

**Washington State Criminal Sentencing Task Force  
Sentencing Grid Subgroup  
Meeting Notes: January 18<sup>th</sup>, 2022  
Meeting via Zoom**

**Attendees:**

- Keri-Anne Jetzer, *Sentencing Guidelines Commission (SGC)*
- Greg Link, *Washington Association of Criminal Defense Attorneys; Washington Defender Association*
- Lauren Knoth, *WA State Institute for Public Policy (WSIPP)*
- Judge Wesley Saint Clair, *Sentencing Guidelines Commission*
- Melody Simle, (Alt. for Suzanne Cook), *Statewide Family Council*
- Clela Steelhammer, *Caseload Forecast Council*
- Nick Straley (Alt. for Nick Allen), *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Interests of Incarcerated Persons*

**Guests:** James Chambers, Joanne Smieja, Bruce Glant

**Facilitation Team:** Amanda Murphy, Chris Page, Molly Stenovec, Maggie Counihan

**WELCOME & AGENDA REVIEW**

Amanda Murphy welcomed the Subgroup and reviewed the areas of focus for the meeting.

**Literature Review: Criminal History Score Wash-Out Periods**

Keri-Anne walked through the beginnings of a literature review she is putting together about criminal score history (CHS) wash-out periods (see Appendix A.). She explained that the Robina Institute has done a great deal of work on wash-out/look-back policies and there are two types:

1. Decay policy: prior convictions age out of the calculation after a certain time period. This policy makes a statement that a conviction will become old enough that it is no longer relevant in determining culpability or predicting risk to reoffend. A key question when determining decay policy is how long to keep a prior conviction relevant. This policy is easier to implement than a gap policy.
2. Gap Policy: prior convictions are excluded based on the time an individual is crime-free. This policy makes a declaration that efforts to remain crime-free can mitigate culpability; encourages desistance. Those able to remain crime-free for the time period are rewarded. Key question when determining gap policy is how long must an individual remain crime-free in order for prior conviction to be irrelevant.

The Robina Institute examined four considerations present in existing decay or gap policies. The first was length of time period and found the most commonly used decay or gap time period is ten years. Washington has 10- and 5-year gap policies.

The second was 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 (J&S) form.

The third consideration looked at was any instance for revival of prior convictions. Washington State does not have a revival policy. An example of one that does is Washington D.C., which has a ten-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.

The fourth consideration looked at was prior convictions that are always counted. Only three states exclude specific offenses from washing out: Arkansas, Delaware, and Washington. Arkansas excludes any prior convictions for offenses with a seriousness level of 6-10 from its policy; Delaware excludes all Felony A and Felony B from its ten-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 (for those felony offenses all prior felonies of the same types never wash out).

#### **Washington State 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**.

#### **Subgroup Members Questions and Potential Areas for Further Discussion**

**Q:** How do misdemeanors function?

**R:** It depends on the misdemeanor. Some count and some do not. It is offense specific. Serious traffic and repeat DV apply in those instances.

**Q:** Do misdemeanors affect the gap years? For example, if it is a felony and they are convicted of a misdemeanor in year 9, does the time restart?

**R:** Yes, for any crime. The statute indicates “crime-free” period.

*Potential area for discussion – could there be modifications based on the type of offense? As serious or more serious?*

**Q:** Are all misdemeanors that count for points included in these washout rules via the DUI and DV clauses?

**R:** It appears so, yes. They reset the clock for washouts but doesn't necessarily count for another point, unless one of the misdemeanors specified in scoring rules.

*Potential consideration – should misdemeanors be excluded completely from CHS and/or have a specific washout period that is very short?*

**Q:** What's the reasoning for some convictions to never wash out?

**R:** Unclear but class A violent offenses which is not uncommon to preclude from washout. Perhaps it's that it aligns with stat maxes for the offense classes for which class A has no stat max.

*Potential consideration: Should it align with statute of limitations instead – the length of time that someone can be held accountable/prosecuted vs the length of time it can be held against them?*

**Q:** Do technical/supervision violations restart washout periods? If a person's washout period starts on their last date of release from confinement and commits a supervision violation, does that restart the washout clock?

**R:** – Yes, community custody violation – *State vs. Blair* – will restart the washout period.

*Potential area for discussion: Should be just conviction of a new crime, so only violations if it is a violation resulting from conviction of a new offense. If supervision violation leads to confinement time does that time still count for the crime free period? Similarly, what about DOSA revokes?*

**Q:** What's the reasoning for some convictions to never wash out?

**R:** Unclear, but other states often preclude Class A violent offenses from washout.

**Q:** Does washout period start from the date of release OR J&S? Why? In what situations is it one or the other?

**R:** Depends on the sentence and whether there is community supervision/time served and thus no confinement.

### **Review of Research on Justifications for Criminal History Score Calculation Policy**

Keri-Anne presented information on research on the basis for using prior criminal history to enhance current sentencing and research on previous criminal history being a predictor of future criminal involvement (see Appendix A). In sum, when criminal activity is in the recent past, research shows 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.

The subgroup discussed other factors related to a person's likelihood to commit future offenses, e.g., collateral consequences of incarceration, adverse life events, or being at the wrong place at the wrong time. A member suggested that a person who commits a misdemeanor in the future may have less probability of future felony convictions than someone who commits a felony. Another member agreed with the sentiment that it might not make sense for the Task Force to recommend that no misdemeanors contribute to a person's CHS.

**Summary of Future Discussion Topics – Agenda for next several weeks**

1. Are the current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout?
2. Should washout periods be restarted for any offense or only for an offense that is as serious or more serious than the new conviction?
  - E.g., conviction for class C in 2000
  - Conviction for class B in 2004 – class C still counts
  - Conviction for class B in 2006 – class C and Class B priors would count. Should class C count?
3. Should misdemeanors be excluded completely from CHS and/or have a specific washout period that is very short?
4. Should misdemeanors trigger reset of “crime-free” period for felony offenses?
5. Juvenile adjudications – should they count, should they have separate washout rule, should they stay as is?
  - Should all count or just certain types (e.g., violent/serious violent)?
  - What were the previous WA laws regarding juvenile washout?
6. Anticipatory offenses scored as completed offense – should they be treated as completed or have separate washout rule?
7. When does the washout period start? What about technical violations or DOSA revokes.
  - This is particularly important if new grid increases the number of or access to sentencing alternatives.
  - Community custody violation – *State vs. Blair* – will restart the washout period.
  - Complexity with determining when washout periods start if it is last release of confinement. Does DOC have insight on this complexity? Are counties consistently recording/using information about confinement/date of last confinement?

**COMMENTS SUBMITTED BY GUEST OBSERVERS VIA ZOOM CHAT and/or EMAIL**

N/A

## APPENDIX A

### DRAFT Criminal History Score Wash-Out Periods

#### **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.

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.