

**Washington State Criminal Sentencing Task Force**  
**Sentencing Effectiveness Working Group**  
**Meeting Summary: September 16, 2020**  
Zoom Digital Conferencing Technology

**Attendees:**

- Russ Brown (alt. for Jon Tunheim), *Washington Association of Prosecuting Attorneys*
- Judge Veronica Alicea-Galván, *Washington State Minority & Justice Commission*
- Representative 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 Defenders Association*
- Judge Stanley Rumbaugh, *Sentencing Guidelines Commission*
- 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:**

- Matt Tremble
- David Triewweiler

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

**WELCOME & AGENDA REVIEW**

Amanda welcomed Sentencing Effectiveness Working Group (SEWG or working group) members and reviewed the agenda. She reminded SEWG members that since the Task Force will begin consensus decision-making in October, the working group has two meetings to review and revise any remaining potential recommendations.

Chris and Amanda then led the working group through several potential recommendations, asking members to discuss each recommendation and make any needed revisions to ensure each is ready to “offer” to the Task Force for review at its October 1<sup>st</sup> meeting. (*See supporting materials section for the potential recommendations reviewed and tracked changes made during the meeting.*)

**POTENTIAL RECOMMENDATION #18: Move crime of “failure to register as a sex offender” to an unranked or non-sex offense.**

Chris read the potential recommendation and recapped past SEWG and Task Force discussions. The following summarizes working group questions/comments/responses in discussing the potential recommendation:

- **C:** Since the Grid Subgroup is looking at ways to incorporate as many unranked offenses into the grid as possible to reduce complexity, while I agree that failure to register (FTR) should not be classified as a sex offense, I think we should avoid creating new unranked offenses.

- **Q:** Was there any discussion of lifetime registration requirements? **R:** The Department of Corrections (DOC) has talked about eliminating such requirements in the past.
- **C:** As part of their budget cut proposal, DOC recently recommended “no lifetime supervision for individuals sentenced as indeterminate plus sex offense.”
- **Q:** If this is something DOC is putting forward in their budget proposal, aren’t they pursuing it regardless of Task Force input? **R:** DOC is presenting a lot of ideas in the name of cost cutting but I would hate for the work of this Task Force to feel rushed or pressured based on funding concerns rather than policy.
- **C:** All failures to register were originally categorized as sex offenses, then that got changed so the first failure to register (FTR) is no longer listed as a sex offense, but all subsequent FTRs are considered sex offenses. By making it an unranked offense, individuals would face a presumptive jail sentence rather than being returned to DOC confinement. In FY19, there were 516 FTR sentences issued; of these, in 237 sentences the person was sent back to prison. Thus, any change to presumptive jail time could impact county resources.
- **Q:** How many second and third FTR convictions are there each year—wouldn’t that be rare? **R:** From a judge’s perspective it is not as uncommon as you would think.
- **C:** Anecdotally, many individuals fail to register not out of malicious intent or a desire to subvert the system, but rather because barriers like homelessness or lack of resources (such as transportation) limit their ability to comply with registration requirements.
- **C:** It should be noted that sex-offenses triple a score when calculating criminal histories. For example, if an individual receives a second FTR conviction, their minimum criminal history score is four.
- **C:** That seems unnecessarily punitive. I would like to see the (criminal history score) multiplier removed. I still think it makes sense to have some sort of ranking. The point of un-ranking sentences is to ensure a presumptive criminal history score of one. However, this seems overly complex and I think we can address the issue of multipliers another way. **R:** While I agree that moving an offense from ranked to unranked increases complexity, I think prosecutors are likely to be split on whether (subsequent) FTRs should remain a sex offense. Could we look at forwarding part of this recommendation to the Task Force and leave some of it for further discussion in the Grid Subgroup?
- **Q:** Could we strike a compromise by recommending all FTRs be categorized as non-sex offense but removing the language that would make them unranked offenses? DOC would still likely see substantial cost savings because their supervision caseload would be reduced.
- **Q:** Is there any interest in rewording the potential recommendation to distinguish between the first and subsequent FTR rather than the first, second, and third? Subsequent failures to register could face same consequences as third FTR conviction (Class B, seriousness-level 2 offense). If FTR were no longer a sex offense there would be no practical difference between Class C and Class B seriousness level offense; they would both face the same statutory maximum.

The SEWG generally supported this path forward.

*Action Item: Lauren Knoth (Washington State Institute for Public Policy, aka WSIPP) to review research on FTR and recidivism among individuals convicted of a sex crime.*

*Action Item: The SEWG agreed to present the revised potential recommendation to the full Task Force.*

**POTENTIAL RECOMMENDATION #19: Remove Identity Theft 1 and 2 as “crimes against persons.”**

- **Q:** Would dropping the mandatory community custody term be the only consequence of this proposal? **R:** Yes, I believe so.

- **C:** Community custody helps us address some of the underlying causes of these types of crime (e.g., substance abuse disorders), so I am not thrilled about the idea of removing the ability to monitor folks convicted of Identity Theft.
- **C:** It should be noted that DOC has proposed increasing earned release time to 50% for most crimes as part of the agency's suggestions for potential budget cuts. Although this budget cut proposal does not specify, previous language does restrict earned time for crimes against a person.
- **C:** This proposal will bring up some philosophical questions rather than legal questions. Some Task Force members will see Identify Theft as at least somewhat of a crime against persons.
- **C:** The Grid Subgroup has discussed getting rid or revising various categories of crime (e.g., *crimes against a person*) and instead addressing issues of required supervision etc., via the sentencing grid.
- **Q:** Is there any legal definition of what constitutes a *crime against a person*? **R:** RCW 9.94A.911 lists offenses considered *crimes against a person*. The statute was meant to help prosecutors categorize charges, but it appears to have been picked up by the Legislature to drive policy.

Action Item: The SEWG agreed to postpone presenting this potential recommendation and allow the Grid Subgroup to refine it for reconsideration in 2021.

- Is there any way to make reasoned decisions about how long a certain crime should be sentenced? **R:** Since the 1980s, sentencing has contained a sense of retribution in addition to concerns about reducing recidivism and rehabilitating individuals. The U.S. Sentencing Commission has released reports analyzing impacts of sentencing statute changes on recidivism rates, but given the number of factors that can influence recidivism, there is no practical way to draw such conclusions about an entire sentencing grid at once.
- **C:** Multiple working group members noted the importance of prison culture and reentry opportunities in determining recidivism rates.
- **C:** If sentences are adjusted or reduced without addressing our state's past and current practices when it comes to incarceration and reentry support services, the results are not going to be what we hope for.
- **C:** The Department of Corrections (DOC) is unlikely to receive more program funding any time soon; however, without additional programming resources, people in prison will continue to lack rehabilitation programming. **C:** It does not make sense to keep people in prison longer if DOC does not offer enough programming options to support their successful reentry. It would be more appropriate to partner with community organizations to programming in the community and avoid incarceration as much as possible.
- **Q:** Will the protected zone enhancement be considered in this research agenda? **R:** It will be included to the extent that the enhancement affects racial disparities.

Amanda reminded the SEWG they would present this research proposal to the Task Force on September 17<sup>th</sup>.

Action Item: All members in attendance will share this proposal with their constituents and provide any input or suggested edits to Lauren by close of business on Friday (9/21/20).

**POTENTIAL RECOMMENDATION #16: *Firearm and Deadly Weapon (FA/DW) enhancements reform (see supporting material for full complete potential recommendation and track change).***

The Facilitation Team summarized past discussions on this proposal: Representative Goodman drafted three policy options aimed at reforming the FA/DW enhancements. The Grid Subgroup, based on SEWG input, started to coalesce around Option C. Rep. Goodman reviewed the key points of option C, as revised by the subgroup. The potential recommendation would presume FA/DW enhancements would:

1. Be presumed to run concurrently, unless the trial court says otherwise;

2. Be eligible for earned release time and partial confinement options; and
3. Be retroactive, allowing those currently serving time to have the enhanced portion of their sentence become eligible for earned release time and partial confinement options AND prosecutors would have the opportunity to seek resentencing in cases of inordinately long sentences (this mechanism would operate similarly to the resentencing mechanism allowed under [SB 6164](#)).

Rep. Goodman also mentioned the potential of eliminating the mandatory minimum requirement and instead allowing judges to sentence *up to an additional two years*.

SEWG comments/ questions/responses are summarized below:

- **C:** Subgroup members did not agree that prosecutors should have sole discretion to seek resentencing. Instead, some supported allowing individuals facing these sentences to have a way to seek resentencing. (Leaving the decision to seek resentencing solely up to the prosecutors could lead to geographic disparities as some prosecutors are more willing to take another look at these sentences than others.)
- **C:** I agree. The prosecutors who have sought the harshest sentences under these enhancements are unlikely to consider resentencing. If we want to fix overly punitive sentences, we shouldn't vest the prosecutors with sole discretion to address them. Individuals should be able to petition the court. Some judges may decline to consider the case without prosecutorial consent, similar to a personal restraint petition (PRP).
- **C:** Retroactive resentencing would require enormous resources at the county level. I am worried about the prospect of another unfunded mandate.
- **Q:** Could we get an idea of the potential cost of resentencing based on the experience of other states? **R:** I don't have cost estimate studies from other states. However, we should keep in mind that most states have integrated court systems, so the state would bear resentencing costs rather than local jurisdictions.
- **Q:** Could resentencing be funded via a justice reinvestment account? **R:** Upfront funds are still needed before cost savings can be realized. We should note some counties have far more firearm-related crimes than others (e.g., Pierce County).
- **C:** I don't think we should let cost get in the way of justice. If we all agree these sentences were overly punitive, we need to be willing to pay the cost of justice.
- **Q:** If this recommendation passes the Legislature, we will have hundreds of resentencing petitions immediately. This is going to require a lot of resources to address, and when you talk about resentencing it opens the entire sentence for review. If we could limit resentencing to de-stacking (i.e., amending the consecutive/concurrent nature of enhancements) and victims could be included in the process, I think prosecutors would agree to this.
- **Q:** Is making elimination of stacking in individual cases retroactive cheaper than having court hearings? Isn't a court hearing cheaper than decades of imprisonment?
- **C:** Most of these sentences were reached via plea deal agreements, where individuals presumably contemplated the increased time they faced under an enhancement. Under current law prosecutors are required to support their deals.
- **C:** The intentions behind this are good, but I worry about the practical challenges of implementing it. These sentences have led to disproportionate impacts on communities of color. Still, I would like to hear more about how retroactive resentencing would be funded.

The Facilitation Team asked SEWG members to focus on how to solve the resource issue.

- **C:** Justice reinvestment is a good idea. It would pay for itself and DOC could walk away with more savings.

- **C:** Justice reinvestment does not get around the potential for an unfunded mandate. The savings are only realized after the fact, so resources would be needed up front.
- **C:** If we only get a retroactive resentencing mechanism as in SB 6164, that would still be better than nothing.
- **C:** We need to be ready to address what is happening in the streets and across the Country. This Task Force should push to get needed resources to the courts. To say that justice is too expensive is wrong.
- **C:** Post-conviction review will hopefully be an avenue to address some of these overly punitive sentences.
- **C:** It is worth reminding folks that in its 2019 report, the Sentencing Guidelines Commission (SGC) “unanimously recommend[ed] eliminat[ing] mandatory stacking of subsequent enhancements” (the only SGC recommendation that all members were in full agreement on).
- **C:** This conversation has produced many potential recommendations. The Task Force might want to add a foreword to its 2020 report detailing the need for increased resources. Reforming the sentencing system is not a cost-free mission and the Legislature should be reminded of its importance.
- **C:** Retroactive resentencing under this potential recommendation is finite.
- **Q:** What about appointing a special master to handle these cases? **R:** Some folks might oppose to a special master because case history can be very important. **R:** Even though case history is helpful, the judiciary has had significant turnover in recent years, so many cases are not likely to be reviewed by the original judge.
- **C:** This is also likely to have a cost impact for all parties (i.e., defense and prosecutors will need additional resources to handle retroactive resentencing cases).
- **C:** Thinking back on recent legislative changes addressing legal financial obligation, a few counties hosted volunteer days to handle some of the immense caseloads. Perhaps we could consider a similar approach?

Although they do not plan to do anything until after the Task Force has deliberated on this potential recommendation, Rep. Goodman said he and Senator Dhingra plan to introduce companion bills to address FA/DW enhancements.

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

- **All SEWG members** should continue brainstorming potential funding mechanisms to support retroactive resentencing related to potential recommendation #16.
- Lauren** to review research on FTR and recidivism among individuals convicted of a sex crime.

## SUPPORTING MATERIALS: Potential Recommendations and Track Changes

### POTENTIAL RECOMMENDATION #18

Move crime of "failure to register as a sex offender" to ~~an unranked or~~ non-sex offense.

**DOC explanation (from DOC budget cut proposal), modified by SEWG:**

Failure to Register (FTR) as a sex offender changed to ~~an unranked and~~ non-sex offense. ~~Under This would change~~ current law, under which FTR is split into three offenses:

- 1st conviction for FTR is a Class C unranked felony offense, not classified as a sex offense but still has up to one year of community custody after jail if high risk, and 12 months after prison regardless of risk.
- ~~2nd conviction of FTR is a Class C felony ranked at Seriousness Level 2 and is classified as a sex offense. Up to one year of community custody after jail and 36 months after prison, regardless of risk level; and~~
- ~~3rd conviction of Subsequent~~ FTR is a Class B felony ranked at Seriousness Level 2 and would no longer be classified as a sex offense. Up to one year of community custody after jail and 36 months after prison, regardless of risk level.

This proposal would amend all ~~three~~ forms of FTR to ~~unranked~~ felony offenses ~~that are~~ not classified as ~~a~~ sex offense. The first conviction would remain Class C and all subsequent convictions would remain Class B. ~~The 1st and 2nd convictions would remain Class C, and 3rd and subsequent convictions would remain Class B. This~~ change would result in increased jail caseloads, and reduced prison and supervision caseloads.

~~The savings to prison ADP would result because by making all FTRs offenses unranked, the~~ standard range becomes 0 to 12 months confinement, shifting current prison sentences to jail. The supervision savings assume no community custody is allowed for any Failure to register as a Sex Offender.

There would be additional indeterminate savings realized for both prison and jail sentences based on lower offender scores as sex offenses triple score against one another. So, as a non-sex offense it would single score rather than triple score.

- Reduces complexities and errors: See explanation above**
- Improves effectiveness of the sentencing system:**
- Promotes/improves public safety:**
- SEWG Input: would help to have data underpinning the rational for applying this to subsequent convictions (i.e., that it would not be indicative of future recidivism)**

### POTENTIAL RECOMMENDATION #19

Remove Identity Theft 1 and 2 as "crimes against persons."

**DOC explanation (from DOC budget cut proposal):**

The term "crimes against a person" refers to a broad array of criminal offenses which usually involve bodily harm, the threat of bodily harm, or other actions committed against the will of an individual.

Under current law, Identity Theft 1 and 2 are classified as a Crime against a Person (CAP). Courts are allowed to order up to 12 months community custody for non-prison sentences and are required to order 12 months community custody for those with a prison sentence.

This proposal would remove identity theft 1 and 2 as a crime against a person, which would restrict the courts from ordering community custody for individuals convicted of ID Theft. Individuals assessed as high risk to reoffend would no longer be supervised for 12 months. There would be no impact for those at Low or Moderate risk.

- Reduces complexities and errors: See explanation above**
- Improves effectiveness of the sentencing system:**
- Promotes/improves public safety:**
- SEWG Input: Identity Theft should require a period of community custody. At least one TF member opposed to this as written. Have Grid Subgroup address this in its work to simplify (e.g., by removing unneeded/overlapping categories of crimes in favor of a classification system).**

- d) **SEWG Input:** Identity Theft should require a period of community custody. At least one TF member opposed to this as written. Have Grid Subgroup address this in its work to simplify (e.g., by removing unneeded/overlapping categories of crimes in favor of a classification system).

#### POTENTIAL RECOMMENDATION #16

Firearm and Deadly Weapon Enhancements:

##### 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, using judicial discretion.
- **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.
- **Would allow incarcerated individuals or prosecutors to petition for “de-stacking” where inordinately long sentences were given, requiring Legislative funding for the involved parties to deal with resentencing.**

SEWG Notes (8/19):

- *This, like other proposed recommendations, would require Legislative investments. Suggestions to address funding/resource needs: implement all prospective changes immediately, and delay implementation of retroactive mandatory stacking resentencing (apply savings to fund the parties for implementation); consider appointing a “special master” to adjudicate resentencing petitions. ALSO: Task Force can include a note in its report requesting the “front-loading” of projected savings from other recommendations to enable the short-term court implementation of key changes to achieve policy goals.*
- *Consider ways to expedite the resentencing process, when all parties are in agreement.*
- *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.*
- *This recommendation was supported unanimously by SGC in its 2019 report.*