

**Washington State Criminal Sentencing Task Force
Sentencing Grid Subgroup
Meeting Notes: November 23, 2021
Meeting via Zoom**

Attendees:

- Russ Brown, (Alt. for Jon Tunheim) *WA Association of Prosecuting Attorneys*
- Rep. Roger Goodman, *Washington State House Democratic Caucus*
- Keri-Anne Jetzer, *Sentencing Guidelines Commission (SGC)*
- Greg Link, *Washington Association of Criminal Defense Attorneys; Washington Defender Association*
- Lauren Knoth, *WA State Institute for Public Policy (WSIPP)*
- 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, Corey Patton, Joanne Smieja, David Triewailer

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

WELCOME & AGENDA REVIEW

Amanda welcomed the Subgroup and recapped what the Subgroup has been focusing its conversations on over the last two months: the methods for addressing repeat offending behaviors and discretionary increases in sanctions. So far, the group has discussed:

- Three strikes and two strikes laws
- Scoring rules – multipliers
- Mandatory consecutive sentencing for serious violent offenses and for other offenses
- Exceptional sentences – aggravators and mitigators

(For a refresher on any of these discussions, [here](#) are meeting notes. Any handouts that were provided on the history and current sentencing data are included as appendices in the meeting notes.)

Amanda reminded the Subgroup that today's meeting will wrap up the discussions on exceptional sentences. Next week the group will start the combined discussion of all the ideas that have been discussed so far on the bullets above.

Following those discussions (anticipated to take a few weeks), the next set of topics for discussion include sentencing enhancements and Criminal History Score (CHS). As currently projected, in February and March the Subgroup will present to the Task Force potential recommendations for the horizontal-axis.

Mitigated and Aggravated Exceptional Sentences

Clela Steelhammer showed lists of aggravating and mitigating factors documented in records of exceptional sentences in Fiscal Year 2019. The list showed the number of each type of mitigated sentence issued for drug, non-violent, sex, violent, and serious violent offenses. The majority of them are for two reasons: “all parties agreed” and “mitigated sentence is in the interest of justice.”

Clela showed a spreadsheet with all the reasons listed in the records of aggravated exceptional circumstances for Fiscal Year 2019. The most common reason: “Defendant agreed to prison, greater sentence, or treatment.” A member asked if we know what percentage of all these types of offenses got issued as mitigated or aggravated exceptional sentences. Clela showed that information and walked the group through the numbers. (The list of mitigating factors, with numbers and types of sentences, is included here as Appendix A. The list of aggravating factors, with numbers and types of sentences, is included here as Appendix B.).

A member asked if it would be possible to take the high-volume exceptional offenses (e.g., Theft 1, Robbery 2, Assault) and break it down by race to see who got mitigated and who got aggravated? Clela responded that it would be possible but cautioned that the Caseload Forecast Council does not have high-quality demographic data.

Judgment & Sentencing Forms in Relation to Exceptional Sentences

A member commented on how discussions about aggravated exceptional sentences seem to assume it were as simple as identifying one of a list of aggravated factors but there are other characteristics of cases—not enumerated on Judgment and Sentencing (J&S) Forms—beyond the list of aggravating factors in statute. Every year the Legislature adds one or more aggravating factors. This connects to the Blakely ruling that requires an aggravated sentence that goes above the range to get put in writing (the rationale) and go before a jury.

The first aggravating factor is “the stipulation of the parties.” A member commented that this reason obscures the rationale for any exceptional sentence and noted that if the state required and had electronic J&S Forms with drop-down lists of aggravating and mitigating factors it would improve transparency. It is vital the Task Force say clearly that “we want things to be transparent.”

A member suggested eliminating those aggravated departures that are not required to be pled and proven. This would create a requirement to list a specific characteristic or circumstance justifying the aggravated exceptional sentence. The reason for the parties agreeing to the exceptional sentence could get listed on the J&S Form to provide more transparency. A member pointed out that this could lead to less flexibility for prosecutors, which might result in fewer plea agreements to reduce sentence lengths.

Another member cautioned that the more findings that judges are required to list explaining aggravated factors, the more likelihood it could run the risk of violating the Blakely ruling. This would also raise practical constraints, since without a uniform J&S Form there are limited resources within courts to record additional details.

The Subgroup briefly discussed the possibility of establishing a statewide electronic J&S system for superior courts. The technology exists, but it might be an uphill battle to get buy-in from all the courts around the state, especially the smaller, under-resourced counties. The National Center for State Courts has information on approaches for unifying courts: states can either unify the whole court system or unify the record-keeping databases into one system.

A member explained that Washington state has looked at unifying its court system since as long ago as 1988. Most courts enter the same basic information, though some county courts require entering more information than others. The state just spent hundreds of millions of dollars to create a system called Odyssey, which has not been met with a warm reception by some users around the state. If we recommend the state spend such amounts of money, it will be critical that it be for something that will truly improve the system. If it comes down to a choice between creating and adopting a unified court database system and addressing irrationally long sentences retroactively, they would choose the latter.

Pennsylvania has SGS Web, a unified technology system. A user enters the characteristics of the case, and the system pulls up all the potential sentencing options and guidelines. Other states too have adopted working unified electronic systems that have simplified record keeping and increased transparency.

Another member commented that a unified statewide electronic J&S system would be crucial for more accurate data collection. It would assist in revealing racial disproportionality, implementing retroactivity, and ensuring the accuracy of sentences along with Department of Corrections decision making.

Bounded Discretion

Lauren Knoth reviewed options for capping the amount by which an aggravated or mitigated sentence might veer above or below the guidelines to reduce the disproportionate application of aggravated sentences. Statistics show, for example, at certain Offense Seriousness Levels (OSLs), defendants of color received exceptional sentences more than 30 months above the grid guideline, while white defendants got exceptional sentences 14 months above the guideline. If there were a cap of 12 months on the aggravated exceptional sentence, the gap would be significantly lower.

Options that Task Force may want to consider could be bounded discretion by a number of months or a percentage of the sentence length. As OSLs increase, the length or percentage of the aggravated departure would also increase. The Task Force could also consider a cap on aggravated exceptional sentences for Class B and Class C offenses, but not Class A offenses.

A member expressed support for capping aggravated sentences to limit disproportionality. Another member suggested that establishing a single number for each cell of the grid would address disproportionate sentencing.

A member commented that in 36 years since the Sentencing Reform Act, appellate review has only found one aggravated exceptional sentence unwarranted. The member encouraged the Subgroup (not to build a new system around the hypothetical extremes but around the majority of sentences and

cases that comprise the disparity in the system. Another member agreed, noting that if the Task Force could create a sentencing grid that addresses 70-85% of the cases that result in disproportionate outcomes, that would be a great accomplishment. These two members both expressed support for capping discretion as a tool to that end.

Notes captured on screen during the meeting:

1. Create a new column on the grid with the *maximum* aggravated departure length

- The amount should be graduated such that longer departures are acceptable for higher offense seriousness levels.
- The maximum departure length for OSL 9 should not exceed 12 months and the maximum departure length for OSL 5 should not exceed 6 months to be consistent with statutory maximums.
- May reduce disproportionate application of aggravated departures.

Concerns:

- Flexibility for pros to engage in charge bargaining. If there's less flexibility, may be less likely to reduce charges.
- If stat max for Class A is life, but grid caps aggravated sentences, then judges can't access/use stat max.

Possible modifications:

- Include the max departure column only for OSL 1-9
- Make advisory instead of presumptive/mandatory
 - How can courts deal with extreme cases on the margins?
 - Should we legislate to the hypothetical extremes?

2. Create a new column on the grid with the *minimum* aggravated departure length

- The amount should be graduated such that longer departures are acceptable for higher offense seriousness levels.

Concerns:

- Not really a need – could prevent justified reductions.

Possible modifications:

- Make advisory instead of presumptive/mandatory

3. Eliminate the aggravated departures that are not required to be pled/proven (eliminating the stipulation as an aggravated factor)

- Requires that there be a particular characteristic/circumstance justifying the aggravated exceptional sentence.

Concerns:

- Flexibility for pros to engage in charge bargaining. If there's less flexibility, may be less likely to reduce charges.
- Practical constraints – no uniform JNS – limited time/resources in the courts to record additional details
- Requiring judges to record/make findings of fact about case characteristics may violate *Blakely*.

Possible modifications:

- Require that the JNS record more details about the reason for agreement (e.g., charge bargain to avoid three-strikes sentence, charge reduction, reduction in total number of charges).

4. Establish a state-wide, electronic JNS system for Superior Courts. NOT unified court system, but unified technological network.

- Administrative Office of the Courts previously attempted, but failed. But technology has come a long way, so may be possible to develop something that is integrated into Odyssey CMS.

- Could be state funded – saves resources across state agencies (e.g., CFC, DOC) and local courts (which no longer have to invest separate IT resources to create and maintain their own system)
- Key for more accurate data collection. Useful for: examining racial disproportionality, implementing retroactivity, ensuring accuracy of sentences/DOC decision making

Concerns:

- Lack of a unified court system – courts like their independence to collect information as they see fit.
 - But not looking to create unified court system, but a unified technology network.
- Varying resource availability across different courts. May add to the court burden for data collection/data entry.
- Huge amount of money that doesn't actually address or reduce unjust sentences. Ought that \$ be better spent/used elsewhere (e.g., retroactive sentence reform)?

5. Retroactivity for application of Blakely decision on pre-Blakely exceptional sentences.

Next Steps & Action Items:

Next meeting: begin combined discussion of all of the methods for addressing repeat offending behaviors and discretionary increases in sanctions. Will review all the key discussion points, ideas, options, etc. that have been discussed over this last month+, begin stitching ideas and options together, putting together ideas and potential rec's for the Task Force.

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

None

APPENDIX A

Number of Fiscal Year 2019 Mitigated Sentences by Rationale & Category of Offense

	Victim was an initiator, willing participant, aggressor, or provoker	Before detection, the defendant compensated victim, or made effort	Crime committed under duress, coercion, threat, or compulsion	With no apparent duress, coercion, threat, or compulsion	Capacity to appreciate the wrongfulness was significantly impaired	The multiple offense policy results in a clearly excessive presumptive sentence	Confession before apprehension	To make frugal use of the state's resources	Exceptional sentence is more appropriate/s in the interests of justice	For defendant's rehabilitation or treatment	Defendant's age	No prior convictions or they are remote in time	Defendant is remorseful	Defendant is addressing psychological problem	Other mitigating factor	The defendant's mental condition	Part of Plea Agreement	LEO was either the victim or injured as a result of the offense	Total				
CAPS	16				9	2	1	5	214	151	6	1	2		1	72			480				
DRUGS	0				0	1	2		98	66			2			7			176				
NV	2	1	2	5	1	1	7		168	158		1	2			42			390				
SV	1	1	1	2	3			1	5	21	2	7	1			2			49				
SEX					1			4	2	35	50	1	2			1	1		101				
VIOLENT	1		2	5			3	2	58	45	4	3		1	1	1	1	10	137				
	20	1	4	2	22	7	1	17	10	578	491	13	13	2	1	9	1	1	1	2	137	1	1333

This table represents the mitigated reasons used for all exceptional sentences.

FY19 data

Number of Fiscal Year 2019 Aggravated Sentences by Rationale & Category of Offense

	Deliberate cruelty to the victim	Victim was particularly vulnerable	Major economic offense involving multiple victims or multiple incidents	Major economic offense - high sophistication, planning, long time period	Major economic offense - used position of trust, confidence, responsibility	Drug offense - manufacture of controlled substances (excluding)	Drug offense - quantity substantially larger than personal use (dealing)	Drug offense - offender occupied a high position in distribution hierarchy	The multiple offense policy results in a clearly excessive presumptive sentence	Severance of the offense/more egregious than typical	Defendant agreed to prison greater sentence, or treatment	Defendant was in a position of trust (not an economic or drug offense)	Factors in the criminal record	Additional incidents which, if changed, would result in higher range	Part of an ongoing system of sexual abuse of the same victim under 18	Criminal history score greater than 9 points	Crime injured/harmed a person other than the victim	Defendant showed no remorse	LEO was either the victim or injured as a result of the offense	DV offense that occurred in eighth or ninth or sound of victims children under age 18	DV offense that was a part of an ongoing pattern of multiple incidents over prolonged period of time	Violent offense and the defendant knew the victim was pregnant	Result of a plea agreement in exchange for a reduced charge	DV against a family member of household member	Rapid escalation	Total											
CAPS	1	1	1					1	64		1							3	1						75												
DRUGS						2	1	4	1	2	1					2									71												
NV		2	2	2	2	4			2	150						3	1	1	2						173												
SV	1	1							1	2	11					2	1	1							23												
SEX	1	4							1	42	7					1	3								68												
VIOLENT	2	1	1						74			3	1			1	3	2		1	1	1	1	1	93												
	5	9	3	3	2	4	2	1	4	1	2	6	2	399	7	1	3	1	2	11	4	1	1	1	11	4	1	1	11	7	1	1	1	4	2	3	503

This table represents the aggravated reasons used for all exceptional sentences.

FY19 data