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. 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.)

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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.
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 firearm\(^1\), 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**
INTRODUCTIONS & AGENDA

Amanda welcomed Grid Subgroup (Subgroup) members and reviewed the 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.”**

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\(^1\) **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 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.
Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group Grid Subgroup
Meeting Summary: June 30, 2020
Zoom Digital Conferencing Technology

Attendees:
- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Melody Simle
- Clela Steelhammer
- Jon Tunheim

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

INTRODUCTIONS & AGENDA
Amanda welcomed Grid Subgroup (Subgroup) members and provided a few highlights from the Sentencing Effectiveness Working Group (working group or SEWG) meeting on 6/24.

AGGRAVATORS & ENHANCEMENTS
Lauren Knoth (Washington Institute for Public Policy, aka WSIPP) walked the Subgroup through a visualization of various sentencing alteration approaches the SEWG discussed. These approaches include (see Appendix A for a complete diagram):

- **Aggravator Approaches:**
  - 1a. Status quo: a proven aggravating factor allows the judge to sentence above the standard presumptive range but within the statutory maximum and within reason.
  - 1b. Bounded discretion: a proven aggravating factor allows the judge to sentence above the standard presumptive range but within a pre-defined limit (e.g., a 12-month cap).

- **Enhanced Range Approaches:**
  - 2a. Range shift: an enhancement shifts the standard range upward by adding a predetermined number of months to the top and bottom of the standard range. An individual can still be sentenced in the original standard range if mitigating factors exist.
  - 2b. Range expansion: an enhancement expands the standard range by adding a predetermined number of months only to the top end of the range.

- **Mandatory Minimum Approach:** an enhancement adds a mandatory term to the sentence, functionally shifting and constricting the range upward (NOTE: this currently describes how enhancements function, but the Subgroup could suggest the SEWG propose to the Task Force that the nomenclature for enhancements change to become or include “mandatory minimums”).

Lauren pointed out the Subgroup would also need to consider the order of operations, if the SEWG decides to propose a system that still includes both aggravators and enhancements; the Subgroup would also need to address whether any cap on exceptional sentences for aggravating factors should be applied per factor or per sentence.

- **Q:** Does Blakely apply to some, or all, of these approaches? **R:** Blakely would only apply to the mandatory minimums approach.

- **C:** A Subgroup member suggested reclassifying all the seldomly-used enhancements as aggravators and setting a limit to the upper range.

- **C:** Some enhancements seem fundamentally different than others and thus should perhaps operate differently. For example, the firearms enhancement came out of the *hard time for armed crime* era...
and was specifically designed to ensure a mandatory minimum sentence for acts that involve a gun. However, other enhancements (e.g., sexual motivation) are broader and appear to allow for more discretion.

- **Q:** If an enhancement can be applied towards good time, how is that still a mandatory minimum? **R:** Representative Goodman informed the Subgroup he plans to introduce legislation to ban stacking of enhancements in the 2021 session. The bill will likely be similar to [HB 1148](https://legislature.wa.gov/billintroductions/2015-2016/), which was introduced in 2015 and would have removed stacking of enhancement, ensured enhancements are eligible for earned time, and removed the requirement of total confinement.

- The Subgroup generally supported this proposed legislation, though at least one member requested the bill also ensure enhancements are served concurrently unless explicitly sentenced as consecutive.

- **Q:** What kind of earned time would enhancements be eligible for under this bill? **R:** Earned time would track to the underlying offense (e.g., 10% for violent offenses).

- **C:** A Subgroup member pointed out that earned time for many types of offenses has been significantly shrunk by the Legislature in past years.

**Decision:** The Subgroup agreed to present a potential recommendation to the SEWG where deadly weapon and firearm enhancements function like the enhanced approaches (2a or 2b) discussed above. As the questions, comments, and responses below indicate, the Subgroup needs more discussion to determine whether it supports an enhanced approach like 2a or 2b.

- **C:** If we change all other enhancements (i.e., not deadly weapons or firearms) to aggravators, they would be subject to the current system and body of case law surrounding aggravators.

- Others noted support for instituting a proportional or set cap on the length of exceptional sentences imposed based on aggravating factors.

- A Subgroup member suggested adding an aggravating/mitigating grid column like Pennsylvania’s model. Another member felt this would be too large a change to the system and noted that checks exist already on judicial discretion in the current aggravator system. If a judge sentences above the standard range, these exceptional sentences are automatically subject to a review by appellate courts.

- **Q:** Are there cases that have multiple aggravators? **R:** Yes, it is not unusual for prosecutors to seek a sentence with multiple aggravating factors.

The Subgroup agreed it needed more discussion on aggravating factors and asked Clela to prepare some information on their use in the current system.

**NEXT STEPS & ACTION ITEMS**

- Facilitation Team will follow-up with Subgroup members unable to attend.

- Clela will provide a brief statistical summary/report on aggravators, including:
  - The number of exceptional sentences due to aggravating factors;
  - How much beyond the standard presumptive range such sentences were; and
  - How many went in front of a jury, i.e., were not the result of a two-party agreement.

**ADJOURN**
APPENDIX A: Enhancements & Aggravators Approaches Visualization

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<thead>
<tr>
<th>Standard range - Offense Seriousness Level 10, Criminal History Score 2, Felony Class A</th>
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<td>50</td>
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*technical range 62-82

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<tr>
<th>AGGRAVATOR APPROACHES</th>
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<tr>
<td>1a. AGGRAVATOR APPROACHES</td>
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<td>Range with aggravator, assuming no change to aggravator structure</td>
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<td>*Range extends from 62 months to the statutory maximum - Life</td>
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<td>1b. AGGRAVATOR APPROACHES</td>
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<td>Range with aggravator, assuming a 12 month cap to aggravating sentences</td>
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<tr>
<td>*range includes the standard range of 62-82, plus an additional 12 months.</td>
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<th>ENHANCED RANGE APPROACHES - Assumes enhancement is 12-24</th>
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<td>2a. ENHANCED RANGE APPROACHES - Assumes enhancement is 12-24</td>
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<td>Range with enhancement shifting entire range</td>
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<td>*Range minimum moves from 62 to 74 and maximum moves from 82 to 106</td>
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<td>2b. ENHANCED RANGE APPROACHES - Assumes enhancement is 12-24</td>
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<td>Range with enhancement expanding only upper end of range</td>
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<td>*range includes the standard range of 62-82, plus an additional 24 months</td>
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<th>MANDATORY MINIMUM APPROACHES - Assumes enhancement is 12-24</th>
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<td>3a. MANDATORY MINIMUM APPROACHES - Assumes enhancement is 12-24</td>
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<tr>
<td>Mandatory Minimum of 24 months, functionally shifting range upward.</td>
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<tr>
<td>*Range moves upward 24 months to 86-106</td>
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WASHINGTON STATE CRIMINAL SENTENCING TASK FORCE
SENTENCING EFFECTIVENESS WORK GROUP: GRID SUBGROUP
MEETING SUMMARY: JULY 14, 2020
Zoom Digital Conferencing Technology

Attendees:
- Russ Brown
- Rep. Roger Goodman
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Judge Roger Rogoff
- Melody Simle
- Clela Steelhammer
- Nick Straley
- Jon Tunheim

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

WELCOME & AGENDA REVIEW
Amanda welcomed Grid Subgroup (Subgroup) members and reviewed the meeting agenda, encouraged members to focus on information and decisions to further hone the sentencing grid research proposal.

FIREARMS/DEADLY WEAPONS ENHANCEMENTS & SENTENCING DISPARITIES
Clela Steelhammer from the Caseload Forecast Council (CFC) presented a spreadsheet of Washington sentencing data comparing single, paired, and multiple firearm and deadly weapons enhancements by race. She walked the Subgroup through various tables, noting that the greatest racial disparity appears when multiple weapon enhancements get applied. Although a small portion of cases, the data shows African Americans more likely than any other racial group to be sentenced with multiple counts of firearm enhancements or multiple counts that include both firearm and deadly weapon enhancements.

The following summarizes the Subgroup’s subsequent questions, comments, and responses:

- C: It is common for prosecutors to reduce a firearm enhancement to a deadly weapon enhancement during plea negotiations.
- Q: Are there studies that examine the impact of firearm enhancements and gun policies on racial disparity? R: Though due to the relatively small sample size, few studies look explicitly at firearm enhancements, it does appear that people of color, and particularly African Americans, are more likely to be charged and convicted of firearm offenses.
- C: It is often on the fringes of sentencing, i.e., the application of aggravating/mitigating factors or enhancements, where we see the most racial disparity.
- C: Less than 10% of enhanced sentences (20 of 290) apply to drug offenses. The majority of firearm and deadly weapon enhancements are attached to the most serious types of offenses.
- Q: How do enhancements get processed and recorded in court proceedings? Would we see them in court data if an enhancement initially got filed but then dropped as part of the negotiation process? R: Whether such data gets captured varies by (and within) counties. No data captures what is not charged (e.g., a gun was used or present but the prosecutor did not attach an enhancement to the offense charged), but depending on office preference, you may see whether it got initially filed and then dropped.

Lauren Knoth (Washington Institute for Public Policy, or WSIPP) noted it is hard to determine the why or how of disproportionality from just this data. She will look at WSIPP’s database and other sources for ways the Subgroup (or other researchers) might parse out the initial filing statistics.

- C: Maybe we could limit the disparate impact of enhancements would be to eliminate their use on offenses where the enhancement is already in the definition of the crime. For example, the definition of Robbery 1 (see RCW 9A.56.200) includes firearms and deadly weapons. R: Another
member cautioned that the definition of Robbery 1 also includes what appears to be a firearm or deadly weapon.

- **Q:** Is there research that supports the idea that firearm enhancements actually deter people from committing a crime with a gun? How many people really know about enhancements? Can they be a deterrent if most people are not aware of them? **R:** The research is not definitive, but it appears that such enhancements do not have a general deterrent effect. They may have specific deterrent effect for individuals who have gone through the system and thus know of the steeper consequences associated with firearm and/or deadly weapon enhancements.

### ENHANCEMENTS & AGGRAVATORS REVISITED

The facilitation team asked the Subgroup to consider how they want to treat enhancements in the future. The Subgroup generally agrees that all enhancements, except firearms and deadly weapons, should be converted to aggravating factors; however, the Subgroup still needs to work out the details of how the aggravating factors should operate.

Representative Roger Goodman informed they Subgroup he is currently working on draft legislation to make firearm and deadly weapon enhancements presumptively concurrent and eligible for earned time. His team has not yet decided whether to pursue retroactivity.

- A Subgroup member asked that the draft legislation make charges including enhancements also eligible for mitigating factors.
- Another member suggested that any potential recommendation that emerges out of the Sentencing Effectiveness Working Group should require data collection to assess the impacts of future changes to the system, and provide guidance (if not explicit rules and procedures) for data collection.
- A Subgroup member also suggested another way to address disparities would be to limit how many enhancements can be applied (e.g., a prosecutor cannot charge multiple firearm enhancements). The Subgroup agreed Representative Goodman’s draft legislation should be discussed with the full Task Force.

### ACTION ITEMS & NEXT STEPS

- Representative Goodman will share draft legislation language with the Subgroup when complete.
- The Subgroup will table discussion of firearms and deadly weapons until the draft legislation language is available and will focus on the specifics of how to treat the remaining enhancements would work as aggravators (i.e., using the current parameters or instituting a cap or some other constraint on aggravated sentences).
WASHINGTON STATE CRIMINAL SENTENCING TASK FORCE
SENTENCING EFFECTIVENESS WORK GROUP: GRID SUBGROUP
MEETING SUMMARY: JULY 21, 2020
Zoom Digital Conferencing Technology

Attendees:
- Russ Brown
- Rep. Roger Goodman
- Keri-Anne Jetzer
- Lauren Knoth
- Greg Link
- Melody Simle
- Nick Straley
- Jon Tunheim

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

WELCOME & AGENDA REVIEW
Amanda welcomed Grid Subgroup (Subgroup) members. Representative Goodman announced his team has begun working on draft legislation to eliminate stacking of firearm and deadly weapon enhancements. The Subgroup will focus on the remaining enhancements, revisiting firearms and deadly weapons when draft bill language is ready for review.

ENHANCEMENTS & SENTENCING DISPARITIES
Lauren Knoth (Washington Institute for Public Policy, aka WSIPP), shared a list of enhancements and asked Subgroup members to consider which, if any they would like to remove, make aggravating factors, or build into the emerging grid research proposal.

C: A Subgroup member suggested making some or all enhancements offenses, adding them to the grid, and assigning them a seriousness level. Some enhancements already appear to double count, as some elements of a crime are also enhancements, for example a sexual motivation enhancement applied to a sex crime. R: The sexual motivation enhancement applies to non-sex crimes, so that enhancement is not about double counting.

Q: Isn’t there a body of case law that protects citizens from double jeopardy? R: Actually, State v. Kelly supports the opposite.

C: Making enhancements an element of the crime may complicate how prosecutors charge crimes. R: It would just require prosecutors to charge it as they would any other offense, instead of further alleging.

Lauren noted that racial disparity in application could be examined in the research process but some of these emerging recommendations may be independent of the research process (i.e., the suggestion to eliminate specific enhancements).

Further Subgroup questions, comments, and responses are organized by enhancement, below:

Protected Zones & Correctional Facilities
- C: I can see the policy logic around protecting correctional facilities from contraband, but I take issue with the protected zone, as most cases where this enhancement is applied happened in the vicinity of a school (or other zone) but have nothing to do with the school and do not involve students or staff.
• C: A Subgroup member noted the disproportionate application of the protected zone enhancement in urban areas. Furthermore, the classification of public parks and public housing complexes as protected zones leads to disparate impacts by socio-economic status and race.
• C: Given that the correctional facilities enhancement is concurrent and thus functions like an element of an aggravated offense, why not make delivery within a correctional facility a separate crime?
• C: Another Subgroup member noted the potential for pushback from Washington Association for Sheriffs and Police Chiefs. Protected zones have been politically popular and prosecutors may use it in plea negotiations, helping to move cases through the system.
• C: The Sentencing Guidelines Commission (SGC) strongly supports eliminating the protected zone enhancement due to the inherent racial and geographic disproportionality.

**Emerging Potential Recommendation:** eliminate the protect zone enhancement altogether.

**Manufacturing Meth with a Child Present**

• Q: Should this enhancement be made an element of a crime or should it be an aggravator because it describes a characteristic specific to the victim?
• C: This enhancement was associated with just one sentence in the past 20 years. It may not even be relevant anymore.
• C: A potential alternative could be to develop an aggravator for substantial danger to children.
• C: Given women’s societal role in childrearing, this enhancement (or aggravator) could disproportionately impact females. Is there evidence we could look at to better understand potentially disproportionate impacts on women?

**Sexual Motivation**

• C: There is already a sexual motivation aggravating factor. Eliminating the mandatory sexual motivation enhancement, sentences could still be subject to a sexual motivation aggravator, which if proven, would still trigger additional consequences (e.g., automatically categorizing the offense a sex crime).
• Q: With an enhancement there is a specific time associated with the sentence but if sexual motivation is only an aggravator, would prosecutors and judges be more willing to seek and issue even longer sentences?

**Endangerment While Eluding Law Enforcement Officer (LEO)**

• Q: Why not just build this into the grid and assign it an offense seriousness level? This would reduce complexity. R: Making this enhancement or others an offense may mean it gets subsumed into other charges.
• Q: Isn’t any type of alluding always endangerment?
• C: This enhancement increases the range by 12 months and a day to allow for a possible prison sentence. We could get at the same effect by making it a separate subsection and assigning it an offense seriousness level.
• C: WASPC may not support eliminating this enhancement.

**Assault of a Law Enforcement Officer (LEO)**
• C: WASPC may not support eliminating this enhancement.
• C: Like the above enhancement, assault of a LEO already increases the sentencing range. The same effect by making it a separate subsection and assigning an offense seriousness level.

Street Gang

• C: We should recommend eliminating this enhancement. It is difficult to prove, thus hardly used, and has problematic implications for free speech and association with defendants.
• C: In the past 19 years, only one sentence has been issued with a street gang enhancement.
• C: Several members agreed and expressed concerns about racial disproportionality AND racial disparity (in application or attempt to pursue the enhancement).

Emerging Potential Recommendation: eliminate the street gang enhancement.

Robbery of a Pharmacy

• C: This is a relatively recent enhancement which was created in response to the opioid epidemic. However, instead of an enhancement we could create a separate offense for robbery of a pharmacy.
• Q: Why is robbery of a pharmacy inherently more problematic than other types of robbery? A subgroup member expressed concern about criminalizing people’s desperation and instead suggested there may be a more public health-oriented way to address criminal behavior motivated by an underlying substance abuse disorder.
• C: Another Subgroup member suggested creating a separate offense but making it eligible for alternatives, noting that DOSA was just expanded to include property crime.

ACTION ITEMS & NEXT STEPS

• Representative Goodman will share draft legislation language with the Subgroup upon completion.
• Nick Straley to review correctional facilities enhancement prior to the Subgroup’s next meeting.
• Greg Link to review protected zone enhancement prior to the Subgroup’s next meeting.
• Jon Tunheim to review endangerment while eluding and assault of a law enforcement officer enhancements prior to the Subgroup’s next meeting.
• Rep. Goodman to review robbery of a pharmacy enhancement prior to the Subgroup’s next meeting.
Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group: Grid Subgroup
Meeting Summary: July 28, 2020
Zoom Digital Conferencing Technology

Attendees:
• Russ Brown
• Rep. Roger Goodman
• Keri-Anne Jetzer
• Lauren Knoth
• Greg Link
• Melody Simle
• Clela Steelhammer
• Nick Straley
• Jon Tunheim

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

WELCOME & AGENDA REVIEW
Amanda welcomed Grid Subgroup (Subgroup) members and briefly reviewed the revised Task Force workplan. The Subgroup is slated to present its emerging findings at the first September Task Force meeting (9/10), including suggested directions for a new grid and research to gauge projected impacts.

ENHANCEMENTS
The Subgroup continued discussing enhancements, reviewing recent notes and policy suggestions submitted by members. The Subgroup’s conversation, organized by specific enhancement, is summarized below.

Nick Straley: Correctional Facilities Enhancement
Nick briefly summarized his correctional facilities enhancement notes and suggested changes, including draft statute language to create a new offense, similar to the underlying sections of RCW 69.50.401, .410, and .4103. As Nick noted, the “sentence for violation of this newly designated crime would be the range for violation of those offenses, plus up to 18 months for violations of .401(2)(a) or (b), or .410, 15 months for violations of .401(2)(c),(d) or (e), and 12 additional months for violations of .4013.” This could increase judicial discretion without necessarily increasing the severity of the sanction (i.e., additional time is not mandatory).

Nick explained this would meet the Task Force goals of improving effectiveness and reducing complexity because making this enhancement a separate underlying offense will make it easier for DOC to calculate sentences and determine earned time, etc.

• C: Reviewing the statute language, it appears this enhancement do not cover city or tribal jails.
• Q: Would the Legislature need to re-rank crimes (if committed in correctional facility), assigning seriousness level? R: The drug grid is tight (only three offense seriousness levels and three categories of criminal history scores) and assumes a B felony or less. Thus, it could be difficult to incorporate new offenses based on enhancements without sending everything out of whack. R: Perhaps adopting a +/- felony system (e.g., C-, C, C+, etc.) would allow greater sentencing precision.
• C: Essential this new offense would function the same way as the original enhancement. If this is the direction folks want to go, one option might be to create a separate sentencing matrix for drug offenses in correctional facilities like Pennsylvania. This would provide more transparency for individuals being sentenced and improve simplicity by eliminating the need for mental math.
• Q: Are you saying we just widen the top end of the sentencing range, keeping the bottom end the same? If so, I think this is a good idea. R: Pennsylvania’s various matrices operate by increasing the range on both the bottom and the top (e.g., + 6-12 months), but you could also just increase the top.
• **Q:** Does it apply to any crime within that zone or just specific types of crime? **R:** If prosecutors purse the correctional facilities or protected zone enhancement on qualifying offenses, that would determine what sentencing matrix is used.

• **C:** Adding to drug grid ranges could add substantial amount of time to sentences because the ranges are already quite wide. Another possibility would be to change the statute language to assert if any of these offenses occur in a correctional facility, the judge *may* add X months, instead of the court *shall* add.

• **Q:** Is this enhancement common? **R:** It is not uncommon. There were ten in 2019.

• **C:** Currently, “harder” drugs result in a longer sentence but does the type of drug really matter? **R:** Several members supported simplifying the potential recommendation to allow a judge to add up to 12 months for any substance, rather than different amounts for different drugs.

• **C:** All sentencing statutes should be brought into the Sentencing Reform Act, aka SRA, (i.e, incorporating RCW 69.50 into 9.94A) so folks only need to look at one chapter while sentencing. This would reduce complexity. **R:** This is possibly something that the full Sentencing Effectiveness Working Group (SEWG) could recommend the Sentencing Guideline Commission (SGC) take on.

• **C:** If the Task Force does recommend the SGC review RCW 69.50 and other sentencing statutes to combine them within the SRA, the SGC should also look at opportunities to mitigate overly harsh drug sentences.

*The Subgroup agreed to develop a potential recommendation to make the correctional facilities enhancement a separate offense where courts MAY impose UP TO 12 additional months on qualifying underlying drug offenses.*

**Jon Tunheim: Endangerment while Eluding Law Enforcement Officer (LEO) & Assaulting a Police Officer**

Jon summarized the results of his review of the “endangerment while eluding” enhancement, which was enacted in response to an incident in Yakama in which two young men were killed when a vehicle eluding police hit them. The bill passed with near-unanimous support, as a priority for the Washington Association of Sheriffs and Police Chiefs (WASPC). Unlike other enhancements, endangerment while eluding applies to a specific underlying crime (i.e., eluding) and is straightforward to charge.

Jon also reviewed his notes on the assaulting a police officer enhancement. This enhancement also introduced in response to an incident—when a fleeing suspect turned and pointed an airsoft pistol at the pursuing officer; the officer believed the gun was real and drew his gun and fired two rounds, missing the suspect both times. Like the endangerment enhancement, assaulting a police officer also passed with little opposition and was strongly supported by law enforcement groups. This enhancement also applies only to a specific underlying crime (i.e., third-degree assault against a police officer).

Given their strong political support and the fact that both enhancements are limited to one underlying crime and easy to apply, Jon suggested they remain as enhancements.

• **C:** Both enhancements might make sense to turn into aggravating factors because enhancements created by “hero bills” like these usually are not used often. In the past 20 years, endangerment while eluding has been charged 15 times and assaulting a police officer has never been charged.

• **C:** Making these aggravating factors would give judges the discretion to determine if (and how much) additional time gets added—so unless some sort of limit is imposed, sentences could end up being longer for crimes charged with aggravators rather than enhancements.

• **C:** These actually operate the way enhancements should, i.e., the statutory language does not establish a mandatory minimum sentence. However, keeping them as enhancements does not reduce complexity.
WORKING PLAN REVIEW
The facilitation team reminded the Subgroup they do not need to reach full agreement. Instead, they may want to put forward two or more options to be thoroughly assessed via the research being proposed by WSIPP. Amanda and Chris also reminded the Subgroup that next week (8/5) is the last scheduled meeting of the full SEWG, so any potential recommendations or findings the Subgroup wishes to share must go to the SEWG on or by August 5th.

Some Subgroup members suggested extending the SEWG’s life. The facilitation team agreed to revise the workplan but noted process challenges that could bring, which in turn would likely require some “shuttle diplomacy” between meeting to ensure the Task Force has the best chance possible of reaching consensus.

NEXT STEPS & ACTION ITEMS
• Facilitation team to distribute Representative Goodman’s draft bill language for firearm and deadly weapon enhancements to the Subgroup and revise the SEWG meeting plan/schedule.
• Greg Link to review protected zone enhancement prior to the Subgroup’s next meeting.
• Rep. Goodman to review robbery of a pharmacy enhancement prior to the Subgroup’s next meeting.