

# SENATE BILL REPORT

## SB 5904

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As of April 6, 2017

**Title:** An act relating to convicted persons.

**Brief Description:** Concerning convicted persons.

**Sponsors:** Senators Braun and Brown.

**Brief History:**

**Committee Activity:** Law & Justice: 4/06/17.

### Brief Summary of Bill

- Increases criminal penalties for sexual offenses against children, domestic violence felonies, crimes against seniors and vulnerable adults, and habitual property and Driving Under the Influence (DUI) offenders.
- Adjusts community custody caseload by: (1) reducing supervision for most jail offenders; (2) authorizing earned time for community custody sentences; (3) making concurrent supervision the default when there are multiple supervision sentences for multiple offenses; (4) instituting a pilot project for the supervision of offenders convicted of motor vehicle related offenses; and (5) requiring a first time offender waiver for eligible offenses.
- Reduces prison caseload by (1) mandating the first time offender waiver for certain offenses, and (2) removing the sunset date from the existing drug sentencing grid.
- Makes Driving With a License Suspended in the third degree an infraction rather than a misdemeanor.
- Creates a program that provides state-issued identicards to certain offenders released from prison.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Aldo Melchiori (786-7439)

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:** Sentencing Reform Act (SRA). In 1981, the Legislature passed the SRA, which established determinate sentencing for felony offenders. The SRA eliminated indeterminate sentences and parole in Washington, with some exceptions. Instead, the SRA determines a specific sentence within the statutory maximum. Judges determine an offender's sentence within a sentence range provided in statute, which is calculated using the severity or seriousness level of the offense and the offender's criminal history score calculated using points based on the offender's past convictions. The standard sentence range for any offense that is not a drug offense is established by referring to the standard sentencing grid.

The Legislature and citizens, through the initiative process, have utilized various mechanisms for increasing sentences beyond the standard sentence range for offenses perceived as a greater threat to public safety. Those mechanisms include:

1. *Sentencing enhancements*. Enhancements typically add time to a sentence if the offender is found guilty of a particular act. This time is generally not eligible for good time credits.
2. *Additional scoring*. Repeat offenders may be subject to double or triple scoring of offenses that will increase the offender's criminal history score and result in a higher standard sentencing range on the sentencing grid.
3. *Increased seriousness level*. The Legislature may increase the seriousness level of a particular crime, resulting in a higher standard sentencing range on the sentencing grid.
4. *Consecutive/concurrent sentences*. The court may require a term of confinement or community custody to run consecutively instead of concurrently, lengthening the offender's term of confinement or supervision.

Sentencing for Drug Offenses. In 2003, the Legislature adopted a separate sentencing grid that applies to drug offenses. Drug offenses committed on or after July 1, 2003, are divided into three seriousness levels. Offenders sentenced for Seriousness Level 1 drug offenses have a current offense of one of the following:

- possession or forged prescription of a controlled substance, legend drug, or marijuana;
- manufacturing, delivering, or possession with intent to deliver marijuana; or
- using a building for drug purposes.

Prior to 2013, the court had the discretion to impose a sentence of between 6 to 18 months for offenders with a criminal history of three to five prior felony offenses. As a result, the court could sentence the offender to either jail or prison depending on the length of the sentence. The drug sentencing grid was modified in 2013 so that any offender who commits a Seriousness Level 1 drug offense, and has a criminal history score within the range of three to five, will serve their sentence in jail unless an exceptional sentence is imposed. That change is set to expire July 1, 2018.

First-Time Offender Waiver (FTOW). An offender is eligible to receive a sentencing alternative of FTOW if the person:

- has never been convicted of a felony or participated in a program of deferred prosecution for a felony; and
- is not currently convicted of:

- a violent offense or sex offense;
- manufacturing, delivery, or sale of certain controlled substances; or
- felony driving under the influence.

In sentencing a first-time offender, the court may waive imposition of the standard sentence and impose a sentence of up to 90 days confinement and community custody of up to one year, or up to 24 months if treatment is also ordered.

**Community Custody.** Certain offenders sentenced to prison must also be sentenced to a term of community custody. Terms of community custody depend on the type of offense. Mandatory terms of community custody for certain offenses are as follows:

- a three-year term for a sex offense or serious violent offense;
- an 18-month term for a violent offense, rather than a serious violent offense;
- a one-year term for crimes against persons, unlawful possession of a firearm when the offender is a criminal street gang member, certain drug offenses, or failure to register as a sex offender; and
- a length of term as authorized by statute for a sentencing alternative.

The court may impose up to one year of community custody for offenders who will be sentenced to a term of confinement for one year or less and therefore will serve their term of confinement in jail. Those offenses include any of the above listed offenses and offenders sentenced to a sentencing alternative for a FTOW. Statute dictates which offenders sentenced to a term of community custody the Department of Corrections (DOC) is required to supervise. DOC may not supervise any offender for which there is not express statutory authorization.

DOC is required to supervise all sex offenders, serious violent offenders, dangerous mentally ill offenders, offenders under the jurisdiction of the Indeterminate Sentence Review Board, offenders convicted of failure to register, certain domestic violence offenders, offenders serving a sentencing alternative, offenders under the Interstate Compact, and felony DUI offenders. For any other offender sentenced to a term of community custody, DOC is only required to supervise the offender if the offender is assessed at a high risk to reoffend.

Unless the offender qualifies for a FTOW, the statute does not authorize a term of community custody for any offender convicted of a property offense. Sixty percent of the offenders supervised by DOC serve their confinement time in jail and are not sentenced to the custody of DOC.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute): Part I - Crimes Against Vulnerable Persons.** Two new crimes of theft in the first and second degree from a vulnerable adult are created. A six-year statute of limitations applies for theft from a vulnerable adult. A vulnerable adult is defined as a person 18 years of age or older who has the mental or physical inability to care for oneself; or is suffering from a cognitive impairment other than intoxication. The culpability standard for criminal mistreatment in the first and second degrees is lowered from reckless to criminal negligence. These offenses are defined as crimes against persons.

Part II - Seriousness Level of Crimes. The seriousness level for the following sex crimes against children are increased by one level:

- Rape of a child 1 from XII to XIII;
- Rape of a child 2 from XI to XII;
- Rape of a child 3 from VI to VII;
- Child Molestation 1 from X to XI;
- Child Molestation 2 from VII to VIII; and
- Child Molestation 3 from V to VI.

Felony assault in the fourth degree where domestic violence was pleaded and proven is ranked as a seriousness Level IV.

Part III - Driving Under the Influence. The fourth DUI or being in physical control of a motor vehicle while under the influence (PC) is a felony offense if the person's criminal record includes three or more prior offenses within the applicable time periods. The fourth DUI or PC offense is a felony ranked at Level IV instead of Level V on the sentencing grid. A \$50 fee is created to allow for grants to organizations to combat DUI.

Part IV - Community Custody: Concurrent. Terms of community custody run concurrently when an offender is serving consecutive terms of confinement on multiple sentences, unless a court specifically orders otherwise. The DOC must also recalculate end dates for community custody, supervision, and placement so that they run concurrently to previously imposed sentences and it applies to all offenders currently in confinement or under active supervision. The recalculations do not create any expectations that any term will end before July 1, 2017.

Part V - Community Custody: Motor Vehicle Offense Pilot. A two-year pilot program, requiring the DOC to supervise persons convicted of felonies relating to the theft or taking of a motor vehicle regardless of the risk level assessed by the Department, is established.

Part VI - Community Custody: Good Time. Individuals serving a community supervision sentence may earn positive time for complying with their supervision plan. Earned time is calculated at 15 days of positive time for each 30 days in complete compliance, excluding during the first and last month.

Part VII - Community Custody: Jail Offenders. The Legislature intends to provide additional staff to the Department for increased case management to individuals on supervision. Courts may order up to one year of supervision for offenders sentenced to a term of one year or less if the offender is being sentenced for a sex offense or a violent offense. Offenders sentenced to one year or less for a crime against persons, a violation of the Controlled Substances Act, or a felony failure to register may receive up to six months of supervision.

Part VIII - Habitual Property Offenders. A special allegation may be brought for habitual property offenders when the offender has a criminal history score of nine points or higher in certain property crimes. Once a person is found beyond a reasonable doubt based on the evidence to be a habitual property offender, the allegation requires an addition 24 months in total confinement for a Class B felony and an additional 12 months for a Class C felony.

Part IX - Identicards for Persons Released from the Department of Corrections. The DOC, working in conjunction with the Department of Licensing (DOL), creates and implements a

program to provide state-issued identicards. DOC must inquire as to a person's immigration status prior to the issuance of an identicard and cannot be prohibited from an investigation of person's legal presence. DOL charges an \$18 fee for each identicard issued under the program.

**Part X - Driving While License Suspended.** Driving With a License Suspended in the third degree is a traffic infraction subject to a \$550 fine. Currently, it is misdemeanor when a person is found driving when their license is suspended because the person:

- has not furnished proof of satisfactory progress in alcohol or drug treatment;
- has not furnished proof of financial responsibility for the future;
- has failed to comply with RCW 46.29 related to uninsured accidents;
- has failed to respond to a notice of traffic infraction or failed to appear at a requested hearing;
- has committed an offense in another state that is not grounds for suspension in this state; or
- has a suspended license but is eligible to reinstate it.

**Part XI - First Time Offender Waiver.** The court must order a FTOW for any eligible offender, unless the court sentences the offender to a residential drug offender sentencing alternative or parenting sentencing alternative. The sentence requires up to a 90-day jail sentence and up to 12 months community supervision. An offender who is eligible for a FTOW may not be sentenced to a prison-based drug offender sentencing alternative.

**Part XII - Domestic Violence.** Assault in the fourth degree where domestic violence (DV) is plead and proven is a Class C felony if the person has two or more prior adult convictions with the past ten years for any of the following crimes where DV was plead and proven:

- Repetitive DV;
- Harassment;
- Assault in the first, second, or third degree; or
- an out-of-state comparable offense.

Prior adult convictions for Assault of a Child or Criminal Mistreatment involving DV are counted as two points when calculating an offender score for sentencing of a DV conviction. If Assault in the fourth degree when DV is plead and proven, the collection of DNA is required.

Sheriffs may waive fees associated with service of a writ of habeas corpus that was issued for the return of a child when the person who was granted the writ is unable to pay due to poverty.

**Part XIII - Applicability and Expiration.** The sunset date for the drug grid changes from the 2013-15 biennium is removed.

**Appropriation:** None.

**Fiscal Note:** Requested on March 30, 2017.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony on Proposed Substitute:** PRO: This bill is a compilation of a number of bills that came out of this session and a review of existing policies and other policies in budget that allow us to make better decisions as to the money we are spending. There are several considerations that went into this final bill. First, the rule of law as a society that there need to be consequences for crime; second, how to reduce recidivism; and third, how do we do it in a way that is fiscally possible. This started as a broad proposal early on and has been refined with constructive feedback from prosecutors, law enforcement and counties as well as internal staff and legislators. There is evidence supporting positive achievement time on community custody.

CON: Seventy-two percent of prison population is incarcerated for a sex or violent conviction and 70 percent of the people supervised are at high risk. Two-thirds of offenders already serve their sentence in jails instead of prisons. We do not do a particularly good job at reducing recidivism in this state. We should be doing a better job and this should be the focus of legislation. We support the positive time provision. Concurrent supervision also makes sense. The community custody for jail offenders change from 12 months to six months with positive time could result in a period of incarceration as low as four months. The change should be to nine months so that the offender must serve at least six months. Mandating the FTOW is too absolute. It could result in unintended consequences for some serious offenders, such as those convicted of controlled substance homicide, some of the domestic violence offenses created in another section of the bill, and some felonies committed while armed with a deadly weapon. The increases in the seriousness level on a number of sex crimes would drive a big fiscal impact several biennia out. We do not believe there is a good reason to do this. Public safety of primary importance. Washington is the only state that does not supervise property offenders. As a result, we have the highest rate of property crime in the nation. Community custody is cost effective compared to incarceration because it allows offenders to be assessed and targeted with interventions. Valuing supervision solely based on recidivism undervalues the immediate community safety function. Underlying issues of drug addiction and mental health do not go away without providing adequate interventions. The problem is that terms of incarceration have already been reduced to the bare minimum. From experience supervising offenders, community custody for offenders who serve their time in local jail are just as likely to commit heinous or violent crimes as those coming from prison. The state and counties are essential partners in criminal justice system. When one partner backs off, it can overburden the other. Two things happen when the state and counties do not work together: (1) it undermines criminal justice by undercutting supervision and potential for reintegration; and (2) it offloads expenses from state to counties. Public safety and function of criminal justice system are important. We do not want to save money at expense of public safety. We realize that budgets are difficult but we are concerned about the impacts of bill. Reducing supervision could produce long-term effects could be felt locally for some time. Property crime is a large problem. If we can get these offenders off the street, we will actually see a reduction in the crime rate. We take particular issue with the portion of the bill that reduces supervision for offenders who serve their time in local jails. There are multiple cases of community custody jail offenders where supervision has been successful in maintaining public safety. This bill is a message to victims that public safety is of no importance. With cuts in past years, DOC is already down

to supervising the worst of the worst. Treatment and cognitive behavioral intervention are key.

OTHER: The identicard program offers a positive step in community safety by providing offenders leaving custody with identification. Identification is necessary to access housing and employment. Providing offenders leaving custody with an ID removes a significant barrier to successful reentry. DOC continues to be challenged by the continual changes to sentencing structure. This bill has some provisions that reduce complexity including concurrent supervision and the elimination of the sunset for the drug grid. However, we want to point out that the bill increases complexity by establishing positive achievement time and providing motor vehicle related offense supervision. DOC would ask for an additional six to 12 months to implement. DOC believes that supervision should be targeted to high risk offenders. Also, the report is due too early. Many offenders will not be out of prison yet. DOC generally uses a three-year return to prison after release as a review. Records and other staff will need to be trained to these changes to make sure audit and hand calculations are correct. As for long-term capacity indicated by this bill, DOC believes that estimates will show a modest decrease in average daily population over the next few years. However, several estimates are indeterminate and some will cause increases out further than six years. For example, changes to the seriousness levels for sex offenses have a modest increase over the next few years, but the ten-year impact is about a 400 average daily population increase. The city and county of Spokane are huge supporters of supervision for motor vehicle related offenses. If a statewide program for supervision of motor vehicle offenders cannot be funded, we would remind the committee that Spokane has laid the foundation to do this on a smaller, local basis. The state should be thoughtful about reductions and should support a workgroup that targets money effectively.

**Persons Testifying:** PRO: Senator Braun, Prime Sponsor.

CON: Tom McBride, WAPA; Judy Kudel, WFSE; Sean Rabell, WFSE; John Conaty, WFSE; Paul Pasto, Pierce County Sheriff's Office; Dusty Pierpoint, Lacey Police Department; Rees Campbell, WFSE; Don Malo, WFSE; Andy Page, WFSE; Chad Winfrey, WFSE; Ton Johnson, WFSE.

OTHER: Devon Schrum, DOC; Alex MacBain, DOC; Luke Esser, City of Spokane.

**Persons Signed In To Testify But Not Testifying:** No one.