

Washington State Criminal Sentencing Task Force
Sentencing Grid Subgroup
Meeting Notes: November 2, 2021
Meeting via Zoom

Attendees:

- Keri-Anne Jetzer, *Sentencing Guidelines Commission*
- Greg Link, *Washington Association of Criminal Defense Attorneys; Washington Defender Association*
- Lauren Knoth, *WA State Institute for Public Policy*
- Judge Wesley Saint Clair, *Sentencing Guidelines Commission*
- Melody Simle, (Alt. for Suzanne Cook), *Statewide Family Council*
- Clela Steelhammer, *Caseload Forecast Council*
- Nick Straley, (Alt. for Nick Allen) *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Interests of Incarcerated Persons*

Guests: James Chambers, Bruce Glant, Joanne Smieja, David Trieweller

Facilitation Team: Amanda Murphy, Chris Page, Maggie Counihan, Molly Stenovec

WELCOME & AGENDA REVIEW

Amanda welcomed the Subgroup and reminded members that the Task Force meets on Thursday, where the focus of the meeting will be revisiting all of the potential recommendations associated with the vertical axis of the grid. She pointed out that in the email sent to the Task Force with the meeting agenda, there was a second large document attached, which is a detailed step-by-step guide (what the facilitation team has been calling a “field guide”) to these emerging potential recommendations for Task Force consideration.

Amanda then walked through the purpose of today’s meeting, which will focus on mandatory consecutive sentences.

PRESENTATION: Mandatory Consecutive Sentences

Keri-Anne Jetzer gave the Subgroup background on the history of consecutive sentencing in Washington state (see Appendix A to these notes), starting with how the Sentencing Guidelines Commission (SGC) developed policies governing whether sentences would be served consecutively or concurrently. The SGC considered current sentencing practices, existing case law, anti-merge statute, and multiple counts/charges reflect an increased level of criminal activity.

Clela Steelhammer then provided information on the conditions under which a court might issue consecutive sentences along with numbers of sentences issued in Fiscal Year 2019 (see Appendix B below). Amanda then invited Subgroup members to share their reactions and thoughts.

Discussion

- A member described situations in which an individual might have a prior conviction and commit an offense involving multiple firearms, which can lead to several consecutive sentences stacked on top of each other. The member suggested that this combination of circumstances leads to a punishment disproportionate to the crime.
- Another member pointed out that while the Subgroup and Task Force have discussed giving more discretion to judges, this discretion can lead to racially disproportionate outcomes. This provides rationale against simply making it optional for judges to stack sentences consecutively instead of having them run concurrently.
- Lauren Knoth highlighted one condition that might merit attention: "If a person has a current offense of either Unlawful Possession of a Firearm 1° or 2° **and** for felony Theft of a Firearm or Possession of a Stolen Firearm, or both, these offenses do not score against one another but are ran consecutively." A member responded that since prosecutors determine the charges, they might still hold the decision power even if that condition were changed.
- Moving from mandatory consecutive to discretionary would retain some of the current policy's focus on the severity of offenses committed with firearms; however, one member questioned the wisdom of weighing gun crimes so heavily in terms of the sentencing.
- Another member asked the Subgroup to consider whether consecutive sentences have truly made the public safer.
- If the Task Force proposes less severe sentencing rules for firearm-related offenses, and the Legislature determines that would not be politically palatable, it might call into question the value of all the work the Task Force has been doing.
- One suggestion offered was instead of making sentences consecutive based on charges/counts, base it on criminal events. For example, multiple burglaries with guns could be consecutive, but a single burglary with multiple guns could result in concurrent sentences.
- The Task Force could consider changing the unit of prosecution for gun crimes: right now, a charging unit is a single gun but this could get changed to have the unit of prosecution be a criminal event or episode.
- The Task Force could also recommend eliminating mandatory consecutive sentencing for firearm offenses and make them concurrent, as other types of offenses are.
- In response to the idea of making multiple simultaneous firearm charges count against each other, a member suggested that charging decisions could still get manipulated to get longer sentences.
- A member asked whether the current philosophy of punishment related to firearm offenses had served as a deterrent to future violent crime. It appears the data does not provide a direct finding on that question.
- The group discussed the considerations with individuals committing firearm-related burglaries with different circumstances: e.g., robbing a gun store, vs. burglarizing a home that just happens to have a gun/guns, vs. targeting a home to burgle because the homeowner has a gun collection.
- A member asked whether some firearm-related conditions could become aggravating factors instead of causing mandatory consecutive sentences. That would provide some judicial discretion while retaining a tool to punish egregious firearm-related acts.
- A member stated that while judicial discretion could enable disparate treatment and disproportionate outcomes, at least the decisions would be transparent, and the judges could be

held accountable for those decisions. Another member responded that discretionary acts by judges are practically unreviewable by appellate courts; the abuse of discretion standard requires any discretionary act by a trial judge to get overturned only if it gets deemed expressly unreasonable.

- The criminal history score is meant as a tool to address such exacerbating circumstances.
- The Task Force could recommend firearm-related elements of criminal acts become aggravating factors while suggesting the Legislature put bounds or limits on the discretion.
- Eliminating mandatory sentencing rules and introduction of discretion has potential for increasing racial disparity. To address this, the Task Force could consider a recommendation that would enable data collection to track and make transparent the sentencing decisions around the state.
- A member asked whether the consecutive sentencing policies, ostensibly created out of concern for protecting the community from those committing crimes on the extremes, should be required given that most criminal acts do not involve people committing crimes on the extremes.
- Another member responded that mandatory consecutive sentences only get issued for serious violent offenses that likely have multiple victims.
- To address the issue of multiple victims (or multiple incidents per victim), the Task Force could recommend another aggravating factor that isolates when multiple serious violent factors exist with separate victims. It could also recommend another, separate aggravating factor when there are multiple incidents for the same victim.

In summary, the Subgroup generated and discussed the following potential recommendations:

- A. Like the Task Force's 2020 recommendation on gun enhancements, change mandatory consecutive firearm sentencing to discretionary consecutive. The Task Force could recommend something similar: **allow judges to determine whether offenses should run consecutively when multiple crimes are committed with multiple guns involved.**
 - Maintain some aspect of the consecutive firearm policy. With gun violence increasing, there may not be political will to fully eliminate.
 - Allow sentences to get tailored to the circumstances of the case. For example: even if 10 guns were involved, maybe only 2-3 run consecutive instead of all 10 (could reduce extreme sentence lengths while acknowledging the impact of gun violence).
 - This is a carve out just for guns – harsh sentences for the sake of harsh sentences. Discretion creates significant differences between charging decisions and judicial decisions.
- B. Instead of basing consecutive sentences on charges or counts, **base consecutive sentences on criminal events (e.g., multiple burglaries of guns would bring consecutive sentences; one burglary of five guns would bring concurrent ones).**
 - This would change the unit of prosecution for gun crimes – right now, unit is each gun. This would change unit of prosecution to criminal episode.
 - A significant portion of the extreme lengths is based on the number of guns in an episode (e.g., in a single burglary).
 - Punishment philosophy is related to the number of guns that will ultimately end up in the streets (which together present a greater risk to society).
- C. **Eliminate consecutive sentencing on gun charges but add some aggravating factors that may address the cases with the most concern about culpability.**

- Where are the real differences in the decisions of the individuals when engaging in the acts? There is a difference between robbing a gun store vs. burglarizing a home that happens to have a gun vs. targeting a home to burgle because they know the owner has a gun collection.
- Could some of these conditions become aggravating factors instead? Maintains discretion to acknowledge unique characteristics/motive/culpability in each case. Guided/bounded discretion. As opposed to potential recommendation A above, which is unbounded discretion to run consecutive regardless of circumstances.
- Do we even need them as aggravating factors if situations where the culpability is higher (e.g., robbing a gun store and stealing 20 guns) they will already have an exceptional sentence because their CHS will exceed 9.

D. Eliminate mandatory consecutive sentences for firearm offenses and make concurrent.

Eliminate the carve-out for guns so these offenses would get sentenced similarly to others.

- **Q:** Would you want to make them score against each other then? **R:** Yes.
- But the reality is that charging decisions may be manipulated to get longer sentences.
- Still likely to result in shorter sentences than current approach with consecutive sentences.

E. Eliminate all consecutive sentencing carve-outs.

- Purely retributive, but how much is enough—how do consecutive carve outs increase public safety?
- Eliminate all including serious violent offense carve outs.
- SV offenses already at the top of the grid with longer sentences, so the mandatory consec makes for extremely long sentences.
- In addition to the number of cases directly affected in the sentencing statistics – this becomes a tool for prosecutors to negotiate people into pleas in order to avoid the consecutive sentencing.
- Potential to leave this as discretion for judges.
 - More transparent, subject to appeal, better than having decision in hands of prosecutors.
 - Reduces the potential for prosecutors use in plea negotiations.
 - Discretionary acts by judges are almost unreviewable by appellate courts. Abuse of discretion standard applies: any discretionary act by trial judge can only be overturned if it is deemed expressly unreasonable.
 - If we're going to shift to judges, recommendation should include some boundaries around judicial discretion. Need specific criteria.

Arguments against eliminating consecutive sentencing carve outs:

- What we're talking about is serious violent offenses, likely with multiple victims. The idea is that each act against a person should be punished. This involves a particular concern for victims.
- If a recommendation goes forward with elimination of consecutive, could you have another aggravating factor that isolates when multiple serious violent factors with separate victims exist? There could be an aggravator to differentiate between cases where it is two serious violent charges for an act against the same victim vs. two serious violent charges for acts against separate victims.

- This still wouldn't fully address some issues (like multiple Assault 1 charges for a drive-by shooting, even if only one shot fired).

F. Have "second look" apply to all individuals incarcerated with mandatory consecutive sentences.

- The Task Force should ensure that whatever recommendation ensues refers to these sentences.
- A member pointed out that the Task Force support for a review of "second look" would provide another chance to review the circumstances of the crime and the progress of the individual.

NEXT STEPS & ACTION ITEMS

- Next meeting: discuss aggravating and mitigating factors.

COMMENTS SUBMITTED BY GUEST OBSERVERS VIA ZOOM CHAT and/or EMAIL

Bruce Glant: Regarding comments earlier today and in previous meetings, I believe the committee should be putting all suggestions forward to the legislature and not be holding back any they think the legislature won't go along with. I believe the committee is here to review and suggest changes, whatever they may be. We need to deal with the racial disparity, the punitive nature and history of incarceration and supervision, rehabilitation, and mass incarceration itself are tough subjects for the legislature to deal with, but we need present them regardless.

In the net nanny stings, the detectives add one or more individuals to their conversation in order to get more victims, extra counts, and increase the charges and sentences. Unfortunately, the government pays a financial incentive for increase convictions and sentences. It's like stacking in a drug sting.

APPENDIX A

History of Consecutive Sentencing
Criminal Sentencing Task Force
11/2/21

History

Pre-SRA

Judges had discretion to determine if sentences should be run consecutively or concurrently. Reportedly, most sentences were concurrent, and consecutively-run sentences were save for exceptional cases.

SRA

As directed by the Legislature, the SGC was required to "devise recommended standards to govern whether sentences are to be served consecutively or concurrently."

The SGC considered:

- Current sentencing practices
- Existing case law

- Anti-merge statute
- Multiple counts/charges reflect an increased level of criminal activity

Issues that emerged from discussion with stakeholders:

- A distinction between crimes committed as part of a single criminal episode and those which represent separate and distinct events is necessary.
- Multiple crimes involving at least one violent crime should be treated more severely than multiple non-violent crimes.
- People who are sentenced for one crime and then convicted of additional crime(s) should receive a separate sentence to be served after the original sentence is completed.
- The sentencing grid relies on offense seriousness and criminal history, so it is important to ensure scoring of multiple counts is not “double counted”.
- Uniform application of this policy is necessary to avoid disparity in sentences with like persons.

Recommended Policy:

	At least 1 violent offense	No violent offenses
All offenses arose out of same act	Concurrent (1)	Concurrent (2)
Not all offenses arose out of same act	Consecutive	Concurrent (10

Consecutive: Score the most serious offense using correct criminal history score based on prior felonies. Score the other offenses using a zero criminal history score.

Concurrent (1): Total sentence length based on most serious offense, counting other current offenses as prior offenses.

Concurrent (2): Total sentence length based on most serious offense. Other current offenses do not affect criminal history score.

APPENDIX B

Concurrent – Consecutive Confinement Sentences (RCW 9.94A.589):

Whenever someone is sentenced for two or more current offenses*, they are to be served concurrently (at the same time) with a few exceptions. The exceptions that exist require consecutive sentences (one sentence begins after the other is completed).

The exceptions are for offenses not ruled same criminal conduct:

- Two or more serious violent offenses. The offense with the highest seriousness level is scored using prior convictions and other current convictions that are offenses not classified as serious violent. The serious violent offense(s) that is not the highest seriousness level receives a score of 0, and all the serious violent offenses are ran consecutively.

Example: A person is sentenced to two counts of Assault 1° (SV) and one count of Assault 2° (V) and has a Theft 1° (NV) as a prior offense. Assuming a low range sentence for each count, the person would receive a sentence of 213 months of confinement (Cts 1 and 2 are consecutive to each other and Ct. 3 runs concurrently).

Ct. 1 Assault 1 (SL 12) , Sc=3, Range 120 – 160 months. Sentence = 120

Ct. 2 Assault 1 (SL 12) , Sc=0, Range 93 - 123 months. Sentence = 93

Ct. 3 Assault 2 (SL 4) , Sc=5, Range 22 - 29 months. Sentence = 22

- If a person has a current offense of either Unlawful Possession of a Firearm 1° or 2° **and** for felony Theft of a Firearm or Possession of a Stolen Firearm, or both, these offenses do not score against one another but are ran consecutively.
- The court may run counts consecutively in other situations through an aggravated exceptional sentence. Such sentences must be for a reason listed in RCW 9.94A.589 and submitted to a jury and proved beyond a reasonable doubt. The court may impose an aggravated exceptional sentence *without* a finding of fact by a jury if the defendant and state both stipulate that justice is best served by an exceptional sentence and the court agrees that the stipulation is in the interest of justice and consistent with the Sentencing Reform Act under RCW 9.94A.535(2).

Summary of FY19 Sentences with Current Offenses (single sentencing) that had Consecutive Counts:

Type of Consecutive Sentence:

1. Unlawful Possession of a Firearm 1 or 2 **and** Possession of a Stolen Firearm:
29 Sentences in FY19 (8 were Prison DOSA and 1 was Res DOSA)
2. Serious Violent Offenses (excludes sentences of life):
33 Sentences in FY19
3. Exceptional Sentences:
2 Sentences in FY19

** Per RCW 9.94A.525, offenses sentenced on the same day as the offense being score are considered "other current offenses".*