

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group
Meeting Summary: May 19, 2020
Zoom Digital Conferencing Technology

Attendees:

- Suzanne Cook
- Sen. Manka Dinghra
- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Kelly Leonard
- Sydney Oliver
- Judge Roger Rogoff
- Melody Simle
- David Trieweiler
- Jon Tunheim

Facilitation Team: Amanda Murphy, Chris Page, and Hannah Kennedy

WELCOME & REVIEW AGENDA

Amanda Murphy welcomed Working Group members, reviewed the agenda, and took attendance. She briefly summarized the Grid Sub-Group’s meeting schedule and Chris emphasized the tremendous progress the Sub-Group has achieved. The facilitation team also reminded SEWG members they will present their “first offer” of findings and emerging recommendations to the full Task Force on June 4, 2020.

GRID SUB-GROUP UPDATE

Jon Tunheim and Rep. Goodman summarized the Sub-Group’s work to date. They emphasized the sheer complexity of trying to reform a 40-year-old system. To guide the Sub-Group, Lauren Knoth provided examples of grids from other states and developed a decision tree to walk folks through a stepwise approach to constructing a simpler, more effective grid system so the Sub-Group could focus on tackling one issue at a time. The major topics (framed as questions below) discussed thus far include:

- *How many grids?* Washington’s current system includes one grid, with an additional, separate drug sentencing grid and several (approximately 300) unranked offenses. To meet the Task Force policy goal of simplicity, the Sub-suggests maintaining a single grid system that incorporate features used by other states, such as zones and collapsed cells:
 - **Zones** allow for diagonal movement within the grid. For instance, they could allow for a loosening of judicial discretion lower down on the grid, while maintaining stricter sentencing guidelines for the most serious crimes or individuals with longer criminal histories.
 - When “criminal history scores” (the Grid Sub-Group’s suggestion for a revised name for Offender Scores) occupy the horizontal axis, **collapsed cells** (combining certain cells) can help control how quickly an individual’s sentence increases (i.e., move to the right in the grid) with additional past convictions.
- *How to define the horizontal axis?* In the current grid, the horizontal axis is determined by Washington’s offender score, ranging from 0 to 9+. In the example grids included in their draft research proposal, the Sub-Group suggests maintaining a horizontal axis based on past convictions. They discussed ways to limit the influence prior convictions exert on sentencing severity (particularly for less serious crimes) by incorporating zones and collapsed cells, as discussed above.
- *How to define the vertical axis?* In the current grid, the vertical axis is defined by offense seriousness level. While agreeing that the vertical axis should be based on offense classification, the Sub-Group struggled with the variety of ways offenses are currently classified in WA (e.g., felony class, offense seriousness, unranked offenses in statute, etc.), since those various classifications can be confusing and at times appear to conflict with each other. They identified the need for research to fully understand the spider-web effect of reclassifying all felony offenses under one system.

- *What is the appropriate range for grid cells?* The Sub-Group considered increasing sentencing ranges for some crimes to offer more judicial discretion. This could occur proportionally (i.e., by the same amount up and down) or disproportionately (i.e., increasing the range more either on the top or bottom end). Some Sub-Group members pointed out that it may be more politically feasible to increase ranges proportionally rather than disproportionately, especially on the bottom end.
- *How to address judicial discretion?* The Sub-Group discussed at length the appropriate degree of judicial discretion, and how to achieve it, without reaching agreement on ideal mechanism/s or amount/s of increase. Ideas discussed include:
 - Allow for intermediate punishment (e.g., non-incarceration alternatives)
 - Ways to incorporate age as a factor into sentencing
 - Creating criteria and mechanisms for judges to consider sentences outside a prescribed grid cell
 - Increasing sentence ranges within cells

Draft Research Proposal—Lauren Knoth, Washington State Institute for Public Policy (WSIPP)

Lauren walked the Working Group through a draft research proposal (see Appendix A) to ensure any new grid/s the Task Force recommends are based on the best available evidence. All the complications involved with potential changes (hinted at above) make it difficult to know the impact of any potential grid changes. We do have enough data now to make some informed decisions; Lauren, Clela, and Keri-Anne have outlined research to examine the demographic differences the potential impacts of moving forward with either grid option developed by the Sub-Group. For example, the research could answer:

- How would changing the vertical axis from offense seriousness to felony class effect sentencing?
- Are demographic disparities in sentencing driven by associations between a specific sub-population/demographic group and particular offenses?
- How frequently are individuals convicted under unranked offenses? How would changes in the categorization of unranked offenses impact sentencing?

Lauren proposed the following timeline: Clela and the Caseload Forecasting Council (CFC) would begin evaluation of sentencing trends within the current grid during the summer of 2020; Lauren and WSIPP would then begin forecasting and exploring demographics in September or October.

Discussion

The following summarizes the comments, questions, and responses as SEWG members reacted to the Sub-Group and Lauren's presentations:

- Several Working Group members expressed concern about increasing the maximum length of sentences. In response, Lauren highlighted the difficulty in predicting how judges will sentence when ranges are widened; however, if we find that for certain crimes most judges tend to sentence in the middle of the range, then we might assume a proportional expansion of the range will not significantly impact sentencing.
- It could be politically difficult to disproportionately widen ranges, especially if proposing to decrease minimum confinement length.
- Past WSIPP research indicates that the longer sentences had no statistical impact on recidivism.
- Group members noted the importance of pre-trial negotiation on sentencing length. For example, when the State agrees to lessen a charge, it usually results in an individual being sentenced at the maximum end of the lesser charge. As most cases are settled via plea bargaining, high-end sentencing may actually be mostly due to pre-trial agreements.
- In general, the SEWG supported the Sub-Group's work to date, especially their work to ensure any new grid recommendations are backed up by research. However, some expressed concerns about
 - Inadvertently increasing sentencing lengths
 - The use of certain risk assessment tools, such as WA1.

- Given the Sentencing Guideline Commission (SGC) has had an ongoing discussions of judicial discretion and justice reinvestment, a Group member proposed assigning some work and/or research to the SGC.
- SEWG members wanted to know: To what extent are upcoming decisions for them and the full Task Force contingent on the proposed research? Lauren responded that the research would not be conducted in a silo. Instead, the process would be iterative with CFC and WSIPP sharing information regularly with Task Force members to refine research questions and ensure the availability of all the information needed to make informed recommendations.
- Based on the Task Force's commitment to providing evidence-based recommendations and the anticipated need to educate the Legislature about the complexities of sentencing, the SEWG discussed the pros and cons of suggesting the full Task Force extend their work through June 2021.
- A Working Group member also emphasized the importance of considering retroactive action, asking: how do we move forward knowing of historical challenges, especially around criminal history scores? Another member echoed this comment, pointing out that criminal history scores are the number one driver of increased sentencing lengths.
- Another member asked that the grid development process also address pre-trial investigations.

Decision: The SEWG will present the proposed research proposal to the full Task Force on June 4, 2020.

OTHER POTENTIAL POLICY CHANGES RELATED TO SENTENCING EFFECTIVENESS

The SEWG briefly reviewed the Summary Table of emerging possible recommendations for the Task Force to consider and discussed other potential, non-grid-specific sentencing-related recommendations the Working Group could explore. Keri-Anne summarized the unanimous recommendations from the SGC's 2019 report:

- Eliminate mandatory stacking of enhancements such that the first would be required, but all subsequent enhancements would be subject to judicial discretion.
- Make enhancement time eligible for goodtime.

Keri-Anne explained the cost-benefit of these would be greatest if they are retroactive.

Questions and Response

The following bulleted list summarizes SEWG questions and comments related to potential enhancement recommendations:

- Some SEWG members noted the SGC recommendations would likely improve simplicity, particularly when calculating sentences.
- Another member pointed out the second proposal appears only to address total time served in confinement and suggested that time of enhancement could be converted to another type of custody.

NEXT STEPS & ACTION ITEMS

- SEWG agreed to begin meeting on a regular, bi-weekly basis. The Facilitation Team will follow up to coordinate schedules and set a recurring meeting time.
- The Facilitation Team will ask members to help populate the Summary Table in advance of the next Working Group meeting.

ADJOURN

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group
Meeting Summary: June 10, 2020
Zoom Digital Conferencing Technology

Attendees:

- Lydia Flora Barlow
- Suzanne Cook
- Sen. Manka Dinghra
- Judge Veronica Galvin
- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Judge Roger Rogoff
- Melody Simle
- Clela Steelhammer
- Nick Straley
- David Triewailer

Facilitation Team: Amanda Murphy, Chris Page, and Hannah Kennedy

WELCOME & REVIEW AGENDA

Chris welcomed members of the Sentencing Effectiveness Working Group (SEWG or working group) and reviewed the agenda. He addressed a few “housekeeping” items, including the grid Subgroup composition. The technical nature of the grid requires a diverse, yet small group to dive into the materials. However, the Subgroup is open to all Task Force members or alternates who wish to observe and track these meetings.

JUNE TASK FORCE MEETING REFLECTIONS

The SEWG debriefed the June Task Force meeting, focusing on addressing the Task Force’s input on their “first offer” of potential recommendations. Comments, questions, and responses are summarized below:

- A working group member reiterated concern about any step that would increase sentencing ranges on the top end. **R:** A Subgroup member noted no consensus has been reached, the potential recommendations discussed at the June Task Force meeting are just suggested paths the Task Force could take.
- **Q:** What do we mean by system improvements? Reducing complexity? **R:** For some SEWG members, simplicity means ending the complexities and constant changes to our sentencing system that have exacerbated the trends of increasing incarceration and longer sentences. Additionally, these constant changes make it difficult to understand the potential impact of any proposed changes to sentencing. Hopefully the emerging research proposal can help address this.
- A working group member requested the SEWG discuss earned time.
- Another member encouraged the SEWG to get “into the weeds” a bit more. There is not enough time in full Task Force meetings to discuss the details, so the working groups really need to do the heavy lifting.
- **Q:** Can the SEWG consider ways to incorporate recent brain science in sentencing, especially as it relates to young people being sentenced? **R:** There are two ways age operates in the sentencing system:
 - 1) **criminal history scores** are supposed to predict risk.
 - 2) We know that age is one of the strongest predictive factors for future recidivism.However, emerging brain science indicates that the legal age of adulthood, does not always correspond with completely developed **cognitive function**. The Subgroup has discussed youthfulness but reached no general agreement on if and how to address it in the grid.
- **Q:** Can we address geographic variations in the research proposal? **R:** While most members agreed it would be important to address geographic disparities, a lack of data could limit researchers’ ability to examine causal links. For example, Washington has 39 counties—each with separate court systems where judges and prosecutors respond to the communities they serve. These local cultural differences may make it difficult to

reach consistency across the entire system. Another member suggested disparities could be reduced if the State's Attorney's General's office handled appeals.

OTHER POTENTIAL SENTENCING EFFECTIVENESS RECOMMENDATIONS

Enhancements

Keri-Anne briefly summarized the 2019 Sentencing Guidelines Commission (SGC) report's discussion of enhancements. The SGC unanimously recommended eliminating mandatory stacking of enhancements and generally agreed enhancements should be eligible for "goodtime" based on the underlying sentence. The SGC and others have long acknowledged that enhancements top the list when you talk about system complexities.

- Several members suggested that all enhancements be reclassified as aggravating factors. Others think enhancements should be addressed on a case-by-case basis, as some (e.g., firearms and deadly weapons) are more politically popular than others.
- A working group member pointed out the many technical and structural conversations that go along with enhancements and suggested this could be a topic area for the Grid Subgroup to discuss.

Decision: SEWG agreed the Subgroup would discuss enhancements and determine whether the working group should present a potential recommendation to move all or some enhancements to the list of aggravating factors.

Multipliers

- A working group member hoped the Task Force could aggressively tackle multipliers as a key factor driving longer sentences. The member suggested ideas such as creating a repeat violent offense category in the grid, reclassifying certain offenses, or making repeat violent offense an aggravating factor.
- Another member suggested the SEWG may want to differentiate between criminal history score multipliers and current sentence multipliers.
- Other members said the SEWG should wait to tackle multipliers until research finding from the Statistical Analysis Center's investigation of criminal history scores become available.

The SEWG agreed the Subgroup would tackle multipliers as part of their work to improve the sentencing grid.

Intermediate Sanctions and Alternative Sentences

The working group generally agreed the Task Force should consider ways to expand alternatives to incarceration reduced incarceration sentencing options. Some courts are already experimenting with such programming.

Decision: The SEWG agreed to catalog existing sentencing alternatives to gauge whether they seem sufficient or whether additional options should be considered. The Subgroup will then look at how to incorporate sentencing alternatives into the grid. The Subgroup will also discuss intermediate sanctions.

Post-Conviction Review

- Several working group members noted the SGC and others have been working on post-conviction review for years. Across the state many parties agree that such "second look" options should be available but the details of any such proposed policy still need to be determined.
- Suggestion: eliminate mandatory stacking of enhancements such that the first would be required, but all subsequent enhancements would be subject to judicial discretion.
- Make enhancement time eligible for goodtime.

Keri-Anne explained the net cost-benefit results of these potential changes would be greatest if they are retroactive.

NEXT STEPS & ACTION ITEMS

- Facilitation Team to streamline format of summary table and provide working documents to Keri-Anne Jetzer and Greg Link.

- Keri-Anne to review potential recommendation topic areas assigned to the SEWG to note how each proposed recommendation meets the stated goals of the Task Force.
- Greg to review and revise potential recommendation language related to post-conviction reviews.

ADJOURN

**Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group
Meeting Summary: June 24, 2020
Zoom Digital Conferencing Technology**

Attendees:

- Sen. Manka Dinghra
- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Kelly Leonard
- Greg Link
- Sydney Oliver
- Judge Roger Rogoff
- Melody Simle
- Clela Steelhammer
- Nick Straley
- David Trieweler
- Jon Tunheim

Facilitation Team: Amanda Murphy, Chris Page, and Hannah Kennedy

WELCOME & REVIEW AGENDA

Amanda welcomed Sentencing Effectiveness Working Group (SEWG or working group) members and commended them for their ongoing commitment to this Task Force. She briefly reviewed past and future meeting schedules and then turned the meeting over to Jon Tunheim and Representative Goodman who updated the SEWG on recent Grid Subgroup (Subgroup) conversations.

GRID SUBGROUP UPDATES

Jon summarized recent Subgroup conversations on aggravators and enhancements, briefly defining both.

- **Aggravators** authorize a judge to impose sentences outside the standard presumptive range (but within reasonableness standards) up to the statutory maximum, while also triggering the right to appeal the sentence via a jury.
- **Enhancements** add onto a sentence automatically (i.e., impose a mandatory minimum). There is no right to appeal if the judge sentences within the standard presumptive range, with the enhancement portion of the individual's sentence not eligible for earned/good time.

The Subgroup would like the SEWG's input on how to address firearm and deadly weapon enhancements, by far the most common types of enhancements and ones with strong political support (voters passed the firearms enhancement by initiative). Jon described the various policy options the Subgroup has discussed and asked SEWG members to provide input on the following potential policy recommendations:

- Maintain the status quo but perhaps rename "enhancements" as "mandatory minimums" to more accurately reflect how they operate;
- Adopt an "enhanced range" approach, where certain factors (i.e., enhancements) when present, shift the presumptive standard range to the right (e.g., by 24 months), allowing judges to sentence within the new enhanced range (or the original range if mitigating factors were found); or
- Change enhancements to aggravators, enhancing judicial discretion and making such sentences eligible for earned/good time.

Representative Goodman emphasized the broad political support for firearm and deadly weapon enhancements. He also informed the SEWG of his plans to introduce legislation during the 2021 session that would eliminate stacking of firearm and deadly weapon enhancements, make them eligible for earned time, and remove the requirement that such enhanced time be served in total confinement.

Lauren Knoth (Washington Institute for Public Policy, aka WSIPP) shared a diagram of the current system and walked the SEWG through the expanded range option for aggravating and mitigating factors, using Pennsylvania’s grid as an example.

This bulleted list summarizes questions, comments, and responses from the SEWG’s discussion that followed:

- **Q:** Do all enhancements operate the same in Washington? Do they operate as originally intended? I’ve heard that despite the difference in structural language, they all basically operate as mandatory minimums. **R:** Most are characterized as expansions to the standard range but because they are not eligible for earned/good time and may be served consecutively, enhancements end up looking more like mandatory minimums.
- **C:** We have certain facts that we all generally agree lead to increased culpability, and we need to decide what to do with them. I don’t understand why one tool is right for a specific case but not for another similar case. Do we really need distinctions between the different tools (e.g., aggravators, multipliers, enhancements, etc.)? **R:** Some members felt the various tools are meant to serve the same purpose (i.e., impart longer sentences for factors deemed to increase culpability) but that the Legislature’s habit of reacting to the facts of specific cases has unintentionally increased complexity.
- **Q:** If Washington changed enhancements to aggravators, could you expect to see longer sentences than the mandatory minimum format because judges would no longer be bound to a fixed amount of additional time? **R:** Under our current system, yes, you could see even longer sentences, as the judges would only be bound by the statutory maximum and reasonableness standards. However, the Task Force may also recommend changes to the grid that could cap the amount of additional time judges could sentence when aggravating factors were found (similar to Pennsylvania’s (PA’s) model).
- **C:** The Sentencing Reform Act (SRA) was first developed with aggravators in mind, but few if any enhancements existed. In this sense, the original spirit of the SRA provided more judicial discretion, which has since shifted toward prosecutors with the addition of various enhancements and in the wake of the *Blakely* decision.

Amanda asked the working group to consider whether the enhanced range approach or another policy option could allow both judicial and prosecutorial discretion.

- **Suggestion:** Take an “enhanced range” approach, but only increase the presumptive standard range on the top end while keeping the original minimum sentence length. **R:** Even if the presumptive standard range is significantly widened (i.e., we increase judicial discretion), agreements between parties would still drive judges towards a specific sentence length because judges generally follow joint recommendations if the parties can agree.
- **C:** It is important to note that if the state uses a percentage for enhancements, the higher the prior record score, the greater the sentence length. PA ties such range increases to offense seriousness level; the SEWG may want to consider something similar.
- **Q:** What is the purpose of enhancements?
 - **R:** The practical purpose is to issue longer sentences.
 - **R:** Enhancements are created by the Legislature in response to specific types of conduct to address increased culpability based on particularly distressing factors of a crime. However, the outcome has certainly been longer sentences.
 - **R:** Enhancements and aggravators also serve to categorize crimes, no matter the offense type, by victim. For example, a state might decide that a crime against a pregnant woman, whether assault or theft, becomes more egregious because the victim is pregnant.
- **Q:** Are enhancements attached to specific offenses or to the overall action (i.e., all charges)? **R:** Enhancements are attached to specific offenses, and depending on the type of enhancement, it may be

applied to the sentence of the offense attached to the enhancement, or it could be applied to the sentence with the longest sentence.

EMERGING BASIC PRINCIPLES OF ENHANCEMENTS

A working group member suggested the SEWG establish agreed upon principles with regards to enhancements, and suggested the following:

- Enhancements do not need to be served in total confinement;
- Enhancements should be eligible for earned time;
- Enhancements should operate concurrently unless explicitly ordered by a judge; and
- Enhancements should not be applied if the factor is also an element of the crime or is considered in the criminal history score calculation.

Other working group members added the following “First Order” principles:

- Any potential recommendation related to enhancements should improve simplicity;
- Any potential recommendation related to enhancements should restore some judicial discretion; and
- Any potential recommendation related to enhancements should help avoid irrationally long sentences (the four bullets above primarily serve to address this).

POST-CONVICTION REVIEW

The SEWG reviewed draft language and notes for a potential recommendation related to post-conviction review. They discussed the need to consider retroactivity for any post-conviction review policy changes but did not necessarily agree on specific policy options.

Decision: the SEWG approved the draft potential recommendation language for post-conviction review and agreed to bring it to the full Task Force in August.

NEXT STEPS & ACTION ITEMS

- The Facilitation Team to follow-up with SEWG “homework.”
- The Subgroup will continue to discuss enhancements and develop related potential policy recommendations before moving on to multipliers.
- The SEWG will tackle sentencing alternatives and pre-sentencing investigations at its next meeting.

ADJOURN