Alaska Criminal Justice Commission
Staff Notes of November 18, 2014 Meeting[1]
at the Snowden Conference Center

Commissioners attending:
Alex Bryner, Brenda Stanfill, Wes Keller (tel.), Mike Geraghty, Fred Dyson, Quinlan Steiner, Greg Razo (tel.), Kris Sell (tel.), Trevor Stephens, Stephanie Rhoades, Joe Schmidt, Jeff Jessee.
Staff present: Teri Carns, Mary Geddes, Susie Dosik, Giulia Kaufman.
Participating: Janet McCabe, Darrel Gardner, Brad Mrystol, Chris Provost, Chuck Kopp, Ernest Prax.

Next meeting: **Thursday, December 18, 10:00 AM to 1:00 AM**
Snowden Conference Center

PRESENTATION

David Mannheimer, Chief Judge of the Alaska Court of Appeals, a member of the court since 1990, was invited to make remarks to the ACJC concerning the presumptive sentence scheme and the criminal code. Chief Judge Mannheimer stated:

- The presumptive sentence scheme and the criminal code were both enacted in 1978 and took effect in 1980. The criminal code had been unchanged since territorial days. The change followed a huge uptick in the numbers of prosecution and court cases, all due to the oil boom.
- Because of the increasing volume of cases, the legislature had to decide whether to increase the size of the Alaska Supreme Court or create an intermediate court. It decided to create an intermediate court that would only handle criminal cases, which is unusual; other states' intermediate courts handle criminal and civil appeals cases.
- Before the passage of the new criminal code, felonies were defined merely by having a sentence minimum of one year. Most felonies carried 'indeterminate sentencing' penalties, allowing the court to impose any outcome up to a maximum.
- Changes to the Alaska sentencing scheme coincided with a national 'transparency in sentencing' movement against obscure decision-making. Legislators sought to require more objective factors as a basis for sentencing decisions. Also influencing this passage to the new sentencing scheme was the Alaska Judicial Council's study showing that the two most significant factors influencing a sentencing outcome were the judge's identity and the defendant's race.
- The new scheme established "presumptive" sentences, specifying years. This scheme took into account the background of the defendant and factors concerning the crime. Twenty states have similar structures, but there are major differences. For example, Oregon, the state to which Alaska is most compared, has sentencing guidelines presented in a matrix which factors in the defendant's prior criminal history and the seriousness of the offense.

[1] Staff Notes are neither minutes nor an official record of Commission proceedings except with respect to any votes by its members. Statements attributed by staff to any speaker are not necessarily accurate.

- In Alaska, a "presumptive" sentence was intended for a typical offender who has committed a typical offense. If the offense is aggravated, the judge has authority to increase the sentence. If there are mitigators, those factors give the judge authority to decrease the sentence from the presumptive term.
- With a mitigator, if the presumptive term was 4 years or less, the sentence could be as low as 0; if the presumptive term was more than 4 years, the term could be reduced by 50%. With an aggravator, the sentence could go up to the maximum. If the offense was neither aggravated nor mitigated the judge could impose only the "determinate" presumptive sentence, e.g. 4 years.
- In theory, the judges' sentencing discretion was constrained, but in actuality, it was not because almost all cases have an aggravator, or mitigator, or both. With even one mitigator or aggravator, the sentencing changed from presumptive to indeterminate.
- But in 2005, Alaska's sentencing system changed again because of a 2004 United States Supreme Court decision. Blakely v. Washington, 542 U.S. 296, which impacted many states' and federal sentencing practices. [Washington state law had allowed a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons" for doing so that were not computed into the standard range sentence. The U.S. Supreme Court held that an exceptional sentence increase based on a judge's determination that Blakely had acted with "deliberate cruelty" violated Blakely's Sixth Amendment right to trial by jury. Bottom line: facts increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.]
- One type of response was to permit greater judicial discretion; the federal government, for example, made its sentencing guidelines, which included aggravating factors, advisory rather than mandatory in terms of the sentence to be imposed.
- The Alaska Legislature took a different tack. First, consistent with Blakely, it revised the sentencing statutes to acknowledge that if an aggravating factor was alleged, which would increase a presumptive sentence, the fact had to be proved to a jury beyond a reasonable doubt. Second, the legislature changed the presumptive term (e.g. 7 years) to a presumptive range of years (e.g., 7-11 years). Notably, the new range started from the prior presumptive term and went upwards. The stated intent of the legislature, however, was not to increase sentences. This stated intent, however, is largely unenforceable.
- Given these changes, and the enactment of dozens of statutory aggravating factors to increase a sentence, if one is proved, the presumptive 'determinate' scheme is largely an indeterminate scheme in practice.
- In the 1970's, legislators focused only on "just desserts" and isolation purposes of criminal sanctions because they believed that other factors such as offender's capacity for rehabilitation and deterrence effect were unknowable. Presumptive sentencing was therefore, to some extent, inconsistent with the *Chaney* criteria (which predated presumptive sentencing) of deterrence, community condemnation, and rehabilitation.[2]

[2] Staff note: The Alaska Supreme Court outlined the goals of criminal sanctions in State v. Chaney, 477 P.2d 441 (Alaska 1970). As the court interpreted the sentencing statute, AS 12.55.120, the goals of sanctions were rehabilitation, isolation, specific and general deterrence, and community condemnation. *Id. at* 444. These goals were viewed as an implementation of Alaska's constitutional mandate that "penal administration shall be based on the principle of reformation and upon the need for protecting the public." *Id. At 443 (quoting* Alaska Const., art. I, § 12).

- The original presumptive sentencing scheme was not applicable to the most serious "unclassified" crimes; rather those crimes carried maximum penalties of 99 years. However, more serious felonies have since been designated as unclassified.
- The most significant changes in sentencing has been in sexual offenses, both in terms of a potential maximum offense of 99 years, and dramatically lengthened presumptive ranges.

Trends:

- There are more trials and more appeals.
    - There are 5000 felonies charged per year and 18,000 misdemeanors that are filed in a year. But there has been a 30% increase in the number of cases tried over the last 3 years.
    - There has also been an increase in the number of cases appealed. 2 years ago, between 70-80% of cases in which a conviction was obtained at trial were appealed; now 100% of those cases involve appeals. Previously, 25% of misdemeanor trial verdicts were appealed, now 40% are appealed.
- The conviction rate has gotten lower.
    - Since 2009, the trial conviction rate has been 60%. In FY12, 137 felony trials ended in guilty verdicts; 123 misdemeanor trials ended in guilty verdicts. In FY14, 151 felony trials ended in guilty verdicts; 151 misdemeanor trials ended in a guilty verdict.
    - Between 2009 and 2013, the trial conviction rate for a felony conviction dropped to 60% from 77%. 15-20% of trials end in acquittals, the rest are plea bargains after the trials began or dismissals after trial begins.
- There are fewer sentence appeals and more merit appeals.
    - A large percentage of criminal appeals are merit, not sentence appeals.
        - Merit appeals take more time to prepare and decide. At present it takes two years for the parties to file their briefs and 8-9 months for the court to decide.
    - In 1990, 20% were sentence appeals; now, it's fewer than 10%.
        - The right to appeal a sentence has been restricted: a defendant can't complain about procedure nor that the defendant was denied an opportunity to present claims; one can only complain that the sentence was excessive.
        - A defendant may only appeal an unsuspended sentence of imprisonment that exceeds two years for a felony offense or 120 days for a misdemeanor offense, unless there was a plea agreement for a specific sentence and a longer sentence was imposed.

QUESTIONS FROM COMMISSION MEMBERS AND PARTICIPANTS

Q; *Why the change in the numbers of trials?*
A: It may be the relationship between the prosecutors and the defense attorneys.

Q: *Isn't plea bargaining sometimes a perversion of justice? Aren't we seeing a stacking of charges to force a plea? Don't we see an inordinate number of convictions from Western Alaska because there is a cultural norm there that if you screw up, you fess up? How does this impact sentences?*

A: The way the system was re-structured in 1980, there were many more charges that might apply to the same criminal conduct. Could be theoretically used to pressure a defendant into pleading. But more pressure probably results from bail. An old AJC study said there is a huge pressure to plead if you can't get bail or release on conditions. We have very few bail appeals Certainly, you don't want to be the judge that sets a low bail and then a problem occurs. So it's difficult to get a low bail decision, and that increases pressure on a defendant to plead.

With respect to cases involving Western Alaska people, there is an inherent pressure in our system to talk, to explain. This creates a disadvantage for those who are culturally inclined to do that because we have an adversarial system.

Q: *Can you discuss the delays in the appeal process?*
A: Notices of appeal and requests for transcripts must be filed 30 days after sentencing. The transcripts are done 40 days later. After that, the parties are required to file various briefs. There has been a "creeping expansion" of the time to file a brief. We willl be allowing up to 500 days is allowed for the opening brief, the appellee is given a maximum of 230 days to respond, and 60 days are permitted for the filing of a reply brief. This means that it takes 2 years to brief a case at present. The court is implementing new rules for briefing, gradually reducing the amount of permissible time to 1.5 years. Once a merit case is fully briefed, the process of deciding typically takes 8-9 months for law clerk and judge review and assignment, the scheduling and hearing of oral argument, and the circulating of draft opinions among the appellate panel.

Q: *The lengthening of sex offense terms has a big impact on the percentages of Alaska Natives in DOC institutions. While they are 37% of the DOC population, they are 40% of sex offender population. With longer sentences, their percentage in the population grows. Ten years ago, all DOC programs were eliminated; but now they have been brought back. Can sentences be shortened if an offender has successfully completed treatment?*
A: The sentencing judge cannot modify a sentence after 180 days, so the answer is no. There is no way to re-sentence.

Q: Could you please explain about the law concerning three-judge panels.
A: Three judge panels are convened only after the sentencing judge determines that the case is exceptional and the presumptive sentence should not apply. It's not easy to obtain a non-presumptive sentence: first you have to persuade the sentencing judge and then you still have to persuade three more judges.

Q: I am concerned that a lot of court-ordered restitution never gets to the victim.
A: My impression is that restitution doesn't get paid because people don't have the money to pay it. 90% of defendants are represented by public counsel. Two thirds of them are represented by the PD and one third by OPA. 5% of defendants represent themselves and 5% have private counsel.

Q: How much does it cost to do an appeal?
Quinlan Steiner: a typical case takes 3 weeks to work up, and costs the PD approximately $7500. Defendants are assessed $2000 in costs, but it is unknown how much of those costs are recovered

Q: Who decides if there is to be an appeal?
Mannheimer: It is a client's decision.
Steiner: If the client is being convicted of a felony, there is little disincentive to filing an appeal.

Q: How many appeals are "post-conviction relief" petitions [filed in cases where a defendant has already been convicted]?
A: In FY 2012, there were 111 direct appeals and 27 post-conviction relief cases; in FY 2013, there were 168 direct appeals and 41 PCRs. This is an interesting trend because the basis for appealing a PSR decision is very limited. The only grounds on which you can seek relief are ineffective assistance of counsel and the discovery of new evidence. Because most cases are handled by the PD, any PCR complaining about attorney representation has to be assigned to OPA. It's hard to find private attorneys that can be contracted by OPA. Most attorneys don't want them. One OPA contractor had 85 PCR cases. They are stacking up. Both the PDs and OPA have qualified experienced attorneys. Lots of private attorneys don't have the experience.

STAFF REPORT (M. Geddes)

- Many Alaskans are attending the Pew Justice Reinvestment Summit in San Diego: Susanne DiPietro, Ron Taylor, Steve Williams, Carmen Gutierrez, Nancy Meade, and legislative staffers. Alaska has missed this year's window for participation in the JR Initiative.
- The new Walker Administration has created transition teams which will be making recommendations. Three Commissioners are members: Greg Razo, Jeff Jessee and Fred Dyson.
- Some legislative leadership positions have changed with the election. Senate Judiciary is now chaired by Sen. McGuire. House Judiciary is chaired by Rep. LeDoux and Rep. Keller is now co-chair.
- Regarding the ACJC webpage: we intend to keep adding articles of interest. It is still a work in progress. In the future, we will expand the webpage to include meeting schedules, agendas and correspondence.

OTHER AGENDA ITEMS

- Sen. Dyson asked to postpone a discussion of victim restitution to a future meeting.

- Commissioners should direct requests for information to AJC staff; Mary is the usual contact person.

- Workgroup Reports
    - Barriers to Re-Entry- Jeff Jessee: Initial focus is on Title 28 (because loss of a driver's license is significant barrier), plus we have our SB 64 mandate to look at these issues. We will have a plan of action for the December 18 meeting. We need to come up with standards for reviewing legislative proposals. Maybe we will have a symposium of best practices during legislative session. We will also be looking at the issues which resulted in the SB108 bill. Our look at barrier crimes will begin

with misdemeanors, particularly "DV" assaults. Brenda Stanfill is chair of that subcommittee effort.

- Rural Criminal Justice- Greg Razo – we have planned an all-day meeting on November 24 in order to have a presentation from Alaska Legal Services, AFN, AVCP, and Judge Jeffrey on tribal courts. [This report elicited the comment that groups have overlapping interests. A recommendation was made to tape presentations and post on the website in the future. Also, it was suggested that staff send out reports from all groups to ACJC.]
- Pre and Post Trial Laws and Practices – Stephanie Rhoades – We are interested in delays in court processes, data collection, risk and needs assessments, and bail statutes. Bryan Brandenburg from DOC is going to present on risk and needs assessments of offenders by DOC pursuant to SB 64.
- Classification of Crimes and Applicable Sentences – Mike Geraghty – the group is looking at drug sentences and reclassification efforts in other states.
- Data Group – Alex Bryner, Quinlan Steiner and Terry Vrabec have attended and heard presentation on the Results First model. UAA is considering taking this on. We could have some presentation on this on December 18. Justice Bryner noted this is a long term project.
- Sentencing Alternatives will be meeting for the first time today.

- Question for the Commission: Should there be other workgroups?
  - Alex Bryner asked if there should be a group focusing on outreach strategies to ensure rural input. He would like to further discuss.
    - Rhoades: I think that outreach should be discussed by the entire Commission. Similarly, discussing of programming for treatment probably relevant to all workgroups.

- Question for the Commission: Should there be DHSS representation on the Commission?
  - Stephanie Rhoades asked if the Commission could be enlarged so as to formally include Department of Health and Social Services.
  - Can we invite DHSS to attend? (Stephens)
  - We should consider the fact that the legislators did not seek their input. (Bryner)
  - Membership went through many permutations during legislative process. (Jessee)
  - Consensus to participate encourage participation, if not membership.
  - In December we can consider whether to ask for legislative action to add another Commissioner position.

PUBLIC PARTICIPATION

Chris Provost asked if there was interest in the juvenile waiver issue.

- Quinlan Steiner stated that the Classification of Crimes group has agreed to discuss the topic in the future.