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Task Force 2.0: Race and the Criminal Justice System

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Task Force 2.0

# Race and Washington's Criminal Justice System

2021 Report to the Washington Supreme Court

Submitted by the Research Working Group

A Publication by the  
Task Force 2.0: Race and Washington's Criminal Justice System  
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## Message from the Task Force Co-Chairs

Chief Justice González and Justices of the Washington Supreme Court:

We are pleased to present the *2021 Report on Race and Washington's Criminal Justice System*, authored by the Research Working Group of Task Force 2.0. The Research Working Group's mandate was to investigate disproportionalities in the criminal justice system and, where disproportionalities existed, to investigate possible causes. This fact-based inquiry was designed to serve as a basis for the Task Force and others to make recommendations for change in order to promote fairness, reduce disparity, ensure legitimate public safety objectives, and instill public confidence in our criminal justice system.

Task Force 2.0 picks up where the previous Task Force on Race and the Criminal Justice System (2010-12) left off. That first task force came into being in 2010 to discuss remarks regarding the purported relationship between race and crime made by two sitting Washington Supreme Court justices. That exploration led to a powerful report presented at an historic symposium held at the Temple of Justice in March 2011. The following year, the Task Force presented a report on juvenile justice and race disproportionality. These reports have been impactful, cited by judges, advocates, and scholars within our region and beyond.

Task Force 2.0 launched in the wake of the protests following the murder of George Floyd, protests that rocked this nation as well as Washington State. The protests served as a reminder that the intersection between race and the criminal justice system remains a critically important issue. We took this moment as a renewed call to examine where things stand in this state with regard to race disproportionality in the criminal justice system.

The Task Force 2.0 membership agreed that we shared a commitment to ensuring fairness in the criminal justice system. We developed working groups, including the Research Working Group, whose *2021 Report* finds that race continues to affect outcomes in the criminal justice system and matter in ways that are unfair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system.

We are fortunate to have the formal participation of a broad range of organizations and institutions, as well as many people who are contributing in their individual capacities.

We have come together to offer our time, energy, expertise, and dedication to help achieve fairness in our criminal justice system.

Sincerely,

Deans Mario L. Barnes, Annette E. Clark, and Jacob H. Rooksby  
Co-Chairs, Task Force 2.0: Race and Washington's Criminal Justice System

## Participating Organizations and Institutions

[Access to Justice Board](#)

[American Civil Liberties Union of Washington](#)

[Asian Bar Association of Washington](#)

[Center for Human & Civil Rights – Gonzaga School of Law](#)

[Center for Indian Law & Policy – Seattle University School of Law](#)

[Civil Survival](#)

[El Centro de la Raza](#)

[CHOOSE180](#)

[Columbia Legal Services](#)

[Commission on Asian Pacific American Affairs](#)

[Commission on Hispanic Affairs](#)

[Community Passageways](#)

[The Curtis Firm](#)

[Davis Wright Tremaine LLP](#)

[Federal Public Defender – Western District of Washington](#)

[Galanda Broadman PLLC](#)

[Gonzaga University School of Law](#)

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[Indian Law Section, Washington State Bar Association](#)

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[Legal Counsel for Youth and Children](#)

[Look2Justice](#)

[Loren Miller Bar Association](#)

[Mockingbird Society](#)

[Northwest Indian Bar Association](#)

[Office of Juvenile Justice, Washington State Department of Children, Youth & Families](#)

[Office of Law Enforcement Oversight, King County](#)

[Office of Police Ombudsman, Spokane](#)

[Pacific Islander Community Association of Washington](#)

[Pierce County Minority Bar Association](#)

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Team Child

Thurston County Prosecuting Attorney's Office

University of Washington School of Law

Vietnamese American Bar Association of Washington

Washington Appellate Project

Washington Association of Criminal Defense Lawyers

Washington Association of Prosecuting Attorneys

Washington Defender Association

Washington Attorney General's Office

Washington State Bar Association

Washington State Gender and Justice Commission

Washington State Minority and Justice Commission

Whatcom County Prosecuting Attorney's Office

## Acknowledgments

This report, submitted by the Research Working Group, is the product of a process initiated and conducted by an ad hoc Task Force on Race and Washington's Criminal Justice System. Called Task Force 2.0, it includes many organizations and individuals who came together to document existing race disproportionalities in the criminal justice system, to identify its causes, and to propose recommendations to reduce and, where possible, eliminate disparities.

Co-chaired by the deans of Washington's three law schools, Task Force 2.0 builds on the work of the 2010-12 Task Force on Race and the Criminal Justice System (Task Force 1.0). The work of Task Force 1.0 and 2.0 builds on decades of work of the Minority and Justice Commission, which carries forward the work of the legislatively-created Minority and Justice Task Force that issued its pathbreaking 1990 Final Report.

Task Force 2.0 was initially organized with the following working groups: Oversight, Recommendations, Research, and Community Engagement. A separate group, called the Juvenile Justice Subcommittee, which really was a task force within a task force, addressed the separate issue of the Juvenile Justice System, and will be issuing its report and recommendations later this year. In addition, organically, other teams were created to meet to discuss different topics.

We gratefully acknowledge the members of these different working groups and teams. Given the nature of an ad hoc task force whose work extended over a fifteen-month period, people's active participation at times waxed and waned. We include everyone who participated in some fashion, without making distinctions based on level of contribution. In addition, with such a large group of individuals, we admittedly did not always successfully involve everyone in the work.

**Oversight Working Group:** Nick Allen, Robert Chang, Diane Clarkson, Adam Cornell, Lisa Daugaard, Judge (ret.) Theresa Doyle, Michele Fukawa, Jason Gillmer, Alexes Harris, Jaime Hawk, Melissa Lee, Christina Miyamasu, and Andrés Munoz.

**Recommendations Working Group:** Nick Allen, Sahar Fathi, Mohammad Hamoudi, Jaime Hawk, Ali Hohman, Hazel Kerkemor Johnson, Melissa Lee, Jacqui Merrill Martin, Kate Miller, Christina Miyamasu, Chelsea Moore, Karisa Morikawa, Tarra Simmons, Eric Richey, Kurtis Robinson, Joseph Seia, Leah Taguba, Dorian Taylor, Nancy Talner, and Jennifer Wellman.

**Community Engagement Working Group:** Sunitha Anjilvel, Lorraine Bannai, Ann Benson, Diane Clarkson, Rosemarie Clemente, James Curtis, Jenna Franklin, Candice Garza, Tony Gonzalez, Darrah Hinton, Amber Letchworth, Noe Merfeld, Alex Narvaez, Andrés Munoz, Christy Peters, Brooke Pinkham, Isabell Rocha, Maria Siguenza, Sandra Simpson, Aileen Tsao, Adrienne Wat, and Sara Zier.



**Juvenile Justice Subcommittee:** Zubin Abraham-Ahmed, Jo Bechtold, Rosemarie Clemente, Alice Coil, Julian Cooper, Dominique Davis, Koa Derouin, Judge Theresa Doyle (ret.), Krista Elliott, Brianna Fenske, Louisa Florio, Hickory Gateless, Destinee Harris, Jaime Hawk, Vanessa Hernandez, Jimmy Hung, Katherine Hurley, Stephany Inocente, Hazel Kerkemor Johnson, Judge David Keenan, Jr Kiona, Tori Sullivan Lavoie, Anne Lee, Jessica Levin, Mynor Lopez, Athlete Makasini, Desmond Maiava, Jacqui Merrill Martin, Julia Mizutani, Karisa Morikawa, Alex Narvaez, Gloria Ochoa-Bruck, Bailey Michaela Warrior Pahang, Crystal Pardue, Dontay Proctor-Mills, Karen Pillar, Jessica Rock, Nathan Rouse, Judge Averil Rothrock, Matthew Sanders, Joseph Seia, Cameron Sheldon, Patreece Spence, Calson Tiweyang, Bry’Onta Thomas, Claire Thornton, Liz Trautman, Dalia Pedro Trujillo, Tara Urs, Kendrick Washington, and Sara Zier.

**Policing Team:** Robert Chang, Gabe Galanda, Omana Luvimae, Vivienne Nguyen, Chuck Reasons, Nancy Talner, and Adrienne Wat.

**Alternatives to Policing Team:** Lisa Daugaard, Prachi Dave, Sahar Fathi, Natasha Hill, Paul Holland, Katherine Hollingsworth, Luvimae Omana, Sarah Max, Karen Pillar, and Brenda Williams.

**Prosecuting Team:** Brooke Burbank, Robert Chang, Daniel Fulce, Mohammed Hamoudi, Christina Miyamasu, Douglas Shae, Arthur Sepulveda, and Jennifer Wellman.

**Research Working Group:** Laura Anglin, Lorraine Bannai, Emily Beale, Kayvon Behroozian, Catherine Bentley, Amy Bolstad, Robert Boruchowitz, Gloria Ochoa-Bruck, Israel Carranza, Katie Chan, Alexandra Chen, Kate Cohn, Kaylee Cox, Anna Creed, Lisa Daugaard, Prachi Dave, Roxanne Degens, Cynthia Delostrinos, Ryan Dreveskracht, Paula Enguinados, Sahar Fathi, Louise Florio, Sarah Fortier, Michele Fukawa, Gabe Galanda, Ameya Gehi, Jason Gillmer, Alexander Hager, Josh Halladay, Alexis Harris, Jaime Hawk, Karama Hawkins, Bryce Herman, Vanesa Hernandez Rodriguez, Natasha Hill, Caitlin Hoerberlein, Paul Holland, Katherine Hollingsworth, Cassidy Ingram, Matt Jedreski, Katherine Joseph, Maria Jouravleva, George Kaai, Galilee Kamai, Melissa Lee, Mynor Lopez, Carnissa Lucas-Smith, Shannon Lynch, Russell Lytle, Thiago Marques, Sarah Max, Rose McCarty, Carl McCurley, Kate Miller, Clayton Mosher, Leah Willborn Neese, Amanda Ng, Carson Nies, Luvimae Omana, Sierra Paola, Karen Pillar, Chuck Reasons, Rolando Cardona Roman, Sharon Sakamoto, Darrias Sime, Rachel Simon, Danielle Wingfield Smith, Sam Sueoka, Nancy Talner, Frank Thomas, Dalia Pedro Trujillo, Sarah Vatne, Adrienne Wat, Jamie Wilson, and Archer Wu.

**Additional Members:** Seth Alexander, Jessica Alvarez, Kimberly Ambrose, LaRond Baker, Katherine Beckett, Trey Big, Alexia Diorio, Krista Elliott, Heather Evans, Rya Fishman, Sally Fouché, Emily Geddes, Hannah Godwin, Noelle Green, Lillian Hawkins,

Neeke Hodaie, Maria Hodgins, Cassandra Hughes, Emaan Jaber, Alek Johnson, James Johnson, Treja Jones, Karim Jooma, Heather Kelley, Ria Kuruvilla, Pui-Yan Lam, Anne Lee, David Montes, Andrew Newman, Melanie Nguyen, Andrew Pollam, Maya Ramakrishnan, Carly Roberts, Sierra Rotakhina, Mike Russo, Jason Schwarz, Julie Shapiro, Diane Singleton, Ron Slye, Stephanie Smith, Travis Stearns, Cody Stoddard, Marcus Stubblefield, Tori Sullivan Lavoie, Donnell Tanksley, Amanda Tucker, Samuel VanFleet, Jacob Walsh, David Wang, Mike Webb, Mary Whisner, and Rayshaun Williams.

In addition, we acknowledge those members of the Research Working Group who drafted the research memoranda from which the Appendices were drawn. We also make a special acknowledgment to Kate Miller for her work in shepherding the research teams in the Research Working Group.

Appendix A. Race Disproportionality in Policing: Robert Chang

Appendix B. Prosecutorial Decision-Making: Kate Miller

Appendix C. Pretrial Release: Carnissa Lucas-Smith and Matt Jedreski

Appendix D. Confinement Sentencing Outcomes: Roxanne Degens, Bryce Herman, Caitlin Hoerberlein, and Katherine Joseph

Appendix E. Prisons and Jails: Alexandra Chen, Kate Cohn, Louisa Florio, Melissa Lee, and Darrias Sime

Appendix F. Legal Financial Obligations: Israel Carranza, Cynthia Delostrinos, Alexes Harris, Sam Sueoka, and Frank Thomas

Appendix G. DWLS3: Rose McCarty, Carson Nies, and Amanda Ng

Appendix H. Disproportionality Following Conviction and Reentry: Lorraine Bannai and Sharon Sakamoto

Appendix I. Community Voices: Lorraine Bannai

Appendix J. Native Hawaiian/Pacific Islander (NH/PI) Report: Lorraine Bannai, George Ka'ai, and Galilee Kamai

Appendix K. Traffic Stops: Lorraine Bannai, Katie Chan, Ameya Gehi, Josh Halladay, and Cassidy Ingram

Appendix L. Asset Forfeitures: Alexander Hager and Jamie Wilson

Appendix M. Public Defender Report: Robert C. Boruchowitz, Vanesa Hernandez Rodriguez, and Jamie Wilson

Appendix N. Language Access: Lorraine Bannai

Appendix O. Spokane Prosecutor Report: Amy Bolstad, Anna Creed, Sarah Fortier, Michele Fukawa, Jason Gillmer, Russell Lytle, Thiago Marques, Sierra Paola, Shannon Lynch, Danielle Wingfield Smith, Dalia Pedro Trujillo, and Sarah Vatne

We also want to thank the following organizations for their direct financial support that has facilitated the participation of community-based organizations: American Civil Liberties Union of Washington, Asian Bar Association of Washington, Center for Children & Youth Justice, Latina/o Bar Association of Washington, Loren Miller Bar Association, Korean American Bar Association of Washington, Pierce County Minority Bar Association, QLaw Association of Washington, Seattle University School of Law, University of Washington School of Law, and the Vietnamese American Bar Association of Washington.

We are also grateful to the Gonzaga Law Review, the Seattle University Law Review, and the Washington Law Review for agreeing to publish this report as a joint project in their respective journals.

We apologize for any omissions or errors in acknowledging any individual or organization.

## Definitions

### **What We Mean by “Disproportionality” and “Disparity”**

Although the terms disproportionality and disparity often are used interchangeably, there is an important distinction between these two concepts. Researchers have found it useful to distinguish between racial inequities that result from differential crime commission rates and racial inequities that result from practices or policies. In this report, we use disproportionality to refer to a discrepancy between reference groups' representation in the general population and in criminal justice institutions. Disproportionality can be measured relatively or comparatively.

Relative disproportionality. Using data from Washington state in 1980, the Black share of Washington's incarcerated population was 28%. The Black share of Washington's overall population was 3%. Relative to their share of the population, Black people are overrepresented in incarceration ( $28 \div 3$ ) by a factor of 9.33x relative to their share of the Black population in Washington.

Comparative disproportionality. If you take the 1980 figures and calculate the incarceration rate for each group,<sup>1</sup> you can calculate comparative disproportionality between groups. White people were incarcerated at a rate of 95 per 100,000 White people in Washington's general population. Black people were incarcerated at a rate of 1,342 per 100,000 Black people in Washington's general population. A comparison of Black to White incarceration rates ( $1,342 \div 95$ ) produces a comparative disproportionality ratio of 14.1.

In contrast, we use disparity when there is sufficient evidence to indicate that race accounts at least in part to unequal outcomes for one group when compared with outcomes for another group. For example, disparity exists when a Black capital defendant in Washington is 4.5 times more likely to receive the death penalty than a similarly situated White capital defendant. This difference in outcomes is considered *unequal* because race, and not other differences in case characteristics, accounts significantly to this difference in outcomes.

### **What We Mean by “Imprisonment” and “Incarceration”**

Imprisonment refers to being held in state prisons. Incarceration refers to being held in state prisons or local jails. Many local jails do not collect and report on ethnicity.

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1. For example, to calculate the White incarceration rate, take the number of White persons incarcerated, divide it by the number of White persons in the relevant general population, and then multiply by 100,000 to determine the number of White persons incarcerated per 100,000 White persons in the relevant general population. Though some organizations make the methodological choice to compute rates using different population groups, such as the number of White persons 18 and older or the number of White persons between 18 and 64 years of age, the Research Working Group has chosen to use total population figures.

## What We Mean by “Race” and “Ethnicity”

One of the most perplexing problems with race is that few people seem to know what “race” means. Widely accepted understandings of race focus on biology, invariably pointing to physical differences amongst humans that are used to define, in genetic terms, different racial groups.<sup>2</sup> The distinctions that we employ today to categorize humans, such as Black, White, and Latina/o, date back only a few centuries or less.<sup>3</sup> These labels do not signal genetically separate branches of humankind. Racial distinctions are largely social constructs based upon perception and history.

Not only are these distinctions socially constructed, they are also in constant flux, and under perpetual siege by those who dispute the arbitrary lines that they draw. The problem is compounded by the fact that different institutions use the terms differently. This lack of common nomenclature makes some comparisons difficult. When a term like “Asian” may encompass over two billion individuals, its ability to precisely and accurately describe an individual, much less a group of individuals, becomes challenging. Similar difficulties imperil the classifications of “Hispanic” and “Latino,” which are used to describe not only Dominicans whose descendants may be from Africa, but also Argentines whose ancestry may be traced to Italy, and Peruvians whose forefathers may have emigrated from Japan. Additionally, these traditional categories have come under increasing strain because one in seven marriages within the United States is now “interracial” or “interethnic,” rendering single labels less accurate.<sup>4</sup>

In this report, we use “race” to refer to groups of people loosely bound together by history, ancestry, and socially significant elements of their physical appearance.

## Racial Group Designations

Though people have different views on preferred group designations, for the sake of consistency, the following are the racial group designations used in the report.

Asian and Native Hawaiian or Other Pacific Islander (Asian and NH/PI). At times, “Asian” is used by reporting agencies or groups as an umbrella designation that includes Native Hawaiians and other Pacific Islanders. Where possible, the report disaggregates Native Hawaiians and other Pacific Islanders from the broader “Asian” racial category. Listening sessions held in Washington revealed a

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2. Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994).

3. *Id.* at 7-8.

4. Susan Saulny, *Counting by Race Can Throw Off Some Numbers*, N.Y. TIMES, Feb. 10, 2011, at A1, <http://www.nytimes.com/2011/02/10/us/10count.html?scp=1&sq=race%20counting&st=cse>.

preference that “NH/PI” be used instead of “NHOPI” which appears in the literature. Detail on the importance of disaggregating these groups can be found in Appendix J.

**Black.** We capitalize “Black” unless it appears otherwise in quoted material. Though there are differences between Black persons whose ancestry traces to U.S. slavery and more recent immigrants from Africa and the Caribbean, data collection in the criminal justice system typically does not disaggregate these groups.

**Indigenous.** Though there are important differences in the histories of groups indigenous to the lower 48 in comparison to those indigenous to Alaska, because many reporting agencies combine “Native American” (or “American Indian”) with “Alaska Native,” we use the umbrella term “Indigenous” to describe people who are indigenous to the lands comprising the forty-eight contiguous states as well as Alaska.<sup>5</sup>

**Latina/o.** For instance, when using the term “Latina/o” – which we will use where possible rather than “Hispanic” – we mean to describe those individuals whose ancestry is traced back to Latin America, Spain, and Portugal. Though “Hispanic” remained an ethnic designation on the 2020 U.S. Census, the Census Bureau in 2017 had recommended that OMB reassign “Hispanic, Latino, or Spanish origin” to a racial category.<sup>6</sup>

**White.** We capitalize “White” unless it appears otherwise in quoted material. In the report, “White” sometimes includes “Hispanics” who identify as White. Where possible, the report separates out “non-Hispanic Whites.”

For the most part, the report does not use BIPOC (Black, Indigenous, and People of Color) except when a reporting agency or organization uses that term and the reported data does not allow for easy disaggregation.

These definitions contemplate race and ethnicity as social phenomena, such that race and ethnicity are not objective observations rooted in biology, but rather self-reinforcing processes rooted in the

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5. “Indigenous” in this report does not include Native Hawaiians or Other Pacific Islanders, who tend to be lumped together under the “Asian” category described above when not appearing as a separate category.

6. See Race/Ethnicity and the 2020 Census (Mar. 23, 2019), <https://www.census2020now.org/faces-blog/same-sex-households-2020-census-r3976> (discussing proposed change and noting that the Office of Budget and Management did not respond to this recommendation). The Census Bureau in 2017 had also suggested new race category for individuals identifying as being of Middle Eastern or North African descent (MENA). *Id.*

daily decisions we make as individuals and as institutions. Although socially constructed and enacted, race and ethnicity have important consequences for people's lived experiences.

### **What We Mean by “Structural Racism”**

A structurally racist system can be understood best as a system in which a society and its institutions are embedded, and from which racial disparity results. Within such systems, notions and stereotypes about race and ethnicity shape actors' identities, beliefs, attitudes and value orientations. In turn, individuals interact and behave in ways that reinforce these stereotypes. Thus, even with facially race-neutral policies, processing decisions are informed by actors' understandings (or lack thereof) about race and ethnicity, often leading to disparities in treatment of people of color. As a consequence, structural racism produces cumulative and persistent racial and ethnic inequalities.

Racism should not be viewed as an ideology or an orientation towards a certain group, but instead as a system: “[A]fter a society becomes racialized, racialization develops a life of its own...[and] [a]lthough it interacts with class and gender...[race] becomes an organizing principle of social relations itself.”<sup>7</sup> The persistent inequality experienced by Black persons and other people of color in America is produced by this racial structure. The contemporary racial structure is distinct from the past in that it is covert, is embedded within the regular practices of institutions, does not rely on a racial vocabulary, and is invisible to most White people.<sup>8</sup> That structural racism exists does not negate the effects of explicit racism, which continues to exist and which must also be addressed where evident.

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7. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 475 (1997).

8. *Id.* at 467.

## Executive Summary

At the outset, it is important to make clear what this report is and what it is not. Task Force 2.0 includes many organizations and individuals. It developed a process by which the Research Working Group was tasked with drafting research memoranda to update the work of the previous task force to provide a more complete picture of race disproportionality in Washington's criminal justice system and to identify, where and when it could, the extent to which those observed disproportionalities were not justified by differential involvement of individuals of different racial/ethnic groups in crime commission. The process allowed for input and robust involvement by stakeholders in all of the different working groups, including the Research Working Group.

This report is the product of that process. But at the end of the day, it is the work of the Research Working Group. Thus, the listing of organizations and individuals in Task Force 2.0 does not indicate endorsement of each statement or report finding.

This report was intended to be accompanied by a full set of recommendations from the Recommendations Working Group. It does not. Late in the process, a concern was raised that proposed recommendations should be vetted with more stakeholders. We have extended the process for consideration of recommendations. It is also probable that consensus will not be reached on everything, in which case majority and minority positions may issue for certain recommendations. This process is under way, and Task Force 2.0 is committed to providing its full set of recommendations later this year.<sup>9</sup>

This report focuses primarily on the treatment and experience of adults in the criminal justice system. A separate subcommittee, in some ways a task force within the broader task force, examined race and the juvenile justice system and will issue its findings and recommendations later this year.

This report focuses on race and not on the intersection of race and gender. There are important limitations to the chosen focus, including that the experiences of women of color in the criminal justice system may be obscured and the experiences of certain men of color, for example, Black men, may not appear to be as severe because what they experience is considered relative to the entire Black population instead of to the subset of the Black male population. This report is offered as a complement to the just-released *2021: How Gender and Race Affect Justice Now: Final Report*<sup>10</sup> issued by the Washington State Gender and Justice Commission.

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9. The Appendices accompanying this Report are drawn from research memoranda on disproportionality in specific areas or aspects of the criminal justice system. Some appendices include recommendations drawn from that research. These recommendations, as well as others, are undergoing review by the Recommendations Working Group.

10. Wash. Gender & J. Comm'n, *2021: How Gender and Race Affect Justice Now: Final Report*, [https://www.courts.wa.gov/subsite/gjc/documents/2021\\_Gender\\_Justice\\_Study\\_Report.pdf](https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf) (Sept. 16, 2021). The breadth and depth of this report is remarkable. Though the Research Working Group has not had a chance to review this



The 2011 Preliminary Report, issued by the previous task force, for the most part failed to examine or report disproportionalities as experienced by Indigenous people. Though additional work remains to document and understand fully these disproportionalities, we begin by highlighting our findings of the disproportionalities experienced by Indigenous people.

Indigenous people, in comparison to non-Hispanic White people,

- were killed at a higher rate by law enforcement (3.3x);
- were more likely to have force used against them by law enforcement in 3 of the 4 cities examined (2.9x, 5x, 1.3x – 2x);
- were stopped more frequently by law enforcement in both cities examined (5.8x and 2.6x);
- were searched more frequently in the two cities examined as well as by the Washington State Patrol;
- were arrested more frequently in all four years examined (2017, 2.3x; 2018, 1.7x, 2019, 2.6x; 2020, 2.6x);
- received felony sentences at a higher rate in the three years examined (2018, 1.5x; 2019, 1.5x, 2020, 1.7x);
- bear a disproportionate per capita share of legal financial obligations; and
- are incarcerated at a higher rate (3.7x).

The persistence of this disproportionately through different encounter points in the criminal justice system may come as a surprise to some; to others, these figures may put numbers to what was already well known to Indigenous people and Indigenous communities.

Below are some additional key observations about race disproportionality and disparity in Washington’s criminal justice system. The lack of consistent data collection on Latinas/os makes it difficult to determine the existence and extent of disproportionality. Where possible, the Research Working Group reports figures for that population, but with the exception of certain data sets, such as police killings for which there is more complete and accurate information, we do not have a lot of confidence for most data sets.

- **Stops.** In the jurisdictions examined, racial minorities tend to be stopped disproportionately. Studies of select jurisdictions in Washington have found that certain racial minorities are stopped more frequently than similarly situated White people.

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new report closely, it is amply evident that the Commission’s report provides a comprehensive examination of the intersection of gender and race in many areas in our legal system, including in the criminal justice system.

- **Searches.** In the jurisdictions examined, racial minorities tended to be searched disproportionately, even though research shows that racial minorities who are searched are less likely to possess narcotics or weapons than White people who are searched. Because discretionary searches ought to be driven by legitimate criminal justice reasons (likelihood of finding contraband, whether narcotics for drug violations or weapons for officer safety), the fact that disproportionality persists in the face of what is known about “hit rates,” suggests strongly that race is a factor in searches.
- **Use of Force.** In the jurisdictions examined, racial minorities, with the exception of Asian Americans, are more likely to be the victim of police use of force. It is very important to note that with regard to the lethal use of force by police, because disaggregated ethnic information is available,<sup>11</sup> individuals who are Native Hawaiians and Other Pacific Islanders are 3.3 times more likely than a White person to be killed by police.
- **Arrests.** Black and Indigenous persons are consistently arrested disproportionately, whether measured by relative or comparative ratios. This might be expected given the upstream disproportionalities of stops and searches. Observed disproportionality varies in significant ways for different crimes, with disproportionality for Black persons being greatest for robbery and the lowest for drug crimes. Though disproportionality for drug offenses may be lower than for other offenses, it remains high, with Black people arrested for drug offenses at a comparative ratio more than 2x that of White people, despite consistent findings that Black and White people use and sell drugs at similar rates.<sup>12</sup>
- **Convictions.** As measured by all felony sentences in 2018, 2019, and 2020, Black people were 2.7x more likely to be convicted than White people in each of those years. Indigenous people in those same years ranged from being 1.5x to 1.7x more likely to be convicted than White people. There also appears to be additional disproportionality in the punishment given for felony sentences for certain kinds of offenses, where White people are slightly more likely than others to be sent to jail or receive an alternative punishment instead of being sent to prison.

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11. More complete and more accurate information on the demographic profile of those killed by law enforcement is available because there are many fewer people killed by police than are stopped by police, and media usually investigates and reports on each police killing.

12. E.g., The Hamilton Project, *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race* (Brookings Institute, Oct. 21, 2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS 3 (2005); Katherine Beckett et al., *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 1 (2006).

- **Legal Financial Obligations (LFOs).** Black persons, Indigenous persons, and Latina/os are sentenced to LFOs more frequently and at higher rates than White persons and Asian Americans/NHOPIs. Even after controlling for relevant legal factors, Latina/os are sentenced to significantly higher LFOs than similarly situated White defendants.
- **Incarceration Sentences.** An examination of all fiscal year 2019 felony sentences for non-drug offenses revealed that BIPOC defendants on average received longer sentences than White defendants as measured at different offense seriousness levels. For the two most serious offense levels, BIPOC defendants received significantly longer sentences than White defendants. In addition, disproportionality was pronounced for BIPOC defendants with lower criminal history scores who received longer sentences than White defendants for the same offense levels. Stated differently, Black people who commit very serious crimes are treated more harshly than White people who commit very serious crimes; Black people with low criminal history scores are treated more harshly than White people with low criminal history scores.
- **Death penalty.** In Washington, a Black defendant in a capital case was 4.5 times more likely to be sentenced to death than a similarly situated White defendant.
- **Disproportionate incarceration.** When viewed over time, it appears that Black/White comparative disproportionality has improved since 1980 when a Black person was 14.1 times more likely to be incarcerated than a White person. In 2005, this had dropped to 6.4, and in 2020, to 4.7. This looks like great progress. However, it is important to understand how this “improvement” was achieved. From 1980 to 2005, the Black rate of incarceration nearly doubled, from 1,342 Black people incarcerated per 100,000 Black people to 2,522 per 100,000. But the comparative disproportionality ratio dropped because the rate of White incarceration more than quadrupled, going from 95 White people incarcerated per 100,000 White people to 393. Then, from 2005, the drop from 6.4 to 4.7 comparative ratio came about because the Black rate of incarceration dropped from 2,522 to 1,267 per 100,000 Black people, while the White rate dropped from 393 to 269. Because the Black rate dropped more than the White rate, the comparative disproportionality ratio decreased. But this figure, 4.7x, remains substantially greater than the recent comparative Black/White disproportionality ratios for felony convictions the last few years, 2.7x.

The 2011 Preliminary Report found that facially neutral policies resulted in disparate treatment of minorities over time. It also found that disproportionality was explained in part by the prevalence of racial bias – whether explicit or implicit – and the influence of bias on decision-making within the criminal justice system. It found that race and racial bias matter in ways that are not fair, that

do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

The Research Working Group of Task Force 2.0 finds, likewise, that facially neutral policies and bias continue to operate to contribute significantly to the observed disproportionalities. Certainly, some things have improved. A bright spot, if it can be called that, is that the Black rate of incarceration has dropped from 2,522 per 100,000 in 2005 to 1,267 per 100,000. But race and racial bias continue to matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

## I INTRODUCTION

This report is an update on the 2011 Preliminary Report on Race and Washington’s Criminal Justice System. This update does not include as context the history of race discrimination in Washington, and readers are encouraged to view the 2011 report for its brief historical overview.<sup>13</sup> The 2011 report began with that historical overview because the criminal justice system does not exist in a vacuum. Instead, it exists as part of a legal system that for decades actively managed and controlled where people could live, work, recreate, and even be buried.

Members of communities impacted by race disproportionality in Washington’s criminal justice system were invited to share with the task force their experiences and perspectives. These listening sessions revealed pain, suffering, and distrust that statistics fail to capture. The listening sessions serve to remind us that lives, families, and communities are torn apart by a criminal justice system that allows for disproportionate incarceration, disproportionate prosecution, disproportionate arrests, and disproportionate stops without examining fully the causes of this disproportionality.

Part II provides a summary of the findings of the 2011 report and includes some key developments that have occurred since that report was issued. Part III provides an updated picture of disproportionality in Washington’s criminal justice system. It includes statistics on disproportionalities in policing, which was not surveyed in the 2011 report. Part IV includes perspectives from communities and individuals who directly experience the effects of disproportionality in the criminal justice system. Part V examines proffered causes for the observed race disproportionality.

## II CAPSULE SUMMARY OF 2011 FINDINGS AND SOME KEY DEVELOPMENTS SINCE THEN

### A. Capsule Summary of 2011 Findings<sup>14</sup>

The 2011 Preliminary Report, for the areas, agencies, and time periods studied, found the following:

- With regard to drug law enforcement, a focus on crack cocaine – a drug associated with Black persons stereotypically and in practice – at the expense of other drugs, resulted in

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13. Research Working Group, *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251 (2011), 35 SEATTLE U. L. REV. 623 (2012), 87 WASH. L. REV. 1 (2012) [hereinafter “2011 Preliminary Report”]; because of the difficulties of providing pinpoint citations to all three journals, page references to this report will be to the PDF of the report released to the public as part of its historic presentation to the Court, available here: <https://perma.cc/6BV4-RBB8>].

14. These are drawn from the 2011 Preliminary Report, *supra* note 13, at 1-2.

greater disproportionality without a legitimate policy justification.

- This disparity in drug law enforcement informed related asset forfeitures, which involve distorted financial incentives for seizing agencies and facilitate further disparity.
- With regard to the Washington State Patrol, although racial groups were subject to traffic stops at equitable rates, minorities were more likely to be subjected to searches, while the rate at which searches result in seizures was lower for minorities.
- Disparity in traffic law enforcement informed the disproportionate imposition of “Driving While License Suspended” charges, which inflicts disparate financial costs.
- With regard to legal financial obligations, which are now a common though largely discretionary supplement to prison, jail, and probation sentences for people convicted of crimes, similarly situated Latino defendants received significantly greater legal financial obligations than their White counterparts.
- Similarly situated minority juveniles in Washington’s juvenile justice system faced harsher sentencing outcomes and disparate treatment by probation officers.
- Disparate treatment existed in the context of pretrial release decisions, which systematically disfavored minority defendants.
- Defendants of color were significantly less likely than similarly situated White defendants to receive sentences that fell below the standard range.
- Among felony drug offenders, Black defendants were 62% more likely to be sentenced to prison than similarly situated White defendants.

The 2011 report identified that disparities resulted in part from facially neutral policies as well as bias, whether explicit or implicit. In response to the specific claim made by a then-sitting state supreme court justice, it found that “the assertion that Black disproportionality in incarceration is due solely to differential crime commission rates is inaccurate.” Further, the Report found:

- Facially neutral policies that have a disparate impact on people of color contribute significantly to disproportionalities in the criminal justice system.
- Racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system.
- Race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.

## B. Some Key Court Developments Since the 2011 Report

Task Force 1.0 identified several causes for disproportionate outcomes in Washington’s criminal justice system, including that courts typically refuse to grant relief based on racially disproportionate outcomes and instead require proof that an entity was motivated at least in part by improper animus and acted to cause harm to an identifiable victim. This approach led to no relief for Mr. Warren McClesky, a Black man, who was sentenced to death in Georgia despite uncontroverted statistical evidence that the death penalty was administered in Georgia in a racially disproportionate manner.<sup>15</sup> In refusing to grant relief, the U.S. Supreme Court held that this evidence failed to establish that Mr. McClesky had been the victim of unlawful discrimination by decisionmakers in his case and that evidence regarding disproportionate impact did not render the application of the death penalty to him to be cruel and unusual.<sup>16</sup>

In 2018, the Washington Supreme Court in *State v. Gregory* departed from the approach taken in *McClesky* and held that Washington’s death penalty violated the Washington constitutional prohibition against cruel punishment because it was administered in an arbitrary and racially biased manner, established by statistical evidence of race disproportionality.<sup>17</sup> Importantly, the Court took “judicial notice of implicit and overt racial bias against black defendants in this state.”<sup>18</sup>

In addition, in that same year, the Washington Supreme Court adopted a novel approach to peremptory challenges. It adopted GR 37, which moved away from *Batson*’s three-step test for intentional discrimination during jury selection.<sup>19</sup> The stated purpose of GR 37 is “to eliminate the unfair exclusion of potential jurors based on race or ethnicity.” Under the rule, a party (or the court on its own initiative) may object to the use of a peremptory challenge to raise the issue of improper bias. Once an objection is raised, the court must evaluate the reasons given to justify the peremptory challenge using the standard of an objective observer. Importantly, for purposes of GR 37, an objective observer is someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state.<sup>20</sup> It also requires consideration of whether any proffered reason is disproportionately associated with race or ethnicity, and outlines several reasons as presumptively invalid because historically these reasons have been associated with improper discrimination in jury selection. GR 37 was subsequently constitutionalized in *State v. Jefferson*.<sup>21</sup>

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15. *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

16. *Id.*

17. *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

18. *Id.* at 22.

19. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

20. GR 37 - Jury Selection.

21. 192 Wn.2d 225, 429 P.3d 467 (2018).

In 2021, the Washington Supreme Court in *State v. Blake* held that Washington's simple drug possession statute was unconstitutional. Though not forming the direct basis for the invalidation of the statute, the Court acknowledged that the enforcement of this statute had a racially disproportionate impact, noting that this statute "affected thousands upon thousands of lives, and its impact has hit young men of color especially hard."<sup>22</sup>

The decision in *Blake* was preceded by a remarkable letter signed by all the justices on the Washington Supreme Court, issued on June 4, 2020, days after the killing of George Floyd and the protests that erupted around the nation. The letter sought to put the killing of Mr. Floyd into its historical context. It said, "The injustices faced by black Americans are not relics of the past." Rather, the devaluation and degradation of black lives "is a persistent and systemic injustice that predates this nation's founding." The Court went on to note, "We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems." The letter called on the collective legal community to "recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will."<sup>23</sup>

In the next part, we document the "racialized policing and the overrepresentation of black Americans in every stage of our criminal...justice system." The other detail that emerges clearly is that Indigenous people likewise encounter racialized policing and overrepresentation in every stage of our criminal justice system, which was not explored and documented in detail in the 2011 Preliminary Report. Though Latinas/os are overrepresented in Washington prisons and jails, a clear picture of racialized policing and overrepresentation in other stages of our criminal justice system is unavailable because of inaccurate, inconsistent, and/or incomplete data collection with regard to Latinas/os. Similarly, as shown below, Native Hawaiians and Other Pacific Islanders appear to experience racialized policing in certain jurisdictions, but a full picture of their representation in the criminal justice system is unavailable because of inconsistent and/or incomplete data collection or reporting.

### **III RACE DISPROPORTIONALITY WITHIN WASHINGTON STATE'S CRIMINAL JUSTICE SYSTEM**

It begins with laws passed by the legislature and ordinances passed by counties and municipalities that criminalize certain conduct and, in some instances, status. These laws and ordinances are then

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22. *State v. Blake*, 197 Wn.2d at 192 (2021) (citing 2011 Preliminary Report).

23. Washington Supreme Court, Letter of June 4, 2020. <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.



enforced by law enforcement, leading to stops and arrests. Charges can lead to detainment pre-trial; those charged can proceed before the tribunal pro se, with publicly-paid defense counsel, or with privately-paid defense counsel. Conviction can lead to an incarceration sentence, a non-incarceration sentencing alternative, and/or legal financial obligations. In addition, a host of collateral consequences can follow, including loss of housing and employment and adverse immigration consequences.

Though the laws and ordinances themselves are facially neutral, race disproportionalities exist at stops, searches, arrests, charges, convictions, and punishment. The existence of race disproportionality, by itself, does not prove race discrimination. It is critical, though, to understand as best we can where race disproportionality exists so we can examine what is causing it and, where appropriate, recommend changes to ameliorate or eliminate unwarranted race disproportionality.

In reporting rates, relative disproportionality ratios, and comparative disproportionality ratios, the Research Working Group notes that these are approximate measures intended to highlight areas and trends for leaders, policy-makers, criminal justice system (CJS) actors, affected communities, and the general public.<sup>24</sup>

#### **A. Policing**

The murder of George Floyd, the renewed attention it drew to Breonna Taylor and other Black people killed by police, and the protests that erupted across the nation and in Washington state were the immediate impetus for the launch of Task Force 2.0. Though these killings took place in other states, Washington had its own high profile in-custody death of a Black man, Manuel Ellis, in March 2020. Although the details of his death have been slow to emerge. Ellis, before his death, said, “I can’t breathe, sir.”<sup>25</sup> Criminal charges have been filed against three officers involved in Ellis’s death.<sup>26</sup>

It is extremely rare for criminal charges to be filed against police officers when a civilian is killed. Typically, accountability must come from internal law enforcement disciplinary proceedings and/or is left to after-the-fact civil lawsuits on behalf of the decedent’s estate. In one unusual example, an Auburn police officer, Jeffrey Nelson did not face criminal charges or face internal discipline and instead received a medal of valor when he killed Isaiah Obet, a Pacific Islander man, in 2017, though the City of Auburn later settled a civil lawsuit in August 2020 for \$1.25 million.

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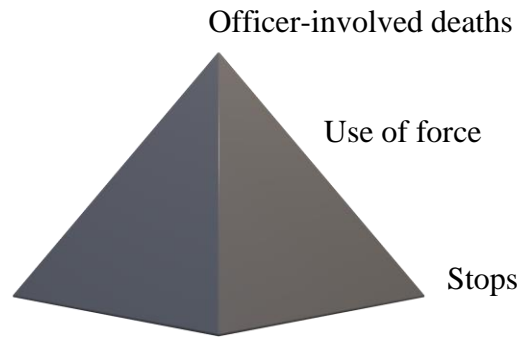
24. See *supra*, at x (definitions of relative and comparative disproportionality ratios).

25. Stacia Glenn, *Manuel Ellis Called Tacoma Police “Sir” as He Told Them He Couldn’t Breathe, New Video Shows*, SEATTLE TIMES, June 9, 2020, <https://www.seattletimes.com/seattle-news/crime/manuel-ellis-called-tacoma-police-sir-as-he-told-them-he-couldnt-breathe-new-video-shows/>.

26. AG Ferguson Charges Three Officers in Killing of Manuel Ellis, May 27, 2021, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-charges-three-officers-killing-manuel-ellis>.

The same officer now faces criminal charges after killing Jesse Sarey, a Southeast Asian man, in 2019. When criminal charges were filed against Nelson in August 2020, it “mark[ed] only the third time in 40 years a police officer in Washington has been charged for killing someone in the line of duty.”<sup>27</sup>

In three other recent killings, of Charleena Lyles, a Black woman, in 2017, of Tommy Le, a Vietnamese American, in 2017, and Renee Davis, a Muckleshoot tribal citizen, in 2016, no criminal charges have been filed, leaving their respective families to seek a measure of accountability in civil proceedings, two of which have been settled for seven-figure amounts paid to their respective families, with one case still proceeding.<sup>28</sup> Though deaths get the most media and public attention, one way to visualize disproportionality is to consider deaths as the apex of a pyramid with the base of the pyramid being the day-to-day contact that police have with the public. It is critical to document and understand the extent and operation of disproportionality at all stages.



**Disproportionate deaths.** In Washington state, during the period 2013–20, 253 people were killed by police.<sup>29</sup> Calculated as a rate based on each group’s relative population, Black people were killed in police civilian killings at a rate that was 3.6 times that of non-Hispanic White people; Indigenous people were killed at a rate 3.3 times that of non-Hispanic White people; Latinos were

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27. Sara Jean Green, Mike Carter & Asia Fields, *Auburn Police Officer Charged with Murder in 2019 Shooting*, SEATTLE TIMES, Aug. 20, 2020, <https://www.seattletimes.com/seattle-news/crime/auburn-police-officer-charged-with-murder-in-2019-shooting/>.

28 Sara Jean Green, *Appeals Court Rules Charleena Lyles Wrongful-Death Suit Against Seattle Police Can Proceed*, SEATTLE TIMES, Feb. 16, 2021, <https://www.seattletimes.com/seattle-news/crime/appeals-court-rules-charleena-lyles-wrongful-death-suit-against-seattle-police-can-proceed/>; Mike Carter, *King County Sheriff’s Office Will Pay \$5 Million Settlement in Deputy’s Fatal Shooting of Tommy Le*, SEATTLE TIMES, Mar. 24, 2021, <https://www.seattletimes.com/seattle-news/king-county-sheriffs-office-will-pay-5-million-settlement-in-deputys-fatal-shooting-of-tommy-le/>; Mike Carter, *King County to Pay \$1.5 Million in 2016 Shooting Death of Pregnant Muckleshoot Mother Renee Davis*, SEATTLE TIMES, Aug. 4, 2021, <https://www.seattletimes.com/seattle-news/king-county-to-pay-1-5-million-settlement-over-2016-shooting-death-of-pregnant-muckleshoot-mother-renee-davis/>.

29. See State Comparison Tool, Mapping Police Violence, <https://mappingpoliceviolence.org/states> (select “Washington”).

killed at a rate that was 1.3 times greater than for non-Hispanic White people; and Pacific Islanders were killed at a rate 3.3 times that of non-Hispanic White people.<sup>30</sup>

**Disproportionate use of force.** Consistent with the disproportionate deaths described above, there is strong evidence that non-lethal force is used in a racially disproportionate manner. At present, there is no central repository for use-of-force data in Washington state. A new law that went into effect on July 25, 2021, is intended to create a statewide data collection program.<sup>31</sup> Though this program will take time to be implemented, information collected and reported by some law enforcement agencies indicates strongly that non-lethal force is administered in a racially disproportionate manner. The Research Working Group examined data from four cities, Seattle, Spokane, Tacoma, and Vancouver, to determine comparative disproportionality ratios.<sup>32</sup>

A review of these cities reveals that a Black person is more likely to be subjected to force by a law enforcement officer by each of the city police departments reviewed, from a low of 3.9 times (Tacoma) to a high of 10.6 times (Vancouver) in comparison to the likelihood that a White person will be subjected to force. Indigenous people were more likely to be subjected to force in Seattle, Spokane, and Tacoma, but not in Vancouver. Pacific Islanders were more likely to be subjected to force in Seattle, Tacoma, and Vancouver, with no disaggregated information available in Spokane.

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30. See Table 1: Washington State (2013-20), Appendix A, at A-2.

31. Engrossed Second Substitute Senate Bill 5259, <http://lawfilesexxt.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5259-S2.SL.pdf#page=1>.

32. **Case Study 1: City of Seattle.** A review of 13,240 uses of force by the Seattle Police Department during the period 2014 – June 2021 revealed, using the methodology used above, that a Black person was 6.5 times more likely to be the recipient of force than a non-Hispanic White person; Indigenous persons, 2.9 times, and Pacific Islanders, 3.2 times. Asians and Latinas/os were, respectively, .4 times and .8 times as likely as a non-Hispanic White person to be the recipient of force. It is important to note, though, that 2,838 uses of force did not include demographic information about the use of force subject.

**Case Study 2: City of Spokane.** Using data from a recent study commissioned by the Spokane Police Department, and calculating rates and ratios as above, reveals that during the period 2013-19, of 736 uses of force, a Black person was 6.6 times more likely to be the recipient than a non-Hispanic White person and an indigenous person was 5 times. Because Pacific Islanders were not disaggregated, collectively Asian/Pacific Islanders were .6 times as likely; Latinas/os were .5 times as likely.

**Case Study 3: City of Tacoma.** A recent report reviewing the Tacoma Police Department, for the period 2015 – mid September 2020, disaggregated race and gender. Disproportionality ratios were calculated from this information: Black males were 3.9 times more likely to be the subject of use of force than White males; Black females were 4.9 times more likely than White females; Pacific Islander males were 2.3 times more likely than White men; Indigenous men were 1.3 times more likely than White men; Hispanic males and Asian males were less likely, respectively .4 times and .4 times. Indigenous females were nearly 2 times (1.9) more likely than White women.

**Case Study 4: City of Vancouver.** The Vancouver Police Department reports race independently from ethnicity. For uses of force in 2020, relative to Vancouver City demographics, a Black person is 10.6 times more likely than a White person to be the subject of police use of force; a Pacific Islander is 2.7 times more likely. A Latina/o person is about as likely to be the recipient of force as a White person, and an Asian person and an Indigenous person was .7 times as likely as a White person to be subjected to force.

Latinas/os were as likely in Vancouver and less likely to be subjected to force than White persons in Seattle, Spokane, and Tacoma. It is important to note, though, that the task force does not have confidence in what is reported regarding Latinas/os because of the failure often to collect, accurately or not, information regarding Latina/o identity.

As indicated at the outset of this section, a new law requires all law enforcement agencies to collect data on use of force. Once this information is available, better and, it is hoped, uniform data collection will allow for better analysis of data from all law enforcement agencies.

**Disproportionate stops.** Though there is no central repository that collects demographic data from all law enforcement agencies in Washington with regard to when law enforcement stops a person, the information available suggests strongly that race disproportionality exists at the level of stops. The task force examined data from Seattle and Spokane.

Data from the Seattle Police Department shows that from the period March 2015 to early June 2021, there were 47,855 Terry stops. These stops indicate that, relative to Seattle's population, Black persons are stopped at a rate that is 4.1 times that of non-Hispanic White persons and Indigenous people are stopped at a rate that is 5.8 times that of non-Hispanic White persons. Based on the available demographic information, in comparison to non-Hispanic White persons, Asians, Pacific Islanders, and Latinas/os were less likely than non-Hispanic White persons to be subjected to a Terry stop by the respective factors, .21, .47, and .52. It is important to note, though, that 4,586 Terry stops did not include race demographic information for the person stopped.

The task force's analysis of data in a recent report analyzing the Spokane City Police Department reveals that, for the period 2017 – June 30, 2020, of 137,034 stops resulting from Computer Assisted Dispatch, Black people were likely to be stopped at a rate 4.74 times that of non-Hispanic White people. During that same period, Indigenous people were likely to be stopped at a rate 2.61 times that of non-Hispanic White people. Asians and Latinas/os were stopped a lower rate, respectively .60 and .53. For traffic stops that were officer-initiated, for the period 2014 – June 30, 2020, Black people were stopped at a rate 2.65 times that of non-Hispanic White people. Asians were more likely to be stopped at a rate 1.23 times that of non-Hispanic White people. Latinas/os and Indigenous people had rates of .51 and .95 that of non-Hispanic White people. It is important to note that instances when demographic information is missing or not provided were excluded from consideration.

A look at these two jurisdictions reveals that certain racial minority groups are stopped disproportionately in comparison to non-Hispanic White persons as the reference group. The data from Spokane reveals interesting differences between when stops result from calls to law enforcement and officer-initiated stops.

**Disproportionate searches.** A subset of those stopped will be searched. Though comprehensive data for all jurisdictions and law enforcement agencies is not available, for agencies for which data was available, racial minorities are searched at disproportionate rates (relative and comparative) and “hit rates,” where weapons were found, are lower for racial minorities than for White persons.

**Case Study 1: City of Seattle.** During stops, Black persons, Hispanics, and Asian Americans were searched at rates greater than White people were. Even though minorities were searched more frequently than White persons, minorities were less likely to have weapons, with the greatest disparity in hit rates occurring for Indigenous people.<sup>33</sup> A 2021 report on the Seattle Police Department found that White men were the least likely to be stopped, the least likely to be searched, and when searched, were much more likely than other racial minorities to possess a weapon. Importantly, the report stated, “The elevated rates at which Black and Native American men were stopped and searched, then, are not explained by any elevated likelihood that they would possess weapons.”<sup>34</sup>

**Case Study 2: City of Spokane.** Though racial disproportionality exists for consent searches following a traffic stop, the small number of these searches makes it difficult to draw any conclusions.<sup>35</sup> Searches for officer safety following a traffic stop reveals troubling disproportionalities. Black drivers are twice as likely and Indigenous people were nearly three times more likely to be subjected to a search than would be expected based on their proportion of traffic stops.<sup>36</sup>

**Case Study 3: Washington State Patrol.** The 2021 Gender and Justice Study Report notes that “Data from the Washington State Patrol confirms that Black, Latino, Indigenous people, and Native Hawaiian and other Pacific Islander drivers are searched at a higher rate than White motorists. Indigenous people, in particular, are searched at a rate five times higher than White motorists—and these searches

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33. Seattle Police Department, *Disparity Review, Part I: Using Propensity Score Matching to Analyze Racial Disparity in Police Data* (April 2019), at 27-29, available at <https://crosscut.com/sites/default/files/files/19718539884.pdf>.

34. Center for Policing Equity, *The Science of Justice: Seattle Police Department: National Justice Database City Report*, at 15-16, (Jan. 2021), <https://www.documentcloud.org/documents/21015602-spd-cityreport-final-11121-1>.

35. Police Strategies LLC, *Demographic Disparity Analysis of Law Enforcement Data from the Spokane Police Department*, at 21 n.7 (Jan. 11, 2021), <https://static.spokanecity.org/documents/opendata/spd/spokane-pd-disparity-report-police-strategies-llc-jan-2021.pdf>.

36. *Id.* at 21-22.

appear to be focused along the I-5 corridor and near the Yakima and Colville reservations.<sup>37</sup>

The jurisdictions and law enforcement agencies for which data is available reveal a troubling consistency with regard to disproportionate searches of racial minorities.

**Disproportionate arrests.** For each of the past four fiscal years, Black people and Indigenous people have been arrested in Washington state at rates that far exceed their relative population and in comparison to White people. From 2017 through 2020, Black people had relative disproportionality ratios of 3.0 to 3.1 and comparative disproportionality ratios of 3.0 to 3.2. For Indigenous people, with the exception of 2018 when they were lower,<sup>38</sup> the relative disproportionality ratios ranged from 2.2 to 2.5 and comparative disproportionality ratios ranged from 2.3 to 2.6.

Because the Washington Association of Sheriffs and Police Chiefs (WASPC) does not report arrests by ethnicity, the tables below does not include any information on Latinas/os. WASPC, though, has begun reporting disaggregated numbers for Native Hawaiians and other Pacific Islanders (NH/PI), though the research working group is not certain that data collection by law enforcement agencies for arrests is complete or consistent.

**Table 1: Relative and Comparative Disproportionality Ratios for Arrests in Washington State by Demographic Group and Year**

|                                   | 2017             |                   | 2018             |                   | 2019             |                   | 2020             |                   |
|-----------------------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
|                                   | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio |
| White (including Hispanic Whites) | 1.0              | n/a               | 1.0              | n/a               | 1.0              | n/a               | 1.0              | n/a               |
| Black                             | 3.0              | 3.0               | 3.0              | 3.0               | 3.1              | 3.2               | 3.1              | 3.2               |
| Indigenous                        | 2.2              | 2.3               | 1.7              | 1.7               | 2.5              | 2.6               | 2.5              | 2.6               |
| Asian                             | 0.3              | 0.3               | 0.3              | 0.3               | 0.4              | 0.4               | 0.4              | 0.4               |
| NH/PI                             | 0.3              | 0.3               | 0.3              | 0.3               | 0.4              | 0.4               | 0.4              | 0.4               |

The table above reflects aggregate arrests. Different disproportionalities emerge with regard to arrests for different crimes. For example, arrests for certain crimes, aggravated assault and robbery, have significantly higher disproportionality ratios for Black persons, with the greatest differences for robbery, with comparative disproportionality ratios of 11.8 (2020); 10.7 (2019); 10.3 (2018),

37. Gender and Justice Commission, *2021: How Gender and Race Affect Justice Now*, at 636 (citing THE STANFORD OPEN POLICING PROJECT (2021), <https://openpolicing.stanford.edu>, and Joy Borkholder & Jason Buch, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (Dec. 19, 2019)).

38. The Task Force did not investigate why the 2018 numbers were significantly lower.

and 10.1 (2017). These ratios are starkly different from the disproportionality ratios for Black persons, around 3.0, when examining all crimes in the aggregate during each of those years.

A review of the data shows consistently that Black people and Indigenous people are arrested disproportionately, whether measured by relative or comparative disproportionality. More detail can be found in Appendix A.

## **B. Prosecutorial Decision-Making.**

At the moment, insufficient information is available for the Research Working Group to report on disproportionalities. Based on arrests and sentences, it can surmised reasonably that disproportionalities exist, but information is not available that indicates whether disproportionalities at arrest are exacerbated or ameliorated at the charging stage. The King County Prosecuting Attorney’s Office has developed a data dashboard that includes some demographic information, which indicates that, though there is relative disproportionality for Black persons in felony referrals its office receives, the disproportionality carries forward in its filings without being magnified or exacerbated.<sup>39</sup> The data dashboard does not include analysis of the case characteristics of felony referrals and the charges filed.

More on this subject is discussed in Appendix B. Information on disproportionality with regard to the Spokane County Prosecutor can be found in Appendix O.

## **C. Pretrial Release.**

At the moment, insufficient information is available for the research working group to identify specific areas or jurisdictions that require additional attention. Washington State’s Pretrial Reform Task Force, established on June 22, 2017, issued its Final Recommendations Report in February 2019.<sup>40</sup> This report stated that one of its guiding principles, “[m]aximize justice for all,” includes that “[e]very entity in the criminal justice system should take steps to ensure that the systems in place and the reforms to be implemented do not have a disproportionate impact on a person because of his or her race, ethnicity, gender, socioeconomic position, or otherwise.”<sup>41</sup> Though this report included information on several Washington counties and estimates about the percent of the jail

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39. See Data Dashboard, <https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx>. Select “Demographics” tab. Though there is a slight difference – 30.0% of felony referrals to 31.7% felony filings – for Black people, this difference is attributed to race demographic information that is missing or listed as unknown when referred by law enforcement, which are reduced at filing. The dashboard notes the problems that exist with regard to data collection and emphasizes: “Unfortunately, this results in the PAO having very unreliable and inaccurate race and ethnicity data.” *Id.* (last visited July 14, 2021).

40. See Intisar Surur & Andrea Valdez, *Pretrial Reform Task Force: Final Recommendations Report* (Feb. 2019), <https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf>.

41. *Id.* at 8.

population detained on pretrial status,<sup>42</sup> it did not include demographic profiles of the pretrial detainee population.

As emphasized by the Pretrial Reform Task Force, data is needed to assess the extent of any disproportionality and, if reforms are made, to assess their impact. A longer discussion of pretrial release, including criticism and caution about the use of pretrial risk assessment tools, can be found in Appendix C.

**D. Sentences.**

The Caseload Forecast Council has been tasked by the Washington Legislature to analyze and issue annual reports on race disproportionality in felony sentencing, which it began doing starting with FY 2018. The Council also provides a separate statistical report. Unlike WASPC, it includes “Hispanic” in its reporting based on race, and it refers to “Caucasians,” which the research working group takes as “non-Hispanic White” people. The Council does not disaggregate Native Hawaiians and Other Pacific Islanders and instead lumps them in the broader “Asian” category. In addition, WASPC reports on arrests for “Aggravated Assault” and “Simple Assault.” The Caseload Forecast Council reports only on Assault felony sentences. This creates certain challenges in analyzing arrests and sentences for assault because “Aggravated Assault” does not correlate exactly with assaults that are felonies in Washington.

For fiscal years 2018, 2019, and 2020, a look at aggregate felony sentences in Washington state reveals clear disproportionalities for Black persons and for Indigenous persons.

**Table 2: Relative and Comparative Disproportionality Ratios in Washington State by Demographic Group and Year for All Felony Sentences**

|                    | 2020             |                   | 2019             |                   | 2018             |                   |
|--------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
|                    | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio |
| Non-Hispanic White | 1.1              |                   | 1.1              |                   | 1.1              |                   |
| Black              | 3.0              | 2.7               | 3.0              | 2.7               | 3.0              | 2.7               |
| Indigenous         | 1.9              | 1.7               | 1.7              | 1.5               | 1.7              | 1.5               |
| Asian              | 0.3              | 0.3               | 0.3              | 0.3               | 0.3              | 0.3               |
| Latina/o           | 0.6              | 0.5               | 0.6              | 0.6               | 0.6              | 0.6               |

42. Notably, there are significant differences among counties as to what percentage of their overall jail populations comprise pretrial detainees. For example, King, Pierce, and Spokane had percentages, respectively of 77.7%, 75.5%, and 77%, in comparison to the nationwide average of 65.1%, with Thurston at 57.3% and Whatcom County at 59.3% being lower. *Id.* at 19. The Research Working Groups cautions that not too much be made of these figures because they are provided as percentages relative to the total jail populations and without additional contextual information about what leads to these relative percentages that necessarily are in relation to the percentages serving jail incarceration sentences.



Given the greater disproportionality in arrests for certain crimes, reported above, it ought not to be surprising that there is greater disproportionality in felony sentences for Black persons for assault and robbery. The Research Working Group did identify an additional disproportionality that merits attention and additional study: disproportionality that exists for certain groups with regard to whether a felony sentence results in a prison sentence versus a shorter jail sentence. Curiously, this information is not directly found in Caseload Forecast Council’s annual Adult Disproportionality Reports. This divergence only becomes apparent when looking at the Adult Disproportionality Report in conjunction with the Council’s Statistical Summary of Adult Felony Sentencing.

**Table 3: 2020 Felony Assault Sentences with Breakdown of Prison, Jail, or Other Sentences<sup>43</sup>**

|              | Felony Assault Sentences |       | Prison |       | Jail |       | Other |       |
|--------------|--------------------------|-------|--------|-------|------|-------|-------|-------|
|              | #                        | %     | #      | %     | #    | %     | #     | %     |
| Non-Hispanic |                          |       |        |       |      |       |       |       |
| White        | 2683                     | 63.6% | 1001   | 61.1% | 1516 | 64.8% | 163   | 67.4% |
| Black        | 776                      | 18.4% | 347    | 21.2% | 385  | 16.5% | 43    | 17.8% |
| Indigenous   | 145                      | 3.4%  | 53     | 3.2%  | 82   | 3.5%  | 10    | 4.1%  |
| Asian        | 147                      | 3.5%  | 46     | 2.8%  | 90   | 3.8%  | 11    | 4.5%  |
| Latina/o     | 415                      | 9.8%  | 175    | 10.7% | 230  | 9.8%  | 10    | 4.1%  |
| Total        | 4166                     |       | 1622   |       | 2303 |       | 237   |       |

Of note is that non-Hispanic White persons received 63.6% of the total felony sentences, but received 61.1% of the prison sentences, 64.8% of the jail sentences, and 67.4% of the “other” sentences, whereas Black persons received 18.4% of the total felony sentences, but received 21.2% of the prison sentences, 16.5% of the jail sentences, and 17.8% of the “other” sentences. Relative to their share of overall felony assault sentences, non-Hispanic White persons received a lower share of prison sentences and a higher share of jail and an even higher share of “other” sentences; Black persons received a higher share of prison sentences and lower shares of jail and “other” sentences. Hispanics received a slightly higher percentage of prison sentences and significantly lower percentage of “other” sentences. Asian offenders received a lower percentage of prison sentences in comparison with their relative share of felony assault sentences. An examination of 2019 and 2018 felony assault sentences reveal similar trends.

These observed disproportionalities are consistent with a 2021 report of the Washington State Institute for Public Policy (WSIPP) that examined race disproportionality based on the seriousness level of offenses and based on an offender’s criminal history.<sup>44</sup> An examination of all fiscal year

43. Percentages, when calculated for this table, included “Unknowns” that are not reported in the table.

44. Washington State Institute for Public Policy, *Examining Washington State’s Sentencing Guidelines: A Report for the Criminal Sentencing Task Force* (May 2021), [http://www.wsipp.wa.gov/ReportFile/1736/Wsipp\\_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf).

2019 felony sentences for non-drug offenses revealed that “[o]verall, BIPOC defendants, on average received longer sentences than White defendants.”<sup>45</sup> The greatest differences, where BIPOC defendants received longer sentences, occurred for the two highest offense seriousness levels.<sup>46</sup> In addition, race disproportionality was evident when comparing the sentences of BIPOC defendants with White defendants for those with lower criminal history scores, leading WSIPP to conclude, “Thus, racial disproportionality was higher than average for individuals with lower CHs [criminal history scores].”<sup>47</sup>

A review of felony drug violations reveals similar disproportionalities in sentencing outcomes. Interestingly, the relative and comparative disproportionality ratios for drug arrests for Black persons is significantly lower than it is for total arrests, and much lower than it is for aggravated assault and robbery. But as with felony assault violations, Black persons who receive felony sentences for drug violations receive, comparatively, a greater share of prison sentences and a lesser share of jail and other sentences.

**Table 4: Comparative Disproportionality Ratios in Washington State by Demographic Group for Drug Offenses by Arrest, Felony Sentence, and Type of Punishment, FY 2020**

|            | Arrest | Felony Sent. | Prison as Punishment | Jail as Punishment | Other Punishment |
|------------|--------|--------------|----------------------|--------------------|------------------|
| Black      | 2.2    | 1.9          | 2.4                  | 1.8                | 1.4              |
| Indigenous | 2.0    | 1.5          | 1.4                  | 1.6                | 1.6              |
| Asian      | 0.2    | 0.2          | 0.2                  | 0.2                | 0.1              |
| NH/PI      | 0.4    | n/a          | n/a                  | n/a                | n/a              |
| Latina/o   | n/a    | 0.5          | 0.6                  | 0.4                | 0.4              |

These observed disproportionalities are troubling and warrant close examination to see if they stem from differences in case characteristics independent of race or if race is playing a role.

Additional information can be found in Appendix D.

### E. Incarceration

Looking at changes to race disproportionalities since the 2011 report, the disproportionality ratio for Blacks in Washington prisons decreased, and the disproportionality ratio for Latina/o people remained nearly unchanged for prison but significantly decreased for jail.<sup>48</sup> The previous report only provided statistics for three population groups in prisons—White, Black, and Latina/o. This

45. *Id.* at 21.

46. *Id.*

47. *Id.* at 23.

48. The respective disproportionality ratios for 2011 were 6.4 for Black incarcerated individuals and 1.3 for Latina/o incarcerated individuals, compared to 4.64 for Black and 1.24 for Latina/os in 2020.

report includes Indigenous people and Asian and Native Hawaiians or Pacific Islanders (Asian & NH/PI). Indigenous incarceration show significant disproportionality ratios for both prison and jail.<sup>49</sup>

The 2011 report, for incarceration, used figures from 1980 and 2005 that combined prison and jails. The following table compares directly the 2005 and 2020 combined prison and jail figures.

**Table 5: Incarceration Rates and Comparative Disproportionality Ratios, 1980 – 2020**

|               | 1980                       |                   | 2005                       |                   | 2020                       |                   |
|---------------|----------------------------|-------------------|----------------------------|-------------------|----------------------------|-------------------|
|               | Incarc. rate (per 100,000) | Comp. disp. ratio | Incarc. rate (per 100,000) | Comp. disp. ratio | Incarc. rate (per 100,000) | Comp. disp. ratio |
| White         | 95                         | n/a               | 393                        | n/a               | 269                        | n/a               |
| Black         | 1342                       | 14.1              | 2522                       | 6.4               | 1267                       | 4.7               |
| Latina/o      | n/a                        | n/a               | 527                        | 1.3               | 302                        | 1.1               |
| Indigenous    | n/a                        | n/a               | n/a                        | n/a               | 985                        | 3.7               |
| Asian & NH/PI | n/a                        | n/a               | n/a                        | n/a               | 134                        | .5                |

As the 2011 report discussed, Washington in 1980 had the worst Black/White disproportionality ratio in the country. Though by 2005, the comparative disproportionality ratio had decreased significantly, the incarceration rate for White and Black persons increased dramatically. This increase is consistent with the rise of mass incarceration connected with the so-called war on drugs. The rate of Black incarceration between 1980 and 2005 nearly doubled; the rate of White incarceration more than quadrupled. So incarceration rates went up but the disproportionality ratio went down because the increase in the rate of White incarceration was twice as great as the increase in the rate of Black incarceration.

The numbers from 2005 to 2020 tell a different story, though it is one that will likely require some recalculation that chooses a date pre-pandemic, a date within the pandemic, and then a date at an appropriate distance temporally, post-pandemic. The incarceration rate for Black persons is halved; the incarceration rate for White people decreases, but not by as much, resulting in a decrease in the comparative disproportionality ratio, from 6.4 in 2005 to 4.7 in 2020. The trend data for the incarceration rate for Black persons for jail shows a steady drop, from nearly 900 in 2000 to about 600 in 2018. But as a point of reference – the comparative disproportionality ratio for arrests for Black persons in 2020 was 3.2. It was 3.2, 3.0, and 3.0 respectively for the years 2019, 2018, and 2017. The comparative disproportionality ratio for incarceration for Black persons in 2020 was 4.7. The persistence of higher imprisonment disproportionality when compared to

49. See Table 2, Appendix E, at E-3; Table 5, Appendix E, at E-11.

lower (but still high) felony sentencing disproportionality may reflect the fact that historically, as well as recently, Black people tend to be punished more harshly than are White people.<sup>50</sup>

The other key takeaway is the very high comparative disproportionality ratio for Indigenous people. Task Force 1.0 did not research and calculate incarceration rates and disproportionality ratios for Indigenous people in its 2011 Preliminary Report.

## **F. Legal Financial Obligations**

From traffic citations and juvenile misdemeanor and felony convictions, people are charged fines, fees, surcharges and payment costs related to the violation of the law and costs for court processing.<sup>51</sup> This system of monetary sanctions, also known as legal financial obligations or LFOs, is a two-tier punishment scheme embedded throughout local, state, and federal courts of the United States criminal legal system. It is a system that on one hand is a determinate sentence for people with means, and on the other hand, an indeterminate sentence that imposes a longer and disproportionate punishment for people without financial means.<sup>52</sup>

In Washington State, an aggregate analysis was done to specifically examine the racial and ethnic disproportionality in LFOs.<sup>53</sup> The analysis found that Black, Latina/o, and Indigenous people are sentenced to LFOs more frequently and at higher rates than Whites and Asian & NH/PI.

Specifically, Latina/o people are sentenced to significantly higher LFOs than White defendants, even after controlling for relevant legal factors. Latina/o people are sentenced to a median superior court LFO of \$1,500, Indigenous people are sentenced to a median LFO of \$1,100, Whites are sentenced to a median LFO of \$1,000, Asian/Pacific Islanders are sentenced to a median LFO of \$900, and Blacks are sentenced to a median LFO of \$850. In addition, Black people and Indigenous people, per capita, bore a disproportionate share of LFOs in comparison to White people and to Asian/Pacific Islanders.

Collection trends also suggest that inability to pay LFOs is greater for Black, Latina/o, and Indigenous people.

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50. See Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, at 27-(2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> (discussing overrepresentation of Black and Indigenous people receiving long or life sentences); *infra* Part III.D., at 18-19 (discussing race disproportionality in sentences for the most serious offenses as well as for racial minorities with lower criminal history scores).

51. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

52. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT OF THE POOR (2016).

53. Alexes Harris & Frank Edwards, *Legal Debt, Monetary Sanctions and Inequality* (2017), in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Henry Pontell ed.) (online research encyclopedia that is regularly updated).

The overall effect is that LFOs perpetuate poverty and future involvement with the criminal justice system disproportionately for Black, Indigenous, and people of color. One research project underway conducted by Kate O’Neil, Ian Kennedy, and Alexes Harris examines data from the Washington State Administrative Office of the Courts for the years 2000-2014. This ongoing project has found that the observed LFOs per capita are spatially concentrated. Certain census tracts across Washington State carry identifiable amounts of LFO debt compared to other census tracts. Second, the analysis found that neighborhoods with higher poverty rates also tended to have higher per capita LFO debt. Third, LFOs were associated with increases in future poverty rates experienced by certain census tracts in Washington. This association was stronger for non-White neighborhoods.

The analysis led the researchers to an alarming conclusion that LFOs sentenced per capita can predict future shares of residents in poverty. The system of monetary sanctions appears to reproduce the structural conditions that generated these neighborhood conditions in the first place, such as racial differences in access to housing, and the accrual of household wealth and community resources.<sup>54</sup> Carrying court-imposed debt negatively affects people’s abilities to access housing, employment, education, and furthers their involvement with the legal system.<sup>55</sup>

A fuller discussion of LFOs can be found in Appendix F.

### **G. Third Degree Driving While License Suspended (DWLS3)**

Third Degree Driving While License Suspended (“DWLS3”) is a misdemeanor crime that has been called “driving while poor.”<sup>56</sup> Under RCW 46.20.342(1)(c)(iv), a prosecutor can charge an individual with DWLS3 if they are driving with a suspended license and that suspension arose because they “failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation (failure to pay).” DWLS3 has become the most frequently charged crime in Washington State.<sup>57</sup>

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54. See also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

55. Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 *UCLA CRIM. J. L. REV.* 269 (2020).

56. Though there are many ways to be charged with DWLS3, the focus of this research is on charges and convictions based on an underlying suspended license for failure to appear or financial inability to pay.

57. Amy Roe, *It’s Time to Stop Wasting Money on Our State’s Most Commonly Charged Crime*, ACLU WASHINGTON, (Feb. 12, 2018), <https://www.aclu-wa.org/story/it%E2%80%99s-time-stop-wasting-money-our-state%E2%80%99s-most-commonly-charged-crime>.

Between 2010–2020, Black drivers were consistently charged with the crime of DWLS3 at a rate disproportionate to the percentage of Black residents within each county.<sup>58</sup> In some of Washington's larger jurisdictions, the percentage of DWLS3 charges brought against Black residents in a given year was double or triple the percentage of Black residents in the county's total population. For example, Black residents make up only 7 percent of King County's population. Yet in 2010, Black residents made up 18.3 percent of the county's total DWLS3 charges and by 2020 constituted 24.3 percent of DWLS3 charges in the county.

Latina/o individuals of unknown race<sup>59</sup> were also disproportionately represented in DWLS3 charges. This was particularly true in Grant County where Hispanic residents represented up to 40.4 percent of charges but only 8.2 percent of the population. Hispanic individuals of unknown race also made up a disproportionate percentage of charges in King County, Benton County, Clark County, Snohomish County, Whatcom County, Lynnwood Municipal, Renton Municipal, and Yakima Municipal, though to a lesser extent.

Although Indigenous people made up smaller percentages of the general population, there was particular over-representation in DWLS3 charges in Yakima Municipal, Yakima County, and Whatcom County. More generally, Indigenous people were over-represented in yearly DWLS3 charges in all jurisdictions except Snohomish County, Benton County, Clark County, Cowlitz County, and Pierce County.

Asian residents tended to be disproportionately underrepresented in DWLS3 charges per year, except for Cowlitz County in 2015, 2017, and 2019.<sup>60</sup>

In comparison, the percentage of DWLS3 charges brought against White drivers almost never overtook the percentage of White residents in each county.<sup>61</sup>

Disproportionalities that exist at charging, not surprisingly, persist at convictions. As a simple misdemeanor offense, a conviction for DWLS3 comes with a maximum fine of \$1,000

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58. The raw data on DWLS3 charges, outcomes, and race of defendants was obtained from the Administrative Office of the Courts. The Administrative Office of the Courts did not provide any analysis. The general population data is from the 2019 U.S. Census population estimates. See <https://www.census.gov/quickfacts/WA>.

59. Although Latina/o refers to "Hispanic" and "Hispanic of Unknown Race," the numbers for this group are not an accurate reflection of the Latina/o population in Washington State. For purposes of data analysis, the authors have chosen to use the terms "Hispanic of Unknown Race" and "Hispanic" to refer to people who identified as Race: Unknown and Ethnicity: Hispanic. Individuals who identified as Race: White and Ethnicity: Hispanic were counted as White. Accordingly, this data does not correctly capture the percentage of Latina/o individuals residing in each county or the percentage of Latina/o individuals that make up the total DWLS3 charges for each year.

60. In those years, Asian individuals made up 2.0 percent of DWLS3 charges compared to 1.6 percent of the county's total population.

61. The few exceptions are discussed in detail in Appendix G.

and a maximum sentence of ninety days.<sup>62</sup> In practice, the monetary impact of a DWLS3 conviction can be much higher than the base penalty set by a judge. Even assuming that a judge imposes a base penalty of \$300<sup>63</sup> for the DWLS3 conviction, there are further mandatory and discretionary traffic-based financial obligations authorized under the law which can add up to a total owed amount of \$708.<sup>64</sup> And although Washington no longer allows imposition of interest upon non-restitution penalties, fines, fees, and costs owed from a criminal proceeding,<sup>65</sup> defendants who had their licenses suspended due to underlying unpaid traffic tickets may continue to owe additional collection fees and accrued interest<sup>66</sup> on top of the penalties assessed for a DWLS3 conviction.<sup>67</sup>

Even a jail sentence of a few days can impact an individual's employment prospects and a family's ability to pay the bills. In 2009, the Administrative Office of the Courts reported that the average jail sentence for an individual convicted of DWLS3 was 61.9 days, "with all but 3.3 days suspended."<sup>68</sup> For one 29-year-old father in Spokane, Washington, the DWLS3 conviction and

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62. RCW § 46.20.342(1)(c) (2015) (providing that DWLS3 is a misdemeanor crime without a specified punishment); RCW § 9.92.030 (1982) (providing that "Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, 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 both such imprisonment and fine").

63. In 2012, the Administrative Office of the Courts produced a fiscal note stating that, based on a past study, "the average penalty assessed per DWLS3 case was \$293 with an average payment of \$91." See 6284 P S SB, *Civil traffic infractions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 3 (2012), available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (searching under session year 2012, bill number 6284).

64. See, e.g., RCW § 3.62.085 (2018) ("Upon conviction or a plea of guilty in any court organized under this title or Title 35 RCW, a defendant in a criminal case is liable for a fee of forty-three dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)."); RCW § 3.62.090 (2019) (providing an additional public safety and education assessment calculated as  $.70(\text{base penalty}) + .50(\text{initial public safety and education assessment})$  which "shall not be suspended or waived by the court"); RCW § 46.64.055 (2009) ("In addition to any other penalties imposed for conviction of a violation of this title that is a misdemeanor . . . the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent.").

65. RCW § 10.82.090(1) (2018) ("[R]estitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."); RCW § 3.62.020(5)(b) (2018) ("As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in district courts] shall not accrue interest."); RCW § 3.62.040(5)(b) (2018) ("As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in city cases] shall not accrue interest."). But see RCW § 10.01.180 (2018) (providing that a non-indigent defendant found to have willfully defaulted in the payment of any fine, penalty, assessment, fee, or costs can have the amount sent to a collection agency).

66. See RCW § 19.16.500(2) (2011); RCW § 19.16.500(1)(b) (2011).

67. See Diagram 1 and Diagram 2, Appendix G, at p. G-11.

68. 6284 P S SB, *Civil traffic infractions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 2 (2012), available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (searching under session year 2012, bill number 6284).

subsequent sentence of 10 days in jail cost him his job.<sup>69</sup> Another 43-year-old father in Spokane reported being imprisoned numerous times for DWLS3.<sup>70</sup> Over time, he lost his car, his job, and his income.<sup>71</sup>

Though a misdemeanor, disproportionalities that exist for DWLS3 have an outsize impact because it is, as noted above, the most charged crime in Washington, and the negative impact can have cascading effects that lead to further entanglement with the criminal justice system.

More on this topic can be found in Appendix G.

## **H. Community Supervision and Reentry.**

BIPOC individuals can be and are disparately impacted after conviction, including (1) in decisions regarding whether they can enter community supervision instead of serving all or part of their sentence incarcerated; (2) in decisions regarding whether they can be released from prison early; and (3) on reentry into the community.

It is impossible to examine in isolation these issues that arise later in processing individuals through the criminal justice system. Disproportionalities at this point are often the result of disparities that begin much further upstream. Other parts of the report explain how BIPOC individuals experience differential treatment that regards them as “bad” from their initial encounters with the system, including that they are stopped, searched, and arrested at higher rates; experience harsher conditions of confinement;<sup>72</sup> are charged with more serious crimes; are more likely to receive aggravated or enhanced sentences and less likely to receive mitigated sentences;<sup>73</sup> and generally receive longer sentences as a result of harsher assessments.<sup>74</sup> These negative assessments of BIPOC individuals compound as they are processed through the system and have lasting impact. Labeling and presumptions carry forward into the issues in this section—decisions

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69. Center for Justice, *Voices of Suspended Drivers* 14 (Jan. 2013), <https://www.smith-barbieri.com/wp-content/uploads/2013/01/CFJ-Voices-of-Suspended-Drivers.pdf> (quoting the same 52-year-old SSI recipient from Spokane Valley).

70. *Id.*

71. *See id.*

72. *See, e.g.*, King County Auditor's Office, *Adult Jails Need Risk-Based Approach to Improve Safety, Equity* 27-37 (2021), <https://kingcounty.gov/depts/auditor/auditor-reports/all-landing-pgs/2021/jail-safety-2021.aspx> [hereinafter King Co. Auditor Report].

73. Washington State Institute for Public Policy, *Examining Washington State's Sentencing Guidelines: A Report for the Criminal Sentencing Task Force*, at 32 (May 2021), [http://www.wsipp.wa.gov/ReportFile/1736/Wsipp\\_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf), [hereinafter WSIPP 2021 Sentencing Guidelines Report].

74. *Id.* at 21.



about continued incarceration and early release, as well as the experience of BIPOC individuals on reentry.

For example, in explaining its findings about racial disproportionalities in sentencing, the Washington State Institute for Public Policy explained that

[t]hese disproportionalities may be driven, in part, by differences in treatment at earlier stages of the criminal justice system. For example, there may be disproportionality in the likelihood of arrest regardless of differences in actual offending behavior. If people of color are more likely than White people to be arrested, then they may also be more likely to be convicted of an offense. Consequently, differences in sentencing outcomes may represent disparate treatment prior to conviction and/or sentencing.<sup>75</sup>

Further, simply on the basis that members of BIPOC communities are overrepresented in prison and jail populations, they are disproportionately subject to discretionary decisions concerning their eligibility for release to community supervision, dependent on services designed to aid in their reentry, and impacted by collateral consequences of their incarceration. Any bias, explicit or implicit, in discretionary decisions, and any neutral practices, including risk assessment tools that have race disproportionate effects, will negatively impact individuals and communities of color.

Additional discussion, including a longer discussion of risk assessment tools used in this context, can be found in Appendix H.

## **I. Criminal Justice System Actors**

In at least one listening session, community members emphasized that diversity among criminal justice system actors was important. They did not feel that inclusion by itself would be a panacea, as research shows that racial minorities are not immune from harboring explicit and/or implicit bias, including within-group biases. But research shows consistently that diversity improves group deliberation and decision-making, supporting the notion that representation matters.

There is very little systematic collection of race demographic information about criminal justice system actors. With regard to the judiciary, it is relatively easy to determine the demographic profile of the Washington Supreme Court, which went from having no persons of color in 2011 when the first task force presented its first report to now having four persons of color on the Court. The racial diversity on the high court now is much greater than the diversity overall of state court

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75. *Id.* at 14. *See also* King Co. Auditor Report at 29 (“Black people in the United States are more likely than White people to be arrested; they are more likely to be charged with crimes that carry heavier sentences; once charged, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences. These systemic factors compound on each other to inflate the average criminal involvement score for Black people.”)

judges in Washington, which in 2016 had 4% women of color with a state population share of 15% women of color and 6% men of color with a state population share of 16% men of color, which earned Washington a “D” grade on the Gavel Gap Report Card.<sup>76</sup>

For elected county prosecutors, though the Washington Association of Prosecuting Attorneys does not collect demographic information of its elected prosecuting attorneys, WAPA reports that it believes, based on self-identification, there is one woman of color now serving, and that one other person of color previously served as an elected prosecutor. One was elected in 2014; the other, 2018. That means that before 2015, for the 39 counties in Washington, it is not known if a person of color had ever served as an elected county prosecutor.

The Research Working Group was unable to collect comprehensive data on elected and appointed city attorneys. Further, comprehensive data on the demographics of staff in county prosecutor and city attorney offices is not available.

Though some county defender agencies collect demographic information on their staff, comprehensive data on attorneys who provide public and private defense is not available. Likewise, comprehensive data is not available with regard to law enforcement statewide.

#### IV COMMUNITY VOICES

Most are now familiar with “the talk” that is given by Black parents and elders to Black children to prepare them for and to give them tools and strategies to survive encounters with law enforcement.<sup>77</sup> The need for “the talk” is rooted in the lived experience of those who experience disparate treatment in the criminal justice system.

To understand the disparities that exist for communities of color in the criminal justice system, it is essential to not simply rely on data; it is essential to hear those communities speak about their experiences with the system. Community members and organizations were involved in Task Force 2.0’s workgroups. In addition, the Task Force’s Community Engagement Working Group organized engagement sessions with various individuals and groups around the state to share the task force’s work and to gain their perspectives on the criminal justice system.

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76. Tracey E. George & Albert Yoon, *Gavel Gap: The Differences Between the Race & Gender Composition of the Courts & the Communities They Serve*, <https://www.acslaw.org/analysis/reports/gavel-gap/> (scroll to “Report Card,” select “Washington”).

77. See, e.g., Geeta Gandbhir & Blair Foster, “A Conversation With My Black Son,” N.Y. TIMES, Mar. 17, 2015, <https://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html>. Sam Sanders & Kenya Young, *A Black Mother Reflects on Giving Her 3 Sons “The Talk” ... Again and Again*, NPR (June 28, 2020), <https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again>.

The participants in these sessions addressed a range of issues confronting BIPOC communities:

- Every person participating in the engagement sessions felt that individuals of color are not treated fairly or equitably in the criminal justice system.
- Many participants spoke specifically about how bias and stereotypes criminalize BIPOC individuals.
- Participants said that police seem to escalate and fail to deescalate encounters with BIPOC individuals.
- Participants raised the problem of over- and under-policing in their communities.
- Many participants emphasized that one cannot look at racial disparities in the criminal justice system separate from the social and economic inequalities that exist in society as a whole.
- Participants felt that there was a lack of fairness in sentencing.
- Numerous participants, particularly those from the Latina/o community, spoke about how fear of immigration authorities impedes access to justice.
- Numerous participants expressed that access to justice was impeded because of language issues, including a lack of translators, court forms not being translated, and a failure by CJS actors to appreciate cultural differences.

Participants also expressed frustration over what they perceived as a lack of progress in addressing disparities in the criminal justice system and made the following observations about what they perceived as barriers to reform:

- Lack of access to data;
- Lack of disaggregated data for Asian, Native Hawaiian, and Pacific Islander communities;
- Lack of systems of accountability for CJS actors;
- Collective bargaining within police unions as a major impediment to reform and to getting justice;
- Police hiring practices, including the need to see more officers of color and to see better screening of officers
- Challenges posed by structural racism that infuses the criminal justice system;
- Failure by those seeking reform to recognize and include expertise provided by community.

Finally, participants expressed a concern about reports, including frustration that reports are written and recommendations are made, but that nothing really changes.

These summary bullet points do not do justice to what participants expressed in the listening sessions. They do not capture fully the pain expressed by participants.

More on what participants expressed in the listening sessions can be found in Appendix I.

## V

### PROFFERED CAUSES FOR RACIAL DISPROPORTIONALITY

#### A. CRIME COMMISSION RATES

The best available evidence suggests that the disproportionalities discussed in Part III above are only partly attributable to differences in crime commission rates. It is important to note that crime commission rates are difficult to approximate and perhaps impossible to determine accurately. Generally, criminologists use two methods to estimate the level of crime commission among different racial and ethnic groups. Each has their problems.

Some criminologists use household crime victimization survey data in which victims identify the race of their assailant as proxies for differential commission rates by race.<sup>78</sup> These data reflect victim perceptions of racial identity of their assailant, and include only non-fatal crimes where there is direct contact between the victim and the perpetrator (e.g., robbery, rape, and assault). Because information about victim perceptions of perpetrators' race is only available for a few violent offenses, crime victimization survey data presents an incomplete picture of crime commission rates by race. In addition, a significant percentage of victims (16% in 2019) of non-fatal violent crimes do not identify the race/ethnicity of their assailant.<sup>79</sup>

Other criminologists use arrests as a proxy for crime commission.<sup>80</sup> However, this likely presents a distorted picture. First, according to 2019 national data, less than half (41%) of violent victimizations were reported to police, and only about one-third (33%) of property victimizations were reported to the police.<sup>81</sup> Second, crimes of violence are committed most often by an offender

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78. See, e.g., Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666 (1985).

79. Rachel E. Morgan & Jennifer Truman, *Criminal Victimization, 2019*, at 19 (Office of Justice Programs, Bureau of Justice Statistics, Sept. 2020), <https://bjs.ojp.gov/content/pub/pdf/cv19.pdf>.

80. See, e.g., Albert Blumstein, *On the Disproportionality of the U.S. States' Prison Population*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

81. Morgan & Truman, *supra* note 78, at 8.

who is the same race as their victim: most White victims identify their assailants as White (61.6%), and most Black victims identify their assailants as Black (70%).<sup>82</sup> Third, Black victims (49%) are more likely than White victims (37%) to report their victimization to the police.<sup>83</sup> Higher reporting rates among Black persons means that crimes involving Black suspects are more likely to come to the attention of the police. Further, the use of arrest data as a proxy for crime commission is problematic when clearance rates (the percentage of crimes that comes to the attention of the police that lead to arrest or are cleared by exceptional means) are low. In 2019, WASPC reports that the clearance rate for “Crimes Against Persons” was 47.2%; the clearance rate for Crimes Against Property was 15.2%.<sup>84</sup>

Use of crime victimization surveys as accurate proxies for differential crime commission among different racial groups is problematic for the reasons identified above. Use of arrests as a measure of differential crime commission among different racial groups is also problematic and will likely overstate the rate of crime commission by Black persons and therefore underestimate race disparity in criminal justice processing. Incomplete or unreported data on other racial groups only supports the conclusion that it is difficult to determine with confidence that either of these proxies are accurate measures of differential involvement in criminal activity.

## **B. THE INTERPLAY OF BIAS AND FACIALLY NEUTRAL POLICIES**

Research shows that bias, whether held consciously (explicit) or unconsciously (implicit), affects behaviors.<sup>85</sup> It may be difficult, though, to establish when precisely bias affects behavior that impacts a particular person. The criminal justice system involves numerous actors—such as police officers, prosecutors, defense counsel, judges, jurors, and eyewitnesses—whose decisions and judgments have a significant impact on the conviction and punishment of criminal defendants.

The 2011 Report discussed existing research that showed that CJS actors, in experimental settings, exhibited bias in ways that affected or could affect outcomes. For example, a juror who associates Black persons (as opposed to White persons) with a particular crime will be more likely to convict Black persons (as opposed to White persons) of that crime on the *same* evidence. In another experiment, police officers tended to associate Black faces with criminality. In yet another experiment, both police and probation officers exhibited a significant influence of race on their judgments of culpability and decisions to arrest and to charge.<sup>86</sup>

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82. *See id.*, at 19 (Table 17: Percent of violent incidents and percent of the U.S. population, by victim and offender race or ethnicity, 2019).

83. *Id.*

84. Washington Association of Sheriffs and Police Chiefs, *Crime in Washington 2019 Annual Report*, at 13, [https://waspc.memberclicks.net/assets/CJIS/Crime%20in%20Washington%202019-small\\_111620.pdf](https://waspc.memberclicks.net/assets/CJIS/Crime%20in%20Washington%202019-small_111620.pdf).

85. For a fuller discussion of explicit and implicit bias, see 2011 Preliminary Report, *supra* note 13, at 17-20.

86. These experiments are discussed in detail in the 2011 Preliminary Report, Appendix A.8. Implicit Bias.

The 2011 Report relied on previous research in non-experimental settings that reviewed actual CJS outcomes in Washington that found disparate treatment of racial minorities with regard to prosecutorial decision-making, confinement sentencing outcomes, LFOs, pretrial release, enforcement of drug laws, asset forfeiture, traffic stops, and DWLS3.<sup>87</sup> But conclusions about race disparity when viewing aggregate outcomes do not, in general, provide a remedy in individual circumstances. Remedies in individual circumstances generally require proof of intentional discrimination by particular CJS actors.<sup>88</sup>

While traditional models of racism emphasize individual acts of discrimination, structural racism describes the interaction between various institutions and practices that are neutral on their face, but nevertheless produce racially disparate outcomes.<sup>89</sup> Facially neutral policies can produce foreseeable, if unintended, race disproportionality.<sup>90</sup> For example, judicial consideration of ostensibly race-neutral factors, such as employment status, when making pre-trial release decisions, disadvantages certain Black and Latina/o defendants because they are less likely than White and Asian defendants to be employed in Washington.<sup>91</sup>

Another example of a facially neutral policy that can produce foreseeable, if unintended, race disproportionality is the provision of publicly-funded criminal defense. The Office of Public Defense reports that in 2018 county filings, “courts appointed public defense attorneys to represent approximately 95% of felony defendants, 54% of misdemeanor defendants, and almost 100% of juveniles.”<sup>92</sup> If sufficient resources are not provided for public defense, the burden disproportionately hits Black and Indigenous people especially hard because they are grossly overrepresented at arrest, charging, conviction, and sentencing. In addition, the low rate of

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87. *See id.* at 13-17.

88. With regard to Black people, Latinas/os, and Indigenous people who are stopped while driving their cars and searched, absent an admission from officers that they were acting based on bias, intentional discrimination will be nearly impossible to prove. Yet even though intentional discrimination cannot be proven, Black people, Latinas/os, and Indigenous people are more likely will be searched, even though, statistically, those individuals are less likely to be in possession of narcotics or weapons. *See* Appendix A: Policing, at A-6 – A-7; Appendix K: Traffic Stops, at K-1, K-4.

89. *See generally* John A. Powell, *Structural Racism: Building Upon the Insights on John Calmore*, 86 N.C. L. REV. 791 (2008).

90. *Id.* at 794.

91. In Washington, in 2020, the Black unemployment rate was 12.7%, the Latina/o unemployment was 9.8%, as compared with the White unemployment rate of 7.9% and the Asian unemployment rate of 6.3%, with Indigenous unemployment not reported. Bureau of Labor Statistics, *Employment Status of the Civilian Noninstitutional Population by Sex, Race, Hispanic or Latino Ethnicity, Marital Status, and Detailed Age, 2020 Annual Averages*, at 71, <https://www.bls.gov/lau/table14full20.pdf>.

92. Washington State Office of Public Defense, *2019 Status Report on Public Defense in Washington State* (July 2020), at 20, [https://www.opd.wa.gov/documents/00799-2020\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf). This 95% figure may be inflated because of difficulties in collecting data from different sources.

assigned counsel for misdemeanors may indicate that insufficient resources are provided to indigent defendants who face what might be considered by some to be less serious jeopardy. This ignores how consequential misdemeanors such as DWLS3 can be in pushing a person into a cycle of poverty and continued entanglement in the criminal justice system. Any criminal conviction can lead to the loss of housing or employment as well as host of other collateral consequences. Some criminal convictions have immigration consequences.<sup>93</sup> To the extent that public defense is underfunded, race disproportionality at arrest, charging, conviction, and sentencing is likely amplified.

If public defense is underfunded, a question arises as to what role race may play in funding decisions. The level of public defense funding may reflect bias, explicit and/or implicit, based on the population served by public defense. The unknown counterfactual is whether public funding of criminal defense would look different if White people were overrepresented at arrest, charging, conviction, and sentencing.

Consider the way that the opioid crisis, associated more with White people, has tended to be regarded as a public health issue, whereas the earlier crack cocaine crisis, associated more with Black people, was addressed largely through criminal justice and carceral approaches.<sup>94</sup> The criminal justice and carceral approach undergirded a facially neutral law that was enforced in a ways that the Washington Supreme Court recognized “has hit young men of color especially hard.”<sup>95</sup>

If public defense is underfunded and decisions regarding funding are impacted by bias, explicit and/or implicit, this facially neutral policy may turn out not only to exacerbate disproportionality but may stem in part from improper racial considerations. This suggests that there is an interplay between facially neutral policies and bias that requires careful consideration.

Consider the facially neutral policies that exist with regard to juror selection. Prospective jurors can be struck for cause if the judge finds that the juror cannot serve as a juror, including if the juror is unable to be impartial. In addition, the prosecutor and defense counsel may exercise peremptory challenges, where, at least initially, they do not have to provide a reason for striking a prospective

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93. More detail on delivery of public defense can be found in Appendix M.

94. See Helena Hansen & Julie Netherland, *Is the Prescription Opioid Epidemic a White Problem?*, 106 AM. J. PUB. HEALTH 2127 (2016) (“[w]hen nonmedical opioid use increased in White communities, rather than arresting consumers, regulators” sought to address the problem in ways that did not involve the criminal justice system), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5105018/>; Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 426-27 (2019) (discussing how the response to the “crack cocaine crisis” resulted in large numbers of arrests of drug users); Mary Crossley, *Opioids and Converging Interests*, 49 Seton Hall L. Rev. 1019, 1027 (2019) (noting difference in public attitudes toward “opioids (drugs that have been racially coded as ‘white’) ... [and] “crack cocaine (a drug racially coded as ‘black’)”).

95. *Blake*, 197 Wn.2d at 192 (citing 2011 Preliminary Report).

juror. The exercise of peremptory challenges has raised serious questions about whether prospective jurors were being struck for improper reasons. Though people may disagree about the extent of race discrimination against potential jurors, there is universal agreement that race discrimination in jury selection is wrong.<sup>96</sup> The challenge, though, has been how to prove when a strike of a prospective juror is motivated by improper race considerations.

Until recently, Washington followed a three-step test that required a finding of invidious (intentional) discrimination by the striking attorney.<sup>97</sup> GR 37, adopted by the Court in 2018, dramatically altered the way peremptory challenges would be tested, including that it was intended to address implicit bias.<sup>98</sup> The Court's adoption of GR 37 is an example of reform intended to address the exclusion of jurors of color through the exercise of peremptory challenges, which could, before GR 37, be challenged successfully only through proof of intentional discrimination, which necessarily failed to address or remedy implicit bias. The Court recognized that the facially race-neutral *Batson* test was ineffective in addressing race discrimination in the exercise of peremptory challenges in individual cases and instituted, instead, a test that operated at a systemic level that sought to correct the deficiencies with the previous approach. The Court's new approach to peremptory challenges recognizes the interplay between bias and facially neutral policies and provides a systemic solution intended to protect against the possible operation of bias in individual circumstances.

Solutions, though, even when disparity has been demonstrated, remain elusive. A recent study that examined the treatment of juveniles sentenced as adults in Washington over a ten-year period, from 2009 – 2019, revealed not just that Black and Latina/o children are disproportionately overrepresented among youth convictions, discretionary decline, and auto-decline cases, but also that “[d]ifferences neither in criminal histories nor types of offense explain this disproportional over-representation.”<sup>99</sup> The disparity that is demonstrated at the aggregate outcome level does not, by itself, prove discrimination in any individual case. Though the disparity in aggregate outcomes is likely the result of the interplay of bias, explicit and/or implicit, operating within the framework

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96. See generally *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879); *Batson v. Kentucky*, 486 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *Flowers v. Mississippi*, 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019).

97. *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) (recognizing the limitations of *Batson* but adhering to it). See GR 37 (setting forth new test for assessing peremptory challenges that includes consideration of implicit bias).

98. GR 37 was essentially constitutionalized by *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018).

99. Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State, 2009-2019*, at 4 (June 14, 2021), available at [https://www.opd.wa.gov/documents/00866-2021\\_AOCReport.pdf](https://www.opd.wa.gov/documents/00866-2021_AOCReport.pdf). See also *id.* at 17 (“no evidence that criminal history is a primary driving factor in prosecutors’ decisions to initiate a discretionary decline hearing”); and 26 (“youth of color are, to an extraordinary degree, disproportionately over-represented among juveniles adjudicated as adults through the discretionary decline process, even when type of offense is accounted for in the analysis”). The researchers also identify very significant disproportionalities with regard to convictions and auto-decline for Indigenous children. *Id.* at 15 and 20.



of facially neutral laws and policies regarding discretionary decline and auto-decline,<sup>100</sup> this study noted that it “cannot speak to the precise mechanisms that produce ethno-racially disparate outcomes.”<sup>101</sup>

This last statement presents a conundrum and challenge for those seeking to reduce or eliminate disparity in the criminal justice system. We may not always be able to identify with precision the mechanisms that produce disparate outcomes. It does not mean, though, that we cannot act.

Recommendations will issue later this year from the Recommendations Working Group. These recommendations will propose solutions.

## VI CONCLUSION

As we did in the 2011 Preliminary Report, we have presented evidence of race disproportionality in the criminal justice system. Our examination of the data leads us to repeat the conclusions we reached ten years ago. In 2021, race *still* matters in ways that are not fair, that do not advance legitimate public safety objectives, that produce racial disparities in the criminal justice system, and that undermine public confidence in our legal system.

The question and challenge, then and now, is what will be done to remedy these problems.

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100.*Id.* at 33 and 33 n.29 (discussing pervasiveness of implicit bias and noting “ways in which adults such as justice officials may tend to view children of color as products of broken families, less amenable to rehabilitation, more threatening, more adult-like and therefore more culpable for criminal behavior”).

101.*Id.* at 33.

## Closing Remarks from the Task Force Co-Chairs

Unlike our opening remarks which were addressed to the Court, our closing remarks are directed to all criminal justice system actors, policymakers, and to the public.

We know that “the talk” given by Black parents and elders to Black children is meant to equip Black children with tools and strategies to avoid, if possible, and to survive, if confronted, encounters with law enforcement. “The talk” is motivated by fierce love and by terror.<sup>102</sup>

Can you imagine a world in which Black parents and elders would not have to give “the talk” to Black children?

If you can imagine this world, consider then what we would have to do bring it about.

The picture of the criminal justice system painted by the facts about race disproportionality and disparity is painful to look at. But look we must.

We must learn to talk about it in order to educate ourselves and others.

Then, we must act if we are to bring about this imagined world.

Task Force 2.0 is committed to bringing into being this world.

Join us in this work.

Sincerely,

Deans Mario L. Barnes, Annette E. Clark, and Jacob H. Rooksby  
Co-Chairs, Task Force 2.0: Race and Washington's Criminal Justice System

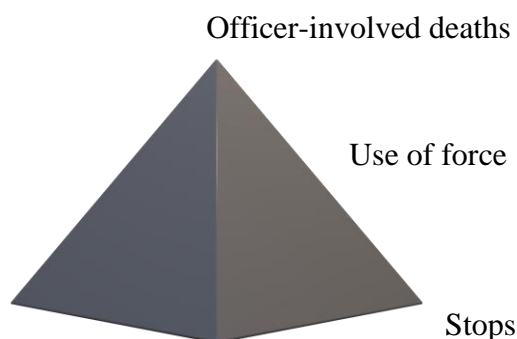
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<sup>102</sup>. We are unfamiliar if there are versions of “the talk” in Indigenous or other minority communities. We would not be surprised if it existed in some form, where parents and elders teach Indigenous and other minority children about racism and try to equip the children to face it.

## APPENDIX A - RACE DISPROPORTIONALITY IN POLICING

The murder of George Floyd, the renewed attention it drew to Breonna Taylor and other Black people killed by police, and the protests that erupted across the nation and in Washington state were the immediate impetus for the launch of Task Force 2.0. Though these killings took place in other states, Washington had its own high profile in-custody death of a Black man, Manuel Ellis, in March 2020, though the details of his death have been slow to emerge. Ellis, before his death, said, “I can’t breathe, sir.” Criminal charges have been filed against three officers involved in Ellis’s death.<sup>1</sup>

Though deaths get the most media and public attention, one way to visualize disproportionality is to consider deaths as the apex of a pyramid with the base of the pyramid being the day-to-day contact that police have with the public. A working hypothesis is that if you can reduce the base of the pyramid, initial stops, there may be less use of force, including lethal force by law enforcement personnel.



**Disproportionate deaths.** In Washington state, during the period 2013–20, 253 people were killed by police.<sup>2</sup> Calculated as a rate based on each group’s relative population, Black people were killed in police civilian killings at a rate that was 3.9 times that of non-Hispanic white people; Indigenous people were killed at a rate 3.5 times that of non-Hispanic white people; Latinos were killed at a rate that was 1.3 times greater than for non-Hispanic white people; and Pacific Islanders were killed at a rate 3.5 times that of non-Hispanic white people.

The disproportionality ratios that appear in the tables in this appendix are calculated from raw data sources and sometimes differ from what other sources may report. The spreadsheets that include calculations are available upon request.

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1. AG Ferguson Charges Three Officers in Killing of Manuel Ellis, May 27, 2021, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-charges-three-officers-killing-manuel-ellis>.

2. State Comparison Tool, Mapping Police Violence, <https://mappingpoliceviolence.org/states> (last visited Sept. 26, 2021).

## APPENDIX A - RACE DISPROPORTIONALITY IN POLICING

**Table 1: Washington State (2013-20).**

|                        | Pop.<br>(Census<br>July 1,<br>2019) | Pop.<br>% | # killed | Approx.<br>% of<br>deaths | Relative<br>disproportionality<br>ratio<br>(% deaths/<br>% population) | Comparative<br>Disproportionality<br>Ratio (rel. to<br>white non-<br>Hispanic) |
|------------------------|-------------------------------------|-----------|----------|---------------------------|--|--|
| Total                  | 7,614,893                           |           | 253      |                           |  |  |
| White only             | 5,977,691                           | 78.5      | (128)    | (50.6)                    | (.64x)   |  |
| White non-<br>Hispanic | 5,140,053 <sup>3</sup>              | 67.5      | 128      | 50.6                      | .75x   |  |
| Black                  | 335,055                             | 4.4       | 30       | 11.9                      | 2.7x   | 3.6x   |
| Asian                  | 731,030                             | 9.6       | 6        | 2.4                       | .25x   | .33x   |
| NH/PI                  | 60,919                              | .8        | 5        | 2.0                       | 2.5x   | 3.3x   |
| Latina/o               | 989,936                             | 13.0      | 34       | 13.4                      | 1.0x   | 1.3x   |
| Indigenous             | 137,068                             | 1.8       | 12       | 4.7                       | 2.6x   | 3.5x   |
| 2 or more<br>races     | 373,130                             | 4.9       |          |                           |  |  |
| Unknown                |                                     |           | 36       | 14.2                      |  |  |

There are geographic differences in these disproportionate rates. In the City of Seattle, the rate of police civilian killings of Black people during this period was 5.7 times greater than killings of white people; the Latino rate was two times that of white people.<sup>4</sup> In the City of Spokane, though the overall rate of civilian police killings was more than twice the state rate (annual rate of 9.9 per 1 million people in comparison to overall state rate of 4.3), the race disproportionality was lower, with Black people having a rate of 3.3 times greater in comparison to white people. However, it is important to note that during this period, there was 1 Black person killed by the Spokane Police Department, and the rate and ratio are based then on a single instance.

It is also important to note that during this period, there has been a decline in police homicides of civilians in cities while there has been an increase in police homicides in rural and suburban areas. For example, of 43 killings of civilians since 2016 in King County, 24 were in south King County, involving several different agencies as well as the King County Sheriff's Department.<sup>5</sup>

3. Extrapolation - White Hispanic = 837,638, or 84% of Latinas/os ID as white

4. Mapping Police Violence, <https://mappingpoliceviolence.org/cities> (select "Compare Places"; under "Explore Police Killings Data," select State "WA," select "Spokane Police Department") (last visited July 14, 2021).

5. Christina Henderson et al., Police Homicide: Race and Ethnicity, 6 J. Trauma Acute Care Surg. 2 (2021) (citing Melissa Hellmann, *Killings by Seattle Police Grab Attention but Far More Happen in the South King County Suburbs*, SEATTLE TIMES, Dec. 6, 2020, <https://www.seattletimes.com/seattle-news/killings-by-seattle-police-grab-attention-but-far-more-happen-in-south-king-county-suburbs/>).

## APPENDIX A - RACE DISPROPORTIONALITY IN POLICING

The following table shows disproportionality ratios in Washington state and in select counties to highlight some of the differences based on geography. The “\_\_x” indicates the factor by which a person from a particular group is more or less likely than a non-Hispanic white person to be killed by law enforcement. The disproportionality ratios are calculated based on the demographic profiles of each county, as most civilian encounters with police occur near the places where civilians live, work, play, and otherwise go about their daily lives.

**Table 2. Comparative Disproportionality Ratios (in Comparison to Non-Hispanic White Persons) (2013-20) for Washington State and Select Counties.**

|            | WA State | King | Pierce | Spokane | Clark | Yakima | Benton & Franklin |
|------------|----------|------|--------|---------|-------|--------|-------------------|
| # killed   | 253      | 62   | 36     | 30      | 14    | 9      | 17                |
| Black      | 3.6x     | 6x   | 2.4x   | 2.1x    | 4.1x  | 0      | 8.1x              |
| Indigenous | 3.5x     | 7.9x | 3.3x   | 4.7x    | 0     | 0      | 0                 |
| Latina/o   | 1.3x     | 1.6x | .8x    | 0       | 1.9x  | 2.5x   | 1.9x              |
| NH/PI      | 3.3x     | 6.6x | 0      | 7x      | 4.1x  | 0      | 0                 |
| Asian      | .33x     | .5x  | 0      | 0       | 0     | 0      | 0                 |

**Disproportionate use of force.** Consistent with the disproportionate deaths described above, there is strong evidence that non-lethal force is used in a racially disproportionate manner. At present, there is no central repository for use-of-force data in Washington state. A new law that went into effect on July 25, 2021, is intended to create a statewide data collection program.<sup>6</sup> Though this program will take time to be implemented, information collected and reported by some law enforcement agencies indicates strongly that non-lethal force is administered in a racially disproportionate manner. The task force examined data from four cities to determine comparative disproportionality ratios.<sup>7</sup>

6. Engrossed Second Substitute Senate Bill 5259, <http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5259-S2.SL.pdf#page=1>.

7. **Case Study 1: City of Seattle.** A review of 13,240 uses of force by the Seattle Police Department during the period 2014 – June 2021 revealed, using the methodology used above, that a Black person was 6.5 times more likely to be the recipient of force than a non-Hispanic white person; Indigenous persons, 2.9 times, and Pacific Islanders, 3.2 times. Asians and Latinas/os were, respectively, .4 times and .8 times as likely as a non-Hispanic white person to be the recipient of force. It is important to note, though, that 2,838 uses of force did not include demographic information about the use of force subject.

**Case Study 2: City of Spokane.** Using data from a recent study commissioned by the Spokane Police Department, and calculating rates and ratios as above, reveals that during the period 2013-19, of 736 uses of force, a Black person was 6.6 times more likely to be the recipient than a non-Hispanic white person and an indigenous person was 5 times. Because Pacific Islanders were not disaggregated, collectively Asian/Pacific Islanders were .6 times as likely; Latinas/os were .5 times as likely.

**Case Study 3: City of Tacoma.** A recent report reviewing the Tacoma Police Department, for the period 2015 – mid September 2020, disaggregated race and gender. Disproportionality ratios were calculated from this information:

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**Table 3: Comparative Disproportionate Use of Force Ratios – Select City Police Departments**

|                 | Seattle<br>(2014-<br>June<br>2021) | Spokane<br>(2013-19) | Tacoma<br>(2015 – Sept.<br>2020)<br>(male/female) | Vancouver<br>(2020) |
|-----------------|------------------------------------|----------------------|---|---------------------|
| # uses of force | 13,240                             | 736                  | 1,248   | 287                 |
| Black           | 6.5                                | 6.6                  | 3.9/4.9   | 10.6                |
| Indigenous      | 2.9                                | 5.0                  | 1.3/2   | .7                  |
| Latina/o        | .83                                | .5                   | .4/--   | 1.0                 |
| NH/PI           | 3.2                                | n/a                  | 2.3/--  | 2.7                 |
| Asian           | .4                                 | .6                   | .4/--   | .7                  |

A review of these cities reveals that a Black person is more likely to be subjected to force by a law enforcement officer by each of the city police departments reviewed, from a low of 3.9 times to a high of 10.6 times in comparison to the likelihood that a white person will be subjected to force. Indigenous people were more likely to be subjected to force in Seattle, Spokane, and Tacoma, but not in Vancouver. Pacific Islanders were more likely to be subjected to force in Seattle, Tacoma, and Vancouver, with no disaggregated information available in Spokane. Latinas/os were as likely in Vancouver and less likely to be subjected to force than white persons in Seattle, Spokane, and Tacoma. It is important to note, though, that the task force does not have confidence in what is reported regarding Latinas/os because of the failure often to collect, accurately or not, information regarding Latina/o identity.

As indicated at the outset of this section, a new law requires all law enforcement agencies to collect use of force data. Once this information is available, better and, it is hoped, uniform data collection will allow for better analysis of data from all law enforcement agencies.

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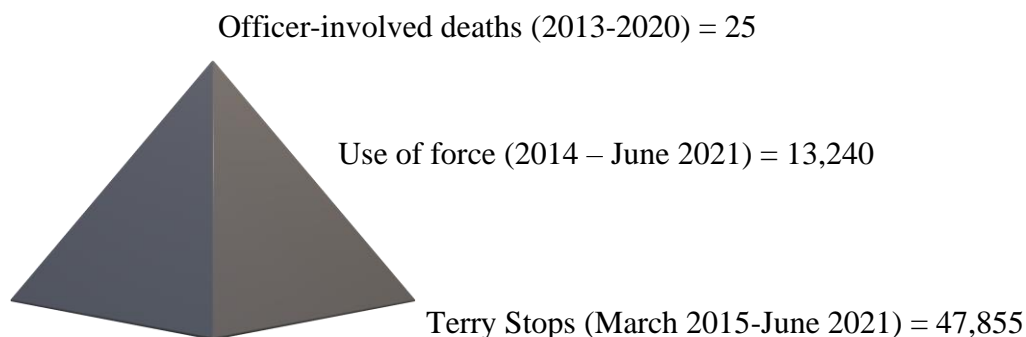
Black males were 3.9 times more likely to be the subject of use of force than white males; Black females were 4.9 times more likely than white females; Pacific Islander males were 2.3 times more likely than white men; Indigenous men were 1.3 times more likely than white men; Hispanic males and Asian males were less likely, respectively .4 times and .4 times. Indigenous females were nearly 2 times (1.9) more likely than white women.

**Case Study 4: City of Vancouver.** The Vancouver Police Department reports race independently from ethnicity. For uses of force in 2020, relative to Vancouver City demographics, a Black person is 10.6 times more likely than a white person to be the subject of police use of force; a Pacific Islander is 2.7 times more likely. A Latina/o person is about as likely to be the recipient of force as a white person, and an Asian person and an Indigenous person was .7 times as likely as a white person to be subjected to force.

**Disproportionate stops.** Though there is no central repository that collects demographic data from all law enforcement agencies in Washington with regard to when law enforcement stops a person, the information available suggests strongly that race disproportionality exists at the level of stops.

**Case Study 1: City of Seattle.** Data from the Seattle Police Department shows that from the period March 2015 to early June 2021, there were 47,855 Terry stops. These stops indicate that, relative to Seattle’s population, Black persons are stopped at a rate that is 4.1 times that of non-Hispanic white persons and Indigenous people are stopped at a rate that is 5.8 times that of non-Hispanic white persons. Based on the available demographic information, in comparison to non-Hispanic white persons, Asians, Pacific Islanders, and Latinas/os were less likely than non-Hispanic white persons to be subjected to a Terry stop by the respective factors, .21, .47, and .52. It is important to note, though, that 4,586 Terry stops did not include race demographic information for the person stopped.

Returning to the pyramid visual, for Seattle, the apex, number of deaths is a small number.



Though the time periods don’t align perfectly, though the disproportionality observed when civilians are killed by law enforcement may get the most attention, the killings occur upon the foundation of disproportionalities with uses of force, stops, and perhaps other day-to-day encounters civilians have with law enforcement.

**Case Study 2: City of Spokane.** A recent report analyzing the Spokane City Police Department reveals that for the period 2017 – June 30, 2020, of 137,034 stops resulting from Computer Assisted Dispatch, Black people were likely to be stopped at a rate 4.74 times that of non-Hispanic white people. During that same period, Indigenous people were likely to be stopped at a rate 2.61 times that of non-Hispanic white people. Asians and Latinas/os were stopped a lower rate,

respectively .60 and .53. For traffic stops that were officer-initiated, for the period 2014 – June 30, 2020, Black people were stopped at a rate 2.65 times that of non-Hispanic white people. Asians were more likely to be stopped at a rate 1.23 times that of non-Hispanic white people. Latinas/os and Indigenous people had rates of .51 and .95 that of non-Hispanic white people.

It is important to note that in instances where demographic information is missing or not provided, they were excluded from consideration. It is unclear how many or what percentage of each kind of report might have been excluded, but as an example, the report examined NIBRS (National Incident Based Reporting System) data for a two-year period, 2017-2018, in which there were 64,584 records but only included 40,610 NIBRS records in its demographic analysis, which translates into approximately 37% of NIBRS records being excluded from the analysis. It is unclear from the report how many records in other categories were excluded from the analysis.

It is also worth noting that this report assessed disproportionality based on the NIBRS data when suspect demographic information was available. Thus, rather than using as a baseline a group's demographic percentage in the city's population, it used NIBRS suspect demographics. For example, instead of using the 2.3% Black population figure for Spokane, it used 12.5% as the percentage of NIBRS reported crimes where the suspect was indicated to be Black. In the 2011 Preliminary Report, the Task Force explained the problems with using crime reports as proxies for crime commission. See also *infra*, section on Crime Commission Data.

A look at these two jurisdictions reveals that certain racial minority groups are stopped disproportionately in comparison to non-Hispanic white persons as the reference group. The data from Spokane reveals interesting differences between when stops result from calls to law enforcement and when stops are officer-initiated.

**Disproportionate searches.** A subset of those stopped will be searched. Racial minorities are searched disproportionately, even though study after study finds that racial minorities, including in Washington, are less likely to have narcotics or weapons.

**Case Study 1: City of Seattle.** During stops, Black persons, Hispanics, and Asian Americans were searched at rates greater than White people were. Even though minorities were searched more frequently than White persons, minorities were less likely to have weapons, with the greatest disparity in hit rates occurring for



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Indigenous people.<sup>8</sup> A 2021 report on the Seattle Police Department found that White men were the least likely to be stopped, the least likely to be searched, and when searched, were much more likely than other racial minorities to possess a weapon. Importantly, the report stated, “The elevated rates at which Black and Native American men were stopped and searched, then, are not explained by any elevated likelihood that they would possess weapons.”<sup>9</sup>

**Case Study 2: City of Spokane.** Though racial disproportionality exists for consent searches following a traffic stop, the small number of these searches makes it difficult to draw any conclusions.<sup>10</sup> Searches for officer safety following a traffic stop reveals troubling disproportionalities. Black drivers are twice as likely and Indigenous people were nearly three times more likely to be subjected to a search than would be expected based on their proportion of traffic stops.<sup>11</sup>

**Case Study 3: Washington State Patrol.** The 2021 Gender and Justice Study Report notes that “Data from the Washington State Patrol confirms that Black, Latino, Indigenous people, and Native Hawaiian and other Pacific Islander drivers are searched at a higher rate than White motorists. Indigenous people, in particular, are searched at a rate five times higher than White motorists—and these searches appear to be focused along the I-5 corridor and near the Yakima and Colville reservations.”<sup>12</sup>

**Disproportionate arrests.** For each of the past four fiscal years, Black and Indigenous people have been arrested in Washington state at rates that far exceed their relative population and in comparison to white people. Because the Washington Association of Police and Sheriffs does not report arrests by ethnicity, the tables below do not include any information on Latinas/os.

[Table 4 appears on next page]

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8. Seattle Police Department, *Disparity Review, Part I: Using Propensity Score Matching to Analyze Racial Disparity in Police Data* (April 2019), at 27-29, available at <https://crosscut.com/sites/default/files/files/19718539884.pdf>.

9. Center for Policing Equity, *The Science of Justice: Seattle Police Department: National Justice Database City Report*, at 15-16, (Jan. 2021), <https://www.documentcloud.org/documents/21015602-spd-cityreport-final-11121-1>.

10. Police Strategies LLC, *Demographic Disparity Analysis of Law Enforcement Data from the Spokane Police Department*, at 21 n.7 (Jan. 11, 2021), <https://static.spokanecity.org/documents/opendata/spd/spokane-pd-disparity-report-police-strategies-llc-jan-2021.pdf>.

11. *Id.* at 21-22.

12. Gender and Justice Commission, *2021: How Gender and Race Affect Justice Now*, at 636 (citing THE STANFORD OPEN POLICING PROJECT (2021), <https://openpolicing.stanford.edu>, and Joy Borkholder & Jason Buch, *Driving While Indian: How InvestigateWest Conducted the Analysis*, INVESTIGATEWEST (Dec. 19, 2019)).

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**Table 4: Relative and Comparative Disproportionality Ratios for Arrests in Washington State by Demographic Group and Year**

|                                   | 2020             |                   | 2019             |                   | 2018             |                   | 2017             |                   |
|-----------------------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
|                                   | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio |
| White (including Hispanic Whites) | 1.0              |                   | 1.0              |                   | 1.0              |                   | 1.0              |                   |
| Black                             | 3.1              | 3.2               | 3.1              | 3.2               | 3.0              | 3.0               | 3.0              | 3.0               |
| Indigenous                        | 2.5              | 2.6               | 2.5              | 2.6               | 1.7              | 1.7               | 2.2              | 2.3               |
| Asian                             | 0.4              | 0.4               | 0.4              | 0.4               | 0.3              | 0.3               | 0.3              | 0.3               |
| NH/PI                             | 0.4              | 0.4               | 0.4              | 0.4               | 0.3              | 0.3               | 0.3              | 0.3               |

The table above reflects aggregate arrests. Different disproportionalities emerge with regard to arrests for different crimes. For example, arrests for certain crimes, aggravated assault and robbery, have significantly higher relative and comparative disproportionality ratios for Black persons.

**Table 5: Relative and Comparative Disproportionality Ratios in Washington State by Demographic Group and Year for Aggravated Assault Arrests.**

|                                   | 2020             |                   | 2019             |                   | 2018             |                   | 2017             |                   |
|-----------------------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
|                                   | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio |
| White (including Hispanic Whites) | 0.9              |                   | 0.9              |                   | 0.9              |                   | 0.9              |                   |
| Black                             | 5.0              | 5.8               | 4.3              | 4.8               | 4.8              | 5.5               | 4.5              | 5.1               |
| Indigenous                        | 1.3              | 1.5               | 2.1              | 2.3               | 1.7              | 2.0               | 1.8              | 2.1               |
| Asian                             | 0.4              | 0.5               | 0.4              | 0.4               | 0.4              | 0.5               | 0.4              | 0.5               |
| NH/PI                             | 0.4              | 0.5               | 0.5              | 0.6               | 0.2              | 0.3               | 0.2              | 0.2               |

[Table 6 appears on next page]

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**Table 6: Relative and Comparative Disproportionality Ratios in Washington State by Demographic Group and Year for Robbery Arrests.**

|                                   | 2020             |                   | 2019             |                   | 2018             |                   | 2017             |                   |
|-----------------------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|------------------|-------------------|
|                                   | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio | Rel. disp. ratio | Comp. disp. ratio |
| White (including Hispanic Whites) | 0.7              |                   | 0.7              |                   | 0.7              |                   | 0.7              |                   |
| Black                             | 7.8              | 11.8              | 7.4              | 10.7              | 7.5              | 10.3              | 7.3              | 10.1              |
| Indigenous                        | 2.3              | 3.5               | 2.0              | 2.9               | 1.7              | 2.3               | 2.4              | 3.2               |
| Asian                             | 0.4              | 0.6               | 0.4              | 0.6               | 0.5              | 0.6               | 0.4              | 0.6               |
| NH/PI                             | 0.8              | 1.1               | 1.1              | 1.6               | 0.5              | 0.7               | 0.2              | 0.3               |

As can be seen in the tables above, the relative and comparative disproportionality ratios for aggravated assault and robbery are significantly higher for Black persons, with the greatest differences for robbery, with comparative disproportionality ratios of 11.8 (2020); 10.7 (2019); 10.3 (2018), and 10.1 (2017). When looking at arrests for all crimes, the disproportionality ratios for Black persons during each of those years is right around 3.0. Additional disproportionalities appear at felony sentencing for assault and robbery in terms of the distribution of prison, jail, and other sentences.

A review of the data shows consistently that Black people and Indigenous people are arrested disproportionately, whether measured by relative or comparative disproportionality. People of Asian ancestry are arrested at rates lower than their relative population and in comparison to White people. The data on NH/PI people is unevenly collected and is incomplete, making it impossible to make any conclusions about stops, searches, and arrests. However, NH/PI persons are disproportionately killed by law enforcement.

## Introduction

Compared to the large body of research focusing on the ways that police practices and sentencing decisions contribute to the proliferation of mass incarceration, relatively little attention has been dedicated to investigating the role that prosecutors have played in the expansion of the criminal legal system in the United States and Washington. This lack of scrutiny may be partially attributable to the lack of accessible data. In 2018, a nationwide survey of state prosecutors' offices found that less than half of offices collect basic case information – including the volume of cases coming into the office, the number of charges, and what happens within a case – and only 24% made their data analyses public.<sup>1</sup> In Washington State, only one out of the 39 county prosecutors' officers makes data about its practices publicly available. What is clear, however, is that prosecutors exercise discretion at every point in a case, from when it is first referred to the office by law enforcement through sentencing. Without adequate racial data, it's impossible to determine how these choices may be perpetuating inequities in the criminal legal system.

This report contains three parts. The first provides an account of how prosecutorial power in Washington has expanded over the last 40 years. The second presents an explanation of each point in a criminal case in which prosecutors are able to exercise discretion along with any available data regarding whether a defendant's race impacts prosecutorial decision-making. Finally, the third section lays out policy recommendations for state actors, advocates, and others seeking to limit the racially disparate impacts of prosecutorial decision-making.

## The Expansion of Prosecutorial Power

Over the last four decades, Washington prosecutors have gained more discretion in making decisions that influence criminal cases than possibly any other actor in the criminal legal system. Beginning with the passage of the Sentencing Reform Act (SRA) in 1981, the Washington legislature dramatically revised the state's sentencing structure to prioritize retribution and incapacitation of criminal defendants over their rehabilitation.<sup>2</sup> The SRA, in part, implemented a new sentencing scheme in which the length of a sentence is determined by the seriousness of the offense and by the defendant's criminal record (known as the offender score).<sup>3</sup> The stated purpose

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1. Robin Olsen et al., *Collecting and Using Data for Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices*, Urban Institute, 6, (Sept. 2018), available at [https://www.urban.org/sites/default/files/publication/99044/collecting\\_and\\_using\\_data\\_for\\_prosecutorial\\_decisionmaking\\_0.pdf](https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf).

2. Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, at 6 (Feb. 2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>.

3. *Id.* at 12.

of the SRA was to enhance fairness and predictability across cases.<sup>4</sup> However, this new framework functionally diminished judicial discretion and instead shifted discretionary power to the legislature,<sup>5</sup> which classifies sentences based on their perceived seriousness and sets sentencing ranges for various offense categories, and to prosecutors, who decide which crimes to charge and what pleas are offered and accepted, and thus which sentencing range is ultimately applicable.

Subsequent laws which required lengthy or life sentences for certain convictions gave additional weight to prosecutors' decisions during charging and plea bargaining. In 1993, Washington, through voter initiative, adopted the Persistent Offender Accountability Act (POAA), which mandated life sentences without the possibility for parole or reduction by good time upon a third conviction of offenses designated by the legislature as "most serious."<sup>6</sup> Washington voters and the legislature took additional steps that increased the length of sentences through the adoption of the so-called Hard Time for Armed Crime Act and through legislative changes governing the calculation of offender scores for purposes of sentencing under the SRA and provided for mandatory sentence enhancements.<sup>7</sup>

Against this backdrop of lengthening sentences, the legislature increased the number of youth who were eligible for prosecution in adult court with the passage of the Youth Violence Reduction Act (YVRA) in 1994.<sup>8</sup> Before the passage of the YVRA, children under the age of 18 who were charged with criminal offenses were tried in juvenile court unless, after a hearing, a court found that transfer to the adult system was in the best interest of the child or the public. The YVRA mandated that 16 and 17 year old children charged with certain felonies must be automatically "declined" from jurisdiction in the juvenile system and prosecuted in adult courts.<sup>9</sup> Because the YVRA removes judicial oversight from a transfer decision and makes the charged offense the sole determining factor of whether adult jurisdiction is required, it further enhanced prosecutors' power

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4. RCW 9.94A.010 (stating purpose).

5. Beckett & Evans. *supra* note 2, at 6.

6. See David Boerner, *Sentencing Policy in Washington, 1992-1995*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 30, at 31 (Michael Tonry & Kathleen Hatlestad eds., 1997). A few years after passage of the POAA, the legislature expanded the definition of "persistent offender" to include "Two-Strike Sex Offenders," or defendants who received two separate convictions of specified sex offenses. See Beckett & Evans, *supra* at 14. Additional offenses were added to the list of "two strike" offenses in 1997, further increasing the number of people who were eligible for life sentence without the opportunity for parole. See RCW 9.94A.030(38)(b).

7. See Beckett & Evans, *supra* note 2 at 19-21 (discussing these changes).

8. Wash. State Inst. for Pub. Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth* (Dec. 2013), <https://www.wsipp.wa.gov/ReportFile/1544/Wsipp-The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth-Report.pdf>.

9. RCW 13.04.030. The statute was amended in 2018 in an attempt to address racial disparities in auto-decline, in part by reducing the number of crimes that previously resulted in youths 16 or 17 years-old at the time of offense being subject to exclusive adult court jurisdiction. S.B. 6160, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

during charging and plea bargaining.

Taking into account the increased relative power of prosecutors in criminal proceedings, the legislature directed the Washington State Sentencing Guidelines Commission to devise recommended prosecuting standards regarding the charging of offenses and plea agreements.<sup>10</sup> The Commission complied and developed a comprehensive set of guidelines, but opted to make compliance voluntary. Subsequently, courts held that a claim that a prosecutor had not followed the guidelines was not subject to judicial review.<sup>11</sup> As a result, local prosecutors retained the power to adopt their own policies regarding charging and plea bargaining without interference from other government actors.

In 2020, the Washington legislature passed Senate Bill 6164, granting prosecutors additional discretion to review past cases and request resentencing if the sentence no longer advances the interest of justice. Under 6164, a prosecutor may choose to petition the sentencing court to resentence a defendant if their sentence is no longer in the interest of justice, but how or whether such review occurs is not subject to judicial or public oversight.

### **Prosecutorial Discretion and Race Disproportionality**

Despite the large amount of relative power that they wield in criminal cases, prosecuting attorney's offices in Washington make little information about how they exercise their discretion available to the public. In this respect, Washington is not unique – a 2018 survey of prosecutors' offices nationwide found that only 24% of offices publish analyses of case data.<sup>12</sup> This lack of data transparency has long been the norm among prosecutors' offices for a variety of reasons. First, state law does not mandate the recording or public disclosure of substantive prosecutorial data, nor does it require prosecutors' offices to make their policies public. On a national level, prosecutors' offices have been particularly slow compared to other law enforcement actors, like police departments and correctional facilities, to accept the need for data collection and create systems to capture it.<sup>13</sup> Second, citizens demanding change have largely focused on the lack of transparency from police, and have only recently turned their attention to prosecutors.<sup>14</sup> As such, prosecuting attorneys' offices may not have been subject to as much external pressure of political consequences for operating their offices with relatively little public oversight. Third, the limited information that prosecutors do keep is often difficult to obtain. While prosecuting attorneys' offices are subject to

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10. RCW 9.94.040(2)(b)

11. *State v. Lee*, 847 P.2d 25 (Wash. App. 1993).

12. Olsen et al., *supra* note 1 at 6.

13. Marc Miller & Ronald Wright, *The Black Box*, 94 Iowa L. Rev. 125 (Nov. 2018).

14. Nicole Zayas Fortier, *Unlocking the Black Box*, ACLU Smart Justice, 8 (Feb. 2019), available at [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_smart\\_justice\\_prosecutor\\_transparency\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf).

Washington’s Public Records Act, the reality is that obtaining these records is often a lengthy and costly endeavor.

In the absence of specific data about prosecutors’ policies and practices, it is difficult to ascertain whether the myriad racial disparities in the criminal legal system are attributable to prosecutors or other state actors. For example, in an instance where a Black defendant receives a harsher sentence than a white one convicted for identical conduct, it is impossible to determine whether this disparity occurred because of a judge’s final sentencing decision or because of prosecutorial decisions made during charging, plea-bargaining, and sentencing fact-finding. With this caveat in mind, consider the following findings regarding racial disparities in Washington’s criminal legal system:

### ***Charging decisions***

The first decision that a prosecutor makes in criminal cases is whether to charge an individual who has been referred to them by the police and, if so, with what offense. As such, racial bias may cause an attorney assigned to the case to charge a white defendant with a lesser offense than a person of color referred to them for similar conduct or to decline to bring charges all together.

In King County, the only jurisdiction in which such information is publicly available, law enforcement agencies referred 11,028 felony cases to the King County Prosecuting Attorney’s Office (KCPAO) in 2019.<sup>15</sup> Of those persons referred to KCPAO by law enforcement, 54.3% were white, 30% were Black, 7% were Asian or Pacific Islanders, and 2% were Indigenous.<sup>16</sup> Of the 6,570 felony filings from the referred cases, 54.99% were White, 31.72% were Black, 7.3% were Asian or Pacific Islander, 2.04%, Indigenous.<sup>17</sup> While this data suggests that King County prosecutors did not show White defendants preferential treatment when declining to file felony charges, it does not provide insight into whether race plays a factor in the severity of offense that is ultimately charged.

### ***Juvenile decline***

Black children are disproportionately represented among automatic declines—in 2007, the Sentencing Guidelines Commission found that Black youth were over-represented in the number of automatic declines at about 10 times their proportion to the population.<sup>18</sup> In 2013, 34.9% of

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15. *Data Dashboard*, King County Prosecuting Attorney’s Office, available at <https://kingcounty.gov/depts/prosecutor/criminal-overview/CourtData.aspx> (accessed on May 26, 2021).

16. *Id.*

17. *Id.*

18. Wash. St. Sentencing Guidelines Comm’n, *Disproportionality and Disparity in Juvenile Sentencing: Fiscal Year 2007*, at 4 (May 2008) [http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Juvenile\\_DisparityDisproportionality\\_FY2007.pdf](http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Juvenile_DisparityDisproportionality_FY2007.pdf).

children who were auto-declined were Black youth.<sup>19</sup> Because a decline determination hinges on the charged offense, increased prosecutorial discretion may play a role in this disparity.

### ***Pre-trial detention***

In 2015, an estimated 12,000 people were being held in Washington’s jails at any given time, a significantly larger number than in previously decades.<sup>20</sup> This growth is largely attributable to an increased reliance on pre-trial detention by prosecutors and courts.<sup>21</sup> Often, jailed persons are facing low-level misdemeanors and are routinely held because bail is set at an amount that they cannot afford to pay.<sup>22</sup> Moreover, Black and Native American people are detained in Washington’s jails at a disproportionately high rate compared to their White counterparts.<sup>23</sup>

While judges typically make the final decision to release or jail an accused person, prosecutors make requests to the court for pre-trial detention and recommend bail amounts. In many city and county courts throughout Washington, a judge sets bail before a defendant is appointed an attorney, meaning that prosecutors’ requests for pre-trial detention go unchallenged.<sup>24</sup> These decisions likely contribute to the size and racial composition of the jail population – Washington’s jail population shrank by approximately 50% in 2019 and 2020 due, in part, to prosecutors restricting their number of detention requests in response to the COVID-19 pandemic.

### ***Pre-trial Diversion Programs and Therapeutic Courts***

Prosecutors play key roles with regard to diversion programs and therapeutic courts. The impact on race disproportionality in these areas was not examined.

### ***Plea Bargaining***

Prosecutors play an outsize role in the plea bargaining. The impact on race disproportionality in this area was not examined.

### ***Sentencing***

As stated in the introduction to this section, a judge’s final sentencing decision is inextricable from

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19. Wash. State Partnership Council on Juv. Just., *A Summary of Washington State Data and Recent Study Findings: The Transfer of Youth (under age 18) to the Adult Criminal Justice System*, 3 (Dec. 2014), available at [https://dcyf.wa.gov/sites/default/files/pdf/decline\\_Final.pdf](https://dcyf.wa.gov/sites/default/files/pdf/decline_Final.pdf).

20. Prison Policy Initiative, *Washington State Profile*, (2018), <https://www.prisonpolicy.org/profiles/WA.html>.

21. Nationally, 95% of the growth in the U.S. jail inmate population since 2000 was due to the increase in the number of people being held before trial. Todd D. Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Justice Statistics, at 4 (June 2015), available at <https://bjs.ojp.gov/content/pub/pdf/jim14.pdf>.

22. Jaime Hawk, *No Money, No Freedom: The Need for Bail Reform*, at 4 (ACLU of Washington, Sept. 2016), available at <https://www.aclu-wa.org/bail>.

23. *Id.*

24. *Id.* at 6.



the prosecutor’s decisions during charging, sentencing fact-finding, and plea bargaining. All of these decisions regarding how to charge a crime and whether to submit evidence of aggravating factors impact the sentencing range that is ultimately before the court. While this may make it difficult to determine whether prosecutors make racially biased decisions in regard to sentencing, some evidence suggests that race does play a factor in the imposition of non-standard sentences.

In 2019, 42.5% of criminal sentences in Washington state were non-standard sentences, meaning that they were derived from a discretionary decision by prosecutors or judges.<sup>25</sup> That is, a sentence is non-standard if prosecutors decide to pursue fact-finding for an aggravating factor or sentencing enhancement and, as a result, judges decide if and how much to depart above the standard sentencing range. Of these non-standard sentences, White defendants were the most likely group to receive mitigated sentences or sentencing alternatives, while Black and Latina/o defendants were most likely to receive an aggravated or enhanced sentence.<sup>26</sup> When giving an exceptional sentence, judges are required to state the reason for doing so. In a study of the five most common stated reasons for aggravated and mitigated exceptional sentences, the general distribution of reasons for exceptional sentences was similar for white defendants and defendants of color.<sup>27</sup> However, a greater percentage of mitigated sentences for BIPOC defendants listed “all parties agreed to mitigated sentence” as the reason, while White defendants were most likely to receive a mitigated sentence because it was “more appropriate/in the interests of justice.”<sup>28</sup>

The use of non-carceral or partial confinement sentencing options in lieu of total confinement were also disproportionately distributed by race in 2019. White defendants were disproportionately likely to receive a sentencing alternative rather than a standard sentence, while Black and Latina/o defendants were more likely to receive a standard sentence than any sentencing alternatives.<sup>29</sup>

### **6164 relief**

In 2020, SB 6164 gave prosecutors the new legal authority to review past cases and petition the court for resentencing if the sentence no longer advances the interest of justice. Since the law took effect in 2020, seven counties have issued public guidance on their criteria and priorities for seeking relief, but most are not proactively reviewing older cases.<sup>30</sup>

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25. Lauren Knoth, *Examining Washington State’s sentencing guidelines: A report for the Criminal Sentencing Task Force*, at 31 (Wash. St. Inst. for Public Policy, 2021), available at [http://www.wsipp.wa.gov/ReportFile/1736/Wsipp\\_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf).

26. *Id.* at 32.

27. *Id.* at 36.

28. *Id.* at 36.

29. *Id.* at 38.

30. See Wash. Defender Ass’n, *6164 Implementation: Prosecutor Discretion to Seek Resentencing Hearings* RCW 36.27.130, <https://defensenet.org/resource-category/6164-implementation/> (last visited July 14, 2021).

## Introduction

Whether racial minorities are treated fairly with regard to pretrial release was identified as an area needing further research in the Washington State Minority and Justice Task Force Final Report issued in December 1990.<sup>1</sup> This report led the Washington Supreme Court to create the Washington State Minority and Justice Commission. It issued a report in 1997 that found that “minority defendants and men were less likely to be released on their own recognizance than others even after controlling for differences among defendants in the severity of their crimes, prior criminal records, ties to the community and the prosecuting attorney’s recommendations.”<sup>2</sup>

The 2011 Preliminary Report on Race and Washington’s Criminal Justice System, though it did not conduct original research and did not identify more recent Washington-specific studies, highlighted that the decision to release or detain someone pretrial remained a critical issue.<sup>3</sup> Specifically, it highlighted that “[w]hether an individual is released pending trial has a significant outcome of a case, and can have cascading effects on a defendant’s family, ability to maintain a job, and ability to pay for representation.”<sup>4</sup>

This remains true today. Pretrial detention can have devastating effects on a defendant; even a short jail stay can result in loss of employment, housing, and child custody. Research also shows that pretrial detention directly increases the likelihood of worse case outcomes for the defendant.<sup>5</sup> Not only are these consequences significant, but they are felt disproportionately by non-white defendants, with reverberating effects on the individuals’ families and communities.<sup>6</sup> And yet, 70% of all incarcerated individuals in the United States are pretrial detainees.<sup>7</sup>

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1. Washington State Minority and Justice Task Force, Final Report at 22 (December 1990). <https://www.courts.wa.gov/committee/pdf/TaskForce.pdf>. Specifically, it called for research to examine whether judges set higher bail for minorities compared with non-minorities, whether prosecutors recommend higher bail for minorities compared with non-minorities, and whether persons who make screening decisions for amenability for release recommend disparate treatment for minorities. *Id.*

2. George S. Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington* (Washington State Minority and Justice Commission 1997), [https://www.courts.wa.gov/committee/pdf/1997\\_ResearchStudy.pdf](https://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf).

3. 2011 Preliminary Report at 15-16.

4. *Id.* at 15.

5. Kristian Lum et al., *The Causal Impact of Bail on Case Outcomes for Indigent Defendants*, 3 OBSERVATIONAL STUD. 38 (2017); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, 60 J. L. & Econ. 529 (2016); Megan Stevenson, *Distortion of Justice: How Inability to Pay Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511 (2018).

6. See Cynthia Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919 (2013); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. Econ. 1885 (2018); American Civil Liberties Union of Florida, *Unequal Treatment: Racial and Ethnic Disparities in Miami-Dade Criminal Justice* (July 2018), <https://www.aclufl.org/sites/default/files/6440miamidadedisparities20180715spreads.pdf>.

7. Adureh Onyekwere, *How Cash Bail Works* (Brennan Center for Justice, Feb. 24, 2021),

Getting this right is of critical importance. And it is worth noting that both federal and Washington law establish a presumption of release for criminal defendants pending trial in most cases, although they also permit courts to detain or impose conditions on release of defendants to ensure their appearance at trial or to protect the community.

This report begins by discussing one tool intended, in part, to reduce explicit and implicit bias. It then examines the role resources such as counsel at first appearance and/or certain pretrial services play. It then examines the practice of money bail. It ends with a set of recommendations that follows from the examination of these areas and how race disproportionality is impacted by the use of risk assessment tools, the resources provided in the form of counsel and pretrial services, and money bail.

## I. Pretrial Risk Assessment Tools

Concerns that bias, whether explicit or implicit, was affecting pretrial release decisions, led advocates and policymakers to develop risk assessment tools as a way to minimize or diminish the operation of explicit and implicit bias. Many jurisdictions across the country and in Washington state have adopted the use of Pretrial Risk Assessment Tools (PRATs) to assist courts in deciding whether to grant pretrial release to a criminal defendant, and what release conditions to impose.<sup>8</sup> Such tools promised an objective, consistent, data-based system for evaluating pretrial release, which would result in fewer biased outcomes and ease the burdens on overworked judges, prosecutors, and public defenders.

The 2011 Preliminary Report cautioned, though, that facially neutral practices still could reproduce race disproportionality.<sup>9</sup> While such tools are well-intended and have certain advantages, the well-documented risk that these tools will perpetuate racial inequality in the justice system outweighs any proven advantages to their use. The significant resources required to safely use PRATs would accomplish far more in advancing decarceration and racial justice if they were devoted to other pretrial programs.

PRATs are actuarial tools that make recommendations for pretrial detention and supervision based on a statistical prediction of the likelihood a person will “do something bad in the future.”<sup>10</sup> While this is similar conceptually to what a judge does when evaluating pretrial

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<https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

8. A 2019 report identified 10 jurisdictions in Washington using PRATs. Washington’s Pretrial Reform Task Force, Final Recommendations Report (Feb. 2019), at 14.

9. 2011 Preliminary Report at 13-14.

10. Washington’s Pretrial Reform Task Force, Final Recommendations Report (February 2019), at 13-14; Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform (July 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform#>.

release without the use of a PRAT, there are significant differences that make the use of PRATs problematic from a racial justice perspective.

One issue is that most PRATs rely uncritically on information about defendants that is inherently the result of racially disparate practices, including prior warrants, prior convictions, prior incarceration sentences, education, employment, and other socio-economic factors.<sup>11</sup> Racially unequal inputs create racially unequal outputs – even where the creators of the tool harbor no discriminatory animus, and specifically design the tool in a race-neutral way.<sup>12</sup>

Another issue relates to the data used to develop a PRAT’s predictive capabilities. Not only will this data have the same inextricable racial disparities, but it also will suffer from fundamental accuracy problems unless developed from robust local data. For example, it is unlikely that past outcomes involving criminal defendants in a far-flung rural jurisdiction with limited pretrial resources and different demographics will accurately predict outcomes in an urban jurisdiction with robust pretrial programs.<sup>13</sup> It is also the case that numerous pretrial reforms in the last few years have increased the likelihood of pretrial success for criminal defendants, but these reforms are not taken into account with PRATs trained on data that pre-dates the reforms.<sup>14</sup> Finally, most PRATs rely on data collected from defendants who were released pretrial – they do not account for defendants who were detained, but would have been successful had they been released.<sup>15</sup>

Further, there is a dearth of scientifically sound evidence that PRATs are useful and unbiased. While there is a lot of research positing that algorithmic or statistical prediction is more accurate than human intuition, these studies suffer from fundamental flaws.<sup>16</sup> And in a 2018 study, the

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11. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 30 (2018); see also June 4, 2020 letter from the Washington Supreme Court acknowledging and discussing systemic racism in the criminal justice system.

12. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO, L. REV. 1671, 1682 (2020).

13. For example, the Public Safety Assessment tool was created using nearly 750,000 cases drawn from more than 300 jurisdictions from October 2001 through December 2011. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 120 YALE J. L. & TECH. 103 (2018); <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/05/PSA-Sheet-CC-Final-5.10-CC-Upload.pdf>.

14 “Success” here means a defendant awaiting trial shows up for court and does not commit any crimes while awaiting trial. See J. L. Koepke & D. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1757 (2018) (“But prediction at bail is problematic because the training data often come from times and places that are materially different from the ones where the predictions are being made, and few actors continuously update tools with new facts.”).

15. Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments*, CHAMPION, at 18 (June 2018), <https://www.nacdl.org/Article/June2018-MakingSenseofPretrialRiskAsses>.

16. See Stevenson, *supra* note 11, at 321-322; Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys* (John, D., Catherine, T. MacArthur Foundation, Feb. 2019). <http://www.safetyandjusticechallenge.org/resource/pretrial-risk-assessment-tools-a-primer-for-judges-prosecutors-and-defense-attorneys/> (“[T]he current body of research on pretrial risk assessment tools supports their ability to identify defendants at different rates of failure to appear and pretrial arrest, and leaves open

authors found that a random group of online participants consistently were able to more accurately predict recidivism among a group of real-world examples than a number of PRATs.<sup>17</sup> Even in published cases where PRATs have been “validated,” i.e., where a study has been done to evaluate whether a tool accurately predicts what it is meant to predict, such validation has been scientifically unsound.<sup>18</sup> And just because the PRAT technically does what it is intended to do does not mean it is accomplishing the goals of decarceration and reducing racial disparities. Compounding this problem is that many PRATs are not transparent in the data used to train them or how they weight certain factors, which is a due process problem on top of a reliability one.

Case studies from jurisdictions using PRATs bear out these concerns. An empirical study of the use of the Public Safety Assessment tool in Kentucky found that it had negligible effects on the rates at which defendants were released pretrial, failed to appear, or were rearrested pretrial.<sup>19</sup> It also had *no* effect on the racial disparities in pretrial release.<sup>20</sup> Efforts to introduce PRATs in Washington also have achieved limited success.<sup>21</sup>

There is ample support and guidance for how PRATs can be used in a way that does not perpetuate racial injustice,<sup>22</sup> but to create and implement a PRAT that will be useful and racially unbiased is onerous to the point of being unrealistic for most jurisdictions. This would include using only local and recent data to develop a tailored PRAT model; early, regular, and independent validation; and complete transparency. However, to achieve this, jurisdictions would need to dedicate proper time and resources for reform – which, despite the well acknowledged recent national and local reckoning regarding racial biases<sup>23</sup>, has not been

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the possibility that they could have a positive impact on pretrial decisions and outcomes. However, there have been relatively few methodologically rigorous investigations of the use of pretrial risk assessment tools in practice.”)

17. Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES 1, 1 (2018)

18. See Cynthia Mamalian, *The State of the Science of Pretrial Risk Assessment*, (Pretrial Justice Institute, March 2011), at 19, available at [https://www.ncsc.org/\\_data/assets/pdf\\_file/0016/1627/mamalian-2011-state-of-the-science-pretrial-ra.ashx.pdf](https://www.ncsc.org/_data/assets/pdf_file/0016/1627/mamalian-2011-state-of-the-science-pretrial-ra.ashx.pdf). For example, the Public Safety Assessment is validated nationally – not locally. See Liberty at Risk: Pre-trial Risk Assessment Tools in the U.S., (Electronic Privacy Information Center, Sept. 2020), <https://epic.org/LibertyAtRisk/LibertyAtRisk-Sept2020.pdf>.

19. Stevenson, *supra* note 11, at 369.

20. *Id.*

21. Spokane County initially worked to create a PRAT of its own, but after significant expenditure of time and resources it abandoned the program and turned to use of the PSA tool around 2016. Similarly, Yakima County received a SMART pretrial grant in 2015-2016, but with the depletion of that grant money, the jurisdiction has begun to revert to its earlier pretrial practices.

22. See Washington’s Pretrial Reform Task Force, Final Recommendations Report (February 2019), at 17; Koepke & Robinson, *supra* note 14, at 1800 – 06..

23. Letter from the Supreme Court of Washington State to Members of the Judiciary and Legal Community, June 2020, <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

accomplished. The resources required for these efforts would far more effectively be used in other pretrial reforms, such as implementing reminders about upcoming court dates, creating and expanding pretrial service agencies, shortening the time between citation and court date, and implementing a robust data collection program.

## II. Money Bail

The freedoms guaranteed by the Constitution extend to those awaiting trial. As the Supreme Court has affirmed, “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>24</sup> The Eighth Amendment also assures that “[e]xcessive bail shall not be required” of a criminal defendant awaiting trial. Yet many criminal defendants are impoverished and neither they nor their families can afford the full amount of even modest cash bail required by courts for them to go free while awaiting trial.

This has led to the creation of a multi-billion dollar commercial bail bond industry.<sup>25</sup> A bail bond agent working for a private company will charge a fee to the defendant – usually about 10 percent of the total bail amount – in exchange for guaranteeing to pay the court the full bail amount if the defendant fails to appear. But defendants often cannot afford the 10 percent fee, and so are put on a payment plan that can last longer than the criminal case itself.<sup>26</sup> If the defendant (and often their family members and friends who help afford the bail fee) fails to make timely payments, they can trigger annual interest rates as high as 30 percent.<sup>27</sup>

Bail agents also have expansive and unchecked authority over the property and bodies of the defendants. They have the ability to require defendants to check in with them, disclose personal records for review, and allow searches of their vehicle and houses at any time. Bail agents can also detain defendants and bring them to jail for failure to pay, even causing the defendant to miss court dates.<sup>28</sup>

Due in part to a healthy industry lobby, the number of defendants on cash bail has soared. In 1990, 24 percent of those on pretrial release nationwide were subject to a cash bond; in 2009,

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24. *United States v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 2105, 95 L. Ed. 2d 697 (1987)

25. *The Devil in the Details: Bail Bond Contracts in California*, UCLA School of Law Criminal Justice Reform Clinic (May 2017).

26. Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES, Mar. 31, 2018, <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>.

27. *Id.* According to the New York Times report, over a five-year span, Maryland families paid more than \$256 million in nonrefundable bail premiums, with over \$75 million of that paid in cases in which there ultimately was no finding of guilt, and the vast majority of that paid by black families. In 2015, New Orleans families paid \$6.4 million in premiums and fees, and in 2017 in New York City, bond companies collected between \$16 million and \$27 million.

28. *Id.*

that number was 49% (and is much higher in some jurisdictions).<sup>29</sup> The two-billion-dollar bail bond industry donates heavily to politicians and lobbies against the public funding of pretrial services to keep its revenue stream intact.<sup>30</sup> Despite the industry's resources and efforts, several states have outlawed the bail bond industry because of the problems cited above.<sup>31</sup> Yet the commercial bail bond industry thrives in most places, where it exacerbates racial inequality, perpetuates the cycle of poverty, and actively works to undermine progress in pretrial services.

### III. Recommendations and Resources

#### A. Judges and Courts

Considering the vast discretionary powers wielded by judges in their courtrooms, it is imperative that judges receive continued education and training regarding the inherent racial biases within the criminal justice system and, further, the United States in general. Most importantly, judges should focus on the court rule already in existence that establishes a presumption of release for the criminally accused and that the imposition of money bail is reserved for only exceptional cases.<sup>32</sup> This court rule explicitly states that the accused should be released on their personal recognizance unless the court determines that there is reason to believe that the accused will not appear for subsequent court hearings, that the accused would commit a violent crime, or that the accused would likely seek to obstruct justice through actions such as witness intimidation.

Still, even with this presumption of release, it is of the utmost importance that judges weigh the factors that determine if the court believes that the accused will fail to make later appearances with the lens of social equity. For instance, a prior failure to appear may have less to do with an individual's likelihood of failing to appear in the future but, in actuality, demonstrate the inherent systemic oppressive forces at work.

#### B. Prosecutors

As the actors requesting conditions of release within the courtroom, prosecutors must heed the importance of their roles. Considering the presumption of release and court rule requirement that money bail is imposed only as a last resort, prosecutors must pledge to not seek money bail in minor cases, reserving this condition of release for only serious offenses and considering the life circumstances of the accused. As previously noted, bail should only ensure that the accused

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29. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* 1, 15 (U.S. Dep't. of Justice, Bureau of Justice Statistics, 2013), <https://bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables>.

30. UCLA School of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California*, (May 2017), available at [https://static.prisonpolicy.org/scans/UCLA\\_Devil%20in%20the\\_Details.pdf](https://static.prisonpolicy.org/scans/UCLA_Devil%20in%20the_Details.pdf).

31. *Id.* These are Illinois, Kentucky, Oregon, and Wisconsin.

32. CrR 3.2

makes later appearances - not be a hindrances for pretrial release. Asking for money bail for someone who may be suffering housing instability, contending with mental health issues, or otherwise struggling to remain financial stable does more than simply ensuring their appearance at later proceedings. In these situations, money bail is an unacceptable barrier to release that disproportionately impacts communities of color. For their part, prosecutors must thoughtfully consider the conditions of release requested along with the facts of the alleged crime and the individual situation of the accused. Achieving this level of analysis would require substantially more time and resources than simply asking for a standard money bail amount for a specific crime – which appears to be the more standard practice in actuality.

### C. Defense Counsel

The provision of defense counsel at initial appearances equalizes the playing field between the accused and the state in pretrial proceedings. Without meaningful access to adequate counsel, the accused has negligible tools with which to argue on their own behalf. Put simply, it's not a fair fight. Moreover, the level of counsel provided, if provided at all, varies by county and municipality. Ensuring that the accused receives competent counsel at all pretrial proceedings state-wide is imperative to upholding equity within the criminal justice system.

### D. Other actors within the system

#### a. The Money Bail Lobby

Because of the negative impacts of money bail, namely the continuation of systemic oppression, constraining the money bail lobby is necessary. The significant influence exerted upon the criminal justice system by the bail bonds lobby and their agents ultimately allows for profits to be snatched from the accused before a final verdict has been reached.

#### b. Community Alternatives

Community-based alternatives to pretrial detention would alleviate burdens on the criminal justice system while also allowing the accused to access appropriate resources. Additionally, having community members attending pretrial hearings as a show of support will help the court better understand the accused's personal situation that should inform the conditions of release. Organizations in King County such as Community Passageways and the Urban League have started programs involving community members appearing in support at pretrial hearings and are currently drafting a report regarding how this investment has provided net positives overall.

#### c. Technology

As most public defenders know, communication can be a serious barrier in



representation. Luckily, within the modern age, society has access to a variety of helpful tools. Providing accused persons without consistent access to a telephone or internet with an inexpensive “burner” phone for the life of their case would allow counsel to stay in contact with their client. Importantly, providing communication devices would allow the court to remind the accused of hearing dates, times, and locations – thus providing a much better chance of participation and appearances.

d. Data Collection

In preparing this report, it became painfully clear that the lack of data on the local impacts of pretrial release practices creates almost insurmountable obstacles to reform. Ongoing documentation, data collection, and production of public reports for pretrial decisions would demonstrate jurisdiction-specific shortfalls and allow for customized solutions. Tracking information by multiple variables, including by specific judge, would allow for relevant actors to better assess and address the pretrial release related issues.

## I. Introduction

Two individuals, roughly the same age and with similar backgrounds, stand before a judge at the sentencing phase of trial. While their crimes and criminal histories may be substantively similar, if one of them is a person of color, that person is more likely to be sentenced to confinement and for a period longer than their White counterpart. Empirical studies of Washington state sentencing outcomes show that this disparity in sentencing outcomes has been true for generations—people of color, particularly Black people, are regularly confined and subject to confinement periods that exceed the sentences given to White offenders.

Sentencing disparities correlate to lifelong, intergenerational disadvantages. Longer sentences create further burdens to communities of color, as individuals are exposed to different pains that arise from prolonged incarceration, including an especially large toll on physical and mental well-being and the ability to sustain relations with families and communities. This burden extends beyond the incarcerated individual. As the National Research Council concludes: “Incarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families. Men with a criminal record often experience reduced earnings and employment after prison. Fathers’ incarceration and family hardship, including housing insecurity and behavioral problems in children, are strongly related.”<sup>1</sup>

In its prior report from 2011 (“2011 Report”), the Race and Criminal Justice System Task Force 1.0 concluded that race and ethnicity clearly matter when it comes to confinement sentencing outcomes. Studies available at the time showed that defendants of color, compared to similarly situated White defendants, were much less likely to receive sentences that fell below the standard sentencing range and were much more likely to be sentenced to prison if convicted for a felony drug offense. Latinos in conservative counties were also less likely to receive the statutorily established drug offender sentencing alternative than other defendants. The data available in 2011 showed a disparity in sentencing outcomes for populations of color. Data since 2011 suggest that these racial disparities in sentencing outcomes have not narrowed.

A report released in 2020 by the Caseload Forecast Council confirms that people of color are still imprisoned in WA state at a much greater rate than White populations, and their sentences tend to be longer. While some new data exists that lends details to these discrepancies, more data is required to understand and resolve disparities in confinement sentencing. This report is intended to bring the available literature on confinement sentencing outcomes in Washington up to date.

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1. NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 6 (2014).

The findings suggest that further research is needed to better understand the causes of disproportionality<sup>2</sup> in confinement sentencing.

## **II. Background: 2011 Task Force 1.0**

In the 2011 Report, the Task Force on Race and Criminal Justice (the “Task Force”) reported on the available data related to disparities in confinement sentencing outcomes. The Task Force found that, based on several studies, race and ethnicity play a role in confinement sentencing outcomes.

The Task Force relied on three studies. The 2003 Engen, Gainey, Crutchfield, and Weis study found that defendants of color were significantly less likely than similarly situated White defendants to receive sentences that fell below the minimum standard range. A year later, Fernandez and Bowman reported that Latino defendants sentenced in conservative counties with comparatively large Latino populations were less likely to receive the statutorily-established drug offender sentencing alternative than other defendants. Finally, the 2005 Steen, Engen, and Ganey study found that, among felony drug offenders, the odds that a Black defendant would be sentenced to prison were 62% greater than among similarly situated White defendants.

While the 2011 Report highlighted sentencing disparities that had persisted for decades, it left many questions unanswered. Notably, the 2011 Report’s findings also showcase the lack of information available on these disparities and their root causes.

## **III. Studies on Racial Disparities since the 2011 Report**

Scholarship has shown that people and communities of color are disproportionately affected by Washington’s sentencing laws and practices. Collectively, these effects undermine economic well-being, worsen mental and physical health, exacerbate housing instability, and increase debt within Black communities.

Nationally, the Black imprisonment rate is five times higher than that of the White population, and Native Americans are also considerably over-represented.<sup>3</sup> Some racial disparities are even more pronounced in Washington state. At the time of the 2011 Report, the Black incarceration rate (2,372 per 100,000 residents) was six times higher than the White rate (392), and the incarceration

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2. We use “disproportionality” to refer to a discrepancy between reference groups’ representation in the general population and in criminal justice institutions. In contrast, we use “disparity” when similarly situated groups of individuals are treated differently within those institutions or to refer to overrepresentation of particular groups in the criminal justice system that stems from criminal justice practices or policies.

3. Ashley Nellis. *The Color of Justice: Racial and Ethnic Disparity in State Prisons*. Washington, D.C.: The Sentencing Project, June 14, 2016, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

rate for Native Americans (1,427) was 3.6 times higher than the White incarceration rate in Washington.<sup>4</sup>

Since the 2011 Report was published, it is difficult to see that any progress has been made. The 2020 Adult General Disproportionality Report to the Washington legislature for fiscal year 2020, produced by the Caseload Forecast Council, reported that in fiscal year 2020 Black individuals accounted for 13.5% of felony sentences,<sup>5</sup> despite representing 4.2% of the general population.<sup>6</sup> This disproportional representation represents an increase from the Council's reports for fiscal year 2019 (in which Black individuals represented 12.6% of adult felony sentences<sup>7</sup>) and fiscal year 2018 (in which Black individuals represented 13.1% of adult felony sentences<sup>8</sup>), despite the Black population largely staying consistent during in that time period.<sup>9</sup> In contrast, Caucasians represented only 71.9% of felony sentences while representing 78.5% of the general population.<sup>10</sup>

The 2020 Adult General Disproportionality Report also noted that Black people and Native Americans have disproportionality ratios of 3.20 and 1.96 respectively for felony sentences reduced to gross misdemeanor or misdemeanor. Meanwhile, the ratio for Caucasians was only 1.03.<sup>11</sup>

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4. Including jail inmates and federal prisoners as well as state prisoners. Data calculated by the Prison Policy Initiative based on the U.S. Census 2010 Summary File. *Washington State Profile*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/profiles/WA.html> (last visited Mar. 8, 2021).

5. WASH. CASELOAD FORECAST COUNCIL, ADULT GENERAL DISPROPORTIONALITY REPORT FISCAL YEAR 2020, at vii (Dec. 2020), [http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport\\_FY2020.pdf](http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2020.pdf).

6. *Washington State Population by Race*, WASH. OFFICE OF FIN. MGMT., <https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-race> (last updated Oct. 27, 2020).

7. WASH. CASELOAD FORECAST COUNCIL, ADULT GENERAL DISPROPORTIONALITY REPORT FISCAL YEAR 2019, at vii (Dec. 2019), [https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport\\_FY2019.pdf](https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2019.pdf).

8. WASH. CASELOAD FORECAST COUNCIL, ADULT GENERAL DISPROPORTIONALITY REPORT FISCAL YEAR 2018, at vii (Dec. 2018), [https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport\\_FY2018.pdf](https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2018.pdf).

9. *QuickFacts: Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WA> (last visited Mar. 8, 2021).

10. WASH. CASELOAD FORECAST COUNCIL, *supra* note 8, at vii.

11. *Id.* at vii-iii.

Racial disparities in sentencing are starkest among the individuals serving the longest prison terms. In Washington, Black people comprise 19% of those sentenced to prison in Washington state, but 28% of the defendants sentenced to life without the possibility of parole since 1986.<sup>12</sup> Studies also indicate that Black defendants in capital trials are more than four times as likely as non-Black defendants to be sentenced to death in Washington State.<sup>13</sup> Relatedly, Latina/o defendants are assessed higher fees and fines, after controlling for other relevant factors, than non-Latina/o defendants.<sup>14</sup>

Yet despite consistent findings of disproportionate sentencing outcomes year after year, the courts have failed to effectively identify and address the causes of these disproportionate outcomes for communities of color. There is consensus, however, that widespread racial bias in the operation of the criminal justice system is a significant contributor.

As an example, one study by Levinson, Smith, and Hioki sought to determine whether the prominence of retribution in our legal code provides an entryway for racial bias. The study found that there is a significant implicit association between the word “Black” and “retribution,” whereby subjects associated “Black” with “payback” and “White” with “mercy” on the implicit association test. The authors concluded that the connection between race and retributive demand presents an opportunity for implicit racism in sentencing outcomes.<sup>15</sup>

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12. Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>. The authors analyzed Washington State Superior Court Sentencing data provided by the Washington Caseload Forecast Council.

13. Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 COLUM. J. RACE & L. 77 (2016).

14. Alexes Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234 (2011).

15. Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 879, 891 (2019).

Part I discusses disproportionality in prisons. Part II Discusses disproportionality in jails. The research memos drafted by the teams included recommendations, not included here, that are being reviewed by the Recommendations Working Group.

## I. Prisons

While the main content of this part focuses on disproportionate imprisonment rates in Washington State, the disparities and disproportionalities identified in Washington are part of a larger, national picture of mass incarceration. The United States has the highest incarceration rate of any industrialized country in the world, more than six times that of Canada, nearly four times that of Mexico, and nearly twice that of Russia.<sup>1</sup> While fewer than one out of twenty people in the world reside in the United States, one out of five prisoners in the world is incarcerated in the United States.<sup>2</sup> Approximately 1.46 million people in the United States are incarcerated in state and federal prisons alone,<sup>3</sup> making up 0.44% of the national population.<sup>4</sup> Nationally, the high incarceration rate is disproportionately experienced by historically oppressed racial and ethnic groups. In 2019, the Bureau of Justice Statistics (BJS) report on demographics of people incarcerated in prisons and jails in the United States indicated a White incarceration rate of 263 per 100,000, while Black people were incarcerated at a rate of 1,446 per 100,000, and Latinas/os were incarcerated at a rate of 757 per 100,000.<sup>5</sup> However, this information is somewhat oversimplified, as BJS tracks only these three racial groups, and the actual rate of disproportionality varies widely by state.<sup>6</sup>

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1. See World Prison Brief, Highest to Lowest – Prison Population Rate, [https://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-rate?field_region_taxonomy_tid=All).

2. Peter Wagner & Wanda Bertram, Prison Policy Initiative, “What percent of the U.S. is incarcerated?” (and other ways to measure mass incarceration) (Jan. 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

3. Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Policy Initiative <https://www.prisonpolicy.org/reports/pie2020.html> (documenting 1,291,000 people in state prisons and 166,000 in federal prisons). This figure does not include the many thousands of people incarcerated in local jails. See *id.* (documenting 691,000 people incarcerated in local and federal jails, including both pretrial and convicted persons).

4. United States Census Quick Facts (July 1, 2019) <https://www.census.gov/quickfacts/fact/table/US/PST045219> (Calculated as 1,457,000/328,239,523).

5. E. Ann Carson, Ph.D., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 2019 10 (Oct. 2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>, [hereinafter “BJS Report 2019”]. This report offers the following definitions: Adult imprisonment rate—The number of prisoners sentenced to more than one year under state or federal jurisdiction per 100,000 U.S. residents age 18 or older; Imprisonment rate—The number of prisoners sentenced to more than one year under state or federal jurisdiction per 100,000 U.S. residents. Comparing rates from this source to those included in the 2011 report demonstrates a drop for White persons, an increase for Black persons, and a mostly steady rates for Latinas/os. 2011 Preliminary Report: 412 White people incarcerated per 100,000 White residents, Black people incarcerated at a rate of 2,290 per 100,000 Black residents, and Latinas/os incarcerated at a rate of 742 per 100,000 Latina/o residents.

6. *Id.* at 36.

**Table 1 - Imprisonment rates of U.S. adults, based on sentenced prisoners in jails and prisons under jurisdiction of state or federal correctional authorities, 2019**

| Race/Ethnicity <sup>7</sup> | Incarceration rate<br>(per 100,000) | Disproportionality ratio<br>(in comparison to White) |
|-----------------------------|-------------------------------------|--|
| White                       | 263                                 | n/a  |
| Black                       | 1446                                | 5.49   |
| Latina/o                    | 757                                 | 2.88   |

Source: BJS Prisoners in 2019.

### RACE IN WASHINGTON'S PRISONS

As of 2020, 0.21% of Washington residents were currently incarcerated in a state prison facility, a significantly lower percentage of the population than what is documented at the national level.<sup>8</sup> However, like the national data, state level data demonstrates high racial disproportionality ratios when comparing race within the state prison population. Though the two data sets are not directly comparable because the state data has been limited to include only those in prison, and not those in local and county jails, the disparities are concerning, nonetheless. White residents in Washington are incarcerated at a rate of 187 per 100,000 White residents. The Black incarceration rate in Washington is many times higher than that for White residents—869 per 100,000 Black residents. Indigenous people living in Washington are also vastly overrepresented in state prisons, with an incarceration rate of 682 per 100,000 Indigenous residents. While the disparity is slightly lower for Latina/o residents, they are still incarcerated in prisons at a higher rate than White residents, 231 per 100,000 Latina/o residents.<sup>9</sup>

7. For BJS data, the White and Black racial categories exclude persons of Hispanic origin. *Id.* at 10

8. See Washington State Office of Financial Management (OFM), Estimates of April 1 population by age, sex, race and Hispanic origin (2020), <https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin> (Home » Washington Data & Research » Population & demographics » Population estimates » Estimates of April 1 population by age, sex, race and Hispanic origin (2020)) [hereinafter “OFM Populations Estimate, April 2020”], and Washington State Department of Corrections (DOC), Agency Fact Card, 100-QA002d (6/2020), Research & Data Analytics (June 2020), <https://www.doc.wa.gov/information/records/publications.htm#stat-reports> [hereinafter “DOC, June 2020 Report”].

Note that due to the COVID-19 pandemic, prison populations have declined in response to public health concerns and because significant numbers of criminal trials have been delayed, resulting in fewer admissions to DOC facilities. Therefore, the prison population data relied on for this report may not be representative of typical prison population levels either before or after the pandemic.

9. For raw data used to calculate these rates and ratios, see OFM Populations Estimate, April 2020, and DOC, June 2020 Report.

These incarceration rates demonstrate significant racial disproportionalities in our state prison system. All races other than Asian and Native Hawaiian/ Pacific Islander<sup>10</sup> are incarcerated at rates greater than their White counterparts. Black people in Washington experience the greatest negative impacts with an incarceration ratio 4.64 times that of White people. Indigenous people are also significantly disproportionately represented compared to White people, at a ratio of 3.64, and Latinas/os are represented at a ratio of 1.24 times that of White people in Washington.

**Table 2 - Washington State, Prison Demographic Rates and Ratios by Race, 2020**

| Race/Ethnicity              | Incarceration rate<br>(per 100,000) | Disproportionality ratio<br>(in comparison to White) |
|-----------------------------|-------------------------------------|--|
| White                       | 187                                 | n/a  |
| Black                       | 869                                 | 4.64   |
| Indigenous                  | 682                                 | 3.64   |
| Latina/o <sup>11</sup>      | 231                                 | 1.24   |
| Asian & NH/PI <sup>12</sup> | 88                                  | 0.47   |

Source: OFM Populations Estimate, April 2020, and DOC, June 2020 Report<sup>13</sup>

Looking at changes to race disproportionalities since the 2011 report, the disproportionality ratio for Black people in Washington prisons decreased, and the disproportionality ratio for Latinas/os

10. *See infra* note 11.

11. One important note regarding the race reporting is that Hispanic origin is sometimes recorded separately from race; a person's demographic information is recorded as both their race and their Hispanic origin. Both OFM and DOC race categories include people who also identify as of Hispanic origin. Therefore, individuals accounted for in the Hispanic origin category are also counted in the respective race category. For purposes of this report, we treated persons reporting Hispanic origin to be analogous to the Latina/o designation.

12. Although the demographics for distinct populations of Asian and NH/PI peoples are available through the OFM reports, the DOC statistics sheet does not separate Asian and NH/PI people into distinct categories; therefore, this report has combined them into one group. However, the authors recognize that sub-populations of this combined group may have different experiences with the criminal legal system and may, as a result, be represented at different rates in the prison system.

13. *See* OFM Populations Estimate, April 2020; *and* DOC, June 2020 Report. In reporting race and ethnicity demographics, Washington Department of Corrections also reports numbers for the categories of "Other" and "Unknown." Those categories have been omitted here due to a lack of comparable categories in state level population data from the Office of Financial Management.



remained nearly unchanged.<sup>14</sup> The previous report only provided statistics for three population groups in prisons—White, Black, and Latina/o. This report includes Indigenous people and Asians and Native Hawaiians/Pacific Islanders (Asian & NH/PI).

## GENDER/RACE

Overall, women are disproportionately underrepresented in prison populations compared to men. In 2019 women accounted for only 99,000 out of approximately 1.3 million people incarcerated in state prisons nationally<sup>15</sup> despite consisting of 50.8% of the general population.<sup>16</sup>

The national imprisonment rate for women has been dropping steadily over the past two decades, particularly for Black women. In 2000, there were 205 Black women incarcerated per 100,000 nationally compared to 34 White women per 100,000. In 2019, those numbers shifted to 83 Black women per 100,000 and 48 White women per 100,000.<sup>17</sup> Despite these changes, the female population incarcerated in the U.S. is more than seven times higher than it was in 1980,<sup>18</sup> and Black women continue to be incarcerated at higher rates than their White counterparts.

In Washington, almost all women incarcerated in the Department of Corrections are housed in one of two women’s prisons, Mission Creek Corrections Center for Women and Washington Corrections Center for Women. As of June 2020, there were 1127 women incarcerated under DOC jurisdiction—0.03% of the total female population in the state and 7.0% of the state’s prison population.<sup>19</sup> As of June 2020, The Mission Creek Corrections Center for Women had a total population of 188 women, and Washington Corrections Center for Women housed 738

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14. The respective disproportionality ratios for 2011 were 6.4 for Black incarcerated individuals and 1.3 for Latina/o incarcerated individuals, compared to 4.64 for Black and 1.24 for Latina/o in 2020.

15. Aleks Kajstura, Prison Policy Initiative, Women’s Mass Incarceration: The Whole Pie 2019, <https://www.prisonpolicy.org/reports/pie2019women.html> (chart of numbers of incarcerated women, nationally); Wendy Sawyer & Peter Wagner, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2019, <https://www.prisonpolicy.org/reports/pie2019.html#slideshows/slideshow1/1> (chart of numbers of incarcerated persons, nationally).

16. United States Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/table/US/LFE046219> (table including female percent of population age 16 years and older, 2015-2019).

17. See Sentencing Project, Incarcerated Women and Girls (Nov. 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (Imprisonment Rates by Gender, Race, and Ethnicity per 100,000: 2000 vs. 2019, chart documenting the national imprisonment rate per 100,000 for White, Black, and Latinas).

18. See *id.*

19. See OFM Populations Estimate, April 2020; and DOC, June 2020 Report. (reporting 1127 women out of 16,138 in active inmate population).

women.<sup>20</sup>

As in the overall prison population in Washington, significant disparities exist among racial groups of women in prison. The disparity is greatest for Indigenous women in prison, who are incarcerated at a rate of 119 per 100,000, compared to White women, who are incarcerated at a rate of 22 per 100,000. Black women are also overrepresented in Washington Prisons, at a rate of 55 per 100,000, as are Latinas, at 27 per 100,000. Like the prison population as a whole, Asians and Native Hawaiians/Pacific Islanders are the only group represented at a rate lower than their White counterparts, 11 per 100,000.

Viewed through the lens of disproportionality ratios, the disparate impacts on BIPOC women are striking. Most negatively impacted are Indigenous women, who are incarcerated at a ratio 5.37 times that of White women. Disproportionalities for Black women are also high, at a ratio of 2.47 compared to White women, but are lower than the ratio for Black people in Washington’s prisons overall, 4.64. Latinas in Washington are also overrepresented, at a ratio of 1.22 times that of White women, which is nearly identical to the disproportionality ratio for Latina/o people in prison overall.

**Table 3 - Washington State, Prison Demographic Rates and Ratios, Females by Race, 2020**

| Race/Ethnicity | Incarceration rate (per 100,000) | Disproportionality ratio (in comparison to White) |
|----------------|----------------------------------|---|
| White          | 22                               | n/a   |
| Black          | 55                               | 2.47  |
| Latina/o       | 27                               | 1.22  |
| Indigenous     | 119                              | 5.37  |
| Asian & NH/PI  | 11                               | 0.52  |

Source: OFM Populations Estimate, April 2020, and DOC, June 2020 Report<sup>21</sup>

20. See DOC, June 2020 Report. The total population of women in the two women’s prisons in June 2020 was only 926. The remaining 201 women were housed in work release facilities (92), in out-of-state prisons (3), on electronic home monitoring (101), or in juvenile facilities (5). *Id.*

21. See OFM Populations Estimate, April 2020; and DOC, June 2020 Report.

## AGE/RACE

On a national level, race disparities among incarcerated young people are very apparent; per 100,000 Black residents age 18-24, 3,492 are incarcerated, and 1,293 young Latinas/os 18- 24 years of age are incarcerated per 100,000 residents.<sup>22</sup> These numbers stand in stark contrast to White youths in the same age group, who are incarcerated at just 405 per 100,000 residents.<sup>23</sup> The highest Black-to-White disproportionality rates occur in the 18-19 year-old age group, with Black males in this age group 12 times as likely to be incarcerated compared to White youth.<sup>24</sup>

Unfortunately, available data for people held in Washington prisons is not disaggregated by both age and race, so determining the disparities among young Washingtonians in prison is not currently feasible. We recommend that DOC publish disaggregated data demonstrating racial disparities across various subgroups of the prison population.

## II. Jails

This part focuses on the racially disparate use of jails in Washington State. However, the patterns identified in Washington that contribute to harsh racial disparities in jail incarceration are part of a dramatic nation-wide expansion of the scale of jail operations over the last three decades. Between 1983 and 2013, the number of total annual jail admissions in the United States nearly doubled from 6 million to 11.7 million admissions,<sup>25</sup> and the average daily population of the nation's jails grew from 408,075 in 1990 to a peak of 776,600 in 2008. The most recent estimates, from 2019, are that jails hold be approximately 741,900 on any given day.<sup>26</sup>

Nationally, the increased jail incarceration rate has been disproportionately experienced by historically oppressed racial and ethnic groups. In 2019, the Bureau of Justice Statistics reported a White jail incarceration rate of 184 per 100,000 people, while Black people were incarcerated at a rate of 600 per 100,000, Indigenous people at a rate of 420 per 100,000.<sup>27</sup>

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22. BJS Report 2019 at 16.

23. *Id.*

24. *Id.*

25. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, Vera Institute of Justice, 7 (Feb. 2015), [https://www.vera.org/downloads/publications/incarcerations-front-door-report\\_02.pdf](https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf).

26. Zhen Zeng & Todd D. Minton, *Jail Inmates in 2019*, Bureau of Justice Statistics, 2 (March 2021), <https://bjs.ojp.gov/content/pub/pdf/ji19.pdf>.

27. *Id.* at 4.

**Table 4 – Jail incarceration rates of U.S. adults by race/ethnicity, 2019**

| <b>Race/Ethnicity</b> | <b>Incarceration rate (per 100,00)</b> | <b>Disproportionately ratio (in comparison to White)</b> |
|-----------------------|--|--|
| White                 | 184                                    | N/A  |
| Black                 | 600                                    | 3.26   |
| Latina/o              | 176                                    | 0.96   |
| Indigenous            | 420                                    | 2.28   |
| Asian                 | 25                                     | 0.14   |

Source: BJS Jail Inmates in 2019

### RACE IN WASHINGTON'S JAILS

In line with national trends, the use of county, city, and tribal jails in Washington began expanding around 1980.<sup>28</sup> By 2015, an estimated 12,000 people were being held in local jails at any given time, and about 98,000 individuals total were held in custody at some point.<sup>29</sup>

The available state-level data indicates that Black and Indigenous residents are vastly overrepresented in Washington's jails. Moreover, for these two groups, there are higher racial disproportionalities in the state jail incarceration rates than the national jail incarceration rates.

**Table 5 – Jail incarceration rates of Washington adults by race/ethnicity, 2018**

| <b>Race/Ethnicity</b> | <b>Incarceration rate (per 100,00)</b> | <b>Disproportionately ratio (in comparison to White)</b> |
|-----------------------|--|--|
| White                 | 125                                    | N/A  |
| Black                 | 591                                    | 4.72   |
| Latina/o              | 138                                    | 1.10   |
| Indigenous            | 444                                    | 3.55   |
| Asian & NH/PI         | 26                                     | 0.27   |

Source: Washington Association of Sheriffs and Police Chiefs

The previous task force report did not examine jails separately from prisons. However, the existing racial disparities in the jail incarceration rate have been present since at least the year 2000.<sup>30</sup>

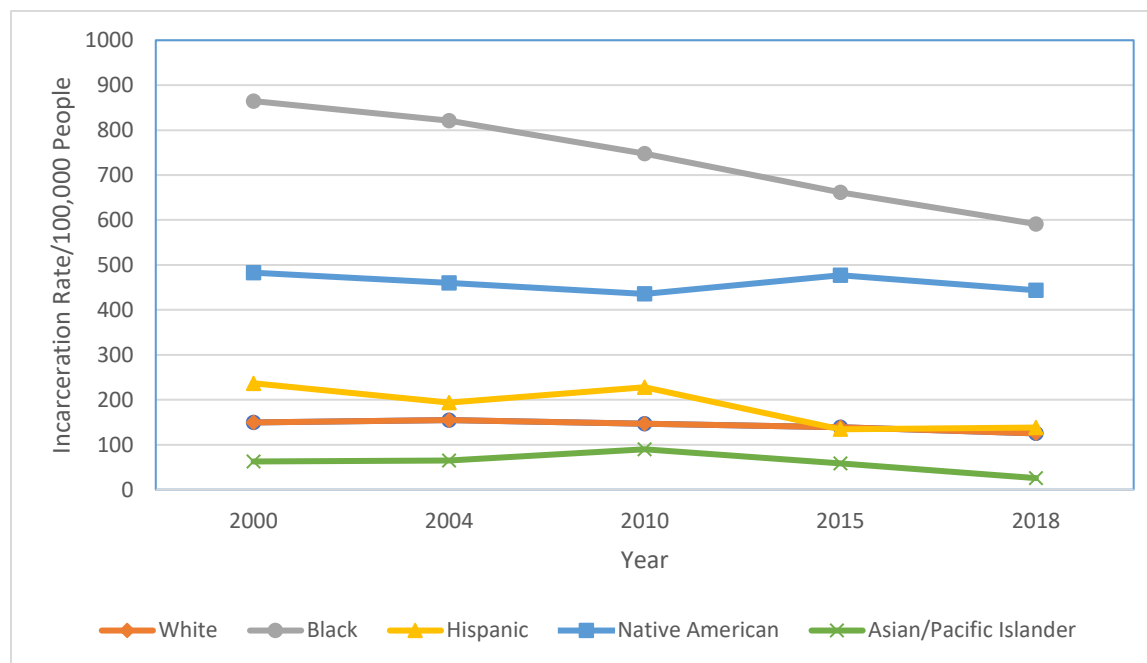
28. Prison Policy Initiative, *Washington State Profile*, (2018), <https://www.prisonpolicy.org/profiles/WA.html>.

29. *Id.*

30. WASPC does not publish jail population data from before the year 2000.

Moreover, the disparities between the Black and Indigenous jail incarceration rates have been greater in Washington state than in the U.S. as a whole for the last two decades.<sup>31</sup>

**Chart 1 – Jail incarceration rates of Washington adults by race/ethnicity, 2000-2018**



Source: Washington Association of Sheriffs and Police Chiefs

It should be noted that getting an accurate snapshot of who is being confined in Washington’s jails is difficult, as the state contains 56 facilities operated by various county, city, and tribal governments.<sup>32</sup> No state agency currently tracks or requires standardized reporting of jail populations. The only centralized source of data for Washington jails is from the Washington State Association of Sheriffs and Police Chiefs<sup>33</sup> (WASPC), which collects data regarding the annual average daily populations of all jails in Washington and then posts it on its website. The information is collected and self-reported by each of the facilities and is therefore inconsistent between jurisdictions, with significant omissions from several facilities. Additional, standardized data collection is urgently needed to fully understand the scope of the racial disparities.

31. Zheng & Minton, *supra* note 26 at 4.

32. *Annual Jail Statistics*, Wash. Ass’n of Sheriffs and Police Chiefs, (2020), available at <https://www.waspc.org/crime-statistics-reports>.

33. WASPC is a non-governmental entity composed of sheriffs, police chiefs, the Washington State Patrol, the Washington Department of Corrections, and representatives of federal agencies that exists to provide “materials and services” to law enforcement agencies. See Wash. Ass’n of Sheriffs and Police Chiefs, *About WASPC*, (accessed on July 12, 2021), available at <https://www.waspc.org/about-waspc>.

### A. Pre-trial Detention

The rapid growth in the nation's jail population can largely be attributed to an increased reliance on pre-trial detention, which disparately impacts BIPOC communities. The Bureau of Justice Statistics found that 95% of the growth in the overall jail population since 2000 was due to the increased number of people being held while awaiting trial.<sup>34</sup> Nationally, data on the race or ethnicity of people in pre-trial detention has not been collected since 2002, when it was found that 43% of the national pre-trial detention population was Black and 19.6% was Latina/o. That year, Black people only accounted for 12.2% of the total U.S. population and Latina/o people only accounted for 13.4% of the total U.S. population.<sup>35</sup>

In line with national trends, Washington has expanded its use of pre-trial detention over the previous two decades. As of 2013, Washington state held just over 6,000 people in pre-trial detention and approximately 4,000 people post-conviction in local jails.<sup>36</sup> These numbers are down from their respective highs in 2005; however, the rate of pre-trial detention has dropped substantially less sharply than the rate of post-conviction detention.<sup>37</sup> As of 2015, pretrial detainees represented 62% of the total jail population in Washington.<sup>38</sup> There is no available data regarding the race or ethnicity of people being held in pre-trial detention in Washington.

### B. Jail Conditions

Beyond the racial disparities in the rates of incarceration, people of color are also subjected to more restrictive confinement and face harsher discipline in jails than their White counterparts. In King County, for example, the Department of Adult and Juvenile Detention (DAJD) holds more Black individual in high-security, restrictive housing than White individuals.<sup>39</sup> Corrections officers are also more likely to discipline Black people and to use harsher punishments when they do so.<sup>40</sup>

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34. Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Justice Statistics, 4 (June 2015), available at <https://bjs.ojp.gov/content/pub/pdf/jim14.pdf>.

35. *How Race Impacts Who is Detained Pretrial*, Prison Policy Initiative (October 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/).

36. *See Washington State Profile*, *supra* note 28.

37. *Id.*

38. *Id.*

39. Grant Dailey et al., *Adult Jails Need Risk-Based Approach to Improve Safety, Equity*, King County Auditor's Office, 34 (April 6, 2021), available at <https://kingcounty.gov/~media/depts/auditor/new-web-docs/2021/jail-safety-2021/jail-safety-2021.ashx?la=en>.

40. From 2017 to 2019, Black people received 23% more disciplinary infractions than people of other races, while White people received 14% less infractions than others. Corrections staff also gave harsher punishments to Black people in custody and more lenient punishments to White ones. Black men receive 24% more days in restrictive housing per infraction on average compared to other men and Black women receive 70% more days in restrictive confinement. White men, by contrast, received 17% less days and White women received 40% less days than similarly situated individuals in confinement. *Id.* at 38.

People of color are also more likely to die in Washington jails. Statewide, between 2005 and 2016, 210 people died in jails. Of those who died, 15% were Black, 7% were Latinas/os, 8% were Indigenous, and 3% were Asian.<sup>41</sup> The percentage of deaths of Black detainees was comparable to their representation in the overall jail population, while Latina/o detainees and Indigenous detainees died at rates disproportionately high to their representation in the total jail population.<sup>42</sup>

Lack of access to mental health and substance abuse treatment are likely responsible for many of these needless deaths. Up to 60 percent of people entering Washington jails have substance use disorder or other mental health issues and up to 40 percent have co-morbid mental health issues.<sup>43</sup> While suicide was the most common cause of death, Washington jails have design flaws and inadequate suicide prevention practices that actually increase the likelihood of suicide including inadequate staffing, isolation protocols, and cells or other structures that enable suicide.<sup>44</sup> Further, roughly two-thirds of Washington jails have no therapeutic programs for mentally ill inmates.<sup>45</sup>

### C. Impacts of Covid-19

Nationally, the number of people held in jails decreased by 25% in response to the COVID-19 pandemic.<sup>46</sup> It is estimated that Washington's jail population decreased by approximately 50% as the result of policy decisions by a variety of local officials, including policy changes relating to booking criteria and restrictions, requests for bail and pretrial detention, delayed filing of new

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41. *Gone But Not Forgotten: The Untold Stories of Jail Deaths in Washington*, Columbia Legal Services 6 (May 2019), <https://columbialegal.org/wp-content/uploads/2019/05/Gone-But-Not-Forgotten-May2019.pdf>.

42. *Id.*

43. *Id.* at 6.

44. Over 80 percent of jail suicides in Washington occurred by hanging and many occurred in single-occupancy cells or spaces that were otherwise isolated. *Id.* at 9.

45. *Wasted Time: Lack of Access to Programming for Inmates with Disabilities in Washington's County Jails*, Disability Rights Washington 3 (Feb. 2017), <https://www.disabilityrightswa.org/reports/wasted-time/>.

46. Todd D. Minton, et al., *Impact of COVID-19 on Local Jail Population, January-June 2020*, Office of Justice Programs, Bureau of Justice Statistics, U.S. Dept. of Justice Special Report NCJ 255888 1 (March 2021).

cases, and early releases mandated by state’s Supreme Court<sup>47</sup> In King County alone, the average daily population in its two jail facilities dropped from 2,000 to 1,300 people.<sup>48</sup>

WASPC has published its report of annual jail population statistics from 2020, which provide some indication of how these COVID-related practices impacted the racial composition of the state’s jail population. According to WASPC’s data, the disparities in the Black and Indigenous jail incarceration rates in comparison to the White rate increased slightly in 2020. Specifically, Black residents were jailed at 4.83 times the rate that White residents were in 2020, as compared to 4.72 times in 2018; and Indigenous people were incarcerated at 3.68 times the rate of White residents in 2020, compared to 3.55 times the rate in 2018. This data may suggest that the practices used to decrease the number of people in jails during COVID may have slightly benefited more White residents than Black and Indigenous residents, although additional data is needed.

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47. Jaime Hawk, *Don’t Go Back – Washington Jails Should Permanently Adopt Practices That Led to Reductions in Populations Due to COVID-19*, ACLU Washington (August 31, 2020), [https://www.aclu-wa.org/story/don%E2%80%99t-go-back-washington-jails-should-permanently-adopt-practices-led-reductions-populations#:~:text=In%20response%20to%20the%20COVID,populations%20between%2030%2D65%25](https://www.aclu-wa.org/story/don%E2%80%99t-go-back-washington-jails-should-permanently-adopt-practices-led-reductions-populations#:~:text=In%20response%20to%20the%20COVID,populations%20between%2030%2D65%25;); Nina Shapiro, *Washington’s Prisons May Have Hit Pivotal Moment as They Eye Deep Cut in Their Population*, *Seattle Times*, Sept. 17, 2020, <https://www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial-injustice/>.

48. Lewis Kamb, *Audit of King County jails finds racial disparities in discipline, says ‘double-bunking’ leads to violence*, *SEATTLE TIMES* April 6, 2021, <https://www.seattletimes.com/seattle-news/audit-of-king-county-jails-finds-racial-disparities-in-discipline-says-double-bunking-leads-to-violence/>.



## Introduction

From traffic citations, juvenile, misdemeanor and felony convictions, people are charged fines, fees, surcharges, and payment costs related to the violation of the law and costs for court processing.<sup>1</sup> This system of monetary sanctions, also known as legal financial obligations or LFOs, is a two-tier punishment scheme embedded throughout local, state, and federal courts of the United States criminal legal system. It is a system that on one hand is a determinate sentence for people with means, and on the other hand, an indeterminate sentence that imposes a longer and disproportionate punishment for people without financial means.<sup>2</sup>

While the practice of sentencing fines has existed for some time, in fact, since the *Magna Carta* was written in 1215, legal assumptions by policy makers and American jurisprudence has always been that the costs would “be proportioned to the wrong” and “not be so large as to deprive [an offender] of their livelihood.”<sup>3</sup> However, in modern day practice, LFOs have emerged as an oppressive and exploitative system imposed by the criminal legal system with a varied set of penological aims to punish, generate local and state revenue, and expand social control over individuals who cannot pay. As a result, this punishment system perpetually holds poor people to a standard of accountability they can never achieve because of their precarious economic situations.<sup>4</sup>

State policymakers began to expand the system of LFOs in the 1990s because of the local and state costs related to mass conviction and incarceration. Between 1982 and 2001, state corrections costs alone increased from \$15 billion to \$53.5 billion across the United States.<sup>5</sup> Policymakers and practitioners found frustration with the rising costs associated with increasing convictions and mass incarceration, so they began looking for additional revenue streams. In the midst of state budget austerity and attempts at fiscal restraint, policy makers developed state statutes that either allowed for or mandated courts to shift criminal legal costs from the state to persons accused and convicted. Sanctions across the U.S. now include LFOs for the use of a public defender, the cost

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1. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT OF THE POOR (2016).

2. HARRIS, *supra* note 1.

3. *Timbs v. Indiana*, 139 S. Ct. 682, 688, 203 L. Ed. 2d 11 (2019) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 271, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)) at 271.

4. Alexes Harris, *Framing the System of Monetary Sanctions as Predatory: Policies, Practices, and Motivations*, 41 UCLA CRIM. J. L. REV. 1 (2020).

5. Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2012 –: Preliminary*, (Bureau of Justice Statistics, Feb. 2015), <https://bjs.ojp.gov/library/publications/justice-expenditure-and-employment-extracts-2012-preliminary>.

of conviction, incarceration and supervision, jury fees, surcharges, collection fees and per payment costs.<sup>6</sup> As a result, the United States has experienced a dramatic increase in the number of people who have been sentenced to LFOs, in fact, a 25% increase between 1991 and 2004 with two-thirds of people incarcerated in state or federal prisons receiving LFOs as a part of their sentences.<sup>7</sup>

The system of LFOs is a unique punishment option in contrast to other sentences such as incarceration, probation, drug or alcohol treatment, or community service. In contrast to purely serving a punitive aim or (in theory) a rehabilitative outcome, LFOs have wide-ranging and unconnected objectives. The stated purpose of the system of LFOs in, for example, Washington State, suggests the purpose of LFOs are to assist courts in sentencing by holding offenders accountable for costs associated with their crimes, and to recoup losses associated with the illegal behavior.<sup>8</sup> These objectives have created a new sentencing option in addition to incarceration, codifying a vague concept of “accountability” and developing a formalized outlet for local and state governments to pursue revenue generation.

From several dimensions, emerging scholarship has examined the system of LFOs, including the consequences of court debt to individuals and their families, the practice and outcomes of local and state court revenue generation, and a comparative analysis of the laws and policies governing sentencing, monitoring, and sanctioning. While research is nascent, we do know that courts regularly continue to impose LFOs, legal debt is typically substantial relative to the expected earnings of people convicted, and LFOs reduce family income and create long-term debt for individuals who cannot pay. What policy makers have created, and what we continue to allow in LFOs is a two-tiered system of justice, one that is a determinate sentence for people with means, and one that is an indeterminate sentence that imposes a longer and disproportionate punishment for people without financial means.<sup>9</sup>

### **Racial Disparities in LFOs in Washington State Courts**

The criminal legal system serves as a revised form of social control over people who are poor and for Black, Indigenous, and other people of color who are disproportionately affected by the system. Because the imposition of LFOs is a regular and common practice within the criminal legal system,

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6. Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 2018 ANN. REV. CRIMINOLOGY 471.

7. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010).

8. RCW 9.94A.030. Purpose—1989 c 252: "The purpose of this act is to create a system that: (1) Assists the courts in sentencing felony offenders regarding the offenders' legal financial obligations; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior."

9. HARRIS, *supra* note 1.

the people who are disproportionately represented in the system are also the people who are disproportionately impacted by LFOs.

In Washington State, an aggregate analysis was done to specifically examine the racial and ethnic disproportionality in LFOs.<sup>10</sup> The analysis found that Black, Latinas/os, and Indigenous people are sentenced to LFOs more frequently and at higher rates than Whites and Asian & NH/PI. It also found differences in collection trends suggesting that inability to pay LFOs is greater for Black, Latinas/os, and Indigenous people.

### **Latinas/os Are Sentenced to Higher LFO Amounts**

A 2008 report commissioned by the Minority and Justice Commission found that convictions involving Latina/o defendants are associated with significantly higher LFOs than those involving White defendants, even after controlling for relevant legal factors.<sup>11</sup> In a more recent study, Harris and Edwards gathered data from the Administrative Office of the Courts for all Superior Courts from 2000-2014.<sup>12</sup> What they found was that the median amount of LFOs sentenced continues to be much higher for Latina/o people than any other groups, and is relatively lower for Black and Asian & NH/PIs relative to other groups. Figure 1 illustrates the median amount sentenced and collected per case for the years 2000-2014.

Latina/o people are sentenced to a median superior court LFO of \$1,500, Indigenous people are sentenced to a median LFO of \$1,100, Whites are sentenced to a median LFO of \$1,000, Asian & NHPIs are sentenced to a median LFO of \$900, and Black people are sentenced to a median LFO of \$850.

It is important to note that there was a difference found in collection trends. The analysis found that the expected trend for API and White debtors was that the older debts were paid off more frequently, but the line is near flat for Black, Latina/o, and Indigenous debtors, suggesting a clear inability to pay the median LFO for those racial groups.

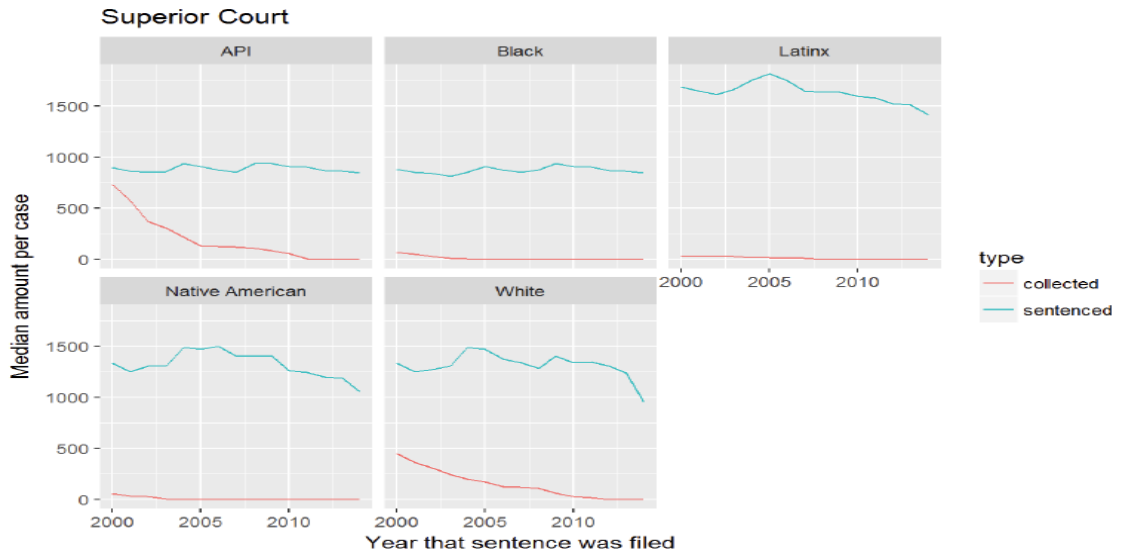
*Figure 1. Median Sentenced and Collected in Superior Courts, WA State, 2000-2014*

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10. Alexes Harris & Frank Edwards, *Legal Debt, Monetary Sanctions and Inequality* (2017), in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Henry Pontell ed.) (online research encyclopedia that is regularly updated).

11. Katherine A. Beckett, Alexes M. Harris & Heather Evans, *The Assessment and Consequences of Legal Financial Obligations in Washington State: Research Report* (Aug. 2008), [https://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

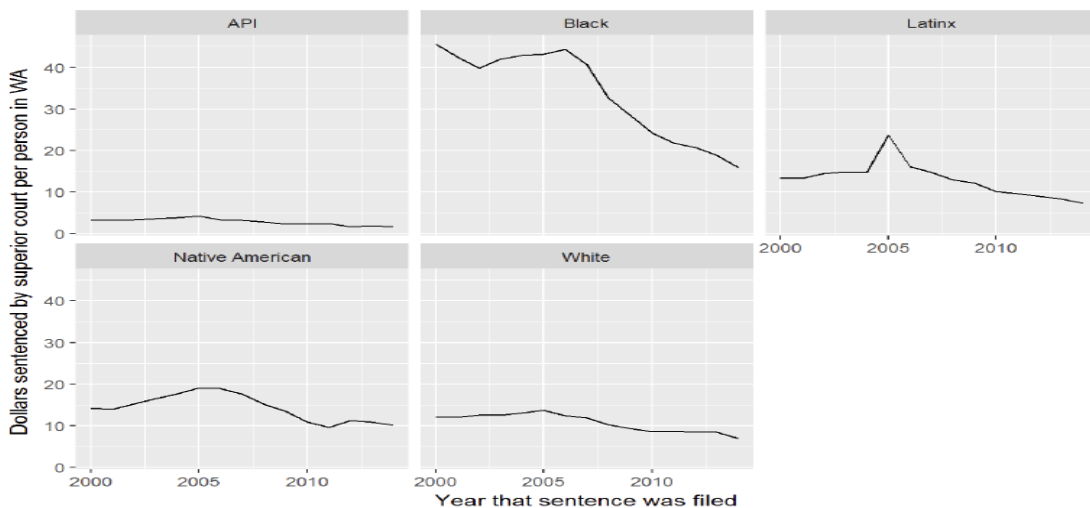
12. They were unable to gather comparable data from courts of limited jurisdiction because many of the case data are missing race and ethnicity data elements.



**Black and Indigenous People Are Sentenced to LFOs More Frequently and at Higher Rates Per Capita**

To understand sentencing a little differently, Harris and Edwards did an analysis of the per capita rate of LFO sentencing in Superior Courts in Washington State per 1,000 people in the population. In other words, these figures allow us to see the amount of dollars sentenced by Superior Courts in Washington per every 1,000 given a certain race and ethnic group. What was found is that in 2014, Black people in Washington were sentenced to an average of \$15.87 per capita, and White people were sentenced to an average of \$8.48 per capita. Figure 2 below shows the total amount of LFOs sentenced by the size of the population and shows that exposure to sentencing is one vector of inequality. Black people, as well as Latinas/os and Indigenous people, are sentenced fines and fees much more frequently and at higher rates than are White people and Asian & NH/PIs.

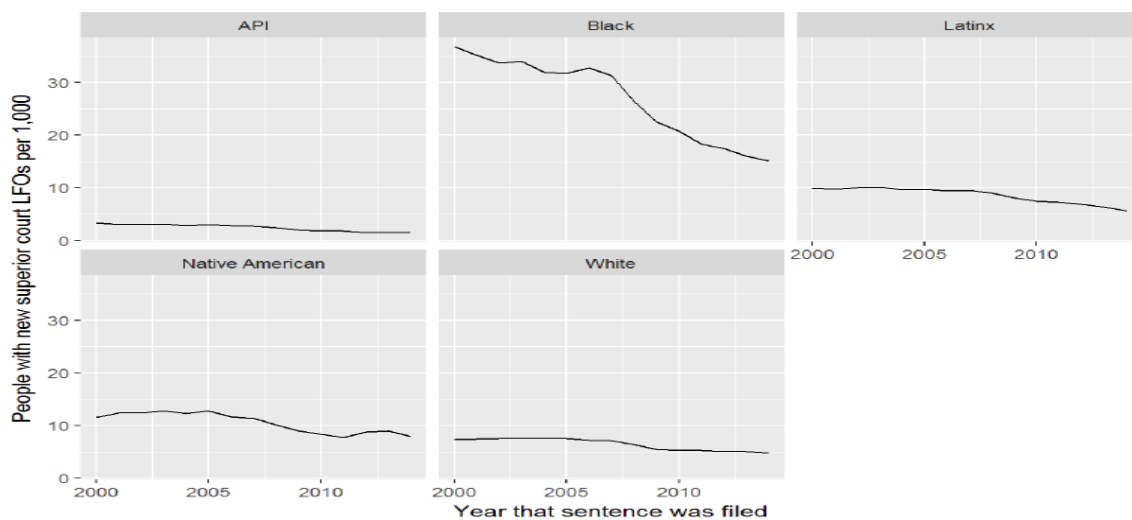
*Figure 2 – Per Capita Rate of LFO Sentencing in Superior Courts by Race and Ethnicity, WA State 2000-2014*



**Black People Receive the Highest Counts of New LFO Sentences**

Exposure to charges is one key source of inequality in the population-level exposure to LFOs in Washington state. We know that Black, Indigenous, and other People of Color are disproportionately impacted by the criminal legal system. It is not surprising that they are also disproportionately impacted by LFOs. Figure 3 below shows the counts of people with new LFO sentences by race, by year, per 1,000 people in the population. Black people have the highest rate of new superior court cases from 2000-2014, followed by Indigenous people, Latinas/os, Whites, and then Asian & NH/PIs.

**Figure 3 – Counts of New LFO Sentences by Race Per Capita, WA State, 2000-2014**



**LFOs Perpetuate Poverty and Future Involvement with the Criminal Justice System, Disproportionately For Black, Indigenous, and People of Color**

Recent research in Washington State has showed that Black Washingtonians experience worse outcomes from court-imposed LFOs, than any other racial group in comparison.

In 2020, Frank Edwards and Alexes Harris prepared a report analyzing data from the Seattle Municipal Court.<sup>13</sup> One of the key questions that the report looked at was the extent to which there may be racial and ethnic differences in criminal and traffic citations, sentencing, ability to pay the debt, and subsequent court contact. The report found that for each class of case, Black men and women are significantly more likely than their peers to be sentenced to incarceration through a

13. Frank Edwards & Alexes Harris, *An Analysis of Court Imposed Monetary Sanctions in Seattle Municipal Courts, 2000-2017*, <https://www.seattle.gov/Documents/Departments/CivilRights/SMC%20Monetary%20Sanctions%20Report%207.28.2020%20FINAL.pdf>.

Washington superior court following a paid Seattle Municipal Court legal financial obligation sentence (SMC LFO). The report also found that Black men and women are more likely to be incarcerated following an unpaid SMC LFO than are any other racial or ethnic group. Lastly, the report also found that people of color have a higher likelihood than White people to be charged with a DWLS3 following a Seattle Municipal Court LFO sentence. This is especially pronounced for Black Seattle drivers.

Another project examining racial disparities in LFO debt in Washington State is an ongoing analysis by Kate O’Neil, Ian Kennedy, and Alexis Harris. In this analysis, the researchers examine the degree of LFO debt owed at the community level (measured by census tract level) across Washington State. The analysis uses Washington State Administrative Office of the Courts data (AOC) for the years 2000-2014.

First, the researchers found that the observed LFOs per capita are spatially concentrated. Certain census tracts across Washington State carry identifiable amounts of LFO debt compared to other census tracts. Second, the analysis found that neighborhoods with higher poverty rates also tended to have higher per capita LFO debt. Third, LFOs were associated with increases in future poverty rates experienced by certain census tracts in Washington. This association was stronger for non-White neighborhoods.

The analysis led the researchers to an alarming conclusion that LFOs sentenced per capita can predict future shares of residents in poverty. The system of monetary sanctions appears to reproduce the structural conditions that generated these neighborhood conditions in the first place, such as racial differences in access to housing and the accrual of household wealth and community resources.<sup>14</sup> Carrying court-imposed debt negatively affects people’s abilities to access housing, employment, and education, and furthers their involvement with the legal system.<sup>15</sup>

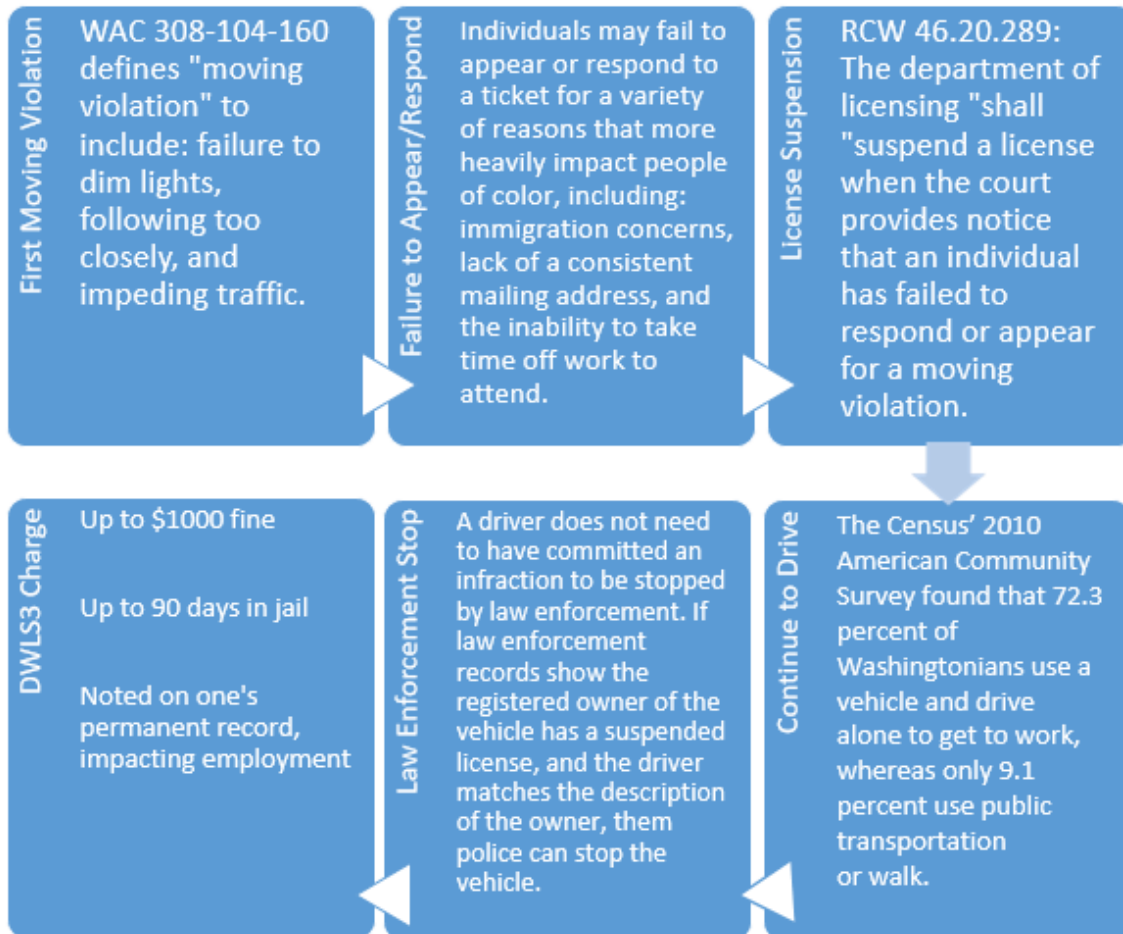
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14. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

15. Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 UCLA CRIM. J. L. REV. 269 (2020).

**I. WHAT IS DWLS3?**

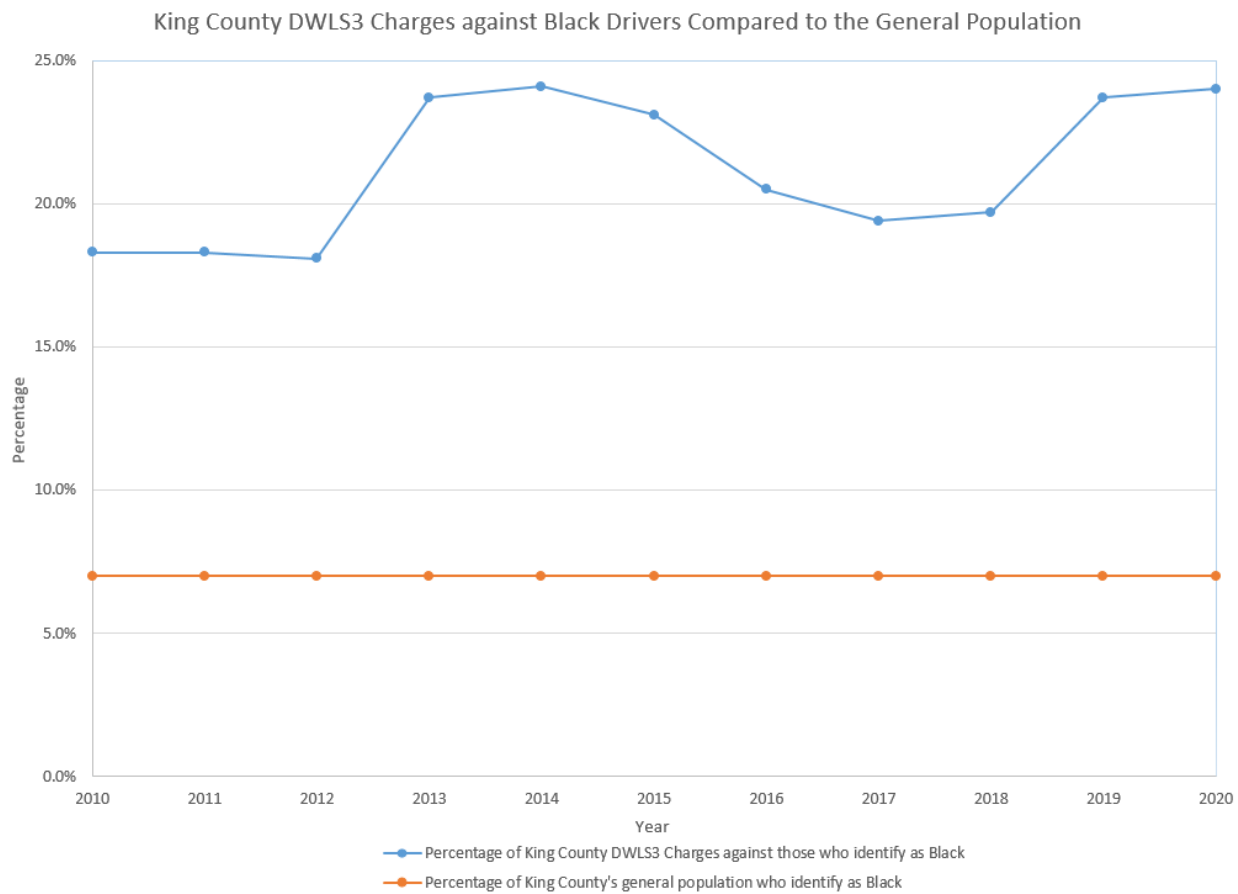
Third Degree Driving While License Suspended (“DWLS3”) is a misdemeanor crime known as “driving while poor.”<sup>1</sup> Under RCW 46.20.342(1)(c)(iv), a prosecutor can charge an individual with DWLS3 if they are driving with a suspended license and that suspension arose because they “failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation (failure to pay).”



1. Though there are many ways to be charged with DWLS3, the focus of this research is on charges and convictions based on an underlying suspended license for failure to appear or financial inability to pay.

**II. WHO IS CHARGED WITH DWLS3?<sup>2</sup>**

Between 2010–2020, Black drivers were consistently charged with the crime of DWLS3 at a rate disproportionate to the percentage of Black residents within each county.<sup>3</sup> In some of Washington’s larger jurisdictions, the percentage of DWLS3 charges brought against Black residents in a given year was double or triple the percentage of Black residents in the county’s total population. For example, Black residents make up only 7 percent of King County’s population. Yet in 2010, Black residents made up 18.3 percent of the county’s total DWLS3 charges and by 2020 constituted 24.3 percent of DWLS3 charges in the county.



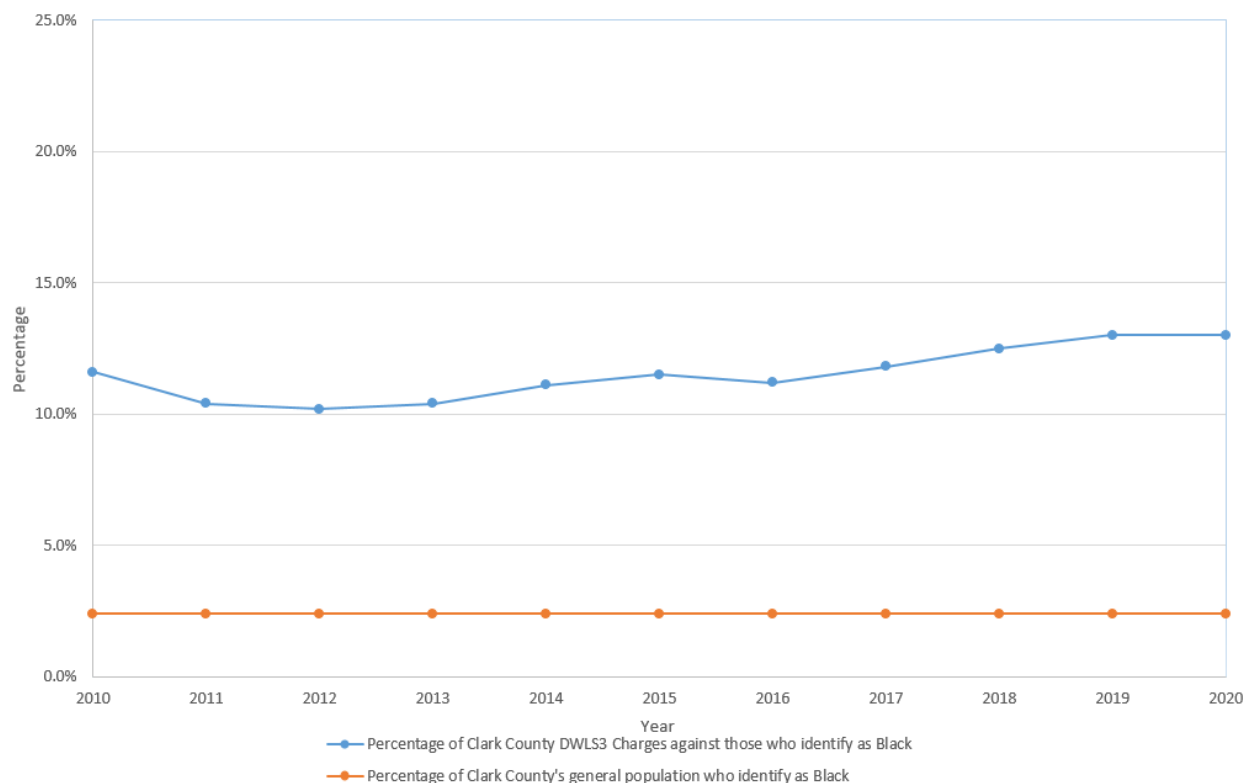
2. Unless otherwise stated, the statistics in this section are taken from data which provides DWLS3 charges from the seventeen county and municipal courts that had over 1,000 DWLS3 charges in 2010: Benton County District Court, Clark County District Court, Cowlitz County District Court, Grant County District Court, Kent Municipal Court, King County District Court, Lynnwood Municipal Court, Pierce County District Court, Renton Municipal Court, Snohomish County District Court, Spokane County District Court, Spokane Municipal Court, Tacoma Municipal Court, Thurston County District Court, Whatcom County District Court, Yakima County District Court, and Yakima Municipal Court. The Research Working Group has this data and can supply it upon request.

3. The raw data on DWLS3 charges, outcomes, and race of defendants was obtained from the Administrative Office of the Courts. The Administrative Office of the Courts did not provide any analysis. The general population data is from the 2019 U.S. Census population estimates. See <https://www.census.gov/quickfacts/WA>.



In counties with a smaller Black population (less than 5 percent), DWLS3 charges against Black residents were even more disproportionate to their representation in the general population—in some cases, the percentage of charges brought against Black individuals was six times the percentage of Black residents living in those jurisdictions. In Clark County, where 86.1 percent of the population is White and 2.4 percent is Black, the percentage of Black drivers charged with DWLS3 between 2010-2020 comprised roughly five to six times their percentage in the county’s population and showed an upward trend during the decade. In comparison, the percentage of charges brought against White drivers reflected well below the 86.1 percent of White residents living in Clark County and showed a downward trend over the same ten-year period.

Clark County DWLS3 Charges against Black Drivers Compared to the General Population

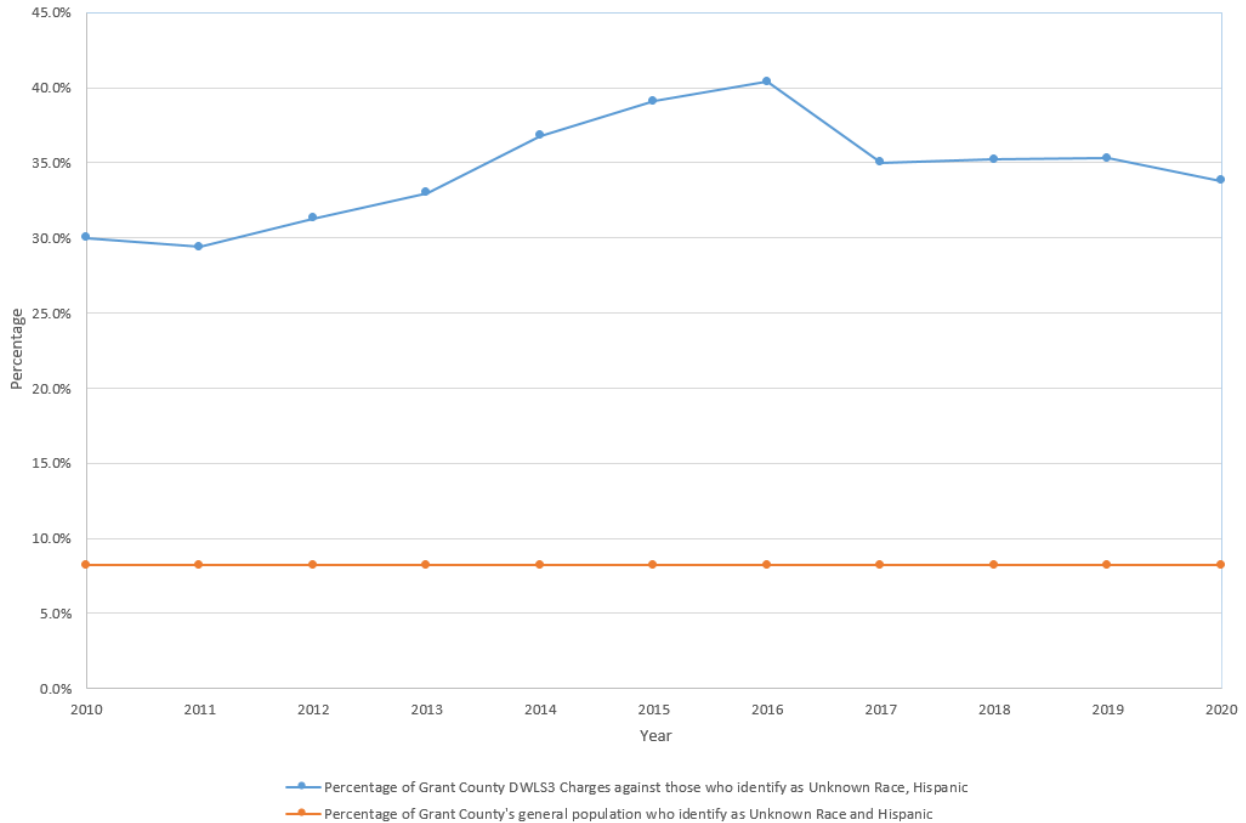


Hispanic individuals of unknown race<sup>4</sup> were also disproportionately represented in DWLS3 charges. This was particularly true in Grant County where Hispanic residents represented up to

<sup>4</sup> Although the terms “Hispanic” and “Hispanic of Unknown Race” will be used interchangeably within this report, the authors wish to highlight and clarify that these numbers are not an accurate reflection of the Latina/o population in Washington State. In the data provided from the Administrative Office of the Courts, Hispanicity was provided as a secondary question regarding respondent’s ethnicity. Consistent with Census data, this question was separate from the racial categories of White, Black, Asian, American Indian, Pacific Islander, Multiracial, and Unknown. For purposes of data analysis, the authors have chosen to use the terms “Hispanic of Unknown Race” and “Hispanic” to refer to people who identified as “Race: Unknown and Ethnicity: Hispanic.” Individuals who identified as “Race: White and Ethnicity: Hispanic” were counted as White. Accordingly, this data does not correctly capture the percentage of Latina/o individuals residing in each county or the percentage of Latina/o individuals that make up the total DWLS3 charges for each year. Hopefully, future publications can address this issue more fully.

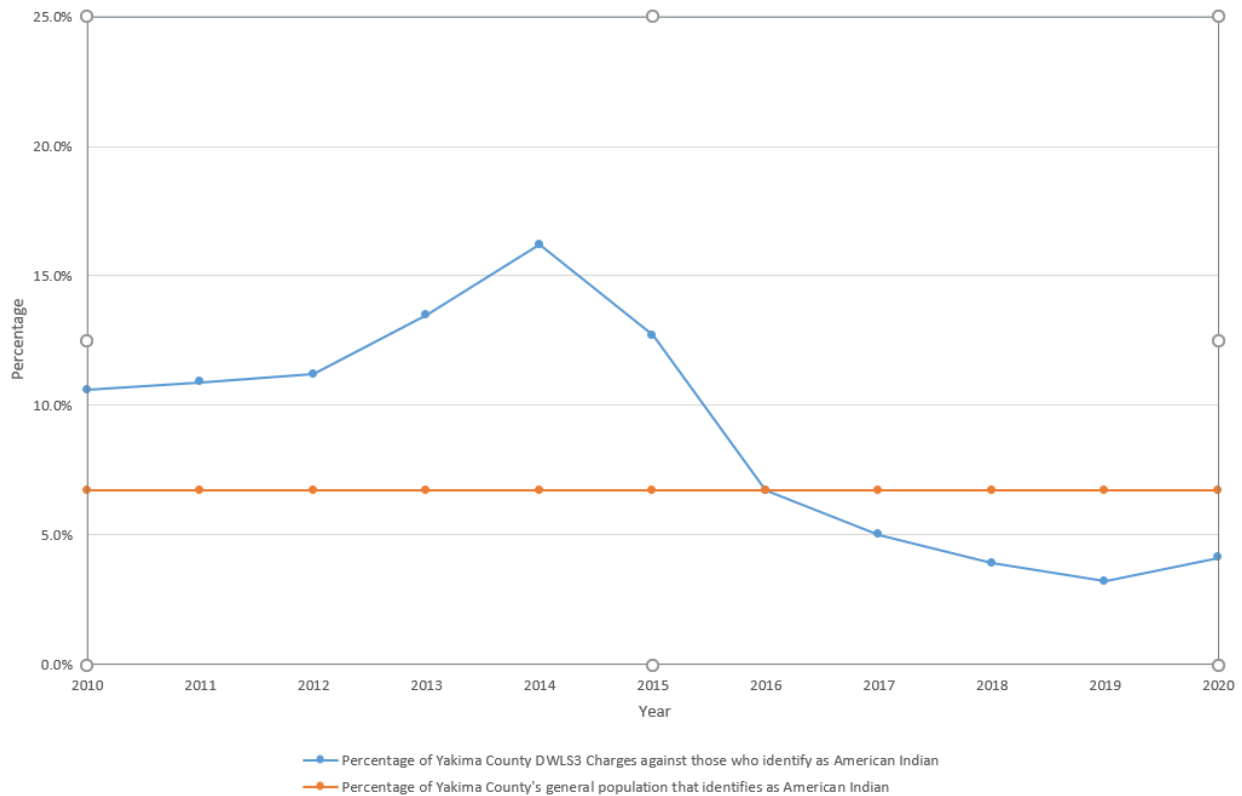
40.4 percent of charges but only 8.2 percent of the population. Hispanic individuals of unknown race also made up a disproportionate percentage of charges in King County, Benton County, Clark County, Snohomish County, Whatcom County, Lynnwood Municipal, Renton Municipal, and Yakima Municipal, though to a lesser extent.

Grant County DWLS3 Charges against Hispanic Drivers Compared to the General Population



Although American Indians made up smaller percentages of the general population, there was particular over-representation in DWLS3 charges in Yakima Municipal, Yakima County, and Whatcom County. More generally, American Indians were over-represented in yearly DWLS3 charges in all jurisdictions except Snohomish County, Benton County, Clark County, Cowlitz County, and Pierce County.

Yakima County DWLS3 Charges against American Indian Drivers Compared to the General Population

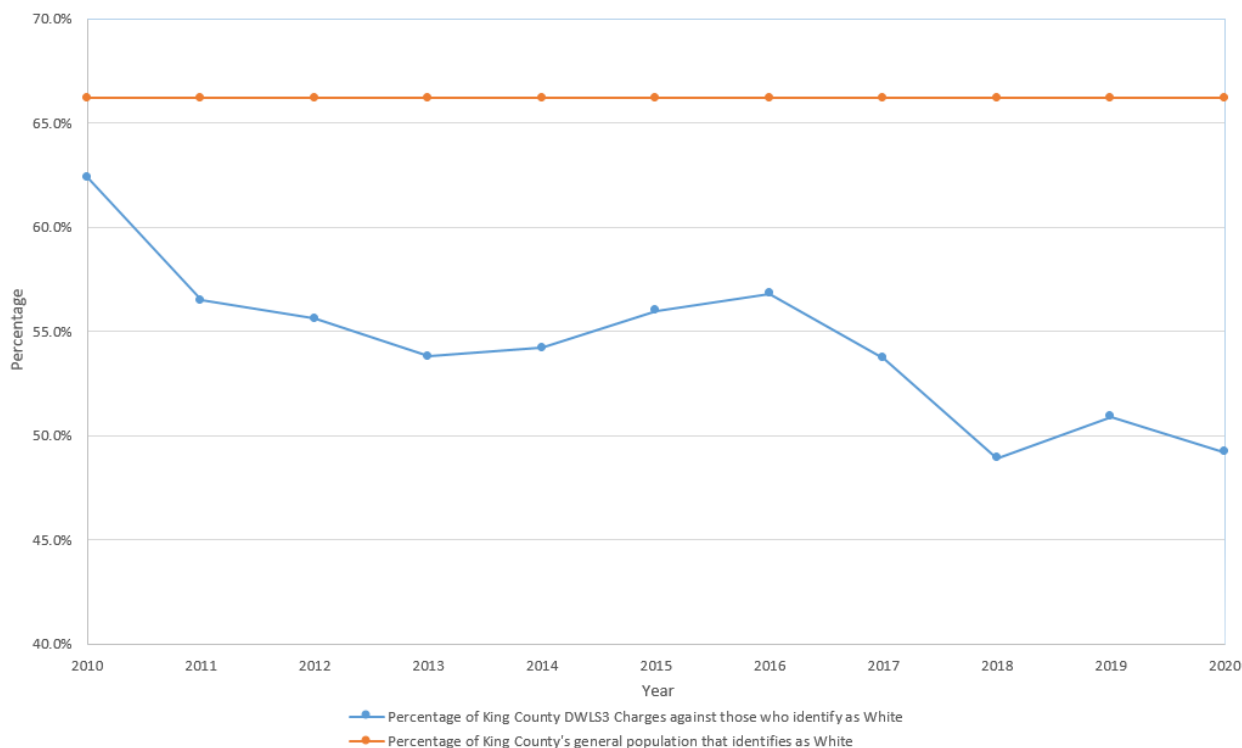


Asian residents tended to be disproportionately underrepresented in DWLS3 charges per year, except for Cowlitz County in 2015, 2017, and 2019.<sup>5</sup>

In comparison, the percentage of DWLS3 charges brought against White drivers almost never overtook the percentage of White residents in each county—the only exceptions were Thurston County in 2010, when White residents made up 81.7 percent of DWLS3 charges compared to 81.5 percent of the population, and Lynnwood Municipal Court, where White defendants made up 59.2 percent of the city’s population compared to 61.9–71.9 percent of DWLS3 charges between 2010–2020. White residents make up about 66.2 percent of King County’s population. In 2010, King County brought 2,256 charges against White individuals, which was 62.4 percent of the total DWLS3 charges for that year. In the ten years since then, White drivers have made up a decreasing proportion of the county’s DWLS3 charges. In 2020, 49.2 percent of King County’s DWLS3 charges were brought against White drivers.

5. In those years, Asian individuals made up 2.0 percent of DWLS3 charges compared to 1.6 percent of the county’s total population.

King County DWLS3 Charges against White Drivers Compared to the General Population



### III. WHO IS CONVICTED OF DWLS3?<sup>6</sup>

Black drivers were found guilty of DWLS3 charges at a rate disproportionate to the percentage of Black residents in five counties between 2010 and 2020.<sup>7</sup> In both large and small counties, of the percentage of DWLS3 convictions, Black drivers made up double and sometimes triple the percentage of the county’s total percentage of Black residents.<sup>8</sup> In years 2017–2020, Hispanic individuals of unknown race in King County were also found guilty of DWLS3 charges at a disproportionate rate. The percentage of white drivers found guilty of DWLS3 charges, by comparison, was consistently smaller than the total population of white residents in each county.<sup>9</sup>

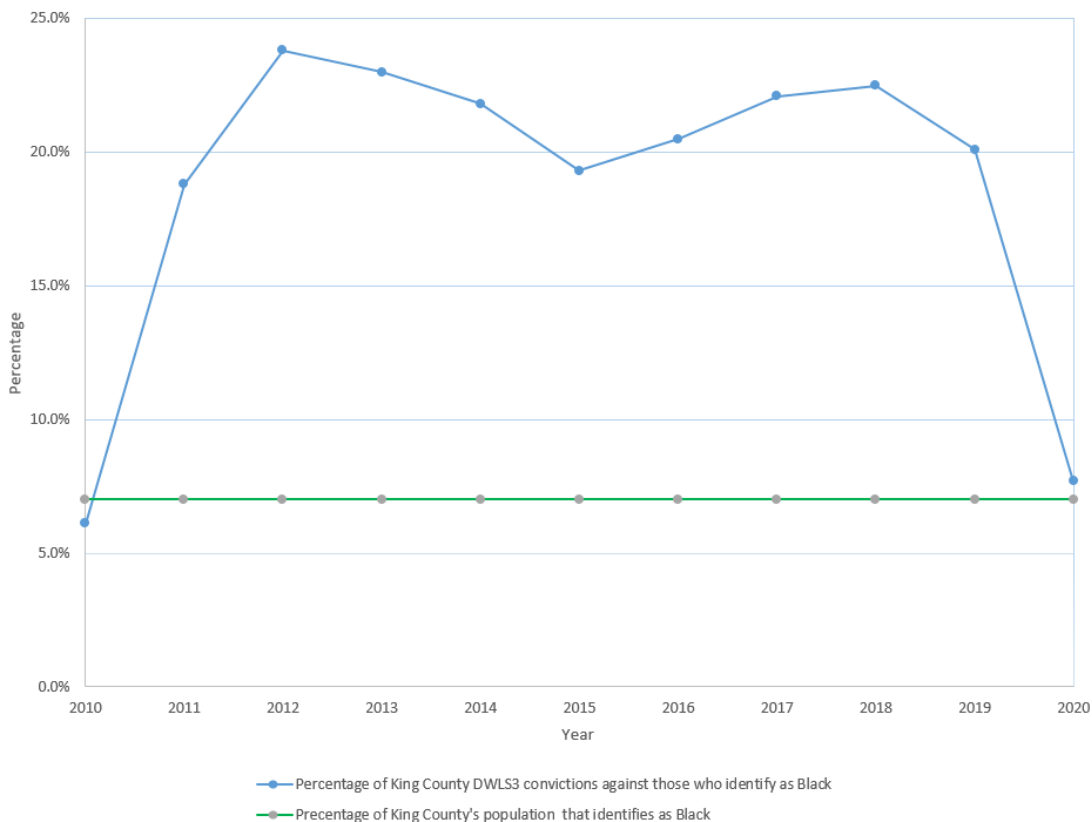
6. Unless otherwise stated, the statistics in this section are taken from data on charges that ended in a dismissal, charges that were amended, and charges that ended in a conviction in the five counties that had the most charges overall in 2010: King County District Court, Pierce County District Court, Cowlitz County District Court, Benton County District Court, and Clark County District Court. The Research Working Group has this data and can supply it upon request.

7. The sample data used was pulled from the five counties that had the most charges overall in 2010: King County District Court, Pierce County District Court, Cowlitz County District Court, Benton County District Court, and Clark County District Court.

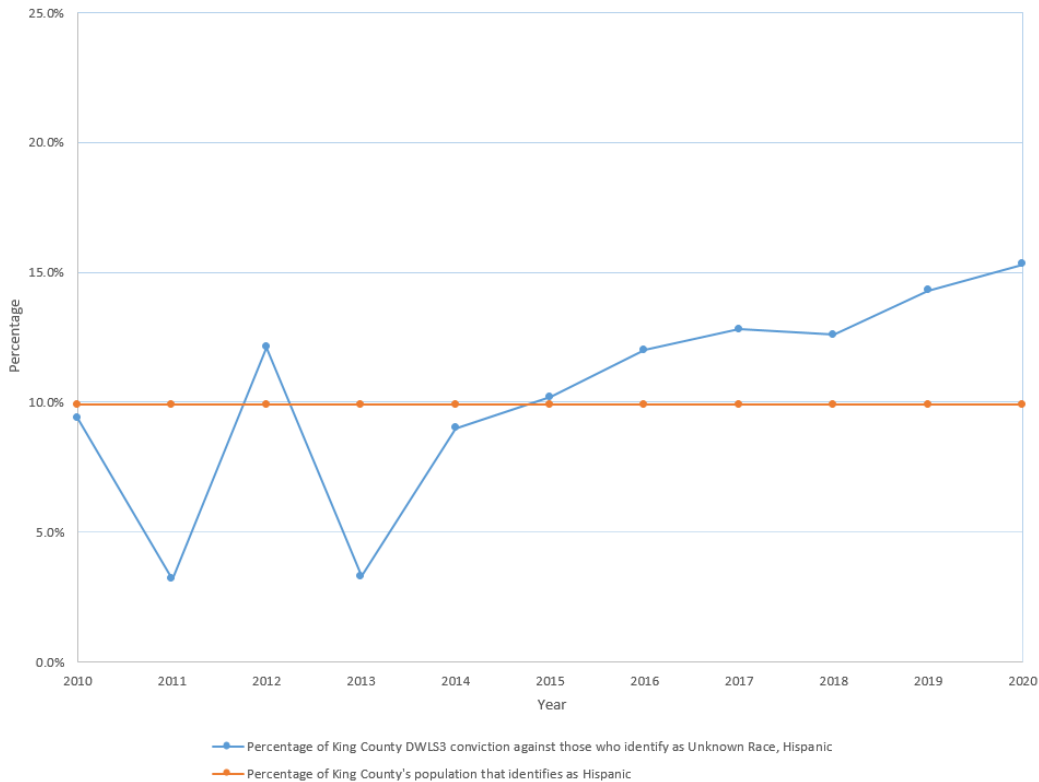
8. Disparities in DWLS3 guilty verdicts were found among Black drivers across all counties and Hispanic drivers in King County.

9. In King County, for example, White individuals make up 66.2 percent of King County’s population but only accounted for an average of 59.8 percent of the DWLS3 convictions between 2010–2015 and 55.4 percent of the convictions between 2016–2020.

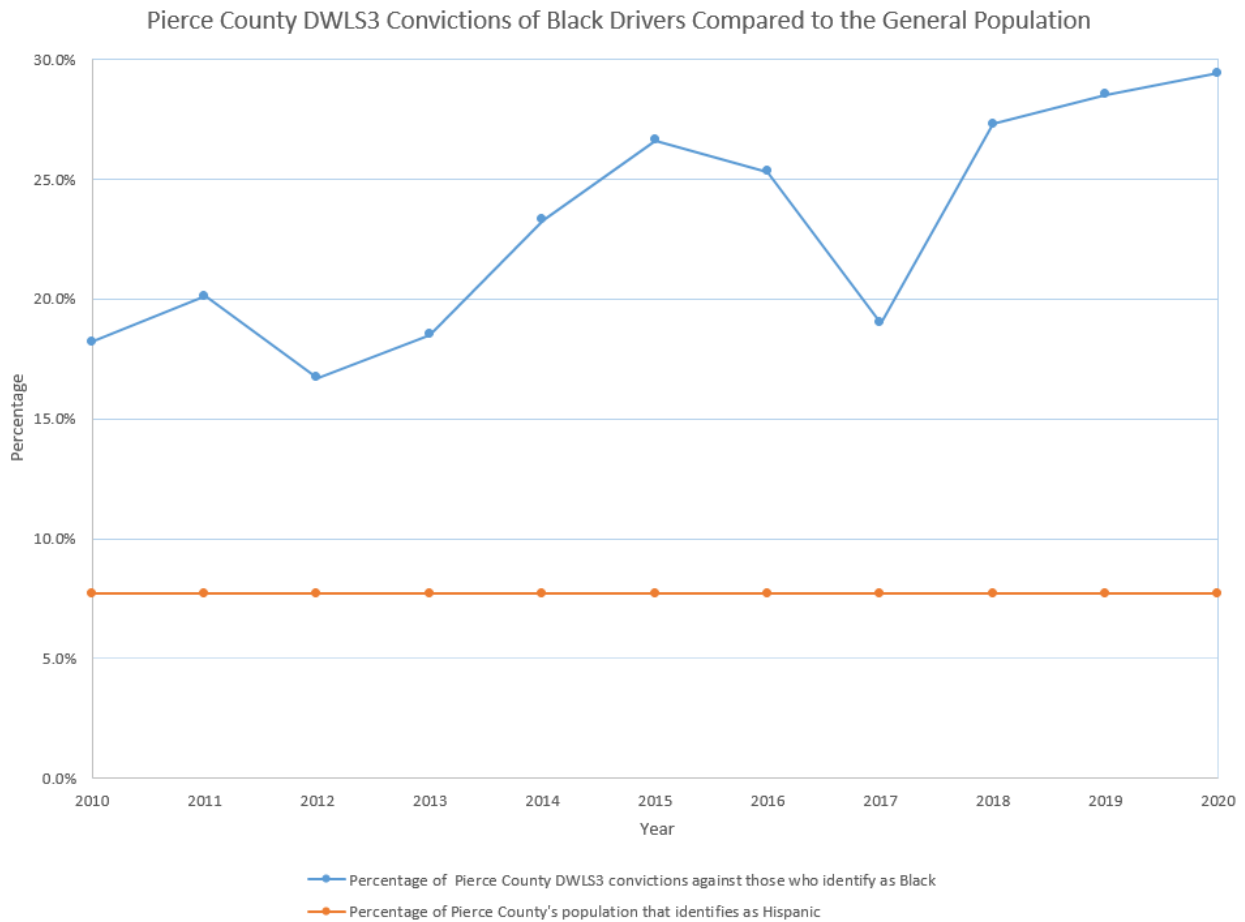
King County DWLS3 Convictions of Black Drivers Compared to the General Population



King County DWLS3 Convictions of Hispanic Drivers Compared to the General Population



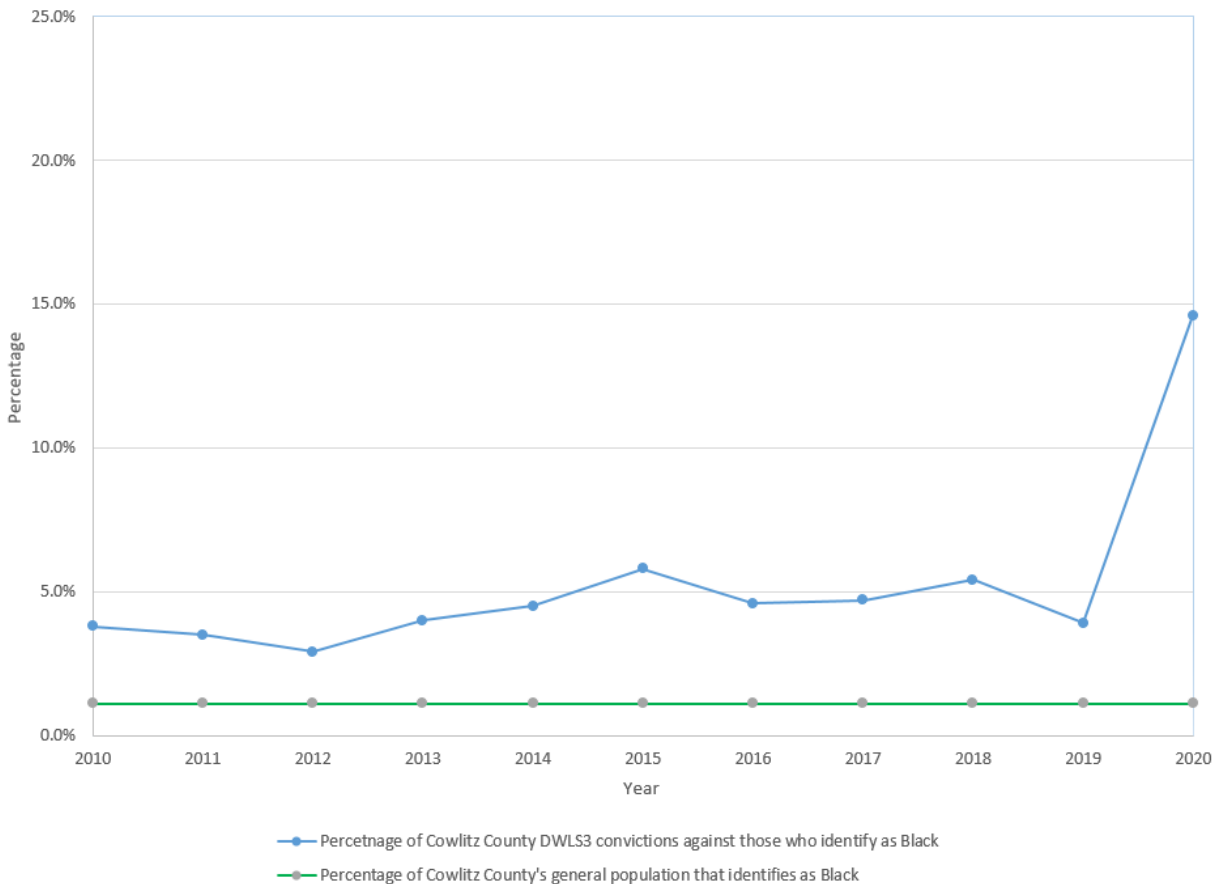
In Pierce County, Black residents make up 7.7 percent of the county’s total population but were found guilty at a disproportionate rate.



In Cowlitz, Benton, and Clark counties, which have smaller percentages of minority residents, the disparities in verdicts among Black drivers remained disproportionate.<sup>10</sup>

10. Comparatively, White individuals make up 90 percent of Benton County’s total population, but only made up 68.1 percent of the convictions in 2010 and 56.6 percent of convictions in 2020. And, in Clark County, White residents only made up 69.8 percent of the convictions in 2020 despite making up 86.1 percent of the total county population.

Cowlitz County DWLS3 Convictions of Black Drivers Compared to the General Population



**IV. WHAT IS THE IMPACT OF A DWLS3 CHARGE ON THE INDIVIDUAL?**

DWLS3 has become the most frequently charged crime in Washington State.<sup>11</sup> As a simple misdemeanor offense, a conviction for DWLS3 comes with a maximum fine of \$1,000 and a maximum sentence of ninety days.<sup>12</sup>

In practice, the monetary impact of a DWLS3 conviction can be much higher than the base penalty set by a judge. Even assuming that a judge imposes a base penalty of \$300<sup>13</sup> for the DWLS3

11. Amy Roe, *It's time to stop wasting money on our state's most commonly charged crime*, ACLU WASHINGTON (Feb. 12, 2018), <https://www.aclu-wa.org/story/it%E2%80%99s-time-stop-wasting-money-our-state%E2%80%99s-most-commonly-charged-crime>.

12. RCW 46.20.342(1)(c) (providing that DWLS3 is a misdemeanor crime without a specified punishment); RCW 9.92.030 (providing that “Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, 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 both such imprisonment and fine”).

13. In 2012, the Administrative Office of the Courts produced a fiscal note stating that, based on a past study, “the average penalty assessed per DWLS3 case was \$293 with an average payment of \$91.” See 6284 P S SB, *Civil traffic infractions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 3 (2012), available at

conviction, there are further mandatory and discretionary traffic-based financial obligations authorized under the law which can add up to a total owed amount of \$708.<sup>14</sup> And although Washington no longer allows imposition of interest upon non-restitution penalties, fines, fees, and costs owed from a criminal proceeding,<sup>15</sup> defendants who had their licenses suspended due to underlying unpaid traffic tickets may continue to owe additional collection fees and accrued interest<sup>16</sup> on top of the penalties assessed for a DWLS3 conviction. *See* Diagram 1 and Diagram 2 below.

Even a jail sentence of a few days can impact an individual’s employment prospects and a family’s ability to pay the bills. In 2009, the Administrative Office of the Courts reported that the average jail sentence for an individual convicted of DWLS3 was 61.9 days, “with all but 3.3 days suspended.”<sup>17</sup> For one 29-year-old father in Spokane, Washington, the DWLS3 conviction and subsequent sentence of 10 days in jail cost him his job.<sup>18</sup> Another 43-year-old father in Spokane reported being imprisoned numerous times for DWLS3.<sup>19</sup> Over time, he lost his car, his job, and his income.<sup>20</sup>

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<https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (searching under session year 2012, bill number 6284).

14. *See, e.g.*, RCW 3.62.085 (“Upon conviction or a plea of guilty in any court organized under this title or Title 35 RCW, a defendant in a criminal case is liable for a fee of forty-three dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).”); RCW 3.62.090 (providing an additional public safety and education assessment calculated as  $.70(\text{base penalty}) + .50(\text{initial public safety and education assessment})$  which “shall not be suspended or waived by the court”); RCW 46.64.055 (“In addition to any other penalties imposed for conviction of a violation of this title that is a misdemeanor . . . the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent.”).

15. RCW 10.82.090(1) (“[R]estitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.”); RCW 3.62.020(5)(b) (“As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in district courts] shall not accrue interest.”); RCW 3.62.040(5)(b) (“As of June 7, 2018, penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding [in city cases] shall not accrue interest.”). *But see* RCW 10.01.180 (providing that a non-indigent defendant found to have willfully defaulted in the payment of any fine, penalty, assessment, fee, or costs can have the amount sent to a collection agency).

16. *See* RCW 19.16.500(2) (“[A] contingent fee of up to fifty percent of the first one hundred thousand dollars of the unpaid debt per account and up to thirty-five percent of the unpaid debt over one hundred thousand dollars per account is reasonable, and a minimum fee of the full amount of the debt up to one hundred dollars per account is reasonable. Any fee agreement entered into by a governmental entity is presumptively reasonable.”); RCW 19.16.500(1)(b) (providing that “any rate of interest shall be legal so long as the rate of interest does not exceed the higher of” two rate calculation options, including “(a) Twelve percent per annum”).

17. 6284 P S SB, *Civil traffic infractions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 2 (2012), available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (searching under session year 2012, bill number 6284).

18. Center for Justice, *Voices of Suspended Drivers* 14 (Jan. 2013), available at <https://www.smith-barbieri.com/wp-content/uploads/2013/01/CFJ-Voices-of-Suspended-Drivers.pdf> (quoting the same 52-year-old SSI recipient from Spokane Valley).

19. *Id.*

20. *See id.*



A DWLS3 conviction can also remain on someone’s record when applying for jobs or housing. Although a 2019 law made it easier to vacate criminal convictions,<sup>21</sup> the statute still requires that the applicant first complete “all of the terms of the sentence for the offense.”<sup>22</sup> Accordingly, a DWLS3 misdemeanor conviction that imposed a monetary penalty would not be eligible for vacatur until the outstanding financial obligations are paid.

Diagram 1. Accumulation of Legal Financial Obligation for Moving Ticket Violation

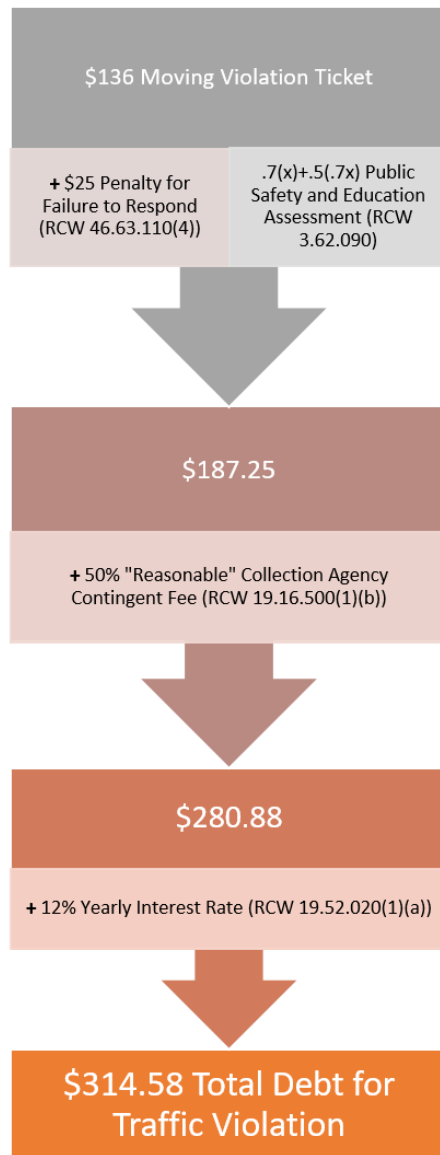
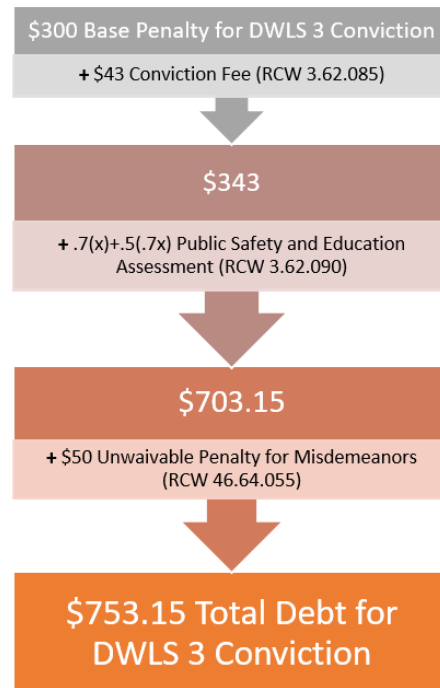


Diagram 2. Accumulation of Legal Financial Obligation for DWLS 3 Conviction



21. New Hope Act, SHB 1041, 2019 Leg., 66th Sess. (Wash. 2019) (codified as amended at RCW 9.94A.640; RCW 9.941.030; RCW 9.94A.637; RCW 9.96.060 (2019)).

22. RCW 9.96.060.

## V. WHAT IS THE IMPACT OF A DWLS3 CHARGE ON THE STATE?

### A. Monetary

DWLS3 charges cost Washington a substantial amount of money, but they also generate state revenue. In 2010, there were 40,030 DWLS3 convictions, of which the average penalty assessed per DWLS3 case was \$293.<sup>23</sup> That year, the State received 56.39 percent of the revenue generated by DWLS3 charges and 43.61 percent remained with local governments.<sup>24</sup> A 2017 ACLU report estimated that in 2015 alone the State spent \$37.5 million in prosecution, defense, court, and jail costs related to DWLS3 filings and convictions.<sup>25</sup> In 2019, however, revenue that cities, counties, and special districts collected from traffic infractions totaled over \$64 million.<sup>26</sup> This substantial revenue that DWLS3 charges generate supports changing Washington's DWLS3 enforcement because it highlights the immorality of relying on the most needy Washington citizens to fill the state's budget.<sup>27</sup>

### B. Public Safety

Any argument that DWLS3 charges arising from failure to appear or pay have a beneficial impact upon public safety fails because those who can take time off work to attend court or can afford to pay the initial citation are allowed to keep driving. The only difference between those individuals immediately let back on the road and those charged with DWLS3 is the ability to pay. Thus, it is not surprising that there is no evidence showing that jurisdictions that take a more lenient approach to filing DWLS3 charges have worse traffic safety records.<sup>28</sup>

Even if those drivers who are charged with DWLS3 were a public safety concern, DWLS3 does not actually keep people with suspended licenses off the road—the National Cooperative Highway Research Program estimated that 75 percent of individuals who have their license suspended for any reason will continue to drive.<sup>29</sup> Additionally, a 2003 study found that the Seattle Impound

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23. 6284 P S SB, *Civil traffic infractions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 3 (2012), available at <https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/2012/6284> (searching under session year 2012, bill number 6284).

24. *Id.*

25. ACLU Washington, *Driven to Fail: The High Cost of Washington's Most Ineffective Crime – DWLS III*, 9 (2017), available at <https://www.aclu-wa.org/docs/driven-fail-high-cost-washingtons-most-ineffective-crime> (showing that Washington spent \$1,168,712,151 on filing and adjudicating DWLS3 cases between 1994 and 2015).

26. 5226 SSB, *License suspensions*, MULTIPLE AGENCY FISCAL NOTE SUMMARY 20 (2021), available at <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=62537>.

27. See Heidi Groover, *ACLU sues over Washington suspending licenses of people who can't pay traffic fines*, THE SEATTLE TIMES (Oct. 7, 2020), <https://www.seattletimes.com/seattle-news/transportation/aclu-sues-washington-state-licensing-department-saying-license-suspensions-over-traffic-fines-punish-poor-people/>.

28. ACLU Washington, *Driven to Fail: The High Cost of Washington's Most Ineffective Crime – DWLS III*, 15 (2017), available at <https://www.aclu-wa.org/docs/driven-fail-high-cost-washingtons-most-ineffective-crime>.

29. *Best Practices Guide to Reducing Suspended Drivers*, AM. ASS'N OF MOTOR VEHICLE ADM'RS 4 (2013), available at <https://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709>.

Program, which impounded vehicles of drivers cited for DWLS3,<sup>30</sup> had no overall effect on deterring DWLS3 offenses and had racial and class biases.<sup>31</sup>

## VI. POLICY INTERVENTIONS

### A. Pending Litigation

On October 7, 2020, the ACLU of Washington filed a lawsuit in Thurston County Superior Court against the Washington Department of Licensing.<sup>32</sup> The ACLU represents individuals who have had their license suspended by the Department of Licensing because they were unable to pay the fines and fees for moving violations. If these individuals are found driving while their license is suspended, they can be charged with DWLS3. The complaint alleges the statutory automatic suspension of a driver’s license for failing to pay a fine or judgment without an inquiry into the driver’s ability to pay violates multiple sections of the state constitution, including procedural due process, equal protection, and the prohibition on excessive fines. The court found that the automatic suspension was unconstitutional as applied to individuals who are indigent and therefore violates due process and is void and unenforceable. This decision can be appealed so is still currently pending.

### B. Current Washington Programs

A couple of Washington’s jurisdictions already have programs aimed at alleviating the financial burdens posed both by the underlying suspensions of indigent drivers’ licenses and by the prosecution of DWLS3. These models illustrate the high monetary cost of criminalizing Washington drivers’ inability to pay and offer alternatives focused on creating safer roads and better access to employment opportunities through relicensing, insurance, and job training.

For example, King County has adopted a payment plan and relicensing program to help those who cannot immediately pay off their traffic-related debt retain or regain their legal driving privileges.<sup>33</sup> The City of Seattle has similarly acknowledged the disconnect between DWLS3 and public safety. Starting in 2010, the Seattle Police Department (“SPD”), Seattle City Attorney’s Office, and the non-profit Legacy of Equality, Leadership and Organizing (“LELO”) have worked in tandem to deprioritize DWLS3 charges.<sup>34</sup> Rather than refer DWLS3 citations to the City Attorney, SPD refers

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30. ACLU Washington, *Driven to Fail: The High Cost of Washington’s Most Ineffective Crime – DWLS III*, 15 (2017), available at <https://www.aclu-wa.org/docs/driven-fail-high-cost-washingtons-most-ineffective-crime>.

31. RAND Public Safety & Justice, *Evaluation of the Impact of Seattle’s DWLS Impound Law*, xxii (2003), available at <https://www.dol.wa.gov/about/docs/DWLSreport.pdf>.

32. Complaint, Pierce et al. v. Department of Licensing (2020), available at <https://www.aclu-wa.org/docs/complaint-18>.

33. *Payment Options*, KING COUNTY DIST. CT., <https://kingcounty.gov/courts/district-court/citations-or-tickets/payment-options.aspx>; *Unified Payment Program*, LELO RELICENSING PROGRAM, <https://www.lelorelicensing.org/king-county-unified-up-payment-prog>.

34. *Annual Report*, SEATTLE CITY ATT’Y 10–11 (2010), available at [http://clerk.ci.seattle.wa.us/~CFS/CF\\_311637.pdf](http://clerk.ci.seattle.wa.us/~CFS/CF_311637.pdf).

drivers to the City’s Law Department for processing through a pre-filing diversion program.<sup>35</sup> This program includes relicensing support, referrals to free support services, and financial assistance with traffic debt, as well as help enrolling in construction industry pre-apprenticeship training.<sup>36</sup> Over the past decade, King County’s program has resulted in a 76 percent decrease in DWLS3 cases.

The city of Edmonds has also recently changed the way it treats people who are pulled over for driving with a suspended license.<sup>37</sup> In November 2020, the Edmonds Mayor and interim Police Chief announced that police officers would now issue a civil infraction for No Valid Operator’s License with ID<sup>38</sup> under RCW 46.20.015(1)<sup>39</sup> accompanied by a \$250 ticket rather than file such offenses as criminal cases.<sup>40</sup> The city council voted to make this change permanent.<sup>41</sup> This alternative to DWLS3 charges does not extend to drivers who were previously convicted of a hit-and-run, vehicular assault, vehicular homicide, attempting to elude, driving under the influence, or 10+ DWLS offenses.<sup>42</sup> However, this \$250 ticket adds to any existing or newly assigned traffic tickets. This means that the cost of one traffic stop paired with a DWLS3 citation could be up to \$550.<sup>43</sup> Those who are still unable to pay for the ticket will be subject to the prosecutors’ and municipal courts’ discretion, which could choose to set up a diversion plan to help people regain their licenses, establish a payment plan or volunteer hours system to pay off the debt, or send the unpaid debt to collection agencies.<sup>44</sup>

### C. Other States’ Programs

With an aim to address the harm associated with the loss of the right to drive, state and local jurisdictions have moved to decouple the loss or suspension of a driver’s license from unpaid parking tickets or other outstanding court costs. A number of states do not suspend, revoke, or

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35. *Unified Payment Program*, LELO RELICENSING PROGRAM, <https://www.lelorelicensing.org/king-county-unified-up-payment-prog>.

36. *Id.*

37. Joseph Thompson, *Edmonds eases penalties for driving with a suspended license*, HERALDNET (Dec. 31, 2020 5:57 AM), <https://www.heraldnet.com/news/edmonds-changes-how-it-cites-drivers-with-suspended-licenses>.

38. MyEdmondsNews, *Edmonds police issue new orders: No more criminal charges for 3rd-degree driving while license suspended* (Nov. 5, 2020), <https://myedmondsnews.com/2020/11/edmonds-police-issue-new-orders-no-more-criminal-charges-for-3rd-degree-driving-while-license-suspended>.

39. RCW 46.20.015(1) (providing that it is a traffic infraction rather than a misdemeanor to drive on a highway without a valid driver’s license as long as the driver provides the citing officer with an expired driver’s license or other valid ID at the time of the stop).

40. *Id.*; RCW 46.20.015(2) (providing penalty of \$250); Joseph Thompson, *Edmonds eases penalties for driving with a suspended license*, HERALDNET (Dec. 31, 2020 5:57am), <https://www.heraldnet.com/news/edmonds-changes-how-it-cites-drivers-with-suspended-licenses>.

41. Joseph Thompson, *Edmonds eases penalties for driving with a suspended license*, HERALDNET (Dec. 31, 2020 5:57am), <https://www.heraldnet.com/news/edmonds-changes-how-it-cites-drivers-with-suspended-licenses>.

42. *Id.*

43. *Id.*

44. *Id.*

prohibit the renewal of one’s driver’s license for failure to pay.<sup>45</sup> Fewer states do not suspend, revoke, or prohibit the renewal of driver’s licenses for failure to appear.<sup>46</sup>

In 2017, California was one of the first states to stop suspending driver’s licenses related to unpaid traffic fines.<sup>47</sup> The City of San Francisco went even further to reinstate some licenses for people who failed to appear in court related to traffic citations. Just recently, several states have followed suit. Virginia’s SB 1, enacted July 1, 2019, ended driver’s license suspension for unpaid fines and fees and required the Department of Motor Vehicles to reinstate driver’s licenses and waive fees for cases prior to this date.<sup>48</sup> In early 2021, the Illinois legislature passed legislation ending the practice of suspending driver’s licenses for unpaid automated speeding and red light camera tickets.<sup>49</sup> New York’s Governor in early 2021 signed the “Driver’s License Suspension Reform Act” which ended suspension for unpaid traffic tickets and mandated income-based payments.<sup>50</sup> Similarly, the Texas legislature repealed the Driver Responsibility Program (DRP) and all associated fees and surcharges which could impact 1.4 million Texans.<sup>51</sup>

Moreover, Oregon, which just passed legislation in late 2020 to stop suspension of licenses for failure to pay,<sup>52</sup> offers a License Reinstatement Program through the Oregon Department of Revenue.<sup>53</sup> The program partners with circuit courts to help people reinstate their suspended Oregon licenses by assisting them with setting up a payment plan to pay off their debt.<sup>54</sup>

Wisconsin, which does not suspend, revoke, or prohibit renewal of driver’s licenses for failure to appear,<sup>55</sup> offers two relicensing programs. The first is through the Center for Driver’s License

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45. FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> (last visited May 10, 2021) (according to the Campaign, the following states do not suspend, revoke, or prohibit the renewal of one’s driver’s license for failure to pay: California, Oregon, Idaho, Montana, Wyoming, Mississippi, Virginia, Kentucky, Hawaii, and, in most cases, New York and Michigan).

46. FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> (last visited May 10, 2021) (according to the Campaign, the following states do not suspend, revoke, or prohibit the renewal of driver’s licenses for failure to appear: Idaho, South Dakota, Iowa, Wisconsin, Michigan, Mississippi, Virginia, and South Carolina).

47. California State Budget, *Public Safety* (2018), <http://www.ebudget.ca.gov/2017-18/pdf/Enacted/BudgetSummary/PublicSafety.pdf>.

48. *SB1 Driver’s license; suspension for nonpayment of fines or costs, reinstate of privilege to drive*, VIRGINIA’S LEGIS. INFORMATION SYS. (2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB1>.

49. HB5340, 100th Gen. Assemb. (Ill. 2019), <https://www.ilga.gov/legislation/100/HB/PDF/10000HB5340lv.pdf>.

50. Kristin Galison, *NY Ends License Suspension for Unpaid Fines*, GALISON LAW (Jan. 26, 2021), <https://galisonlaw.com/new-york-ends-license-suspension-for-unpaid-fines/>.

51. *DRP Repeal Allows More Than 1.6 Million People to Drive Again*, TEXAS ASS’N OF COUNTIES (Nov. 1, 2019), <https://www.county.org/News/County-Issues/2019/October/DRP-Repeal-Allows-More-Than-1-6-Million-People>.

52. See FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> (last visited May 10, 2021).

53. *Oregon License Reinstatement Program*, OREGON DEP’T OF REVENUE, <https://www.oregon.gov/dor/programs/gov-research/Pages/license-reinstatement.aspx> (last visited May 10, 2021).

54. *Id.*

55. See FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> (last visited May 10, 2021).

Recovery & Employability, which collaborates with Legal Action of Wisconsin to work with low-income Milwaukee County residents to obtain a valid license.<sup>56</sup> The program assists people with resolving active suspensions against a current or future Wisconsin driver's license.<sup>57</sup> Additionally, the Wisconsin YMCA offers a Driver's License Recovery Program to help people with suspensions get back on the road so that they may work and support their families.<sup>58</sup> The program helps people arrange a payment plan or schedule community service work to pay off the fees owed to the courts. Those who qualify for the program usually have their suspensions lifted within a few weeks.<sup>59</sup>

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56. *Community and Reintegration Services*, WISCONSIN CMTY. SERVICES, <https://www.wiscs.org/programs/comm/wo/.php> (last visited May 10, 2021).

57. *Id.*

58. *Driver's License Recovery Program*, ISTHMUS (Mar. 11, 2020), <https://isthmus.com/events/drivers-license-recovery-program-second-wednesdays/>.

59. *Id.*

## I. Introduction

This memo addresses the extent to which BIPOC individuals can be and are disparately impacted after conviction, including (1) in decisions regarding whether they can enter community supervision instead of serving all or part of their sentence incarcerated; (2) in decisions regarding whether they can be released from prison early; and (3) on reentry into the community. This memo also addresses data regarding recidivism rates.

It is impossible to examine in isolation these issues that arise later in processing individuals through the criminal justice system. Disparities at this point are the result of disparities that begin much further upstream. Other parts of the Task Force report explain how BIPOC individuals experience differential treatment that labels them as “bad” from their initial encounters with the system, including that they are stopped, searched, and arrested at higher rates; experience harsher conditions of confinement<sup>1</sup>; are charged with more serious crimes; are more likely to receive aggravated or enhanced sentences and less likely to receive mitigated sentences<sup>2</sup>; and generally receive longer sentences as a result of harsher assessments<sup>3</sup>. These negative assessments of BIPOC individuals compound as they are processed through the system and have lasting impact. Labeling and presumptions carry forward into the issues discussed in this memo—decisions about continued incarceration and early release, as well as the experience of BIPOC individuals on reentry.

For example, in explaining its findings about racial disproportionalities in sentencing, the Washington State Institute for Public Policy explained that

[t]hese disproportionalities may be driven, in part, by differences in treatment at earlier stages of the criminal justice system. For example, there may be disproportionality in the likelihood of arrest regardless of differences in actual offending behavior. If people of color are more likely than White people to be arrested, then they may also be more likely to be convicted of an offense. Consequently, differences in sentencing outcomes may represent disparate treatment prior to conviction and/or sentencing.<sup>4</sup>

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1. See, e.g., King County Auditor’s Office, Adult Jails Need Risk-Based Approach to Improve Safety, Equity 27-37 (2021), <https://kingcounty.gov/depts/auditor/auditor-reports/all-landing-pgs/2021/jail-safety-2021.aspx> (hereinafter King Co. Auditor Report).

2. Washington State Institute for Public Policy, Examining Washington State’s Sentencing Guidelines: A Report for the Criminal Sentencing Task Force 32 (May 2021), [http://www.wsipp.wa.gov/ReportFile/1736/Wsipp\\_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf), (hereinafter WSIPP 2021 Sentencing Guidelines Report).

3. *Id.* at 21.

4. *Id.* at 14. See also King Co. Auditor Report at 29 (“Black people in the United States are more likely than White people to be arrested; they are more likely to be charged with crimes that carry heavier sentences; once charged,

Further, simply on the basis that members of BIPOC communities are overrepresented in prison and jail populations, they are disproportionately subject to discretionary decisions concerning their eligibility for release to community supervision, dependent on services designed to aid in their reentry, and impacted by collateral consequences of their incarceration. In 2020, out of a total population of 7,649,844, Black people made up 4.15% of the population, but 18.2% of the prison/jail population. Indigenous people made up 1.8% of the population, but 6% of the prison/jail population. People of Latina/o origin made up 13.5% of the population, but 15.4% of the prison/jail population. Data for Asians & Native Hawaiians/ Pacific Islanders was not disaggregated.<sup>5</sup>

|                   |                        | % of total state population | % of prison/jail population            |
|-------------------|------------------------|-----------------------------|--|
| Total population  | 7,649,844 <sup>6</sup> |                             |  |
| White             | 6,020,427              | 78.7%                       | 69.1%                                  |
| Black             | 317,469                | 4.15%                       | 18.2%                                  |
| Indigenous        | 138,462                | 1.8%                        | 6%                                     |
| Asian             | 703,786                | 9.2%                        | 4.4% (did not disaggregate NH/PI data) |
| NH/PI             | 60,434                 | .79%                        |  |
| Two or more races | 405,442                | 5.3%                        |  |
| Latina/o          |                        | 13.5% <sup>7</sup>          | 15.4%                                  |

Communities of color are thus disproportionately impacted by practices that involve release, release to community supervision, and reentry.

II. Discretionary decisions to place offenders in community supervision or to provide them early release.

A. Concerns about risk assessment decisions and tools

Just as racial bias can impact the treatment of members of BIPOC communities in other

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they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences. These systemic factors compound on each other to inflate the average criminal involvement score for Black people.”).

5. Washington Department of Corrections, Agency Fact Card (2021), <https://www.doc.wa.gov/docs/publications/reports/100-QA002.pdf>. For statistics showing that Black and Indigenous people are overrepresented in King County, see King Co. Auditor Report at 4.

6. 2020 Washington State population data from Office of Financial Management, <https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-race>.

7. Office of Financial Management, Population of Hispanic/Latino Origin (2020), <https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-hispaniclatino-origin>.



interactions with the criminal justice system, it can manifest itself in discretionary decisions to place them into community custody, to revoke their placement in community custody, and to release them before their maximum term. All of these discretionary decisions involve risk assessments, and bias may play a role in them. The Washington State Institute for Public Policy (WSIPP) has found that, overall, White defendants have been disproportionately likely to receive a sentencing alternative rather than a standard sentence, and Black and Hispanic defendants have been more likely to receive a standard sentence than any of five sentencing alternatives.<sup>8</sup>

Risk assessment tools have been controversial.<sup>9</sup> In 2013, WSIPP recommended the STRONG-R risk assessment tool (later renamed Washington ONE) as the instrument “with the highest predictive accuracy of risk for recidivism.”<sup>10</sup> The Washington Department of Corrections (DOC) began transitioning to Washington ONE in 2017.<sup>11</sup> Concerns regarding risk assessment tools include that that they disproportionately impact racial minorities.<sup>12</sup>

One of the most concerning possible sources of bias can come from the historical outcomes that an RAI [Risk Assessment Instrument] learns to predict. If these historical outcomes are the product of unfair practices, it is possible that any derivative model will learn to replicate them, rather than predict the true underlying risk for misconduct. For example, though race groups have been estimated to consume marijuana at roughly equal rates, Black Americans have historically been convicted for marijuana possession at higher rates. A model that learns to predict convictions for

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8. WSIPP 2021 Sentencing Guidelines Report at 38-39.

9. Brookings Institute, *Understanding Risk Assessment Instruments in Criminal Justice* (2020), <https://www.brookings.edu/research/understanding-risk-assessment-instruments-in-criminal-justice/> (hereinafter Brookings Institute Risk Assessment).

10. Washington State Institute for Public Policy (WSIPP), *Predicting Criminal Recidivism: A Systematic Review of Offender Risk Assessments in Washington State* (2014), [http://www.wsipp.wa.gov/ReportFile/1554/Wsipp\\_Predicting-Criminal-Recidivism-A-Systematic-Review-of-Offender-Risk-Assessments-in-Washington-State\\_Final-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1554/Wsipp_Predicting-Criminal-Recidivism-A-Systematic-Review-of-Offender-Risk-Assessments-in-Washington-State_Final-Report.pdf). STRONG and the factors it considers are described in Zachary Hamilton et al, *Designed to Fit: The Development and Validation of the STRONG-R Recidivism Risk Assessment* (2015), [https://www.researchgate.net/publication/285549068\\_Designed\\_to\\_Fit\\_The\\_Development\\_and\\_Validation\\_of\\_the\\_STRONG-R\\_Recidivism\\_Risk\\_Assessment](https://www.researchgate.net/publication/285549068_Designed_to_Fit_The_Development_and_Validation_of_the_STRONG-R_Recidivism_Risk_Assessment); WSIPP, *Washington Offender Needs Evaluation (Washington ONE): Evaluating Community Contacts Impact* (2020), [http://www.wsipp.wa.gov/ReportFile/1730/Wsipp\\_Washington-Offender-Needs-Evaluation-Washington-ONE-Evaluating-Community-Contact-Impacts\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1730/Wsipp_Washington-Offender-Needs-Evaluation-Washington-ONE-Evaluating-Community-Contact-Impacts_Report.pdf) (hereinafter Washington Offender Needs Evaluation).

11. For a description of Washington ONE, see Washington Offender Needs Evaluation, *supra* note 10.

12. Brookings Institute Risk Assessment. *See also* National Reentry Resource Center, *Risk and Needs Assessment and Race in the Criminal Justice System* (2016), <https://nationalreentryresourcecenter.org/resources/risk-and-needs-assessment-and-race-criminal-justice-system>; Jennifer Skeem and Christopher Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact* (Nov. 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2687339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339).

marijuana possession from these historical records would unfairly rate Black Americans as higher risk, even though true underlying rates of use are the same across race groups.<sup>13</sup>

It does not appear that any study has been done on the effectiveness of Washington ONE as a risk assessment tool; it should be evaluated to see if its application results in any racial disparities, and, if so, why. Analysis of another risk assessment tool, COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), showed that it overpredicted recidivism on the part of Black offenders and underpredicted recidivism on the part of White offenders.<sup>14</sup> A study by Jeff Larson et al looked at 10,000 criminal defendants in Broward County, Florida, and compared their predicted recidivism rates with the rate that actually occurred over a two-year period. The study found that Black defendants who did not recidivate over a two-year period were nearly twice as likely to be misclassified as higher risk compared to their white counterparts (45 percent vs. 23 percent). At the same time, White defendants who reoffended within the next two years were mistakenly labeled low risk almost twice as often as black reoffenders (48 percent vs. 28 percent). Black defendants were 45 percent more likely to be assigned higher risk scores than white defendants. Black defendants were also twice as likely as white defendants to be misclassified as being a higher risk of violent recidivism. And White violent recidivists were 63 percent more likely to have been misclassified as a low risk of violent recidivism, compared with Black violent recidivists. The violent recidivism analysis also showed that even when controlling for prior crimes, future recidivism, age, and gender, Black defendants were 77 percent more likely to be assigned higher risk scores than White defendants.<sup>15</sup> This analysis was rejected by Equivalent (formerly Northpointe), which developed COMPAS.<sup>16</sup>

#### B. Points of risk assessment decisions before allowing community custody or early release.

Understanding that risk assessment decisions made by the courts, the DOC, and the Indeterminate Sentence Review Board (ISRB) disproportionately impact racial minorities, it is important to understand the myriad of points in which risk is assessed. This discussion identifies some of those points of decision.

##### 1. Certain crimes allowing community custody.

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13. *Id.*

14. Jeff Larson et al, *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>.

15. *Id.*

16. Equivant, *Response to Pro Publica: Demonstrating Accuracy Equity and Predictive Parity* (Dec. 1, 2018), <https://www.equivant.com/response-to-pro-publica-demonstrating-accuracy-equity-and-predictive-parity/>.

Numerous statutes give the court discretion to impose community custody as an alternative to all or part of a term of imprisonment. For example,

- RCW 9.94A.711 (giving court discretion to impose community custody for certain motor vehicle theft offenses);
- RCW 9.94A.702 (giving court discretion to impose a term of up to one year community custody when offender receives sentence of one year or less for certain listed offenses);
- RCW 9.94A.660(1)(a)(b) (giving court discretion, under drug offender sentencing alternative, DOSA, to waive imposition of sentence under certain circumstances and impose either a prison-based or residential treatment-based alternative);
- RCW 9.94A.670(2)(a) (giving court discretion under the special sex offender sentencing alternative, SSOSA, to grant a suspended sentence to defendant who had close relationship to victim under identified circumstances and place defendant in community custody for the statutory maximum term).
- RCW 9.94A.702(1) (giving court discretion to impose up to one year of community custody for certain crimes where court imposed sentence of confinement for one year or less);
- RCW 9.94A.650 (giving court discretion to waive imposition of sentence for a first-time offender under certain circumstances and impose a sentence of confinement in a facility under contract with the county and/or community custody);
- RCW 9.94A.655(1)(e) (giving court discretion to waive imposition of sentence for a parent of a child under certain circumstances and impose sentence of 12 months community custody).

## 2. Community custody (parole) after a pre-7/1/1984 determinate sentence

A person convicted of a felony committed before July 1, 1984 (given an indeterminate sentence prior to Washington’s adoption of determinate sentences) may be released from prison prior to serving their maximum sentence if the ISRB determines that “his or her rehabilitation has been complete and he or she is a fit subject for release.”<sup>17</sup> Washington Administrative Code 381-60-160 sets out examples of reasons to deny parole.<sup>18</sup>

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17. RCW 9.95.100; RCW 9.95.009 (“the indeterminate sentence review board shall give public safety considerations the highest priority when making all discretionary decisions . . . regarding the ability for parole, parole release, and conditions of parole.”); *In re Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221 (2004)(“[B]etween a statutory requirement that a prisoner is not to be released until rehabilitation is complete and a duty to attempt consistency with the SRA, the statutory requirement trumps the duty to attempt”); *In re Marler*, 108 Wn. App. 799, 807, 33 P.3d 743 (2001) (“A prisoner sentenced prior to the enactment of the SRA is ““subject entirely to the discretion of the Board, which may parole him now or never.””).

18. The board panel shall render a decision of either parolable or not parolable on each case heard under this chapter. All decisions concerning inmates convicted of murder in the first degree will be made by the full board. Examples of adequate reasons for a finding of nonparolability include, but are not limited to:

- (1) Active refusal to participate in available program or resources designed to assist an offender to reduce the risk of reoffense (e.g., anger management, substance abuse treatment).

If the ISRB grants parole, the inmate is moved into community custody under supervision of the DOC and may be discharged from supervision if the terms of parole are followed for 36 months. If parole is denied, a new minimum term is set.<sup>19</sup>

3. Alternative sentence for certain sex offenders

Persons found guilty of certain sex offenses listed in RCW 9.94A.507 are subject to a form of “determinate-plus” sentencing.<sup>20</sup> The court will set a minimum and maximum term (usually life imprisonment), and, at the end of the minimum term, the ISRB will assess the risk that the offender will reoffend.<sup>21</sup> If not, the offender can be released under conditions the board determines appropriate. If the ISRB refuses release, it will establish a new minimum term.<sup>22</sup>

4. Resentencing for offenses committed under the age of 18.

A person convicted of committing aggravated murder prior to the age of 18 cannot be sentenced to a minimum term of life without parole. *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018). Instead, they will receive a “determinate plus” sentence with a minimum term of not less than 25 years.<sup>23</sup> In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.<sup>24</sup> Under RCW 9.94A.730, a person convicted of certain crimes prior to the age of 18, other than aggravated murder and certain sex offenses, may petition the ISRB for release after serving at least 20 years of confinement.<sup>25</sup>

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(2) Serious and repetitive disciplinary infractions during incarceration.

(3) Evidence of an inmate's continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, continued use of illegal substances).

(4) Statements or declarations by the inmate that he or she intends to re-offend or does not intend to comply with conditions of parole.

(5) Evidence that an inmate presents a substantial danger to the community if released.

In parolability hearings, actions may range from no change in the length of sentence to redetermination of the original sentence and imposition of an extension of the term not to exceed the maximum term. Good time credits will not be addressed inasmuch as there are no allegations of rule infractions.

19. RCW 9.95.052.

20. Washington Department of Corrections, *Frequently Asked Questions, What are the three types of inmates for which the ISRB has jurisdiction?*, <https://www.doc.wa.gov/corrections/isrb/faq.htm#isrb-inmates>.

21. RCW 9.95.420(3).

22. *Id.*

23. RCW 10.95.030(3).

24. RCW 10.95.030(3)(b).

25. RCW 9.94A.730(1).

No later than five years prior to the end of the minimum term, DOC must identify programming and services that are appropriate to prepare the offender for return to the community.<sup>26</sup> One concern is that there should be much more flexibility on when relevant services are identified and provided. The needed services may not be offered at the offender’s institution, requiring transfer; there may be other obstacles to getting the services; or the services might be useful to the offender earlier.

Prior to the expiration of the offender’s minimum term, DOC engages in a “prediction of dangerousness,” including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board.<sup>27</sup> There is a presumption of release “unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.”<sup>28</sup> The board is to give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.<sup>29</sup>

An offender whose petition for release is denied may file a new petition for release five years from the date of denial.<sup>30</sup> Offenders released by the ISRB are subject to DOC supervision for a period of time determined by the ISRB, up to the maximum term imposed by the court.<sup>31</sup>

#### 5. Eligibility for Graduated Reentry

RCW 9.94A.733 provides that certain offenders can serve the final months of their sentences in home detention as part of graduated reentry program. In determining eligibility for home detention, DOC will conduct a risk assessment, considering criminal history, nature of harm, prison discipline and behavior, and any participation in programs, work, treatment, and education during incarceration.<sup>32</sup>

Because risk assessments are made from the time a person first engages with law enforcement to their release from DOC custody, if charged and convicted, great care must be taken to ensure that assessments are untainted by racial bias.

#### 6. SB 6164

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26. RCW 10.95.030(3)(e) (aggravated murder); RCW 9.94A.730(2).

27. RCW 10.95.030(f) (aggravated murder); RCW 9.94A.730(3).

28. *Id.*

29. *Id.*

30. RCW 10.95.030(f) (aggravated murder); RCW 9.94A.730(6).

31. RCW 10.95.030(h) (aggravated murder); RCW 9.94A.730(5).

32. Washington Department of Corrections, Opportunity for Supervision Reform and Reentry (Jan. 2020), <https://doc.wa.gov/docs/publications/fact-sheets/300-FS002.pdf> (hereinafter DOC Opportunity).

SB 6164, recently signed into law, allows a prosecutor to petition for resentencing when the original sentence for a felony “no longer advances the interests of justice.”<sup>33</sup> In determining whether to release an inmate under the statute, the court may consider

postconviction factors including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated; evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence; and evidence that reflects changed circumstances since the inmate's original sentencing such that the inmate's continued incarceration no longer serves the interests of justice. Credit shall be given for time served.<sup>34</sup>

Under this statute, the prosecutor and court exercise vast discretion in assessing inmates’ post-conviction behavior. Prosecutors should proactively utilize 6164 to reassess sentences for those who have rehabilitated, including the aged and ill, those who were incarcerated as youths, and those who should be released under the *Blake* decision, a large proportion of whom are Black individuals.<sup>35</sup> It has also been suggested that inmates and their counsel ought to be able to seek resentencing on the grounds provided in the statute and that inmates have a right to counsel in 6164 proceedings.<sup>36</sup>

### 7. Earned release time for “good” conduct

Certain offenders in DOC custody can accumulate earned release time towards early release “for good behavior and good performance, as determined by the correctional agency having jurisdiction.”<sup>37</sup> Whether they are entitled to earned release time is, again, a discretionary decision that can be affected by bias. Earned release time is considered at numerous points, including, as just mentioned, under 6164.

In addition, the DOC, the Criminal Sentencing Task Force, and others have recognized the need to streamline and reform the current system of earned release time. When the Sentencing Reform Act (SRA) was enacted in 1984, all offenses were eligible for 33% earned time, excluding

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33. SB 6164, <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/6164.SL.pdf?q=20210815100319>; for a discussion of 6164, see also Jennifer Smith & Jeremiah Bourgeois, *The Retroactive Application of Justice: Using Prosecutorial Discretion to Correct Sentences that No Longer Serve a Valid Purpose*, 19 SEATTLE J. FOR SOC. JUST. 409 (2021).

34. *Id.*

35. Stephen M. Thomas & Andrea Altheimer, *Resentencing Can Bring Deserving Inmates Home*, SEATTLE TIMES, May 27, 2021, <https://www.seattletimes.com/opinion/resentencing-can-bring-deserving-individuals-home/>.

36. *Id.*

37. RCW 9.94A.729; Dep’t of Corrections, Earned Release Time Policy (2015), <https://www.doc.wa.gov/information/policies/files/350100.pdf>.

mandatory minimum terms and certain sentence enhancements. In the 1990s, the Legislature amended the early release calculations, notably reducing the maximum earned release time available for certain serious offenses to 15%. In 2003, some further adjustments were made (including reducing the 15% allowance to 10% and increasing the allowance to 50% for some low-level offenses). As the Washington Criminal Sentencing Task Force has noted, some of these 2003 changes were not made to enhance public safety.

Some of these [2003] changes were made to comply with federal grant requirements that provided funding to states for construction and renovation in which individuals convicted of serious crimes served a minimum of 85% of their sentence.<sup>38</sup> The result of these changes and amendments has been to create a complex system which requires different calculations of release time for different inmates.<sup>39</sup>

The Criminal Sentencing Task Force has recommended, first, that the reduced time calculations be made less complex by applying the maximum percentage to an entire sentence, rather than just a part. This will make the calculations less complex, as well as recognize that earned time programs reduce recidivism and decrease the correctional population and costs.

DOC supports this recommendation and seeks to allow earned release time up to a uniform 33% of an inmate's total sentence, including enhancements and applied retroactively. It notes that doing so would alleviate some of the racial disproportionality in Washington State prisons. DOC projects that racial disparities in Washington's prisons would be greatly reduced. By the 2031-33 biennium, approximately 11% of the prison population would be Black, as compared to 18% today, and 5% would be Alaskan/American Native, compared to 6% today.<sup>40</sup>

HB 1282, which proposes to provide most offenders a maximum 33% release time, is now pending in the legislature.

### III. Receipt of services as a part of community supervision and reentry

People in community supervision are required to fulfill numerous conditions, such as drug counseling, as part of their supervision. However, a major issue for BIPOC individuals is the

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38. William D. Ruckleshaus Center, Washington State Criminal Sentencing Task Force December 2020 Report, at 23, [https://s3.wp.wsu.edu/uploads/sites/2180/2020/12/CSTF-Final-Report-2020\\_12.21.20\\_1.pdf](https://s3.wp.wsu.edu/uploads/sites/2180/2020/12/CSTF-Final-Report-2020_12.21.20_1.pdf) (hereinafter Sentencing Task Force Report 2020).

39. *Id.*

40. Dep't of Corrections, *Increased Earned Time Scenarios* (2021-23 Biennium), <https://s3.wp.wsu.edu/uploads/sites/2180/2020/12/SGC-Increased-Earned-Time-Scenarios-FINAL-1.pdf>.

inability to access services that are culturally relevant. There may be language barriers, as well as cultural barriers. These barriers result not only in the inability to gain the benefit of the services, but also in the inability to comply with conditions that will earn release from supervision.

#### IV. Recidivism

The goal of the decisions discussed above is to assess the likelihood that an offender will reoffend. “The primary goal of community corrections is to reduce recidivism among the formerly incarcerated and currently supervised individuals in the community.”<sup>41</sup> It is therefore essential to measure and understand recidivism rates, especially to measure the extent to which rates vary based on race and why.

DOC data shows that recidivism rates are high for every racial category except White. White offenders represented 66% of offenders released in 2009 and only 27.5% of offenders recidivating. In contrast, Black offenders represented 17.3% of offenders released in 2009 and 30.4% of those recidivating; Hispanic inmates represented 8.6% of offenders released and 24.6% of those recidivating; Native American offenders represented 4.6% of offenders released and 34.2% of those recidivating; and Asian/Pacific Islander offenders represented 2.9% of offenders released and 17.6% of those recidivating.<sup>42</sup>

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41. Wash. Dep’t of Corrections, Opportunity for Supervision Reform and Reentry (Jan. 2020), <https://www.doc.wa.gov/docs/publications/fact-sheets/300-FS002.pdf>.

42. DOC Research Unit, Washington State DOC 3-Year Prison Recidivism Rates (%) (2013), <https://www.doc.wa.gov/docs/publications/200-CH001.pdf>.



Offender Demographic Characteristics by Release and Recidivism  
2009

|                        | Offenders Released in 2009* |                     | Offenders Recidivating |                      |
|------------------------|-----------------------------|---------------------|------------------------|----------------------|
|                        | Number                      | Percent by Breakout | Number                 | Percent Recidivating |
| <b>Total</b>           | <b>7,865</b>                | <b>100%</b>         | <b>2,190</b>           | <b>27.8%</b>         |
| <b>Gender</b>          |                             |                     |                        |                      |
| Female                 | 970                         | 12.3%               | 195                    | 20.1%                |
| Male                   | 6,895                       | 87.7%               | 1,995                  | 28.9%                |
| <b>Race/Ethnicity</b>  |                             |                     |                        |                      |
| White                  | 5,194                       | 66.0%               | 1,427                  | 27.5%                |
| Black                  | 1,358                       | 17.3%               | 413                    | 30.4%                |
| Hispanic               | 676                         | 8.6%                | 166                    | 24.6%                |
| N. American Indian     | 360                         | 4.6%                | 123                    | 34.2%                |
| Asian/Pacific Islander | 226                         | 2.9%                | 52                     | 23.0%                |
| Other/Unknown          | 51                          | 0.6%                | 9                      | 17.6%                |
| <b>Age</b>             |                             |                     |                        |                      |
| 19 and Under           | 164                         | 2.1%                | 48                     | 29.3%                |
| 20-24                  | 1,193                       | 15.2%               | 404                    | 33.9%                |
| 25-29                  | 1,566                       | 19.9%               | 483                    | 30.8%                |
| 30-34                  | 1,170                       | 14.9%               | 351                    | 30.0%                |
| 35-39                  | 1,152                       | 14.6%               | 348                    | 30.2%                |
| 40-44                  | 1,005                       | 12.8%               | 252                    | 25.1%                |
| 45-49                  | 814                         | 10.3%               | 188                    | 23.1%                |
| 50-54                  | 473                         | 6.0%                | 84                     | 17.8%                |
| 55 and Up              | 328                         | 4.2%                | 32                     | 9.8%                 |

Research is necessary to understand why the recidivism rates are so high for members of BIPOC communities. They could be high for any number of reasons, including the treatment and dehumanization of BIPOC individuals in the criminal justice system, the lack of support in reentry, and barriers to reentry discussed above.

#### V. Reentry into the community

Viewed narrowly, reentry is the term used to describe the multi-faceted process faced by people, adults and juveniles, who have completed their sentences, are released from the Department of Correction’s control, and are to restart their lives in society. Reentry issues arise all at once when post-sentence individuals get released from incarceration and begin their lives in communities and society. A broader view would see reentry as a process that should begin soon after offenders become system-involved and that lasts both while they are under and after they are released from DOC supervision. This discussion will focus on issues faced when an individual is under DOC community supervision and after.

Multiple barriers surround re-entry. Such barriers have long been noted, studied, and recognized at the federal, state, and local levels in the criminal legal system with many organizations, agencies, and projects working to assist and support people in the reentry process.<sup>43</sup> Successful reentry will not necessarily or likely look the same for all individuals being released. Yet the basic needs of

43. On the state level, see, for example, Civil Survival, <https://www.civilsurvival.org>; The Washington Reentry Council, <https://www.commerce.wa.gov/about-us/boards-and-commissions/statewide-reentry-council/>. On the national level, see, for example, The Sentencing Project, <https://www.sentencingproject.org>.

housing, employment, healthcare, education, and human rights and respect must be addressed in each case.

Because BIPOC groups are overrepresented in Washington State prisons, they disproportionately face obstacles, overt and covert, to successfully reestablish themselves in society.

#### A. Housing

Housing creates one's base from which to find and maintain employment, healthcare, education, and to make a stable life. Whether juvenile or adult, without a place to call and make home, the chances to successfully reenter society notably diminish.

While individuals are under DOC community supervision, DOC does not have enough housing to support successful reentry. After release from DOC supervision, individuals with criminal backgrounds are discriminated against. Because racial minorities have historically been discriminated against in housing, and continue to be discriminated against in housing, former inmates of color are greatly disadvantaged in seeking housing.

In August 2017, Seattle passed historic legislation in its Fair Chance Housing ordinance to prevent unfair bias against renters with criminal records.<sup>44</sup> Similar legislation should be passed statewide or by other city and county jurisdictions.

#### B. Employment

Gainful employment is also a major component of successful reentry. Again, individuals with criminal backgrounds are discriminated against in employment, and, because racial minorities also experience employment discrimination, former inmates of color are greatly disadvantaged in seeking employment.

In Washington, the Fair Chance Act, adopted in 2018, prohibits covered employers from inquiring into an applicant's criminal history until after the employer initially determines that the applicant is otherwise qualified for employment.<sup>45</sup> It further prohibits an employer from advertising positions in a way that excludes people with criminal records. This measure is often referred to the "ban the box" measure, disallowing employers from unfair treatment based on criminal background. The Act, however, does have some exceptions, including, for example, that it does not apply to jobs involving unsupervised access to children.<sup>46</sup>

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44. City of Seattle, Seattle Fair Chance Housing Ordinance, <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing>.

45. RCW 49.94.010.

46. *Id.*

### C. Legal Financial Obligations

Legal Financial Obligations (LFOs) are fines, fees, costs, and restitution payments imposed as part of a criminal sentence, and they often pose insurmountable burdens to individuals leaving prison.<sup>47</sup> 80-90% of persons with a felony conviction are indigent, a majority lack a high school diploma, and many have limited job opportunities. LFOs compound with interest and can leave people in perpetual debt and facing the risk of imprisonment for failure to pay.<sup>48</sup>

A study by the ACLU Washington and Columbia Legal Services of LFO practices in Benton, Clark, Clallam, and Thurston Counties found that

- courts impose discretionary LFOs (including court costs) without considering a person’s present or future ability to pay;
- while state law says restitution payments to victims should take precedence, county clerks’ offices garner annual LFO collection fees prior to using LFO payments to provide restitution to victims;
- the state’s excessive interest rate for LFOs creates insurmountable debt for already impoverished people, prolonging their involvement with the criminal justice system and imposing severe barriers to reentry into their communities;
- courts require that persons use public assistance for basic needs to pay off LFOs; and
- courts incarcerate persons for nonpayment even when they are destitute and unable to pay.<sup>49</sup>

There has been progress in trying to alleviate the burden of LFOs. LFOs can be mandatory or discretionary, and efforts exist to educate judges on their discretion to waive LFOs and to educate people on how to obtain a waiver of LFOs.<sup>50</sup> In 2018, the Washington State legislature passed significant legislation that ended the practice of jailing people unable to pay LFOs; eliminated the 12 percent interest rate on non-restitution LFOs and stopped interest from accruing while a person is incarcerated; prioritized the allocation of LFOs to restitution for victims; set clear standards for

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47. American Civil Liberties Union, *Modern-Day Debtors Prisons: The Ways Court-Imposed Debts Punish People for Being Poor* 3 (2014), [file:///C:/Users/bannail/Downloads/Modern%20Day%20Debtor's%20Prison%20Final%20\(3\).pdf](file:///C:/Users/bannail/Downloads/Modern%20Day%20Debtor's%20Prison%20Final%20(3).pdf); see 2018 Washington Supreme Court Symposium, *Legal Financial Obligations (LFOs): beyond Defining the Problem; Advancing Solutions*, <https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2>; see also Alexis Harris, *Monetary Sanction As a Permanent Punishment*, <https://www.courts.wa.gov/subsite/mjc/docs/2018/WA%20Sup%20Ct%202018%20Monetary%20Sanctions%20Harris%20Slides.pdf>.

48. *Id.* at 4.

49. *Id.* at 7.

50. *Id.*

determining a person's ability to pay; and prohibited the forced collection of funds received from needs-based public assistance programs.<sup>51</sup>

HB 1412 in the 2021-2022 legislative session seeks to further work against the disparate impact of LFOs on poor and BIPOC individuals by, among other things, allowing courts to waive or reduce certain currently mandatory LFOs based on a person's inability to pay; to waive the onerous twelve-percent interest rate on restitution; to waive or reduce restitution owed to entities other than individuals if the person lacks the ability to pay; and to address the mandatory Victim Penalty Assessment (VPA). The bill also creates explicit statutory authority for courts to waive previously imposed fines based on a finding of inability to pay.<sup>52</sup>

Further discussion of LFOs can be found in Appendix F.

#### D. Education

A criminal record poses numerous challenges to individuals seeking further education on release. A person convicted of a drug offense must report the offense when applying for federal financial aid. Even if the offense does not affect eligibility,<sup>53</sup> being required to report can be a deterrent. Colleges require applicants report criminal convictions,<sup>54</sup> which can also deter applications from formerly system-involved individuals.

In addition, formerly system-involved individuals can have great difficulty navigating an educational environment without the support of someone familiar with the barriers they face.

*With regard to education, there's very little peer support to help us navigate through the institution. I get a lot of support from my professors and a dean of students or whatever, but I advocate for myself on every level and it's exhausting. Every institution needs to have a system in which peers can help with navigation, to ensure the success of formerly incarcerated. A lot of us don't have a lot of education. I didn't go to middle school at all. I missed a lot of those foundational pieces that could have helped me or I could have received help within the prison system to make up for that gap to you know. We need support from people who*

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51. ACLU-WA, Legislature passes bill to bring fairness to Washington's system of Legal Financial Obligations (2018), <https://www.aclu-wa.org/news/legislature-passes-bill-bring-fairness-washington%E2%80%99s-system-legal-financial-obligations>.

52. Columbia Legal Services, Washington Legislature to Consider Relieving Legal Financial Obligations (LFOs) for Indigent Individuals (2021), <https://columbialegal.org/washington-legislature-to-consider-relieving-legal-financial-obligations-lfos-for-indigent-individuals/>.

53. Federal Student Aid, U.S. Department of Education, <https://studentaid.gov/sites/default/files/aid-info-for-incarcerated-individuals.pdf>.

54. Merf Ehman, *Barriers to Reentry: Housing, Employment, Education*, <https://www.courts.wa.gov/subsite/mjc/docs/EhmanReentrySymposium2.pdf>.

*understand the experience of incarceration. Other counselors try to help and it's not that expertise can't be built and developed over time, but we're not there.*

### E. Healthcare

Poor healthcare in prison has long-lasting impacts that can impair reentry. Numerous Washington inmates report problems with receiving treatment for their illnesses or injuries while in prison.<sup>55</sup> Crosscut reviewed lawsuits, investigations by the Office of Corrections Ombuds, and internal DOC documents that expose a pattern of delay that denied inmates access to basic health services.

Former inmates describe prisoners with protruding hernias and crippling chronic injuries that could be repaired with simple surgeries, but are left to fester. . . .

In a deposition filed with U.S. District Court, a physician treating one prisoner with ulcerative colitis, an inflammatory bowel disease, recounted asking to conduct a biopsy to confirm the diagnosis. The doctor's request was denied and, as he feared, the man's colon ruptured through his abdominal wall and nearly killed him.

"This is not how you treat human beings," said [attorney Nick] Allen, who led the failed class action lawsuit in which those stories were collected.

"A lot of this stuff has life or death implications," he continued. "If you're not taking it seriously, if you're treating folks as 'other,' that's going to result in unnecessary and preventable death."<sup>56</sup>

Because of poor care in prison for both their physical and mental health, former inmates can be hampered by debilitating illness as they face the other challenges of finding housing and employment.

### VI. Summary of recommendations

- Collect data on racial disparities that may exist in discretionary decisions to move offenders to community supervision, to revoke community supervision, and to grant early release.

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55. Levi Pulkkinen, *Health Care in WA Prisons Leaves Inmates Waiting Months or Years for Help*, CROSSCUT (Aug. 4, 2020), <https://crosscut.com/news/2020/08/health-care-wa-prisons-leaves-inmates-waiting-months-or-years-help>.

56. *Id.*

- Examine the effectiveness of Washington ONE as a risk assessment tool and to determine whether its use results in racial disparities.
- Study data on disproportionate rates of recidivism to better understand why the disproportionalities exist and support programs to eliminate those disproportionalities.
- Create a statewide tracking of reentry data.
- Enhance programs in prison, during community supervision, and after release that will better aid and support system-involved individuals in rehabilitation and reentry, and ensure that programs and services are culturally relevant to BIPOC individuals.
- Allow more flexibility in when DOC must identify programming and services that are appropriate to prepare a juvenile offender for return to the community to ensure that they will actually receive the services at a meaningful time and in a meaningful manner.
- Reexamine the funding of reentry services. Examine DOC funding for reentry services, and consider shifting funding to community organizations to do reentry work. Support peer-led reentry organizations.
- Pass statewide legislation that will prevent landlords from asking tenants about their criminal records.
- Stop treating LFOs as a means to fund the court system.<sup>57</sup>
- Establish clear processes for judges to waive all non-restitution LFOs when payment of the amounts would result in hardship that would result in a person's inability to meet basic needs or re-enter society.<sup>58</sup>
- Waive the twelve-percent interest rate on restitution.
- Analyze and evaluate the mandatory nature of the Victim Penalty Assessment (VPA).
- Ensure that individuals know their rights and have assistance of counsel whenever appearing in court or signing an order to be entered with the court for LFO collections.<sup>59</sup>
- Expand reporting requirements to account for the cost of collecting LFOs.<sup>60</sup>
- Ensure that courts are educated on LFO standards and that LFOs can be

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57. ACLU-WA & Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor*, at 19 (2014), (hereinafter *Debtors' Prison*), <https://www.aclu-wa.org/docs/modern-day-debtors-prisons-washington>.

57. Washington State Department of Corrections, Health Services, <https://www.doc.wa.gov/corrections/services/health.htm>.

58. *Id.*

59. *Id.*

60. *Id.*

waived.

- Waive or reduce restitution owed to entities other than individuals if the person lacks the ability to pay.
- Allow earned release time up to a uniform 33% of an inmate's total sentence, including enhancements and applied retroactively.

To understand the disparities that exist for communities of color in the criminal justice system, it is essential to not simply rely on data; it is essential to hear those communities speak about their experiences with the system. Community members and organizations were involved in Task Force 2.0's workgroups. In addition, the Task Force's Community Engagement Workgroup organized engagement sessions with various individuals and groups around the state to share the task force's work and to gain their perspectives on the criminal justice system.

I. Every person participating in the engagement sessions felt that individuals of color are not treated fairly or equitably in the criminal justice system.

*Members of BIPOC communities usually receive longer sentences, harsher treatment during stops, and limited access to sentencing alternatives.*

2. Racial disparities in the criminal justice system are deeply rooted in disparities beyond the system itself.

a. Many participants emphasized that one cannot look at racial disparities in the criminal justice system separate from the social and economic inequalities that exist in society as a whole.

*The problems with the criminal justice system are deeply rooted in systemic inequalities, such as scarcity of resources in communities and our schools.*

*Look at our—let's call it—zip code inequities. In our school systems. Minorities are always getting the short end of that stick, so if we want to have a true conversation, we cannot afford just to focus on our criminal justice system; we must focus on all of our systems.*

*You can't just draw clean lines around the criminal justice system. So I confess to not fully understanding the purview of what you're able to report necessarily. But I will mention that as the spouse of someone in education, one of the things that you know my partner notices is that, in his words, there is a black or brown kid in every corner. The troubled kids overwhelmingly were always those kids, and then those kids were sort of getting shunted into that pipeline. They end up in the criminal justice system, and he was seeing this in elementary school grades. Third and fourth graders; he was seeing this in a Spokane school, so that's just something worth noting.*

*For me personally, I want to see us address more root cause issues such as education. You know there's so many people of color that I know throughout their academic career been told by some teacher along the way, oh you, you don't need to go to college, go for something else, and so many of us buy into that. So again, it goes back to our systems that encourage failure.*



*We've been talking about police culture; don't forget police culture comes from the American culture. You know, it just didn't spring up out of nowhere; this is a part of our environment and that's why we treat people like animals. Sometimes they end up acting like animals when you put them in an area in which they have no resources, where you fight over those resource. So again I go back to my original point—let's make sure we do a better job in making cities work; make sure the school systems are addressing these zip code inequities—you know just where it all starts.*

*There is a cycle where Black people are criminalized for crimes of poverty and the punishment causes economic devastation. Meanwhile, there's an absence of resources to address the root cause of these problems. Additionally, the people arrested and brought to court have already been subjected to disparate treatment by other state actors—overpolicing of Black neighborhoods, increased referrals of Black defendants to courts.*

*Real public safety requires better houses, better jobs, better education.*

b. Many participants spoke specifically about how bias and stereotypes criminalize BIPOC individuals.

*There are so many underlying biases. . . . When people see BIPOC individuals, they perceive the threat first and then the person.*

*Law enforcement, to me, cannot use the excuse of needing more deescalation training because what we see and what is true is that they deescalate when they respond to white calls. It is not that they don't understand how to deescalate; there is something that is deeper in them, deeper in the culture of law enforcement, that when they respond, they see that as a person of color. And I think the thing that happens is racism. We can't keep just saying it's about training, because then the law enforcement agencies will say, well, we don't have training dollars, so we don't have a budget to do these things well, but you do know how to do them already, just not in communities of color.*

*They don't realize that they humanize people that look like them and then reflexively demonize people that look like us.*

*A Pierce County Sheriff told me he had a complaint where a young man was waiting at the transit station in Tacoma to take a bus to Seattle on a Friday night. Police car rolled up and smelled marijuana and walked over to the only Black person at the bus stop. The man said no, so police pulled him aside and asked him to point out who was smoking marijuana, and he said he didn't know. The police officer then told the man to get on the ground, which was wet where they were standing. Man asked if he could move 4 feet away before getting down to avoid the mud and water, but the officers said no and made him get on the ground. No one else at the stop was questioned about marijuana.*

c. Participants noted law enforcement’s inability to recognize and effectively address mental health issues.

*Mental illness is often confused for criminal activity. There’s a perception that mental illness is for white and not black people, and if a black person exhibits signs of mental illness, people think they’re criminals. There’s an example of black man in Tukwila who ended up dying when police came. He had a golf club and he was tased and he ended up falling out of the window and that’s how he passed away.*

d. Some participants expressed the impossibility of reforming a criminal justice system infused with structural racism.

*Abolish the entire system because the system is rooted on white supremacy. We can use band aids to fix small problems, but that doesn’t fix the system.*

### 3. Youth

a. Participants spoke about the need to give their children and family members “the talk,” that is, the need for people of color to be extremely careful in interactions with police so as to avoid escalation.

*When you talk about kids of color, I also think parents need to take more and more of an active role. I started driving probably almost 50 years ago, and one of the things that my father told me, make sure I’ve checked out the headlights, tail lights, signal light before I left home. Make sure there’s no issues for anyone to pull you over because if you get in that space sometimes that’s the beginning of that slippery slope, at least to the criminal justice system.*

*A Latina said she has to talk to her boys about how to act when confronted by police. “What we tell our family is different than white families.”*

b. Many youth of color are “adultified”; that is, they are not treated like the juveniles that they are.

*Lots of studies demonstrate that Black children are perceived as 4-4.5 years older than they actually are to do implicit bias. This leads to fifth and sixth graders being treated like adults by the system when they’re acting out their own adolescent behavior. This leads to increased surveillance/criminalization of their behavior so that, as they get older, they see themselves as criminal or wrong and engage in more problematic behavior. Black and brown kids are also more likely to be declined and tried in adult court for behavior that’s not criminalized in their white counterparts. I think also that school security guards are often more problematic than the school resource officers. I don’t endorse police on any level, but the security guards often assume authority of police officer to live out their aspirations*

*of being law enforcement, leads to much great harm to young people in the school system.*

*I'd like to speak from the perspective of a Pacific Islander mother. My son's father is 6'4", 315 pounds on a really light day after he's been dieting. My son was born at almost 12 pounds. He is six years old and already weighs 98 pounds. So the physical attributes that we are celebrated for on football fields in athletics, for all the things that people try to shine a light on us, are the same reasons that our boys are being killed on the streets. . . .*

*And the theme is always the same, that the police officers were scared about these men's bodies - thinking about how big they were, how violent they were at the time. So I think about those cultural/genetic competencies that are lacking when police deal with our community.*

*Also I think about how these people are criminalized after their death, much like all other people of color. We start to look at their rap sheets, what they've done prior to being killed by police officers, rather than looking at the reasons why those people were put in that situation in the first place. So why was this Micronesian boy stealing in the first place? Where was the food, where was all that access provided to him so he didn't feel he needed to burglarize homes? And I get emotional because I see two young men who are on this call today.*

*I'm fearful. I have nephews who are 200-300 pounds and I tell them all the time, you have to be careful, and I don't want to have to have this conversation. I have to constantly remind people my son is only six years old. He looks like he's eight, but he's only six. And so I will continue to have to have this conversation with him until the end of my time here on earth to remind him that, as much as you are celebrated for those things, you also have to be very careful about your body. I don't think that's something very fair for our children to have to maneuver. Women in our communities also face these same issues. Being adultified when they are being sentenced and so forth.*

*I fear for all of my brothers and sisters. I fear for my ex-husband. He's a big dude. If he gets into it with the wrong people, my children will no longer have a father.*

*We need to separate data regarding Native Hawaiian and Pacific Islander (NH/PI) youth from data for Asian youth. I think that most API youth who are auto-declined are NH/PI, but we need to data to help us know how to target support and resources.*

c. Youth of color are overpoliced, and many are presumed to be involved in gang activity. Police and school resource officers seem to target students of color.

*There is a large Marshallese community in Spokane, and there are concerns about how their youth confront a school-to-prison pipeline. Teenage problems seem to be categorized as gang activity.*

*When I was in high school, officers would be on campus. Students were allowed to get stuff from car during school hours. The students of color could feel the officers' presence around them. One time, the school resource officer called the police because he was suspicious that students of color were doing drugs. BIPOC students were always considered troublemakers, and white students were not targeted in the same way.*

*My high school is half white and half Mexican. An officer told me and my brother who are Latinos, "if you walk in a group of five, people will think you're in a gang." White students would walk together and were not spoken to this way.*

*For the younger kids, police will see a perceived gang affiliation and will send them to the juvenile court and will be harder on them, but based solely on the perception of gang affiliation.*

*When there is police presence at the high schools, many students feel like they are only there to monitor kids of color. Kids of color have more interaction with the school police. And there is a heavy police presence at these schools, but there is a lack of mental health resources and substance resources.*

*There are disparities in high school with regard to school officers. There are students that are considered "ivy league" that officers treat better because they are from the richer side of town compared to the kids in trailer parks. Mexicans that are white-passing will get treated better by police. This creates a disproportionate experience among the Hispanic community.*

*From a defense attorney of color: There is clear racism and disproportionate treatment from law enforcement in this county. I routinely see that children of color are policed differently – kids of color who hang out together in the streets are regularly harassed, searched by Tacoma Police Department. But police don't do the same things to white kids. Looking at drug use stats, white people use drugs at a higher rate than Black individuals, but Black kids are arrested more. This shows that Black kids are in contact with police at higher rate. Some TPD call themselves gang officers and use that as an excuse to stop and search Black kids on the street, regardless of their involvement in criminal activity. It's very clear that TPD targets Black people.*

d. The need for cultural competence in the legal system.

*When our youth do have an opportunity to be evaluated, for like mental health issues or substance abuse, the evaluations themselves are racist. They're done by a lot of old white people who have zero understanding of these children and the society they come from, and then you get a racist outcome, and then you get a racist sentence, so it's just a self-perpetuating cycle of inequity and racism that our youth are completely harmed by.*

*Get experts to inform the courts about the experiences of communities of color. For example, Samoan youth are adultified and treated more harshly.*

*From a Samoan formerly incarcerated man who now speaks to younger men of color who are now incarcerated: When I was in prison, I took the time to read. People came in, cared enough about us to educate us on not committing crimes; on how to build your own business, have a 9 to 5, and be an entity yourself, so that way, you can stand tall. And speak to other people, especially white people.*

*So I took that, and I ran with it, and that's the only reason I believe I'm still free and on this side.*

*A lot of us, especially coming from my background, we don't have the capacity, mentally, to engage something like this, to hear like "auto-adult" and "adultification." They don't understand that these things are why they're going to end up in jail for 10, 20, 30 years vs. getting help from people who actually know about this and knowing that these terminologies can actually have a strong effect on their future.*

*I have two nephews who are serving "football" numbers, what they call it, meaning 30 years plus for something they did when they were 14 and 13. And one of them is already in the adult system. They waited until he turned 18 to come to him with a plea deal for 32 years in prison.*

*And then I have another nephew who was involved in a gang-related altercation. He took the rap. He's sitting there for 30-plus years in Green Hill juvenile. And it just so happens that he was inspired by something that I left there. I got involved about 10 years ago in taking the message of reform, rehabilitation, and cultural awareness back into Green Hill, so when he came there, the seed was planted. He got to meet the governor while he was in Green Hill. He got to leave the juvenile prison to educate on racial reform and cultural awareness. And that was because, accidentally, I had a bit of thought to spread the word about justice and how we can take control of justice ourselves. And so a young kid, getting related on, you know, how to speak from the heart with his "what's up," and now he's actually pushing for reforms himself and he's only 18. When he's 21, they'll send him upstate to prison. He deserves to be on the streets.*

*So, for youth, I think it's a matter of making a connection with them while they're in there. They're trapped, and the only conversation they can have is with each other, the police who are locking them up, or individuals with knowledge of how they can better benefit themselves and benefit those who are caught up in the system. It will help with the diversion process and getting the ball started so they can reach out to us, the ones of us who are out here on the street, the ones who can go to Olympia and push those reforms and policies.*

*They're not unreachable. It's just that we, as people who care and can do something, need to reach out and talk to them. And so we had a talk about reaching out to the juvies. It's a tough crowd. You can't go in there with trinkets and unicorns and blowing them all up because they're used to getting gassed up. That's the reason they ended up in there. They were told that they were great, that they can do anything, and then giving them guns and put dope in their hands. And then they go and make that money. So all that pump, all that talk, they need more than that.*

*I'm here on the streets, but I'm not. Access and barriers. They're the biggest things I deal with every single day. So it's just a matter of everybody collectively working with each other to stop the siloing. Everybody wants to silo and don't want to reach out because they don't want to be a snitch or be "that" person or that group. I'm willing to work with anyone who is willing to work with us. I don't give a damn what name it comes with, so long as it has freedom, and opportunity, and access.*

*As for the Yakima court, there are not many translators provided. Students who are job shadowing at the court will be asked to translate from people who need a translator. Public lawyers also don't speak much Spanish, and this creates a barrier between their clients and them.*

*The juvenile division encounters a lot of Marshallese youth, recently some Chuukese youth, as well, who will often need interpreters.*

*We need interpreters for a lot of juvenile court hearings. If you take away Guam, one in three Micronesian households in the U.S. live in linguistic isolation. The courts don't have translated documents or paperwork or anything like that to really explain this process to families who are dragged into these systems. And I don't understand why that is. There is so much more they could be doing as far as accessibility that they're not doing. I'm not just speaking about prosecutors – I'm speaking about defense attorneys and juvenile superior court. On juvenile probation counselors, which are unique to juvie because you're assigned someone to walk you and your family through this process. It's a real issue.*

#### e. Systems fail youth of color and support the school-to-prison pipeline

*Reports were made that some students in a Parkland area school were in a gang. After repeatedly being "hammered" for six months by other kids, two twins, youth of color, fought back to defend their sister and struck another kid, who lost some teeth. The three children were tried in adult court and shackled during proceedings, despite the fact that it was two years after the law had been changed that said children should not be shackled in court. The situation shows how failure of school, courts, and sheriffs compound to make situations much worse for Black families. From an advocacy perspective, it is very hard to stay calm when thinking about this, but this is how the school-to-prison pipeline is operating and students face these problems every day.*

*I used to be a case manager for Pacific Islander youth who were system-involved. There are a lot of Pacific Islander youth who are being neglected by the system. Ones that come to mind are the Taafulisia boys who were sentenced to 40 years for the Beacon hills murders. Really, what failed there were the systems: Child Protective Services failed, the social welfare system failed those boys. Those boys were facing homelessness and were having to sell drugs to put food on the table. I've seen this play out. I've seen Dan Satterberg try these three Pacific Islander boys three times. Two couldn't convict, and tried them a third time. To me, it's so*

*violent – the decision by Dan Satterberg and the decision by the court system to continue to dehumanize these Pacific Islander boys and say that your life is not worth any sort of redemption. That is unfortunately something that is not unique to the Taafulisia boys.*

*There are lots of other Pacific Islander young men. All the young Pacific Islander men who are being dehumanized and being locked up in cages.*

*And it's not just a size thing. Our Micronesian youth are very small and still being thrown into the prisons. There is not worth and dignity being ascribed to our young people. Their lives are seen as less than. There's no services, no mental health services.*

*I had a young Chuukese man who was an intern who was homeless. So what do you do? You go and you try to get money to put food on the table, to put his mom in a hotel. Because his mom is out on the streets, that's unconscionable for him. So now he's in prison for many, many years because you have a system that continues to invisibilize our Pacific Islander youth and also the families that they come from.*

f. Families of color face difficulties in being present in court

*A lot of families from Micronesian communities live far from Seattle – Federal Way, Auburn, and it's not easy to go up to the Central District for a court hearing in just a few hours to be there for a proceeding. So we wind up with children who are sitting in courtrooms by themselves with someone who has zero cultural competency or knowledge about where they come from.*

g. More focus should be on returning youth to society, rather than incarceration.

*Youth of color are disproportionately incarcerated. There is a need to approach sentencing reform through a race equity lens and a need to create a path to reconnect youth back to society.*

#### 4. Police encounters

a. Participants said that police seem to escalate and fail to deescalate encounters with BIPOC individuals

*Officers tend to come into the Black community already preescalated, yet the interesting thing is they've supposedly been trained in deescalation. I keep pondering that disconnect. I feel like they're saying "it's your fault, well, he didn't communicate to me well," but the officer is the one with the badge and the gun and the deescalation training logged in their book.*

*Once at the Yakima Duplex, children of color were walking from one duplex yard into the yard of the next duplex, which was owned by a white man. The white person in the other duplex called the police on the children and when the officers arrived, he was standing in the doorway with a long gun. The officers spoke with the children and the white homeowner, made a report, and then left. Police did not*

*mediate the incident or deescalate the situation where the white man was armed. Both complaints from reports to NAACP.*

*Spokane is the third deadliest police force in the nation. And Black individuals here and in Spokane are five times as likely to get arrested or detained than their white counterparts. There's a severe issue here, and so, if there's anything that you all can take back to your task force is that the Department of Justice needs to do a patterns and practice investigation on this police department, just like they did in Seattle, and so, with your help, I, I hope that that takes place.*

b. Some participants also said that law enforcement fails to protect BIPOC communities in the same way it protects White communities.

*There is a concern in Spokane/Eastern Washington that police do not protect the community against white nationalist activists. The community doesn't feel safe. Police seem harsher on Black Lives Matters protesters than on White Nationalists. Even when Black and brown people call the police for help, they are more likely to be criminalized.*

c. Participants said that police should not be the first responders in many situations to which they now respond.

*I also think about a lot of medical situations. I have more than one friend who has had a medical crisis or a mental health crisis where the police became involved and actually did violence to their person because someone experiencing a crisis, apparently, to them looks a lot like someone who's threatening. Never mind that neither of these people were armed with anything, and, even if they were, I still will necessarily think someone should make a phone call for them. So I had a friend who was dragged across pavement because they were in something of a catatonic state and then somebody touched them unexpectedly, and they flipped out. The response of the police was to throw them to the ground and then they got road rash on their face as a result. I do think that a lot of the problems that we're seeing could be reduced if police were not allowed to respond to certain kinds of things. And to some degree, I don't think police even want to respond to all these things. But whether they do or not, they simply don't belong, they don't have the training, they don't have any value there.*

d. Participants questioned police hiring practices and expressed the need to see more officers of color and better screening of officers.

*In Pierce County, people can't afford to pay their car tabs because it's become too expensive, then leads to being pulled over by the police. Being pulled over can result in either an arrest/violent encounter, or an explanation of why you can't pay your tabs and empathy from the police officer. If there were more Black officers handling these situations, it may keep situations from escalating and lead to better outcomes. This is particularly important in situations where the offense is minor, like car tabs.*



*Hiring of Black people in law enforcement and other systems is critical. Hiring practices for police should try to match racial composition of state populations.*

*There is a problem with hiring police who are hostile or not sensitive to the needs of the community.*

*There needs to be better screening of police officers. A 36-year-old Samoan man Iosia Faletofo was killed by a Seattle police officer, Jared Keller, in 2018 after fleeing from a traffic stop. Officers tackled him and a gun fell from his pants. An officer said he was reaching for his gun; Iosia's last words before he was shot were that he was "not reaching." The Office of Police Accountability (OPA) found the shooting justified. A year before, Keller was involved in another shooting. In 2019, Keller was hired by the Spokane PD. So the outcome of the shooting was that Iosia loses his life, his family, and his kids lose him. After these killings, Keller got hired in Spokane, and the only thing that Spokane PD said was they have a "rigorous" hiring process. So what are the requirements? What more can we add to that?*

5. Immigration status. Numerous participants, particularly those from the Latina/o community, spoke about how fear of immigration authorities impedes access to justice.

*As far as asking for help, it's hard for an undocumented individual to come out and ask for help because they're not sure who to trust.*

*Undocumented people do not even want to go to the hospital for fear of being deported. There's also fear of being labeled a public charge: "will this count against me?" Such as going to the food bank. Status affects whether you have access to resources and access to justice.*

*If the judge does impose cash bail, someone has to come to court to fill out the paperwork and put up the money. It's terrifying if you know that border patrol can be there.*

*There's still cooperation between local jurisdiction police and ICE to make arrests.*

*The moment that an individual was released, ICE was there immediately to hold, transfer to Tacoma, and reinstate hold.*

*The goal of supervised release in unlawful entry cases is to hold something over the individual's head, compounding punishments.*

*A lot of times, police will use the word "ICE" as a scare tactic or to threaten people they are interacting with.*

*Take ICE out of the area, especially near courts. Police should not be working with ICE in any manner.*

6. The criminal justice system needs to be much more accessible to individuals for whom English is a second language.

- a. Information and court forms need to be translated.

*Mostly everyone at El Centro has had someone approach them wanting help. For example, people wanting help in filing a police report.*

*There is a language barrier between the criminal justice system and the Hispanic community. The court files are in English, and it is hard for people to fill out. There aren't a lot of organizations that can offer pro bono hours to help fill out forms for everyone.*

*When asked as an individual to help translate forms, I feel uncomfortable because I'm not an attorney and I don't want to interpret something wrong and have them fill it out wrong. It's a lot of pressure being asked to translate court documents.*

*At one point, I was working at a grocery store late and a man came in and started talking to me and my co-workers. He asked if we knew both Spanish and English and, because I am fluent in both, I said yes. He asked if I could help him with his court documents and court proceedings because the documents were in English and his attorney didn't know a lot of Spanish. Because I am not fluent in legal Spanish, I didn't feel comfortable helping him but I tried to give him a few names of organizations that might be able to help.*

*We have a lot of community leaders who always provide translation. They're not necessarily certified or licensed, but we trust them. I work with pastors and their wives and other community leaders that are very close with other community members that can translate and interpret for them, so we would trust them as kind of like messengers and also as gathering spots like trusted places. We always like to say that everything that we need to heal ourselves is already within our own communities so just look within.*

*Forms in the jail are in English. Medical forms. Work forms. And there is no help to fill out forms. I'm not sure if the jail is allowed to help. This creates barrier for incarcerated folks to get anything done. Interpreters are provided in court, but not in jail.*

- b. Translators need to be provided out of court, as well as in court.

*Tenants are worried to call the police because they don't know how to communicate. They don't know if people who answer the phone are going to be able to understand them.*

*I want to add something about the Marshallese community as an example. There was a situation really recently where a young man. I don't know his age, but a man*

*and his family, they had an issue with their child who was experiencing some sort of developmental things and the police were called. Long story short, the man was arrested, the father was arrested, and there was no way to communicate because there was a language barrier. There was no way to communicate what the real issue was and to help the police understand that the father was not the person actually that they were even there for. So, as the father was not able to express himself, he is then in protective mode of his family, which then felt aggressive to police officers. So I said all that just to say, if we're going to look at how we fix these systems, there has to be something that that the police department is able to do when there has been a misunderstanding like that situation when the wrong person was arrested.*

*It was a situation that really should not have happened because, with this particular one that I'm thinking of, I even called the chief of police on this family's behalf. But at that point, it was already too far gone and they had to attend court, so this guy was away from his family for multiple days. His wife was afraid, his son was afraid, and then at the end of the day, the case was dropped, of course, but there was nothing in real time to say this, this was a mistake. Okay, we can say we made a mistake, and now we need to let this person go back to their family like that didn't happen. That reminded me of those intersections of, you know, disability and race or disability and ethnicity, where you have, like so many barriers and are so many misunderstandings that is extra, extra difficult. It's almost as if the families are then held responsible for their language barrier. Law enforcement needs to have some way that they are able to communicate with the communities that they're responding to; it is not the onus of the family to be able to communicate with law enforcement.*

*It's about like getting ahead of it and being able to interview the family or whoever's call you are responding to and understanding what they're saying and understanding their responses. Otherwise, the thing that happens is then they get upset, they get worked up because you're not understanding what they're saying, and now the police will say that they're even more threatened or the situation has escalated, but the escalation is due to "I'm not able to communicate to you and then you're not communicating to me" and then this is going to end up with me in the back of that car and go into to jail. Especially in the communities of color in this Marshallese community where this thing had happened.*

*The fathers are usually the breadwinners too, and so it is so problematic when the dad is taken out of a home for three or four days. To get to court and then to finally be released anyway, like that puts that family's well-being in harm's way completely because it can't undo everything from a misunderstanding based on translation absolutely.*

*What happens when there is a need for an interpreter and there isn't one? For example, during traffic stops. How often do officers access language lines outside 911 calls? How could language limitations affect officer response to emergency*

*situations? What about languages for which we don't have interpreters, for example, Marshallese?*

*The language barriers influence the way the police react and treat people in the Yakima area. Police will pull people out of their cars because they can't understand them. An example is a man was dragged out of his car and bitten by a police dog, but this all happened because the man didn't speak English and the police officer didn't speak Spanish. This was all caught on camera and left a traumatized impression on the Hispanic community.*

*I worked for a lawyer who spoke Spanish fluently. The lawyer said that many people come to her because of her ability to speak in the same language. This lawyer also meets with clients on Saturdays because she knows it is difficult for them to miss work Monday to Friday.*

*To me, that language barrier smacks of a civil rights issue when someone doesn't know why they're being arrested or why they're being detained or they don't have any awareness of what the Miranda rights are or what's happening.*

*There is a lack of resources. There are language barriers; there needs to be funding so they can call someone to come to the scene.*

*There is a lack of access to legal services in more rural areas, for example, Spokane and Yakima, especially because of the lack of interpretation.*

*There is one probation officer that speaks Spanish and serves all of lower Yakima, so her case file is always full. Other probation officers who don't know Spanish will try and take on her load but this creates another barrier.*

*Here at El Centro, we get people who are afraid to report things. They'll have police come here. It's taxing on the staff who hear the stories and translate. Staff have to have to show love to the person making the report and be nice to the police.*

*One participant said that, when she was watching a court proceeding, she saw a lot of translation get muddled.*

c. In addition to providing language access, actors within the criminal justice system need to be sensitive to the various cultures they interact with.

*Within the Native Hawaiian and Pacific Islander cultures, our cultures, family, and community are everything. So I think about what de-escalation would look like in our communities, a lot of that would have to happen from someone that they know, someone that they love and trust, because family is basically weaved into every aspect of our lives. Even if you see someone from the community who is not from your family, you know that they are there to protect you, to provide safety, to provide a net there. That deescalation would be much more effective than someone yelling at you, pointing guns at you.*

*There are extremely limited resources for the Pacific Islander community. Just this last weekend, there was an incident in which a Pacific Islander needed some mental health assessment, and the King County Sheriff's office couldn't locate the family and there was no organization addressing the needs of the Pacific Islander community that they could call. So often people like those on this call get calls at their homes because someone happened to know someone who is, for example, Tongan or Samoan. Huge barrier to culturally relevant, appropriate services for the Pacific Islander community.*

*There are big language barriers and cultural misunderstandings. And a lack of wraparound to actually help families get what they need after something occurs.*

d. One participant also noted the technology barriers.

*Sometimes I wonder if the problem isn't just a language barrier; instead, there are real issues regarding access to technology.*

*Another resource that is missing is the ability to provide wifi, especially during COVID times when court appearances have to be on zoom. My mom had a court appearance but the court didn't have a translator. Because we are all on zoom, I was able to attend and help translate for my mom.*

## 7. Lack of fairness in sentencing

*People are not treated fairly in the criminal justice system, and race is a huge factor. My husband is African American—none of his crimes have been violent, all drug related—and he has done 19 out of the last 22 years. He was never “eligible” to receive drug court or diversion programs. I am white and received first time offender/DOSA.*

*I believe that every case needs to be taken individually, and not use a person's past criminal problems when addressing a situation like it was brand new. If a guy's been in trouble more than once, they use the past to enhance their sentence and give him a lot more time. So basically, being re-sentenced for the same thing over and over. It creates a lot more recidivism and punishing a person several times for what they've done in the past. You should be sentenced on what you are currently struggling with, not what you did 20 years ago.*

## 8. Release

*We should find ways to release people from prison when they have rehabilitated. There are plenty of people serving life who are leaders and working to help other people, could help so many more if they were released. Many folks serving life sentences have so much to offer the world and are not a threat to public safety.*

## 9. Challenges during reentry

a. Participants spoke about the need to focus more on preparing individuals to reenter the community after incarceration.

*The criminal legal system was designed to create (or continue) second-class citizenship. The revocation of rights and privileges when people get involved with the criminal legal system create a sense of shame and a vicious cycle that most individuals never get out of. Not only do we not get out of it ourselves, it then becomes generational. I am a third-generation prison-goer, but a first-generation college go-er. The cycle needs to be broken, and we as a society can do better.*

*One of the things that gets to me at times is that many of us who are formerly incarcerated are under the impression that we have zero rights, that basically we signed all our rights away when we got sentenced. Some people like really believe that, and that's a tough place, a tough position to be in because, if your baseline is I don't have any rights, then you have no reason to fight for those rights.*

*Two sisters co-founded The Way to Justice (“The Way” for short), and they try to make sure that they fight on behalf of directly impacted individuals to let them know what their rights are and whether their liberties are being infringed upon or violated. What I really appreciate about them and the work that they do, and why it's important to me, is because it does more than just restore people's rights or more than just inform people; it really gives people their humanity back. And that's the thing that I think a lot of time we don't actually talk about—people's humanity being stolen from them. And so I really appreciate a shout out to the sisters of The Way to Justice.*

*We need to change our mindset and stop thinking of “reentry” as something that begins after someone is released from prison. We need to start thinking of reentry—of how to support this person in returning to the community—at the time of a person's initial contact with the criminal justice system. We need to think about restoring their sense of belonging to society and giving them tools in a culturally competent way.*

*It's important to take a look at what got someone justice-involved in the first place and start dealing with that while they're in the time-out period of incarceration. That is, while someone is in prison, start helping them unpack things in a healthy way. Right now, we have a system that 100% traumatizes people instead of helping them. Help people find their own agency and set up a plan for their future, rather than just releasing them with the names of some contacts. Our agencies' practices need to be both culturally competent and trauma-informed. We need a better hand-off where people are getting the follow-along case support to help break down those barriers that exist.*

*I would encourage all criminal justice system actors to focus on trauma-informed care because criminal behavior is a reaction to trauma.*

*DOC (the Department of Corrections) gives you so many tasks to do—have a place to live, get a job, go to outpatient three times a week, go to meetings two times a week, check in weekly with DOC, do random UA's, MH counseling, but hey, reenter back into society and don't get in trouble. But there's no real support. Recipe for disaster if you ask me. The system itself is overburdened. Language, race, and immigration status add even more barriers to getting access to services. I see a lot of us trying for reform, but it's always an uphill battle.*

b. Barriers to education.

*For every school I've ever applied to, I've had to explain my crimes.*

*With regard to education, there's very little peer support to help us navigate through the institution. I get a lot of support from my professors and a dean of students or whatever, but I advocate for myself on every level, and it's exhausting. Every institution needs to have a system in which peers can help with navigation, to ensure the success of formerly incarcerated. A lot of us don't have a lot of education. I didn't go to middle school at all. I missed a lot of those foundational pieces that could have helped me or I could have received help within the prison system to make up for that gap to you know. We need support from people who understand the experience of incarceration. Other counselors try to help, and it's not that expertise can't be built and developed over time, but we're not there.*

c. Language barriers.

*Reentry can be very difficult for individuals who are not fluent in English. It's difficult for them to hold a job, but it's also difficult to support them in building agency, confidence, and self-advocacy when language is a barrier to services. So they're homeless and circling the drain, and it's hard to help them bring themselves up.*

d. Track reentry data.

*There is very little, if any, consistent statewide tracking of reentry in measuring the success or lack of success of the outcomes. The very system that's created the problem and that is holding people accountable for lack of success in reentry is not tracking what's happening in reentry. When we measure recidivism, we're only measuring it by when people come back in contact with the legal system. We're not measuring what worked for the people who stay out.*

10. Barriers to seeking reform.

- a. A big problem to seeking reform is lack of access to data.

*There are claims from government that data supports their decisions, but then it's very hard to get data from the Spokane courts and we've had to jump through a lot of hoops. Trying to get material through public records requests is difficult and expensive. For example, Spokane police recently released findings from an expert affiliated with Seattle University on police use of force, but it's hard to get the data. For community members, there was a lack of transparency regarding the data and lack of ability to challenge the report.*

*We need state-level consistency on data gathering and data transparency. That will help places like Spokane where there isn't a tradition of transparency. There should be a "best practices" on data collection, focused in terms of addressing inequities.*

- b. A major issue for the Asian, Native Hawaiian, and Pacific Islander communities is the need to disaggregate data.

*If data for Native Hawaiian and Pacific Islander peoples is not disaggregated from data for Asian communities, we Native Hawaiian and Pacific Islanders are going to continue to be invisible to the systems impacting our communities. If we're not counted or don't fit within or revealed in the categories as they exist, we might as well be ghosts.*

*We know that Native Hawaiian and Pacific Islander communities are often erased from a lot of these conversations and also that we are among the most impacted communities.*

*It's important to note that the issue of making the Pacific Islander group autonomous from the AAPI group is not a new one. But more and more PI people are starting to understand the importance of disaggregating the data. It's still a sensitive subject in our own communities. We have forcibly been put in alliance with the Asian American community because they control a lot of the money and resources that have been put out, but also keeping them for themselves. This conversation within our communities about pulling ourselves apart from the AAPI umbrella and data is almost as controversial as saying abolish the police and prison system. I think there's a bit of grace allowed there for people who are just starting to understand our story. But it is time now to say to those of you concerned about the Pacific Islander community that we are not Asian, we do not need to be put in that data, and we need a representative at these tables and in these spaces.*

*While we're talking about disaggregating Native Hawaiian/Pacific Islander (NHPI) from the Asian category, we need to also note that the NHPI community is not homogenous. I come from Micronesia; there is a significant amount of anti-Micronesian discrimination on the other islands, such as on Guam and Hawai'i. There was a 16-year-old Chuukese boy shot on Hawai'i and in some of the social*



*media posts, you see the level of vitriol and racism that Micronesians experience from other islanders.*

c. Collective bargaining within the police union is a major impediment to reform and to getting justice.

d. Recognize the expertise provided by community.

*It's frustrating to rely on communities for answers and not compensate them for their effort*

*It feels to me inequitable that even in this conversation that we're coming to communities of color to say how do we fix this stuff. If we're suggesting the solutions and all of that is happening for free and then someone else gets paid to do the work to fix it and someone else gets paid to go through the training to be fixed or whatever, I'm not giving any solutions for free.*

*There needs to be training by "lived experience" experts. "Lived experience" experts should be compensated adequately for their expertise, right? Where training has happened, who are the individuals working on changing the culture? The real problem for me is that it's like 95% of the problem is the culture. They keep picking people that they want to tell them the story. They may not want to hear the story, but they'll frame it in a way that they want to hear it.*

*So therefore they're not implementing in a way that really challenges anything, let alone being required to have meaningful conversations about how it, how it impacts them to deal with the reality of bias, instead of the possibility. The same trainings result in pretty much that same kind of mode of operation for the most part. Right, so at least one of the solutions that they need is to have training done by life experience experts determined by the community, instead of by them. And they need to be compensated well for doing so.*

## 11. Educate communities

*From a Latina in the Tri-cities area: People don't really know about resources. In high school, I became aware of a lot of different resources in my senior year, when I was on track to go to college. These resources were given to me by my school counselor.*

*There is a need to educate the community on the criminal justice system and how to protect their rights. Here in Spokane, when something happens, there's like a lack of folks who know their rights. About what should be expected of law enforcement when there is an interaction. Our folks don't really know who to reach out to when something happens. They just don't really know the system.*

*From like an organizing perspective, it is good to have opportunities for the community to come together to learn about the criminal justice system. And I think it's important, from the law enforcement side of things, to have meaningful engagement and outreach like before any incident occurs.*

*From a Pacific Islander participant: The justice system has raped us enough and oppressed us into silence. We have no voice in the system at all. Back home, there's justice in terms of the chief system that really dealt with everything that we do. But when we come here, we're lost like we're in a big shopping mall where we don't know where to go. We're so illiterate in terms of all this judicial language that we have nowhere to turn to. Because it's the white man's law, we just say yes and we cannot even say no, and we just surrender to a lot of things we really don't know anything about. We remain silent and we swallow all of this pain within our own community. There is no place or lighthouse for each of us as Pacific Islanders to be heard. Are we really going to be heard?*

12. Educate law enforcement about the communities they work within.

*Police have a resistance to listening to people of color who are trying to step alongside them to improve the system. There is a greater need for community voice in police training, but officers are resisting. In 2014-15, there were 3 killings among Black teens in Tacoma. In one of them, a 15-year-old arrived on scene to learn his brother was the one who had been killed. The police did not show sympathy to the child, but instead treated him as a subject and questioned him as a gang member. Black Collective responded by writing a full proposal to the city council stating that police should treat area as both a crime scene and a trauma scene where people are respected. The report asked police to show community the same respect in a shooting that it would show to parents at a school shooting. Also requested trauma-informed care from police, or to have trained people alongside them, to help families. But those proposals face resistance and rejection from police because they came from outside – police see their own engagement as priority and no one else is recognized.*

*At the same time the community needs to better understand the criminal justice system, I think law enforcement has a lack of familiarity with the Pacific Islander community; for example, in Spokane we have really great Marshallese community.*

*Negative incidents keep occurring and I think our community just seems so foreign to our law enforcement. There's just so many different misunderstandings and barriers, and it just leads to really not good situation, so I think we need more meaningful engagement.*

13. The need to be “at the table”

*The NH/PI community is not at the table where many of the discussions about issues with the criminal justice system and reform are taking place. Why not? The Pacific Islander community is effectively erased if we're not brought along side in any of the work being done in communities of color.*

14. Concern about reports and nothing gets done

*I guess when it comes to direct barriers to making change, I would say that in the city of Spokane especially, that's one big city that has a long tradition of having task forces and groups and things that are not particularly empowered but that exist to say that something is being done, and then not necessarily do it.*

## I. The need to disaggregate data for Native Hawaiian/Pacific Islander (NH/PI) communities from the Asian Pacific Islander category

*There is a need to disaggregate the data or we're going to continue to be invisible to the systems impacting our communities. If we're not counted or don't fit within or revealed in the categories as they exist, we might as well be ghosts.*

- A woman of Samoan descent raised in Seattle

Most Washington state data identifying the race and national origin of individuals involved in the criminal justice system has one category combining Asians with Pacific Islanders, which masks the tremendous diversity within that group and their very different experiences with the system.<sup>1</sup>

Nationally, the term “Asian Pacific Islander” encompasses over 22 million people, making up approximately 7% of the population. The grouping, however, is unworkably overinclusive. It includes 8.6 million people of East Asian descent (e.g., individuals of Chinese, Korean, Japanese, and Taiwanese descent); 7.6 million people of Southeast Asian descent (e.g., Filipino, Vietnamese, Cambodian, Thai, Hmong, Laotian, Burmese, and Indonesian descent); and 5.3 million people of South Asian descent (e.g., people of Indian, Pakistani, Bangladeshi, and Nepalese descent), which make up the largest shares. It also encompasses more than 1.5 million Pacific Islanders, including 600,000 people of Native Hawaiian descent, 209,000 people of Samoan descent, 159,000 people of Guamanian or Chamorro descent, and 253,000 people categorized as “other Pacific Islander.”<sup>2</sup> These numbers have continued to increase. “The Asian American population is the fastest-growing racial or ethnic group in the U.S., growing by 81% from 2000 to 2019. The Hispanic population saw the second-fastest growth, at 70%, followed by Native Hawaiians and Pacific Islanders, at 60%. The white population grew by only 1% in that time.”<sup>3</sup>

Groups combined together in the overly broad Asian Pacific Islander category are vastly different in terms of economic status, educational achievement, health outcomes, and other measures.<sup>4</sup> The stories from the NH/PI community, as well as the disaggregated data that does exist, support the need to disaggregate NH/PI data collected by individuals and organizations connected with the criminal justice system. One commentator stated:

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1. While the Washington Association of Sheriff's and Police Chiefs has some data that disaggregates NH/PI data, that data is not complete because it is dependent on whether the reporting agencies disaggregate the data.

2. Connie Hanzhang Jim, 6 Charts That Dismantle the Trope of Asian Americans as a Model Minority, May 25, 2021, <https://www.npr.org/2021/05/25/999874296/6-charts-that-dismantle-the-trope-of-asian-americans-as-a-model-minority>.

3. *Id.*

4. *Id.* (chart showing percent of adults age 25 and above with at least a bachelor's degree).

When all our diverse communities are included in one broad category, we can't see the needs of Asian American & Native Hawaiian/Pacific Islander communities who are smaller in size, more geographically dispersed, recent immigrant and refugee communities, and those that are limited English proficient. As community leaders, we strongly believe that OMB [Office of Management and the Budget] should not only encourage such disaggregation but proactively require it for all federal departments and agencies, and for all federally-funded programs and services.<sup>5</sup>

For example, about 7,951 NH/PIs in Washington (17% of the NH/PI population) live in poverty.<sup>6</sup> Data from the Washington Office of the Superintendent of Public Instruction, which does disaggregate data, shows that, in some school districts, NH/PI youth are subject to discipline in proportions greater than their representation in the student population.<sup>7</sup> In King County, for example, NH/PI students have discipline rates greater than their representation in the student body in the Bellevue, Enumclaw, Issaquah, Lake Washington, Seattle, and Snoqualmie School Districts.<sup>8</sup> In Pierce County, NH/PI students make up either the smallest or second smallest demographic, but have among the higher discipline rates in the Dieringer, Orting, Peninsula, and Sumner School Districts.<sup>9</sup> See attached Exhibit 1.

In addition, members of the NH/PI community explain how they are treated more harshly by law enforcement and the courts. They relate how NH/PI youth are auto-declined (tried as adults) at a significantly higher rate than members of the White and Asian communities. It's essential to disaggregate that data to better understand the extent to which the NH/PI community is disparately impacted within the criminal justice system and to provide appropriate resources and support to those individuals and communities.

*I'd like to speak from the perspective of a Pacific Islander mother. My son's father is 6'4", 315 pounds on a really light day after he's been dieting. My son was born at almost 12 pounds. He is six years old and already weighs 98 pounds. So the*

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5. Kathy Ko Chin, Opinion: Asian American, Native Hawaiians, and Pacific Islanders Need to Mobilize for Disaggregated Data (October 12, 2016), <https://www.nbcnews.com/news/asian-america/opinion-asian-american-native-hawaiians-pacific-islanders-need-mobilize-disaggregated-n664366>.

6. Commission on Asian Pacific American Affairs, 2020 State Fact Sheet, [https://capaa.wa.gov/wp-content/uploads/2020/03/Washington-2020.API\\_FactSheet.pdf](https://capaa.wa.gov/wp-content/uploads/2020/03/Washington-2020.API_FactSheet.pdf).

7. Discipline rate is a measure used to monitor the use of out-of-school exclusionary discipline actions in schools. Discipline Rate is calculated by counting the number of distinct students who have received an out-of-school exclusionary action divided by the number of distinct students enrolled. For the purposes of this calculation, out-of-school exclusionary actions include: Short-term Suspension (SS), Long-term Suspension (LS), Emergency Expulsion (EE), and Expulsion (EX). The number of distinct students enrolled includes students enrolled at any point during the school year regardless of the length of enrollment.

8. <https://washingtonstatereportcard.ospi.k12.wa.us/>.

9. *Id.*

*physical attributes that we are celebrated for on football fields in athletics, for all the things that people try to shine a light on us, are the same reasons that our boys are being killed on the streets. . . .*

*And the theme is always the same, that the police officers were scared about these men's bodies - thinking about how big they were, how violent they were at the time. So I think about those cultural/genetic competencies that are lacking when police deal with our community.*

*Also I think about how these people are criminalized after their death, much like all other people of color. We start to look at their rap sheets, what they've done prior to being killed by police officers, rather than looking at the reasons why those people were put in that situation in the first place. So why was this Micronesian boy stealing in the first place? Where was the food, where was all that access provided to him so he didn't feel he needed to burglarize homes? And I get emotional because I see two young men who are on this call today.*

*I'm fearful. I have nephews who are 200-300 pounds and I tell them all the time, you have to be careful, and I don't want to have to have this conversation. I have to constantly remind people my son is only six years old. He looks like he's eight, but he's only six. And so I will continue to have to have this conversation with him until the end of my time here on earth to remind him that, as much as you are celebrated for those things, you also have to be very careful about your body. I don't that's something very fair for our children to have to maneuver. Women in our communities also face these same issues. Being adultified when they are being sentenced and so forth.*

*I fear for all of my brothers and sisters. I fear for my ex-husband. He's a big dude. If he gets into it the wrong people, my children will no longer have a father.*

## **II. The NH/PI population in Washington State and the OMB and OSPI models for disaggregating NH/PI data**

### **A. The sizable NH/PI population in Washington State**

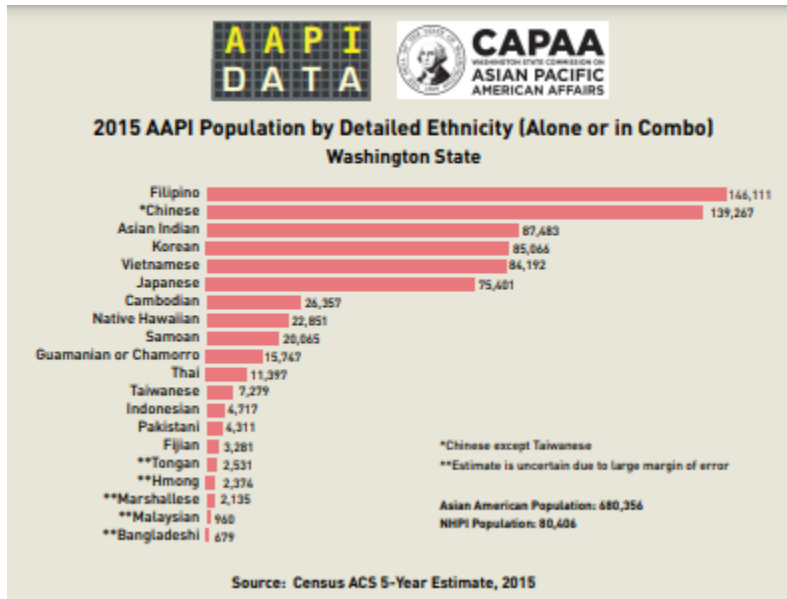
Disaggregating NH/PI data is especially important because Washington State is home to one of the largest populations of NH/PI individuals in the nation. Based on census data, as of 2015, 80,406 NH/PI individuals resided in Washington State, making up 1.15% of the population (including individuals who reported more than one race).<sup>10</sup>

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10. Commission on Asian Pacific American Affairs, AAPI Data, Population by Race, <https://capaa.wa.gov/wp-content/uploads/2019/10/pop-by-race.pdf>.

## APPENDIX J – DISAGGREGATING DATA ON NATIVE HAWAIIANS/PACIFIC ISLANDERS

The below chart, again based on census data, shows that, in 2015, at the same time there were 80,406 members of the NH/PI population, there were 680,000 Asian Americans, illustrating how much information is lost when NH/PI data is combined with data for Asian Americans.



King County was ranked eighth among the top 10 counties in the United States with the highest number of NH/PI individuals<sup>11</sup>:

| <b>Ten Counties With the Largest Number of Native Hawaiians and Other Pacific Islanders: 2010</b>  |                  |  |         |       |        |                |         |
|--|------------------|--|---------|-------|--------|----------------|---------|
| <small>(For information on confidentiality protection, nonsampling error, and definitions, see <a href="http://www.census.gov/prod/cen2010/doc/pl94-171.pdf">www.census.gov/prod/cen2010/doc/pl94-171.pdf</a>)</small> |                  |  |         |       |        |                |         |
| County   | Total population | Native Hawaiian and Other Pacific Islander |         |       |        |                |         |
|  |                  | Alone or in combination                    |         | Alone |        | In combination |         |
|  |                  | Rank                                       | Number  | Rank  | Number | Rank           | Number  |
| Honolulu County, HI . . . . .  | 953,207          | 1  | 233,637 | 1     | 90,878 | 1              | 142,759 |
| Hawaii County, HI . . . . .  | 185,079          | 2  | 62,487  | 3     | 22,389 | 2              | 40,098  |
| Los Angeles County, CA . . . . .   | 9,818,605        | 3  | 54,169  | 2     | 26,094 | 3              | 28,075  |
| Maui County, HI . . . . .  | 154,834          | 4  | 42,264  | 4     | 16,051 | 4              | 26,213  |
| San Diego County, CA . . . . .   | 3,095,313        | 5  | 30,626  | 6     | 15,337 | 5              | 15,289  |
| Clark County, NV . . . . .   | 1,951,269        | 6  | 27,088  | 9     | 13,628 | 6              | 13,460  |
| Sacramento County, CA . . . . .  | 1,418,788        | 7  | 24,138  | 8     | 13,858 | 8              | 10,280  |
| King County, WA . . . . .  | 1,931,249        | 8  | 23,664  | 7     | 14,486 | 11             | 9,178   |
| Alameda County, CA . . . . .   | 1,510,271        | 9  | 22,322  | 10    | 12,802 | 10             | 9,520   |
| Salt Lake County, UT . . . . .   | 1,029,655        | 10   | 20,824  | 5     | 15,781 | 19             | 5,043   |
| Kauai County, HI . . . . .   | 67,091           | 12   | 17,374  | 18    | 6,060  | 7              | 11,314  |
| Orange County, CA . . . . .  | 3,010,232        | 11   | 19,484  | 13    | 9,354  | 9              | 10,130  |

Source: U.S. Census Bureau, 2010 Census Redistricting Data (Public Law 94-171) Summary File, Table P1.

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11. See also interactive map showing number NH/PI population in each county, Commission on Asian Pacific American Affairs, Washington State’s Asian and Pacific Islander Populations: 2009-2013 estimate, <https://capaa.wa.gov/resources/apa-facts-wa-state/>.

12. *Id.*

**APPENDIX J – DISAGGREGATING DATA ON NATIVE HAWAIIANS/PACIFIC ISLANDERS**

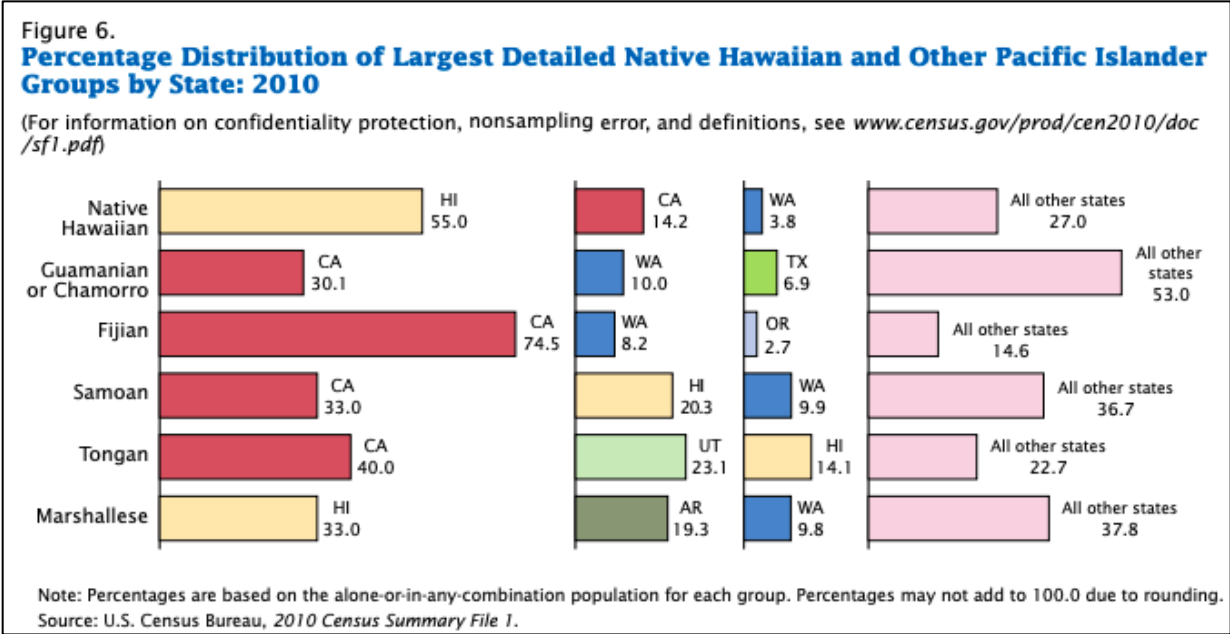
Furthermore, Pierce County and Kitsap County rank nationally for the highest percentage of NH/PI individuals in relation to the rest of the population in the county:

**Ten Counties With the Highest Percentage of Native Hawaiians and Other Pacific Islanders: 2010**  
 (For information on confidentiality protection, nonsampling error, and definitions, see [www.census.gov/prod/cen2010/doc/pl94-171.pdf](http://www.census.gov/prod/cen2010/doc/pl94-171.pdf))

| County <sup>1</sup>        | Total population | Native Hawaiian and Other Pacific Islander |                                |       |                                |                |                                |
|----------------------------|------------------|--|--------------------------------|-------|--------------------------------|----------------|--------------------------------|
|                            |                  | Alone or in combination                    |                                | Alone |                                | In combination |                                |
|                            |                  | Rank                                       | Percentage of total population | Rank  | Percentage of total population | Rank           | Percentage of total population |
| Hawaii County, HI          | 185,079          | 1  | 33.8                           | 1     | 12.1                           | 1              | 21.7                           |
| Maui County, HI            | 154,834          | 2  | 27.3                           | 2     | 10.4                           | 2              | 16.9                           |
| Kauai County, HI           | 67,091           | 3  | 25.9                           | 4     | 9.0                            | 3              | 16.9                           |
| Honolulu County, HI        | 953,207          | 4  | 24.5                           | 3     | 9.5                            | 4              | 15.0                           |
| Anchorage Municipality, AK | 291,826          | 5  | 2.8                            | 6     | 2.0                            | 8              | 0.7                            |
| Washington County, AR      | 203,065          | 6  | 2.2                            | 5     | 2.0                            | 259            | 0.2                            |
| Pierce County, WA          | 795,225          | 7  | 2.1                            | 10    | 1.3                            | 6              | 0.8                            |
| San Mateo County, CA       | 718,451          | 8  | 2.1                            | 9     | 1.4                            | 12             | 0.7                            |
| Salt Lake County, UT       | 1,029,655        | 9  | 2.0                            | 8     | 1.5                            | 24             | 0.5                            |
| Garfield County, OK        | 60,580           | 10   | 1.9                            | 7     | 1.8                            | 325            | 0.1                            |
| Solano County, CA          | 413,344          | 11   | 1.9                            | 18    | 0.9                            | 5              | 1.0                            |
| Kitsap County, WA          | 251,133          | 13   | 1.7                            | 14    | 0.9                            | 7              | 0.8                            |
| Sacramento County, CA      | 1,418,788        | 12   | 1.7                            | 12    | 1.0                            | 9              | 0.7                            |
| Utah County, UT            | 516,564          | 15   | 1.4                            | 26    | 0.8                            | 10             | 0.7                            |

<sup>1</sup> Counties of 10,000 or more total population.  
 Source: U.S. Census Bureau, 2010 Census Redistricting Data (Public Law 94-171) Summary File, Table P1.

Washington consistently ranks second or third among states with the highest percentage of NH/PI individuals, considering the largest NH/PI sub-categories. In 2010, Washington was home to 3.8% of all Native Hawaiians, 10% of all Guamanians/Chamorros, 8.2% of all Fijians, 9.9% of all Samoans, and 9.8% of all Marshallese:





## B. Federal Mandate to Federal Agencies on Disaggregating NH/PI Data

The federal Office of Management and Budget (OMB)<sup>13</sup> has long recognized the importance of disaggregating data as it relates to the many ethnicities comprising the broad “Asian Pacific Islander” category. In 1997, the OMB issued Directive No. 15, which broke apart the “Asian Pacific Islander” category into two separate groups: the “Asian” category, which identifies individuals originating from “the Far East, Southeast Asia, or the Indian subcontinent including . . . Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam,” and the “Native Hawaiian or Other Pacific Islander” (NH/PI) category, which identifies individuals originating from “Hawaii, Guam, Samoa, or other Pacific Islands.”<sup>14</sup> These categories established by Directive No. 15 were initially used by the Bureau of the Census in the 2000 decennial census.<sup>15</sup>

The OMB’s decision to separate NH/PI groups from the broad “Asian Pacific Islander” (API) category was “spurred by the contention that data on [NH/PI] groups were overshadowed by Asian populations that were larger in numbers. Thus, data aggregating API groups did not accurately illustrate the social, economic, and health profiles of Native Hawaiians and Pacific Islanders.”<sup>16</sup> The OMB found the policy arguments made by NH/PI advocacy groups to be particularly compelling:

The Native Hawaiians presented compelling arguments that the standards must facilitate the production of data *to describe their social and economic situation and to monitor discrimination against Native Hawaiians in housing, education, employment, and other areas*. Under the current standards for data on race and ethnicity, Native Hawaiians comprise about three percent of the Asian and Pacific

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13. OMB is charged with coordinating the U.S. Federal statistical system to promote “quality . . . Federal statistical information that facilitates evidence-based policies and programs and the viability of the underlying systems that produce that information.” Among many OMB directives and standards, the OMB’s Statistical Policy Directives identify minimum requirements for Federal principal statistical agencies when they engage in statistical activities. Office of Management and Budget, Statistical Programs and Standards, <https://www.whitehouse.gov/omb/information-regulatory-affairs/statistical-programs-standards/>.

14. *Id.* Directive No. 15 endeavors to separate individuals having origins in any of the original peoples of the locations mentioned, as opposed to individuals who were simply born in the locations mentioned but do not otherwise have ties to the original inhabitants of the locations mention. The OMB intends for the term “native Hawaiians,” for example, to refer to individuals who are descendants of the original peoples who inhabited the Hawaiian Islands, and not individuals who were born in the Hawaiian Islands but are not descendants of the original peoples who inhabited the Hawaiian Islands; See [https://obamawhitehouse.archives.gov/omb/fedreg\\_1997standards](https://obamawhitehouse.archives.gov/omb/fedreg_1997standards).

15. <https://www.whitehouse.gov/wp-content/uploads/2017/11/Revisions-to-the-Standards-for-the-Classification-of-Federal-Data-on-Race-and-Ethnicity-October30-1997.pdf>.

16. M.T. Godinet, H.F.O. Vakalahi, & N. Mokuau, *Transnational Pacific Islanders: Implications for Social Work*, 64 SOC. WORK 113 (2019).

Islander population. *By creating separate categories, the data on the Native Hawaiians and other Pacific Islander groups will no longer be overwhelmed by the aggregate data of the much larger Asian groups.* Native Hawaiians will comprise about 60 percent of the new category. The Asian, Native Hawaiian, and Pacific Islander population groups are well defined; moreover, there has been experience with reporting in separate categories for the Native Hawaiian and Pacific Islander population groups. The 1990 census included “Hawaiian,” “Samoaan,” and “Guamanian” as response categories to the race question. In addition, two of the major tests conducted as part of the current review (the NCS and the RAETT) used “Hawaiian” and/or “Native Hawaiian,” “Samoaan,” “Guamanian,” and “Guamanian or Chamorro” as response options to the race question. These factors facilitate breaking apart the current category.<sup>17</sup>

### **C. The Washington Office of the Superintendent of Public Instruction’s Adoption of the OMB Model for Disaggregating NH/PI Data**

The Washington State Office of the Superintendent of Public Instruction (OSPI) has adopted Directive No. 15’s model for disaggregating NH/PI data, which provides a framework for adoption by agencies within the criminal justice system<sup>18</sup>. The OSPI utilizes a simple and straightforward ethnicity and data collection form that disaggregates data between the NH/PI and Asian population:

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17. *Id.* (emphasis added).

18. <https://washingtonstatereportcard.ospi.k12.wa.us/ReportCard/ViewSchoolOrDistrict/103300>.

**Sample Ethnicity and Race Data Collection Form**

**QUESTION 1.** Is your child of Hispanic or Latino origin? (Check all that apply.)

|  |  |
|--|--|
| <input type="checkbox"/> NOT HISPANIC/LATINO | <input type="checkbox"/> MEXICAN / MEXICAN AMERICAN/ CHICANO |
| <input type="checkbox"/> CUBAN               | <input type="checkbox"/> CENTRAL AMERICAN                    |
| <input type="checkbox"/> DOMINICAN           | <input type="checkbox"/> SOUTH AMERICAN                      |
| <input type="checkbox"/> SPANIARD            | <input type="checkbox"/> LATIN AMERICAN                      |
| <input type="checkbox"/> PUERTO RICAN        | <input type="checkbox"/> OTHER HISPANIC/LATINO               |

**QUESTION 2.** What race(s) do you consider your child? (Check all that apply.)

|  |  |
|--|--|
| <input type="checkbox"/> AFRICAN AMERICAN/ BLACK | <input type="checkbox"/> ALASKA NATIVE                       |
| <input type="checkbox"/> WHITE                   | <input type="checkbox"/> CHEHALIS                            |
| <input type="checkbox"/> ASIAN INDIAN            | <input type="checkbox"/> COLVILLE                            |
| <input type="checkbox"/> CHINESE                 | <input type="checkbox"/> COWLITZ                             |
| <input type="checkbox"/> FILIPINO                | <input type="checkbox"/> HOH                                 |
| <input type="checkbox"/> HMPONG                  | <input type="checkbox"/> JAMESTOWN                           |
| <input type="checkbox"/> INDONESIAN              | <input type="checkbox"/> KALISPEL                            |
| <input type="checkbox"/> JAPANESE                | <input type="checkbox"/> LOWER ELWHA                         |
| <input type="checkbox"/> KOREAN                  | <input type="checkbox"/> LUMMI                               |
| <input type="checkbox"/> LAOTIAN                 | <input type="checkbox"/> MAKAH                               |
| <input type="checkbox"/> MALAYSIAN               | <input type="checkbox"/> MUCKLESHOOT                         |
| <input type="checkbox"/> PAKISTANI               | <input type="checkbox"/> NISQUALLY                           |
| <input type="checkbox"/> SINGAPOREAN             | <input type="checkbox"/> NOOKSACK                            |
| <input type="checkbox"/> TAIWANESE               | <input type="checkbox"/> PORT GAMBLE KLALLAM                 |
| <input type="checkbox"/> THAI                    | <input type="checkbox"/> PUYALLUP                            |
| <input type="checkbox"/> VIETNAMESE              | <input type="checkbox"/> QUILEUTE                            |
| <input type="checkbox"/> OTHER ASIAN             | <input type="checkbox"/> QUINAULT                            |
| <input type="checkbox"/> NATIVE HAWAIIAN         | <input type="checkbox"/> SAMISH                              |
| <input type="checkbox"/> FIJIAN                  | <input type="checkbox"/> SAUK-SUIATTLE                       |
| <input type="checkbox"/> GUAMANIAN or CHAMORRO   | <input type="checkbox"/> SHOALWATER                          |
| <input type="checkbox"/> MARIANA ISLANDER        | <input type="checkbox"/> SKOKOMISH                           |
| <input type="checkbox"/> MELANESIAN              | <input type="checkbox"/> SNOQUALMIE                          |
| <input type="checkbox"/> MICRONESIAN             | <input type="checkbox"/> SPOKANE                             |
| <input type="checkbox"/> SAMOAN                  | <input type="checkbox"/> SQUAXIN ISLAND                      |
| <input type="checkbox"/> TONGAN                  | <input type="checkbox"/> STILLAGUAMISH                       |
| <input type="checkbox"/> OTHER PACIFIC ISLANDER  | <input type="checkbox"/> SUQUAMISH                           |
|  | <input type="checkbox"/> SWINOMISH                           |
|  | <input type="checkbox"/> TULALIP                             |
|  | <input type="checkbox"/> YAKAMA                              |
|  | <input type="checkbox"/> OTHER WASHINGTON INDIAN             |
|  | <input type="checkbox"/> OTHER AMERICAN INDIAN/ALASKA NATIVE |

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The OSPI recognizes 15 Asian groups, 31 American Indian groups, and nine Pacific Islander groups and also provides an “other” option within each subset.<sup>20</sup> OSPI explains that these racial groups were selected because they reflect the major population groups in Washington state.<sup>21</sup>

III. Recommendations

Require all actors within the criminal justice system in Washington to gather, disaggregate, and report data for Asian & Native Hawaiian/ Pacific Islander communities in the way similar to the way data is gathered, disaggregated, and reported by the Office of the Superintendent of Public

19. <https://www.k12.wa.us/data-reporting/reporting/cedars/training-and-materials>.

20. See

OSPI, PowerPoint: New Federal and State Ethnicity and Race Categories, <https://www.k12.wa.us/cedars/trainingmaterials>, slide 9.

21. *Id.* at slide 10.

Instruction (OSPI) (at present, 15 Asian groups, 9 Native Hawaiian/Pacific Islander groups, and an “other” option within each subset, as described in the chart above). For example, data should be disaggregated to be able to see the extent to which NH/PI individuals are differentially experiencing stops, use of force by law enforcement, arrests, searches, auto-decline, sentencing, and imprisonment. Actors within the criminal justice system should also look to Office of Management and Budget (OMB) Directive 15 for standards for disaggregating data.

Exhibits

Exhibit 1 – Statistics for discipline rates of NH/PI youths in King and Pierce County, Washington.

A. King County

| <b>School District</b> | <b>% of NH/PI Students</b> | <b>Discipline Rate</b>   | <b>Discipline Rates Higher than NH/PI</b>                                      |
|------------------------|----------------------------|--------------------------|--|
| Auburn                 | 5%                         | 3%                       | 5.6% Black/AA<br>4.3% American Indian/Alaskan Native<br>3.6% Two or more races |
| Bellevue               | .3%                        | <5%                      | <8% American Indian/Alaskan Native   |
| Enumclaw               | .3%                        | <10%                     |  |
| Federal Way            | 5.6%                       | 3.6%                     | 6.6% Black/AA<br>5.8% American Indian/Alaskan Native<br>3.9% Two or more races |
| Highline SD            | 3.5%                       | 2.9%                     | 3% Black/AA  |
| Issaquah               | .2%                        | <6%                      | <6% American Indian/Alaskan Native   |
| Kent                   | 2.9%                       | 1.1%                     | Smallest out of all the other races  |
| Lake WA                | .1%                        | <9%                      | Highest Rate   |
| Mercer Island          | .1%                        | Count suppressed<br>N<10 |  |
| Northshore             | .1%                        | <8%                      | Highest Rate   |
| Renton                 | 1.1%                       | 3.4%                     | 7.6% American Indian/Alaskan Native<br>5.2% Black/AA<br>4.2% Two or more races |
| Riverview              | .1%                        | Count suppressed<br>N<10 |  |
| Seattle                | .4%                        | 4.2%                     | Highest discipline rate  |
| Shoreline              | .6%                        | <5%                      | <10% American Indian/Alaskan Native  |
| Snoqualmie             | .2%                        | <10%                     | Highest discipline rate  |
| Tahoma                 | .7%                        | <4%                      | <10% American Indian/Alaskan Native<br>5.4% Black/AA                           |
| Tukwila                | 4.2%                       | <2%                      | <10% American Indian/Alaskan Native  |

APPENDIX J – DISAGGREGATING DATA ON NATIVE HAWAIIANS/PACIFIC ISLANDERS

|        |     |                          |                       |
|--------|-----|--------------------------|-----------------------|
|        |     |                          | <2% Two or more races |
| Vashon | .1% | Count suppressed<br>N<10 |                       |

B. Pierce County

| <b>School District</b> | <b>% of NH/PI Students</b>    | <b>Discipline Rate</b>   | <b>Discipline Rates Higher than NH/PI</b>                                    |
|------------------------|-------------------------------|--------------------------|--|
| Bethel                 | 4.9%                          | 6.1%                     | 9.1% Black/AA<br>7% American Indian/Alaskan Native                           |
| Cabonado               | Did not have NH/PI Statistics |                          |  |
| Clover Park            | 5.8%                          | 3.7%                     | Third Smallest   |
| Dieringer              | .8%                           | <10%                     | <10% American Indian/Alaskan Native<br>Tied                                  |
| Eatonville             | .3%                           | Count suppressed<br>N<10 |  |
| Fife                   | 7.2%                          | 5%                       | <9% American Indian/Alaskan Native   |
| Franklin Pierce        | 6.4%                          | 2.8%                     | Second smallest discipline rate  |
| Orting                 | .7%                           | <10%                     | <10% American Indian/Alaskan Native<br>Tied                                  |
| Peninsula              | .1%                           | <10%                     | <10% American Indian/Alaskan Native<br>Tied                                  |
| Puyallup               | 2.3%                          | 2.7%                     | Second smallest discipline rate  |
| Steilacoom             | 1%                            | <7%                      | <10% American Indian/Alaskan Native  |
| Sumner                 | .5%                           | <6%                      | Highest discipline rate  |
| Tacoma                 | 3.3%                          | 4.1%                     | 7.3% Black/AA<br>5.8% American Indian/Alaskan Native<br>5% Two or more races |
| University Place       | 1.3%                          | 3.5%                     | <10% American Indian/Alaskan Native<br>5.4% Black/AA                         |
| White River            | .3%                           | Count suppressed<br>N<10 |  |

## **I. Introduction**

For most Americans, traffic stops are a routine experience. Many Americans are occasionally pulled over for speeding. They produce their driver’s license, vehicle registration, and proof of insurance, and they are then free to leave, perhaps subsequently having to pay a fine. They will likely not interact with a police officer for years until they again go through this routine. However, people of color, particularly Black people, experience these stops more frequently and with sometimes fatal results.

Philando Castile, a school cafeteria worker, was killed by a police officer after being pulled over for a broken taillight.<sup>1</sup> Mr. Castile informed the police officer he had a firearm.<sup>2</sup> Within a matter of seconds, the officer opened fire on Mr. Castile, pulling the trigger seven times from close range.<sup>3</sup> The officer shot Mr. Castile as Mr. Castile’s girlfriend and her daughter were in the car, and as Mr. Castile and his girlfriend pleaded with the officer that Mr. Castile was not reaching for the firearm.<sup>4</sup> The entire encounter lasted only one minute.<sup>5</sup> The officer was perhaps on high alert because Mr. Castile resembled a robbery suspect, “just ‘cause of the wide-set nose,” according to the officer.<sup>6</sup> And because he was Black. What’s more, over a 13-year period, Mr. Castile had been pulled over 49 times.<sup>7</sup>

In its prior report from 2011, the Race and Criminal Justice System Task Force concluded that for the Washington State Patrol, while there was no evidence of racial profiling or observable racial disparity in traffic stops, there was substantial disparity in the outcomes of those stops. First, Black, Latino, and Indigenous drivers received more violations per stop than White and Asian drivers.<sup>8</sup> Second, when Black, Latino, and Indigenous drivers were cited, their citations were for more serious offenses.<sup>9</sup> Third, police were more likely to search minority drivers, even though searches of White drivers more often led to seizures.<sup>10</sup> A decade later, although further data is needed, many

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1. Madison Park, *The 62-Second Encounter Between Philando Castile and the Officer Who Killed Him*, CNN (May 30, 2017), <https://www.cnn.com/2017/05/30/us/philando-castile-shooting-officer-trial-timeline/index.html>.

2. *Id.*

3. *Id.*

4. Tim Nelson, *Philando Castile Traffic Stop Shooting Footage Release*, NPR (June 21, 2017), <https://www.npr.org/2017/06/21/533764381/philando-castile-traffic-stop-shooting-footage-released>.

5. Park, *supra* note 1.

6. Nelson, *supra* note 4.

7. Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES, July 16, 2016, <https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html>.

8. 2011 Preliminary Report, at 16, A-11.

9. *Id.* at A-12.

10. *Id.* at A-11-12.

of these results appear confirmed.

## **II. Reporting Requirements**

It is impossible to get a completely detailed or accurate understanding of Washington’s disparities because not all jurisdictions are required to collect or report data, because of the ways in which data is collected, and because of other difficulties in evaluating the data provided.<sup>11</sup>

By way of background, the following laws address present reporting requirements. While the Revised Code of Washington (RCW) requires the WSP to collect certain data, it does not place the same requirements on local law enforcement agencies. Specifically, the WSP must collect the following data: the number of individuals stopped; identifying characteristics of the individuals stopped; the nature of alleged violation; whether a search occurred; whether an arrest was made; and whether any other enforcement action was taken.<sup>12</sup> WSP and the Criminal Justice Training Commission (CJTC) must compile this data and report it to the legislature.<sup>13</sup> WSP, CJTC, and the Washington Association of Sheriffs and Police Chiefs are then required to work together to develop further criteria for collection and evaluation of that data, as well as training materials for use by law enforcement on the issue of racial profiling.<sup>14</sup> In contrast, local law enforcement agencies need only collect and analyze traffic stop data if doing so is “[w]ithin fiscal constraints.”<sup>15</sup>

## **III. Disparities**

### **A. WSP Traffic Stop Racial Disparities**

#### **1. Need for WSP to compile the data is collects**

WSP collects raw data on traffic stops, but does not compile it regularly to show data by race. Washington State University has provided reports analyzing WSP data, but not on a regular basis. One recommendation is that WSP regularly provide data in a compiled form to better monitor stops, searches, seizures, and arrests by race, which will help identify and address potential problem areas.

For example, the Traffic Stops Research Group received three sets of data from WSP. First, WSP maintains what we’ll refer to as “District Data Sheets.” These Excel spreadsheets show individual

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11. *See, e.g., id.* at 11-18 (noting challenges in using available benchmarks for analysis).

12. RCW 43.43.480(1).

13. RCW 43.43.480(2).

14. RCW 43.43.490.

15. RCW 43.101.410.



traffic stops from June 1, 2019, through June 1, 2020. Each individual stop includes the following information: the individual's race, the contact type, enforcement action, if any, the violation, and the individual's gender. There are eight Excel spreadsheets for each district, and each spreadsheet has more than 100,000 rows. The sheets have their own legend, which is called "Guide for District # Sheets." As presented, the spreadsheets do not aggregate the data into a summary form that breaks down the traffic stops by race/ethnicity; whether individuals were cited; for what violation(s) the individuals were cited; what enforcement action, if any, was taken; whether a search was initiated; and whether the search yielded contraband. They further do not identify whether there are significant differences in the rates of stops among races/ethnicities.

Second, WSP gave us a summary of traffic stops on a yearly basis from January 1, 2012, through July 31, 2020. This summary breaks down how many individuals were stopped by race, gender, and age. These breakdowns are separate and do not overlap in identifying factors. For example, 38,710 Black individuals were stopped in 2012, but the summary does not specify the individuals' genders nor the alleged traffic violations. The summary also reports whether a search was initiated and whether an arrest was made, but not by race, gender, or age.

Third, WSP gave us an Excel spreadsheet detailing, from January 1, 2012, through July 31, 2020, how many stops were made based on various combinations of race/ethnicity, gender, whether a search was initiated; and the number of contacts for each combination. For example, there were 2,694 stops in which a search was initiated and contraband was found involving White males. There are about 100 rows for each year. There are certain "repeat" combinations because police use different types of searches, but the spreadsheet does not specify the different types of searches. And WSP gave us a spreadsheet on traffic stops, the violation, and what enforcement action based on race/ethnicity and gender was taken, if any, for every year from January 1, 2012, through July 31, 2020. There are about 2,000 rows each. The spreadsheet does not aggregate the data into a summary form that breaks down the traffic stops by race/ethnicity; whether individuals were cited; for what violation(s) the individuals were cited; what enforcement action, if any, was taken; whether a search was initiated; and whether the search yielded contraband. It also does not analyze whether there are significant differences in the rates of stops among races/ethnicities.

Recommendation: WSP regularly provide data in a compiled form to better monitor stops, searches, seizures, and arrests by race.

## 2. 2020-2021 WSU Reports on the WSP

On December 30, 2020, the WSU Department of Governmental Studies and Services issued its "Report to the Legislature: Recommendations to Inform a Longitudinal Study Regarding Potential

Reform in Washington Patrol Traffic Stops.”<sup>16</sup> WSU’s initial analysis set out in this report shows that, from 2015-2018, Black drivers were overrepresented in stops in proportion to their population, while nearly all other groups are underrepresented or in near parity to their proportion of the population.<sup>17</sup> Further, in 2018, White drivers constituted 74.10 percent of persons stopped while 74.61 percent of the population; Black drivers constituted 5.80 percent of persons stopped while 3.73 percent of the population. And preliminary hit rate analysis indicates that, “while high discretion search rates across groups are similar, successfully finding contraband was lower for Black and Hispanic motorists and Black and Hispanic motorists were statistically more likely to be subject to high discretion searches.”<sup>18</sup>

Despite these observations, the 2020 WSU Report states that preliminary findings show no evidence of systemic bias in WSP stops or enforcement actions.<sup>19</sup> The report warns that any findings must be considered with caution, as there are numerous potential problems with reaching conclusions based on the type of data used. WSU has submitted what we assume to be a more detail report to the WSP.<sup>20</sup> Further, it appears that WSU is still in the process of issuing a “final report,” which was originally due to be released to the public in January 2021.<sup>21</sup> WSU has also conducted county-level comparisons, although that data was not analyzed in summary form discussed in the 2020 report. It will be useful to see if that type of summary is in the further reports referenced above.

The 2020 WSU Report reviews the scholarly literature and states that, although the literature “often finds . . . that minority drivers are often stopped, searched, cited and/or arrested more than their White counterparts,” the overall literature reaches different conclusions about the extent to which disproportionalities are due to racial profiling.<sup>22</sup> The 2020 WSU Report helpfully reviews various approaches to studying biased policing, including the limitations of using census data (e.g., the census data does not identify the subset of drivers within each group); the approach of “veil of darkness” studies (studies that compare stops that occur when officers can discern race and when darkness makes discerning race difficult); and the usefulness of studies that focus on “hit rates,” rather stops.<sup>23</sup> The 2020 WSU Report also discusses studies finding evidence of biased policing,

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16. Washington State University Department of Governmental Studies and Services, *Report to the Legislature: Recommendations to Inform a Longitudinal Study Regarding Potential Reform in Washington Patrol Traffic Stops*, at 13 (Dec. 2020) (hereinafter Dec. 2020 WSU Report to the Legislature).

17. *Id.* at 13 (Dec. 2020).

18. *Id.* at 17.

19. *Id.* at 9.

20. *Id.* at 2 (stating that a Draft 2020 Traffic Stop Data Analysis Report was recently submitted to WSP and that the Recommendations to the legislature contained only excerpt from the report given to WSP).

21. *Id.* at 17 (stating that a final report will be submitted to the WSP in January 2021).

22. *Id.* at 3.

23. *Id.* at 3–4.

and studies without evidence of biased policing.<sup>24</sup> The studies finding evidence of biased policing attribute disparities to implicit stereotypes and the race of the driver in contrast to the race of the officer.<sup>25</sup>

The WSU 2020 report emphasizes that disproportionality alone is not in and of itself evidence of bias. Instead, it states that other explanations must be ruled out.<sup>26</sup> Further, it states that preliminary findings show no evidence of systemic bias in WSP stops of enforcement actions.<sup>27</sup> It is unclear what the WSU report means when it states that there is “no evidence of systemic bias” or how the WSU report defines “systemic bias.” That is, while the report states that there is no evidence of racial profiling, it does not speak to whether unconscious bias may be at play.

In addition to its further reports, WSU will be conducting a statewide survey and focus groups to assess public perceptions of the WSP. WSU states that it is working with community groups on outreach, including having the survey translated into Spanish.

### B. Local Jurisdictions

Information on traffic and pedestrian (*Terry*) stops from local city and county jurisdictions is essential to understand what is happening within communities. We found little information about traffic and pedestrian stops from local jurisdictions. Even localities that have critically examined their policing and criminal legal systems do not provide data about stops. For example, Pierce County recently reviewed its criminal legal system and published a report, but that report did not include information about *Terry* stops due to time constraints.<sup>28</sup>

The Seattle Police Department (SPD) publishes a robust collection of data on police stops.<sup>29</sup> In contrast to the WSP data, which reports only traffic stops, SPD publishes data on both traffic and pedestrian stops.<sup>30</sup> This information is provided via an online dataset<sup>31</sup> and interactive online

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24. *Id.* at 5-9.

25. *Id.* at 6.

26. *Id.* at 8.

27. *Id.* at 9.

28. Pierce Cty. Office of the Exec., *Pierce Cty. Criminal Justice Review*, at 5 (Sept. 10, 2020), [https://www.piercecountywa.gov/DocumentCenter/View/94647/Digital\\_Report\\_Criminal\\_Justice\\_Review\\_Council\\_Final](https://www.piercecountywa.gov/DocumentCenter/View/94647/Digital_Report_Criminal_Justice_Review_Council_Final).

29. Terry Stops Data, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry-stops> (last visited Jan. 8, 2021).

30. Seattle Police Department Manual § 6.220, available at <http://www.seattle.gov/police-manual/title-6---arrests-search-and-seizure/6220---voluntary-contacts-terry-stops-and-detentions> (last visited Jan. 10, 2021) (“The [*Terry*] stop can apply to people as well as vehicles.”).

31. Terry Stops Dataset, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry->

dashboard,<sup>32</sup> and the SPD summarizes this data in annual reports.<sup>33</sup> These annual reports are “not intended to be [studies] on racial, ethnic, or gender disparity, either of stops, arrests, or victimization rates in Seattle.”<sup>34</sup> Additionally, the most recent annual report was published in 2018 and covered only 2017 data.<sup>35</sup> It is unclear if the SPD continued to publish annual reports after that time. For these reasons, we refrained from using findings in those reports as the basis for our analysis, and instead pulled data from the SPD’s interactive online dashboard.

The dashboard allows users to sort data by date, officer demographics, subject demographics (as perceived by the reporting officer), location, and other metrics related to the stop. By sorting the data by race and comparing those numbers with Seattle’s population data, we identified several disparities that show inequality in the rates at which the SPD stops individuals of different races. The dashboard does not allow users to sort by age, though the SPD collects and publishes age data on their online dataset.<sup>36</sup> If someone familiar with raw data and social science works with that dataset, they should be able to identify racial inequalities in juvenile *Terry* stops in Seattle.

First, we compared the SPD’s race data on *Terry* stops from January 1, 2013, through January 8, 2021, to the Census Bureau’s estimates of Seattle’s population as of July 1, 2019.<sup>37</sup> The table below shows this comparison.

### **January 2013 – January 2021**

| <b>Race</b>       | <b>Percentage of Women Stopped</b> | <b>Percentage of Men Stopped</b> | <b>Percentage of Population</b> |
|-------------------|------------------------------------|----------------------------------|---------------------------------|
| <b>Black</b>      | 25.3%                              | 31.4%                            | 7.3%                            |
| <b>Indigenous</b> | 4.5%                               | 2.5%                             | 0.5%                            |
| <b>Latina/o</b>   | 2.3%                               | 4.1%                             | 6.7%                            |
| <b>Asian</b>      | 3.3%                               | 3.2%                             | 15.4%                           |

[stops/terry-stops-dataset](#) (last visited Jan. 8, 2021).

32. Terry Stops Dashboard, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry-stops/terry-stops-dashboard> (last visited Jan. 8, 2021).

33. 2017 Stops and Detentions Annual Report, Seattle Police Dept. (2018), available at <https://www.seattle.gov/Documents/Departments/Police/Reports/2017-Stops-and-Detentions-Final.pdf>; Stops and Detentions Annual Report, Seattle Police Dept. (May 15, 2017), available at <http://spdblotter.seattle.gov/wp-content/uploads/2017/05/Stops-and-Detentions-Annual-Report-Final.pdf>.

34. Stops and Detentions Annual Report, Seattle Police Dept. 2 (May 15, 2017), available at <http://spdblotter.seattle.gov/wp-content/uploads/2017/05/Stops-and-Detentions-Annual-Report-Final.pdf>

35. *Id.*

36. Terry Stops Dataset, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry-stops/terry-stops-dataset> (last visited Jan. 8, 2021).

37. Quickfacts Seattle city, Washington, U.S. Census Bureau, <https://www.census.gov/quickfacts/seattlecitywashington> (last visited Jan. 8, 2021).

## APPENDIX K – TRAFFIC STOPS

|                     |       |       |       |
|---------------------|-------|-------|-------|
| <b>White</b>        | 52.7% | 48.6% | 63.8% |
| <b>NH/PI</b>        | 0.1%  | 0.1%  | 0.3%  |
| <b>Multi-racial</b> | 2.1%  | 1.7%  | 6.9%  |
| <b>Other</b>        | 0.5%  | 0.3%  | --    |
| <b>Unknown</b>      | 5.8%  | 4.8%  | --    |
| <b>--</b>           | 3.5%  | 3.2%  | --    |

During this time, SPD officers identified 78.2 percent of the individuals they stopped as men and 20.4 percent as women.<sup>38</sup> The table above reflects the percentage of each gender’s stops that fall within the racial categories in the far left column. For example, 25.3 percent of all women stopped were Black, while 31.4 percent of all men stopped were Black. The far right column reflects the Census Bureau’s estimates of each racial category’s percentage of Seattle’s total population as of July 1, 2019.<sup>39</sup> For example, the Census Bureau estimates that 7.3 percent of Seattle’s total population was Black.<sup>40</sup>

From January 2013 through January 2021, Black and Indigenous men and women were stopped at rates higher than their representation in the population would suggest. White, Latina/o, and Asian men and women were stopped at rates lower than their representation in the population would suggest. The data on stopping Native Hawaiian/Pacific Islander people is sparse, so it is difficult to draw conclusions from it, though they seem to be stopped at rates lower than their representation in Seattle’s overall population.

Second, we examined the SPD’s *Terry* stops data from a more limited and recent timeframe—January 1, 2019, through January 8, 2021—again comparing this data to the Census Bureau’s estimates of Seattle’s population as of July 1, 2019. The table below shows this comparison.

### **January 2019 – January 2021**

| <b>Race</b>       | <b>Percentage of Women Stopped</b> | <b>Percentage of Men Stopped</b> | <b>Percentage of Population</b> |
|-------------------|------------------------------------|----------------------------------|---------------------------------|
| <b>Black</b>      | 23.8%                              | 29.3%                            | 7.3%                            |
| <b>Indigenous</b> | 4.1%                               | 1.8%                             | 0.5%                            |
| <b>Latina/o</b>   | 0.9%                               | 1.5%                             | 6.7%                            |

38. The data in this section of the report is limited to individuals identified by Seattle police officers as men and women. The SPD’s *Terry* stops data on transgender, gender non-conforming, and unknown gender individuals is disorganized, so it is difficult to draw meaningful conclusions from it. SPD’s dashboard provides six gender categories: men, women, gender diverse (gender non-conforming and/or transgender), unable to determine, “--”, and unknown. SPD officers recorded only four stops in the last eight years as gender diverse individuals, and the relationship and/or distinction between the latter three categories is unclear.

39. Quickfacts Seattle city, Washington, U.S. Census Bureau, <https://www.census.gov/quickfacts/seattlecitywashington> (last visited Jan. 8, 2021).

40. *Id.*

## APPENDIX K – TRAFFIC STOPS

|                     |       |       |       |
|---------------------|-------|-------|-------|
| <b>Asian</b>        | 3.3%  | 3.8%  | 15.4% |
| <b>White</b>        | 47.6% | 47.5% | 63.8% |
| <b>NH/PI</b>        | 0.4%  | 0.3%  | 0.3%  |
| <b>Multi-racial</b> | 0.4%  | 0.3%  | 6.9%  |
| <b>Other</b>        | 0.3%  | 0.0%  | --    |
| <b>Unknown</b>      | 8.9%  | 6.4%  | --    |
| <b>--</b>           | 10.3% | 9.0%  | --    |

During this time, SPD officers identified 79.6 percent of the individuals they stopped as men and 19.6 percent as women.<sup>41</sup> The table above reflects the percentage of each gender’s stops that fall within the racial categories in the far left column. For example, 23.8 percent of all women stopped were Black, while 29.3 percent of all men stopped were Black. The far right column reflects the Census Bureau’s estimates of each racial category’s percentage of Seattle’s total population as of July 1, 2019.<sup>42</sup> For example, the Census Bureau estimates that 7.3 percent of Seattle’s total population was Black.<sup>43</sup>

This recent data suggests that Seattle police officers continue to stop Black and Indigenous men and women at rates higher than their representation in the population suggests, while other racial groups are stopped at rates proportionate to or less than their representation in the population. Additionally, SPD officers identified a higher percentage of individuals as the “Unknown” or “--” race categories in 2019 and 2020. From January 2013 through January 2021, SPD officers identified 9.3% of women and 8% of men as “Unknown” or “--” race categories. From January 2019 through January 2021, SPD officers identified 19.2% of women and 15.4% of men as “Unknown” or “--” race categories. It is unclear how this change might have affected the data for other racial groups.

#### **IV. Effects on Community**

Disparities in traffic stops are eroding community confidence and trust in police agencies and the criminal justice system. Supreme Court Justice Sonia Sotomayor described this erosion as follows:

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. The indignity of the stop is not limited to an officer telling you that you look like a

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41. Terry Stops Dataset, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry-stops/terry-stops-dataset> (last visited Jan. 8, 2021).

42. Quickfacts Seattle city, Washington, U.S. Census Bureau, <https://www.census.gov/quickfacts/seattlecitywashington> (last visited Jan. 8, 2021).

43. *Id.*

criminal. By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.<sup>44</sup>

This erosion of trust has been measured in Washington. In 2012, the Washington State Supreme Court Minority and Justice Commission surveyed four groups of Washingtonians—Whites (611), Blacks (288), Latinos (305), and Asians (320)—to determine the differences in the respective groups’ perceptions of the criminal justice system.<sup>45</sup> When asked to rate the seriousness of the problem in their communities of police stopping and questioning Black people more than Whites, about twice as many Black respondents (almost 70 percent) as White respondents (almost 35 percent) said there was a serious problem. More than half of Latino and Asian respondents said there was a serious problem. Similar disparities existed when respondents were asked whether they felt they were treated unfairly and disrespectfully by police. Perceived negative treatments negatively impacted respondents’ confidence in the criminal justice system.

## V. Recommendations

Addressing racial disparities in traffic stops requires a multi-faceted approach that should feature public accountability and training. We recommend the following:

- (1) every law enforcement agency should be required to collect and compile demographic and other data of those stopped, and there needs to be more data on pedestrian stops;
- (2) every officer should undergo racial bias training;
- (3) Washington should adopt a law or rule suppressing evidence found during racially based traffic stops, similar to GR 37 or Massachusetts law, discussed below; and
- (4) additional research should be done into the effectiveness of body cameras as a deterrent to biased policing.

First, every law enforcement agency in Washington should be required to collect, compile, analyze, and publish demographic data of those stopped, just as the WSP is required to do under RCW 43.43.480.<sup>46</sup> In addition, there should be more collection of data on pedestrian stops. Most

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44. *Utah v. Strieff*, 579 U.S. —, 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).

45. Michael Peffley, et al, *Justice in Washington State Survey, 2012*, available at [https://www.courts.wa.gov/subsite/mjc/docs/JusticeInWashingtonReport\\_2014.pdf](https://www.courts.wa.gov/subsite/mjc/docs/JusticeInWashingtonReport_2014.pdf).

46. RCW 48.48.430 requires officers to collect: (a) The number of individuals stopped for routine traffic

of the data available is from WSP. This data does not account for pedestrian stops, which may have racially disproportionate impacts. Data reporting can also be improved. For example, as the 2020 WSU Report states, at present, the WSP combines arrest and citation data; separating those pieces of data would be useful.<sup>47</sup> WSU will be working with WSP to “streamline data acquisition to simplify analysis” and to electronically identify the location of stops.<sup>48</sup> WSU also recommends that data be analyzed annually and that community surveys be conducted annually.<sup>49</sup> The agencies should be required to post this data in an accessible manner (like the SPD dashboard) so that communities can hold law enforcement agencies accountable and determine whether progress is being made in addressing the disparities.

Second, officers should undergo implicit racial bias training so they can understand their own biases and account for them when conducting traffic stops. One concern is whether the conclusion that there is no evidence of “racial profiling” or “systemic discrimination” inappropriately dismisses the operation of, and need to address, implicit bias. Some law enforcement agencies have implemented racial bias training for officers. For example, Fight Crime: Invest in Kids is an organization comprising 5,000 police chiefs, sheriffs, and prosecutors from across the country that has developed an implicit bias training module.<sup>50</sup> The module is designed to train those within agencies on how to conduct racial bias training so that those agencies may implement the training for their officers. The implicit bias training presents information that enables law enforcement personnel to understand the impact that biases have on everyday life, how biases exist in the enforcement of laws, and how these biases can impact people in a negative way. The training presents the differences between explicit and implicit bias and explores how bias has a significant impact in all aspects of the criminal justice system. Objectives of the training include the following:

1. Assess personal biases and potential impact on decision-making;
2. Recognize the tools of modern racism e.g., stereotyping, implicit bias, institutional racism;
3. Recognize implicit bias and how it manifests in public settings, agencies, and society, including policing;
4. Understand the effects of biases in other public systems, e.g., juvenile justice, courts, education, child welfare, mental health etc., on policing;

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enforcement, whether or not a citation or warning was issued; (b) Identifying characteristics of the individual stopped, including the race or ethnicity, approximate age, and gender; (c) The nature of the alleged violation that led to the stop; (d) Whether a search was instituted as a result of the stop; and (e) Whether an arrest was made, or a written citation issued, as a result of either the stop or the search.

47. Dec. 2020 WSU Report to the Legislature, at 18.

48. *Id.* at 19.

49. *Id.* at 18-19.

50. Fight Crime: Invest in Kids, Police Training Institute, *Training Project Overview*, at 13–14 (Nov. 30, 2016).



5. Experience and address the intellectual and emotional challenges related to engaging in sensitive issues of race; and
6. Understand how bias manifests in public agencies through the use of language and the differential application and enforcement of policies procedures and the law.

Widespread training should help officers understand and address the problems of implicit bias in traffic stops and other aspects of policing,

Third, Washington courts should adopt a new standard for suppressing evidence where racial bias or profiling was a factor in the stop. Washington courts have stated that *Terry* stops can never be based on racial incongruity. *State v. Barber*, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992) (stating that a person of any race being allegedly “out of place” in a particular geographic area should never constitute a finding of reasonable suspicion of criminal behavior). Further, a *Terry* stop cannot be based on the belief that a suspect is an immigrant alien. *State v. Almanza-Guzman*, 94 Wn. App. 563, 567, 972 P.2d 468 (1999) (“[B]eing an alien does not, in and of itself, implicate criminal activity.”). However, the Washington courts have not addressed what factors a court should consider in determining whether a stop is the result of bias.

Massachusetts courts employ a test that lowers the burden of the defendant alleging profiling.<sup>51</sup> In Massachusetts, a traffic stop motivated by race is unconstitutional, even if the officer was also motivated by the legitimate purpose of enforcing the traffic laws.<sup>52</sup> Evidence found during a traffic stop motivated by race will be suppressed if the defendant raises a reasonable inference of racial profiling and the prosecutor fails to rebut the inference.<sup>53</sup> A defendant alleging improper discrimination can raise a reasonable inference of racial profiling through a motion to suppress in which he or she describes all of the circumstances of the traffic stop that support a reasonable inference that the decision to make the stop was motivated explicitly or implicitly by race.<sup>54</sup> When examining the totality of the circumstances, courts consider a list of non-exhaustive factors, including (1) patterns in enforcement actions by the particular police officer; (2) the regular duties of the officer involved in the stop; (3) the sequence of events prior to the stop; (4) the manner of the stop; (5) the safety interests in enforcing the motor vehicle violation; and (6) the specific police department's policies and procedures regarding traffic stops.<sup>55</sup>

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51. *Commonwealth v. Long*, 485 Mass. 711, 152 N.E.3d 725 (2020).

52. *Id.*, 485 Mass. at 724.

53. *Id.* at 724-25.

54. *Id.* at 724.

55. *Id.* at 724-25.

Washington courts are familiar with such a test to combat racial bias. GR 37 uses a similar framework for ensuring bias is not a factor in *voir dire*.<sup>56</sup> Washington should follow Massachusetts and its own lead and establish a similar test to ensure minorities are not further harmed by racially disparate traffic stops. Such a test could also serve as a deterrent to police officers.

Fourth, additional research is needed to learn how officer-worn body cameras can be used to deter racially disparate treatment. Research on the use of body cameras in traffic stops has already been conducted to some degree. Using footage from body cameras, researchers from Stanford University analyzed the respectfulness of police officer language toward White and Black community members during routine traffic stops.<sup>57</sup> The researchers found that officers were consistently less respectful toward Black versus White community members, even after controlling for the race of the officer, the severity of the infraction, the location of the stop, and the outcome of the stop.<sup>58</sup> However, the studies are indeterminate as to whether the use of body cameras affects the results of traffic stops, with some showing they reduce result in fewer complaints and use of force complaints but others finding no significant effect. It appears there is some potential for body cameras to decrease disparate treatment. Therefore, more research on the topic would be useful.

## VI. Suggestions for Other Groups

As the different aspects of the criminal justice system are connected, the findings and recommendations of other working groups will impact those of the traffic stops working group, and vice versa. The traffic stops working group has identified the following information that other working groups may find relevant.

- Police Standards Working Group: The WSP and CJTC are required by statute, see *supra*, to collect and analyze data on traffic stops to curb racial profiling by police. WSP, CJTC, and the Washington Association of Sheriffs and Police Chiefs are required to work together to develop further criteria for collection and evaluation of that data, and training materials for use by law enforcement on racial profiling. It would be prudent for the Police Standards Working Group to evaluate whether these statutory requirements are being met and whether any efforts undertaken are effective.

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56. GR 37, [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&ruleid=gagr37](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&ruleid=gagr37).

57. Rob Voigt et. al, *Language from police body camera footage shows racial disparities in officer respect*, PNAS (2017), <https://www.pnas.org/content/114/25/6521>.

58. *Id.*

- Juvenile Justice Working Group: the SPD publishes a robust collection of *Terry* stop data in both an interactive online dashboard and a full dataset in spreadsheet format.<sup>59</sup> While the interactive dashboard does not allow users to sort by age, the full dataset provides age information, sorted into categories including ages 1-17 and 18-25.<sup>60</sup> If someone familiar with raw data and social science works with that dataset, they should be able to identify racial inequalities in juvenile *Terry* stops in Seattle.

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59. Terry Stops Data, Seattle Police Dept., <https://www.seattle.gov/police/information-and-data/terry-stops> (last visited Jan. 8, 2021).

60. *Id.*

## I. Introduction

Washington law has long allowed law enforcement agencies to confiscate and retain the alleged proceeds or instruments of crime, including cash, vehicles, and other personal property, a practice known as asset forfeiture. The laws governing asset forfeiture in the state have remained almost totally unchanged since their enactment in 1993, and the practice still remains a considerable source of revenue for state law enforcement agencies. Between 2001 and 2014, law enforcement in Washington obtained an average of \$8,337,606 per year in forfeiture proceeds.<sup>1</sup> Proponents of asset forfeiture argue that its continued existence is necessary to deter, disrupt, and dismantle criminal enterprises by depriving them of the instruments of criminal activity and increase departments' resources to combat crime.<sup>2</sup> While Washington's lax record-keeping requirements make it impossible to assess the validity of this assertion, national research suggests that asset forfeiture does not increase public safety and disproportionately burdens low-income communities.

## II. Asset Forfeiture in Washington

Washington law enforcement agencies may obtain forfeiture revenue pursuant to either state law or through cooperation agreements with federal law enforcement. Under state law, officers have the authority to seize property they have reasonable suspicion to believe was used or intended to be used in the manufacture of controlled substances<sup>3</sup> or any felony offense.<sup>4</sup> In order to reclaim their property, the owner must notify the seizing agency in writing of their claim to ownership within 45 days of the seizure.<sup>5</sup> Once the claim is filed, a civil proceeding commences wherein the seizing agency must establish by a preponderance of the evidence if the property is subject to forfeiture, regardless of whether the owner was ultimately convicted of the offense that led to the seizure.<sup>6</sup> Because these are civil proceedings, property owners must pay to retain their own counsel when attempting to contest a seizure.

Between 2001 and 2013, Washington law enforcement agencies obtained an estimated total of \$108,388,882 in asset forfeiture proceeds.<sup>7</sup> There is, however, little information available about

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1. Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, at 154 (Institute for Justice, 3d Ed., Dec. 2020), <https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf>.

2. See e.g. U.S. Dep't. of Justice, *About the Asset Forfeiture Program*, (Dec. 16, 2020), <https://www.justice.gov/afms/about-asset-forfeiture-program-afp>.

3. RCW 69.50.505.

4. RCW 10.105.010.

5. RCW 10.105.010(5).

6. *Id.*

7. Knepper, *supra* note 1. Because law enforcement agencies are not required to report their total forfeiture revenue, the Institute for Justice ("IJ") estimated this figure by obtaining calendar-year records of forfeiture proceeds

who law enforcement seized property from. The state’s asset forfeiture laws require law enforcement to keep records of the descriptions, estimated values, and owners (if known) of all seized property and report the information to the treasurer’s office on a quarterly basis.<sup>8</sup> Because no demographic information on property owners is collected, ascertaining the racial impact of asset forfeiture is impossible. Moreover, law enforcement agencies may not even be complying with these minimal reporting requirements. A recent review of the quarterly forfeiture reports from 15 police agencies that engage in asset forfeiture found that compliance is uneven. The Seattle and Spokane police departments and the Snohomish and Clark county drug task forces do not identify the owners of forfeited property, but instead supply case numbers, further hindering oversight.<sup>9</sup> The King County Sheriff’s Office was found to report only the case numbers and the proceeds from the sale of the forfeited property, while the Pierce County Sheriff’s Office merely reported the proceeds, rendering their seizures effectively untraceable.<sup>10</sup>

Some anecdotal evidence suggests that asset forfeiture may be used in connection with drug enforcement efforts targeting communities of color. In 2019, 70% of the property forfeited by the Valley Narcotics Enforcement Team in Kent came from owners with Chinese, Vietnamese, or Latino surnames.<sup>11</sup> That same year, the Grays Harbor Drug Task Force engaged in a “crackdown” on marijuana growers in an operation code-named “Green Jade” that resulted in 147 forfeitures, 128 of those from property owners with Chinese last names.<sup>12</sup>

Moreover, this lack of record keeping makes it difficult to ascertain how law enforcement agencies spend asset forfeiture proceeds. Pursuant to Washington’s forfeiture laws, agencies must give the state treasurer 10% of the net proceeds, and may retain the remaining 90%.<sup>13</sup> While Washington law generally requires property and proceeds obtained via asset forfeiture to be used in connection with furthering law enforcement activities, there is no way to know whether police and sheriffs departments actually comply with this mandate.<sup>14</sup> In a recent news article, a staff attorney from the

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transferred from law enforcement agencies to the Office of the State Treasurer. These transfers represented 10 percent of all forfeiture proceeds in Washington. IJ multiplied the figures by 10 in order to estimate the total value of forfeiture proceeds in the state.

8. RCW 69.50.505(8).

9. Eric Scigliano, *In WA, a ‘Black Box’ of Practices Hides Civil Forfeiture from Oversight*, CROSSCUT (July 14, 2021), <https://crosscut.com/news/2021/07/wa-black-box-practices-hides-civil-forfeiture-oversight>.

10. *Id.*

11. Eric Scigliano, *WA Civil Forfeiture Law Turns Minor Drug Offenses into Major Losses*, CROSSCUT, (July 12, 2021), <https://crosscut.com/news/2021/07/wa-civil-forfeiture-law-turns-minor-drug-offenses-major-losses>.

12. *Id.*; see also *‘Operation Green Jade’ Fallout: Courts Still Juggling Chinese Drug-ring Cases*, DAILY WORLD, (Feb. 15, 2019), <https://www.thedailyworld.com/news/operation-green-jade-fallout-courts-still-juggling-chinese-drug-ring-cases/>.

13. RCW 10.105.010(7); RCW 69.50.505(9)(a).

14. RCW 69.50.505(10), RCW 10.105.010(7)(c).

Treasurer’s Office stated that the agency is “not equipped” to examine departments’ filings and the office did not have an obligation to enforce the statute.<sup>15</sup> This lack of transparency is particularly concerning because, unlike other types of revenue in an agency’s budget, forfeiture proceeds are immune from oversight by city and county governments.

State law enforcement agencies can also obtain funds from the federal Equitable Sharing Program. This program is meant to encourage cooperation between federal, state, and local law enforcement agencies.<sup>16</sup> Specifically, the federal government is permitted to transfer forfeited property “to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.”<sup>17</sup> State and local law enforcement can receive up to 80% of the assets forfeited.<sup>18</sup> There are less restrictions on the way funds must be spent when received through equitable sharing; they must be used simply to “increase or supplement the resources of the receiving state or local law enforcement agency.”<sup>19</sup>

In 2016, the most recent year with available data, Washington law enforcement agencies obtained a total of \$3,577,460 from the federal equitable sharing program.<sup>20</sup> The Seattle Police Department obtained the largest portion of this revenue, \$1,092,412, the majority of which came from cash seizures.<sup>21</sup> Other local law enforcement agencies also made considerable revenue from asset forfeitures, such as the City of Yakima Police Department, which obtained \$296,632, and the Tukwila Police Department, which gained \$538,993.<sup>22</sup> It should also be noted that of the 41 entities that received proceeds through this program, 11 were special drug enforcement task forces which obtained a total of \$954,653.<sup>23</sup> These task forces pose a particular concern because they may not be subject to the same public oversight as state and local law enforcement agencies.

Washington’s asset forfeiture laws have not changed since the issuance of the previous task force report. This has not been the case nationally. Since 2011, the District of Columbia, New Mexico, and Wisconsin no longer permit law enforcement to keep any of the forfeiture revenue.

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15. *Scigliano, supra* n.9.

16. U.S. Dep’t of Justice, *About the Asset Forfeiture Program*, <https://www.justice.gov/afms/about-asset-forfeiture-program-afp> (last visited April 4, 2021).

17. 18 U.S.C. § 981(e)(2); *see also* 21 U.S.C. § 881(e)(1)(A).

18. U.S. Dep’t of Justice, U.S. Dep’t of the Treasury, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies*, at 9 (July 2018), <https://www.justice.gov/criminal-afmls/file/794696/download>.

19. *Id.* at 13.

20. U.S. Dep’t of Justice, *FY2016 Equitable Sharing Payment of Cash and Sale Proceeds by Recipient Agency by State* (Feb. 1, 2017), <https://www.justice.gov/afp/fy2016-equitable-sharing-payments-cash-and-sale-proceeds-recipient-agency-state>.

21. *Id.*

22. *Id.*

23. *Id.*

Additionally, California, Connecticut, Iowa, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, and Vermont generally require a criminal conviction before assets can be seized, with some exceptions. It is important to note that other than Missouri, North Carolina, and Vermont, the states that generally require a criminal conviction to seize assets still permit law enforcement agencies to retain a percentage of the funds seized.

The United States Supreme Court has also issued one major decision regarding asset forfeiture since the previous task force report, *Timbs v. Indiana*.<sup>24</sup> In this decision, the Court found that forfeiture of an asset may violate the excessive fines clause of the 8th Amendment when it is “grossly disproportional to the gravity of the defendant’s offense.” This decision is unlikely to have a significant effect on the state’s asset forfeiture practices, as it still requires property owners to challenge the forfeiture in court, which may be cost-prohibitive for many individuals.

### III. Impacts of Asset Forfeiture

As stated previously, Washington only requires agencies to internally record the identity of the owner, a description of the property and its disposition, and the value of property.<sup>25</sup> There is no record of the crimes associated with the seizure, no location for where the property was seized, and no demographic data.<sup>26</sup> In addition, these records are not made readily available to the public and there are no penalties imposed for state agencies failing to record this minimal data.<sup>27</sup> With this lack of data, it is difficult for researchers to determine the magnitude of asset forfeiture’s effects on marginalized communities and law enforcement behavior.

National studies suggest that asset forfeiture does not improve public safety or the effectiveness of law enforcement. In a study across five states that collect data tying specific forfeitures to specific seizing agencies, one researcher found that an increase in asset forfeiture revenue led to a decreased number of violent crimes solved and only a slight increase in the number of property crimes solved.<sup>28</sup> The same study found no evidence to support the claim that increased asset forfeiture proceeds led to a decrease in illicit drug use.<sup>29</sup> Further, evidence suggests that asset forfeiture does not target drug kingpins or large scale criminal empires as proponents of the practice tout. In fact,

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24. 139 S. Ct. 682 (2019).

25. RCW 69.50.505(8)

26. Angela Erickson, Jennifer McDonald & Mindy Menjou, *Forfeiture Transparency & Accountability, State-by-State and Federal Report Cards* (Inst. For Justice, Nov. 3, 2020), <https://www.ij.org/report/forfeiture-transparency-accountability/?state=US-WA>.

27. *Id.*

28. Brian Kelly, *Does Forfeiture Work? Evidence from the States*, at 18 (Inst. for Justice, Feb. 21, 2021), <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf>.

29. *Id.* at 20.

the median currency forfeiture is small, averaging just \$1,276 nationally. In many states, the average is only a few hundred dollars.<sup>30</sup> Large volumes of cash are not being taken from criminal enterprises. Instead, small amounts are being taken in large volumes from low-income communities.<sup>31</sup>

Additionally, low-income people suffer greater harm by having their assets taken than their wealthy counterparts. When vehicles are seized, individuals' abilities to go to work and accomplish basic responsibilities are impacted. People often incur extra costs for necessary transportation. Cash seizures are also more likely than others to deny owners the financial means to fight forfeiture actions, whether by hiring an attorney or paying bonds.<sup>32</sup> Attorneys are not appointed to individuals fighting forfeiture actions. A conservative estimate for a private attorney in a relatively simple forfeiture case is around \$3000—more than double the national median currency forfeiture.<sup>33</sup> The median number of court days required in forfeiture cases is four, costing someone making minimum wage around \$232 to take that time off.<sup>34</sup> When faced with the large costs of getting representation and a lack of resources, many low income individuals opt to forego challenging the forfeiture.

Despite the lack of available data, some organizations have investigated the racial impacts of asset forfeiture and have found seizures are more common in communities of color than in white neighborhoods.<sup>35</sup> Though these results indicate that race plays a role in the implementation of asset forfeiture, they do not firmly establish a causal link between the financial incentives created by asset forfeiture and police activity in communities of color. Such a link would require much more expansive crime and demographic data and is hampered by the lack of transparency and record-keeping required for law enforcement in forfeiture matters.

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30. U.S. Dep't. of Justice, *About the Asset Forfeiture Program*, (Dec. 16, 2020), <https://www.justice.gov/afms/about-asset-forfeiture-program-afp>.

31. For example, from 2012-2017, law enforcement in Cook County, Illinois, conducted over 23,000 seizures totaling \$150 million in value. The median value of the seizures was only \$1049 and 75% of all seizures were cash. Many of these seizures, and most of the cash seizures of \$100 or less, were conducted in the poorest areas of Chicago, IL. C.J. Ciamala, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (Jun. 13, 2017), <https://reason.com/2017/06/13/poorneighborhoods-hit-hardest-by-asset>.

32. Knepper, *supra* note 1, at 154.

33. *Id.*

34. *Guilty Property: How Law Enforcement Takes \$1 Million in Cash Away from Innocent Philadelphians Every Year - and Gets Away with It*, ACLU of Pennsylvania, 8 (2015), [https://www.aclupa.org/sites/default/files/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](https://www.aclupa.org/sites/default/files/Guilty_Property_Report_-_FINAL.pdf).

35. See generally *Civil Asset Forfeiture A 5 Month Snapshot in New Jersey*, ACLU New Jersey, <https://www.aclu-nj.org/theissues/criminaljustice/civil-asset-forfeiture> (2018); *Civil Asset Forfeiture*, SOUTHERN POVERTY LAW CENTER (OCTOBER 2017), [https://www.splcenter.org/sites/default/files/com\\_policybrief\\_civil\\_asset\\_forfeiture\\_web.pdf/](https://www.splcenter.org/sites/default/files/com_policybrief_civil_asset_forfeiture_web.pdf/); Nathaniel Cary and Mike Ellis, *65% of Cash Seized by SC Police Comes from Black Men. Experts Blame Racism*, GREENVILLE NEWS (Jan. 27, 2019), <https://www.greenvilleonline.com/story/news/taken/2019/01/27/south-carolina-racism-blamed-civil-forfeiture-black-men-taken-exclusive-investigation/2459039002/>.



#### IV. Recommendations

Washington state has implemented no reforms of asset forfeiture over the last decade. The research group ultimately recommends eliminating civil asset forfeiture as a practice. Proponents of asset forfeiture state that asset forfeiture helps fight crime by taking resources from criminals and giving them to police.<sup>36</sup> As stated above, most individual forfeitures are of relatively low value, and seizing these small amounts is not likely to bring down drug traffickers and large criminal organizations. Additionally, with the lack of crime data reported with the forfeitures, it is difficult to prove what kind of effect forfeiture has on crime rates. However, recent data from New Mexico indicates that crime rates experienced no change as a result of abolishing civil asset forfeiture;<sup>37</sup> Short of eliminating civil asset forfeiture all together, the research group makes the following recommendations to the Task Force:

- Redirect any forfeiture revenue, whether state or federal, away from the seizing agencies to reduce trends of “policing for profit”;<sup>38</sup>
- Allow owners to petition for payment of their lawyers’ fees after a successful forfeiture challenge;<sup>39</sup>
- Increase forfeiture record-keeping requirements to include demographic data on the owners of the seized property and data of the specific putative crimes the owners are charged with. This information would allow researchers and advocates to better evaluate forfeiture programs and guard against disparate impacts.

#### V. Conclusion

Asset forfeiture practices in Washington state have remained unchanged for over a decade. Police seize people’s cars, homes, and most often, cash, then require individuals to weigh the value of their seized property against the exorbitant legal costs of getting it back. These police actions appear to target communities of color most frequently, but because seizing agencies are not required to record more than a few sparse details about forfeited property, it is difficult for researchers and activists to determine the pervasiveness of the problem. In addition, the purported goal of asset forfeiture is to prevent and reduce crime rates, but current research shows eliminating asset forfeiture has no impact on those rates.

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36. Knepper, *supra* note 1, at 51.

37. *Id.* at 5.

38. D.C., Maryland, Missouri, New Mexico, and North Carolina no longer allow the seizing agencies to directly spend the revenue they acquire through forfeiture. New Mexico specifically directs all funds acquired through criminal forfeiture to the state’s general fund. *See id.* at 12 and 31.

39. *Id.* at 51.

Action must be taken to change the state of asset forfeiture, a practice that has no demonstrated positive effects on the community and continues to disproportionately target and harm those most marginalized within it.

The inconsistent and, in many places, inadequate resources for public defense in Washington has a disproportionate racial impact because defender clients are disproportionately of color.

This observation is consistent with a recent article by a professor who concluded:

Regardless of race, higher public defender and support staff caseloads tend to be associated with worse case outcomes. In the case of pretrial detention, I find that high public defender and support staff caseloads exacerbate Black-White disparities. With respect to sentence length, I find evidence that high public defender caseloads exacerbate Latinx-White disparities and some evidence that they mitigate Black-White disparities. In sum, these results provide strong support for the view that the public defender funding crisis harms indigent defendants regardless of race and mixed evidence regarding its impact on racial disparities in the criminal justice system.<sup>1</sup>

The scope of the problem – the disproportionate impact stemming from inconsistent and inadequate funding – is enormous. In 2020, there were 161,343 cases filed in misdemeanor courts in Washington.<sup>2</sup> There were 31,867 criminal cases and 5,133 juvenile offender cases filed in superior courts.<sup>3</sup> Most of the people charged in these cases were represented by public defense counsel. The Washington Office of Public Defense reported, “It is estimated that in 2018 courts appointed public defense attorneys to represent approximately 95% of felony defendants, 54% of misdemeanor defendants, and almost 100% of juveniles.”<sup>4</sup>

As outlined in greater detail below, racial disparity permeates the criminal legal system. The Seattle Times reported, “Black people constitute 4% of Washington’s population but nearly 18% of the state’s roughly 16,000 inmates, 25% of those serving 15 years or more (and also those serving life without parole), and 27% of prisoners given extra time for so-called weapon enhancements.”<sup>5</sup> 30.9% of people in Washington’s prisons are of color.<sup>6</sup> Almost all of those people were represented by public defenders.

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1. Aaron Gottlieb, *Making Gideon Count? Public Defender Resources and Felony Case Outcomes for Black, White, and Latinx Individuals*, RACE & JUSTICE (2021), <https://journals.sagepub.com/doi/abs/10.1177/21533687211006456?journalCode=raja&>.

2. Caseloads of the Courts of Washington, Courts of Limited Jurisdiction, cases filed, 2020 Annual Report, at <https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=&fileID=rpt01> (last visited July 4, 2021).

3. Caseloads of the Courts of Washington, Superior Court Cases Filed by Type of Case - 2020 Annual Report, <https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=filyr>. (last visited July 4, 2021).

4. Office of Public Defense, *2019 Status Report on Public Defense in Washington State*, at 20 (July 2020), [https://www.opd.wa.gov/documents/00799-2020\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf).

5. Nina Shapiro, *Washington’s prisons may have hit pivotal moment as they eye deep cut in their population*, SEATTLE TIMES, Sept. 17, 2020, <https://www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial-injustice/>.

6. Washington Department of Corrections, Agency Fact Card (3/2021), <https://doc.wa.gov/docs/publications/reports/100-QA002d.pdf>.

## I. A Modest Proposal to Address “Justice By Geography”

One could argue that Washington has “justice by geography,”<sup>7</sup> in part because the resources provided to defenders from county to county and city to city are so different. While budgets alone do not determine the quality of public defense, the funding local governments provide can make a huge difference in the resources defenders have to represent their clients. In Washington in 2018, the per capita expenditure by counties for public defense ranged from \$1.71 to \$31.02.<sup>8</sup> In 2017, one city spent \$1.93 per capita on public defense.<sup>9</sup> It spent \$16,300 on 354 cases assigned to counsel.<sup>10</sup> That is \$46.04 per case. That shocking figure raises substantial questions about what kind of representation is being provided. Another city reported spending \$451,588 for 815 cases, or \$554.09 per case.<sup>11</sup> This variation cries out for review.

While the Washington State Bar Association Council on Public Defense has provided leadership on developing standards and issuing policy statements,<sup>12</sup> its volunteer committees are not in a position to evaluate the defender services in every county and every city, and neither is the Washington State Office of Public Defense (OPD), which has a staff of only 22 people to administer its budget and oversee contract services.<sup>13</sup> As a result, the mix of structures, with many local governments operating without either an organized defender office or a public defense administrator, results in a wide spectrum of quality of representation.

A stronger state Office of Public Defense, with authority to act as an ombuds office and with resources to provide to counties and cities that meet standards, would ameliorate those differences.

The Washington Supreme Court has rejected the idea that OPD is responsible for the counties’ failure to provide effective public defense. The Court wrote, “we cannot hold the State liable for the local government’s failure to comply with its statutory obligations.” *Davison v. State*, 196 Wn.2d 285, 298, 466 P.3d 231, 238 (2020), *as amended on denial of reconsideration* (Oct. 20, 2020). It stated:

While the State bears responsibility to enact a statutory scheme under which local

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7. This phrase is used by the current Director of the Washington Office of Public Defense, Larry Jefferson.

8. *2019 Status Report on Public Defense in Washington State*, OPD, 26 (July 2020), [https://www.opd.wa.gov/documents/00799-2020\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf).

9. *Id.* at page 96.

10. *Id.*

11. *Id.* at 91.

12. Washington State Bar Council on Public Defense, <https://www.wsba.org/connect-serve/committees-boards-other-groups/council-public-defense>.

13. Washington State Office of Public Defense Staff Directory, at <https://www.opd.wa.gov/contact-us/14-admin/24-directory>. OPD in 2019 provided funds to three cities to evaluate their public defense services. “Each jurisdiction was small in size, and evaluations focused on one or two contract attorneys providing primary public defense representation.” Washington State Office of Public Defense 2019 Status Report, at 10, [https://www.opd.wa.gov/documents/00799-2020\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf).

governments can adequately fund and administer a system of indigent public defense, it is not directly answerable for aggregated claims of ineffective assistance of counsel. Rather, to prevail on their claims against the State, the plaintiff class must show that the current statutory scheme systemically fails to provide local governments, across Washington, with the authority and means necessary to furnish constitutionally adequate indigent public defense services.

*Id.* at 289.

The Court acknowledged that “The State plainly has a duty to provide indigent public defense services—both our state and federal constitutions guarantee the accused the right to counsel. Wash. Const. art. I, § 22; U.S. CONST. amend. VI.” *Davison*, 196 Wn.2d at 293. But, the Court wrote, “the legislature has not given authority to any statewide agency to provide oversight on the administration of local indigent public defense services. It delegated that responsibility to counties and cities by requiring them to adopt local standards safeguarding the right to counsel.” *Id.* at 297–98.

The Court noted: “Without commenting on the adequacy of funding, we recognize that the legislature has provided local governments with taxing authority that can be used to fund public defense services.” *Id.* at 300.

The Court said that OPD does not have authority to remedy public defense shortcomings even if it knows about them:

The plaintiffs claim that OPD knows about an ongoing, systemic violation of the right to counsel in Grays Harbor County. *Id.* at 29-33. Even if true, OPD's knowledge or awareness does not trigger the asserted—yet amorphous—duty to act. The legislature has not granted OPD superauthority to sweep in and remediate shortcomings in local governmental functions when it has knowledge a particular county is inadequately providing trial level indigent public defense services.

*Id.* at 301.

The *Davison* opinion makes clear that to improve public defense across the state, the Legislature should provide OPD both the authority and the funding to be responsible for responding to local governments' failures to implement the standards that the WSBA has promulgated and the Court has approved.

## II. The Right to Counsel Is a Racial Justice Issue

Following the murder of George Floyd, the Washington Supreme Court issued a letter to the judiciary and the legal community, in which it acknowledged “the overrepresentation of [B]lack Americans in every stage of our criminal and juvenile justice systems.”<sup>14</sup> The Court urged

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14. The Supreme Court of the State of Washington, Letter to the Judiciary and the Legal Community (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community>

members of the legal community to recognize the responsibility they play in perpetuating the systemic oppression of Black Americans and called on them to ask themselves “how we may work together to eradicate racism.”<sup>15</sup> In response, the Washington State Bar Association’s Council on Public Defense recognized that its clients are “disproportionately persons of color,” and that public defenders, prosecutors, and judges amplify this racial disproportionality when they fail to recognize the role race plays in the courtroom.<sup>16</sup>

The right to counsel is a fundamental, constitutional right guaranteed by both the state and federal constitutions.<sup>17</sup> It is not enough for public defenders<sup>18</sup> simply to acknowledge the role they play in perpetuating the systemic racism that permeates the criminal legal system. It is imperative that public defenders also be properly trained and supervised and have access to the resources necessary to represent their clients effectively and competently.<sup>19</sup> Not having access to counsel, or having counsel that is inadequate, does not affect the population equally. Because public defenders overwhelmingly represent people of color, if they are not adequately funded or trained it is non-white communities that are most negatively affected. As a recent report on social work in public defense noted:

The quality of indigent defense has a direct impact on racial disparities in the criminal justice system. The criminal justice system both highlights and exacerbates socioeconomic racial disparities. Black or African American people make up a disproportionate share of the impoverished population in the country, largely because of systemic discrimination in education, employment, and other areas of society.... Further, Black or African American people are more likely to become involved in the criminal justice system because of several factors including over-policing and pervasive poverty and lack of economic opportunity. This has a cyclical effect because economic barriers for those with criminal justice records often stand between incarceration and successful reentry. Because public defenders’ clients are impoverished and often disproportionately Black or African American, they face tremendous adversities. There should be high expectations for quality defense to decrease the racial disparities in the criminal justice system. Further, multidisciplinary teams, including social workers, allow public defense providers increased opportunities to support clients’ needs based on the external

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[%20SIGNED%20060420.pdf](#).

15. *Id.*

16. Response by the Washington State Bar Association’s Council on Public Defense to the Supreme Court’s Call to Action after the Death of George Floyd (June 30, 2020), [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/statement-of-the-council-on-public-defense-responding-to-supreme-court-as-approved-by-the-cpd.pdf?sfvrsn=bf2409f1\\_0](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/statement-of-the-council-on-public-defense-responding-to-supreme-court-as-approved-by-the-cpd.pdf?sfvrsn=bf2409f1_0).

17. WASH. CONST. art. 1, § 22; U.S. CONST. amend. VI

18. In this paper, *public defenders* include lawyers and staff in organized government offices, non-profit corporations, assigned counsel and conflict counsel panels, and contract attorneys who provide representation to indigent clients in cases involving potential loss of liberty.

19. See generally *Standards for Indigent Defense Services*, Washington State Bar Association (2011), [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/standards-for-indigent-def-services-boh-apprv-9-22-11.pdf?sfvrsn=dae43cf1\\_2](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/standards-for-indigent-def-services-boh-apprv-9-22-11.pdf?sfvrsn=dae43cf1_2).

economic challenges they face.<sup>20</sup>

Although Washington has examples of outstanding defender services with dedicated staff, in many places, defenders are operating without enough staff and resources to provide consistent quality representation, which contributes to racial inequity.<sup>21</sup> The COVID-19 pandemic has strained resources further, as cases are remaining open for longer periods of time, jury trials are backing up, and prosecutors are filing many cases that have been on hold.<sup>22</sup>

### **III. Black, Indigenous, and Other People of Color Are Disproportionately Involved in the Criminal Legal System.**

As outlined in the examples below, in Washington, Black, indigenous, and other people of color are disproportionately represented in nearly every stage of the criminal legal system.

Non-white individuals are often negatively and disproportionately affected before even coming into contact with the judicial system. For example, Native Americans are searched by the Washington State Patrol at a rate more than five times that of White individuals; Black individuals are twice as likely to be searched.<sup>23</sup> Latina/o and Pacific Islander individuals are 80% more likely to be searched than white individuals.<sup>24</sup> Many of the searches of Native Americans occur on the edge of reservations. The two highest concentrated areas of searches of Native Americans by the Washington State Patrol are on U.S. 97 where it enters the Colville Reservation and 130 miles

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20. Andreea Mateir, et al., *Assessing a Social Worker Model of Public Defense*, URBAN INSTITUTE (Mar. 12, 2021), <https://www.urban.org/research/publication/assessing-social-worker-model-public-defense>.

21. Justice Chambers wrote for the Washington Supreme Court:

While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance. Public funds for appointed counsel are sometimes woefully inadequate, and public contracts have imposed statistically impossible case loads on public defenders and require that the costs of experts, investigators, and conflict counsel must come out of the defenders' own already inadequate compensation.

*State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956, 960 (2010).

22. The Washington State Bar Association Council on Public Defense noted: COVID-19 and the restrictions imposed to limit exposure to the virus have dramatically altered how public defense attorneys can hold confidential meetings with clients, go to court safely, investigate, and prepare cases.... As courts begin to resume hearings and trials, and as prosecutors start to file a backlog of cases, public defense attorneys face an increased volume of cases and an increased complexity in their work.

Advisory Notice by WSBA Council on Public Defense, Implementation of the Standards for Indigent Defense During the Coronavirus Emergency, [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/covid-standards-workload-statement-9-24-2020.pdf?sfvrsn=ae880bf1\\_2](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/covid-standards-workload-statement-9-24-2020.pdf?sfvrsn=ae880bf1_2).

23. Jason Busch & Joy Borkholder, *Driving While Indian? You're More Likely to Be Searched by the Washington State Patrol*, INVESTIGATEWEST (Dec. 19, 2019), <https://www.invw.org/2019/12/19/driving-while-indian/>.

24. *Id.*

south where it enters the Yakima Reservation.<sup>25</sup> While White individuals are the least likely to be searched, they are the most likely to be carrying drugs or other contraband when they are searched.<sup>26</sup>

Additionally, people of color are disproportionately arrested, booked into jail, and charged.<sup>27</sup> In Pierce County, while white people constitute 70.8% of the county population, they constitute only 67.6% of the people arrested, 56% of the people booked, and 58% of people charged with a crime.<sup>28</sup> In contrast, while Black people make up 5.6% of the county population, they constitute 17.4% of the people arrested, 24% of the people booked, and 25% of people charged with a crime.<sup>29</sup> Asian/Pacific Islander people represent 4.7% of the county population, but account for 5.0% of the people arrested, 6.0% of the people booked, and 6.0% of the people charged.<sup>30</sup> Additionally, American Indian/Alaskan Native people make up 1.0% of the county population, yet 1.3% of the people arrested, 3.0% of the people booked, and 3.0% of the people charged.<sup>31</sup>

Black and American Indian/Alaska Native individuals are also disproportionately represented in the Washington State prison system.<sup>32</sup> Black individuals represent 4.4% of the state population,<sup>33</sup> but represent 12.1% of inmates in Washington State prisons.<sup>34</sup> Similarly, while American Indian/Alaska Native represent 1.9% of the state population,<sup>35</sup> they represent 4.3% of the state prison population.<sup>36</sup> Statewide Hispanic/Latino population is reported at 13% and the prisons report a Hispanic population of 15.4%.<sup>37</sup>

Racial disparities are also present in juvenile detention facilities.<sup>38</sup> While Black youth represent

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25. *Id.*

26. *Id.*

27. *Pierce County Criminal Justice Review of Policies and Practices*, 16-18 (2020), [https://www.piercecountywa.gov/DocumentCenter/View/94647/Digital\\_Report\\_Criminal\\_Justice\\_Review\\_Council\\_Final](https://www.piercecountywa.gov/DocumentCenter/View/94647/Digital_Report_Criminal_Justice_Review_Council_Final).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See Agency Fact Card*, WASH. STATE DEP'T OF CORR. (Dec. 2020), <https://www.doc.wa.gov/docs/publications/reports/100-QA002.pdf>; *QuickFacts: Washington*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/WA> (last visited Mar. 31, 2021).

33. *QuickFacts: Washington*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/WA> (last visited July 4, 2021).

34. *Agency Fact Card*, *supra* note 32.

35. *QuickFacts*, *supra*.

36. *Agency Fact Card*, *supra* note 32.

37. *Quick facts*, *supra*, and *Agency Fact Card*, *supra*.

38. *See* Amanda B. Gilman & Rachel Sanford, *Washington State Juvenile Detention 2019 Annual Report*, WASHINGTON STATE CENTER FOR COURT RESEARCH, at 11 (2021); *Under 18 child population by race/ethnicity in Washington*, KIDS COUNT DATA CENTER, <https://datacenter.kidscount.org/data/tables/4490-under-18-child->



4% of the state youth population,<sup>39</sup> they represent 14.9% of juvenile detention admissions.<sup>40</sup> American Indian/Alaska Native youth represent 1% of the state population,<sup>41</sup> but they represent 4.6% of the juvenile detention admissions.<sup>42</sup> White youth represent 54% of the youth population,<sup>43</sup> but only 47.7% of the juvenile detention admissions.<sup>44</sup> Asian American/Pacific Islanders represent 9% of the state youth population,<sup>45</sup> but 3.2% of the juvenile detention admissions.<sup>46</sup> While people who identify as Hispanic represent 22% of the youth population,<sup>47</sup> people who identify as Latina/o/Hispanic represent 28.3% of the juvenile detention admissions.<sup>48</sup>

Further, Black and Native American individuals are disproportionately given long or life sentences, whereas people who identify as White, Latina/o, or Asian were underrepresented among those who receive long or life sentences in Washington.<sup>49</sup> One report found that while 1.2% of the state population identifies as Native American, Native Americans make up 2.4% of offenders receiving long sentences, 2.5% of offenders serving very long sentences, and 1.9% of offenders serving life sentences.<sup>50</sup> Additionally, the same report found that while 3.5% of the state population identifies as Black, Black people make up 19% of those sentenced to prison and 28% of those sentenced to life in prison.<sup>51</sup>

#### IV. The Criminal Legal System Has a Negative Impact on People's Lives

Involvement with the criminal legal system has significantly negative impacts on one's life.<sup>52</sup>

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[population-by-race-ethnicity#detailed/2/any/false/1729/3,724,142,2,4533,71,1,13/10512,10513](#) (last visited March 31, 2021).

39. *Under 18 child population, supra.*

40. Gilman & Sanford, *supra*.

41. *Under 18 child population, supra.*

42. Gilman & Sanford, *supra*.

43. *Under 18 child population, supra.*

44. Gilman & Sanford, *supra*.

45. *Under 18 child population, supra.*

46. Gilman & Sanford, *supra*. But the aggregation of Asians and Pacific Islanders in one category likely obscures the disproportionate representation of Pacific Islanders in the criminal legal system. See Cathy Hu & Sino Esthappan, *Asian Americans and Pacific Islanders, a missing minority in criminal justice data*, URBAN WIRE, May 23, 2017, <https://www.urban.org/urban-wire/asian-americans-and-pacific-islanders-missing-minority-criminal-justice-data>.

47. *Under 18 child population, supra* note 26.

48. Gilman & Sanford, *supra* note 26.

49. Katherine Beckett & Heather D. Evans, *About time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, at 28 (ACLU-WA 2020).

50. *Id.*

51. *Id.*

52. See generally *Words From Prison: The Collateral Consequences of Incarceration*, ACLU, <https://www.aclu.org/other/words-prison-collateral-consequences-incarceration> (last visited Apr. 15, 2021); Terry-Ann Craigie, et al., *Conviction, Imprisonment, and Lost Earning: How Involvement with the Criminal Justice System*

Because non-white people are disproportionately represented in all stages of the criminal legal system, they are disproportionately negatively affected.<sup>53</sup>

For example, research shows that people who do not have the economic resources to post bail or bond and therefore remain incarcerated experience worse outcomes than those who are released on their personal recognizance.<sup>54</sup> Those held pretrial are more likely to be convicted, less likely to have a trial, and more likely to receive a harsher sentence if convicted.<sup>55</sup> Additionally, remaining in jail pretrial has significant financial impacts.<sup>56</sup> If incarcerated, people are unable to work and risk losing their jobs and potentially even their housing; only a couple of days in jail can trigger these negative impacts.<sup>57</sup>

Although Washington court rules presume release,<sup>58</sup> a majority of the state jail population is being held pretrial, meaning that they have not yet been convicted of the crime for which they have been charged.<sup>59</sup> For example, in King County, the average jail population is 77.7% pretrial defendants; in Pierce County the average jail population is 75.5% pretrial defendants; in Thurston County the average jail population is 57.3% pretrial defendants; and in Whatcom county the average jail population is 59.3% pretrial defendants.<sup>60</sup>

## V. Recognizing and Responding to Racial Bias in the Criminal Legal System

It is impossible to discuss the racial disparity in the criminal legal system without acknowledging the racial bias of legal actors.

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*Deepens Inequality*, BRENNAN CENTER FOR JUSTICE (Sept. 15, 2020), [https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport\\_pdf.pdf](https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf); Lucius Coulourte & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POLICY INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>; Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, CENTER FOR AMERICAN PROGRESS (April 14, 2021), <https://www.americanprogress.org/issues/poverty/news/2021/04/14/498053/preventing-removing-barriers-housing-security-people-criminal-convictions/>; *Voting Rights*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/issues/voting-rights/> (last visited Apr. 15, 2021).

53. The Executive Director of The Bronx Defender, Justine Olderman, recently wrote: “In fact, if our work has taught us anything, it is that the criminal legal system, and its siblings - the deportation, family regulation, and eviction legal systems - are much more effective at inflicting harm against low-income communities of color than delivering justice.” Email entitled “Why We Must Continue to Fight for Racial Justice,” May 4, 2021.

54. Jaime Hawk, *No Money, No Freedom: The Need for Bail Reform*, ACLU-WA, at 5 (2016).

55. *Id.* at 6.

56. *Id.* at 7-8.

57. *See Pretrial Justice Institute*, 3DAYS COUNT, <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> (last visited Apr. 2, 2021).

58. *See* CrR 3.2 and CrRLJ 3.2.

59. Intisar Surur & Andrea Valdez, *Pretrial Reform Task Force Final Recommendations Report*, 19 (2019), <https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf>.

60. *Id.*

### a. Addressing Bias in Public Defense Offices

The Washington State Bar Association has stated that “the paramount obligation of criminal defense counsel is to provide conscientious, ardent, and quality representation to their clients at all stages of the criminal process.”<sup>61</sup> But how ardent, or zealous, a lawyer is can be affected by implicit bias. Implicit bias is “unintentional and unconscious racial biases that affect decisions and behaviors.”<sup>62</sup> Implicit bias can “permeate the work of criminal justice professionals,” can affect defender caseloads, and can even influence how defendants are viewed in court.<sup>63</sup> For example, one study reported that white clients typically have more family involvement in their cases and less intergenerational poverty or economic segregation.<sup>64</sup> At times, having family or friends in the court room during proceedings can lead to more favorable exercises of discretion.<sup>65</sup> Black defendants often come from less favorable economic situations, which can translate to friend and family involvement that the court may not deem as “favorable” to the defendant’s recovery, or the defendant may lack friend and family connections.<sup>66</sup> In some instances, this economic disparity translates into having “demographic characteristics that engender sympathy from others” resulting in racial discrimination and disadvantage in the courtroom.<sup>67</sup> To counter this bias, the first step in creating a fair and equitable system of defense is implementing implicit bias training.

The American Bar Association (ABA) offers resources for public defenders, prosecutors, and judges that educate them on implicit bias and its impact on the legal system.<sup>68</sup> The ABA Section of Civil Rights and Social Justice proposed a resolution to foster and expand the association’s continued support for increasing implicit bias awareness and education for lawyers, judges, court personnel, and other professionals.<sup>69</sup> The ABA adopted the resolution on August 3-4, 2020,<sup>70</sup> urging states to require judges, attorneys, and court personnel to undergo periodic training to address implicit bias-ingrained beliefs about race, gender, religion, or sexual orientation that can result in excessive charges, ineffective assistance of counsel, or wrongful prosecution.<sup>71</sup> Required

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61. *Performance Guidelines for Criminal Defense Representation*, WSBA, 2 (2011), [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1\\_2](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1_2).

62. Nazgol Ghandnoosh, *How Defense Attorneys Can Eliminate Racial Disparities in Criminal Justice*, NACDL The Champion (June 2018), <https://www.nacdl.org/Article/June2018-HowDefenseAttorneysCanEliminat>.

63. *Id.*

64. Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, YALE L.J., 2236, 2240 (2013).

65. *Id.* at 2256.

66. *Id.* at 2240.

67. *Id.*

68. *Implicit Bias Videos and Toolkit*, ABA, <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> (last visited Apr. 25, 2021).

69. *See* ABA Resolution 116G, ABA, <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/116g-annual-2020.pdf> (last visited Apr. 27, 2021).

70. *Id.* at 1.

71. Melissa Heelan Stanzione, *ABA Group Urges Implicit Bias Training for Judges, Lawyers*, BLOOMBERG LAW (July 28, 2020), <https://news.bloomberglaw.com/us-law-week/proposal-seeks-implicit-bias-training-for-judges->

training can mitigate the negative impacts of implicit bias.

With more training requirements comes the opportunity to acknowledge and address how implicit bias affects all aspects of the legal field, allowing lawyers, judges, and others to become more aware of their implicit bias. As implicit biases go unchecked, the more unfair the legal system becomes, “creating the illusion that remedies may be too costly or too unattainable to achieve.”<sup>72</sup>

One first step in addressing implicit racial bias would be to implement the ABA’s suggested training. “The Diversity and Inclusion 360 Commission, a one-year presidential initiative established by past ABA President Paulette Brown, explored the existence of implicit bias and what can be done to combat it through a series of videos specifically targeting key players in the judicial system: judges, prosecutors and public defenders.”<sup>73</sup> The Washington State Bar Association’s Performance Guidelines for Juvenile Defense Representation Section 2.2. (j) provides: “Counsel should be knowledgeable about where racial disparities exist in the juvenile justice system, how racial bias affects youth of color, and how racial bias can affect counsel’s practice.”<sup>74</sup>

### **b. Alternatives to Incarceration**

Another way to address implicit bias within the criminal legal system is to develop punishment alternatives that keep people out of jail, and defenders can lead such efforts.

Moving away from harsh sentencing and criminalization of “victimless crimes”<sup>75</sup> is to develop alternatives to traditional prosecution. The Defender Association in Seattle has been a pioneer in racial justice. In 1999, The Defender Association received a \$146,000 grant from the U.S. Department of Justice for its Racial Disparity Project (RDP).<sup>76</sup> The RDP aimed to reduce racial disparity and racial bias in the criminal justice system.<sup>77</sup> To meet this objective, the RDP identified key strategies, including training of defenders and other justice system professionals about ways to raise and address these issues.<sup>78</sup> The RDP selected cases that have racial implications and then used those cases as opportunities to educate judges, the public, and the office about the role of race

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[lawyers.](#)

72. *Id.*

73. *Implicit Bias Videos and Toolkit*, ABA, <https://www.americanbar.org/groups/diversity/resources/implicit-bias/> (last visited Apr. 25, 2021).

74. Washington State Bar Association’s Performance Guidelines for Juvenile Defense (2017), [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1\\_6](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1_6).

75. *See, e.g.*, Robert C. Boruchowitz, Victimless Crimes: A Proposal to Free the Courts, 57 JUDICATURE 69 (1973). <https://digitalcommons.law.seattleu.edu/faculty/668>.

76. Kim Taylor-Thompson, *Taking it to the Streets*, N.Y.U. REV. L. & SOC. CHANGE, 153, 180 (2004).

77. *Id.* at 180.

78. *Id.*

in the system.<sup>79</sup>

The RDP recognized the racial disparity involved in the decisions to arrest and prosecute.<sup>80</sup> The first issue the RDP tackled was the prosecution of people for the misdemeanor of Driving While License Suspended in the third degree (DWLS 3).<sup>81</sup> Overwhelmingly, those cases resulted from not paying fines for minor traffic offenses. The defenders recognized that enforcement of this law had a disparate impact on low-income communities of color.<sup>82</sup> Although African Americans represented approximately 9% of the city's drivers, African American drivers received 16.8% of the traffic citations in 1999. Of these cases, roughly 20% involved the local impoundment law that allowed police to take the cars of people stopped for DWLS 3.<sup>83</sup> The Defender Association representatives met with judges and the City Attorney and developed a re-licensing program.<sup>84</sup> The Defender Association helped to secure \$300,000 from the City Council to fund what became known as the Revenue Recovery Program in the municipal court.<sup>85</sup> The funds enabled people to take advantage of time payment arrangements.<sup>86</sup>

The Defender's Racial Disparity Project also spearheaded development of LEAD, originally Law Enforcement Assisted Diversion, now known as Let Everyone Advance with Dignity, designed as a post-arrest/pre-bookings diversion program that allows officers to redirect low-level offenders engaged in street-level drug possession or sales or sex work to community-based services instead of jail and prosecution.<sup>87</sup> The Public Defender Association<sup>88</sup> staff were intimately involved in the design and implementation of LEAD in Seattle-King County.<sup>89</sup> These efforts have been found to challenge harmful and biased justice practices and be successful at effectuating change.<sup>90</sup> The LEAD program has been replicated across the country, including in Santa Fe and Albany, and other jurisdictions are considering it.<sup>91</sup>

Public Defenders can recognize systemic problems stemming from bias and lead efforts to resolve

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79. *Id.*

80. *Id.* at 183.

81. *Id.* at 184.

82. *Id.*

83. *Id.* at 184.

84. *Id.* at 188.

85. *Id.*

86. *Id.*

87. *LEAD*, Public Defender Association, <http://www.defender.org/projects/lead> (last visited April 15, 2021).

88. The Public Defender Association (PDA) is the successor non-profit to The Defender Association, which was incorporated into King County's Department of Public Defense. "PDA has preserved its original mission of policy reform and working with community partners to end inequities in the justice system." See Public Defender Association website at <http://www.defender.org/about>. (Last visited July 4, 2021.)

89. *LEAD website, supra*.

90. Ghandnoosh, *supra* note 49.

91. *LEAD, supra* note 77.

them. As the WSBA Performance Guidelines for Juvenile Defense Representation emphasize:

Public defense counsel who have a significant juvenile court practice are in a unique position to identify and challenge any harmful or unlawful conditions and systemic issues adversely affecting both their clients and other juveniles....

The same analysis applies to adult cases. And as Silicon Valley De-Bug, a community based organization in California, has demonstrated, organized public defense working with community organizations can have systemic impact well beyond individual cases.<sup>92</sup> The power of the community can also be leveraged to change policies to help ensure that public defenders are given the budgetary resources to provide just defense for indigent clients.<sup>93</sup>

## VI. Recommendations

The following are recommended for consideration by the Recommendations Working Group of Task Force 2.0.

Because public defenders represent most people charged with crimes and because people of color are disproportionately charged with crimes, when the defenders do not have adequate resources, non-white communities are disproportionately affected. To maintain and increase effective representation, we offer these recommendations: (1) engage in conversation regarding the implicit racial bias present in the criminal legal system and provide implicit bias training, and (2) increase the authority of and (3) funding for the Washington Office of Public Defense.

### a. Implicit Racial Bias Dialogue and Training

Implicit racial bias is visible in the way law enforcement officers interact with people of color,<sup>94</sup> the way judges make decisions,<sup>95</sup> the way juries operate,<sup>96</sup> and even the way public defenders work

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92. *About*, PARTICIPATORY DEFENSE, <https://www.participatorydefense.org/about> (last visited July 4, 2021).

93. *Id.*

94. For example, in 2020 Black people were 28% of those killed by police, while representing only 13% of the population. *Mapping Police Violence*, <https://mappingpoliceviolence.org/> (last visited Apr. 15, 2021). See also Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>.

95. For example, for those who are Black or Latino, judges are likely to set bail twice as high as the average bail set for a white person. *Freedom Should be Free*, THE BAIL PROJECT, 9 (2020), [https://bailproject.org/wp-content/uploads/2020/12/the\\_bail\\_project\\_annual\\_report\\_2020\\_5x8\\_Portrait\\_50pp\\_v5\\_WEB.pdf](https://bailproject.org/wp-content/uploads/2020/12/the_bail_project_annual_report_2020_5x8_Portrait_50pp_v5_WEB.pdf). See also Jerry Kang, et al., *Implicit Bias in the Courtroom*, UCLA L. REV. 1126, 1146-50 (2012), <https://law.ucla.edu/sites/default/files/PDFs/Academics/%2BwWQYDRt.pdf>; George S. Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission 52-67 (1997).

96. *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326, 335 (2013) (addressing race discrimination in jury selection, acknowledging “we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them”); see also GR 37 (an objective observer is “aware that implicit, institutional, and unconscious bias...have all contributed to the unfair exclusion of jurors.”); *State v.*

with their clients.<sup>97</sup> To reduce their own implicit bias, people must be aware of their own bias and the potential that bias has on the way they function within the criminal legal system.<sup>98</sup> By taking the time to recognize and engage in conversation about the implicit bias in the court room, lawyers can shed light on an issue that has always existed, but has largely been ignored.<sup>99</sup>

Often attorneys become so overwhelmed by their responsibilities and caseloads that it can be difficult to begin and sustain important conversations about race. The more lawyers speak about the issue the more they can understand bias and develop alternatives to their practice and to the legal system within which they operate. The Washington Office of Public Defense offers a wide array of resources for defenders to use in improving advocacy for their clients, including materials on bias.<sup>100</sup>

### **b. Increase the Role of The Office of Public Defense**

There is no state-wide independent body with authority to review public defense and implement changes. As the *Davison* Court pointed out, it is up to local governments to determine whether their public defense counsel are complying with the standards developed by the Washington State Bar Association.

Despite the teaching of *A.N.J.*, *supra*, and the Supreme Court’s adoption of standards for public defense, claims of ineffective assistance of counsel persist in Washington. For example, in Asotin County, after being advised to plead guilty to two felony charges, a formerly incarcerated person claimed the public defender who was appointed to him was not actually licensed in the state of Washington, denying his right to counsel.<sup>101</sup> An Idaho-licensed attorney who was never admitted to the Washington Bar was hired by the county to represent public defense clients on a contract basis.<sup>102</sup> Two other persons have petitions for review pending in the Washington Supreme Court claiming that failure to provide a Washington-licensed lawyer violated their Sixth Amendment right to effective assistance of counsel.<sup>103</sup>

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*Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467, 481 (2018) (recognizing *Batson*’s deficiencies and the need to adopt a new framework, holding that “trial courts must ask if an objective observer could view race as a factor in the use of preemptory challenge”).

97. Song Richardson & Philip A. Goff, *Implicit Racial Bias in Public Defender Triage*, YALE L.J., 2626, 2635-41 (2013), <https://core.ac.uk/download/pdf/157779464.pdf>.

98. *Id.* at 2645-46. See also Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, LEGIS. PUB. POL’Y., 1000, 1019-22 (2013), <https://www.nyujlpp.org/wp-content/uploads/2014/01/Rapping-Implicitly-Unjust-16nyujlpp999.pdf>; Letter from the Supreme Court, *supra* note 1 (“We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions.”).

99. Rapping, *supra* at 1022-42.

100. Office of Public Defense, *Using Data to Strengthen Disproportionality Advocacy*, <https://www.opd.wa.gov/index.php/program/trial-defense/12-pd/223> (last visited May 1, 2021).

101. Debra Cassens Weiss, *Former inmate’s suit says appointed lawyer was ineffective and unlicensed in this state*, ABA JOURNAL (Aug. 31, 2020), <https://www.abajournal.com/news/article/inmates-suit-says-appointed-lawyer-was-ineffective-and-unlicensed-in-the-state>.

102. *Id.*

103. *Matter of Ayerst*, 486 P.3d 943 (Wash. Ct. App. 2021), petition for review pending; *Matter of Lewis*, 37284-

The Court of Appeals reversed a Grays Harbor County juvenile conviction because of ineffective assistance of counsel.<sup>104</sup> The Court held that “counsel's performance was deficient in preparing and presenting the diminished capacity defense.”<sup>105</sup> In *Davison, supra*, also involving public defense in Grays Harbor County Juvenile Court, a class action alleged systemic ineffective assistance of counsel.<sup>106</sup> Among the allegations were that a defender did not object to a 15-year-old serving “a sentence for probation violations that was four times the length allowed by statute” or to an 11-year-old spending two months in a juvenile detention center awaiting a capacity hearing, also in violation of state law.<sup>107</sup> The Supreme Court wrote that if and when ongoing and systemic violations of the right to counsel occur at an individual county level, the state does not have a duty or a statutory authority to intervene.<sup>108</sup> In light of that decision, the need is clear to provide authority for state action to correct systemic deficiencies of counsel.

Other states have independent bodies of review. For example, Massachusetts has The Committee for Public Counsel Services (CPCS), which oversees the provision of legal representation to all indigent persons in criminal and civil cases, as well as administrative proceedings.<sup>109</sup> The CPCS sets division standards, such as caseload limits,<sup>110</sup> and appoints a chief counsel.<sup>111</sup> In order to receive assignments, attorneys must meet certain requirements and must be trained and certified accordingly.<sup>112</sup> Within 12-24 months of certification, a performance evaluation of the attorney’s conduct will be completed.<sup>113</sup> The attorney will be certified for up to five years, at which point

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7-III, 2021 WL 1750935 (Wash. Ct. App. May 4, 2021), unpublished opinion, petition for review pending.

104. *State v. K.A.B.*, 14 Wn. App. 2d 677, 716, 475 P.3d 216, 236 (2020).

105. *Id.*

106. *Davison v. State*, 196 Wn.2d 285, 290, 466 P.3d 231 (2020).

107. *Id.*

108. *Id.* at 301-02.

109. The CPCS is comprised of 15 members. Two members are appointed by the Governor; two members are appointed by the president of the senate; two members are appointed by the speaker of the house of representatives. Nine members must be appointed by the justices of the supreme judicial court. Of those nine, one must have criminal appellate experience; one must have a background in public administration and public finance; and one must be a current or former dean of faculty member of a law school. No member can be a serving judge; an elected state, county, or local official; a district attorney; a state or local law enforcement official; or a public defender employed by the state. MASS. GEN. LAWS ch. 211D, § 1.

110. MASS. GEN. LAWS ch. 211D, § 9.

111. MASS. GEN. LAWS ch. 211D, § 13.

112. For example, to represent juveniles in delinquency proceedings, an attorney must: apply for admission into a county bar advocate program; be accepted onto the panel of attorneys of a county bar advocate program; complete a required training program to represent adults in criminal matters in the district court; provide at least one year of high-quality trial advocacy on behalf of adults charged with criminal offenses in district court; take eight hours of approved juvenile-specific training; demonstrate a commitment to juvenile defense; and demonstrate a familiarity with the specifics of juvenile justice. *Assigned Counsel Manual Policies and Procedures*, Committee for Public Counsel Services, 3.10 (Jan. 1, 2019), <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>.

113. *Id.* at 3.11.



they must fulfill additional training and education requirements to recertify.<sup>114</sup> Once an assignment has been accepted, attorneys must then comply with certain performance requirements.<sup>115</sup> The CPCS also monitors and evaluates attorney compliance with these standards.<sup>116</sup>

The Michigan Indigent Defense Commission (MIDC) was created to establish minimum standards for the delivery of indigent criminal defense services providing effective assistance of counsel to people throughout the state.<sup>117</sup> MIDC evaluates compliance with these standards in part through court watching.<sup>118</sup> Regional managers observe criminal docket proceedings in every trial court and then provide information regarding compliance, taking into consideration things such as the availability of private space for attorneys to meet with their clients confidentially and the presence of counsel during all critical proceedings.<sup>119</sup>

The Washington State Office of Public Defense (OPD) exists "to implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state."<sup>120</sup> It would make sense to expand OPD's statutory authority to make more clear that it has a role to monitor city and county public defense services and to address deficiencies, including the failure of public defense counsel to comply with the court rule-imposed standards. OPD should have additional staff to implement that role.

### c. Increase Funding

While dollars alone do not determine the quality of a public defense program, budgets make a difference in the ability of defenders to have the resources they need. In 2018, Asotin County spent \$14.39 per capita on public defense.<sup>121</sup> Grays Harbor County spent \$18.23.<sup>122</sup> King County, which has been recognized nationally as a leader in public defense,<sup>123</sup> spent \$25.92.<sup>124</sup> King County has an organized county government-based defender office that grew out of a non-profit defender office that began in 1969 with Model Cities funding.<sup>125</sup> The non-profit has continued as The Public

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114. *Id.*

115. *Id.*

116. MASS. GEN. LAWS ch. 211D, § 10.

117. MICH. COMP. LAWS § 780.985.

118. *2019 Impact Report*, Michigan Indigent Defense Commission, 18 (June 2020), <https://michiganidc.gov/wp-content/uploads/2020/06/2019-Annual-Impact-Report.pdf>.

119. *Id.*

120. WASH. REV. CODE. § 2.70.005 (2008).

121. *2019 Status Report on Public Defense in Washington State*, OPD, 26 (July 2020), [https://www.opd.wa.gov/documents/00799-2020\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00799-2020_StatusReport.pdf).

122. *Id.* at 38.

123. Robert C. Boruchowitz, *Caseload limits a win for public defenders, clients-and justice*, THE SEATTLE TIMES (July 18, 2012), <https://www.seattletimes.com/opinion/caseload-limits-a-win-for-public-defenders-clients-8212-and-justice/>.

124. *2019 Status Report*, *supra* at 41.

125. *About*, Public Defender Association, <http://www.defender.org/about> (last visited Apr, 4, 2021).

Defender Association, which states that from its earliest days as The Defender Association, it “practiced a client-centered approach to indigent defense and was a pioneer in ‘community-oriented defense,’ continuously identifying and working to address the dynamics with which clients were struggling, both individually and systemically. The Racial Disparity Project emerged from that tradition.”<sup>126</sup>

King County’s current Department of Public Defense “works to address racial disproportionality in the criminal legal system, the collateral consequences of system involvement, and other structural and systemic issues that undermine the rights of our clients.”<sup>127</sup> The Department has a policy team of four special counsel who work on a wide range of systemic issues.<sup>128</sup> King County is the most populous county in the state and has a median income of \$94,974.<sup>129</sup>

The median income in Asotin County is \$53,715.<sup>130</sup> The County uses contract attorneys without central supervision to provide public defense.<sup>131</sup> The Grays Harbor County median income is \$51,240.<sup>132</sup> Twenty-one percent of the population in Grays Harbor are people of color.<sup>133</sup> The variation in county resources supports the need for greater state investment in public defense services.

Underfunding public defense leads to worse outcomes for low-income defendants.<sup>134</sup> Effective public defense should not depend on how affluent the county is. The Washington Association of Counties has proposed that the Legislature fully fund trial court public defense services or “[i]n the alternative, that the State assume all administrative and fiscal responsibility for public defense, taking local government out of the equation entirely.”<sup>135</sup>

With additional funding, local public defense offices can more easily work with prosecuting attorneys to implement LEAD programming.

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126. *Id.*

127. *King County Department of Public Defense*, <https://www.kingcounty.gov/depts/public-defense.aspx> (last visited Apr. 14, 2021).

128. *Id.*

129. *QuickFacts: King County, Washington, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/kingcountywashington> (last visited Apr. 14, 2021).

130. *QuickFacts: Asotin, Washington, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/fact/table/asotincountywashington/PST045219> (last visited Apr. 14, 2021).

131. See February 13, 2020, advertisement requesting applications from attorneys for public defense contracts, at <https://www.co.asotin.wa.us/DocumentCenter/View/806/Indigent-Defense-Advertisement-PDF>. (last visited July 4, 2021).

132. *QuickFacts: Grays Harbor County, Washington, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/graysharborcountywashington> (last visited Apr. 14, 2021).

133. *Id.*

134. Ghandnoosh, *supra* note 49.

135. *Counties Suffer From Inadequate State Funding for Trial Court Public Defense Services*, WASHINGTON STATE ASSOCIATION OF COUNTIES (January 14, 2020), <https://www.wsac.org/counties-suffer-from-inadequate-state-funding-for-trial-court-public-defense-services/>.

The Washington State OPD already provides some state funding to supplement city and county public defense budgets and some training for public defense staff.<sup>136</sup> In partnership with The Washington Defender Association, it also provides resource attorneys to assist local counsel.<sup>137</sup> Further, OPD has resources to address disproportionality advocacy.<sup>138</sup> The Legislature should increase funding for OPD to help raise the level of public defense services across the state.

## VII. Conclusion

Public Defenders are literally the protectors of their clients' freedom. Their clients are disproportionately people of color. To ameliorate the disproportionate impacts of the criminal legal system, Washington needs to improve both funding for and oversight of public defense. Adequate funding, implicit bias training, and recognition of racial issues that affect public defense clients, including laws and policies that have disproportionate impacts, can make a difference for the thousands of clients a year facing loss of liberty in Washington. The state needs to provide defenders the resources to overcome the existing inequities in the criminal legal system

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136. *Public Defense Improvement Program*, OPD, <https://www.opd.wa.gov/program/trial-defense> (last visited Apr. 14, 2021).

137. *Resource Attorneys, Public Defense Improvement Program*, OPD, <https://opd.wa.gov/index.php/program/trial-defense/12-pd/79-attyresource> (last visited Apr. 14, 2021).

138. *Using Data to Strengthen Disproportionality Advocacy*, OPD, <https://www.opd.wa.gov/index.php/program/trial-defense/12-pd/223> (last visited Apr. 14, 2021).

*Just this last weekend, there was an incident in which a Pacific Islander needed some mental health assessment, and the King County Sheriff's office couldn't locate the family and there was no organization addressing the needs of the Pacific Islander community that they could call. So often people like [the community leaders present in this meeting] get calls at their homes because someone happened to know someone who is, for example, Tongan or Samoan. Huge barrier to culturally relevant, appropriate services for the Pacific Islander community.*

- A woman of Samoan descent from Federal Way

Language interpreters are needed to ensure fair access and treatment in the criminal justice system. The Washington State Board for Judicial Administration has long-recognized the need for language access in the court system,<sup>1</sup> but language barriers place language minorities at great risk in any interactions they have with the criminal justice system, including contacts with law enforcement outside the courts. If individuals are limited in their ability to speak English (Limited English Proficient, LEP), they are unable to understand what is happening or questions they are being asked, to meaningfully respond, to seek assistance, or to protect their rights.

According to data compiled by Washington's Office of the Superintendent of Public Instruction, over 250 languages are spoken in Washington homes.<sup>2</sup> For example, in King County, the primary language spoken at home is identified as Spanish in 2,092 homes, Somali in 1,108 homes, and Vietnamese in 604 homes.<sup>3</sup> In Spokane, the primary language spoken at home is identified as Arabic in 229 homes, Marshallese in 524 homes, and Spanish in 289 homes.<sup>4</sup> In Yakima, the primary language spoken at home for all grades is identified as Spanish in 5,484 homes.<sup>5</sup> While the data does not indicate the number of individuals in need of interpreters, it does illustrate the range of languages spoken in the state and illustrates the need for interpreters.

This appendix addresses the need for interpreters, first, in court and court-related proceedings and, second, during interactions with law enforcement outside of court proceedings.

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1. Resolution of the Board for Judicial Administration of the State of Washington In Support of Language Access Services In Court, Adopted by the Board for Judicial Administration, July 20, 2012 ("Language barriers can create impediments to access to justice for individuals who are limited-English proficient."); re-adopted by the Board for Judicial Administration May 19, 2017, though it expires May 19, 2022. The resolution can be found at Washington Administrative Office of the Courts, Deskbook on Language Access in Washington Courts, Model Access Plan for Individuals Who Are Limited-English Proficient, Deaf, Hard of Hearing, or Deaf-Blind at 10-11 (June 2017), [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/content/pdf/StateLAP.pdf](https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf) (hereinafter Washington Language Access Deskbook).

2. Washington Tracking Network, <https://fortress.wa.gov/doh/wtn/WTNPortal/> (select section (community), topics (community characteristics), subtopic (languages), measure (OSPI Student Population Language Data - Percentages).

3. TBIP Appendices 2018, <https://public.tableau.com/app/profile/student.information4068/viz/TBIPAppendices2018/TBIPbyStudentGroups> (select "Primary Languages" tab).

4. *Id.*

5. *Id.*

## I. Interpreters in court and court-related proceedings

*There is a language barrier between the criminal justice system and the Hispanic community. The court files are in English, and it is hard for people to fill out. There aren't a lot of organizations that can offer pro bono hours to help fill out forms for everyone. When asked as an individual to help translate forms, I feel uncomfortable because I'm not an attorney and I don't want to interpret something wrong and have them fill it out wrong. It's a lot of pressure being asked to translate court documents.*

- A Latina with United Family Center in Grandview, Washington

*My mom had a court appearance, but the court didn't have a translator. Because we are all on zoom, I was able to attend and help translate for my mom.*

- A Latina from Pullman and the Tri-Cities Area

*There are a lot of Marshallese youth, recently some Chuukese youth, as well, who will often need interpreters. . . . If you take away Guam, one in three Micronesian households in the U.S. live in linguistic isolation. The courts don't have translated documents or paperwork or anything like to really explain this process to families who are dragged into these systems. And I don't understand why that is. There is so much more they could be doing as far as accessibility that they're not doing.*

- A Native Hawaiian woman in Seattle

### A. Introduction

As explained in the discussion that follows, numerous standards and practices are already in place regarding the provision of interpreters in court and court-related proceedings. However, there need to be better mechanisms and more resources made available to enforce the standards and ensure that they are being met.

### B. Requirement of an interpreter in court proceedings

Defendants in criminal proceedings have the constitutional right to an interpreter. “[T]he right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and ‘the right inherent in a fair trial to be present at one’s own trial.’” *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989)).

In addition, both criminal defendants and others required to participate in court proceedings, including witnesses, are entitled to interpreters by statute.<sup>6</sup> Washington statute RCW 2.43.010 et seq., which governs court interpreters, states that it is the policy of the state

to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010. The cost of providing an interpreter in a legal proceedings in which a non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority, is borne by the governmental body initiating the legal proceedings. RCW 2.43.040(2).

Title VI of the federal Civil Rights Act of 1964 also requires that courts receiving federal funds take reasonable steps to provide interpreter services to Limited English Proficient individuals.<sup>7</sup> The Department of Justice (DOJ) Title VI Guidance sets out four factors used to determine whether recipients of federal funds are in compliance with Title VI.<sup>8</sup> With regard to the provision of interpreters in court proceedings, the DOJ will consider the following:

(1) The number or proportion of LEP persons served or encountered by the court.<sup>9</sup> In determining the number of persons who might be served, courts should consider LEP parents whose children and dependents come into contact with the court.<sup>10</sup>

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6. The Board of Judicial Administration has also resolved, in pertinent part

WHEREAS, equal access to courts is fundamental to the American system of government under law; and  
 WHEREAS, language barriers can create impediments to access to justice for individuals who are limited-English proficient; and . . .  
 WHEREAS, the provision of free and qualified interpreter services in all legal proceedings promotes the Principal Policy Objectives of the State Judicial Branch regarding fair and effective administration of justice in all civil and criminal cases, and accessibility to Washington courts;  
 . . .  
 NOW, THEREFORE, BE IT RESOLVED:  
 That the Board for Judicial Administration:  
 1) Endorses the provision of interpreter services, at public expense, in all legal proceedings, both criminal and civil [and]  
 2) Supports the elimination of language-related impediments to access to the justice system for limited English proficient litigants.

Washington Language Access Deskbook at 10-11.

7. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 (June 12, 2002) (hereinafter DOJ Title VI Guidance).

8. *Id.* at 41,471-72.

9. *Id.* at 41,459-60.

10. RCW 13.04.043 states that “The administrator of juvenile court shall obtain interpreters as needed consistent with the intent and practice of chapter 2.43 RCW, to enable non-English-speaking youth and their

(2) The frequency with which LEP individuals come into contact with the court.<sup>11</sup> Courts should be required to provide more services to language minority groups that come into contact with the court more often.

(3) The nature and importance of the service provided.<sup>12</sup> This factor is of particular import in the context of the courts and other entities within the criminal justice system. “[T]he greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed.”<sup>13</sup>

(4) The resources available to the recipient and costs.<sup>14</sup> While more will be expected of larger institutions, the guidelines suggest ways that smaller institutions can provide language assistance that are less resource intensive.<sup>15</sup>

The Guidelines provide specific examples of ways that courts can meet their language access obligations under Title VI, including hiring bilingual staff,<sup>16</sup> using other sources of interpreter services, and identifying written materials for translation.<sup>17</sup>

It is also important to note that the DOJ’s interpretation of Title VI may go beyond state law by requiring recipient courts to provide interpreters in court-related proceedings held outside the courtroom.<sup>18</sup> In its 2010 letter to State Court Chief Justices and State Court Administrators (Courts Letter), DOJ stated that “the meaningful access requirement extends to court functions that are conducted outside the courtroom.”<sup>19</sup> Examples of such court-managed offices, operations, and programs include information counters; intake or filing offices; cashiers; records rooms; sheriff’s offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; detention facilities; and other similar offices, operations, and programs. In addition, interpreter services must be provided to LEP individuals to aid them in communicating with court-appointed or supervised personnel, such as counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, trustees, and others who are employed, paid, or supervised by the courts.<sup>20</sup>

C. Language Assistance Plans (LAP). The DOJ Title VI Guidance also advise court recipients to develop a language assistance plan.<sup>21</sup> While the DOJ guidance discusses the elements

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families to participate in detention, probation, or court proceedings and programs.”

11. *Id.* at 41,460.

12. *Id.* at 41,460.

13. *Id.*

14. *Id.* at 41,460-61.

15. *Id.*

16. *Id.* at 41,461-62.

17. *Id.* at 41,463.

18. *Id.* at 41,471.

19. Washington Language Access Deskbook, App. K p. 3 (June 2017), [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/content/pdf/StateLAP.pdf](https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf).

20. *Id.*

21. *Id.* at 41,464-66.

of an effective Language Assistance Plan, this discussion will focus on Washington law and guidelines on effective plans.

Effective June 12, 2008, RCW 2.43.090(1) required every Washington trial court to develop a Language Access Plan to provide interpreter services for non-English-speaking persons in both civil and criminal legal matters.<sup>22</sup> This was a one-time requirement. Some courts continue to submit these Language Access Plans, which are required if a court seeks reimbursement for interpreter expenses from the State Administrative Office of the Courts<sup>23</sup>. RCW 2.43.090(1) sets out the minimum requirements for each plan, including that they contain, for example,

[p]rocedures to identify and assess the language needs of non-English-speaking persons using the court system[;]

[p]rocedures for the appointment of interpreters as required under RCW 2.43.030 [that do] not require the non-English-speaking person to make the arrangements for the interpreter . . . [;]

[p]rocedures for notifying court users of the right to and availability of interpreter services . . . prominently displayed in the courthouse in the five foreign languages that census data indicates are predominate in the jurisdiction[;]

[p]rocedures for evaluating the need for translation of written materials, prioritizing those translation needs, and translating the highest priority materials[;]

[a] process for requiring and providing training to judges, court clerks, and other court staff on the requirements of the language assistance plan and how to effectively access and work with interpreters; and

[a] process for ongoing evaluation of the language assistance plan.

A sample Language Access Plan is set out as Appendix B in the Language Access Deskbook.

When developing its language assistance plan, a court must consult with judges, court administrators and court clerks, interpreters, and members of the community, such as domestic violence organizations, pro bono programs, courthouse facilitators, legal services programs, and/or other community groups whose members speak a language other than English. Each court is required to assess the language needs of its community annually.<sup>24</sup> Because courts are not required to submit Language Access Plans or annual assessments to the AOC unless they seek reimbursement for interpreter costs, AOC cannot know whether and which constituencies, including community groups, are being consulted, although the AOC suggests that courts work with the Commissions on Asian Pacific American, Hispanic, and African American Affairs.

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22. Washington Language Access Deskbook at 31-39.

23. RCW 2.43.090(4).

24. Washington Language Access Deskbook at 9.



With regard data collection, the Washington Language Access Deskbook emphasizes that courts should use multiple methods for identifying languages spoken in the communities they serve, not relying solely on requests for language assistance.<sup>25</sup> “Some Washington Courts have reported providing interpreter services in upwards of 160 languages and some school districts in Washington report as many as 215 languages spoken by families at home.”<sup>26</sup> Courts could consider consulting, for example,

- U.S. Census Language Use Data:
  - <https://www.census.gov/topics/population/language-use.html>
- U.S. DOJ Civil Rights Division, Language Map App: <http://www.lep.gov/maps/>
- State and local reporting entities such as DSHS and schools<sup>27</sup>

The Washington Deskbook on Language Access in Washington Courts states that the Interpreter Program will periodically ask courts to assess the language needs of individuals accessing their services, including interpreter usage inside and outside the courtroom by encounter type; compile the data; and monitor for language trends.<sup>28</sup> However, it does not appear that this has been done because, at present, court data forms do not have a required field to collect language needs for their cases.

D. Certified and Registered Languages in 2016

In its 2016 Annual Report, the Washington State Interpreter Commission reported that courts used interpreters for 96 different languages, with the following five languages requiring the most number of hours.<sup>29</sup>

| Hours per Language |       | Language   |
|--------------------|-------|--|
| Language           | Hours |  |
| Spanish            | 28831 | Courts reported using interpreters for 96 different languages in FY 2016. Courts vary in the diversity of languages they needed interpreters for, ranging from 1 language (Spanish for some Eastern WA courts) to 56 languages (Seattle Municipal). Courts usually pay interpreters at an hourly rate for in-person interpreting. The table at the left shows the languages that courts recorded the most number of hours for. |
| Russian            | 2778  |  |
| Vietnamese         | 2098  |  |
| ASL                | 1431  |  |
| Chuukese           | 1348  |  |

Mileage (if applicable)

25. *Id.* at 37.

26. *Id.*

27. *Id.*

28. *Id.* at 41-42.

29. Washington State Supreme Court Interpreter Commission, *2016 Annual Report*, at 9, [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/content/pdf/IC%20Annual%20Report.pdf](https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/IC%20Annual%20Report.pdf).

The Commission’s 2016 Annual Report also identified the following certified and registered languages.<sup>30</sup> Courts are required to appoint certified interpreters unless the services of a certified interpreter are not reasonably available to the appointing authority. RCW 2.43.030(1)(b).

**Certified and Registered Languages**

The AOC offers credentials in 14 certified languages and over 80 registered languages. However, there are not credentialed interpreters available in all languages. Certified or registered interpreters are available in the following languages:

| Certified Languages      | Registered Languages |                  |
|--------------------------|----------------------|------------------|
| Arabic                   | Albanian             | Korean           |
| Bosnian/Croatian/Serbian | Amharic              | Kurdish-Kurmanji |
| Cantonese                | Burmese              | Polish           |
| French                   | Czech                | Portuguese       |
| Khmer (Cambodian)        | Dutch                | Punjabi          |
| Laotian                  | Farsi                | Romanian         |
| Mandarin                 | German               | Samoan           |
| Russian                  | Hebrew               | Somali           |
| Spanish                  | Haitian Creole       | Swahili          |
| Tagalog                  | Hindi                | Tagalog*         |
| Vietnamese               | Hungarian            | Thai             |
|                          | Indonesian           | Tigrinya         |
|                          | Ilocano              | Turkish          |
|                          | Italian              | Ukrainian        |
|                          | Japanese             | Urdu             |
| <b>11 Languages</b>      | <b>30 Languages</b>  |                  |

*\*Tagalog is transitioning from a registered to a certified language, so there are currently interpreters in both categories.*

Note from these tables that Chuukese is listed as one of most needed languages, but there are no certified or registered Chuukese interpreters.

III. Interpreters during interactions outside of court, including during interactions with law enforcement and imprisonment.

*In the Marshallese community, there was a situation recently where a man and his family had an issue with their child who was experiencing some sort of developmental things and the police were called. The father was arrested, and there was no way to communicate what the real issue was because there was a language barrier. The father was not able to express himself and he was in protective mode of his family, which then felt aggressive to police officers. There has to be something that that the police department is able to do when there has been a misunderstanding like that situation when the wrong person was arrested. I even called the chief of police on this family's behalf. But at that point, it was already too far gone and they had to attend court, so this guy was away from his family for*

30. *Id.* at 10.

*multiple days. His wife was afraid, his son was afraid, and then at the end of the day, the cases dropped, but there was nothing in real time to say this, this was a mistake. It's almost as if the families are then held responsible for their language barrier. Law enforcement needs to have some way that they are able to communicate with the communities that they're responding to; it is not the onus of the family to be able to communicate with law enforcement.*

- A Black woman in Spokane

### A. Introduction

At the task force's community engagement sessions, community members spoke of the pressing need for interpreters when law enforcement interacts with individuals with limited English ability. Language barriers between law enforcement and LEP individuals can create misunderstanding, escalate encounters, and compromise legal rights. At a listening session at El Centro de la Raza in Seattle, staff explained, for example, that Spanish-speaking clients call them for help in filing police reports because they're afraid they won't be understood without assistance.

The extent to which a person is entitled to an interpreter during interactions with law enforcement is based on both constitutional and statutory grounds and is dependent on the type of interaction and rights involved.

It is unclear when a person has a constitutional right to an interpreter in interactions with the police, but it seems essential that a person should be entitled to an interpreter after they are in custody and need to be advised of their rights. The Fifth Amendment right to *Miranda* warnings attaches when a custodial interrogation begins<sup>31</sup>; thus, it should be that individuals are entitled to an unbiased interpreter during interrogation. The court's decision in *State v. Cervantes* seems to support this conclusion. In that case, the court affirmed the suppression of statements made when a co-defendant acted as interpreter. The court stated, "If it is fundamentally unfair for a trial court to appoint a biased interpreter in a courtroom setting, it cannot be less unfair for police to use a potential codefendant as an interpreter in the process of advising an arrestee of his rights, determining he understands them and voluntarily waives them and then conducting custodial translated interrogation at the scene of the crime."<sup>32</sup>

While there is little guidance in Washington on when an interpreter is required outside of court proceedings, the DOJ Title VI Guidance addresses how Title VI applies to a variety of criminal justice actors outside the courts themselves, including state and local law enforcement, departments of correction, and other types of recipients of federal funds.<sup>33</sup>

### B. DOJ Guidelines as applied to law enforcement

The DOJ Title VI Guidance applies the same four-factor analysis discussed above to law

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31. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002).

32. *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991).

33. DOJ Title VI Guidance, App. A, *supra* at 41,466-72.

enforcement, stating that “the obligation to provide language services increases where the importance of the activity is greater.”<sup>34</sup> Using that approach, the Guidance states that critical areas for language services might reasonably include the following:

- Receiving and responding to requests for assistance. LEP persons need to have meaningful access to police services when reporting criminal activity. 911 lines need to be accessible to LEP individuals.<sup>35</sup>
- Field enforcement, including traffic and pedestrian stops, and serving warrants and restraining orders. Law enforcement must be able to communicate instructions, commands, and notices. The Guidance explains  
     For example, a routine traffic stop can become a difficult situation if an officer is unable to effectively communicate the reason for the stop, the need for identification or other information, and the meaning of any written citation. Requests for consent to search are meaningless if the request is not understood.<sup>36</sup>
- Custodial interrogation.<sup>37</sup> See above re: constitutional requirements.
- Intake/detention. LEP individuals should be provided an interpreter when giving information during the intake or booking process, for example, when being assessed for any medical conditions.<sup>38</sup>
- Community outreach activities.<sup>39</sup>

C. DOJ Guidelines as applied to Departments of Corrections, jails, and detention centers

The same DOJ Title VI four-factor analysis applies to providing interpreter services to LEP individuals in detention.<sup>40</sup> For example, the guidelines address when a department of corrections may need to provide language services

- at intake/orientation,
- before disciplinary action,
- when providing health services,

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34. *Id.* at 41,468.

35. *Id.*

36.. *Id.*

37. *Id.* at 41,469.

38. *Id.*

39. *Id.*

40. *Id.*

- when offering a prisoner access to programs that could affect the length of their sentence; and
- in offering ESL classes.<sup>41</sup>

#### IV. Recommendations

1. Courts should be required to provide updated Language Access Plans using the template provided in the Language Access Handbook, Appendix A, and to update their plans regularly.<sup>42</sup> As discussed in the Language Access Handbook, courts should assess language needs in their local community and consult with local community organizations connected with LEP individuals.
2. Ensure that meaningful language access is provided not only in court proceedings, but also during court-related interactions outside of court, consistent with DOJ Guidance.
3. The legislature should provide both the Administrative Office of the Courts and local courts themselves adequate staffing and resources to ensure that courts are meeting the needs of LEP individuals. The AOC should have the authority to ensure that courts submit and comply with language access programs, be equipped to provide technical assistance to courts, collect necessary data, collaborate with both courts and community to ensure that courts are meeting the needs of LEP individuals, and recruit and test qualified interpreters.
4. At a minimum, require the presence of an interpreter whenever the person interrogated has a right to counsel.<sup>43</sup> In addition, develop, monitor, and enforce statewide standards for when law enforcement should provide interpreters and translated materials, including, but not limited to instances addressed in the DOJ Title Guidance: receiving and responding to requests for assistance; field enforcement, including traffic and pedestrian stops, and serving warrants and restraining orders; custodial interrogation; intake/detention; and community outreach activities.
5. Develop, monitor, and enforce statewide standards for when interpreters should be provided to LEP individuals while in jail or otherwise incarcerated, including, but not limited to instances addressed in the DOJ Title Guidance: at intake/orientation, before disciplinary action, when providing health services, when offering a prisoner access to programs that could affect the length of their sentence; and in offering ESL classes.<sup>44</sup>

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41. *Id.* at 41,469-70.

42. Washington Administrative Office of the Courts, Deskbook on Language Access in Washington Courts, Model Access Plan for Individuals Who Are Limited-English Proficient, Deaf, Hard of Hearing, or Deaf-Blind (June 2017), [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/content/pdf/StateLAP.pdf](https://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf).

43. Kate O. Rahel, Why the Sixth Amendment Rights to Counsel Includes an Out-of-Court Interpreter, 99 IOWA L. REV. 2299, 2302 (2014) (arguing that the Sixth Amendment guarantees indigent LEP defendants court-appointed interpreters for out-of-court communications with their attorneys).

44. *Id.* at 41,469-70.

6. The need for more language interpreters increases, especially as Washington becomes more diverse. Commensurate with that need, the legislature and courts must develop better pipelines for identifying and training potential interpreters.

## **Racial Disproportionately in Adult Felony Sentencing in Washington State and Spokane County**

### **PROBLEM**

Racial disproportionality in felony sentencing has been documented by the Washington State Caseload Forecast Council since 2018. In 2019, their annual “Adult General Disproportionately Report” shows that Black and Indigenous adults in Washington have been sentenced to felonies at a rate of 3.67 times and 2.15 times their representation in the general population, respectively. The disproportionality is even more amplified in Spokane County, where Black adults were sentenced to felonies at a rate of 5.7 times their relative share of the general population, and Indigenous adults were sentenced at 3.42 times their relative share of the general population. The data for 2020 shows similar (and in some cases worsening) disproportionality for both Black and Indigenous adults statewide and in Spokane County.

### **KEY POINTS**

#### **1) Felony sentencing in Washington State in 2019 and 2020 show disproportionality for Black and Indigenous adults**

- a) In fiscal year 2019 (July 1, 2018, to June 30, 2019), the State of Washington Caseload Forecast Council (CFC) reported that the total number of adult felony sentences imposed in Washington State was 24,257.<sup>1</sup> Of that number, 73.2% involved White individuals (17,689), 12.6% involved Black individuals (3,052), 7.9% involved Hispanic individuals (1,909), 3.2% involved Indigenous individuals (762), and 3.1% involved AAPI individuals (749).<sup>2</sup>
  - i) Black adults were sentenced to felonies at a rate that far exceeds their percentage of the population. According to the Office of Financial Management (OFM) State Population Forecast for 2018, Black adults accounted for approximately 3% of the population in Washington, yet they made up 12.6% of those convicted of a felony.<sup>3</sup> CFC calculates that they are charged and convicted of a felony at 3.67 times their relative share of the population.<sup>4</sup>
  - ii) Indigenous adults were also sentenced to felonies at a rate that far exceeds their percentage of the population. During the same period, OFM reports that Indigenous persons accounted for approximately 1% of the population, yet they made up 3.2% of

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1. Caseload Forecast Council, Adult General Disproportionately Report Fiscal Year 2019 – State of WA, at vii, [https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport\\_FY2019.pdf](https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2019.pdf).

2. *Id.*

3. *Id.* at 20.

4. *Id.*

- those convicted of a felony.<sup>5</sup> CFC calculates their felony conviction rate to be 2.15 times their relative share of the population.<sup>6</sup>
- iii) Whites, in contrast, appear to be proportionately represented. In 2019, they accounted for approximately 73% of the population in Washington and 72% of the population convicted of a felony.<sup>7</sup>
- b) In fiscal year 2020 (July 1, 2019, to June 30, 2020), the disproportionality rate for Indigenous adults worsened compared to 2019, while the rate for Black adults improved slightly. For FY 2020, the CFC reported that the total number of adult felony sentences imposed in Washington State had gone down slightly from the previous year, from 24,257 to 19,742.<sup>8</sup> Of that number, 71.9% involved White individuals (14,033), 13.5% involved Black individuals (2,632), 7.9% involved Hispanic individuals (1,536), 3.5% involved Indigenous individuals (680), and 3.3% involved AAPI individuals (637).<sup>9</sup>
- i) Similar to 2019, Black adults were sentenced to felonies at a rate that far exceeds their percentage of the population. According to the OFM Population Forecast for 2019, Black persons accounted for approximately 4% of the population in Washington. yet they made up 13.5% of those convicted of a felony.<sup>10</sup> CFC calculates their felony conviction rate to be 3.45 times their relative share of the population, down from 3.67 during the previous year.<sup>11</sup>
- ii) Indigenous adults also continued to be sentenced to felonies at a rate that far exceeds their percentage of the population. During the same period, they accounted for approximately 1% of the population, yet they made up 3.5% of those convicted of a felony.<sup>12</sup> CFC calculates their felony conviction rate to be 2.75 times their relative share of the population, up from 2.15 in 2019.<sup>13</sup>

## **2) Felony Sentencing in Spokane County in 2019 and 2020 show increased disproportionality, compared to state disproportionality**

- a) Spokane County is the fourth largest county in the state of Washington. Located in Eastern Washington, it consists of nine cities, with the city of Spokane being the largest and the county seat. According to the OFM, in 2020, there are approximately 522,600 people within Spokane County.<sup>14</sup>

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5. *Id.*

6. *Id.*

7. *Id.*

8. Adult General Disproportionately Report Fiscal Year 2020 – State of WA, Caseload Forecast Council, at [https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport\\_FY2020.pdf](https://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/AdultDisproportionalReport_FY2020.pdf).

9. *Id.*

10. *Id.* at 20.

11. *Id.*

12. *Id.*

13. *Id.*

14. <https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/estimates-april-1-population-age-sex-race-and-hispanic-origin>



- b) The Center for Civil and Human Rights requested data from the CFC on adult felony sentencing in Spokane County for FY 2019 and FY 2020. According to the CFC data, the racial disparities in adult felony sentencing found in the state of Washington are amplified in Spokane County.
- c) In FY 2019 (from July 1, 2018, to June 30, 2019), the total number of adult felony sentences in Spokane County was 2,756.<sup>15</sup> Of that number, 81.9% involved White individuals (2,256), 10.2% involved Black individuals (281), 5.2% involved Indigenous individuals (143), 1.5% involved Hispanic individuals (41), and 1.3% involved AAPI individuals (35).<sup>16</sup>
- i) As with the state as a whole, Black adults in Spokane County were sentenced to felonies at a rate that far exceeds their percentage of the population. According to the OFM Population Forecast for 2018, Black adults accounted for approximately 2% of the population in Spokane County, yet they made up 10.2% of those convicted of a felony.<sup>17</sup> CFC calculates their felony conviction rate to be 5.7 times their relative share of the population in Spokane county, a disproportionality rate that is much worse compared to the state-wide rate of 3.67 that same year.<sup>18</sup>
  - ii) Indigenous adults were also sentenced to felonies at a rate that far exceeded their percentage of the population. During the same period, they accounted for approximately 2% of the population, yet they made up 5.2% of those convicted of a felony. CFC calculates their felony conviction rate to be at 3.42 times their relative share of the population, which is much worse than the state-wide rate of 2.15 that same year.<sup>19</sup>
  - iii) In comparison, for the same time period, White adults made up 89% of the population in Spokane County, and they accounted for 82% of those sentenced for a felony.<sup>20</sup>
- d) In FY 2020 (July 1, 2019, to June 30, 2020), the total number of adult felony sentences in Spokane County dropped from 2,756 in 2019 to 2,475.<sup>21</sup> During this period, the percentage of White adults prosecuted for felonies decreased compared to 2019, while the percentage of Black adult sentences *increased*. Of the 2,475 total felonies in 2020, 79.9% involved White individuals (1,977). This is down two percentage points from 2019, when 81.9% involved White adults. The percentage of Black adults sentenced to felonies, however, increased from 10.2% in 2019 to 12.0% percent (298) in 2020. In 2019, 5.2% of all felony sentences involved Indigenous persons; in 2020, it was 5.0% (124). In 2020, 1.5% involved Hispanic individuals; in 2020, it was 1.4% (35). For AAPI individuals, in 2019 they represented 1.3% of all felony sentences; in 2020 they represented 1.7% (41).
- i) In FY 2020, Black adults in Spokane County were once again sentenced to felonies at a rate that far exceeds their percentage of the population. According to the OFM State Population Forecast for 2019, Black persons accounted for approximately 2% of the

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15. *See infra* Appendix A.

16. *Id.*

17. *Id.* at Table 6.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See infra* Appendix B at 1.

population in Spokane County, yet they made up 12% of those convicted of a felony.<sup>22</sup> CFC calculates their felony conviction rate to be at 6.46 times their relative share of the population.<sup>23</sup> For comparison, in 2019, Black persons were sentenced to a felony at 5.7 times their relative share of the population in Spokane County.

- ii) Indigenous adults continue to be sentenced to felonies at a rate that far exceeded their percentage of the population. Similar to 2019, in 2020, Indigenous people accounted for approximately 1% of the population in Spokane County, yet they made up 5% of those convicted of a felony.<sup>24</sup> CFC calculates their felony conviction rate to be at 3.60 times their relative share of the population.<sup>25</sup> For comparison, in 2019, Indigenous adults in Spokane were sentenced to felonies at a rate 3.42 times the rate of their population.
- iii) In comparison, in 2020, White adults continue to make up 89% of the population in Spokane county, and they accounted for 80% of those sentenced for a felony.<sup>26</sup>

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22. *Id* at 12.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

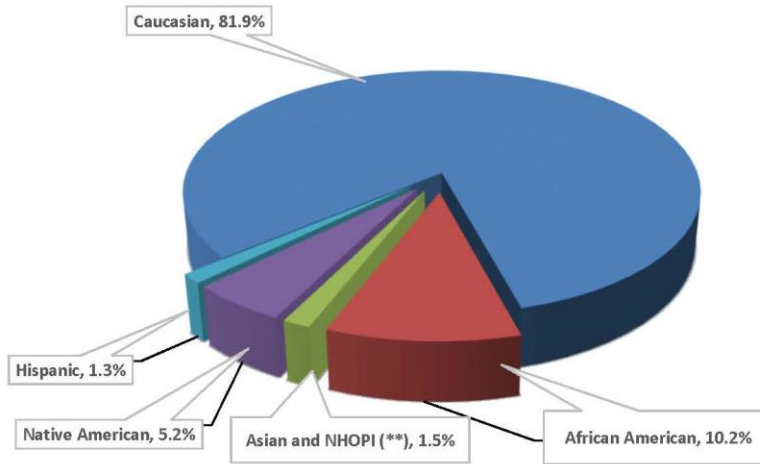
**APPENDIX A**

Caseload Forecast Council

**Table 1  
Adult Felony FY 2019 Spokane County Sentences  
Racial Distribution (All ages)**

| Forecasting Categories              | Caucasian    | African American | Asian and NHOPI (**) | Native American | Hispanic    | Unknown  | Grand Total (excl. Unknown) |
|-------------------------------------|--------------|------------------|----------------------|-----------------|-------------|----------|-----------------------------|
| <b>FY2019 Sentences</b>             |              |                  |                      |                 |             |          |                             |
| Assault                             | 491          | 109              | 5                    | 36              | 11          | 1        | 652                         |
| Drug                                | 655          | 72               | 14                   | 33              | 10          | -        | 784                         |
| Failure To Register As Sex Offender | 23           | 2                | -                    | 2               | -           | -        | 27                          |
| Manslaughter                        | 11           | 4                | -                    | 1               | -           | -        | 16                          |
| Murder 1                            | 3            | 1                | -                    | 2               | -           | -        | 6                           |
| Murder 2                            | 8            | -                | -                    | -               | 1           | -        | 9                           |
| Other Felonies                      | 208          | 31               | 3                    | 17              | -           | -        | 259                         |
| Property                            | 756          | 45               | 14                   | 44              | 11          | 1        | 870                         |
| Robbery                             | 34           | 8                | 2                    | 6               | -           | 2        | 50                          |
| Sex                                 | 67           | 9                | 3                    | 2               | 2           | -        | 83                          |
| <b>Total Sentences</b>              | <b>2,256</b> | <b>281</b>       | <b>41</b>            | <b>143</b>      | <b>35</b>   | <b>4</b> | <b>2,756</b>                |
| <b>% of Sentences in Race</b>       | <b>81.9%</b> | <b>10.2%</b>     | <b>1.5%</b>          | <b>5.2%</b>     | <b>1.3%</b> |          | <b>100%</b>                 |

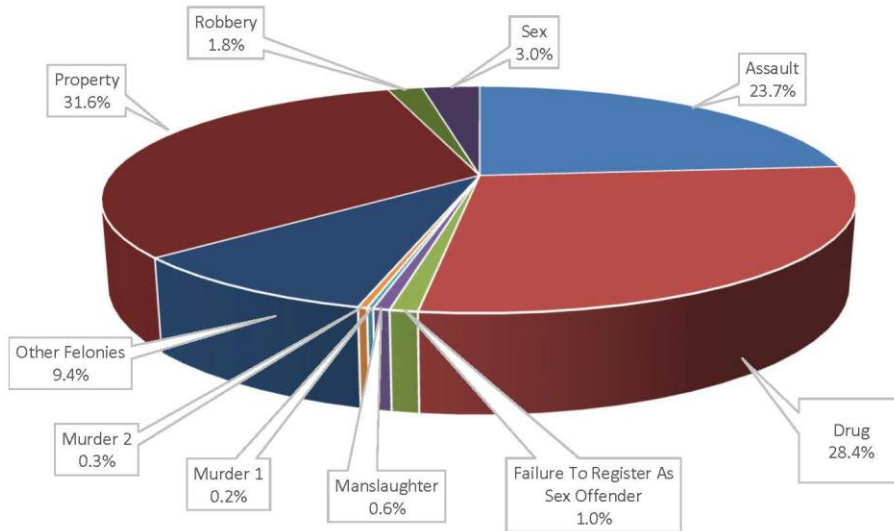
(\*\*) including Native Hawaiian and Other Pacific Islander



**Table 2**  
**Adult Felony FY 2019 Spokane County Sentences**  
**Race Distributed by Crime Category (All ages)**

| Forecasting Categories              | Caucasian |      | African American |      | Asian and NHOPi (**) |      | Native American |      | Hispanic |      | Unknown |   | Grand Total (excl. Unknown) |       |
|-------------------------------------|-----------|------|------------------|------|----------------------|------|-----------------|------|----------|------|---------|---|-----------------------------|-------|
| FY2019 Sentences                    | 0         | %    | 0                | %    | 0                    | %    | 0               | %    | 0        | %    | 0       | % | 0                           | %     |
| Assault                             | 491       | 22%  | 109              | 39%  | 5                    | 12%  | 36              | 25%  | 11       | 31%  | 1       | 0 | 652                         | 23.7% |
| Drug                                | 655       | 29%  | 72               | 26%  | 14                   | 34%  | 33              | 23%  | 10       | 29%  | 0       | 0 | 784                         | 28.4% |
| Failure To Register As Sex Offender | 23        | 1%   | 2                | 1%   | -                    | 0%   | 2               | 1%   | -        | 0%   | 0       | 0 | 27                          | 1.0%  |
| Manslaughter                        | 11        | 0%   | 4                | 1%   | -                    | 0%   | 1               | 1%   | -        | 0%   | 0       | 0 | 16                          | 0.6%  |
| Murder 1                            | 3         | 0%   | 1                | 0%   | -                    | 0%   | 2               | 1%   | -        | 0%   | 0       | 0 | 6                           | 0.2%  |
| Murder 2                            | 8         | 0%   | -                | 0%   | -                    | 0%   | -               | 0%   | 1        | 3%   | 0       | 0 | 9                           | 0.3%  |
| Other Felonies                      | 208       | 9%   | 31               | 11%  | 3                    | 7%   | 17              | 12%  | -        | 0%   | 0       | 0 | 259                         | 9.4%  |
| Property                            | 756       | 34%  | 45               | 16%  | 14                   | 34%  | 44              | 31%  | 11       | 31%  | 1       | 0 | 870                         | 31.6% |
| Robbery                             | 34        | 2%   | 8                | 3%   | 2                    | 5%   | 6               | 4%   | -        | 0%   | 2       | 0 | 50                          | 1.8%  |
| Sex                                 | 67        | 3%   | 9                | 3%   | 3                    | 7%   | 2               | 1%   | 2        | 6%   | 0       | 0 | 83                          | 3.0%  |
| Total Sentences                     | 2,256     | 100% | 281              | 100% | 41                   | 100% | 143             | 100% | 35       | 100% | 4       | 0 | 2,756                       | 100%  |

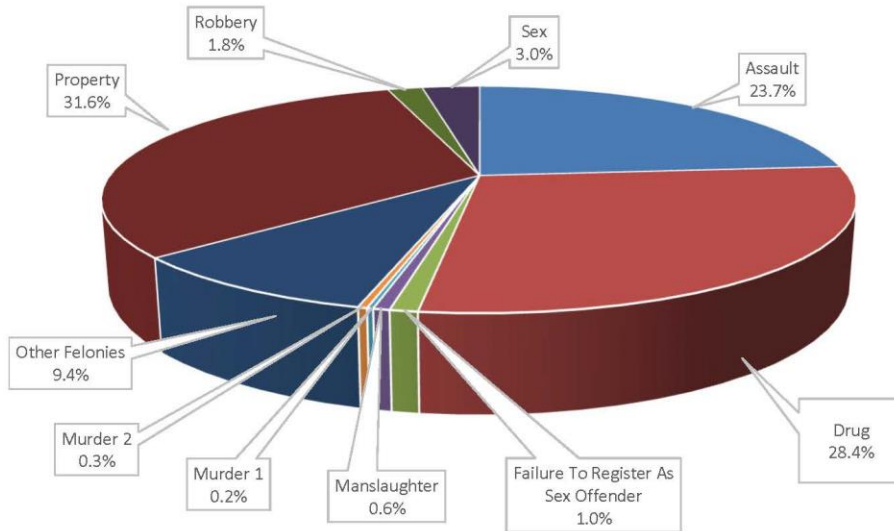
(\*\*) including Native Hawaiian and Other Pacific Islander



**Table 2**  
**Adult Felony FY 2019 Spokane County Sentences**  
**Race Distributed by Crime Category (All ages)**

| Forecasting Categories              | Caucasian |      | African American |      | Asian and NHOPi (**) |      | Native American |      | Hispanic |      | Unknown |   | Grand Total (excl. Unknown) |       |
|-------------------------------------|-----------|------|------------------|------|----------------------|------|-----------------|------|----------|------|---------|---|-----------------------------|-------|
| FY2019 Sentences                    | 0         | %    | 0                | %    | 0                    | %    | 0               | %    | 0        | %    | 0       | % | 0                           | %     |
| Assault                             | 491       | 22%  | 109              | 39%  | 5                    | 12%  | 36              | 25%  | 11       | 31%  | 1       | 0 | 652                         | 23.7% |
| Drug                                | 655       | 29%  | 72               | 26%  | 14                   | 34%  | 33              | 23%  | 10       | 29%  | 0       | 0 | 784                         | 28.4% |
| Failure To Register As Sex Offender | 23        | 1%   | 2                | 1%   | -                    | 0%   | 2               | 1%   | -        | 0%   | 0       | 0 | 27                          | 1.0%  |
| Manslaughter                        | 11        | 0%   | 4                | 1%   | -                    | 0%   | 1               | 1%   | -        | 0%   | 0       | 0 | 16                          | 0.6%  |
| Murder 1                            | 3         | 0%   | 1                | 0%   | -                    | 0%   | 2               | 1%   | -        | 0%   | 0       | 0 | 6                           | 0.2%  |
| Murder 2                            | 8         | 0%   | -                | 0%   | -                    | 0%   | -               | 0%   | 1        | 3%   | 0       | 0 | 9                           | 0.3%  |
| Other Felonies                      | 208       | 9%   | 31               | 11%  | 3                    | 7%   | 17              | 12%  | -        | 0%   | 0       | 0 | 259                         | 9.4%  |
| Property                            | 756       | 34%  | 45               | 16%  | 14                   | 34%  | 44              | 31%  | 11       | 31%  | 1       | 0 | 870                         | 31.6% |
| Robbery                             | 34        | 2%   | 8                | 3%   | 2                    | 5%   | 6               | 4%   | -        | 0%   | 2       | 0 | 50                          | 1.8%  |
| Sex                                 | 67        | 3%   | 9                | 3%   | 3                    | 7%   | 2               | 1%   | 2        | 6%   | 0       | 0 | 83                          | 3.0%  |
| Total Sentences                     | 2,256     | 100% | 281              | 100% | 41                   | 100% | 143             | 100% | 35       | 100% | 4       | 0 | 2,756                       | 100%  |

(\*\*) including Native Hawaiian and Other Pacific Islander



**Table 3**  
**Adult Felony FY 2019 Spokane County Sentences**  
**Crime Category Distributed by Race (All ages)**

| Forecasting Categories              | Caucasian    | African American | Asian and NHOPI (**) | Native American | Hispanic  | Unknown  | Grand Total (excl. Unknown) |
|-------------------------------------|--------------|------------------|----------------------|-----------------|-----------|----------|-----------------------------|
| <b>FY2019 Sentences</b>             |              |                  |                      |                 |           |          |                             |
| Assault                             | 491          | 109              | 5                    | 36              | 11        | 1        | 652                         |
|                                     | 75%          | 17%              | 1%                   | 6%              | 2%        |          | 100%                        |
| Drug                                | 655          | 72               | 14                   | 33              | 10        | -        | 784                         |
|                                     | 84%          | 9%               | 2%                   | 4%              | 1%        |          | 100%                        |
| Failure To Register As Sex Offender | 23           | 2                | -                    | 2               | -         | -        | 27                          |
|                                     | 85%          | 7%               | 0%                   | 7%              | 0%        |          | 100%                        |
| Manslaughter                        | 11           | 4                | -                    | 1               | -         | -        | 16                          |
|                                     | 69%          | 25%              | 0%                   | 6%              | 0%        |          | 100%                        |
| Murder 1                            | 3            | 1                | -                    | 2               | -         | -        | 6                           |
|                                     | 50%          | 17%              | 0%                   | 33%             | 0%        |          | 100%                        |
| Murder 2                            | 8            | -                | -                    | -               | 1         | -        | 9                           |
|                                     | 89%          | 0%               | 0%                   | 0%              | 11%       |          | 100%                        |
| Other Felonies                      | 208          | 31               | 3                    | 17              | -         | -        | 259                         |
|                                     | 80%          | 12%              | 1%                   | 7%              | 0%        |          | 100%                        |
| Property                            | 756          | 45               | 14                   | 44              | 11        | 1        | 870                         |
|                                     | 87%          | 5%               | 2%                   | 5%              | 1%        |          | 100%                        |
| Robbery                             | 34           | 8                | 2                    | 6               | -         | 2        | 50                          |
|                                     | 68%          | 16%              | 4%                   | 12%             | 0%        |          | 100%                        |
| Sex                                 | 67           | 9                | 3                    | 2               | 2         | -        | 83                          |
|                                     | 81%          | 11%              | 4%                   | 2%              | 2%        |          | 100%                        |
| <b>Total Sentences</b>              | <b>2,256</b> | <b>281</b>       | <b>41</b>            | <b>143</b>      | <b>35</b> | <b>4</b> | <b>2,756</b>                |
| <b>% of Sentences in Race</b>       | <b>82%</b>   | <b>10%</b>       | <b>1%</b>            | <b>5%</b>       | <b>1%</b> |          | <b>100%</b>                 |

(\*\*) including Native Hawaiian and Other Pacific Islander

**Table 3**  
**Adult Felony FY 2019 Spokane County Sentences**  
**Crime Category Distributed by Race (All ages)**

| Forecasting Categories              | Caucasian    | African American | Asian and NHOPI (**) | Native American | Hispanic  | Unknown  | Grand Total (excl. Unknown) |
|-------------------------------------|--------------|------------------|----------------------|-----------------|-----------|----------|-----------------------------|
| <b>FY2019 Sentences</b>             |              |                  |                      |                 |           |          |                             |
| Assault                             | 491<br>75%   | 109<br>17%       | 5<br>1%              | 36<br>6%        | 11<br>2%  | 1<br>-   | 652<br>100%                 |
| Drug                                | 655<br>84%   | 72<br>9%         | 14<br>2%             | 33<br>4%        | 10<br>1%  | -        | 784<br>100%                 |
| Failure To Register As Sex Offender | 23<br>85%    | 2<br>7%          | -                    | 2<br>7%         | -         | -        | 27<br>100%                  |
| Manslaughter                        | 11<br>69%    | 4<br>25%         | -                    | 1<br>6%         | -         | -        | 16<br>100%                  |
| Murder 1                            | 3<br>50%     | 1<br>17%         | -                    | 2<br>33%        | -         | -        | 6<br>100%                   |
| Murder 2                            | 8<br>89%     | -                | -                    | -               | 1<br>11%  | -        | 9<br>100%                   |
| Other Felonies                      | 208<br>80%   | 31<br>12%        | 3<br>1%              | 17<br>7%        | -         | -        | 259<br>100%                 |
| Property                            | 756<br>87%   | 45<br>5%         | 14<br>2%             | 44<br>5%        | 11<br>1%  | 1        | 870<br>100%                 |
| Robbery                             | 34<br>68%    | 8<br>16%         | 2<br>4%              | 6<br>12%        | -         | 2        | 50<br>100%                  |
| Sex                                 | 67<br>81%    | 9<br>11%         | 3<br>4%              | 2<br>2%         | 2<br>2%   | -        | 83<br>100%                  |
| <b>Total Sentences</b>              | <b>2,256</b> | <b>281</b>       | <b>41</b>            | <b>143</b>      | <b>35</b> | <b>4</b> | <b>2,756</b>                |
| <b>% of Sentences in Race</b>       | <b>82%</b>   | <b>10%</b>       | <b>1%</b>            | <b>5%</b>       | <b>1%</b> |          | <b>100%</b>                 |

(\*\*) including Native Hawaiian and Other Pacific Islander

**CHART 3.  
FY2019 SPOKANE COUNTY ADULT FELONY SENTENCES DISTRIBUTED BY RACE AND CRIME CATEGORY**

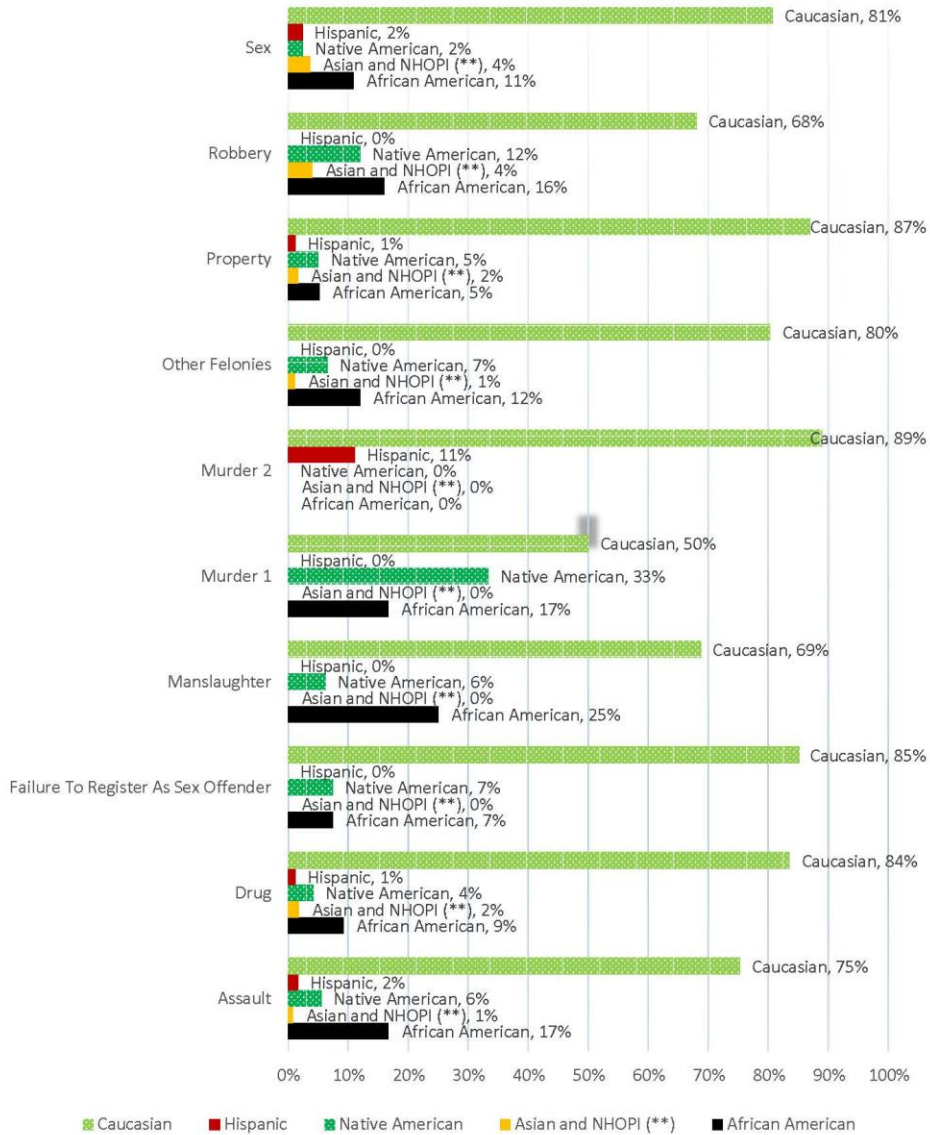




CHART 4. FY2019 ASSAULT SENTENCES

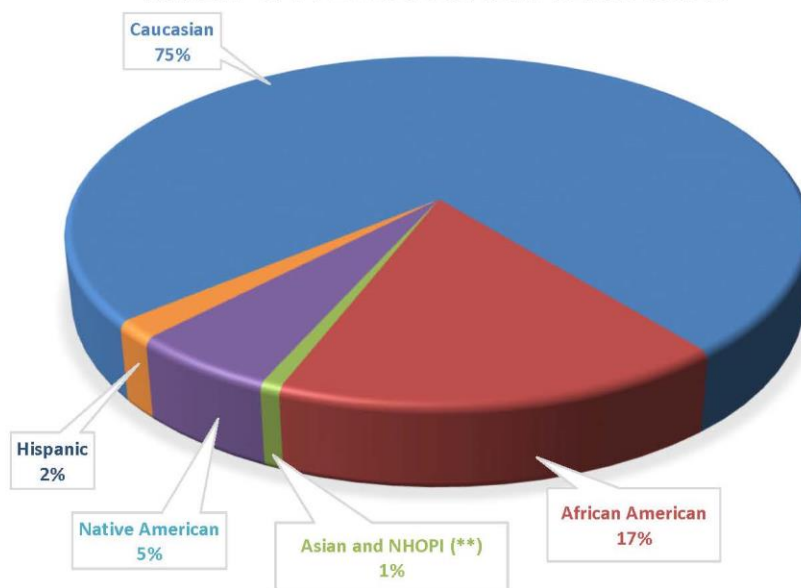
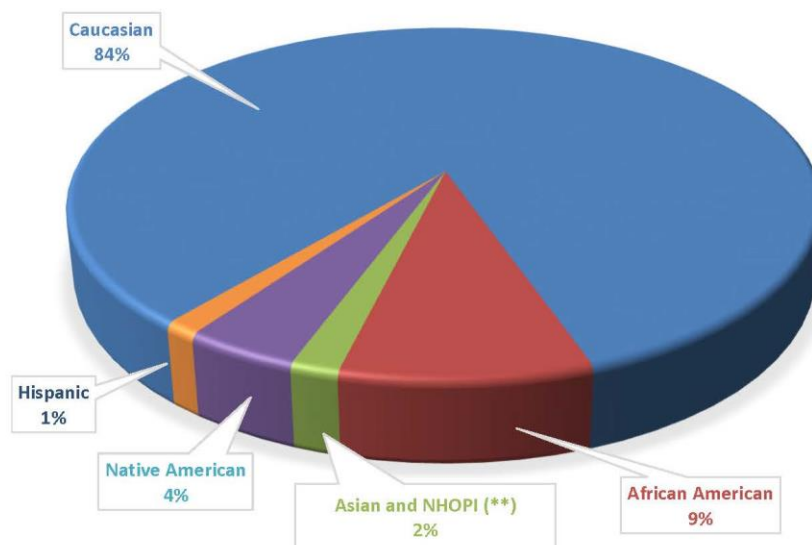
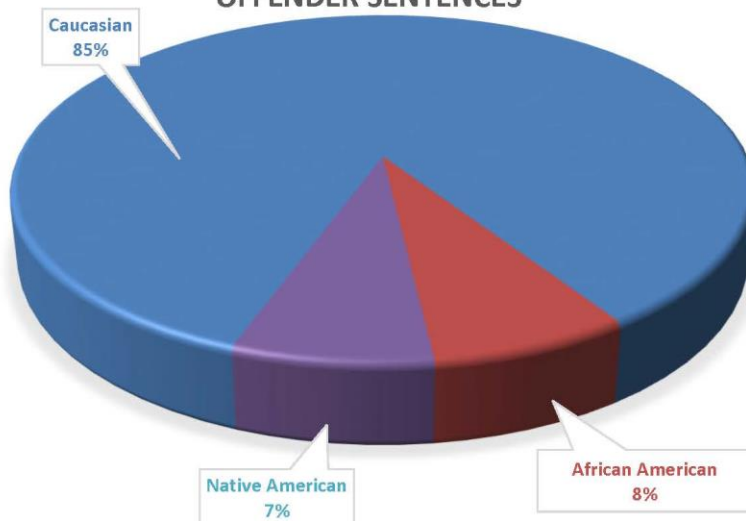


CHART 5. FY2019 DRUG SENTENCES



**CHART 6. FY2019 FAILURE TO REGISTER AS SEX OFFENDER SENTENCES**



**CHART 7. FY2019 MANSLAUGHTER SENTENCES**

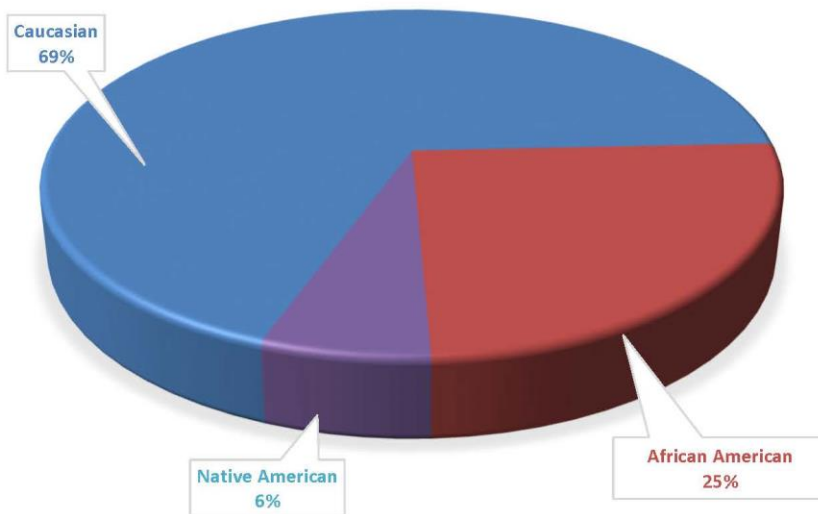


CHART 8. FY2019 OTHER FELONIES SENTENCES

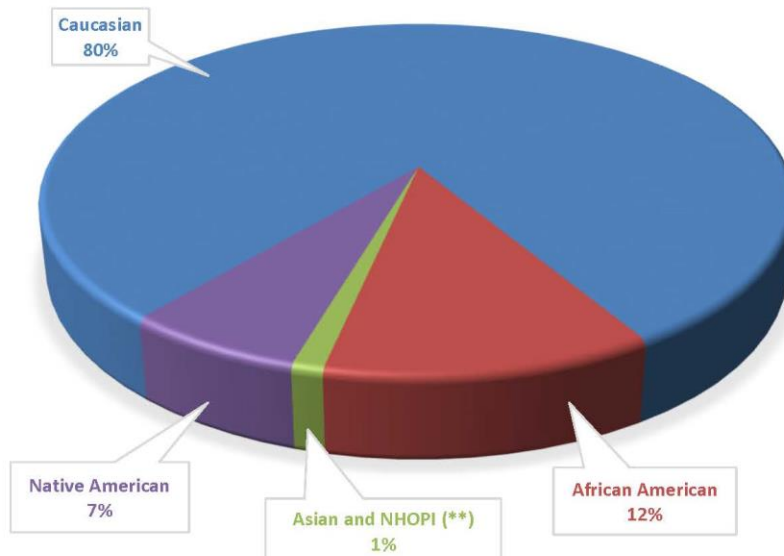


CHART 9. FY2019 PROPERTY SENTENCES

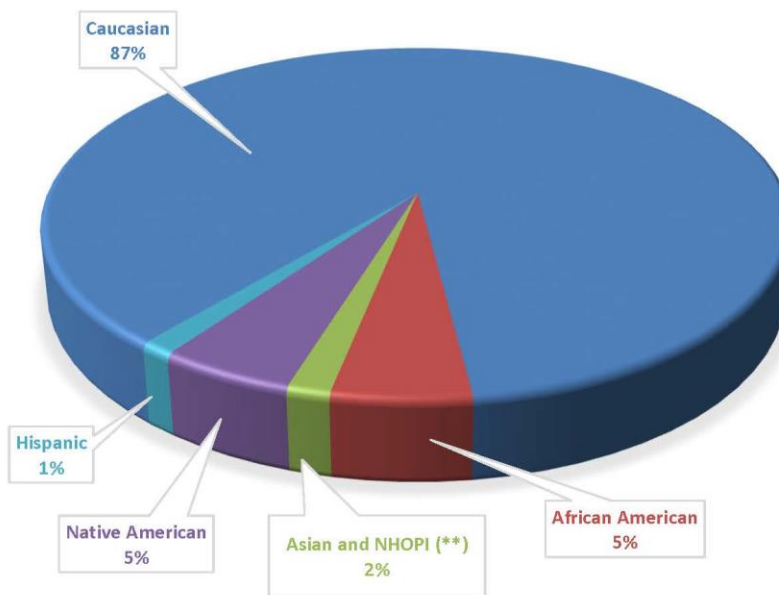


CHART 10. FY2019 MURDER 1 SENTENCES

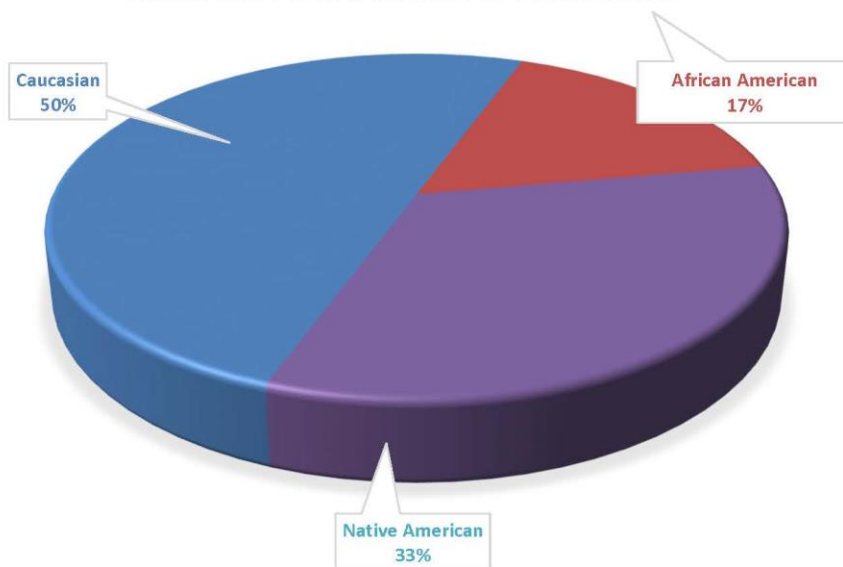


CHART 11. FY2019 MURDER 2 SENTENCES

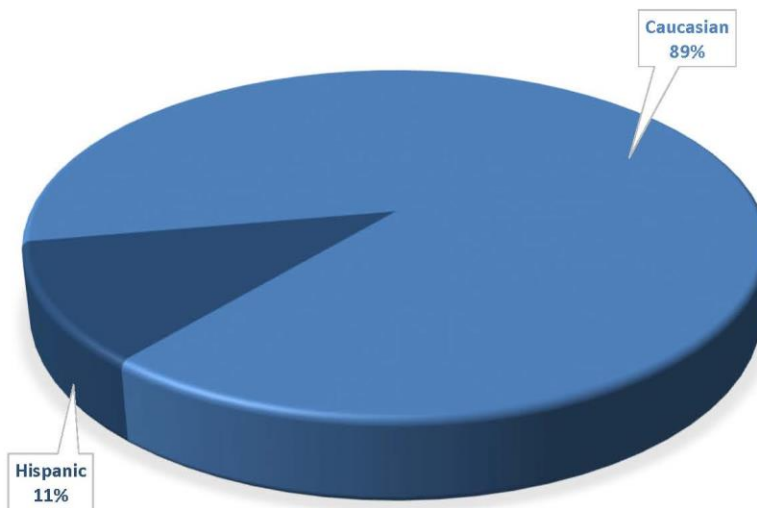


CHART 12. FY2019 SEX SENTENCES

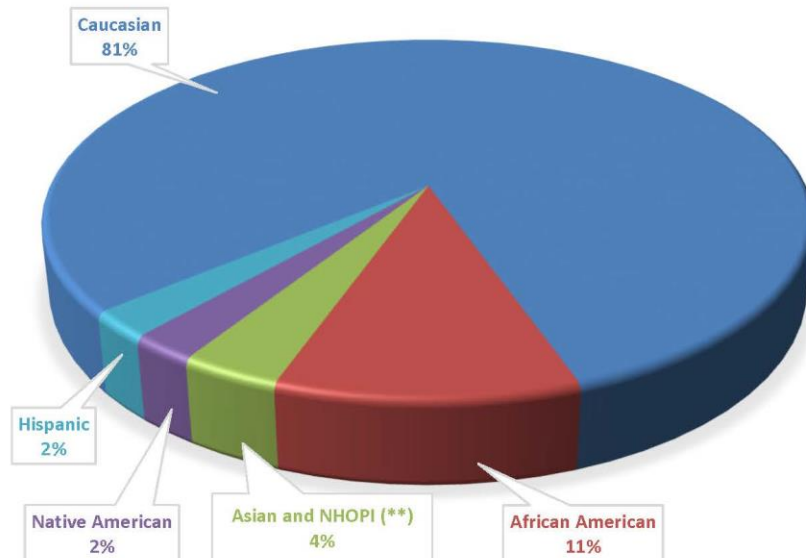
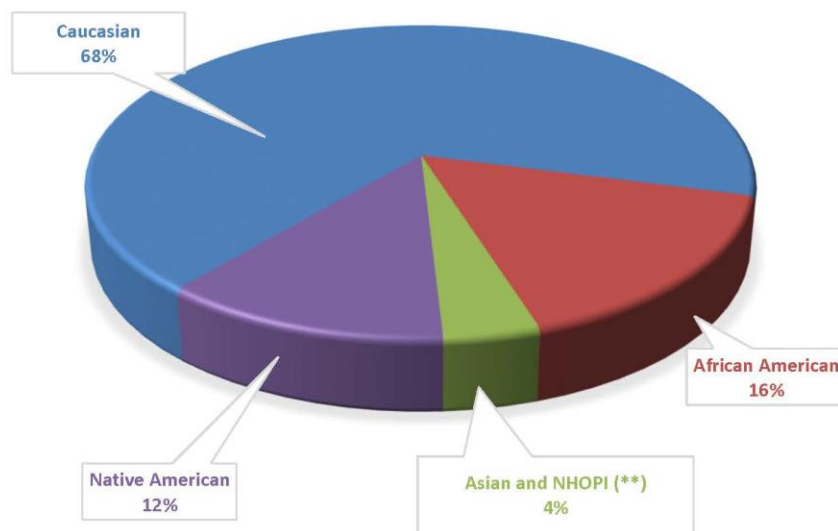


CHART 13. FY2019 ROBBERY SENTENCES

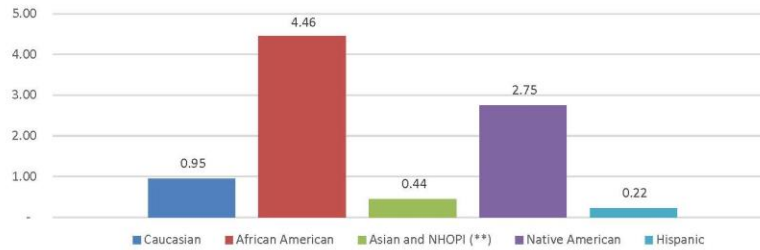


**Table 5.**  
**Adult Felony FY 2019 Spokane County Sentences vs. Population (aged 18-54)**

| Forecasting Categories                 | Caucasian    |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown  |             | Grand Total (excl. Unknown) |             |
|--|--------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|----------|-------------|-----------------------------|-------------|
|  | count        | %           | count            | %           | count                | %           | count           | %           | count       | %           | count    | %           | count                       | %           |
| <b>Sentences (At-Risk: 18-54 only)</b> |              |             |                  |             |                      |             |                 |             |             |             |          |             |                             |             |
| Assault                                | 465          | 22%         | 101              | 38%         | 5                    | 13%         | 35              | 26%         | 11          | 32%         | 1        | 25%         | 617                         | 24%         |
| Drug                                   | 612          | 29%         | 65               | 25%         | 13                   | 33%         | 30              | 22%         | 9           | 26%         | -        | 0%          | 729                         | 28%         |
| Failure To Register As Sex Offender    | 19           | 1%          | 2                | 1%          | -                    | 0%          | 1               | 1%          | -           | 0%          | -        | 0%          | 22                          | 1%          |
| Manslaughter                           | 11           | 1%          | 4                | 2%          | -                    | 0%          | -               | 0%          | -           | 0%          | -        | 0%          | 15                          | 1%          |
| Murder 1                               | 2            | 0%          | 1                | 0%          | -                    | 0%          | 2               | 1%          | -           | 0%          | -        | 0%          | 5                           | 0%          |
| Murder 2                               | 7            | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | 1           | 3%          | -        | 0%          | 8                           | 0%          |
| Other Felony                           | 203          | 9%          | 29               | 11%         | 3                    | 8%          | 17              | 13%         | -           | 0%          | -        | 0%          | 252                         | 10%         |
| Property                               | 734          | 34%         | 45               | 17%         | 14                   | 35%         | 43              | 32%         | 11          | 32%         | 1        | 25%         | 847                         | 32%         |
| Robbery                                | 33           | 2%          | 8                | 3%          | 2                    | 5%          | 6               | 4%          | -           | 0%          | 2        | 50%         | 49                          | 2%          |
| Sex                                    | 56           | 3%          | 9                | 3%          | 3                    | 8%          | 2               | 1%          | 2           | 6%          | -        | 0%          | 72                          | 3%          |
| <b>Total Sentences</b>                 | <b>2,142</b> | <b>100%</b> | <b>264</b>       | <b>100%</b> | <b>40</b>            | <b>100%</b> | <b>136</b>      | <b>100%</b> | <b>34</b>   | <b>100%</b> | <b>4</b> | <b>100%</b> | <b>2,616</b>                | <b>100%</b> |
| % of Sentences in Race                 | 82%          |             | 10%              |             | 2%                   |             | 5%              |             | 1%          |             |          |             | 100%                        |             |
| 2018 Count of Race (*)                 | 211,803      |             | 5,546            |             | 8,443                |             | 4,625           |             | 14,415      |             | 0%       |             | 244,832                     |             |
| Race distribution                      | 87%          |             | 2%               |             | 3%                   |             | 2%              |             | 6%          |             |          |             | 100%                        |             |
| <b>Ratio Sentences vs. Population</b>  | <b>0.95</b>  |             | <b>4.46</b>      |             | <b>0.44</b>          |             | <b>2.75</b>     |             | <b>0.22</b> |             |          |             |                             |             |

(\*) Data are from the 2019 OFM State Population Forecast for 2018, excluding the group of 2 or more races, which is 9,149, as there is not such race group in sentencing data  
 (\*\*) including Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population  
(At risk, aged 18-54)**

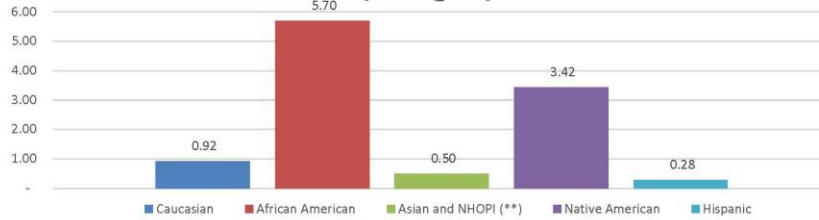


**Table 6.**  
**Adult Felony FY 2019 Spokane County Sentences vs. Population (age 18+)**

| Forecasting Categories                       | Caucasian    |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown  |             | Grand Total (excl. Unknown) |             |
|--|--------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|----------|-------------|-----------------------------|-------------|
|  | count        | %           | count            | %           | count                | %           | count           | %           | count       | %           | count    | %           | count                       | %           |
| <b>FY2018 Sentences (at age 18 or older)</b> |              |             |                  |             |                      |             |                 |             |             |             |          |             |                             |             |
| Assault                                      | 491          | 22%         | 109              | 39%         | 5                    | 12%         | 36              | 25%         | 11          | 32%         | 1        | 25%         | 652                         | 24%         |
| Drug   | 655          | 29%         | 72               | 26%         | 14                   | 34%         | 33              | 23%         | 9           | 26%         | -        | 0%          | 783                         | 28%         |
| Failure To Register As Sex Offender          | 23           | 1%          | 2                | 1%          | -                    | 0%          | 2               | 1%          | -           | 0%          | -        | 0%          | 27                          | 1%          |
| Manslaughter                                 | 11           | 0%          | 4                | 1%          | -                    | 0%          | 1               | 1%          | -           | 0%          | -        | 0%          | 16                          | 1%          |
| Murder 1                                     | 3            | 0%          | 1                | 0%          | -                    | 0%          | 2               | 1%          | -           | 0%          | -        | 0%          | 6                           | 0%          |
| Murder 2                                     | 8            | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | 1           | 3%          | -        | 0%          | 9                           | 0%          |
| Other Felony                                 | 208          | 9%          | 31               | 11%         | 3                    | 7%          | 17              | 12%         | -           | 0%          | -        | 0%          | 259                         | 9%          |
| Property                                     | 756          | 34%         | 45               | 16%         | 14                   | 34%         | 44              | 31%         | 11          | 32%         | 1        | 25%         | 870                         | 32%         |
| Robbery                                      | 33           | 1%          | 8                | 3%          | 2                    | 5%          | 6               | 4%          | -           | 0%          | 2        | 50%         | 49                          | 2%          |
| Sex  | 67           | 3%          | 9                | 3%          | 3                    | 7%          | 2               | 1%          | 2           | 6%          | -        | 0%          | 83                          | 3%          |
| <b>Total Sentences</b>                       | <b>2,255</b> | <b>100%</b> | <b>281</b>       | <b>100%</b> | <b>41</b>            | <b>100%</b> | <b>143</b>      | <b>100%</b> | <b>34</b>   | <b>100%</b> | <b>4</b> | <b>100%</b> | <b>2,754</b>                | <b>100%</b> |
| % of Sentences in Race                       | 82%          |             | 10%              |             | 1%                   |             | 5%              |             | 1%          |             |          |             | 100%                        |             |
| 2018 Count of Race (*)                       | 355,852      |             | 7,129            |             | 11,901               |             | 6,044           |             | 17,450      |             | 0%       |             | 398,376                     |             |
| Race distribution                            | 89%          |             | 2%               |             | 3%                   |             | 2%              |             | 4%          |             |          |             | 100%                        |             |
| <b>Ratio Sentences vs. Population</b>        | <b>0.92</b>  |             | <b>5.70</b>      |             | <b>0.50</b>          |             | <b>3.42</b>     |             | <b>0.28</b> |             |          |             |                             |             |

(\*) Data are from the 2019 OFM State Population Forecast for 2018, excluding the group of 2 or more races, which is 11,202, as there is not such race group in sentencing data  
 (\*\*) including Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population (all ages)**

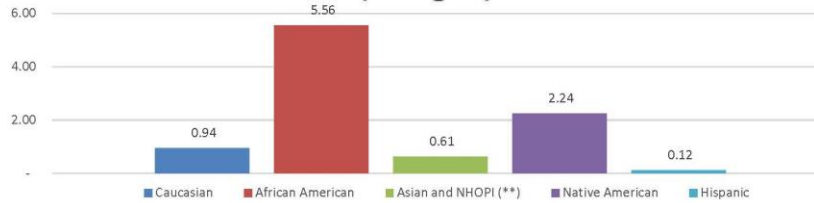


**Table 4.**  
**Adult Felony-Reduced-To-Gross Misdemeanor & Misdemeanor Sentences**  
**vs. Population (all ages) in FY 2019 Spokane County**

| Forecasting Categories               | Caucasian   |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown   |             | Grand Total (excl. Unknown) |             |
|--------------------------------------|-------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|-----------|-------------|-----------------------------|-------------|
|                                      | count       | %           | count            | %           | count                | %           | count           | %           | count       | %           | count     | %           | count                       | %           |
| Sentences (at age 18 or older)       |             |             |                  |             |                      |             |                 |             |             |             |           |             |                             |             |
| Assault                              | 96          | 30%         | 20               | 53%         | 3                    | 43%         | 3               | 23%         | 1           | 50%         | 5         | 42%         | 123                         | 32%         |
| Drug                                 | 11          | 3%          | -                | 0%          | -                    | 0%          | 1               | 8%          | -           | 0%          | -         | 0%          | 12                          | 3%          |
| Failure To Register As Sex Offender  | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Manslaughter                         | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Murder 1                             | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Murder 2                             | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Other Felony                         | 20          | 6%          | 5                | 13%         | -                    | 0%          | -               | 0%          | -           | 0%          | 2         | 17%         | 25                          | 7%          |
| Property                             | 187         | 58%         | 10               | 26%         | 4                    | 57%         | 8               | 62%         | 1           | 50%         | 5         | 42%         | 210                         | 55%         |
| Robbery                              | 1           | 0%          | 1                | 3%          | -                    | 0%          | 1               | 8%          | -           | 0%          | -         | 0%          | 3                           | 1%          |
| Sex                                  | 7           | 2%          | 2                | 5%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | 9                           | 2%          |
| <b>Total Sentences</b>               | <b>322</b>  | <b>100%</b> | <b>38</b>        | <b>100%</b> | <b>7</b>             | <b>100%</b> | <b>13</b>       | <b>100%</b> | <b>2</b>    | <b>100%</b> | <b>12</b> | <b>100%</b> | <b>382</b>                  | <b>100%</b> |
| % of Sentences in Race               | 84%         |             | 10%              |             | 2%                   |             | 3%              |             | 1%          |             |           |             | 100%                        |             |
| 2018 Count of Race (*)               | 355,852     |             | 7,129            |             | 11,901               |             | 6,044           |             | 17,450      |             | 0%        |             | 398,376                     |             |
| Race distribution                    | 89%         |             | 2%               |             | 3%                   |             | 2%              |             | 4%          |             |           |             | 100%                        |             |
| <b>Ratio Sentence vs. Population</b> | <b>0.94</b> |             | <b>5.56</b>      |             | <b>0.61</b>          |             | <b>2.24</b>     |             | <b>0.12</b> |             |           |             |                             |             |

(\*) Data are from the 2019 OFM State Population Forecast for 2018, excluding the group of 2 or more races, which is 11,202, as there is not such race group in sentencing data  
 (\*\*) including Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population**  
**(all ages)**

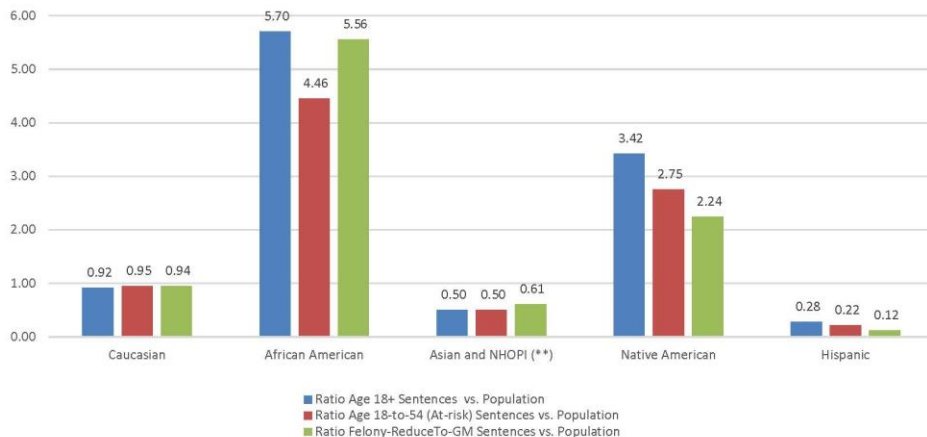




**Table 7.**  
**Comparison of all ratios FY 2019 Spokane County**

| Ratio   | Caucasian | African American | Asian and NHOPI (**) | Native American | Hispanic |
|---|-----------|------------------|----------------------|-----------------|----------|
| Ratio Age 18+ Sentences vs. Population                | 0.92      | 5.70             | 0.50                 | 3.42            | 0.28     |
| Ratio Age 18-to-54 (At-risk) Sentences vs. Population | 0.95      | 4.46             | 0.50                 | 2.75            | 0.22     |
| Ratio Felony-ReduceTo-GM Sentences vs. Population     | 0.94      | 5.56             | 0.61                 | 2.24            | 0.12     |

(\*\*) including Native Hawaiian and Other Pacific Islander



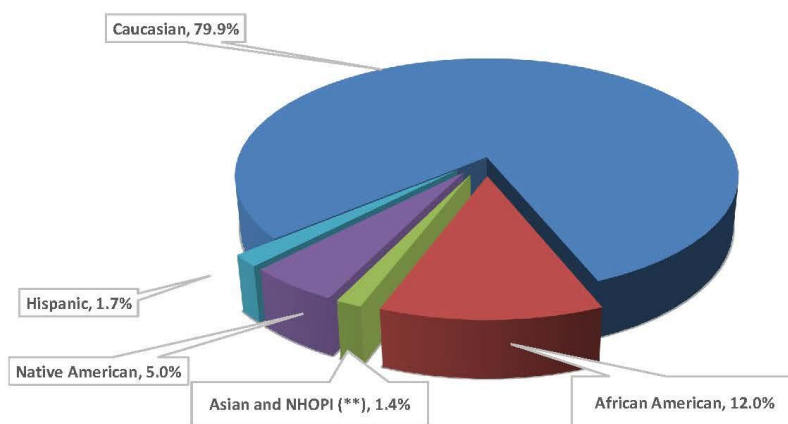
**APPENDIX B**

Caseload Forecast Council

**Table 1  
Adult Felony FY 2020 Sentences  
Racial Distribution (All ages)**

| Forecasting Categories              | Caucasian    | African American | Asian and NHOPI (**) | Native American | Hispanic    | Unknown  | Grand Total (excl. Unknown) |
|-------------------------------------|--------------|------------------|----------------------|-----------------|-------------|----------|-----------------------------|
| <b>FY2020 Sentences</b>             |              |                  |                      |                 |             |          |                             |
| Assault                             | 514          | 108              | 12                   | 34              | 10          | 1        | 678                         |
| Drug                                | 665          | 106              | 3                    | 40              | 11          | 1        | 825                         |
| Failure To Register As Sex Offender | 13           | 2                | -                    | 2               | -           | 0        | 17                          |
| Manslaughter                        | 5            | 3                | -                    | -               | 1           | 0        | 9                           |
| Murder 1                            | 5            | 1                | -                    | -               | 1           | 0        | 7                           |
| Murder 2                            | 4            | 2                | -                    | -               | -           | 0        | 6                           |
| Other Felonies                      | 193          | 23               | 2                    | 13              | 5           | 0        | 236                         |
| Property                            | 517          | 45               | 17                   | 32              | 12          | 1        | 623                         |
| Robbery                             | 12           | 1                | 1                    | -               | 1           | 0        | 15                          |
| Sex                                 | 49           | 7                | -                    | 3               | -           | 1        | 59                          |
| <b>Total Sentences</b>              | <b>1,977</b> | <b>298</b>       | <b>35</b>            | <b>124</b>      | <b>41</b>   | <b>4</b> | <b>2,475</b>                |
| <b>% of Sentences in Race</b>       | <b>79.9%</b> | <b>12.0%</b>     | <b>1.4%</b>          | <b>5.0%</b>     | <b>1.7%</b> |          | <b>100%</b>                 |

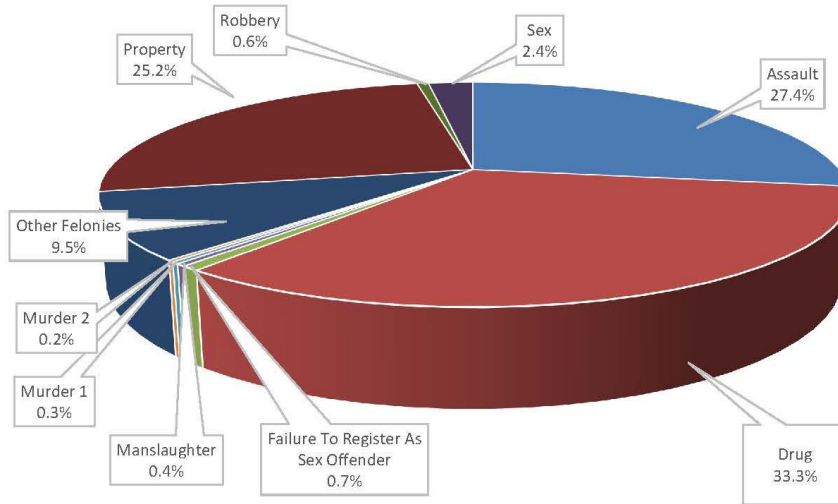
(\*\*) NHOPI: Native Hawaiian and Other Pacific Islander



**Table 2  
Adult Felony FY 2020 Sentences  
Race Distributed by Crime Category (All ages)**

| Forecasting Categories              | Caucasian    |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic  |             | Unknown  |   | Grand Total (excl. Unknown) |             |
|-------------------------------------|--------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-----------|-------------|----------|---|-----------------------------|-------------|
| <b>FY2020 Sentences</b>             |              |             |                  |             |                      |             |                 |             |           |             |          |   |                             |             |
| Assault                             | 514          | 26%         | 108              | 36%         | 12                   | 34%         | 34              | 27%         | 10        | 24%         | 1        | 0 | 678                         | 27.4%       |
| Drug                                | 665          | 34%         | 106              | 36%         | 3                    | 9%          | 40              | 32%         | 11        | 27%         | 1        | 0 | 825                         | 33.3%       |
| Failure To Register As Sex Offender | 13           | 1%          | 2                | 1%          | -                    | 0%          | 2               | 2%          | -         | 0%          | 0        | 0 | 17                          | 0.7%        |
| Manslaughter                        | 5            | 0%          | 3                | 1%          | -                    | 0%          | -               | 0%          | 1         | 2%          | 0        | 0 | 9                           | 0.4%        |
| Murder 1                            | 5            | 0%          | 1                | 0%          | -                    | 0%          | -               | 0%          | 1         | 2%          | 0        | 0 | 7                           | 0.3%        |
| Murder 2                            | 4            | 0%          | 2                | 1%          | -                    | 0%          | -               | 0%          | -         | 0%          | 0        | 0 | 6                           | 0.2%        |
| Other Felonies                      | 193          | 10%         | 23               | 8%          | 2                    | 6%          | 13              | 10%         | 5         | 12%         | 0        | 0 | 236                         | 9.5%        |
| Property                            | 517          | 26%         | 45               | 15%         | 17                   | 49%         | 32              | 26%         | 12        | 29%         | 1        | 0 | 623                         | 25.2%       |
| Robbery                             | 12           | 1%          | 1                | 0%          | 1                    | 3%          | -               | 0%          | 1         | 2%          | 0        | 0 | 15                          | 0.6%        |
| Sex                                 | 49           | 2%          | 7                | 2%          | -                    | 0%          | 3               | 2%          | -         | 0%          | 1        | 0 | 59                          | 2.4%        |
| <b>Total Sentences</b>              | <b>1,977</b> | <b>100%</b> | <b>298</b>       | <b>100%</b> | <b>35</b>            | <b>100%</b> | <b>124</b>      | <b>100%</b> | <b>41</b> | <b>100%</b> | <b>4</b> |   | <b>2,475</b>                | <b>100%</b> |

(\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

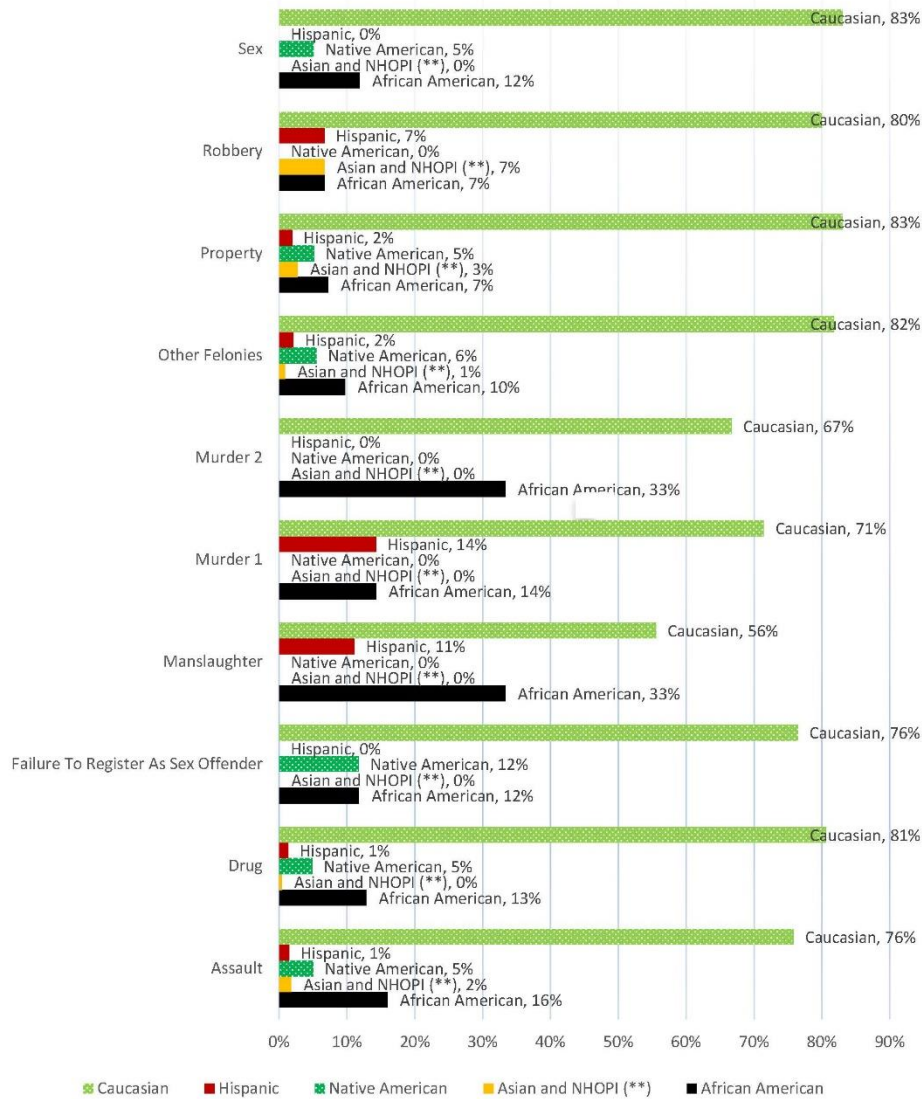


**Table 3  
Adult Felony FY 2020 Sentences  
Crime Category Distributed by Race (All ages)**

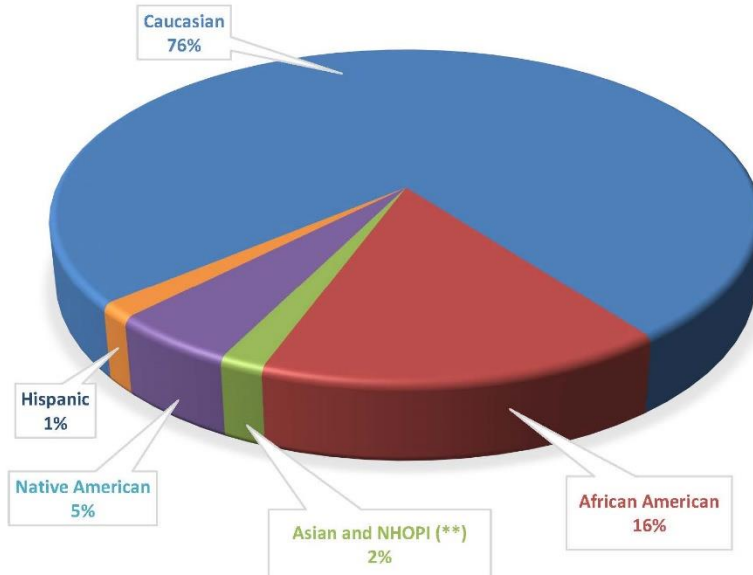
| Forecasting Categories              | Caucasian    | African American | Asian and NHOPI (**) | Native American | Hispanic    | Unknown  | Grand Total (excl. Unknown) |
|-------------------------------------|--------------|------------------|----------------------|-----------------|-------------|----------|-----------------------------|
| <b>FY2020 Sentences</b>             |              |                  |                      |                 |             |          |                             |
| Assault                             | 514<br>76%   | 108<br>16%       | 12<br>2%             | 34<br>5%        | 10<br>1%    | 1<br>1%  | 678<br>100%                 |
| Drug                                | 665<br>81%   | 106<br>13%       | 3<br>0%              | 40<br>5%        | 11<br>1%    | 1<br>1%  | 825<br>100%                 |
| Failure to Register As Sex Offender | 13<br>76%    | 2<br>12%         | -<br>0%              | 2<br>12%        | -<br>0%     | -<br>0%  | 17<br>100%                  |
| Manslaughter                        | 5<br>56%     | 3<br>33%         | -<br>0%              | -<br>0%         | 1<br>11%    | -<br>0%  | 9<br>100%                   |
| Murder 1                            | 5<br>71%     | 1<br>14%         | -<br>0%              | -<br>0%         | 1<br>14%    | -<br>0%  | 7<br>100%                   |
| Murder 2                            | 4<br>67%     | 2<br>33%         | -<br>0%              | -<br>0%         | -<br>0%     | -<br>0%  | 6<br>100%                   |
| Other Felonies                      | 193<br>82%   | 23<br>10%        | 2<br>1%              | 13<br>6%        | 5<br>2%     | -<br>0%  | 236<br>100%                 |
| Property                            | 517<br>83%   | 45<br>7%         | 17<br>3%             | 32<br>5%        | 12<br>2%    | 1<br>1%  | 623<br>100%                 |
| Robbery                             | 12<br>80%    | 1<br>7%          | 1<br>7%              | -<br>0%         | 1<br>7%     | -<br>0%  | 15<br>100%                  |
| Sex                                 | 49<br>83%    | 7<br>12%         | -<br>0%              | 3<br>5%         | -<br>0%     | 1<br>1%  | 59<br>100%                  |
| <b>Total Sentences</b>              | <b>1,977</b> | <b>298</b>       | <b>35</b>            | <b>124</b>      | <b>41</b>   | <b>4</b> | <b>2,475</b>                |
| <b>% of Sentences in Race</b>       | <b>79.9%</b> | <b>12.0%</b>     | <b>1.4%</b>          | <b>5.0%</b>     | <b>1.7%</b> |          | <b>100%</b>                 |

(\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

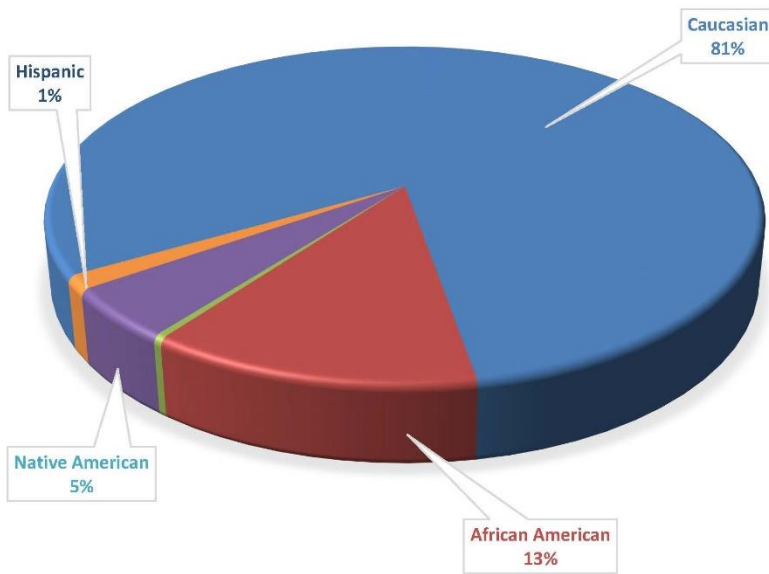
**CHART 3.  
FY2020 ADULT FELONY SENTENCES  
DISTRIBUTED BY RACE AND CRIME  
CATEGORY**



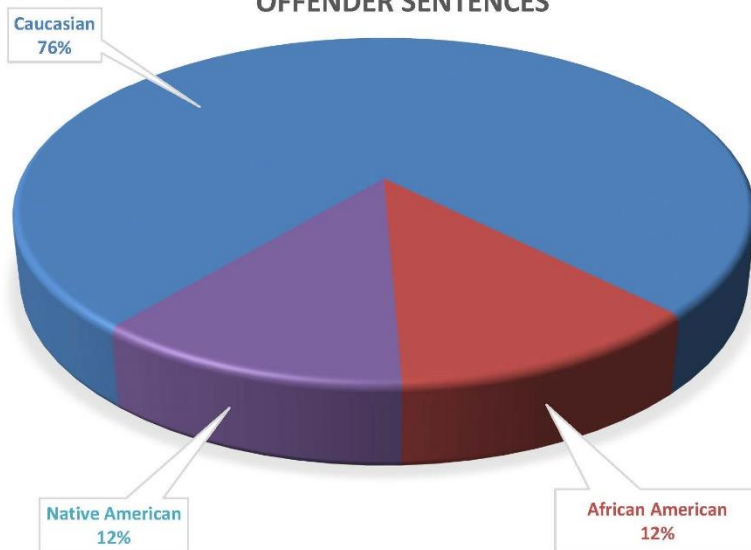
**CHART 4. FY2020 ASSAULT SENTENCES**



**CHART 5. FY2020 DRUG SENTENCES**



**CHART 6. FY2020 FAILURE TO REGISTER AS SEX OFFENDER SENTENCES**



**CHART 7. FY2020 MANSLAUGHTER SENTENCES**

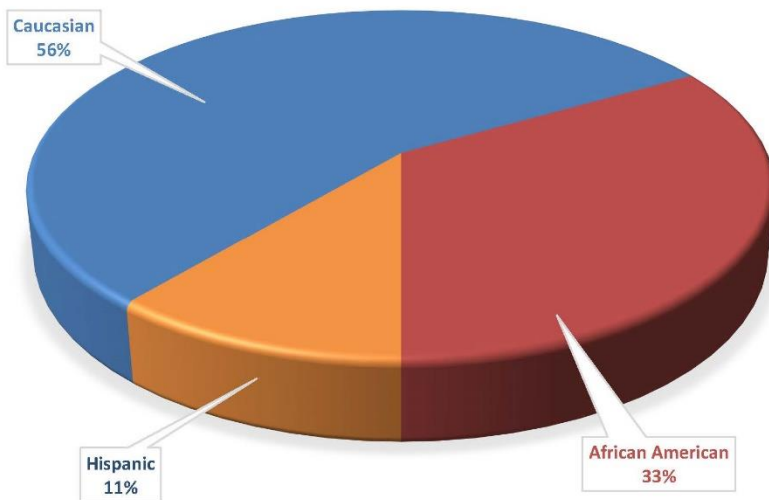


CHART 8. FY2020 OTHER FELONIES SENTENCES

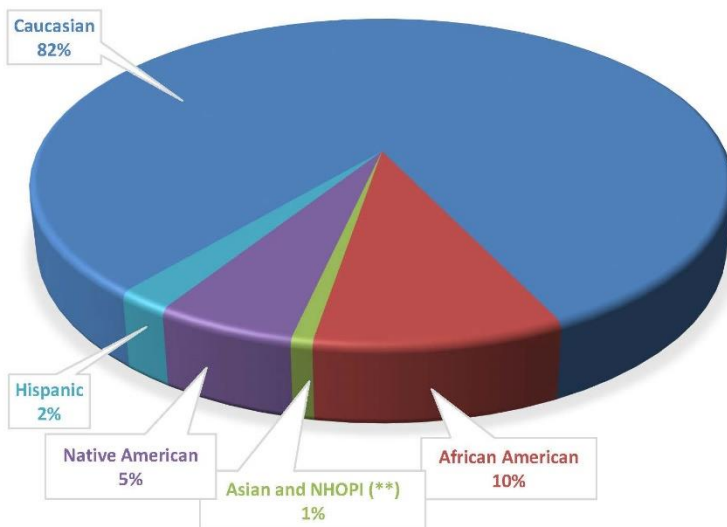


CHART 9. FY2020 PROPERTY SENTENCES

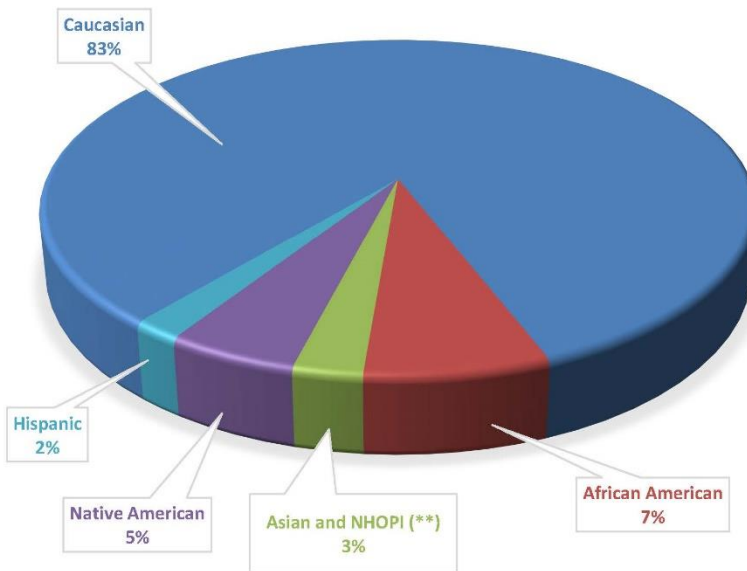




CHART 10. FY2020 MURDER 1 SENTENCES

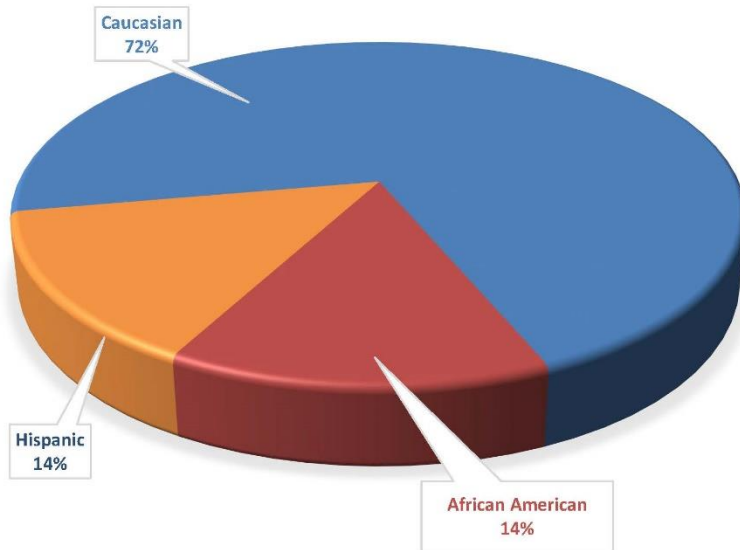


CHART 11. FY2020 MURDER 2 SENTENCES

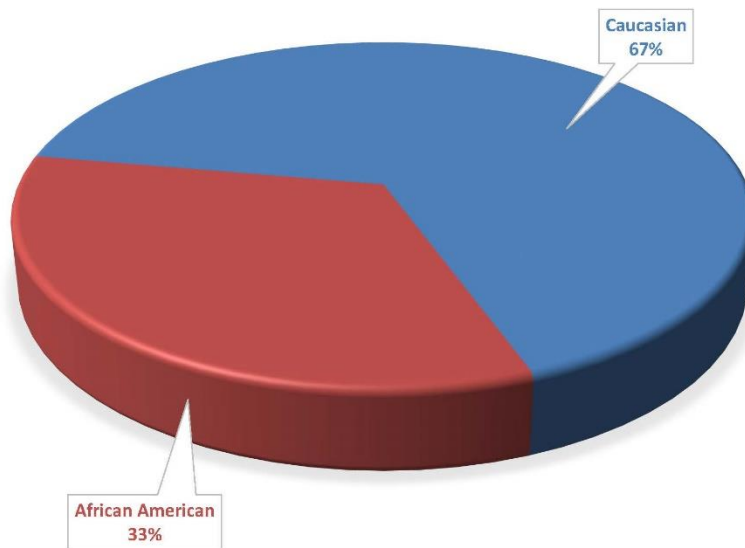


CHART 12. FY2020 SEX SENTENCES

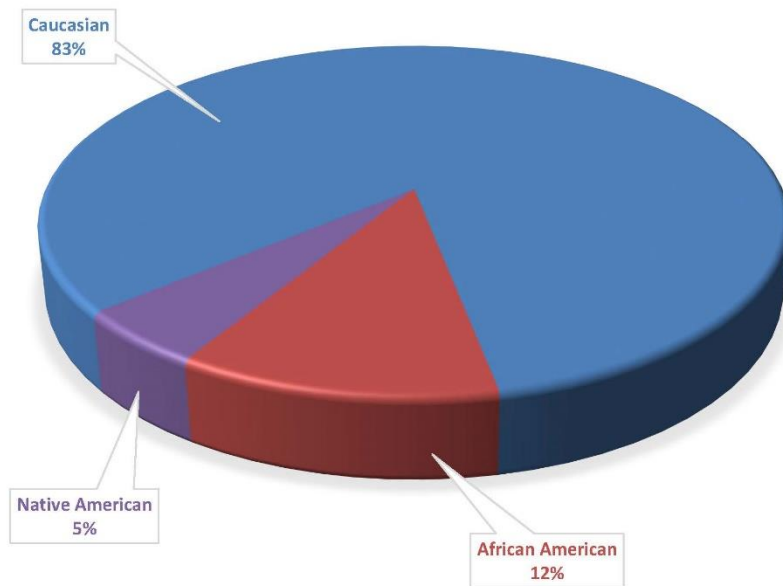
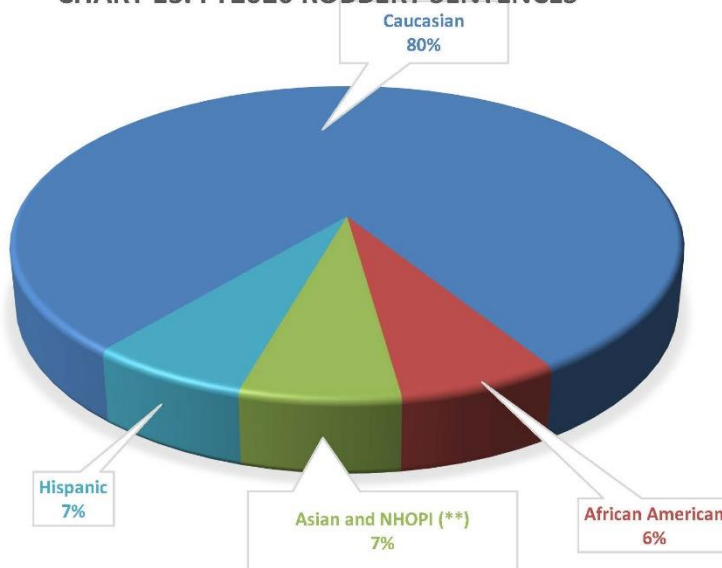


CHART 13. FY2020 ROBBERY SENTENCES

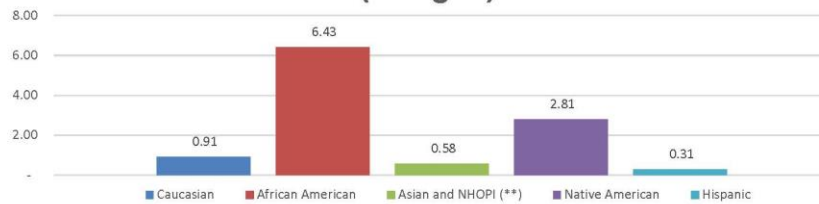


**Table 4.**  
**Adult Felony-Reduced-To-Gross Misdemeanor & Misdemeanor Sentences**  
**vs. Population (all ages) in FY 2020**

| Forecasting Categories               | Caucasian   |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown   |             | Grand Total (excl. Unknown) |             |
|--------------------------------------|-------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|-----------|-------------|-----------------------------|-------------|
|                                      | count       | %           | count            | %           | count                | %           | count           | %           | count       | %           | count     | %           | count                       | %           |
| Sentences (at age 18 or older)       |             |             |                  |             |                      |             |                 |             |             |             |           |             |                             |             |
| Assault                              | 101         | 33%         | 17               | 37%         | 1                    | 14%         | 7               | 47%         | 2           | 33%         | 3         | 30%         | 128                         | 33%         |
| Drug                                 | 19          | 6%          | -                | 0%          | -                    | 0%          | 2               | 13%         | 1           | 17%         | 2         | 20%         | 22                          | 6%          |
| Failure To Register As Sex Offender  | 2           | 1%          | -                | 0%          | -                    | 0%          | 1               | 7%          | -           | 0%          | -         | 0%          | 3                           | 1%          |
| Manslaughter                         | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Murder 1                             | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Murder 2                             | -           | 0%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | -                           | 0%          |
| Other Felony                         | 20          | 6%          | 6                | 13%         | 1                    | 14%         | -               | 0%          | 1           | 17%         | -         | 0%          | 28                          | 7%          |
| Property                             | 157         | 51%         | 18               | 39%         | 5                    | 71%         | 5               | 33%         | 2           | 33%         | 5         | 50%         | 187                         | 49%         |
| Robbery                              | 7           | 2%          | 5                | 11%         | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | 12                          | 3%          |
| Sex                                  | 4           | 1%          | -                | 0%          | -                    | 0%          | -               | 0%          | -           | 0%          | -         | 0%          | 4                           | 1%          |
| <b>Total Sentences</b>               | <b>310</b>  | <b>100%</b> | <b>46</b>        | <b>100%</b> | <b>7</b>             | <b>100%</b> | <b>15</b>       | <b>100%</b> | <b>6</b>    | <b>100%</b> | <b>10</b> | <b>100%</b> | <b>384</b>                  | <b>100%</b> |
| % of Sentences in Race               | 81%         |             | 12%              |             | 2%                   |             | 4%              |             | 2%          |             |           |             | 100%                        |             |
| 2019 Count of Race (*)               | 376,274     |             | 7,926            |             | 13,448               |             | 5,914           |             | 21,584      |             | 0%        |             | 425,146                     |             |
| Race distribution                    | 89%         |             | 2%               |             | 3%                   |             | 1%              |             | 5%          |             |           |             | 100%                        |             |
| <b>Ratio Sentence vs. Population</b> | <b>0.91</b> |             | <b>6.43</b>      |             | <b>0.58</b>          |             | <b>2.81</b>     |             | <b>0.31</b> |             |           |             |                             |             |

(\*) Data are from the 2020 OFM State Population Forecast for 2019, excluding the group of 2 or more races, which is 13,232, as there is not such a race group in sentencing data  
 (\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population**  
**(all ages)**

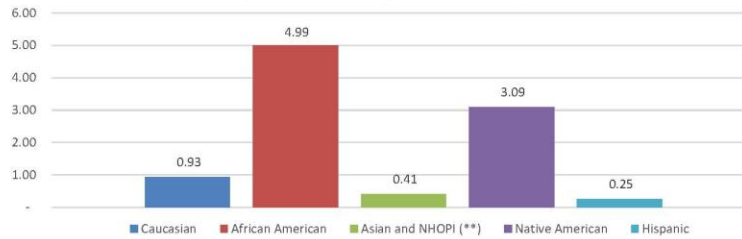


**Table 5.  
Adult Felony FY2020 Sentences vs. Population (aged 18-54)**

| Forecasting Categories                 | Caucasian    |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown  |             | Grand Total (excl. Unknown) |             |
|--|--------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|----------|-------------|-----------------------------|-------------|
|  | count        | %           | count            | %           | count                | %           | count           | %           | count       | %           | count    | %           | count                       | %           |
| <b>Sentences (At-Risk: 18-54 only)</b> |              |             |                  |             |                      |             |                 |             |             |             |          |             |                             |             |
| Assault                                | 486          | 26%         | 101              | 37%         | 12                   | 34%         | 33              | 27%         | 10          | 26%         | 1        | 25%         | 642                         | 27%         |
| Drug                                   | 626          | 33%         | 93               | 34%         | 3                    | 9%          | 39              | 32%         | 9           | 24%         | 1        | 25%         | 770                         | 33%         |
| Failure To Register As Sex Offender    | 12           | 1%          | 1                | 0%          | -                    | 0%          | 2               | 2%          | -           | 0%          | -        | 0%          | 15                          | 1%          |
| Manslaughter                           | 3            | 0%          | 3                | 1%          | -                    | 0%          | -               | 0%          | 1           | 3%          | -        | 0%          | 7                           | 0%          |
| Murder 1                               | 5            | 0%          | 1                | 0%          | -                    | 0%          | -               | 0%          | 1           | 3%          | -        | 0%          | 7                           | 0%          |
| Murder 2                               | 4            | 0%          | 2                | 1%          | -                    | 0%          | -               | 0%          | -           | 0%          | -        | 0%          | 6                           | 0%          |
| Other Felony                           | 185          | 10%         | 22               | 8%          | 2                    | 6%          | 12              | 10%         | 5           | 13%         | -        | 0%          | 226                         | 10%         |
| Property                               | 509          | 27%         | 42               | 15%         | 17                   | 49%         | 32              | 26%         | 11          | 29%         | 1        | 25%         | 611                         | 26%         |
| Robbery                                | 11           | 1%          | 1                | 0%          | 1                    | 3%          | -               | 0%          | 1           | 3%          | -        | 0%          | 14                          | 1%          |
| Sex                                    | 43           | 2%          | 6                | 2%          | -                    | 0%          | 3               | 2%          | -           | 0%          | 1        | 25%         | 52                          | 2%          |
| <b>Total Sentences</b>                 | <b>1,884</b> | <b>100%</b> | <b>272</b>       | <b>100%</b> | <b>35</b>            | <b>100%</b> | <b>121</b>      | <b>100%</b> | <b>38</b>   | <b>100%</b> | <b>4</b> | <b>100%</b> | <b>2,350</b>                | <b>100%</b> |
| % of Sentences in Race                 | 80%          |             | 12%              |             | 1%                   |             | 5%              |             | 2%          |             |          | 100%        |                             |             |
| 2019 Count of Race (*)                 | 200,362      |             | 5,405            |             | 8,535                |             | 3,879           |             | 14,960      |             | 0%       | 233,141     |                             |             |
| Race distribution                      | 86%          |             | 2%               |             | 4%                   |             | 2%              |             | 6%          |             |          | 100%        |                             |             |
| <b>Ratio Sentences vs. Population</b>  | <b>0.93</b>  |             | <b>4.99</b>      |             | <b>0.41</b>          |             | <b>3.09</b>     |             | <b>0.25</b> |             |          |             |                             |             |

(\*) Data are from the 2020 OFM State Population Forecast for 2019, excluding the group of 2 or more races, which is 8,364, as there is not such a race group in sentencing data  
 (\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population  
(At risk, aged 18-54)**

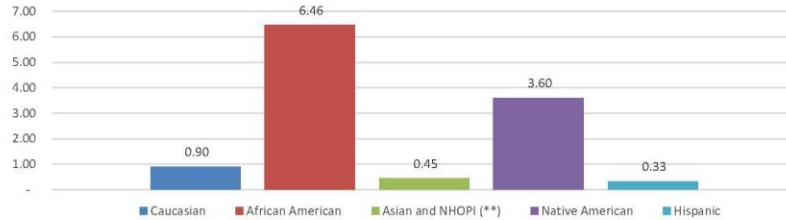


**Table 6.**  
**Adult Felony FY 2020 Sentences vs. Population (All ages)**

| Forecasting Categories                       | Caucasian    |             | African American |             | Asian and NHOPI (**) |             | Native American |             | Hispanic    |             | Unknown  |             | Grand Total (excl. Unknown) |             |
|--|--------------|-------------|------------------|-------------|----------------------|-------------|-----------------|-------------|-------------|-------------|----------|-------------|-----------------------------|-------------|
|  | count        | %           | count            | %           | count                | %           | count           | %           | count       | %           | count    | %           | count                       | %           |
| <b>FY2018 Sentences (at age 18 or older)</b> |              |             |                  |             |                      |             |                 |             |             |             |          |             |                             |             |
| Assault                                      | 514          | 26%         | 108              | 36%         | 12                   | 34%         | 34              | 27%         | 10          | 24%         | 1        | 25%         | 678                         | 27%         |
| Drug   | 665          | 34%         | 106              | 36%         | 3                    | 9%          | 40              | 32%         | 11          | 27%         | 1        | 25%         | 825                         | 33%         |
| Failure To Register As Sex Offender          | 13           | 1%          | 2                | 1%          | -                    | 0%          | 2               | 2%          | -           | 0%          | -        | 0%          | 17                          | 1%          |
| Manslaughter                                 | 5            | 0%          | 3                | 1%          | -                    | 0%          | -               | 0%          | 1           | 2%          | -        | 0%          | 9                           | 0%          |
| Murder 1                                     | 5            | 0%          | 1                | 0%          | -                    | 0%          | -               | 0%          | 1           | 2%          | -        | 0%          | 7                           | 0%          |
| Murder 2                                     | 4            | 0%          | 2                | 1%          | -                    | 0%          | -               | 0%          | -           | 0%          | -        | 0%          | 6                           | 0%          |
| Other Felony                                 | 193          | 10%         | 23               | 8%          | 2                    | 6%          | 13              | 10%         | 5           | 12%         | -        | 0%          | 236                         | 10%         |
| Property                                     | 517          | 26%         | 45               | 15%         | 17                   | 49%         | 32              | 26%         | 12          | 29%         | 1        | 25%         | 623                         | 25%         |
| Robbery                                      | 12           | 1%          | 1                | 0%          | 1                    | 3%          | -               | 0%          | 1           | 2%          | -        | 0%          | 15                          | 1%          |
| Sex  | 49           | 2%          | 7                | 2%          | -                    | 0%          | 3               | 2%          | -           | 0%          | 1        | 25%         | 59                          | 2%          |
| <b>Total Sentences</b>                       | <b>1,977</b> | <b>100%</b> | <b>298</b>       | <b>100%</b> | <b>35</b>            | <b>100%</b> | <b>124</b>      | <b>100%</b> | <b>41</b>   | <b>100%</b> | <b>4</b> | <b>100%</b> | <b>2,475</b>                | <b>100%</b> |
| % of Sentences in Race                       | 80%          |             | 12%              |             | 1%                   |             | 5%              |             | 2%          |             |          |             | 100%                        |             |
| 2019 Count of Race (*)                       | 376,274      |             | 7,926            |             | 13,448               |             | 5,914           |             | 21,584      |             | 0%       |             | 425,146                     |             |
| Race distribution                            | 89%          |             | 2%               |             | 3%                   |             | 1%              |             | 5%          |             |          |             | 100%                        |             |
| <b>Ratio Sentences vs. Population</b>        | <b>0.90</b>  |             | <b>6.46</b>      |             | <b>0.45</b>          |             | <b>3.60</b>     |             | <b>0.33</b> |             |          |             |                             |             |

(\*) Data are from the 2020 OFM State Population Forecast for 2019, excluding the group of 2 or more races, which is 13,232, as there is not such a race group in sentencing data  
 (\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

**Ratio: Sentences to Racial Population (all ages)**



**Table 7.  
Comparison of all ratios FY 2020**

| Ratio   | Caucasian | African American | Asian and NHOPI (**) | Native American | Hispanic |
|---|-----------|------------------|----------------------|-----------------|----------|
| Ratio Age All-age Sentences vs. Population            | 0.90      | 6.46             | 0.45                 | 3.60            | 0.33     |
| Ratio Age 18-to-54 (At-risk) Sentences vs. Population | 0.93      | 4.99             | 0.45                 | 3.09            | 0.25     |
| Ratio Felony-Reduce To-GM Sentences vs. Population    | 0.91      | 6.43             | 0.58                 | 2.81            | 0.31     |

(\*\*) NHOPI: Native Hawaiian and Other Pacific Islander

