

**Washington State Criminal Sentencing Task Force  
Sentencing Grid Subgroup  
Meeting Notes: November 9, 2021  
Meeting via Zoom**

**Attendees:**

- Russ Brown, (Alt. for Jon Tunheim) *WA Association of Prosecuting Attorneys*
- 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)*
- 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, Audra Garcia, Bruce Glant, Joanne Smieja, David Triewailer

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

**WELCOME & AGENDA REVIEW**

Amanda welcomed the Subgroup and reminded members that the focus today would be on exceptional sentences, i.e., aggravators or mitigators. But first, she asked the group to spend some time discussing the feedback received from Task Force members at last week's meeting. She also shared with the group that when the facilitation team and the co-chairs met recently, they shared some concerns around how the Task Force might restructure the grid without getting into offense-by-offense reclassification. With the potential Task Force recommendations moving toward a clean division of felony classes by offense seriousness level (OSL)—with Class A in OSL 11 and above, Class B in OSL 6-9, and Class C in OSL 1-5—some offenses will need to get moved to logically fit with the new grid. Both the facilitation team and the co-chairs thought it best to gather some initial thoughts from the Subgroup on how to address this tension.

A member suggested that in creating a given OSL and categorizing offenses therein, the state implicitly posits that those offenses have similar culpability, but when you start looking at individual offenses and making the case they should fit at a certain level, you risk moving toward disproportionate outcomes. The member encouraged the Subgroup and Task Force to create a more logical and systematic structure for the grid and trust the structure to hold its integrity with the Legislature having responsibility for sentence lengths for individual offenses.

Another member spoke of their experience with the SGC work of classifying unranked offenses.

The three mandatory minimums established benchmarks and statutory minimum sentences for certain offenses. The SGC considered information on prosecuting standards, judicial sentencing practices, and

jail and prison populations as it ranked some offenses higher in seriousness level since they represented crimes against a person.

When thinking whether to move Class B offenses above Level 9, or Class C offenses above Level 5, the number of offenses in question is relatively small. A member observed that certain offenses seem to emerge as flashpoints during those conversations, e.g., Assault 2, and spoke in favor of reclassifying groups of offenses rather than fixating on the punishment for a single crime. Perhaps the Task Force could discuss and consider agreeing on that handful of offenses that would need reclassifying.

A member pointed out there are two things in play: first, the form and structure of the grid; second, the practical on-the-ground effects of that form and structure. Perhaps it would make sense to have two separate processes to discuss and make recommendations to the Legislature on each of those. For a number of members it may be hard to accept the form and structure without considering where some offenses would lie on the grid.

A member suggested that the grid itself is not that complicated as it stands, and that the real issue is what length of punishment is appropriate. Another member agreed that the Task Force would not benefit from going offense by offense after creating a new grid structure. Some crimes can be considered in groups or clusters, e.g., each OSL comprises a cluster and each Class also comprises a cluster. In theory, the crimes in each OSL cluster were deemed of equal or similar culpability.

The Subgroup discussed whether the SGC could have a role in ranking offenses. The idea arose to recommend to the Legislature to give the SGC more resources to tackle the work of reclassifying offenses if a new grid structure is put forward. Amanda asked whether the group thought the Task Force should recommend the Legislature allocate more resources to the SGC. A member agreed that this made sense and added that the Legislature should also examine the composition of the SGC, pointing out that it got created 40 years ago and certain constituencies probably got omitted.

Another member suggested that perhaps this conversation is premature, and Task Force members should wait to ask how a given offense is going to exist on the grid until after the grid structure solidifies more. It is not clear whether the Task Force will end up with a single grid proposal or one with options built into it. If the former, the discussion on seriousness levels can follow. Coming up with the grid structure and how it impacts scoring should come first. Another member agreed that the Task Force should maintain its focus on developing and agreeing on a new grid structure while keeping in mind that some offenses will need reclassifying. The grid, including its rules and scoring should come first then the discussions around reclassification can be had.

Item for next Grid Subgroup report to the Task Force: complete the grid first in a way that creates resiliency, then tackle the reclassifying of offenses, potentially by creating criteria for that reclassification. Strengthening the SGC could also be part of that dialog.

**PRESENTATION: Exceptional Sentences**

Keri-Anne Jetzer reviewed the history of exceptional sentences - those with aggravating or mitigating circumstances (see Appendix A). The original SGC language with six mitigating factors and four

aggravating factors was codified in 1983. The Legislature added that the judge must put in writing the justification for any exceptional sentence. Keri-Anne showed the Subgroup a document (**Appendix A**) showing the additions of various aggravating and mitigating factors with the year in which the Legislature added each one. By 2005 the four aggravating factors had expanded to 25; the six mitigating factors now stands at 33.

The data on aggravators and mitigators shows that in most cases, the exceptional sentences got issued because both sides (prosecution and defense) agreed on the aggravating or mitigating factor/s. Exceptional sentences rarely get issued since the aggravating and mitigating factors are very specific so not able to be broadly applied.

Exhibit 11 in the WSIPP report for the Task Force (included below as **Appendix B**) lists the five most common justifications for aggravated and mitigated exceptional sentences. A member suggested that the group consider whether exceptional sentences should get issued simply because all parties agree or whether there should have to be evidence or convincing arguments presented in court. Another topic the Subgroup could tackle is whether there should be caps on aggravated or mitigated sentences—this “bounded discretion” could help limit disproportionate outcomes.

A member explained that sometimes a judge issues an exceptional aggravated sentence to avoid the harsh sentence associated with a Third Strike conviction. Having this in writing could assist in the endeavor of collecting data in the interest of understanding and limiting the root causes of disproportionate outcomes. A member agreed that the only reason for a defendant to agree to an aggravated sentence would be to avoid a third strike. Another member suggested that the data shows that black, indigenous, and people of color (BIPOC) get unjustly charged with third strike offenses and can agree to exceptional aggravated sentences as a result.

Capping exceptional sentences could limit disparate treatment. The Task Force could recommend a cap on exceptional sentences for OSL 9 and below since the statutory maximum sentence for OSL 10 and above (Class A) is a life sentence and capping exceptional aggravated sentences in Class A would mean that judges cannot impose the statutory maximum. Should the cap on exceptional sentences only apply to aggravators and not mitigators?

Looking at other states:

- Oregon has a maximum departure (above or below) the sentence guidelines in the middle and lower OSL levels
- Pennsylvania has a similar model, with a column on the far right of the grid listing maximum allowable aggravated or mitigated sentences (+/- 12 months at higher levels; +/- 6 months at middle levels; +/- 3 months at lower levels).
- California also has limits on exceptional sentences, but that grid goes cell by cell.

The Subgroup and Task Force could consider capping exceptional sentences in a couple ways:

- By % (e.g., 20% at highest levels; then 15% and 10% in middle and lower levels respectively) or
- By months (e.g., 48, 36, and/or 24 months for Class A; 12 months for all Class B; 6 months for all Class C)

**Next Steps & Action Items:**

- Next meeting: continue discussing exceptional sentences.

## **APPENDIX A**

### **Exceptional Sentences - Aggravators and Mitigators**

#### **1981 – SRA**

RCW 9.94A.120 - Sentences.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds that imposition of a sentence within the standard range would impose an excessive punishment on the defendant or would pose an unacceptable threat to community safety.

#### **1981 - SGC Review**

- SGC considered advantages and disadvantages.
- Concerns were raised:
  - Standard was excessively vague, could have multiple interpretations and lead to sentencing disparity.
  - Standard was too restrictive and would pose an unacceptable threat to community safety.
- Proposed language: “The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purposes of this act, that there are substantial and compelling reasons justifying an exceptional sentence.”
- Created a non-exclusive list of appropriate justifications for departures.
  - Mitigating Circumstances:
    1. To a significant degree, the victim was an initiator, will participant, aggressor, or provoker of the incident.
    2. Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.
    3. The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
    4. The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
    5. The defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded).
    6. The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern or the safety or well-being of the victim.
  - Aggravating Circumstances
    1. The defendant’s conduct during the commission of the offense manifested deliberate cruelty to the victim.

2. The defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability or ill health.
3. The offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
  - a) The offense involved multiple victims or multiple incidents per victim;
  - b) The offense involved attempted or actual monetary loss substantially greater than typical for the offense;
  - c) The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
  - d) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense.
4. The offense was a major violation of the Uniform Controlled Substance Act, Chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition. The presence of ANY of the following may identify an offense as a major VUCSA:
  - a) The offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so; or
  - b) The offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
  - c) The offense involved the manufacture of controlled substances for use by other parties; or
  - d) The offender possessed a firearm during the commission of the offense; or
  - e) The circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or
  - f) The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or
  - g) The offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary responsibility (e.g. pharmacist, physician or other medical professional).

### **1983 – Codified**

The Legislature elaborated the authorizing language in the statute by requiring the court to provide written justification for departing from the standard range and making any sentence outside the standard range subject to appeal, but the list of aggravating and mitigating factors as recommended by the SGC was codified into law.

## 1984 – 2019 Other Statutory Modifications

1984 added – 2005 removed aggravating factor:

(h) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.400.

1986 – eliminated an aggravating factor:

(d) The offender possessed a firearm during the commission of the offense;

2005 – response to *Blakely* decision. According to the bill report: The list of aggravating factors used to justify an upward departure from the standard sentence range is made exclusive. The aggravating factors list is expanded to include current judicially recognized factors. Four aggravating factors, all based on questions of law, may be used to impose a sentence above the standard range without findings of fact by a jury. The remaining twenty-five aggravating factors pose questions of fact that must be submitted to a jury.

Current 9.94A.535 List:

### (1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

- 1983 (a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
- 1983 (b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.
- 1983 (c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
- 1983 (d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
- 1983 (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.
- 1983 (f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.
- 1984 (g) The operation of the multiple offense policy of RCW [9.94A.589](#) results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW [9.94A.010](#).
- 1989 (h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.
- 2010 (i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

- 2010 (j) The current offense involved domestic violence, as defined in RCW [10.99.020](#), and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.
- 2016 (k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in RCW [9.94A.030](#), and the sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW [9.94A.010](#).

(2) Aggravating Circumstances - Considered and Imposed by the Court

- 2005 The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
- 2005 (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
- 1995 (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW [9.94A.010](#).
- 2005 (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
- 2005 (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW [9.94A.525](#) results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

- 2005 Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW [9.94A.537](#).
- 1983 (a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.
- 1983 (b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.
- 1996 (c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.
- 1983 (d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
  - 1983 (i) The current offense involved multiple victims or multiple incidents per victim;
  - 1983 (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

- 1983 (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- 1983 (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- 1983 (e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter [69.50](#) RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
- 1983 (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
- 1983 (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
- 1983 (iii) The current offense involved the manufacture of controlled substances for use by other parties;
- 1983 (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
- 1983 (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
- 1983 (vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).
- 1990 (f) The current offense included a finding of sexual motivation pursuant to RCW [9.94A.835](#).
- 1987 (g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
- 1996 (h) The current offense involved domestic violence, as defined in RCW [10.99.020](#), or  
2013 [stalking, as defined in RCW 9A.46.110](#), and one or more of the following was present:
- 1996 (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;
- 1996 (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or
- 1996 (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
- 1997 (i) The offense resulted in the pregnancy of a child victim of rape.
- 1999 (j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.
- 2002 (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.
- 2003 (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

- 2005 (m) The offense involved a high degree of sophistication or planning.
- 2005 (n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- 2005 (o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.
- 2005 (p) The offense involved an invasion of the victim's privacy.
- 2005 (q) The defendant demonstrated or displayed an egregious lack of remorse.
- 2005 (r) The offense involved a destructive and foreseeable impact on persons other than the victim.
- 2005 (s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.
- 2005 (t) The defendant committed the current offense shortly after being released from incarceration.
- 2005 (u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.
- 2005 (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.
- 2005 (w) The defendant committed the offense against a victim who was acting as a good samaritan.
- 2005 (x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.
- 2005 (y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW [9.94A.530\(2\)](#).
- 2007 (z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.
- 2007 (ii) For purposes of this subsection, "metal property" means commercial metal  
2008 property, **private metal property**, or nonferrous metal property, as defined in RCW [19.290.010](#).
- 2008 (aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW [9.94A.030](#), its reputation, influence, or membership.
- 2010 (bb) The current offense involved paying to view, over the internet in violation of RCW [9.68A.075](#), depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW [9.68A.011\(4\)](#) (a) through (g).
- 2011 (cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW [9.94A.030](#).
- 2013 (dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW [9A.36.031\(1\)\(k\)](#), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is

being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW [2.28.200](#) at the time of the offense.

- 2013 (ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW [46.04.350](#), with a posted speed limit of forty-five miles per hour or greater.
- 2019 (ff) The current offense involved the assault of a utility employee of any publicly or privately owned utility company or agency, who is at the time of the act engaged in official duties, including: (i) The maintenance or repair of utility poles, lines, conduits, pipes, or other infrastructure; or (ii) connecting, disconnecting, or recording utility meters.

## APPENDIX B

Exhibit A11 lists the five most common justifications for aggravated and mitigated exceptional sentences.

**Exhibit A11**  
Aggravated and Mitigated Exceptional Sentence Justifications, by Race

	Total		BIPOC		White	
	N	%	N	%	N	%
<b>Aggravated exceptional</b>						
Defendant agreed to prison, greater sentence, or treatment	251	86.0%	95	88.8%	153	82.7%
Victim was particularly vulnerable	9	3.1%	3	2.8%	5	2.7%
A domestic violence offense that occurred in sight or sound of victims children under age 18	8	2.7%	2	1.9%	5	2.7%
A domestic violence offense that was a part of an ongoing pattern of psychological, physical, or sex abuse of victim multiple incidents over a prolonged period of time	7	2.4%	3	2.8%	4	2.2%
Defendant was in a position of trust (not an economic or drug offense)	6	2.1%	2	1.9%	3	1.6%
<b>Mitigated exceptional</b>						
Exceptional sentence is more appropriate/is in the interests of justice	427	42.3%	188	45.1%	234	39.5%
All parties agreed to mitigated sentence	397	39.3%	138	33.1%	252	42.5%
Part of Plea Agreement	125	12.4%	57	13.7%	67	11.3%
Capacity to appreciate the wrongfulness was significantly impaired	21	2.1%	9	2.2%	12	2.0%
Victim was an initiator, willing participant, aggressor, or provoker	19	1.9%	7	1.7%	12	2.0%