

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group – Grid Sub-Group
Meeting Summary: June 9, 2020
Zoom Digital Conferencing Technology

Attendees:

- Rep. Roger Goodman
- Russ Hauge
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Sydney Oliver
- Judge Roger Rogoff
- Clela Steelhammer
- Jon Tunheim

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

WELCOME & REVIEW AGENDA

Amanda welcomed Grid Subgroup (Subgroup) members and briefly reviewed the agenda. The facilitation team heard from other Task Force members and alternates interested in observing Subgroup meetings. Before extending invitations, the facilitators would like the Subgroup’s approval; no members objected, and Lauren Knoth (WSIPP) offered to onboard folks interested in joining future meetings.

Agreement: open Subgroup meetings to any Task Force members or alternates who want to observe.

RECAP JUNE TASK FORCE MEETING

The Subgroup reflected on input from the Task Force at its June meeting about ways to incorporate nuanced data (from prosecutorial charging decisions, especially in rural counties) into the emerging research proposal. Subgroup members agreed that recidivism analysis should be based on reconviction, emphasizing the importance of collecting more data at the prosecutor office level. For example, Kitsap County used to keep records of rearrests, referrals, and why a case was pursued or not.

JUDICIAL DISCRETION

Keri-Anne Jetzer reviewed the Minnesota Sentencing Guidelines Commission’s 2010 report on the impact of expanded ranges on the state’s sentencing grid. In response to the 2004 *Blakely v. Washington* decision, Minnesota amended its criminal sentencing grid, expanding ranges by 15% downwards and 20% upwards.¹ The Minnesota SGC report found that average sentence lengths dropped from 46 to 42 months, with much of the reduction due to increased judicial discretion. Sentence lengths did increase slightly for some offenses at higher severity levels. The following summarizes the Subgroup’s comments, questions, and responses:

- **Q:** How did sentencing vary by jurisdiction? Washington courts operate independently across counties. While expanded ranges might lead to average sentence lengths decreasing across the state, some local county courts might see significant increases in sentencing length. **R:** Ideally, the research proposal and subsequent studies could provide this type of information.
- **Q:** Should Washington expand ranges evenly across the grid (i.e., apply the same percentage expansions up and down across all sentencing ranges) or should certain grid areas (e.g., the “southwest” or lower left corner) be treated differently? (NOTE: most Washington sentences are for offense seriousness levels 1-5, so for first-time offenses or people with low criminal history scores, this would mean lots of sentences get issued in the southwest corner.)

¹ The disproportionate expansion was largely due to political reasons.

- Several Subgroup members favored expanding ranges differently in various sections of the grid, particularly if judicial discretion could increase in the southwest grid corner.
- Other Subgroup members expressed reservations about expanding ranges, especially on the top end of sentences. Instead, a member suggested increased judicial discretion could be achieved by reforming the state’s enhancements policies.
- **C.** The state should transfer discretion from prosecutors to judges because, as elected officials, judges are beholden to community standards and can more easily be held accountable.
- Another member proposed focusing on broadening judicial discretion for lower seriousness level offenses to balance power between the courts and prosecutors.
- The Subgroup agreed that any proposed increase in judicial discretion on the lower end of seriousness level should also consider the potential impact on county jail populations.
 - Members suggested that incorporating more alternatives to incarceration into the grid could reduce the burden on counties.

NEXT STEPS & ACTION ITEMS

The Subgroup reviewed the draft agenda of the upcoming Sentencing Effectiveness Working Group meeting, emphasizing the need to discuss enhancements with the full group.

- Lauren will ask Pennsylvania colleagues to clarify statutory language regarding aggravating and mitigating factors.
- The Facilitation Team will open future Subgroup meetings to all Task Force members and alternates.

ADJOURN

**Washington State Criminal Sentencing Task Force
Grid Subgroup Meeting Summary
Meeting Summary: June 16, 2020
Virtual Meeting via Zoom**

Attendees:

- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Kelly Leonard
- Greg Link
- Clela Steelhammer
- Jon Tunheim

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

INTRODUCTION & AGENDA REVIEW

Amanda welcomed Grid Subgroup (Subgroup) members and recapped the recent Sentencing Effectiveness Working Group (SEWG) meeting. As requested by the SEWG, the Subgroup reviewed a list of the current enhancements to determine which might fit better as aggravating factors. Whatever enhancements remain will go back to the full SEWG for further discussion on issues such as whether enhancements should be consecutively (as they are now) or concurrently applied, enhancement length, offense eligibility, etc. Lauren reviewed a list of current Washington state enhancements. The following summarizes Subgroup comments, questions, and responses:

- **C:** The most frequently used enhancements are Firearms and Deadly Weapons. Between 2009 and 2018, approximately 150 firearm¹, 94 non-firearm enhancements, and 34 Sexual Motivation enhancements per year were applied.
- **C:** Since the Legislature only recently established the Vehicular Homicide and Child Minor enhancements, it may be politically difficult to recategorize them as aggravating factors. Deadly Weapons and Firearms enhancements are also considered politically “sacred.” **R:** Members noted the political landscape may be shifting and suggested the group consider all possible options.
- **C:** Enhancements is somewhat of a misnomer; they function more like mandatory minimums.
- Discussion of specific enhancements highlighted the system’s current complexity. Different enhancements operate differently from each other (e.g., some increase criminal history scores, they have varied lengths, some require special allegations, some are eligible for earned release time).

What is the aim of enhancements as compared to aggravating factors (what does the Legislature consider worse behavior)?

- **C:** In PA, enhancements either add onto the standard range or increase the offense seriousness level. Then aggravators and mitigators get added to either end of the range. Aggravators cannot be anything that is currently addressed via the grid (e.g., factors already accounted for in criminal history score or offense seriousness).

¹ NOTE: The Caseload Forecasting Council (CFC) counts firearm enhancements by sentence, e.g., if four firearm enhancements are applied to one sentence, they count as one firearm enhancement in CFC adult sentencing statistical summary.

- Some Subgroup members expressed interest in adopting a similar system, particularly where enhancements would broaden the sentencing range and could be applied alongside aggravating and/or mitigating factors.
- C. Adopting such a system could reduce future complexity by limiting the Legislature’s ability to influence specific sentences.

The Subgroup agreed to suggest the SEWG recommend the Task Force:

- Keep Firearms and Deadly weapons as enhancements.
- Develop a consistent approach to enhancements (e.g., get rid of stacking, make eligible for earned time, decide if enhancements should be included in criminal history score calculations, etc.).

ACTION ITEMS & NEXT STEPS

- Facilitation Team to inform full SEWG of the Subgroup’s intention to keep Firearms and Deadly Weapons as enhancements; Subgroup will continue to discuss the remaining enhancements and potentially agreeing to suggest they become aggravating factors with enhanced ranges.
- Jon will broach the enhancements/aggravators conversation with prosecutors and report back.
- Jon will review statutory language on enhancements, clarifying how they are applied in practice.
- Clela will gather information on annual frequency in sentencing for each enhancement.

ADJOURN

**Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group Grid Subgroup
Meeting Summary: June 23, 2020
Zoom Digital Conferencing Technology**

Attendees:

- Rep. Roger Goodman
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Judge Roger Rogoff
- Clela Steelhammer
- Jon Tunheim

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

INTRODUCTIONS & AGENDA

Amanda welcomed Grid Subgroup (Subgroup) members and reviewed the SEWG work plan and schedule. She mentioned that Russ Hauge stepped down from chairing the Sentencing Guidelines Commission (SGC). In the interim, Keri-Anne will represent the SGC on the Task Force and Russ has indicated he is available to answer questions and chat should the Subgroup want his input on anything.

ENHANCEMENTS

Clela Steelhammer introduced the following materials:

- **Enhancement Chart:** An excel table of Washington state (WA) enhancement information, including the annual frequency in sentencing for specific enhancements.
- **Judgment & Sentencing Form (J&S) Examples of Enhancements:** A document with screenshots of J&S examples for each enhancement for Lauren Knoth (Washington Institute for Public Policy, aka WSIPP) to compare WA with Pennsylvania’s system.
- **Enhancements:** A document with the statute for each enhancement, including the date each became effective.

Using one of the J&S examples, Lauren described how a similar enhanced sentence would work under the Pennsylvania (PA) system. The “enhanced range” approach in PA allows for more judicial discretion to increase *or* decrease the suggested sentence, whereas enhancements in WA offer little discretion, operating more like mandatory minimums. PA also includes a “reasonableness range” like the federal sentencing system.

The Subgroup then discussed how to address enhancements and develop potential recommendations. The following summarizes the Subgroup’s questions, comments, and responses:

- **C:** The firearm and deadly weapon enhancements should go to the full SEWG for further discussion and the Subgroup should suggest making the remaining enhancements into aggravating factors.
- **C:** A Subgroup member noted that *Blakely v. Washington*¹ applies anytime a judge pursues a sentence above the presumptive range and suggested the only way to avoid this is to make the grid advisory. **R:** Other members did not see this change as politically feasible.
- The Subgroup discussed how Legislative changes and the creation of new enhancements has led to an increasingly complex sentencing system over time. For some, it appears the Legislature has created various enhancements in response to specific cases, where a certain element of the crime becomes the political “flavor of the month.”

¹ *Blakely v. Washington* requires a sentence above the presumptive range be substantiated via proof before a jury

- **C:** A member emphasized the importance of using “mandatory minimums” terminology instead of “enhancements” because it more accurately reflects how these sentencing tools operate.
- If it is indeed politically infeasible to reclassify firearms and deadly weapons as aggravators, then the Subgroup and working group should focus on ensuring they operate more rationally and consistently (by addressing issues such as enhancement stacking, multipliers, etc.).
- **Q:** Amanda asked the Subgroup to consider what can be done to make potential recommendations related to enhancements more politically feasible? **R:** The Subgroup generally agreed that setting aside firearm and deadly weapon enhancements could help the Task Force reach consensus.
- **Q:** Do folks foresee pushback from defense attorneys if the Task Force recommends changing any or all enhancements to aggravating factors, given there are no limits on additional sentence length beyond the statutory maximum? **R:** Defense attorneys seem to be divided when it comes to increased judicial discretion. However, their support likely depends on how the grid is structured. A new grid recommendation could build in limits to aggravators.
- **C:** A Subgroup member pointed out that aggravators are eligible for goodtime and earned time, so making enhancements into aggravators would ensure individuals are eligible for goodtime based on the underlying offense.

SENTENCING EFFECTIVENESS WORKING GROUP (SEWG) MEETING PREPARATION

The Subgroup agreed to walk the full SEWG through their progress and discuss the theoretical, political, and philosophical implications of reclassifying ALL enhancements as aggravating factors. Specifically, the Subgroup will solicit input on three potential policy options:

1. ***Change (all, or all except Firearms & Deadly Weapons) enhancements to aggravators under current grid structure;***
2. ***Adopt an “enhanced range” approach similar to Pennsylvania’s; or***
3. ***Treat enhancements in the same way as now (as a mandatory “add-on” once an individual has been sentenced) but change the name “enhancements” to “mandatory minimums” to more accurately describe how they function.***

NEXT STEPS & ACTION ITEMS

- Facilitation Team will send meeting agenda and enhancement materials to full SEWG.
- Jon Tunheim and Rep. Roger Goodman will provide a progress update and summary of Subgroup discussions to-date at the SEWG meeting.

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