

# Racial and Ethnic Impact Analysis

SSB 5056, 2024

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**Forecasting and Research**  
Office of Financial Management  
February 2024

Washington State Office of Financial Management



Public Safety Policy & Research Center

# Contents

<b>Executive Summary .....</b>	<b>1</b>
SSB 5056 REIS.....	1
<b>Racial and Ethnic Impact Assessment.....</b>	<b>2</b>
Data.....	3
Findings.....	4
Table 1. Sample Characteristics .....	4
Figure 2. Percent of FY23 Class B Sentences Eligible for Habitual Property Offender Enhancement, by Race.....	5
Figure 1. Percent of FY23 Sentences Eligible for Habitual Property Offender Enhancement, by Race .....	5
<b>Conclusions .....</b>	<b>6</b>

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**Suggested Citation:** Knoth-Peterson, L. (2024). *Racial and Ethnic Impact Analysis: SSB 5056, 2024*. Office of Financial Management; Public Safety Policy and Research Center. Olympia, WA.

## Executive Summary

Racial and Ethnic Impact Statements (REIS) provide information related to the potential impacts of a policy change on individuals from different racial and/or ethnic backgrounds. The purpose of these statements is to provide additional information to policymakers to aid in identifying potential unwanted disparities in the criminal justice system. The Washington State Legislature has previously indicated support for the production of REIS in various areas, including criminal justice. With the formation of the new Public Safety Policy and Research Center (PSPRC) at the Office of Financial Management (OFM) we are able to provide this additional information in a limited capacity for the 2024 Legislative Session.

### SSB 5056 REIS

The PSPRC examined the potential for disproportionate impacts resulting from Substitute Senate Bill 5056. Our assessment of disproportionality examines whether the percent of individuals affected by the policy is equal across race categories. Using data from sentences imposed in FY 2023, the PSPRC concludes the following:

- Our analyses suggest that SSB 5056 has the potential to lead to disproportionately longer sentences for defendants of color, particularly Black and Asian/Native Hawaiian/Pacific Islander defendants.
- Disparate impacts are most likely to be seen with Class B felonies.
- The discretionary nature of sentencing enhancements and their application may lead to more significant disparities by race.
- Due to the discretionary nature of sentencing enhancements, we cannot reliably estimate the magnitude of disparity that will likely result from SSB 5056.

## Bill Summary

Substitute Senate Bill 5056 would establish a new habitual property offender special allegation that prosecutors may file to increase an individual's sentence. The habitual property offender statute would apply if:

1. The current conviction is for Residential Burglary, Burglary 2, Theft 1, Theft 2, Theft of a firearm, Unlawful Issuance of Checks or Drafts, Organized Retail Theft, Theft with Special Circumstances, or Mail Theft;
2. The defendant has a criminal history score of nine or higher;
3. The defendant's criminal history score includes at least five points from any combination of the aforementioned property crimes; and
4. The defendant has committed at least three property offenses within 180 days.

If there is sufficient evidence for the habitual property offender enhancement, an additional term of incarceration is added to the standard sentencing range. For Class B felonies, 24 months are added to the standard sentencing range and for Class C felonies, 12 months are added to the standard sentencing range. The final sentence may not exceed the statutory maximum (120 months for Class B felonies and 60 months for Class C felonies).

## Racial and Ethnic Impact Assessment

The Caseload Forecast Council (CFC) submitted an indeterminate fiscal note. It is not possible to identify the exact populations who would be affected by a new habitual property offender for several reasons.

1. **Discretion.** It is unknown if or when prosecutors will seek a filing for the new habitual property offender enhancement. Similarly, it is unknown if or when judges will use their discretion to escalate the sentence even when a special allegation is filed and pled or proven with the court.
2. **Criminal History Score.** Current calculations for an individual's criminal history score include not only prior convictions, but also current convictions. Defendants may have a criminal history score of 9+ as a result of other current offenses and not prior convictions. It is unclear from the language in the bill if the intent is to apply the special allegation even if the qualifying points in the criminal history score come from other current offenses and not prior convictions (see section 2(2)).
3. **Sentencing Alternatives.** The bill does not include language that precludes individuals who meet the habitual property offender definition from being sentenced to a sentencing alternative.

Although it is not possible to identify the exact cases in which the new enhancement would apply, we can review past sentencing data to provide insight into the potential impact of the new enhancement.

## Data

Data comes from the CFC's Judgement and Sentence database. Washington State Superior Courts report final sentencing information for all felony sentences recorded on a judgement and sentence (J&S) form. These forms are collected and maintained by the CFC. These data include information about the convicted offenses, criminal history scores, and resulting sentences.

We selected sentences imposed in Fiscal Year 2023 where the most serious offense was one of the offenses qualifying for the habitual property offender enhancement and that included a criminal history score of nine or greater.<sup>1</sup> We excluded exceptional cases and cases disposed with a sentencing alternative other than prison-based DOSA.<sup>2</sup> Due to limitations in the data, we were unable to distinguish which cases included criminal history scoring that included at least five points from the eligible property offenses as well as which cases included at least three property offenses within 180 days.<sup>3</sup>

### Race Classification

The CFC data reflect the information conveyed by Washington State Superior Courts on the J&S forms. To date, each court has the discretion to design their own J&S form. In addition, the type of information recorded varies by court, particularly regarding race. For FY 2023, the CFC defaulted to reporting Hispanic as a race. For example, if a court reports an individual's race as white and their ethnicity as Hispanic, they are coded as Hispanic in the singular race/ethnicity indicator. If a court reports an individual's race as Hispanic, they are recorded as Hispanic. If ethnicity is not provided and a race is reported, that race is recorded.

Currently, the PSPRC is unable to connect the CFC data to other data sources to verify or correct the race data reported in the J&S database.<sup>4</sup> As a result, we do not have fully reliable indicators of race and ethnicity. In addition, when individuals are recorded as Hispanic in the CFC data, it is unclear what racial category they should be included in. For purposes of this racial impact assessment, we included the

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<sup>1</sup> **NOTE:** Our final data likely oversamples cases that may be affected since not all the included cases will meet the last two eligibility criteria. However, we believe these analyses are still helpful to understand potential racial impacts. If anything, it is likely that the findings are conservative estimates of potential racial disproportionality. Prior research indicates that racial disproportionality in prison populations is driven, in large part, by disparate arrest and conviction records, especially in states that use sentencing guidelines. It is possible that including the final eligibility criteria would reduce the number of whites in our sample at a greater rate than people of color.

<sup>2</sup> SSB 5056 does not preclude eligible individuals from being issued a sentencing alternative. For some alternatives, such as the First Time Offender Waiver, changes to the standard range would not change the incarceration sentence. However, under prison-based DOSA, the increased sentencing range would apply and would affect the resulting incarceration sentence.

<sup>3</sup> If the PSPRC were able to connect the CFC data to the Washington State Institute for Public Policy's Criminal History Database, we could more accurately identify case and defendant characteristics to increase the reliability of future racial equity impact statements.

<sup>4</sup> Beginning in FY 2024, the CFC has modified their reporting of data to maintain separate indicators for race and ethnicity. It is important to note that the underreporting of ethnicity is a result of differences in county-level reporting and not the CFC. While the CFC maintains the final J&S database, they are not responsible for the reporting of original data submitted to the database.

findings only for defendants classified as white, Black, Asian/Native Hawaiian/Pacific Islander, and Native American. We excluded sentences for which the defendant was recorded with an unknown race and those who were recorded with Hispanic ethnicity, but an unknown race.

## Findings

Overall, there were 2,360 sentences in Fiscal Year 2023 where the most serious offense was Residential Burglary, Burglary 2, Theft 1, Theft 2, Theft of a firearm, Unlawful Issuance of Checks or Drafts, Organized Retail Theft, Theft with Special Circumstances, or Mail Theft. Table 1 reports the percent of cases by criminal history score, race, and felony class.

Table 1. Sample Characteristics

	N	%
<b>Criminal history score</b>		
<9	1,976	84%
9 or more	384	16%
<b>Race</b>		
Unknown	195	8%
White	1,569	66%
Black	288	12%
Asian/Native Hawaiian/ Pacific Islander	55	2%
Native American	122	5%
Hispanic (unknown race)	131	6%
<b>Felony Class (Most Serious)</b>		
Class B	1,493	63%
Class C	867	37%

Black and Asian/Native Hawaiian/Pacific Islanders were more likely than whites and Native Americans to be eligible for the habitual property offender enhancement.

Differences by race were most pronounced for sentences associated with Class B felonies. Within the sample, only 9.1% of sentences for a Class C felony had a criminal history score of 9 or more. On the other hand, 20.4% of sentences for a Class B felony had a criminal history score of 9 or more. Thus, we expect that the habitual property offender enhancement would be more likely to apply in cases associated with Class B felonies than Class C felonies. For Class B felonies, Black and Asian/Native Hawaiian/Pacific Islanders were more likely to be eligible for the habitual property offender enhancement than whites and Native Americans, and these differences were more significant than the differences

identified when analyzing all of the applicable Class C and Class B offenses.

Among the eligible offenses, Class B felonies are consistently ranked higher than Class C felonies. Accordingly, standard sentence ranges for Class B felonies are longer than the standard sentence ranges for Class C felonies. In addition, the enhancement for Class B felonies is 24 months, double the enhancement for Class C felonies. Thus, racial disproportionality in the likely application of the enhancement among Class B felonies would be particularly problematic for racial disparity in sentencing outcomes.

Figure 1. Percent of FY23 Sentences Eligible for Habitual Property Offender Enhancement, by Race

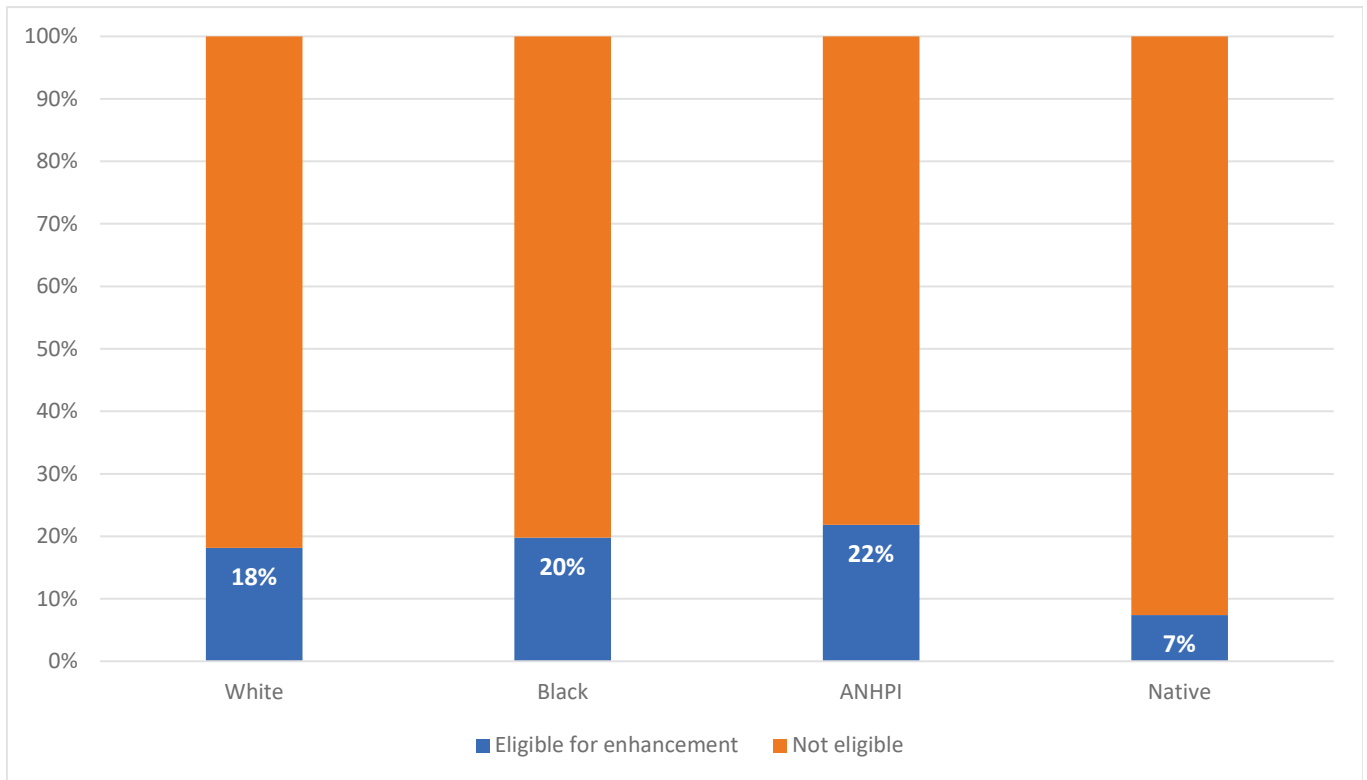
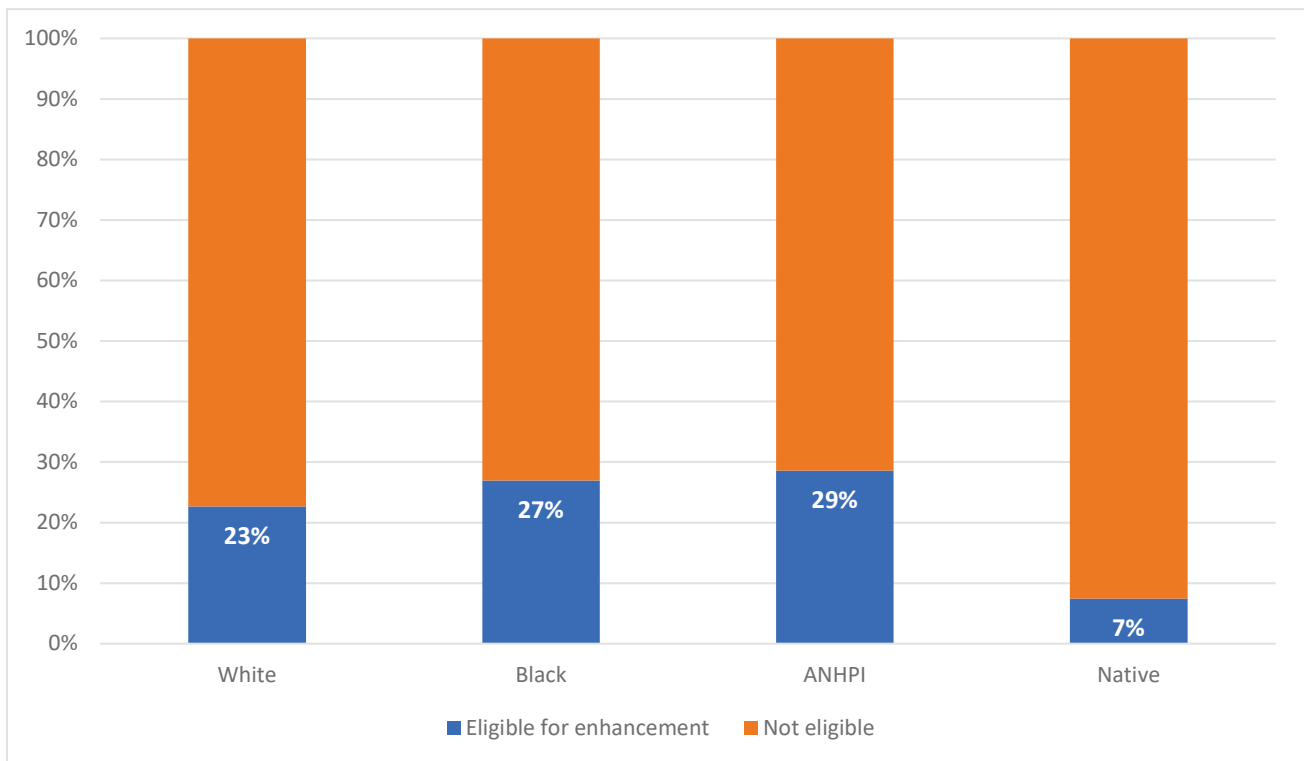


Figure 2. Percent of FY23 Class B Sentences Eligible for Habitual Property Offender Enhancement, by Race



## Conclusions

Initial analyses suggest that SSB 5056 could disproportionately affect defendants of color, particular Black and Asian/Native Hawaiian/Pacific Islanders. These analyses assume that the only source of disproportionality would come from the underlying differences in offending behaviors by race (i.e., defendants of color who commit these offenses having lengthier criminal histories).

We are unable to predict the exact sentences that would be affected by SSB 5056 due to the discretionary application of the habitual property offender special allegation and limitations in the presently available data. Prior research suggests that discretionary charging decisions, particularly with mandatory minimums, have a substantial effect on racial disparity in sentencing.<sup>5</sup> The decision to file for the habitual property offender special allegation is akin to the decision to file a charge with a mandatory minimum. The enhancement increases the minimum and maximum of the standard range by a prescribed amount. As a result, defendants would only avoid serving the full term of incarceration associated with the enhancement, if they also receive an exceptional mitigated sentence. This occurrence is unlikely.

If there is disparity in the decision to file a habitual property offender special allegation, we expect that the analyses in the current report would be an underestimate of the differential effects by race. We cannot conclusively estimate the likelihood that SSB 5056 would increase, decrease, or have no impact on racial disproportionality. However, these preliminary analyses do suggest that the changes have the potential to lead to disproportionately longer sentences for defendants of color.

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<sup>5</sup> Starr, S.B., and Rehavi, M.M. (2013). Mandatory sentencing and racial disparity, assessing the role of prosecutors and the effects of Booker. *Yale Law Journal*, 123(1):2-80.