



STATE OF WASHINGTON

SENTENCING GUIDELINES COMMISSION

Helen Sommers Building, PO Box 43124 • Olympia, Washington 98504-3124 • (360) 688-8511

MEETING MINUTES

September 9, 2022 9:00am – 12:00pm

Zoom

Members Present:

Hon. J. Wesley Saint Clair, Chair
Kimberly Gordon
Hon. Sharonda Amamilo
Jon Tunheim
Rep. Gina Mosbrucker
Secretary Cheryl Strange (proxy: Sean Murphy)
Jennifer Albright
Senator Claire Wilson
Greg Link
Norrie Gregoire
Councilmember Derek Young
Marc Baldwin
Rep. Tarra Simmons
Hon. Stanley Rumbaugh

Members Absent:

Senator Mike Padden
Tony Golik
Chief Ken Thomas
Kathleen Harvey
Kecia Rongen
Gina Cardenas
Hon. William Houser
Tim Wettack
Hon. Josephine Wiggs

Staff:

Keri-Anne Jetzer

Guest:

Mac Pevey, DOC

I. CALL TO ORDER

Chair Judge Saint Clair called the meeting to order.

II. APPROVAL OF MINUTES

MOTION #22-48: APPROVE THE MINUTES FROM AUGUST 2022

MEETING

MOVED: Marc Baldwin
SECONDED: Rep. Mosbrucker
PASSED: Passed
ABSTAINED: Judge Rumbaugh

III. COMMITTEE ON [HB 1844](#) - CREATING THE OFFENSE OF UNLAWFUL BRANDING OF ANOTHER PERSON - UPDATE

Jon Tunheim reported that the work group started looking at the original bill, what the legislative intent was, what behavior they are trying to get at and if it is already encapsulated in code. They recognized the legislative intent was focused on the roll this offense has in the human trafficking arena and decided it would be better placed within the kidnapping/human trafficking chapter. They then worked on why/how it is different than assault. A legislative intent section would describe the issue that is driving this crime. The hate crime legislative intent was used as a template to articulate that the bill is focused on the harm caused by a person being marked in the human trafficking context and the display of ownership. Jon added that 'burn or other scar' was added to the types of identifiable marks that could be used to claim ownership over the other person.

Judge Amamilo added that most of the time was spent on the intent language because of the prior discussion of the full membership about why the offense doesn't fit under assault. She felt the extra time spent working on the intent language to explain why this is different than assault was very valuable.

Kimberly Gordon felt it was important to complete this task in a way that reduces complication in the SRA. She felt this product makes it clear to prosecutors, law enforcement, and the public that the same conduct is not to be punished under both assault and branding, but that the branding statute is the one to be used. She also felt comfortable that this allowed for defenses of this being a voluntary act as opposed to one that was forced upon them.

Rep. Mosbrucker expressed her gratitude for the work that was put into this bill.

Judge Rumbaugh wondered if the court could consider branding that took place in another state as an aggravating factor. Jon Tunheim thought it would take something more egregious than the branding itself. He added if the branding was done in a way that would satisfy a jury that it was tantamount to torture, there is an aggravating factor for deliberative cruelty. He admitted the work group hadn't considered aggravating factors and thought that was a great question. Kimberly Gordon agreed and said the bill defines what branding is but that language could be added to the intent section to make it clear that all of those are contemplated as to what goes into branding.

Greg Link asked Jon Tunheim how frequently he thought prosecutors would be using this statute. Jon replied that, based on his experience, he has not seen a case come into his office where branding was used. Through trainings in the human trafficking arena, he said he has learned that this conduct is becoming more prevalent in that industry. Greg said he appreciated the intent but is not convinced that another crime needs to be added to statute and doing so runs counter to adding complexity to the code. Judge Amamilo replied that this conduct is found in some areas or corridors and not in others. She reminded people of the harm that is caused by this conduct. Jon Tunheim

added that this draft language is meant to cover not only human trafficking but also labor trafficking.

Kimberly Gordon offered to send proposed language related to aggravators to the other work group members for feedback.

There was discussion around whether this would or could become a strike offense.

Judge Saint Clair commended the committee for their work on this task.

IV. DEPARTMENT OF CORRECTIONS, RCW 9.94.041 – FOLLOW UP

Keri-Anne reminded members of the discussion related to this offense at the last meeting where DOC was asked to provide their perspective on this statute. Secretary Strange didn't feel prepared to offer input at that time and asked Sean Murphy, DOC Deputy Secretary, and Mac Pevey, DOC Assistant Secretary – Community Corrections Division, to provide information to the members.

Sean Murphy presented on the effects of contraband in the DOC facilities. He reported that contraband is a top safety concern for DOC and includes weapons, cell phones, drugs and other items. Contraband increases gang activity, increases violence to staff and people who are incarcerated, increases health and safety concerns, and can cause overdoses and death. Because DOC was asked if it prefers this offense remain unranked or be ranked, he reported that DOC's preference is to rank the offense as that allows the sanction to be applied consistently. He observed that while this offense addresses the problem of those who are in DOC's custody, it does not address those who introduce the contraband into the facilities. DOC seeks help from the criminal justice stakeholders by strengthening RCW 9.94.045, which is limited to narcotic drugs or controlled substances, and by law enforcement, prosecutors and judges to hold people accountable.

Mac Pevey added that DOC's position on ranking RCW 9.94.041(2) is not with the intent to bring additional penalties but rather so that it would add certainty to enforcement of current statutes and also set the expectation for incarcerated individuals on what the potential penalty might be. As an unranked offense, a person can receive a sentence between 0 and 365 days. As a ranked offense, there is a shorter presumptive sentencing range that would be used.

There was discussion about DOC's position, what DOC does when employees bring contraband into facilities, and that substance use disorder treatment often isn't available to individuals until later in their confinement stay.

Rep. Simmons asked what is being done about young men who are serving 50 or 60 years in prison who don't have the opportunity for a second chance, for resentencing, or for parole. She asked where the balance was in today's conversation. Judge Rumbaugh reminded members of the numerous legislative proposals on second look processes that have been introduced over the years, including one from the SGC.

Noting that none of them have passed the Legislature, he didn't think the absence of such a process was due to the lack of discussion or support from the SGC.

Jon Tunheim thanked Sean and Mac for providing this additional information to help further the SGC's discussion. Jon said he, himself, would not have any interest in criminally prosecuting or seeking additional punishment against an incarcerated individual struggling with substance use disorder who gets ahold of and uses some substance while incarcerated. He does, though, have an interest in a criminal justice response to those who are involved in the smuggling of contraband into the institutions, regardless of who they are. He asked what the DOC response is toward someone who is incarcerated, has a substance use disorder and uses. Sean Murphy replied that one of the things they do is take a look at the behavior of the incarcerated individual through their classification system and then apply the appropriate resources when they are available. Outside of that, the incarcerated individual who introduced the contraband will receive an infraction, which goes through the hearing process. For anyone else, such as an employee or vendor, a referral to local law enforcement is made.

Sean Murphy was asked if DOC provides medication assisted treatment. He replied that DOC does not have the resources to offer that treatment. Sen. Wilson talked about the need for resources and giving people treatment before they release from custody.

Rep Simmons commented that as the SGC and Legislature suggest new crimes or increase penalties, more money is shifted to DOC for security and prisons. She pointed out that money could have been spent on resources and services that treat the root causes.

Judge Saint Clair thanked everyone for participating in this conversation. He recognized that it is a continuing discussion as members try to change the focus to rehabilitative practices.

V. SENTENCING GUIDELINES COMMISSION FUTURE

Keri-Anne was asked at the last SGC meeting to include this as an agenda item. She informed members that a meeting was taking place after this SGC meeting to bring together interests from the Criminal Sentencing Task Force, the SGC, and the Office of Financial Management who are all working on this topic.

Judge Saint Clair noted that the CSTF concludes in June 2023 and has a report due in December 2022. It is expected that there will be some on-going cleanup work that will be handed off to the SGC. The meeting will be about staffing and making sure the SGC can fulfill the task. Marc Baldwin reported that OFM is agnostic about the outcome but wants to make sure the SGC put its best foot forward in whichever direction it decides to go. The budget placeholder he mentioned a few meetings ago still remains.

VI. CRIMINAL CODE REVIEW COMMITTEE UPDATE

RCW 9.47.090 – Maintaining a Bucket Shop

Keri-Anne reported that this was one of the two unresolved items from the last meeting. She was directed to contact the Attorney General’s office to learn if they used RCW 9.47.090. She called them twice but has not received any response. She suspects she would need to submit a public disclosure request and is happy to move forward with that if the members wish for her to continue down that path. She also requested from the CFC a copy of the J&S for the three known convictions. The CFC only had the J&S for one of the convictions, and it did not include any information that would be helpful.

Judge Saint Clair thought submitting a request to the AGO and looking at the certification of probable cause would be helpful.

Councilmember Young commented that this offense is severely archaic, and he suggested it be repealed. He said it appears the offense is related to secondhand brokers who would invest or gamble on one’s behalf.

Jon Tunheim sent an email to the Spokane County prosecuting attorney to see if he had any insight or background on the convictions that occurred there and will report back to the SGC.

RCW 9.94.041(1) – Possession of controlled substance by prisoner (state facility)

Keri-Anne explained that the CFC does not distinguish between subsection 1 (state facility) and subsection 2 (local facility) of this statute, while the court charging data does. Because convictions for both subsections are collected under one RCW, there was likely many convictions for the local facility (RCW 9.94.041(2)). That RCW fell under the blanket motion to repeal because the conviction data showed no convictions for it in the past 20 years. She presented the racial breakdown and average sentence length by race category of the convictions for RCW 9.94.041(1) collected by the CFC. She was not able to pull population numbers for comparison by the time of the meeting.

Since the members decided to add this to the parking lot, Keri-Anne will provide the population data for comparison at the next meeting. She cautioned members that the CFC data is based on what is reported on the J&S and includes Hispanic as a race while the OFM Census data does not.

MOTION #22-49: REMOVE RCW 9.94.041(1) FROM REPEAL MOTION, ADD BACK ON TO UNRANKED LIST FOR REVIEW

MOVED: Judge Rumbaugh
SECONDED: Jennifer Albright
PASSED: Passed (2 opposed)

RCW 9A.36.060 - Promoting a suicide attempt

Kimberly Gordon inquired how many convictions occurred after the Death with Dignity Act went into effect. The Act went into effect in March 2009 so most of the convictions in the past 20 years occurred after the Act was in effect.

Judge Rumbaugh thought, at a minimum, the statute's language would have to be consistent with the Death with Dignity Act, but he wasn't sure what that language would be. Keri-Anne remarked that there is an unranked offense for Coerce a Patient to Request Life Ending Medication, which is under Chapter 70.245 RCW. That is a class A offense and a strike offense, while Promoting a Suicide Attempt is a class C offense.

Judge Saint Clair asked if the SGC should be recommending to the Legislature whether the offense should be ranked or recommend the level at which this should be ranked. Keri-Anne told members that she found archive material from the early 1990s that reported the SGC had been asked to look at unranked offenses. She said the reports show that the SGC used to make recommendations for seriousness level rankings and offense classifications. Jon Tunheim would support the SGC recommending seriousness levels. He noted that one of the convictions was in his county, so he is going to look into that.

Judge Rumbaugh thought that the most recent focus of this statute would be related to social media with highly publicized cases where people have been prodded into committing suicide. Jennifer Albright suggested that Juvenile Rehabilitation might want to weigh in on this because, with the social media aspect, that would impact juveniles. She said if there is discussion about where to rank this, the juvenile ranking would need to be considered as well. Keri-Anne noted that the court case data separated juvenile cases from adult cases and the court cases shown for this offense are only for adults. Keri-Anne said she didn't know any more about the nuances of the crimes committed.

Rep. Mosbrucker remarked that this also is prevalent in the LGBTQ movement and in videotaping attempted suicides. If the SGC can play any role in diminishing that, she would be very supportive of that. Judge Saint Clair asked that this offense be put in the parking lot for next meeting.

VII. OTHER BUSINESS

VIII. ADJOURNMENT

APPROVED AND ADOPTED BY THE SENTENCING GUIDELINES COMMISSION



10/14/2022

Judge J. Wesley Saint Clair (Ret), Chair

Date

SGC Meeting Minutes 9/9/2022

Keri-Anne Jetzer

9/22/2022