Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group – Grid Sub-Group
Meeting Summary: August 4, 2020
Zoom Digital Conferencing Technology

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

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

WELCOME & REVIEW AGENDA
Amanda welcomed Grid Subgroup (Subgroup) members and reviewed the Sentencing Effectiveness Working Group (SEWG or working group) and Subgroup timelines. She then turned the meeting over to Lauren Knoth (Washington State Institute for Public Policy, aka WSIPP), who drafted some additional potential recommendations based on past Subgroup discussions. Amanda and Chris asked the Subgroup to decide which potential recommendations they would like to bring to the SEWG on August 5th.

ADDITIONAL POTENTIAL RECOMMENDATIONS
Lauren walked the Subgroup through the two potential recommendations she drafted (see supporting materials section below). The following summarizes the Subgroup’s questions/comments/responses, organized by potential recommendation.

Potential Recommendation 1: Direct the Sentencing Guidelines Commission (SGC) to develop a proposal to move all statutes concerning criminal penalties from RCW Title 69 to RCW Title 9.94a. This proposal should include a review of drug sentences and include recommendations to reduce overly punitive sanctions.
• C: This is a good recommendation. The SGC would just need a directive from the Legislature or a legislative member to begin enacting this proposal.
• The Facilitation Team requested that any policy recommendations folks would like the Task Force to weigh-in on and potentially support will need to be presented to the full Task Force as soon as possible. Chris and Amanda also asked members to be open about any criminal sentencing-related policies they plan to pursue regardless of the Task Force’s final recommendations.

Action Item: Subgroup members agreed to bring the policy recommendation to the full Task Force prior to any legislative member or body issuing a directive to the SGC.

• Q: What scope should the SGC look at? To what degree would it make sense to do a more sweeping review of drug policies? R: Subgroup members generally agree they would like to see the justice system adopt a more therapeutic approach to drug policies.
• Q: Are we just discussing the penalty pieces of RCW 69.50? R: Yes.
• C: The recommendation should explicitly reference reducing or eliminating incarceration sentencing for drug-related crimes. The Department of Corrections (DOC) is already calling for some de-incarceration.
Meeting Summary – August 4, 2020

- C: "Drug-related" is too broad a term, we should consider being more specific and limit it to possession and addiction motivated property crime. Q: What about the term “non-violent drug offenses”? R: All (except one) RCW 69.50 offenses are non-violent.
- C: If we’re trying to reduce drug charges and sentencing length and increase behavioral health support, we should also consider the burden this puts on local jurisdictions: reduced sentencing lengths may lead to increases in local jail populations, and therapeutic programs are run at the county-level. We should consider ways to help finance such a transition. C: We should also acknowledge that, to a certain extent, these costs are driven by county-level actors. It is the county prosecutor’s office that decides to charge each possession case etc.

Revised Potential Recommendation 1: Request that the SGC develop a proposal to move all statutes concerning criminal penalties from Chapter 69.50 RCW to Chapter 9.94A RCW. At a minimum, this proposal should also include:
- a review of drug sentences and recommendations to reduce reliance on punitive sanctions and to prioritize a therapeutic model for associated drug offenses.
- a review of reforms to reduce or eliminate incarceration penalties for drug related offenses, particularly felony possession.

Potential Recommendation 2: Eliminate the Correctional Facilities Drug Enhancement (RCW 9.94A.533(5)) and replace it with a new statute allowing judges to sentence up to 12 months of additional incarceration time above the standard range for violations of RCW 69.50.401, 69.50.410, or 69.50.4013 that occur in a county jail or state correctional facility.
- Q: Should the language be broadened to include city and/or tribal jails? They are not included in the current statute.
- C: The Subgroup’s individualized approach to enhancements is confusing and may add to the system’s complexity, rather than reducing it.
- Q: I’m afraid this enhancement just serves to further criminalize addiction. Does the correctional facilities drug enhancement differentiate between personal use and intent to distribute? R: No.
- Q: We just discussed recommending the SGC should review drug policies. Should this enhancement also be a part of this? Would the protected zone enhancement also be included, as a drug-related charge? R: Some members agreed drug-related enhancements should be reviewed by the SGC. Other members expressed reservation about postponing review of the protected zone enhancement, arguing the broad definition of “protected zone” (e.g., public parks, public housing, etc.) explicitly perpetuates socio-economic inequalities.
- Q: We keep discussing enhancements but are we looking at things backwards? If the Task Force is going to rework the grid, does the conversation about what to do with enhancements become less substantial? R: The Subgroup discussed incorporating several enhancements into the grid as separate offenses. Q: What if enhancements stay separate and we table the discussion of enhancement reform until we have a better understanding of what a new sentencing grid might look like? Depending on how the grid changes, the impact of enhancements and/or the number of exceptional sentences may be diminished.
- Q: Can various potential approaches to enhancements be analyzed in the research proposal? Can we assess the impacts of eliminating all enhancements? Some enhancements? Etc.? R: Yes. This can be added to the draft research proposal.

NEXT STEPS & ACTION ITEMS
• Subgroup will present the revised draft potential recommendation 1 (above) to the Sentencing Effectiveness Working Group on 8/5.
CONSOLIDATING SENTENCING STATUTES

1. **POTENTIAL RECOMMENDATION:** Direct the Sentencing Guidelines Commission to develop a proposal to move all statutes concerning criminal penalties from RCW Title 69 to RCW Title 9.94a. This proposal should include a review of drug sentences and include recommendations to reduce overly punitive sanctions.
   
   a. **Reduces complexities and errors:** Currently sentencing provisions exist in both title 69 and title 9.94a. This proposal would centralize all criminal sentencing provisions within the Sentencing Reform Act to eliminate redundancy and reduce the likelihood of errors.
   
   b. **Improves effectiveness of the sentencing system:** Centralized sentencing provisions makes it easier to assess the full scope of applicable statutes at sentencing.
   
   c. **Promotes/improves public safety:** Helps ensure that sanctions are accurately determined.

REFORMING ENHANCEMENTS

1. **POTENTIAL RECOMMENDATION:** Eliminate the Correctional Facilities Drug Enhancement (RCW 9.94A.533(5)) and replace with a new statute allowing judges to sentence up to 12 months of additional incarceration time above the standard range for violations of RCW 69.50.401, 69.50.410 or 69.50.4013 that occur in a county jail or state correctional facility.
   
   a. **Reduces complexities and errors:** Clarifies that an additional sanction may be rendered, but is not mandatory. Eliminates potential confusion about whether the additional time is eligible for earned time.
   
   b. **Improves effectiveness of the sentencing system:** Eliminates disparity in the amount of additional time that may be assessed by type of drug. In the current statutes, the enhancement ranges from 12 to 18 months depending on the type and amount of drug. The proposed revision creates consistency across all types and amounts of drugs associated with the underlying offense.
   
   c. **Promotes/improves public safety:** Helps ensure that sanctions are accurately determined and there is not confusion about whether or not the additional time is eligible for earned time.
Washington State Criminal Sentencing Task Force  
Sentencing Effectiveness Working Group – Grid Sub-Group  
Meeting Summary: August 11, 2020  
Zoom Digital Conferencing Technology

Attendees:  
• Russ Brown  
• Rep. Roger Goodman  
• Keri-Anne Jetzer  
• Lauren Knoth  
• Greg Link  
• Judge Stanley Rumbaugh  
• Melody Simle  
• Clela Steelhammer

Facilitation Team: Chris Page and Maggie Counihan

WELCOME & AGENDA REVIEW  
Chris welcomed Grid Subgroup (Subgroup) members and reviewed the meeting agenda. The Subgroup reviewed the research proposal from Lauren Knoth (Washington State Institute for Public Policy, aka WSIPP) and discussed enhancements.

POTENTIAL RESEARCH PROPOSAL  
Lauren walked the Subgroup through the research proposal (see supporting materials section below) she drafted and noted her recent addition of questions #4 and #5 (on first page). She asked the Subgroup to consider what to prioritize if limited resources prevented WSIPP and partners from researching all the questions listed.

Lauren pointed out that the research would examine current sentence distributions, both across the grid and within individual cells, by race, gender, and age. She mentioned that some members had expressed interest in geography, and that the research might also to look at east and west or urban and rural.

The second part of the research proposal would analyze the potential impacts of two proposed grid approaches (A & B). She can use information on the status quo to forecast:

• potential increases or decreases in sanctions;  
• the core demographic characteristics; and  
• potential factors causing the disparities.

She recently added Question #7 to the study of potential future grid impacts: What are the potential outcomes from revising enhancements to be either a) a new, separate offense or b) moved into aggravating factors?

The proposal involves WSIPP, Caseload Forecast Council (CFC), and the Ruckelshaus Center (to provide funding). Clela would pull data from CFC; Lauren will put together the final report with data from WSIPP and CFC to help explain potential changes to the grid.

Lauren asked the Subgroup about their desired timeline and which questions they would prioritize.

Desired timeline:  
The Subgroup discussed the possible extension of the Task Force through at least June 30, 2021 and potentially the end of 2021. Lauren said that based on when a report from the Statistical Analysis Center is due (March), she could prepare a preliminary internal report for the Subgroup by March and a final comprehensive report looking at all the factors by the end of June, 2021. She also mentioned the possibility of doing a cost-benefit analysis if resources are available.
**Priorities Discussion:**

- Q: If we move forward making changes to enhancements, is it worth looking at enhancements in this report?
- Q: I was wondering how you could look at the fiscal impacts of enhancements if they get changed to become new offenses. R: This is where we would be making some logical assumptions and then say, “this is what we could expect to see.” R: CFC has also given a range in the past when DOC has requested information.
- C: You had mentioned asking about the breakout of the offense +/- class system and the SGC has gone through all of them.

**Action Item:** The group agreed to make question #7, about enhancements, a low priority, and questions #5 and 8 high priority. The research proposal will go to the SEWG and then to the Task Force in September.

**Enhancements: Robbery of a Pharmacy**

The Subgroup discussed the robbery of a pharmacy enhancement which currently adds an additional 24 months. Members focused on two potential options: create a new “prong” of Robbery 1 (the same as bank robbery) or make it an aggravating factor with a potential limit of 12 months. Below is a summary of the discussion (questions/comments/responses):

- C: Armed robbery of a pharmacy is already a seriousness-level 9. Robbery 1 is a class A felony and Robbery 2 is a class B felony.
- C: My preference would be to create a new prong of Robbery 1 and get rid of the enhancement.
- C: You would not want to make it an aggravator? It would be more judicial discretion. These offenses are conduct-specific when you consider where in the range someone should be sentenced.
- Q: Does this depend on what the grid looks at the end?
- C: If you turn the pharmacy part into an aggravator, it could fit into either robbery or theft, whichever fits best (making it an aggravator makes it more flexible).
- C: We still do not have a clear idea of what enhancements are supposed to do. Do we treat the use of a firearm as an enhancement as Robbery 1 and something else for Robbery 2? How do we find a consistent way where we do not make more confusion in the system? I want some sort of framework on how to deal with something that makes a crime more culpable and do it in a consistent way.
- Chris asked if Lauren has information on what other states do for a more consistent way. Lauren noted that is a policy question and not a research question, so not in her area of expertise.
- C: I would want to expand judicial discretion and make it an aggravator.
- C: I do not think I have a preference, but one thing about an enhancement is that it limits the scope and could limit geographic disparities.
- C: The argument about increasing judicial discretion and the potential to increase disparities is something you are going to have for all of them. You have a check on judicial discretion because they are elected.

**Next Steps & Action Items**

- Grid Subgroup will discuss other remaining enhancements (protected zones, assaulting a law enforcement officer, sexual motivation, etc.)
- The Subgroup will update the SEWG about research proposal on 8/19.
- Have SEWG discuss Rep. Goodman’s three options for Firearms/deadly weapons
SUPPORTING MEETING MATERIALS: *Research Proposal from WSIPP (8.11.20)*

**Proposal for Data-Driven Decision Making**
Sentencing Effectiveness Work Group
Sentencing Grid Sub-Group

**Remaining questions for sub-group:**
1. Currently there are 3 classes of offenses (A, B, C) plus unranked offenses. The grid mockup had up to class D as a way to show the potential for making more offense-type distinctions within a class-based guidelines system. There are not currently class D offenses. What classification system does the group want to use on the vertical axis for a class-based grid? Would need to determine if/how to incorporate unranked offenses.
   a. There is not currently a +/- system for adult felony sentences. We would need guidance on which offenses fall in which classification.

**Potential research Directions:**
The current proposal for research includes gathering detailed information on the current grid using historical data and then assessing the possible impacts of changing components of the grid using the same set of historical data. Comparisons could be made between the current grid and the two potential grid options put forth by the sub-group. The information on the current grid and hypothetical scenarios can help identify which options best meet the previously identified *desired outcomes*, but may also help identify where additional changes are necessary to meet the *desired outcomes*.

**Information on current grid:**
Data could be gathered to examine the following:
1. Number of sentences issued within each cell of the grid
2. Average sentence within each cell on the grid
3. Range of sentences in each cell as well as proportions of sentences that are are in the range, below the range, and above the range.
4. Average reduction in length of stay for mitigated sentences and average increase in length of stay for aggravated sentences, by offense seriousness level.
5. Are there racial/ethnic or gender disparities in the use of sentencing enhancements?
6. Assessment of average range of sentences for the 5 most common crimes in each cell
7. Amount of sentences in each guideline cell that received a disposition alternative
8. Disparity in the outcomes for individuals across the grid?
   a. Is there racial/gender/age disparity in the general distribution of individuals?
   b. Is there racial/gender/age disparity in average sentences within a guideline cell?

**Assessing the impact of changes:**
There are two proposed options that the group has coalesced around.
**Grid A: two vertical axes: Level and Class (+/- system)**
**Grid B: two vertical axes: Level and Offense Seriousness Level**
In order to assess the potential impact of moving forward with either grid, we could examine:
1. How many offenses would have an increase or decrease in the range of sentences on the new grid? *(Relevant only for the class-based grid)*
2. How many sentences would have had a potential increase or decrease on the new grid?
3. How do changes differentially affect racial/ethnic groups? Different genders? Different age groups?
4. Are there data-driven adjustments to the ranges in different cells that can reduce racial/ethnic, gender, or age disparities?
5. Where do disposition alternatives most commonly fall on the new grid? (to assess reasonable placements for new “levels”)
6. What are the potential outcomes from expanding the ranges in the guideline cells?
7. What are the potential outcomes from revising enhancements to be either a) a new, separate offense or b) moved into aggravating factors?

Other potential areas of examination:
The above questions focus primarily on the changes to the guideline rows and the width of the range in each of the individual cells. Based on the conversations from the sub-group, other potential areas of exploration include:

1. Combining felony and drug grid – additional analyses could examine the effects of eliminating the drug grid and putting those offenses back into the main felony sentencing grid.
2. Incorporating unranked offenses – how would sentences be affected if unranked offenses were incorporated into the grid?
WASHINGTON STATE CRIMINAL SENTENCING TASK FORCE
SENTENCING EFFECTIVENESS WORKING GROUP – GRID SUB-GROUP
MEETING SUMMARY: AUGUST 18, 2020
ZOOM DIGITAL CONFERENCING TECHNOLOGY

ATTENDEES:
• Russ Brown
• Rep. Roger Goodman
• Omeara Harrington
• Keri-Anne Jetzer
• Lauren Knoth
• Judge Stanley Rumbaugh
• Melody Simle
• Clela Steelhammer
• Nick Straley

FACILITATION TEAM: Amanda Murphy and Hannah Kennedy

WELCOME & REVIEW AGENDA
Amanda welcomed Grid Subgroup (Subgroup) members and apologized for any redundancies as the Facilitation Team continues to balance annual leave schedules. The Subgroup confirmed the draft research proposal was finalized and is ready to be reviewed by the Sentencing Effectiveness working group (SEWG or working group). Lauren Knoth (Washington State Institute for Public Policy, aka WSIPP) agreed to present the draft research proposal at the next SEWG meeting. Lauren also noted WSIPP’s board would need to approve the research proposal prior to any data collection or analysis. WSIPP’s next board meeting is scheduled for September 14th, thus full Task Force approval should be sought at the September 10th meeting.

SENTENCING ENHANCEMENTS
ROBBERY OF A PHARMACY
Based on past Subgroup conversations, Lauren drafted a potential recommendation to make the robbery of a pharmacy enhancement and aggravating factor. The following summarizes the Subgroup’s questions/comments/responses:

• C: The current language excludes participatory offenses and given attempted robbery of a pharmacy is considered a participatory offense, this recommendation may limit a court’s ability to consider mitigating factors.
• C: Including participatory offenses would also allow individuals to be eligible for Drug Offender Sentencing Alternatives (DOSA).
• Q: How exactly would this recommendation operate? R: The aggravating factor would be conditional on the underlying offense.
• Q: How is this functionally different from the current robbery of a pharmacy enhancement? R: Making it an aggravating factor removes the required exceptional sentence allowing courts to sentence within the original standard range.
• C: Making it an aggravating factor would remove the mandatory minimum. This could help address racial disparities, as African Americans are disparately sentenced in robbery cases.
• Q: If you were to shoplift from a pharmacy would you be eligible for this aggravating factor? If the concern is about the robbery of controlled substances, shouldn’t we make that explicit? R: Different types of robbery are distinguished by monetary value. This aggravator would only
apply to individuals who stole $750 or more worth of goods from a pharmacy. Still, we may want to consider being more detailed about controlled substances.

- **Q:** How often is this enhancement currently used? **R:** Since 2013, only two sentences appear to have included this enhancement.

*Action Item: The Subgroup decided to revisit this enhancement and the potential recommendation next week.*

**Sexual Motivation**

WA’s current sentencing system includes both a sexual motivation enhancement and a sexual motivation aggravating factor. The Subgroup discussed whether to remove and/or modify either; the Subgroup’s comments/questions/responses are summarized below:

- **C:** The enhancement allows for some degree of certainty (i.e., a mandatory additional time) and it can also be used to mitigate a sentence in certain situations. For example, a prosecutor might agree to charge an individual with assault of a child with sexual motivation rather than the more serious offense of child molestation. Removing the enhancement and making sexual motivation just an aggravating factor could reduce sentencing certainty because judges would then have discretion to issue an exceptional sentence up to the statutory maximum.

- **Q:** Is this an instance where you would want to require pre-sentencing investigations (PSIs)? **R:** Sex crimes currently require PSIs and they can be very helpful, especially for more serious sex crimes.

- **C:** The mandatory minimum aspect of this enhancement could be eliminated. For example, we could recommend changing the statutory language to allow for “up to X years.” This would still allow for some certainty.

- **Q:** What if the underlying crime is already a sex crime? Can an individual still be charged with sexual motivation? **R:** No, it is presumed to be built into the underlying crime.

- **C:** The sexual motivation aggravator does not provide certainty for either the defense or the victim.

- **Q:** How often do judges decline to follow the sentence agreed to during the plea negotiation process? **R:** It likely depends on the judge but not very often.

- **C:** Sex crimes and sexually motivated offenses are a unique type of criminal behavior.

- **C:** Approximately 60% of individuals charged with a sexual motivation enhancement are white and approximately 15% are Black/African American.

*Action Item: Subgroup members decided to continue discussing sexual motivation as an enhancement, though with possible modifications and generally agreed the sexual motivation aggravating factor was not necessary.*

*Action Item: Clela Steelhammer will compile additional data on sexual motivation enhancements and aggravating factors, including associated underlying offense.*
NEXT STEPS & ACTION ITEMS

- The Subgroup will share their draft research proposal with the Sentencing Effectiveness working group on 8/19.
- The Subgroup will continue to discuss robbery of a pharmacy and the remaining enhancements (e.g., protected zones).
- Clela will compile as much information as possible on the remaining enhancements, including sexual motivation.
Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group: Grid Subgroup
Meeting Summary: August 25, 2020
Zoom Digital Conferencing Technology

Attendees:
- Russ Brown
- Rep. Roger Goodman
- Omeara Harrington
- Lauren Knoth
- Kelly Leonard
- Greg Link
- Judge Stanley Rumbaugh
- 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 agenda. She briefly summarized the August 19th Sentencing Effectiveness working group (working group or SEWG) meeting where Rep. Goodman introduced three policy options (A-C) to mitigate irrationally long sentences from stacking of firearm and deadly weapon enhancements. The working group provided feedback on those policy options and asked the Subgroup to refine them based on their input. Policy options A-C are summarized in the supporting materials section (below); SEWG feedback is highlighted in yellow.

POLICY OPTIONS A-C: FIREARM & DEADLY WEAPON ENHANCEMENTS
Rep. Goodman reviewed the three policy options and walked the Subgroup through key points and concerns raised by SEWG members. The following summarizes Subgroup questions/comments/responses:

- **C:** Washington Association of Prosecuting Attorneys (WAPA) discussed these options and members raised concerns about retroactivity. They noted the possibility of revictimization, the potentially immense workloads/resources required, and the possibility of undermining mutual agreement previously reached by all parties.

- **Q:** Did WAPA (Washington Association of Prosecuting Attorneys) members discuss the SEWG suggestion of allowing partial retroactivity (i.e., resentencing under an appeal process similar to SB 6164)? **R:** WAPA members did not discuss this specific option, but most prosecutors still find it difficult to resentence under 6164 because courts are required to resentence under the law as it existed at the time. Prosecutors may also be wary of retroactive bills as they tend to be inundated with resentencing requests.

- **C:** Prosecutors expressed concern about the notion of resentencing individuals who bargained for the sentence they got.

- **Q:** What about instances where all parties agree to resentencing? **R:** WAPA members may support that.

- **C:** If we agree that the stacking of firearm and deadly weapon enhancements resulted in overly punitive sentences and we want to truly fix the problem, we need to be willing to go backwards. If we are not willing to pursue retroactivity then we need to be willing to say that other concerns, including financial and resource burdens, outweigh the benefit of righting past wrongs.

- **Q:** These policy options would make multiple enhancements presumptively concurrent. Would trial judges then have to have exceptional findings to sentence enhancements consecutively? **R:** The proposed options would not require exceptional findings.
• **Q:** Can we eliminate the application of multiple firearm and deadly weapon enhancements altogether? **Q:** What about if a person is charged with three discrete events, all of which involved guns—should there only be one enhancement? **R:** Perhaps we can consider making multiple enhancements episodic.

• **Q:** Can all constituencies support the retroactive application of partial confinement and earned time? **R:** I would be willing to make that case to WAPA members.

• **C:** Based on data from the Department of Corrections (DOC), retroactively applying earned time would have a bigger impact than just de-stacking.

• **C:** If earned time were extended to firearm and deadly weapon enhancements, it would be based on the percentage associated with the underlying (i.e., base) sentence. For example, if an individual were convicted of a serious violent offense, including a firearm enhancement, the enhanced portion of the sentence would be eligible for 10% earned time.

• **C:** Of partial confinement options, the enhancement portion is served first and then base sentence (when you might be eligible for partial confinement/earned time) is served last—so for graduated reentry, you need to serve a number of months before you’re eligible. That part can be confusing.

• **C:** Looking at the list of offenses that included weapon enhancements in FY2019, approximately 70% of them would be eligible for 33.3% earned time based on their base sentence.

• Several Subgroup members raised concern that discretionary retroactive re-sentencing would lead to regional disparities.

• **C:** Without some discretion somewhere, the question of retroactivity becomes an all or nothing proposition. **R:** If discretionary resentencing is all we get, I think it is better than a mandatory minimum.

• **C:** Any amount of resentencing will require resources, including court time, pre-sentencing investigations, etc.

• **Q:** How many resentences are we talking about? **R:** According to DOC data, approximately 631 individuals could be affected. However, individuals’ current release dates vary widely.

• **Q:** Could the Subgroup consider making individuals eligible for resentencing based on their proximity to current release dates?

Amanda asked the Subgroup to consider where there may be points of agreement.

*Action Item:* Subgroup members generally supported recommending the Task Force consider making goodtime retroactive for firearm and deadly weapon enhancements.

**NEXT STEPS & ACTION ITEMS:**

- Subgroup will present the draft research proposal to the full Task Force on 9/10.
- Subgroup will continue to discuss remaining enhancements, including sexual motivation, protected zones, etc.
Meeting Summary – September 1, 2020

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group – Grid Subgroup
Meeting Summary: September 1, 2020
Zoom Digital Conferencing Technology

Attendees:
- Russ Brown
- Rep. Roger Goodman
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Kelly Leonard
- 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 reviewed the meeting agenda and the Task Force 2020 workplan. The Facilitation Team asked Subgroup members to focus on any potential recommendations they want the Sentencing Effectiveness working group (SEWG or working group) to consider proposing to the full Task Force for potential consensus this year. She reminded the Subgroup they had discussed eliminating all enhancements except firearms and deadly weapons or turning them into aggravating factors. She asked Subgroup members to consider whether this was still an option.

Though the Subgroup had discussed making all enhancements (except firearms/deadly weapons) aggravators or eliminating them entirely, each seems to have come from specific legislative intent and thus may be hard to change without significant pushback. Other members noted that enhancements bring avoidable complexity, trying to target very specific set of conditions when each case is different.

Action Item: Subgroup members agreed more dialog was needed on all enhancements with the possibility of developing one or two potential recommendations for the SEWG to consider this year.

Protected Zones Enhancement (see RCW.69.50.435 for list of qualifying zones)
A Subgroup member suggested the SEWG consider a potential recommendation to eliminate all or most of the protected zones enhancement. The resulting Subgroup discussion (questions/comments/responses) is summarized below:

- C: No place in Seattle lies outside a protected zone, so this enhancement becomes more of a hammer to force plea bargains instead of protecting children from drugs: this enhancement has been applied to drug sales that occurred at 1:00am July and did not involve any minors.
- C: The argument for eliminating or reducing protected zones makes sense. We would need to discuss with prosecutors; there may be a rural/urban divide in their support for this enhancement.
- Q: As a trade off for eliminating this enhancement, could we develop legislation addressing the sale of drugs to children, or strengthen existing 69.50.406? R: The Task Force is considering a potential recommendation to have the Sentencing Guidelines Commission (SGC) review drug crimes. There are already four offenses focused on dealing drugs to children (see RCW 69.50.030(2), RCW 69.50.4015, and RCW 69.50.406), each with a Drug Grid seriousness level of three.
- C: Quite a few studies have demonstrated the disparity associated with protected zone laws.

Action Item: Lauren will provide list of studies analyzing the impact of protected zone laws on sentencing disparities.
STREET GANG ENHANCEMENT (see RCW 9.94A.533(10))
The Subgroup briefly discussed the street gang enhancement. Several members advocated to eliminate the enhancement entirely. Those in support of elimination noted the street gang finding is incredibly hard to prove and as a result the enhancement has only been included in a few sentences, if any. Another member noted that the street gang enhancement language focuses on involving a minor in criminal gang activity and while it may not appear in many final sentences, it could be useful in the plea bargain process.

FIREARM & DEADLY WEAPON ENHANCEMENTS
Chris summarized past Subgroup and SEWG firearm/deadly weapon conversations, noting limited support for Option A (see supporting materials for overview of policy options A-C) and that much of the dialog focused on retroactivity as related to both earned time and total/partial confinement. Subgroup questions/comments/responses:

- C: We should consider recommending firearm/deadly weapon enhancements by permissive rather than mandatory (i.e., judges would have discretion to sentence individuals up to five years, instead of a mandatory five additional years). R: Prosecutors are unlikely to support making weapon enhancements permissive. They may be open to some level of discretion, for example shifting the standard range upwards (i.e., resulting in a higher minimum and maximum).
- C: Washington Association of Prosecuting Attorneys (WAPA) cannot support full retroactivity (i.e., Option B), expressing concern about truth in sentencing and the burden resentencing would put on local court systems. WAPA members generally support extending eligibility for alternatives to confinement but differ in views on retroactive earned early release time (though may be persuadable).
- C: These policy options (i.e., A-C) are a good first start, but we should not view this as the end of our reform efforts. These enhancements are Washington’s version of mandatory minimums and similar to the federal crack vs. powder cocaine disparities, weapon enhancements disproportionately hurt minorities.
- Q: How would retroactivity of earned early release time be applied? Would the Department of Corrections (DOC) award earned time retroactively, or would individuals just start accruing earned time after the start date of any legislative change? R: That is an open conversation, though basing earned time calculations on any new/different date will increase complexity for DOC.
- C: Support for potential policy options may depend on how much earned early release time enhancements would be eligible for. We should consider increasing the percentage of earned early release time accrued.

Action Item: Clela Steelhammer (Caseload Forecast Council) will compile data on the number of weapon enhancement sentences that would be eligible for various percentages of earned time (based on the underlying crime).

- Q: Why are weapon enhancements applied to crimes where a weapon is already part of the underlying offense? R: The SEWG is considering a draft potential recommendation to correct this.
- Members representing the interests of incarcerated individuals and their families support the Task Force pursuing full retroactivity, noting a preference for policy Option B.
- C: Based on past conversations, the full SEWG most favored Option C. Option B is a non-starter for Prosecutors. We should fine tune Option C in the coming weeks/months.

The Subgroup reviewed the main components of Option C. Some members suggested also allowing prosecutors the discretion to seek resentencing. The Facilitation Team asked if anyone objected to proposing this revised Option C to the full working group. No objections emerged.
Action Item: Subgroup members agreed to share a revised Option C with the full working group.

NEXT STEPS & ACTION ITEMS:

- The Facilitation Team will draft a potential recommendation to eliminate the protected zones enhancement, based on Subgroup discussions. (DONE)
- Rep. Goodman will share protected zone research with Facilitation Team. (DONE)
- Lauren Knoth will also share protected zone research with the Facilitation Team. (DONE)
- Clela Steelhammer will compile data on weapon enhancement sentences and potential earned time eligibility based on the underlying crime. (DONE)
SUPPORTING MATERIALS: Firearm/Deadly Weapon Enhancement Policy Options

Bill Draft Summary: AN ACT Relating to sentencing enhancements (7/27/20), including Options A through C.

Requested by: Representative Goodman | Prepared by: Office of Program Research | Modified by: WA Criminal Sentencing Task Force facilitation staff (8/20) to reflect feedback/notes from Sentencing Effectiveness working group (SEWG) members.

Option A: Prospective Only.
- Eliminates mandatory stacking of firearm and deadly weapon enhancements.
  Specifically, provides that multiple firearm or deadly weapon enhancements imposed for offenses (occurring after the effective date of the act) are to be served concurrently, unless the court orders the enhancements to be served consecutively.
- Eliminates the requirement for firearm and deadly weapon enhancements to be served in total confinement, thereby subjecting that portion of a sentence to the general restrictions and requirements on confinement options.
- Eliminates the restriction on earned early release time for firearm and deadly weapon enhancements.

SEWG Notes (8/19):
- SEWG members to confirm with their constituents, but generally did not favor Option A.

Option B: Prospective and Retroactive.
- Eliminates mandatory stacking of firearm and deadly weapon enhancements.
  Specifically, provides that multiple firearm or deadly weapon enhancements imposed for offenses are to be served concurrently, unless the court orders the enhancements to be served consecutively.
- Requires the resentencing of persons currently incarcerated and serving sentences involving consecutive firearm and deadly weapon enhancements.
- Eliminates the requirement for firearm and deadly weapon enhancements to be served in total confinement, thereby subjecting that portion of a sentence to the general restrictions and requirements on confinement options.
- Eliminates the restriction on earned early release time for firearm and deadly weapon enhancements. Allows the Department of Corrections to implement the retroactive application of these changes for those currently incarcerated over a six month period.

SEWG Notes (8/19):
- Likely to have a large fiscal note, which would make it difficult to pass during this Legislative session. Therefore, would be helpful to know how many individuals/cases would be impacted.
- Some would like to see cost-savings reinvested into prison programming and reentry support services.
- Should also consider impact on county resources and jail populations if sentences are to be lowered.

Option C: Prospective and Partially Retroactive (Earned Early Release)
- Eliminates mandatory stacking of firearm and deadly weapon enhancements going forward (prospective only). Specifically, provides that multiple firearm or deadly weapon
enhancements imposed for offenses (occurring after the effective date of the act) are to be served concurrently, unless the court orders the enhancements to be served consecutively.

- **Eliminates the requirement for firearm and deadly weapon enhancements to be served in total confinement (prospective and retroactive),** thereby subjecting that portion of a sentence to the general restrictions and requirements on confinement options.
- **Eliminates the restriction on earned early release time for firearm and deadly weapon enhancements (prospective and retroactive).** Allows the Department of Corrections to implement the retroactive application of these changes for those currently incarcerated over a six month period.

**SEWG Notes (8/19):**

- If full retroactivity is unattainable, consider allowing individuals and/or prosecutors to petition for resentencing (similar to relief mechanisms established under [SB 6164 (2019-20)](https://leg工序esparent.state.mn.us/LegislationDetail.aspx?LegislationId=9159)).
- Consider ways to expedite the resentencing process, when all parties are in agreement.

**Additional SEWG Notes (8/19):**

- Consider whether firearm/deadly weapon enhancements should be mandatory. Instead of an automatic five years, perhaps judges should have discretion to issue an additional sentence of up to five years.

**Important Drafting Considerations:**

- Please keep in mind that these are rough drafts, and have not been subjected to either an informal or formal review and editing process. The drafts are intended to be illustrative for the purposes of policy development, and will require additional changes to be finalized. For example, the drafts amend statutes that were changed in the previous legislative session, and final versions will likely require additional sections to amend multiple session laws (as previously enacted legislation contained delayed effective dates, requiring any following legislation to amend both the current and future versions of the statutes). In addition, the drafts may need to amend other statutes in the Sentencing Reform Act in order to carry out the intended policy changes.
- There are other types of enhancements without express requirements for consecutive or concurrent application. These enhancements are presumed to be concurrent. An alternative drafting approach for Options B through C would be to strike out the language regarding consecutive terms without inserting any additional language in the amendatory section. However, it might be unclear whether a court would have express authority to impose consecutive terms (as an alternative) going forward without providing additional language. This may require additional research and exploration before finalizing.
- All of the drafts contain some ambiguity with respect to whether the firearm/deadly weapon enhancements run consecutively or concurrently to other types of enhancements containing stacking requirements.
- You discussed the possibility of exploring a possible fourth option where, in lieu of resentencing persons with consecutive enhancements, the state considered a policy of administrative earned early release that would effectively provide the same relief (in terms of incarceration length). This option requires additional discussion before drafting, as there is complexity in terms of the diversity of sentences (deadly weapon and firearm enhancements have variable terms and persons have varying numbers of enhancements). In addition, some courts considered the presence of "stacking" when calculating base sentences or other requirements.