

Washington State Criminal Sentencing Task Force
Grid Subgroup
Meeting Summary: August 30th, 2022
Meeting via Zoom

ATTENDEES:

- Clela Steelhammer, *Caseload Forecast Council*
- Chief Brian Smith, *WA Association of Sheriffs and Police Chiefs*
- Melody Simle, *Statewide Family*
- Chris Gildon, *Washington State Senate (Republicans)*
- Jon Tunheim, *WA Association of Prosecuting Attorneys*
- Keri-Anne, *Sentencing Guidelines Commission*
- Nick Straley, *Interests of Incarcerated Persons*
- Representative Roger Goodman, *Washington State House of Representatives (Democrats)*

Facilitation Team: Amanda Murphy, Chris Page, Molly Stenovec, Alec Solemslie, Zack Cefalu

Research Team: Dr. Lauren Knoth-Peterson, *Washington State Institute for Public Policy*

Public Guests: David Triewiler, Joanne Smieja, Jim Chambers, Audrey Koreski

Welcome and Agenda Review:

Amanda welcomed the group and reviewed the agenda. The group will discuss information to guide discussions on vehicle prowling offenses and scoring, then review three strikes recommendations. Reminded members of the Grid Subgroup to be ready at Wednesday's Task Force meetings to explain how the decisions on proposed recommendations came about. Thursday's task Force meeting will be a consensus day for the Proposed Felony Sentencing Grid. If consensus cannot be reached, the Task Force will discuss elements that they cannot live with and what would make the grid work.

Amanda asked the group to focus on refining the potential recommendations to proposed recommendations rather than reopening the recommendations for discussions on a fundamental level.

Potential Recommendation 29: Reduce the OSL for vehicle prowl second degree (third or subsequent) to OSL 1 (the same as vehicle prowl first degree).

Dr. Knoth-Peterson reviewed the previous discussion of vehicular prowl including the background of the Vehicular Prowl 2, where at the third or subsequent conviction this offense becomes a felony at OSL 4 with a CHS 0. This is because prior gross misdemeanor Vehicle Prowl 2 do not count in the scoring of the felony Vehicle Prowl 2 – 3rd/subsequent unless the felony is Theft of motor Vehicle (or similar felony) during which the gross misdemeanor priors are counted in the CHS.

The prior discussions from the Subgroup pointed out that Vehicular Prowl 1 is in OSL 1 but is intended to be a more serious offense than Vehicular Prowl 2. Vehicle Prowl 1 is akin to Residential Burglary as it involves breaking into a motor home or in a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities. Vehicular Prowl in the second degree is all vehicles that are not as listed in Vehicular Prowl 1.

Dr. Knoth-Peterson reviewed data provided by Clela Steelhammer illustrating the number of convictions of vehicular felonies. Vehicular prowl 2 (at the 3rd or subsequent) felony makes up 49 convictions from 2017-2022.

Background Information:

Vehicle Prowl 2 is a gross misdemeanor when the first or second conviction. It becomes a felony upon 3rd or subsequent conviction.

The inclusion of gross misdemeanor Vehicle Prowl 2 offenses in the calculation of CHS would, at most, only ever add 2 points to a criminal history score— third and subsequent vehicular prowl 2 offenses are felonies and would count under the standard scoring rules as 1 point.

Inconsistencies:

Vehicle prowling 2nd degree third and subsequent is in OSL 4. Prior gross misdemeanor vehicle prowl 2 do not count in the scoring of the felony Vehicle Prowl 2 – 3rd/subsequent. So, someone charged with their third vehicle prowl 2 would be OSL 4 with CHS 0 – range of 3-9. Vehicle Prowling 1, which is considered to be more serious than Vehicle Prowl 2 – 3rd /subsequent and similar to Residential Burglary (OSL 4), is in OSL 1. However, although it is meant to be a more serious offense it exists in OSLs lower than Vehicle Prowl 2. Vehicle Prowl 2 is also in a higher OSL than Theft of a Motor Vehicle, Possession of a Stolen Vehicle, and Taking a Motor Vehicle without the Owner’s Permission in the second degree, all offenses deemed to be a more serious offense than second degree Vehicle Prowling.

Subgroup suggested splitting the potential recommendation into two recommendations, separating the complexities regarding misdemeanor scoring and the OSL classification:

1. Reduce the OSL for vehicle prowl second degree (third or subsequent) to OSL 1 (the same as vehicle prowl first degree).
2. Eliminate the special scoring for prior misdemeanor vehicle prowl for TMV, Possession of a Stolen Motor Vehicle, or TMV w/o Owner’s Permission 1 or 2.

Grid Group Discussion:

- A member asked why vehicle prowl 1 even exists and not just be charged as residential burglary?
 - Residential burglary is defined as “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person

enters or remains unlawfully in a dwelling other than a vehicle.” Potentially vehicle prowl 1 was created to address similar action, but in a vehicle.

- This was originally passed in 1982 immediately after the passage of the SRA, however the alignment of Vehicle Prowl 1 and 2 should be reflected in parity.
- Believe Vehicle Prowl 1 was intended to be aligned with Residential Burglary 1 because originally burglary extended only to buildings, in order to establish a closing of this legal loophole that it where these prowl offenses for vehicles came from.
- So, someone with two Vehicle Prowl 2 priors then break into a motorhome they are charged with Vehicle Prowl 1 and their range is 0-2 months but if they instead break into another car they receive the felony Vehicle Prowl 2 and their range is now 3-9 months. A longer sentence for a less serious offense does not seem right.
- It seems rather than lowering the OSL for Vehicle Prowl 2, creating parity could be achieved through raising Vehicle Prowl 1 to the same OSL as either Residential Burglary 1 or 2.
- A member said that both Vehicle Prowl 1 and 2 are being charged very infrequently so it makes it difficult to say if Vehicle Prowl 1 is really similar to a Residential Burglary thus the Grid Subgroup should not treat these two offenses in the same manner and should not increase the OSL of either Vehicle Prowl offenses.
- Police have similar challenges once someone is arrested for breaking into a vehicle it is hard to determine what qualifies as someone living in that vehicle and its risk of occupancy. Police try to collect that information and pass it onto the prosecution who will determine whether a prowl in the first or second degree is appropriate. This seems to have been solely done in WA and done so to expand the definition of burglary rather than just simply doing that.
- As a prosecutor, if someone broke into a vehicle with sleeping/cooking quarters they would first charge Vehicle Prowl 1 and then could discuss circumstances or other factors that may take it down to second degree if it is found out there is no occupancy of that vehicle.
- A member shared that since there were only 14 convictions last year for these offenses, so they do not see the need to increase sentences for this at all. Either these do not happen very often or there is another way prosecutors can deal with the crime.
- Several members agree that this is a high occurrence crime that has a low clearance rate for being solved, the public would not be happy to see lesser sentences associated with this crime, as it is a high-impact crime that leads to great frustration with both law enforcement and prosecution. Therefore, this enhanced scoring exists.
- Another member said that Theft of a Motor Vehicle crimes occur exponentially higher than Vehicle Prowl 1 and 2 as it seems prosecutors have other tools to deal with this offense. There is no need to increase sentences for a crime that is not frequently charged. Since 2017 this has been only 35 convictions for Vehicle Prowl in the 1st degree.
- A member recommended that the Task Force recommend to the Legislature that they recalibrate Vehicle Prowl 1 and Vehicle Prowl 2 (3rd and subsequent) to be at least in the same OSL.

- Another member was not in support of doing this as they do not think the Task Force should recommend any movement of these offenses unless they are reducing the OSL or sentences for these offenses that are rarely convicted.

Through the discussion of potential avenues on how to address this came three alternative recommendation options:

Alternative Recommendation 1: Increase the OSL for Vehicle Prowl in the first degree to OSL 4 – the same as Residential Burglary and Vehicle Prowl in the Second Degree (3rd and Subsequent)

Alternative Recommendation 2: Move Vehicle Prowl 1 up and move Vehicle Prowl 2 down, so they both meet at OSL 2.

Alternative Recommendation 3: Recommend to the Legislature that they recalibrate Vehicle Prowl 1 and Vehicle Prowl 2 (3rd and subsequent) to be at least the same OSL.

The Grid Subgroup agreed to put forward the following as their proposed recommendation:

Proposed Recommendation: Move Vehicle Prowl 1 up and move Vehicle Prowl 2 down, so they both meet at OSL 2.

Potential Recommendation 29b: Eliminate the special scoring for prior misdemeanor vehicle prowl for TMV, Possession of a Stolen Motor Vehicle, or TMV w/o Owner's Permission 1 or 2.

This would move a person's CHS down by, at most, 2 points due to the elimination of the special scoring of the two prior vehicle prowl misdemeanors. This would affect a small percentage of sentences for TMV, Possession of a Stolen Motor Vehicle, or TMV w/o Owner's Permission 1 or 2, as only 8% of those convicted of these offenses have prior misdemeanor vehicle prowl offenses in their CHS.

The rationale of having a vehicle prowl 2 as a gross misdemeanor that counts in CHS calculation was to reflect the idea is that multiple prowls is an escalation in criminal behavior. However, since prior misdemeanors are inherent in the offense, they are double counted.

Grid Subgroup Input:

- The group discussed various situations and scoring examples: Someone who is convicted for their first felony of TMV, inherently also has prior misdemeanor prowling convictions—so also counting those misdemeanors to determine CHS would double count the offenses. Subsequent felony TMV would still count prior felony TMV as 1 point.
- Prosecutors have concerns with the recommendation and no suggestions to address those concerns that differ from current policy--but agree to put this forward to the Task Force.
- A member stated that it is double penalty like DUI. The two gross misdemeanors that propped the offense up to the felony level are getting counted again if they are convicted of the theft of a motor vehicle/possession of a vehicle without permission.

The Grid Group agreed to present the following as their proposed recommendation:

Proposed Recommendation:

Eliminate the special scoring for prior misdemeanor vehicle prowl for TMV, Possession of a Stolen Motor Vehicle, or TMV w/o Owner's Permission 1 or 2.

Three-Strikes Recommendations:

Potential Recommendation 27:

This recommendation has 3 potential options for it concerning three-strikes.

- a. Eliminate and do not replace three-strikes.
- b. Replace 3-strikes mandatory sentence with determinate plus - 25 years with opportunity for release.
- c. Replace 3-strikes mandatory sentence with mandatory minimum 25 years with judicial discretion up to life.

Background Info:

Research that was passed along to the group by the research team indicates Three-Strikes laws do not decrease crime rates regardless of how aggressively they are applied. Three-Strikes increases homicide rates in areas it is applied, and these laws can negatively impact public safety. Those who are facing strikes, especially their third strike, can be seen as have nothing to lose and are increasingly likely to harm witnesses and law enforcement in attempt to escape.

In 1993, there were two legislative bills concerning three-strikes in WA that failed to pass the legislature before going to the public in a referendum. HB 2053 was attempted to be passed by the Governor, that was less harsh version of HB 1159, that tried to limit strikes for “lesser crimes” such as Robbery 2 and Assault 2. After both bills seemed like they were not likely to pass, the NRA donated substantial amounts of money to publicize the three-strikes laws in the public ballot and run ad-campaigns in favor of these laws. Originally there were 17 specific offenses that could count as a strike offense in Washington, that now have been extended up to 56 specific offenses, this even includes unranked offenses. Someone could receive all three of their three-strikes on purely unranked offenses.

During last week's Grid Subgroup meeting they identified a potential recommendation for Three-Strikes that they would consider for proposal: *Replace Three-Strikes mandatory sentencing with mandatory minimum of top of standard range with maximum up to determinate plus sentence with mandatory review starting at 25 years.*

Grid Subgroup Discussion:

- It makes the most sense to look at this from a determinate plus ideology, such that the judges can choose a sentence within the standard range, after which there can be a risk assessment done to determine if release is appropriate or keeping them incarcerated. This would be one of our state's few reversions back to the parole structure.
- Basically, this would not determine the minimum term in the statute but would determine the minimum through the standard sentencing range.

- How would this model play out if someone is given a strike on unranked felony offenses?

The group discussed the potential recommendation they developed last week and altered this to the following two alternatives that they agreed to table for future conversations, as they ran out of time and wanted to think on these alternative recommendations:

Alternative Recommendation: Replace Three-Strikes mandatory sentences with determinate plus

- Some standard sentence ranges will have a maximum below 25 years and some may have above 25 years. Instead choose determinate plus where the judge sets time within standard range and then they are reviewed for potential release or continued detention.
- Minimum of the term would be the sentence imposed by the judge within the standard range. Review every 2 years for potential release thereafter.

Potential Recommendation: Recommend that the Legislature review the offenses included in the most serious offense list to potentially reduce the number of offenses eligible for the Three-Strikes sentencing.

Amanda closes the group. Next week the group will discuss three strikes first and then other recommendations will be reviewed to get through some stand-alone recommendations then return to washouts.