

**Washington State Criminal Sentencing Task Force
Sentencing Grid Subgroup
Meeting Notes: November 16, 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, Joanne Smieja, David Triewweiler

Facilitation Team: Amanda Murphy, Chris Page

WELCOME & AGENDA REVIEW

Amanda welcomed the Subgroup and asked the Subgroup to begin by discussing factors that can contribute to exceptional sentences (those with aggravators or mitigators) along with how the Task Force might place them on the grid. To provide food for thought, she asked Lauren Knoth to present information on how other states incorporate exceptional sentences into the grid. Dr. Knoth, after noting that white defendants get aggravated exceptional sentences at lower rates than non-white defendants, provided the following examples:

- Arizona has presumptive, maximum, and minimum sentences, along with exceptional sentence lengths, specified cell-by-cell. As offense classes (akin to Offense Seriousness Levels (OSLs) in the Washington state grid) get higher, the allowed range of departure from the sentence range increases.
- California has limits on exceptional sentences and specifies them cell by cell.
- 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).

Washington state could cap exceptional sentences in a couple ways:

- By %, e.g., 20% at highest levels or 48 months/36 months/24 months; then 15% (12 months) and 10% (6 months) 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)

A member pointed out that capping exceptional sentences at the highest OSLs, where the maximum sentence is life in prison, would mean that judges could not issue sentences at the statutory maximum. Another member suggested that the Task Force could recommend limits on aggravated sentences at higher OSLs but still allow for life sentences under certain circumstances. Another member responded that if we want to address the disparity that has characterized exceptional sentences then we need to avoid those types of carve-outs.

Caps on aggravator and mitigator may limit flexibility. Plea bargains often involve the use of aggravators, as a member explained, a defendant agrees to Robbery 2 in lieu of Robbery 1 if Robbery 2 sentence carries an aggravator; limit on that aggravator might mean a sentence cannot be long enough for prosecution to be comfortable with the reduced charge. Prosecutors value the ability to use plea bargains to craft recommended sentences tailored to the unique circumstances of specific cases.

A member suggested that perhaps potential limits on exceptional sentences should apply only to aggravators and not mitigators.

Another member asked what actions/recommendations can limit disproportionality. Lauren explained that studies such as Booker et al show that disproportionality generally stays the same no matter who in the system has the discretion. Targeting only one portion of the system serves simply to displace the disproportionality; to reduce disparate treatment a state must address it holistically across all decision points of the system.

In the interest of transparency, the Task Force could recommend that each exceptional sentence have its rationale clearly articulated. This implies that aggravated exceptional sentences get driven at least in part by prosecutorial charging decisions that lead to plea bargains. Judges have to provide rationale for their decisions, and this transparency allows disproportionality to be identified more easily. While prosecutorial charging decisions get listed on judgment and sentencing (J&S) forms, giving some transparency for prosecution as well as judicial decisions; however, the J&S forms do not clearly list rationale for recommended sentence so have limited transparency.

9.94a.480 (1) A current, newly created or reworked judgment and sentence document for each felony sentencing shall record any and all recommended sentencing agreements or plea agreements and the sentences for any and all felony crimes kept as public records under RCW 9.94A.475 shall contain the clearly printed name and legal signature of the sentencing judge. The judgment and sentence document as defined in this section shall also provide additional space for the sentencing judge's reasons for going either above or below the presumptive range. . . .

The Subgroup looked at an Oregon data dashboard showing convictions by sentence type across county in the state including defendant ethnicity (via an equity dashboard), gender, and prison and jail intake numbers. The information shows disparity along with what charges are driving each county's jail and prison usage and how it is changing over time.

The Subgroup discussed how the lack of consistency in J&S forms prevents systematic data collection in Washington state. Task Force members early in the process identified more consistent J&S forms as an opportunity to reduce complexities and reduce errors in the system. The Subgroup briefly discussed the prospects for a uniform J&S form or worksheet, ideally electronically, that enables data collection.

Potential Recommendation: Establish a uniform electronic J&S system for WA Superior Courts.

Discussion Points:

- While a couple members suggested this could decrease complexity and reduce errors, another member responded that it cannot eliminate human error.
- Should there be statutory requirements for what must be reported?
- This would enable systematic data collection, reporting, and research

The Blakely Decision in 2005 changed the aggravators able to be charged. It created an exhaustive set of aggravating factors, with four that do not need to go before a jury and required judges to provide written rationale when issuing sentences shorter than the mitigated minimum sentence or aggravated maximum sentence.

The group returned to the discussion of exceptional sentences. A member observed that capping how much lower than the guidelines a mitigated sentence can go might end up in longer sentences getting issued. Capping mitigated sentences at six months, for example, might require a jury trial due to the Blakely Decision. Since judges currently can issue mitigated sentences as low as zero months, capping mitigators would require carve-outs.

A member stated that capping exceptional sentences would limit judicial discretion and would not further the Task Force's policy goals. Another member suggested the Task Force should recommend changes to the system that reduce the power of prosecutors by eliminating mandatory consecutive sentences and enhancements and spend less time "tinkering at the edges" in the form of limiting aggravated sentences. It could also help to rein in prosecutorial discretion by eliminating aggravated exceptional sentences that do not require conditions to be pled and proven.

A member suggested lowering the Class A statutory max from life down to 50 years. Most sentences do not come close to life in prison (unless stacked consecutively) and get resolved via plea bargain. This would limit the use of aggravated exceptional sentences so potentially increase transparency.

The Subgroup touched on overall incarceration rates and sentence lengths, with a member asking if the Task Force has a fundamental disagreement on these issues. Another member replied that there does appear to be agreement on reducing the number of incarcerated people in the lower OSL levels, in favor of community-based treatment alternatives that have been shown to reduce recidivism. The divide may be more pronounced at the higher OSLs but reducing or eliminating the stacking of enhancements and mandatory consecutive sentences can make a real difference.

Another member commented on how the executive branch (prosecutor) has jurisdiction over what gets charged, the judicial branch gets to decide actual sentences, and the Legislature determines the

penalties for various offenses. This is meant to be a balance; the disagreement maybe more around whether the system is out of balance and, if so, how much out of balance.

For notes captured on screen during the discussion, see Appendix A.

Next Steps & Action Items:

- Next meeting: continue discussing exceptional sentences.

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

Joanne Smieja: I liked Keri Anne's suggestion to get rid of the four court allowed aggregators. That will begin to limit the power of the prosecutors.

Bruce Glant: I think Nick Straley hits on the total concept of the need to change mindset for everyone from one of a punitive nature to one of a rehabilitative nature.

APPENDIX A

Potential options:
Have a column for constraints on aggravated and/or mitigated sentences. This puts bounds on discretion for the judges. This could either be a set amount (i.e., number of months allowed above or below) or a percentage of the minimum/maximum.

	0	1	2	3	4	5	6	7	8	9+	Agg/Mit +/-	Agg/Mit +/-										
XV	Life Sentence without parole/death penalty for defendants at or over the age of 18. For defendants under the age of 18, a term of 25 years to Life																					
XV	240	320	250	333	261	347	271	361	281	374	291	388	312	416	338	450	370	493	411	548	20%	48
XIV	123	220	134	234	144	244	154	254	165	265	175	275	195	295	216	316	257	357	298	397	20%	48
XIII	123	164	134	178	144	192	154	205	165	219	175	233	195	260	216	288	257	342	298	397	20%	36
XII	93	123	102	136	111	147	120	160	129	171	138	184	162	216	178	236	209	277	240	318	20%	36
XI	78	102	86	114	95	125	102	136	111	147	120	158	146	194	159	211	185	245	210	280	20%	24
X	51	68	57	75	62	82	67	89	72	96	77	102	98	130	108	144	129	171	149	198	15%	24
IX	31	41	36	48	41	54	46	61	51	68	57	75	77	102	87	116	108	144	129	171	15%	12
VIII	21	27	26	34	31	41	36	48	41	54	46	61	67	89	77	102	87	116	108	144	15%	12
VII	15	20	21	27	26	34	31	41	36	48	41	54	57	75	67	89	77	102	87	116	15%	10
VI	12.05	14	15	20	21	27	26	34	31	41	36	48	46	61	57	75	67	89	77	102	15%	10
V	6	12	12.05	14	13	17	15	20	22	29	33	43	41	54	51	68	62	82	72	96	10	5
IV	3	9	6	12	12.05	14	13	17	15	20	22	29	33	43	43	57	53	70	63	84	10	5
III	1	3	3	8	4	12	9	12	12.05	16	17	22	22	29	33	43	43	57	51	68	10	5
II	0	3	2	6	3	9	4	12	12.05	14	14	18	17	22	22	29	33	43	43	57	10	5
I	0	2	0	3	2	5	2	6	3	8	4	12	12.05	14	14	18	17	22	22	29	10	5
Unr	0 - 365 days																					

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	0	1	2	3	4	5	6	7	8	9+	Agg/Mit +/-	Agg/Mit +/-										
18	Life Sentence without parole/death penalty for defendants at or over the age of 18. For defendants under the age of 18, a term of 25 years to Life											Months	Years									
17	240	368	252	384	264	400	277	418	291	436	306	456	321	476	337	498	354	520	372	544	48	4
16	104	186	114	200	126	216	138	232	152	251	167	271	184	294	203	318	223	345	297	445	48	4
15	93	160	102	173	113	186	124	201	136	218	150	236	165	256	182	278	200	303	267	392	36	3
14	82	146	90	157	100	169	110	182	121	197	133	213	146	231	161	250	177	272	236	351	36	3
13	71	119	79	129	87	140	95	151	105	164	115	178	127	193	140	210	154	229	205	298	24	2
12	61	105	67	113	74	122	81	132	89	143	98	155	108	168	119	182	131	198	174	257	24	2
11	50	91	55	97	60	105	67	113	73	122	81	132	89	143	98	154	108	168	144	216	24	2
10	39	76	43	82	47	87	52	94	58	101	63	109	70	117	77	126	84	137	113	175	24	2
9	16	33	19	37	23	43	27	49	33	56	40	65	48	76	58	89	69	104	81	120	12	1
8	14	31	17	34	20	39	24	44	29	51	35	59	42	68	51	80	61	93	71	107	12	1
7	12	28	14	31	17	35	21	40	25	46	30	52	36	60	44	70	52	82	61	94	12	1
6	10	25	12	28	14	31	17	35	21	40	25	46	30	53	37	61	44	71	51	81	12	1
5	3	16	3	18	4	21	5	24	6	28	8	32	9	38	11	44	13	52	16	60	6	0.5
4	2	15	3	16	3	18	4	21	5	24	6	28	8	32	9	38	11	44	13	51	6	0.5
3	2	13	2	14	3	16	3	18	4	20	5	23	6	27	7	31	9	36	10	42	6	0.5
2	0	9	1	12	2	13	2	14	3	16	3	18	4	20	5	23	6	27	8	33	6	0.5
1	0	8	0	9	1	11	1	12	2	13	2	14	3	16	3	18	4	20	5	24	6	0.5
Unr	0 - 365 days																					

- Perhaps apply the restriction on 9 and below but not 10 and above -
 - Since stat max for Class A is life, caps on agg in 10 and above would mean judges cannot impose stat max.

- But is there actually a sentence of life for anything outside of agg murder? Because of determinate sentencing, there must be a number, but there is no stat guideline on presumed life.
- Stat max of life has very little relevance to what we do today. Exceptions are sex offenses and combo of inc and comm supe (indeterminate lifetime supervision) but that would still exist even with caps on agg.
- Should stat max from class A be changed to something else? Some actual number?
- Option - Cap agg sentences but not mitigated sentences.
 - Not general concern about mit sentences being too lenient.
 - At a minimum would need to create carveouts for some instances of mitigation.
- Caps on mit/agg may limit flexibility. Often now used to interact with charge bargains - e.g., plea to Rob 2 in lieu of Rob 1 and agree to agg sentence. May limit flex b/c can do a Rob 2 but not a high enough agg sentence for pros to be comfortable with the reduced charge.
- On exceptional sentence reasons:
 - There is transparency in the courtroom/case process, but it isn't being captured in the same level of detail in the JNS. How do you reform the JNS requirements to better capture case characteristics?
 - No statewide consistent JNS requirements, makes it difficult to systematically collect these data. What would it take to get certain information in check boxes - e.g., was this the result of a charge bargain, did all parties agree, and then some more detailed information about the characteristics of the case/reasons for the exceptional.
 - Not a unified court system - so courts want independent control of their data collection, JNS forms, etc.
 - Need for additional data not only on racial disp. in sentence outcomes, but also in exceptionals, enhancements, etc.
 - 05 post Blakely agg became exhaustive list w/ 4 that do not have to go before a jury. 1 of those used most frequently is a non-jury justification. Should those 4 be removed?
- Option: eliminate the aggravated exceptional sentences that do not require conditions to be pled and proven.
- Potential recommendation: Establish a uniform, electronic JNS system for Washington Superior Courts.
 - Are there any req for what must be reported now by statute?
 - Allows for better systematic data collection, reporting, and research

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	%
Aggravated exceptional						
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%
Mitigated exceptional						
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%