

Fiscal Year 2019

A Comprehensive Review of the Sentencing Reform Act

***** DRAFT *****



Sentencing Guidelines Commission
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Executive Summary

Background

Recommendations

Recommendation – Unranked Offenses

Assign a seriousness level to all unranked felonies and add them to the bottom of any grid, current or proposed, with a 0 – 12 month presumptive range.

Recommendation – Offense Seriousness Levels

Because seriousness levels are an integral part of a sentencing grid, knowing what the sentencing grid looks like is necessary for an effective review of seriousness level offenses. As the SGC does not know if the legislature would pursue either of the two proposed sentencing grids by the SGC or continue use of the current grid, they were unable to complete the review.

Recommendation – Offender Scoring

[any recommendation based on CSG findings?]

Recommendations – Pre-Sentence Investigations

- Increase the occasions when a PSI can be requested
- Make PSIs available earlier in the court process
- Relocate the duty to complete PSIs requested by superior court judges to the superior court
- Increase cultural competency to reduce disproportionality in PSIs
- Exclude risk-assessment information and sentencing recommendation from PSIs

Recommendations – Proposed Sentencing Grids

The SGC unanimously recommends an increase in judicial discretion in sentencing. They offer two sentencing grid proposals that increase discretion by different degrees.

- The Incremental approach increases most sentencing grid cell ranges but leaves the drug grid, mitigating and aggravating factors, and enhancements intact.
- The Guided Discretion approach creates a new two-step sentencing grid that subsumes the drug grid and incorporates mitigating and aggravating factors and enhancements.

Recommendation - Enhancements

The SGC unanimously recommends eliminating mandatory stacking of subsequent enhancements. The initial enhancement in a single case would be required but any subsequent enhancements would be discretionary.

Recommendations – Legal Financial Obligations

- The SGC supports the work of the LFO Stakeholder Consortium and the recommendations that result from that work.
- The SGC encourages judges to use available tools, such as the LFO calculator, to assist with the computing of legal financial obligations.

Recommendation – Standard Recidivism Report

The SGC recommends the creation of a research position within the Washington State Statistical Analysis Center dedicated to recidivism research, including a standard recidivism report, on justice-involved individuals.

Recommendation – Sentencing Outcomes Interface

The SGC recommends investigating the creation of a user interface into the justice data warehouse. This would aid judges in their sentencing decisions by allowing them to query records of similar cases and observe what the sentencing outcomes were across the state.

Recommendation – Full-time SGC Staff

The SGC recommends the .5 FTE allotted to the SGC be increased to 1 FTE. Having a dedicated staff person to assist its members is essential to the group's ability to carry out its statutory duty.

Introduction

Sec. 20(b)(i) Review the current sentencing grid and recommend changes to simplify the grid and increase judicial discretion.

In 1981, the Washington State Legislature passed the Sentencing Reform Act which moved the state from an indeterminate sentencing system to a determinate (guideline) system. One of the primary goals of Washington and other states that moved to a guidelines system was to reduce unwarranted disparity in sentencing. Washington's legislature declared that the primary purpose of the SRA is "...to make a criminal justice system accountable to the public by developing a system for sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences."¹

In addition to judicial discretion, the SGC reviewed many components of sentencing, including judicial discretion, offender scores, unranked offenses, and pre-sentence investigation reports.

Broadening Sentencing Grid Ranges

In its review of the literature on judicial discretion, the SGC found there are essentially two ways that judicial discretion can be increased in sentencing, by broadening ranges in the guidelines and by removing mandatory minimums. It is general knowledge that sentencing disparity has decreased in Washington since it moved to a guideline system. A concern raised by the SGC was whether broadening the sentencing ranges would cause unwarranted disparity to increase again. Predicting changes in the sentencing behavior of superior court judges who are given increased discretion is not an exact science; however, there is research available that may offer some insight as to what one could expect.

In 2005, United States v Booker² determined that U.S. sentencing guidelines must be advisory if they are to comply with the Sixth Amendment. In one day, the federal sentencing system went from a mandatory guideline system to an advisory one. Many researchers have taken advantage of this "natural experiment" to analyze federal sentencing data for the impact of judicial discretion and unwarranted disparity as judges were released from more structured guidelines. The United States Sentencing Commission has published several reports on federal sentencing trends post-Booker that suggest an increase in judicial discretion leads to greater racial disparity.³ However, this work has been soundly discounted by researchers for its flawed analyses.⁴

¹ Revised Code of Washington 9.94A.010.

² United States v. Booker, 543 U.S. 220(2005)

³ See <https://www.ussc.gov/research/topical-index-publications#booker> for list of publications.

⁴ Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf. Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419. Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. Federal Sentencing Reporter, 25(5), p323-326. Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2). Brashear Tiede, L. (2009). The impact of the federal sentencing guidelines and reform: A comparative analysis. Retrieved from

Researchers who have compared federal sentencing data before and after Booker concluded that greater judicial discretion does not lead to increased disparity.⁵ Fischman and Schanzenback reported that “our findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing.”⁶ Starr saw a statistically significant reduction in disparity⁷ and Bennett reported that an increase in judicial discretion did not significantly change the length of most defendant’s sentences.⁸ Because Booker changed the limits on federal judicial discretion instantaneously, it was believed that if judges were inclined to exercise their discretion, the impact would have been observed immediately after the change. In its searches, the SGC did not find any studies that reported a dramatic increase or decrease immediately following Booker.

The National Center for State Courts compared three states (Virginia, Michigan and Minnesota) that are at different locations on the “mandatory-voluntary” guidelines continuum. Virginia is more voluntary, Minnesota is more mandatory and Michigan is located in between. When looking at whether guidelines limit unwarranted sentencing disparity, their data showed that “the discretion afforded judges under more voluntary guidelines does not result in discriminatory sentences.”⁹

Broadening sentencing ranges has consequences. Narrower sentencing ranges lead to better predictability which leads to better forecasting trends. Narrower sentencing ranges also lead to greater uniformity in sentencing. One of the purposes of Washington’s SRA is to “Be commensurate with the punishment imposed on others committing similar offenses,”¹⁰ in other words, treat similar defendants and similar cases similarly. Yet, there is much to be gained by increasing sentencing ranges. Broader ranges increase judicial discretion. Increasing judicial discretion allows judges to shape a sentence to the circumstances of the defendant and the situation. Many studies have shown that this can be done with little to no increase in unwarranted disparity. When commenting on the post-Booker era, Hillier and Baron-Evans state that “defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules and take greater account of relevant differences among defendants.”¹¹

<https://www.ncsc.org/~media/Files/PDF/Publications/Justice%20System%20Journal/The%20Impact%20of%20the%20Federal%20Sentencing.ashx>

⁵ Ulmer, J., Light, M. T. and Kramer, J. (2011). The “liberation” of federal judges’ discretion in the wake of the Booker/Fanfan decision: Is there increased disparity and divergence between courts?, *Justice Quarterly*, 28(6), p 799-837. Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2). Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M. (2008). Assessing consistency and fairness in sentencing: a comparative study in three states. Retrieved from <https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>. Hillier II, T. W. and Baron-Evans, A. (2010). Six years after Booker, the evolution has just begun. *Federal Sentencing Reporter*, 23(2), p 132-137.

⁶ Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419.

⁷ Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. *Federal Sentencing Reporter*, 25(5), p323-326.

⁸ Bennett, M. W. (2014). *Confronting cognitive “anchoring effect” and “blind spot” biases in federal sentencing: A modest solution for reforming a fundamental flaw*. *Journal of Criminal Law & Criminology*, 104(3).

⁹ Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M. (2008). Assessing consistency and fairness in sentencing: a comparative study in three states. Retrieved from <https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>.

¹⁰ Revised Code of Washington 9.94A.010.

¹¹ Hillier II, T. W. and Baron-Evans, A. (2010). Six years after Booker, the evolution has just begun. *Federal Sentencing Reporter*, 23(2), p 132-137.

Mandatory Minimums

Many of the studies on judicial discretion included discussions on mandatory minimums and their effect on unwarranted disparity. “Research outside the [United States Sentencing] Commission has repeatedly found that mandatory minimums are a primary source of racial disparity, and that increased judicial discretion after *Booker* likely mitigates racial disparity when not blocked by mandatory minimums.”¹² Several studies observed that mandatory minimums limit judicial discretion.¹³ As noted by Starr and Rehavi, “Flexibility allows appropriate tailoring of both charges and sentences to the circumstances of individual cases, so as to avoid unduly harsh punishments when they are not justified.”¹⁴ Mandatory minimums remove a judge’s ability to consider all relevant facts when sentencing.

In addition to curtailing judicial discretion, analyses showed that mandatory minimums have a disparate impact on minorities as well.¹⁵ While analyzing the sentence gap between Blacks and Whites, Starr found that “about half to the entire gap can be explained by prosecutor’s initial charging decision, specifically the decision to charge an offense with a mandatory minimum.”¹⁶

The American Law Institute has long recommended elimination of mandatory minimum penalties. Their reasons are that such sentences hinder judicial discretion, create disproportionate punishments, and are excluded from the prioritization of correctional resources. They also cite an unequal application of this penalty due to the plea bargaining process and selective charging by prosecutors. Uneven application in Washington was affirmed by members of the SGC as well. ALI states that the use of mandatory minimums “shifts the power to individualize punishments from courts to prosecutors.”¹⁷

¹² Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf

¹³ Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419. Spohn, C. (2000). Thirty years of sentencing reform: the quest for a racially neutral sentencing process. Retrieved from <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=185535>. Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of *Booker*, *The Yale Law Journal*, 123(2). Bowman III, F. O. (2005). The failure of the federal sentencing system: A structural analysis. *Columbia Law Review*, Vol 100.

¹⁴ Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of *Booker*, *The Yale Law Journal*, 123(2).

¹⁵ Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf. Starr, S. B. (2013). Did *Booker* increase sentencing disparity? Why the evidence is unpersuasive. *Federal Sentencing Reporter*, 25(5), p323-326. Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419. Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of *Booker*, *The Yale Law Journal*, 123(2).

¹⁶ Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of *Booker*, *The Yale Law Journal*, 123(2).

¹⁷ American Law Institute. (April, 2017). Model penal code: Sentencing (Proposed final draft). Philadelphia, PA: Author.

Unranked Offenses

Unranked offenses are felony offenses that have a classification designation of A, B, or C, and a default sentencing range of 0 – 12 months. They have not been assigned a seriousness level on the sentencing grid nor do they require a calculation of an offender score. As of December 2018¹⁸, there were 1,240 unranked felony offenses, three of which are Class A and 94 that are Class B. All Class A felonies have a statutory maximum of life, Class B felonies have a statutory maximum of 10 years, and Class C felonies have 5 years. Notwithstanding their classification, unranked offenses have a sentencing range of one year or less. Furthermore, many of these unranked offenses are largely unknown because they are rarely used. This can sometimes create confusion for members of the public and those engaged in the criminal justice system.

In an effort to reduce confusion and increase transparency, the SGC suggests that unranked offenses become part of whichever sentencing grid is being used. All unranked offenses would be ranked and placed on the bottom of the sentencing grid with a presumptive range of 0 -12 months. As new offenses are created, they would now be assigned a seriousness level ranking. [if they don't count in scoring, how are they different than gross misdemeanors, functionally?]

Offense Seriousness Levels

States with sentencing guidelines systems use some form of criminal history and offense severity in their grids; they are fundamental to the operation of a sentencing grid. The SGC started to review the offenses within each seriousness level but determined that, because of the function of the seriousness levels, such a review would require knowing what sentencing grid they would be applied to. Equally, determining the efficacy of a sentencing grid cannot be assessed without the seriousness levels. Addressing offenses that are incorrectly ranked is important work, to be sure, but the SGC felt an examination of a sentencing grid and the ranked offenses need to occur at the same time.

Offender Scoring

It is a long-held belief that past behavior is a good predictor of future behavior, therefore, an individual's criminal history is used to gauge the likelihood of recidivism. The Council of State Government Justice Center demonstrated in their April 12, 2019¹⁹, presentation to the SGC that, in the other guideline states they have worked with, there is a positive correlation between offender score and recidivism rates. That is, the higher the offender score, the higher the recidivism rate. Washington is the exception to that rule.

In Washington, the calculation of the offender score is comprised of factors above and beyond criminal history. The five factors that are part of the offender score calculation are: (1) prior criminal convictions or juvenile dispositions; (2) the relationship between any prior offense and the current offense; (3) presence of other current convictions; (4) whether the defendant was on community custody status at the time the offense was committed; and (5) the length of time the defendant has been crime-free.²⁰ CSG's analysis showed that Washington's offender score does not correlate

¹⁸ Caseload Forecast Council. (2018). *Washington state adult sentencing guidelines manual*, Olympia, WA: Author.

¹⁹ Council of State Governments Justice Center. Presentation to the Sentencing Guidelines Commission on April 12, 2019. Available at https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2019/WA_Sent_Comm_Apr_12_Presentation_FINAL_update.pdf.

²⁰ Caseload Forecast Council. (2018). *Washington state adult sentencing guidelines manual*, Olympia, WA: Author.

strongly with recidivism. Those with an offender score of 2 have a recidivism rate of 40% while those with an offender score of 6 have a recidivism rate of 38%. [what does the SGC want to say about this?]

Pre-Sentence Investigation

The pre-sentence investigation (PSI) report is “considered among the most important documents in the criminal justice field.”²¹ Its primary purpose is to collect information about the defendant to assist the court in determining the appropriate sentence.²² This information promotes individualized sentencing by informing judges of a person’s characteristics and/or the circumstances of the offense when determining the appropriate sentence. It is also used by probation officers to assist in probation and parole and by correctional officials for inmate classification, programming, and release planning.²³

History

In 1988, the Washington legislature added language in the Revised Code of Washington that directed the superior courts to order the Department of Corrections to complete a PSI prior to sentencing for anyone convicted of a felony sex offense.²⁴ From there, the list of individuals on whom the court could order a PSI grew. In 1998²⁵, individuals the court determined may be mentally ill were added, and the court was given authority in 1999²⁶ to request a Risk Assessment Report, which is different than a PSI, on any individual except those sentenced to life without the possibility of parole or sentenced to death for aggravated murder. DOC policy states that “Risk Assessment Reports (RARs) are completed when ordered by the Superior court when the crime is not eligible for a PSI.”²⁷ In the past, PSIs were requested frequently, but as budgets were impacted by the recession, requests are limited to those who have been convicted of a sex offense or who may be mentally ill.

Current Practice

According to court rule, the court may order a risk assessment or PSI “at the time of, or within 3 days after, a plea, finding, or verdict of guilt of a felony.”²⁸ DOC staff complete the investigative

²¹ Center on Juvenile and Criminal Justice. (2008). *The history of the pre-sentence investigation report*. Retrieved from: http://www.cjci.org/uploads/cjci/documents/the_history.pdf.

²² Administrative Office of the United States Courts. (1984, April). *The presentence investigation report, Publication 105*. Retrieved from: <https://www.ncjrs.gov/pdffiles1/Digitization/101715NCJRS.pdf>. United States Probation Office Eastern District of Pennsylvania. (2019). Presentence Investigation. Retrieved February 21 from URL <https://www.paep.uscourts.gov/presentence-investigation>. Center on Juvenile and Criminal Justice. (2008). *The history of the pre-sentence investigation report*. Retrieved from: http://www.cjci.org/uploads/cjci/documents/the_history.pdf. American Probation and Parole Association. (n.d.) *Probation pre-sentence investigation*. Retrieved on February 21 from URL: https://www.appa-net.org/eweb/Dynamicpage.aspx?&webcode=IB_PositionStatement&wps_key=24e1c1d8-c753-4710-8f89-6085c6191128.

²³ Administrative Office of the United States Courts. (1984, April). *The presentence investigation report, Publication 105*. Retrieved from: <https://www.ncjrs.gov/pdffiles1/Digitization/101715NCJRS.pdf>. United States Probation Office Eastern District of Pennsylvania. (2019). Presentence Investigation. Retrieved February 21 from URL <https://www.paep.uscourts.gov/presentence-investigation>.

²⁴ [Laws of 1988, ch. 60 § 1.](#)

²⁵ [Law of 1998, ch. 260 § 2](#)

²⁶ [Laws of 1999, ch. 196 § 4](#)

²⁷ Washington Department of Corrections. (2014). *Pre-Sentencing Investigations and Risk Assessment Reports Ordered by the Court (DOC 320.010)*. Olympia, WA: Author.

²⁸ [Washington CrR 7.1](#)

work and submit the PSI to the Superior court. On average, it takes staff approximately 23 hours to complete a PSI and DOC policy dictates that the reports will be submitted to the court at least 10 calendar days before sentencing, or per local practice.²⁹

In the juvenile and district courts, court staff complete the PSIs requested by their respective judges. Requests by juvenile courts are fulfilled by dedicated juvenile probation counselors or supervision probation staff. An informal survey of juvenile court administrators found that PSI processes vary by county.³⁰ Some counties conduct the PSI and then have the disposition hearing, while others reach a plea agreement, conduct the PSI, and then take the plea and impose disposition on the same day. Some counties conduct PSIs on all cases and others limit them to certain cases like sex offenders, decline cases, manifest injustice cases, or when ordered by the court. All PSIs are submitted to the court, the prosecuting attorney, and the defense attorney. It was reported that from two to four weeks is the goal for completing the reports, although in some cases, such as with a sex offense, it may take longer.

District court probation officers complete pre-sentence and post-sentence investigations requested by district court judges. While the district courts were not surveyed, it is likely there may be variations by county in these PSI processes as well.

To allow judges to incorporate individual characteristics and circumstances when sentencing, the SGC believes it would be beneficial to increase the occasions when a PSI can be requested. They do not recommend making them available for all cases and defer to the legislature to determine which offenses or cases would best be served with the information gathered in a PSI. They also believe receiving the PSI information earlier in the court process, rather than at the end when sentencing occurs, would provide helpful information to the case participants.

As noted above, the juvenile and district courts complete their own PSIs while DOC completes the PSIs for the superior court. The juvenile and district court are successful examples of placement of the duty to collect the PSI information within the court that requests it. Superior court staff have greater access to file information that is available on a more limited basis to DOC staff. If the offenses for which PSIs can be requested increases, it is possible DOC may be completing PSIs for individuals who do not come under its jurisdiction. The SGC believes creating a unit within the superior court to assume the duty of completing PSIs requested by superior court judges to mirror the success of the juvenile and district court processes would be worth considering.

Recommendations

Recommendation – Unranked Offenses

The SGC recommends moving away from unranked offenses. They recommend assigning a seriousness level to all unranked felonies and adding them to the bottom of any grid, current or proposed, with a 0 – 12 month presumptive range. Having all offenses on the sentencing grid will help make the sentencing system rational, reduce confusion, and increase transparency.

²⁹ Washington Department of Corrections. (2014). *Pre-Sentencing Investigations and Risk Assessment Reports Ordered by the Court (DOC 320.010)*. Olympia, WA: Author.

³⁰ Email correspondence with Mike Fenton on 2/26/2019.

Recommendation – Offense Seriousness Levels

The SGC did not complete a review of the offenses within each seriousness level. To complete this task, members agreed the sentencing grid to which they would apply would need to be known as seriousness levels are an integral part of any grid. As the SGC does not know if the legislature would pursue either of the two proposed sentencing grids by the SGC or continue use of the current grid, they were unable to complete the review.

Recommendation – Offender Scoring

[any recommendation based on CSG findings?]

Recommendations – Pre-Sentence Investigations

Increase the occasions when a PSI can be requested

While making PSIs mandatory for all crimes is not necessary, an increase in available PSIs would complement the increase in judicial discretion found in the SGC's two proposed sentencing grids and provide judges additional information when using either of the proposed sentencing grids. Even on the current sentencing grid this is important information for the judges, the defense, and the prosecution to have.

Make PSIs available earlier in the court process

Much of the information collected in PSIs would be helpful to prosecuting attorney, judge and defense attorney in the time leading up to sentencing.

Relocate the duty to complete PSIs for the Superior court to the Superior court

While the DOC does utilize information from the PSI, the primary stakeholders are the players in the court: judge, defense and prosecution. Additionally, if there is a broadening of the types of cases in which a PSI would be ordered, DOC could possibly be charged with completing PSIs for individuals who may not come under their jurisdiction. It is for these reasons the SGC feels that the duty would best be placed within a unit in the superior court, similar to the way the state's juvenile courts and district courts complete their PSIs. Judges would then be able to tailor the PSI for information that they find most relevant. Because other entities do use the PSI, it is also recommended that the superior court work with all stakeholders to make the form as universally functional as possible.

Increase cultural competency and reduce disproportionality in PSIs

The SGC recognizes that there exists the risk of perpetuating racial disproportionality by increasing the amount of PSI information provided to the courts. Some of the information reported can be subjective in nature and there may be barriers to obtaining all the relevant information for persons from different cultures. The SGC recommends to whichever agency has the duty to complete PSIs that they actively look for ways to increase cultural competence so as to help reduce disproportionality.

Exclude risk-assessment information and sentencing recommendation

The reasoning behind the expanded use of the PSI is to provide additional information related to the defendant and the circumstances of the crime to the judge, the prosecution and the defense. Not all risk assessments are of equal quality and efficacy and the tools used by an agency or county can vary. This creates too much uncertainty about the risk assessment provided and SGC members felt the PSIs were better without that information. Likewise, probation or community supervision staff providing recommendations for sentencing outcomes was deemed unnecessary.

Recommendations – Proposed Sentencing Grids

The SGC unanimously recommends an increase in judicial discretion in sentencing. Although the SGC was not able to reach consensus on exactly how to increase judicial discretion, they offered two grid proposals that increase discretion by different degrees. The Incremental approach increases most sentencing grid cell ranges but leaves the drug grid, mitigating and aggravating factors, and enhancements intact. The Guided Discretion approach creates a new two-step sentencing grid that subsumes the drug grid and incorporates mitigating and aggravating factors and enhancements.

Sentencing Grid #1 – Incremental

The Incremental approach provides a balance between increasing judicial discretion and ensuring that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences, the purpose of the SRA. (See Appendix A for Incremental sentencing grid).

This grid increases judicial discretion from the current sentencing grid significantly in two ways. First, cells that currently result in a jail sentence are changed to 0-364 days regardless of offender score. The one exception is Seriousness Level V with an Offender Score equal to 0. This cell remains at 6-12 months due to the crimes within this seriousness level, Rape 3 in particular. Second, in the prison term cells, the upper end of each range is increased by 20% and the lower end of each range is decreased by 20%. The exceptions are in cells where the lower end of the range is currently 12+ or cells where a decrease of 20% would produce a value less than 12. This allows the prison term cells to continue to be prison term cells. The ranges for seriousness level 14 remain the same because it is already expanded in the current grid.

While increasing judicial discretion, this grid still maintains the jail/prison line. This means cells that previously resulted in a jail sentence still result in a jail sentence and cells that resulted in a prison sentence still result in a prison sentence. Furthermore, this proposal presumes no changes to scoring, enhancements, mandatory minimum sentences or mandatory consecutive terms.

Sentencing Grid #2 – Guided Discretion

The Guided Discretion approach is intended to limit disproportionate sentences among counties, give judges greater discretion in sentencing, and simplify the sentencing scheme. 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.

This new approach overall simplifies Washington's sentencing scheme by subsuming sentencing enhancements, the majority of aggravating and mitigating factors, the separate drug offense grid, unranked crimes, and other confusing piecemeal aspects of the current scheme. (See Appendix B for Guided Discretion sentencing grids).

Currently, many felony sentences are determined by a grid that 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 the "seriousness level" (currently I-XVI) that has been assigned to the offense and

the horizontal side of the grid sets forth the “offender score.” There is also presently a separate sentencing 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 Guided Discretion proposal, there would be a new two-step grid with broad ranges based on the longstanding legislative felony Classification Levels of A, B and C. For instance A-level felonies would have a mandatory term from 1 year + 1 day to Life. This grid also adds another column for Offender Scores of 10+.

Step 1 - Presumptive Grid

The Guided Discretion proposal creates a presumptive grid with nine seriousness levels (A+, A, A-, B+, B, B-, C+, C, C-) based largely on the classification assigned to the offense. (See Appendix C for examples of offenses under this classification system). Aggravated Murder would be deemed A++, would not be on the grid, and would maintain its current mandatory sentence of life without possibility of parole. As with the current grid, the seriousness level would be on the vertical axis of the grid, and the offender score (1-10), would be on the horizontal axis. This revised approach eliminates the current disconnection in the SRA between offense seriousness levels and offense classification levels making the seriousness levels more understandable to the public.

Step 2 - Discretionary Grid

Under the Guided Discretion proposal, sentencing courts would be required to sentence within the Presumptive guideline grid (step 1) unless one of approximately 40 mitigating or aggravating considerations exist. This structure is very similar to the original SRA and the federal sentencing scheme, 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 this proposal, mitigating considerations would either have to be proven by a preponderance of the evidence or agreed to exist by the prosecution and defense to be used in sentencing. 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 and mitigating considerations under the Guided Discretion proposal are not new: they are consistent with current sentencing enhancements and current aggravating and mitigating factors found in RCW 9.94A.533 and .535, respectively. Currently existing sentencing enhancements such as bus zone, school zone, domestic violence, and deadly weapon enhancements would, under the new proposal, become factors the judge could consider when issuing a sentence either below or above the advisory guidelines range.

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 Discretionary grid ranges set by the classification of the offense so long as the judge also considers: (1) the guidelines in the 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 Presumptive 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 Presumptive guidelines is presumed unreasonable, but that presumption can, again, be overcome based on the information provided at sentencing.

The Guided Discretion proposal retains all legislatively approved sentencing alternatives, including the First-time Offender Waiver, Drug Offender Sentence Alternative, Special Sex Offender Sentence Alternative, Family and Offender Sentencing Alternative, and therapeutic courts such as

drug courts. Wherever possible, sentencing alternatives would be visually included in the Guided Discretion grid.

This sentencing scheme has multiple advantages over the current scheme. It provides 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 almost exclusively drive the current criminal case sentences – 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 the 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.

Example of how the Guided Discretion grids work using Assault 2nd Degree with Firearm:

Current Sentencing Scheme

Under the current scheme, if a judge had before her a Class B Assault with a deadly-weapon enhancement where the defendant has two prior convictions, the defendant would face 12-14 months in prison with a 36-month enhancement. Those ranges would be mandatory absent a very rare exceptional sentence. The 12-14 months would carry 33% off for good time, whereas the 36-month enhancement would have no good time. The sentence is opaque, difficult for the public to understand, and allows almost no discretion for the trial court.

Proposed Guided Discretion Scheme

Under the proposed scheme, the defendant would face a presumed range of 1-2 years. The Court could consider any mitigating considerations proven by a preponderance of the evidence, and any aggravating considerations proven beyond a reasonable doubt and, depending on what was proven (including the possession/use of a firearm), the Court could exceed the presumptive guidelines so long as the sentence is reasonable. Any sentence between 6 months and 30 months would be presumed reasonable in this example. The entire sentence would have the same good-time provision. The parties and public would know exactly how much time the defendant would likely spend in prison.

The Guided Discretion proposal 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 makes sentencing hearings relevant again. Because decisions on sentences will be made in public, and not part of a mysterious plea bargain based on “evidentiary concerns,” it should eliminate discrepancies between sentences among Washington

counties. And if, as the Guided Discretion proposal envisions, the adoption of it is coupled with 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.

Sec. 20(b)(ii) Review mitigating and aggravating factors and sentencing enhancements.

When the SRA was implemented in July 1984, it included a sentencing enhancement for being armed with a deadly weapon.³¹ If the offense was Rape 1, Robbery 1, or Kidnapping 1 the enhancement was 24 months. If the offense was Burglary 1, the enhancement was 18 months. An enhancement for 12 months was applied if the offense was Assault 2, Escape 1, Kidnapping 2, or Burglary 2 of a building other than a dwelling. As with many aspects of the SRA, these have since been modified and expanded. In the past 30 years, the deadly weapon enhancement was divided into separate firearm and deadly weapon enhancements, the cache of offenses to which these two enhancements could be applied was increased, and 11 other enhancements were created for a variety of other crimes.

While some enhancements are well established, there are others that practitioners have never seen applied during their legal careers. The most frequently applied enhancements are for firearms and deadly weapons, averaging 150 sentences and 194 sentences per year, respectively.³²

As demonstrated in Appendix D, the components of sentencing enhancements differ vastly. Some are mandatory, others are not. Some are to be served consecutively, some are not. Some include statutory language that explicitly states the enhancement time may not be reduced if the sentence exceeds the statutory maximum, while others remain silent. Complexity in the sentencing enhancements creates confusion for many players in the criminal justice system. It caused problems for the Department of Corrections' computer system when calculating release dates for some incarcerated individuals who had enhancements³³ and is still an area of concern for the agency.

Because of their mandatory nature and the ineligibility for application of earned release time, most enhancements are essentially mandatory minimums. As noted under Mandatory Minimums found earlier in this report, research has indicated that mandatory minimums limit judicial discretion, hinder individualized sentencing, and can increase unwarranted disparity.

In the big picture, the SGC could not reach consensus on the removal of enhancements or relocation of enhancements to the list of aggravating factors. This is evident by the two different grid recommendations. Sentencing enhancements are included as aggravating factors in the Guided

³¹ RCW 9.94A.310 (1983) Retrieved from <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/1983/Vol1.pdf>.

³² Calculated using data from the 2007 - 2018 Statistical Summary of Adult Felony Sentencing reports available on the Caseload Forecast Council's website and data provided at the November 9, 2018, SGC meeting available on its website.

³³ See Sentencing Calculating Error 2015 at <https://www.doc.wa.gov/corrections/justice/sentencing/error.htm>.

Discretion grid recommendation, while they remain unchanged in the Incremental grid recommendation.

There is one point the SGC was able to find consensus on, however. The SGC unanimously passed a motion to eliminate the mandatory stacking of enhancements. What members agreed upon was the mandatory application of the first enhancement and discretionary application of subsequent enhancements within the same case.

Recommendation

Recommendation - Enhancements

The SGC unanimously recommends eliminating mandatory stacking of subsequent enhancements. The initial enhancement in a single case would be required but any subsequent enhancements would be discretionary.

Sec. 20(b)(iii) Review fines, fees, and other legal financial obligations associated with criminal convictions.

The Minority and Justice Commission was awarded a three-year, \$500,000 grant in 2016 by the U.S. Department of Justice “to identify strategies ‘to structure criminal justice legal financial obligations in ways that support, rather than undermine, rehabilitation and successful reintegration of justice-involved individuals into communities’.”³⁴ To complete this task, the MJC created the Legal Financial Obligations Stakeholder Consortium. The objectives of the Consortium include “working collaboratively to understand the issues around Washington State’s LFO system” and to “gather data on LFOs that looks at all angles of the LFO system...and develop meaningful recommendations for change.”³⁵

In March 2019, the MJC presented findings from its latest report and demonstrated the new LFO calculator to the SGC. The SGC members voted to support the Consortium’s work on LFOs and added two volunteers to participate on its work group.

Recommendations

Recommendation – Legal Financial Obligations

The review and analyses being carried out by the LFO Stakeholder Consortium into the issues around LFOs is more comprehensive than what the SGC would be able to accomplish, given its time frame and funding for the SRA review. The SGC supports the work of the LFO Stakeholder Consortium and the recommendations that result from that work.

³⁴ 2017-2018 Minority and Justice Commission Annual Report, Retrieved from <http://www.courts.wa.gov/committee/pdf/AnnualReportMJC2017-2018.pdf>.

³⁵ 2017-2019 Washington State LFO Stakeholder Consortium Progress Report, Retrieved from <https://www.courts.wa.gov/subsite/mjc/docs/2018/LFO%20Stakeholder%20Consortium%20Progress%20Report.pdf>.

Recommendation – Encouraged Use of Available Tools

The SGC was impressed with the LFO calculator created by the Consortium and encourages judges to use available tools, such as the LFO calculator, to assist with the computing of legal financial obligations.

Sec. 20(b)(iv) Review community supervision and community custody programs including eligibility criteria, length and manner of supervision, earned time toward termination of supervision, and consequences for violations of conditions.

The SGC contracted with the Council of State Governments Justice Center to provide data analysis and research support on supervision practices and trends, felony sentencing trends, and recidivism. CSG's final report can be found under Appendix E and their three presentations can be found on the SGC's website. Unless otherwise cited, all data and analyses mentioned in this section are from CSG.

Key Research Findings by CSG³⁶ [reference report if possible]

Prison does not deter crime and can even have a criminogenic effect.

CSG reported on a meta-analysis of 57 studies that found individuals sentenced to prison have a 7% higher recidivism rate than those who were sentenced to community supervision. Data from Idaho compared paroled individuals to those who were sentenced directly to probation and showed that, regardless of risk level, those sentenced to probation-only sentences had lower recidivism rates.

These results parallel the findings of a 2004 study by the Washington State Institute for Public Policy. After testing with three different methodologies, "The results consistently indicate that prison does not reduce felony recidivism, and may increase it by 5 to 10 percentage points."³⁷

Supervision yields better outcomes and costs less than incarceration.

CSG reported that a number of states, such as Arkansas and Georgia, have demonstrated that probation-only sentences can provide lower recidivism rates. Washington spends more than \$600 million on prisons and only \$185 million to supervise over 32,000 in the community³⁸. Looking at the felony probation-only rate in 2015, Washington ranked 30th out of the 33 states that provided data. That is because in Washington state over 90% of felony sentences include a confinement term.

³⁶ Council of State Government Justice Centers. Community Supervision: an effective tool to change behavior. Presentation to the Washington Sentencing Guidelines Commission on October 12, 2018. Available at https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2019/wa_sent_comm_20181012_vFINALcopy.pdf.

³⁷ Barnoski, R. (2004). *Sentences for adult felons in Washington: Options to address prison overcrowding – Part II (recidivism analyses)* (Doc. No. 04-07-1201). Olympia: Washington State Institute for Public Policy.

³⁸ As of August 2018.

This is much higher than the national average of 69%. It also makes potential comparisons of supervision-only sentences to those where supervision is post-incarceration problematic.

Research demonstrates the effectiveness of a Risk, Need, Responsivity approach to supervision.

Risk, Need, Responsivity is an evidence-based approach that allows supervision to be tailored to the individual. Tailoring conditions based on an individual's risk factors promotes success. It also lets community custody officers focus on what is most important.

CSG refers to the online WSIPP cost-benefit data that shows RNR supervision strategies can reduce technical violations by 16% and provide a benefit of over \$8,000 after costs. CSG also cites work by Andrews and Bonta that shows a positive correlation between the employment of RNR principles and recidivism. The greater number of the RNR principles that are followed, the greater the reduction in recidivism that can be achieved. This recidivism reduction is evident in prison but is even greater when delivered in the community. And even greater reductions in recidivism were reported when using core correctional practices in conjunction with RNR principles. Currently, Washington does not incorporate core correctional practices into officer training and includes it in performance evaluations, however, opportunities for refresher training is not provided to community corrections officers.

Doing supervision well means moving to a 'coaching' model.

CSG introduced the concepts of 'coaching' and 'referee' approaches to supervision. A referee employs procedural justice and applies the rules as intended. They are authority figures who control the application of sanctions. A coach is viewed by individuals as supportive and trustworthy. They are aware of the individual's deficits that need improving. They train and encourage. They are still an authority figure but are trusted and respected. As noted above, data shows that incorporation of the coaching approach, which is an embodiment of core correctional practices, with RNR principles promotes even greater reductions in recidivism.

The number of supervision violation admissions and the average daily population of people confined for violations have increased in the past three years.

CSG found that the increase in the supervision violator population was greater than the increase in the supervision population.³⁹ They estimate that in a year's time, about one-third of people on supervision will be admitted for a violation. Both the number of people receiving a violation and the number of times they violate in a year has increased since 2015. Analysis also found that those on supervision are accumulating higher numbers of violations, leading to longer incarceration stays and growth in incarcerated populations and costs.

According to DOC's Supervision Sanctioning Process, the first low-level violation does not receive a sanction of confinement. The second through the fifth low-level violation receives a one to three day confinement sanction and six or more low-level violations receive up to a 30 day confinement sanction. The increases reported by CSG may be due to the continued accrual of an individual's violation count during any continuous period they are under DOC jurisdiction. There is no mechanism to 'wash out' violations if an individual has been compliant for a long period of time.

³⁹ Some of the increase in admissions between 2016 and 2017 is due to better data collection through the Violator Improvement Project at DOC.

Incentivizing discharge through compliance helps safely reduce the supervision footprint.

The CSG stated that research points out that the amount of supervision assigned to an individual should be based on risk level and there should be a mechanism incorporated to incentivize time off.

Lengthy supervision terms can expand the criminal justice footprint. The average probation term in the U.S. is 38 months. Experts agree that maximum supervision terms should not exceed five years for higher risk levels⁴⁰ because the impact of supervision diminishes after a few years⁴¹. CSG provided survey data from the National Conference of State Legislatures of which states have a 5 year cap on probation terms. NCSL reported that 30 states have a cap on maximum felony probation terms of five years or less, but only 7 of those, Washington included, does not have a mechanism to shortened those terms. Another 12 states allow probation terms to be shortened but do not have a cap of 5 years or less.

CSG provided specific information on supervision of people convicted of a sex offense. They found that lifetime supervision terms may provide little benefit, if any. A study they cited that analyzed data from 20 different samples totaling over 7,000 people who were convicted of sex offenses determined that after 20 years without reoffending, even the high risk individual has a likelihood of reoffending equal to that of someone with no criminal history. Thus lifetime supervision terms are not offering any more public safety but are adding more costs. According to WSIPP's cost-benefit data, sex offender registration and community notification, which has a lifetime term for specific individuals, have a benefit of -\$2,200 and only a 33% chance that they will produce a benefit.

People are at greatest risk of recidivism in the first three months following release from a jail sentence, while people released from prison are at similar risk throughout the first year.

Historically, over half of all annual felony convictions result in a jail sentence. Over half of jail sentences do not include a term of community supervision. For those releasing from jail, CSG found that within the first three months of release about 17% of individuals were rearrested. When looking at all people who release from jail and get rearrested, 48% do so within the first six months. CSG reported that individuals who commit less serious offenses had higher rates of recidivism.

CSG also highlighted that individuals with a term of supervision after releasing from jail have lower reconviction rates than those who are released without supervision. This is regardless of the amount of criminal history. For those releasing from prison with community supervision, they have a higher recidivism rate than those who do not have a supervision term. This applies to low- and moderate-risk categories only. High-risk category with supervision shows a slightly lower recidivism rate than high-risk without supervision. The conclusion is that people who commit less serious offenses had much higher recidivism than those who committed more serious offenses because supervision is more often linked to offense severity than criminal history or offender need.

⁴⁰ Rhine, E. E., Petersilia, J., & Reitz, K. R. (2015). Improving Parole Release in America. *Federal Sentencing Reporter*, 28(2), 96-104. doi: 10.1525/fsr.2015.28.2.96.

⁴¹ Harvard Kennedy Executive Sessions. (May 2018). Statement on the future of community corrections. Retrieved from <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/executive-session-on-community-corrections/publications/less-is-more-how-reducing-probation-populations-can-improve-outcomes/statement-on-the-future-of-community-corrections>.

Recommendations

Recommendation – Supervision eligibility shall be based on RNR and not solely on offense type

SGC recommends legislative, judicial, and departmental discussions about eligibility for community supervision shall be based on an individual's RNR and not solely on offense type. Data shows that low- and moderate-risk individuals released from prison to serve a term of community supervision recidivate at higher rates than those who do not have a supervision term. Half of all jail sentences do not receive supervision after release and, of those that do, over one-third are rearrested within the first six months after release. To comport with RNR principles, supervision terms should be linked to need instead of offense or offense seriousness level.

Recommendation – Front-load reentry services for all felony offenders releasing from confinement

SGC recommends exploration of a system with front-loaded reentry services for all felony offenders releasing from confinement. They further recommend that policies, services, and programs should adhere to the current theory of risk-needs-responsivity. Supervision should be flexible to meet the risks and needs of the individuals. Research concludes that front-loading supervision resources for an initial period of time is more important than extending the supervision term. This is supported by CSG's analysis that an individual's greatest risk of reoffending after release from confinement is within the first three to six months.

Recommendation – Encourage motivational-focused supervision

The SGC recommends that DOC implement a supervision model to encourage motivational-focused supervision in addition to the current regulatory supervision model. This form of supervision would include RNR principles, trauma-informed coaches, and core correctional practices. Studies show the benefit of shifting from supervision with an eye toward discipline to supervision that motivates individuals while still being able to discipline when necessary, i.e. the carrot and the stick.

Recommendation – Add behavior-based incentives to community supervision

The SGC recommends the addition of behavior-based incentives to the community supervision process. This includes, but is not limited to, positive achievement time. Using incentives is part of RNR supervision and other states, like Missouri, have been successful in reducing supervision population without increasing recidivism rates. Instead of providing feedback on the undesired behavior, the focus and reinforcement should be on desired behavior with a ratio of four reinforcements for every punishment.

Recommendation – Expand DOC's range of violation sanctions

The SGC recommends expanding the range of sanctions to extend beyond incarceration to allow DOC to address any community supervision violations. Expanding the range of sanctions will give DOC the flexibility to sanction undesired behavior accordingly. The expansion should include imposition of non-incarceration-based punishments.

Recommendation – Supervision and violation sanctions should be individualized

The SGC recommends that supervision and violation sanctions should be based on the risk and need of the individual, the undesired behavior, and the circumstances. Like in sentencing, these factors should be taken into consideration.

Sec. 20(b)(v) Review available alternatives to full confinement including work crew, home detention and electronic home monitoring.

CSG reported that a strong research foundation exists to support the use of supervision-only sentences as an effective public safety alternative to custody-based sentencing. They offered examples of states that demonstrated probation-only sentences can have better outcomes than an incarceration sentence with lower costs. For example, Arkansas found probation sentences for drug/property offenses had similar or better recidivism rates as prison sentences with a substantially lower cost. Georgia saw lower reconviction rates for people sentenced to probation only than for people sentenced to prison, regardless of their amount of criminal history.

Recommendation

Recommendation – Make alternatives to confinement available to the sentencing judge

The SGC recommends the use of alternatives to confinement, community supervision in particular, as a discretionary option available to the sentencing judges for felony sentences. As noted by the CSG, very few felony sentences receive a supervision-only sentence, yet, district courts have had success with their probation-only sentences. An example of the inconsistency between the courts is that a crime of Assault 4 – Domestic Violence could receive a probation sentence in district court, whereas an unranked felony in superior court could result in one day in jail but no probation. The research is clear that probation is as successful as and less expensive than confinement for some individuals.

Related topics considered by the SGC.

Standard Recidivism Reports

Recidivism is “the most commonly used definition of correctional success, is one example of a performance measure that many states use.”⁴² Understanding the importance of a common definition, in 1997 the legislature tasked WSIPP with creating a common definition of recidivism. WSIPP determined that “a recidivism event is any offense committed after release to the community that results in a Washington State court legal action.”⁴³ WSIPP has used this definition while studying recidivism rates of sex offenders, adults who released from prison, or to know the impact a program has on recidivism, like a prison treatment program or community notification. The work of

⁴² King, R. & Elderbroom, B. (2014). *Improving recidivism as a performance measure*. Washington, DC: Urban Institute.

⁴³ Barnowski, R. (1997). *Standards for improving research effectiveness in adult and juvenile justice*. Olympia: Washington State Institute for Public Policy. Document No. 97-12-1201, page 2.

WSIPP is directed by the legislature so their studies are ad-hoc and, most often, look only at the specific population in the legislature's request.

The Department of Corrections has also completed a few recidivism studies that focus only on people who have released from prison. While that is informative, it leaves out a large population, those who received a jail sentence, which is more than half of all annual felony convictions.

The Problem

Washington does not have an agency or any dedicated personnel providing recidivism data for the state on a regular basis.

According to the Urban Institute, it is important to routinely collect and analyze recidivism data “to examine system functioning, effectiveness, costs, and trends. Recidivism also represents a critical area of interest for criminal justice stakeholders, elected officials, prospective funders, and the general public.”⁴⁴

The Oregon Statistical Analysis Center, located in the state's Criminal Justice Commission, releases a recidivism report twice per year for the entire state. The report breakouts out recidivism data in many different ways, including age, gender, race, county, and risk level. There is also an interactive, online recidivism dashboard for criminal justice stakeholders and members of the public to use. Information at the county level is especially interesting.

A Solution

Create a research position that focuses on the state's recidivism. This position will develop and run regular recidivism reports and conduct ad hoc analyses to better understand specific recidivism questions. The Statistical Analysis Center is an ideal organization for housing such a research position.

The Washington State Statistical Analysis Center

In 1989 Former Governor Booth Gardner authorized the SAC with Executive Order 89-03. There are currently SACs in 51 states and territories, and these are supported by the Justice Research and Statistics Association and the Bureau of Justice Statistics. The SAC conducts and publishes objective, policy-relevant research and analysis on justice issues, provides technical assistance, and maintains a clearinghouse of state justice-related data. SAC studies have examined recidivism and post-release employment rates of Washington property offenders, compared mental health and substance use disorder treatment needs of Medicaid enrollees booked into jail, examined perceptions of sex offenders and sex offender policies within the state, and explored education and workforce outcomes of youth who have had one or more trancies, to mention a few. The SAC has coordinated some of its work with other agencies, such as the Education and Research Data Center (ERDC) located within OFM, DSHS-Research and Data Analysis division, and the Washington State Center for Court Research.

Being located within OFM, the state's central management agency and as the governor's budget, research, and policy office, the SAC is uniquely positioned to facilitate, implement and coordinate an integrated approach to research for justice-related programs in the state.

⁴⁴ Measuring recidivism at the local level: A quick guide. Washington, DC: The Urban Institute. Retrieved from: https://www.urban.org/sites/default/files/recidivism-measures_final-for-website.pdf.

In 2015, the SAC was awarded funding from the Bureau of Justice Statistics for a three-year Special-emphasis Capacity-Building Project. Part of this funding allowed the SAC to partner with the ERDC to develop a new justice data warehouse similar to the ERDC's P20W data warehouse (P20W data warehouse has longitudinally-linked data from early learning, K-12 education, K-12 discipline, higher education, and workforce data). In addition to the Jail Booking and Reporting System data, the justice data warehouse has added prison admission data from DOC, court data from AOC, and sentencing data from the Caseload Forecast Council. All the records in the justice data warehouse will be linkable with the P20W data, thus providing a data-rich source for studies. In September 2018, the SAC was awarded another three-year Bureau of Justice Statistics grant that will build upon the work started under the 2015 award.

Sharing Sentencing Outcomes

A U.S. District Court judge wrote that judges “are not typically rogue intellectuals looking to impose their idiosyncratic views of criminal justice policy on the world” and added that they are responsive to information about the outcomes of similar cases.⁴⁵ The superior court judges on the SGC have indicated they feel the same way and desire to know prior to handing down a sentence what the sentencing outcomes are for similar cases across the state.

As mentioned above, the SAC has the justice data warehouse which contains statewide felony conviction data. Creating an interface to this data would provide judges the sentencing outcome information they seek when sentencing, and may even decrease unwarranted disparity. The SGC and the Caseload Forecast Council receive emails from attorneys, inquiring what the sentence was for cases similar to the case they have, so this would assist prosecutors and defense attorneys as well.

SGC Coordinator Position

In 2011, the legislature passed Engrossed Substitute Senate Bill 5891 which eliminated the SGC as an independent agency and moved it under OFM. That bill allocated .5 FTE to OFM for staff to assist the SGC and the Sex Offender Policy Board. The budget appropriation given to complete this SRA review included funds to allow the SGC Coordinator to work full-time with the SGC for the duration of the review.

SGC members agreed that if the SGC is to continue to provide valuable work and input to the legislature, it is vital to have staff available to support that work.

Recommendations

Recommendation – Standard Recidivism Report

The SGC recommends the creation of a research position dedicated to completing recidivism research on justice-involved individuals. This is a critical piece of information used when determining policy and is lacking in regularity in this state. The SAC has the justice data warehouse which is linked to ERDC's P20W data warehouse and can provide a data-rich source for recidivism studies.

⁴⁵ Lynch, G. E. (2005). Sentencing: Learning from, and worrying about, the states. *Columbia Law Review*, 105(4), p 933-942.

Recommendation – Sentencing Outcomes Interface

The SGC recommends investigating the creation of a user interface into the justice data warehouse to allow judges to query records of similar cases and observe what the sentencing outcomes were across the state to aid in their sentencing decision. This would be of benefit to prosecutors and defense attorneys, too, as they work on their cases.

Recommendation – Full-time SGC Staff

The SGC recommends the .5 FTE allotted to the SGC be increased to 1 FTE. Having a dedicated staff person to assist its members is essential to the group's ability to carry out its statutory duty.

Appendix A

PROPOSED INCREMENTAL SENTENCING GRID

Offender Score *all ranges are in months											
	0	1	2	3	4	5	6	7	8	9+	
S e r i o u s n e s s L e v e l	LEVEL XVI	Life sentence without parole/death penalty for offenders at or over the age of eighteen. For offenders under the age of eighteen, a term of twenty-five years to life.									
	LEVEL XV	192 - 384	200 - 400	209 - 416	217 - 433	225 - 449	233 - 466	250 - 499	270 - 540	296 - 592	329 - 658
	LEVEL XIV	123 - 220	134 - 234	144 - 244	154 - 254	165 - 265	175 - 275	195 - 295	216 - 316	257 - 357	298 - 397
	LEVEL XIII	98 - 197	107 - 214	115 - 230	123 - 246	132 - 263	140 - 280	156 - 312	173 - 346	206 - 410	238 - 476
	LEVEL XII	74 - 148	82 - 163	89 - 176	96 - 192	103 - 205	110 - 221	130 - 259	142 - 283	167 - 332	192 - 382
	LEVEL XI	62 - 122	69 - 137	76 - 150	82 - 163	89 - 176	96 - 190	117 - 233	127 - 253	148 - 294	168 - 336
	LEVEL X	41 - 82	46 - 90	50 - 98	54 - 107	58 - 115	62 - 122	78 - 156	86 - 173	103 - 205	119 - 238
	LEVEL IX	25 - 49	29 - 58	33 - 65	37 - 73	41 - 82	46 - 90	62 - 122	70 - 139	86 - 173	103 - 205
	LEVEL VIII	17 - 32	21 - 41	25 - 49	29 - 58	33 - 65	37 - 73	54 - 107	62 - 122	70 - 139	86 - 173
	LEVEL VII	12+ - 24	17 - 32	21 - 41	25 - 49	29 - 58	33 - 65	46 - 90	54 - 107	62 - 122	70 - 139
	LEVEL VI	12+ - 17	12 - 24	17 - 32	21 - 41	25 - 49	29 - 58	37 - 73	46 - 90	54 - 107	62 - 122
	LEVEL V	6 - 12	12+ - 17	12+ - 20	12+ - 24	18 - 35	26 - 52	33 - 65	41 - 82	50 - 98	58 - 115
	LEVEL IV	0 - 12	0 - 12	12+ - 17	12+ - 20	12+ - 24	18 - 35	26 - 52	34 - 68	42 - 84	50 - 101
	LEVEL III	0 - 12	0 - 12	0 - 12	0 - 12	12+ - 17	14 - 26	18 - 35	26 - 52	34 - 68	41 - 82
	LEVEL II	0 - 12	0 - 12	0 - 12	0 - 12	12+ - 17	12+ - 22	14 - 26	18 - 35	26 - 52	34 - 68
	LEVEL I	0 - 12	0 - 12	0 - 12	0 - 12	0 - 12	0 - 12	12+ - 17	12+ - 22	14 - 26	18 - 35

Appendix B

PROPOSED GUIDED DISCRETION SENTENCING GRID

STEP 1 - PRESUMPTIVE RANGES

		OFFENDER SCORE										
		0	1	2	3	4	5	6	7	8	9	10+
C L A S S	A+	10y3m-28y	13y-30y	16y-30y	19y-31y	21y-31y	24y-35y	25y-37y	27y-40y	29y-43y	35y-45y	37y-50y
	A	6y-15y	8y-16y	10y-17y	11y-19y	13y-20y	14y-22y	15y-24y	18y-25y	20y-27y	21y-28y	23y-30y
	A-	3y6m-7y6m	4y6m-8y	5y-9y	5y-9y	6y-9y	7y-10y	8y-11y	9y-12y	10y-14y	11y-17y	14y-22y
	B+	1y9m-3y6m	2y-4y	2y6m-5y	3y-6y	4y-6y	4y6m-7y	5y-7y	6y-9y	6y-9y	8y-10y	10y-17y
	B	6m-1y6m	9m-1y6m	1y-2y	1y2m-2y	1y4m-2y6m	1y6m-3y	2y-4y	3y-5y	4y-6y	5y-7y	6y-8y
	B-	0m-1y	6m-1y4m	1y+-1y6m	1y4m-2y	1y4m-2y	1y8m-2y6m	1y8m-2y6m	2y-3y	2y-3y4m	2y-4y	2y6m-5y
	C+	0m-1y	9m-1y	1y+-1y4m	1y+-1y4m	1y2m-1y8m	1y2m-1y8m	1y4m-2y	1y4m-2y	1y6m-2y6m	1y6m-2y6m	2y-3y6m
	C	0-3m	0-6m	0-9m	3m-1y	3m-1y	3m-1y	6m-1y	9m-1y	1y+-1y6m	1y+-2y	1y6m-3y
	C-	0-1m	0-2m	0-3m	0-6m	0-9m	0-1y	3m-1y	3m-1y	6m-1y	6m-1y	9m-1y

STEP 2 – DISCRETIONARY RANGES

		OFFENDER SCORE										
		0	1	2	3	4	5	6	7	8	9	10+
C L A S S	A	1y+-Life	1y+-Life	1y+-Life	5y-Life	5y-Life	5y-Life	5y-Life	5y-Life	5y-Life	5y-Life	5y-Life
	B	0-5y	0-5y	0-10y	6m-10y	6m-10y	1y+-10y	1y+-10y	3y-15y	3y-15y	4y-15y	4y-15y
	C	0-3y	0-3y	0-3y	0-3y	0-4y	0-4y	0-5y	6m-5y	6m-5y	6m-5y	9m-5y

Appendix C

Examples of Offenses in Presumptive Grid Classifications

Statute (RCW)	Offense	Presumptive Grid Class	Current Class	Current Seriousness Level
29A.84.680(1)	Absentee Voting Violation	C-	C	Unranked
16.52.205(2)	Animal Cruelty 1	C-	C	Unranked
16.52.205(3)	Animal Cruelty 1 - Sexual Contact or Conduct	B-	C	3
9A.36.011	Assault 1	A	A	12
9A.36.021(2)(a)	Assault 2	B-	B	4
9A.36.021(2)(b)	Assault 2 With a Finding of Sexual Motivation	B	A	4
9A.36.031(1)(a-g) & (i-j)	Assault 3 – Excluding Assault 3 of a Peace Officer with a Projectile Stun Gun	B-	C	3
9A.36.031(1)(h)	Assault 3 - Of a Peace Officer with a Projectile Stun Gun	B-	C	4
9A.36.041(3)	Assault 4 (third domestic violence offense)	B-	C	4
9A.52.020	Burglary 1	B	A	7
9A.52.030	Burglary 2	B-	B	3
9A.44.083	Child Molestation 1	A-	A	10
9A.44.086	Child Molestation 2	B	B	7
9A.44.089	Child Molestation 3	B	C	5
9A.90.040	Computer Trespass 1	C	C	2
69.50.4011(2)(a-b)	Create, Deliver or Possess a Counterfeit Controlled Substance - Sched I or II Narcotic or Flunitrazepam or Methamphetamine	B-	B	DG-2
69.50.4011(2)(c-e)	Create, Deliver or Possess a Counterfeit Controlled Substance - Sched I-II Nonnarcotic, Sched III-V Except Flunitrazepam or Methamphetamine	B-	C	DG-2
69.50.401(2)(b)	Deliver or Possess with Intent to Deliver - Methamphetamine	B-	B	DG-2

Appendix D

Sentencing Enhancement Reference Guide

Enhancement	Length	Mandatory	Consecutive or Concurrent	Special Allegation Required	Applies to Attempt, Conspiracy, or Solicitation	Enhancement May Not Be Reduced if Sentence Exceeds Statutory Max	Eligible for Earned Release Time	Notes
Felony Traffic								
Vehicular Homicide – DUI	24 months per prior offense	Yes	Consecutive to all other sentencing provisions for all offenses under Chapter 9.94A RCW	No	Not mentioned (does this mean it does not apply to anticipatories?)	(does the absence of language mean that this does not apply?)	Yes	
Attempting to Elude a Police Vehicle	12 months + 1 day	No	Concurrent (consecutive not mentioned = concurrent?)	Yes	Not mentioned		Yes	
Minor Child	12 months for each passenger under 16	Yes	Consecutive to all other sentencing provisions	No	Not mentioned	Correct	No	
Weapons								
Firearm	<u>Initial</u> 5 years 3 years 18 months <u>Subsequent</u> 10 years 6 years 3 years	Yes	Consecutive to all other sentencing provisions for all offenses under Chapter 9.94A RCW	Yes	Attempt Conspiracy Solicitation	Correct	No	Enhancement also applies to accomplice

Enhancement	Length	Mandatory	Consecutive or Concurrent	Special Allegation Required	Applies to Attempt, Conspiracy, or Solicitation	Enhancement May Not Be Reduced if Sentence Exceeds Statutory Max	Eligible for Earned Release Time	Notes
Deadly Weapon	<u>Initial</u> 2 years 1 year 6 months <u>Subsequent</u> 4 years 2 years 1 year	Yes	Consecutive to all other sentencing provisions for all offenses under Chapter 9.94A RCW	Yes	Attempt Conspiracy Solicitation	Correct	No	Enhancement also applies to accomplice
Drug-Related								
Protected Zone	24 months	No	Consecutive to all other sentencing provisions for all offenses sentenced under Chapter 9.94A RCW	No	Not mentioned		Yes	Also doubles the fine and the maximum imprisonment
Presence of a Child	24 months	No	Consecutive to all other sentencing provisions for all offenses sentenced under Chapter 9.94A RCW	Yes	Not mentioned		Yes	
Correctional Facility	18 months 15 months 12 months	No	Concurrent	No	Attempt Conspiracy Solicitation		Yes	Enhancement also applies to accomplice
Sex Offenses								
Sexual Conduct in Return for a Fee	12 months	No	Consecutive?	Yes	Attempt Conspiracy Solicitation		Yes	

Enhancement	Length	Mandatory	Consecutive or Concurrent	Special Allegation Required	Applies to Attempt, Conspiracy, or Solicitation	Enhancement May Not Be Reduced if Sentence Exceeds Statutory Max	Eligible for Earned Release Time	Notes
Sexual Motivation	<u>Initial</u> 2 years 18 months 12 months <u>Subsequent</u> 4 years 3 years 2 years	Yes	Consecutive to all other sentencing provisions for all offenses sentenced under Chapter 9.94A RCW	Yes	Attempt Conspiracy Solicitation	Correct	No?	
Other								
Assault Law Enforcement Employee w/Firearm	12 months	No	Concurrent	Yes	Not mentioned		Yes	
Criminal Street Gang-related	Standard range multiplied by 125%	No	NA	Yes	Not mentioned		Yes	Similar aggravating factor available (RCW 9.94A.535(3)(aa))
Robbery of a Pharmacy	12 months	No	Concurrent	Yes	Not mentioned		Yes	

Appendix E

Include CSG Final Report

Sentencing Guidelines Commission
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