

## **First-Time Offender Waiver History**

### **CSTF – Sentencing Alternatives Work Group**

First-Time Offender Waiver was created by the Legislature in the Sentencing Reform Act of 1981 (2SHB 440; Laws 1981, Ch 137).

1981 – RCW 9.94A.030(10)

"First-time offender" means any person convicted of a felony not classified as a violent offense under this chapter, who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

1981 – RCW 9.94A.120(5)

In sentencing a first-time offender, the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender:

- (a) Devote time to a specific employment or occupation;
- (b) Undergo available outpatient treatment or inpatient treatment not to exceed the standard range of confinement for that offense;
- (c) Pursue a prescribed, secular course of study or vocational training;
- (d) Remain within prescribed geographical boundaries and notify the court or the probation officer of any change in the offender's address or employment;
- (e) Report as directed to the court and a probation officer; or
- (f) Pay a fine, make restitution, and/or accomplish some community service work.

History of FTOW Modifications:

1982 – excluded from eligibility those with a violent offense

1986 – excluded from eligibility those with a sex offense

1987 – excluded from eligibility those with manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV offense

1990 – excluded from eligibility selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana offense

1995 – excluded from eligibility manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers offense

1999 – reduced term of community supervision from up to 2 years to up to 1 year for offenses committed before 7/1/2000. Modified term of community supervision from up to 2 years to up to 1 year for offenses committed on or after 7/1/2000 unless treatment is ordered where period of community supervision may include up to the period of treatment but shall not exceed 2 years.

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2006 – excluded from eligibility felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug

2011 – reduced term of community custody without treatment from 12 months to 6 months; reduced maximum term of community custody with treatment from 24 months to 12 months

SGC Analysis of FTOW sentences in FY1990 – the alternative “succeeded in providing an avenue for treatment and supervision, it has failed as an alternative to incarceration.”<sup>1</sup>

- Over 2,000 people were sentenced under FTOW since its inception
- In FY1990:
  - o 75% of those eligible for FTOW had a standard sentence of 0-60 or 0-90 days, making the purpose of imposing FTOW was not mitigation. Of those, 35% still received a FTOW sentence.
  - o For those with a presumptive sentence of 90 days or less, there was no difference in the frequency (85%) or average length of jail sentences (1 month) between those who received it and those who did not.
  - o 130 people with a presumptive prison sentence were eligible for FTOW. Of those, about 1/3 received the alternative.
  - o Of eligible persons with a presumptive sentence greater than 90 days, 18% received FTOW. The average jail sentence for FTOW sentences was only 1 month less than that of those who received a standard sentence.

SGC Analysis of FTOW sentences in FY2000 – “FTOW sentences would not be imposed because the waiver involves a greater sanction than time served.”<sup>2</sup>

- Approximately 2,500 FTOW sentences were issued in FY2000.
- Racial distribution was
  - o 78% white
  - o 10% Black
  - o 7% Hispanic
  - o 3% Asian
  - o 2% Native American
- The 1987 elimination of drug dealing from FTOW eligibility “significantly reduced its application”.
- The remaining eligible persons would presumably have minimal presumptive jail sentences and because confinement is often served while awaiting sentencing, there was often no time remaining to apply to the waiver.

WSIPP Analysis of FTOW sentences between 2000 and 2003 – “FTOW functions not as an alternative to prison. Instead, it is an enhancement to standard community supervision.”<sup>3</sup>

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<sup>1</sup> Sentencing Guidelines Commission. (1991). Decade of Sentencing Reform. Located at [A Decade of Sentencing Reform \(wa.gov\)](#).

<sup>2</sup> Sentencing Guidelines Commission. (2001). A Comprehensive Review and Evaluation of Sentencing Policy in Washington State. Located at [A Comprehensive Review and Evaluation of Sentencing Policy in Washington State, 2000-2001](#).

<sup>3</sup> Barnoski, R. (2004). Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding – Part II (Recidivism Analyses). WSIPP: Olympia, WA. Found at [Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding – Part II \(Recidivism Analyses\) - Full Report](#).

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- 91% of FTOWs had a guidelines sentence other than prison.
- Analysis showed a declining trend since 1986 in the percentage of sentences that resulted in a FTOW.
- 24-month felony recidivism rate was lower for those sentenced to FTOW than those who received a prison or non-prison sentence.

### Other Considerations

#### Changes in pretrial release policies

- There is a movement to reduce the reliance of pretrial confinement as many studies have shown that pretrial detention increases the likelihood of the person to become involved in the criminal justice system post release.<sup>4 5</sup>
- The application of FTOW is somewhat based on the amount of credit for time served a person has accrued pretrial. A decrease in the use of pretrial detention could change the frequency in which the FTOW is applied.

#### Probation alternative

- FTOW requires a term of confinement up to 90 days.
- CSG analysis on community supervision.<sup>6</sup>
  - o “People sentenced to community supervision have lower recidivism rates than those sentenced to prison.”

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<sup>4</sup> Loeffler, C. E., and Nagin, D. S. (2021). The Impact of Incarceration on Recidivism. (Review in Advance). *Annual Review of Criminology*. Found at [The Impact of Incarceration on Recidivism | Annual Review of Criminology \(annualreviews.org\)](https://annualreviews.org/doi/10.1146/annurev-crim-080120-010001).

<sup>5</sup> Léon Digard and Elizabeth Swavola. Justice Denied: The Harmful and Lasting Effects of Pretrial Detention. New York: Vera Institute of Justice, 2019. Found at [Justice-Denied-Evidence-Brief.pdf \(vera.org\)](https://www.vera.org/justice-denied-evidence-brief).

<sup>6</sup> Derrick, B. E. (2018, October 12). *Community Supervision: An Effective Tool to Change Behavior* [PowerPoint slides]. Council of State Governments – Justice Center. [Community Supervision: An Effective Tool to Change Behavior \(wa.gov\)](https://www.csg-justicecenter.org/wp-content/uploads/2018/10/Community-Supervision-An-Effective-Tool-to-Change-Behavior-wa.gov)

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People sentenced to community supervision have lower recidivism rates than those sentenced to prison.

*“Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.”*

—Daniel Nagin (2013)

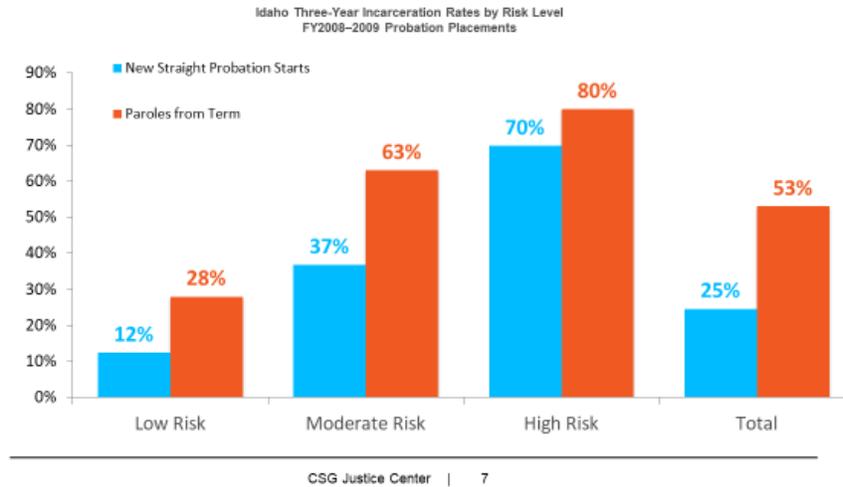
- Smith, Goggin, and Gendreau (2002):
- Meta-analysis of 57 studies
  - Total of 268,806 individuals
  - **7% higher recidivism rates** for people sentenced to prison

Source: Psychology of Criminal Conduct 6<sup>th</sup> edition, p284. <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>

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- “Across all risk levels, people sentenced directly to probation do better than those sentenced to prison followed by a term of supervision.”

**Across all risk levels, people sentenced directly to probation do better than those sentenced to prison followed by a term of supervision.**



- “National trends are reflected in Washington: People who committed less serious offenses had much higher recidivism rates than those who committed more serious offenses.” Due to eligibility requirements, FTOW sentences are more likely to be issued for lower level offenses.

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