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M E M O R A N D U M

To: Sentencing Guidelines Commission, WACDL, WDA

From: Kimberly Gordon

Re: Areas of interest for SRA Reform – Defense stakeholders

Date: November 6, 2017

At the last meeting, Chair Hauge asked each of the major stakeholder groups to be prepared to present areas of interest for SRA Reform. We were asked to tailor our comments to the topics previously selected for reform by the Commission. After consultation with the Washington Association of Criminal Defense Lawyers and Washington Defender Association, I am providing the following list of current areas of interest.

1. **Use of Grids –** The defense bar does not oppose the use of grids to guide judicial discretion and sentencing decisions. However, we support amendment of the grids to account for the permit greater discretion, consideration of individual circumstances that affect culpability. We also support assessment of the seriousness level assigned to individual offenses. The assessment to include a historical review of changes to the punishment of crimes (i.e., seriousness levels increased piecemeal to increase sentence length, enhancements, multiple scoring of prior offenses, 3 strikes, Hard Time for Armed Crime) and how this affects the SRA's goal.

2. **Diversion, *alternatives to confinement, and Pretrial Initiatives* –**

    a. The defense bar supports the use of diversion, particularly pre-charge diversion options, to divert as many offenders as possible from incarceration and conviction. Similarly, the defense bar supports the use of alternatives to confinement for as many people as possible, so long as it can be done without threatening public safety.

    b. The defense bar supports the pre-trial release of the maximum number of arrestees. We support the development of community based alternatives to pre-trial incarceration in order to quickly connect arrestees with programs designed to

address the problems that resulted in the arrest and reduce the effect of pre-trial detention.

i. In 2017, members of the Washington State Superior Court Judge Association, Washington State District and Municipal Court Judges' Association, and Washington Minority and Justice Commission, began meeting to examine policies and practices regarding pretrial detention of persons charged with crimes. We should support them in their work and coordinate with them on recommended legislation.

c. When alternatives to incarceration and/or prosecution are used, the court should be careful to impose only those conditions that are needed in each individual case (in accordance with Risk, Needs, Responsivity.)

3. **Enhancements –** Enhancements should be discretionary. If enhancements are applicable, they should increase the maximum sentence to which the Judge has discretion to sentence, but should not restrict the court's discretion to choose a sentence within or below the otherwise specified standard range. The proliferation of sentence enhancements that has occurred since the creation of the SRA should be balanced by the inclusion of sentence mitigators. The mitigators should take into account individual circumstances that reduce culpability.

4. **Purposes and policies –** Currently, the purposes and policies of sentencing are set forth by RCW 9.94A.010, and are as follows:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

a. In March, 2017, the SGC discussed the inclusion of "uniformity across jurisdictions" as another purpose of sentencing. This is supported by defense stakeholders.

b. Additional purposes should be considered as we continue our SRA revision work. For instance, should the sentence, in each case, take into account circumstances affecting the individual offender's culpability? Should the sentence be tailored to the unique circumstances of individuals? Should the sentence take into account best practices and evidence-based policies? Should the sentencing court consider community-based services or alternatives to incarceration? Should we specifically say that we believe that individuals can change and sentencing should maximize the potential for change and present the opportunity to reconsider the sentence once change occurs? Should we have, as a policy, the reduction of institutional racism or other forms of bias, and promote sentences that counteract (or at least take into consideration) its effects?

c. Should we be looking at the language we use, i.e. "offender." If we can do the "heavy lifting" of finding substitute language, and incorporating into our changes, this would help change the vernacular used by everyone in the system.

5. **Consistency across jurisdictions –** Consistency across jurisdictions as one of the policies or purposes of sentencing.

6. **Judicial and Prosecutorial discretion**

   a. We support increased, but guided, judicial discretion. The defense stakeholders believe judicial discretion can be expanded without compromising prosecutorial discretion. We also believe that judicial discretion can be expanded without compromising the purposes and policies of sentencing.

   b. Separately, we support review of the role that prosecutorial discretion plays in sentencing policies and outcomes, together with a review of the filing standards set forth in RCW 9.94A.411.

7. **Information to judges – pre-sentence –** A lot of considerations go hand-in-hand with increasing the information made available to judges before sentencing an individual. Two examples come to mind: First, the information would need to be reliably and timely provided to the court. Second, if more detailed personal, sensitive information is made available to judges, we need to discuss whether this necessitates changes to public records law. The defense believes that sentencing can be improved if judges have additional information and the discretion to adjust sentences accordingly. But the devil is in the details.

8. **Post-conviction review –** The defense bar supports post-conviction review for the widest number of individuals and the appointment of counsel for individuals seeking review.

9. Reentry

a. The SGC should support the work of the Statewide Reentry Council and coordinate with them on needed legislative amendments.

i. The Council was created in 2016 via RCW 43.380. It is comprised of 15 members representing a cross-section of victims, impacted individuals, families, reentry stakeholders, and criminal justice stakeholders. Its purpose is to "[D]evelop collaborative and cooperative relationships between the criminal justice system, victims and their families, impacted individuals and their families and service providers in order to improve public safety outcomes for individuals reentering the community after confinement.

ii. The Council has developed these Reentry Principles that should also guide sentencing reform:

1. *Individualized Approach Guided by Procedural Justice* – "Reentry policies should focus on individualized justice. … All public safety and judiciary agencies should take steps to increase just, equitable, and non-discriminatory policing, prosecution, and sentencing."

2. *Equitable and Culturally-Responsive Policies.* "A fair and equitable system requires recognition that there are a disproportionate number of incarcerated individuals from historically marginalized communities."

3. *Comprehensive Approaches* – "Every person should participate in a comprehensive and individualized reentry plan."

4. *Collaborative Engagement* – "Reentry is a collaborative process between reentering individuals, the community, and correctional agencies releasing individuals into the community. … Law enforcement, corrections departments, other government agencies, and community-based-reentry-services must develop a formal collaborative structure for the continuity of care to advance case planning and data sharing to ensure a successful reentry for each person."

5. *Fair Policies* – Individuals in the criminal justice system "should not be subjected to conditions like overcrowding, extended periods

of solitary confinement, transfers away from their families without due notice, or violence. Individuals should be free from physical and mental abuse. They should be provided the resources and opportunity to build and maintain positive family relationships." Access to reentry services should not be limited by location or custody. Reentry should include trauma-informed care. Excessive legal and financial obligations should not be imposed.

6. *Preventing the Cycle of Recidivism Through Best Practices and Just Results* – "Policies, services, and programs should adhere to the current Risk-Needs-Responsivity Model ..." Reentry should include both incarcerated individuals and those in the criminal justice system in general. Other programs that promote effective reintegration include, but are not limited to:

    a. Family-integrated services, like the Family Integrated Transitions model.

    b. Housing planning.

    c. Diversion of individuals into need-based services either before or after arrest, such as LEAD.

    d. Therapeutic Court initiatives that seek to divert individuals into treatment and services providers in the community instead of incarceration.

    e. Confinement-based programmatic initiatives meant to enhance the quality of life of participants in and out of incarceration.

    f. Community custody programs.

    g. Community-based collaborative programs that seek to increase access to individuals obtaining education, employment, housing, healthcare and access to services.

    h. Any other innovative or creative approaches to successful reintegration, like community supervision.

iii. The Council's 2017 policy recommendations should inform our work:

1. Expand access to housing supports;

2. Expand access to educational opportunities;

3. Issue Washington state identification prior to an individual exiting incarceration;

4. "Ban the box" for employment;

5. Continue to reform legal financial obligation laws;

6. Support the Civil Justice Reinvestment Plan and other legal aid support efforts;

7. Expand access to educational opportunities related to job placement for youth in Juvenile Rehabilitation Administration Facilities;

8. Consider expansion of the Certificate of Restoration Opportunity (CROP);

9. Remove employment, housing and other barriers based on criminal records.

b. The SGC should support the work of WDA and WACDL to expand opportunities for sealing and vacation of non-conviction and conviction data, including the vacation of multiple misdemeanors. WACDL and WDA are working on related legislative proposals.

10. Legal Financial Obligations –

a. The SGC should push for the elimination of mandatory fees for those who cannot afford to pay them.

b. The Minority and justice commission has a federal grant to gather data re: LFOs (2-year process) goal is to make payment of LFOs something that can be achieved. The defense supports a comprehensive at Washington's use of legal financial obligations. We should also follow the Commission's work and collaborate with them on any resulting legislative proposals.

11. Adult Jurisdiction – the Role of Offender and Offense Characteristics –

a. The SGC should look closely at adult jurisdiction, in light of research and evidence regarding youthful offenders.

b. The SGC should consider amendments to that will allow the sentencing judge to consider other individual characteristics that affect culpability and sentencing needs, and give judges discretion tailor the sentence accordingly.

c. The SGC should follow the Minority and Justice Commission's in its work to identify and reduce bias based on race, ethnicity, national origin, and other similar circumstances. We should collaborate with them on any legislative proposals. This could include efforts to improve the cultural and professional competency of court employees and other justice system actors. This could also include efforts to understand and counteract the effects of institutional bias.