

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Work Group: Grid Subgroup
Meeting Summary: July 21, 2020
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, *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*
- Nick Straley (alt. for Nick Allen), *Interest of Incarcerated Persons*
- Jon Tunheim, *Washington Association of Prosecuting Attorneys*

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.