

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

**Attendees:**

- Sen. Manka Dhingra, *Washington State Senate, Democratic Caucus*
- Representative Roger Goodman, *Washington State House of Representatives, Democratic Caucus*
- Keri-Anne Jetzer, *Sentencing Guidelines Commission*
- Lauren Knoth (research/data support), *Washington State Institute for Public Policy*
- Greg Link, *Washington Association of Criminal Defense Attorneys; Washington Defender Association*
- Judge Roger Rogoff, *Superior Court Judges Association*
- Melody Simle (alt. for Suzanne Cook), *Statewide Family Council*
- Clela Steelhammer (research/data support), *Caseload Forecast Council*
- Nick Straley (alt. for Nick Allen), *Interests of Incarcerated Persons*
- Jon Tunheim, *Washington Association of Prosecuting Attorneys*

**Guests:**

- Omeara Harrington
- Kelly Leonard
- Sydney Oliver
- David Triewailer

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

**WELCOME & REVIEW AGENDA**

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

**GRID SUBGROUP UPDATES**

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

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

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

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

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

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

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

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

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

- **Suggestion:** Take an “enhanced range” approach, but only increase the presumptive standard range on the top end while keeping the original minimum sentence length. **R:** Even if the presumptive standard range is significantly widened (i.e., we increase judicial discretion), agreements between

parties would still drive judges towards a specific sentence length because judges generally follow joint recommendations if the parties can agree.

- **C:** It is important to note that if the state uses a percentage for enhancements, the higher the prior record score, the greater the sentence length. PA ties such range increases to offense seriousness level; the SEWG may want to consider something similar.
- **Q:** What is the purpose of enhancements?
  - **R:** The practical purpose is to issue longer sentences.
  - **R:** Enhancements are created by the Legislature in response to specific types of conduct to address increased culpability based on particularly distressing factors of a crime. However, the outcome has certainly been longer sentences.
  - **R:** Enhancements and aggravators also serve to categorize crimes, no matter the offense type, by victim. For example, a state might decide that a crime against a pregnant woman, whether assault or theft, becomes more egregious because the victim is pregnant.
- **Q:** Are enhancements attached to specific offenses or to the overall action (i.e., all charges)? **R:** Enhancements are attached to specific offenses, and depending on the type of enhancement, it may be applied to the sentence of the offense attached to the enhancement, or it could be applied to the sentence with the longest sentence.

#### **EMERGING BASIC PRINCIPLES OF ENHANCEMENTS**

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

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

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

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

#### **POST-CONVICTION REVIEW**

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

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

#### **NEXT STEPS & ACTION ITEMS**

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