

**Washington State Criminal Sentencing Task Force  
Sentencing Grid Subgroup  
Meeting Notes: February 1<sup>st</sup>, 2022 Meeting via Zoom**

**Attendees:**

- Chief Gregory Cobb, *Washington Association of Sheriffs & Police Chiefs*
- 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*
- Nick Straley, *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Interests of Incarcerated Persons*

**Guests:** Jim Chambers, Joanne Smieja, David Triewailer

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

**WELCOME & AGENDA REVIEW**

Amanda Murphy welcomed the Subgroup and began the meeting with a reminder that the full Task Force meets on Thursday and the focus of the meeting will be on the work this group has done so far on criminal history scoring, multipliers, and the potential recommendation to eliminate multipliers and add a column to the grid for repeat violent offenses.

**RECAP OF MISDEMEANOR SCORING EXCEPTIONS AND SUBGROUP'S DISCUSSION ON 1.25.22**

Lauren Knoth reminded the Subgroup of the four existing exceptions to misdemeanor scoring rules:

- Scoring exception 1: Felony Traffic (Felony DUI)
- Scoring exception 2: Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree - Vehicular Prowling Misdemeanor Priors
- Scoring exception 3: Homicide or Assault by Watercraft Offenses
- Scoring exception 4: Felony Domestic Violence

The Subgroup discussed last week how these exceptions create complexity and lead to calculation errors of individuals CHS. Lauren then provided the following overview of the Subgroup's discussion and ideas generated during last week's meeting, which focused on scoring exception #1 and # 2:

**Scoring exception 1: Felony Traffic 1**

**Status quo:** traffic misdemeanor/gross misdemeanor offenses (serious traffic offenses) count as 1 point; certain juvenile traffic misdemeanor/gross misdemeanor offenses (serious traffic offenses) count as ½ point.

**Potential Recommended Change:** Eliminate the special misdemeanor scoring exception for felony traffic and reclassify felony DUI from OLS 4 to OSL 6.

Summary of Discussion/Justification:

- Prior misdemeanor DUIs are an element of felony DUI. Thus, in the status quo, the prior convictions both increase the seriousness of offense in the court and increase a person's criminal history score. This means that individuals charged with felony DUI should never have a CHS of 0 or 1. Individuals are essentially double punished for their prior record.
- Eliminating the scoring exceptions without changing the offense seriousness level would create a situation where individuals may have a lesser sentence for the felony DUI than the mandatory minimum for a 3<sup>rd</sup> misdemeanor DUI (which is 180 days).
- DUI is a class B felony. Reclassifying it as OSL 6 would put it in the middle of the grid where Class B offenses are generally concentrated. For an individual in OSL 6 with a CHS of 0, the recommended sentence range would be similar to the recommended sentence range of individuals in OSL 4 with a CHS of 3. Thus, the prosecutors and judges would still be able to seek similar sentences, but without the unnecessary complication in the Criminal History Score.
- DUI offenses differ from others because of the gradual increase in severity that specifically starts with misdemeanor offenses.

**Scoring Exception 2: Theft of a Motor Vehicle**

**Status Quo:** Misdemeanor offense of Vehicular Prowling 2<sup>o</sup> counts as 1 point.

**Potential Recommended Change:** Eliminate the special misdemeanor scoring exception for vehicular prowling and create a new subsection of Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1<sup>st</sup> degree or 2<sup>nd</sup> degree for individuals with two prior misdemeanor convictions of vehicle prowl. Make this new subsection OSL 4.

Summary of Discussion/Justification:

- The idea behind this misdemeanor scoring exception is that stealing a car is a continuation of or escalation of previous vehicle prowl behaviors.
- For individuals with their third vehicle prowl conviction, it is a felony offense at OSL 4.
- For individuals with their first theft of a motor vehicle, it is a felony offense at OSL 2, but the prior prowls increase criminal history score.
- Not all vehicle prowls are with the intent to steal a car – thus theft of a motor vehicle may not always reflect increasing intensity of behaviors – it may be a change in behavior. However, for those who are prowling with intent to steal a car, it doesn't make sense that the third time they're caught for prowl (i.e., they are stopped before they steal the car) the sentence is greater than the individual who successfully steals the car on the third try.
- Creating a new offense for theft of a MV with two prior vehicle prowls and making that OSL 4 makes it consistent with the third and subsequent vehicle prowl convictions.
- Eliminating the special scoring rules increases transparency, increases defense flexibility in plea bargaining process, and significantly reduces complexity and error in the calculation of CHS.

**SUBGROUP DISCUSSION ON SCORING EXCEPTION #3 AND #4**

- A Subgroup member commented that these seem like technical tweaks that would not meaningfully change outcomes and questioned whether it was worth spending additional time trying to address. Another member responded that these exceptions represent examples of

where and how the Sentencing Reform Act (SRA) has gone off the rails due to legislative reactions to the crime of the day. Therefore, it is worth at least asking does it really make sense to have misdemeanor motor vehicle theft offenses as high as OSL 6, and is it comparable to the types of offenses in that OSL? Another member shared their experience that vehicle theft usually comes down to a small group of people with a high frequency of criminal behavior—and the vehicle thefts have significant negative impacts on vulnerable people.

### **Scoring Exception 3: Homicide or Assault by Watercraft**

**Status quo:** certain adult traffic misdemeanors/gross misdemeanors count as 1 point; certain juvenile traffic misdemeanors/gross misdemeanors county as ½ point.

**Potential Recommended Change:** Mirror the recommendation for felony traffic offenses

#### **Summary of Discussion/Justification:**

- Felony traffic includes things you would not have in a boat, e.g., eluding, hit and run.
- The felony traffic offenses for which misdemeanors count should be limited to offenses that can be committed by vehicle and boat.

### **Scoring Exception 4: Felony Domestic Violence**

**Status quo:** Count one point for each adult offense for a repetitive domestic violence offense (misdemeanor and gross misdemeanors), where domestic violence pled and proven after 8/1/2011.

**Potential Recommended Change:** Include language in the SRA that would define the scope of a person's CHS as limited to prior felony convictions.

#### **Summary of Discussion/Justification:**

- Could this get moved to an aggravated factor or enhancement instead? This would create a way for the judge to consider prior misdemeanor domestic violence offenses at sentencing.
- We could spend a huge amount of time on this and not change outcomes. From my constituency's perspective, misdemeanors should not be counted in a person's CHS since the SRA was never intended to cover misdemeanors. Then the aggravating factor would be constrained under the other potential recommendation to limit increases in sentences as a result of aggravators.
- Municipal courts do not have the same quality of record-keeping as superior courts so errors in peoples' CHS often stem from the former.

**Potential Recommended Change:** Include language in the SRA that would define the scope of the CHS as limited to prior felony convictions.

#### **Justification:**

- This would increase the likelihood of lasting change and prevent the slippery slope of continued misdemeanor scoring exceptions.
- SRA was not originally intended to cover M and should not include M except for where there is an explicit step up of the same offense (e.g., DUI).

- Inclusion of M leads to significant complexity and uncertainty. Full discretion of the legislature to decide when they should or should not count.
- Inherent issues with reliability and accuracy of prior M because reliance on municipal court data.
  - Some of the hardest work in prosecutors' offices is because they have the burden of proof to provide evidence of priors that fit under scoring exceptions.

## **WASHOUT PERIODS**

In the remaining time of the meeting, the Subgroup started discussion on topic #1 on the discussion list (Appendix A.): *Are current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout?* The Subgroup identified the following list of washouts:

- Class A – never
- Class B – 10 years
- Class C – 5 years
- Sex offenses (all classes) – never
- Felony DUI – prior traffic never washout
- Class C repetitive DV – 10 years
- Misdemeanors – stay until vacated

### **Discussion: *Should Class A offenses ever be eligible for washout?***

- Yes, Class A offenses should wash out. No person should have the “scarlet letter” the rest of their life for one mistake.
- Another member agreed, noting the disproportionate outcomes that have resulted from the lack of a washout period for Class A felony convictions.
- Maybe there should be a difference between “serious” and “serious violent” in Class A, with a washout period for serious but not for serious violent?
- With multiple other ways to increase punishment for those convicted of violent offenses. We don't need to keep this mechanism that never allows them to wipe their record clean.
- For sex offenses, the vast majority of people who commit them will never do so again—a small number will—but for most, we need to find a way to allow people to start over without that black mark on their record, if they go long enough crime-free in the community.
- Is washout really about reducing recidivism? I see it as more focused on culpability.

In response to members of the Subgroup voicing differing understandings about recidivism rates for sex offenders, Lauren showed statistics on the three-year recidivism rates for various types of offenses (property offenses, sex offenses, drug offenses, and offenses against persons). All showed low rates of recidivism except property offenses.

**Next Steps:** Next week will continue where left off today with the discussion of topic area #1.

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

N/A

## APPENDIX A

### Upcoming Grid Subgroup Discussion Topics:

1. **Discuss on 2/1 and 2/8:** Are the current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout?
2. Should washout periods be restarted for any offense or only for an offense that is as serious or more serious than the new conviction?
  - E.g., conviction for class C in 2000
  - Conviction for class B in 2004 – class C still counts
  - Conviction for class B in 2006 – class C and Class B priors would count. Should class C count?
3. **Discuss on 1/25 and 2/1:** Should misdemeanors be excluded completely from CHS and/or have a specific washout period that is very short?
4. Should misdemeanors trigger reset of “crime-free” period for felony offenses?
5. Juvenile adjudications – should they count, should they have separate washout rule, should they stay as is?
  - Should all count or just certain types (e.g., violent/serious violent)?
  - What were the previous WA laws regarding juvenile washout?
6. Anticipatory offenses scored as completed offense – should they be treated as completed or have separate washout rule?
7. When does the washout period start? What about technical violations or DOSA revokes.
  - This is particularly important if new grid increases the number of or access to sentencing alternatives.
  - Community custody violation – *State vs. Blair* – will restart the washout period.
  - Complexity with determining when washout periods start if it is last release of confinement. Does DOC have insight on this complexity? Are counties consistently recording/using information about confinement/date of last confinement?

## APPENDIX B

### Washington State Rules for Washouts

RCW 9.94A.525(1) defines a prior conviction as “a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94a.589.”

Washington counts prior adult convictions except when wash-out rules apply, a court had determined the offenses count as ‘same criminal conduct’ (RCW9.94A.589), offenses not considered ‘same criminal conduct’ but their sentences were served concurrently and a court now determines they were committed at the same time, same place and involved the same victim; or offenses were committed before 7/1/1986 and were served concurrently.

All felony juvenile adjudications are counted as part of the criminal history score except under general wash-out rules that apply to adult convictions. Juvenile convictions that were sentenced the same are counted separately unless they have been deemed 'same criminal conduct' or unless the date the offense was committed was before 7/1/1986.

**Wash Out Rules** RCW 9.94A.525 (apply to both juvenile and adult prior convictions)

- Class A and felony sex convictions **never wash out**.
- If current conviction is a felony DUI or felony DUI-Physical Control, all predicate crimes for the offense as defined by RCW 46.61.5055(14) and prior convictions for felony DUI or felony DUI-Physical Control **never wash out**.
- Class B felony convictions and convictions for repetitive domestic violence offenses wash out if the individual has not been convicted in the past **10 consecutive years since date of release or entry of J&S**.
- Except as noted above, Class C felony convictions and serious traffic convictions wash out if the individual has not been convicted in the past **5 consecutive years since date of release or entry of J&S**.