

Exceptional Sentences - Aggravators and Mitigators
CSTF Sentencing Grid Work Group
11/9/2021

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 confirm 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 for 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.

Exceptional Sentences - Aggravators and Mitigators

CSTF Sentencing Grid Work Group

11/9/2021

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.

Exceptional Sentences - Aggravators and Mitigators
CSTF Sentencing Grid Work Group
11/9/2021

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**.

Exceptional Sentences - Aggravators and Mitigators

CSTF Sentencing Grid Work Group

11/9/2021

- 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.

Exceptional Sentences - Aggravators and Mitigators
CSTF Sentencing Grid Work Group
11/9/2021

(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](#).

Exceptional Sentences - Aggravators and Mitigators
CSTF Sentencing Grid Work Group
11/9/2021

- 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.

Exceptional Sentences - Aggravators and Mitigators

CSTF Sentencing Grid Work Group

11/9/2021

- 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.