

Alaska Criminal Justice Commission

Meeting Summary

Wednesday, November 28, 2018

9:30 am – 12:30 p.m.

Snowden Training Center, Anchorage
And teleconference

Commissioners Present: Jay Butler, Matt Claman, John Coghill, Greg Razo, Stephanie Rhoades, Brenda Stanfill, Quinlan Steiner, Trevor Stephens, Dean Williams, Steve Williams

Commissioners Absent: Joel Bolger (Nancy Meade served as proxy for Justice Bolger), Sean Case, Jahna Lindemuth (Rob Henderson served as proxy for AG Lindemuth), Walt Monegan

Participants: Nancy Meade, Lizzie Kubitz, Kim Stone, Brad Myrstol, Diane Casto, Tony Piper, Don Habeger, Teri Tibbett, Mike Matthews, Araceli Valle, Lizzie Kubitz, Leslie Heber, Triada Stampas, Michael Berger, Rob Henderson, Pete Harrison

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

Approval of Meeting Agenda

Judge Rhoades asked to add the issue of using jail for mental health holds to the agenda. There was no objection to the agenda as amended.

Approval of Previous Meeting Summaries

Judge Rhoades moved to approve the summaries of the previous two meetings; Judge Stephens seconded the motion. There was no objection and the summaries were approved.

Update on Sex Offenses Report and Directive to the Workgroup

Project attorney Barbara Dunham gave the Commission a brief update on the report to the Legislature on sex offenses. The report had data, legislative history, information on treatment and reentry, and information on victims' issues. Some members of the Sex Offenses Workgroup wanted additional time to review the latest draft and provide comments before forwarding the draft to the full Commission. Comments were due to Ms. Dunham by December 8 and the Workgroup would meet again on December 18.

Chair Claman explained that there had been a question at the last Sex Offenses Workgroup meeting about what the Commission had asked the workgroup to discuss at the last plenary meeting. He said it sounded like there was some uncertainty from the workgroup about whether there should be a discussion on the sex offense statutes and gaps in the law.

Commissioner Stanfill said that she thought the idea was to get a recommendation to the legislature before the start of the legislative session in January. Her understanding was that the request was not necessarily to include a recommendation in the report, but rather to review sex crimes in the report, and separately to look at the statutes and assess them for potential recommendations. At the last workgroup meeting, there wasn't a willingness to do that. She was

not sure where that left the Commission. She believed the Attorney General's office would be doing something about this and that the Public Defender wasn't interested, but she was very interested in having the Commission review the statutes and assess them for potential recommendations. She was not sure whether a workgroup could reject a request from the Commission.

Judge Rhoades wondered where the Alaska Federation of Natives (AFN)'s request fit into all this. Commissioner Razo explained that it was just a request from another organization that suggested the Commission review the statutes, and not binding. He believed it was important the Commission look at this. He knew that the Attorney General's office was working on various proposals, but observed that that has not stopped the Commission before. It was important to take a look at these statutes to see if additions or changes should be made. He requested that the workgroup do this.

Judge Rhoades said she was curious whether any work had been done about the AFN resolutions. She thought reviewing the statutes was within the mission of the Commission and in particular the workgroup, and she thought it should be done.

Deputy AG Rob Henderson said it was accurate to say that the AG's office was preparing legislative proposals for sex offenses. As a practical matter, he was not sure the workgroup could finish a recommendation in time for the legislative session. Commissioner Razo said that even so, he thought it was important to provide the legislature with the Commission's perspective.

Chair Claman said his impression from the September meeting was that this would be included in the sex offenses report, but not necessarily in a detailed way. He thought it was the consensus view that it would be included, and that not to include it would not be fulfilling the Commission's role. He asked if there was any objection to continuing that direction.

Commissioner Stanfill noted that Commissioner Steiner, who had voiced his objection to the workgroup taking up this issue, was not present. She thought there could be a subcommittee of the subcommittee for those that want to be involved. The issue raised by the Schneider case was not the only gap she knew of. Something might come out of the upcoming legislative session that might fix this identified gap, but there might be other gaps that Alaska has in comparison to other states.

Commissioner Razo said that this kind of criminal activity was the hardest to grapple with, but making recommendations regarding sex offenses was clearly part of the Commission's statutory mission. Judge Rhoades endorsed that idea, and said that if there was going to be movement on this in the Legislature, it would be better for the legislators to have the best thinking of the Commission on the subject to inform their discussion.

Commissioner Steve Williams thought it was important that the Commission look at the whole system with regard to sex offenses rather than a couple of issues. Statutes are often not reviewed in a holistic way, and statutory responses to individual situations can have unintended consequences long term.

Chair Claman wondered if the Commission needed a motion to make this happen. Mr. Henderson thought that would be best.

Commissioner Razo moved to have Sex Offenses Workgroup specifically take a look at the conduct alleged in the Schneider case as well as other statutes to determine if the Commission should make a recommendation. Mr. Henderson seconded the motion. The motion passed unanimously.

Ms. Dunham asked whether this topic should be included. Chair Claman said that it should be included to the extent possible with the time constraints already set. Commissioner Stanfill agreed.

Victim Listening Sessions Planning

[Commissioner Steiner joined at this point.]

Ms. Dunham reminded the group that the Commission had also agreed to hold victim listening or roundtable sessions at the September meeting. Staff was in need of direction on this, so she had contacted the Commissioners who would be remaining on the Commission to form an ad-hoc workgroup to plan the listening sessions. This ad-hoc group would meet Monday, Dec. 3 at noon.

Chair Claman asked what the timing would be for these listening sessions, and Ms. Dunham replied that she was happy to take direction from the Commission on that as well. Commissioner Razo noted that there are a number of events that involve a gathering of rural Alaskans. He recalled that Commission trips to Nome and Kotzebue were very beneficial. The Tanana Chiefs Conference was specifically devoted to tribal justice, and the Commission would probably find a lot of interested people there. There was the BIA providers' conference happening now. Since the Commission did not have much of a budget, it should take advantage of existing gatherings. He was planning to participate in the ad-hoc group. He also noted there was a need to do these sessions in urban areas, as there was no shortage of victims in urban centers as well.

Commissioner Stanfill asked if the previous facilitator, Anne Seymore, was available. Ms. Dunham said that she was contracted with Pew and theoretically available to the Commission through CJI, but she was booked through the end of the year and was not sure about her availability after that. Chair Claman asked if a facilitator would be helpful, and Commissioner Stanfill said yes, because a facilitator can allow the Commissioners present to just listen to the victims who want to speak and the facilitator is seen as a neutral party.

Preliminary Report on Bail Study

Ms. Dunham explained that the Judicial Council had performed a study of a sample of files to review bail and pretrial practices, as a follow-up to a similar study the Council had done in 2015. The new study was of cases that began between April 1 and June 30 of 2018, and took a sample from a variety of courts that was comparable to the sample taken for the 2015 study.

Ms. Dunham reminded the Commissioners that the new pretrial practices enacted through criminal justice reform had been based on research showing that actuarial risk assessments help judges make more accurate decisions than just using their professional judgment alone, that unsecured bonds were just as effective as secured bonds at ensuring appearances in court, and

that third-party custodians were detrimental to pretrial success for low-risk defendants but helpful for high-risk defendants.

Commissioner Stanfill asked what was meant by “more accurate” decision making. Ms. Dunham and Judicial Council researcher Teri Carns explained that there were a number of studies showing that the judges could more accurately tell who was low, medium or high risk for pretrial failure and what conditions should therefore be imposed on their release.

Ms. Dunham explained that the 2015 study showed that just under half of the defendants sampled were released pretrial, that most defendants were assigned a third-party custodian and/or a cash bond requirement; that on a given day, and that Alaska Natives were more likely than Caucasians to be held pretrial.

Ms. Dunham explained that the 2018 study asked similar questions, namely, what percentage of people were released pretrial, whether there were any regional differences in release rates, whether the ethnic disparity changed, whether cash bond amounts had changed, what percentage were released by the bail schedule, and what percentage failed to appear for trial. Initially the study did not seek to determine the rate of new criminal arrests for the sample. The study looked at a sample of 366 cases from Anchorage, Nome, Bethel, Fairbanks, and Juneau.

In 2015, about 48% of the defendants in the cases sampled were released at least once pretrial. In 2018, about 75% of the defendants in the cases sampled were released at least once pretrial. In 2018, about 30% of the defendants in the cases sampled were released according to the bail schedule. Of the cases that did not involve the bail schedule, 64% of defendants were released after a judicial hearing. This was the statewide average; release rates varied by location, from 53% in Bethel to 78% in Fairbanks (non-bail schedule cases).

In 2015, 10% of defendants were released on an unsecured bond and money bond was set in about 67% of cases; in 2018, 22% of defendants were released on an unsecured bond and money bond was set in 41% of cases. In 2015, there was a heavy reliance on third-party custodians; in 2018, there were only 4 cases where a third-party custodian was required (SB 91 limited the use of third-party custodians to areas where supervision from the Pretrial Enforcement Division (PED) was not available).

In 2018, about half of all defendants had drug/alcohol and/or electronic monitoring equipment conditions of release. Similarly, judges ordered PED supervision for about half of the people released at arraignment. According to recent DOC counts, about half of all defendants on PED supervision were assessed as low risk.

Commissioner Steiner wondered what the level of supervision was for those assessed as low risk. He has heard anecdotal evidence that judges are ordering conditions for some defendants that are not appropriate, which might be a training issue.

Commissioner Dean Williams noted that the number of people assigned to PED is creating capacity issues. The level of supervision is not standard, and there are cases of PED being ordered to “overwatch” some individuals. They would like the ability to go back to the court to alert the judge if conditions are inappropriate. Practices vary by jurisdiction. In cases where no specific method of supervision is ordered, PED will follow best practices.

Commissioner Razo said that he worried that PED was taking the place of third-party custody. It spoke to the need for ongoing training for DOC and the judiciary. Judge Stephens said it was also a training issue for DAs and PDs. Chair Claman said it sounded like there was a lot of uncertainty in this area and that the various departments could use a little clarity or perhaps legislative action.

Judge Rhoades noted that the therapeutic court officers could request bail review hearings, and thought that could be a model for PED officers.

Pete Harrison, Deputy Director of PED, noted that in areas with lower case volumes, PED officers will attend arraignments and can interact with the judge, but this is not possible in Anchorage or Fairbanks. There was a steep learning curve for the new division in the first 6 months, but they are now getting the hang of things. Regarding the level of supervision, they follow whatever the judge puts on the bail order. When they see orders that don't seem to match the defendant, they try to alert the court, but in some cases have been told by the DA's office not to ask for bail review hearings.

Judge Stephens noted that several PED officers came to the judicial conference in October for a training session, and that the court system intends to follow up with PED for further dialogue. Mr. Harrison said that attending the judges' conference was very helpful to them. They heard from the judges that they wanted more PED boots on the ground, and that they weren't satisfied with EM alone.

Commissioner Razo wondered if a court rule could clear up the confusion. Judge Stephens said it had not been discussed. Judge Rhoades said she didn't think a new court rule would be helpful, but a mechanism to re-set bail hearings might be.

Ms. Dunham continued her presentation on the 2018 bail study, explaining that the Failure to Appear (FTA) rate from 2015 was 14% and from 2018 was 13%; this was not a statistically significant difference.

Ms. Dunham explained that about half of the files did not include a risk assessment; upon further follow-up from the judicial council, more assessments were discovered and in the end, about one third of the files did not include a risk assessment. Nancy Meade said that Judicial Council staff had alerted the Court System to this issue and the Court System was now ensuring that the risk assessment made it to all the files. She reported that some judges do not have confidence in the utility or accuracy of the risk assessments. Judge Stephens added that the most common complaints he hears about the risk assessment is that it doesn't account for the current charge and doesn't account for out of state history. He didn't necessarily agree with that take but that was what he was hearing. Chair Claman noted that HB 312 addressed those concerns.

Commissioner Dean Williams said that he was not sure that a greater percentage of people being released pretrial meant that the pretrial population itself was decreasing. They were seeing the highest pretrial number they'd ever seen. Commissioner Steiner theorized that it was because charging was skyrocketing. Mike Matthews from DOC confirmed that the sentenced population was decreasing while the pretrial population was increasing. Bookings were up. Length of stay was decreasing. Ms. Dunham noted that the current study looked at the percentage of people released at least once, meaning that some of those who were released could cycle back in.

Ms. Dunham noted that the 2018 study seemed to show that racial disparity in pretrial release was decreasing, though this was a preliminary finding. The Judicial Council would look at this more closely, and would also look at the rate at which the defendants in the sample accrued new criminal arrests. Because the sample was taken from between April and June of this year, they would need to wait until the cases are resolved to get an accurate picture. They will also distinguish between arrests for new crimes and arrests for violating conditions of release. Preliminary analysis shows there are a lot of arrests for violating conditions of release.

Commissioner Razo thought it was important to point out that the Commission does actually review the implementation of its recommendations as required by statute. This work was important.

Brad Myrstol, director of the UAA Justice Center, explained that Troy Payne in his office was taking the lead on the revalidation study of the risk assessment tool. They will validate the existing tool and evaluate the available data for possible new metrics to include in the tool. He estimated that the whole project would take about a year to complete. Mr. Payne said they were hoping to have preliminary information to the legislature for the upcoming session.

Chair Claman noted that changing the tool based on the results of the revalidation would not require legislative action. Commissioner Stanfill wondered whether DOC had the final say in what a new tool would look like. Commissioner Dean Williams said that DOC did have final say, but they will follow whatever comes out of the revalidation study. Commissioner Stanfill suggested including the court system on the development of any new tool. Commissioner Dean Williams noted that there were extensive stakeholder meetings in the initial development of the tool, including representatives from the court system. Judge Rhoades said that there was an enormous effort to include these stakeholders the first time around, and noted that just because a group was involved does not mean the tool turned out the way they specifically wanted. Mr. Henderson observed that the law requires DOC to engage stakeholders in the development (or redevelopment) of the tool.

Commission Planning and Committee Chairmanship

Ms. Dunham explained that she had circulated a memo summarizing the recent active workgroups as well as previous workgroups that had been inactive for some time. The current workgroups were all chaired by continuing Commissioners, with the exception of the Sex Offenses Workgroup, which was chaired by Deputy DOC Commissioner Karen Cann on behalf of Commissioner Dean Williams. Commissioner Stanfill said she could serve as workgroup chair for the time being, provided that the Barriers to Reentry Workgroup was not meeting at the same time. Commissioner Razo moved to appoint Commissioner Stanfill as chair of the Sex Offenses Workgroup and Commissioner Rhoades seconded the motion. The motion passed without objection.

Chair Claman noted that the leadership of the House was still in question and therefore so was his participation in the Commission. Ms. Dunham reminded the group that Commissioner Stanfill still served as vice chair and could fill in at the start of the next meeting until a new chair was elected if need be.

Use of Jail for Mental Health Holds

Judge Rhoades said she thought most people were aware that this issue has been in the news recently: The Alaska Psychiatric Institute (API) is on divert mode and those who are the subject of a civil commitment order are being held in DOC facilities. She thought this was a civil rights violation. The Commission has recommended that prison beds be used for high- to medium-risk sentenced offenders, and the policy of holding the mentally ill in prison beds contravenes that. Also for some time there has been a number of people who are waiting to be assessed for or restored to competency languishing in in prison beds. They need treatment before their cases can go forward.

Judge Rhoades continued that there was recently an unfortunate incident lately in which a person was found not restorable but released into the community [who is now charged with killing someone]; it was not clear why this person had been released to the community. There is a gap in the standards for civil commitment and competency that can allow dangerous people to be released to the community untreated. She recalled a case that she had to dismiss because the defendant was not able to be assessed and restored within the timeframe of the maximum allowable sentence for the crime charged.

Judge Rhoades noted that this issue had previously been put before the Commission. The UNLV report had made many statutory recommendations on these issues. Tragedies continue to happen behind a veil because of confidentiality. She wanted to make a pitch for distinct movement from the Commission. She felt very strongly that these were serious issues that must be attended to.

Commissioner Steiner alerted the group that the Public Defender Agency had filed a habeas petition about this and named DOC and DHSS as defendants. He didn't think their representative should discuss this without counsel. He thought it was appropriate for the Commission to discuss this topic but there was a need to address the lawsuit issue first.

Mr. Henderson added that he also needed to abstain from this conversation.

Commissioner Dean Williams noted that this was his last meeting with the Commission, and said it had been great to participate in these policy discussions. He said that generally his sense was that this had been a serious issue for some time on a national level. He agreed with Judge Rhoades that this was serious.

Commissioner Butler summarized previous comments he had made publicly: generally speaking, this issue is a "predictable surprise"—a theory from natural disaster and terror response preparedness. A predictable surprise is one that everyone can see coming, like being killed by advancing glacier, because humans have a tendency to maintain the status quo. It will take collaborative effort and dialogue to make headway on this.

Chair Claman asked for the thoughts of the Commission on whether to refer this issue to the Behavioral Health Standing Committee (BHSC). Commissioner Steve Williams said that he was the chair of the BHSC, and noted that the UNLV report's legal competency recommendations had been discussed thoroughly; it has been sitting in a holding pattern because there was not a lot of energy behind taking it up. He thought the UNLV report discussed interrelation of the statutes in Title 12 and Title 47. He thought the BHSC should take up this issue but needed to be clear about the expectations of the BHSC in light of pending litigation and other issues surrounding API. The Commission should know there is a lot of work being done on this subject within the various

departments. He didn't want the Commission to complicate or cause problems with that work that will impede progress.

Judge Rhoades thought the whole Commission needed to understand the issues, and could start by reconvening the Committee just to get information out there. There were wider policy issues to discuss beyond the subject of the current litigation.

Commissioner Steve Williams thought it was important for the BHSC to get a briefing on what's being done at various levels, as well as the statutory issues informing this crisis.

Commissioner Razo agreed with Judge Rhoades on this. The Commission saw in the visit to Anvil Mountain that mental health issues in Alaska were being treated by incarceration. He thought the BHSC was the right place to discuss it. He moved that the BHSC make the interplay between Title 47 and the criminal justice system a high priority. Commissioner Stanfill seconded the motion.

Commissioner Stanfill said she thought she spoke for Fairbanks when she said that there was no comprehensive behavioral health system in Fairbanks; they see people cycling into criminal justice system because there was no behavioral health system to help them. She thought the issue was even broader than the criminal justice arena and that the Commission should deal with this issue but needed to partner with actors in other fields.

Judge Rhoades said that regarding the interplay between Title 12 and Title 47, the civil commitment standard does not kick in when a person is found incompetent. Some states have assisted outpatient treatment. That was recommended by UNLV report.

Commissioner Razo said this mirrors the problem the state has with addiction. Many people have co-occurring disorders—they are two sides of the same coin. There is a deficit in Alaska for humans who need treatment. The Commission's job was to identify and call out this deficit, as it has a significant effect on the justice system. This should not be ignored.

Chair Claman suggested that since the next meeting was in January, if there was time for the BHSC to meet before then, the BHSC could report to January the plenary meeting on any issues identified and steps going forward.

Commissioner Razo's motion was approved unanimously.

Judge Rhoades said she thought that some of these things had been addressed in the Commission's reinvestment recommendations. She noted that so far, reinvestment treatment funding has only gone to DOC, and was not entirely spent; nothing was added to prevent people with treatment needs from becoming justice-involved in the first place. The new administration has signaled it will be looking closely at DHSS's budget, and she thought the Commission could help highlight importance of allocating resources for this purpose.

Closing Announcements

Commissioner Steve Williams said he wanted to acknowledge the Commissioners who might not be around for future meetings, as well as their staff who have participated in the Commission's work and probably put in a lot more legwork and effort into implementation of criminal justice reform. Commissioners Claman and Razo echoed this sentiment.

The Commission decided to move the January 18 plenary meeting to January 24, starting at 11:00 a.m. in Juneau.

Commissioner Stanfill suggested that if the next meeting was going to be in Juneau, the Commission should make the most of its time there and do something legislative- or Juneau-specific—e.g. a lunch and learn. Chair Claman said that he could facilitate something along those lines.

Commissioner Butler announced that DHSS just completed its Opioid Action Plan. The Opioid Action Plan is the product of engagement in over a dozen communities around Alaska over the past year. DHSS hosted the events and compiled information, but the Action Plan is based on what was said by community members around the state, including those in active recovery or currently suffering from addiction.

[The report is available online at <http://dhss.alaska.gov/dph/Director/Documents/heroin-opioids/Statewide-Opioid-Action-Plan-2018-2022.pdf>]

Commissioner Butler added there had been 41 deaths confirmed through early November of this year, compared with 100 during all of 2017; however, it should be noted that there can be a delay of up to 2-3 months before the case counts are confirmed.

Public Comment

Michael Berger said that he had, all told, probably served around 20 years in the criminal justice system in Alaska. He was tired of seeing friends fall into addiction and homelessness. When he first came out of prison 1989 there was very little help for people like him but there was now a lot, especially from Partners for Progress. He added that he used to be the editor of the Bristol Bay Times and the Arctic Sounder. He wanted to comment on including former prisoners in the Commission's process.

Mr. Berger noted that everything he did to get involved in the criminal justice system was because of his addiction, though he was clean for three years now. He said that despite the ongoing discussion of SB 91, no matter what the law was, if a person is on drugs, that person will go out and steal for it. That was what he did.

Mr. Berger added that there had been a lot of discussion on risk assessments and studies but he could tell if someone will reoffend or not. The reasons people offend are usually same. People released in to Anchorage never make back to their village because they are facing addiction and homelessness. He thought state could save time and money by getting more input from reentrants. He lives with a lot of reentrants now, and thought that there were things that could be done for them to help them address their addiction. He also noted that IV drug use is much more prevalent now. Lots of people are forced into treatment, but they won't succeed unless they're actually ready, and have reason to succeed.

Mr. Berger said that he has had to face the issue of barrier crimes. He tried to get a drug and alcohol counseling certificate, but has a lifetime ban because of his criminal history. He understood why barrier crimes existed, but in this case it stopped someone with experience from helping others. He can't help friends who are felons because they are all on probation/parole; it's hard to see them suffering from addiction and not help.

Commissioner Stanfill explained that the Commission has been looking at barrier crimes, and she knew revisions were made to the regulations. She asked Mr. Berger if he was able to do peer support through the reentry center. Mr. Berger explained that he had a permanent barrier because he was convicted of robbery, although he didn't use a weapon, and he was not able to do peer support. There is a variance process, but employers typically don't get to that point.

Leslie Hiebert explained that she was a local attorney and that she sat in on Commission meetings a few times previously. Regarding pretrial release, she didn't think "better safe than sorry" was the right approach; she thought generally people should be released before conviction and punished after conviction, and thought that some pretrial practices were a way of creating predicates for new charges. She said she appreciated how much the Commission has done. She asked Commissioners to remember that the constitution guarantees a person's release unless there is a reason to keep them in jail or they are found guilty.

Josh Fannon said that he was a local attorney and just found out about meeting about 30 minutes prior to calling in. He wanted to alert the Commission to loopholes in the felony DUI license reinstatement process; these are significant loopholes that go against the intent of the new laws. In short, form CR-741 allows someone convicted of a felony DUI to get their license back. This procedure was attached to the therapeutic courts in several locations. People in those locations are now in a catch-22. If someone has a felony DUI conviction from a location with a therapeutic court, that person can't apply to get their license back if they didn't complete therapeutic court. If there is not room in the program or the person is not assessed to be at the right level of therapeutic need for the therapeutic court, the person can't apply to get their license back.

Clinton Serta explained that he was a client of Mr. Fannon, and wanted to echo what Mr. Fannon was saying. The statutory language reads that to get your license back, you must be court-ordered to therapeutic court. He got a flat sentence, so never got that court order, and had no opportunity to go to therapeutic court. He tried submitting the forms anyway but was denied.

Janet McCabe said that she was representing Partners for Progress, and she wanted to pass out their latest data sheet. They served 343 people in November; participation typically increases in winter. She also noted that reentry center director Cathleen McLaughlin was in Juneau where they want to start their own reentry center. She thanked Chair Claman for attending their last meeting.

Janet Kincaid from Palmer said she wanted to echo what Mr. Fannon said. She said that alcoholism is a problem, but thought there needed to be a way for people to get their license back. She has worked with a faith-based program and knew firsthand that it was possible for people to get sober, and she wanted those people to get a second chance.