SRA REFORM PROPOSAL

The Washington State Legislature has asked the Sentencing Guidelines Commission (SGC) to review the Sentencing Reform Act (SRA), passed over 35 years ago, and determine whether it is time to modernize Washington's felony sentencing scheme. There is consensus among the SGC members that judges need far more information than they currently receive when they conduct felony sentencings, and also that judges should have more sentencing discretion. To meet these goals, members of the SGC have created two separate proposals. This paper serves to summarize one of the two proposals – The Advisory Guidelines Approach.

The Advisory Guidelines approach is informed by the approach taken in federal court. Washington's original SRA was modeled on federal sentencing. But when the United States Supreme Court, reviewing a Washington sentencing decision in Blakely v. Washington in 2004, struck down the provisions of the sentencing act which allowed judicial discretion in sentencing, the federal courts moved to their current "advisory" sentencing approach. Since Blakely, in federal court, a defendant's sentence is controlled by several factors, which include mandatory minimum and maximum terms, an advisory guideline range, and alternative sentence options. The SGC is working on a proposal that would, to the extent legally allowed by the Washington State Constitution and the practicalities of sentencing in Washington, construct a sentencing scheme more similar to this current federal model.

The Advisory Guidelines Proposal is intended to limit disproportionate sentences among counties, which is primarily due to differences in county prosecutorial filing, charging, and plea bargaining approaches. Instead, Washington's elected judges, who are answerable at each election date to their voting constituents, would publicly pronounce reasonable sentences. Current practice would be changed by providing judges before sentencing with significantly more information about the defendant, the defendant's case, the defendant's background, and the sentences handed down by other judges in similar cases. Moreover, the proposal contemplates that this enhanced information would be available to the prosecution and defense much earlier in the process, ideally at or before the point that a defendant is first charged.

In addition, the current sentencing grid would change. At the present time, many felony sentences are determined by a grid which sets forth narrow ranges based on criminal history, the "offender score," and the seriousness of the offense. The vertical side of the grid is based on "seriousness level" (currently I-XVI) and the horizontal side of the grid sets forth the "offender score." There is also presently a separate grid for drug offenses, a separate sentencing scheme for sex offenses, and a number of "unranked" felony offenses with a range of 0-12 months. Under the Advisory Guidelines proposal, there would be a new, single grid with broad ranges based on the longstanding legislative classifications of crimes into A, B and C level felonies. For instance A-level felonies would have a mandatory term from 1 year + 1 day to Life.

In addition, the Advisory Guidelines proposal would create an advisory guideline grid with nine seriousness levels (A+, A, A-, B+, B, B-, C+, C, C-.) Aggravated Murder would be deemed A++, and not on the grid. As in the current grid, seriousness level would be on the vertical axis of the grid, and the offender score (1-10), would be on the horizontal access. But this revised approach would eliminate the current disconnection in the SRA between seriousness level and the legislative classifications of

crimes as A, B and C level. It would also make crime seriousness levels more understandable to the public.

Under the Advisory Guidelines proposal, sentencing courts would have to sentence within the advisory guideline range set forth in the grid unless one of approximately 40 mitigating or aggravating considerations exist. (This structure is very similar to the original SRA and the federal sentencing scheme on which it was based, which before Blakely allowed judges to deviate upward or downward from sentencing ranges based on a sentencing judge's determination that mitigating or aggravating circumstances existed.) Under the proposal, to be used in sentencing, mitigating considerations would have to be proven by a preponderance of the evidence or agreed to exist by the prosecution and defense. Aggravating considerations would have to be pled and proven beyond a reasonable doubt to a jury or agreed to exist by the prosecution and defense. The aggravating considerations under the Advisory Guidelines proposal are not new: they are current sentencing enhancements and current aggravating factors.

If any enumerated mitigating or aggravating consideration exists in a particular case, the sentencing judge would have discretion to impose an appropriate sentence within the overall range set by the classification of the crime so long as the judge also considers: (1) the guidelines in the Advisory grid; (2) the purposes of the SRA; and (3) the circumstances of the offense, and so long as the sentence is reasonable. A sentence of more than 25% above the top end of the advisory guidelines is presumed unreasonable, although that presumption can be overcome based on the information provided at sentencing. A sentence more than 50% below the low end of the advisory guidelines is presumed unreasonable, but that presumption can be overcome based on the information provided at sentencing.

The Advisory Guidelines proposal would retain all legislatively approved sentencing alternatives, including the First-time Offender Waiver, DOSA, SSOSA, FOSA, and therapeutic courts such as Drug Courts. Wherever possible, sentencing alternatives would be visually included in the Advisory Guidelines grid. Sentencing enhancements such as current bus zone, school zone, domestic violence, and deadly weapon enhancements would be retained as factors the judge could consider when issuing a sentence either below or above the advisory guidelines range.

This sentencing scheme has multiple advantages over our current SRA. It will provide guided discretion to the sentencing judge. It will allow sentencing judges to issue the individualized sentences our public wants from our courts. Judges will be checked by ongoing collection of publicly available information about how other judges are sentencing in similar cases, and by the reality that at sentencing, judges make public decisions, in courts which are open to their constituents, the media, and the public in general. By contrast, the plea bargains that drive many criminal case resolutions – and leave sentencing judges with virtually no discretion in most cases – are necessarily arrived at behind closed doors. Unfortunately judges reviewing these plea agreements can only determine whether a defendant is knowingly and voluntarily giving up their trial rights. They cannot force the parties to go to trial, and in the vast majority of cases, no explanation other than "evidentiary concerns" or "equitable reasons," is given for an amendment to charges to obtain the plea bargain. This sentencing scheme, however, would allow the judge to be a check on the plea bargaining process, by imposing consistent sentences for publicly stated reasons. This is the function for sentencing judges that was traditionally envisioned by the framers of the federal and state constitutions, and which citizens still expect from their elected judges.

The Advisory Guidelines proposal cleans up and clarifies the SRA, which has become increasingly complicated and lacking in transparency. It puts the courts back in the business of deciding what sentence is appropriate for a defendant. It puts prosecutors and defense attorneys back in the business of making strong, principled arguments about why particular sentences are appropriate for a particular offender who committed a particular crime. It should eliminate discrepancies between sentencing among Washington counties. And if, as the Advisory Guidelines proposal envisions, the adoption of it is coupled providing much more information, much earlier, to the parties and to the sentencing judge, a new light will shine on a criminal adjudication and sentencing process that has worked in the dark for far too long.