

# Resentencing in the Interest of Justice in King County, Washington

By Dan Satterberg, Carla Lee, and Douglas Wagoner

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Russell Harvey described his biggest regret from his time behind bars: He couldn't say goodbye to his mother in person before she died. In the King County courtroom, the judge, prosecutor, and defense attorney all teared up as Mr. Harvey—who appeared from Monroe Correctional Complex via Zoom—explained how during his 24 years of incarceration he learned to cope with his mental health and substance use disorder, challenges that stemmed from childhood trauma. Decades earlier in 1997, those adverse childhood experiences contributed to Harvey committing three second-degree robberies—three “strikes” under Washington state law—that resulted in an extraordinary life without the possibility of parole (LWOP) sentence. At 60 years old, Mr. Harvey had every expectation he would die in prison for the crimes he committed at 36 when he was in the throes of addiction. As Harvey put it, “I had an attitude of not caring about anything or anybody ... it's been a tremendous waste of a lifetime.”

However, on June 3, 2021, prosecutors and defense—working collaboratively—succeeded in petitioning a judge to resentence Mr. Harvey to time served, and he was ordered to be immediately released. In fact, when noting Harvey's transformation, the judge declared that the resentencing wasn't a difficult decision “at all.” (Harvey's moving story made the front page of the *Seattle Times*: <https://bit.ly/37Aw6LR>). In the following weeks, Harvey's unlikely path to freedom was followed by others—for a total of 13 people serving a LWOP sentence, predicated on one or more second degree robbery charges, who were successfully resentenced between June and August of 2021. If second degree robbery had not been considered as a three strikes offense, some of these resentenced individuals would have served 10–15 fewer years in prison. And these 13 people are just the first cases on the King County Prosecuting Attorney's Office (KCPAO) docket—there are many more resentencings to come.

## The Relationship Between Washington's Three Strikes Law and Mass Incarceration

Unfortunately, Mr. Harvey's extreme sentence is not particularly unique in Washington state. Over the past several decades, Washington reformed its sentencing laws in ways that dramatically increased the number of long and life prison sentences. Those reforms include the 1981 Sentence Reform Act, which effectively abolished parole statewide; the 1993 ballot measure that resulted in a first-in-the-nation three strikes law; and the “Hard Time for Armed Crime” sentencing enhancement ballot measure that passed in 1994. As a result of these measures, as well as others, the length of prison sentences in Washington state increased substantially, and incarceration rates grew to unsustainable levels that do not measurably improve public safety. See Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. (July 2017), <https://bit.ly/3jSZoem>.

From 1978 to 2015, Washington's prison and jail populations more than doubled, with 37,000 residents locked up today in various kinds of facilities. Today, 480 Washingtonians are incarcerated per 100,000,

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and those figures are far higher for Black people (2,372 per 100,000) and American Indian/Alaskan Natives (1,427 per 100,000). See Prison Pol’y Inst., *Washington State Profile*, Prison Pol’y Initiative, <https://bit.ly/3yKlx81>. The use of LWOP sentences also increased during this time frame. Indeed, the number of LWOP sentences imposed in 2016 was nearly five times higher (53) than it was in 1986 (11); and according to University of Washington Professors Katherine Beckett and Heather D. Evans, in March 2019, Washington’s prisons held 697 people serving LWOP sentences, and as of 2015 “another 632 people were serving ‘de facto’ or ‘virtual’ LWOP sentences—sentences so long that those serving them are expected to die in prison.” See Katherine Beckett & Heather D. Evans, ACLU of Wash., *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, at 5 & fig. 7 (Feb. 2020), <https://bit.ly/3g11vMb>.

After King County Prosecuting Attorney Dan Satterberg was elected in 2007, he directed his team to review the three strikes cases previously charged by the KCPAO, analyzing what was the least a person could do to result in a life sentence. The result of that analysis was clear: Robbery in the second degree was the lowest crime on the list of three strikes offenses; it was also the most common and the most racially disproportionate. Many people who received a LWOP sentence in the 1990s or 2000s were men in their 20s and 30s who committed impulsive, unsophisticated robberies driven by drug addiction. While punishment is warranted for robbery, it is a prosecutor’s job to make sure it is proportionate to the harm that was caused. A LWOP sentence—which is effectively a slow death sentence—is not proportional for robbery. That didn’t seem fair or just—so here’s how the KCPAO set about fixing it.

### **Old and New Tools of Retroactive Justice: Clemency vs. Resentencing**

For a number of years, Satterberg and his team sought relief for incarcerated people through the clemency process. This meant petitioning Washington’s governors—first Governor Christine Gregoire and later Governor Jay Inslee—to use their extraordinary clemency power to release people from prison. However, using clemency as a tool to address a systemic injustice proved both limited and problematic. Politically, it’s a high-risk, low-reward action for governors; that’s why so many U.S. presidents wait until their final days in office to issue pardons, the presidential equivalent of clemency. To their credit, Washington’s governors advanced some clemency cases, but the sheer volume of petitions far outweighed the relatively small capacity of the governor’s Clemency & Pardons Board. That board is comprised of five volunteers, meets four times annually, and can review and act on just a handful of cases each year.

Ultimately, the KCPAO supported 20 three strikes/second degree robbery cases through the clemency process. But because of the limited capacity of the Clemency & Pardons Board, the KCPAO office began to pursue additional options. The reality facing people incarcerated in Washington on a LWOP sentence—where parole hasn’t existed since the Sentence Reform Act went into effect in 1984—is if the prosecutor doesn’t “look back,” no one will. Because there wasn’t a court rule that explicitly allowed prosecutors to resentence, King County followed California’s example and sought explicit prosecutorial authority to resentence in the interest of justice through the state legislature. Working with reform advocates in the Washington legislature, Satterberg and his leadership team supported a resentencing bill (Sente Bill 6164), which gives prosecutors just such authority. Since then, there have been a handful of jurisdictions that have advanced similar efforts.

Since the enactment of Washington’s resentencing law, the prosecutor of a county in which an individual was sentenced for a felony offense may petition the sentencing court to resentence that individual if the original sentence no longer advances the interests of justice. If the court grants the petition, the court’s resentencing may not be greater than the original sentence, and there are requirements for crime victims to be contacted so that they can provide input in the process. Meanwhile, the KCPAO pushed for further legal changes to complement the state’s resentencing law. This includes a bill that removed second degree

robbery from the list of three strikes offenses, and a law requiring prosecutors to resentence individuals who are serving a three strikes LWOP sentence predicated on second degree robbery.

### **Redemption Through Resentencing, Then Reentry**

Based on these changes to the law, individuals like Mr. Harvey—whose 24 years in prison would now be considered more than triple the standard range—should no longer be incarcerated. Nonetheless, there are still people from King County serving a LWOP sentence even though the state no longer considers one of their strikes—second degree robbery—to be a strike. And there are many more people just like them in counties across Washington. That’s not justice, and it’s why the KCPAO’s Sentence Review Unit (SRU), chaired by Deputy Chief of Staff Carla Lee, is resentencing these cases. But the SRU’s review is not limited to three strikes cases. The pending resentencing list also includes a broader set of cases where past legal practice no longer comports with current legal practice. To guide its work, the SRU has developed a list of current priority case categories, including:

- “Three Strikes” LWOP cases where the last strike is a King County conviction resulting in a life sentence with an emphasis on robbery in the second degree conviction;
- Non-homicide cases with sentences of 15 years or more where there are no serious injuries;
- Non-homicide cases with sentences of 20 years or more where there are injuries deemed minor;
- Non-homicide cases involving an individual who was under the age of 25 at the time the crime was committed; and
- Cases involving victims of human trafficking.

Other SRU priority cases may include:

- Cases involving domestic violence abuse with a justified Battered Women Syndrome claim or other abuse identified as a mitigating factor;
- Cases where the individual is over 70 years of age;
- Cases where immigration consequences are triggered; and
- Cases where the individual is terminally ill or has a diagnosed mental illness resulting in limited cognitive ability.

The SRU receives numerous snail mail, telephone calls, and emails from incarcerated individuals, family members, and supporters desiring for their loved ones to return home. While the SRU team cannot say yes to all requests, because they are willing to listen and review cases seeking the interest of justice, many community members have expressed a restoration of hope and system legitimacy. One unique aspect of resentencing is that often King County prosecutors work collaboratively with defense attorneys. Many times, that includes the nearly 200 volunteer lawyers working with the Seattle Clemency Project, which was founded in 2016 by Jon Zulauf and Jennifer Smith, two criminal defense attorneys practicing in the King County area. The Seattle Clemency Project is a nonprofit agency committed to assigning pro bono counsel to these second look cases, and since their inception the organization has reviewed hundreds of cases.

But it’s not enough to just resentence someone. One out of three people released from prison in Washington will be back in prison in three years—which means it is critical to work with community partners to help create a plan for housing, employment, and connection for people who rejoin the community. Accordingly, King County prosecutors insist on a reentry plan and work with nonprofit partners—which includes multiple people the KCPAO has resentenced who now work to help formerly incarcerated people successfully transition home—to make sure those plans are in place.

### **Why Prosecutors Must Resentence**

Resentencing old cases may be counterintuitive to prosecutors, and the legal system places great value on the finality of a case. Instinctively, prosecutors defend time bar guidelines and “truth in sentencing”—the

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idea that sentences should be served according to how they were delivered by a judge. This is where things can be completely legal, but totally wrong. Prosecutors tell crime victims that incarcerated people will never get out, that sentences are final. Terms of permanence are often used in the criminal justice system and its results, but the law is impermanent; the unjust consequences of Washington's three strikes law, for example, led the KCPAO to ask the legislature to make changes.

The truth is a prosecutor's duty to do justice goes forward as well as backward. And there are old laws on the books that no longer comport with how justice is thought of today. Those "tough on crime" laws fueled the mass incarceration crisis that has devastated Black and Brown communities. Taking up the mantle of resentencing also means encountering the dissonance involved in resurrecting cases that prosecutors aren't required to. To put it bluntly: Some victims who were sure that the sentence handed down by the judge would be the final response to the case will be disappointed or angry when a case is later resentenced. That's why King County works with agencies such as Healing Justice and other restorative justice partners to ensure that victims receive needed services in these instances. But ultimately, sentence review isn't about overturning convictions; it's about achieving justice. Prosecutors have the duty to seek justice, and that includes giving second chances that advance the interest of justice. If there are administrative or procedural hurdles to justice, prosecutors also have the ability and responsibility to advocate for changes—including legislative changes—to ensure justice *can* be done; it's time for more prosecutors to do so.

### **Watch a Resentencing Hearing in Action**

You can get an in-depth look at three recent King County resentencings on YouTube:

- June 23, 2021, resentencing of Gregory Nelson: <https://bit.ly/3xNwhOU>
- June 25, 2021, resentencing of Terry Martin: <https://bit.ly/3AAYaLI>
- June 30, 2021, resentencing of Paul Lewis: <https://bit.ly/3g0nUJH>