Enhancements, Aggravating Factors and Mitigating Factors
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The SRA was structured around the idea that the normal or standard offense would fall within the standard range while recognizing not every crime is the same. We have developed a robust list of aggravating factors which address heightened culpability. However, we have never been able to develop a similar body of law for mitigating factors or lessened culpability. Sentencing should address both the crime and the person.

Enhancements have skewed departures from or adjustments to the standard range towards the aggravation of punishment. These enhancements have substantially limited judicial discretion. Enhancements have moved the SRA further away from a scheme that seeks an appropriate sentence for the person as well as the crime. Moreover, they ignore the SRA's original recognition that not every crime is the same.

In rethinking exceptional sentences and enhancements, or whatever the new term for atypical sentencing is, we believe the exercise of discretion must remain guided to avoid the disparate treatment that predated SRA. Simply moving unguided discretion from the trial court or the parole board to the charging entity has not eliminated disparate outcomes. It has, however, shielded that critical decision from review. Additionally, sentencing procedures should recognize that an offense may be atypical based upon the characteristics of the person as much as circumstances of the crime. The person is more than merely their criminal history or the crime they committed.

With respect to mitigating factors the increased allowance of offender specific characteristics is appropriate. *State v. O'Dell* provides an example of the appropriate use of one such factor, youthfulness, which had historically been prohibited. Without creating an exhaustive list, or suggesting such a list be created, other factors include intellectual disability, mental illness, and even aberrational behavior. None of these are currently recognized by case law as valid mitigating factors. Each of these, and others like them, may well mitigate an individual's culpability for a crime. The appropriate sentence should account for that lessened culpability.

On the other side of the spectrum, aggravating factors and enhancements both provide for increased punishment based on some additional characteristic that heightens culpability, or at least they should. Yet they currently operate very differently from one another. Among enhancements there is even inconsistency in how each operates; some are consecutive to one another while others are not, some are mandatory while others may be subject to exceptional. Consistency affords easier application.

As currently structured, enhancements ignore the basic idea of the SRA that not every crime is the same. Criminal history is the closest the SRA comes to accounting for the person and provides an avenue for treating people differently even if they commit the same crime. The current application of enhancements ignores all of that as a person with an offender score of "0" receives the same enhancement as one with a "9." In fact, it is disproportionately harsher for the person with the lower standard range. An enhanced or aggravated sentence should continue to reflect the idea that not every offense or offender is the same.

Whether we call them enhancements or aggravators, because they both seek to address some heightened culpability there should be consistency in their operation. Neither should operate separately from the sentence for the underlying offense, but should instead aggravate or enhance the penalty of that crime. Too, regardless of title, enhancement or aggravation of punishment should not rely on facts accounted for in the standard range for the substantive crime as that sentence reflects the view of what the standard crime is and thus what the standard range is intended to address.

In terms of application, our proposal is to use both aggravators and enhancements to broaden the standard for an offense. A jury finding, or guilty plea, to an enhancement or aggravator should lead to a determined increase to the high-end of the sentence range. Using as an example a person convicted of possession of a stolen vehicle, a Class B felony, with an offender score of "2." That person's standard range is 3 to 9 months. If she were armed with a knife in commission of the offense her range becomes 15 to 21 months, and the court may not impose an exceptional sentence of less than 12 months. Instead, we propose the enhancement result in a sentence of 3 to 21 months and permit the court discretion to impose a mitigated sentence below that range.[1] So too, what are now considered aggravating factors should result in a legislatively determined broadening of the range rather than simply allowing a sentence up to the statutory maximum.

This allows the legislature to indicate certain facts which merit an increased potential punishment. It reinforces the SRA's original aim of limiting grossly disparate sentences based on irrelevant or improper factors. Prosecutors retain full discretion to make appropriate charging decisions accounting for the facts of a defendant's offense. Sentencing in this way vests judges with the discretion to consider all relevant information about an individual in arriving at the correct sentence. Finally, enhancing sentences ranges this way returns to the idea that not every crime and not every person is the same; and the sentence should not be either.

[1] These ranges and enhancements are used for convenience to illustrate the proposal. Whether 3 to 9 months is the appropriate range or 12 months the appropriate length of the enhancements is the subject of a different discussion.