STATE OF WASHINGTON

SENTENCING GUIDELINES COMMISSION

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

**MEETING MINUTES**
**November 8, 2024 9:00am – 12:00pm**
1500 Jefferson Building, Room 2330
Olympia, WA 98516
And Zoom

Members Present:
Hon. J. Wesley Saint Clair
Hon. Sharonda Amamilo
Greg Link
Secretary Cheryl Strange (proxy: Mac Pevey)
Ramona Brandes
Dr. Vasiliki Georgoulas-Sherry
Hon. Karen Donohue
Commissioner Tye Menser
Hon. Jeffery Swan
Kecia Rongen
Jeremiah Bourgeois
Hon. Josephine Wiggs
Senator Claire Wilson
Norrie Gregoire
Chief Brian Smith
Rep. Gina Mosbrucker
Amy Anselmi
Rochelle Cleland
Hon. Veronica Galván
Dr. Esther Matthews
Jon Tunheim
Councilmember Carmen Rivera

Members Absent:
Rep. Tarra Simmons
Jennifer Redman

Guests:
Chief Kal Fuller

Staff:
Keri-Anne Jetzer
Dr. Lauren Knoth-Peterson, PSPRC

## I. CALL TO ORDER

Chair Judge Saint Clair called the meeting to order.

## II. APPROVAL OF MINUTES

**MOTION #24-64: APPROVE OCTOBER 2024 MEETING MINUTES**
**MOVED:** Judge Galván
**SECONDED:** Ramona Brandes
**PASSED:** Passed
**ABSTAIN:** Greg Link, Mac Pevey

## III. FINALIZE RE-RANKING DRAFT REPORT

Keri-Anne reminded members of the focus of the report. She asked if members had any feedback, correct, changes, or additions. Several members reported the report was clear and encompassed the discussions correctly.

**MOTION #24-65: APPROVE THE RE-RANKING REPORT FOR SUBMISSION**
**MOVED:** Ramona Brandes
**SECONDED:** Greg Link
**PASSED:** Passed unanimously
**ABSTAIN:** Mac Pevey

## IV. FINALIZE HB 2504 REVIEW WORK REQUEST

Keri-Anne briefed members on prior discussion about possibly using percentages instead of integers for the Aggravated Departure Cap values. She provided a mock-up of what some percentages would look like and how they compare to the integers currently in HB 2504.

Dr. Knoth-Peterson reminded members that the Repeat Violator column, when applied, extends the standard range, while the Aggravated Departure Cap does not extend the standard range but rather provides a guideline for judges for when a departure greater than the range on the grid is potentially excessive or unreasonable.

There was discussion about why to use percentages versus integers. Dr. Knoth-Peterson offered there are two fundamental ways of thinking about how to apply the Aggravated Departure Cap. The intent of an aggravator is that additional punishment is warranted if there is a characteristic of the offense makes it more egregious than the standard definition. When using an integer, the value is uniform for the offense, meaning it is the same value regardless of what the person's criminal history level is. When using a percentage, then the additional amount of punishment is tied to the criminal history score. Thus, if a person has a lower criminal history score, the additional amount of punishment for the egregious behavior is less than it would be for someone with more criminal history.

Greg Link suggested there is a legal framework that warrants using the percentage rather than the integer. The US Supreme Court (USSC) has said that aggravating factors are just elements of the crime. The grid, he went on to say, already differentiates between people who commit Murder 1 without the aggravating factor

based on their criminal history and it has a proportionate increase based on criminal history. If we think about aggravating factors in the legal framework given by the USSC then we are doing the same thing by using the percentage approach. It's like punishing one element of the crime one way and a different element of the crime in a different way.

Chief Smith thought that aggravators are about what a person does that supersedes the person's criminal history. Some members believe that people with fewer felony convictions have less of an understanding of how the system works and those with more convictions have a better understanding of the potential consequences including aggravating factors. Dr. Knoth-Peterson talked about the theory of punishment and how the sentencing grid is essentially based on the theory of retribution.

Rochelle Cleland added that the amount of discretion a judge has is very important to victims as it is sometimes the only form of justice that is given, particularly with violent offenses.

If members are interested in using percentages instead of integers for the Aggravated Departure Cap, Keri-Anne asked members what they would want those percentages to be. Dr. Knoth-Peterson remarked that there is no consistent guidance for what is a reasonable departure when sentencing with an aggravating factor. The Aggravated Departure Cap is intended to provide bounded discretion so there is consistent guidance, although judges could still sentence up to the statutory maximum.

There was discussion about how sentencing above the 'cap' would be presumed excessive and puts the burden of proof on the state instead of the defendant. Jon Tunheim remarked that the standard of review for an exceptional sentence above the range is an abuse of discretion standard. Prosecutors, he said, are struggling with this part.

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| **MOTION #24-66:** | **RECOMMEND USING PERCENTAGE INSTEAD OF INTEGER APPROACH FOR AGGRAVATED DEPARTURE CAP COLUMN** |
| **MOVED:** | Greg Link |
| **SECONDED:** | Ramona Brandes |
| **PASSED:** | Passed (Y=8; N=2) |
| **ABSTAIN:** | Mac Pevey, Jon Tunheim, Kecia Rongen, Dr. Georgoulas-Sherry, Judge Donohue, Rochelle Cleland, Amy Anselmi, Councilmember Rivera |

Members discussed what percentage or percentages to apply to the Aggravated Departure Cap. There was a suggestion to break the percentages according to offense classification. There wasn't any interest in tying the Aggravated Departure Cap percentages to the Repeat Violator percentages as there are still negotiations on what the Repeat Violator percentages are going to be that the SGC is not part of and don't know what they may end up being.

**MOTION #24-67: RECOMMEND APPLYING 10% for SL 17-10, 15% for SL 9-6, AND 20% FOR SL 5-1 FOR THE AGGRAVATED DEPARTURE CAP**

**MOVED:** Greg Link
**SECONDED:** Ramona Brandes
**PASSED:** Passed (Y=7; N=1)
**ABSTAIN:** Mac Pevey, Jon Tunheim, Kecia Rongen, Dr. Georgoulas-Sherry, Judge Donohue, Rochelle Cleland, Amy Anselmi, Norrie Gregoire, Judge Wiggs, Commissioner Menser

Keri-Anne briefed members on the two definitions that she thought may have been confusing and would require explanations and changing the term "standard range sentence" to be "standard range value" throughout the bill. She inquired if there were any other definitions members thought would be helpful. Members did not have any additional definitions to add and were ok with the term change she proposed and suggested modification to the definitions as such:

a. Minimum standard range value is the minimum number of months of the standard sentencing range at each offender score within the cell.

b. Maximum standard range value is the maximum number of months of the standard sentencing range at each offender score within the cell.

Greg Link shared with members his conversation with Rep. Goodman about what the term "presumed to be clearly excessive" might mean. Clearly excessive is not defined within the SRA. The courts have determined that a sentence is clearly excessive if it's manifestly unreasonable, which is the same standard used to determine if a judge has abused their discretion. He said the Supreme Court has said that excessive means unreasonable and clearly excessive means clearly unreasonable. The idea that presuming that something is unreasonable is completely foreign to the way the appellate courts work. There isn't an instance in criminal law, he said, where an appellant goes in with a presumption that the sentence they received is unlawful. The Supreme Court has also determined that if a sentence is clearly excessive it is unlawful, thus, presuming a sentence to be clearly excessive means it is presumed to be unlawful.

Greg also talked about the shift in the burden to determine if the sentence is excessive. Currently, that burden is on the defendant but under the change in HB 2504, the burden would be on the state. He observed that there is no guidance to the trial courts about how the presumption is overcome. Greg and Rep. Goodman also talked about the possible issue with Blakely. If a judge needs to make a finding or point to some fact in order to overcome the presumption of unreasonable, that is not something that the USSC allows that judge to do if the sentencing system is a mandatory system. In other words, it seems to invite judges to make findings that they constitutionally can't make but, rather, that a jury has to make. At the end of his conversation with Rep. Goodman, Greg noted there were three options that seemed available:

1. Leave it as is and see how it works;
2. Make the Aggravating Departure Cap a hard cap, not a presumption. This would resolve any Constitutionality problems and it resolves the question about who had the burden in appeal and how that would play out;
3. Figure out a way to make it work in practice. This would require conversations that would likely take a long time.

Jon Tunheim expressed that he shares the same concerns. Members agreed that this may be too complex for the SGC to work through given that its report on HB 2504 is due on December 1. On that note, Keri-Anne announced that the report is due before the next SGC meeting on December 13. Since she will not be able to provide a draft at the next meeting, she offered to provide a draft with the discussed changes during this meeting via email and ask for feedback that way. Members agreed with this suggestion.

Ramona Brandes reported that she, Greg Link and Jeremiah Bourgeois created draft language that offers some meaning for the language under Section 5(3)(b) as no one was able to ascertain a meaning from the current language. She went on to explain that this operationalizes how to apply the Repeat Violator column if the current offense meets more than one of the Repeat column factors. It applies the Repeat Violator column only once regardless of whether there are multiple prior qualifying offenses.

Roshelle Cleland inquired if this language reflects the current law or changes it. Ramona replied that it is meant to simplify the calculation by removing most of the multipliers. Dr. Knoth-Peterson added that the language applies to prior offenses, not other current offenses. Currently, if the current offense is a violent sex offense and the defendant has a prior violent and a prior sex offense, both of those prior offenses would count toward the offender score. However, using the Repeat Violator column in HB 2504, in the same example, the column would only be applied once.

Ramona Brandes stated that there wasn't any language in HB 2504 that indicated an interest in applying the column multiple times and since the goal of the bill is to simplify and not complicate the sentencing guidelines, this is what was assumed to be the intent of the vague language. Greg Link observed that there isn't anything in the language to change when sentences are served consecutively. Greg confirmed that HB 2504 doesn't amend RCW 9.94A.589, which currently states that when two serious violent offenses are to be served consecutively, the offense with the highest seriousness level is scored based on prior offenses and the second offense is given a score of 0. Under HB 2504, the second offense would now be subject to the increased range for the zero.

Members made a minor modification to the proposed language to reflect current policy as such:

(b) If the present convictions are for multiple offenses qualifying for an increased maximum sentencing range sentence under subsection (a)(i), (a)(ii), or (a)(iii), then the

maximum of the sentencing range for each current qualifying offense shall be calculated as described in subsection (a). Each current qualifying conviction shall be subject to only one increase of the maximum range sentence under subsection (a) even when the present conviction qualifies as a repeat offense under more than one of the subsections set forth in (3)(a), or if there are multiple prior qualifying convictions. If there are multiple current offenses that are eligible for the repeat violator column but also subject to mandatory consecutive sentencing per RCW 9.94A.589, the increase of the maximum range sentence under subsection (a) applies only to the offense with the highest seriousness level.

Since members were unsure if this met with Rep. Goodman's intent, Keri-Anne offered to note in the report that the SGC offers this language as a starting place for further conversation.

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| **MOTION #24-68:** | **SUBMIT THE REPORT TO REP GOODMAN WITH THE CAVEATS THAT HAVE BEEN DISCUSSED INCLUDING THE AGG DEPARTURE CAP DECISION, THE DEFINITIONS, THE DISCUSSION AROUND PRESUMED CLEARLY EXCESSIVE LANGUAGE AND THE DRAFT LANGUAGE FOR SECTION 5(3)(b).** |
| **MOVED:** | Ramona Brandes |
| **SECONDED:** | Jeremiah Bourgeois |
| **PASSED:** | Passed (Y=11; N=0) |
| **ABSTAIN:** | Mac Pevey, Kecia Rongen, Dr. Georgoulas-Sherry |

## V. 2025 LEGISLATIVE COMMITTEE

Chair Judge Saint Clair reminded members of the Legislative Committee that meets during the early part of the legislative session and asked for volunteers. Dr. Knoth-Peterson added that this year the committee will also determine on which bills they will want to see a Racial and Ethnic Impact Statement. Ramona Brandes, Jeremiah Bourgeois and Dr. Matthews volunteered to participate on the Legislative Committee. Keri-Anne noted it is helpful to also have a prosecuting attorney and judge on the committee.

Keri-Anne informed members that she will be sending calendar holds for the special meetings that will take place during the legislative session.

## VI. OTHER BUSINESS

Jeremiah Bourgeois informed members that he is the new chair of the Juvenile Committee. It has met twice and is working on varying levels of policy changes. Currently, they are working on grounding themselves on the research.

Dr. Matthews reported that the Jail Modernization Task Force has met only once so far. She noted that there was a lot of discussion about what jail modernization means,

whether it's the physical building or the total environment. There are many who are interested in both definitions.

Keri-Anne reported that she and Dr. Georgoulas-Sherry met with OFM's attorney and are working on some language to submit for an AAG and/or AG opinion. Getting an AAG opinion is quicker so they are deciding which questions to ask for an AAG opinion and for an AG opinion.

## VII. PUBLIC COMMENT

No member of the public wished to address the members.

## VIII. ADJOURNMENT

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

12/13/2024

Judge J. Wesley Saint Clair (Ret), Chair — Date