THE NECESSITY FOR RETROACTIVITY IN HB 1169 – "UNSTACKING" CRIMINAL SENTENCING ENHANCEMENTS

Mass Incarceration Is Real and Unnecessary

There is no longer any reasonable doubt that Washington imprisons far more people for far longer than is necessary for public safety or any other valid penological goals.[1] This increase in imprisonment was fueled primarily by the increase in sentence lengths for violent crimes since 1980. [2]

Washington now imprisons more people with life sentences than it did for all crimes in 1970.[3] Washington state's prison population grew by 337% between 1980 and 2019. [4] Washington state's incarceration rate is 3 times greater than the rates of Western Europe, Korea, Japan and Turkey. [5]

This massive increase in incarceration did not result in any increase in public safety as measured by crime rates or recidivism, and there were never any data-driven reasons to believe that it would. In fact, it was driven by racial and law and order politics. [6]

Mass Incarceration Has Been Imposed Disproportionately on African Americans and Other Persons of Color

These harsh sentencing policies have been imposed disproportionately on African Americans and other persons of color. For example, only 3.5% of Washington's population is African American. Nevertheless, 19% of those in prison are African American. African- Americans account for 21% of those sentenced to long sentences, 24% of those sentenced to very long sentences, and 28% of those sentenced to life without parole. [7]

The Legal Engines of Mass Incarceration

The primary engines of long and very long sentences in Washington over the last 40 years have been the Three Strikes law, the Hard Time for Armed Crime law (which created sentencing enhancements for the use of weapons and required them to be served consecutively to the underlying sentence and to each other), and numerous other incremental changes in sentencing laws that almost always made sentences longer. [8]

Reversing Mass Incarceration and Its Discriminatory Application Requires Changes in Sentencing Laws to Be Retroactively Applied

We now recognize the need to reverse these cruel and racist sentencing practices. This requires changing the law to make sentences far less draconian, reorient it toward rehabilitation rather than vengeance, and make other changes that will help communities heal rather than

contributing to their destruction. This includes things such as significantly shortening sentence lengths by cutting the standard ranges, increasing the amount of good time back to historical norms, eliminating the consecutive nature of sentencing enhancements, eliminating mandatory consecutive sentences for serious violent crimes, and more.

However, changing sentencing laws prospectively only will be insufficient to remedy past wrongs in our sentencing structure. Those changes must also be made retroactively in order to help the thousands of current inmates who continue to be imprisoned based on incredibly long sentences that were imposed during the "tough on crime" decades. For example, HB 1169 would "unstack" sentencing enhancements for firearms and deadly weapons. There is wide agreement among all stakeholders that requiring multiple enhancements in a single case to be run consecutively has led to unjustly long sentences. However, prosecutors and law enforcement oppose this change being applied retroactively to cover the approximately 650 inmates currently serving sentences that include two or more consecutive firearm or deadly weapon enhancements. This would lead to the grave injustice of wildly disparate sentences for the same crimes based solely on when the inmates were sentenced. It would leave imprisoned, often for decades, hundreds of inmates most now recognize to have been unjustly sentenced.

There Are No Credible Reasons Not To Apply These Changes Retroactively

Several reasons have been given by prosecutors and police for opposing the retroactive application of the unstacking of firearm and deadly weapon enhancements. However, none of them are valid.

The first objection is that it would be too expensive. The claim is made that since it would require the re-sentencing of all 650 inmates, it would be prohibitively expensive. That objection is without merit for several reasons.

First it simply will not do to say that 650 men and women must remain in prison unjustly for years and decades because it will cost money to release them. It is also rank hypocrisy because every year that prosecutors and law enforcement appeared before the legislature to urge passage of an expensive new law that increased the incarceration rate and size of prisons, they argued that "you can't put a price on justice." Notwithstanding that the massive increase in imprisonment was, in fact, the opposite of justice, prosecutors cannot now be heard to argue that releasing hundreds or thousands of prisoners from unjust prison sentences cannot be done because the price is too high. In fact, the moral price of not doing so is too high.

Additionally, re-sentencing these offenders would almost certainly save the state hundreds of millions of dollars. That is because even if it was necessary for every one of the 650 inmates, it is hard to imagine that a one-to-two-hour court hearing would be more expensive than continuing to incarcerate them for years. For example, it currently costs, on average, $38,000 per year to house someone in a Washington prison. All these stacked enhancements are many years or decades long. They usually exceed the length of the sentence for the underlying crime, often by decades. Therefore, it is highly unlikely that one court hearing would cost more than continued imprisonment. In fact, not re-sentencing them would be the financially foolish choice.

Second, prosecutors claim that re-sentencings are necessary to allow them to argue or negotiate for similarly long sentences through means other than stacked enhancements. However, this argument contradicts their admission that the mandatory nature of enhancements

is unjust prospectively precisely because it results in sentences that are far too long. If it is unjust for future offenders, it is equally unjust for past offenders.

Also, a large percentage of stacked enhancements were the result of trials, not negotiated plea bargains. We have reason to believe that at least 40% of these sentences were imposed after trials. They were added to the charges as a trial penalty for the defendants' refusals to accept the prosecutors' plea offers. Therefore, unless prosecutors are arguing that a trial penalty of decades in prison is appropriate, there is no need to re-negotiate these sentences.

Third, prosecutors argue that re-sentencing would be a practical impossibility for older cases because all of the witnesses would be difficult to locate. However, this argument implicitly misrepresents how sentencings actually occur in Washington courts. In the vast majority of cases, even serious violent ones, prosecutors do not call any witnesses at sentencing. In cases where someone does testify, it is usually just the victim. Therefore, even if re-sentencing were necessary, finding numerous old witnesses to testify for the state would not be required.

Last, but not least, it would be unnecessary to re-sentence 650 inmates to figure out their revised sentence length. The DOC could simply administratively recalculate their sentences based on running the sentencing enhancements concurrent rather than consecutive. DOC performs these types of calculations on every inmate who enters prison. There is no reason they could not easily do the same for these cases.

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[1] See *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, Katherine Beckett and Heather Evans, (2020), Executive Summary.
[2] *Id* at pg. 2.
[3] *People Serving Life Exceeds Entire Prison Population in 1970*, The Sentencing Project (2-2-20).
[4] *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, Becket and Evans, (2020).
[5] Beckett and Evans, pg. 1.
[6] *The Growth of Incarceration in the United States; Exploring Causes and Consequences*, The National Research Council, (2014); See also Beckett and Evans at pg. 3.
[7] Beckett and Evans, pgs. 6-7.
[8] Becket and Evans, pg. 4.