

**REPORT OF THE
SENTENCING GUIDELINES COMMISSION**

**DISCRETION UNDER THE SENTENCING REFORM ACT
AND THE IMPACT OF *BLAKELY v. WASHINGTON***

DECEMBER 1, 2005

I. INTRODUCTION

The Sentencing Guidelines Commission, at the request of the Legislature and the Governor, undertook a comprehensive review of the allocation of discretion under the Sentencing Reform Act (SRA). Precipitated by the decision of the United States Supreme Court in *Blakely v. Washington* and the subsequent debate in the Legislature as to what Washington's response should be, the Sentencing Guidelines Commission examined how the Sentencing Reform Act allocates discretion among the various participants in the criminal justice system and how it structures the discretion among those actors. To complete this task, the Commission invited past members of the Commission and other interested persons to join the current members. Many responded. Nineteen of these special invitees attended our first meeting on March 11, 2005. (See the attached Exhibit A for a list of attendees.)

Our review was comprehensive; not limited to the narrow issues presented by *Blakely v. Washington*, but extending to the Legislature's overarching purpose in the original Sentencing Reform Act of 1981 of "developing a system for the sentencing of felony offenders, which structures, but does not eliminate, discretionary decisions affecting sentences..." Following the initial meeting in March, we met monthly and considered all offered proposals. We hosted a visit by a team from the Vera Institute of Justice which brought representatives from Minnesota, New Hampshire, Pennsylvania and Virginia to discuss their sentencing systems, the impact of *Blakely v. Washington* on those systems and their responses to those impacts.

This report begins with a description of how the Sentencing Reform Act allocates discretion among the Legislature, the Judiciary and other actors in the criminal justice system. It then addresses the impact of *Blakely* on Washington's system, other states with similar presumptive guideline systems, Federal sentencing guidelines and on states with advisory guideline systems or indeterminate systems. Finally, this report makes recommendations to the Legislature for its consideration.

II. Allocation of Sentencing Discretion under the SRA

Sentencing discretion begins with the plenary power of the Legislature. As our Supreme Court said in 1937:

"Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and

subject only to constitutional provisions against excessive fines and cruel and inhumane punishment.” *State v. Mulcane*, 189 Wash. 625, 628, (1937)

Our Supreme Court unanimously upheld the constitutionality of the Sentencing Reform Act in *State v. Ammons*, 105 Wn.2d 175, 180 (1986) stating:

This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function.”

In that same decision, the court held “[t]he trial court’s discretion in sentencing is that which is given by the Legislature.” *Id.* at 181.

In enacting the Sentencing Reform Act in 1981, the Legislature exercised its plenary power. In doing so, it reserved a number of sentencing decisions to itself, while delegating other decisions to the courts and to other actors in the criminal justice system. These delegations were frequently coupled with constraints on the discretion so delegated. Throughout its history, however, the Legislature retained the power to set sentencing policy. Over the two decades since passage of the Act in 1981, the Legislature has returned to the Sentencing Reform Act almost annually to modify its policy choices, but has never relinquished its plenary power over sentencing.

A. Legislative Decisions

1. Initially

The Legislature’s first decision was to prescribe the purposes of sentencing. The Legislature stated:

“The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, . . .” RCW 9.94A.010.

By focusing on “discretionary decisions affecting sentences” rather than on the act of imposing a sentence, the Legislature recognized that a number of decisions made by various actors are involved in the process that results in a sentence. The Legislature intended to exert its authority over the entire process, not just the act of imposing a sentence.

To implement its stated purposes, the Legislature created the Sentencing Guidelines Commission and directed it to devise a “series of recommended standard range sentences for all felony offenders,” RCW 9.94A.040(2)(a) (Recodified at RCW 9.94A.850(2)(b)), and

“recommended prosecuting standards in respect to the charging of offenses and plea agreements.” RCW 9.94A.040(2)(b) (Recodified at 9.94A.850(2)(b)). The Legislature gave the Sentencing Guidelines Commission only the power to recommend, reserving to itself the power to adopt, or not, the Commission’s recommendations. The Legislature also made clear its intent that the standard ranges and prosecuting standards reduce the then existing disparity between defendants and sentencing practices across the state. The Legislature stated:

“The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” RCW 9.94A.340.

2. Prosecutorial Discretion

Understanding that the plea bargaining process between prosecutors and defendants involved “discretionary decisions affecting sentences,” the Legislature enacted for the first time in the United States prosecuting standards which regulated both the initial charging decision, RCW 9.94A.411, and plea agreements. RCW 9.94A.421 and .450.

Recognizing that the prosecutorial discretion involved in reaching plea agreements with defendants could potentially undermine the SRA’s purposes the Legislature adopted, again for the first time in the United States, a system of substantive judicial review of the exercises of prosecutorial discretion in plea bargaining. The Act requires that if a plea agreement has been made, the prosecutor and the defendant disclose at the time of the plea guilty “the nature of the agreement and the reasons for the agreement.” The SRA also provides that “The court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards.” RCW 9.94A.431. Should the court determine that the plea agreement “is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that [it is] not bound by the agreement and that the defendant may withdraw the defendant’s guilty plea, if one has been made, and enter a plea of not guilty.” RCW 9.94A.431. By creating this structure and empowering judges to supervise the plea agreement process, the Legislature, in effect, created a system of checks and balances to ensure that prosecutorial discretion was exercised in the public intent and consistently with the Legislature’s intent.

An example of how this authority works is found in *State v. Conwell*, 141 Wn.2d 901 (2000) where the defendant was originally charged with manslaughter in the first degree. The defendant and the prosecutor reached a plea agreement in which the defendant agreed to plead guilty to a dangerous weapon violation and second degree reckless endangerment, both gross misdemeanors. The judge rejected the plea agreement, stating "...not where there's the use of a weapon and the resulting death of another human being..." The charges were subsequently amended to manslaughter in the first degree and the defendant was convicted. The Supreme Court held that "[t]he court acted within its authority in effectively rejecting the plea agreement as inconsistent with the interests of justice." *Id.* at 910.

This judicial authority remains available in every case where a plea agreement has been reached.

3. Judicial Discretion

The Legislature reserved to itself the authority to establish standard sentencing ranges. It adopted the Sentencing Guidelines Commission's recommendations and ranked felony offenses into 14 Seriousness Levels. It provided that the applicable sentence range was determined by the intersection of the Seriousness Level and the offender's Offense Score, determined by past and current criminal history. Judges were granted non-reviewable discretion to impose any sentence within the standard range that they "deem appropriate", RCW 9.94A.530(1). The court must impose a sentence within the applicable sentence range unless it finds "substantial and compelling reasons justifying an exceptional sentence", RCW 9.94A.525. An exceptional sentence is subject to substantive appellate review. RCW 9.94A.585. Since its implementation in 1984 the Legislature has frequently revisited the Act to revise its initial decisions. The most notable were to increase penalties for drug offenses in 1987, sex offenses in 1990, and to establish a separate system of sentencing ranges for drug offenses in 2003. In each instance, it retained the basic structure of the SRA and used that structure to carrying out its new policy choices.

4. Corrections Discretion

The Legislature abolished parole and required all sentences to be "determinate", that is "a sentence that states with exactitude" all its terms at the time it is imposed. RCW 9.94A.030(18). With one exception, sentencing of certain offenders, traditional probation and parole and the power to revoke sentences were abolished. RCW 9.94A.575. Correctional supervision was

initially limited to one year and sentences for violations of the requirements of a sentence were limited to 60 days confinement per violation. The Legislature revisited these decisions in 1987 when it authorized periods of “community custody” and “post-release supervision” and in 1999 when it enacted the Offender Accountability Act. Both authorized longer and more intensive community based supervision.

In 2001, the Legislature adopted a “Determinate Plus” sentencing system for serious sex offenders. RCW 9.94A.712. Eligible offenders receive a maximum term of confinement equal to the statutory maximum and a minimum sentence within the standard sentence range. The Indeterminate Sentence Review Board is authorized to release offenders on community custody after they have served their minimum sentence, RCW 9.95.420, and they are supervised by the Department of Corrections until the maximum sentence expires. RCW 9.94A.712(6).

Throughout the more than two decades of the existence of the Sentencing Reform Act two features have remained constant; the Legislature has retained its “plenary power” to set sentencing policy and, with the single exception of the “Determinate Plus” system for serious sex offenders, it employed the original structure of the Act to implement changes in sentencing policy it determined were necessary.

B. Delegated Discretion

Recognizing that no predetermined structure, regardless of the care with which it was constructed, could accommodate every individual factual situation, the Legislature provided that in a number of circumstances and with certain restrictions judges would have discretion to fashion individualized sentences.

1. Within the Standard Range

Judges have unrestricted and non-reviewable discretion to sentence at any point within the standard range as they “deem appropriate.” RCW 9.94A.530(1). The judge’s choice need not be based on articulated reasons. The only restriction on this discretion is the width of the standard ranges. With regard to the ranges for prison sentences, the minimum of the range was required to equal 75% of the top of the range. RCW 9.94A.850(4)(b) Thus bounded, but non-reviewable discretion exists for every SRA sentence.

2. Sentences Below One Year

Judges have non-reviewable discretion to convert total confinement to a series of alternatives including:

- a. One day of partial confinement may be substituted for one day of total confinement, without limit. RCW 9.94A.680(1).
- b. For offenders convicted of non-violent offenses, one day of total confinement may be converted to eight hours of community restitution, up to a total of 30 days, RCW 9.94A.670(2).
- c. For offenders convicted of non-violent and non-sex offenses “the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct...”, RCW 9.94A.680(3).

The net effect of these three provisions is to authorize judges to convert all or any part of any jail sentence to any available alternative to incarceration. Judges are not required to state reasons for this exercise of discretion and their decisions are not subject to appellate review. In Fiscal Year 2004, 18,290 sentences or 65% of all sentences imposed were eligible for these alternatives.

3. First Time Offender Sentences

Judges have non-reviewable discretion to waive the imposition of standard range sentences for eligible defendants and to impose a sentence that includes up to 90 days of confinement coupled with a series of affirmative conditions. This option is available for defendants who have no prior felony offenses and who have not been convicted of a violent or sex offense or certain drug offenses. In Fiscal Year 2004, 9268 defendants or 33% of all defendants sentenced under the Act were eligible for this option. Judges used their discretion to impose this option in 1,539 cases. Judges are not required to state reasons for the decision to use or not to use this option and their decisions are not subject to appellate review.

4. Special Sex Offender Sentencing Alternative (SSOSA)

Judges have non-reviewable discretion to suspend the standard range sentence for eligible offenders and to impose an alternative sentence of not more than 6 or 12 months, depending on the date of the offense, in jail followed by sex offender treatment in the community. In Fiscal Year 2004, 861 offenders were eligible for this option and judges exercised their discretion to use it in 222 cases. Judges are not required to give reasons for the exercise of discretion and their decisions are not subject to appellate review.

5. Drug Offender Sentencing Alternative (DOSA)

Judges have non-reviewable discretion to “waive imposition of a sentence within the standard range and impose a sentence that must include a period of total confinement ... for one-half of the mid-period of the standard sentence range” for eligible offenders. RCW 9.94A.660. Judges are not required to give reasons for the decision to use this option and their decision is not subject to appellate review. In Fiscal Year 2004 5,802 offenders were eligible for this option and judges used it in 1,417 cases.

6. Exceptional Sentences

Judges are authorized to impose sentences outside the standard sentence ranges if they find that “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The court is required to “set forth reasons for its decision in written findings of fact and conclusions of law,” RCW 9.94A.535, and those reasons are subject to appellate review. RCW 9.94A.585. In FY 2004, there were 1,186 exceptional sentences imposed (4.2% of all sentences). Of those exceptional sentences, 648 were aggravated sentences (above the standard range), 500 were mitigated sentences (below the standard range) and 38 were within the standard range. The bulk of aggravated exceptional sentences, 524 or 81%, were agreed to by the defendant and the prosecutor. Only 108 aggravated exceptional sentences were contested in Fiscal Year 2004.

A judge’s decision not to impose an exceptional sentence need not be supported by reasons and is not subject to appellate review.

III. Impact of *Blakely v. Washington*

A. In Washington

The United States Supreme Court’s decision in *Blakely v. Washington* held that any factual finding which authorized a judge to exceed the standard sentence range must be found to exist by a jury beyond a reasonable doubt. Prior to the *Blakely* decision, the Sentencing Reform Act provided that disputed facts were to be determined by the judge, not a jury, by a preponderance of the evidence. RCW 9.94A.530. It was this provision of the Sentencing Reform Act, and only this provision, which was found unconstitutional by the United States Supreme Court. The decision applies only to aggravated exceptional sentences, sentences above the standard range, and not to mitigated exceptional sentences. The ruling is further limited to only to those aggravated exceptional sentences

where the defendant does not agree to the exceptional sentence. The following table summarizes the number of cases falling within this category over the past three years.

	Number of Cases	% of All SRA Cases
FY 2004	108	0.4%
FY 2003	122	0.4%
FY 2002	138	0.5%

The *Blakely* decision presented Washington, as it did other states with presumptive guideline systems, with two primary options. The states could comply with the requirements of *Blakely* by modifying their systems to provide for jury determination, beyond a reasonable doubt, of all facts which justify an aggravated exceptional sentence. In the alternative, states could avoid the requirements of *Blakely* by converting to an advisory guidelines system to which *Blakely* is not applicable. Another available response would be for states with presumptive systems to increase the maximum sentence in the presumptive ranges and thereby eliminate the need to find aggravating circumstances to impose longer sentences.

Washington's response, which was the same as other states with similar presumptive sentencing guidelines systems, was to change its procedures to provide for jury determination, beyond a reasonable doubt, of all contested facts which authorized an aggravated exceptional sentence. Senate Bill 5477, Laws of 2005, ch. 68. The legislation also codified all aggravating factors which had been approved by the appellate courts and made the new list of aggravating factors exclusive.

This response was developed by a group of prosecutors and defense attorneys working together with the Sentencing Guidelines Commission. It had broad, but not universal support. Some judges opposed it because it did not address the impact of *Blakely* on the judge's ability to independently initiate aggravated exceptional sentence proceedings. (This issue will be addressed in Section E of this Report.)

B. Other States with Presumptive Guidelines

With one exception, every state which had adopted a presumptive sentencing guidelines system retained their guidelines and added procedures for the determination by a jury beyond a reasonable doubt of the additional facts which justify an aggravated exceptional sentence.

1. *Kansas*

Kansas faced the issue presented by *Blakely* when its Supreme Court held in 2001 that facts justifying an aggravated exceptional sentence must be found by a jury beyond a reasonable doubt. *State v. Gould*, 23 P.3d 801 (Kan. 2001). The Kansas Sentencing Commission recommended and the Kansas Legislature adopted procedures for jury determination of aggravating circumstances. Kan. Stat. Ann. § 21-4178(b)(2) to (7) (Supp. 2003) (Appendix A). A survey of judges, prosecutors and defense attorneys in Kansas conducted by Professor Kevin Reitz of the University of Minnesota reported “we did not find anyone who believed that the post-*Gould* statutory changes have had any appreciable effect on the operation of the Kansas sentencing process.” Reitz, *The New Sentencing Conundrum*, 105 Columbia Law Review 1082, 1109, fn. 101. (2005) The Kansas response was to become the dominant response in states with presumptive guideline systems.

2. *Other Presumptive Guideline States*

Minnesota, which was the first state to adopt presumptive sentencing guidelines and served as a model for Washington’s system, complied with *Blakely* by creating procedures for jury determination of aggravating circumstances. Minnesota also expanded the width of its presumptive sentence ranges to increase judicial discretion.

North Carolina and Oregon also added procedures for jury determination beyond reasonable doubt of all aggravating factors. These states did not otherwise revise their sentencing system.

Tennessee, which does not have a sentencing guidelines commission, has a hybrid determinate sentencing system with broad statutory minimum and maximum sentencing ranges. For example, the state statute provides the sentencing range for serious, Range III Class A felony as “not less than forty (40) nor more than sixty (60) years.” Following *Blakely*, the legislature announced what it terms “advisory sentences” within those broad ranges.

C. *The Federal Sentencing Guidelines*

Because of the fundamentally different nature of the federal sentencing system, the impact of the Supreme Court’s decision in *Blakely v. Washington* on the Federal Sentencing Guidelines was far greater. Washington’s guidelines are based on the offense

of conviction; “facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation.” RCW 9.94A.530(2). Only facts related to the crime of conviction which make the instant crime more serious than typical for that offense may justify an exceptional sentence. In sharp contrast, the federal guidelines are based on the nature of the crime the sentencing judge believes was committed, regardless of whether the defendant was actually convicted of that crime. Thus a federal sentencing judge is required to determine the existence of many facts which would not be an issue for a Washington judge. When the United States Supreme Court applied the principles of its decision in *Blakely* to the federal guidelines many more cases were impacted than was the case in Washington. The United States Supreme Court responded to this situation by determining that Congress would have adopted voluntary guidelines had it known that every fact determining the applicable guideline range had to be found by a jury beyond a reasonable doubt. This issue is pending in Congress, but we note that the Department of Justice has proposed a return to presumptive guidelines with the top of every range being raised to the statutory maximum. We believe the federal response to *Blakely* is of little relevance to Washington because of the fundamentally different nature of the federal guidelines system.

D, Advisory Guideline States

States whose sentencing guidelines are advisory, not presumptive, have felt no impact from the United States Supreme Court’s decision in *Blakely*. In these states the guidelines have no legal effect; judges are not required to make any findings to depart from the guidelines and their discretionary decisions to do so are not subject to appellate review. For the reasons we articulate in Section V of this report, we advise against following this route.

IV. The Remaining Issue

Washington’s response to *Blakely* leaves one issue remaining. Senate Bill 5477 provides that when the state decides to seek an aggravated exceptional sentence “it” may give notice that it is seeking a sentence above the standard sentencing range.” The notice may be given “at any time prior to trial or the entry of a guilty plea.” Laws of 2005, §68, §4. While the statute does not contain an express definition, we believe that this

language means that the prosecutor represents or is “the state” and would give the requisite notice.

The new language does not, however, authorize the judge to initiate aggravated sentence proceedings independent of the prosecutor. Prior to the decision of the United States Supreme Court in *Blakely*, judges could initiate aggravated exceptional sentence proceedings and many judges believe their authority to do so should be restored. The issue is likely to arise when the prosecutor has reached a plea agreement with the defendant which does not include an aggravated exceptional sentence, but the judge believes that an aggravated exceptional sentence may be justified. The Sentencing Reform Act contemplates that such disagreements, when they arise, will be resolved by the judge’s authority to reject the plea agreement, as happened in the *Conwell* case described above. Judges point out that in several large counties judges do not have the time or information necessary to determine whether a plea agreement is “in the interests of justice” or “consistent with the prosecuting standards” prior to the acceptance of the guilty plea. Thus in those counties, judges are unable, as a practical matter, to exercise their discretion to reject a plea agreement.

This issue has two parts. First, should judges have the authority to initiate, independent of the prosecutor, aggravated exceptional sentence proceedings. Second, if such authority is granted, should judges be able to exercise this authority after the guilty plea or trial has occurred.

V. Recommendations

A. Summary of Recommendations

After extensive deliberation, the Sentencing Guidelines Commission recommends:

- 1) That Washington reject a shift to advisory guidelines and retain its presumptive determinate sentencing system.
- 2) That Washington reject the Superior Court Judge’s Association proposal to double the top of all standard ranges for violent offenses.
- 3) That Washington expand judicial discretion by adopting expanded sentencing ranges and an expansion of the grid to

allow sentences of up to the statutory maximum for offender scores of ten or more. (See Exhibit C – Expanded Grid with Bed Impact)

- 4) That Washington not adopt a proposal to authorize judges to initiate aggravated sentence proceedings.

B. Basic Structure of SRA - Presumptive v. Advisory Guidelines

From its inception, the basic structure of the Sentencing Reform Act has been for the Legislature to establish presumptive sentence ranges based on the offender's crime and criminal history. Judges are granted non-reviewed discretion within the range, but in order to depart from the range they must find "substantial and compelling reasons" to justify an exceptional sentence above or below the range. All exceptional sentences are subject to substantive appellate review. None of the many legislative modifications to the Sentencing Reform Act over the past two decades changed this basic structure.

One response to the United States Supreme Court's decision in *Blakely v. Washington* would be to reject the presumptive nature of Washington's sentencing guidelines and make the sentence ranges advisory. This would avoid the requirements of *Blakely* because there would then be no factual findings necessary to exceed the standard sentence range. Judges would be free to sentence anywhere short of the statutory maximum without finding any "substantial and compelling" reasons, without being required to state their reasons for departing from the standard range and without being subject to substantive review on appeal.

When the Sentencing Guidelines Commission first considered the impact of *Blakely* during the latter part of 2004 and during the 2005 legislative session, we considered this approach but rejected it in favor a procedural response, which was ultimately enacted as SB 5477. Laws of 2005, ch. 68. We again examined this issue at the request of the Legislature and the Governor. After extensive consideration, the Commission voted to recommend that Washington not reject our presumptive sentencing system and replace it with an advisory system. We believe the Sentencing Reform Act has served Washington well and should continue to provide the basic structure for sentencing in Washington. In the following portion of this section of our report we detail the reasons for this conclusion.

1. Implementation of Legislative Policy Judgments

Presumptive sentencing systems have proven remarkably effective at implementing legislative policy judgments. When it adopted the original Sentencing Reform Act, the Legislature intended to “emphasize confinement for the violent offender and alternatives to total confinement for the non-violent offender.” RCW 9.94A.850(2)(a)(ii). A study in 1986 showed the following changes:

Percentage Receiving Prison Sentences

Violent:	1982	1985
Statutory Rape	16%	53%
Robbery 1°	79%	94%
Burglary 1°	35%	98%
Nonviolent:		
Burglary 2°	19%	16%
Forgery	16%	3%
Theft 1°	11%	3%

Fallen, *Preliminary Evaluation of Washington State’s Sentencing Reform Act* (1986).

There could be no doubt that these sentences were charged in accordance with the Legislature’s policy judgments. The same results occurred with later and different policy judgments of the Legislature. Time after time when the Legislature amended the Sentencing Reform Act to implement new policies, judicial sentencing behavior changed in direct response to the Legislative judgment. A detailed study in 1990 of the effects of changes increasing the severity of sentences for drugs, burglary and sex offenses, for example, showed that in every instance the length of sentences imposed increased following the statutory changes. Boerner, *The Role of the Legislature in Guideline Sentencing in “The Other Washington,”* 28 Wake Forest L. Rev. 381 (1993).

This result is particularly significant because a natural experiment provided the ability to separate the effect of the statutory changes from other contemporaneous influences on sentence length. There is always a delay between the commission of a

crime and the imposition of a sentence for that crime. The length of the delay, of course, varies considerably because some offenders are apprehended immediately while others are not apprehended until some time later. Because increases in sentence severity can be applied only prospectively there is a period after each statutory charge when sentences are being simultaneously imposed by the same judges under both the old guidelines and the new guidelines. In every such instance, the same judges imposed significantly more severe sentences on defendants subject to the new guidelines than they did on defendants who were subject to the former guidelines. These two studies demonstrate the power of presumptive guidelines to implement the Legislature's policy choices.

Advisory systems simply do not produce as high a level of compliance as has been Washington's experience with presumptive guidelines. In Washington, our Superior Court judges developed their own advisory guidelines system during the years before the Sentencing Reform Act. A study conducted by the Superior Court Judges Association together with the Office of the Administrator for the Courts determined that Washington's judges used the guidelines in 70% of the cases studied and of those sentences 66% were within the guidelines. Thus only 46% of the sentences imposed were within the advisory guidelines the judges developed. In sharp contrast, Washington judges follow the Sentencing Reform Act in 95% of the cases.

Virginia is generally believed to be the best example of an advisory guidelines system. The Virginia Criminal Sentencing Commission reports that after early compliance rates of approximately 75% Virginia judges now sentence within the advisory guidelines in 80% of the cases. Virginia Criminal Sentencing Commission, 2004 Annual Report, p. 19-21. Virginia has the highest compliance rates of any state with advisory guidelines. Were Washington's judges to follow Virginia's experience and sentence within the guidelines in 80% of the cases there would be over 4,000 more cases in Washington each year, which would receive sentences outside the legislatively determined presumptive guidelines of the Sentencing Reform Act.

2. Control of Prison Population

Research across the United States has demonstrated that presumptive sentence guidelines are effective at curbing the growth in prison population. When first implemented, the Sentencing Reform Act dramatically reduced Washington's prison

population. The Vera Institute of Justice recently conducted a comprehensive analysis of trends in prison populations in all states over the last quarter century. It concluded that “presumptive determinate guidelines systems are associated with lower growth in prison population” while “advisory determinate guidelines systems are associated with higher growth in prison populations.” Stemler and Rengifo, *The Impact of State Sentencing Reforms on Prison Populations*, (March 7, 2005). Washington’s experience is consistent with the Vera Institute’s findings. A study in 2001 showed that Washington’s rate of imprisonment per 100,000 population increased from 156 per 100,000 in 1985 to 251 per 100,000 in 1999, an increase of 61%. In sharp contrast, the national imprisonment rate went from 200 per 100,000 in 1985 to 476 per 100,000 in 1999, an increase of 138%. Had Washington’s imprisonment rate increased at the same rate as the nation we would have 31,649 prison inmates rather than the 17,000 we have now.

3. Disparity Reduction

The Legislature gave high priority to the equal application of the sentencing guidelines. It provided that “[t]he sentencing guidelines and the prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” RCW 9.94A.340. Washington’s criminal justice system through sentencing is exclusively local. Thirty-nine county prosecuting attorneys and 178 locally elected Superior Court judges are the key decision makers. Just as the various regions of our state are diverse, so do these locally elected decision makers reflect that regional diversity. They inevitably reach different resolutions of the various policy choices contained within the criminal justice system.

The Commission and the Legislature did not proceed under the premise that one set of policy preferences is right and another wrong. We recognize that often views on relevant issue are merely different. By imposing state-wide guidelines, however the Legislature sought to decrease the regional disparity that would eventually result from allowing each local decision maker to follow their own policy preferences. Advisory guidelines by their very nature would not bind these local decision makers. Prosecutors and judges would be legally free to implement their own policy preferences, not those state-wide choices made by the Legislature. Prosecutors and judges would be guided by

the state-wide guidelines, but they would have no legal obligation to follow them and there would be no review of their individual local discretionary decisions. The Sentencing Guidelines Commission believes that to abandon our presumptive guidelines in favor of advisory guidelines would inevitably increase regional disparity; a result we believe would be inconsistent with the basic premises of the Sentencing Reform Act.

The most damaging type of disparity is that based on race and it is in reducing racial disparity that the Sentencing Reform Act has had its greatest success. Studies in 1987, 1997, 1999, and 2000 have consistently found that there were no significant differences in sentences imposed within the guidelines for those convicted of the same crime with the same offender score. Fallen, *Statistical Summary, Washington Sentencing Guidelines Commission (1987)*; *Statistical Summary of Adult Felony Sentencing, Washington Sentencing Guidelines Commission (1997)*; Engen, Gainey & Steen, *Racial and Ethnic Disparities in Sentencing Outcomes for Drug Offenders in Washington State (1999)*; *The Sentencing Reform Act at Century's End, Washington Sentencing Guidelines Commission (2000)*.

Our examination of exceptional sentences discovered little evidence of disparity correlated with race. Conversely, significant racial disparities have been found in the use of the first time offender and sex offender sentencing alternatives. Fallen, *Statistical Summary, 1987*; Engen, Gaines, and Stern, *Racial and Ethnic Disparities in Sentencing Outcomes for Drug Offenders in Washington State (1999)*. We believe that the starkly different results of these two categories is that in the first, discretion is constrained by the guidelines and departures are subject to review on appeal. In the latter discretion is unrestrained and not subject to review. Imposing sentences within the presumptive range and granting exceptional sentences are decisions that are constrained by the guidelines. The applicable sentence range is determined solely by the crime of conviction and prior criminal history. Exceptional sentences must be justified by explicit findings of “substantial and compelling circumstances” and are subject to substantive appellate review. The Act retains unstructured and non-reviewed discretion for sentencing judges in cases in which the offender is eligible for the first-time offender and the sex offender sentencing alternatives. There are no requirements that these options be used and the exercise of judicial discretion is not subject to review. In these circumstances, and only

in these circumstances, racial disparity emerges. The lesson is powerful: racial disparity can be definitively correlated with unstructured and non-reviewed discretion.

C. The Superior Court Judges Association's Proposal

The Superior Court Judges Association has urged the Sentencing Guidelines Commission to recommend the adoption of a proposal which would restore judges' discretion to impose upward exceptional sentences in cases where the prosecutor did not seek an exceptional sentence upward. The judges' proposal was contained in SB 5476 which was considered but not recommended by the Commission nor adopted by the Legislature during the 2005 legislative session. The proposal contains the following elements:

1. For offenders convicted of a violent offense, the upper limit of the standard sentencing range is advisory up to two times the top of the standard range where the standard range is a prison sentence (a sentence where the lower limit of the standard range is more than 12 months).
2. If the offender's standard range is a jail sentence (the top of the standard range is 12 months or less), the judge may impose twice the upper limit of the standard range or 12 months, whichever is less.
3. The state must assert a statutory aggravating factor in cases in which the state seeks an aggravated sentence.

Judges argue that this proposal restores the role of victims, particularly in cases in which the prosecutor had not sought an exceptional sentence upward; that it restores the check and balance of the judicial branch on the decisions of the executive branch through the prosecutors' plea bargaining decisions and; that it is consistent with the purpose of the Sentencing Reform Act "to structure, but not eliminate" sentencing discretion.

A copy of this proposal is attached as Exhibit B. The attachment contains a fiscal impact statement for this proposal. The fiscal note contains three alternate assumptions regarding how frequently the expanded authority would be used by judges. The judges believe that under the two most reasonable scenarios, there would be 1) a slight decrease

in prison population until 2015 when the bed demand will increase by two beds, rising to 31 additional beds by 2025 or 2) a slight decrease until 2016 when the bed demand will increase by three beds, rising to 37 additional beds by 2025. This proposal would thus accomplish, the judges believe, the legislative goal of restoring some of the judicial discretion to impose an exceptional sentence upward in the category of violent offenses lost as a result of the *Blakely* decision, with little or no cost.

The third scenario is based on the same assumptions as are used in evaluating the fiscal impacts of proposals which expand the width of each sentencing range. *See* Section D, *supra*. This scenario predicts significantly greater fiscal impacts. *See* Exhibit B.

After extensive consideration and analysis, the Sentencing Guidelines Commission voted not to recommend the adoption of the judges’ proposal. We believe the proposal’s impacts would be significantly greater than the judges believe and that it would result in significantly greater disparity than exists today.

The judge’s proposal would do significantly more than restore the discretion to initiate aggravated sentence proceedings which was lost as a result of the *Blakely* decision. By doubling the top of every sentence range applicable to every conviction of a violent offense, the legal effect of the proposal would be to double the sentencing authority of the judge in those cases. In effect, each range is expanded to double its previous width. Judges could sentence anywhere within these doubled ranges without stating reasons and their decisions would not be subject to appellate review. The following table identifies the differences between what existed before *Blakely* and what would exist should the judge’s proposal be adopted.

	Before <i>Blakely</i>	Judges Proposal
Notice to Defendant	Required	None Required
Hearing To Determine Existence of Aggravated Circumstance	Required	None Required
Proof By a Preponderance of the Evidence	Required	Not Required

Written Findings of Fact and Conclusions of Law	Required	Not Required
Substantive Appellate Review	Required	Not Required or Permitted

As can be seen from this table, the legal effect of the proposal is to authorize a judge to impose a sentence anywhere within the expanded range without notice, hearing, findings and substantive appellate review. Because any sentence within the doubled range would not be “outside the standard sentence range”, RCW 9.94A.585(4), it would not be subject to substantive appellate review. Based upon fiscal year 2004 data, there were 2443 sentences for violent offenses. As such, exclusive of certain sex offenses, under the judges’ proposal 2176 sentences would be eligible for sentences up to twice as long as previously authorized. We have not been able to accurately forecast in how many of the 2176 sentences judges would impose longer sentences. Assuming, however, that judges who impose sentences at the top of the current ranges would exercise their new authority to sentence at the top of the expanded range, the impact on prison population would be significant. See Scenario 3 of the Fiscal Impact Analysis.

D. Expanding Judicial Discretion

The Commission explored a number of ways of expanding judicial discretion within the structure of the Sentencing Reform Act. We sought to identify changes that would both expand judicial discretion and remain faithful to the basic principles of the Act. After considering numerous proposals, we developed and now recommend a new sentencing grid. (See Exhibit C – Expanded Grid with Bed Impact)

The proposed new grid will increase the discretion judges exercise yet retain the boundaries on that discretion we believe are necessary to insure that the beneficial effects of the Sentencing Reform Act are not lost. It was developed in the following manner. First, the existing ranges were expanded equally up and down so that the bottom of each range was 66% of the top (current law requires the bottom to be 75% of the top). Then the narrowest ranges were expanded so that the narrowest range was at least six months wide. A new column of ranges was then added for defendants with an offender score of ten or more (the previous grid stopped at offender scores of nine or more). These new ranges would apply only to defendants with offender scores of ten or more and would

permit sentences of up to the statutory maximum (five years for Class C felonies, ten years for Class B felonies and life imprisonment for Class A felonies). The bottom of these new ranges was fixed at the same point as the bottom of the ranges for offender scores of nine. These new ranges would not be subject to the general rule that the bottom of the range not be less than 66% of the top. The new ranges will authorize but not require longer sentences for defendants with very high offender scores.

We believe that authorizing judges to impose sentences up to the statutory maximum is sound public policy. It will however, increase prison population. To balance this increase, we lowered the bottom of the standard ranges in the middle of the grid from three to twelve months, with the lower ranges receiving the smaller reductions and the higher ranges receiving proportionality greater reductions up to twelve months. No reductions were made in any ranges for crimes ranked at Level XI or higher. We also chose not to make reductions in any ranges where the bottom of the range was twenty months or less. The fiscal impact of this proposal is provided in Exhibit C. It would slightly decrease prison population.

There is one caution that must be considered. Discretion within the expanded ranges is not structured in any way. Judges are not required to give reasons for why they chose a particular point within the standard range and their decisions are not subject to substantive review on appeal. History teaches that unstructured and non-reviewed discretion is associated with increased disparity. The Commission's staff is currently undertaking a study to revisit the question of whether disparity based on race is present in sentences within the standard ranges. We urge the Legislature's careful attention to this issue.

The Sentencing Guidelines Commission believes this proposal, on balance, accomplishes the purpose of expanding judicial discretion while retaining the basic structure of the Sentencing Reform Act. In our judgment it is consistent with the values which underlie the Sentencing Reform Act. We believe its adoption would be in the public interest.

E. Judicial Power To Independently Initiate Aggravated Exceptional Sentence Proceedings

The only discretion which judges have lost due to the *Blakely* decision is the discretion to initiate aggravated exceptional sentence proceedings in those cases where the prosecutor has not sought an exceptional sentence. Before *Blakely*, Washington's judges could give notice and conduct a hearing to determine whether aggravating circumstances existed even if the prosecutor did not seek an exceptional sentence. At first appearance, it would appear to be a simple matter to give judges the authority to give notice that in their judgment aggravating circumstances may exist. There are a number of circumstances, however, that make this simple response ineffective.

First, judges point out that they frequently do not have sufficient information to make an informed judgment before trial or before a plea of guilty is entered. While many judges have sufficient time to review case files before taking a guilty plea, in several of the larger counties pleas of guilty are taken on a calendar and the sentencing judge is not involved. Under this system, there would be no way for the sentencing judges to make an informed decision in a timely manner. This problem could be solved by providing that a judge may give the requisite notice at any time before the imposition of the sentence. In the case of the guilty pleas, however, this would require allowing the defendant to withdraw the guilty plea. Since 97% of felony cases are resolved by guilty pleas, this result could have a considerable disruptive influence on the orderly processing of cases. Assuming these practical problems could be overcome, there remains a more fundamental issue.

The authority to select the criminal charges alleged against a defendant is given to prosecuting attorneys. Judges have no authority to determine the nature or numbers of the crimes initially charged. A judge's disagreement with the prosecutorial judgment involved in the charging decision does not give that judge the authority to add additional or more serious charges against the accused. Defendants have the right to plead guilty as initially charged, and thus if the prosecutor has filed charges pursuant to the plea agreement, the defendant may plead guilty even if the judge rejects the plea agreement. This occurred in *State v. Conwell*, discussed previously. There the Supreme Court said the judge acted properly in rejecting the plea agreement, but that the defendant had the right to plead guilty as charged. The fact that the prosecutor had charged the two gross misdemeanor crimes had the effect of preventing the judge from forcing felony charges

on an unwilling defendant. We heard from individuals who argued that the *Blakely* decision makes the decision to initiate aggravated sentence proceedings the functional equivalent of charging a higher crime. Thus, it was argued that that authority is a part of the charging decision which belongs exclusively to the prosecuting attorney.

Examining the facts in *Blakely* to illustrate the issue, it should be remembered that Blakely was charged by the prosecuting attorney with kidnapping in the second degree while armed with a firearm (RCW 9A.40.030). The standard sentencing range was 49 to 53 months. Had he been charged with and convicted of kidnapping in the first degree while armed with a firearm (RCW 9A.40.020) the applicable standard range would have been 117 to 135 months. There was no question that the judge did not have the authority to amend the charges to kidnapping in the first degree, which would have had the effect, assuming conviction, of requiring a sentence longer than the exceptional sentence actually imposed (90 months). It is argued, then, that permitting judges to initiate aggravated sentencing proceedings would have the same functional effect as permitting the court to amend charges and would improperly impinge upon the province of the prosecuting attorney. Just as judges may not increase the severity of charges, they may not increase the severity of the sentence beyond that permitted by the charges or aggravating circumstances alleged by the prosecutor. The response to this argument is that judges have had the authority to initiate exceptional sentence proceedings from the inception of the Sentencing Reform Act and no court has ever suggested that judges did not properly have such authority.

After extensive discussion of these issues, and of the need to authorize judges to serve as a check and balance on prosecutorial charging discretion, the Sentencing Guidelines Commission decided, by an equally divided vote, not to recommend the adoption of this proposal. A draft of an amendment to the Sentencing Reform Act which would accomplish this result is available should others determine that it should be formally considered by the Legislature.