B. Sentencing Discretion**

3. **Proposed Recommendation (page 7):** Require that any aggravated departure has reasoning articulated in the Judgement and Sentence, including any additional information, particular characteristic, or other circumstance justifying aggravating departure.
4. **Proposed Recommendation (page 8):** Eliminate mandatory consecutive sentencing. Leave default consecutive but allow judges discretion to issue concurrent sentences without invoking an exceptional sentence.

5. **Proposed Recommendation (page 10):** Replace three-strikes mandatory sentence with determinate plus sentencing.
6. **Proposed Recommendation (page 11):** Change the legal procedure for three-strikes laws to mirror aggravating factors such that the three-strikes must be treated as elements of the crime. Pled in information. Proven to a jury beyond a reasonable doubt. Or entered via stipulated agreement. Individual acknowledges and agrees in a plea agreement.

### **C. Legal Procedures and Other Sentencing Laws**

7. **Proposed Recommendation (page 11):** For aggravated murder 1 change the language from: “Life sentence without parole/death penalty for individuals at or over the age of eighteen. For individuals under the age of eighteen, a term of twenty-five years to life.” To “Life sentence without parole/death penalty for individuals at or over the age of twenty-one. For individuals under the age of twenty-one, a term of twenty-five years to life.” In addition, strike reference to the death penalty as it is no longer a valid sentence in Washington State.

### **D. Criminal History Score**

8. **Proposed Recommendation (page 14):** Maintain special misdemeanor scoring for prior Misdemeanor DUI offenses when the current offenses is a serious felony traffic offense involving DUI (e.g., Vehicular homicide-DUI, Vehicular Assault-DUI, Felony DUI, Felony physical control, etc). Prior misdemeanor DUI offenses no longer score for felony offenses not involving DUI.
9. **Proposed Recommendation (page 15):** Maintain the special misdemeanor DUI scoring exceptions for homicide or assault by watercraft offenses and make homicide or assault by watercraft offenses the same OSL as the corresponding felony traffic offense (by either increasing watercraft offenses to higher OSLs or reducing vehicular offenses to a lower OSL) with the goal of creating parity between vehicular and watercraft offenses (Homicide by watercraft and vehicular homicide. Assault by watercraft and vehicular assault).
10. **Proposed Recommendation (page 15):** Maintain the special misdemeanor scoring exception for domestic violence. As described in the proposed recommendation of the new felony sentencing guidelines grid, offense-specific exceptions to standard scoring rules for adult felony offenses are eliminated and a new column is added to the grid for adjustments to the standard range for qualifying individuals. The scoring exceptions for adult felony offenses where domestic violence was pleaded/proven will score as 1 point per standard scoring rules, and are eligible for the expanded sentence range under the repeat violent/serious violent and repeat domestic violence column.
11. **Proposed Recommendation (page 15):** Reduce the OSL for vehicle prowl – 2nd degree (third or subsequent) to Offense Serious Level (OSL) 2 and raise the OSL for vehicle prowl – 1st degree to OSL 2.

12. Proposed Recommendation (page 15): Eliminate special misdemeanor scoring for prior misdemeanor vehicle prowl for theft of a motor vehicle, possession of a stolen vehicle, or theft of a motor vehicle without permission 1 or 2.
13. Proposed Recommendation (page 18): Include language in the SRA that would define the scope of offenses that can be scored in the calculation of a CHS as limited to prior felony convictions other than DV, DUI, and vehicular prowl (conditional on vehicular prowl and DUI recommendations passing).
14. Proposed Recommendation (page 19): 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 community custody violation will not reset the washout period.
15. Proposed Recommendation: Washouts for Class A Felonies (page 20): Violent Class A felonies washout after 15 years. Serious violent Class A felonies would not washout.
16. Proposed Recommendation: Washouts for Class B Felonies (page 20): All class B felonies washout after 7 years if the current offense is less serious than the original offense.
17. Proposed Recommendation: Washouts for Class C Felonies (page 20): Class C felonies washout after 3 years.

#### **E. Continuing Work**

18. Proposed Recommendation (page 21): The Legislature should review the offenses included in the most serious offense list to potentially reduce the number of offenses eligible for the three strikes sentencing.
19. Proposed Recommendation (page 21): Direct the Sentencing Guidelines Commission to reviews offenses that have not been sentenced in the last 5-10-20 years for potential elimination from the criminal code.

#### **F. Post Sentencing Reform**

TBD – being discussed by the Grid Subgroup on 10.4.22

## CSTF: Sentencing System Proposed Recommendations

### A. FOUNDATIONAL

- Proposed Recommendation:** *Since the current supervision model based on surveillance is insufficient, changes to the grid are based on a broader paradigm shift focused on providing the appropriate treatment, resources, and mentoring for individuals placed in state custody. To sufficiently achieve those goals, changes to the grid must include concurrent changes to the DOC community custody approach to fully adopt the i-COACH model or to adopt a comparable model of community reentry practices.*

#### **Background and Explanation**

In 2018, the Council of State Governments (CSG) Justice Center assisted the Washington Sentencing Guidelines Commission (SGC) in its review of the Sentencing Reform Act (required under Engrossed Substitute Senate Bill 6032, Chapter 299, Laws of 2018) by providing an analysis of criminal justice system trends and practices using Washington data and identified key components of effective community supervision based on current literature. According to the CSG:

*“Recent research has focused on the mindset of supervision and corrections officers and the type of relationships they build with the people they supervise, noting that additional recidivism-reduction potential exists when officers use a strengths-based, therapeutic approach in their interactions. This concept is known as becoming a “coach” rather than a “referee” and is truly the embodiment of core correctional practices, which focus on building relationship skills, problem solving, effective reinforcement and modeling in interactions with people under supervision or in a correctional setting.”*

In 2020, the CSTF provided the following consensus recommendation to the Legislature and Governor in its 2020 Report:

*“Develop and implement a formal motivational and coaching focused supervision model, which includes trauma informed care and core correctional practices and allows for a more responsive and individualized case management approach to facilitate successful transitions and reentry to the community. This supervision model should consider staffing needs, caseload, and program/service delivery, including how community corrections officers dress during routine home and work checks. Because addressing liability concerns will be an important element of any new supervision model, parties directly affected should address this issue and keep the Task Force updated on their work.”*

In 2021, the Legislature provided funding to expand reentry supports and transition services for incarcerated individuals including development and implementation of a coaching model approach to supervision. The Legislature tasked the Department of Corrections to develop an implementation plan for a community supervision coaching model to begin in fiscal year 2023 and to submit an initial report to the legislature on the progress of implementation of the coaching supervision model by no later than February 1, 2023.

**Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

Individualized Community Oriented Accountability Collaborative Help (iCoach) will be the delivery of supervision, programming, and services for individuals under DOC's supervision and includes a requirement of the CCO to coach supervised individuals throughout the course of supervision. iCoach will be driven by two philosophies:

**Community Reintegration supervision model**

- Will apply to supervised individuals who release from a prison or re-entry center and all supervised individuals who release from a violator facility after serving a high-level sanction.
- Frontloads programs, resources, and services to support reentry into the community:
  - For the first 90 days of supervision in the community for individuals releasing from a prison or reentry center, and;
  - For 30 days after release from a violator facility for individuals who have served a confinement sanction for high-level violations.
- Provides evidence-based approach that includes frequent contacts and increased drug/alcohol testing (as applicable), as well as advocacy and assistance in accessing services, to support the individual's success in the community.
- Tailors supervision and support functions to the supervised individual's needs upon release.

**Enhanced supervision model**

- Will be utilized throughout the course of supervision for all populations.
- Provides supervised individuals with coaching, advocacy and assistance in accessing services, to support their success in the community. This requires CCOs to be trained in the use of coaching being responsive to the individual's needs, the delivery of services and advocating for the supervised individual.
- Focuses on the supervised individuals and tailors case management approaches and support functions to meet the identified needs of the supervised individual.

2. **Proposed Recommendation:** *Require the SGC to review the state of evidence about the efficacy of reforms and publish a report every five years including recommendations for additional reforms. Research should include the impact of the reforms on:*
- *Public safety (including recidivism, technical violations, violations of protection orders)*
  - *Racial and gendered disproportionality*
  - *The rate and use of incarceration and community alternatives*

- *Reentry outcomes including employment, housing, participation in and completion of treatment, etc.*
- *Complexity and errors in sentencing*

### **Background and Explanation**

The SGC will be responsible for a review every 5 years of all enacted reforms that result from the work being done by the Task Force. This ongoing research will focus on reviewing the evidence of the effectiveness of these reforms with the SGC publishing a report on the findings on this ongoing research. The scope of this research will include, but is not limited to,

- The impact of the reforms on public safety (including recidivism, technical violations, violations of protection orders, overall crime rates, collateral consequences of crime/incarceration)
- The impact of the reforms on racial and gendered disproportionality
- The impact of the reforms on the rate and use of incarceration and community alternatives
- The impact of reforms on reentry outcomes including employment, housing, participation in and completion of treatment, etc.
- The impact on complexity and errors in sentencing.

The purpose of this research is to ensure avenues for ongoing reviews of any sentencing system reforms occur more frequently than once every 40+ years. SGC reviews will be on an ongoing basis with reports on findings being published every 5 years, the value in the ongoing analysis with occasional reports provide value in identifying year-to-year patterns, impact on public safety, added or reduced effectiveness, increased or decreased racial disproportionality, and effects on rates of recidivism. If implementation of any reforms indicates negative unintended consequences or exacerbation of existing problems the ongoing analysis will be able to flag this sooner than previous analysis of Washington's sentencing system.

This recommendation also outlines the ability of the SGC to make additional recommendations to address any shortcomings of the reforms being reviewed. This will create a more responsive analysis of Washington's sentencing system that allows for timely solutions to existing or new problems.

### **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

- Periodic reviews are aimed at identifying and addressing any complexities or errors in the functioning of the sentencing system.
- Produces actionable steps to address the identified complexities/errors and mend these consequences through SGC's additional recommendations.
- Reviews will also examine the success of reforms and its impacts to identify areas of potential expansion of the successful reforms to other aspects of the sentencing system.

- SGC analysis will identify how any reforms impact public safety, determined through analysis of overall crime rates, changes in rates of recidivism, and collateral consequences of incarceration, allowing for the expansion or mending of reforms until they benefit public safety.
- Analysis addressing any benefits or shortcomings of any enacted reforms have on public safety informs future work on how improve public safety in Washington.

## **B. SENTENCING DISCRETION**

- 3. Proposed Recommendation:** *Require that any aggravated departure has reasoning articulated in the Judgement and Sentence (J&S) record, including any additional information, particular characteristic, or other circumstance justifying aggravating departure.*

### **Background and Explanation**

Under current law, the court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. If an exceptional sentence is given, the sentencing court is required to set forth the reasons for the departure from the standard range ([RCW 9.94A.535](#)) or from the consecutive/concurrent policy ([RCW 9.94A.589](#)(1) and ((2)) in written Findings of Fact and Conclusions of Law. The law ([RCW 9.94A.535](#)) has a list of factors for the court to consider when imposing an aggravated exceptional sentence (above the standard range) or a mitigated exceptional sentence (below the standard range).

In response to *Blakely v. Washington*, 542 U.S. ... (2004) the Legislature made exclusive the list of aggravating factors used to justify an upward departure from the standard sentence range ([RCW 9.9A.537](#)). The Legislature also expanded the list of aggravating factors to include current judicially recognized factors. There are currently 32 aggravating factors (some with multiple subsections) that pose questions of fact that must be submitted to a jury. There are four aggravating factors that can be used to impose a sentence above the standard range without findings of fact by a jury:

- The court may impose an aggravated exceptional sentence if the defendants and state both stipulate that justice is best served by an exceptional sentence and the court agrees that the stipulation is in the interest of justice.
- The defendants 's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of [RCW 9.94A.010](#).
- The defendant committed multiple current offenses and the defendant's high criminal history score results in some offenses going unpunished.
- The failure to consider the defendant's prior criminal history which was omitted from the criminal history score calculation results in a presumptive sentence that is clearly too lenient.

## **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

This proposed recommendation will require that the Judgement and Sentence (J&S) record more details about the reason for agreement in instances where these four aggravating factors that are not required to be pled and proven are used. In particular, for the most frequently used factor (the first bullet above), which stipulates that justice is best served by an exceptional sentence and the court agrees that the stipulation is in the interest of justice. Under this recommendation there would be greater documented information and transparency about the agreement (e.g., charge bargain to avoid three-strikes sentence, charge reduction, reduction in total number of charges), which is needed to conduct research evaluating whether the use of certain aggravators are a potential source of disproportionality. It is important to note that this recommendation does not eliminate the ability to stipulate to the aggravated sentence rather than requiring a finding of fact with a jury.

- 4. Proposed Recommendation:** *Eliminate mandatory consecutive sentencing. Leave default consecutive but allow judges discretion to issue concurrent sentences without invoking an exceptional sentence.*

### **Background and Explanation**

Generally, sentences for multiple offenses set at one sentencing hearing are served concurrently unless there are two or more separate serious violent offenses, driving under the influence offenses, or weapon offenses. In those cases, the sentences are served consecutively, unless an exceptional sentence is entered ([RCW 9.94A.589](#)(1)(a-c)). There are exceptions to this general rule:

- **Offenses that Constitute Same Criminal Conduct:** If the court enters a finding that some or all of the current offenses required the same criminal intent, were committed at the same time and place, and involved the same victim, the offenses are treated as one offense. A departure from this rule requires an exceptional sentence.
- **Multiple Serious Violent Offenses:** In the case of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences for these serious violent offenses are served consecutively to each other and concurrently with any other sentences imposed for current offenses. A departure from this rule requires an exceptional sentence.
- **Certain Firearm-Related Offenses:** In the case of sentences that include Unlawful Possession of a Firearm in the First or Second Degree and one or both of the crimes of Theft of a Firearm or Possession of a Stolen Firearm, the sentences for these crimes are served consecutively for each conviction of the felony crimes listed and for each firearm unlawfully possessed. ([RCW 9.94A.589](#)(1)(c)). A departure from this rule requires an exceptional sentence ([RCW 9.94A.535](#)).

*\*Note: This is different from firearm/deadly weapons enhancements. And these offenses don't qualify for a weapon enhancement.*

- Felony Driving while under the Influence (DUI) /Felony Actual Physical Control of a Vehicle while under the Influence: All sentences imposed shall be served consecutively to any sentences imposed under the specified RCWs for two Gross Misdemeanors.

**Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

There is no evidence that mandatory consecutive sentencing is effective at reducing recidivism and there is no evidence that this policy is a deterrent. This recommendation would eliminate the use of mandatory consecutive sentencing while keeping consecutive sentencing as the default approach for the listed circumstances. This allows for judicial discretion to sentence concurrently without invoking an exceptional sentence. This judicial discretion may allow for more effective decisions regarding specific characteristics of a specific case. Currently, judges may be more hesitant to issue a concurrent sentence due to the appealability of exceptional sentences.

**Three Strikes Sentencing Laws**

**Background and Explanation**

In 1994, Washington state voters passed Initiative 593, the first Three Strikes law in the United States (see History of Two and Three Strikes in Washington, SGC for additional information on history in WA). The law defined “persistent offender,” set the term of confinement as “life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law.” Under RCW 9.94A.565, the Governor would not have the power to grant a pardon or clemency to such individuals “until the offender has reached the age of at least sixty years old and has been judged to be no longer a threat to society.”

There were originally 17 specified offenses eligible for a “strike” in addition to all Class A felonies. Since then, additional offenses were added and currently there are to [56 offenses eligible for a “strike”](#). ([History of Two and Three Strikes in Washington, SGC](#)). All Class A felonies, Class B felonies with findings of sexual motivation, and any felony, regardless of class, with deadly weapons findings, and all other crimes of violence, in addition to the specified [56 offenses](#) are eligible for a “strike” on an individual’s record, the third of which requires the mandatory sentence of life without the possibility of parole ([RCW 9.94A.030](#)).

Defined in [RCW 9.94A.030](#), “Most serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies:

*“(a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony; (b) Assault in the second degree; (c) Assault of a child in the second degree; (d) Child molestation in the second degree; (e) Controlled substance homicide; (f) Extortion in the first degree; (g) Incest when committed against a child under age 14; (h) Indecent liberties; (i) Kidnapping in the second degree; (j) Leading organized crime; (k) Manslaughter in the first degree; (l) Manslaughter in the second degree; (m) Promoting*

*prostitution in the first degree; (n) Rape in the third degree; (o) Sexual exploitation; (p) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; (q) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug”*

Juvenile offenses do not count as a strike, unless they are either automatically or discretionarily declined from juvenile court and sentenced as an adult.

#### Determinate Plus Sentencing

A determinate-plus sentencing model is a type of sentencing that sets a range of sentencing that an inmate will serve within the determined range. Inmates sentenced under the determinate plus sentencing system are given a minimum and maximum sentence by the court, and upon the earliest possible release date are given a hearing with the ISRB to determine if they are rehabilitated and a fit subject for release ([ISRB FAQs, Washington State Department of Corrections](#)).

- 5. Proposed Recommendation:** *Replace 3-strikes mandatory sentence with determinate plus sentencing.*

#### Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:

The Grid Subgroup and Task Force looked at several studies and research around Three Strikes Laws (listed on the Task Force’s webpage and will be included and cited in the final report). Studies found after the passage of its Three Strikes law, California saw an increase in offenses governed by the new law, rather than a decrease. Trends in crime in the 1990s have shown to be attributed to phenomena other than Three Strikes laws (Striking Out as Crime Reduction Policy) and concluded that Three Strikes laws had no quantifiable impact on crime rates. If anything, Three Strikes laws may have contributed to an increase in violent crime rates in urban areas (Homicide Promoting Effects of Three Strikes in U.S. Cities).

This recommendation would eliminate the mandatory life sentences as a result of a third strike under the Three-Strikes Law and replace this with a determinate-plus sentence. Judges would issue a standard sentence as if three strikes did not exist. The sentence would then be converted to a determinate-plus sentence with the minimum of the sentence issued by the judge and a maximum of life. Minimum of the term would be the sentence imposed by the judge within the standard range, and the maximum term would be a sentence of life. Once the minimum term of the sentence has been reached, the Indeterminate Sentencing Review Board (ISRB) will then review the sentence for potential release or continued confinement. Reviews will continue every 2 years thereafter.

- 6. Potential Recommendation:** *Change the legal procedure for three-strikes laws to mirror aggravating factors such that the three-strikes must be treated as elements of the crime. Pled in information. Proven to a jury beyond a reasonable doubt. Or entered via stipulated agreement. Individual acknowledges and agrees in a plea agreement.*

### **Addresses Sentencing Complexities and Errors and Effectiveness of the Sentencing System:**

Currently, no requirement exists for a defendant to get notice that current case and criminal history means a guilty plea or jury finding will bring a term of life. Nor is there a requirement for a jury to get notice that a finding of guilt will qualify as a third strike and resulting sentence of life.

## **C. LEGAL PROCEDURES AND OTHER SENTENCING LAWS**

- 7. Proposed Recommendation:** *For aggravated murder 1 change the language from: “Life sentence without parole/death penalty for individuals at or over the age of **eighteen**. For individuals under the age of **eighteen**, a term of twenty-five years to life.” To “Life sentence without parole/death penalty for individuals at or over the age of **twenty-one**. For individuals under the age of **twenty-one**, a term of twenty-five years to life.” In addition, strike reference to the death penalty as it is no longer a valid sentence in Washington State.*

### **Background and Explanation**

In 2012, the United States Supreme Court in *Miller v. Alabama* held that mandatory sentences of life without parole are unconstitutional when applied to individuals younger than 18 and that such statutes violate the Eight Amendment protection against cruel and unusual punishments. The ruling also stated that judges sentencing minor defendants must be allowed to exercise their discretion to craft an individualized sentence that considers the mitigating qualities of youth. In 2018, Washington State Supreme Court prohibited any sentences of life without parole for minors (*State v. Bassett*).

Washington’s aggravated murder statute provides for a mandatory sentence of life without parole for individuals at or above the age of 18 years old, and for those under 18 years old, a sentence term of 25 years to life. In 2021, the Washington State Supreme Court held that under the Eight Amendment and Washington’s constitutional prohibition on cruel punishments, the holding of *Miller* should be extended those 18-20 years old, citing neuroscience research and that mental development continues into a person’s 20s. The court also cited statutes from other states that provide for differentiated penalties for individuals in their 20s on account of their youth and pointed out that the age of majority in the United States used to be 21 and that some states continue to use 21.

### **Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System:**

Recent Supreme Court decisions recognize the emerging brain science and Washington Legislature has made other policy changes recognizing continued brain development between the ages of 18 and 25. Recent WA Supreme Court Case decisions - *Monschke* and *Bartholomew* - ruled that 18, 19, and 20-year-olds facing life sentences for aggravated murder must be viewed through a lens that considers the “transient immaturity of youth” and that the court must first consider the age of those under 21 before sentencing to a term of life without parole. Under this proposed recommendation, raising the age to 21 years old makes these sentences constitutional.

## D. CRIMINAL HISTORY SCORE

Criminal History Score (called the offender score, [RCW 9.94A.525](#)) is one factor affecting a felony sentence and is measured on the horizontal axis of the sentencing guidelines grid. An individual may receive from 0 to 9+ points on that axis. In general, the number of points received depends on five factors: (1) the number of prior criminal convictions or juvenile dispositions; (2) the relationship between any prior offense(s) and the current offense of conviction; (3) the presence of other current convictions; (4) the person's community custody status at the time the crime was committed; and (5) the length of crime-free behavior between offenses.

Pursuant to RCW [9.94A.030](#)(11), criminal history includes the defendant's prior adult convictions and juvenile court dispositions, whether in this state, in federal court, or elsewhere, and any issued certificates of restoration of opportunity. Although criminal history consists almost exclusively of felony convictions, in some instances, it also includes misdemeanors. The effect of criminal history also relates to the felony class of the crime (Class A, Class B or Class C), and the type of offense (i.e., serious violent, violent, nonviolent, sex, etc.).

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)

In addition:

- If there is more than one offense for in a sentence, the current offenses will score against one another, but are run concurrently (at the same time). There are exceptions that we'll go over in the scoring document (SV & certain weapon offenses)
- If a person was under community custody at the time of the current offense, 1 pt is added to the criminal history score.
- Offenses score as if they were a completed offense (example: Robbery 2° is a Violent offense and Attempted Robbery 2° is NV, but would be scored as Violent offense).
- Only offenses ranked on the adult felony sentence grid are scored – unranked offenses have a score of 0 and a standard range of 0-12 months.

### Misdemeanor Scoring Exceptions

Prior Misdemeanor convictions count in the criminal history score in four unique situations:

#### 1) Felony Traffic 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
- 2) Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1<sup>st</sup> degree or 2<sup>nd</sup> degree – Vehicular Prowling Misdemeanor Priors
- a. Misdemeanor offense of vehicular Prowling 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
- 3) 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 ½ point
  - d. Any other felony offenses count standard
- 4) Felony Domestic Violence
- 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 2<sup>nd</sup> 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

### **Background and Explanation**

The four misdemeanor 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.

Task Force discussions focused on the logic behind the four scoring exceptions and the group explored 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.

The Grid Subgroup put together a series of potential recommendations that included a separate change for each of the four current scoring exceptions. In combination, these changes would have eliminated all special scoring exceptions for misdemeanors in the CHS. When the Grid Subgroup presented these potential recommendations to the full Task Force for input at the 6.2.22 full Task Force meeting, there were a number of members that believed their constituency would not be able to support eliminating one or more of these special scoring exceptions.

The Grid Subgroup incorporated the input from the full Task Force, made revisions, and the proposed recommendations on special scoring exceptions for misdemeanors are #8-13 as follows:

- 8. Proposed Recommendation:** *Maintain special misdemeanor scoring for prior Misdemeanor DUI offenses when the current offense is a serious felony traffic offense involving DUI (e.g., Vehicular homicide-DUI, Vehicular Assault-DUI, Felony DUI, Felony physical control, etc). Prior misdemeanor DUI offenses no longer score for felony offenses not involving DUI.*

#### **Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System:**

This recommendation would allow for the misdemeanor scoring exceptions for DUI Misdemeanor Offenses to remain in use when an individual's current offense is a serious felony traffic charge involving DUI. If an individual's current offense is a serious felony traffic offense involving DUI (Vehicular Homicide with DUI, Assault with DUI, Felony DUI, Felony Physical Control, and all other DUI felony traffic offenses then prior misdemeanor DUI) offenses would be included in the calculation of a criminal history score. This would eliminate the use of prior misdemeanor DUI offenses in the calculation of criminal history scores for felony offenses not involving DUI-related offenses. While this does not fully eliminate complexity, it limits the complexity to DUI-related cases, reducing opportunities for error.

- 9. Proposed Recommendation:** *Maintain the special misdemeanor DUI scoring exceptions for homicide or assault by watercraft offenses when the current offense involves a DUI and make homicide or assault by watercraft offenses the same OSL as the corresponding felony traffic offense (by either increasing watercraft offenses to higher OSLs or reducing vehicular offenses to a lower OSL) with the goal of creating parity between vehicular and watercraft offenses (Homicide by watercraft and vehicular homicide. Assault by watercraft and vehicular assault).*

#### **Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System:**

Reduces complexity by having these offenses 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. Parity in similar offenses is critical to perceived legitimacy of the court and criminal law

code. This recommendation eliminates a source of disparity that may also lead to racial disparity.

**10. Proposed Recommendation:** *Maintain the special misdemeanor scoring exception for domestic violence. As described in the proposed recommendation of the new felony sentencing guidelines grid, offense-specific exceptions to standard scoring rules for adult felony offenses are eliminated and a new column is added to the grid for adjustments to the standard range for qualifying individuals. The scoring exceptions for adult felony offenses where domestic violence was pleaded/proven will score as 1 point per standard scoring rules, and are eligible for the expanded sentence range under the repeat violent/serious violent and repeat domestic violence column.*

#### **Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System:**

Domestic violence is an offense that may occur at the misdemeanor level one or more times before escalating in seriousness to reach the threshold of a felony DV offense. Because misdemeanor DV offenses represent similar or the same criminal conduct as felony DV offenses, it is important to maintain consideration of these prior convictions in sentencing for DV cases. Felony DV offenses will still increase the CHS as normal (one point for each conviction), so second and subsequent offenses will result in longer sentencing ranges because of the higher CHS. However, judges will have additional discretion to increase sanctions even further in the instance of repeat offending. This discretion allows for more nuanced and effective approaches to sentencing based on the characteristics of a particular case.

**11. Proposed Recommendation:** *Reduce the OSL for vehicle prowl – 2<sup>nd</sup> degree (third or subsequent) to Offense Serious Level (OSL) 2 and raise the OSL for vehicle prowl – 1<sup>st</sup> degree to OSL 2.*

**12. Proposed Recommendation:** *Eliminate special misdemeanor scoring for prior misdemeanor vehicle prowl for theft of a motor vehicle, possession of a stolen vehicle, or theft of a motor vehicle without permission 1 or 2.*

#### **Background and Explanation**

Theft 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

*“(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count **one point for prior convictions of Vehicle Prowling 2**, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.”*

**Key Information:**

- This is **NOT** for convictions of vehicular prowling.
- Vehicle Prowl 2 is a gross misdemeanor when it is the first or second conviction. It becomes a felony upon 3<sup>rd</sup> or subsequent conviction.
- This would, at most, add 2 points to a criminal history score for the two gross misdemeanor vehicle prowl 2 offenses– third and subsequent vehicular prowl 2 offenses are felonies and would count under the standard scoring rules as 1 point.

<b>Vehicle Prowling In The First Degree</b> (RCW <a href="#">9A.52.095</a> )	<b>Vehicle Prowling In The Second Degree</b> (RCW <a href="#">9A.52.100</a> )
<p>(1) A person is guilty of vehicle prowling in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a motor home, as defined in RCW <a href="#">46.04.305</a>, or in a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.</p> <p>(2) Vehicle prowling in the first degree is a class C felony.</p>	<p>(1) A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle other than a motor home, as defined in RCW <a href="#">46.04.305</a>, or a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.</p> <p>(2) Except as provided in subsection (3) of this section, vehicle prowling in the second degree is a gross misdemeanor.</p> <p>(3) Vehicle prowling in the second degree is a class C felony upon a third or subsequent conviction of vehicle prowling in the second degree. A third or subsequent conviction means that a person has been previously convicted at least two separate occasions of the crime of vehicle prowling in the second degree.</p>

**Current OSLs:**

- Theft of Motor Vehicle: **OSL 2**
- Possession of a Stolen Vehicle: **OSL 2**
- Taking a Motor Vehicle without Owner’s Permission 1<sup>st</sup> degree: **OSL 5**
- Taking a Motor Vehicle without Owner’s Permission 2<sup>nd</sup> degree: **OSL 1**

**Inconsistencies:**

- Vehicle prowling 2<sup>nd</sup> degree third and subsequent is **OSL 4**. Prior gross misdemeanor vehicle prowl 2 do not count in the scoring of the felony Vehicle Prowl 2 – 3<sup>rd</sup>/subsequent. Therefore, someone charged with their third vehicle prowl 2 would be OSL 4 with CHS 0.
- Vehicle Prowling 1, which is considered to be more serious than vehicle prowl 2 – 3<sup>rd</sup> /subsequent, is at OSL 1 and contributes 1 point to the criminal history score of the above offenses.

Most Serious Offense	Number of Sentences (may include multiple sentences for the same person)					Total
	2017	2018	2019	2020	2021	
POSSESSION OF STOLEN VEHICLE	908	942	769	582	413	3,614
TAKING MOTOR VEHICLE WITHOUT PERMISSION 1	12	7	13	10	8	50
TAKING MOTOR VEHICLE WITHOUT PERMISSION 2	876	908	791	560	434	3,569
THEFT OF MOTOR VEHICLE	295	307	286	226	193	1,307
VEHICLE PROWL 1	13	12	8	4	5	42
VEHICLE PROWL 2 (3RD OR SUBS - POST 2013)	15	8	8	9	9	49
<b>Total</b>	<b>2,119</b>	<b>2,184</b>	<b>1,875</b>	<b>1,391</b>	<b>1,062</b>	<b>8,631</b>
Total Felony Sentences in FY	25,186	25,171	24,257	19,742	13,655	108,011
# MV sentences (above) w/a Misd Veh Prowl 2 in Criminal History:	130	107	128	117	78	560
% of MV sentences with a Misd Veh Prowl 2 in Criminal History:	6%	5%	7%	8%	7%	6%

**Addresses Sentencing Complexities and Errors and Effectiveness of the Sentencing System:**

Eliminating the special misdemeanor scoring for prior misdemeanor vehicle prowl for theft of a motor vehicle, possession of a stolen vehicle, or theft of a motor vehicle without permission 1 or 2 would eliminate complexity associated with including misdemeanors in the calculation of CHS. Standard scoring rules would then become more transparent and thus would reduce errors in CHS calculation, improving both effectiveness and reducing complexity.

Reducing the OSL for vehicle prowl – 2<sup>nd</sup> degree (third or subsequent) to OSL 2 and raising the OSL for vehicle prowl – 1<sup>st</sup> degree to OSL 2 creates parity in the OSLs for these two offenses.

**13. Proposed Recommendation:** *Include language in the SRA that would define the scope of offenses that can be scored in the calculation of a CHS as limited to prior felony convictions other than DV, DUI, and vehicular prowl (conditional on vehicular prowl and DUI recommendations passing).*

### **Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System:**

This recommendation would add language into the SRA that would effectively limit the scope of a CHS to only include prior felony convictions with the exception of misdemeanors such as DUI, Domestic Violence, and vehicular prowl 2o. The inclusion of misdemeanor DUI, Domestic Violence, and vehicular prowl 2o are all conditional on the vehicular prowl and DUI recommendations passing consensus.

The SRA was not originally intended to cover misdemeanor except for where there is an explicit step up of the same offense (i.e., DUI). Inclusion of misdemeanors has led to complexity, errors in calculating CHS, and uncertainty. Inherent issues with reliability and accuracy of prior misdemeanors because reliance on municipal court data. The recommendation increases the likelihood of long-term consistency and prevent future misdemeanor scoring exceptions, which create complexity and increase calculation errors. Currently disproportionate discretion in that full discretion of the legislature to decide when they should or should not count.

### **Washouts Rules**

Washout is a period of crime-free behavior that changes the inclusion of prior convictions in the criminal history score calculation (this does not equate to a vacated offense).

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.

### **Background and Explanation**

The Task Force’s Grid Subgroup spent several months discussing the following:

- Are the current washout periods appropriate for the different classes? (based on current research and data)
- Should Class A offenses ever be eligible for washout? (based on current research and data)
- When does the washout period start? What about technical violations or DOSA revoke?
- Should washout periods be restarted for any offense or only for an offense that is as serious or more serious than the new conviction?
- Should misdemeanors trigger reset of “crime-free” period for felony offenses?
- Anticipatory offenses scored as completed offense – should they be treated as completed or have separate washout rule?<sup>1</sup>

**14. Proposed Recommendation:** *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 community custody violation will not reset the washout period.*

### **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

This recommendation would allow for the start period of washouts, for all classes of felonies, to begin upon the release from confinement for the original sentence, not the conviction of said offense or a revocation to incarceration under “violator status”. This would allow for those serving their original sentence in community custody in programs, such as rDOSAs, to not have their washout periods reset if they are returned to confinement for violations. Further, the washout periods will reset only upon the conviction of either a new felony conviction or new

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<sup>1</sup> Regarding anticipatory offenses, the Grid Subgroup concluded no recommendations were necessary since scoring would be the same regardless of whether it is a Class A or B felony. Washout is based on the conviction class, for example, if an anticipatory drops to Class B, the conviction will washout according to Class B washout rules.

gross misdemeanor conviction. Convictions for misdemeanors will require 3 convictions before resetting an individual's washout period, this is done to reflect evidence concerning the process of desistance from criminogenic behavior.

**15. Proposed Recommendation: Washouts for Class A Felonies:** *Violent Class A felonies washout after 15 years. Serious violent Class A felonies would not washout.*

**16. Proposed Recommendation: Washouts for Class B Felonies:** *All class B washout after 7 years if the current offense is less serious than the original offense.*

**17. Proposed Recommendation: Washouts for Class C Felonies:** *Class C felonies washout after 3 years.*

### **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

The Grid Subgroup and Task Force reviewed recent data and research on recidivism, the age-crime curve, and desistance (*which are available on the CSTF resources page and will be included in appendices in the final report*). Key findings included:

- Most people who recidivate, do so quickly.
- Around years 7-10, most people who have not recidivated have the same probability of committing a crime as someone who has no criminal history. Risk for any person is never 0, but at this point, risk is no longer elevated compared to others with no criminal history. ("Redemption benchmarks")
- In general, recidivism rates tend to be higher for individuals convicted of a drug or property offense than serious violent offenses. This may be in part because serious violent offenses have longer incarceration sentences and individuals are much older when they are released from prison.

Allowing washouts for some Class A felonies, which currently do not wash out, moves away from a one-size-fits-all approach to tailor the washout period to the severity of the offense. For Class B, allowing past convictions to wash out if a person commits a less serious offense aligns with the research around desistance from criminogenic behavior, for which a reduction in the seriousness of offending behaviors is an indicator.

#### **E. Continuing Work**

**18. Potential Recommendation:** *Recommend that the Legislature review the offenses included in the most serious offense list to potentially reduce the number of offenses eligible for the three strikes sentencing.*

### **Background and Explanation**

In 1993 when Initiative 593 was passed, there were originally [17 strikable offenses](#) eligible for a "strike" in addition to all Class A felonies, over the years offenses eligible for a "strike" grew to

[56 offenses](#) ([History of Two and Three Strikes in Washington, SGC](#)). All Class A felonies, Class B felonies with findings of sexual motivation, and any felony, regardless of class, with deadly weapons findings, and all other crimes of violence, in addition to any individual specified offenses are eligible for a “strike” on an individual’s record, the third of which requires the mandatory sentence of life without the possibility of parole ([RCW 9.94A.030](#)).

However, there are inconsistencies in the inclusion of strikable offenses. The list of “most serious offenses” has the inclusion of unranked felony offenses as strikes, offenses that have never been charged (Malicious Explosion 1/ Malicious Placement of an Explosive), and inconsistent application of aggravating factors such as Sexual Motivation and Deadly Weapons. Sexual Motivation is limited to only applying to Class B felonies, but Deadly Weapon applies to all offenses, including Class C felonies.

### **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

Under this recommendation the Legislature would be tasked with reviewing the list of offenses that qualify as a “most serious offense” and thus count as a strike under Washington’s Three-Strikes law to address inconsistencies such as offenses that are never/rarely used and the inclusion of unranked felony offenses.

**19. Potential Recommendation:** *Direct the SGC to reviews offenses that have not been sentenced in the last 5-10-20 years for potential elimination from the criminal code.*

### **Background and Explanation**

In 2020 as the Grid Subgroup was in the early phases of its work to review the sentencing guidelines grid, the Subgroup had been looking at the more than 300 unranked (non drug related) offenses to determine whether, and if so how, to incorporate them into the adult felony sentencing guidelines grid. While this work to address unranked offenses was later assigned to the Sentencing Guidelines Commission (*Judge Saint Clair SGC.TF Request*), the Grid Subgroup had come across a number of offenses both ranked and unranked, where there have been no convictions between FY00-FY17 (*Appendix to include in report: grid subgroup unranked offenses homework workbook\_12.15.20 with list of ranked offenses convictions*). For example, FY2000-2020 data shows there have been no sentences for Malicious Explosion 1 (Class A felony at OSL 15).

### **Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:**

A review of offenses and repealing those that have not been sentenced, were created as a result of specific incidents during a period of time that have not since reoccurred, and/or are rare and other offenses can be used to charge, would help to reduce unnecessary complexity and simplify the criminal code. While there are standard methods for creating new offenses, there is no standard method for repealing outdated and unused offenses. If the Legislature were to make changes to and/or adopt a new sentencing guidelines grid structure, recalibration

and/or reclassification of some offenses would be needed, and this review of unused offenses could be part of this work. It is worth noting that regardless of the time period of review (5, 10, or 20 years) chosen, it will be important to identify whether any sentences were received for that offense in which individuals may still be serving a sentence.

#### **F. Post Sentencing Reform**

*TBD – being discussed by the Grid Subgroup on 10.4.22*

DRAFT