

**Washington State Criminal Sentencing Task Force
Sentencing Grid Subgroup
Meeting Notes: January 25th, 2022 Meeting via Zoom**

Attendees:

- 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, *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Waldo Waldron-Ramsey, *Interests of Incarcerated Persons*

Guests: Jim Chambers, Bruce Glant, Caylin Jensen, Joanne Smieja

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

WELCOME & AGENDA REVIEW

Amanda Murphy welcomed the Subgroup and reminded them that the Task Force meeting on February 3rd would focus on the potential recommendation to eliminate multipliers and add a column to the grid for repeat violent offenses (focusing on criminal history score (CHS) and multipliers). Amanda asked members for input on the planned presentation portion of the meeting, which will include an overview of WA's scoring rules with Clela Steelhammer walking through a couple scoring scenarios.

A group member asked if anyone had access to a scoring form from the time before the Sentencing Reform Act (SRA) passed to illustrate how the complexity has increased over time. Clela replied that before the SRA, prosecutors did not use the same type of form.

Keri-Anne informed the group that she got permission to use some slides from Matt Landon (of the Statistical Analysis Center at the Office of Financial Management) with preliminary results of his research on criminal history.

Washout Rules and Misdemeanors

Amanda then reminded the group about the list of discussion topics they created to guide their discussion for the next month (Appendix A.). The focus of today's meeting will be on #3: *Should misdemeanors be excluded completely from CHS and/or have a specific washout period that is very short?*

Keri-Anne walked through information she gathered about washout rule changes in WA (Appendix B.), including the original washout rules were in 1993 and what they are now in 2021. There were significant changes to the rules in 1997.

Lauren mentioned a piece of legislation passed in 1997 in response to increasing rates of juvenile offenses that intended to provide a community-based approach to mitigating crime by juveniles. The 1997 changes to washout rules may have been passed to increase accountability for recidivism.

Potential Washout Reforms: Excluding Misdemeanors from CHS

There are four misdemeanor offenses that count towards criminal history score:

- Scoring exception 1: Felony Traffic (Felony DUI)
- Scoring exception 2: Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree - Vehicular Prowling Misdemeanor Priors
- Scoring exception 3: Homicide or Assault by Watercraft Offenses
- Scoring exception 4: Felony Domestic Violence

The Subgroup identified three options for how to address misdemeanor scoring exceptions:

1. Eliminate them all.
 - Members noted the unlikelihood that this approach would be politically feasible and that there does appear to be logical reasons for some of the exceptions.
2. Make all misdemeanors count for something like .25 point (simplify and eliminate exceptions)
 - Members noted that this approach may have unintended outcomes, such as expanding the Legislatures use of misdemeanors.
3. Create alternative approaches to meet the goals of the current misdemeanor scoring exceptions in a way that does not rely on CHS and de facto eliminates the inclusion of misdemeanors in CHS.
 - Some members notes that this approach would meet Task Force policy goals by simplifying the CHS system while maintaining similar goals of accountability.
 - Some members questioned whether it was worth even spending time on addressing this topic if the proposed changes would result in the same outcome.

Scoring exception 1: Felony Traffic (Felony DUI)

The subgroup began the conversation with felony traffic, specifically, felony DUI. Members questions, input, and ideas during this portion of the discussion are summarized in the following bullets.

- It is possible that if you don't count the prior misdemeanor DUI then the sentence for misdemeanor DUI may end up longer than the sentence for felony DUI.
- Logic is same criminal conduct but it is escalating over time so those priors should be included because it is the same criminal conduct.
- For deferred DUI prosecution – *does it count for the number to get to Felony DUI but not count in CHS?*
 - Yes, they do count. There can only be one deferred prosecution. If revoked, it is no longer deferred.
- Felony DUI 10 year look back (4th DUI in 10 years) as element of the crime. Different from scoring when talking about washout for scoring. However, not just DUI – also includes predicate offenses.

- *Is it true that every felony DUI must have a prior conviction as a factor of determining whether they would be at the felony DUI level? And if so, if the offense itself accounts for the priors as an element of the offense why then also punish the individual for those priors via the CHS calculation?*
 - Yes. 3rd misdemeanor DUI is 180 days in jail. Felony DUI with no priors would have a lesser sentence.
- If were to remove prior DUIs then the legislative response may be to increase OSL so that the punishment is at least commensurate with the punishment for 3rd misdemeanor DUI.
- There are other offenses where this happens – UPFA, harassment, DV NCO – enhances the OSL and counts in CHS.
- Since DUI is a class B felony, it may make sense to reclass OSL up to the middle of the grid and then could eliminate the misdemeanor from CHS calculation.

Potential Recommended Change: Eliminate the special misdemeanor scoring exceptions for felony traffic and reclassify felony DUI from OSL 4 to OSL 6.

Summary of Discussion/Justification:

- Prior misdemeanor DUIs are an element of felony DUI. Thus, in the status quo, the prior convictions both increase the seriousness of offense in the court and increase a person's criminal history score. This means that individuals charged with felony DUI should never have a CHS of 0 or 1. Individuals are essentially double punished for their prior record.
- Eliminating the scoring exceptions without changing the offense seriousness level would create a situation where individuals may have a lesser sentence for the felony DUI than the mandatory minimum for a 3rd misdemeanor DUI (which is 180 days).
- DUI is a class B felony. Reclassifying it as OSL 6 would put it in the middle of the grid where Class B offenses are generally concentrated. For an individual in OSL 6 with a CHS of 0, the recommended sentence range would be similar to the recommended sentence range of individuals in OSL 4 with a CHS of 3. Thus, the prosecutors and judges would still be able to seek similar sentences, but without the unnecessary complication in the Criminal History Score.

Scoring Exception 2: Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree – Vehicular Prowling Misdemeanor Priors

The Subgroup then discussed the second scoring exception. Members questions, input, and ideas during this portion of the discussion are summarized in the following bullets.

- The rationale for the DUI misdemeanor scoring exception is that a person's felony DUI sentence should not be shorter than their third misdemeanor DUI sentence. For theft of a motor vehicle, the predicate offense is not a condition of the felony itself as is the case for DUI. And for the domestic violence, it is a mixture: a prior offense may or may not be the justification for a felony charge.
- Perhaps trying to capture the instances where individuals are caught just prior to stealing the car (and thus charged with prowling).
- Vehicular prowling 2 (OSL 4) is more serious than taking MV (OSL 1).

- Instead of addressing with CHS, one option may be to make it an element of crime with a higher OSL.
- This approach would make more transparent and eliminate complexity of the special scoring exceptions for misdemeanors.
- If a prior offense is an element of the crime, it should not count in CHS. This might justify eliminating special misdemeanor scoring exceptions while rooting it in a grounded philosophy that could limit or prevent legislative pushback.

Potential Recommended Change: Eliminate the special misdemeanor scoring exceptions for vehicular prowling and create a new subsection on Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle without the Owner's Permission 1st degree or 2nd degree for individuals with two prior misdemeanor convictions of vehicle prowl. Make this new subsection OSL 4.

Summary of Discussion/Justification:

- The idea behind this misdemeanor scoring exception is that stealing a car is a continuation of or escalation of previous vehicle prowl behaviors.
- For individuals with their third vehicle prowl conviction, it is a felony offense at OSL 4.
- For individuals with their first theft of a motor vehicle, it is a felony offense at OSL 2, but the prior prowls increase criminal history score.
- Not all vehicle prowls are with the intent to steal a car – thus theft of a motor vehicle may not always reflect increasing intensity of behaviors – it may be a change in behavior. However, for those who are prowling with intent to steal a car, it doesn't make sense that the third time they're caught for prowl (i.e., they are stopped before they steal the car) the sentence is greater than the individual who successfully steals the car on the third try.
- Creating a new offense for theft of a MV with two prior vehicle prowls and making that OSL 4 makes it consistent with the third and subsequent vehicle prowl convictions.
- Eliminating the special scoring rules increases transparency, increases defense flexibility in plea bargaining process, and significantly reduces complexity and error in the calculation of CHS.

Next Steps:

- Next week conclude the discussion on misdemeanor scoring exceptions: scoring exception # 3: Homicide or assault by watercraft offenses and # 4: felony domestic violence.
- Next week will begin discussion on: *Are the current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout?*

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

N/A

APPENDIX A

Upcoming Grid Subgroup Discussion Topics:

1. **Start discussion on 2/1:** *Are the current washout periods appropriate for the different classes? Should Class A offenses ever be eligible for washout?*
2. Should washout periods be restarted for any offense or only for an offense that is as serious or more serious than the new conviction?
 - E.g., conviction for class C in 2000
 - Conviction for class B in 2004 – class C still counts
 - Conviction for class B in 2006 – class C and Class B priors would count. Should class C count?
3. **Discuss on 1/25 and 2/1:** *Should misdemeanors be excluded completely from CHS and/or have a specific washout period that is very short?*
4. Should misdemeanors trigger reset of “crime-free” period for felony offenses?
5. Juvenile adjudications – should they count, should they have separate washout rule, should they stay as is?
 - Should all count or just certain types (e.g., violent/serious violent)?
 - What were the previous WA laws regarding juvenile washout?
6. Anticipatory offenses scored as completed offense – should they be treated as completed or have separate washout rule?
7. When does the washout period start? What about technical violations or DOSA revokes.
 - This is particularly important if new grid increases the number of or access to sentencing alternatives.
 - Community custody violation – *State vs. Blair* – will restart the washout period.
 - Complexity with determining when washout periods start if it is last release of confinement. Does DOC have insight on this complexity? Are counties consistently recording/using information about confinement/date of last confinement?

APPENDIX B

Washington State Rules for Washouts

RCW 9.94A.525(1) defines a prior conviction as “a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94a.589.”

Washington counts prior adult convictions except when wash-out rules apply, a court had determined the offenses count as ‘same criminal conduct’ (RCW9.94A.589), offenses not considered ‘same criminal conduct’ but their sentences were served concurrently and a court now determines they were committed at the same time, same place and involved the same victim; or offenses were committed before 7/1/1986 and were served concurrently.

All felony juvenile adjudications are counted as part of the criminal history score except under general wash-out rules that apply to adult convictions. Juvenile convictions that were sentenced the same are counted separately unless they have been deemed 'same criminal conduct' or unless the date the offense was committed was before 7/1/1986.

Wash Out Rules RCW 9.94A.525 (apply to both juvenile and adult prior convictions)

- Class A and felony sex convictions **never wash out**.
- If current conviction is a felony DUI or felony DUI-Physical Control, all predicate crimes for the offense as defined by RCW 46.61.5055(14) and prior convictions for felony DUI or felony DUI-Physical Control **never wash out**.
- Class B felony convictions and convictions for repetitive domestic violence offenses wash out if the individual has not been convicted in the past **10 consecutive years since date of release or entry of J&S**.
- Except as noted above, Class C felony convictions and serious traffic convictions wash out if the individual has not been convicted in the past **5 consecutive years since date of release or entry of J&S**.