

**Washington State Criminal Sentencing Task Force  
Sentencing Grid Subgroup  
Meeting Notes: February 15<sup>th</sup>, 2022 Meeting via Zoom**

**Attendees:**

- Keri-Anne Jetzer, *Sentencing Guidelines Commission (SGC)*
- Greg Link, *WA Assn. of Criminal Defense Attorneys; WA Defender Assn*
- Lauren Knoth, *WA State Institute for Public Policy (WSIPP)*
- Judge Wesley Saint Clair, *Sentencing Guidelines Commission*
- Melody Simle, *Families of Incarcerated Persons*
- Nick Straley, *Interests of Incarcerated Persons*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*

**Guests:** Jim Chambers, Bruce Glant, David Trieweiler, Jim Whisman

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

**WELCOME & AGENDA REVIEW**

Amanda Murphy welcomed the Subgroup and explained that the Subgroup would present the next set of potential recommendations on the horizontal axis of the sentencing grid to the full Task Force in March. In order to put together the agenda, the facilitation team needs confirmation from members on which recommendations are ready to go to the full Task Force for input, so will spend the last 30minutes of today's meeting discussing.

Amanda provided a recap of last week's meeting, which focused on potential recommendations A.1 and A.2, (Appendix A.) and two key areas still to be addressed: 1) the # of months that the sentencing range would increase for each OSL and 2) whether there was support for eliminating all multipliers and if not, if there were other approaches to address those specific multipliers. Today's meeting will begin with a report out from members that agreed to reach out to their constituencies regarding these two potential recommendations, and in particular, the two key areas still needing to be addressed.

**FEEDBACK FROM MEMBER CONSTITUENCIES**

Jon Tunheim, representing the WA Association of Prosecuting Attorneys (WAPA) provided a report out from his meeting with the Legislative Committee of WAPA. Related to multipliers, the prosecutors' Committee did express some concern with the idea of eliminating all multipliers and the added column to address repeat violent/serious violent offenses. If the column would only apply to one prior violent offense and not to multiple prior violent offenses, it might not sufficiently address the increased culpability of a situation involving multiple prior violent offenses. However, no serious concern arose connected to the *concept* of replacing multipliers with an added column.

Related to the potential recommendation to allow residential drug offender sentencing alternative (rDOSA) eligibility to those that have previously gone through DOSA, Jon relayed that the Committee expressed general acceptance of the proposal for those with more than two prior DOSA to still have eligibility for rDOSA. (Amanda clarified for the group that this potential recommendation had emerged from the Sentencing Alternatives Workgroup and not the Grid Subgroup.)

**EXAMPLES OF PROPOSED SCORING RULES**

Dr. Lauren Knoth showed the group the simulated sentencing grid with numbers in red font showing how high each cell’s sentencing range would go with the added column to address repeat violent offenses.

	0	1	2	3	4	5	6	7	8	9+	Repeat Violent																				
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																														
17	240	320	380	252	336	396	264	352	412	277	370	430	291	388	448	306	408	468	321	428	488	337	450	510	354	472	532	372	496	556	60
16	104	138	186	114	152	200	126	168	216	138	184	232	152	203	251	167	223	271	184	246	294	203	270	318	223	297	345	297	397	445	48
15	93	124	172	102	137	185	113	150	198	124	165	213	136	182	230	150	200	248	165	220	268	182	242	290	200	267	315	267	356	404	48
14	82	110	146	90	121	157	100	133	169	110	146	182	121	161	197	133	177	213	146	195	231	161	214	250	177	236	272	236	315	351	36
13	71	95	131	79	105	141	87	116	152	95	124	163	105	140	176	115	154	190	127	169	205	140	186	222	154	205	241	205	274	310	36
12	61	81	105	67	89	113	74	98	122	81	108	132	105	139	163	98	131	155	108	144	168	119	158	182	131	174	198	174	233	257	24
11	50	67	91	55	73	97	60	81	105	67	89	113	73	98	122	81	108	132	89	119	143	98	130	154	108	144	168	144	192	216	24
10	39	52	64	43	58	70	47	63	75	52	70	82	58	77	89	63	85	97	70	93	105	77	102	114	84	113	125	113	151	163	12
9	16	21	33	19	25	37	23	31	43	27	37	49	33	44	56	40	53	65	48	64	76	58	77	89	69	92	104	81	108	120	12
8	14	19	31	17	22	34	20	27	39	24	32	44	29	39	51	35	47	59	42	56	68	51	68	80	61	81	93	71	95	107	12
7	12	16	28	14	19	31	17	23	35	21	28	40	25	34	46	30	40	52	36	48	60	44	58	70	52	70	82	61	82	94	12
6	10	13	25	12	16	28	14	19	31	17	23	35	21	28	40	25	34	46	30	41	53	37	49	61	44	59	71	51	69	81	12
5	3	10	16	3	12	18	4	15	21	5	18	24	6	22	28	8	26	32	9	32	38	11	38	44	13	46	52	16	54	60	6
4	2	9	15	3	10	16	3	12	18	4	15	21	5	18	24	6	22	28	8	26	32	9	32	38	11	38	44	13	45	51	6
3	2	7	13	2	8	14	3	10	16	3	12	18	4	14	20	5	17	23	6	21	27	7	25	31	9	30	36	10	36	42	6
2	0	3	9	1	6	12	2	7	13	2	8	14	3	10	16	3	12	18	4	14	20	5	17	23	6	21	27	8	27	33	6
1	0	2	8	0	3	9	1	5	11	1	6	12	2	7	13	2	8	14	3	10	16	3	12	18	4	14	20	5	18	24	6
Inr	0 - 365 days																														

Keri-Anne then walked through a few scoring examples that show what the proposed scoring rules (eliminate all multipliers and use only the general scoring rules) would look like on the simulated grid – see Appendix A.

As these examples show, the potential recommendation to eliminate multipliers and add the column to address repeat violent offenses would broaden the sentence range, with the person facing a sentence range with a *higher* top end and a *lower* bottom end (since the simulated grid has somewhat shorter sentence ranges in most cells). In these examples, people would also emerge with a lower CHS—in each instance with current charge(s) for violent offense(s) that would carry multiplier(s) under the current grid.

The group briefly discussed philosophies of punishment and the potential drawbacks of using examples to illustrate how the proposed recommendations would play out. In a system this complex, it would be possible to isolate examples with certain characteristics to create different outcomes. The group asked to see sentences (in cases with the same characteristics) under the status quo along with the simulated grid using multipliers and the simulated grid using the added column in place of multipliers. It could also help to show examples with more general case history descriptions e.g., violent current with violent (or serious violent) with a general OSL for current offense and then general buckets of CHS.

## POTENTIAL RECOMMENDATIONS FOR MARCH TASK FORCE MEETING

Amanda asked Subgroup members if there were any potential recommendations on the list (Appendix B.) that they could not live with going in front of the full Task Force in order to get a temperature read and feedback.

- **Q.** Potential Rec B.3: eliminated aggravated departures not required to be pled/proven (eliminate the stipulation as an aggravated factor)—what is this meant to achieve? **R.** Better record-keeping and documentation, primarily.
- **Q.** Potential Rec B.2 (*should read*) Create a new column on the grid with the maximum mitigated departure length—would that raise a concern that sentences could get mitigated *too* much? **R.** I don't think prosecutors would object on the face of it but might want more details on how it would play out. The devil's in the details.
- I don't think eliminating Three Strikes entirely would gain support: it is very unlikely the Legislature would consider this and there would be concerns and potentially opposition from the prosecutors' association. However, do think it would be good to see what other Task Force members think and would be good to put it in front of the Task Force for input.
- Rec. E.1 to eliminate special misdemeanor scoring exceptions for felony traffic and reclassify felony DUI from OSL 4 to 6 would likely face opposition from defense attorneys.

Amanda explained to the group that the full Task Force would review and provide input on the combined list of potential recommendations on the horizontal axis and asked for any guidance the group might have to aid in presenting the recommendations. She asked again if any Subgroup members could not live with any of the potential recommendations going in front of the Task Force—not whether they objected to the proposed policy, but whether they objected to gaining Task Force input on them.

**Next Steps:** Continue discussing the list of items about washout periods; also, the facilitation team would be reaching out to schedule some individual sessions with member constituencies.

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

N/A

**APPENDIX A.**

**Proposed Scoring Rules:**

The general rule for scoring is that prior felony convictions count as:

- Adult offenses count as 1 point
- Juvenile Violent offenses count as 1 point
- Juvenile non-violent (NV) offenses count as 1/2 point (rounded down)

**Current: Assault 2 (class B/Violent)**

Prior: None

CHS: 0            SL: 4            Presumptive Range: **2 – 9 months**

**Current: Burglary 1 (class A/Violent)**

Prior: Assault 2 (class B/Violent)

CHS: 1            SL: 7            Presumptive Range: **14 – (19) 31 months** [RepViol=12 mos]

**Current: Assault 1 (class B/Serious Violent)**

Prior: Assault 2 (class B/Violent); Burglary 1 (class A/Violent)

CHS: 2            SL: 13            Presumptive Range: **87 – (116) 152 months** [RepViol=36 mos]

**Current: Theft of a Motor Vehicle (class B/NonViolent)**

Prior: None

CHS: 0            SL: 2            Presumptive Range: **0 – 3 months**

**Current: Assault 3 (Excl Stun Gun) (class C/NonViolent)**

Prior: Theft of a Motor Vehicle (class B/Nonviolent)

CHS: 1            SL: 3            Presumptive Range: **2 – 8 months**

**Current: Vehicle Prowl 1 (class C/NonViolent)**

Prior: Theft of a Motor Vehicle (class B/Nonviolent); Assault 3 (Excl Stun Gun) (class C/NonViolent)

CHS: 2            SL: 1            Presumptive Range: **1 – 5 months**

**Current: Kidnapping 2 w/Sexual Motivation** (class A/Violent/Sex)

Prior: None

CHS: 0            SL: 5            Presumptive Range: **3 – 10 months**

**Current: Failure to Register - SO on or after 6/10/2010** (class C/NonViolent/Sex)

Prior: Kidnapping 2 w/Sexual Mot (class A/Violent/Sex)

CHS: 1            SL: 2            Presumptive Range: **1 – 6 months**

**Current: Failure to Register- SO on or after 6/10/2010** (class C/NonViolent/Sex)

Prior: Kidnapping 2 w/Sexual Mot (class A/Violent/Sex); FTR-SO (class C/Nonviolent/Sex)

CHS: 2            SL: 2            Presumptive Range: **2 – (7) 13 months** [RepViol=6]

**APPENDIX B.**

**Horizontal Axis: Grid Subgroup Discussions and Potential Recommendations**

**DRAFT as of 2.10.21**

**A. Criminal History Score Multipliers and Repeat Offending**

**A.1 Potential Recommendation:** *Eliminate all offense-specific multipliers. And create a new column on the grid for repeat violent offending that increases the maximum of the standard sentencing range if the individual has convictions for a previous violent or serious violent offense.*

- Recognizing that retributive sanctions may be justified for individuals who have committed repeat violent offenses (more cumulative harm done to society), this recommendation maintains the ability to increase sanctions for repeat violent offenses while eliminating a significant source of complexity, inefficiency, and error.
- Repeat violent offending could be defined as an individual who has a prior conviction (not a concurrent conviction) for a violent or serious violent offense. Alternatively, it could be defined as a violent offense of the same or higher seriousness level (e.g., it wouldn't count if the current offense is OSL XIV but the prior conviction was OSL IX. If an individual fits in the repeat offending category, the sentencing range would increase by based on a set month approach. Another option could be based on a percentage increase. The amount would be graduated such that higher seriousness levels have a larger increase in the range.

*Column could be based on a percentage increase or a set number of months by OSL. Graduated by OSL (exact values could change)*

	0	1	2	3	4	5	6	7	8	9+	Repeat Violent	Repeat Violent										
	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																					
18																						
17	240	320	252	336	264	352	277	370	291	388	306	408	321	428	337	450	354	472	372	496	25%	60 mos
16	104	138	114	152	126	168	138	184	152	203	167	223	184	246	203	270	223	297	297	397	20%	48 mos
15	93	124	102	137	113	150	124	165	136	182	150	200	165	220	182	242	200	267	267	356	20%	48 mos
14	82	110	90	121	100	133	110	146	121	161	133	177	146	195	161	214	177	236	236	315	15%	36 mos
13	71	95	79	105	87	116	95	127	105	140	115	154	127	169	140	186	154	205	205	274	15%	36 mos
12	61	81	67	89	74	98	81	108	89	119	98	131	108	144	119	158	131	174	174	233	15%	24 mos
11	50	67	55	73	60	81	67	89	73	98	81	108	89	119	98	130	108	144	144	192	15%	24 mos
10	39	52	43	58	47	63	52	70	58	77	63	85	70	93	77	102	84	113	113	151	15%	12 mos
9	16	21	19	25	23	31	27	37	33	44	40	53	48	64	58	77	69	92	81	108	10%	12 mos
8	14	19	17	22	20	27	24	32	29	39	35	47	42	56	51	68	61	81	71	95	10%	12 mos
7	12	16	14	19	17	23	21	28	25	34	30	40	36	48	44	58	52	70	61	82	10%	12 mos
6	10	13	12	16	14	19	17	23	21	28	25	34	30	41	37	49	44	59	51	69	10%	12 mos
5	3	10	3	12	4	15	5	18	6	22	8	26	9	32	11	38	13	46	16	54	10%	6 mos
4	2	9	3	10	3	12	4	15	5	18	6	22	8	26	9	32	11	38	13	45	10%	6 mos
3	2	7	2	8	3	10	3	12	4	14	5	17	6	21	7	25	9	30	10	36	10%	6 mos
2	0	3	1	6	2	7	2	8	3	10	3	12	4	14	5	17	6	21	8	27	10%	6 mos
1	0	2	0	3	1	5	1	6	2	7	2	8	3	10	3	12	4	14	5	18	10%	6 mos
Unr	0 - 365 days																					

- Scoring is based solely on the standard scoring rules. Eliminates the variations of scoring sheets.
- As proposed, the recommendation would eliminate multipliers (without replacement) for:
  - Escape from Community Custody
  - Escape 1/2
  - Burglary 2/residential burglary\*
  - Failure to register\*
  - NV sex offenses\*
  - Theft of Motor vehicle/possession of stolen vehicle\*
  - Manufacture methamphetamine
  - NV Drug offenses
  - NV felony traffic offenses
- All violent and SV related offense-specific multipliers would be eliminated but are replaced by a column on the grid.

### **Notes from 2.8.22 Subgroup Discussion**

- Starred offenses might have the most push back from some individuals.
- Standard scoring, but perhaps juvenile priors should all count as ½ point regardless of violent/NV. This is still one type of scoring exception/multiplier that would remain.
- Technically the repeat violent column could stop at OSL 4.
- No consistency between V/SV and other classifications – why are there violent offenses so far at the bottom? Seems to reflect the inconsistency in how we treat “violent” offenses.
- Should we just eliminate the classifications of violent and serious violent offenses?
- Is the leg using V/SV as a way to get certain other conditions/sentence types that are tied to those labels?
- NV/V/SV may be most descriptive of what the Legislature is thinking w/ regards to offenses – more meaningful than class, for example. Need to think about unintended consequences.
- What are the criteria for determining different classifications (OSL, Class, V/SV/CAP)
- Practitioners may understand what these classifications mean, but does the Leg understand them? Does the public understand them?
- Some restrictions on Legislative decisions may be good – for example, if class B offenses MUST be OSL 6-9, Leg will be forced to have the discussion of whether those OSLs are appropriate or if the Class should be different.

Does the column apply once regardless of the number of violent priors or for each prior?

- Once regardless of number of priors – alternative replicates harm of current multiplier system.
- Once regardless maintains the increased retribution while not doing so in an excessive way. If people have multiple priors, then they likely would’ve seen the increase in retribution on one of their priors.

### Reducing complexities and errors

- Multipliers happen in the background and have many complex rules that aren’t always known. -
- Applying a new column consistently regardless of offense reduces the complexity and potential for errors.

- Applying a new column increases transparency and makes it clearer that an individual's sentence was higher or eligible to be higher as a result of the types of offenses in their criminal history.

#### Improving effectiveness of the sentencing system

- Multipliers increase discretion of the legislature and reduce the discretion of judges/pros/defense.
- Increasing the maximum allows for the same outcomes as today (e.g., the same increased punishment), but also allows for more consideration of cases that may not need increased sanctions.
- More individualized sanctions.

#### Promoting and improving public safety

- Recommendation maintains the ability to issue more serious sanctions for more serious individuals/cases.
- In particularly egregious cases, aggravating factors are likely to apply.
- Many violent and serious violent offenses will also have enhancements which still apply.
- Given the lack of evidence that specialization is a signal for increased risk, there is no evidence that increased incapacitation is necessary to maintain public safety for repeat offenses vs. generalists.

#### Reducing racial disproportionality/disparity

- Initial evidence from OFM suggests there is racial disproportionality in the application of multipliers which creates disproportionality in sentences.
- Increasing the maximum still allows for increased sentences when warranted, but allows defense to argue that increased sanctions are not justified given considerations of an individual's specific criminal history.
- Allows for more clear understanding of potential disparity by being able to compare cases where the sentence was increased due to the type of offenses in a person's criminal history. In status quo, there is significant heterogeneity in the meaning of different people's criminal history scores.

#### **Additional Considerations**

Eliminating all offense-specific multipliers or just eliminating all multipliers related to violent and serious violent offenses?

If multipliers function as a retributive form of punishment only, are they necessary or appropriate for non-violent offenses? Should individuals with three similar NV offenses be treated more harshly than individuals with 3 different NV offenses?

**A. 2** ***Potential Recommendation:** Create a new column on the grid for repeat offending. Repeat offending could be defined as an individual who has a prior conviction (not a concurrent conviction) for the same offense or for an offense in the same seriousness level. If an individual fits in the repeat offending category, the sentencing range would increase by either a*

*percentage amount or by a flat amount. The amount would be graduated such that lower seriousness levels have a smaller increase in the range.*

	0	1	2	3	4	5	6	7	8	9+	Repeat Offending	Repeat Offending										
XVI	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%	+60 months
XIV	123	220	134	234	144	244	154	254	165	265	175	275	195	295	216	316	257	357	298	397	+20%	+50 months
XIII	123	164	134	178	144	192	154	205	165	219	175	233	195	260	216	288	257	342	298	397	+15%	+40 months
XII	93	123	102	136	111	147	120	160	129	171	138	184	162	216	178	236	209	277	240	318	+15%	+30 months
XI	78	102	86	114	95	125	102	136	111	147	120	158	146	194	159	211	185	245	210	280	+10%	+20 months
X	51	68	57	75	62	82	67	89	72	96	77	102	98	130	108	144	129	171	149	198	+10%	+10 months
IX	31	41	36	48	41	54	46	61	51	68	57	75	77	102	87	116	108	144	129	171	+10%	+10 months
VIII	21	27	26	34	31	41	36	48	41	54	46	61	67	89	77	102	87	116	108	144	+10%	+10 months
VII	15	20	21	27	26	34	31	41	36	48	41	54	57	75	67	89	77	102	87	116	+10%	+6 months
VI	12.05	14	15	20	21	27	26	34	31	41	36	48	46	61	57	75	67	89	77	102	+10%	+6 months
V	6	12	12.05	14	13	17	15	20	22	29	33	43	41	54	51	68	62	82	72	96	+10%	+6 months
IV	3	9	6	12	12.05	14	13	17	15	20	22	29	33	43	43	57	53	70	63	84	+10%	+6 months
III	1	3	3	8	4	12	9	12	12.05	16	17	22	22	29	33	43	43	57	51	68	+10%	+ 3 months
II	0	3	2	6	3	9	4	12	12.05	14	14	18	17	22	22	29	33	43	43	57	+10%	+ 3 months
I	0	2	0	3	2	5	2	6	3	8	4	12	12.05	14	14	18	17	22	22	29	+10%	+ 3 months
Unr	0 - 365 days																					

**Notes from 2.8.22 Subgroup Discussion**

- No evidence to support increased risk with specialization. Thus, doesn't serve maintenance of public safety goal.
- Violent reoffending supported by philosophy of retribution. That doesn't apply to non-violent offenses.
- From full TF conversation, seems like those who are opposed just want people to spend more time in prison – no other justifications provided/supported.
- Quantitative aspect already accounts for people who do multiple offenses
- Original SRA had a general distinction between violent and non-violent crimes such that violent crimes were intended to be treated more harshly and had special considerations like repeat offending because of the increased seriousness of the offense.
- Does increased punishment for repeat commission of the same offense actually incentivize people to commit different types of crimes?

**B. Exceptional Sentences: Aggravators and Mitigators**

**B 1 Potential Recommendation:** Create a new column on the grid with the maximum aggravated departure length.

Subgroup Discussion Notes:

- The amount should be graduated such that longer departures are acceptable for higher offense seriousness levels.
  - The maximum departure length for OSL 9 should not exceed 12 months and the maximum departure length for OSL 5 should not exceed 6 months to be consistent with statutory maximums.
- May reduce disproportionate application of aggravated departures.
- Concerns:
  - Flexibility for pros to engage in charge bargaining. If there's less flexibility, may be less likely to reduce charges.

- If stat max for Class A is life, but grid caps aggravated sentences, then judges can't access/use stat max.
- How can courts deal with extreme cases on the margins?
- Should we legislate to the hypothetical extremes?

● **Possible modifications:**

- Include the max departure column only for OSL 1-9.
- Make advisory instead of presumptive/mandatory

	0	1	2	3	4	5	6	7	8	9+	Agg/Mit +/-											
	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									
18	240	320	252	336	264	352	277	370	291	388	306	408	321	428	337	450	354	472	372	496	48	4
17	104	138	114	152	126	168	138	184	152	203	167	223	184	246	203	270	223	297	297	397	48	4
15	93	124	102	137	113	150	124	165	136	182	150	200	165	220	182	242	200	267	267	356	36	3
14	82	110	90	121	100	133	110	146	121	161	133	177	146	195	161	214	177	236	236	315	36	3
13	71	95	79	105	87	116	95	127	105	140	115	154	127	169	140	186	154	205	205	274	24	2
12	61	81	67	89	74	98	81	108	89	119	98	131	108	144	119	158	131	174	174	233	24	2
11	50	67	55	73	60	81	67	89	73	98	81	108	89	119	98	130	108	144	144	192	24	2
10	39	52	43	58	47	63	52	70	58	77	63	85	70	93	77	102	84	113	113	151	24	2
9	16	21	19	25	23	31	27	37	33	44	40	53	48	64	58	77	69	92	81	108	12	1
8	14	19	17	22	20	27	24	32	29	39	35	47	42	56	51	68	61	81	71	95	12	1
7	12	16	14	19	17	23	21	28	25	34	30	40	36	48	44	58	52	70	61	82	12	1
6	10	13	12	16	14	19	17	23	21	28	25	34	30	41	37	49	44	59	51	69	12	1
5	3	10	3	12	4	15	5	18	6	22	8	26	9	32	11	38	13	46	16	54	6	0.5
4	2	9	3	10	3	12	4	15	5	18	6	22	8	26	9	32	11	38	13	45	6	0.5
3	2	7	2	8	3	10	3	12	4	14	5	17	6	21	7	25	9	30	10	36	6	0.5
2	0	3	1	6	2	7	2	8	3	10	3	12	4	14	5	17	6	21	8	27	6	0.5
1	0	2	0	3	1	5	1	6	2	7	2	8	3	10	3	12	4	14	5	18	6	0.5
Unr	0 - 365 days																					

**B.2 Potential Recommendation:** Create a new column on the grid with the minimum aggravated departure length.

- The amount should be graduated such that longer departures are acceptable for higher offense seriousness levels.

Subgroup Discussion Notes:

- **Concerns:**
  - Not really a need – could prevent justified reductions.
- **Possible modifications:**
  - Make advisory instead of presumptive/mandatory

**B.3 Potential Recommendation:** Eliminate the aggravated departures that are not required to be pled/proven (eliminating the stipulation as an aggravated factor)

- Requires that there be a particular characteristic/circumstance justifying the aggravated exceptional sentence.

Subgroup Discussion Notes:

- **Concerns:**
  - Flexibility for pros to engage in charge bargaining. If there's less flexibility, may be less likely to reduce charges.

- Practical constraints – no uniform JNS – limited time/resources in the courts to record additional details.
- Requiring judges to record/make findings of fact about case characteristics may violate Blakely.
- Possible modifications:
  - Require that the JNS record more details about the reason for agreement (e.g., charge bargain to avoid three-strikes sentence, charge reduction, reduction in total number of charges).

**B.4 Potential Recommendation:** *Establish a state-wide, electronic JNS system for Superior Courts. NOT unified court system, but unified technological network.*

Subgroup Discussion Notes:

- Administrative Office of the Courts previously attempted, but failed. But technology has come a long way, so may be possible to develop something that is integrated into Odyssey CMS.
- Could be state funded – saves resources across state agencies (e.g., CFC, DOC) and local courts (which no longer have to invest separate IT resources to create and maintain their own system)
- Key for more accurate data collection. Useful for: examining racial disproportionality, implementing retroactivity, ensuring accuracy of sentences/DOC decision making.
- Concerns:
  - Lack of a unified court system – courts like their independence to collect information as they see fit.
  - But not looking to create unified court system, but a unified technology network.
  - Varying resource availability across different courts. May add to the court burden for data collection/data entry.
  - Huge amount of money that doesn't actually address or reduce unjust sentences. Ought that \$ be better spent/used elsewhere (e.g., retroactive sentence reform)?

**B.5 Potential Recommendation:** *Retroactivity for application of Blakely decision on pre-Blakely exceptional sentences.*

### C. 3-Strikes And 2-Strikes

**C. 1 Potential Recommendation:** *Change the legal procedure for three-strikes laws to mirror aggravating factors such that the three-strikes must be treated as elements of the crime.*

- Pled in information
- Proven to a jury beyond a reasonable doubt
- Individual acknowledges and agrees in a plea agreement

Subgroup Discussion Notes:

- CX no req for defendants to be put on notice that their current case and criminal HX means a guilty plea or jury finding will carry term of life.
  - Inconsistent CX practice by pros office

- No CX requirement for jury to be notified that a finding of guilt will qualify as a third strike, thus resulting a sentence of life.
  - Jury nullification potential
  - Some defense attorneys may prefer that the jury not be notified of the two prior strikes as it may prejudice the jury. Could lead to pros using prior convictions as evidence for CX case
    - Propensity evidence already introduced/used in other cases (e.g., cx DUI disclosure of 3 prior DUIs)

**C. 2** *Potential Recommendation: Replace 3-strikes mandatory sentence with determinate plus - 25 years with opportunity for release.*

Subgroup Discussion Notes:

- Could reduce incarceration lengths with individuals being released upon review
- Recognizes potential for rehabilitation/reform
- Could reduce racial disparity at sentencing
- Shifts discretion from pros to the board conducting release reviews
- Replicates concerns of parole that there is a group facing an unknown amount of time in incarceration

**C. 3** *Potential Recommendation: Replace 3-strikes mandatory sentence with mandatory minimum 25 years with judicial discretion up to life.*

Subgroup Discussion Notes:

- Inability to show growth after time like you would with a determinate plus
- Shifts discretion to judges rather than some external review board

**C. 4** *Potential Recommendation: Eliminate and do not replace 3-strikes*

Subgroup Discussion Notes:

- Sentences are already lengthy because they are a high SL and individuals will have criminal history points
- Undermines the structure of the sentencing system by carving out exceptions
- Other approaches could meet same goals within the grid (e.g., repeat SV column on grid)
- Restores individualized sentencing - 25 years may not be appropriate or necessary in all cases

## **D. Consecutive Sentencing Policy**

**D. 1** *Potential Recommendation: Like the gun enhancement – changing consecutive to be discretionary. Would do something similar – allow judges to determine whether offenses run consecutive when multiple crimes for multiple guns.*

Subgroup Discussion Notes:

- Maintain some aspect of the cx firearm policy. With gun violence increasing in some areas, may not be the political will to fully eliminate.

- Allow more tailored sentences to the circumstances of the case. Even if 10 guns, maybe only 2-3 run consecutive instead of all 10, so reduces the extreme sentence lengths while still allowing for some acknowledgement of the impact of gun violence.
- Concern: have to be careful about discretion b/c how it will potentially increase disparity. Instead need to ask why we're doing this anyway? Perhaps we just shouldn't do it. Eliminate the consecutive rule.
- This is a carve out just for guns – harsh sentences for the sake of harsh sentences. Discretion creates sig differences between charging decisions and judicial decisions.

**D. 2 *Potential Recommendation:*** *Instead of consecutive based on charges/counts, but rather on criminal events. E.g., multiple burglaries of guns = consecutive. One burglary of 5 guns concurrent.*

Subgroup Discussion Notes:

- Changes unit of prosecution for gun crimes – right now, unit is each gun. This would change unit of prosecution to criminal episode.
- A sig portion of the extreme lengths is based on the number of guns in an episode (e.g., in a single burglary).
- Punish philosophy related to number of guns that will ultimately end up in the streets/greater risk to society.

**D. 3 *Potential Recommendation:*** *Eliminate consecutive sentencing on gun charges, but add some aggravating factors that may address the cases with most concern about culpability.*

Subgroup Discussion Notes:

- Where are the real differences in the decisions of the individuals when engaging in the acts? Difference between robbing a gun store vs. burglarizing a home that happens to have a gun vs. targeting a home to burgle because they know the owner has a gun collection.
- Could some of these conditions be aggravating factors instead? Maintains discretion to acknowledge unique characteristics/motive/culpability in each case. Guided/bounded discretion. As opposed to rec A which is unbounded discretion to run consecutive regardless of circumstances.
- Do we even need them as aggravating factors if situations where the culpability is higher (e.g., robbing a gun store and stealing 20 guns) they will already have an exceptional sentence because their CHS will exceed 9.

**D. 4 *Potential Recommendation:*** *Eliminate mandatory consecutive for firearm offenses and make concurrent. Eliminate the carve out so that these offenses function like all others.*

Subgroup Discussion Notes:

- Would you want to make them score against each other then?
- Yes?
- But the reality is that charging decisions may be manipulated to get longer sentences.
- Still likely to result in shorter sentences than current approach with consecutives.

**D. 5 Potential Recommendation:** *Eliminate all consecutive carve outs.*

Subgroup Discussion Notes:

- Purely retributive, but how much is enough? How do these consecutive carve outs increase public safety?
- Eliminate all including serious violent offense carve outs.
- SV offenses already at the top of the grid with longer sentences, so the mandatory consecutive makes for extremely long sentences.
- In addition to the number of cases directly affected in the sentencing statistics – this becomes a tool for prosecutors to negotiate people into pleas in order to avoid the consecutive sentencing.
- Potential to leave this as discretion for judges.
  - Question is where is the decision made and who gets to make that decision?
  - More transparent, subject to appeal, better than having decision in hands of pros.
  - Reduces the potential for pros use in plea negotiations
  - Discretionary acts by judges are almost unreviewable by appellate courts. Abuse of discretion std. – any discretionary act by trial judge only o/t if expressly unreasonable.
    - If we're going to shift to judges, recommendation should include some boundaries around judicial discretion. Need specific criteria.
- What we're talking about is serious violent offenses likely with multiple victims. Idea is that each act against a person should be punished. Particular concern/focus on victims.
  - If rec goes forward with elimination of consecutive, could you have another aggravating factor that isolates when multiple SV factors with separate victims there could be an aggravating factor to differentiate between cases where it is two SV charges for act against the same victim vs. two SV charges for acts against separate victims.
  - This still wouldn't fully address issue – like multiple assault 1 charges for DBS – even if only 1 shot fired.

**D. 6 Potential Recommendation:** *Second look proposal apply to all sentences with mandatory consecutive sentences.*

Subgroup Discussion Notes:

- Ensure that the cx recommendation refers to these sentences.

## **E. Misdemeanor Scoring in Criminal History Score**

Prior Misdemeanor convictions count in the criminal history score in four unique situations. These scoring exceptions depend on the type of current offense and the types of prior misdemeanor convictions. As the SRA and Superior Courts primarily handle felony offenses, it may be argued that the criminal history score calculations should be limited to the same jurisdiction – felony offenses. The current misdemeanor scoring exceptions create substantial confusion for courts and other agencies who use the CHS (e.g., Caseload Forecast Council, Department of Corrections).

The Grid subgroup has been discussing the logic behind the four scoring exceptions and exploring ways that the same goals can be achieved through alternative means while increasing transparency, simplifying the CHS calculation process (increasing efficiency), and reducing errors in calculating CHS.

Below are draft potential recommendations discussed by the Grid Subgroup on 1/25/22 and 2.1.22.

**Scoring exception 1: Felony Traffic (Felony DUI, veh assault/homicide)**

Status Quo:

Certain adult Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses (serious traffic offenses) count as 1/2 point

**E. 1 Potential Recommendation:** *Eliminate the special misdemeanor scoring exceptions for felony traffic and reclassify felony DUI from OSL 4 to OSL 6.*

Justification:

- Prior misdemeanor DUIs are themselves 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 3<sup>rd</sup> misdemeanor DUI which is 180 days.
- Felony 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 highly 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.
- Achieves TF goals of reducing complexity and error and increasing efficiency of the sentencing system.
- DUI unique because of the gradual increase in severity that specifically starts with M offenses.

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

Status Quo:

Misdemeanor offense of Vehicular Prowling 2° counts as 1 point

**E. 2a Potential Recommendation:** *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.*

Justification:

- The idea behind the M scoring 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. However, it should be considered whether it makes sense to have these MV theft offense at OSL 4, given the other offense in this OSL.
- 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.

**E. 2b *Potential Recommendation:* Eliminate the special exception misdemeanor scoring for vehicle prowl.**

- Doesn't make sense to have MV theft offenses at OSL 4 when looking at the other offenses.
- This is the result of the crime-of-the-day logic. Represents an expansion of the authority under the SRA which is otherwise focused on felony offenses.

**Scoring exception 3: Homicide or Assault by Watercraft Offenses**

Status Quo:

Certain adult Traffic Misd/Gross Misd count as 1 point

Certain juvenile Traffic Misd/Gross Misd offenses count as 1/2 point

**E. 3 *Potential Recommendation:* Mirror the recommendation for felony traffic offenses: Eliminate the special misdemeanor scoring exceptions for homicide or assault by watercraft offenses and reclassify to the same OSL as the felony traffic offense.**

Justification:

- These offenses should mirror traffic offenses. Committing the same offense in a boat vs. a car is really about a different affluence of the individual committing the offense.
- Felony traffic offenses for which misdemeanors count should be limited to offenses that can be committed by vehicle and boat.
- Felony traffic does include things that you wouldn't have in a boat, for example, eluding. We apply these priors to a broader classification of traffic offenses as boating.

**Scoring exception 4: Felony Domestic Violence**

Status Quo:

Count one point for each adult offense for a repetitive domestic violence offense (misd/GMs), where domestic violence was pleaded/proven after 8/1/2011

**E. 4 Potential Recommendation:** *Eliminate the misdemeanor scoring exception and instead create an aggravated factor or enhancement.*

- Maintain a way for judges to consider prior misdemeanor DV at sentencing.
- Aggravating factor would then be constrained under the potential recommendation for limiting increases in sentences as a result of aggravating factor.
- Potentially limited to offenses involving the same victim/same relationship.
- Potentially an option similar to the repeat violent column approach.

Justification:

- Prior DV is a high predictor of lethality in DV.
- Doesn't require that the priors be against the same person. But still allowed to be introduced in court.

**E. 5 Potential Recommendation:** *Include language in the SRA that would define the scope of the CHS as limited to prior felony convictions.*

Justification:

- This would increase the likelihood of lasting change and prevent the slippery slope of continued misdemeanor scoring exceptions.
- SRA was not originally intended to cover M and should not include M except for where there is an explicit step up of the same offense (e.g., DUI).
- Inclusion of M leads to significant complexity and uncertainty. Full discretion of the legislature to decide when they should or should not count.
- Inherent issues with reliability and accuracy of prior M because reliance on municipal court data.
  - Some of the hardest work in prosecutors offices because they have the burden of proof to provide evidence of priors that fit under scoring exceptions.