

## **Recommendations from the SGC Criminal Code Review Committee on Projects #2 and #3 Related to Drug Sentences**

**Project #2** - a review of sentences for drug offenses and recommendations to reduce the reliance on punitive sanctions and to restructure outcomes to prioritize a therapeutic model for associated drug offenses.

**Recommendation: Review the penalties for Manufacture, Deliver, or Possess with Intent to Manufacture or Deliver – Cannabis (RCW 69.50.401(2)(c)) as it was not changed after cannabis became legal.**

Chapter 311, Laws of 2021 made knowingly possessing cannabis a misdemeanor offense.

- The penalty under RCW 69.50.4013 (Possession of controlled substance—Penalty—Possession of useable cannabis, cannabis concentrates, or cannabis-infused products—Delivery) was reduced to a misdemeanor
- The language for RCW 69.50.4014 (Possession of forty grams or less of cannabis—Penalty) was modified to require a person to ‘knowingly’ possess 40 grams or less of cannabis in order to be charged with a misdemeanor.
- Both changes are effective until July 1, 2023

The penalty for manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance (cannabis) is still a class C felony ranked at seriousness Level I on the drug grid.

RCW 69.50.401 Prohibited acts: A—Penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW, except as provided in RCW 69.50.475;

## Recommendation: Repeal RCW 69.50.408

- Some members felt that this statute likely increased plea deals by the PAO.
- It is only a tool for the PAO to coerce pleas
- Suspicious of hidden application (not transparent)
- Take discretion away from judges
- Aggravating factors available if higher sentence is just

### RCW [69.50.408](#)

Second or subsequent offenses.

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, cannabis, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW [69.50.4013](#).

[ [2022 c 16 § 89](#); [2003 c 53 § 341](#); [1989 c 8 § 3](#); [1971 ex.s. c 308 § 69.50.408](#).]

### Annual Convictions

Offense	2021				2019				2017			
	Pris	Mos	Non-pris	Mos	Pris	Mos	Non-pris	Mos	Pris	Mos	Non-pris	Mos
Del Pos w/I Meth - 2nd offense	26	45.1			26	55.2	3	0.7	32	68.4	2	0.4
Del Pos w/I Meth - 2nd offense (consp)	1	50	4	1.7	1	12	3	4				
Del Pos w/I Meth - 2nd offense (att)							1	0				
Del Pos w/I Meth - 2nd offense (sol)					2	39.4						
Forged Prescrip - VUCSA - Subseq									1	12	2	1
Mfg Del Pos w/I Her Coc - Subseq	17	51.5	1	0	9	48.7	3	4	17	57.4		
Mfg Del Pos w/I Her Coc - Subseq (att)			2	1.1								
Mfg Del Pos w/I Her Coc - Subseq (consp)			7	5.5			7	1.8			2	10
Mfg Del Pos w/I Her Coc - Subseq (sol)							1	9	3	35	1	9
Mfg Del Pos w/I Cannabis - Subseq					1	24					2	3
Mfg Del Pos w/I Sch I/II Narc or Flunt - Subseq	2	84			2	22.5						
Poss of Ephd/Psed/Anh Amm w/I Mfg Meth - Subseq									1	29.8		
Selling for Profit - Subseq	1	75							1	61		

Source: Caseload Forecast Council Statistical Summary of Adult Felony Sentencing annual reports

**Recommendation: Legislature should expand the eligibility of drug courts to include drug-adjacent crimes (e.g. Unlawful Possession with intent to Distribute, Unlawful Delivery of a Controlled Substance, crimes against property, crimes involving theft, robbery, and burglary) where there is a nexus between the alleged criminal act and an individual's undiagnosed, untreated substance use disorder. This recommendation includes examining and reducing sole gatekeeper functions by requiring the application of objective admittance criteria, in alignment with best practice standards.<sup>1</sup>**

Research shows that drug courts work. WSIPP's drug court information shows a 100% probability that the benefits would exceed the costs<sup>2</sup>. *State v. Blake* impacted drug courts which prioritized simple possession charges as an eligibility factor, and whose participant population were mostly individuals charged with Unlawful Possession of a Controlled Substance (RCW 69.50.4013).

A member suggested that when a person gets to a point where they are committing property crimes to buy illicit substances, the severity of that substance use disorder has increased and they really need assistance. People in these cases should not be excluded from drug courts. There needs to be an offramp from the criminal legal system for higher risk populations and drug courts are a good option.

Several members agreed that most 'possess with intent' and delivery cases are individuals who use drugs and who have been relegated to a role in the distribution and selling of illicit substances. Others suggested there is a socioeconomic aspect at play for some people who turn to drug delivery. These cases should be eligible for drug court.

Some drug court eligibility criteria are narrowly defined in statute. RCW 2.30.030 defines ineligible crimes and allows the prosecutor discretionary rights, which require prosecutor consent prior to admission. It was noted that for some counties, starting a drug court would be a big step and they may not be at the same level as existing courts to be interested in widely opening eligibility.

One member also suggested moving the 'gate keeper' function from the prosecuting attorney's office to the judge or objective criteria agreed upon by committee, requiring a plea offer to be included on the J&S to show if the plea was voluntary, make funding dependent on county's stipulation for greater eligibility and transparency. It was noted that funding for housing and food is a MUST as it is hard for people to deal with SUD without having stable housing and food.

Between the Criminal Justice Treatment Account (RCW 71.24.580) and funding provided to AOC under ESB 5476 and ESSB 5693, the state provides almost \$30 million in biennial funding for therapeutic courts.

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<sup>1</sup> <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf>

<sup>2</sup> Washington State Institute for Public Policy Benefit-Cost: Drug Courts found at <http://www.wsipp.wa.gov/BenefitCost/Program/14>.

**Recommendation: Advise the Legislature that there is a need for a statewide process to evaluate fidelity to standards and promising practices, and make sure that ‘justice by geography’ is not occurring, to make sure programs are targeting the correct population of high risk, high need individuals, and that best practices are being employed.**

Many of the drug courts in the state have not been evaluated. It is important for the program’s success to know if it is maintaining fidelity and targeting the correct population.

**Recommendation: Need more funding for treatment. Treatment on demand is essential and harm reduction strategies should also be supported, e.g. supplying fentanyl test strips to reduce morbidity and mortality associated with illicit substance use.**

All members agreed that funding for more treatment is necessary. Virginia has a treatment on demand program that could be considered. It takes an average of 18 “no’s” before someone will say “yes” to trying to quit drugs. This would include addressing the need to think outside the box for harm reduction options.

Fentanyl testing strips are commonly distributed to substance users to ensure the drugs they are consuming are not tainted with fentanyl. It is a harm reduction strategy or used to ensure the avoidance of drug poisoning. Many individuals who are labeled “overdosed” did not intend to ingest fentanyl hence the terminology “poisoning” more accurately reflects the critical event.

**Recommendation: Conduct a review of the drug grid. Suggested areas of review include, but are not limited to:**

- **Disproportionality**
- **Comparison of sentence lengths pre- and post-drug grid**
- **Comparison of offenses with similar presumptive sentence ranges**
- **Evaluate for meeting original intent**

Section 24 of the 2002 drug grid bill directed the WSIPP to “evaluate the effectiveness of the drug offense sentencing grid in reducing recidivism and its financial impact.”<sup>3</sup> A preliminary report was published in January 2008<sup>4</sup> but the final report was not completed.

Some members felt the original intent “to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons”<sup>5</sup> is still a goal to be achieved. Others believed that recidivism should not be the primary focus as relapse is part of recovery but rather it be equality in access to treatment.

<sup>3</sup> 2SHB 2338 (2002)

<sup>4</sup> E. Drake (2008). Drug offender sentencing grid: preliminary report. Olympia: Washington State Institute for Public Policy, Document No. 08-01-1201. Found at [http://www.wsipp.wa.gov/ReportFile/1003/Wsipp\\_Drug-Offender-Sentencing-Grid-Preliminary-Report\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1003/Wsipp_Drug-Offender-Sentencing-Grid-Preliminary-Report_Report.pdf)

<sup>5</sup> 2SHB 2338 (2002)

Completing a review similar to what WSIPP completed on the standard grid, with similar focus on disparities and overrepresentation, for the Criminal Sentencing Task Force would provide a picture of how the drug grid is or is not working. There was discussion on whether to suggest areas of interest for analysis or not.

**Project #3**

- a. the SGC develop a proposal to move statutes that specifically prescribe felony criminal penalties from the Uniform Controlled Substances Act, Chapter 69.50 RCW, into the Sentencing Reform Act ("SRA"), Chapter 9.94A RCW.
- b. the SGC develop a proposal to consolidate any other criminal statutes that specifically prescribe felony criminal penalties into the SRA, Chapter 9.94A RCW

Members felt that creating such a proposal would be a huge undertaking for the sake of tidying up the code and didn't really see a value in it. They felt that, as practitioners, they knew where to find offenses or search for them. For non-practitioners, they felt the tables in the manual were a valuable resource.