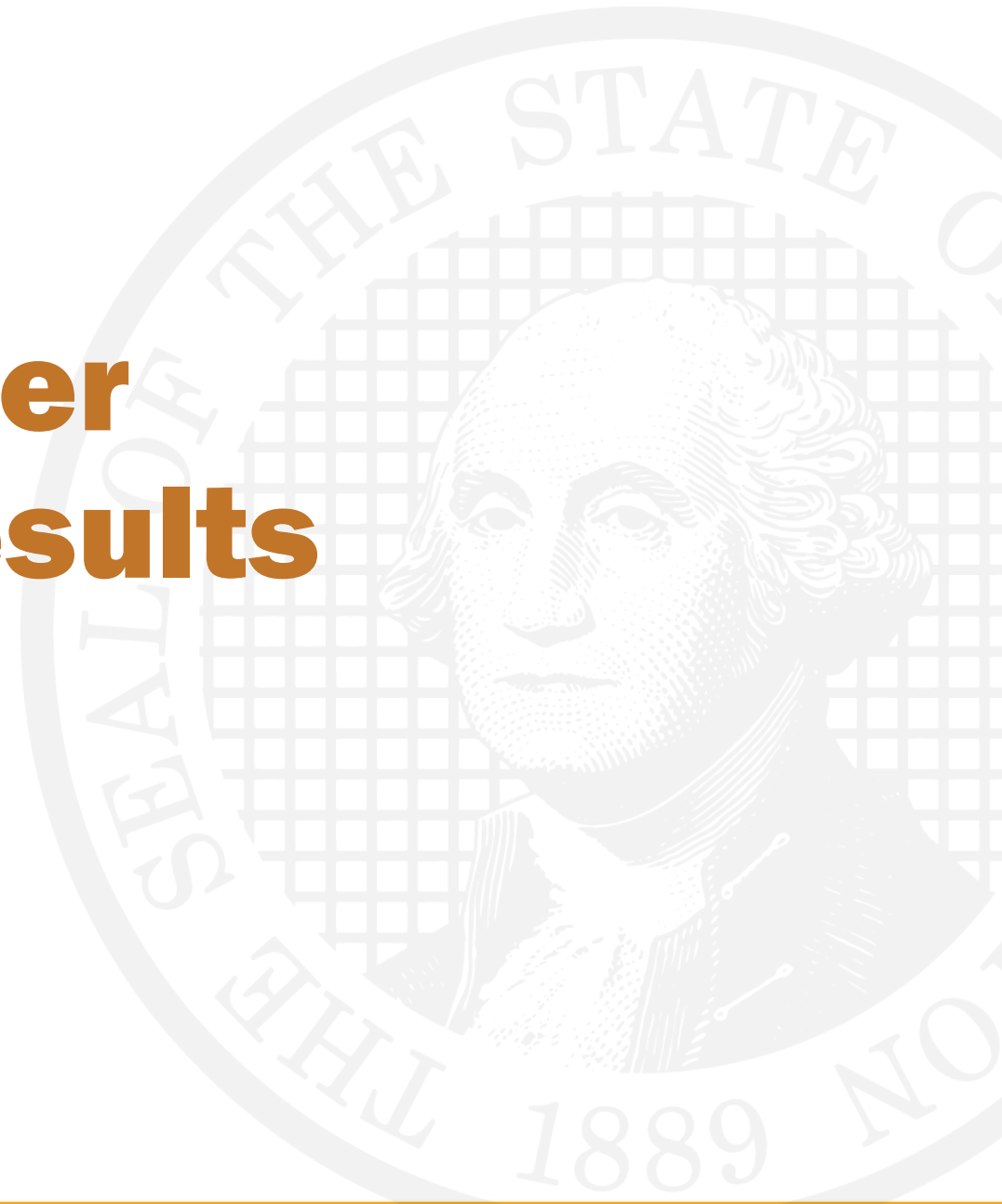


October 10, 2025

# First Time Offender Waiver Survey Results



Sentencing Guidelines Commission



Q1: As an officer of the court, are there barriers to you considering or using the First Time Offender Waiver sentencing alternative? If yes, please describe those barriers.

Responses:

Defense Attorneys = 53

Prosecuting Attorneys = 12

Superior Court Judges = 11

**A: Standard sentence range is less than FTOW sentence; no incentive to participate (N=30)**

"The barrier I see most often is with an offender score of 0 the standard sentencing range on a number of class C felonies is 0-90 days and the offender would not be subject to community custody. Therefore, there is no benefit to taking a FTOW because it would only result in the offender being sentenced under the same range and make them subject to community custody for 6-12 months."

"There are times as a prosecutor I feel the FTOW is not an appropriate sentence because defense wants to request the FTOW on multiple filed offenses at the same sentencing. For a single non-violent/property offenses the standard ranges are already so low that the FTOW is not necessary. The FTOW is really only beneficial for defendants on SRA level 4 or greater offenses and very few of those qualify currently. It's more often desired by defense when the low end of the standard range exceeds 3 months so that the defendant can actually get a benefit or discount from the FTOW reducing his/her sentence."

**A: Prosecutors won't agree to use it; Judges are reluctant to use it; Attorneys don't ask to use it (N=25)**

"The biggest barrier is prosecutorial discretion. In many cases, in order to qualify, it is necessary for the prosecutor to reduce the charges, and the prosecutor's office will often not permit the defense to ask for FTOW as part of the plea agreement."

"Yes, there are barriers. Many judges seem reluctant to impose a FTOW sentence, especially at a contested sentencing. Many prosecutors seem reluctant to recommend a FTOW sentence, believing a standard range sentence makes more sense."

**A: Eligibility criteria too limiting (N=18)**

"Yes. Juvenile Felony Dispositions. I do not believe that a juvenile conviction should count against a first time offender waiver."

"A high percentage of my cases are not eligible. For many others which ARE eligible it would actively disadvantage the client because FTO creates community custody obligations which wouldn't exist for a given property/other crime. So, it's really only regularly useful for assault 3 or burg 2. The restriction on violent offenses which are (at least sometimes) barely violent--like robbery 2--really limits use."

Q1: As an officer of the court, are there barriers to you considering or using the First Time Offender Waiver sentencing alternative? If yes, please describe those barriers.

Responses:

Defense Attorneys = 53

Prosecuting Attorneys = 12

Superior Court Judges = 11

**A: No barriers; Use it frequently (N=13)**

**A: Defendant concerned if able to comply with community custody obligations; minor violation incarceration is disruptive to defendant/family; no supervision compliance credit; delay in seeking vacation of conviction (N=10)**

**A: Credit for Time Served covers sentence (N=7)**

**A: Cost of evaluations and/or treatment (N=2)**

**Other Interesting Comments:**

> “There should be more treatment options. Using this for SUD or MH issues is a great resolution. Hoping I can use this for DV treatment, gambling addiction, etc.”

> “Limited access to treatment resources.”

Q2: What are the three most common reasons you believe attorneys and/or judges do not pursue the FTOW sentencing alternative when a case is eligible? (reasons may be the same or different than any barriers noted above)

Responses:

Defense Attorneys = 53

Prosecuting Attorneys = 12

Superior Court Judges = 11

### **A: No benefit to using FTOW compared to standard range sentence; Enough Credit for Time Served; Electronic Home Monitoring eligible (N=45)**

“Those crimes that *are* eligible frequently are Level I, II, or III felonies, with standard ranges of 0 - 60 days, 0 - 90 days, or 1 - 3 months (with an offender score of 0), respectively. The first time offender waiver, replacing the standard range with 0 - 90 days, doesn't significantly change the range, and often adds a term of community custody where one would not otherwise occur. In other words, the sorts of situations in which a FTOW pencils out are relatively rare. And when it would make sense--say, a case involving multiple counts of identity theft--often other resolutions provide a better fit--say, plead to a single count, dismiss the others; or a therapeutic court. I have used it when it made sense. But it simply isn't the best option for most cases, even when technically eligible.”

“I am a public defender and if someone is eligible I absolutely bring it up, but I always make sure the client knows about likely community custody requirements if FTOW is given. I would estimate that about 80% of my previously FTOW eligible clients have balked at an FTOW because of 6-12m of community custody is perceived to be disproportionate to a relatively brief jail sentence of 0-60 or 0-90d. Most clients of mine would rather ask for CFTS, convert any remaining time to EHD, or they have already overserved their standard range because of ridiculous bail decisions.”

### **A: Addition of community custody requirement (N=39)**

“The most common reason I don't pursue this when my client is eligible is when it's just giving the State an easy way to impose a longer community custody. A lot of eligible clients are looking at a range that starts with a low end of either 0, 1, 2, or 3 months and might not come with any community custody. If that's the case, why would we want a FTOW which would impose the same sentence but add additional consequences.”

“(3) The Community Custody condition for FTOW places more requirements/supervision on the client that would not be placed on them, if they were sentenced on the offense w/o FTOW.”

“Juice isn't worth the squeeze, for most qualifying individuals the work of being on DOC is not worth a fairly minor reduction in possible incarceration time.”

“1) Defendants who have no prior felonies who commit offenses that qualify for FTOW have such low standard ranges the defendant does not want to be on community custody for 12 months when the offense they committed typically would otherwise not carry community custody. Even if the offense does carry community custody, a smart defense attorney will advise their client DOC is likely to close community custody down quickly on a straight plea for someone with no priors, and DOC can't do that on a FTOW. Defense will advise them it would be easier to just do the time up front, which will likely be 20-30 days for a first time property crime, and not have the hassle of supervision where you can get warrants and get arrested post-conviction.”

Q2: What are the three most common reasons you believe attorneys and/or judges do not pursue the FTOW sentencing alternative when a case is eligible? (reasons may be the same or different than any barriers noted above)

Responses:

Defense Attorneys = 53

Prosecuting Attorneys = 12

Superior Court Judges = 11

**A: Potential for Trial Tax (judges/prosecutors unwilling to impose FTOW after defendant exercises right to go to trial); Prosecutors deny as part of plea deal (N=15)**

“#1 - A negotiated reduction in charges was conditioned on an agreement NOT to request a FTOW sentence.”

“And prosecutors weaponize it on cases where client could strike a low end deal to try to stick Community Custody on them. So a lot of times, the existence of the FTOW hurts a client who is eligible for it, I'd almost rather they weren't eligible so the prosecutor couldn't play that card.”

“The State has already recommended a reduction and as part of that recommendation objects to an FTOW.”

**A: Better option is available (N=11)**

“2) For motivated defendants needing treatment, there are preplea options like drug court or mental health court that are more attractive options then pleading guilty.”

“And when it would make sense--say, a case involving multiple counts of identity theft--often other resolutions provide a better fit--say, plead to a single count, dismiss the others; or a therapeutic court.”

“3) Gross misdemeanors are more robust, are outside the SRA so we can craft a sentence that actually addresses their client's problems, and supervision through district court tends to be more robust.”

**A: Many offenses are ineligible (N=10)**

**A: FTOW not appropriate for offense; deemed not enough punishment (N=9)**

**A: FTOW requires guilty plea; results in a felony (N=7)**

**A: FTOW not thought about (N=7)**

**A: Judges are unpredictable/hesitant in granting of FTOW (N=6)**

**A: Defendant not ready for treatment or unlikely to be successful complying with requirements (N=5)**

**A: Lack of available services (N=2)**

Q3: Please provide suggestions on ways the FTOW could be made more functional to you and/or the client(s) that you represent as an officer of the court.

Responses:

Defense Attorneys = 51

Prosecuting Attorneys = 11

Superior Court Judges = 8

**A: Expansion of offenses eligible (N=25) [Assault 2 and Robbery 2 most mentioned]**

**A: Create a different level of FTOW for more serious offenses (N=5)**

“Increase the available offense in relation to risk of re-offense.”

“Expand eligibility. Actually incentivize use for people whose ranges would make a SR sentence more advantageous to them.”

“I think it would be helpful to have the option of a waiver the first time anyone is looking at over 12 months in custody (i.e. any prison time) or anytime that cannot be completed on EHD. This may mean it's not the person's first felony.”

“Make an alternate FTOW for which violent offenses are eligible.”

“Perhaps there could be a FTOW+ with more guardrails for those first offenses that happen to be “violent” under the SRA.”

“Get a second level for more serious crimes that involves up to 12 months of CC but without the in custody time.”

**A: Allow record to be dismissed if successful (N=12)**

“FTOW would be much more attractive if a successful FTOW resulted in dismissal and allowed a defendant with no felony criminal history to keep their record clean-like a diversion opportunity. Legislation can be written in a way that if the defendant has a future felony crime that the FTOW dismissed/diverted crime will score if the wash-out period hasn't expired, which will discourage recidivism.”

“I would love there to be a mechanism to make FTOW's more similar to deferred sentences where if the sentence and community custody was completed it would result in withdrawing the guilty plea, dismissing and vacating the case. That would provide a tremendous incentive to have clients take a FTOW. It would also provide additional incentive to complete programming and/or treatment. Even if the period of community custody were longer, the benefit to have a felony removed from your record at the end of the term would be so beneficial.”

“1. Allow the guilty finding to be either vacated (carrying same legal effect as a pardon) or reduced to a misdemeanor upon successful completion of FTOW.”

“The FTOW could be made more functional if we limited its availability and treated it more like a deferral in district court. If the offender had to comply with 24 months of community custody and after the 24 months it resulted in a dismissal. This would provide a greater incentive to not reoffend and seek treatment.”

**A: Make FTOW pre-trial diversion by judge instead of post-conviction (N=2)**

**A: Reduce FTOW to misdemeanor sentence (N=2)**

Q3: Please provide suggestions on ways the FTOW could be made more functional to you and/or the client(s) that you represent as an officer of the court.

Responses:

Defense Attorneys = 51

Prosecuting Attorneys = 11

Superior Court Judges = 8

### **A: Remove the community custody requirement; discretion in issuing jail and community custody terms (N=12)**

"Expand the confinement time in certain situations. For example, if someone is facing 24 months of confinement, have the FTOW range be 90-180 days, rather than 0-90 days. Have the imposition of community custody be discretionary with the court."

"... if underlying charge does not carry Community Custody, allow the court to not place client on community custody or make FTOW not carry community custody, if the underlying charge does not require community custody."

"Also, having the maximum be different for different levels of crimes. 0 to 30, 60, or 90 days."

"If this FTOW required a reduction to a misdemeanor, or did not require DOC supervision, I think I would suggest it's use to clients more often."

### **A: No changes suggested; it is fine (N=11)**

**A: Remove or reform prosecutor and/or judicial discretion (N=6)**

**A: Make FTOW presumptive/non-discretionary (N=5)**

**A: Have FTOW discussion earlier in the process (N=5)**

**A: Train attorneys and judges on alternatives (N=5)**

**A: Clarify if FTOW applies to cases with multiple felony offenses (N=3)**

**A: Remove juvenile felonies from eligibility (N=2) [1=yes; 1=no]**

**A: Improve DOC resources for supervisees (N=4)**

**A: Provide funding for treatment and evaluations (N=1)**

**A: Allow a second FTOW after a washout period (N=1)**

Q3: Please provide suggestions on ways the FTOW could be made more functional to you and/or the client(s) that you represent as an officer of the court.

Responses:

Defense Attorneys = 51

Prosecuting Attorneys = 11

Superior Court Judges = 8

### Other interesting comments:

- > Modify out of state criminal history conviction to only include convictions equivalent to a felony in WA
- > Change name as “waiver” leads defendants to believe it is waiving the felony.



Q4: Are there particular aspects of the FTOW sentencing alternative that you believe are helpful or useful? If yes, please describe those aspects.

Responses:

Defense Attorneys =

Prosecuting Attorneys =

Superior Court Judges =

### **A: Less incarceration (N=30)**

"I have found it useful as an alternative to seeking an exceptional sentence downward under RCW 9.94A.535(1)(g); to mitigate the impact of scorable non-felonies;"

"Currently FTOW is most useful in the cases of felony VNCO's where the client's offender score is high because of scored misdemeanors so client is facing a prison sentence notwithstanding the fact that this is their very first felony."

"Gives offenders access to substance abuse treatment and support in sobriety if they are on community custody as part of the FTOW. Gets lower level offenders out of jail sooner and back into society and treatment (potentially) sooner, which reduces the negative impact globally that jail time can have on their lives."

"It's helpful to have a trade off of custody time in exchange for community custody time."

### **A: Community custody when it otherwise wouldn't apply. (N=20)**

"I like the ability to add community custody to first offense property crimes."

"It is helpful that an FTOW allows the parties to recommend a term of community custody. It allows for more room to negotiate for people who may not benefit from serving custodial time but need some form of monitoring."

"DOC supervision through community custody which allows defendants to perform community service work instead of being incarcerated or suffering the expense of EHM."

"...and to add a term of community custody where otherwise unavailable on an amended charge pursuant to In re Barr."

"Gives offenders access to substance abuse treatment and support in sobriety if they are on community custody as part of the FTOW."

### **A: Gets people into treatment. (N=15)**

"The treatment program. It allows for someone to get a lenient sentence, but get them the treatment they need. The vast majority of crimes are tied to a SUD, MH, or other issue that needs to be addressed. "

"The potential for treatment - where it is otherwise unavailable is very important."

"Treatment, and assistance with finding it and enrolling in it."

## Multiple Separate Offenses Filed at Same Time

### Comments:

> “I recommend that the language describing the alternative expressly indicate that it applies to a person pleading to multiple felonies at the same time.”

> “FTOWs should not be allowed for people who are pleading to multiple separate and distinct crimes. Currently if a defendant commits 5 separate burglaries over the course of one year and the State charges them all at the same time under separate case numbers, the defendant is technically eligible for an FTOW. The State could combine all 5 acts into one charging document, and the defendant would be eligible for an FTOW even though PGAC'ing to the charges would have the defendant score over a 9. I do not believe this could be how the legislature intended FTOWs to work but it is a resolution that defense has asked me for multiple times. Leaving this option open, rewards individuals who commit a series of crimes for their "first offense" rather than providing an alternative for true first-time offenders. .”

“There are times as a prosecutor I feel the FTOW is not an appropriate sentence because defense wants to request the FTOW on multiple filed offenses at the same sentencing.”

“Also, some judges will decline to grant a FTO if the client is pleading to multiple crimes, even though the clients have no record.”

“An FTOW may be available to individuals who have multiple open cases but no priors. I don't think it is appropriate, or was the legislatures intent, to allow individuals who have committed, for example three separate crimes all near in time, to take advantage of an FTOW simply because they did not spread out their criminal actions.”

“Right now the Court is permitted to waive the standard range and impose 0-90 days at sentencing regardless of whether the defendant is convicted of one count or multiple counts (or multiple filed cases from different dates of violation but sentenced on the same date). I think it would be beneficial to modify the FTOW statute to give the Court discretion that if the Court is sentencing a defendant for crimes committed on more than one date or multiple offenses that the Court can waive the standard range and impose 0-12 months or some expanded category such as up to the low end of the standard range) than 0-90 days and still include 12 months of community custody. This would be a beneficial tool for negotiations and incentivize a defendant to resolve all his/her cases at one time with one sentencing.”

“helpful when client is facing multiple charges and I can't get the prosecutor's office to accept the client into an alternative court.”

“FTOW in my experience seem to be most helpful and sought after for clients who are charged with multiple current offenses with no criminal history, so the prospect of waiving the as charged standard range is perceived to be a real benefit and actual waiver.”