



STATE OF WASHINGTON

SENTENCING GUIDELINES COMMISSION

Helen Sommers Building, PO Box 43124 • Olympia, Washington 98504-3124 • (360) 902-0425

MEETING MINUTES

November 13, 2020 9:00am – 12:00pm

MS Teams

Members Present:

Hon. William Houser
Jon Tunheim, Acting Vice-Chair
Derek Young
Rep. Lauren Davis
Stephen Sinclair
Hon. Catherine Shaffer
Jennifer Albright
Senator Jeannie Darneille
Phillip Lemley
Kimberly Gordon
Greg Link

Members Absent:

Senator Mike Padden
Rep. Skyler Rude
Norrie Gregoire
Hon. Stanley Rumbaugh
Sonja Hallum
Kathleen Harvey
Kecia Rongen
Tim Wettack

Staff:

Keri-Anne Jetzer

I. CALL TO ORDER

Acting Vice-Chair Jon Tunheim introduced himself, asked members to introduce themselves, and then summarized the agenda for the day.

II. APPROVAL OF MINUTES

MOTION #20-18: APPROVE MINUTES FROM OCTOBER 2020 MEETING WITH CHANGE

MOVED: Judge Shaffer
SECONDED: Secretary Sinclair
PASSED: Unanimous

Change: Correct the spelling of Senator Darneille's name

III. DOC AGENCY REQUEST LEGISLATION

Secretary Sinclair provided a recap on the three DOC proposals. Secretary Sinclair explained that DOC was working on a strategy to reduce complications that impacted

DOC in the past, some that resulted in noteworthy sentencing issues, and to build capacity to improve their coaching and reentry model.

Secretary Sinclair and Trisha Newport, DOC Deputy Director – Legislative & Policy, briefed members on the Graduated Reentry Expansion proposal. Trisha noted that the GRE program has an 82% successful completion rate and, of those, only 1% return to prison. Representative Davis inquired about the fiscal implications of the proposal. Secretary Sinclair replied that this proposal would have a long-term investment by reducing the percentage of recidivism.

**MOTION #20-19: MOTION TO SUPPORT DOC’S PROPOSAL ON
GRADUATED REENTRY EXPANSION**

MOVED: Greg Link
SECONDED: Judge Shaffer
PASSED: Unanimous

Secretary Sinclair described the complexity in the tracking necessary for Community Custody Tolling. He added that this administrative function costs the department an incredible amount of resources. He said DOC would rather see the resources invested in enhanced supervision instead of in an administrative function that doesn’t add value to help people become successful and reduce recidivism. Trisha observed that results of a DOC survey of tolling in other states conducted in 2019 showed that Washington’s current tolling policies are an anomaly. She reported that 62% of the 31 respondents indicated they use tolling. Of those, only 17% toll for new technical violations into jail and 26% for new offense booked into jail.

Acting Vice-Chair Tunheim inquired about a version he saw that includes tolling for new felony convictions. Trisha believed the ‘new felony’ part came about at a Criminal Sentencing Task Force meeting.

MOTION #20-20: REMOVE MOTION 20-15 FROM TABLE

MOVED: Judge Shaffer
SECONDED: Judge Houser
PASSED: Unanimous

Councilmember Derek Young asked if there was a difference between this proposal and the one the Criminal Sentencing Task Force (CSTF) has discussed. Acting Vice-Chair Tunheim responded that he thought the difference was the tolling during a new felony conviction. He added that is the one concern WAPA has of that proposal, but he didn’t think the CSTF had deliberated for consensus on that proposal. Judge Houser also expressed concern for tolling of community custody upon rearrest for a felony charge, however, he believes as an overall policy, the idea of simplifying this is a good idea.

Mac Pevey joined the meeting and informed members that the recommendation specific to tolling will be heard for consensus deliberation by the CSTF on Nov 19. He

confirmed that the DOC agency request legislation (the proposal before the SGC) differs from the one before the CSTF by tolling during any new felonies.

MOTION #20-15: SUPPORT DOC PROPOSED CHANGES TO TOLLING

MOVED: Judge Shaffer

SECONDED: Judge Houser

PASSED: Unanimous

ABSTAIN: Jon Tunheim

Secretary Sinclair noted that Increased Earned Time was discussed at the CSTF meeting and was sent back to a subgroup for more work. There was consensus on allowing earned time on sentencing enhancements as applied to the underlying offense. He supports treating sentences the same as opposed to applying different amounts of earned time based on the offense; he said it feels more like an ‘angry’ sentencing moment instead of a thoughtful sentencing moment. The data shows that the people who receive lower levels of earned release time aren’t at a great risk of reoffense and, in some categories, it would be even less risk of reoffense. Trisha added that during the budget reduction exercise, DOC also tried to identify areas that would reduce racial and ethnic disparities. DOC doesn’t have control over who comes under its jurisdiction and this is one tool that can impact disparities while also incentivizing good behavior and participation in treatment. She reported that 18% of the average daily population (ADP) reduction would be Black individuals (who represent about 4% of state population) and 7% will be Indian/Alaskan Native individuals (who represent 1.8% of state population). Secretary Sinclair added that weapon enhancements are very disparate; 31% of those in prison with a weapon enhancement are Black individuals. If this change is made retroactively, he felt it would be an opportunity to make up for errors of the past and get at some of the systemic racism.

Acting Vice-Chair Tunheim suggested discussing the two subsets, the move of certain offenses to 50% earned release time (ERT) and to allow ERT on enhancements, separately. Secretary Sinclair agreed based on his experience of the CSTF discussions. Regarding the 50% ERT, Secretary Sinclair wondered if there is a better approach to balance all ERT rather than targeting a certain percentage and making it specific to a crime type.

Acting Vice-Chair Tunheim asked Keri-Anne Jetzer if the SGC’s Review of the SRA report included applying ERT to weapon enhancements. Keri-Anne replied that the report included a recommendation to make all enhancements eligible for good time (aka ERT) as applied to the underlying offense. Acting Vice-Chair Tunheim added that the CSTF also reached consensus on supporting the application of ERT on all enhancements as well as supporting the application of partial confinement to all enhancements.

Greg Link agreed that this is consistent with the work the SGC did last year with the idea of applying the same sentencing rules to the enhancements as to the underlying offense. Besides decreasing the complexity, it will also bring in the notions of fairness

that have been discussed and that we need to start moving away from the one-size-fits-all approach to sentencing.

Kimberly Gordon added that the SGC has spent part of the year talking about the importance of the SGC responding to problems of racial disparity. This is a time when members can actually do something that could have an impact.

Judge Houser talked about the calls for a remedy to racial injustice that have taken place this year. If this is retroactive and member can do something specifically to address the racial injustice portions of sentences in the past and where statistics show racial disparity in sentences, he thinks this is an imperative in the community.

**MOTION #20-21: MOTION TO SUPPORT PROSPECTIVE AND
RETROSPECTIVE APPLICATION OF EARNED RELEASE
TIME TO ALL ENHANCEMENTS**

MOVED: Judge Shaffer
SECONDED: Secretary Sinclair
PASSED: Unanimous

Members discussed the 50% ERT subset of the proposal. Acting Vice-Chair Tunheim noted that the CSTF did discuss this but did not reach consensus on it so it was referred to the Sentencing Grid work group. In the work group's meeting on Nov. 19, he suspects the discussion will include a recommendation that the Legislature review good time on all offenses instead of recommending a specific percentage.

Secretary Sinclair observed, that since the biggest sticking point is the 50%, he will talk with his policy folks to find out if there is a way to flatten the ERT across the board, regardless of the percentage. He believed that, itself, would be a significant step forward. Councilmember Young agreed that there seemed to be consensus in simplifying it, and increasing transparency to victims and the public, but he felt that it would be tough to get support from everyone for 50%. The reduction of confusion and consistency in application is something that should be emphasized during these discussions, he said.

Keri-Anne showed members a document that she had provided to the Sentencing Grid work group as it discussed ERT, which showed that before the SRA, ERT was 33% for all offenses.

Acting Vice-Chair Tunheim asked the members if they would favor having DOC work on this. Greg Link commented that the sentences imposed over the life of the SRA have been disparate and grow with the severity of the sentencing. If, at a minimum, there is agreement of having a single level of ERT, that is going to affect and rectify the problems that have been created. Those given the least amount of ERT have been convicted of serious violent offenses and the disparity amongst those offenses is great. He sees this as a big opportunity to rectify sentencing issues of the past.

Senator Darneille was impressed with the discussion today and the work the SGC is doing on racial disparity issues. She asked Keri-Anne if she would send the ERT document to members. Keri-Anne said she would.

Acting Vice-Chair Tunheim proposed that this item be put on the agenda for the December meeting to give DOC an opportunity to have the conversations that Secretary Sinclair talked about and bring back the same or another proposal. Members did not object to that idea.

Judge Houser asked about the document in the meeting materials that included a proposal from DOC to eliminate the supervision by DOC for Drug Offense Sentencing Alternatives. Trisha Newport replied that the proposal was for the budget reduction exercise only, it was not submitted by DOC as an agency request proposal. Keri-Anne added that the document was sent only to provide fiscal impact information for the three proposals just discussed. Because the impacts are interrelated, DOC was not able to separate the impacts for only the three proposals and submitted the document as the only source of fiscal data.

IV. PRE-TRIAL REFORM DELIVERABLE(S)

Acting Vice-Chair Tunheim refreshed members on the on-going conversations members have had on pretrial reform and asked them what tangible goals they would like to see come out of these discussions.

Judge Shaffer talked about how pretrial disparity is driven by what comes before it. She would like to have literature gathered on what other states are doing, such as no cash bail programs, and learn if it could be applicable in WA and gather information on risk instruments that might help inform judicial discretion. Then the SGC can decide what should be proposed to the Legislature.

Secretary Sinclair remembered Washington State University presented at a legislative committee meeting several years ago on a project for a risk-based tool for bail setting in Spokane County. He thought that project would be informative to the conversation. Acting Vice-Chair Tunheim recalled that Yakima County also had a project, plus there are the two on-going projects happening in Thurston and Pierce Counties as part of the Arnold Ventures Group work.

Councilmember Derek Young found out during his investigation into cash bail, that he probably can't do it at the local level. He said language may need to be changed in state statute and perhaps even the state Constitution.

Acting Vice-Chair Tunheim reflected that the Covid pandemic has required jails to reduce their populations and perhaps that is an opportunity for the SGC to look into the impact on public safety the dramatic force reduction in jail populations has had.

Kimberly Gordon circled back to the equity tool she is working on with Microsoft. She agrees on gathering information on the research but also would like to support access

to data for this tool. She feels this would offer another important subset of information on which to make recommendations. Part of the broader conversation could include sources of data, data points to be incorporated into the tool and support toward efforts to obtain that data.

Acting Vice-Chair Tunheim summarized the goal of the project as the creation of a white paper or report for legislators that captures what we learned from investigation on what other states are doing, looking at on-going projects within the state and what data is available. And possibly include recommendations on what the best or preferable practices might be for WA.

Senator Darneille mentioned the National Conference of State Legislatures maintains information on what all states are doing on selected topics. She offered to begin the process of seeing what they have on pretrial issues so the information can be made available to members.

Judge Houser thought it would be helpful to know if there are statistics that show if pretrial procedures in other states impacted how sentencings occur and how it may have impacted any sentencing program they may have had.

Acting Vice-Chair Tunheim reported there are many discussions occurring across the country on money bail. He would be interested in learning what it would take to get to a point where we would no longer have money bail in the state, e.g., identify the barriers, to create some strategy proposals for a pathway to get there. Judge Shaffer would like to learn what the impact has been of eliminating cash bail and if it has reduced disparity and incarceration.

Senator Darneille mentioned there are many reports already available. She asked Keri-Anne to provide members with a synopsis of the 2019 report from the State Auditor's Office, the report by the Pretrial Reform Task Force that was established by the Superior Court Judges' Association, the recommendations made by the Supreme Court's Minority and Justice Commission in 2019.

Councilmember Derek Young talked about how the suspension of Medicaid benefits upon incarceration. The federal government currently allows either cancellation or suspension of those benefits. In WA, this limits the ability to help pay for treatment in a local facility and to connect individuals with assistance upon release. He felt it would be helpful for the Legislature to urge Congress to change that statute. It would really help those who were incarcerated pretrial to not lose their benefits. He suggested this as a potential recommendation to make this more successful. Representative Lauren Davis replied that she is already working on this issue. She is looking into replicating what New Mexico did which is to not suspend benefits if an individual is in jail for less than 30 days, which is a majority of Washington's jail population.

Kimberly Gordon ask Keri-Anne if this work was doable knowing that she is only half-time staff for the SGC. Keri-Anne replied that she will do the best that she can

and that it may take time to complete this project while also expecting more work for the CSTF. Acting Vice-Chair Tunheim asked members to think about ways that they may be able to contribute a little work to help Keri-Anne with this project.

Secretary Sinclair inquired what would need to be done for Keri-Anne to work for the SGC full-time. Keri-Anne replied that it would require a budget request to the legislature from OFM to make her position full-time for the SGC. Secretary Sinclair said he would send an email to OFM management. Acting Vice-Chair Tunheim commented that if other members have any influence in that direction to feel free to lend a hand. Not only would it help Keri-Anne to devote 100% of her time to the SGC but it would also help the SGC be more productive.

V. CRIMINAL SENTENCING TASK FORCE UPDATE

Acting Vice-Chair Tunheim asked if any of the members who participate on the CSTF would like to provide a briefing on the work to date. Greg Link informed members that the CSTF has been working on consensus deliberations for the past six weeks. He spoke about some of the recommendations and noted that many reflect the recommendations made by the SGC in its report. He noted that there have been a lot of discussions around the idea of retroactivity on many of the proposals, with strong positions on both sides but also an effort to move forward. He expects there will be ongoing conversations about this topic. Work of the CSTF will continue into 2021, focusing on the sentencing grid and how to structure criminal history scoring, using the studies being completed by the WSIPP/CFC and the Statistical Analysis Center.

Keri-Anne informed members that the CSTF had reached consensus on Recommendation #10 which requests the SGC to review felony penalties throughout the statutes and consolidate them under the SRA. Another recommendation, Recommendation #9, had the SGC review penalties under Chapter 69.50 RCW, move those to the SRA, and also consider whether those penalties could be reduced or eliminated. There was concern among some CSTF members that the language about reducing or eliminating penalties was leading the SGC in the study. Keri-Anne was under the impression that work was still being done on Recommendation #9. She explained the process would be for Representative Goodman to send a letter to the SGC asking to have this work done. She doesn't know when the request might be made.

Acting Vice-Chair Tunheim also noted that many of the recommendations coming from the CSTF were in the SGC's SRA review report. That work did set the stage for work with stakeholders, particularly around the idea of moving to the coaching model of supervision and he wanted to reassure members that the work they did helped the CSTF move forward. Secretary Sinclair added that he is very appreciative of the work of the SGC and the CSTF.

VI. RECOMMENDATIONS ON EXPANDED REPRESENTATION ON SGC

Keri-Anne reminded members that several months ago, they chose this from a list of suggested topics as something they wanted to work on when there was room on the

agenda. In the meeting materials, she provided a list of current positions in statute and suggested positions that other sentencing commissions have or that SGC members had provided to her. Keri-Anne confirmed Acting Vice-Chair Tunheim’s question that any change to membership would require a statutory change.

Members discussed the positions. Greg Link commented that Appellate Court judges have remarkable impact on sentencing law because they are the ones who will make interpretations. He felt having that insight on the SGC would be important. Representative Davis suggested adding tribal representation and representation of families of incarcerated individuals to the list.

Acting Vice-Chair Tunheim suggested members could work on narrowing the list and create a specific proposal to send to the legislature at the next meeting.

VII. OTHER BUSINESS

Senator Darneille wanted to alert the membership of some of the topic areas she has been working on in case anyone would like to see the draft legislation or talk with her about the draft legislation. Topics on which she will be bringing forth legislation:

- Jail standards (condition of incarceration) outside of the Department of Corrections.
- Post-conviction review systems.
- Many bills on reentry, for both adult and juvenile.
- Raising the age of juvenile court jurisdiction to include 18- and 19-year olds (based on a racial impact assessment conducted by Department of Health).
- Eliminating or reviewing the youth registration requirements, particularly for youth with a sex offender registration demand.

Keri-Anne informed members that, upon a discussion she had with the Boards and Commissions Office, they expect the Governor will be appointing a new chair to the SGC by the end of the year.

VIII. ADJOURNMENT

Next meeting: 9:00a – 12:00p on Friday, December 11, 2020.

APPROVED AND ADOPTED BY THE SENTENCING GUIDELINES COMMISSION

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Judge Stanley Rumbaugh, Acting Vice-Chair

Date