

Criminal Sentencing Task Force
Proposed Recommendations: Sentencing System
DRAFT
8.26.22

Sentencing System Proposed Recommendations

The proposed recommendations in this section are those that are not specifically related to the guidelines grid formula and structure or about sentencing alternatives.

A. Sentencing Discretion

Proposed Recommendation: *Require that any aggravated departure has reasoning articulated in the Judgment and Sentence (J&S) record, including any additional information, particular characteristic, or other circumstance justifying aggravating departure.*

Background and Explanation

Under current law, the court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. If an exceptional sentence is given, the sentencing court is required to set forth the reasons for the departure from the standard range ([RCW 9.94A.535](#)) or from the consecutive/concurrent policy ([RCW 9.94A.589](#)(1)) and ((2)) in written Findings of Fact and Conclusions of Law. The law ([RCW 9.94A.535](#)) has a list of factors for the court to consider when imposing an aggravated exceptional sentence (above the standard range) or a mitigated exceptional sentence (below the standard range).

In response to *Blakely v. Washington*, 542 U.S. ... (2004) the Legislature made exclusive the list of aggravating factors used to justify an upward departure from the standard sentence range ([RCW 9.9A.537](#)). The Legislature also expanded the list of aggravating factors to include current judicially recognized factors. There are currently 32 aggravating factors (some with multiple subsections) that pose questions of fact that must be submitted to a jury. There are four aggravating factors that can be used to impose a sentence above the standard range without findings of fact by a jury:

- The court may impose an aggravated exceptional sentence if the defendants and state both stipulate that justice is best served by an exceptional sentence and the court agrees that the stipulation is in the interest of justice.
- The defendants 's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of [RCW 9.94A.010](#).
- The defendant committed multiple current offenses and the defendant's high criminal history score results in some offenses going unpunished.

- The failure to consider the defendant’s prior criminal history which was omitted from the criminal history score calculation results in a presumptive sentence that is clearly too lenient.

Addresses Sentencing Complexities and Errors and Effectiveness of the Sentencing System:

This proposed recommendation will require that the Judgement and Sentence (J&S) record more details about the reason for agreement in instances where these four aggravating factors that are not required to be pled and proven are used. In particular, for the most frequently used factor (the first bullet above), which stipulates that justice is best served by an exceptional sentence and the court agrees that the stipulation is in the interest of justice. Under this recommendation there would be greater documented information and transparency about the agreement (e.g., charge bargain to avoid three-strikes sentence, charge reduction, reduction in total number of charges), which is needed to conduct research evaluating whether the use of certain aggravators are a potential source of disproportionality. It is important to note that this recommendation does not eliminate the ability to stipulate to the aggravated sentence rather than requiring a finding of fact with a jury.

Proposed Recommendation: *Eliminate mandatory consecutive sentencing. Leave default consecutive but allow judges discretion to issue concurrent sentences without invoking an exceptional sentence.*

Background and Explanation

Generally, sentences for multiple offenses set at one sentencing hearing are served concurrently unless there are two or more separate serious violent offenses, driving under the influence offenses, or weapon offenses. In those cases, the sentences are served consecutively, unless an exceptional sentence is entered ([RCW 9.94A.589](#)(1)(a-c)). There are exceptions to this general rule:

- **Offenses that Constitute Same Criminal Conduct:** If the court enters a finding that some or all of the current offenses required the same criminal intent, were committed at the same time and place, and involved the same victim, the offenses are treated as one offense. A departure from this rule requires an exceptional sentence.
- **Multiple Serious Violent Offenses:** In the case of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences for these serious violent offenses are served consecutively to each other and concurrently with any other sentences imposed for current offenses. A departure from this rule requires an exceptional sentence.
- **Certain Firearm-Related Offenses:** In the case of sentences that include Unlawful Possession of a Firearm in the First or Second Degree and one or both of the crimes of Theft of a Firearm or Possession of a Stolen Firearm, the sentences for these crimes are served consecutively for each conviction of the felony crimes listed and for each firearm unlawfully possessed. ([RCW 9.94A.589](#)(1)(c)). A departure from this rule requires an exceptional sentence ([RCW 9.94A.535](#)).

**Note: This is different from firearm/deadly weapons enhancements. And these offenses don't qualify for a weapon enhancement.*

- Felony Driving while under the Influence (DUI) /Felony Actual Physical Control of a Vehicle while under the Influence: All sentences imposed shall be served consecutively to any sentences imposed under the specified RCWs for two Gross Misdemeanors.

Addresses Sentencing Complexities and Errors, Effectiveness of the Sentencing System, and Public Safety:

There is no evidence that mandatory consecutive sentencing is effective at reducing recidivism and there is no evidence that this policy is a deterrent. This recommendation would eliminate the use of mandatory consecutive sentencing while keeping consecutive sentencing as the default approach for the listed circumstances. This allows for judicial discretion to sentence concurrently without invoking an exceptional sentence. This judicial discretion may allow for more effective decisions regarding specific characteristics of a specific case. Currently, judges may be more hesitant to issue a concurrent sentence due to the appealability of exceptional sentences.

B. Legal Procedures and Other Sentencing Laws

Proposed Recommendation: *For aggravated murder 1 change the language from: “Life sentence without parole/death penalty for individuals at or over the age of **eighteen**. For individuals under the age of **eighteen**, a term of twenty-five years to life.” To “Life sentence without parole/death penalty for individuals at or over the age of **twenty-one**. For individuals under the age of **twenty-one**, a term of twenty-five years to life.” In addition, strike reference to the death penalty as it is no longer a valid sentence in Washington State.*

Background and Explanation

In 2012, the United States Supreme Court in *Miller v. Alabama* held that mandatory sentences of life without parole are unconstitutional when applied to individuals younger than 18 and that such statutes violate the Eight Amendment protection against cruel and unusual punishments. The ruling also stated that judges sentencing minor defendants must be allowed to exercise their discretion to craft an individualized sentence that considers the mitigating qualities of youth. In 2018, Washington State Supreme Court prohibited any sentences of life without parole for minors (*State v. Bassett*).

Washington’s aggravated murder statute provides for a mandatory sentence of life without parole for individuals at or above the age of 18 years old, and for those under 18 years old, a sentence term of 25 years to life. In 2021, the Washington State Supreme Court held that under the Eight Amendment and Washington’s constitutional prohibition on cruel punishments, the holding of *Miller* should be extended those 18-20 years old, citing neuroscience research and that mental development continues into a person’s 20s. The court also cited statutes from other states that provide for differentiated penalties for individuals in their 20s on account of

their youth and pointed out that the age of majority in the United States used to be 21 and that some states continue to use 21.

Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System

Recent Supreme Court decisions recognize the emerging brain science and Washington Legislature has made other policy changes recognizing continued brain development between the ages of 18 and 25. Recent WA Supreme Court Case decisions - Monschke and Bartholomew - ruled that 18, 19, and 20-year-olds facing life sentences for aggravated murder must be viewed through a lens that considers the “transient immaturity of youth” and that the court must first consider the age of those under 21 before sentencing to a term of life without parole. Under this proposed recommendation, raising the age to 21 years old makes these sentences constitutional.

C. Criminal History Score

Criminal History Score (called the offender score, [RCW 9.94A.525](#)) is one factor affecting a felony sentence and is measured on the horizontal axis of the sentencing guidelines grid. An individual may receive from 0 to 9+ points on that axis. In general, the number of points received depends on five factors: (1) the number of prior criminal convictions or juvenile dispositions; (2) the relationship between any prior offense(s) and the current offense of conviction; (3) the presence of other current convictions; (4) the person’s community custody status at the time the crime was committed; and (5) the length of crime-free behavior between offenses.

Pursuant to RCW [9.94A.030](#)(11), criminal history includes the defendant's prior adult convictions and juvenile court dispositions, whether in this state, in federal court, or elsewhere, and any issued certificates of restoration of opportunity. Although criminal history consists almost exclusively of felony convictions, in some instances, it also includes misdemeanors. The effect of criminal history also relates to the felony class of the crime (Class A, Class B or Class C), and the type of offense (i.e., serious violent, violent, nonviolent, sex, etc.).

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)

In addition:

- If there is more than one offense for in a sentence, the current offenses will score against one another, but are run concurrently (at the same time). There are exceptions that we’ll go over in the scoring document (SV & certain weapon offenses)
- If a person was under community custody at the time of the current offense, 1 pt is added to the criminal history score.
- Offenses score as if they were a completed offense (example: Robbery 2° is a Violent offense and Attempted Robbery 2° is NV, but would be scored as Violent offense).

- Only offenses ranked on the adult felony sentence grid are scored – unranked offenses have a score of 0 and a standard range of 0-12 months.

Prior Misdemeanor convictions count in the criminal history score in four unique situations:

1) Felony Traffic Offenses

- Adult and Juvenile Vehicular Homicide or Vehicular Assault offenses count as 2 points
- 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***
- Adult convictions of Operation of a Vessel under the Influence offenses count as 1 point and juvenile offenses for Operation of a Vessel offenses under the Influence count as ½ point.
- Any other felony offenses count standard

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

- Misdemeanor offense of vehicular Prowling counts as 1 point***
- Adult and Juvenile offenses of Theft 1° or 2° of a Motor Vehicle, Possession of Stolen Property 1° or 2° of a Motor Vehicle, Theft of a Motor Vehicle, Possession of a Stolen Vehicle, or Taking a Motor Vehicle without the Owner's Permission 1° or 2°, count as 3 points
- Any other felony offenses count standard

3) Homicide or Assault by Watercraft Offenses

- Adult and Juvenile Homicide or Assault by Watercraft offenses count as 2 points
- Certain adult Traffic Misd/Gross Misd offenses count as 1 point***
- Certain juvenile Traffic Misd/Gross Misd offenses count as ½ point***
- Any other felony offenses count standard

4) Felony Domestic Violence

- Count 2 points for each Adult offense where DV was pleaded/proven after 8/1/2011 for any of the following offenses: Violation of a No Contact or Protection Order, felony Harassment, felony Stalking, Burglary 1°, Kidnapping 1° or 2°, Unlawful Imprisonment, Robbery 1° or 2°, Assault 1°, 2° or 3°, or Arson 1° or 2°.
- Count 2 points for each Adult offense where DV was pleaded/proven after 7/23/2017 for any of the following offenses: Assault of a Child 1°, 2° or 3°, or Criminal Mistreatment 1° or 2°.
- Count 1 point for each 2nd and subsequent Juvenile offense with DV was pleaded/proven after 8/1/2011 for the list of offenses under (a) above.

- d. **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. Any other felony offenses count standard

Background and Explanation

The four misdemeanor 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.

Task Force discussions focused on the logic behind the four scoring exceptions and the group explored 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.

The Grid Subgroup put together a series of potential recommendations that included a separate change for each of the four current scoring exceptions. In combination, these changes would have eliminated all special scoring exceptions for misdemeanors in the CHS. When the Grid Subgroup presented these potential recommendations to the full Task Force for input at the 6.2.22 full Task Force meeting, there were a number of members that believed their constituency would not be able to support eliminating one or more of these special scoring exceptions.

The Grid Subgroup incorporated the input from the full Task Force, made revisions, and the proposed recommendations on special scoring exceptions for misdemeanors are as follows:

Proposed Recommendation: *Maintain special misdemeanor scoring for prior Misdemeanor DUI offenses when the current offense is a serious felony traffic offense involving DUI (e.g., Vehicular homicide-DUI, Vehicular Assault-DUI, Felony DUI, Felony physical control, etc). Prior misdemeanor DUI offenses no longer score for felony offenses not involving DUI.*

Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System

This recommendation would allow for the misdemeanor scoring exceptions for DUI Misdemeanor Offenses to remain in use when an individual's current offense is a serious felony traffic charge involving DUI. If an individual's current offense is a serious felony traffic offense involving DUI (Vehicular Homicide with DUI, Assault with DUI, Felony DUI, Felony Physical Control, and all other DUI felony traffic offenses then prior misdemeanor DUI) offenses would be included in the calculation of a criminal history score. This would eliminate the use of prior misdemeanor DUI offenses in the calculation of criminal history scores for felony offenses not involving DUI-related offenses. While this does not fully eliminate complexity, it limits the complexity to DUI-related cases, reducing opportunities for error.

Proposed Recommendation: *Maintain the special misdemeanor DUI scoring exceptions for homicide or assault by watercraft offenses and make homicide or assault by watercraft offenses the same OSL as the corresponding felony traffic offense (by either increasing watercraft*

offenses to higher OSLs or reducing vehicular offenses to a lower OSL) with the goal of creating parity between vehicular and watercraft offenses (Homicide by watercraft and vehicular homicide. Assault by watercraft and vehicular assault).

Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System

Reduces complexity by having these offenses 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. Parity in similar offenses is critical to perceived legitimacy of the court and criminal law code. This recommendation eliminates a source of disparity that may also lead to racial disparity.

Proposed Recommendation: *Maintain the special misdemeanor scoring exception for domestic violence. As described in the proposed recommendation of the new felony sentencing guidelines grid, offense-specific exceptions to standard scoring rules for adult felony offenses are eliminated and a new column is added to the grid for adjustments to the standard range for qualifying individuals. The scoring exceptions for adult felony offenses where domestic violence was pleaded/proven will score as 1 point per standard scoring rules, and are eligible for the expanded sentence range under the repeat violent/serious violent and repeat domestic violence column.*

Addresses Sentencing Complexities and Errors, and Effectiveness of the Sentencing System

Domestic violence is an offense that may occur at the misdemeanor level one or more times before escalating in seriousness to reach the threshold of a felony DV offense. Because misdemeanor DV offenses represent similar or the same criminal conduct as felony DV offenses, it is important to maintain consideration of these prior convictions in sentencing for DV cases. Felony DV offenses will still increase the CHS as normal (one point for each conviction), so second and subsequent offenses will result in longer sentencing ranges because of the higher CHS. However, judges will have additional discretion to increase sanctions even further in the instance of repeat offending. This discretion allows for more nuanced and effective approaches to sentencing based on the characteristics of a particular case.

Forthcoming Proposed Recommendations

Proposed Recommendation: *Theft of motor vehicle, etc. Grid Subgroup discussing on 8.30.22 and will send out to Task Force asap after the meeting.*

Proposed Recommendation: *Language in SRA defining scope of CHS. Grid Subgroup discussing on 8.30.22 and will send out to Task Force asap after the meeting.*

Proposed Recommendation: *three strikes. Grid Subgroup discussing on 8.30.22 and will send out to Task Force asap after the meeting.*

Proposed Recommendation: *washouts. October meeting*

Proposed Recommendation: *current sentencing alternatives. October meeting*

Proposed Recommendation: *current sentencing alternatives. October meeting*

Proposed Recommendation: *Foundational. October meeting*

Proposed Recommendation: *Continuing work. October meeting*

DRAFT