

1. THE SENTENCING COMMISSION

Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

In 1981, the Washington legislature enacted the Sentencing Reform Act of 1981, establishing the Washington Sentencing Guidelines Commission.¹ The Commission remained in the same form until 2011, when the legislature eliminated the Commission as an independent state agency, placed responsibility for statistical analysis and sentencing manuals with the Caseload Forecast Council, and placed the Commission, along with the newly created Sex Offender Policy Board, within the Office of Financial Management in an advisory role.² However, the commission retains the same role that it has had since 1981; its role has always been advisory to the legislature.³

Q. Membership: who appoints them, for what terms, with what required qualifications?

The Commission consists of twenty voting members, four of whom are ex-officio, and sixteen who are appointed by the Governor subject to senate confirmation. All appointed members serve three year terms, or until a successor is appointed and confirmed. In making the appointments, the governor must try to ensure that commission membership includes adequate representation and expertise from both the adult criminal justice system and the juvenile justice system. The Governor designates one of the twenty to serve as chairperson.

The four ex-officio voting members are:

- the head of the state agency having general responsibility for adult correction programs;
- the director of financial management, or that person's designee;
- the chair of the indeterminate sentencing review board; and
- the head of the state agency, or designee, having responsibility for juvenile corrections programs.

The sixteen appointed members are:

- two prosecuting attorneys, after seeking recommendation from Washington prosecutors;
- two attorneys with particular expertise in defense work, after seeking recommendations from the Washington state bar association;
- four persons who are superior court judges, after seeking recommendations from the superior court judges' association;
- one person who is the chief law enforcement officer of a county or city, after seeking recommendations from the Washington association of sheriffs and police chiefs;
- four members of the public who are not prosecutors, defense attorneys, judges, or law enforcement officers, one of whom is a victim of crime or a crime victims' advocate, after seeking recommendations from the office of crime victims advocacy and other like organizations for the member who is a victim or a crime victims advocate;
- one person who is an elected official of a county government, other than a prosecuting attorney or sheriff, after seeking recommendations from the Washington association of counties;

¹ 1981 Wash. Sess. Laws 519–34.

² 2011 Wash. Sess. Laws 3498–3503.

³ Wash. State Adult Sentencing Guidelines Manual 27 (2018).

- one person who is an elected official of a city government, after seeking recommendations from the Washington city association; and
- one person who is an administrator of juvenile court services, after seeking recommendations from the Washington association of juvenile court administrators.

Additionally, the Speaker of the House and the President of the Senate may each appoint two nonvoting members to the commission, one from each of the two largest caucuses in each house. The members shall serve two-year terms, or until they cease to be members of the house from which they were appointed.⁴

Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?

In 2011, the legislature eliminated the Commission as an independent state agency, placed responsibility for statistical analysis and sentencing manuals with the Caseload Forecast Council, and placed the Commission, along with the newly created Sex Offender Policy Board, within the Office of Financial Management. The Commission retained its advisory role to the legislature.⁵

Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

The Caseload Forecast Council, the agency responsible for publishing the guidelines, has nine dedicated staff members at the time of this writing.⁶ The commission, post-relocation to the Office of Financial Management, has no dedicated staff.

Q. What is the commission's current statutory mandate?

The Commission must advise the governor and legislature on issues related to adult and juvenile sentencing, and to suggest modifications or revisions to current guidelines where necessary.⁷

Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

Washington's sentencing guidelines system is directed to make frugal use of state and local government resources.⁸

Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

Annual statistical summaries of felony sentencing are published annually and posted on line by the Caseload Forecast Council, and the underlying sentencing data is available on request from the Council.⁹

⁴ Wash. Rev. Code § 9.94A.860 (2019).

⁵ 2011 Wash. Sess. Laws 3498–3503.

⁶ See Wash. State Adult Sentencing Guidelines Manual ii (2018).

⁷ Wash. Rev. Code §§ 9.94A.860(1), 9.94A.865 (2019).

⁸ Wash. Rev. Code § 9.94A.010(6) (2019).

⁹ See *Statistical Summaries of Adult Felony Sentencing*, Wash. Caseload Forecast Council, http://www.cfc.wa.gov/CriminalJustice_ADU_SEN.htm (last visited Jun. 11, 2019).

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The Washington State Legislature enacted the Sentencing Reform Act in 1981, establishing the Sentencing Guidelines Commission and empowering it to create and recommend to the Legislature a determinate system for sentencing adult felonies. The original sentencing guidelines were enacted into law in 1983, and took effect on July 1, 1984 for all crimes committed on or after that date.¹⁰

Q. In recent years, have they been modified at least once a year?

The legislature modifies the Sentencing Reform Act, the statute containing the adult felony sentencing guidelines, and the Juvenile Justice Act, the statute containing juvenile guidelines, on a nearly annual basis.¹¹ The most recent update to the Washington State Sentencing Manual, the instructive version of the Sentencing Reform Act's statutes, was published in 2018.

Q. Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

Washington's guidelines are statutory, and thus must be approved through the normal legislative process.¹²

Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

The guidelines apply to all felonies, but not to misdemeanors.¹³

Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

The sentencing guidelines are primarily divided into two grid types: the standard sentencing grid and the drug sentencing grid. However, the sentencing guidelines manual contains multiple versions of each grid based both on the effective dates of the grids and whether the grids contain ranges for completed or anticipatory crimes.¹⁴ The grid range for anticipatory offenses is 75% of the standard sentence range for

¹⁰ *Sentencing Reform Act: Historical Background*, Wash. State Sentencing Guidelines Comm'n, <http://www.ofm.wa.gov/sgc/documents/historical.pdf>.

¹¹ *Id.*

¹² See Wash. Rev. Code § 9.94A.865 (2019) (requiring revisions and modifications to the guidelines to be submitted to the legislature at least every two years).

¹³ Wash. Rev. Code § 9.94A.505(1) (2019). However, even though aggravated murder has a severity level ranking (XVI) on the main grid, the prescribed sentence for this crime is life without parole or death, for adult offenders, and life with or without parole for offenders less than 18 years old, without regard to the prior record of the offender. See Wash. Rev. Code § 10.95.030 (2017); 2016 Wash. State Adult Sentencing Guidelines Manual 210; *but see State v. Bassett*, 394 P.3d 430 (Wash. Ct. App. 2017) holding mandatory juvenile LWOP unconstitutional under *Miller v. Alabama*.

¹⁴ There are five Standard Sentencing Grids in Washington. Sentencing Grid A is the standard sentencing grid for offenses committed prior to July 1, 1990. Sentencing Grid B is the standard sentencing grid for offenses committed July 1, 1990 through July 26, 1997. Sentencing Grid C is the standard sentencing grid for offenses committed July 27, 1997 through July 24, 1999. Sentencing Grid D is the current standard sentencing grid, and applies to offenses committed after July 24, 1999. Sentencing Grid D – Anticipatories is the current standard sentencing grid with recalculated ranges that reflect the sentencing discount given for incomplete crimes.

the completed offense.¹⁵ Only one grid applies to a given crime, based upon the date the offense was committed or sentenced, whether it was a drug or non-drug crime, and whether it was a completed or anticipatory offense. The current standard sentencing grid has 16 severity levels; the drug sentencing grid has three severity levels.¹⁶

Q. How is the presumptive sentence determined?

Under the guidelines, the sentencing court must first determine the offense seriousness level, and the offender score of the criminal to be sentenced. The offense seriousness level is determined by the offense of conviction. The guidelines provide a list of felony offenses, and assign an offense seriousness score to each.¹⁷

A criminal offender can receive 0 to 9+ offender score points. Several factors contribute to the score, including the number of past adult convictions and juvenile dispositions, the relationship between the current offense and prior offenses, and the time between offenses. Misdemeanors are generally not included when calculating offender scores.¹⁸

After identifying the seriousness level of the offense of conviction, and calculating the offender score, the sentencing court determines the presumptive sentence by referring to the appropriate sentencing grid. For all current offenses not involving controlled substances, the sentencing court uses the standard sentencing grid. For crimes involving controlled substances, the court refers to drug sentencing grid.¹⁹

When using the appropriate grid, the court determines the standard sentence range by locating the intersection of the column defined by the offender score and the row defined by the offense serious level. If the presumptive sentence duration exceeds the statutory maximum for the offense, the statutory maximum is the presumptive sentence unless the offender is a “persistent offender.”²⁰ If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced; however, the underlying sentence will be reduced to keep the total sentence within the statutory maximum.²¹

If the crime of conviction is for an anticipatory offense, the presumptive sentence is determined by locating the presumptive sentence for the completed version of that offense on the grid, and then multiplying the

Drug Sentencing Grid A is for drug offenses committed on or after July 1, 2003 and sentenced before July 1, 2013. Drug Sentencing Grid B applies to sentences imposed for drug offenses on or after July 1, 2013, or committed on or before June 30, 2018. There are two versions of Drug Sentencing Grid C for crimes sentenced after July 1, 2018, with one grid having lesser sentences imposed for anticipatory or solicitation offenses. Wash. State Adult Sentencing Guidelines Manual 85–104.

¹⁵ See Wash. State Adult Sentencing Guidelines Manual 50 (2018); Wash. Rev. Code § 9.94A.595 (2019). One further difference between the anticipatory and the completed-offense grids is that the former only provide cell ranges, whereas the two completed-offense grids also show cell mid-points, indicating specific presumptive sentences. See Wash. State Adult Sentencing Guidelines Manual 49–66 (2018).

¹⁶ Wash. Rev. Code §§ 9.94A.510, 9.94A.517 (2019).

¹⁷ Wash. Rev. Code § 9.94A.515 (2019) (table listing all crimes within each seriousness level).

¹⁸ Wash. State Adult Sentencing Guidelines Manual 52–55 (2018).

¹⁹ Wash. Rev. Code §§ 9.94A.510 (Grid D), 9.94A.517 (Grid B) (2019).

²⁰ See, Rev. Code Wash. § 9.94A.030 (38) (defining persistent offender as having been convicted of a most serious offense in addition to having at least two prior convictions); See also, Wash. State Adult Sentencing Guidelines Manual 62 (2018).

²¹ Rev. Code § 9.94A.533(4)(g) (2018) (adjustments to standard sentences); Wash. Rev. Code § 9.94A.599 (2018) (presumptive ranges exceeding the statutory maximum; *State v. DeSantiago*, 68 P.3d 1065, 1071 (2003)).

range by 75%.²² The sentencing guidelines manual also displays a versions of the standard and drug sentencing grids where these ranges are recalculated.²³

The guidelines also provide general and offense-specific forms to aid in scoring an offender's criminal history and applying the guidelines.²⁴

If an offender is convicted of an unranked crime, which does not have an established seriousness level, the sentencing grids and worksheets do not apply. Instead, a court is required to impose a determinate sentence which may include zero to 365 days of confinement, as well as other forms of punishment.²⁵

Q. Is the choice among types of sentences regulated by a “disposition” or other prison in/out line? Are “out” sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

The sentencing grids do not contain disposition lines.²⁶ The presumptive ranges provided on the grids are terms of total confinement. Crimes of the highest severity (level 17) may receive life without parole (LWOP)/death penalty if an adult, and 25-years to life if a juvenile.²⁷ Any term of one year or less will be served in a jail or other county facility rather than in state prison.²⁸ Custody terms of one year or less may also be converted into a variety of forms of partial confinement, and for nonviolent offenders the court must state reasons for not making such a conversion; partial confinement may include work release, home detention, work crew, or a combination of work crew and home detention, and one day of partial confinement satisfies one day of imposed total confinement. In addition, for nonviolent offenders, the court may convert up to 30 days of total confinement into community service; eight hours of service satisfies one day of imposed total confinement.²⁹

Certain other offenders can be given alternative sentencing under the guidelines, depending on:

- Custodial-parent status;
- Deportable-alien status;
- Whether the crime of conviction was sexual in nature;
- Whether the offender has a drug dependency problem;
- Whether the offender is a first-time felony offender.³⁰

When an alternative sentence is given to a deportable alien, a sex offender, or a drug dependent offender in a prison-based program, a prison term is pronounced and then totally or partially suspended; all other

²² Wash. Rev. Code § 9.94A.595 (2019).

²³ Wash. State Adult Sentencing Guidelines Manual 50, 60 (2018).

²⁴ Wash. State Adult Sentencing Guidelines Manual 27, 189–432 (2018). The worksheets were developed by sentencing commission staff as an aid to practitioners and judges in applying the guidelines. However, they have not been enacted by the legislature and thus have no independent legal effect.

²⁵ Wash. Rev. Code § 9.94A.505(2)(b) (2019).

²⁶ Wash. State Adult Sentencing Guidelines Manual 49–50, 60 (2018).

²⁷ Wash. State Adult Sentencing Guidelines Manual 85 (2018).

²⁸ Wash. Rev. Code § 9.94A.190 (2019).

²⁹ Wash. Rev. Code § 9.94A.680 (2019).

³⁰ Wash. Rev. Code § 9.94A.650 (2019) (first-time offender); Wash. Rev. Code § 9.94A.655 (2019) (parents); Wash. Rev. Code § 9.94A.685 (2019) (deportable aliens); Wash. Rev. Code § 9.94A.670 (2019) (sex offenders); Wash. Rev. Code §§ 9.94A.660 – 9.94A.664 (2019) (drug dependency).

suspended-execution prison terms are abolished.³¹ When an alternative sentence is given to a custodial parent or to a drug-dependent offender in a non-prison program, violation of the conditions of release generally permits imposition of any sentence within the applicable standard range for that case³² (in effect, the imposition of any prison sentence had been suspended up to that point). As for qualifying first-time felony offenders, violation of release conditions does not permit imprisonment, but only the imposition of a short jail term.³³

Q. Are there border boxes or other categories permitting multiple sentence types?

The grids do not contain border boxes, but sentences of a year or less may be converted into a variety of forms of partial confinement, and up to 30 days of total confinement may be converted into community service.³⁴

Q. Are the guidelines purely advisory, or are they legally binding?

The guidelines are legally binding, and either party may appeal sentences that depart from the standard presumptive range.³⁵

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

Q. What is the overall/general standard for departure?

Departure from the guidelines is referred to in Washington as an “exceptional sentence.” It must be based on substantial and compelling reasons, which must be set forth in written findings of fact and conclusions of law.³⁶

Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

The guidelines provide lists of aggravating and mitigating factors for courts to consider when determining whether to impose an exceptional sentence.

The list of mitigating factors is nonexclusive, and intended to be illustrative. The factors provided generally relate to case-specific facts that diminish an offender’s culpability, and take into account legal defenses which are insufficient to completely absolve an offender but substantial enough to mitigate culpability.

The list of aggravating factors is exclusive, and a decision to impose an exceptional aggravated sentence must be based on one or more of the listed factors. The factors provided are intended to punish an offender whose actions increase their relative culpability as compared to others committing the same or a similar

³¹ Wash. Rev. Code § 9.94A.575 (2018) (abolishing power to suspend sentences); see also Wash. Rev. Code §§ 9.94A.662, 9.94A.670, 9.94A.685 (2018).

³² Wash. Rev. Code §§ 9.94A.655, 9.94A.660 (2017). In the case of residential drug treatment, only one half of the applicable prison term may be imposed in case of violation of conditions. Wash. Rev. Code § 9.94A.664 (2019).

³³ Wash. Rev. Code § 9.94A.633(1) (2019).

³⁴ Wash. Rev. Code § 9.94A.680 (2019).

³⁵ Wash. Rev. Code § 9.94A.585 (2019).

³⁶ Wash. Rev. Code § 9.94A.535 (2019).

offense. Examples of this include: conduct that manifests deliberate cruelty, repeated violations of economic or drug trafficking laws, sexually motivated conduct, and offenses that required a high degree of sophistication and planning. Because Washington's list of aggravating factors is exclusive, it is also extensive, and encompasses a wide variety of fact-specific behaviors.

The Washington guidelines do not provide a list of prohibited factors.³⁷

Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

The guidelines do not address mitigations based on guilty pleas, acceptance of responsibility, or providing assistance to law enforcement.³⁸

Q. Are there limits on the degree of durational (length-of-custody) departure?

Durational departure is limited only by the statutory maximum, and any mandatory minimum applicable to the crime of conviction.³⁹

Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

The guideline ranges are presumptive terms of total confinement. A sentencing judge may convert a sentence of total confinement into partial confinement, or other forms of punishment, if the offender's characteristics and crime of conviction meet certain statutory criteria.⁴⁰ Although such alternative sentences are not considered to be "departures," they function in a manner analogous to departure -- the offender must receive the recommended term of total confinement unless the court finds that the statutory criteria for alternative sentencing are met.⁴¹

4. PRISON RELEASE DISCRETION

Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

Parole release discretion has been abolished for all crimes committed after July 1, 1984.⁴²

Q. Does this jurisdiction have a "truth in sentencing" law, limiting the extent of early release?

³⁷ Wash. Rev. Code § 9.94A.535 (2019) (departures from the guidelines); Wash. Rev. Code § 9.94A.535(2) (2019) (aggravating facts that may be found by the court); Wash. Rev. Code § 9.94A.535(3) (2019) (aggravating facts subject to *Blakely*, that must be found by the jury).

³⁸ See Wash. Rev. Code § 9.94A.535 (2019).

³⁹ Wash. State Adult Sentencing Guidelines Manual 58 (2018).

⁴⁰ *E.g.* Wash. Rev. Code § 9.94A.650 (2017) (first-time offender); Wash. Rev. Code § 9.94A.655 (2019) (parents); Wash. Rev. Code § 9.94A.660 (2019) (drug dependency); Wash. Rev. Code § 9.94A.670 (2019) (sex offenders); Wash. Rev. Code § 9.94A.680 (2019) (alternatives to total confinement); Wash. Rev. Code § 9.94A.685 (2019) (deportable aliens); Wash. Rev. Code § 9.94A.690 (2019) (work ethic camp program).

⁴¹ See Wash. Rev. Code § 9.94A.505(2) (2019).

⁴² See Wash. Rev. Code § 9.95.017 (2019).

Felony offenders are generally required to serve their full term of sentence in prison. However, some offenders can earn early release credits for good behavior and good performance, as determined by the correctional agency having jurisdiction over the offender's confinement. The amount of early release time that can be earned varies based upon the characteristics of the offense and offender and thus ranges from a low of 10% of the sentence to a high of 50% of the sentence.⁴³

Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

Recommended and imposed prison sentences represent the maximum term the offender will serve in prison, which generally may only be reduced by the award of earned-time credits.⁴⁴

Q. Is the period of post-prison supervision independent of any unserved prison term?

The court must impose a period of post-prison supervision for certain types of offenses, and the length is determined by the conviction offense. The supervision period is independent of any unserved prison term resulting from the award of earned-time credit.⁴⁵ Offenders eligible for early release who are subject to required supervision because of their crime of conviction are transferred to community custody from confinement in lieu of earned release time.⁴⁶

Q. What good-time credits do prisoners earn? Is program participation considered?

Prisoners earn early release credits for good behavior and good performance, as defined by the correctional agency responsible for their confinement.⁴⁷ The Washington Department of Corrections policy indicates that Offenders who participate in approved programs, which including work and school, are eligible for earned time credits.⁴⁸

Generally, aggregate earned early release time may not exceed one-third of the total sentence. However, this rule is subject to a number of exceptions.

- If an offender was convicted of a serious violent offense, a serious sex offense, or certain forms of murder, aggregate earned release time may not exceed 10%.
- If an offender is convicted of a felony that involves a deadly weapon enhancement, no good time credits can be earned toward the enhancement portion of the total sentence.
- An offender may receive up to 50% of aggregate earned early release time if he or she is not classified as a high risk to reoffend, is not confined pursuant to certain crimes, participates in programming or activities as directed by his or her reentry plan, and has not committed a new felony while under community custody.⁴⁹

⁴³ Wash. Rev. Code §§ 9.94A.728–.729 (2019).

⁴⁴ *Id.*

⁴⁵ See Wash. Rev. Code § 9.94A.701 (2019).

⁴⁶ See Wash. Rev. Code § 9.94A.729(5) (2019) (eligibility for early release); *but see* Wash. Rev. Code § 9.94A.728(2) (2019) (juvenile correction facilities are not subject to the same limitations).

⁴⁷ Wash. Rev. Code § 9.94A.729(1) (2019).

⁴⁸ Wash. Dep't of Corr. Policy No. DOC 250.100 ("Earned Release Time") (revised Sept. 21, 2015), <http://www.doc.wa.gov/information/policies/files/350100.pdf>.

⁴⁹ Wash. Rev. Code § 9.94A.729 (2–3) (2019).

Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?

Washington law does provide a few exceptional and “second look” release mechanism. Except for persistent offenders and those sentenced to death or life without parole, the secretary of corrections may authorize an extraordinary medical placement for offenders who have serious medical conditions that are expected to require costly care or treatment and who pose a low risk to the community due to physical incapacitation or age if such placement is expected to result in a cost savings to the state. Additionally, the governor, “upon recommendation from the clemency and pardons board, may grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances.”⁵⁰ Finally, individuals who were convicted of one or more crimes committed prior to their eighteenth birthday may petition the indeterminate sentence review board for early release after serving at least 20 years of confinement.⁵¹

5. RELATIONSHIP TO CRIMINAL LAWS

Q. Did the guidelines replace some or all previous statutory maxima?

The guidelines were developed to function within the confines of existing statutory maximum sentences. However, in *Blakely v. Washington*, the U.S. Supreme Court determined that the top of the standard sentencing range in the appropriate cell on the applicable grid functions as the statutory maximum.⁵² This is due in part to the fact that the sentencing grids are enacted in statute.

Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The 1981 guidelines enabling act repealed most mandatory minimum provisions, although some were later enacted.⁵³ In some cases, the recommended guidelines sentence is more severe than the applicable mandatory minimum.⁵⁴ If the court finds substantial and compelling reasons to impose a mitigated exceptional sentence, the court cannot impose a term less than any existing mandatory minimum sentence.⁵⁵

Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

No, except that certain mandatory minimum terms are not to be applied in the sentencing of juveniles tried as adults.⁵⁶

⁵⁰ Wash. Rev. Code § 9.94A.728 (2019).

⁵¹ Wash. Rev. Code § 9.94A.730 (2019).

⁵² See *Blakely v. Washington*, 542 U.S. 296 (2004).

⁵³ See David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 *Crime and Justice: A Review of Research* 71, 105–06, 112 (Michael Tonry, edit.) (2001).

⁵⁴ Compare Wash. Rev. Code § 9.94A.540(1)(b) (2017) (providing a mandatory minimum for first degree assault of five years), with Wash. State Adult Sentencing Guidelines Manual 85, 87, 112 (2018) (showing that lowest guideline range for first degree assault is ninety-three months or 7.75 years with 9 years being the recommended sentence).

⁵⁵ Wash. State Adult Sentencing Guidelines Manual 53 (2018).

⁵⁶ Wash. Rev. Code § 9.94A.540(3) (2019).

6. CRIMINAL HISTORY SCORING

Q. What are the major components of the criminal history score?

The major components of an offender’s criminal history score under the guidelines (called the “offender score”) are: “(1) the number of prior adult convictions or juvenile dispositions; (2) the relationship between any prior offense(s) and the current offense of conviction; (3) the presence of other current convictions; (4) an offender’s community status at the time the crime was committed; and (5) the length of the offender’s crime-free behavior between offenses.”⁵⁷

While an offender’s adult criminal history consists almost exclusively of felony convictions, in certain instances it can include misdemeanors (such as severe traffic offenses). Adult felony convictions, and all juvenile felony dispositions, should be counted as criminal history unless:

- Washout provisions apply⁵⁸
- A court has determined they constitute the “same criminal conduct” as another previous conviction.
- They were not previously deemed “same criminal conduct” but their sentences were served concurrently and a court now determines that they were committed at the same time, in the same place, and involved the same victim
- The sentences were served concurrently and they were committed before July 1, 1986.⁵⁹

Federal or out-of-state offenses can also be included, and will be “classified according to the comparable offense definitions and sentences provided by Washington law” or as a Class C felony if no comparable law exists.⁶⁰ Offenses sentenced in the same proceeding may be counted in the criminal history calculation if they arise from separate and distinct criminal conduct.⁶¹

Once relevant prior convictions are identified, the criminal history score is calculated, with the applicable scoring rules applying differently depending on the category of offense, and crime of current conviction.⁶²

A community custody point is added if the offender was under a community placement or post-release supervision when the offense was committed.⁶³

Q. Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

The guideline washout rules are automatic, do not require court action, and are as follows:

- Prior Class A and felony sex convictions are always included in the offender score.
- Prior Class B (juvenile or adult) felony convictions, other than sex offenses, are not included in the offender score if, since the last date of release from confinement (including full-time residential

⁵⁷ Wash. State Adult Sentencing Guidelines Manual 54 (2018).

⁵⁸ See *id.* at 53 (“Wash Out” of Certain Prior Felonies).

⁵⁹ *Id.* at 54.

⁶⁰ Wash. Rev. Code § 9.94A.525(5)(3) (2019).

⁶¹ *Id.* at 56.

⁶² *Id.* at 19–20; Wash. Rev. Code § 9.94A.525 (2019).

⁶³ Wash. State Adult Sentencing Guidelines Manual 57 (2018).

treatment) pursuant to a felony conviction, if any, or since the entry of judgment and sentence, the offender had spent ten consecutive years in the community without having been convicted of any crime.

- Prior Class C (juvenile or adult) felony convictions, other than sex offenses, are not included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or since the entry of judgment and sentence, the offender had spent five consecutive years in the community without having been convicted of any crime.
- Prior (juvenile or adult) serious traffic convictions are not included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or since the entry of judgment and sentence, the offender had spent five years in the community without having been convicted of any crime.
- Prior convictions for repetitive domestic violence offense are not included in the offender score if the offender has spent ten consecutive years in the community without committing any crime resulting in a conviction since the last date of release.⁶⁴

Washington also allows offenders to vacate their records of conviction, and vacated convictions cannot be included in the criminal history score for any subsequent prosecution.⁶⁵

Q. Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

No.

7. MULTIPLE CURRENT OFFENSES

Q. Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

When a person is sentenced for multiple current offenses at one sentencing hearing, the sentences must be served concurrently unless the person is being sentenced for two or more separate serious violent offenses, weapons offenses, or certain driving under the influence offenses. In those cases, the sentences are served consecutively unless an exceptional sentence is entered.⁶⁶

The guidelines contain a number of exceptions to this rule, and departure from the following exceptions requires an exceptional sentence:

- If a court finds that some or all of the current offenses required the same criminal intent, were committed at the same time at place, and involved the same victim, the offenses are treated as one offense.
- In the case of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences for these serious violent offenses are served consecutively to each other and concurrently with any other sentences imposed for current offenses.

⁶⁴ Wash. Rev. Code § 9.94A.525(2)(f) (2019).

⁶⁵ Wash. Rev. Code § 9.94A.640 (2019).

⁶⁶ Wash. Rev. Code § 9.94A.589 (2019).

- In the case of an offender convicted of Unlawful Possession of a Firearm in the First or Second Degree and for one or both of the crimes of Theft of a Firearm or Possession of a Stolen Firearm, the sentences for these crimes are served consecutively for each conviction of the felony crimes listed and for each firearm unlawfully possessed.
- In the case of an offender receiving a deadly weapon enhancement for offenses committed after July 23, 1995, the deadly weapon enhancement portion of the standard range is served consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements.
- Whenever a current offense is committed while the offender is under sentence for a previous felony and the offender was also sentenced for another term of imprisonment, the latter term may not begin until expiration of all prior terms.
- In the case of consecutive sentences, all periods of total confinement must be served before any periods of partial confinement, community service, community supervision or any other requirement or condition of a sentence. This rule applies to offenders who have not completed their sentence requirements from a previous conviction and are sentenced to total confinement on a new offense.⁶⁷

Q. In consecutive sentencing, how is the offender's criminal history taken into account?

In sentencing multiple current offenses, the court calculates each offense separately, including the relevant criminal history. If the sentencing court departs from the guidelines and imposes multiple sentences consecutive and not concurrently, each sentence reflects the full criminal history score.⁶⁸

If the sentencing court is required to impose a consecutive sentence because the offender has been convicted of two or more serious violent offenses, the standard sentence range for the highest serious violent offense is calculated with the full criminal history score, while the sentence range for other serious violent offenses is determined using an offender score of zero. Any other current convictions which are not for serious violent offenses are calculated using the full history score. The serious violent offenses are then sentenced consecutively to each other and concurrently to any other current offenses.⁶⁹

There are no other limitations on prior criminal history.

8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Sentences within the recommended range cannot be appealed. Sentences outside of the range, exceptional sentences, may be appealed by the prosecution or the defense.⁷⁰

⁶⁷ *Id.*; Wash. State Adult Sentencing Guidelines Manual 66 (2018).

⁶⁸ Wash. Rev. Code § 9.94A.589 (2019); Wash. State Adult Sentencing Guidelines Manual 55 (2018).

⁶⁹ Wash. Rev. Code § 9.94A.589(b) (2019).

⁷⁰ Wash. Rev. Code § 9.94A.585 (2019); Wash. State Adult Sentencing Guidelines Manual 64 (2018).

Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

If a judge decides to depart, the judge must find on the record that there are substantial and compelling reasons justifying an exceptional sentence. An aggravated exceptional sentence is only allowed if certain prescribed circumstances are present,⁷¹ or if the state gives notice that it is seeking an aggravated sentence and the facts supporting it are proven to a jury beyond a reasonable doubt.⁷²

Q. Are some deviations from the guidelines not deemed departures?

If a relevant statute gives the sentencing court the discretion to convert an offender's sentence from total confinement to an alternative form of punishment, the court may do so without departing.⁷³

Q. Do some deviations require especially strong justification? Or minimal justification?

The standard for imposing an exceptional sentence (departure) is equivalent across sentences.⁷⁴

⁷¹ Wash. Rev. Code § 9.94A.535 (2019).

⁷² Wash. Rev. Code § 9.94A.537 (2019).

⁷³ See, e.g., Wash. Rev. Code § 9.94A.680 (2019) (alternatives to total confinement).

⁷⁴ Wash. Rev. Code § 9.94A.535 (2019).