

**Washington State Criminal Sentencing Task Force**  
**Grid Sub-Group**  
**Meeting Summary: August 2<sup>nd</sup>, 2022**  
Meeting via Zoom

**ATTENDEES:**

- Clela Steelhammer, *Caseload Forecast Council*
- Russ Brown, *WA Association of Prosecuting Attorneys*
- Blaze Vincent, *Interests of Incarcerated Persons*
- Keri-Ann Jetzer, *Sentencing Guidelines Commission*
- Judge Wesley Saint Clair, *Sentencing Guidelines Commission*
- Nick Straley, *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Chief Brian Smith, *WA Association of Sheriffs and Police Chiefs*

**Research/Technical Support Consultant:** Dr. Knoth-Peterson, Washington State Institute for Public Policy

**Facilitation Team:** Amanda Murphy, Chris Page, Alec Solemslie, Zack Cefalu

**Public Guests:** Jim Chambers, Bruce Glant, David Triewailer

**Welcome and Agenda Review:**

Amanda and Chris welcomed the group and congratulated them on the milestones they achieved over the past two all-day work sessions to develop a proposed New Felony Sentencing Grid. The agenda for today will be to continue going through the rest of the sections (Appendix A. Sec. D-J) of potential recommendations, focusing on those that have multiple options. The group will spend today working to agree on winnowing down the set of *potential* recommendations related to mandatory consecutive sentencing into one *proposed* recommendation to the Task Force. This means starting where the discussion left off on Tuesday the 26<sup>th</sup>, on Sec D. #'s 19-21 and 22-25 in the Grouping of Potential Grid Recommendations document. At the end of the day on the 26<sup>th</sup>, the group was considering the following potential recommendations but needs to discuss whether this would add complexity when it comes to scoring:

- Eliminate the mandatory consecutive sentencing for serious violent offenses but allow for judicial discretion to make sentences consecutive.
- Eliminate the mandatory consecutive sentencing for firearms offenses but allow for judicial discretion to make sentences consecutive.

Before launching into discussing that topic, Amanda walked the Subgroup through the updated Task Force's **2022 Work Plan:**

**August 4<sup>th</sup> CSTF Meeting:**

- Remaining Potential Recommendations (Sentencing Alternatives)
- First Proposed Recommendation: New Felony Sentencing Guidelines Grid

**August 31<sup>st</sup> CSTF Meeting:**

- Presenting all remaining Proposed Recommendations (CISRS Program and all of the proposed recommendations the Grid Subgroup is working on today and for the next 3 weeks)

**September 1<sup>st</sup> CSTF Meeting is all day consensus deliberation on Proposed Recommendation: New Felony Sentencing Guidelines Grid:**

- Will start the day with the test for consensus. If there is consensus, celebrate and go home early. If not, then will spend the rest of the day trying to work out the issues, ending the day with a call for consensus.

**The October CSTF Meeting will then be consensus on all other Proposed Recommendations.**

**The November CSTF Meeting will be the last opportunity for consensus on any remaining Proposed Recommendations.**

**The December CST Meeting will be tying up any loose ends and finalizing the report.**

**Grid Group Work Plan:**

**August 9<sup>th</sup> Meeting:** If needed, review and address input from the CSTF Aug. 4<sup>th</sup> meeting on the new grid proposed recommendation, Potential Rec. #16, #26 and 27a-c (3 strikes)#11 and #12. (See Appendix A)

**August 16<sup>th</sup> Meeting:** Section E. CHS, Potential Rec #28, 28a, 29a, 29b, 30, 31, 32 (misdemeanor scoring recs), any other single recommendations that need to be addressed

**August 26<sup>th</sup> Meeting:** Section E. Washouts Potential Rec #34, 35a, 35b, 35c, 35d, 35e, 36a, 36b, 37a, 37b

**August 30<sup>th</sup> Meeting:** Section F. Foundational Potential Rec # 1, 5; Section G. Continuing Work, Potential Rec # 4; any others that are still remaining

Returning to **Section D**, Amanda then reviewed the Grouping of Potential Recommendations document, reminding the group that Sections A-C have now become the Proposed Recommendation, the New Felony Sentencing Grid. The goal for today's meeting is to pick up where the group left off on the 26<sup>th</sup> starting with Section D #'s 19-21 and 22-25. As mentioned, the group needs to further discuss whether the following would lead to further complexity when it comes to scoring:

- Eliminate the mandatory consecutive sentencing for serious violent offenses but allow for judicial discretion to make sentences consecutive.
- Eliminate the mandatory consecutive sentencing for firearms offenses but allow for judicial discretion to make sentences consecutive.

**Concurrent versus Consecutive Sentencing:**

The Grid Group must decide today which one of the several potential recommendations concerning consecutive versus concurrent sentencing for both serious violent and firearms offenses they want to propose to the full Task Force. The research and facilitation team reviewed the scoring rules for these sentences: scoring for consecutive sentencing is calculated differently from concurrent sentencing. For concurrent sentencing when determining the sentence for two offenses, the offenses are scored against one another, and both add together at sentencing, increasing the criminal history score (CHS). However, for consecutive sentencing, offenses are not scored against one another, and while each offense individually carries a lower sentence range, when combined the two sentences make a longer period of incarceration as they are served back-to-back.

A member asked if concurrent sentencing should be the default while allowing judges to have discretion to sentence consecutively if they find it reasonable to do so.

#### Grid Group Discussion:

- A member said they are struggling to see how the discretionary application of consecutive vs concurrent sentencing would eliminate complexity or would benefit public safety. They are not sure how this can further the three policy goals or if they can get their constituency on board with removing mandatory consecutive sentences.
  - This prompted a discussion around how the status quo currently operates for firearm offenses. Case law says same criminal conduct for each gun—so one count of possession runs consecutive to one count of theft. Example: If someone breaks into a gun store and steals 10 guns and is found in possession of those stolen firearms, then they are charged and sentenced consecutively for the 1 act of theft and 10 Unlawful possessions of a firearm. That person will serve a consecutive sentence for each act and each firearm unlawfully possessed.
  - Another member said that they do not see many consecutive sentences and mostly see concurrent sentences for the same criminal conduct in the commission of one event. They agree with the above comment that they do not feel like they can reach consensus here as they support the status quo. They are not sure how this can further the policy goals or if they can get their constituency on board with this.
  - In response a member stated that this potential recommendation improves effectiveness by increasing discretion to judges. There is a fundamental question of whether it is right for these sentences to always run consecutively. Sentences quickly become extremely long with mandatory consecutive requirements. The group has research available to them that highlights that lesser sentence (e.g., not 30-50 years) are better for reintegration/rehabilitation.
  - Another member said that it is frustrating discussing whether there should be discretion on the application of concurrent versus consecutive as previous case law has stated the judges do have discretion for serious violent consecutive sentencing. The firearms consecutive sentencing has been a large source of racial disproportionality in the justice system and there is evidence available to the group to prove this, however they are not discussing this. Prosecutors have

discretion to pick and choose who will face what firearms charges, but judges do not have discretion over the sentencing of these charges. This does not seem just or serve the interest of justice/public safety, this prioritizes retribution over rehabilitation. It gets frustrating looking at these policy recommendations when multiple people have stated they will not reach consensus.

- The Sentencing Reform Act (SRA) was designed to be a concurrent sentencing structure, but the exception is when there are 2 serious violent offenses. When this is the case, the original SRA mandates consecutive sentencing but the Legislature changed the scoring associated with the sentencing here. When someone commits multiple serious violent offenses, the member stated they are deserving of longer sentences as this furthers public safety.

In response to an issue a member previously raised about case law providing judges with discretion to sentence concurrently (for serious violent and firearm offenses) rather than consecutively, the research team quickly researched and reviewed case law from the “McFarland” and “Mulholland” cases with the group. McFarland and Mulholland give judges the option to issue an exceptional sentence to run concurrent instead of consecutive.

- Discretion for sentencing downward through issuing an exceptional mitigating sentence to allow for concurrent sentencing— these are narrow exceptions. Status quo is always consecutive and exceptions to the rule cases can be concurrent.
- Mitigated exceptional sentences are then appealable – if law were to be concurrent but allow consecutive, that is a standard sentence
- Mitigated sentences may be more difficult to obtain. Courts are reluctant to acknowledge undefined circumstances to go below the guidelines.
- Appealable based on abuse of discretion on mitigated sentences.

Dr. Knoth-Peterson stated the status quo is that these sentences ought to run consecutively. The question is, what is the appropriate rule and assumption? Or should the assumption be that the sentences run concurrently, with exceptions to be consecutive in a serious case? A member agrees that if someone hits a narrow exception, there should be consecutive. But the current system has too many aggravators and not as many mitigators. This should be the other way around, as any crime could be aggravated due to the number of aggravators but not this is not the case with mitigators. This same member asked what constitutes an exceptional sentence to move the sentence downward. Courts have not found that anything can be a potential mitigator, there are not enough avenues to mitigate sentences down.

The group was reminded that these recommendations would not eliminate the use of consecutive sentences but would eliminate the mandatory aspect and turn the discretion over to the judges. This conversation extends back to April, with Chris reminding the group of the Task Force’s concerns in April about potential disproportionate sentencing with leverage by prosecutors to offer a plea bargain to alternate charge to avoid consecutive sentencing.

Amanda reminded the group of the Task Force’s recommendation in 2020: they decided then that firearm enhancements are to be concurrent unless the court says that it should be

consecutive. So, what is different about the firearm or serious violent offenses to say there should be no discretion?

Another member asked if there is a way to reach a compromise between those supporting these recommendations and those not supporting. The member proposed making either concurrent or consecutive sentencing the default and allowing for the judge to have the discretion to decide which type of sentencing to pursue. The facilitation team asked if this was something the group could live with and bring to the Task Force.

**Grid Group Input:**

- A member said that this adds more complexity to the grid and does not address public safety as they believe there is a solid public policy reason to have mandatory consecutive sentencing.
  - In response someone asked if there is a concern that the judges will not see the same severity in sentencing that the prosecutors see; if the discretion were given to the judges and they make the sentencing concurrent rather than consecutive, would the prosecutors argue for consecutive sentencing in that case?
    - Absolutely, if they are committing a significant number of serious violent offenses with multiple victims, it is appropriate to consecutively sentence here, and this is to differentiate their treatment from others who are not as serious/violent in their offenses.
  - This conversation comes down to who the group wants to decide on the type of sentencing: prosecutors or judges? The system that exists already disproportionately gives power to prosecutors and this is a way to move some of this power into the hands of a third party. These recommendations essentially boil down to who we want deciding the type of sentences.
  - In response, a member disagreed that mitigated sentences are not appropriate in all cases. Aggravator case requires the state to plead and prove it, while mitigators are just a board review. One of the mitigating factors is if consecutive sentencing is too much, they can mitigate that down through a review by the court of appeals. What prosecutors charge must be proved beyond a reasonable doubt.
- It was asked if eliminating the mandatory aspect through establishing a default that still provides judges the discretion to decide consecutive vs concurrent without requiring issuing an exceptional mitigated sentence to mitigate down to a concurrent sentence would be problematic?
  - Yes, this will provide no oversight to review and we might see large disparities in its application geographically.
  - This already happens under the status quo, in a way that disproportionately gives lengthier sentences to defendants of color and benefits white defendants that receive more exceptional sentencing down. Eliminating the mandatory aspect and establishing a default avenue that provides judges the discretion to decide consecutive vs concurrent without requiring the exceptional mitigated sentences requirement could benefit all defendants and reduce

disproportionality by expanding appealability to everyone. Judges may be less likely to do an exceptional sentence since they are appealable. They may be more likely to do an exceptional or concurrent sentence if it is not appealable. Suggestion that it may decrease disparity, albeit small, but it at least grants the chance, unlike the status quo.

**Decision:** The facilitation team asked the Subgroup to decide upon a proposed recommendation to bring forward to the full Task Force to deliberate consensus on: “Can the group live with the following as the proposed recommendation?”:

**Proposed Recommendation:** *For both serious violent and firearm offenses: Eliminate Mandatory consecutive sentencing, leaving default consecutive sentencing but allow judges to have discretion to issue concurrent sentences without invoking an exceptional sentence.*

The Grid Group agreed to put forward this proposed recommendation.

**Looking Forward:** The group was reminded about the Task Force meeting this Thursday, August 4<sup>th</sup>. For the next Grid Subgroup meeting on August 9<sup>th</sup>, the agenda will be as follows:

- If needed, review and address input from the CSTF Aug 4<sup>th</sup> meeting on the new grid proposed recommendation
- Potential Rec.’s in the following order: #16, #12, #11 and #26, 27a-c (3 strikes) (See Appendix A)

**Resources Shared via the Chat:** Clela Steelhammer: “I checked 3 cases that had a combination of the Unlawful Possession of a Firearm and Theft of a firearm. 2 of the 3 ran all counts consecutively. One case ran the Thefts of a Firearm concurrent but consecutive to the Unlawful Possession of a Firearm charge. I don’t have the details of the cases to know if it was multiple offenses or a single event.

**Comments Submitted By Guest Observers Via Zoom Chat And/or Email**

None

**Appendix A**

Attachment 1: [CSTF Grouping of Potential Recommendations](#)