



STATE OF WASHINGTON

## SENTENCING GUIDELINES COMMISSION

*Helen Sommers Building, PO Box 43124 • Olympia, Washington 98504-3124 • (360) 902-0425*

### MEETING MINUTES

**November 12, 2021 9:00am – 12:00pm**

**Zoom**

Members Present:

Hon. J. Wesley Saint Clair, Chair  
Councilmember Phillip Lemley  
Kimberly Gordon  
Hon. Josephine Wiggs-Martin  
Jennifer Albright  
Senator Claire Wilson  
Secretary Cheryl Strange  
Kecia Rongen  
Rep. Tarra Simmons  
Rep. Gina Mosbrucker  
Hon. William Houser  
Greg Link  
Hon. Sharonda Amamilo  
Kathleen Harvey  
Jon Tunheim

Members Absent:

Senator Mike Padden  
Tony Golik  
Norrie Gregoire  
Councilmember Derek Young  
Gina Cardenas  
Sonja Hallum  
Chief Cherie Harris  
Tim Wettack  
Hon. Stanley Rumbaugh

Guests:

Sean Murphy, Deputy Secretary,  
DOC  
Dr. Karl Jones, DOC

Staff:

Keri-Anne Jetzer

#### **I. CALL TO ORDER**

Chair Saint Clair called the meeting to order. He welcomed Senator Claire Wilson to the Commission.

#### **II. APPROVAL OF MINUTES**

##### **MOTION #21-59: APPROVE MINUTES FROM OCTOBER 2021 MEETING**

**MOVED:** Judge Houser  
**SECONDED:** Judge Amamilo  
**PASSED:** Unanimous  
**ABSTAIN:** Jon Tunheim

### **III. CRIMINAL SENTENCING TASK FORCE UPDATE**

The Chair asked Jon Tunheim, one of the Task Force co-chairs, to brief members on the current work of the CSTF. Jon reported that, in the CSTF's Sentencing Grid work group, member discussions were moving from grid structure to individual offenses and creating complexity in the discussions. Therefore, the work group has worked at pulling those two aspects apart and focused on the structure and features of the sentencing grid with the understanding that there will be an examination of how offenses are ranked within a new grid and whether some need to be recalibrated.

Jon went on to report that the full Task Force meeting in December will review all the recommendations that have been proposed and as well as what legislation is still pending in the Legislature. The CSTF will take the month of January off and resume in February. The work groups, however, will continue to meet. Chair Judge Saint Clair mentioned an issue he is interested in is to add 'sunshine' every 2-3 years to the system so the racial disproportionality that current exists can be addressed in a timelier manner.

The Chair asked Greg Link if he had any comments since he also participates in the Sentencing Grid work group. Greg agreed with Jon's assessment. He added that the Washington State Institute for Public Policy study showed that racial disparity is found not just in the mechanical features of the grid (e.g., multipliers, aggravating factors, etc.) but also in areas where judicial discretion is called for. The work group is challenged with alleviating the racially disparate pressure in the mechanical features while finding safety values that don't trigger the disparity that comes with the exercising of discretion.

Chair Judge Saint Clair expressed hope that whatever the product ends up being, that it does not replicate what has been done in the past.

### **IV. PRETRIAL CREDIT WORK GROUP UPDATE**

Chair Judge Saint Clair briefed members of the status of this work group. He said the group still needs representation from the Superior Court Judges' Association, Prosecuting Attorneys' Association, and the Superior Court Clerk's Office. Jon Tunheim replied that he would check with Tony Golik. Councilmember Lemley volunteered for the work group.

### **V. ADDING POSITIONS TO THE SGC MEMBERSHIP**

Chair Judge Saint Clair reminded members of the Commission's discussions last year and the resultant letter he submitted to the Governor and the Chairs and Ranking Members of the criminal justice-related Legislative committees.

Judge Amamilo asked if there were any reasons to expect pushback on this request. Chair Judge Saint Clair replied that the announcement of the Blake decision during the last Legislative session changed the priority of the Legislature and many bills fell off the grid. Jeannie Darneille suggested putting together a message point to share with

staff and the committee Chair to explain what the motivation for the change is. Rep. Mosbrucker noted many Legislators are prefiling their legislation in the beginning of December and suggested having that conversation soon.

#### **VI. REQUESTED FEEDBACK ON PROPOSED LEGISLATION**

This item was tabled until members from the requesting organization were present.

Rep. Simmons commented that she had a few bills that she would be sending to the SGC for feedback once they are finalized.

#### **VII. CRIMINAL CODE REVIEW COMMITTEE**

Keri-Anne explained the setup of the new document and hoped it was in line with what members had requested at the last meeting. Members of the Criminal Code Review committee talked about what they took into consideration when making the recommendations.

Jon Tunheim suggested that when an offense had not had a conviction in the past twenty years that either prosecutors have another tool they are using to deal with the conduct, or that the offense addresses something that is so rare in its occurrence that there aren't any charges for it. Greg Link agreed that he didn't see its utility as a bargaining tool if it hadn't been used in twenty years. As he looked through the list, he said it seems a lot of the offenses are covered under other statutes. Specifically looking at the unranked offenses in Chapter 74.09 RCW on the list, he noted that all but one of them have been completed unutilized. Whatever purpose they were meant to serve forty-some years ago hasn't been served or the problem resolved itself. He didn't see the purpose of keeping such statutes on the books to create confusion.

Judge Houser proffered that this type of offense should be kept on the books even though it has not been used because it allows the community to understand that this type of conduct is illegal. He believed it should remain an unranked felony.

#### **MOTION #21-60: ACCEPT COMMITTEE RECOMMENDATION TO REPEAL RCW 74.09.240(1) and (2)**

**MOVED:** Kimberly Gordon

**SECONDED:** Greg Link

**PASSED:** WITHDRAWN

Jon Tunheim realized that he wasn't looking at the statute when he made his earlier comments and said he thought it probably had been underutilized, but since it is pretty specific, he wasn't sure if there was a good alternative crime.

Judge Wiggs-Martin shared her vision what the final report will look like and suggested members look at the forest instead of at individual trees. She would like to see a recommendation in the report entertain that the Legislature examine offenses for which there have been no convictions in the past twenty years since they Legislature have more information, include the origins of the offenses. The crimes under RCW

74.09.240(1) and (2) are representative of a lot of other crimes that contribute to confusion and disparities. Chair Judge Saint Clair thought that was a great way to frame it.

Greg Link concurred that that might be the better way to look at it. Regarding crimes that have not had a conviction in twenty years, he thought the recommendation to the Legislature ought to be to repeal then unless there are specific reasons not to. He went on to say that he thought this specific RCW was related to the Health Care Authority, even though it doesn't specifically say that, and it predates the HCA. He conjectured that his child's orthodontist may have violated this law by giving them a ticket for a prize drawing for referring someone to the practice. He pointed out the statutes are rather vague and may be unconstitutional in terms of their vagueness. They address a problem that doesn't exist, that prosecutors are not charging, or that law enforcement are not seeing. He suggested perhaps they could become civil penalties instead.

Kimberly Gordon suggested that if one of the goals is to make the guidelines less complex, it should suggest that these crimes, which are rarely, if ever, used, should be removed. She withdrew her prior motion (and Greg Link agreed) and made a new motion that she felt fits within the goal of simplification and reduces some of the work the SGC would have to do at this stage. She acknowledged that if the Legislature accepts the recommendation to repeal and reexamine, they may bring it back to the SGC and ask if there are any modifications that need to be made to existing statutes to include behaviors that should still be criminalized.

**MOTION #21-61: RECOMMEND THE LEGISLATURE REPEAL ALL UNRANKED OFFENSES THAT HAVE NOT BEEN USED IN THE LAST 20 YEARS AND, IF THEY WISH, REEXAMINE THE BEHAVIOR COVERED IN THOSE UNRANKED OFFENSES TO DETERMINE WHETHER THE BEHAVIOR STILL NEEDS TO BE CRIMINALIZED. IF IT DOES, RECOMMEND THE RECRIMINALIZATION OF THAT BEHAVIOR OCCUR BY MODIFICATION AS EITHER A RANKED OFFENSE OR GROSS MISDEMEANOR.**

**MOVED:** Kimberly Gordon  
**SECONDED:** Greg Link  
**PASSED:** Y-5; N-5  
**\*REVOTE:** Y-6; N-4

\*There was confusion about whether the Chair was eligible to vote. Keri-Anne clarified that all members are voting members except the Legislative members. There was a misunderstanding when the Chair asked if he could vote for Motion 21-61. Keri-Anne thought he asked if he had voted, and she said no. Because the Chair had not voted and a Legislative member did vote, there was a re-vote on Motion #21-61.

Rep. Mosbrucker commented that each one of these offenses arose out of a concern which was fixed by the Legislature with a new law. If it wasn't being used and not

being charged under another RCW, repealing it takes that crime away and the message will be that the SGC made it ok to do that behavior.

Jon Tunheim agreed with Judge Wiggs-Martin's sentiment that it would be cumbersome to review this crime by crime and that there may be a way to accomplish this more categorically. He expressed concern about a recommendation that presumes repeal and then asks the Leg to consider recriminalizing as it didn't feel like a clean way to do it from a Legislator's standpoint. He recognized that the bills impacted other stakeholders and inquired if they had been consulted by the committee. Regarding the more administrative types of crimes at the state level, he was sure that law enforcement doesn't have the resources or the expertise to investigate them. They are very focused on the criminal code. Jon wondered if there were state agencies that were impowered to investigate these types of administrative crimes. He thought there may be no prosecutions because there is no state agency doing an investigation or they are doing it solely on a civil enforcement basis.

Kimberly Gordon wondered if there was a way for the SGC to put out notice to any stakeholders who are interested that this issue is coming up for consideration and have them contact the SGC. If there is a process that would give the SGC more of that information, she would be interested in hearing about it.

Judge Wiggs-Martin clarified that she did not mean to suggest that any crime that has no convictions in twenty years be repealed. She understood that some statutes had their time and place, but those that have been around for nearly forty years and have had no convictions in the past twenty years are due for a reexamination. She felt it was time to move beyond the status quo. The Judge agreed with Kimberly Gordon that the SGC's report to the Legislature should be responsive enough so that the Legislature does not feel the need to ask the SGC to revisit these offenses.

Greg Link asked members what they see as the role of unranked offenses. Chair Judge Saint Clair agreed that question is a great starting point. Most of the recommendations shown so far are to leave as an unranked offense. Are unranked offenses a good tool to have for counsel in moving cases forward, he wondered. Ninety-seven percent of cases are resolved by plea agreement. Are unranked offenses a mechanism that is utilized? Chair Judge Saint Clair was interested to hear the practitioners' view of the usefulness.

David Trieweiler replied that the committee had talked about that, too. The committee's conclusion was that unranked offenses do serve a purpose. He said David Boerner explained their values in his publications<sup>1</sup>, which included being a good way to account for conduct that is less culpable than a ranked offense and being used as a negotiating tool supported by both prosecution and defense. Keri-Anne added that

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<sup>1</sup> Regarding unranked offenses, "This category was created for low-frequency crimes whose widely varying nature justified greater judicial discretion. Since unranked crimes have a presumptive sentence range of zero to twelve months, a change of convictions from ranked seriousness levels to this unranked category significantly expanded judicial discretion." David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, 28 CRIME & JUST. 71 (2001). <https://digitalcommons.law.seattleu.edu/faculty/634>

unranked offenses offer greater judicial discretion with a presumptive term of 0 – 12 months than some ranked offenses.

Judge Houser added that there is another public policy decision that is made, which is whether the conduct justifies a prison sentence. Even a low ranked felony will result in a prison sentence. He agreed they do serve a purpose and he hoped they would continue.

Chair Judge Saint Clair asked if any members took the position that unranked felonies should become ranked or could think of an argument for that position. Greg Link replied that the recommendation doesn't necessarily need to be that they become ranked. If the behavior doesn't warrant prison time, the recommendation could be that they become misdemeanors or civil infractions. He added, however, unranked offenses with no conviction in the last twenty years have not been a bargaining chip for anyone as they have not been used.

**MOTION #21-62: ACCEPT COMMITTEE RECOMMENDATION TO LEAVE RCW 74.09.240(1) and (2) AS UNRANKED CLASS C FELONIES OR CONSIDER REPEALING BECAUSE OF ZERO CONVICTIONS IN THE LAST 20 YEARS.**

**MOVED:** Judge Houser  
**SECONDED:** Jon Tunheim  
**PASSED:** UNNECESSARY AS MOTION #21-61 WAS REVOTED ON  
**ABSTAIN:** Judge Wiggs-Martin

Judge Houser explained that he made this motion because there was a split decision on the previous motion so there is clearly a significant number of members who would be in favor of repealing this. In order to acknowledge that, we need to at least add something into a recommendation that suggests to the Legislature that repealing it because there has not been a conviction in the past twenty years should be considered. Chair Judge Saint Clair thought it was a good compromise. Some members thought the motion was not really a recommendation.

**VIII. OTHER BUSINESS**

Chair Judge Saint Clair also informed members that he was invited to present to the Supreme Court on racial disproportionality. He explained they are holding a series of hearings to undertake the goal to ensure fairness, equity, and justice in every court room in every instance. They invited the SGC Chair to present on the work the SGC is doing in helping to address that mission.

The Chair recognized Secretary Strange from DOC and the work the Department has done toward reducing the use of restrictive housing. Secretary Strange confirmed that DOC has stopped using disciplinary segregation as a punishment.

Deputy Secretary Sean Murphy and Dr. Karl Jones followed up with on information that the SGC requested at the last meeting regarding restrictive housing and

disproportionality. Their presentation was on Misconduct, Restrictive Housing and Race. The data showed disproportionate results of who received restrictive housing, noting that the population is already disproportionate. Deputy Secretary Murphy reported that DOC's next steps include training, sharing the data, revising 137-30 WAC for earned time so it can be gained when someone is in restrictive housing but still participating in programming, alternatives to restrictive housing such as transition pods, and continuing to work with other entities such as UC-Irvine and the Vera Institute.

There was interest in reports on the difference in outcomes and, ultimately, recidivism before and after the change in DOC's restrictive housing policy. Chair Judge Saint Clair asked DOC to share with the SGC any information they have or will produce. Secretary Strange talked about an agreement with the Department of Social and Health Services – Research and Data Administration that is in the works to provide analyses on many more aspects than what DOC tracks.

**IX. ADJOURNMENT**

**APPROVED AND ADOPTED BY THE SENTENCING GUIDELINES COMMISSION**



12/10/21

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Judge J. Wesley Saint Clair, Chair

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Date