

# HOUSE BILL REPORT

## ESHB 1169

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**As Passed House:**  
February 12, 2022

**Title:** An act relating to sentencing enhancements.

**Brief Description:** Concerning sentencing enhancements.

**Sponsors:** House Committee on Public Safety (originally sponsored by Representatives Goodman, Davis, Dolan, Simmons, Bateman, Lekanoff, Springer, Gregerson, Senn, Fitzgibbon, Ramos, Frame, Ramel, Peterson, Lovick, Ryu, Callan, Slatter, Duerr, Ormsby, Macri and Hackney).

**Brief History:**

**Committee Activity:**

Public Safety: 1/22/21, 1/29/21 [DPS];  
Appropriations: 2/16/21, 2/17/21 [DPS(PS)].

**Floor Activity:**

Passed House: 2/12/22, 53-45.

### Brief Summary of Engrossed Substitute Bill

- Eliminates the sentencing enhancement for certain controlled substances violations committed in protected zones, as well as the sentencing enhancement for involving a minor in a criminal street gang-related felony.
- Removes the requirement that a court order multiple firearm or deadly weapons enhancements to be served consecutively, and instead leaves the matter within the discretion of the court.
- Provides a process for resentencing persons who are currently serving a sentence that includes multiple, consecutive firearm enhancements.
- Removes current law restrictions on partial confinement and earned early release for sentencing enhancements, and applies the changes

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

retroactively to all incarcerated persons.

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## HOUSE COMMITTEE ON PUBLIC SAFETY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Davis, Hackney, Lovick, Orwall, Ramos and Simmons.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Klippert, Assistant Ranking Minority Member; Graham and Griffey.

**Minority Report:** Without recommendation. Signed by 2 members: Representatives Mosbrucker, Ranking Minority Member; Young.

**Staff:** Omeara Harrington (786-7136).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The substitute bill by Committee on Public Safety be substituted therefor and the substitute bill do pass. Signed by 21 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Harris, Johnson, J., Lekanoff, Pollet, Rude, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Caldier, Dye and Hoff.

**Minority Report:** Without recommendation. Signed by 9 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Chandler, Jacobsen, Schmick and Steele.

**Staff:** Yvonne Walker (786-7841).

### **Background:**

#### Criminal Sentences.

Sentences for most felony offenses are determined by reference to a sentencing grid. The sentencing grid provides a standard range of months of confinement, based on both the severity, or "seriousness level," of the offense and the convicted person's "offender score," which is based on the offender's criminal history. While the grid provides the base sentence, additional sentencing policies can increase or decrease a sentence. This includes,

for example, enhancements, exceptional sentences, and alternative sentences.

### Sentencing Enhancements.

Statutory sentencing enhancements add a specified amount of confinement time to an offender's base sentence in qualifying cases.

*Firearms and Deadly Weapons.* A period of additional confinement time must be added to the standard sentence range any time the offender or an accomplice was armed with a firearm or a deadly weapon at the time of the offense. The additional time applied varies according to the classification of the underlying offense and the weapon involved.

When the offender or an accomplice was armed with a firearm at the time of the offense, the court must impose:

- an additional five years for any class A felony;
- an additional three years for any class B felony; and
- an additional 18 months for any class C felony.

When the offender or an accomplice was armed with a deadly weapon other than a firearm at the time of the offense, the court must impose:

- an additional two years for any class A felony;
- an additional one year for any class B felony; and
- an additional six months for any class C felony.

With respect to both firearm and deadly weapon enhancements, if the offender has been previously sentenced for a firearm or deadly weapon enhancement, the additional time must be doubled.

*Controlled Substances Violations in Protected Zones.* An additional 24 months must be added to the standard sentence range for any offense involving certain controlled substances violations committed in a protected zone, including manufacture, sale, or delivery of a controlled substance and possession with intent to manufacture, sell, or deliver a controlled substance. Protected zones include: schools and school buses; the area within 1,000 feet of a school bus route or school grounds; public parks; any public housing project designated as a drug-free zone; public transit vehicles and stop shelters; civic centers; and the area within 1,000 feet of a civic center if designated by the local governing authority.

*Involving a Minor in a Criminal Street Gang-Related Felony.* The standard sentence range must be multiplied by 125 percent for any offense in which the offender was over the age of 18 at the time of the offense and the offense was a criminal street gang-related felony for which the offender compensated, threatened, or solicited a minor in order to involve the minor in the offense.

A criminal street gang-related offense is an offense committed: for the benefit of, at the direction of, or in association with any criminal street gang; with the intent to promote,

further, or assist criminal conduct of the gang; or for other specified reasons such as gaining admission or promotion within the gang, increasing the gang's size or dominance, exacting revenge for the gang, intimidating or eliminating witnesses against the gang, or providing some other benefit to the gang.

*Impaired Driving.* A two-year enhancement is added to the standard sentence range for Vehicular Homicide committed under the influence of alcohol or any drug (Vehicular Homicide-DUI) for each prior impaired driving related offense. A 12-month enhancement is added to the standard sentence for Vehicular Homicide-DUI, Vehicular Assault-DUI, felony Driving Under the Influence, or felony Actual Physical Control of a Vehicle While Under the Influence for each passenger under the age of 16 in the defendant's vehicle at the time of the offense.

*Sexual Motivation.* A period of additional confinement time must be added to the standard sentence range any time an offense was committed with sexual motivation, which means that one of the purposes for which the offender committed the crime was for his or her sexual gratification. The additional time applied varies according to the classification of the underlying offense. The court must add:

- an additional two years for any class A felony;
- an additional 18 months for any class B felony; and
- an additional one year for any class C felony.

If the offender has been previously sentenced for a sexual motivation enhancement, the additional time must be doubled.

#### Stacking of Sentencing Enhancements.

Generally, sentences for multiple offenses set at one sentencing hearing are served concurrently. However, there are some exceptions to this general rule requiring sentences, or portions of sentences, to be served consecutively. This policy is sometimes referred to as "stacking." Certain enhancements must be served consecutively to both the base sentence as well as all other sentencing provisions, including other enhancements of the same type, including firearm and deadly weapons enhancements, impaired driving enhancements, and sexual motivation enhancements. The stacking of these enhancements is mandatory.

#### Partial Confinement.

For certain offenders, a portion of a term of total confinement may be converted to partial confinement. Partial confinement is confinement for up to one year in a facility operated or contracted by the state or other unit of government, or in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement may include work release, home detention, work crew, or electronic monitoring. During the period of partial confinement, an offender may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the Department of Corrections. If the offender violates the rules of the partial confinement program, the offender may be required to serve the remainder of the term in total

confinement.

Portions of an offender's sentence attributed to certain sentencing enhancements, including firearm and weapons enhancements, impaired driving enhancements, and sexual motivation enhancements, must be served in total confinement and are not eligible for partial confinement.

#### Earned Release.

An offender's felony sentence may be reduced by "earned release time," which is earned through good behavior and good performance, as determined by the correctional agency that has jurisdiction over the offender. The total percentage of the sentence that may be reduced by earned release time depends on various factors, including the underlying offense and the date of conviction. An offender may not receive any earned release time for the portion of the sentence that results from certain enhancements specified in statute, including the firearm and deadly weapons enhancements, the impaired driving enhancements, and the sexual motivation enhancement.

### **Summary of Engrossed Substitute Bill:**

#### Elimination of Certain Sentencing Enhancements.

Two sentencing enhancements are eliminated: the sentencing enhancement for certain controlled substances violations committed in protected zones, and the sentencing enhancement for involving a minor in a criminal street gang-related felony.

#### Removal of Mandatory Stacking for Certain Enhancements.

Mandatory stacking of firearms and deadly weapons enhancements is eliminated. Instead, the court may, but is not required to, order that these enhancements are served consecutively.

Any person who is currently serving a sentence involving multiple, consecutive firearm or deadly weapons enhancements may petition the sentencing court for resentencing on the basis that the consecutive enhancements no longer advance the interests of justice. Any applicable county prosecuting attorney may file a petition on the same basis.

The sentencing court may grant or deny the petition. If the petition is granted, the court may, in its discretion, order the firearm or deadly weapons to be served concurrently. The new sentence imposed, if any, cannot be greater than the initial sentence. Whenever a resentencing hearing is scheduled, the prosecuting attorney must attempt to notify victims and their survivors of the hearing, and must provide access to available victim advocates and related services. Additionally, the court must provide victims and survivors an opportunity to present a statement.

#### Allowing Partial Confinement and Earned Release on Enhancements.

The restrictions on partial confinement and earned release for all sentencing enhancements

are removed. This includes firearm and weapons enhancements, impaired driving enhancements, and sexual motivation enhancements, for which partial confinement and earned release are expressly prohibited under current law. However, if a person sentenced to one or more impaired driving enhancements has three or more prior impaired driving offenses, the enhancement or enhancements must still be served in total confinement and are not eligible for partial confinement.

The elimination of restrictions on partial confinement and earned release apply retroactively to any person currently serving an applicable sentence. The Department of Corrections has discretion to recalculate the earned release date for any qualifying offender over a period of 12 months following the effective date of the bill. The recalculation must not extend the term of incarceration beyond that to which the offender is currently subject.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 2, relating to definitions, which due to a delayed effective date in prior legislation takes effect July 1, 2022.

**Staff Summary of Public Testimony (Public Safety):**

(In support) The Criminal Sentencing Task Force has consensus on these policies. For many years judges have been frustrated at not having discretion to impose enhancements concurrently rather than stacking them. Prosecutors have also long had concerns about stacking, particularly with firearm and weapons enhancements. The consecutive imposition of these enhancements has led to clearly excessive sentences that are disproportionate to the conduct. In some cases, a weapon was not even wielded and nobody was injured. The bill allows a judge the discretion to still sentence consecutively in egregious cases. Incarceration rates are too high, disproportionately affect people of color, and do not increase public safety or decrease recidivism. Some of the main drivers of increasing sentence length are these enhancements, with some quadrupling the base sentence. Families have been caused a great deal of pain due to these mandatory minimums. The component of the bill that allows a person to petition for de-stacking is very important. The bill should be amended to be required to apply retroactively. This is a defective policy that should be recalled. Enhancements are only marginally deterrent at a massive social and economic cost.

The protected zone enhancement has also resulted in excessive sentences. The policy behind it is to deter the sale of drugs to children, but research has shown that in 98 percent of cases there was no sale of drugs to children. Schools need to be protected and safe, but the enhancement is not used as intended and leads to racial disparity. There are also other offenses that already apply in those circumstances. With respect to the enhancement for

involving a minor in gang activity, the enhancement has been in place for 20 years and has only been applied once. The enhancement is so narrow and hard to prove that it is rarely used. There are other means to increase sentences for this activity, including an aggravating circumstance.

Some enhancements are not currently eligible for earned release and partial confinement, which has led to complexity. There is no good policy reason that earned time should not be the same as it is for the underlying crime, and the current policies are punitive, not rehabilitative. This change, and the other changes in the bill, will help alleviate mass incarceration. Those closest to release should be prioritized for recalculation of earned time. Many incarcerated people are very different, and more productive, than they were when they became incarcerated. Incarcerated individuals should not be stereotyped under the same umbrella as victims use to depict their assailants. Sentencing reform is not a get out of jail free card. Retroactivity is key, as it is much better for public safety to provide an incentive for good behavior. Space needs to be created for those who are interested in changing for the better.

(Opposed) None.

(Other) There will be savings to the state, but a cost to the counties due to the resentencing hearings. Counties are in charge of courts, prosecutors, and related expenses. Counties are already strapped for money with little ability to raise revenue. Savings should be reinvested to offset the costs.

The Department of Corrections is generally supportive of legislation to reduce sentence complexity, excessive sentence lengths, and disparities. People of color are overrepresented within the incarcerated population and these disparities are even greater with those serving enhancements. The application of earned time would result in a significant reduction to the average daily population. Sentencing recalculations are complex, extremely time consuming, and take a lot of training. There is already increased workload due to prior changes and a six-month recalculation timeline might not be feasible.

#### **Staff Summary of Public Testimony (Appropriations):**

(In support) It is estimated that the average cost of an incarcerated individual is \$127.62 per day. If one offender is able to petition the court for resentencing, then the state could potentially save \$232,906 if that individual's sentences ran concurrently instead of consecutively. In addition, if good time credits are applied to a person's weapon charges, then an additional \$69,000 could be saved by taxpayers. In a vacuum, there is support for the bill. However, local courts are already at a breaking point because of COVID-19 and the number of resentencing bills being considered this year by the Legislature will collectively have a significant fiscal impact on local communities.

(Opposed) None.



(Other) This is one of six bills pending in the Legislature that would authorize the resentencing of individuals. Although this bill will result in savings to the state, this one bill alone would impose huge demands on the court system, and if all six bills were enacted then this would overwhelm courts. There is a cost for resentencing and this bill does not provide any funds for courts to do this. County superior courts are already experiencing a backlog due to COVID-19 and adding resentencing would add an additional large impact to the courts. This bill will result in costs to counties for resentencing individuals. It is recommended that the savings that the state will experience from enacting this bill should be reinvested in the counties to fund the costs of resentencing individuals.

**Persons Testifying (Public Safety):** (In support) Representative Goodman, prime sponsor; Melody Simle, Sentencing Task Force; David Trieweler, Washington Association of Criminal Defense Lawyers and Washington Defender Association; Jeanne Berry; Dan Wright, CAGE–Citizens Against Government Entrapment; Kendra Wynn; Byron Coates, Monroe Correctional Complex Local Family Council; Jon Tunheim, Thurston County Prosecuting Attorney; and Russell Brown, Washington Association of Prosecuting Attorneys.

(Other) Trisha Newport, Department of Corrections; and Juliana Roe, Washington State Association of Counties.

**Persons Testifying (Appropriations):** (In support) Kendra Wynn; and Russell Brown, Washington Association of Prosecuting Attorneys.

(Other) Karen Donohue, Superior Court Judges' Association; and Juliana Roe, Washington State Association of Counties.

**Persons Signed In To Testify But Not Testifying (Public Safety):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.