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SENTENCING GUIDELINES COMMISSION

August 11, 2017

TO: Sentencing Guidelines Commission Members

FROM: Chair Hauge

SUBJECT: Proposal: An Alternative to Washington's Standard Sentencing Grid for Youthful Offenders

1. In our discussions this year, 2017, the Sentencing Guidelines Commission has reached a critical consensus. We have determined that any reform of our adult felony sentencing scheme, referred to in shorthand as the SRA (Sentencing Reform Act), must incorporate a few key concepts.
    a. Enhance Judicial Discretion
    b. Incorporate what we have learned about how the human brain develops over the transition from child to adult.
    c. Incorporate what we have learned about how to change criminal behavior through RNR (Risk, Needs, and Responsivity).
        i. In short, we now know that if we carefully analyze an individual's risk to reoffend, determine the needs of the individual that must be met before we can reasonably expect behavior to change, and tailor our response to the offender's risk and needs to the extent possible, we can, in the aggregate, reduce criminal recidivism significantly.
    d. We need a method to review felony sentences after conviction.
        i. Necessary primarily for long sentences
            1. We need a way to address and reward an offender's efforts at rehabilitation
        ii. This review should remain the responsibility of the judicial branch.
            1. In classic parole systems, the release decision is made by an agent of the executive branch. Cutting the judicial branch out of the decision creates the opportunity to argue that release is not dependent on the same concerns that motivated the original sentence, that the release decision is governed by other concerns—like saving money.
    e. And although there is much to change, we want to retain the primary role of the legislature in determining felony punishment and hold what we have achieved in establish geographic consistency in sentencing.
        i. The legislature determines punishment
            1. Now judicial discretion is perhaps over-controlled.

            2. But there is value in the legislature providing a check on the discretion of the judiciary.
        ii. We can say that similar defendants convicted of similar crimes will receive similar sentences whether they commit their crimes in Pend-Oreille County or King. We want to hold what we've got.

2. Another motivation for our work is the desire to make a significant change.
    a. Small scale proposals—those that affect only a small number of offenders—may represent good policy
        i. But it is difficult to muster legislative enthusiasm for a change that will affect only a few hundred persons convicted of very serious crimes.
        ii. And the SRA rests on principles we now know are flawed. We can change offending behavior. Our work is not done when we calculate a sentence that is "fair" only in that it is similar to that received by others convicted of the same crimes.
3. These considerations suggest to me the following approach:
    a. We adhere to the broad outline of our current system: Judges will be obligated to consider similar sentences for offenders who violate the same laws while carrying the same criminal history.
    b. However, we add another factor—the offender's age at the time of the crime.
        i. If the offender is between the ages of 16 and 26, the sentencing judge will have the option to utilize a different grid.
            1. 16 is the earliest age an offender can find him-or-herself facing a sentence as an adult without a prior judicial ruling.
            2. 26 is apparently the age by which the human brain reaches maturity absent some underlying pathology.
    c. If the judge decides to utilize the alternative grid, the court will have broader discretion than is currently available.
        i. Sentence ranges expanded
        ii. Suspended sentences conditioned on supervision in the community will be authorized.
            1. Limit suspended sentences to time in excess of bottom of standard range. For example, a I-V offender with 4-6 points will have to serve a minimum of 33 months (subject to good time).
    d. Likewise, the Department of Corrections will have increased authority and obligations.
        i. DOC will have to get back in the business of preparing Pre-Sentence reports. Asking judges to take on more discretion makes no sense without providing the information necessary to ensure that they can exercise their enhanced authority wisely.
        ii. DOC's supervisory authority will need to be expanded. It makes no sense to extend our period of control over offenders if we fail to use that time in ways we know can effect positive change. The authority to supervise and treat must be expanded to all crimes. As a part of the sentence, the court can establish the outline of the course of our response to the crime or crimes of the defendant—including the minimum time to be spent locked up. However, once the minimum is served, the Department should decide, based on the conduct of the defendant and good science, the conditions of custody and supervision.

   e. We can give full shape to these policy considerations—or at least enough shape to consider their utility—if we target our efforts at youthful offenders. However we have achieved clear consensus on another matter that cannot be confined to a specific age range of offenders. We all agree that Washington needs a way to review long sentences. Some offenders need to be locked up for life to keep them from committing crimes. Some offenses harm the community to such a degree that the only way to rationally respond is to demand that the offender pay a high price in loss of liberty. In both circumstances, the passage of time may change the calculation. To do justice to the offender and to the community we need a way to revisit a sentence after that passage of time.
      i. We now have a way to provide relief from a sentence through executive clemency. All of us agree that the clemency process should be strengthened and utilized. However, at the end of the day, a clemency decision will always have a political dimension.
      ii. We are close to consensus, I believe, on the need to provide a system for revisiting sentencing decisions. The following questions, and others, remain.
         1. As noted above, the Sentencing Guidelines Commission envisions any review of a felony sentence remaining the province of the judiciary. However, given the passage of time in long sentences, we cannot require the same judge revisit his or her work. Do we want to keep the review within the same county, or is there another way to provide for another look?
         2. Do we allow a review of all sentences or only those that extend past some minimum number, like ten years?

4. Considerations: This will be a heavy lift.
   a. But the policy is sound. We enhance judicial discretion while ensuring ultimate control remains with the legislative branch. In practice, we may lose some geographic consistency, but courts in different counties will be working from the same playbook. More importantly, with this approach we incorporate the principles that have developed in the years since the drafting of the SRA:
      i. The Department of Corrections will be charged with using all that they know about RNR in fashioning their supervision practices.
      ii. By allowing sentences for new offenders to start at zero, we recognize that incarceration is a tool best used on those who need to be incapacitated.
      iii. We incorporate the science of adolescent brain development across the board. Much of our discussion of youthful offenders has focused on those who commit the most serious crimes. This approach shares the benefit of that information with all young people who find themselves before the adult courts.
   b. The cost will be great, but so is the cost of doing nothing.
      i. Our current course devotes almost nothing to changing the behavior of offenders on their first trip or two (or three or four) through our adult felony sentencing system. We know we are missing many opportunities to change behavior and, consequently, to save money by avoiding future crimes.
      ii. The ranges are expanded but not beyond their current reach. Still, a fiscal note could assume that everyone will be sentenced to the top of the new standard ranges. I trust the consequences will not be artificially inflated like that. The real work of predicting the cost cannot be done until we have a clearer picture of the programming

that DOC will have to implement to take full advantage of the opportunities presented. Our Department of Corrections has developed a track record of effectively using the best of what we know about changing offender behavior. The expected outcome of that programming must be factored in before we can develop much of a picture of how much this is going to cost.

iii. We will have to address the local jail cost issue. Under the current grid, we can predict with fair accuracy how much of the cost of incarceration will be borne by the counties and how much by the state. We follow a rule that a commitment of 12 months or less is paid for by the local jurisdiction. That makes more sense under a grid with many narrow ranges. With broader proposed ranges, the Youthful Offender grid would give locally elected judges the power and the responsibility to determine local incarceration costs. With a range of 0-32 months for offenders with three or fewer criminal history points, a judge could steer the largest portion of any criminal calendar either into or away from the local jail. We will need some new, clear thinking to address this issue.

c. No sentencing reform proposal, either at this early stage or on the eve of adoption, will satisfy or even meet the needs of every constituency. We serve the legislature. They have the ultimate responsibility to balance the competing interests. I see our job as creating the starting point for those discussions. I ask that we make our framework as strong and expansive as we can. We are considering real situations, real policy, and real science. But at this stage we cannot, nor is it our job, to create the perfect proposal—that is one that will satisfy all the needs of the people and institutions we serve individually. Certainly, if we imagine a system that represents a substantial improvement over the status quo, it's natural to want to extend its benefits as widely as possible. Likewise, if reform will cause more work and expense for some of the players in the system it is natural to point out, and argue against, those rough spots.

i. However, if we are to produce something that will broadly improve our system of adult felony sentencing, we will have to put aside some of our objections. At least, that is what I'm asking. Certainly we should engage in vigorous discussions and argument, but we must guard against those discussions and arguments becoming so vehement that we get stuck or derailed. Most of our members represent constituencies with critical jobs to do to make our system work. I will not ask any member to commit their constituencies to anything other than to fully consider all ideas. My commitment is to try to keep our work within the realm of the possible. I'm asking that you all remain open to those possibilities within the context of our discussions.

Youthful Offender Grid
(Ranges Expressed in Months)

Seriousness Level	Offender Score 0 – 3	Offender Score 4 - 6	Offender Score 7 – 9+
Level III (XI – XV)	78 – 235	236 – 392	393 - 548
Level II (VI – X)	26 – 83	84 – 141	142 - 198
Level I (I – V)	0 – 32	33 – 64	65 – 96