

## **Sex Offender Sentencing in Washington**

Sex offender sentencing in Washington has gone through a number of changes over the past twenty years. This has made this area of sentencing more complex than sentencing for other types of crime. The complexity of sex offender sentencing is heightened by the fact that, because of the *ex post facto* clauses of the federal and state constitutions, most of the changes made over the years may not be applied retroactively; i.e., to offenders who committed crimes before the effective date of the applicable changes. This means that there are, in essence, a variety of different sentencing systems in Washington operating simultaneously; which one applies to a given sex offender depends on the date he or she committed his or her crime, not the date he or she was caught or convicted.

Some of the significant changes the Legislature has made over time to sex offender sentencing include:

- Determinate sentencing
- Community custody
- Life sentences for "persistent offenders"
- "Determinate-plus" sentencing
- The Special Sex Offender Sentencing Alternative
- Civil restrictions

### **I. Determinate Sentencing**

Prior to 1984, Washington had an "indeterminate" model of sentencing for all felony offenses, including sex offenses. Under this system, the court would set a minimum term and a maximum term. The parole board (now called the Indeterminate Sentence Review Board, or ISRB) would then evaluate the offender near the expiration of his or her minimum term. If the ISRB did not parole the offender, it would assign the offender a new minimum term after which the offender would be re-evaluated by the board. Indeterminate sentencing applies to any offender who *committed* a sex offense prior to July 1, 1984, even if the *conviction* took place today.

In the late 1970's and early 1980's, stakeholders began to consider moving away from indeterminate sentencing due to concerns regarding truth in sentencing, equal treatment among offenders, and fiscal uncertainty. The result of these concerns was the Sentencing Reform Act of 1981 (SRA), which imposed a "determinate" model of sentencing upon offenders who committed felonies on or after July 1, 1984. Determinate sentencing is the foundation upon which all of the subsequent sentencing changes for sex offenders are built.

Under determinate sentencing, a court must sentence an offender to a specific term of years within a "standard range." The standard range is determined using a grid with the offender's criminal history (known as "offender score") on the horizontal axis and the severity of the felony

(known as "seriousness level") on the vertical axis.<sup>1</sup> An offender's offender score is a measure of his or her criminal history, with each prior felony generally corresponding to one point in the score.<sup>2</sup> The seriousness level of a given offense is assigned by the Legislature in statute (RCW 9.94A.515). Felonies that do not have seriousness levels attached to them are known as "unranked felonies" and are punishable by 0-12 months in jail regardless of an offender's offender score.

Despite the changes the Legislature has made to sex offender sentencing over the years, determinate sentencing still applies to a number of sex offenses today, including:

- Child Molestation in the 2nd degree (first two offenses)
- Child Molestation in the 3rd degree
- Communication with a Minor for Immoral Purposes
- Custodial Sexual Misconduct in the 1st degree
- Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct
- Failure to Register as a Sex Offender
- Incest in the 1st degree (first two offenses)
- Incest in the 2nd degree (first two offenses)
- Indecent Liberties (without forcible compulsion)
- Patronizing a Juvenile Prostitute
- Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct
- Rape in the 3rd degree (first two offenses)
- Rape of a Child (statutory rape) in the 3rd degree
- Sending or Bringing into the State Depictions of a Minor Engaged in Sexually Explicit Conduct
- Sexual Exploitation of a Minor (first two offenses)
- Sexual Misconduct with a Minor in the 1st degree
- Sexually Violating Human Remains
- Voyeurism

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<sup>1</sup> Regardless of the standard range, an offender's sentence may not exceed the "statutory maximum sentence" for the crime: Life for class A felonies, 10 years for class B felonies, and five years for class C felonies.

<sup>2</sup> Special scoring rules can apply to certain types of felonies. For example, some juvenile offenses can count as only 1/2 point. Also, some types offenses, like violent offenses or sex offenses, can count as two or three points.

## **II. Community Custody**

A court *must* impose a term of "community custody" between 36-48 months<sup>3</sup> upon a person convicted of a sex offense if the person's term of confinement is greater than one year. "Community custody"<sup>4</sup> refers to the time in which the sex offender is to be supervised in the community. This mandatory term of community custody is in addition to the offender's term of confinement.

Generally speaking, a court is *authorized*, but not required, to sentence a sex offender whose term of confinement is one year or less to a term of community custody of up to 12 months. The one exception to this general rule is for a person convicted of Failure to Register as a Sex Offender for the first time. The court must sentence such a person to a term of community custody between 36-48 months, even though the crime is an unranked felony punishable by 0-12 months in jail.

For an offender given a mandatory term of community custody, a court is required to impose conditions of community custody, including obtaining residence approval from the Department of Corrections (DOC), reporting to a community corrections officer, and refraining from possessing or using controlled substances. Additionally, the court is authorized to impose conditions of community custody, including remaining within or outside of a specified geographic boundary, refraining from having contact with the victim, and refraining from consuming alcohol.

The DOC is required to supervise sex offenders on community custody and may impose conditions of community custody, including electronic monitoring, that do not contravene conditions that were set by the sentencing court. The DOC is prohibited from approving the residence of a sex offender on community custody if the residence: (1) includes a minor victim or a child of similar age or circumstance who may be placed at substantial risk of harm or (2) is within close proximity of the current residence of a minor victim, unless the residence of the victim cannot be determined or unless the residence restriction would interfere with family reunification efforts. The DOC is also authorized to reject a residence location near schools,

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<sup>3</sup> The period of community custody is different for "determinate-plus" offenders (see section IV *infra*).

<sup>4</sup> Prior to the Offender Accountability Act of 1999, supervision in the community went by several different names; e.g., community custody, postrelease supervision, community supervision. Different entities were responsible for the offender during these different types of supervision. In 1999, the Legislature re-named all of the types of supervision in the community "community custody" and placed the supervisory authority for all of the different types of supervision within the DOC.

child care centers, playgrounds, or other facilities where children of similar age or circumstance to the victim are present who may be placed at substantial risk of harm.

### **III. Persistent Offenders**

There are two persistent offender laws in Washington: three-strikes and two-strikes.

#### **A. Three Strikes**

In 1993, the voters approved Initiative 593, otherwise known as the "three-strikes" law, which imposes a life sentence upon certain repeat offenders. Under this law, an offender convicted of a third "strike" (known as a "most serious offense") must be sentenced to life in prison without the possibility of release.

Sex offenses that are strikes under the three-strikes law include:

- Child Molestation in the 2nd degree
- Incest in the 1st degree
- Incest in the 2nd degree
- Indecent Liberties (without forcible compulsion)
- Rape in the 3rd degree
- Sexual Exploitation of a Minor

#### **B. Two-Strikes**

In 1996, the Legislature passed Substitute House Bill 2320, otherwise known as the "two-strikes" law, which imposed a life sentence upon certain repeat sex offenders. Under this legislation, an offender convicted of a second two-strikes offense must be sentenced to life in prison without the possibility of release.

Sex offenses that are strikes under the two-strikes law include:

- Child Molestation in the 1st degree
- Indecent liberties (with forcible compulsion)
- Rape in the 1st degree
- Rape in the 2nd degree
- Rape of a Child (statutory rape) in the 1st degree
- Rape of a Child (statutory rape) in the 2nd degree
- Any of the following crimes if committed with sexual motivation:
  - Assault in the 1st degree
  - Assault in the 2nd degree
  - Assault of a Child in the 1st degree
  - Assault of a Child in the 2nd degree
  - Burglary in the 1st degree

- Homicide by Abuse
- Kidnapping in the 1st degree
- Kidnapping in the 2nd degree
- Murder in the 1st degree
- Murder in the 2nd degree

#### **IV. Determinate-Plus Sentencing**

In 2001, the Legislature passed Third Engrossed Substitute Senate Bill 6151, which created a type of sentencing that has come to be known as "determinate-plus" sentencing. In brief, determinate-plus sentencing allows longer sentences (up to life in prison in some cases) and greater supervision in the community for offenders convicted of certain sex offenses.

Determinate-plus sentencing applies to two groups of offenders: (1) offenders convicted of a first, two-strikes sex offense and (2) offenders who have a prior, two-strikes sex offense in their criminal histories who are convicted of a subsequent sex offense that is not a two-strikes offense.

A court must sentence a determinate-plus offender to a maximum term and a minimum term. The maximum term is equal to the statutory maximum for the offense: life for class A felonies,<sup>5</sup> 10 years for class B felonies, and five years for class C felonies. The minimum term is generally equal to the standard range sentence the offender would have received under determinate sentencing (see section I *supra*).

In 2006, the Legislature passed House Bill 3277, which imposed a 25-year minimum term of confinement for the following types of determinate-plus offenders:

- An offender convicted of child molestation in the first degree, rape of a child in the first degree, or rape of a child in the second degree, if the prosecutor alleges and proves beyond a reasonable doubt that the offense was "predatory." "Predatory" is defined as situations where: (a) the perpetrator was a stranger to the victim (unknown to the victim 24 hours prior to the offense); (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization was a significant reason the relationship was established; (c) the perpetrator was a teacher, counselor, volunteer, or other person in authority and the victim was a student of the school under his or her authority or supervision; (d) the perpetrator was a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in that activity under his or her authority or supervision; or (e) the perpetrator was a pastor, elder, volunteer, or other person in authority in any church or religious organization and the victim was a member or participant of the organization under his or her authority.

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<sup>5</sup> All "two-strikes" sex offenses are class A felonies.

- An offender convicted of indecent liberties with forcible compulsion, kidnapping in the first degree with sexual motivation, rape in the first degree, or rape in the second degree, if the prosecutor alleges and proves beyond a reasonable doubt that the victim was under the age of 15 at the time of the offense.
- An offender convicted of indecent liberties with forcible compulsion, kidnapping in the first degree with sexual motivation, rape in the first degree, or rape in the second degree with forcible compulsion, if the prosecutor alleges and proves beyond a reasonable doubt that the victim was a person with a developmental disability, a mentally disordered person, or a frail elder or vulnerable adult.

The ISRB must evaluate a determinate-plus offender prior to the expiration of his or her minimum term. The ISRB must order the release of the offender upon expiration of the minimum term unless the Board finds that the offender is likelier than not to commit another sex offense if released. If the ISRB does not release the offender, it must re-evaluate the offender at least once every five years up to the offender's maximum term (which is life for some determinate-plus offenders).

If the ISRB releases the offender, the offender will be on community custody status for the remainder of his or her maximum term. If the offender's determinate-plus sentence was due to a conviction for a two-strikes offense committed against a minor victim, the terms of the offender's community custody must include a prohibition against living within a "community protection zone." A community protection zone is the area within two blocks (880 feet) of a public or private school.

## **V. The Special Sex Offender Sentencing Alternative**

In 1984, the Legislature passed Substitute House Bill 1247, which enacted the Special Sex Offender Sentencing Alternative (SSOSA). A SSOSA sentence consists of a suspended sentence, incarceration for up to 12 months, treatment for up to five years, and a term of community custody. In 2004, the Legislature made a variety of changes to SSOSA, including narrowing the eligibility criteria, adding to the factors a court must consider when granting a SSOSA, adding requirements for a SSOSA sentence, and changing the manner in which SSOSA offenders are supervised in the community. The 2004 changes went into effect on July 1, 2005.

An offender is eligible for a SSOSA sentence if: (1) he or she is convicted of a sex offense that is not a serious violent offense or Rape in the 2nd degree, (2) he or she has no prior felony sex offenses, (3) he or she has no prior adult violent offenses within five years of the current offense, (4) the current offense did not cause substantial bodily harm to the victim, (5) he or she has an established relationship or connection to the victim, and (6) his or her standard sentence range includes the possibility of incarceration for less than 11 years. Furthermore, an offender may not receive a SSOSA sentence pursuant to a guilty plea unless he or she has admitted that he or she committed the underlying offense.

Before granting a SSOSA sentence, the court must consider: (1) an examination provided by a treatment provider, (2) the opinion of the victim, (3) whether the offender and the community will benefit from the SSOSA sentence, (4) whether the offender had multiple victims, (5) whether the offender is amenable to treatment, (6) the risk posed by the offender, and (7) whether the SSOSA sentence is too lenient in light of the circumstances.

The DOC is required to supervise an offender who has been granted a SSOSA sentence. The DOC may sanction certain violations of a SSOSA sentence, but must send certain violations back to the sentencing court along with a recommendation that the sentence be revoked. In addition, the sentencing court is required to conduct annual hearings on the offender's progress in treatment in which the victim must be given the opportunity to be heard. The sentencing court is also required to conduct a treatment termination hearing near the end of the offender's term of treatment in which the victim must be given the opportunity to be heard.

## **VI. Civil Restrictions**

There are two main types of civil (non-criminal) restrictions on sex offenders in Washington: registration and civil commitment.

### **A. Registration**

In 1990, the Legislature enacted the Community Protection Act, which created one of the first sex offender registration laws in the country. A person convicted of a sex or kidnapping offense must register with the county sheriff of the county in which he or she resides. An offender must provide a variety of information when registering including his or her name, address, date and place of birth, place of employment, crime of conviction, date and place of conviction, aliases, social security number, photograph, and fingerprints. The offender must also notify the county sheriff if he or she is enrolled in a public or private school or in an institution of higher education.

Failure to meet the registration requirements is a gross misdemeanor if the offense that caused the duty to register was a misdemeanor or a gross misdemeanor. Failure to meet the registration requirements is a class C felony if the offense that caused the duty to register was a felony -- this class C felony is unranked<sup>6</sup> for a first offense and ranked at seriousness level II for second and subsequent offenses.<sup>7</sup>

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<sup>6</sup> Unlike all other unranked felonies, a first conviction for Failure to Register as a Sex Offender carries a mandatory term of community custody.

<sup>7</sup> This ranking will result in a presumptive prison term for second and subsequent offenses.

Law enforcement agencies are authorized to release information regarding registered sex offenders based on the offenders' risk level.<sup>8</sup> For example, for risk level I offenders (evaluated as the lowest level of risk to the community), a law enforcement agency may only disclose information about the offenders to specified persons and entities; e.g., schools, victims, or witnesses. In contrast, for risk level III offenders (evaluated as the most risky to the community), a law enforcement agency may disclose information about the offenders to the public at large.

## **B. Civil Commitment**

Another program put in place by the Community Protection Act of 1990 was civil commitment for sexually violent predators. This program allows a sexually violent predator to be civilly committed after the completion of his or her criminal sentence. A sexually violent predator is a person who: (1) has been convicted of, found not guilty by reason of insanity of, or found to be incompetent to stand trial for, a crime of sexual violence and (2) suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility. Sexually violent predators are committed to the custody of the Department of Social and Health Services (DSHS) for control, care, and individualized treatment. Most sexually violent predators are confined in the Special Commitment Center (SCC) on McNeil Island.

A sexually violent predator who has been civilly committed is entitled to an annual review of his or her condition. As part of this evaluation, a court may order the person to be conditionally released to a less restrictive alternative (LRA). An LRA placement is only authorized if it is in the best interests of the person and adequate safeguards can be put in place to protect the community.

In 2001, the Legislature authorized the DSHS to operate a type of LRA known as a Secure Community Transition Facility (SCTF) from which sexually violent predators may seek treatment and employment in the community. The Legislature specified a variety of security measures for each SCTF the DSHS operates, including continuous electronic monitoring, minimum staff-to-resident ratios, and escorts for all SCTF residents in the community. The DSHS is currently operating two SCTFs, one on McNeil Island (near the SCC) and one in south Seattle.

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<sup>8</sup> A recommended risk level is initially made by the End of Sentence Review Committee (ESRC), which is part of the DOC. There are three risk levels, based upon the offender's level of risk to the community, with level I being the lowest level of risk. Local law enforcement agencies may depart from the ESRC's initial determination, but must notify the ESRC of the departures and the reasons therefor.