

Alaska Criminal Justice Commission

Meeting Summary

January 12, 2018

2:30 PM

Audio-teleconference

Commissioners Present: Joel Bolger, Sean Case, Matt Claman, Val Davidson, Jahna Lindemuth, Walt Monegan, Greg Razo, Stephanie Rhodes, Brenda Stanfill, Quinlan Steiner, Trevor Stephens, Dean Williams, Steve Williams

Commissioners Absent: John Coghill

Participants: Tracy Dompeling, Rob Henderson, Mike Duxbury, Randall Burns, Tony Piper, Teri Tibbet, Carrie Belden, Suki Miller, Alison Hanzawa, Denali Daniels, Chelsea, Phil Shanahan, Bill Comer, Cindy Strout

Staff: Teri Carns, Staci Corey, Susie Dosik, Barbara Dunham

Approval of Meeting Agenda

Chair Razo called for a motion to approve the meeting agenda. Commissioner Lindemuth so moved, and Commissioner Steve Williams seconded the motion. There was no opposition and the motion passed.

Approval of Last Meeting's Summary

Chair Razo called for a motion to approve the summary of the previous meeting. Justice Bolger noted that he was on the phone for the meeting, and Chair Razo said the summary would be updated to reflect that he was present. There was no opposition to approving the summary so amended.

State Forum on Public Safety

Commissioner Claman explained that as part of the 50-State Summit on Public Safety, the Bureau of Justice Assistance is funding state forums on public safety.¹ He is coordinating with Commissioner Coghill and DOC to host Alaska's forum. He anticipated that it would be a half-day forum, with a target date in September 2018, and he expected a good number of people to show. The application for the forum is in, and he will coordinate with the ACJC if the application is

¹ From the Council on State Government (CSG)'s website: "[In 2018,] the U.S. Department of Justice's Bureau of Justice Assistance (BJA) will provide support for up to 25 states to host a State Forum on Public Safety. Criminal justice experts from the CSG Justice Center or the Crime and Justice Institute (CJI) will travel to selected states to facilitate a data-rich public safety discussion between a broad cross-section of policymakers, criminal justice professionals, behavioral health practitioners, and advocates, and meet with state leaders to identify opportunities to increase public safety."

accepted. He saw the commission as a partner in their efforts for public awareness on public safety issues. He was thinking of hosting it at a convention center in Anchorage.

MICS Proposal

Overview

Commissioner Lindemuth explained, for the benefit of those who weren't at the December meeting, that the administration had proposed an A-level felony offenses for drug trafficking. After SB 91, there was no longer a class A felony for drug trafficking unless it was charged as a conspiracy. The Department of Law viewed this as a gap. The proposal was to penalize dealing 25g or more of a Schedule IA drug or 50g or more of a Schedule IIA or IIIA. At the December meeting, the discussion indicated there was general support for this idea but Commissioners were not sure if these amounts were the right threshold at which to set the A-level felony.

Commissioner Lindemuth noted that Barbara Dunham and Deputy AG Rob Henderson had both put together memos looking at similar offenses in other states. In her view, an A-level felony set at the amounts proposed, with a presumptive sentencing range of 3 to 6 years with a maximum of 20 years, was fairly conservative. She noted that Alabama's punishment for trafficking 14-28g of heroin was a 10-year minimum. She thought the current proposal was on the right track.

Deputy AG Henderson explained that his memo was not a 50-state survey, but looked at selected states. Georgia, for example, set the penalty for dealing 14-28g of heroin at a 10-year minimum. He thought the proposal was on the nose. He noted that Captain Mike Duxbury of the Alaska State Troopers could tell the Commission more about the effect this level of drug dealing has on the community. He thought that was also important to consider; this law should be relevant to Alaska and what law enforcement is seeing on ground on a day-to-day basis.

Heroin Dosage

Captain Duxbury explained that around 60-70% of the time, opioids are collocated with methamphetamine (meth). Alaska's drug problem is a poly-drug use problem, which is getting worse. In terms of dosage amounts, heroin is almost always sold in .1g amounts. His slides demonstrating the relative scale of heroin mimic the look of black tar heroin, which is the form most often used. He said that 90% of street users keep 2-3 doses, and sell the rest of what they buy.

Each individual's capacity is different, and dosage and reactions can also be affected when drugs are adulterated with more serious drugs like fentanyl or carfentanil. Alaska's drug scheduling considers substance's propensity for abuse, but not necessarily lethality. Adulteration can alter lethality. For example if oxycodone has a potency of 1, then morphine has a potency of 10, heroin has a potency of 100, fentanyl has a potency of 1000, and carfentanil has a potency of 10,000. Cocaine and meth are starting to be cut with these other drugs too.

Captain Duxbury showed a slide with doses of heroin compared to a penny; one dose was much smaller than a penny. The depicted single dose was what addicts will use to stay "normal"—

around .1g- for the average user. The proposed 25g of heroin would therefore be equivalent to 250 doses. Chair Razo noted that the 2.5g example looked about the size of a milk dud. Capt. Duxbury said the 10g sample, about 4 times larger, would be worth \$10,000 in Bethel

Capt. Duxbury further explained that dealers can make up to 10 times as much money in Alaska as in the Lower 48. In Seattle 1g would sell for \$90, and in San Diego it would sell for \$50. There are dealers going from Mexico to Kodiak on a regular basis. Over the last year, AST has been dealing with the Sinaloa Cartel there. Dealers from the Lower 48 know they can make money here.

Capt. Duxbury said that heroin cut with fentanyl was found in Alaska with increasing regularity. Fentanyl is a synthetic opioid 100 times stronger than heroin, and is believed to be responsible for the deaths in Quinhagak. AST is starting to see it in meth and cocaine too. Carfentanil is a synthetic opioid 1000 times stronger than heroin, and law enforcement is starting to see heroin cut with carfentanil in California, Oregon, and Washington. It is cheaper than heroin, and is very lethal. Commissioner Monegan noted that in some jurisdictions, people are putting it on police car door handles to act as a weapon.

Meth Dosage

Capt. Duxbury explained that meth actually has a therapeutic dose of 5mg. For recreational use, an oral dose can be as much as 100mg (.1g). Commissioner Lindemuth noted that the proposal for meth would cover 50g or more. Capt. Duxbury explained that would be 500 doses.

DPS Deputy Commissioner Bill Comer asked Capt. Duxbury to describe an overdose of meth, would it be over 100mg? Capt. Duxbury said it depends on the person; it could also be cut with something more potent. In cases of a serious overdose, users are in an excited delirium, and have superhuman strength. It takes multiple officers to control them, they can create standoff situations. In cases where they are seeing people use both meth and heroin together, it is because heroin is suppressant, and can put to sleep. People use meth at same time to be “functional”—it boosts their awareness level.

Capt. Duxbury also noted that Alaska’s overdose death rate is twice the national average. Obviously there are greater overall numbers in the Lower 48, but it is a much more resource-intensive problem here because of the limited access to villages. If there were 10 overdose deaths in Alaska in a weekend, it would overwhelm the criminal justice system. Right now AST’s focus is on large-scale dealing. AST doesn’t have the resources to round up each dose, so they are looking for high-impact arrests.

Deputy AG Henderson walked the Commission through his memo, noting that Georgia had a 10-year minimum for dealing 25g of heroin or 50g of cocaine or meth. Idaho had a 10-year minimum for 25g of heroin, a 3-year minimum for 50g of cocaine, and a 2-, 3-, or 5-year minimum for 50g of meth. Mississippi had a 5- to 30-year range for dealing all three substances and a 10- to 40-year range for trafficking 30g or more of all three.

Discussion

Commissioner Steve Williams wondered if any of the states in either memo was in the process of criminal justice reform—was there any talk of modifying these sentences? Deputy AG Henderson said that Georgia had done criminal justice reform, but he was not sure specifically about drug offenses. Project attorney Barbara Dunham noted that Texas was included as an example in her memo but had not done any reform of sentencing, only of supervision. She offered to get information on states that have enacted drug laws. Commissioner Lindemuth noted that the memos both reflected the current state of the law.

Capt. Duxbury wondered if there was a way to deal with cutting drugs with other, more lethal substances, like a weapons enhancement for violent offenses. Commissioner Lindemuth said she thought that was worth discussing but also thought it was a separate issue for future discussion. Chair Razo agreed it deviated from the immediate topic but it was part of the Commission's purview and a valid issue.

Judge Rhoades asked how many possible prosecutions this might affect, and whether it was possible to get a sense of the corrections flow. Deputy AG Henderson said that in the last 3 years there were 114 cases that would have fit the bill for this proposal. Those were DPS numbers of eligible cases and didn't reflect APD cases or number of cases actually prosecuted. Law did not intend to use this statute regularly— they saw it as a tool to have available for big cases. For the biggest cases, they will continue to work with the federal authorities. Judge Rhoades noted that cases prosecuted under the proposed statute would still be sentenced as normal and subject to all existing reforms from SB 91.

Motion

Commissioner Lindemuth moved to recommend that the legislature enact a Class A felony for Misconduct Involving a Controlled Substance (MICS) for dealing 25g of a Schedule IA substance and 50g of a Schedule IIA or IIIA substance. Commissioner Monegan seconded the motion. Chair Razo called for discussion.

Commissioner Steiner said that this proposal raises a couple of questions: one, where to draw the line in terms of amounts, and two, whether this proposal will have any impact. He noted that under existing law, the "large quantities" aggravator could be used to sentence someone charged with a B-level felony to up to 10 years. The Commission does not have any information that this proposal will have any effect. The only information the Commission has is the Commission's previous research indicating that this is the kind of strategy that will end up warehousing people. That strategy was the old approach that the Commission knows is ineffective. He opposed this motion without any evidence that the proposed offense will achieve its intended effect.

Deputy AG Henderson noted that a first-time Class B felony carries a presumptive penalty of 0-2 years. Commissioner Steiner said that was true, but his point was with a large quantity aggravator, the sentence can go up to 10 years, which will do much the same thing as what Law is proposing in the cases that warrant it. The evidence from the justice reinvestment research

process showed that longer jail sentences have no deterrent effect offenders, and there is no evidence this will get drugs out of the community. More likely the effect will be to just warehouse people who will be replaced quickly on the outside by other dealers.

Commissioner Monegan said that another aspect of the proposed offense was that it would provide an incentive for defendants to cooperate with law enforcement to flip other operators. Commissioner Steiner said that would still just result in some people spending time in jail while other people step in to sell the drugs. Commissioner Monegan said that getting a defendant to cooperate means that law enforcement can find out more about the operation from the defendant, which would help dismantle the whole chain of dealers. Commissioner Steiner said he appreciated those efforts to dismantle drug organizations, but this proposal won't get drugs out of Alaska's communities. Commissioner Monegan said it would hold offenders accountable.

Commissioner Lindemuth noted that the reform process had reduced penalties to get users into treatment. This proposal is not about the users, but is about taking a trafficker off the street. This level of trafficker won't go back to village they have been selling to. She disagreed that the steeper penalty would not be a disincentive. Criminals will know what the drug laws are. Commissioner Steiner said that the data shows that longer sentences don't change a potential offender's risk-taking calculus; if a vacuum is created in the market, someone else will step in.

Commissioner Claman said that when this proposal was first brought up, he thought that the 25g/50g threshold was low, and he still views it as too low. He would think that the appropriate threshold would be in the realm of 200g/300g.

Commissioner Case said that if the threshold is set much above 25g/50g, it's won't be a state case, it will be a federal case, and it won't be used often. Chair Razo asked what happens when a case is referred to federal law enforcement, and they choose not to take it. Commissioner Lindemuth said the case would go back to the state, and right now would be prosecuted as a B or C Felony.

Chair Razo said that he recalled that during the justice reinvestment process, the Commission's recommendations regarding drug quantities was trying to get at the difference between the user level and the commercial dealing level, and treating the latter more harshly. He didn't recall if there was a discussion about whether commercial dealers should be distinguished. The question was whether dealers dealing more than 25g/50g were a distinct group.

Public Comment

Cindy Strout, a criminal defense attorney, said she understood the dangers of drug use; her nephew died of a drug overdose. But she seconded Commissioner Steiner's view. This approach is something that has been tried, and it just doesn't work. If one dealer is prosecuted, it just creates a vacuum. She viewed this proposal as a step back from the Commission's previous research on lack of deterrence and lack of rehabilitative effect for longer prison terms. She thought resources should instead be directed towards expanding drug courts, and treatment, as that will have more impact.

Capt. Duxbury said that each case matters to each victim. He noted that in Sitka, dealers from lower 48 came up just to take advantage of dealer-users. They had to use federal law enforcement to prosecute them, and making them unavailable to prey on Sitka. They are not the kind of people who are candidates for treatment; they came up because they could take advantage of people in Alaska, making money off of misery. Also in a recent case in Juneau, the threat of federal prosecution convinced a suspect to flip and cooperate with law enforcement.

Phil Shanahan, also a criminal defense attorney, agreed that the proposal amounted to the same thing Alaska did for many years. It didn't make the community safer, Alaska just spent more on locking people up. Using aggravators and maybe updating them for the current scheme might be better. The evidence from the Commission was that the old ways weren't working, and he saw this as step back to the old ways. He thought that state resources were better spent on treatment.

MICS Proposal

Discussion cont.

Judge Rhoades said she was just reading about the Municipality of Anchorage considering prosecuting felony cases. This made her wonder whether, if Alaska raises the bar, the federal authorities will pass more cases on to the state. Commissioner Lindemuth said that the Department of Law works closely with the federal authorities; they take the biggest cases, and she didn't expect that to change. She viewed this proposal as a gap filler. Cases involving 1000g or more will be federal cases. Cases involving the quantities in the current proposal aren't the kind of case federal prosecutors usually take. Deputy AG Henderson agreed, and added that as administrations change, federal priorities can change, and this proposal will allow the state to prosecute drug cases as necessary.

Capt. Duxbury noted that a dealer was convicted last year of taking 1200g meth into various Alaska villages. The federal prosecutors didn't have resources for the case so the state prosecuted the case. The dealer got 32 days and then went back to dealing once she was released.

Commissioner Stanfill asked how to reconcile that with Commissioner Steiner's point about using aggravators in such cases. Were there really no tools to deal with them? Deputy AG Henderson explained that the aggravator case law is all based on old case law, and the presence of an aggravator doesn't necessarily mean there is a great departure from the presumptive range. A case would need to have facts well outside the ordinary to get the maximum term with an aggravator, a situation that was very unlikely.

Judge Rhoades wondered if it was possible to fix the aggravators. Deputy AG Henderson said he was not sure, and noted that the presumptive terms provide certainty for everyone. Increased use of the aggravators will result in disparate sentences.

Commissioner Monegan reiterated that this proposal was for people who are in this to make money. Alaska has been watching death rates climb. He felt this was needed to protect the community. If it provides enough incentive to flip the offender, it can take a whole string of dealers

out. He added that families were impacted by drug use and there was a downstream effect to letting this problems fester; essentially, drug dealing creates ACES which create future costs.

Commissioner Claman noted that the focus of the Commission is public safety and getting the best results for state resources. Nationally, overdose deaths are now four times the rate of homicides. Figuring out where to spend state resources is critical. He was concerned that this proposal would mean spending a good deal of resources on incarceration and thereby limit resources for treatment.

Commissioner Lindemuth noted that the opioid problem has been increasing exponentially in recent years. Drug use is not the same as it was 3-5 years ago when the Commission was initially discussing justice reinvestment—the state needs more tools. She was not blaming this rise on justice reinvestment, but the Commission was not aware of the potential extent of this problem during its initial discussions.

Commissioner Stanfill said it sounded like the administration was not wanting to lock people up necessarily, but needed more tools to barter with. Chair Razo said that was certainly one factor, and other factors to consider included community condemnation.

Commissioner Steve Williams said he was conflicted about this proposal. One role of the Commission is to consider the community condemnation element, and he was struggling to balance that with evidence that Commissioner Steiner noted—for example, the this is the way the state approached the crack epidemic in the 80s, which was not necessarily effective. But the broader community was very concerned about drugs then. The question was whether the Commission was looking at this proposal as a form of community condemnation or as an effective way to get drugs off street and increate public safety? He was not sure it was latter, and he agreed that if a dealer is prosecuted, someone else will come along to fill that space.

Chair Razo said he didn't want to lose track of the fact that public safety is the Commission's primary goal. He noted that there is a great deal of outrage on this topic in rural Alaska. The rural Alaskan opinion is that drugs have created an insurmountable problem and rural Alaska has no resources to deal with it. As was revealed by today's discussion, enterprise-level drug trafficking is significant in the villages. Dealers can take small package into a remote location with no law enforcement resources. Small populations are greatly affected when they lose someone to drugs. Rural Alaskans have fewer tools than ever to deal with this problem, which puts him in favor of the proposal. He still agreed with the need to focus on treatment for people who need it, and goals of criminal justice reform. This is something different. There might be something the Commission missed the first time around. The problem has grown worse since the Commission first submitted its recommendations. He was in favor of what the administration was proposing, and thought it made sense for where the state is right now. He didn't think it would make a big impact on jail bed usage.

Judge Rhoades said she was also very ambivalent. She understood the law enforcement perspective and the need for a bargaining chip and a way to address the gap in cases not taken by

the federal system. But she also knew that the presumptive system can widen the door to include people with behavioral health and mental health problems, who can get swept into the system. She also knew that the reinvestment money didn't go to treatment as much as she had hoped. The Commission was also bound to make improvements based on evidence and she was not hearing that there was evidence this will actually reduce drug dealing. She was also worried it could negatively impact minorities disproportionately. The quantities proposed felt like a guess.

Commissioner Lindemuth responded that one item in the Public Safety Action Plan was to provide an additional \$3 million in treatment over the next 3 years.

Commissioner Dean Williams agreed that the opioid crisis made this a different situation than it was two years ago. Alaska is in an extreme situation, and he understood the need for another tool. He supported the proposal for a lot of the reasons mentioned.

Chair Razo called for a vote. The Commissioners voted as follows:

- Joel Bolger - abstain
- Sean Case - yes
- Jahna Lindemuth - yes
- Walt Monegan - yes
- Stephanie Rhoades - abstain
- Brenda Stanfill - yes
- Quinlan Steiner - no
- Trevor Stephens - abstain
- Dean Williams - yes
- Steve Williams - no

In explaining his vote, Commissioner Steve Williams said he was voting no because he couldn't be certain there would be any positive impact on public safety or negative impact on DOC. In explaining her vote, Commissioner Stanfill said that she hoped that the Commission and the departments will continue to pay close attention to funding for treatment services, which she thought was much more important.

Chair Razo said that the yesses carried, and that staff will prepare a recommendation that notes the vote was not unanimous. Any member of the Commission can provide input at any time. Staff will send a draft before sending the recommendation to the legislature.

Commissioner Williams noted that the information provided in advance of the meeting was helpful. He hoped the Commission could gather information on the impacts of this proposal should it become law, as he thought this was something the Commission would want to know. He also thought, as Judge Rhoades mentioned, that there might be an impact on federal prosecutions and it would be good to track that as well. He thought it was a good idea to start thinking about the needed data now.

Future Meeting Dates & Tasks

Barriers to Reentry/Expungement: January 22 at 10:30

Behavioral Health Standing Committee: January 30 at 10:30

Full Commission meeting: February 6, Juneau