

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

Attendees:

- Russ Brown (alt. for Jon Tunheim), *Washington Association of Prosecuting Attorneys*
- Rep. Roger Goodman, *Washington State House of Representatives, Democratic Caucus*
- Keri-Anne Jetzer (alt. for Judge Rumbaugh), *Sentencing Guidelines Commission*
- Lauren Knoth (research/data support), *Washington Institute for Public Policy*
- Greg Link, *Washington Association of Criminal Defense Attorneys; Washington Defender 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

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 members 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 begin on next page.

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 \(2019-20\)](#)).
- 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.

