Washington State Criminal Sentencing Task Force
Sentencing Grid Subgroup
Meeting Notes: December 6, 2022
Meeting via ZOOM

ATTENDEES

Task Force Members/Alternates:

- Clela Steelhammer, *Caseload Forecast Council*
- Chief Brian Smith, *WA Association of Sheriffs and Police Chiefs*
- Nick Straley, *Interests of Incarcerated Persons*
- Judge Wesley St. Clair, *Sentencing Guidelines Commission*
- Senator Chris Gildon, *WA Senate Republicans*
- Jon Tunheim, *WA Association of Prosecuting Attorneys (WAPA)*
- Russ Brown, *WA Association of Prosecuting Attorneys (WAPA)*
- Melody Simle, *Statewide Family Council*
- Keri-Anne Jetzer, *Sentencing Guidelines Commission*
- Gregory Link, *WA Defender Association*

Public: Jim Chambers and David Trieweiler

Facilitation Team: Amanda Murphy, Chris Page, Molly Stenovec, Alec Solemslie, Zack Cefalu – *Ruckelshaus Center*

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

WELCOME AND AGENDA REVIEW

Amanda welcomed everyone and reviewed the agenda for today. The Subgroup will be discussing the proposed recommendation on mandatory consecutive vs concurrent sentencing. Those who could not support this recommendation did not provide any alternatives they could live with, so the discussion for this meeting will try to solve problems to save some time on Thursday's Task Force meeting. Earlier the potential recommendations for this topic had many options for the Task Force to choose from and the facilitation team thought it could be helpful to revisit these to see if it would be beneficial to maybe use these as alternate proposals. Previously these were the options:

- **Potential Recommendation 19:** Eliminate the mandatory consecutive sentencing for serious violent offenses and make sentences concurrent.
- **Potential Recommendation 20:** Eliminate the mandatory consecutive sentencing for serious violent offenses and add an aggravating factor for cases involving serious violent offenses with multiple victims.

- **Potential Recommendation 21:** Modify the mandatory consecutive sentencing for serious violent offenses such that it applies only when the offenses are for different victims.
- **Potential Recommendation 22:** Eliminate the consecutive sentencing for firearm offenses and make those sentences concurrent.
- **Potential Recommendation 23:** Eliminate the mandatory consecutive sentencing for firearms offenses but allow judges discretion to make sentences consecutive.
- **Potential Recommendation 24:** Eliminate the mandatory consecutive sentencing for firearms offenses but add aggravating factors that may address the cases with most concern about culpability.
- **Potential Recommendation 25:** Modify the mandatory consecutive sentencing laws for firearms offenses such that sentences for different criminal events are consecutive, but sentences for multiple offenses within a single criminal event are concurrent.

Grid Subgroup Discussion:

- A member had a case earlier this year that involved a home burglary where 3-4 pistols were stolen by a convicted felon. In this case, since the defendant had prior felony convictions they not only had stolen the firearms but were in unlawful possession of them due to the fact they were stolen and the individual had prior felony convictions. In this case there's Unlawful Possession of a Firearm and Theft of a Firearm this would result in the sentences running consecutively, but the multiple counts of Theft of a Firearm and multiple Unlawful Possession of a Firearm run concurrently, due to this being the same criminal conduct. The court cannot give consecutive sentences for the same criminal conduct or score these offenses against each other, so multiple thefts of multiple guns would not stack consecutively, but could run consecutive against the Unlawful Possession of a Firearm charges, these offenses can be scored against each other but are also still eligible for enhancements.
- *State of Washington v. Mulholland* and *State of Washington v. McFarland* allows the court the discretion to impose concurrent sentences for multiple serious violent and firearm offenses as an exceptional sentence.
- A member asked if there was any clarifying language that could be added to the statute?
- This is a very complex topic to distinguish how these firearm offenses interplay in sentencing with each other, to determine how they are charged, and if they are eligible to run consecutively against another is particularly complex. This is especially true if these offenses are not in the same criminal conduct, not sure there is apt time left to fully discuss this issue in the depth it requires.
- The impact on sentences, especially the risk of an extraordinary sentence, is less with Unlawful Possession or Theft of a Firearm is less compared to firearm enhancements.
    - Dr. Knoth-Peterson asked if the statute needs to be clarified if it is that confusing? The Task Force went through the exercise of a situation where an individual steals three guns from a home, and members found that is grounds for three consecutive sentences.
- Dr. Knoth-Peterson suggested creating a recommendation that the statute should match case law? Specifically reading as:

Potential recommendation:

- The Legislature should revise RCW 9.94A.589(1)(c) to be consistent with interpretations of current case law.
    - It is unclear what constitutes "same criminal conduct" for purposes of this subsection
    - It is unclear which charges must run consecutively.

- A member said the statute is correct but complex, analysis of the case law is necessary to highlight the nuances of what is considered same criminal conduct in order to clear up any perceived complexity.
- Case law states that "same criminal conduct" allows only for the imposition of a sentence for one instance, which is defined as same victim, same intent, and same time and place. An example being, if someone breaks into a home and steals a firearm, then breaks into a car and steals another firearm, and then these can be run consecutively. But if someone breaks into a home and steals a gun from three different rooms in a home That is similar conduct and the same investigation so they can run concurrently. Not sure that the RCW is incorrect, similar criminal conduct trumps all other provisions in the RCW according to case law.
- A member stated that prosecutors do not look at this as having the risk of an extraordinary sentence so they do not feel the need to change this statute due to the clarifications of the same criminal conduct. They do not feel case law is out of sync with the statute as practice aligns with the law.
    - A member pointed out that RCW 9.94A.589(1)(a) provides the clarifications for the subsections.
    - In response another member said they are not sure that the statute is inconsistent with the law's intent. The courts have just harmonized the statutes.
- Members do not have a problem with a Legislative review but the practice of this law is not out of touch with the law's intent so several members noted this Legislative review may not be beneficial or result in any new revisions.

Amanda reviewed the Proposed Recommendation concerning consecutive vs concurrent sentencing and asked if this recommendation's approach is similar to the approach taken by the Task Force to recommend eliminating firearm enhancements in 2020? That recommendation put the default sentencing as concurrent with the discretion by the judge to sentence consecutively, but this recommendation sets the default as consecutive with judicial discretion to make them run concurrently. Amanda asked, would changing this to mirror the 2020 firearm enhancement recommendation be a proposal for those who couldn't live with the original? Are they able to live with this change?

Grid Subgroup Discussion:

- A member not in consensus of the original recommendation felt the Legislature got this right in the SRA, and that these laws were voter initiatives that should not be amended.

A change in this sentencing would also affect how these offenses are scored in CHS and this would add additional complexity and create room for errors.
    - Another member agrees with the above statement, still would not change their position either, judicial discretion on this topic adds another layer of complexity that they cannot support.
- Another member, not in consensus, said that discretion on this topic would allow for the risk of disparities in sentencing for this topic and the mandatory nature here ensures equal treatment for those sentenced under this statute.

No one else had anything to add to this conversation and Amanda agreed to table this conversation for Thursday.

Proposed Recommendation #26
Eliminate eligibility exclusion based on current offense/s – modeled after Mental Health Sentencing alternatives (does exclude eligibility if current offense is serious violent or sex offense).

This recommendation had opposition but many in opposition had questions for clarity they needed answers before they could decide. This recommendation came out of the Sentencing Alternatives meetings that had discussions around sentencing alternatives' criteria and the process which is used to determine who is eligible for each alternative. The Mental Health Sentencing Alternative does not have an offense-restricted eligibility criteria, but provides a judge information on the individual before them as well as evaluations of that individual to determine their eligibility for the sentencing alternative, rather than automatic exclusions due to prior offenses. This would allow for more individualized and less "one-size-fits-all" criteria.
Grid Subgroup Discussion:

- A member noted that Drug Courts have been the most researched alternative in American jurisprudence, those who are in the highest need and highest risk quadrant could benefit the most from drug courts or related drug offense sentencing alternatives, but offense exclusion criteria block these individuals who could benefit the most. These therapeutic interventions in tandem with a move to an individualized assessment process that would highlight the needs of each individual could connect far more individuals with the opportunity for rehabilitation over pure incarceration. When therapeutic jurisprudence programs were federally funded they had to follow federal eligibility criteria but once the funding for these programs shifts to the local and state levels these programs can begin to expand their criteria for offenses that could be included into the programs to broaden their eligibility.
- Prosecutors recognize the Mental Health Sentencing Alternative as very unique and this is reflected in the statute as well as the process to determine if someone is eligible for enrollment in this program. This sentencing alternative is still not widely used due to the lack of DOC not having the necessary resources or structure to widely institute this. Expanding this criteria to all sentencing alternatives does not capture the nuances of the need for each type of offense and needs of the individual varying for each sentencing alternative. Mental Health Sentencing Alternative is specifically designed for those

suffering from a diagnosable mental health disorder, expanding this eligibility to other alternatives is not feasible, as there is not enough resources available already to serve those in programs such as DOSA as is. If there is a need to expand alternatives then this could be done at the level of drug courts. The return of investment in, their point of view, comes from the rigorousness of drug court. Rigorous entry process with in-depth needs analysis. The drug courts have rigorous best management practices with the 10 key principles, of which they have not seen anything like that in other alternatives. Cannot support having the eligibility for the Mental Health Sentencing Alternative mirrored in the other alternatives. Their group would not support adding current violent offenses to DOSA. The recommendation does not say that but that is the practical effect.

    - In response to this, another member mentioned that they saw a video of a presentation about drug courts. In that presentation, it was presented that because so many drug courts do not want to address those with the greatest need, and potentially the greatest risk, that they are going with those with lighter needs. These courts are cherry picking those that go into programs. Research suggests risk is a better model of exclusion than current or prior offenses. So this member wonders if the exclusions are cherry picking the easiest for the programs, based on offenses rather than the need/risk?
    - Amanda said that the alternatives group may have looked at this. The Task Force has talked about the programming needed for the highest risk of recidivism. The alternatives we're looking at, is there a better way to provide an individualized process so you can target those at greatest risk? Should this be offense based?
- A member said there is a risk for failure in the program as well as a risk of recidivism, so offense-based exclusions allow for those who have committed lower-level offenses to be eligible for sentencing alternatives, so if they recidivate there is no risk for violence in the community. In this recommendation there is a lot left unsaid, if someone doesn't succeed in DOSA or drug courts and they recidivate and are incarcerated there is no risk for community harm, but if someone with potentially a current/prior violent or serious violent offense is placed in a sentencing alternative and they fail, their recidivism could lead to further violence that would've been avoided had they been incarcerated.
- This is designed to create an opportunity for individuals who have a serious mental illness and allow for sentencing alternatives for those not eligible for other sentencing alternatives. Mental Health Sentencing Alternative is designed to remove folks near that forensic incompetence threshold and not transferable to other sentencing alternatives. We are not talking about the normal sentencing alternatives. This is forensic incompetence and mental health issues. The legislature is trying to move those around the forensic competency issue. This is just a different process.
- A member suggested the creation of a third DOSA option called "vDOSA" for those with violent offenses, allowing for a greater amount of time served in incarceration and time in community custody has higher standards of surveillance.
    - Could require individuals to serve 75% of the midpoint or XX years, whichever is greater

    - Could require individuals to be supervised at the highest contact requirement level, regardless of risk
    - Could consider requiring electronic home monitoring of some other enhanced level of supervision during the community custody period
    - This creates a tiered model of intervention within DOSA, this allows for increased individualization while ensuring offense-specific exclusions for rDOSA or community-based alternatives.
- A member stated they support a more resource intensity on reentry. They stated that this conversation now feels like it is centered around how to include those with a violent offense or violent priors into a sentencing alternative if they have a substance use disorder, this would reduce incarceration time for those currently charged with a violent offense and they could not support this. Drug Courts are moving into this topic and would be a better fit for those with a current violent offense and they would much prefer drug courts deal with this.
- It was mentioned earlier that more discretion to judges could result in disparate treatment, a member responded to this assertion that withholding judicial discretion through mandatory sentencing laws or other statutes, moves this discretion to prosecutors who can decide sentencing alternatives decisions or mandatory consecutive sentencing through charging decisions. Judicial discretion should be expanded such that these decisions are made transparently by judges rather than prosecutors deciding these through their discretion or through charge bargaining. Judicial discretion prevents prosecutors from being the gatekeepers of the legal system.
- A member had a quick question. Are those in drug courts incarcerated?
    - Depends on the court. Incarceration is avoided for most participants. This member's county drug court allows drug treatment in the county jail. So a high risk person would go through some programming in the county jail and they earn more freedom at milestones. The presumptive model is not in custody.
    - Another member agrees with that assessment. King County had a robust custody program that oftentimes certain populations, determined by risk assessment, would mandatorily begin there. Housing would be on the table along with other community-based treatment models, including in-patient treatment at times. It is an earned process in King County.
- In response to the answers provided that member asked if drug courts include those convicted of a violent offense and would allow these individuals to be in the community when dealing with drug court requirements, and why are some members fine with this but not fine with opening up DOSA eligibility to those with a violent offense? The vDOSA proposal allows for those with a violent offense to still be incarcerated.
    - These are two different models and different levels of intensity between drug courts and DOSA. Drug Courts require weekly judicial hearings about treatment progress that allows for individuals to earn their way out of incarceration, DOC does not have the capacity to function in this same model.
    - The DOSA supervision model is a very different model than drug courts, and this is due to a resources issue for DOSA. Frontline workers in drug courts are often social service care providers and trained to work with this population through a

public health model, rather than DOSA has DOC frontline workers who function in a law enforcement or incarcerative model of surveillance rather than public health.

- Amanda asked if the Grid Subgroup should make a recommendation that every county has a drug court or the creation of a state-based drug court. If members believed drug courts are effective why should they not make a recommendation about drug courts?
- Not every county has a drug court and these models between drug court and DOSA are very hard to compare due to their differences.
- There are informal systems that exist to allow for some counties to send those eligible for drug courts to counties that have additional capacity in their drug courts to enroll those individuals in drug courts in other countries.
- It is cost prohibitive and a county would need a large number of people being involved. A drug court is very expensive per person. This would represent an issue of both resource capacity by counties if they have the funding to be able to fund these drug courts or the varying level of need by county. If a county has a low need for a drug court then this would be greatly expensive to fund for the few individuals who need this, and if not every county has this drug court then this places a greater burden on individuals to travel across counties to be sent to the nearest drug court. This wouldn't be an issue of counties not believing in the efficacy of drug courts, but is an issue of resource allocation and need.
- A member said that the Task Force cannot produce an unfunded mandate for counties. Not all counties have the same amount of resources but we are seeing advancements in effective treatment virtually. Maybe collaborative lines of a court going over county lines.
- Another member mentioned the SGC was told to look at drug courts. The criminal code review committee talked about a statewide drug court, considering the level of efficacy of drug courts. This member wonders if funding for drug courts could come from the formerly CISRS program.

Amanda thanked the Subgroup for their participation today and mentioned that this Thursday's upcoming Task Force meeting will be the last of this year. In January and February, there will be a couple of meetings that are a few hours long that focus on updates from the legislature and to provide some reflections on the large body of work that this Task Force has completed over the years. Additionally, there may be some need to retain some Grid Subgroup members if the Legislatures requests for additional information or work from the Task Force, this will be discussed in-depth at the upcoming meeting.

Appendix

Attachment 1: *State of Washington v. Mulholland*

Attachment 2: *State of Washington v. McFarland*

Attachment 3: Washington Therapeutic Courts