



STATE OF WASHINGTON

## OFFICE OF FINANCIAL MANAGEMENT

*Helen Sommers Building, PO Box 43124 • Olympia, Washington 98504-3124 • (360) 902-0425*

### SENTENCING GUIDELINES COMMISSION

## Washington Sentencing Reform: The Fundamentals

### What We Know

Since we started this project, I have been trying to find a way to talk about what we know. The Criminal Sentencing Task Force has the right members in terms of the constituencies represented and in the vitality and engagement of the actual Task Force members. The process we are following requires each participant to identify and share their particular issues. I recognize this is important to the process, and I support it. But continuing examination of the Sentencing Reform Act and consideration of how the adult felony sentencing system can be improved has been the work of the Sentencing Guidelines Commission since 1984. I have been part of those discussions for the last 25 or so years. Over that time, the discussion has produced consensus—or at least generalized head-nodding—on a number of points. To further our discussion, I would like to share my view of those points of generalized more-or-less agreement about where Washington should go with adult felony sentencing.

### We Are Never Going Back to “Indeterminate” Sentencing

Couching our present effort as a contest between determinate and indeterminate sentencing is not an accurate statement of the question. “Indeterminate” is off the table. Everyone wants to preserve the congruence between the judge’s sentence and the actual period of time and the conditions imposed as a result of that sentence. Prior to the implementation of the SRA in 1984, no matter what the felony conviction might have been, a Superior Court judge had only two broad choices. One, the sentence could commit the convicted person to the custody of the Department of Corrections for the maximum term specified for the crime<sup>1</sup>: 5 years for a class C crime like stealing a car; 10 years for a class B crime like drug dealing; or 20 years for a class A crime like first degree robbery. But that order from the judge had little to do with the time the convicted person would spend in prison. With that sentence, the judge merely delegated to DOC and the parole board the decision about when the person convicted would return to the community and under what conditions. The time locked up could be months or years; the decision took place after the sentencing, out of the sight of the public, and by unelected officials. Or two, the judge could give what was called a deferred sentence,<sup>2</sup> keeping the convicted person in the community. When I represented private clients—those who could pay for my services, the services of a private investigator, and for a sympathetic treatment provider—a deferred sentence was always a possibility. I don’t know how it went for less fortunate accused persons. Our sentencing system as it existed through the early 1980s was referred to as indeterminate because the exact sentence was not known when the judge banged the gavel. The SRA imposed order on this system. The Legislature stepped in and determined the length of time convicted persons would serve for criminal conduct. The three major crime classifications in our statutes,

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<sup>1</sup> RCW 9A.20.020.

<sup>2</sup> RCW 3.66.067 (1983) found at <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/1983/Vol1.pdf>.

classes C, B, and A, became 16 seriousness levels. Criminal history became a score: as a general rule each prior felony conviction became a point. The number of points combined with the seriousness level of the charged crime identified the sentence range. No longer would a class C crime earn a five year prison sentence in one jurisdiction while a person convicted of the same crime, with the same criminal history, in another jurisdiction might get to stay home.

We could call our current system Strict Determinate Sentencing. Determinate because state law—the acts of our Legislature—determines to a great level of detail the sentence for each crime given the criminal history of the person charged. Superior Court judges were commanded to work within the narrow range of time in custody specified for a person with a specific criminal history convicted of a particular crime. The ranges were narrow. RCW 9.94A.506(2) specified that “If the maximum term in the range is greater than one year, the minimum term in the range shall be no less than seventy-five percent of the maximum term in the range...”

The ranges were first determined at a time when changing behavior was thought to be beyond the power of the corrections system. The SRA parceled out Just Deserts, or Retribution in terms of months in custody. If the Legislature said 12 to 14 months was what the crime was worth, there was very little room for argument. In a particular case, the parties could ask for an “exceptional sentence” either above or below the standard range.<sup>3</sup> The SRA provided that if a judge made a finding of legislatively approved “aggravating” or “mitigating” factors on the record at sentencing, the sentence could exceed the standard range. Finding mitigating factors could justify a sentence below the standard range. The hook was that either sentence, aggravated or mitigated, could be appealed and overturned. Later, the U.S. Supreme Court added the requirement that aggravating factors had to be proven to a jury, beyond a reasonable doubt, before a sentencing judge could use them to impose a longer sentence.<sup>4</sup> In practice, even before this decision, judges seldom used their power to depart from the Legislature’s sentence range determination.<sup>5</sup>

### The Legislature Determines Sentence Length—For Better or Worse

If an argument is to be made over sentence length, the place to make it is Olympia. For example, in almost every legislative session some group argues for redefining some kind of simple assault as a felony if committed against a member of the group. Nurses working in hospitals achieved this goal.<sup>6</sup> If a patient or some other person shoves, punches, or knocks down a nurse on the job, that act can be charged as a felony Third Degree Assault. The same injury suffered by someone other than a nurse would be gross misdemeanor Fourth Degree Assault. The nurses wanted more severe penalties because of the nature of their work. The same argument has been made, with less success, by utility workers, little league coaches, and wrestling referees.

In practical effect, this distinction has little significance. Fourth Degree Assault can be punished by a year in jail and up to two years of probation. Charged as felony Third Degree Assault, the Legislature specifies a penalty of 1-3 months (30 to 90 days) in the county jail for someone with no criminal history. With a prior felony conviction, the range goes up to 3-8 months. Much more raw punishment, and services that might help prevent another assault, are available from a district or municipal court sentencing a gross misdemeanor. The only practical effect of upgrading the crime’s name to Third Degree Assault from Fourth

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<sup>3</sup> RCW 9.94A.535.

<sup>4</sup> *Blakely v. Washington*, 1264 S. Ct. 2531(2004).

<sup>5</sup> Check and cite study.

<sup>6</sup> Chapter 172, Laws of 1997.

Degree is in the potential punishment—up to 5 years in prison as a Class C Felony. In reality, that prison time will never be imposed.

In determining felony sentences, the Legislature can of course do more than provide ephemeral affirmation of the importance of an occupational group. More substantively, Washington's strict determinate scheme gives the Legislature the power to implement major criminal justice policy. I think the best example is the development of the Drug Sentencing Grid in 2000-2001.

In one of the earliest responses by a government to the issues of mass incarceration, Washington adopted a separate grid to address felony drug sentencing. In the late 1980s, Washington's Legislature had addressed the violence inherent in the crack cocaine and methamphetamine trade by increasing potential prison sentences.<sup>7</sup> For the most part, drug crimes are class B felonies, punishable by up to 10 years in prison. By providing enhancements and scoring multipliers, the Legislature made it possible to charge drug offenders, even those with little criminal history, in ways that left the sentencing judge little choice but to send the offender to prison for many years. As a result, the portion of our prison population made up of persons serving drug sentences—non-violent crimes—started approaching 25%. Senator Adam Kline was serving at the time both in the Legislature and on the Sentencing Guidelines Commission. He advocated doing something to address this alarming growth before it got out of hand. The drug grid was a direct result of his leadership.

Unlike the Legislature's response to assaults on valued community servants, and unlike its first response to the crack and meth scourges, the drug grid did not focus on retribution or seek to deter future offenses by threatening more punishment. Drug offenses were represented within three seriousness levels. The criminal histories of all charged persons were collapsed into three boxes: 0-2 prior felony convictions at the lowest level, 3-5 in the middle, and 6-9+ at the top.<sup>8</sup> Drug sentences were reimaged as a way to coerce offenders immediately into treatment via Drug Courts or the Drug Offender Sentencing Alternative. Currently, persons sentenced under the drug grid make up 6.4% of our prison population.<sup>9</sup> It is doing its job.

A couple of points need emphasis as we consider how the drug grid came to be. First, a coherent draft of the concept was developed by a very small group of criminal justice professionals: one from the academy, one from law enforcement, and one from corrections. All had the support of the SGC. However, in developing the concepts involved, they worked independently of their constituencies and the SGC itself. The draft was not circulated until the drafters could explain and defend the concepts involved. Next, the concept had to be sold, politically, to the stakeholders in the criminal justice system and to the Legislature. We have to remember at this time, more than 20 years ago, the research was not quite as clear on what worked to change criminal behavior. The Drug Court movement was very promising but the justification for the new grid could not rest on good science alone. The argument that developed had two major parts. First, the grid reflected current practice—if we looked at what was actually going on. On level 1 of the new grid were the crimes of addiction, the crimes associated with simple possession of illegal drugs. On level 2 were more serious crimes, the crimes associated with delivery of controlled substances, but still the drug crimes people commit to feed their addiction. On level 3 were the crimes considered most dangerous to the community: entrepreneurial activity flavored with violence and sales to vulnerable

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<sup>7</sup> Washington Sentencing Guidelines Commission. (2001). A comprehensive review and evaluation of sentencing policy in Washington state. Olympia, WA: Author. Found at [https://sgc.wa.gov/sites/default/files/public/SGC/publications/SentencingPolicyReview\\_2001\\_SGC.pdf](https://sgc.wa.gov/sites/default/files/public/SGC/publications/SentencingPolicyReview_2001_SGC.pdf).

<sup>8</sup> RCW 9.94A.517

<sup>9</sup> Washington Department of Corrections Fact Card as of December 31, 2019. Found at <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

populations.<sup>10</sup> Before adoption of the drug grid, many jurisdictions already diverted drug crimes of possession and simple delivery into Drug Courts and the DOSA program. It was relatively straightforward to explain the penalties at levels 1 and 2 as sufficient to provide motivation for the person charged to accept diversion and/or treatment.

The penalties for level 3 were key to the new grid's acceptance. Under the system then in place, it was possible to send a drug offender to prison for a long time, close to the class B 10 year maximum, without much effort. Level 3 of the drug grid enabled the Legislature to conclude, rightly, that those using violence as a business practice or who target young people as customers could still spend a long time in prison. In short, the drug grid was presented to the Legislature not so much as a way to aid those in our community struggling with addiction. It was presented as a way to more finely focus our efforts to exact retribution from criminals, incapacitate dangerous drug entrepreneurs, and deter others who might consider the threat of being caught and punished real enough to regulate their behavior.

### Modifying the Legislature's Role?

It could be said that the Legislature controls sentence length even in an indeterminate system like that in Washington pre-SRA. After all, Olympia defined the statutory maximums for class C, B, and A felonies. One way to look at the SRA is as the Legislature taking control of a broken system, replacing shrouded decision-making and inconsistency between counties with some order and transparency. If we look at the adoption of the SRA in light of what we knew in 1980 about changing offending behavior, it makes even more sense.

At that time, the state of the art of adult corrections was primitive. Professionals in the field, and informed legislators, operated under the assumption that we could not change behavior. Whether a person's crimes were motivated by addiction, mental illness, or personality disorders, the received wisdom was that the individual had to "hit bottom" and decide to change. We saw little or no role for treatment coupled with punishment.

This led the Legislature, necessarily I would argue, to thinking about our official response to crime in terms of punishment: retribution and deterrence.<sup>11</sup> The drafters of the SRA focused almost exclusively on seriousness levels and months in custody. From the inception of the SRA, and for a long time afterwards, the Legislature was taught that the only thing we could do was punish and incapacitate, to seek retribution and deterrence. Although the science is clear that we were wrong in 1980, this argument over the proper currency of accountability is still very much alive.

Consider the discussions that happen every year over Third Degree Assault—turning what would be a misdemeanor into a felony even though it has no positive effect on the possible sentence. It would, however, potentially affect the possible maximum sentence. In terms of retribution/deterrence value, it makes a big difference to the potential victims. But does it have any effect on offending behavior? I submit that a person who might assault a nurse in a hospital setting probably has such a host of personal issues that she or he has a lot of trouble controlling their behavior. And if the behavior is a result of an underlying behavioral or mental health issue, retribution—just deserts for the offense—is problematic. Even more problematic is the issue of deterrence. To deter someone from crime, we must imagine that on the threshold of committing the criminal act, the potential offender will stop, consider the possibility of getting caught,

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<sup>10</sup> RCW 9.94A.518

<sup>11</sup> Washington's Special Sex Offender Sentencing Alternative has been an exception that it couples retribution (punishment) with community treatment for individuals convicted of certain sex offenses.

conclude that getting caught is likely, assume that prosecution will follow, and that the prosecution will result in a potential long period behind bars. Behavioral and mental health issues can interfere with this thought process. Deterrence is not a likely result.

Thinking about responses to crime only in terms of retribution and deterrence, we have learned, is not that useful. But consider the Legislature's adoption of the drug grid. By collapsing and broadening the cells on the sentencing grid, the Legislature created the opportunity to deploy resources that we now know can change behavior: support for the charged individual and his or her family, abstinence and treatment enforced with the credible threat of appropriate sanctions.

The Legislature's role will not, and should not, change substantially. The challenge is to show our Senators and Representatives that considering values beyond retribution and deterrence will make a difference. That should be easy. The data is there. The bigger challenge will be convincing the Legislature that if given the authority and an operating environment less cluttered by scoring rules, enhancements, and mandatory minimums, our Executive and Judicial agencies can deliver.

March 13, 2020

To: Adult Felony Sentencing Task Force and Ruckelshaus Center Staff

From: Russ Hauge, Task Force Member and SGC Chair

Re: Supplemental Comment from Tim Wettack, SGC Citizen Member

Please consider this in addition to the memo I have forwarded on today. My comments are meant to focus us on the big number problems posed by the average sentences imposed by our courts under the SRA, sentences of a period of months and years short enough to ensure the convicted person's return to the community. Tim's comments accurately reflect some of the SGC's concerns about long sentences—those meant to remove a convicted person from the community more-or-less permanently. We all recognize that this is a major problem.

But long sentences present a fundamentally different set of questions. The issues created by long sentences can be addressed by post-conviction procedures. The issues presented by the mine run of adult felony sentences have to be addressed at, or before, sentencing. That said, Tim's comments need to be considered.

All: I concur with Judge Shaffer's comment of no disagreement with what is "in" the document. However, and with respect, I take exception to what is "absent" from the document: no mention of Post Conviction Review (PCR). Since the SRA, the state's prison population has tripled. Prisons are at or over capacity. The prison population is aging resulting in exponential increases in costs. All parties are opposed to building another prison(s). Something has got to give. Prisoners should be given the opportunity to **EARN** their way out of prison. Post Conviction Review would help DOC's management of prisoners by incentivizing positive behavior. The clemency process is anemic and entirely too subject to the political winds. The subject of a fair and equitable and as bullet proof as it can be made to be needs to be cited, and reiterated to all relevant parties. In summary, I assert that the need for the creation of a Post Conviction Review process needs to be included in the document. Tim Wettack, SGC citizen member