

Fiscal Year 2019

Review of the Sentencing Reform Act



Sentencing Guidelines Commission

Office of Financial Management

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Executive Summary

Background

In the nearly 40 years since Washington adopted the Sentencing Reform Act, the Sentencing Guidelines Commission has twice completed a review of the SRA: once in 1991 and again in 2001. These past reports largely focused on determining if current sentencing practices were consistent with the purposes of the SRA as set in statute.

In the 18 years since the SGC's last report, much has been learned in the criminal justice field about evidence- and research-based practices and policies related to sentencing lengths, judicial discretion, community supervision and reentry, among others. And since its inception, the SRA has been modified in some way or another every legislative session. It has become confusing and complex to the point that it has reduced transparency as well as created application issues for some who work with it.

With a focus on best practices and simplification, the Legislature directed the SGC to review the SRA in Chapter 299, Laws of 2018. The SGC no longer has research staff so the Council of State Government Justice Center was contracted to collect and analyze current literature on effective supervision practices and analyze Washington data for sentencing, community supervision and recidivism trends. It submitted three presentations and a final report, which is included (see Appendix F). The final report and all three presentations are available on the SGC's [website](#).

This report is the culmination of the SGC's work over the past year. It includes background information, where applicable or available, and the SGC's recommendations.

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

Like the offender score, seriousness levels are an integral part of a sentencing grid. The SGC believes that 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 proposed sentencing grids or continue use of the current grid, it was unable to complete the review. The SGC offers its assistance to review the offenses within the seriousness levels once a grid is chosen.

Recommendation – Offender Scoring

Data analysis by the Council of State Governments Justice Center provided curious results, compared to other states, about the relationship of Washington's offender score to recidivism rates compared to the results of other states. Complex statistical analysis is needed to determine what those results mean; that level of analysis extends beyond the scope of this project.

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 supports an increase in judicial discretion in sentencing. It offers two possible alternative sentencing grid proposals that increase discretion by different degrees.

- Option 1 increases most sentencing grid cell ranges but leaves the drug grid, mitigating and aggravating factors and enhancements intact.
- Option 2 creates a new two-step sentencing grid with significantly wider sentencing grid cell ranges, subsumes the drug grid and incorporates mitigating and aggravating factors and enhancements.

Recommendations – 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.
- The SGC recommends making all enhancements eligible for good time as applied to the underlying sentence. This change would help decrease the complexity of calculating an incarcerated individual's expected release date.

Recommendations – Legal Financial Obligations

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

Recommendation – Supervision should be based on RNR and not solely on offense type.

The SGC recommends legislative, judicial and agency discussions about eligibility for community supervision should be based on an individual's RNR and not solely on offense type. 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 being released from confinement.

The SGC recommends expansion of a system with front-loaded reentry services for all felony offenders being released from confinement and concurrent supervision terms. It further recommends that policies, services and programs adhere to the current theory of risk-needs-responsivity. Supervision should be flexible to meet the risks and needs of the individual.

Recommendation – Supervision terms should be set concurrent to prior supervision terms.

The SGC recommends clarifying in statute the relationships among multiple supervision terms and reinforcing the court’s responsibility to set consecutive terms, when it is its intent. This would increase community safety by immediately allowing enforcement of all conditions of supervision for individuals serving multiple supervision terms. For example, an individual serving a Drug Offender Sentencing Alternative sentence cannot be revoked for failing to complete treatment until the DOSA community supervision term becomes active.

Recommendation – Encourage motivational-focused supervision.

The SGC recommends that the state continue to 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.

Recommendation – Add behavior-based incentives to community supervision.

The SGC recommends the expansion of behavior-based incentives to the community supervision process, which is part of a RNR supervision model. This includes, but is not limited to, a mechanism to reduce time on supervision, sometimes referred to as positive achievement time. Instead of providing feedback on the undesired behavior, the focus and reinforcement should be on desired behavior, with a ratio of 4 reinforcements for every punishment.

Recommendation – Simplify tolling of supervision terms by limiting tolling to absconders.

The SGC recommends simplifying the rules for tolling (or pausing an individual’s term of supervision) by limiting tolling to those who abscond from supervision. Current statutes require DOC to toll the term of supervision when an individual absconds from supervision or when they serve confinement time that is not ordered by DOC as a sanction for nonsex offenses. For individuals on supervision for a sex offense, any period of time in confinement tolls the term of supervision. DOC does not have a reliable mechanism to be made aware of confinement served in jails that is not ordered by DOC. In addition, the lack of consistent rules for the tolling makes it complex to accurately identify, input and calculate appropriate tolling.

Recommendation – Expand DOC’s range of violation sanctions.

The SGC recommends expanding the range of sanctions to extend beyond incarceration for community supervision violations. This will give DOC the flexibility to sanction undesired behavior accordingly. The expansion should include imposition of nonincarceration-based punishments, including but not limited to, community service and roadside litter pickup.

Recommendation – Supervision requirements and violation sanctions should be individualized.

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

Recommendation – Standard Recidivism Report

The SGC recommends the creation of a research position in 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 exploring the creation of a user interface in the justice data warehouse located in OFM. This interface 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. It would also benefit prosecutors and defense attorneys 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.

Recommendation – Post-conviction Review

The SGC has worked on the topic of post-conviction reviews for several years which resulted in a couple of legislative proposals. While it does not offer any specific recommendations here, it suggests that there is wide support for a review of incarcerated individuals who have long sentences.

Recommendation – Sovereign Immunity

The SGC does not offer any recommendation but, rather, reminds the Legislature that most changes to the SRA will be impacted, to some degree, by the potential for tort liability. While changes to the SRA may have the best intent, the state's agencies and staff always take into consideration the potential for claims against them and that can mitigate the actual effect such changes may have. The lack of the state's sovereign immunity doctrine should be included in any discussions related to changes to the SRA.

Introductory Note from the Chair

In 2018, the Legislature directed us, the Sentencing Guidelines Commission, to review our adult felony sentencing system. We have a determinate sentencing scheme where the Legislature sets tight limits on the range of punishment imposed for felony crimes. Our system's response to crime is largely incarceration, expressed in number of months of confinement. It was adopted in 1981 and implemented in 1984. It has been amended, added to and tweaked in virtually every legislative session since. We refer to it as the Sentencing Reform Act, or SRA.

As we understood it, the Legislature's purpose in assigning us this task was to ensure that adult felony sentencing under the SRA is evidence-based, aligned with current best practices and consistent with federal and state law. We were asked to review the SRA in its current form to determine if it was advancing public safety by holding offenders accountable and facilitating their reentry into law-abiding society. We were told to look for inconsistencies to eliminate. And we were asked to find ways to simplify the system while increasing judicial discretion in sentencing.

We did our best. In the words of our previous chair, Professor David Boerner, the SGC represents "all god's children" in the Washington justice system. The Legislature created the SGC with representatives of law enforcement, the defense bar, prosecutors, judges, victim advocates, state and local government, the Department of Corrections, the Indeterminate Sentence Review Board, the juvenile justice system, legislative representatives from both chambers and major parties and members of the public. This group has been meeting regularly since the SRA became operational in the 1980s. With its own staff, regular attendees from the Caseload Forecast Council and legislative staff, the SGC represents the single deepest resource for criminal justice policy and history in the state.

For this review, we also enlisted the help of the Justice Center of the Council of State Governments to update and supplement our formal research. Employing this organization was the most efficient choice for technical support. From prior projects in this state, it has developed an excellent working knowledge of the sources of Washington data. (See Appendix F for its final report.)

In addition to the policy considerations and recommendations, we submit two sentencing grid proposals. Both increase judicial discretion. Option 1 is a refinement of the current grid that represents a more incremental change. It expands discretion while preserving most of the rules now in place for computing incarceration, sentence enhancements and supervision in the community. Option 2 takes a course different from our current path. Rather than cells with an upper and lower limit on the sentencing judge's authority, we have a mandatory grid — defining the absolute limits of the judge's sentencing authority — coupled with suggested ranges based on the judge's evaluation of aggravating and mitigating factors. Both approaches should be considered seriously. Our failure to agree on one approach means only that our discussions were well-informed and vigorous.

This report is best understood in the context of the history of the SRA. At its inception, it represented cutting-edge thinking in adult felony sentencing. It has benefited the people of the state of Washington in many ways. It has reduced disparity in sentencing and allows good precision in forecasting the costs of adult corrections. But over time our well-researched and targeted sentencing reform morphed into something different. In 2019, the SRA is burdened by complexity. The Department of Corrections employs a cadre of highly qualified professionals who sometimes must manually check the electronic calculation of offender time in custody and under supervision. And

the rules for those calculations can change every time the Legislature is in session or a Washington appellate court issues an opinion.

For a variety of reasons, with the passage of the SRA in 1981, Washington adopted a strict and narrow set of guidelines for adult felony sentencing. To use another term we can attribute to Boerner, the “currency of accountability” used in the SRA was, and is, incarceration. The SRA as originally implemented made very little use of alternatives to confinement or of supervision of offenders in the community. It abolished parole and specifically forbade the deferral or suspension of sentences.

There was one fundamental reason for the SRA to focus on incarceration — punishment — as the standard response to adult felony criminal behavior. At the time of its inception — the late 1970s and early ’80s — the prevailing thought in adult sentencing was that we cannot change offender behavior. The best thinking at that time was that all we can do is impose a punishment that reflects the crime and the offender’s criminal history and is consistently meted out in all the counties of the state. The SRA met these goals. Sentencing immediately became more consistent across the state, and disparities in sentencing correlated to race and other inappropriate factors declined. But in the meantime, we have learned we can do much more to positively affect criminal behavior.

When the SRA was developed and adopted, it was assumed that judges would regularly depart from the guidelines. In its original form, it provided that the sentencing judge could impose more or less incarceration time than the guideline sentence if he or she found that there were certain aggravating or mitigating factors. However, that did not happen in practice. For a variety of reasons, many outside the scope of this discussion, sentencing judges stuck to the guidelines. But in large part this was because most sentencing decisions are presented to the judge as an agreed disposition. In 90+% of felony sentencings (a figure essentially the same across the country), the judge hears both prosecution and defense ask for the same sentence. In Washington, that is almost always a period of months of incarceration within the standard range set by the SRA. The SRA formalized this procedure by calling for the parties to draft a plea agreement and to submit that agreement to the court prior to sentencing. The judge then determines whether the plea agreement is in the “interests of justice.” If the judge finds that it is, the disposition can proceed. Theoretically, a judge could find the agreement not just and reject it. However, under current practice, we give a judge no tools beyond the representations of the parties to make this determination. And at sentencing, with a record that shows the plea agreement to be “in the interests of justice,” it is easy to understand why judges stick to the recommendations and very, very seldom depart from the guidelines.

The argument has long been made that the SRA took discretion from the judiciary and gave it to the representative of the executive branch, the prosecutor. That was not the intent of the drafters of the SRA or the legislators who passed it. But the result is no different. Discretion exists in the criminal justice system because a fair sanction for a criminal act must take into account what actually happened. There is no standard crime. Each criminal transaction — every defendant and every victim — is different. Those differences must be taken into account in fashioning the disposition. The SRA took away the tools judges (and others) used to weigh those differences: no more deferred sentences, no more parole. The SRA did not give more discretion to prosecutors. The fundamental charging authority is the same, and opposing parties to any dispute, including prosecutors and defenders, will always reach settlements. The SRA took discretion away from the judges, leaving the prosecutors standing alone in most cases as the only player with the duty and the authority — and the power — to fashion a just result.

But even if sentencing judges had more room to maneuver, they have few tools beyond incarceration. A guideline sentence may satisfy the value of just deserts, or fair retribution, and will incapacitate the offender while locked up. But beyond ordering the offender to pay, it does little to provide restitution to the victim and, with a standard range sentence, provides few mechanisms to rehabilitate offenders: to facilitate their reentry into law-abiding society.

We make a mistake when we view the current SRA, the one in use every day court is in session, as a system that can be tweaked. Too often, when the Legislature makes a good faith effort to address the SRA's shortcomings, the result is an addition to what is now the almost impenetrable complexity in accurately calculating time in custody and time under supervision. A good example is Chapter 191, Laws of 2019 relating to "Sentencing of motor vehicle-related felonies."

Auto theft is increasing across the state, particularly in our urban areas. Under the SRA, our only response to these offenders is to lock them up. Recognizing what we now know — that we miss an opportunity to change the defendant's behavior if we limit our response to incarceration — this law provides for supervision and programming after release from custody. But it carves out an exception for just one kind of offender and gives the following instructions to the Department of Corrections:

*"The offender's sentence of incarceration may not exceed the mid-point of the standard sentence range reduced by one-third of the ordered term of community custody. An offender receiving a sentence under this section is prohibited from receiving earned release time under RCW 9.94A.729 in excess of one-third of the total sentence."*¹

As a criminal justice practitioner, I might be able to decipher these instructions, given time, and I'm sure that the professionals at DOC, the people responsible for making the law work, will figure it out. But with this law we are giving those professionals one more special case to exempt from the standard adult felony sentences. We are adding yet another layer of complexity. And complexity fosters error. We need to fix this.

One of our members from the defense bar, Greg Link, summed up our shared motivation as well as the belief that it could be done. At a session at the outset of our work, he made the point that at the end of the day, we all want a system of felony sentencing that is fair. We may differ on what we mean and how we get there, but all the participants in the justice system want a way to respond to criminal behavior that takes into account what we know and uses the skills of all the players. This report represents our work toward this goal. We are committed to seeing it through.

Russell D. Hauge, Chair
Sentencing Guidelines Commission

¹ Substitute Senate Bill 5492 (2019) Final Bill Report. Available at <http://lawfilesexst.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/Senate/5492-S%20SBR%20FBR%2019.pdf>.

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

When the Washington State Legislature passed the Sentencing Reform Act, it moved the state from an indeterminate sentencing system and rehabilitative philosophy to a determinate (guideline) system with a retributive philosophy. The driver for this move by Washington and other states that changed 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."²

In the several decades since the sentencing grid was adopted, many changes have been made to it and to the related sentencing laws. The sentencing system has become rather complex and, at times, confusing to practitioners and the public. The SGC reviewed many components of the system, including judicial discretion, offender scores, unranked offenses and pre-sentencing investigations, with a focus on incorporating evidence-based practices and reducing complexity while maintaining the purposes of the SRA.

Judicial Discretion

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. The SGC was concerned whether broadening sentencing ranges would cause increases in unwarranted disparity and sentence lengths. Predicting changes in the sentencing behavior of superior court judges who are given more discretion is not an exact science; however, there is research available that may offer insight as to what one could expect to happen.

In 2005, *United States v Booker*³ determined that U.S. sentencing guidelines must be advisory if they are to comply with the Sixth Amendment. In a single day, the federal sentencing system transformed 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 as judges were released from more structured guidelines.

While the implementation of the SRA has decreased the level of unwarranted disparity⁴ in Washington sentences, it is still present. When judges have small sentencing ranges in which to work, the opportunity for unwarranted disparity is naturally confined, this being the purpose of sentencing guidelines. Therefore, it would not be unusual to observe some level of increase in unwarranted disparity if judges are given more discretion. Researchers note several reasons that could contribute to unwarranted disparity: subconscious bias or racial stereotyping,⁵ extra-legal

² Revised Code of Washington 9.94A.010.

³ *United States v. Booker*, 543 U.S. 220(2005)

⁴ Defined as a variation in treatment or outcome not attributable to legally mandated sentencing factors.

⁵ Fischman, J. B., and Schanzenbach, 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.

characteristics,⁶ mandatory minimums⁷ and geographical differences.⁸ To address the concerns of the SGC, we will highlight two types of disparity: racial and sentencing.

Racial Disparity

After exploring the impact of judicial discretion on racial disparities after *Booker*, Yang presented evidence that *Booker* increased racial disparities in sentencing with a 4% increase in average sentence length for black defendants compared to white defendants.⁹ A study completed for the Bureau of Justice Statistics reported similar results.¹⁰ The U.S. Sentencing Commission reported a 4.9% difference in sentence length between black and white defendants after *Booker*, which fell from 8.2% a few years prior to the *Booker* decision, and explained that year-to-year fluctuations in race and ethnicity variables are not uncommon.¹¹ Further exploration by Yang found that sentences by federal judges appointed after *Booker* had higher disparity rates than those appointed before *Booker*, suggesting an acculturation to the guidelines.

However, several other researchers who also compared federal sentencing data before and after *Booker* concluded that greater judicial discretion did not lead to increased racial disparity. One study found that while black arrestees did receive longer sentences than similar white arrestees, there was no increase in racial disparity for several years before and after *Booker* took effect and, in fact, found the gap between similar black and white arrestees to be slightly smaller by the end of 2009.¹² Fischman and Schanzenbach's analysis determined that judicial discretion did not contribute to federal racial disparities and may actually offer mitigation against other racially disparate biases or policies.¹³

Looking at state sentencing guideline system data, 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 the three systems, NCSC determined that race was of “negligible impact in all three states studied.”¹⁴ In other words, systems where judges have the greatest discretion, where they are not required to abide by the guidelines, do not have an increase in racial disparity over those that are more restrictive.

⁶ 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), pp799-837.

⁷ 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).

⁸ 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>.

⁹ Yang, C. (2013). Free at last? Judicial discretion and racial disparities in federal sentencing. Coase-Sandor Institute for Law & Economics, Working Paper No. 661. Retrieved from https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1663&context=law_and_economics.

¹⁰ Rhodes, W., Kling, R., Luallen, J. and Dyou, C. (2015). Federal sentencing disparity: 2005–2012 (WP-2015:01), Cambridge, MA: Abt Associates

¹¹ U.S. Sentencing Commission. (2006). Final report on the impact of *United States v. Booker* on federal sentencing. Washington, DC: Author.

¹² Ibid, Starr and Rehavi (2013).

¹³ Ibid, Fischman and Schanzenbach (2012).

¹⁴ Ibid, Ostrom (2008).

The SGC believes the potential to increase racial disparity is a very important issue. There are concerns raised by the research so further investigation is encouraged and should guide implementation of any reforms.

Sentence Length

Comparing federal sentencing data before and after *Booker*,¹⁵ researchers Bennet and Scott independently reported average sentence lengths increased by less than two months.¹⁵ Scott's data also showed the percentage of above-the-range sentences doubled from .8% pre-*Booker* to 1.8% post-*Booker*¹⁶ and the rate of below-the-range sentences more than doubled, jumping from 5% to 13% immediately after *Booker*.¹⁷ Consequently, this rate climbed to almost 20% by fiscal year 2014, where it has remained.¹⁸ Although *Booker* made the federal guidelines system advisory, federal judges followed the guidelines more than 80% of the time in the years following *Booker*,¹⁹ a percentage that dropped to around 75% by the end of fiscal year 2017.²⁰ A recent study that looked at sentences after *Booker* and *Gall*²¹/*Kimbrough*²² reported that sentences were significantly shorter after both *Booker* and *Gall* than those imposed prior to *Booker*.²³ When considering individuals adjudicated only after *Booker*, a 7.1% average reduction in sentence length was found.

After the *Blakely*²⁴ decision in 2004, the Minnesota Legislature required its state's Sentencing Guidelines Commission to modify the sentencing grid to allow the courts to set appropriate sentences without departing from the guidelines. The modification required upper range levels to increase by 20% and lower range levels to decrease by 15% and applied to offenses that occurred on or after Aug. 1, 2005. A year later, a separate sex offense grid with expanded ranges was also created. The Minnesota Sentencing Guidelines Commission published a report showing the impacts of the increase in judicial discretion of the two grids.²⁵ The results showed an increase in the percentage of incarcerated individuals sentenced at the bottom of the range for both grids: 13.2% on the standard grid and 24.7%²⁶ on the sex offense grid. There was little change in the percentage of individuals

¹⁵ 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); Scott, R. W. (2010). Inter-judge sentencing disparity after *Booker*: A first look. *Articles by Maurer Faculty*. Paper 779. Located at <http://www.repository.law.indicanan.edu/facpub/779>.

¹⁶ Ibid, Scott (2010).

¹⁷ Ibid, Scott (2010).

¹⁸ U.S. Sentencing Commission Quarterly Data Report, figure D (2017). Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf.

¹⁹ Scott, B. (2011). Essay, *United States v. Booker*: System failure or system fix? 160 University of Pennsylvania Law Review PENnumbra, 160, p195.

²⁰ Ibid, USSC (2017).

²¹ *Gall v. United States*, 552 U.S. 38(2007) decided that federal appeals courts may not presume a sentencing outside the federal guidelines range is unreasonable.

²² *Kimrough v. United States*, 552 U.S. 85(2007) decided that federal district judges have the discretion to impose sentences outside the federal guidelines range in cases related to possession, distribution and manufacture of crack cocaine.

²³ Kim, B., Cano, M. V., Kim K., and Spohn, C. (2016). The impact of *United States v. Booker* and *Gall/Kimbrough v. United States* on sentencing severity: Assessing social context and judicial discretion. *Crime & Delinquency*, 62(8).

²⁴ *Blakely v. Washington*, 1264 S. Ct. 2531(2004) decided that an exceptional sentence increase based on a judge's determination violates the Sixth Amendment.

²⁵ Minnesota Sentencing Guidelines Commission. (2010). *Sentencing practices: Impact of Blakely and expanded ranges on sentencing grid*. St. Paul, MN: Author.

²⁶ The report shows data for sex offenses on the pre-expanded standard grid, the post-expanded standard grid and the new sex offense grid. The comparisons for the sex offenses will be of data from the pre-expanded grid and from sex offense grid.

sentenced at the top of the range for the standard grid (from 6.0% to 6.5%) and for the sex offense grid (from 9.0% to 9.6%). The average sentence length for offenses on the standard grid decreased from 46 to 43 months while the average sentence length for sex offenses decreased from 75 months on the pre-expansion standard grid to 58²⁷ months on the new sex offense grid. Of interest is the difference in average sentence lengths by offense type. The average sentence length decreased for person (68 to 58 months) and drug (46 to 43 months) offense types while it increased slightly for property (24 to 25 months) and other (43 to 44 months) offense types. The report also noted that most of the average sentences lengths that increased were for offenses in severity levels of 8 and higher.²⁸

Broader ranges increase judicial discretion. In turn, increasing judicial discretion allows judges to shape a sentence to the circumstances of the defendant and the situation. Many studies have shown that increasing sentencing ranges can be done with little to no rise in unwarranted disparity and average sentence length.

Mandatory Minimums

Many of the studies on judicial discretion specifically mention mandatory minimums and their effect on unwarranted disparity. According to Starr, “There is good reason to believe that mandatory minimums are an important source of racial disparity in sentences.”²⁹ While analyzing the sentence gap between blacks and whites after *Booker*, Starr and Rehavi 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.”³⁰ Even before the *Booker* decision, the U.S. Sentencing Commission commented in its 15-year study that “mandatory minimum penalties disproportionately apply to minority offenders.”³¹ According to its data from fiscal year 2016, this is still true: that of those convicted of an offense that carries a mandatory minimum, 40.4% were Hispanic, 29.7% were black and 27.2% were white.³²

Several studies found that mandatory minimums also limit judicial discretion.³³ 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.”³⁴ Mandatory minimums remove a judge’s ability to consider all relevant facts when sentencing.

²⁷ The report notes that this average sentence length is lower in part because 56% of the sentences are for Failure to Register and due to the delay in charging and sentencing of sex offense. The MSGC expects the average sentence length on the sex offense grid will increase over time.

²⁸ The Minnesota sentencing grid ranks the severity of offenses in 11 severity categories, 1 being the least severe and 11 being the most severe.

²⁹ Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. *Federal Sentencing Reporter*, 25(5).

³⁰ Ibid, Starr and Rehavi (2013).

³¹ U.S. Sentencing Commission (2004). Fifteen years of guidelines sentencing: An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform. Washington, DC: Author.

³² U.S. Sentencing Commission. (nd). Quick facts: Mandatory minimum penalties. Retrieved from https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf.

³³ Ibid, Fischman and Schanzenback (2012); Starr and Rehavi (2013); 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>; Bowman III, F. O. (2005). The failure of the federal sentencing system: A structural analysis. *Columbia Law Review*, Vol 100.

³⁴ Ibid, Starr and Rehavi (2013).

The American Law Institute has long recommended elimination of mandatory minimum penalties. Its reasons are that such sentences hinder judicial discretion and create disproportionate punishments, and are excluded from the prioritization of correctional resources. It also cites an unequal application of this penalty due to the plea bargaining process and selective charging by prosecutors. ALI states that the use of mandatory minimums “shifts the power to individualize punishments from courts to prosecutors.”³⁵ In its 2011 report to the Congress on mandatory minimum penalties, the U.S. Sentencing Commission data also showed inconsistency in the application of some mandatory minimum penalties, which was confirmed through interviews with defense attorneys and prosecutors in several district courts.³⁶ Additionally, it also observed that “the guidelines prescribe proportional individualized sentences” using factors such as the seriousness and harm cause by the offense, the culpability of the defendant and other characteristics of the individual.³⁷ It suggested this multi-dimensional approach could avoid the “problems inherent in the structure of mandatory minimum penalties” and better serve the purposes of the federal SRA. It went so far as to recommend the Congress consider a statutory safety valve mechanism for some mandatory minimum cases.³⁸

The impact of prosecutorial decisions is not as much of an issue in Washington as it is in the federal system. Washington’s guidelines provide structure to both judicial and prosecutorial discretion, thus avoiding the “concomitant increase in prosecutorial leverage that took place at the federal level.”³⁹ Despite the caution exercised when creating them, the prosecutorial guidelines are advisory only and, as such, are routinely followed in some prosecutor’s offices more than others.⁴⁰ Uneven application of some enhancements, most of which are essentially mandatory minimums, has been part of the discussion at a few of the SGC’s meetings.

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 2018,⁴¹ 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 a statutory maximum of five years. Notwithstanding their classification, unranked offenses have a sentencing range of one year or less. Furthermore, legal practitioners aren’t aware that many of these unranked offenses even exist as they are rarely used in charging and sentencing. The incongruity between the offense class and the sentence range of an unranked offense 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 currently unranked offenses

³⁵ American Law Institute. (April, 2017). Model penal code: Sentencing (Proposed final draft). Philadelphia, PA: Author.

³⁶ United States Sentencing Commission (2011) Chapter 12.

³⁷ United States Sentencing Commission (2011) Chapter 12.

³⁸ United States Sentencing Commission (2011) Chapter 12.

³⁹ Stith, K. (2013). Principles, pragmatism, and politics: The evolution of Washington state’s sentencing guidelines. Available at <http://lcp.law.duke.edu>.

⁴⁰ Ibid.

⁴¹ Caseload Forecast Council. (2018). *Washington state adult sentencing guidelines manual*, Olympia, WA: Author.

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 be assigned a seriousness level ranking.

Offense Seriousness Levels

States with sentencing guidelines systems use some form of criminal history and offense severity in their grids, making them foundational 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 on a grid, such a review would require knowing what sentencing grid the seriousness levels would be applied to. Indeed, 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. The SGC is willing to complete this review once a grid has been chosen by the Legislature.

Offender Scoring

It is a long-held belief that past behavior is a good predictor of future behavior, and therefore it makes sense that an individual's criminal history would be used to gauge the likelihood of recidivism. The Council of State Government Justice Center demonstrated to the SGC that in sentencing guideline systems across the nation, there is a positive correlation between offender score and recidivism rates. That is, the higher the offender score, the higher the recidivism rate. Washington, however, seems to be the exception to that rule.

In Washington, the calculation of the offender score is composed of factors above and beyond criminal history: (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.⁴² The CSG's analysis showed that Washington's offender score does not correlate strongly with recidivism. For example, 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%.⁴³ This trend is a curiosity to the CSG as it has not seen this result in any of the other guideline states. Washington is also unique in that other guideline systems do not have the offense multipliers that we do.⁴⁴ Whether these two are connected is unknown at this time. Complex statistical analyses are needed to unravel the multitude of offender scoring components to understand why the offender score does not comport with the recidivism rate like it does in other states.

Offense Multipliers

As noted above, criminal history is one of five factors used to calculate an offender score. Scoring rules differ depending on the category of the offense. The Caseload Forecast Council's annual Washington State Adult Sentencing Manual provides scoring forms that specify the number of points, or multipliers, associated with prior convictions based on the current offense. Even with these forms, the calculations can be confusing. To start, one scores the adult history, juvenile history

⁴² Ibid, Caseload Forecast Council (2018).

⁴³ Council of State Governments Justice Center. (May 2019). Review of sentencing and supervision in Washington state. Available at <https://sgc.wa.gov/sentencing-guidelines-commission/publications>.

⁴⁴ Telephone conversation with CSG on May 24, 2019.

and other current history of the defendant as well as whether the defendant was on community custody at the time the current offense was committed. The historical convictions differ in the number of points assigned to them and are frequently not on a one-for-one point basis. For example, if the current offense is Burglary 1, in the adult history any previous serious violent or violent convictions count as two points each, any previous Burglary 2 or Residential Burglary conviction counts as two points each and any nonviolent convictions count for one point each. If the current offense is Assault 1, any previous serious violent convictions in the adult history are three points each, any violent convictions are two points each and any nonviolent convictions are one point each.

There are many exceptions to the general scoring rules. For example, misdemeanors generally do not count toward the offender score, except when the current conviction is for a felony traffic offense. Exceptions also apply to Burglary 1, Manufacturing Methamphetamine, Escape offenses and crimes that involve taking, theft or possession of a stolen motor vehicle, to name just a few.

Multiple current convictions can also affect an offender score. The offender score must be calculated for each of the current convictions unless they are determined to be same criminal conduct,⁴⁵ in which case the current offenses count as one offense.

It is important to differentiate between sentence enhancements and offense multipliers. Sentence enhancements relate to the circumstances of the current offense and involve a set of statutory criteria which, if met, require the court to add a specified amount of additional time of incarceration onto the standard range sentence for the offense before the court. Multipliers add time to the sentencing range for the current offense, based on the criminal history that preceded the offense under adjudication. The sentencing range is increased based upon the way the offender score is calculated when multipliers are brought into play.

Multipliers are complex and fraught with potential for causing erroneous sentence calculation, resulting in a disproportionate result. The current system of offender scoring rules, like enhancements, is very complicated and meant only to increase punishment while restricting judicial discretion. The SGC would like to continue to study this issue and propose a more straightforward and simpler way of accomplishing the imposition of an appropriate sentence that reflects the offender's actual offense history.

Pre-sentence Investigation

The SGC agrees that the pre-sentence investigation report, referred to as a PSI, is a very useful tool. Its primary purpose is to collect information about the defendant to assist the court in determining the appropriate sentence.⁴⁶ This information promotes individualized sentencing by informing judges of a person's characteristics and/or the circumstances of the offense. It is also used by

⁴⁵ RCW 9.94A.589

⁴⁶ 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>. U.S. Probation Office Eastern District of Pennsylvania. (2019). Presentence Investigation. Retrieved February 21, 2019, 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. (nd) *Probation pre-sentence investigation*. Retrieved on February 21, 2019, from URL: https://www.appa-net.org/eweb/Dynamicpage.aspx?&webcode=IB_PositionStatement&wps_key=24e1c1d8-c753-4710-8f89-6085c6191128.

probation officers to assist in probation and parole and by correctional officials for inmate classification, programming and release planning.⁴⁷

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.⁴⁸ From there, the list of individuals on whom the court could order a PSI grew. In 1998,⁴⁹ individuals the court determined may be mentally ill were added, and the court was given authority in 1999⁵⁰ to request a risk assessment report,⁵¹ which is different from a PSI, on any individual except those sentenced to life without the possibility of parole or sentenced to death for aggravated murder. In the past, PSIs were requested frequently, but as budgets were affected by the recession, requests were 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.”⁵² DOC staff complete the investigative 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.⁵³

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 probation staff. An informal survey of juvenile court administrators found that PSI processes vary by county.⁵⁴ 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.⁵⁵

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.

⁴⁷ Ibid, Administrative Office of the United States Courts (1984); U.S. Probation Office Eastern District of Pennsylvania (2019).

⁴⁸ [Laws of 1988, ch. 60 § 1.](#)

⁴⁹ [Law of 1998, ch. 260 § 2](#)

⁵⁰ [Laws of 1999, ch. 196 § 4](#)

⁵¹ Washington Department of Corrections. (2014). *Pre-Sentencing Investigations and Risk Assessment Reports Ordered by the Court (DOC 320.010)*. Olympia, WA: Author. 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.”

⁵² [Washington CrR 7.1](#)

⁵³ Ibid, Washington Department of Corrections (2014).

⁵⁴ Email correspondence with Mike Fenton on February 26, 2019.

⁵⁵ Ibid, Mike Fenton correspondence (2019).

To allow superior court judges to incorporate individual characteristics and circumstances when sentencing, the SGC believes it would be beneficial to expand the occasions when a PSI can be requested. It does not recommend making them available for all cases and would defer to the Legislature to determine which offenses or cases would best be served with the information gathered in a PSI. It also believes 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 courts 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 type of offenses for which PSIs can be requested increases, it is possible DOC may complete PSIs for individuals who do not come under its jurisdiction. The SGC believes it would be worth considering the creation of a unit adequately funded by the state within the superior court to assume the duty of completing PSIs requested by superior court judges.

Recommendations

Recommendation – Unranked Offenses

The SGC recommends moving away from unranked offenses by 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.

Recommendation – Offense Seriousness Levels

The SGC did not complete a review of the offenses within each seriousness level. The SGC determined that to complete this task, it would need to know the sentencing grid to which the seriousness levels would be applied. As it is unknown whether the Legislature would pursue either of the proposed alternative sentencing grids or continue use of the current grid, the SGC was unable to complete the review. Addressing offenses that are incorrectly ranked is important work and the SGC would be pleased to complete a review of the offenses within the seriousness levels once a grid has been chosen.

Recommendation – Offender Scoring

Data analysis by the Council of State Governments Justice Center provided curious results, compared to other states, about the relationship of Washington’s offender score to recidivism rates compared to the results of other states. Complex statistical analysis is needed to determine what those results mean and that level of analysis goes beyond the scope of this project.

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 rise in judicial discretion found in the SGC’s two proposed alternative 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 attorneys, judges and defense attorneys in the time leading up to sentencing.

Relocate the duty to complete PSIs requested by the superior court to the superior court

While the DOC does use 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 its jurisdiction. It is for these reasons the SGC believes that the duty would best be placed within a unit adequately funded by the state in the superior court, similar to the way the state's juvenile courts and district courts complete their PSIs. Superior court judges would then be able to tailor the PSI for information they find most relevant. Because other entities do use the PSI, it is also recommended that the superior court work with all stakeholders, including DOC, to reduce difference in the forms and to make the form as applicable as possible to all who use them.

Increase cultural competency and reduce disproportionality in PSIs

The SGC recognizes the risk of perpetuating racial disproportionality by increasing the volume of PSI information provided to the courts: Some of the reported information can be subjective in nature. And there may be barriers to obtaining all the relevant information for persons from different cultures. The SGC therefore recommends to whichever agency has the duty to complete PSIs requested by the superior court seek to increase staff's ability to understand, communicate with and effectively interact with people across cultures to 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. The SGC believes the PSIs are better without that information. Likewise, probation or community supervision staff providing recommendations for sentencing outcomes was deemed unnecessary.

Recommendations – Proposed Alternative Sentencing Grids

The SGC unanimously supports an increase in judicial discretion in sentencing. The SGC was not able to reach consensus on exactly how to increase judicial discretion, and, as a result, offers two sentencing grid proposals that increase discretion by different degrees. Option 1 increases most sentencing grid cell ranges but leaves the drug grid, mitigating and aggravating factors and enhancements intact. (See Appendix A for option 1 sentencing grid.) Option 2 creates a new two-step sentencing grid that increases judicial discretion, subsumes the drug grid and incorporates mitigating and aggravating factors and enhancements. (See Appendix B for option 2 sentencing grids.)

Sentencing Grid Option 1

This approach provides a balance between increasing judicial discretion and maintaining the original design and structure of the SRA. This ensures that offenders who commit similar crimes and have similar criminal histories receive similar sentences.

This grid increases judicial discretion on the current sentencing grid in two ways. First, cells that currently result in a jail sentence are changed to 0–365 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, such as Rape 3, Criminal Mistreatment, Custodial Sexual Misconduct, Incest 2 and Kidnapping 2. 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 where a decrease of 20% would produce a value of less than 12. This allows the prison term cells to continue to be prison term cells. The ranges for seriousness level XIV 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 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. In addition, this option retains all legislatively approved sentencing alternatives, including the First-time Offender Waiver, Drug Offender Sentencing Alternative, Special Sex Offender Sentence Alternative, Family and Offender Sentencing Alternative and therapeutic courts such as drug courts.

Option 1 accomplishes the goal of allowing judges somewhat broader discretion, especially in cases involving lower level felonies, while also maintaining the original goals and structure of the SRA. In addition, option 1 preserves a long-established body of case law that has interpreted and clarified the SRA over the years, a process that would start anew with the option 2 approach. Retaining the structure of the SRA while granting additional discretion to sentencing courts allows judges to continue issuing individualized sentences based on the unique circumstances of the case and the offender while at the same time preventing wide disparity of sentencing practices among counties for relatively similar conduct.

Sentencing Grid Option 2

Option 2's approach is intended to simplify the sentencing system, give judges greater discretion in sentencing and limit disproportionate sentences among counties by subsuming sentencing enhancements, the majority of aggravating and mitigating factors, the separate drug offense grid, unranked crimes and other aspects of the current system.

Under option 2, 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 option also adds another column for offender scores of 10+. (See Appendix C for an example of sentencing under option 2 grids.)

Step 1 –Mandatory Grid

Option 2 creates a grid that sets the mandatory low and high sentencing ranges based on the offender score and the offense classification.

Step 2 –Presumptive Grid

Option 2 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 D for examples of offenses under this classification system.) Aggravated murder would be deemed A++, would not be on the grid and would maintain its mandatory sentence of life without possibility of parole. As with the current grid, the seriousness levels would be on the vertical axis of the grid and the offender score (1–10+), would be on the horizontal axis.

Under option 2, sentencing courts would use the step 2 presumptive grid to issue a sentence while keeping in mind the mandatory lower and upper ranges set in step 1. When sentencing, a judge may consider any of the approximately 40 sentencing factors. These factors are consistent with current sentencing enhancements and aggravating and mitigating factors found in RCW 9.94A.533 and .535, respectively. The process of considering such factors is very similar to the original SRA and the federal sentencing scheme, which, before *Blakeley*, 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 pleaded and proven beyond a reasonable doubt to a jury or agreed to exist by the prosecution and defense.

If any enumerated factors exist in a particular case, the sentencing judge would have discretion to impose an appropriate sentence within the step 2 presumptive grid ranges set by the classification of the offense as 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 if 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 that is 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 option 2 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 included in the grids as a visual reminder of what sentencing alternatives may be available when a sentence falls in a particular area of the grid.

This sentencing system has multiple advantages over the current one. It provides guided discretion to the sentencing judge. And it allows sentencing judges to issue the individualized sentences the public wants from our courts.

Unfortunately, judges reviewing plea agreements can determine only whether a defendant is knowingly and voluntarily giving up their trial rights. Judges 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 have an impact 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.

Option 2 puts the courts back in the business of deciding what sentence is appropriate for a defendant on a case-by-case basis. 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 important 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 this option is intended, its adoption, coupled with more information provided much earlier to the parties and to the sentencing judge, will shine a new light 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.⁵⁶ 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. The deadly weapon enhancement was divided into separate firearm and deadly weapon enhancements, the list of offenses to which these two enhancements could be applied was increased and 11 other enhancements have been 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.⁵⁷

As illustrated in Appendix E, 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. In addition, the rules around eligibility for good time credits differ between enhancements. Complexity in the sentencing enhancements creates confusion for many practitioners in the criminal justice system. It caused significant problems for the Department of Corrections' computer system when calculating release dates for some incarcerated individuals who had enhancements,⁵⁸ resulting in legislative oversight. It remains an area of concern for the agency.

Because of their mandatory nature and the ineligibility for application of earned release time, most enhancements are, at their core, mandatory minimums. As noted 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 the 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 option 2 grid recommendation while they remain unchanged in the option 1 grid recommendation.

There are two points the SGC was able to find consensus on, however. It unanimously passed a motion to eliminate the mandatory "stacking" of enhancements. Stacking occurs in any situation in which a defendant is charged with multiple crimes in a single charging document, like when an offender engages in multiple robberies while armed with a pistol over the course of a night. If each robbery charge is accompanied by a firearm enhancement, the sentencing court must, upon a finding or plea of guilty, impose separate five-year terms to run consecutively to the underlying sentence and

⁵⁶ RCW 9.94A.310 (1983) Retrieved from <http://leg.wa.gov/CodeReviser/RCWArchive/Documents/1983/Vol1.pdf>.

⁵⁷ 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.

⁵⁸ See Sentencing Calculating Error 2015 at <https://www.doc.wa.gov/corrections/justice/sentencing/error.htm>.

to each other. What this means is that if there are six separate robbery charges and each charge includes a firearm enhancement, the defendant faces a sentence of 30 years of incarceration that must be imposed and cannot be reduced in addition to the underlying standard range sentence. What the SGC members agreed upon was the mandatory application of the first enhancement and discretionary application of subsequent enhancements for the same case. The presumption at sentencing would be that the enhancements would be served concurrently, leaving it to the judge to determine if consecutive service was warranted.

It also passed a motion that enhancements should become eligible for good time as applied to the underlying offense. The calculation of good time is complex, as illustrated in the DOC example above. Applying the good time percentage to the entire sentence, as opposed to only part of it, would go a long way in simplifying the calculation.

Recommendation

Recommendations – 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.
- The SGC recommends that all enhancements should be eligible for good time as applied to the underlying sentence. This would be a big step in reducing complexity.

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.’”⁵⁹ To complete this task, the MJC created the Legal Financial Obligations Stakeholder Consortium, whose objectives 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.”⁶⁰

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

⁵⁹ 2017-2018 Minority and Justice Commission Annual Report, Retrieved from <http://www.courts.wa.gov/committee/pdf/AnnualReportMJC2017-2018.pdf>.

⁶⁰ 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>.

Recommendations

Recommendation – Legal Financial Obligations

The review and analyses being carried out by the LFO Stakeholder Consortium on LFO issues 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 resulted from that work.

Recommendation – Encouraged Use of Available Tools

The SGC was impressed with the LFO calculator created by the consortium and encourages judges to use 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.

As it began its review of the SRA, the SGC agreed on the principle that supervision should facilitate reentry and not be considered a continuation of punishment. Furthermore, it believes Washington should be following the best available science in developing DOC practices. To this end, 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. (See Appendix F for the CSG’s final report.)

Key Research Findings by the CSG

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

The CSG presented the results of 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.⁶¹ Nagin and Snodgrass also looked at the effect of incarceration on reoffending and reported that their results echo the conclusions of modern literature that “there is little persuasive evidence that incarceration reduces future criminality.”⁶² 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.⁶³ These results parallel the findings of a 2004 study by the Washington State Institute for Public Policy: After testing with three methodologies, “The results consistently indicate that prison does not reduce felony recidivism, and may increase it by 5 to 10 percentage points.”⁶⁴

⁶¹ Council of State Governments Justice Center. Community Supervision: An effective tool to change behavior. Presentation to the Washington Sentencing Guidelines Commission (October 12, 2018). Available at https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2019/wa_sent_comm_20181012_vFINALcopy.pdf.

⁶² Nagin, D. S. and Snodgrass, G. M. (2013). The effect of incarceration on re-offending: Evidence from a natural experiment in Pennsylvania. *Journal of Quantitative Criminology*, 29(4), pp601-642.

⁶³ Ibid, Council of State Governments (October 2018).

⁶⁴ 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.

Supervision yields better outcomes and costs less than incarceration.

The CSG reported that a number of states, such as Arkansas and Georgia, have demonstrated that probation-only sentences can provide lower recidivism rates.⁶⁵ Washington spends more than \$600 million on prisons but only \$185 million to supervise more than 32,000 individuals in the community, of whom about 20,000 are on active supervision.⁶⁶ Looking at the felony probation-only rate in 2015, Washington ranked 30 out of the 33 states that provided data.⁶⁷ This low ranking is because more than 90% of Washington’s felony sentences include a confinement term, which is much higher than the national average of 69%.⁶⁸ It also makes comparisons of supervision-only sentences to those where supervision is problematic post-incarceration.

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, which promotes success. It also lets community custody officers focus on what is most important, such as building on the individual’s strengths and offering encouragement for improvement of other areas.

WSIPP’s cost-benefit data that shows RNR supervision strategies can reduce technical violations by 16% and provide a benefit of more than \$8,000 per person after costs.⁶⁹ The CSG references work by Andrews and Bonta that shows a negative correlation between the employment of RNR principles and recidivism, which means as more of the RNR principles are employed, the lower the recidivism rate that is reported.⁷⁰ A reduction in recidivism is evident in prison but is even greater when delivered in the community. Greater reductions in recidivism were also reported when using core correctional practices⁷¹ in conjunction with RNR principles.⁷² Currently, Washington incorporates engagement strategies in officer training and includes it in performance evaluations. However, DOC could benefit from additional resources to support coaching and mentoring of staff to enhance the skill sets of DOC employees on cognitive change approaches for supervised individuals.

Doing supervision well means moving to a “coaching” model.

The CSG described and contrasted the “coaching” and “referee” approaches to supervision.⁷³ The referee approach employs procedural justice and applies the rules as intended. Referees are regarded as authority figures who control the application of sanctions. The coaching approach, on the other hand, encapsulates core correctional practices. A coach is viewed by individuals as supportive and

⁶⁵ Ibid, Council of State Governments Justice Center (April 2019).

⁶⁶ Ibid, Council of State Governments Justice Center (October 2018). Supervision total as of August 2018 and includes active and inactive supervision categories.

⁶⁷ Ibid, Council of State Governments Justice Center (October 2018).

⁶⁸ Council of State Governments Justice Center. Presentation to the Washington Sentencing Guidelines Commission (February 8, 2019). Available at https://sgc.wa.gov/sites/default/files/public/SGC/meetings/2019/WA_SGC_Feb_presentation.pdf.

⁶⁹ Washington State Institute for Public Policy. Benefit cost results: Adult criminal justice system (December 2018). Available at <http://www.wsipp.wa.gov/BenefitCost?topicId=2>.

⁷⁰ Ibid, Council of State Governments Justice Center (October 2018).

⁷¹ Core correctional practices are evidence-based approaches for correctional staff to use to increase the therapeutic potential of rehabilitation and include topics such as relationship skills, effective use of reinforcement, effective use of disapproval, prosocial modeling, structured learning and problem solving.

⁷² Ibid, Council of State Governments Justice Center (October 2018).

⁷³ Ibid, Council of State Governments Justice Center (October 2018).

trustworthy. Coaches are aware of the individual's deficits that need improving. While coaches train and encourage, they are still an authority figure but are trusted and respected. As noted above, data show that incorporation of the coaching approach 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.

The CSG found that the increase in the supervision violator population was greater than the increase in the supervision population itself.⁷⁴ It estimates 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 2015.⁷⁵ 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.⁷⁶ The second-through-the-fifth low-level violations receive 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 the CSG may be due to the accrual of an individual's violation count during any continuous period they are under DOC jurisdiction. There is no mechanism in current statutes to "wash out" violations if an individual has been compliant for a long period of time.

Incentivizing discharge through compliance helps safely reduce the supervision footprint.

Research points out that the amount of supervision assigned to an individual should be based on risk level and incorporate an incentive to allow an individual to reduce their time on supervision.⁷⁷

Lengthy supervision terms expand the criminal justice footprint. The average probation term in the United States is 38 months.⁷⁸ The length of time individuals spend on supervision has increased recently in Washington, based on the DOC policy of imposing supervision terms consecutively rather than concurrently when the Judgement and Sentence form from the courts is silent on the relationship between terms. Experts agree that maximum supervision terms should not exceed five years for even the higher risk levels⁷⁹ as the impact of supervision diminishes after a few years.⁸⁰ The CSG presented survey results from the National Conference of State Legislatures of states that have a five-year cap on probation terms. NCSL reported that 30 states have a cap on maximum felony probation terms of five years or less, and only seven of those, Washington included, do not have a

⁷⁴ Ibid, Council of State Governments Justice Center, (May 2019).

⁷⁵ Ibid. Council of State Governments Justice Center, (May 2019).

⁷⁶ Ibid. Council of State Governments Justice Center, (April 2019).

⁷⁷ Ibid. Council of State Governments Justice Center, (October 2018).

⁷⁸ Ibid. Council of State Governments Justice Center, (October 2018).

⁷⁹ Rhine, E. E., Petersilia, J., & Reitz, K. R. (2015). Improving Parole Release in America. *Federal Sentencing Reporter*, 28(2), pp96-104. doi: 10.1525/fsr.2015.28.2.96.

⁸⁰ 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>.

mechanism to shorten those terms.⁸¹ Another 12 states allow probation terms to be shortened but do not have a cap of five years or less.

The CSG also presented information specifically on supervision of people convicted of a sex offense. It reported that lifetime supervision terms may provide little benefit, if any. This is based on a study it cited that analyzed data from 20 samples totaling more than 7,000 people who were convicted of sex offenses.⁸² The study's authors 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 do not offer any more public safety but add costs. According to WSIPP's cost-benefit data, sex offender registration and community notification, which is coupled with the supervision term, have a cost of \$2,200 per person and offer only a 33% chance of producing a benefit.⁸³

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, more than half of all annual felony convictions in Washington result in a jail sentence.⁸⁴ And more than half of jail sentences do not include a term of community supervision.⁸⁵ For those releasing from jail, the CSG found that within the first three months of release, about 17% of individuals were rearrested compared to the 7% who released from prison.⁸⁶ When looking at all people who released from jail and were rearrested, 48% did so within the first six months.⁸⁷ The CSG reported that individuals who commit less serious offenses had higher rates of recidivism.⁸⁸

The CSG also highlighted that individuals with a term of supervision after being released from jail have lower reconviction rates than those who are released without supervision,⁸⁹ regardless of the amount of criminal history the individual has. For those released from prison with community supervision, there is a higher recidivism rate than for those who do not have a supervision term. This applies to low- and moderate-risk categories only. High-risk categories with supervision have a slightly lower recidivism rate than do high-risk categories 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.

⁸¹ Ibid, Council of State Governments Justice Center, (October 2018).

⁸² Ibid, Council of State Governments Justice Center, (October 2018).

⁸³ Ibid, Washington State Institute for Public Policy, (December 2018).

⁸⁴ Ibid, Council of State Governments Justice Center, (May 2019).

⁸⁵ Ibid, Council of State Governments Justice Center, (February 2019).

⁸⁶ Ibid, Council of State Governments Justice Center, (May 2019).

⁸⁷ Ibid, Council of State Governments Justice Center, (April 2019).

⁸⁸ Ibid, Council of State Governments Justice Center, (February 2019).

⁸⁹ Ibid, Council of State Governments Justice Center, (May 2019).

Recommendations

Recommendation – Supervision should be based on RNR and not solely on offense type.

The SGC recommends legislative, judicial and agency discussions about eligibility for community supervision should be based on an individual's RNR and not solely on offense type. Data show 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, more than one-third will be 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 being released from confinement.

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

Recommendation – Supervision terms should be set concurrent to prior supervision terms.

The SGC recommends clarifying in statute the relationships among multiple supervision terms and reinforcing the court's responsibility to set consecutive terms, when it is its intent. Currently, more than 80% of the felony Judgement and Sentence forms do not specify the relationship of a newly imposed term of supervision with prior terms. Setting supervision terms concurrently focuses supervision on the initial period of transition. It also increases community safety by immediately allowing enforcement of all conditions of supervision for individuals serving multiple supervision terms. For example, an individual serving a Drug Offender Sentencing Alternative sentence cannot be revoked for failing to complete treatment until the DOSA community supervision term becomes active.

Recommendation – Encourage motivational-focused supervision.

The SGC recommends that the state continue to 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 a supervision model based on discipline, e.g., the stick, to a model that motivates individuals while still being accountable when necessary, e.g., the carrot and the stick.

Recommendation – Add behavior-based incentives to community supervision.

The SGC recommends the expansion of behavior-based incentives to the community supervision process, which is part of a RNR supervision model. This includes, but is not limited to, a mechanism to reduce time on supervision, sometimes referred to as positive achievement time. Instead of providing feedback on the undesired behavior, the focus and reinforcement should be on desired behavior, with a ratio of 4 reinforcements for every punishment. Other states, like Missouri, have been successful in reducing supervision population without increasing recidivism rates.

Recommendation – Simplify tolling of supervision terms by limiting tolling to absconders.

The SGC recommends simplifying the rules for tolling (or pausing an individual's term of supervision) by limiting tolling to those who abscond from supervision. Current statutes require DOC to toll the term of supervision when an individual absconds from supervision or when they serve confinement time that is not ordered by DOC as a sanction for nonsex offenses. For individuals on supervision for a sex offense, any period of time in confinement tolls the term of supervision. DOC does not have a reliable mechanism to be made aware of confinement served in jails that is not ordered by DOC. In addition, the lack of consistent rules for the tolling makes it complex to accurately identify, input and calculate appropriate tolling.

Recommendation – Expand DOC's range of violation sanctions.

The SGC recommends expanding the range of sanctions to extend beyond incarceration for community supervision violations. This will give DOC the flexibility to sanction undesired behavior accordingly. The expansion should include imposition of nonincarceration-based punishments, including but not limited to, community service and roadside litter pickup.

Recommendation – Supervision requirements and violation sanctions should be individualized.

The SGC recommends that supervision in general and violation sanctions specifically should be based on the risk and need of the individual, the undesired behavior and the circumstances. Like in sentencing, all 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.

In its three presentations, the CSG showed the SGC that there is a strong research foundation to support the use of supervision-only sentences as an effective public safety alternative to custody-based sentencing. The CSG offered examples of states that demonstrated probation-only sentences can have better outcomes than an incarceration sentence and lower costs.⁹⁰ For example, Arkansas found probation sentences for drug/property offenses had similar or better recidivism rates than prison sentences and with a substantially lower cost. Georgia saw lower reconviction rates for people sentenced only to probation than for people sentenced to prison, regardless of the extent of their criminal history.

⁹⁰ Ibid, Council of State Governments Justice Center (April 2019).

Recommendation

Recommendation – Make alternatives to confinement available to the sentencing judge.

The SGC recommends the use of alternatives to confinement, such as community supervision, as a discretionary option available to sentencing judges for felony sentences. As noted by the CSG, very few felony sentences in Washington 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.

Other related topics considered by the SGC.

Standard Recidivism Reports

Recidivism is “the most commonly used definition of correctional success, [and] is one example of a performance measure that many states use.”⁹¹ 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.”⁹² WSIPP has used this definition when studying recidivism rates of sex offenders and 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 WSIPP is directed by the Legislature so its studies are ad hoc and, most often, look only at the specific population identified in the Legislature’s request.

The Department of Corrections has also completed a few recidivism studies that focus only on people who have been 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.”⁹³

The Oregon Statistical Analysis Center, located in its state’s Criminal Justice Commission, releases a recidivism report twice a year for the entire state. The report presents recidivism data in many ways,

⁹¹ King, R. & Elderbroom, B. (2014). *Improving recidivism as a performance measure*. Washington, DC: Urban Institute.

⁹² 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, p2.

⁹³ 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.

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. Recidivism information at the county level is especially interesting.

A Solution

Create a research position that works on the issue of recidivism in Washington. This position could develop and produce regular recidivism reports and conduct ad hoc analyses to better understand specific recidivism issues. The Statistical Analysis Center is an ideal organization for housing such a research position.

The Washington State Statistical Analysis Center

In 1989, Gov. Booth Gardner authorized the SAC with Executive Order 89-03. Currently there are 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 in the state, and explored education and workforce outcomes of youth who have had one or more trancies. The SAC has coordinated some of its work with other agencies, such as the Education and Research Data Center located in the Office of Financial Management, the Department of Social and Health Services-Research and Data Analysis division and the Washington State Center for Court Research.

Being located in OFM, the state's central management agency and 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.

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 (which 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 the Administrative Office of the Courts 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.⁹⁴ The superior court judges on the SGC have

⁹⁴ Lynch, G. E. (2005). Sentencing: Learning from, and worrying about, the states. *Columbia Law Review*, 105(4), pp933-942.

indicated they feel the same way and desire to know before 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 that 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 about sentence outcomes for cases similar to the cases they have, so this interface would assist prosecutors and defense attorneys as well.

SGC Coordinator Position

The Legislature passed Chapter 40, Laws of 2011 1st Special Session which eliminated the SGC as an independent agency and moved it to 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 it is to continue to provide valuable work and input to the Legislature, it is vital to have staff available to support that work.

Post-conviction Review

In 2015, the SGC formed a work group to explore a second-look option for individuals sentenced to Life Without Parole which resulted in draft legislation during the 2017 legislative session. This past year, another SGC work group continued the discussion and offered to the Legislature a post-conviction review process based on criminal justice literature for individuals who have served at least 15 years in confinement and do not have an avenue for review built into their sentence.

In addition to the two proposals by the SGC, several other entities have submitted proposals to the Legislature on post-conviction relief as well. The Washington Association of Prosecuting Attorneys has offered support for a more robust clemency process. It's a safe conclusion that there is a great deal of support in reviewing incarcerated individuals with long sentences. The SGC believes that such proposals should be considered in any comprehensive review of the state's sentencing scheme.

While this topic was not within the parameters of this review, the SGC suggests that a post-conviction review process would create a huge incentive for incarcerated individuals to make positive changes in their behaviors and attitudes, invest in their future and themselves (i.e. "corrections") and reduce prison populations and costs while still providing meaningful and real punishment for criminal behavior and keeping public safety a priority.

Sovereign Immunity

The SGC does not offer a specific recommendation but, instead, suggests that most changes to the SRA will somehow be affected by the potential for tort liability. While changes to the SRA may have the best intent, the state's agencies and staff who implement those changes frequently take into consideration the potential for claims against them which can mitigate the actual effect such changes may have. The SGC believes a better balance between accountability and liability should be included in any discussions related to reform of the SRA.

Recommendations

Recommendation – Standard Recidivism Report

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

Recommendation – Sentencing Outcomes Interface

The SGC recommends investigating the creation of a user interface to 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 duties.

Recommendation – Post-conviction Review

The SGC and others have worked on the topic of post-conviction reviews for several years. While it does not offer any specific recommendations here, the SGC suggests there is wide support for a review of incarcerated individuals who have long sentences and such a review should be considered in any comprehensive review of the state's sentencing scheme.

Recommendation – Sovereign Immunity

The SGC does not offer any specific recommendation but, rather, is mindful of the effect that the waiver of sovereign immunity has on decision-making by agencies and individuals. The SGC believes this topic should be included in any SRA reform discussions.

Appendix A

OPTION 1 SENTENCING GRID

		Offender Score *all ranges are in months									
		0	1	2	3	4	5	6	7	8	9+
Seriousness Level	LEVEL XVI	Life sentence without parole/death penalty for offenders at or over the age of 18. For offenders under the age of 18, a term of 25 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

OPTION 2 SENTENCING GRID

Step 1 – Mandatory Grid

		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

Step 2 – Presumptive Grid

		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

Appendix C

An example of how the sentencing grids under Option 2 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 and difficult for the public to understand and allows almost no discretion for the trial court.

Option 2 Scheme

Under this 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, 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.

Appendix D

Examples of Offenses in Option 2 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 E

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	Not mentioned	Yes	Consecutive to base Veh Hom sentence but not consecutive to another sentence which was itself consecutive to Veh Hom sentence (<i>In re Personal Restraint of Raymundo</i>)
Attempting to Elude a Police Vehicle	12 months + 1 day	No	Concurrent	Yes	Not mentioned	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	Initial 5 years 3 years 18 months Subsequent 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	Initial 2 years 1 year 6 months Subsequent 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	Not mentioned	Yes	Also doubles the fine and the maximum imprisonment Multiple drug zone enhancements not consecutive to one another (<i>State v Conover</i>)
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	Not mentioned	Yes	
Correctional Facility	18 months 15 months 12 months	No	Concurrent	No	Attempt Conspiracy Solicitation	Not mentioned	Yes	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
Sex Offenses								
Sexual Conduct in Return for a Fee	12 months	No	Concurrent	Yes	Attempt Conspiracy Solicitation	Not mentioned	Yes	
Sexual Motivation	Initial 2 years 18 months 12 months Subsequent 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	Not mentioned	Yes	
Criminal Street Gang-related	Standard range multiplied by 125%	No	NA	Yes	Not mentioned	NA	Yes	Similar aggravating factor available (RCW 9.94A.535(3)(aa))
Robbery of a Pharmacy	12 months	No	Concurrent	Yes	Not mentioned	Not mentioned	Yes	

Appendix F

Review of Sentencing and Supervision in Washington State

A report by The Council of State Governments Justice Center provided for the
Washington Sentencing Guidelines Commission

May 2019

Executive Summary

From 2018 to 2019, The Council of State Governments (CSG) Justice Center provided the Washington Sentencing Guidelines Commission (SGC) with analysis on policies and practices related to various aspects of the state’s criminal justice system. This work was done to help inform the commission’s review of the Sentencing Reform Act required under Engrossed Substitute Senate Bill 6032, Chapter 299, Laws of 2018. CSG Justice Center staff examined and analyzed the following key areas:

- Current literature on effective supervision practices
- Washington felony sentencing approaches and trends
- Recidivism
- Trends for people on supervision

Research strongly supports the idea that community supervision can result in reductions in recidivism and technical violations of supervision when risk, need and responsivity principles are followed. With the adoption of the risk principle in statute — focusing supervision on people at the highest risk of recidivating — and the statewide implementation of a swift and certain approach to supervision, Washington is well positioned to benefit from the potential recidivism-reduction impacts that a strong system of community supervision can deliver. However, findings from this study suggest that the state may not be realizing its full recidivism-reduction potential.

Since 2010, the number of sentences for felony offenses has increased in Washington, particularly sentences for certain property and drug offenses. Over 90 percent of these sentences include a term of incarceration, either to jail or prison. While post-release supervision is statutorily reserved for people with a high risk of recidivating, it does not pertain to people sentenced for property offenses. As a result, people with property offenses often go unsupervised.

Violations of people on supervision in Washington have also increased in recent years. These increases exist across multiple metrics, including the number of admissions and people admitted to jail for supervision violations, the length of stay for people admitted due to supervision violations and the population in jail on any given day for supervision violations. In reviewing statutory policies related to supervision, a few areas stand out as potentially exacerbating these trends. For example, supervision violations stay on record regardless of severity for as long as a person is on supervision, allowing for stacking of violations over time, which leads to longer lengths of stay in jail. Finally, findings are mixed when comparing recidivism rates of people sentenced to jail or released from prison who have supervision and do not have supervision and suggests that further study is warranted.

This study highlights some noteworthy trends and practices in Washington, but further examination is needed to answer important questions about drivers of increases in felony sentences and supervision violations, and to identify strategies that can yield recidivism reduction for Washington.

Background

In the fall of 2018, the Washington Office of Financial Management contracted with The Council of State Governments (CSG) Justice Center to assist the Washington Sentencing Guidelines Commission (SGC) in its review of the Sentencing Reform Act required under Engrossed Substitute Senate Bill 6032, Chapter 299, Laws of 2018. The purpose of the assistance was to provide the state with an analysis of criminal justice system trends and practices using Washington data and to identify for the state key components of effective community supervision based on current literature. Over the course of eight months, CSG Justice Center staff received and analyzed case-level data from three state agencies, including information on prison admissions, admissions for supervision violations, felony sentences, and arrests, and assembled key findings from research literature on the components of effective supervision. In the course of the analysis, CSG Justice Center staff gave three presentations to the SGC to provide an overview of effective supervision practices and the impact that supervision can have on reducing recidivism. These presentations also included analysis on Washington sentencing trends and structures, recidivism rates of people sentenced for felony offenses and supervision policies and practices in the state, including trends for people on supervision. This report provides a summary of the analyses conducted, related methodologies and key findings provided to the SGC, including general best practices in supervision and current practices in Washington.

Review of Effective Supervision Practices

Risk, Need, Responsivity

Risk, need and responsivity principles are fundamental components of reducing recidivism for people on community supervision. These principles state that supervision should be focused on people at the highest risk of recidivating; that programs should be prioritized to address the needs most associated with recidivism; and that interventions should be delivered according to a person's unique learning style, motivations and/or circumstances. Research strongly supports that community supervision can result in reductions in recidivism and violations of supervision when these principles are followed, with greater adherence to these principles resulting in greater reductions in recidivism.¹ Further, recent research has focused on the mindset of supervision and corrections officers and the type of relationships they build with the people they supervise, noting that additional recidivism-reduction potential exists when officers use a strengths-based, therapeutic approach in their interactions. This concept is known as becoming a "coach" rather than a "referee" and is truly the embodiment of core correctional practices, which focus on building relationship skills, problem solving, effective reinforcement and modeling in interactions with people under supervision or in a correctional setting.²

In contrast to the evidence supporting the benefits of effective community supervision, there is evidence to suggest that the prison environment may be criminogenic and lead to higher rates of recidivism.³ While prisons are effective at reducing a person's immediate chances of recidivism

through incapacitation, any long-term impacts to deter future crime are unlikely. Instead, people may learn more effective crime techniques and become more susceptible to a criminal lifestyle while in prison.⁴ In several states, people sentenced directly to probation exhibited lower recidivism rates than people with similar profiles who were sentenced to prison, even when the prison sentence was followed by a term of supervision.⁵

The state of Washington has taken meaningful steps to incorporate best practices into supervision policy and practice. From 2000 to 2005, the state passed a series of legislative reforms that required recidivism risk to be considered in the application of supervision.⁶ This ultimately resulted in the elimination of supervision for people convicted of felony and misdemeanor offenses who are deemed to be at a low risk of recidivating, excluding people convicted of serious violent offenses or sex offenses and people with an alternative sentence, such as the First-Time Offender Waiver, for which supervision was maintained regardless of risk. These policy changes led to dramatic reductions in the number of people on community supervision in Washington, with the goal of focusing supervision resources on people at the highest risk of recidivating.

One curious exception to this statutory application of the risk principle was the exclusion of supervision for people sentenced for property offenses, a group that tends to have higher rates of recidivism and thus higher risk than people sentenced for other types of crimes. Unless the sentence involves an alternative, such as the First-Time Offender Waiver, people sentenced for property offenses, even if they are high risk, cannot receive a period of supervision with their sentence. On the other hand, people sentenced for certain violent offenses and those with alternative sentences must receive supervision, even if they have a low risk of reoffending.

Swift and Certain Sanctions

In 2004, a pilot program was launched in Hawaii to reduce probation violations among people supervised for drug offenses and at a high risk of recidivism. The focus of this program, called HOPE probation (Hawaii's Opportunity Probation with Enforcement), was to provide intensive drug treatment to people who needed it most and to respond quickly and consistently to behavior that violated conditions of supervision. Responses to supervision violations occurred immediately upon a court finding that the behavior took place (i.e., within 72 hours) and consisted of short stays in jail, an approach that came to be known as Swift and Certain (SAC) punishment.⁷ The basis for the SAC approach is grounded in research showing that people are more effectively deterred from crime when there are immediate and highly probable threats of punishment for that crime.⁸

A 2009 evaluation of the HOPE program showed that participants were less likely to be arrested, use drugs, miss appointments with probation officers and have their probation revoked than people not in the program.⁹ These signs of success led jurisdictions nationwide to consider implementing practices similar to the HOPE model. In 2012, Washington became the first state to implement a SAC program statewide.¹⁰

Evaluations of these subsequent implementations in Washington and elsewhere have shown mixed results. A 2015 study in Washington found that people starting supervision during the first year of implementation of SAC had reduced propensities for reconviction, confinement following a violation and lengths of stay in confinement when compared to a historical comparison group.¹¹ However, this early examination of SAC in Washington may not have been able to account for implications of SAC sanctions for people on supervision over a long period of time. For example, as people accumulate higher numbers of supervision violations, the certainty of confinement following the violation and the length of stay in confinement for each violation increases.¹² Moreover, these increases are statutorily required with little allowable discretion on the part of the supervising officer or judge.

A 2018 evaluation of four demonstration sites in Arkansas, Massachusetts, Oregon and Texas indicated that implementation of the HOPE model in these sites did not produce better outcomes than “conventional” probation supervision.¹³ Given these mixed results and the varied circumstances that exist across states and jurisdictions regarding the HOPE model of supervision, important questions remain about programs built upon this model and its effectiveness.

Study Methodology for Analysis of Washington Data

Description of Data

The CSG Justice Center obtained case-level data from three Washington state agencies for this project. The Department of Corrections (DOC) provided data from its Offender Management Network Information database on admissions to and releases from state prison due to a sentence imposed by the court and admissions to and releases from local jails/violator centers due to supervision violations. Additionally, data were provided for people under the jurisdiction of DOC (in prison/jail or on community supervision) in a given period. Along with dates associated with DOC jurisdiction and admission/release from a state prison or local jail/violator center, the DOC data contained variables on the most serious offense for that DOC jurisdiction period, admission/release type, risk level, state ID number and demographic information for the person admitted to, released from or under the jurisdiction of the DOC. The data provided accounted for calendar years 2015–18.

The Caseload Forecast Council (CFC) provided data from its database, which includes all felony sentences in a given year for fiscal years 2014–18. The CSG Justice Center had previously obtained sentencing data for fiscal years 2000–13 for the Washington Justice Reinvestment project, and, with permission from the CFC, created a sentencing dataset for fiscal years 2000–18. The sentencing data contained variables on sentence date, offense information for all offenses associated with a sentence, including identification of the lead charge; sentence length; type of sentence (jail or prison); time served pretrial; state ID number; demographic information for the person sentenced and location of a sentence on the sentencing grid (Seriousness Level and Offender Score).

The Washington State Patrol (WSP) provided data on arrests for anyone arrested in the state of Washington for all years captured in the WSP database, containing more than 10 million records going back more than 40 years. The arrest data contained variables on date of arrest, date of offense, description and statutory reference of offense, state ID number and demographic information for the person arrested.

CSG Justice Center staff matched data using the state ID number across datasets from the three separate sources to conduct recidivism and other analyses. The multiple datasets (admissions, releases and supervision) obtained from DOC were matched using the DOC number, a unique person identification number used only by the DOC to bring together prison/jail admission and release data with offense and demographic data into a single dataset.

Variables

For this study, recidivism was defined as rearrest or reconviction and calculated for multiple cohorts of people sentenced to jail or released from prison in fiscal year 2015 (for three-year rates) and in fiscal year 2017 (for one-year rates). For the jail sentence cohorts, an estimated release date was calculated using sentence date, sentence length and credit for time served pretrial (credit for time served subtracted from sentence length and the resulting number of days added to sentence date). Recidivism was then calculated as an arrest or conviction occurring within three years of the estimated release date. If a person was rearrested or reconvicted before their estimated release date from jail but after their current sentence date, the recidivism event was still counted, and the person was considered a recidivist. For the prison release cohorts, only people released after serving a sentence at the DOC were included. People released after serving time for a supervision violation were not included. People who were released from prison or jail more than once in a fiscal year were counted only once in the analysis based on the earliest release date in the fiscal year. Both felony and misdemeanor arrests were included as a rearrest, while only felony convictions were included as a reconviction, as data on misdemeanor convictions was not included in the CFC dataset.

To identify people who were on supervision following release from jail or prison, CSG Justice Center staff matched DOC jurisdiction data to sentencing data and to prison release data, respectively. The jurisdiction data contained start and end dates that covered the time a person was under the jurisdiction of the DOC, whether incarcerated or on community supervision. If the jurisdiction dates indicated that a person was under DOC jurisdiction for at least 60 days following a jail or prison release, that person was considered to be on supervision following release. The 60-day window was suggested by DOC staff to account for the intake and assessment process for people starting supervision. People who are found to be ineligible for supervision in Washington (i.e., assessed as low risk and sentenced for certain offenses) are typically removed from supervision within 60 days.

The categorization of offense type (person, property, drug offense) used in this study was dependent on the type of analysis conducted. While analyses that involved sentencing data and jail recidivism relied upon the offense categorization used by the CFC, analyses that involved DOC prison data,

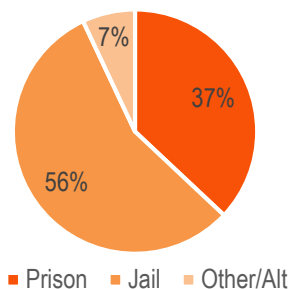
such as prison release recidivism, used the offense categorization provided by the DOC. Some differences exist between the Forecasting Category, or offense type, used by the CFC and the statutory categories assigned to certain offenses. For example, Burglary 1 is a property offense under the CFC-defined category, but statutorily it is a violent offense. These differences generally apply to relatively few cases.

Analysis of Washington Data

Descriptive and Trend Analysis of Felony Sentences

In Washington, over 90 percent of felony sentences include a period of incarceration to either jail or prison. While 17 percent of felony sentences receive an alternative, such as the First-Time Offender Waiver (FTOW) or Drug Offender Sentencing Alternative (DOSA), approximately 10 percent of these alternative sentences also include a jail or prison term, leaving only 7 percent of sentences that do not include a sentence of incarceration (see Figure 1).

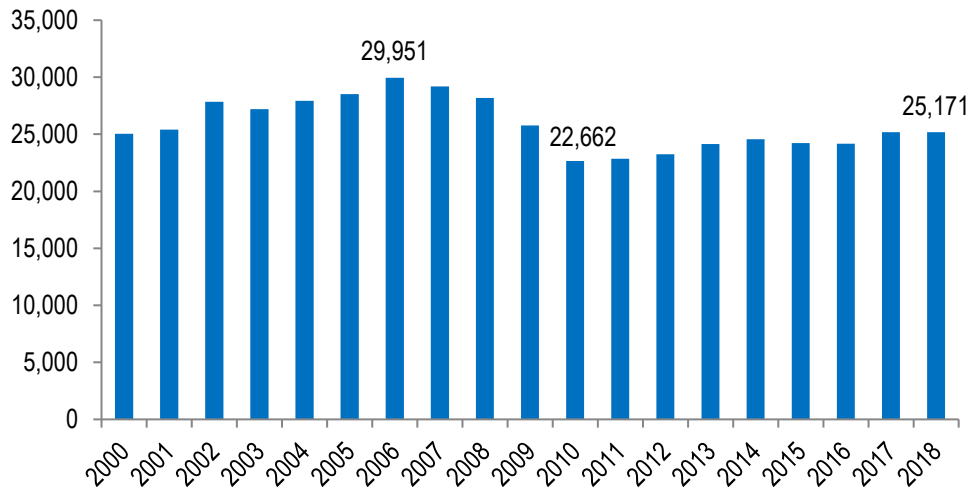
Figure 1. Felony Sentences in Washington by Disposition Type, Fiscal Year 2018



Source: CSG Justice Center analysis of Caseload Forecast Council data; Bureau of Justice Statistics, National Judicial Reporting Program, *Felony Sentences in State Courts, 2006 Statistical Tables*.

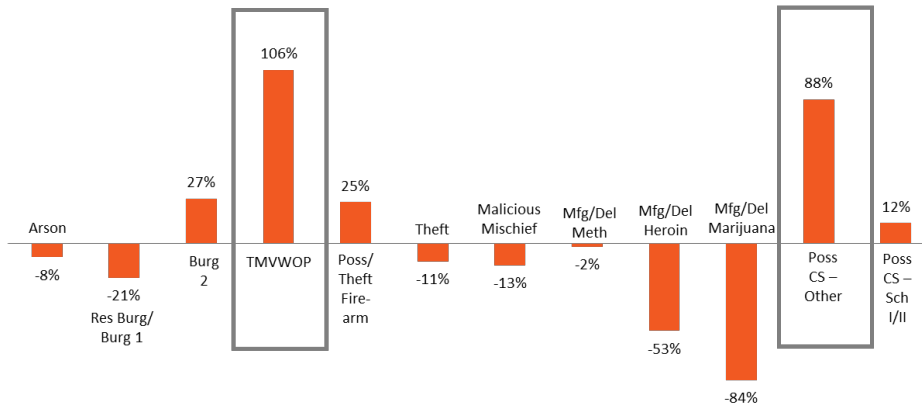
Felony sentences in Washington have increased 11 percent since reaching a near two-decade low in 2010 (see Figure 2). Sentences for property and drug offenses increased 8 and 21 percent, respectively, while sentences for person offenses decreased 1 percent. As shown in Figure 3, among property offenses, Burglary 2, Possession or Theft of a Firearm and Taking a Motor Vehicle Without Permission (TMVWOP) all increased at least 25 percent, with TMVWOP increasing 106 percent. Among drug offenses, sentences for all manufacturing and distribution offenses declined, while sentences for possession offenses increased, with Possession of a Controlled Substance – Other (non-Schedule I/II) having the highest increase at 88 percent.

Figure 2. Felony Sentences in Washington, Fiscal Years 2000–2018



Source: CSG Justice Center analysis of CFC data.

Figure 3. Percent Change in Washington Felony Sentences by Offense Type, Fiscal Years 2010–2018

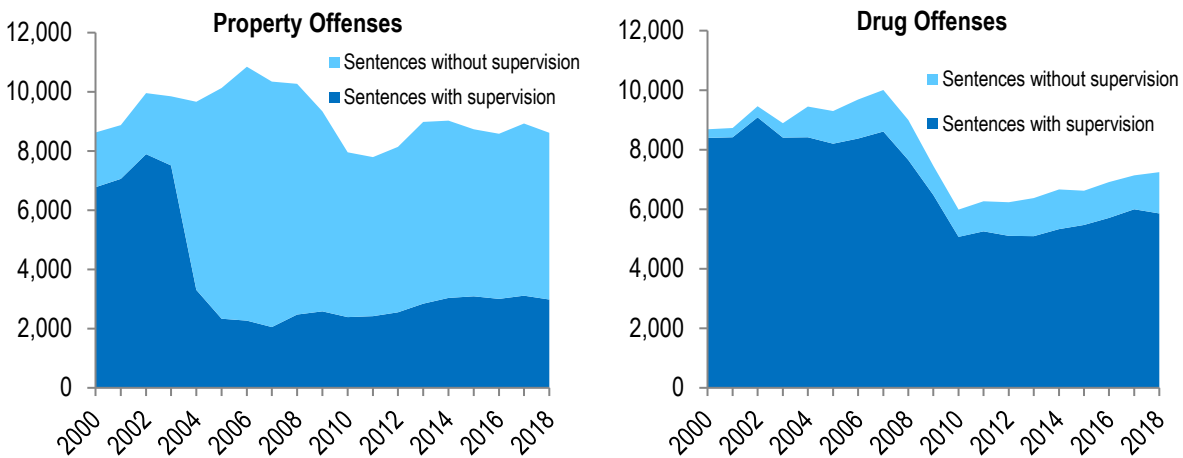


Source: CSG Justice Center analysis of CFC data.

While nearly all felony sentences receive a sentence of incarceration in Washington, a period of supervision is not given by default but may be ordered following the term of incarceration in instances clearly defined by statute. In 2003, the state legislature passed a law that prohibited supervision for people sentenced for property offenses unless the sentence involved a sentencing alternative (e.g., FTOW, DOSA). Conversely, people sentenced for drug and person offenses may be supervised if they are assessed as being at a high risk of reoffending, and people sentenced for serious violent offenses may be supervised regardless of risk. As a result, people sentenced for property offenses have much lower rates of supervision associated with their sentence. Figure 4 shows the effect of these legal and policy changes on the proportion of sentences for property and

drug offenses with orders of supervision. Despite the fact that people convicted of property offenses tend to have high rates of recidivism — and that people convicted of drug offenses tend to have similar, often overlapping characteristics — rates of supervision are now considerably lower among people sentenced for property offenses than those sentenced for drug offenses.

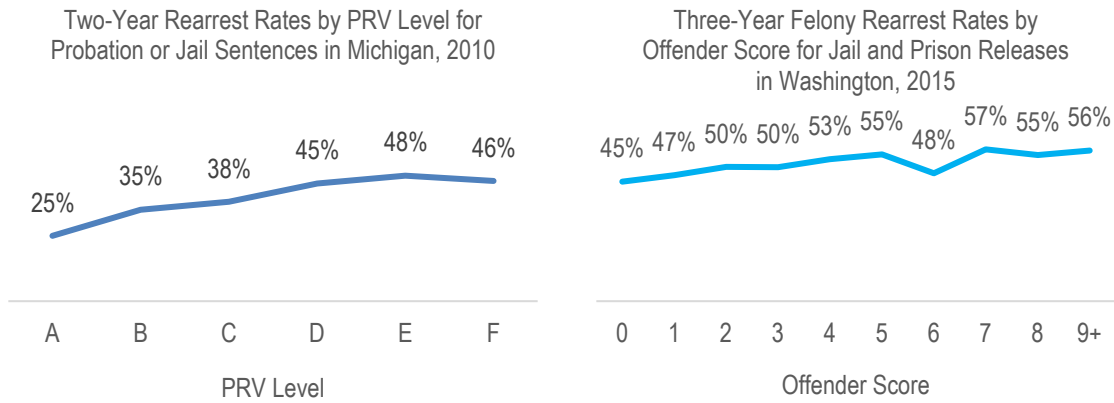
Figure 4. Proportion of Sentences for Property and Drug Offenses with Orders of Supervision in Washington, Fiscal Years 2000–2018



Source: CSG Justice Center analysis of CFC data.

The determination of sentence length in Washington is based on the state’s sentencing guidelines grid adopted under the Sentencing Reform Act of 1981. As with all state sentencing guidelines, a combination of offense severity and prior criminal history is used to guide disposition and sentence length decisions, with the goal that people with more severe offenses and/or more extensive criminal history receive more restrictive dispositions and longer sentence lengths. In Washington, these elements of the guidelines are known as the Seriousness Level and Offender Score, which are represented as the rows and columns of the state’s sentencing grid. While in other state sentencing guidelines, the representation of prior criminal history is a good indicator of likelihood of recidivism, this is not the case for Offender Score in Washington. Figure 5 shows recidivism rates by criminal history indicator score in Michigan, known as the Prior Record Variable, compared to recidivism rates by Offender Score in Washington. While recidivism in both states increases as the criminal history score increases, the relationship is much weaker in Washington.¹⁴ For example, recidivism rates for people with a mid-range Offender Score, such as four, are only two to three percentage points lower than recidivism rates for people with the highest possible Offender Score. This weak relationship between recidivism and Offender Score is problematic as it undermines the goal of Washington’s sentencing guidelines to give sentences that are “proportionate to the seriousness of the offense and the offender’s criminal history.”¹⁵

Figure 5. Recidivism Rates by Criminal History Indicator Score in Michigan and Washington

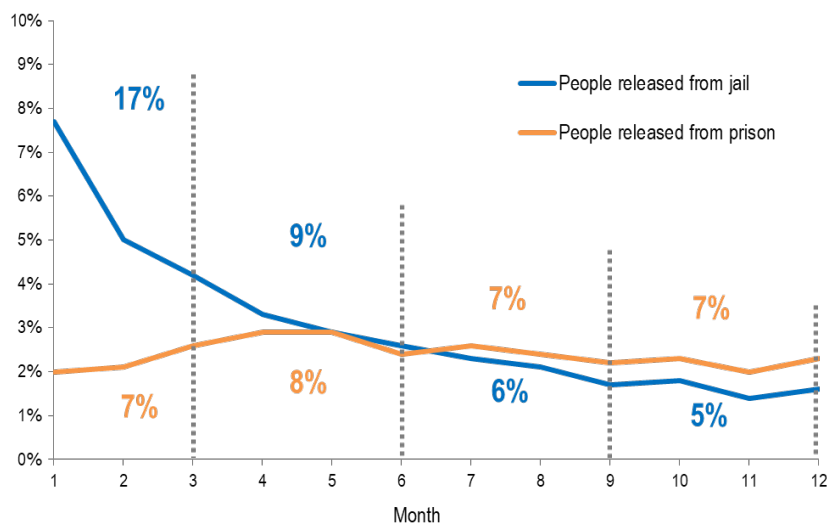


Source: CSG Justice Center, Presentation to the Michigan Law Revision Commission, May 2014; CSG Justice Center analysis of DOC and CFC data.

Washington Recidivism Trends

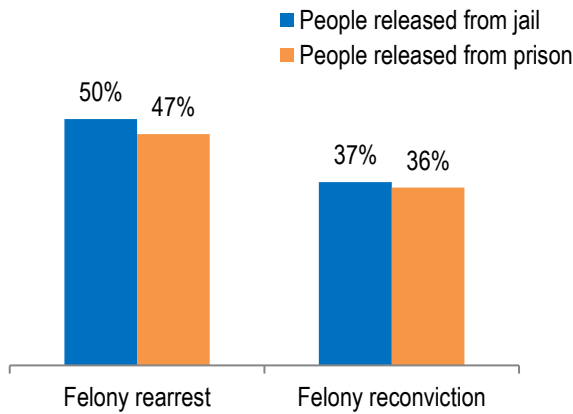
CSG Justice Center staff analyzed recidivism rates for people released from jail and prison in fiscal years 2015 and 2017, examining rates of rearrest and reconviction three years and one year following the date of release (see Figures 6 and 7). People released from jail had higher recidivism rates than people released from prison in the first six months following release. Over the full three-year tracking period available for the 2015 cohort, recidivism rates were only slightly higher for people released from jail. While differences in the level of programs, services and reentry planning that people receive in jail or prison may impact recidivism, it may also be true that people released from jail have a greater likelihood of reoffending due to the types of offenses that receive a jail sentence.

Figure 6. Washington Jail and Prison Release One-Year Felony Rearrest Rates by Month, Fiscal Year 2017 Releases



Source: CSG Justice Center analysis of DOC, WSP and CFC data.

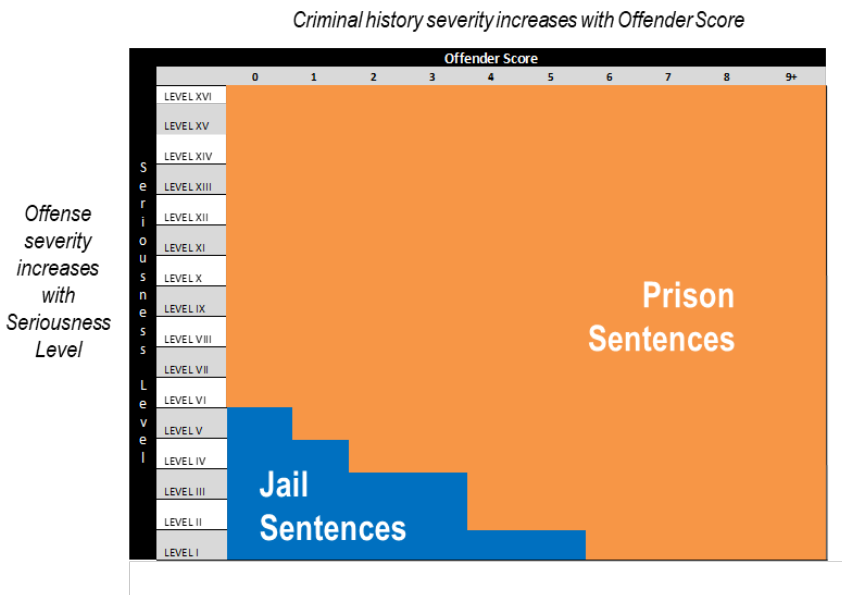
Figure 7. Washington Jail and Prison Release Three-Year Felony Rearrest and Reconviction Rates, Fiscal Year 2015 Releases



Source: CSG Justice Center analysis of DOC, WSP and CFC data.

In Washington, whether a person receives a jail or a prison sentence is largely driven by where they fall on the sentencing grid as dictated by their current offense Seriousness Level and their Offender Score. While judges may order sentences that deviate from the guidelines, evidence of mitigating or aggravating factors is required to do so. As shown in Figure 8, people with a jail sentence tend to have low-severity offenses and Offender Scores, while people with a prison sentence may have a low-severity offense and high Offender Score or a high-severity offense with any Offender Score.

Figure 8. Current Washington Sentencing Grid for Standard Offenses



It is difficult to draw conclusions from recidivism comparisons between people released from jail and prison, because the characteristics and backgrounds of people receiving jail and prison sentences are fundamentally different. A more thorough examination of the risk profiles of jail and prison populations is needed to better understand recidivism among these groups.

Similar questions arise in the examination of the impact of supervision on recidivism rates for people released from jail and prison. Table 1 below shows three-year felony rearrest rates for people released from jail both with and without a period of supervision following release. For people released from jail, those with supervision had lower recidivism rates than those without supervision following release, while for people released from prison the opposite was true.

Table 1. Three-Year Felony Rearrest Rates for People Released from Jail and Prison in Washington in Fiscal Year 2015

People Released from Jail	
With supervision	49%
Without supervision	50%
People Released from Prison	
With supervision	48%*
Without supervision	44%*

*Difference in recidivism between groups is significant at $p < .05$ level.

Source: CSG Justice Center analysis of DOC and CFC data.

Overall, people released from prison with supervision had higher recidivism rates than people released from prison without supervision, but this is not the case across people with different risk levels. Table 2 provides recidivism rates for people released from prison with and without supervision by risk level. Recidivism rates for high-risk people released from prison to supervision are lower than for high-risk people released without supervision, but this is not the case for low- and moderate-risk people. This could confirm other research showing that supervising low-risk people is counterproductive and actually increases the likelihood of recidivism. These findings suggest that the effects of supervision on recidivism should be explored further.

Table 2. Three-Year Felony Rearrest Rates for People Released from Prison in Washington in Fiscal Year 2015 by Risk Level

High Risk	
With supervision	52%*
Without supervision	54%*
Moderate Risk	
With supervision	40%*
Without supervision	18%*
Low Risk	
With supervision	17%
Without supervision	16%

*Difference in recidivism between groups is significant at $p < .05$ level.

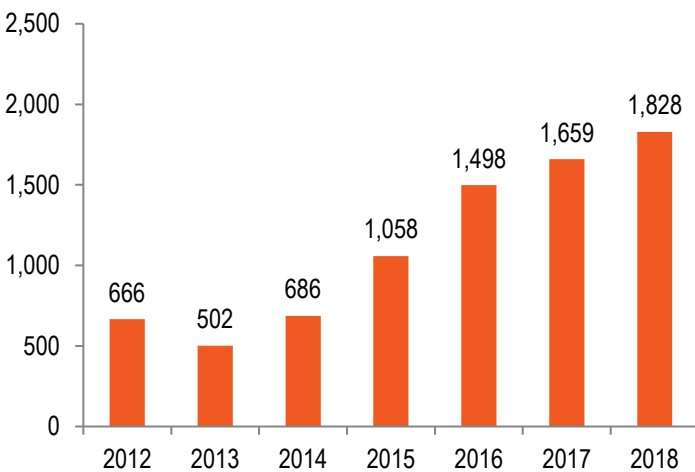
Source: CSG Justice Center analysis of DOC and CFC data.

Issues that complicate an examination of supervision that were not addressed in this study are the statutory restrictions on supervision and the lack of supervision as a sentence in the guidelines. The Washington sentencing guidelines offer a range of months for incarceration in jail (12 months or less) or prison (more than 12 months) with no option for what is referred to in other states as “straight” probation. Outside of an alternative sentence or sentences for certain serious, violent offenses, Washington statute dictates that only people sentenced for drug or person offenses who are also assessed as high risk may be supervised. Judges may include a term of supervision with a sentence of incarceration, but even the recommended terms of supervision can be mooted if the person is not assessed as high risk. For non-prison sentences, a judge may order a jail sentence that results in time served (i.e., time ordered at sentencing is equal to or less than the time served in jail pretrial) and add on a period of supervision, but that is not required, and the person must be assessed as high risk to remain on supervision. People receiving an alternative sentence always get a period of supervision, but certain criteria must be met to receive an alternative sentence (e.g., no prior violent offense). Obtaining comparable groups is a challenge when the options for supervision are so circumstantially limited, and supervision often occurs only following a release from incarceration.

Trends in Supervision Violations

In the two years following the implementation of a Swift and Certain approach to supervision sanctioning in Washington in 2012, the average daily jail population for supervision violations remained steady or declined. Since 2014, this trend has reversed, and the population has increased at a rate much higher than the increase in the total supervision population (see Figure 9). Between 2014 and 2018, the total supervision population increased 19 percent compared to a 166-percent increase in the supervision violator population. While this increase may, in part, be the result of improvements in capturing data on violator populations within the DOC OMNI system that occurred in 2016, the violator population has continued to increase since these system improvements were made.

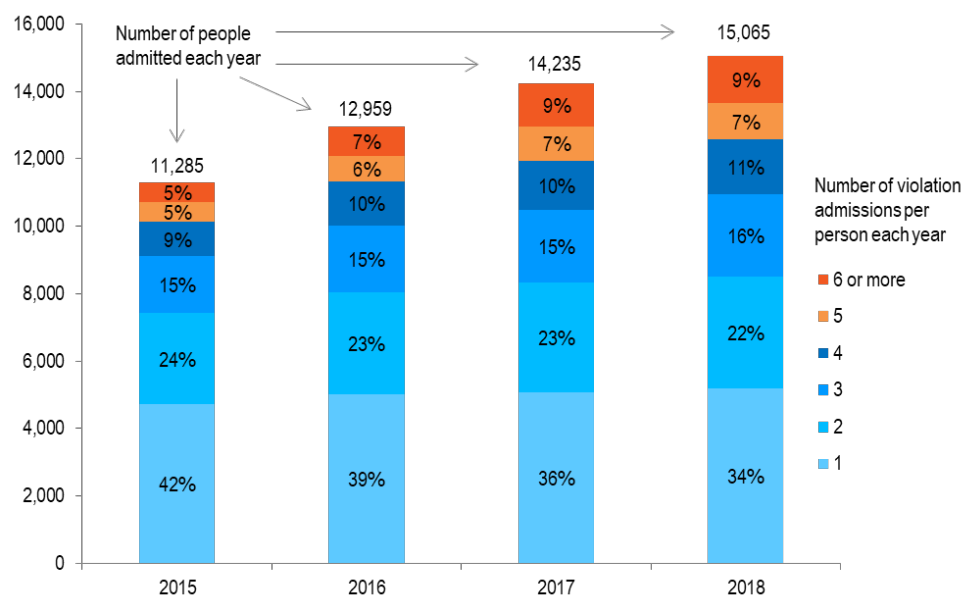
Figure 9. Washington Average Daily Jail Population for Supervision Violations, June 2012 – June 2018



Source: CSG Justice Center analysis of DOC.

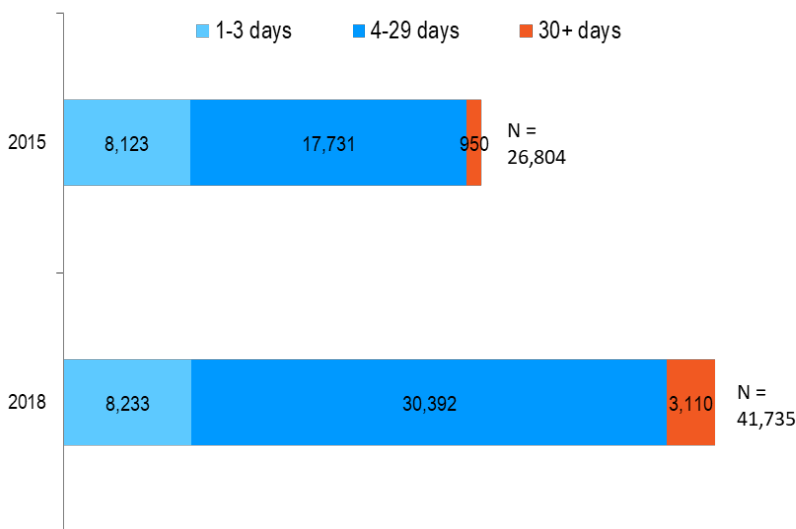
Increases in incarcerated populations are driven by increases in admissions (the volume of people coming into the system), length of stay (the amount of time people are incarcerated) or a combination of both. In Washington, the number of people incarcerated for supervision violations and the average amount of time incarcerated for supervision violations have both increased. Figure 10 shows that the number of people incarcerated for supervision violations and the number of violation admissions per person has increased. Figure 11 shows that while the number of violation admissions lasting one to three days increased only 1 percent between 2015 and 2018, the number lasting four to 29 days increased 71 percent and the number that are 30 days or longer has more than tripled in that period. The amount of time a person is incarcerated for a supervision violation is driven by two potential factors: the number of violations the person has and whether the violation is a “low-level” violation (e.g., missed appointments) or a “high-level” violation (e.g., new arrest). While the data presented in Figure 10 suggests that higher numbers of violations per person may be impacting length of stay, the extent to which this is the case and how the types of violations also impact length of stay is unclear.

Figure 10. Number of People Admitted for Violations and the Average Number of Admissions Per Person Each Year in Washington, Fiscal Years 2015–2018



Source: CSG Justice Center analysis of DOC data.

Figure 11. Number of Days Incarcerated per Violation Admission in Washington, Fiscal Years 2015 and 2018



Source: CSG Justice Center analysis of DOC data.

While presenting this information to the SGC, CSG Justice Center staff identified several supervision policies that could be exacerbating these trends. For example, there is little to no discretion given to supervision officers or judges in the decision to impose a sanction or what the sanction entails, meaning that even the most minor infractions will often result in a formal sanction. This is, in part, driven by the lack of sovereign immunity in Washington, meaning that the state is not immune from civil suit or criminal prosecution and may be liable for the actions of people under supervision. Additionally, while a “washout period” is commonly used in guideline states in calculating criminal history that excludes prior convictions of lower severity after a certain period, no such policy exists in Washington for supervision violations, meaning that violations stay on record regardless of the severity or the passage of time since the last violation. Given the lack of discretion in decision-making related to violations and the lack of formal policy that takes severity or the time between violations into consideration, violations may accumulate over time leading to lengthier jail stays for each violation. Lastly, while the state has instituted caps on the length of probation, there is no form of early discharge from supervision. Multiple orders of supervision are nearly always interpreted by the DOC to run consecutively rather than concurrently, despite a lack of guidance on this matter in statute. This interpretation results in longer supervision periods that can extend beyond the statutory cap.

Other states have adopted similar approaches to supervision sanctioning, employing short periods of confinement in jail in response to violations, yet Washington stands out for its number of annual admissions to jail for supervision violations. Table 3 presents a comparison with North Carolina, a state that has made substantial efforts to implement an approach based on RNR and SAC principles and has greatly improved supervision outcomes and larger system issues in recent years as a result. As compared to Washington, North Carolina has approximately twice the number of people under

supervision in a given year but with only a fraction of the violation admissions to jail. This suggests that it is the policies and practices specific to Washington that are resulting in high numbers of violation admissions rather than the broader approach of swift and certain sanctions alone.

Table 3. Comparison of Washington and North Carolina in Number of Supervision Violation Admissions to Incarceration

State	People on or starting supervision in a year	Annual number of supervision violation admissions to incarceration (excludes revocation)	Violation admissions per 100 people supervised
Washington	38,015	41,745	109
North Carolina	84,003	3,049	4

Source: CSG Justice Center analysis of DOC data; Personal communication with WADOC staff; North Carolina Department of Public Safety, Automated System Query, <http://webapps6.doc.state.nc.us/apps/asqExt/ASQ>; North Carolina Sentencing and Policy Advisory Commission, Justice Reinvestment Act Implementation Evaluation Report, 2018.

Discussion and Conclusion

This study highlights findings from three presentations given to the SGC by CSG Justice Center staff following an analysis of state policies, practices and data-driven analyses of outcomes in the areas of sentencing, recidivism and supervision. Notable findings include the fact that people sentenced for property and drug offenses have driven an increase in felony sentences in recent years along with increases in violations of supervision. Recidivism rates for people released from jail are particularly high during the first six months after release but stabilize over time, while the impact of supervision on recidivism is mixed and requires further study. Trends in supervision violations are consistent across multiple metrics, including increases in the number of jail admissions for violations, the number of people admitted each year and the average length of time spent incarcerated for violation admissions. The factors driving these trends in supervision violations are unclear and call for more detailed analysis. Answers to this important question could help the state develop a more effective approach to supervision and a more efficient criminal justice system overall.

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- ¹² "Behavior Accountability Guide," Washington State Department of Corrections, accessed May 1, 2019, <https://www.doc.wa.gov/information/policies/files/460130a1.pdf>.
- ¹³ Pamela Lattimore et al., *Evaluation of the Honest Opportunity Probation with Enforcement Demonstration Field Experiment, Final Report* (Washington D.C.: National Institute of Justice, 2018).
- ¹⁴ A Pearson product-moment correlation was performed to test the strength of relationship between recidivism and criminal history score in Washington and Michigan. Results from that test produced an R square value of 0.67 in Washington and 0.86 in Michigan, signifying a weaker relationship between recidivism and criminal history score in Washington compared to Michigan.
- ¹⁵ RCW 9.94A.010.

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