

Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group
Meeting Summary: September 02, 2020
Zoom Digital Conferencing Technology

Attendees:

- Russ Brown (alt. for Jon Tunheim), *Washington Association of Prosecuting Attorneys*
- Senator Manka Dhingra, *Washington State Senate, Democratic Caucus*
- Representative Roger Goodman, *Washington State House of Representatives, Democratic Caucus*
- Keri-Anne Jetzer (alt. for Judge Rumbaugh), *Sentencing Guidelines Commission*
- Martina Kartman, *Interests of Crime Victims*
- Rep. Brad Klippert, *Washington State House of Representatives, Republican Caucus*
- Lauren Knoth (research/data support), *Washington Institute for Public Policy*
- 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 Person*

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

WELCOME & AGENDA REVIEW

Amanda welcomed the Sentencing Effectiveness Working Group (SEWG or Working Group) members. She reviewed the agenda, noting the several new potential recommendations to review and reminding SEWG members of the Task Force’s working plan and upcoming meetings.

POTENTIAL RECOMMENDATION

Chris and Amanda briefly summarized potential recommendations #1-6, which the Task Force reviewed on 8/6. Chris then shared onscreen the new potential recommendations and asked Working Group members to discuss and confirm they are ready to present to the full Task Force. Working Group dialog and revisions are below as questions/comments/responses, organized by potential recommendation.

The following recommendation came to the Reentry Working Group, which referred it to the SEWG.

POTENTIAL RECOMMENDATION #7

Provide relief to criminalized survivors preventing further victimization of individuals who have endured domestic and sexual violence at the hands of their abusers by creating meaningful opportunities for pre- and post-arrest diversion, resentencing and record sealing for individuals who committed crimes due to coercion by an abuser, and against or at the behest of an abuser.

- Allow prosecuting attorneys and judges to reduce prison sentences and redirect sentencing from incarceration to community-based programs, which has proven far more effective in rehabilitating survivors;
 - Permit currently incarcerated survivors to apply for resentencing and earlier release due to their prior victimization;
 - Create process for record sealing.
- a. **Reduces complexities and errors:**
 - b. **Improves effectiveness of the sentencing system:**
 - c. **Promotes/improves public safety:** Domestic violence and incarceration rates are highly linked, as over 90 percent of incarcerated women have experienced physical or sexual violence in their

lifetime. With the understanding that many women have gone to prison for defending themselves against their batterer or were coerced into illegal activity by their abuser, this would take a step toward ending this cycle of violence and incarceration and places the burden on the batterer rather than the victim.

After convening a group of victim advocates and violence survivors, Task Force members representing the interests of crime victims brought this recommendation to the working group.

- **Q:** Does this recommendation allow victims of domestic violence charged with a future unrelated crime to get mitigating or alternative sentences because of past victimization? **R:** No, the recommendation, as written, is limited to crimes committed at the behest or because of an abuser.
- **Q:** How do you prove this? I support the recommendation in principle, but I'm not sure if this is something easily proven. **R:** This recommendation is modeled on recent Legislation in New York. (See www.nysenate.gov/legislation/bills/2019/s1077 for a list of acceptable evidence to prove a crime was committed at the behest or because of an abuser.)
- **C:** WA currently has a mitigating factor to address instances of a continued pattern of physical and/or sexual abuse. This recommendation might expand this.
- **C:** An SEWG member suggested referring this potential recommendation to the Grid Subgroup for review alongside other mitigating factors.

Action Item: The Working Group agreed to present the recommendation to the full Task Force for review.

POTENTIAL RECOMMENDATION #8

Expand Community Parenting Alternative and Family Offender Sentencing Alternative, considering the following suggestions:

- Explore sponsor requirements to make them more inclusive to domestic violence survivors and former foster care youth so that parents are not penalized for not having extended family and supportive co-parents to sponsor them;
- Eliminate blanket restrictions for individuals with violent offenses, and undocumented individuals;
- a. **Reduces complexities and errors:** Increases eligibility and access to Community Parenting Alternative & Family Offender Sentencing Alternative.
- b. **Improves effectiveness of the sentencing system:** Children who have incarcerated parents are significantly more likely in end up in the criminal justice system themselves.
- c. **Promotes/improves public safety:** Co-parent is often the only eligible sponsor, but, under some circumstances, that co-sponsor can be a barrier to a criminalized victims' successful reentry.

This recommendation arose from conversations around legal aid for survivors of violence. Crime victim interests' constituents pointed out that when a co-parent is an abuser that an abuser could use access to the child (in parenting alternative sentences) as another means to exert power and control.

- **Q:** Does this potential recommendation address policy or specific statute? **R:** Some of this is Department of Corrections (DOC) policy.

Action Item: A Task Force member representing the interests of crime victims agreed to follow-up with DOC to clarify what policies and/or statutes this potential recommendation would address.

- **C:** SB 5291 eliminated the restrictions on violent offenses unless a firearm was used. Those currently sentenced for a serious violent offense are also excluded.

- **Q:** What does this potential recommendation try to address? **R:** To participate in parenting or family sentencing alternative programs, individuals need a community sponsor (i.e., a co-parent or family member), thus this can be used as leverage by abusers.

SEWG members wondered whether this recommendation would address DOC policy or would require legislative changes. Sentencing alternatives are ordered by the court, but DOC is responsible for working with an incarcerated individual's family members/co-parents to secure support for the alternative.

Action Item: The SEWG agreed potential recommendation #8 required more input and clarification from DOC and crime victim constituents before moving forward for review by the full Task Force.

In presenting the following new potential recommendations, SEWG members explained they received input from a variety of sources: DOC's proposed budget reduction strategies, various advocacy groups, and individual constituents. Members reviewed all input on recommendations and looked for opportunities where the Task Force was already seeking to address them. SEWG members also noted many of the new potential recommendations stemmed from a general desire to address the problem of "too many people in prison for too long."

POTENTIAL RECOMMENDATION #12

Increase earned early release time to a minimum of 33% for all crimes and enhancements and increase earned early release time 50% for some crimes and apply changes retroactively. *(NOTE: DOC has recommended increasing earned early release time and applying changes retroactively so that it can comply with Governor's mandate that it cut its budget by 15%. See DOC Budget Reduction Strategy 2021-23 biennium).*

- a. **Reduces complexities and errors:** System for earned early release time is currently quite complicated and has led to difficulties in calculating sentences and release dates. Furthermore, sentences have over the years become more punitive without any additional benefit. Too many people are serving sentences that should be mitigated. Minimizing complexity around earned early release time and applying the rules retroactively simplify the system and assist in rectifying current sentences where are too long and inconsistent with current best practices.
 - b. **Improves effectiveness of the sentencing system:** Helps with uniformity, consistency and simplicity of sentencing and assists in correcting past misjudgments and injustices. retroactivity also positively impact efforts to address historical and existing racial, ethnic and socio-economic disparities in sentencing. Also, promotes rehabilitation and safety in prisons by encouraging and supporting all people to engage in available programming as early as possible and maintain good behavior.
 - c. **Promotes/improves public safety:** Allows opportunity to reduce the destabilizing impact of long-term incarceration on communities and encourages rehabilitation.
- **C:** A member encouraged others to review the earned early release time information posted on [the Task Force webpage](#). In the past, earned early release time was higher across the board; however, the Legislature has made reductions and changes to it over the years. Washington Institute for Public Policy (WSIPP) research found recidivism did not increased with these legislative changes.
 - Lauren Knoth (WSIPP) noted that a 2003 law increasing earned time for some sentences was associated with a slight reduction in recidivism rates.
 - **Q:** What is the difference between earned early release time and goodtime? **C:** Earned time is associated with programming, whereas goodtime is based on behavior.
 - **C:** This gets at the heart of truth-in-sentencing. If we want to reduce sentences, we should do so via the grid; continuing to tweak earned early release time just increases complexity. I appreciate the

argument for standardizing the percentage earned across all sentences but worry increasing earned early release time for serious violent and Class A sex offenses could negatively impact victims.

- **C:** Earned time is a management tool for prisons, but not necessarily the way to address unnecessarily long sentences. The issue of earned time should be part of the larger grid discussion.
- **C:** Earned time should continue to exist, it is an important population management tool, but it should be noted that case law prohibits judges from even talking about earned time during sentencing. This restriction adds to the confusion and frustration victims and incarcerated individuals feel, as it is not clear how much time an individual will end up serving.
- **C:** Earned time is not really “earned,” individuals lose it rather than earn it. True “earned” time would require resources to expand prison programming.
- **Q:** Is there a federal truth-in-sentencing law that impacts earned early release time? **R:** In the 1990s and early 2000s the federal government provided prison expansion and construction funds to states that ensured individuals convicted of serious violent crimes served a minimum of 85% of their sentence. This program no longer exists.
- **C:** Whether or not we think earned time *should* be a tool to reduce sentences, the Legislature has used it as such. Prior to the mid-1980s, all crimes were subject to 33% earned time, even the most serious. Since then, sentences have become increasingly long and we’ve incarcerated more and more people across the country. We need to be willing to say we made a mistake. There has to be a safety valve. Increasing earned time and applying it retroactively is one way to address these past wrongs. Increasing earned time to 50% does not guarantee an individual walks out of prison after serving 50% of their sentence, but it allows us to recognize the mistakes of the past. If we aren’t willing to increase earned release time, we should address retroactivity in other recommendations.
- **C:** Earned time is a rehabilitation tool. A key reason we send individuals to prison is to rehabilitate them. The fact that the Legislature keeps modifying earned time shows they recognize the importance of it as a tool to manage behavior and adjust sentence lengths.
- **C:** Regardless of the positions that Task Force members take on earned time, it is likely to be discussed in the 2021 Legislative session.

Action Item: The SEWG agreed to pass this new potential recommendation to the Grid Subgroup for further conversations and revisions.

POTENTIAL RECOMMENDATION #13

Prohibit addition of firearms or deadly weapons enhancement to crime for which possession or use of a firearm/weapon is reflected in underlying crime, e.g., 1st degree robbery.

- a. Reduces complexities and errors:** By eliminating enhancements to crimes for which weapon or firearm involved, allows simplified sentencing range and more clarity about actual sentence to be served and sentence length.
- b. Improves effectiveness of the sentencing system:** Addition of mandatory weapons enhancement to existing serious crime for which sentence is already extensive reduces ability to accommodate sentences to individual circumstances and leads to inappropriate results in many cases. Allows for more sentencing discretion and ability to accommodate individual circumstances thereby arriving at more just sentences, while also maintaining sufficient amount of consistency by keeping sentences within range determined for underlying crime. Sentence for underlying crime already takes into consideration presence/use of weapon/firearm additional mandatory term is therefore unnecessary. Weapons enhancements have led to significant racial disparities in sentencing. Many of them have been applied to crimes for which use/possession of a firearm is already part of underlying sentence.

- c. **Promotes/improves public safety:** Allows opportunity to reduce the destabilizing impact of long-term incarceration on communities and encourages rehabilitation.
- **C:** This recommendation makes sense and would align with the way other enhancements work. For example, the sexual motivation enhancement cannot be applied to a sex crime.
- **Q:** Does this mean that an individual implying they have a weapon and an individual actually brandishing a weapon would be treated the same? **R:** That’s an interesting question. Robbery 1 is committed when an individual uses or displays what looks like a deadly weapon.
- **C:** Perhaps we should create a separate offense of Robbery 1. **R:** Could you not just add additional language to clarify: the enhancement does not apply when a weapon is a statutory element of the underlying crime? For example, the Legislature could modify [9.94A.533\(3\)\(f\)](#) and 4(f) to read:
 - “[The firearm/deadly weapon] enhancements in this section shall apply to all felony crimes except the following:
 - Possession of a machine gun or bump-fire stock, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun or bump-fire stock in a felony;
 - Any other offense for which possession and/or use of a firearm/deadly weapon is an element of the underlying crime.”

Action Item: SEWG members agreed to bring this recommendation to the full Task Force on 9/10.

POTENTIAL RECOMMENDATION #14

Eliminate the protected zone enhancement (RCW [69.50.435](#)).

- a. **Reduces complexities and errors:**
- b. **Improves effectiveness of the sentencing system:** Protected zones were established as part of the War on Drugs to guard against the sale/distribution of illegal substances to minors. However, several studies have shown that such laws fail to protect youth and contribute to racially disparate sentencing outcomes (Greene, Pranis, & Ziedenberg, 2006).
- c. **Promotes/improves public safety:** The number and geographic size of protected zones often leads to overlap and can result in entire cities being subject to enhanced sentences. The proliferation of enhancement zones undermines their intended deterrent effect as individuals are no longer incentivized to move criminal activity elsewhere when entire cities are effectively deemed protected zones (Prison Policy Institute; Kajstura, 2014).
- **C:** This recommendation makes sense. The law intended to deter the sale of drugs to minors, but the law does not require schools to be in session and it does not require children to be present. Furthermore, other crime statutes already explicitly address dealing drugs to children.
- **C:** I agree but would note that some prosecutors in more rural counties have traditionally favored protected zone enhancements.
- **C:** There is nearly 20 years of research showing that 70% of the time the offense subject to this enhancement occurs when school is not in session. The research also shows that these types of laws have a hugely disproportionate impact on people of color. Furthermore, the vast majority of crimes these laws are applied to do not involve the sale of drugs to children.
- **C:** If the Task Force does recommend removing this enhancement it should also look at strengthening or creating offenses that deal with the sale of drugs to children.
- **C:** I will have a hard time supporting this recommendation. School grounds really are sacred and ought to be protected.

Action Item: SEWG members agreed to bring this recommendation to the full Task Force.

POTENTIAL RECOMMENDATION #15

Remove juvenile adjudications from calculation of adult offender score and make reforms retroactive.

- a. **Reduces complexities and errors:** Calculation of offender score can be complicated and removing consideration of juvenile crimes will simplify system and treat juvenile adjudications differently than adult convictions. See RCW 9.94A.525. Also, including juvenile crimes in offender scores increases likelihood of inappropriate sentences for actions taken as a juvenile when person has less culpability.
- b. **Improves effectiveness of the sentencing system:** Youth reduces a person's culpability for crimes because of cognitive and emotional development continues into a person's 20s. The law recognizes this reality in many ways, but nonetheless treats a juvenile adjudication the same as an adult conviction when determining a person's offender score. The current system does not appropriately balance juvenile adjudications and such adjudications should not be used to determine the offender score of someone later in life. Removing consideration of these adjudications will more appropriately recognize the lack of culpability that children have early in their lives.
- c. **Promotes/improves public safety:** Allows opportunity to reduce the destabilizing impact of long-term incarceration on communities and encourages rehabilitation.

A Working Group member noted that this recommendation came from constituents. The recommendation acknowledges that juvenile adjudications occur with the understanding that kids are far less culpable than adults and juvenile convictions should not strongly impact adult sentences.

Additional questions, comments, and responses are summarized below:

- **C:** The Subgroup plans to review criminal history score calculations, this recommendation could benefit from additional input/consideration by the Subgroup.
- A legislative member noted that a bill to address this almost passed the Legislature in 2020 and the topic is likely to come up again in the 2021 session.
- **C:** Prior to 1986, a juvenile offense after age 15 could only be included in an individual's criminal history score until the age of 25. This seems like an enlightened approach, and if we could get back to it that would be an improvement.
- **C:** The Statistical Analysis Center (SAC) at the Office of Financial Management (OFM) is currently researching the efficacy of WA's criminal history score calculation system.

Action Item: The Working Group agreed to bring this recommendation to the full Task Force to discuss whether it should be pursued in 2020 or made part of the grid Subgroup's ongoing work.

NEXT STEPS & ACTION ITEMS

- **SEWG members** will present revised recommendations and additional context to the full Task Force on September 10th.
- **Martina Kartman** will follow-up with DOC to clarify what policies and/or statutes potential recommendation #8 would address.