

**Washington State Criminal Sentencing Task Force**  
**Grid Sub-Group**  
**Meeting Summary: October 18<sup>th</sup>, 2022**  
Meeting via Zoom

**ATTENDEES:**

- Clela Steelhammer, *Caseload Forecast Council*
- Chief Brian Smith, *WA Association of Sheriffs and Police Chiefs*
- Representative Roger Goodman, *Washington State House of Representatives (Democrats)*
- Russ Brown, *WA Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Washington Community Action Network*
- Meagen Allen, *Interests of Crime Victims*
- Judge Wesley St. Clair, *Sentencing Guidelines Commission*
- Senator Chris Gildon, *WA Senate Republicans*
- Jon Tuneheim, *WA Association of Prosecuting Attorneys*
- Greg Link, *Washington Association of Defense Attorneys*
- Melody Simle, *Statewide Family Council*

**Facilitation Team:** Amanda Murphy, Chris Page, Alec Solemslie, Molly Stenovec, Zack Cefalu – *Ruckelshaus Center*

**Research Team:** Dr. Lauren Knoth-Peterson, *Washington State Institute for Public Policy*

**Public Guests:** Jim Chambers, Audrey Koreski, David Trieweiler

**Welcome and Agenda Review:**

Amanda welcomed the group and reviewed the agenda, which focuses on reviewing the remaining potential recommendations related to sentencing alternatives. If the Subgroup has time, it will turn its attention to considering and incorporating Task Force input from the October 6<sup>th</sup> meeting into the proposed recommendations on the sentencing system, ones that do not directly relate to the grid and Community Intermediate Sanctions and Rehabilitative Services program.

For the upcoming CSTF meeting, the first part of the day will be presenting the remaining proposed recommendations and the second part of the day will be set aside for the dialogue on retroactivity. The formal part of the meeting will end at 12:45pm then the group will break for lunch. Following lunch the Task Force will then begin the retroactivity dialogue, which will be a loosely structured opportunity to hear from each other and let the conversation go where it needs to go. Amanda reminded the group that Thursday's Task Force meeting is taking place in Downtown Seattle and to show up at the correct location.

A member asked if the public will be able to view the conversation on retroactivity and have an opportunity to make comments. Amanda said that the public will be able to comment on the first half of the meeting for the recommendations but there is no plan to have a second period

for public comment, however they will be able to watch this portion of the meeting and view the recording. Several members expressed concern that the public would not be able to comment on this part of the meeting as they believe this dialogue is a part of the formal meeting.

**POTENTIAL SENTENCING ALTERNATIVES RECOMMENDATIONS:**

- **Proposed Recommendation:** *Include and visually depict sentencing alternatives on the adult felony sentencing guidelines grid.*
- **Proposed Recommendation:** *Eliminate the cap on the number of DOSA sentences that an individual can receive in a 10-year period.*
- **Proposed Recommendation:** *Eliminate eligibility exclusions related to prior convictions for a violent offense from Sentencing Alternatives. ~~This would eliminate eligibility exclusions related to prior convictions for a violent offense from pDOSA and rDOSA (prison and residential drug offense sentencing alternatives).~~*
- **Proposed Recommendation Addition:** *Eliminate eligibility exclusion based on current offense/s – modeled after Mental Health Sentencing alternatives (does exclude eligibility if convicted of serious violent or sex offense).*

**Sentencing Alternatives Eligibility Exclusions on Prior and Current Offenses**

Amanda displayed a chart showing elements of the various sentencing alternatives available including their eligibility, confinement, terms of supervision, special conditions, revocation process, and where the alternative is served. In 2020 the Legislature modified both the Family Offender and Drug Offender Sentencing Alternative eligibility exclusions related to prior violent offenses. The Grid Group needs to provide clarity on the following recommendation:

**Proposed Recommendation:** *Eliminate eligibility exclusions related to prior convictions for a violent offense from Sentencing Alternatives. ~~This would eliminate eligibility exclusions related to prior convictions for a violent offense from pDOSA and rDOSA (prison and residential drug offense sentencing alternatives).~~*

**Grid Subgroup Discussion:**

- A member of the Alternatives Workgroup emphasized that they suggest this change to make treatment available to more people with substance use disorder. This change would make pDOSA and rDOSA eligibility consistent with the other sentencing alternatives in the state.
- A member said that the recommendation to eliminate eligibility exclusions related to prior convictions for a violent offense, should apply to all sentencing alternatives not just for pDOSA and rDOSA.
  - Amanda said that this is already the case for the other sentencing alternatives, several used to exclude those with prior violent offenses, such as FOSA, but have since changed these eligibility exclusions to excluding prior convictions for a Serious Violent offense.
- A member said they were not a part of the Sentencing Alternatives Workgroup and wanted to know the statistics around DOSA's success rate and enrollment rate, as many

of those incarcerated require treatment but are not enrolled in these types of programs. Too many people fall through the cracks, so they have a lot of questions about DOSA and wonder if any information came out of the Sentencing Alternatives group?

- Amanda explained the nuance of the workgroup, explaining that their work did not pertain to the nuance of the workings and administration of these programs but instead focused on the process of sentencing individuals into these programs. The Alternatives Workgroup did have presentations by those administering the programs.
- Dr. Knoth-Peterson provided additional context on DOSA, explaining that DOSA is just not for drug offenses; there is only one Felony Drug sentencing guideline offense eligible for DOSA. The majority comes from the standard grid. Most prison DOSA convictions usually stem from property offenses and most rDOSAs stem from small possession of narcotics offenses. This is part of a report that will be published in December. The only offense exclusively eligible for rDOSAs is for a possession of a small amount of narcotics with a CHS of 0-5, the rest of drug offenses are available for either rDOSAs or pDOSAs.
- Both FOSA and DOSA have gone through updates around 2 years ago and addressed the exact eligibility criteria we are discussing now.

Amanda said the recommendation says that this will eliminate the eligibility exclusions related to prior convictions for a violent offense, however noted that the definition of a Violent Offense also includes Serious Violent offenses. Amanda asked what the distinction is the group would like to make, whether to remove exclusion for just Violent Offenses or both Serious Violent and Violent Offenses, noting that the only alternatives that have an exclusion for just Violent Offenses are rDOSAs and pDOSAs.

#### **Grid Subgroup Discussion Continued:**

- A member said that the way this recommendation was designed was to connect anyone who needs treatment for substance abuse disorder to be given this treatment without still being punished for past offenses which they have already served their time for. This current eligibility exclusion benefits white defendants, as in Washington state BIPOC defendants, and largely Black defendants, are disproportionately sentenced for Violent and Serious Violent offenses. This recommendation can eliminate racial disparities in access to these programs and to ensure equal access across race.
  - Dr. Knoth-Peterson clarified that DOC prioritizes DOSA but even std sentences get treatment. But with current data, half of eligible DOSA individuals do not get treatment
- A member asked what is the intent of this recommendation, that those serve this time in treatment either in confinement or in the community?
  - A member said that the intent is to ensure the elimination of racial disparities in access to these programs and to ensure equal access to alternatives across race.
  - Dr. Knoth-Peterson explained that rDOSAs is community treatment and pDOSAs will be confinement treatment. But some pDOSAs have some treatment in the community if the length is not long enough.

- The member followed up asking why there are individuals with a rDOSA sentence that do not receive treatment despite being sentenced to this alternative for that purpose?
  - Dr. Knoth-Peterson explained this was due to a couple of reasons, they do not have confinement so they go to treatment centers, and some of the residential treatment centers do not have enough beds. So, the person either does not make it into the program, does not make it through the program due to limited capacity or gets a violation. rDOSA requires individuals to screen for level 3 need for treatment, all others are pDOSA. Spaces in rDOSA are prioritized for those individuals with highest need for treatment while deemed safe for community custody, but the necessary number of beds are not always available. The Supreme Court ruled that individuals cannot be held by the courts and jails until a bed became available in a rDOSA treatment center, which used to be the case. In 2020, rDOSA was given statutory allowance to have 30 days being held until a bed is available, but after 30 days, even with no bed, the individual is released. Then COVID changed the dynamic.
- If this recommendation passed, this would increase those eligible for rDOSA and pDOSA but does not increase the resources or capacity of the programs?
  - Potentially, but the way this would likely play out as if opening up eligibility for those with either Violent or Serious Violent priors and a greater CHS this would likely cause a larger increase in eligibility in pDOSA, not having much of an effect on rDOSA.
- A member said that they see pDOSA and rDOSA as different programs at the policy level and the execution of the sentence. Maybe the Task Force needs to distinguish the difference between rDOSA and pDOSA. FOSA doesn't exclude prior violent offenses but excludes findings of the use of a deadly weapon or a firearm. A possible additional recommendation is to align FOSA with both DOSA alternatives and add eligibility exclusions around findings of the use of a deadly weapon or a firearm for DOSA as well. WAPA could be supportive of making those with prior violent offenses eligible for pDOSA if those with a finding of deadly weapon or firearm use are excluded. The member is concerned that eligibility for pDOSA and rDOSA are the same since they see them as fundamentally different. They would support the elimination of violent offense exclusion for pDOSA but not rDOSA as there should be higher levels of exclusions for in community treatment programs. Since pDOSA includes time spent in incarceration, there would be less concern with violent offenses in a facility rather than being in the community with a violent history.
- In response to the addition proposed above, another member noted they think the success rate may be greater in the community rather than in facility. Need to consider the difference between treatment while under duress associated with being incarcerated vs. while in the community.
  - A reminder that treatment is different. rDOSA is in-patient not outpatient.

Amanda recommended that this new proposed recommendation become a separate recommendation from the original proposed recommendation, creating two new proposed recommendations:

Amanda asked if the group can live with the original recommendation being put forward as proposed and presented to the full Task Force? The group agreed to this and the recommendation reads as:

**Proposed Recommendation:**

- **Eliminate eligibility exclusions related to prior convictions for a violent offense (not serious violent offenses) from Sentencing Alternatives (except for SSOSA, which is currently being addressed by the SOPB). This would eliminate eligibility exclusions related to prior convictions for a violent offense from pDOSAs and rDOSAs.**

Amanda reminded the group that there is another recommendation that became an addition to this recommendation that stemmed from the 8.9.22 Sentencing Alternatives meeting that reads as follows:

***Proposed Recommendation Addition: Eliminate eligibility exclusion based on current offense/s – modeled after Mental Health Sentencing alternatives (does exclude eligibility if convicted of serious violent or sex offense.)***

While this Mental Health Sentencing Alternative exists codified in law, the infrastructure and implementation completion do not currently exist yet so there has been little to no use of this alternative yet.

Amanda provided context that the Mental Health Sentencing Alternative (MHSA), the way it is done is unique by not focusing on specific offenses as being the criteria for eligibility. It uses an assessment to determine individual eligibility. Whether or not the Mental Health Sentencing Alternative is a better model for determination of individuals benefiting for public safety, is up for the Grid Group to decide. The only exclusionary criteria are for current sex offenses and serious violent offenses. No prior exclusions for the MHSA. There are conditions such as being diagnosed with a serious mental illness, being willing to participate, victim opinions, judge determination of benefit. So the group was asked if that would be a good model for other alternatives. Is that what led to this proposed addition. Chris highlighted that the Sentencing Alternatives group thought that the new mental health sentencing alternative was a good model.

**Grid Subgroup Discussion:**

- A member of the Alternatives Workgroup noted that the intent was to make the treatment (and supervision) involved with most alternatives available to more people.
- A Grid Subgroup member asked whether there is any data available on the effectiveness of the Mental Health Sentencing Alternative (MHSA); since it took effect on 7/1/22 it is too early to have data.
  - The program exists but the necessary infrastructure does not yet exist. There is not the capability for the evaluations, and no one understands the process quite yet. It is not being used yet by prosecutors since the implementation is not yet there.

- A member of the research team pointed out that the data will come out for FY22 but there were about 1 or 2 sentences, likely no more than 5, for the reasons outlined above.
- This alternative is a niche alternative– not sure how well it translates to other alternatives.
- A member wants to eliminate exclusions for both Serious Violent and Violent offenses to ensure everyone has access to all these alternatives, these conversations were not just limited to DOSA (prison or residential).
  - WAPA could not live with the removal of Serious Violent prior offenses for any sentencing alternatives, they could live with the removal of exclusion for prior violent offenses for pDOSAs or other alternatives with time served in confinement.
- Would the desire not to remove Serious Violent offenses exclusions apply even to FOSA? This is a child-centric program that prioritizes keeping families together.
  - Several members said they would keep exclusions for Serious Violent offenses for FOSA as well, even though this is a child-centric program that prioritizes keeping families together, they have to prioritize child and family safety as there are a select few very serious crimes that fall into the designation of a serious violent offense that could put their family or community in danger as these individuals have a history of violence.

Amanda asked if the Grid Subgroup can live with both the recommendation of modeling current offense exclusion on the MHSA and the recommendation adding eligibility exclusions for use of a deadly weapon and/or a firearm being proposed and presented to the full Task Force. Several members had an issue with these recommendations and felt that in the Sentencing Alternatives group it was proposed that these recommendations would be eliminating eligibility exclusions for both Serious Violent and Violent prior offenses, but now the conversation is just around eliminating the exclusion for Violent offenses. They felt that the way both these recommendations and their discussions went, falls into the recurring theme of this Task Force that someone is not able to escape their past and their mistakes. While several members said this and that they do not agree with this, they want to move forward with any form of these recommendations.

Amanda pointed out that the group is running out of time to address these remaining recommendations. Perhaps the best move is to move forward the remaining recommendations as they exist to get the input from the full Task Force and then either bringing this back to the Grid Group or another smaller working group to address these issues and create verbiage. Amanda asked the group if these recommendations should be put forward to the full Task Force to get input from them and potentially set aside more time to discuss these, would the group support this? The group did not seem to have any issue with this and proposed them both to go forward to the full Task Force.

**Proposed Recommendations:**

- **Add eligibility criteria excluding individuals with prior felony offenses where an individual was armed with a firearm or deadly weapon, therefore aligning DOSA eligibility with FOSA**
- **Eliminate eligibility exclusion based on current offense/s – modeled after Mental Health Sentencing alternatives (does exclude eligibility if convicted of serious violent or sex offense.)**

Amanda then turned the group's focus towards several recommendations from the 10/6/22 Task

Force meetings that have Task Force input the group needs to address.

**Proposed Recommendation #7**

The recommendation was presented to the Task Force as:

*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.*

At the meeting there appeared to be confusion as to what the rationale of the recommendation was. Amanda asked whether the Task Force intent on this was meant to ensure that those facing a potential third strike conviction receive adequate notice of that fact. Under [RCW 9.94A.561](#) does not require, at any point in the system, to give notice to individuals who have been convicted of an offense that is the most serious offense as defined in [RCW 9.94A.030](#).

**Grid Subgroup Discussion:**

- If the proposal is to create language to require written or oral notification to an offender if their potential conviction will result in a third strike and a life sentence with or without parole, then WAPA could support this. However, if the recommendation requires strikes to mirror aggravators such that they are required to be plead and proven they would not support this.
- Isn't the statute on post-conviction? Thought the comment was prior to pleading guilty. The current J&S plea forms have this language. Don't think the statute gets to the conversation. Want to make sure that pleading guilty the defendant is aware of the seriousness of the crime.
- Prior to the plea agreement individuals have to sign this notification of a third strike with a sentence of LWOP on the J&S statement, however this could be saved until after the plea agreement is reached. The conversations from the Task Force revolved around notifying this potential LWOP sentence regardless of if they reach a plea agreement or not.
- When an individual pleads guilty to a strike offense, it is common practice to notify the individual they are facing a strike offense. However, there are instances where individuals may not know that their third strikes require a LWOP sentence, as it is not required to disclose this mandatory sentence, or if they have a prior strike offense in another state and this will be counted in Washington as a strike already.

- Standard practice, although not required, is before conviction in a plea agreement the notification is on a J&S form with no requirement after conviction. Although it has been pointed out there are instances where people are not aware of what the associated sentence will be or if they are facing a strike, any requirement for notification would remove this complexity and safeguard against potential for errors.
- Notice should not only be based on if an individual pleads guilty but also if they are potentially convicted. Before a plea agreement or reach or before an individual takes this to trial they should be notified of the third strike requiring a mandatory LWOP sentence.

This recommendation was updated to capture input from both the Task Force and Grid Group conversations:

**Proposed Recommendation Update:** Change the legal procedure for three-strikes laws to provide prior notice to defendants that a conviction for the charged offense would lead to a third strike and the associated sanctions under the persistent offender laws.

Status quo it is “standard practice” to include notice on the change of plea that an individual’s guilty plea would be a strike offense. Recommendation is to make that “standard practice” a legal requirement such that notice MUST be given prior to entering a guilty plea that the guilty plea would result in a strike offense and, if it is a third strike offense, prior notice must be given that the guilty plea would result in a sentence of life in prison without the possibility of parole. If individuals choose to take their case to trial, notice must be provided prior to the start of trial.

**Action Item:**

- At the Task Force meeting, bring up ideas for a potential second round of public comment pertaining to the discussion on retroactivity.
- Provide data on success of pDOSAs and rDOSAs for Melody

**Items Shared Via Zoom:**

[WA Superior Court Plea Agreement Form](#): Here is the language in the current plea form "This offense is a most serious offense or “strike” as defined by RCW 9.94A.030, and if I have at least 2 prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole."