# 2023 Felony Re-Ranking

## Supplemental Report

Lauren Knoth-Peterson, PhD
Keri-Anne Jetzer
Whitney Hunt, MSW

Washington State Office of Financial Management

## PSPRC

Public Safety Policy & Research Center

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# Abstract

The 2019 Washington State Legislature established the Washington State Criminal Sentencing Task Force (CSTF) with a directive to review state sentencing laws.[1] Members of the CSTF met at least once monthly for three years, resulting in 79 recommendations for criminal justice reforms.[2]

During the final two years of the CSTF, members spent a significant amount of time developing a new sentencing guideline grid for adult felony offenses. The proposed felony sentencing grid differs significantly from the current adult felony sentencing grid. For example, the proposed grid adds two additional seriousness levels, restricts the placement of class C and class B felonies to particular seriousness levels, and uses a systematic formula to establish consistent increases in sentencing ranges as seriousness levels increase and as offender scores increase, among other changes.

In their final report, the CSTF acknowledged that a new felony guideline grid would require recalibration of offenses within seriousness levels. Specifically, they note:

> The Task Force acknowledges that under this new structure, further recalibration of offenses will be needed and recommends this responsibility lie with the Legislature as it is beyond the scope and timeline of this Task Force.

Following the conclusion of the CSTF, Representative Goodman (who served as co-chair of the CSTF) directed the Sentencing Guidelines Commission (SGC) to make recommendations for recalibrating offenses for the proposed adult felony sentencing guideline grid.[3] As a part of this project, the SGC was also directed to consult with the Sex Offender Policy Board (SOPB) when considering the recalibration of sex offenses. To fulfill the request, the SGC was directed to consider, among other things, "historical sentence length patterns, racial disparities in sentencing outcomes, and arranging felony offenses on seriousness levels that reflect similar conduct that causes similar degrees of harm."[4] In addition, Representative Goodman indicated that the SGC may include recommendations for minor modifications to the newly proposed sentencing grid that would assist in the reranking of offenses.

The SGC convened subcommittees and full commission meetings between July 2023 and December 2023 to complete this request. The SGC submitted a final report on December 14, 2023, completing the work as assigned.[5] This report serves as a supplement to the final SGC report and provides additional information about the SGC processes for completing this project and additional considerations that were raised throughout the project, but that were not fully considered for purposes of fulfilling the request as assigned.

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[1] Engrossed Substitute House Bill 1109, Chapter 415, Laws of 2019.

[2] Washington State Criminal Sentencing Task Force. (2022). *December 2022 Final Report*. Prepared for The Washington State Governor and the Washington State Legislature. Olympia, WA

[3] Note: The proposed guideline grid used by the SGC for purposes of this exercise differs slightly from the grid included in the final proposed recommendation published by the CSTF. Specifically, a change to the formula for seriousness levels 10-17 were adjusted after the conclusion of the CSTF. The proposed sentencing guideline grid used for this exercise is available in Appendix X.

[4] Goodman, R. (2023, April 25). *Re: Ranking Felony Offenses on Proposed New Sentencing Grid* [Memorandum]. Washington State House of Representatives. https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2023/Letter_to_SGC_20230424.pdf

[5] Washington State Sentencing Guidelines Commission. (2023). Re-ranking Felony Offenses on Proposed New Sentencing Grid. Olympia, WA.

Section I describes the background of the reranking project, including a review of applicable state statutes. Sections II and III detail the SGC processes for completing the reranking project, including the establishment of subcommittees and subsequent reviews by the full Commission. Section IV provides initial racial impact analysis associated with the proposals put forth in the SGC report. Section V details additional considerations for potential reforms that were briefly discussed throughout the reranking project, but that were beyond the scope of the current SGC report and did not result in formal recommendations to the Legislature.

# Background

Washington State statutes include several different ways of classifying offenses. Each classification captures different characteristics of offenses and attempts to group offenses based on these characteristics. However, most of the statutory classifications are independent from one another. Appendix A provides an overview of the statutory offense classifications in Washington State.

## Felony and Misdemeanor Classification

Table 1. Washington State Statutory Maximum Punishments by Offense Type (RCW 9A.20.021)

| Type of Offense | Maximum Punishment |
|---|---|
| Misdemeanor | • Up to 90 days of incarceration in a local jail<br>• Fines not to exceed $1,000 |
| Gross Misdemeanor | • Up to 364 days of incarceration in a local jail<br>• Fines not to exceed $5,000 |
| Class C Felony | • Up to 60 months of incarceration in a state prison<br>• Fines not to exceed $10,000 |
| Class B Felony | • Up to 120 months of incarceration in a state prison<br>• Fines not to exceed $20,000 |
| Class A Felony | • Any fixed period of confinement in a state prison, including a term of life imprisonment<br>• Fines not to exceed $50,000 |

First, criminal offenses are classified as a misdemeanor or a felony. Misdemeanor offenses are further divided into simple misdemeanors and gross misdemeanors. Felony offenses are further divided into three classes: class A, class B, and class C felonies. Misdemeanor and felony classifications determine the maximum allowable punishment and court of jurisdiction. Table 1 lists the statutory maximum punishments (incarceration time and fines) by type of offense.

Superior Courts in Washington have exclusive, original jurisdiction over felony offenses.[6] Superior Courts and Courts of Limited Jurisdiction (District Courts and Municipal Courts) have concurrent jurisdiction over misdemeanor and gross misdemeanor offenses.[7] In general, Courts of Limited Jurisdiction have original jurisdiction over misdemeanor offenses that are not associated with a felony offense.

## Seriousness Levels

Adult felony offenses are subject to the state's felony sentencing guideline grid. The sentencing guideline grid prescribes a minimum and maximum incarceration term based on the offense's seriousness and the

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[6] RCW 2.08.010
[7] RCW 3.66.060

defendant's criminal history score.[8] Most cases are subject to this nonappealable, standard sentencing range, but statutes do provide some reasons that judges may depart from these standard sentencing ranges in particular cases.[9]

The seriousness levels on the sentencing guideline grid allow for greater delineation in offense seriousness beyond the overarching felony classifications. More serious offenses are placed in higher seriousness levels and are subject to longer periods of confinement. The current felony guideline grid includes 16 seriousness levels. Any offense without a designated seriousness level is considered an "unranked" offense and is subject to a standard sentencing range of 0 – 365 days regardless of the defendant's criminal history score.

Under the current statutes, there are no limitations on the placement of offenses in particular seriousness levels. In general, class A felonies are more concentrated in higher seriousness levels and class C felonies are more concentrated in lower seriousness levels. However, ranked class C felonies are currently placed as high as seriousness level 8 and ranked class A felonies are currently placed as low as seriousness level 6.[10]

Under the current structure, seriousness levels do not take into consideration statutory maximums. As a result, there are offenses placed in seriousness levels for which the ranges in upper criminal history scores exceed the statutory maximum term of incarceration and are invalid sentences. For example, malicious placement of an imitation device is a class B felony ranked at seriousness level 12. At a criminal history score of 0, the standard sentencing range is 93 months to 123 months. However, the statutory maximum term of incarceration for a class B offense is 120 months. Thus, judges cannot issue a sentence at the maximum of the range for this offense for a defendant with a criminal history score of 0. For criminal history scores 3 and greater, the entire sentencing ranges are invalid, and the statutory maximum (120 months) is the only option for the court (See Figure 1).

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[8] As of the publication of this report, statutes still refer to this as the "offender score." Consistent with a larger move to eliminate the use of the term "offender" in state statutes, we follow the CSTF nomenclature for this report and use the term "criminal history score" instead of "offender score."

[9] RCW 9.94A.535

[10] Class A, class B and class C offenses are also found in unranked offenses.

Figure 1. Washington State Felony Guideline Sentence Ranges for Seriousness Level 12

| Sentence ranges for seriousness level 12 offenses according to current sentencing grid | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Criminal History Score | | | | | | | | | | | | | | | | | | | |
| | 0 | | 1 | | 2 | | 3 | | 4 | | 5 | | 6 | | 7 | | 8 | | 9+ |
| | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max |
| 12 | 93 | 123 | 102 | 136 | 111 | 147 | 120 | 160 | 129 | 171 | 138 | 184 | 162 | 216 | 178 | 236 | 209 | 277 | 240 | 318 |

| Actual sentence ranges for Class B felonies ranked at serioussness level 12 according to statutory maximums | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Criminal History Score | | | | | | | | | | | | | | | | | | | |
| | 0 | | 1 | | 2 | | 3 | | 4 | | 5 | | 6 | | 7 | | 8 | | 9+ |
| | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max | Min | Max |
| 12 | 93 | 120 | 102 | 120 | 111 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 | 120 |

**Proposed changes to seriousness levels**

The proposed sentencing guideline grid adds two additional rows for a total of 18 seriousness levels and aligns sentencing ranges with statutory maximums so all sentencing ranges are valid sentences for the offenses in a particular seriousness level. As such, class B offenses cannot be ranked higher than seriousness level 9 and class C felonies cannot be ranked higher than seriousness level 5. The maximum punishment for offenses at seriousness level 9 is 120 months and the maximum punishment for offenses at seriousness level 5 is 60 months, consistent with the statutory maximums for class B and class C felonies, respectively.

## Other Crime Groupings

Statutes specify six additional offense groupings that are not mutually exclusive: serious violent offenses, violent offenses, sex offenses, most serious offenses, crimes against a person, and crimes against property. These classifications impact different aspects of sentencing such as eligibility for earned early release time, whether sentences are served consecutively or concurrently, whether an individual is eligible for community supervision, and eligibility for sentencing alternative programs. Additional information on each of these classifications is available in Appendix A.

When creating the proposed felony guideline grid, the CSTF emphasized a desire to increase consistency with these additional offense classifications. For example, the proposed grid was intended to include primarily serious violent offenses in seriousness levels 14 through 16 and other class A violent offenses in seriousness levels 10 through 13. While the proposed grid does not include any limitations on the ranking of offenses associated with these different offense classifications, the CSTF indicated these classifications should be considered when determining the appropriate offense rankings on the new grid.

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## Current Project: Re-Ranking Felony Offenses

The SGC submitted a final report for their reranking project on December 19, 2023.[11] In order to provide additional context, this supplemental report provides additional information about the SGC's process for completing the reranking project. First, we discuss the initial offense reviews conducted by the committees. Second, we discuss the deliberative process of the full SGC. Third, we discuss racial impact analysis that was provided to the SGC throughout their discussions. Finally, we identify potential concerns that may require additional consideration by policymakers and relevant stakeholders.

# I.    Initial Committee Reviews

The SGC convened three committees and the SOPB (which served as a fourth committee) between July 2023 and November 2023. Each of the ranked felony offenses were delegated to one of the four committees for initial review. All sex offenses were delegated to the SOPB. All remaining felonies were delegated to the SGC committees for review based on felony class. This section discusses the committees' processes for conducting an initial review of felony offense ranking on the proposed guideline grid.

## Decision-Making Framework

Representative Goodman met with each committee to explain his preference for approaching the task of reranking felony offenses. First, he indicated a desire to place offenses in a seriousness level for which the sentence ranges conformed most similarly with current sentencing practices. Second, he asked that the committees consider additional policy considerations that may justify recommendations to increase or decrease the seriousness level of a particular offense.

Each committee proceeded in two steps. First, the committees reviewed sentencing data from FY 2010 through FY 2019 for each ranked felony offense to propose a rank on the new sentencing grid. Using conviction data from the Caseload Forecast Council (CFC), the committees examined the average sentence length for each offense under the current sentencing guideline range with averages calculated for each criminal history score from 0 – 9+. Because exceptional sentences, sentencing enhancements, and sentencing alternatives may result in sentences outside of the standard range, the data were limited to standard sentences. In addition, we excluded cases with consecutive sentences as the final sentencing data do not distinguish which portion of a final sentence is attributed to an individual offense.

Second, committees compared offenses within each seriousness level on the proposed grid and discussed whether there were policy justifications for moving particular offense rankings.

## Step One: Examining Current Sentencing Patterns

Within each seriousness level, judges may approach standard sentences differently for different offenses. For example, judges may believe that certain offenses within a seriousness level should generally receive

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[11] Washington State Sentencing Guidelines Commission. (2023). Re-ranking Felony Offenses on Proposed New Sentencing Grid. Olympia, WA.

sentences closer to the maximum of the sentence range, while other offenses within a seriousness level should generally receive sentences closer to the minimum of the sentence range. Judicial discretion within ranges may also vary between seriousness levels such that judges may be more likely to sentence closer to the maximum for offenses in lower seriousness levels where incarceration lengths are shorter, but may tend more towards the minimum for higher seriousness levels where incarceration lengths are longer.

In addition to differences in sentencing patterns within a particular sentence range, convictions for different offenses may vary in their distribution across criminal history scores. Some offenses, such as Failure to Register[12] or Escape,[13] are more likely to include defendants with a higher criminal history score since they are predicated on the individual having a prior conviction.[14] Other offenses may be more likely to have convictions for defendants with little to no criminal history and thus very low criminal history scores. As a result, analysis of how current sentencing practices comport with the proposed sentence ranges requires varying consideration of the changes in ranges in low or high criminal history scores.

For each offense, the committees examined how the average sentence in each guideline cell compared to the sentence range for the same seriousness level and criminal history score on the proposed grid. The committees then examined how the average sentences compared to the sentence ranges for one to three seriousness levels higher on the proposed sentencing grid.

Figure 2 depicts an example of the data provided to the committees for Reckless Burning 1.[15] Committees were provided with the standard sentence range for the offense on the current guideline grid, the standard sentence range that corresponds with the same seriousness level on the proposed grid, and the standard sentence range for at least two additional seriousness levels on the proposed grid. Additionally, the data indicates whether the average sentence imposed in previous years fell above, below, or within the presented guideline ranges. Finally, the data included the "Where in the Range" (WITR) estimate, which indicates where the average sentence fell within the range. For the WITR estimate, a value of 00% corresponds with an average sentence equal to the minimum of the range, a value of 50% corresponds with an average sentence equal to the midpoint of the range, and a value of 100% corresponds with an average sentence equal to the maximum of the range. Negative values indicate an average sentence below the minimum of the range and values exceeding 100% indicate an average sentence above the maximum of the range.

Using the data from prior sentencing practices, the committees initially selected a seriousness level on the proposed grid for which the average sentence imposed would most often remain a valid sentence. Committees considered both the number of columns for which the average sentence was below, within, or above the proposed range, and how many sentences fell within columns in which the average sentence was below, within, or above the proposed range.

Using the example of Reckless Burning 1, the data indicated that at seriousness level 1 on the proposed grid, the average sentence for criminal history scores 6, 7, 8, and 9+ would exceed the new standard range maximums. By moving the offense to seriousness level 2, only the average sentence for criminal

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[12] RCW 9A.44.132
[13] RCW 9A.76.110
[14] In other words, individuals are only required to register as a sex offender if they have been convicted of a sex offense. Thus, it should be impossible for individuals convicted of failure to register offenses to have an offender score of 0.
[15] RCW 9A.48.040

history score 7 would exceed the maximum. However, there was only one prior conviction for an individual at criminal history score 7. The data indicate that increasing the offense to seriousness level 3 would result in minimum sentences that exceed the average sentence for three criminal history scores.

After reviewing the data, the Class C committee chose to propose ranking Reckless Burning 1 at seriousness level 2 on the proposed grid. This example indicates how a proposal to place an offense at a different seriousness level on the proposed guideline grid does not necessarily mean that the sentences are "increasing" for the offense. In this example, keeping Reckless Burning 1 at seriousness level 1 would have likely decreased sanctions, while moving the offense to seriousness level 2 on the proposed grid is most likely to maintain current sentencing practices.

The appropriate placement of offenses was not always as clear as the example provided in Figure 2. In some instances, the placement of an offense at one seriousness level would result in just as much change as the placement of an offense at a different seriousness level.  In these instances, committee members worked thoughtfully to consider nuances of the data such as whether sentences were concentrated in a particular criminal history score and thus focusing on the average sentences in those ranges or how significant the different changes were (e.g., if an average sentence would exceed the new range by only 1 month or by 10-20 months).

Ultimately, there were many instances where the committee members were split on the appropriate placement of an offense and thus decided to put forward two different options to the full SGC for consideration.

Figure 2. Example of Data Presented to Committee for Re-Ranking Review

**Reckless Burning 1**

RCW: 9A.48.040  Class: C  SL: 1

| | Criminal History Score | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **0** | | **1** | | **2** | | **3** | | **4** | | **5** | | **6** | | **7** | | **8** | | **9+** | |
| Avg Sentence (mos) | 1.3 | | 2.1 | | 3.6 | | 3.3 | | 4.3 | | 6.3 | | 12.5 | | 18.0 | | 20.1 | | 26.7 | |
| Median Sentence (mos) | 1.5 | | 2.6 | | 2.4 | | 3.0 | | 3.5 | | 6.0 | | 12.0 | | 18.0 | | 19.8 | | 29.0 | |
| Number of Sentences | 59 | | 27 | | 23 | | 9 | | 10 | | 6 | | 4 | | 1 | | 4 | | 3 | |
| | min | max | min | max | min | max | min | max | min | max | min | max | min | max | min | max | min | max | min | max |
| Current SL1 | 0 | 2 | 0 | 3 | 2 | 5 | 2 | 6 | 3 | 8 | 4 | 12 | 12 | 14 | 14 | 18 | 17 | 22 | 22 | 29 |
| Avg WITR CSL1 | 63% | | 69% | | 52% | | 33% | | 26% | | 29% | | 25% | | 100% | | 62% | | 67% | |
| Proposed SL1 | 0 | 2 | 0 | 3 | 1 | 5 | 1 | 6 | 2 | 7 | 2 | 8 | 3 | 10 | 3 | 12 | 4 | 14 | 5 | 18 |
| Avg WITR PSL1 | 63% | | 69% | | 64% | | 47% | | 46% | | 72% | | 136% | | 167% | | 161% | | 167% | |
| Proposed SL2 | 0 | 3 | 1 | 6 | 2 | 7 | 2 | 8 | 3 | 10 | 3 | 12 | 4 | 14 | 5 | 17 | 6 | 21 | 8 | 28 |
| Avg WITR PSL2 | 42% | | 21% | | 31% | | 22% | | 19% | | 37% | | 85% | | 108% | | 94% | | 93% | |
| Proposed SL3 | 2 | 7 | 2 | 9 | 3 | 11 | 4 | 13 | 4 | 16 | 5 | 19 | 6 | 23 | 8 | 27 | 10 | 33 | 11 | 39 |
| Avg WITR PSL3 | -15% | | 1% | | 7% | | -7% | | 3% | | 10% | | 38% | | 53% | | 44% | | 56% | |

Notes:

WITR = Where In The Range. This measure depicts where the average sentence falls within the standard range as a percentage of the maximum. A value of 50% corresponds with an average sentence at the midpoint of the range. A negative value corresponds with an average sentence below the minimum of the range and a value greater than 100% corresponds with an average sentence above the maximum of the range.

Minimums highlighted in yellow indicate that the average sentence imposed for individuals with the corresponding offense and criminal history score is below the minimum of the sentence range.
Maximums highlighted in red indicate that the average sentence imposed for individuals with the corresponding offense and criminal history score is above the maximum of the sentence range.

**Considering Racial and Gender Disparities**

Charging data were also collected from the Administrative Office of the Courts (AOC) for each of the ranked offenses. The number of charges filed was displayed by gender and race category for each offense.[16] These data provided committee members with a general idea of how frequently the offenses were charged, knowing that what a defendant is charged with may not always be what the defendant is ultimately convicted of. While an attempt to offer racial disproportionality was offered with ratios, there was little value in these ratios due to numerous confounding variables that could have impacted the results. The Public Safety Policy and Research Center (PSPRC) provided alternative measurements of potential racial disparity to the full SGC as discussed later in this report.[17]

## Step Two: Discussing Policy-Based Considerations

Beyond sentencing practices, committees also discussed additional policy-based considerations for where an offense should be ranked. In some cases, insufficient data were available to make an initial decision based on average sentences. In these cases, the committees discussed characteristics of the offense to guide their initial decisions.

Once all offenses were initially ranked, the committees examined how offenses were collectively ranked within different seriousness levels. They then discussed potential adjustments based on either a) how an offense compared to other offenses in the same seriousness level, or b) other offenses in neighboring seriousness levels. For example, the Class C committee discussed the fact that Unlawful Trafficking in Food Stamps[18] should be ranked higher than Unlawful Use of Food Stamps.[19] In the case of trafficking, the defendant is profiting from the resale of the food stamps which was viewed as more serious than cases of unlawful use where the defendant is inappropriately using food stamps to make purchases. Since Unlawful Use of Food Stamps was recommended to be placed at seriousness level 1, Unlawful Trafficking in Food Stamps was increased to a recommendation of seriousness level 2.

## Sex Offender Policy Board Process for Review

In 2008, the Legislature established the Sex Offender Policy Board (SOPB)[20] to serve to advise the Governor and/or Legislature on policy recommendations related to sex offenses and the sex offender management system. In 2011, the SOPB was moved under the SGC's purview.[21] In this project's request, the SGC was directed to work with the SOPB on re-ranking of the sex offenses. The SOPB served as the SGC's fourth committee to review all of the ranked felony sex offenses and make recommendations to the full SGC. The SOPB began meeting in April 2023 and met 10 times to discuss each individual sex offense.

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[16] The Administrative Office of the Courts and the Caseload Forecast Council collect race data in slightly different categories. To make the data from each source similar, two racial categories were displayed: white and BIPOC.
[17] See Section IV.
[18] RCW 9.91.142
[19] RCW 9.91.144
[20] RCW 9.94A.8673
[21] Engrossed Substitute Senate Bill 5891, Chapter 40, Laws of 2011

The SOPB focused much of their discussion on comparing the current ranges for cases with a criminal history score of 0 and the maximum sentence for individuals with a criminal history score of 9+. The SOPB identified one to three proposals for ranking each offense and held a final meeting in which each member cast a vote for their preferred recommendation.[22] Each member was also able to submit written comments to accompany their votes to explain their position to the SGC. The voting results and associated written comments were submitted to the SGC for consideration.

## II.    Sentencing Guidelines Commission Review

The full SGC began meeting on October 13, 2023, to consider the recommendations of the committees and to determine the final recommendations they would submit to the Legislature. All committee members (including members of the SOPB) were invited to attend the SGC meetings and to participate in the discussions about the committee recommendations.

From the committees, the SGC received initial feedback on the potential ranking for 251 felony offenses. The SGC held five meetings between October and December, with varying members able to attend each meeting. With the limited time available for this assignment, members voiced concern about needing more time to feel confident in having a full and complete discussion about each recommendation.

Ideally, the SGC would have had an initial discussion on each individual offense, identifying the proposed seriousness level that there was the most support for. Then, the SGC would review the full list of offenses an additional time to determine whether the final groupings of offenses within each seriousness level was appropriate. Upon this second review, the SGC could identify how their proposal for each offense compared to similar offenses in the same or neighboring seriousness levels.

Given the limited time for this project, the SGC held a discussion for any offense where the committees put forth multiple ranking proposals. For these offenses, the SGC conducted a straw-poll in which members voiced their initial support for the proposed recommendations. The proposal with the greatest support was recorded and used to conduct initial racial impact analyses (see Section IV). If a committee submitted only a single ranking proposal for an offense, the SGC did not hold a discussion about the offense or the committee's proposal unless the proposed ranking would require a change in the felony class (e.g., if the committee proposed placing a class C felony at seriousness level 6, requiring the offense to be reclassified as a class B felony). Ultimately, the SGC was unable to delve deeper and conduct a second review on the list of ranked felony offenses. Because of this, the SGC did not formally approve the rankings and, instead, submitted its report with a list of proposed recommendations from which the Legislature could start discussions. The proposed rankings reflect the proposals with the greatest support during the straw-poll (or the single recommendation from the respective committees), but may require additional modifications by the Legislature.

*NOTE*: When preparing their final report, SGC staff identified some instances where differing degrees of the same offense ended up with the same seriousness level ranking. In some cases, this may have occurred because two separate committees ended up making the same recommendation on different degrees of an offense not knowing what conversations were occurring in another committee. Given that offense degrees often delineate varying levels of seriousness for the same type of behavior, it may not

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[22] Representatives from the Special Commitment Center and the Association of Cities were unable to attend the meeting and did not cast votes on the proposals. Five members abstained from voting for the proposals and submitted commentary explaining the reason for abstaining.

make sense for differing degrees to be placed at the same seriousness level. For example, Malicious Explosion of a Substance 2 and 3 both have a proposed rank of 9 and Malicious Mischief 1 and 2 both have a proposed rank of 2.

## III.    Racial Impact Analyses

Conversations in the multi-year CSTF and 2023 re-ranking project by the SGC included an intentional focus on the potential racial and ethnic disparities that may result from reforming the state's sentencing system. For this reranking project, PSPRC staff examined how decisions made in the form of straw polls would likely impact sentences for different racial groups. These analyses allowed SGC members to examine potential impacts of their proposed recommendations and to identify offenses that are likely to have the most significant impact on disproportionate outcomes. This section discusses the data and methods used to conduct racial impact analyses for the reranking project and presents the results associated with the final proposals that were included in the final SGC report.

### Data and Methods

For the racial impact analyses of the reranking project, we used sentencing data from the CFC. The CFC is tasked with collecting judgement and sentence forms from all felony convictions in Washington State Superior Courts. These data are entered into a unified sentencing database that records the sentencing outcomes of felony cases disposed in each fiscal year.

Consistent with the data presented to the committees, we used records of felony convictions from FY 2010 – FY 2019. We excluded exceptional sentences, sentencing enhancements, and sentencing alternatives which could result in sentences outside of the standard range. We also excluded cases with consecutive sentences, since the final sentencing data do not distinguish which portion of a final sentence is attributed to a particular offense. Finally, we included only those cases for a conviction of an offense as it is currently ranked in 2023. For example, prior to June 2016, Vehicular Homicide – Reckless Manner[23] was ranked at a seriousness level 8. After June 2016, Vehicular Homicide – Reckless Manner was ranked at a seriousness level 11. Due to this, we omitted convictions for Vehicular Homicide – Reckless Manner under the old statute ranked at seriousness level 8. These criteria ensure that analyses of potential changes in sentencing outcomes reflect only the effect of reranking and placement on the new grid and not the effects of prior legislation.

The CFC data include an indication of the offense seriousness level, the individual's criminal history score, and the corresponding minimum and maximum from the sentencing range. Based on the straw-poll results from the SGC, we created variables capturing the proposed seriousness level on the new grid for each offense as well as the corresponding minimum and maximum from the proposed sentencing range given the proposed seriousness level and the individual's criminal history score.[24] Using the

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[23] RCW 46.61.5195

[24] We recognize that the proposed felony guideline grid also includes reforms to the calculation of criminal history scores. For purposes of these analyses, we were unable to rescore cases to determine whether their criminal history score would differ under the proposed guideline grid and instead used the same criminal history score from the original case. Many of the changes in calculation of criminal history score apply only to certain violent offenses. While an individual's criminal history score may decrease in some instances, there are other changes in the proposed felony sentencing grid that would apply in those cases to provide increased discretion for judges to issue appropriate sentences as they see fit.

suggested seriousness level for the offense, we directly compared the differences in the sentencing range for a case under the current guidelines versus the proposed sentencing guidelines.

We conducted multiple comparisons to identify potential impacts of the proposed reranking by race.[25] First, we examined how often the cases would likely see a decrease or increase in the minimum and/or maximum of the standard sentencing range. Second, we examined the degree of change in the minimums and maximums of the standard sentencing range. Third, we examined how often the sentence that was imposed in the actual case would fall within, below, or above the new standard range on the proposed sentencing guidelines grid. Finally, we examined the amount of change that would be required for a sentence to become a standard sentence on the new grid if the sentence previously imposed was below or above the new standard sentence range.

## Results

The proposed felony guideline grid differs from the status quo grid in many ways. As such, the reranking of offenses does not itself indicate that policymakers believe an offense should be considered more serious or less serious than it is in the status quo. Rather, adjustments to the seriousness levels were often necessary to ensure that offenses have a similar sentencing range on the new grid. The rankings on the two grids should be considered independent. Thus, it is inappropriate to characterize all differences in the ranking on the two grids as an "increase" or "decrease" in the offense seriousness.[26]

Given the structural differences between the two grids, there were few, if any, instances where the minimum and maximum of the proposed standard range was the exact same as the current standard range, even after re-ranking. We first examined how often the standard sentence range maximum or minimum would differ from the status quo.

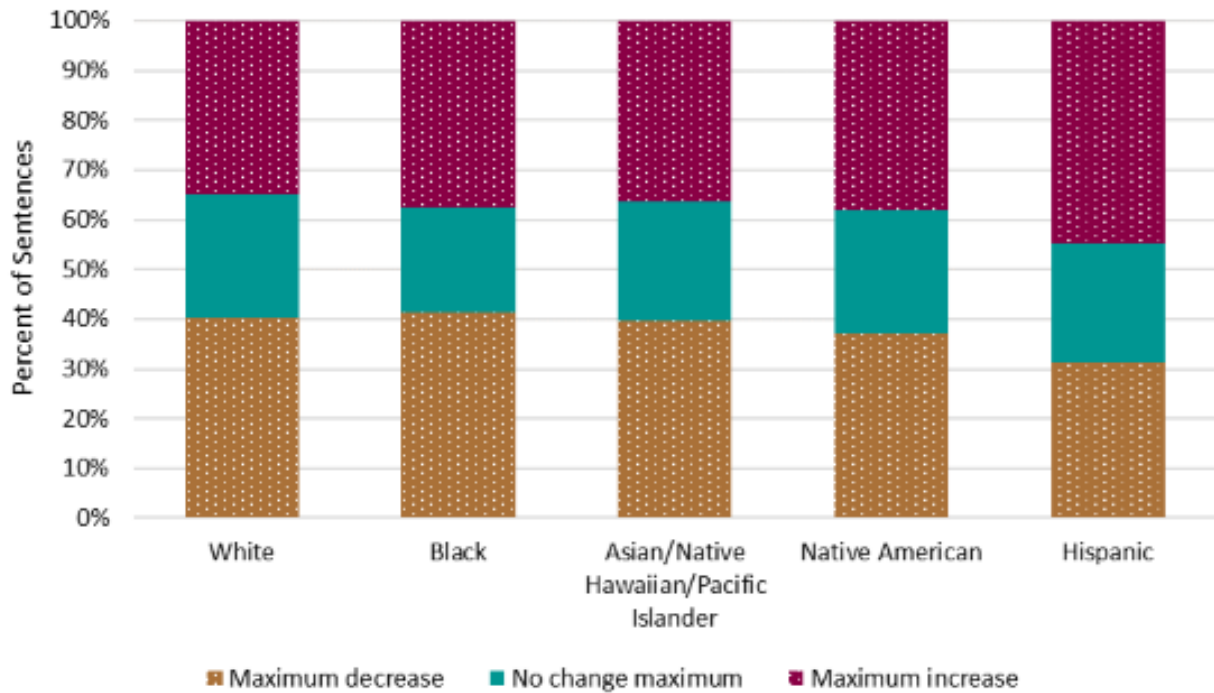**Changes in the Standard Range Maximums**

Figure 3 depicts the percent of sentences between FY 2010 and FY 2019 that would have a different maximum of the standard range under the proposed guideline grid. Overall, about 39.5% of cases would have a decrease in the maximum of the standard range while 36.2% of cases would have an increase in the maximum of the standard range. Black defendants were most likely to see an increase in the maximum of the standard range (37.6%) but were also the most likely to see a decrease in the maximum of the standard range (41.3%). All racial groups, except for Hispanic defendants, were more likely to see a decrease in the maximum of the standard range than the minimum.[27]

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[25] Our analyses, including categorization of race, were limited to the information available in the CFC data. These data reflect the information submitted by each of the independent superior courts. The CFC data are limited with regards to race. Most notably, Hispanic is often reported as a race on judgement and sentence forms. If Hispanic is entered as an ethnicity, it is also not uncommon for the race field to be left blank or identified as unknown. To address these inconsistencies, CFC records ethnicity (Hispanic) as race. If Hispanic is identified as a person's ethnicity and a race is separately identified, CFC records the individual as Hispanic and not their specified race. The CFC modified their recording process starting in FY 2024.

[26] Note that there were instances where members of the SGC felt an offense is currently under ranked or over ranked and thus discussed appropriate placement on the proposed grid where the standard range was higher or lower than the ranges of the offense as it is ranked on the current grid.

[27] Note, due to limitations with the CFC coding for Hispanic, the exception for Hispanic defendants may be an artifact of coding discrepancies.

Figure 3. Percent of FY 2010 - FY 2019 Sentences with Change in Maximum of Standard Range on Proposed Grid



When the maximum of the standard range was projected to decrease, the size of that decrease varied (see Figure 4). Overall, the average reduction in the maximum of the standard range (when the maximum decreased), was 11.4 months. Across race, Black defendants were likely to see the largest reduction in the maximum (12.1 months).

Figure 4. Average Reduction in Maximum (when Maximum Decrease, N = 34,383)
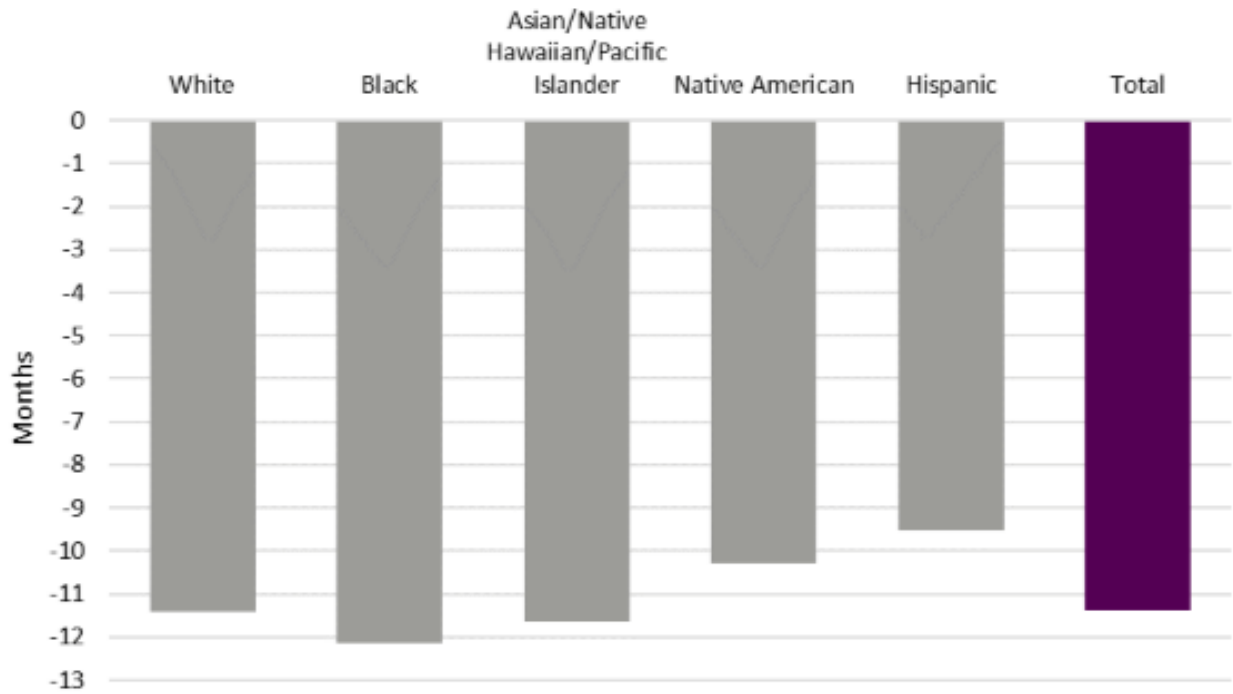


While the maximum of the range was slightly more likely to decrease than to increase on the proposed sentencing grid, increases in the maximum were much smaller than the aforementioned decreases. Figure 5 shows the average increase in the maximum sentence of the standard range, when maximums increased. Across all racial groups, the average increase in the maximum sentence of the standard range was about three months. There was very little difference between racial groups.

Figure 5. Average Increase in Maximum (when Maximum Increase, N = 31,497)
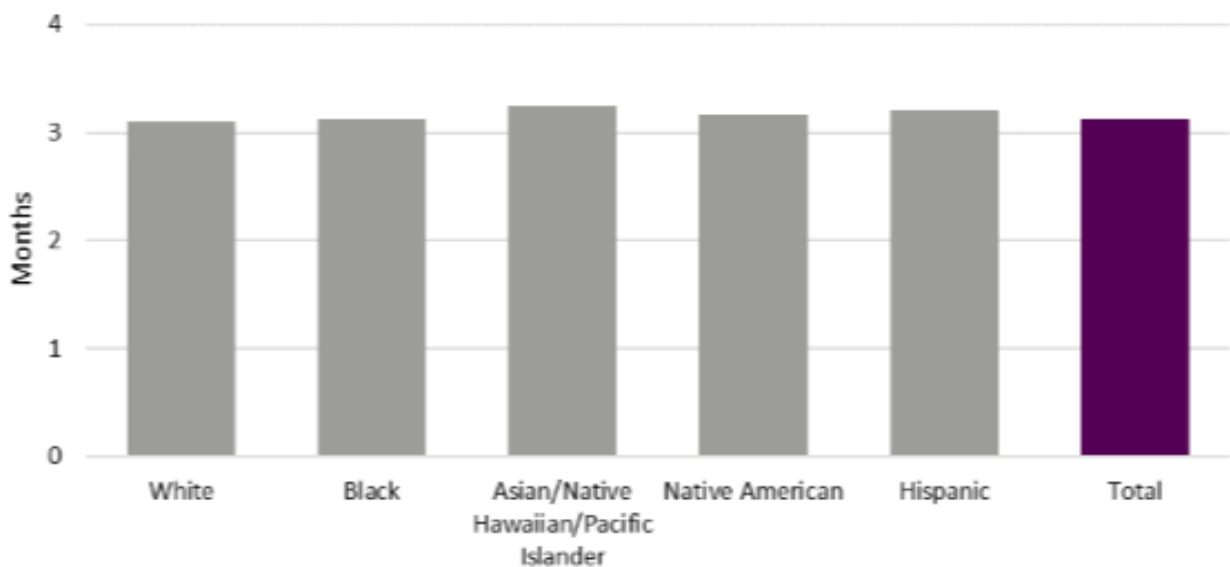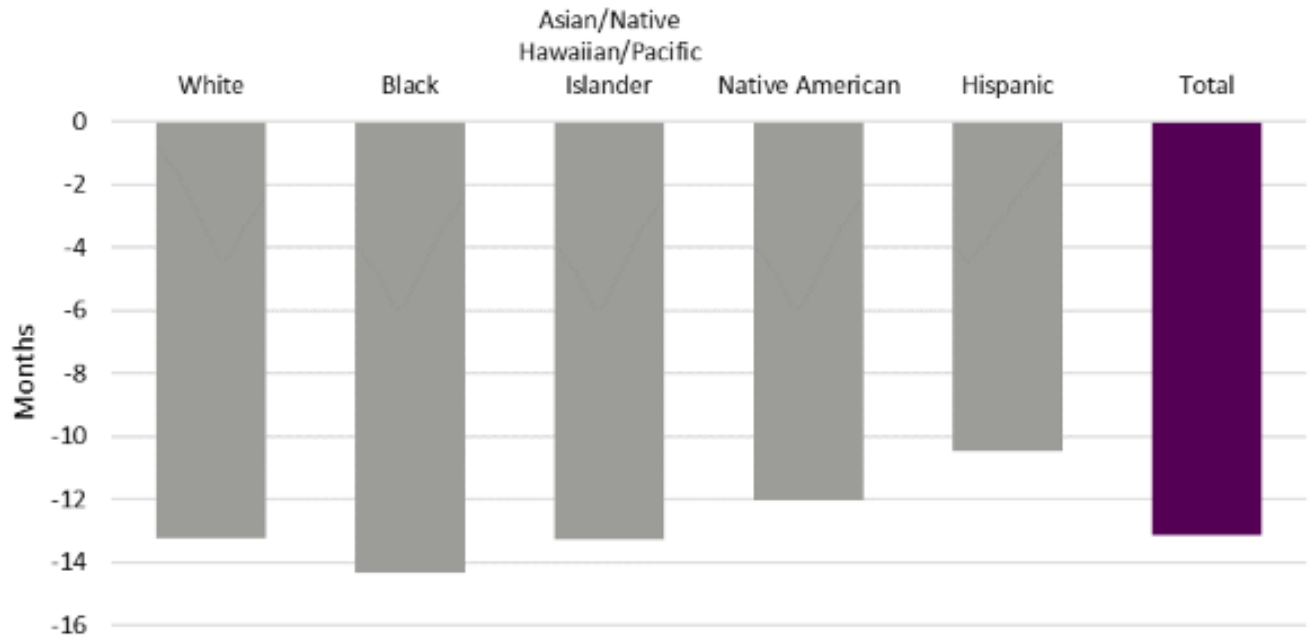
**Changes in the Standard Range Minimums**

In a majority of cases, the minimum of the standard range on the proposed grid would be lower than the minimum of the standard range on the current grid (66.9%). Black defendants were the most likely to have a lower minimum on the proposed grid compared to the standard grid (71.5%) and were the least likely to see an increase in the minimum of the standard range (7.5%). Figure 6 shows the percent of sentences with an increase or decrease in the minimum of the standard range on the proposed grid.

Figure 6. Percent of FY 2010 – FY 2019 Sentences with Change in Minimum of Standard Range on Proposed Grid
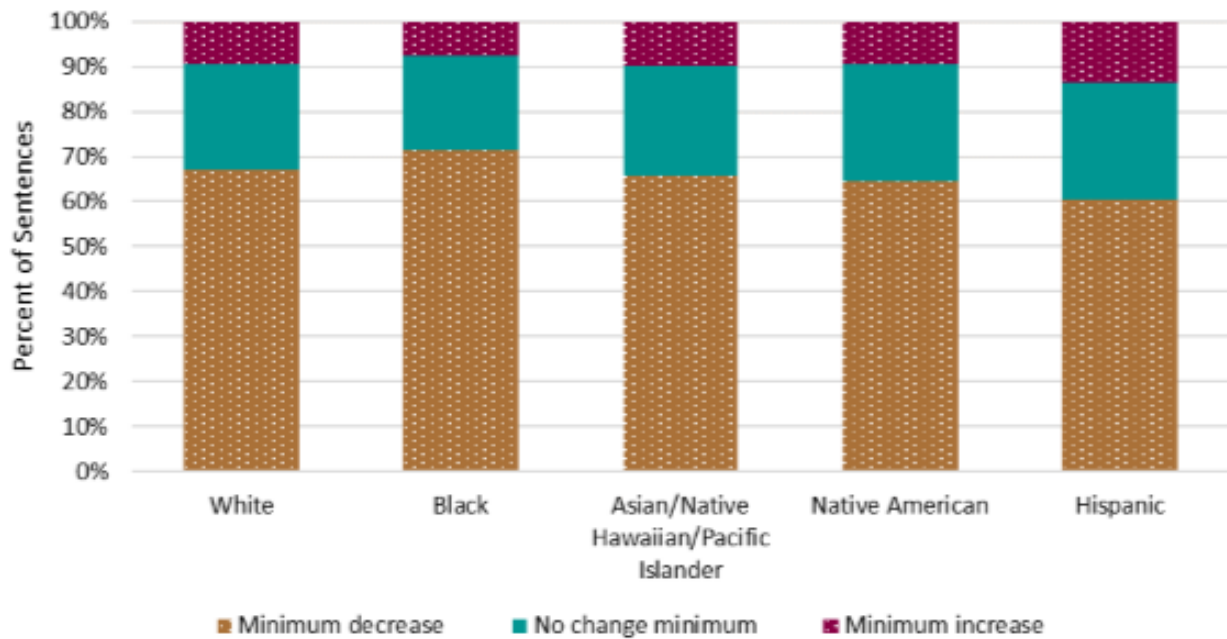


When the minimum of the standard range was projected to decrease, the size of that decrease varied. Overall, the average reduction in the minimum of the standard range (when the minimum decreased), was 13.2 months (see Figure 7). Across race, Black defendants were likely to see the largest reduction in the minimum (14.3 months).

Figure 7. Average Reduction in Minimum (when Minimum Decrease, N = 58,329)



The minimum of the range was less likely to increase and, when it did, increases in the minimum were smaller than the aforementioned decreases. Figure 8 shows the average increase in the minimum sentence of the standard range, when minimums increased (1.3 months). Across all racial groups, the average increase in the minimum sentence of the standard range was about one month.

Figure 8. Average Increase in Minimum (when Minimum Increase, N = 8,148)
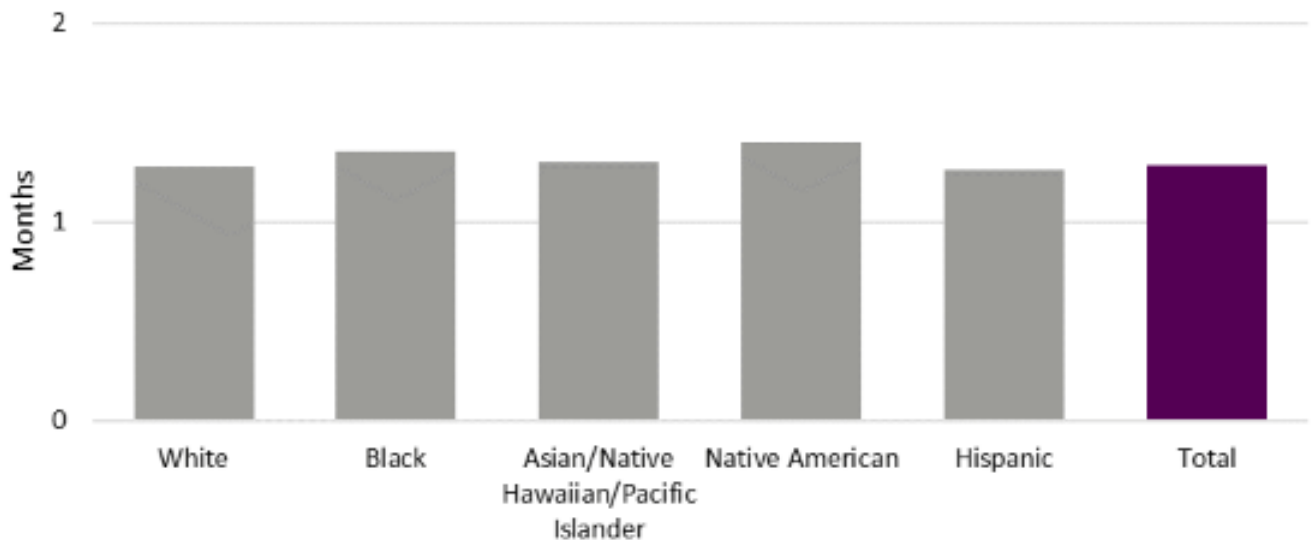
**Widening the Standard Sentencing Range**

On the proposed guideline grid, many of the standard sentencing ranges are wider than the ranges on the current grid. The results presented above indicate that the maximums of standard ranges were more likely to increase than the minimums and the minimums were more likely to decrease than the maximums. These patterns reflect a frequent widening of the sentencing ranges, affording greater discretion to judges at sentencing. In other cases, if the maximum decreased at a slower rate than the minimum decreased, or the maximum increased at a slower rate than the minimum increased, the result would be a range that is still wider than the status quo. Table 2 presents the overall patterns of change in the minimum and the maximum of the standard range as well as the overall rate of widening and narrowing of the standard range.

### Table 2a. Patterns of Change in the Minimum and Maximum of the Standard Range

|  | Decrease in Minimum | No Change in Minimum | Increase in Minimum |
|---|---|---|---|
| Maximum Decrease | 34,258 (39.3%) | 35 (0.0%) | 143 (0.2%) |
| No Change in Maximum | 10,893 (12.5%) | 10,264 (11.8%) | 46 (0.1%) |
| Maximum Increase | 13,297 (15.2%) | 10,328 (11.8%) | 8,005 (9.2%) |

### Table 2b. Widening and Narrowing of Standard Sentence Ranges

|  | N | % |
|---|---|---|
| Range Widened | 69,751 | 79.93% |
| Range the Same Width | 14,035 | 16.08% |
| Range Narrowed | 3,483 | 3.99 |

Overall, 4% of sentences saw a narrowing of the standard range on the proposed grid, 16.1% of sentences saw no change in the width of the range on the proposed grid, and 79.9% of sentences saw a widening of the standard range on the proposed grid. 15.2% of sentences saw a bilateral widening of the range such that the minimum decreased and the maximum increased. Less than one percent of sentences saw a bilateral range narrowing, with the minimum increasing and the maximum decreasing. Black defendants were the most likely to see a widening of the standard range with 83.7% of sentences falling in a range on the proposed grid that was wider than the range on the current grid.

**Imposed Sentences Compared to Proposed Standard Ranges**

The majority of sentences imposed between FY 2010 and FY 2019 would still fall within the presumptive standard range on the proposed grid (68.9% of sentences). When the imposed sentences fell outside of the proposed range, it was most common for the imposed sentence to be above the proposed standard range (25.6% of sentences).

Among different racial groups, Hispanic and Native American defendants were most likely to have an imposed sentence that was still within the standard range on the proposed grid (75.5% and 72.5%,

respectively). White, Black, and Asian/Native Hawaiian/Pacific Islander defendants had nearly equal likelihood of having an imposed sentence that would fall above the proposed standard range (26.5%, 26.4%, and 25.7%, respectively). Figure 9 depicts the percent of imposed sentences below, within, and above the proposed ranges, by racial group.

Figure 9. Imposed Sentences FY 2010 – FY 2019, Relative to Proposed New Ranges
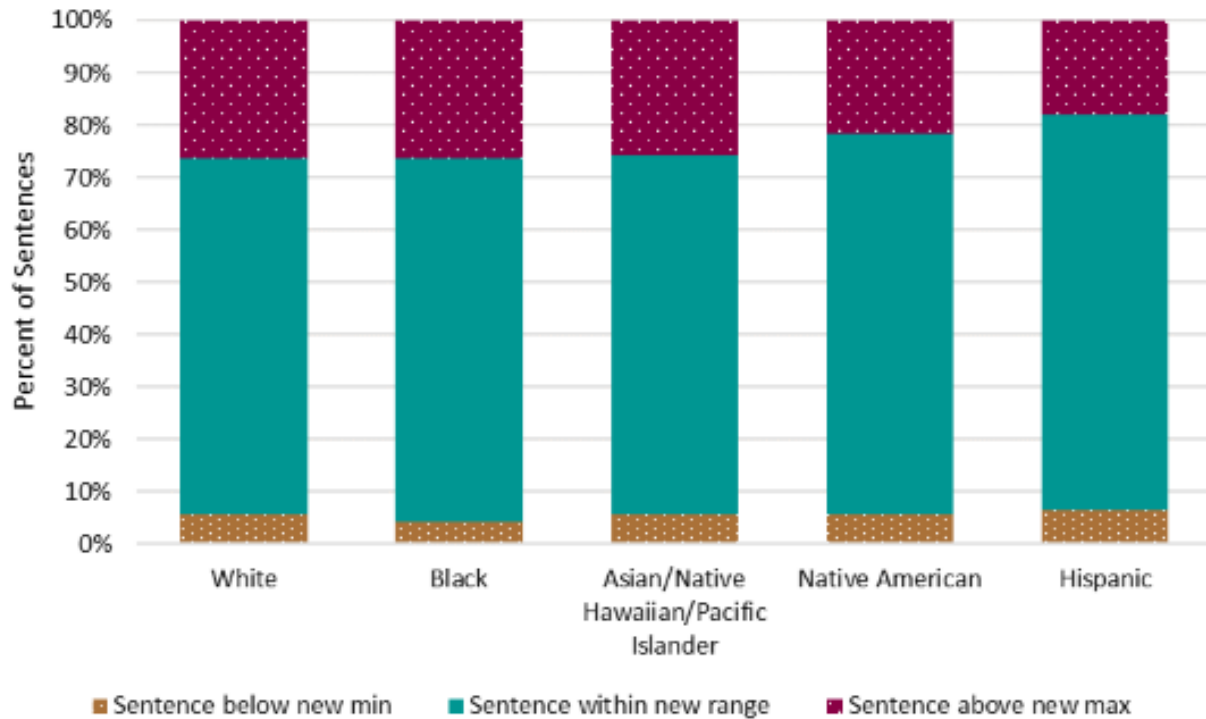


It is possible that if the cases in our dataset were prosecuted under the proposed guideline grid, prosecutors would seek alternative charges or exceptional sentences to obtain the same sentence that was previously imposed. However, if prosecutors and judges moved forward with the same charges and sought a standard sentence, the sentences above the new maximum must decrease to fall within the new standard range. Similarly, sentences below the new standard range must increase to fall within the new standard range.

## Table 3. Average Reduction in Imposed Sentence Necessary to Reach Proposed Standard Range Sentence

| Race | Average Months |
|---|---|
| White | 9.6 |
| Black | 9.1 |
| Asian/Native Hawaiian/ Pacific Islander | 9.5 |
| Native American | 8.4 |
| Hispanic | 8.2 |
| Total | 9.4 |

Table 3 presents the average minimum amount of change in sentences necessary to reach a sentence within the new standard range for instances when the imposed sentence was above the proposed new standard range. The overall average was a reduction in the imposed sentence by 9.4 months. Reductions varied minimally by race.

## Racial Impact Analyses Summary

Overall, these initial analyses suggest that the proposed offense rankings would have similar effects across racial groups. Black defendants were likely to see the largest reductions in both the minimum and maximum of the standard sentence ranges. While it is difficult to predict how prosecutorial or judicial decisions might differ under the proposed guideline grid (i.e., if they would pursue alternative charges or increase the use of exceptional sentences), these findings do suggest that Black defendants could uniquely benefit from the changes on the proposed guideline grid.

We did not find evidence to suggest that the proposed re-rankings of offenses on the proposed guideline grid would increase racial disproportionality. However, there were some concerns raised during discussions with the SGC that the widening of ranges could contribute to additional racial disproportionality in sentencing. If disproportionality exists such that white defendants are more likely to be sentenced near the minimum of the range and defendants of color are more likely to be sentenced toward the maximum of the range, increasing the distance between the minimum and maximum could increase the disproportionality in sentence outcomes.

Our analyses found that decreases in the minimum of the standard range were, on average, greater than increases in the maximum of the standard range. Thus, even when the ranges were widened bilaterally (i.e., an increase in the maximum and decrease in the minimum), the midpoint of the sentence range would still shift downward. The downward shift in sentence ranges would potentially reduce the impact of disproportionate sentencing on defendants of color.

*NOTE*: Analyses of these proposed re-rankings are complex and changes to the proposed rank of one offense may not have the same effect on racial disproportionality as changes to the proposed rank of another offense. Future considerations of modifications to the proposed ranks should include updated analyses of the potential outcomes for different racial groups.

## IV.    Other Potential Considerations

The SGC was tasked with completing a wide-ranging task in a limited time frame. The SGC submitted their initial proposed rerankings for adult felony non-drug offenses, including sex offenses, to the House Community Safety, Justice, and Reentry Committee on December 19, 2023.[28] Throughout the committee meetings and full SGC meetings, several other considerations were discussed. However, the SGC did not have sufficient time to fully debate and vote on these considerations. For purposes of transparency and providing full information to the Legislature, this section details additional modifications that were discussed by the committees and/or full SGC. These considerations raise issues that policymakers may want to consider when drafting legislation related to changes in felony sentencing and we are providing these summaries as a starting point for future discussions.

### Modifying the Formula for Seriousness Levels 10-17

During the Class A committee discussions, members raised concerns about the sentencing ranges in seriousness levels 10 to 17. First, the ranges significantly increased when moving from seriousness level 9 to seriousness level 10. Similarly, ranges also significantly increased when moving from seriousness level 13 to 14. These gaps made it difficult for committee members to identify appropriate seriousness levels for some offenses.

Second, the maximum sentence for criminal history score 9+ was only slightly higher than the maximum sentence for criminal history score 8. Because criminal history score is capped at 9, some members felt that the ranges for 9+ should have a significant increase from criminal history score 8, allowing judges to account for criminal history scores greater than 9.

The Class A committee worked to revise the formulas for seriousness levels 10-13 and 14-16 to establish standard ranges that allowed for more appropriate reranking of violent and serious violent offenses. The adoption of these formula modifications is necessary for the reranking recommendations included in the final SGC reranking report.

### Exceptions to the Class B Seriousness Level Ceiling

The new proposed sentencing guideline grid includes a limit to the ranking of class B felony offenses such that they may not be ranked higher than seriousness level 9. This limitation is necessary to avoid issues present in the SRA felony guideline grid in which the sentence ranges for some offenses exceeded the statutory maximum and, thus, were not valid sentencing ranges. On the new guideline grid the CSTF insisted that all ranges on the new guideline grid be fully valid ranges.

The SGC had to determine whether class B felony offenses ranked higher than 9 should have a lower seriousness level (9 at the highest) or be changed to a class A offense. There was one offense for which some members of the SGC wanted to propose ranking above seriousness level 9, but maintain classification as a class B felony.[29]

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[28] Washington State Sentencing Guidelines Commission, 2023.
[29] Assault of a Child 2, RCW 9A.36.130

Members of the SGC who were opposed to this exception noted that the proposed guideline grid was constructed with the goal of having firm principles guiding the development of sentencing ranges and placement of offenses on the grid. In addition, the new guideline grid is intended to eliminate offense-by-offense exceptions that create unnecessary complexity and reduce transparency at sentencing.

Members who supported this exception felt that the sentencing ranges for lower criminal history scores were not sufficient to address the conduct of Assault of a Child 2,[30] but they did not believe that it was serious enough of an offense to justify moving the offense to a class A felony classification and consequently introducing additional collateral consequences with the reclassification. Members noted this exception would still result in valid ranges for all criminal history scores since all minimum sentences were below the statutory maximum (120 months). By placing a class B offense at level 10, it would create a narrower range of sentence for those with a criminal history score of 9+ (93 months to 120 months rather than 93 months to 155 months), but would still afford judicial officers' some discretion in the final sentence.

Importantly, it was noted that consideration of any exception to the class B ceiling on the guideline grid should have *explicit* guidance that is not predicated on an exception for just one offense. For example, statutes could outline that class B felonies may be ranked no higher than seriousness level 9 unless they are classified as a violent offense, in which case they could not be ranked higher than seriousness level 10. This guideline acknowledges that the new grid intends to capture only violent offenses at seriousness level 10 and above. In addition, this approach maintains a structural design that does not allow for offense-by-offense exceptions not rooted in a broader application of consistent logic and justification at sentencing.

## Separately Ranking Offenses Based on Criminal History

Washington State statute identifies "most serious" offenses subject to the state's persistent offender laws.[31] Upon an individual's third conviction for a most serious offense, they are sentenced to a term of life in prison. For three of these offenses – Assault in the Second Degree,[32] Kidnapping in the Second Degree,[33] and Vehicular Assault in a Reckless Manner or While Under the Influence,[34] there were unique concerns raised during the reranking project. Specifically, the initial committee members were concerned about increasing the seriousness level of these offenses; however, not raising the seriousness level would allow for a jail sentence for individuals up to a criminal history score of 7. Thus, it would be possible that an individual could receive a jail sentence for their first two convictions of a most serious offense and then face a term of incarceration in prison for life for any subsequent conviction of a most serious offense.

Some members believed individuals should not face a lifetime term of incarceration without ever previously going to prison and having access to state-funded rehabilitation programs. As such, the committee proposed raising the seriousness level for Assault 2, Kidnapping 2, and Vehicular Assault in a Reckless Manner or While Under the Influence if the individual had a prior conviction for a most serious offense. Increasing the seriousness level for the offense in these cases by one level ensures that a person

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[30] RCW 9A.36.130
[31] RCW 9.94A.030
[32] RCW 9A.36.021
[33] RCW 9A.40.030
[34] RCW 46.61.522

convicted of their second most serious offense would serve a term of incarceration in prison. This term of incarceration could afford individuals greater access to rehabilitative treatment, which research shows correlates with a likeliness to desist from future offending, potentially avoiding a third serious conviction and imprisonment for life.[35]

Other criminal offenses are differentially ranked based on criminal history or case characteristics, such as Failure to Register as a Sex Offender[36] and Animal Cruelty in the First Degree.[37] However, splitting the ranking of these offenses does raise an additional question of how criminal history scores would be calculated at sentencing. To avoid doubly increasing the sanction for an offense based on criminal history, the committee discussed the need to exclude one prior most serious offense from the calculation of the criminal history score for cases where the offense was prosecuted under a higher seriousness level.[38] The committee did not discuss whether the new column for repeat violent offending would still apply or not, but since it applies in other instances where criminal history does account for a prior violent offense, it could reasonably still apply in these cases as well.[39]

Ultimately, the SGC was in support of keeping these offenses at a single seriousness level regardless of criminal history. During the discussion, two primary concerns were raised about implementing separate rankings based on criminal history. First, members discussed the initial focus of the new grid which is to eliminate complexity associated with offense-by-offense exceptions to the rules. The creation of separate seriousness levels based on criminal history would reintroduce the same complexity that the proposed reforms seek to eliminate.

Second, this approach would add the prior violent offense as an element of the crime, increasing the burden for obtaining a guilty conviction. As a result, there were concerns that this approach would significantly alter the trial and plea proceedings from the status quo.

## Eliminating misdemeanor scoring for felony driving while under the influence and felony physical control of a vehicle while under the influence

The SRA includes special scoring rules for criminal history score when the current offense is a felony DUI. Specifically, statutes indicate "If the present conviction is for a felony traffic offense . . .count one point for each adult prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug."[40] During the development of the proposed new felony sentencing guideline grid, the CSTF sought to simplify the calculation of an individual's criminal history score by eliminating special exceptions to the standard scoring rules. However, the final recommendations maintained the scoring

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[35] National Institute of Justice. (2021). *Desistance From Crime: Implications for Research, Policy, and Practice*. Washington, DC: U.S. Department of Justice, Office of Justice Programs.

[36] RCW 9A.44.132

[37] RCW 16.52.205

[38] For example, if an individual was previously convicted of assault 2 and now before the court for sentencing on a conviction of kidnapping 2, the seriousness level for Kidnapping 2 would be 6, but the prior assault 2 would not count in the calculation of the criminal history score. It was presumed that the repeat column on the new grid would still apply, increasing the maximum of the standard range for these cases.

[39] The proposed additional column on the grid related to repeat violent offending does not itself increase the sanction. Rather, this column increases the discretion for the judge to impose a higher sanction if they believe it is warranted in the particular case.

[40] RCW 9.94A.525(11)

exceptions that allow for misdemeanor DUI offenses to count toward an individual's criminal history score if the current offense is a felony DUI (CSTF, 2022 p. 109).

The inclusion of misdemeanor DUI offenses in criminal history scoring for a felony DUI is necessary under the SRA to ensure that the sanction for a felony DUI is greater than the sanction for a misdemeanor DUI. When reviewing the placement of felony DUI on the proposed sentencing grid, the committee felt that it was most appropriate to rank felony DUI at a seriousness level 6. However, since all presumptive sentencing ranges at seriousness level 6 are presumptive prison sentences, the committee felt that continuing to include misdemeanor DUI offenses in the criminal history scoring was unnecessary and would potentially increase sanctions more than they were comfortable with.

In addition, members discussed how eliminating the special scoring for felony DUI offenses is consistent with the larger CSTF recommendations to simplify criminal history scoring by eliminating as many special exceptions as possible. By raising the seriousness level for felony DUI and eliminating the special scoring for misdemeanor DUI offenses, the presumptive sentences for felony DUI would remain consistent with sentences under the SRA while eliminating complexity in the calculation of criminal history scores.

## Grouping Theft Offenses

The Class B and Class C committees identified two general types of theft offenses – those commensurate with Theft in the First or Second Degree, and those that are more serious than Theft in the First or Second Degree due to additional characteristics of the victim or the method in which the property offense occurred. In general, the committees believed that the theft offenses could be split into two categories and offenses in each category should be ranked together.

For class B offenses, the main consideration was the appropriate ranking of Theft in the First Degree. Offenses considered commensurate to Theft in the First Degree were then placed in the same rank. Offenses considered slightly more serious than Theft in the First Degree were then ranked one seriousness level higher than the base theft offense. For class C offenses, the main consideration was the appropriate ranking of Theft in the Second Degree. Offenses considered commensurate to Theft in the Second Degree were then placed in the same rank. Offenses considered slightly more serious than Theft in the Second Degree were then ranked one seriousness level higher than the base theft offense. The approach to grouping theft offenses was discussed and supported by the full SGC. Rather than considering the rank of each offense individually, the SGC discussed the appropriate placement of all offenses within the identified theft categories.

Group 1: The Class B committee identified the following offenses as **commensurate** to Theft in the First Degree (excluding firearms; RCW 9A.56.030):

- Malicious Mischief 1 (RCW 9A.48.070)
- Possession of a Stolen Vehicle (RCW 9A.56.068)
- Possession of Stolen Property 1 (other than firearm or motor vehicle) (RCW 9A.56.150)
- Theft of a Motor Vehicle (RCW 9A.56.065)
- Theft of Rental, Leased, Lease-purchased or Loaned Property (valued at $5,000 or more) (RCW 9A.56.096(5)(a))

Group 2: The Class B committee identified the following offenses as being slightly more serious than Theft in the First Degree (excluding firearms):

- Trafficking in Stolen Property 1 (RCW 9A.82.050)
- Mortgage Fraud (RCW 19.144.080)
- Organized Retail Theft 1 (RCW 9A.56.350(2))
- Retail Theft with Special Circumstances 1 (RCW 9A.56.360(2))
- Theft with Intent to Resell 1 (RCW 9A.56.340(2))

Group 3: Similarly, the Class C committee identified the following offenses as **commensurate** to Theft in the Second Degree:

- Possession of Stolen Property 2 (RCW 9A.56.160)
- Theft of Rental, Leased, Lease-purchased, or Loaned Property (valued at $750 - $5,000) (RCW 9A.56.096(5)(b))

Group 4: The Class C committee identified the following offenses as being slightly more serious than Theft in the Second Degree:

- Organized Retail Theft 2 (RCW 9A.56.350(3))
- Retail Theft with Special Circumstances 2 (RCW 9A.56.360(3))
- Theft with Intent to Resell 2 (RCW 9A.56.340(3))
- Theft from a Vulnerable Adult 2 (RCW 9A.56.400(2))

Given that the felony class committees met and deliberated independently, there were some offenses that were included in one of the two categories for one felony class group, but similar offenses were not included in one of the two categories for the other felony class group.[41] This was not necessarily an intentional decision when establishing the committees, but rather a result of the best use of time, expertise and resources given the large project scope and short project timeline.

Unfortunately, the limited time available for discussion by the full SGC precluded the opportunity to discuss and reconcile these differences. While the committees and full SGC started the groupings as indicated above, further discussion may be necessary to ensure consistency throughout the rankings.

The following offenses could be considered for inclusion in the aforementioned categories.

- Theft of Livestock 1 (RCW 9A.56.080)
- Theft of Livestock 2 (RCW 9A.56.083)
- Trafficking in Stolen Property 2 (RCW 9A.82.055)
- Electronic Data Theft (RCW 9A.90.100)
- Malicious Mischief 2 (RCW 9A.48.080)

These discussions also uncovered that the monetary value related to Theft with Intent to Resell 1 is still listed at $1,500 or more, whereas the values for Theft 1 and similar offenses were increased from $1,500 to $5,000 in 2009. Committee members proposed that this value be increased to $5,000 to be consistent with Theft 1.

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[41] This is true for all offenses except sex offenses. The SOPB reviewed and discussed all felony sex offenses which fall under all felony classifications.

**Identity theft**

The Class B committee discussed the appropriate placement of Identity Theft in the First Degree[42]. Ultimately, the committee moved forward with a single recommendation of seriousness level 5, but the members did note that this offense should commensurate to other theft offenses. Since there was only a single proposal (SL 5) submitted to the full SGC, this specific offense was not discussed at the full SGC meeting and the singular ranking proposal moved forward.

## Establishing a New Aggravated Theft Offense

Theft in Washington State is divided into three degrees largely based on the value of the property involved. Theft in the Third Degree[43]applies when the theft of property or services does not exceed $750 and is a gross misdemeanor. Theft in the Second Degree[44] applies when the theft of property or services is greater than $750 but does not exceed $5,000 and is a class C felony. Theft in the First Degree[45] applies when the theft of property or services is greater than $5,000 and is a class B felony.

The class B committee struggled with the decision of where to rank Theft 1 largely due to the wide range of harm that may be included in this offense. For example, theft of property valued at $5,100 is treated the same as theft of property valued at $500,000. While there was general support for less serious instances of Theft 1 remaining at a seriousness level 2, there was concern that more serious cases should be placed at a higher seriousness level.

The committee decided to put forward a suggestion that Theft 1 remain at seriousness level 2, but that a new degree of theft should be established for cases involving property valued more than $200,000. The committee felt this new "aggravated theft" could be placed at seriousness level 4.

The full SGC considered this recommendation, but ultimately felt it was unnecessary to establish a new level of theft offenses. Members noted that there are already statutes that allow the court to consider relative differences in theft cases. First, prosecutors may bring multiple charges of theft – one for each individual item – thereby increasing the criminal history score and the resulting sentence length. For example, if an individual stole four computers valued at $6,000 each, the prosecutor could elect to file four separate charges of Theft 1 for each computer rather than filing one charge for the collective theft and property value.

Second, there is an aggravating factor that can be used in particularly serious cases of theft. Specifically, Title 9, Chapter 9.94A, Section 535, Subsection 3.d indicates: "The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors: . . . (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense."[46]

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[42] RCW 9.35.020
[43] RCW 9A.56.050
[44] RCW 9A.56.040
[45] RCW 9A.56.030
[46] RCW 9.94A.535(3)(d)

Given the options for charging and currently established aggravating circumstances, some members felt establishing a new offense would unnecessarily complicate theft statutes without adding any unique improvements to the status quo.

## Monetary Thresholds for Property Crimes

Many property offenses have different misdemeanor and/or felony classifications based on the value of the property involved in the offense. Often, the monetary thresholds initially established remain unchanged over time, despite changes in inflation. As a result, punishments functionally increase over time for essentially the same behavior (e.g., stealing the same item for which the price has increased over time).

For example, unlawful trafficking in food stamps is a gross misdemeanor if the value is less than $100 and a class C felony offense if the value is greater than $100.[47] SGC members noted that the threshold for this offense has remained unchanged since 2004.[48] According to the U.S. Bureau of Labor Statistics, $100 in July 2004 has the same buying power as $162.12 in November 2023.[49] Given the relative change in value over time, some members felt that the monetary threshold for the felony version of unlawful trafficking in food stamps should be increased to maintain the intent of the differences in punishment established in 2004.

Some members suggested that the legislature should revisit all statutory monetary thresholds that determine different grades and seriousness levels of an offense including, but not limited to, unlawful trafficking in food stamps.

## Intimidating a Judge Added to Crime Against Persons List

While reviewing offenses in the Class B committee, members agreed that three intimidation offenses should be treated the same. Specifically, the group recommended that Intimidating a Judge,[50] Intimidating a Juror,[51] and Intimidating a Witness[52] should be ranked either at seriousness level 6 or 7.

Upon review, it was noted that Intimidation of a Juror and Intimidation of a Witness are both classified as a crime against a person, but Intimidation of a Judge is not.[53] Both the committee and the full SGC were surprised by this discrepancy and discussed the need to ensure that Intimidation of a Judge is treated similarly and added to the list of crimes against persons. During the discussion, members were unable to think of any reason to treat Intimidation of a Judge differently from Intimidation of a Juror or Witness.

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[47] RCW 9.91.142
[48] Senate Bill 5758, Chapter 53, Laws of 2003.
[49] U.S. Bureau of Labor Statistics. (n.d.). *CPI Inflation Calculator*. https://www.bls.gov/data/inflation_calculator.htm
[50] RCW 9A.72.160
[51] RCW 9A.72.130
[52] RCW 9A.72.110
[53] RCW 9.94A.411

While working on this assignment, the SOPB ran into several challenges. First, even with the guidelines and instructions on the assignment, discussing and reviewing sex offenses for re-ranking was difficult because of the unique harm this type of offending can cause, often with long-lasting impacts to victim(s). Second, multiple members expressed concern that the proposed sentencing grid eliminates the use of multipliers for sex offenses which could have particularly negative effects on child victims. Third, given that the SOPB had only a few months to conduct its review, and that ranked felony sex offenses fall in multiple offense classifications (classes A, B and C), members felt more time was needed for this assignment.

**The Elimination of Multipliers in the Proposed Grid**

The proposed sentencing grid eliminates the use of multipliers for sex offenses when calculating an individual's criminal history score. The current sentencing grid uses a 3 point multiplier scheme for sex offenses. These multipliers are often an important tool for prosecutors, particularly in cases involving child victims.

For the prosecution of sex offenses against children, current law requires that the child has to articulate the facts of the crime sufficient to allow the jury to identify and agree upon *each specific incident* of harm. Under the current grid, a multiplier of 3 is applied for every sex offense that an individual is charged with. So, for a child who articulates the factors of the crime sufficient to allow the jury to identify and agree to 2 offenses, under the current grid, a multiplier of 3 is applied to the criminal history score point for the second offense, resulting in a score of 3. Under the proposed grid, a child victim would have to articulate the facts of 4 individual crimes sufficient to allow the jury to identify and agree upon for the defendant to receive the same score. Similarly, under the current grid, the child would only need to articulate 4 specific instances of harm for the defendant's criminal history score to reach the highest level of 9. Using the proposed grid (without multipliers), the child would have to articulate and describe 10 specific instances of harm to reach the same level on the criminal history score. Members expressed concern about the negative impact this multiplier removal could have on victims, especially child victims.

**Consider Establishing a Separate Sentencing Grid for Sex Offenses**

To address the issues related to multipliers, some members suggested the Legislature could consider establishing a separate sentencing grid for sex offenses. Proponents discussed how sex offenses are inherently different from other types of crime, including:[54]

- the type of harm caused by sexual offending is unique and seen as some of the highest forms of harm, which can have long-lasting impacts;
- research has shown that specialized treatment is effective in reducing risk and recidivism for those who commit sex offenses; and
- recidivism rates for individuals convicted of a sex offense are some of the lowest of any crime category.

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[54] The SOPB has published several reports that covers these topics in further detail which can be found here.

In addition, treatment and treatment alternatives, such as the Special Sex Offender Sentencing Alternative (SSOSA),[55] could be potentially included directly on the new sex offense grid. This grid could be similar in nature to the separate drug grid used for offenses related to substance abuse.[56] Establishing a separate sentencing grid for sex offenses could alleviate and/or address the concerns and challenges the proposed grid poses. However, members expressed concern that, by creating a new sex offense grid, it could stray from the decisions made through the multi-year CSTF project. In addition, the creation of another grid could add to complexity in the sentencing system that the CSTF sought to reduce.

## Indecent Liberties without Forcible Compulsion

During the SOPB's discussion of the ranked version of Indecent Liberties without Forcible Compulsion,[57] it was noted that there is also an unranked version of this offense. The SOPB members thought that the subsections of this statute should not be treated differently: both the ranked and unranked offenses are about sexual intercourse with a related victim and an abuse of power in absence of consent and both should be similarly ranked. It was noted that when the victim is under 14, this offense becomes a sexually violent offense under Chapter 71.09 RCW. When the SGC conducted its review of unranked offenses, it only looked at unranked offenses and did not compare them to ranked offenses. Had it had time for a full comparison, the SGC likely would have come to the same conclusion as the SOPB and recommend that RCW 9A.44.100(1)(d-f) be ranked similarly to RCW 9A.44.100(1)(b-c).

## Move from Ranked to Unranked Offense

Two offenses included a proposal to be reduced from ranked to unranked felonies. Unlicensed Practice as an Insurance Professional[58] and Unlawful Transaction of Health Coverage as Health Maintenance Organization[59], were deemed by the committee as being more of a licensing/professional misconduct issue than a criminal issue. These statutes already allow for civil or administrative penalties/sanctions. Neither of these offenses have received a criminal conviction since their inception on July 27, 2003.

## Vehicle Prowl 1 and Residential Burglary

There was discussion about the similarities between Vehicle Prowl 1[60] and Residential Burglary.[61] A person is guilty of Vehicle Prowl 1 if they enter/remain unlawfully in a motor home or vessel with sleeping quarters or cooking facilities. A person is guilty of Residential Burglary if they enter/remain unlawfully in a dwelling other than a vehicle. Vehicle Prowl 1 is a class C offense ranked at seriousness level 1 while Residential Burglary is a class B offense ranked at seriousness level 4. While the type of domain differs, the behavior is the same. Many people live in motor homes, and those who do may be more likely to have a lower socioeconomic status, compounding the effects of victimization. Members believed that more consideration should be given to whether Vehicle Prowl 1 should comport with Residential Burglary.

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[55] RCW 9.94A.670
[56] RCW 9.94A.517
[57] RCW 9A.44.100
[58] RCW 48.17.063(2)
[59] RCW 48.46.033(3)
[60] RCW 9A.52.095
[61] RCW 9A.52.025

# Appendix A: Washington State Offense Classifications

| Classification Type | RCW | Definition |
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| Felony and Misdemeanor Classifications and Statutory Maximum Punishments | 9A.20.010 and 9A.20.021 | **RCW 9A.20.010**<br>(1) Classified Felonies. (a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.<br>    (b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:<br>        (i) Class A felony; or<br>        (ii) Class B felony; or<br>        (iii) Class C felony.<br>    (2) Misdemeanors and Gross Misdemeanors. (a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.<br>        (b) All crimes other than felonies and misdemeanors are gross misdemeanors.<br><br>**RCW 9A.20.021**<br>(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:<br>    (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;<br>    (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;<br>    (c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.<br><br>(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.<br><br>(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.<br>    (4) This section applies to only those crimes committed on or after July 1, 1984. |
| Offense Seriousness Level | 9.94A.520 and 9.94A.515 | The offense seriousness level is determined by the offense of conviction as articulated in Table 2 of RCW 9.94A.515 |

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| Violent and Serious Violent | 9.94A.030(58) and 9.94A.030(46) | (58) "Violent offense" means:<br>(a) Any of the following felonies:<br>(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;<br>(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;<br>(iii) Manslaughter in the first degree;<br>(iv) Manslaughter in the second degree;<br>(v) Indecent liberties if committed by forcible compulsion;<br>(vi) Kidnapping in the second degree;<br>(vii) Arson in the second degree;<br>(viii) Assault in the second degree;<br>(ix) Assault of a child in the second degree;<br>(x) Extortion in the first degree;<br>(xi) Robbery in the second degree;<br>(xii) Drive-by shooting;<br>(xiii) 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; and<br>(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW **46.61.502**, or by the operation of any vehicle in a reckless manner;<br>(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and<br>(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.<br><br>(46) "Serious violent offense" is a subcategory of violent offense and means:<br>(a)(i) Murder in the first degree;<br>(ii) Homicide by abuse;<br>(iii) Murder in the second degree;<br>(iv) Manslaughter in the first degree;<br>(v) Assault in the first degree;<br>(vi) Kidnapping in the first degree;<br>(vii) Rape in the first degree;<br>(viii) Assault of a child in the first degree; or<br>(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or<br>(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection. |
| Most Serious Offense | 9.94A.030(32) | (32) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:<br>(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;<br>(b) Assault in the second degree;<br>(c) Assault of a child in the second degree; |

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| | | (d) Child molestation in the second degree;<br>(e) Controlled substance homicide;<br>(f) Extortion in the first degree;<br>(g) Incest when committed against a child under age 14;<br>(h) Indecent liberties;<br>(i) Kidnapping in the second degree;<br>(j) Leading organized crime;<br>(k) Manslaughter in the first degree;<br>(l) Manslaughter in the second degree;<br>(m) Promoting prostitution in the first degree;<br>(n) Rape in the third degree;<br>(o) Sexual exploitation;<br>(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;<br>(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 as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;<br>(r) Any other class B felony offense with a finding of sexual motivation;<br>(s) Any other felony with a deadly weapon verdict under RCW 9.94A.825;<br>(t) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;<br>(u)(i) A prior conviction for indecent liberties under RCW 9A.44.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;<br>(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of 14; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997;<br>(v) Any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was 10 years or more; provided that the out-of-state felony offense must be comparable to a felony offense under this title and Title 9A RCW and the out-of-state definition of sexual motivation must be comparable to the definition of sexual motivation contained in this section. |
| Crime against a person | 9.94A.411 | See table provided in RCW 9.94A.411 for categorization of crimes against persons. |
| Crime against property | 9.94A.411 | See table provided in RCW 9.94A.411 for categorization of crimes against property. |

| Drug offense | 9.94A.030(22) | Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403). |
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| Felony Traffic Offense | 9.94A.030(26) | Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) |
| Sex offense | 9.94A.030(47) | (47) "Sex offense" means:<br>(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;<br>(ii) A violation of RCW 9A.64.020;<br>(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;<br>(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or<br>(v) A felony violation of RCW 9A.44.132(1) (failure to register as a sex offender) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130 prior to June 10, 2010, on at least one prior occasion;<br>(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;<br>(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or<br>(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection. |