STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

SENTENCING GUIDELINES COMMISSION
MINUTES
March 8, 2019 9:00am – 3:00pm

Washington Association of Sheriffs and Police Chiefs
3060 Willamette Dr NE
Lacey, WA 98516

Members Present:
Greg Link
Russ Hauge
Sheriff Paul Pastor
Stephen Sinclair (Alex MacBain)
Maia McCoy
Kimberly Gordon (Mick Woynarowski)
Michael Fenton
Kathleen Harvey
Jennifer Albright
Tony Golik
Senator Jeannie Darnielle (Nathaniel Williams)
Hon. Stanley Rumbaugh
Hon. Catherine Shaffer
Phillip Lemley
Kecia Rongen
Tim Wettack
Jon Tunheim
Hon. William Houser
Hon. Roger Rogoff (phone)

Members Absent:
Rep. Eric Pettigrew
Senator Mike Padden
Rep. Brad Klippert
Sonja Hallum

Staff:
Keri-Anne Jetzer

Guests:
Clela Steelhammer, DOC
Ed Vukich, CFC
Duc Luu, CFC
Kendra Wynn

I. CALL TO ORDER

Chair Hauge called the meeting to order. He asked members to introduce themselves.

II. APPROVAL OF MINUTES

The Commission was asked to approve the minutes from February 2019

MOTION #19-14: APPROVE MEETING MINUTES FROM FEBRUARY 2019
MOVED: Phillip Lemley
SECONDED: Greg Link
PASSED: Unanimous

III. MINORITY & JUSTICE COMMISSION PRESENTATION ON LFO CALCULATOR AND LFO CONSORTIUM WORK

Chair Hauge introduced Cynthia Delostrinos and Judge Linda Coburn. Cynthia presented information on the work the Minority & Justice Commission has been doing on legal financial obligations.

In 2016, Washington was one of five states that received funding from the US Department of Justice Price of Justice program which allowed states to address legal financial obligations or court fees. The M&JC had three objectives of the grant: establish a LFO stakeholder consortium, gather data and information on policies and practices on collecting LFOs, and create a LFO calculator. Cynthia talked about the drivers of legal financial obligations and the large amount of criminal justice debt that is uncollected and why.

Judge Coburn demonstrated the LFO calculator to members. Cynthia noted that there are discussions with the Administrative Office of the Courts to house the calculator but funding is a question as maintenance will be needed as laws change. Funding through the Arnold Foundation is being sought in order to keep the calculator going for another year. The calculator is being tested in a few courts and they hope to study its effectiveness. Preliminary data indicates that, being reminded of the laws with the calculator, judges are assessing about half the amount of LFOs than were assessed prior to using the calculator. Cynthia requested SGC members to forward any funding sources they may know of for the calculator and to spread the word about the calculator. Additionally, LFO Consortium subcommittees are looking for more volunteers.

Chair Hauge asked Cynthia and Judge Coburn what the SGC can do to help. Cynthia replied that having a SGC representative on the consortium to engage in any policy discussions would be helpful. Chair Hauge pointing out the benefit of making common cause with the Minority & Justice Commission on this topic, to join their efforts and lend the SGC's name to their work through participation as has been suggested. Judge Shaffer concurred.

MOTION #19-13: SUPPORT THE MINORITY & JUSTICE COMMISSION'S WORK ON LFOs, INCLUDING PARTICIPATION ON WORK GROUPS
MOVED: Judge Shaffer
SECONDED: Judge Rumbaugh
PASSED: Unanimous

Tony Golik and Judge Shaffer volunteered to represent the SGC at the LFO Consortium meetings.

IV. SENTENCING GRIDS

Keri-Anne described the list of felony offenses she provided and Judge Rogoff added further explanation of the fields.

Chair Hauge and Keri-Anne will create write ups for the two grids. They will be sent to Judge Rogoff and Tony Golik for feedback and then make the documents available to members for review at the April meeting.

Keri-Anne asked members what, if anything, members wanted to do about unranked offenses. There was discussion on ranking unranked offenses and the impact that might have on sentencing. It was noted that many of the unranked offenses are rarely used.

MOTION #19-15: RANK ALL UNRANKED OFFENSES AND INCLUDE IN ANY GRID AT THE BOTTOM LEVEL WITH A 0-12 MONTH RANGE
MOVED: Judge Shaffer
SECONDED: Judge Rumbaugh
PASSED: Unanimous

Chair Hauge asked members what their thoughts were on enhancements. Members discussed the idea of the use of enhancements to coerce a plea. Judge Rumbaugh suggested adding enhancements to aggravating and mitigating factors. He felt that would lead to a more equitable result. Tony Golik countered that that would lead to less equitable results as some judges would impose the factor and others might not. Maia McCoy noted that eliminating enhancements would have a serious impact on crime victims. She thought it might result in a decrease in incentive to testify if the defendant is facing a lesser sentence for a serious crime. Chair Hauge recollected that when he was an elected prosecutor, his office had a standard in place that said enhancements should be charged very conservatively, that they would not be added unless it was necessary to fully explain the crime. That example illustrates that there is tremendous variation among the 39 counties as to when and how enhancements are charged.

Judge Rogoff suggested discussing some of the lesser enhancements (not firearm or deadly weapon) to see if there is consensus. He also suggested looking at the inconsistency of good-time eligibility and consecutive/concurrence placement of enhancements.

Tony Golik said that the stacking of enhancements is an issue that the prosecutors have discussed. He added that WAPA has made it known that it would be supportive of making the first firearm enhancement required but subsequent firearm enhancements could be discretionary. Alex MacBain added that the inconsistency of which enhancements get good-time is a complexity concern for DOC. Members were in agreement that this is a considerable issue.

MOTION #19-16: ELIMINATE MANDATORY STACKING OF SECOND ENHANCEMENT AND MAKE IT DISCRETIONARY
MOVED: Greg Link
SECONDED: Tony Golik
PASSED: Unanimous

MOTION #19-17: MAKE ALL ENHANCEMENTS ELIGIBLE FOR GOOD TIME AS APPLIED TO THE UNDERLYING SENTENCE
MOVED: Tim Wettack
SECONDED: Greg Link
PASSED: No vote

Discussion: Several members noted that this would be a significant change and they have not been able to discuss the topic with their constituent group.

MOTION #19-18: TABLE MOTION #19-17 UNTIL NEXT SGC MEETING
MOVED: Judge Shaffer
SECONDED: Maia McCoy
PASSED: Passed

Tony Golik requested that this topic be added to the next meeting agenda.

Chair Hauge posed a question to members: is the current system of having statutorily defined enhancements that will be added to a particular crime at the discretion of the charging authority what we want to recommend? Is this the best way to achieve the goals of the legislature and the citizenry?

Greg Link commented that although they are both like elements of the offense, conceptually it doesn't make sense that enhancements are treated differently than aggravating factors. There is no legal justification for the

difference and it adds complexity to the system. He thinks they should operate like the element of an offense and if the legislature wants to make Burglary 1 with the use of a gun different, they should create a specific crime of Burglary 1 With a Gun.

Jon Tunheim replied that he thinks the enhancements work because they can be applied to a broad range of crimes such as theft, rape, murder, and burglary. In the case of a firearm enhancement, it is the presence of the firearm that is begin targeted as a policy issue. Enhancements are a more efficient way of addressing the presence of a firearm across a large range of crimes. He added that the firearm enhancement was create via initiative and there was well supported by the public.

Chair Hauge inquired how that compares to the practice of some counties that have different enhancements charging policies. Jon Tunheim thought it might be that prosecutors don't charge it unless it is part of the criminal conduct. Firearm enhancements, he feels, are frequently charged.

Greg Link agrees that there are factors that prosecutors ought to have the discretion to charge and that judges ought to have the ability to consider at sentencing. He would like to break apart the process that because the prosecutor decided to charge the enhancement, the judge has to impose it and the person has to serve it.

Judge Shaffer wondered if the creation of a separate, all-purpose offense such as Committing a Felony With a Firearm that could apply to any felony conduct would work as an alternate proposal. She went on to say that it would penalize the conduct and make the sentencing outcome transparent.

Mick Woynarowski commented that enhancements have a binary nature and they make an incredible difference to how the case is ultimately resolved. They are not applied uniformly across jurisdictions or within a jurisdiction. We wonders if the voters who supported the initiative would question that all the discretion is in the hands of the prosecutor.

Chair Hauge presented a proposal that would apply enhancements through scoring of criminal history for discussion. After discussion, members decided against it.

V. PRESENTENCE INVESTIGATION REPORT DRAFT

Keri-Anne talked about the draft language she provided and asked members for feedback. Mike Fenton talked about the process in the juvenile courts. He said the process works perfectly and he was surprised to learn that it is not replicated at the superior court level. Judge Houser commented that from a best practices point of view it makes sense. He added that the superior court

would probably love to have it under their umbrella but would be concerned about the cost.

Alex MacBain reminded members that there are other users of the information and that by decentralizing it, the reports may lose consistency. Tony Golik agreed that some courts may be able to provide more funding for them than other courts and that could impact the reports.

Jon Tunheim talked about the relationships between the probation officer, judge and prosecutor that are created when the reports are completed at the local level. He said his prosecutors work with the juvenile probation officers daily. He would wish to have that kind of connection in the adult court. His court is also gathering information during the pre-trial program but understands that smaller counties may not have resources for that. Having the information gathering occur earlier in the process has been helpful in creating something like a reentry plan.

Greg Link noted that the use of social workers is the the way to gather information from a defendant that would be presented later. Mick Woynarowski explained that in the federal PSI system a detailed interview is completed with the defendant, defense counsel and the federal court probation officer. A draft report is produced by the probation officer and then both parties have the opportunity to file objections and provide supplemental information to the report. Then court probation decides whether to include those objections or comments. At sentencing, the court has the benefit of the court's PSI, the prosecutor's sentencing memo and the defense sentencing memo. He noted that this process takes months.

Mick went on to say that he feels there is a high risk of perpetuating racial disproportionality by increasing the level of PSI information provided to courts. The information is subjective and there will be barriers to getting all the relevant information about defendants who don't look like the officers who interview them or the judges who sentence them. He suggested adding a recommendation to consider if this process perpetuates racial disproportionality and actively looks for ways to reduce it. He added that there is also a need for culturally competent evaluations for non-citizen populations.

Alex MacBain noted that expanding PSIs is of interest by the legislature, too. He said HB 1517 would require a PSI on cases where an individual is being considered for DOSA and domestic violence was plead and proven. Maia McCoy would like to see cases with domestic violence be included in a list of offenses that could get a PSI.

Keri-Anne confirmed that previous discussions of PSIs excluded the results of a risk assessment. She further inquired if the PSI should include a sentencing recommendation as they do now, or if it is to be viewed solely as providing

information to the defense, the prosecution and the judge. Most members indicated they did not need or want the sentencing recommendation. She will incorporate these discussion points into the draft report language and return to members for feedback next meeting.

There was concern about cases getting held up because too many PSIs were being requested which is what had happened in the past. Members agreed that the recommendation should note that the idea is to increase discretion to order PSIs on additional cases but not on all cases. Another suggestion was a standard form for the PSI, similar to an informational checklist.

Keri-Anne will include the information discussed into a document for review at the next meeting.

VI. COMMUNITY SUPERVISION DISCUSSION

Members talked about the benefits of preserving the process of administrative hearings as opposed to returning the authority back to the courts.

Chair Hauge asked members if they viewed community supervision as part of the punishment or part of the reentry transition. Sheriff Pastor questioned whether it could be both, thinking of the option to let individuals out of prison early and supervise them more intensely in the community. They could get assistance in reentry (carrot) but if they mess up significantly, there may be a short term incapacitation (stick). Jon Tunheim talked about having supervision for low risk level individuals releasing from prison and jail to get them initial reentry support but have flexibility in what the supervision term would be by employing a "good time" or "incentive time". He thought that might be a compromise to putting everyone on supervision and would be a better use of resources.

Mick Woynarowski is supportive of individuals being able to earn a reduction off their supervision term through good behavior as is done in the institutions. However, he felt that social service agencies should providing reentry services to low risk non-violent individuals and let DOC supervise the high risk, violent releasees. He said many clients question if the community correction officer who is there to punish them can also support them in their reentry.

Alex MacBain said that many organizations have stated that offering a way for individuals to earn a reduction in their community supervision time is considered a 'best practice' but it is something DOC does not have available at this time.

Judge Shaffer suggested giving DOC the discretion to impose community supervision requirements on individuals they classify as high-risk for up to two years with an incentive that would allow them to earn time off their supervision term. She also suggested that DOC set up a reentry program for

individuals being released from their institutions which would be separate from the monitoring of the high-risk folks on supervision. Alex MacBain replied that DOC, being risk-averse, would not want the discretion to limit supervision. He informed members of the success that has been witnessed with the Second Chance grant in King County which provided additional resources for intensive release planning. One year recidivism rates for the high-risk population dropped from 12% to less than 6%. He said that is a major change but requires a lot of resources to do.

Chair Hauge noted that it is important to keep in mind that Washington is almost unique in the liability it attaches to supervising authorities of released individuals in the community. He thought one of the recommendations may need to be for the legislature to re-impose the public duty doctrine and give DOC and other supervising authorities some protection.

Chair Hauge reaffirmed that the SGC does not view community supervision as punishment, rather that the focus should be a successful reentry which includes Swift and Certain sanctions if the individual messes up.

VII. OTHER BUSINESS

Chair Hauge informed members that he will not be available for the April meeting and has asked Judge Houser to be Acting Chair for that meeting.

Chair Hauge mentioned that during his confirmation hearing, Senator Pedersen made a point of saying he was looking forward to the SGC's report on July 1. Keri-Anne briefed members on the status of the report, what work needs to be addressed, and her plan for completing the report with the final approval occurring at the June meeting so as to submit the report on the July 1 due date.

Chair Hauge discussed some of the legislative bills that the SGC was watching. He noted that the post-conviction review board and the criminal justice task force bills are not moving.

Judge Shaffer informed members about a new study on pre-trial release conditions. She forwarded it to Keri-Anne and thought the SGC might want to discuss it. Keri-Anne will send on to members next week.

VIII. ADJOURNMENT

APPROVED AND ADOPTED BY THE SENTENCING GUIDELINES COMMISSION

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Hon. William Houser, Acting Chair Date