Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
Nov. 14, 2016 from 2:00-4:00 at the Snowden Training Center with Teleconference

Commissioners Present: Alex Bryner, Quinlan Steiner, Brenda Stanfill, Trevor Stephens, Greg Razo
Participants: Rob Henderson (LAW); Taylor Winston (OVR); Josie Garton (PD), Dunnington Babb (PD)
Staff: Barbara Dunham

The group convened at 2:00 PM.

1. **Language for recommendation to the legislature re: acceptance of responsibility mitigators**

Barbara brought language (taken from Mary's sentencing report) regarding the mitigators already approved by the Commission to be shaped into a recommendation to send to the legislators. Rob Henderson asked whether the Commission would also send legislative commentary to include with the recommended statutory change. The group noted this would be different from the recommendation (essentially a memo to the legislature); commentary would be included with the bill creating the statute and would go into statute books. Greg Razo stated he was reluctant to provide commentary or specific statutory language. Quinlan Steiner agreed that providing commentary was unnecessary but thought the statutory language should be included so the legislators have somewhere to start. Alex Bryner noted that his concern with the mitigators was that fairness could be compromised if defendants took a deal before they were represented, and that it would have a chilling effect on the defendant's right to raise valid defenses. These concerns would be allayed somewhat by providing commentary—otherwise the legislators might not "get it."

Ultimately the group opted not to provide statutory commentary with the recommendation, with most members agreeing that the intent behind the mitigator can be conveyed to the legislature during the drafting process.

Barbara will revise the existing language to draft the recommendation—group members are welcome to offer suggestions.

2. **Revisions to law surrounding GBMI/NGI**

Josie Garton explained her memo on GBMI. The Behavioral Health Workgroup referred this issue to the Sentencing Workgroup because it felt more like a sentencing issue. The scope of this problem is not reflected by the actual numbers of people found GBMI—most defense attorneys will counsel their clients to remain silent about existing mental health issues to avoid getting a GBMI finding. If someone is GBMI, DOC will not release them to parole or furlough while they are still receiving/in need of medication. Josie noted that other states treat this issue differently—they will have periodic resentencing or something similar.

Rob Henderson asked what the UNLV recommendation was. Josie replied that it was to replace GBMI with the M'Naughten test. He also asked whether mitigator (d)(3) might serve as an adequate substitute. Josie said there would be a lack of uniformity in implementation that way. Rob suggested getting a behavioral health specialist to participate in the group's discussion on this, and the group generally agreed. He noted that there were specialists on the defense review group for NGI findings, though there are not many professionals who qualify (the same problem that the competency review

process has). Greg Razo asked how many people were found GBMI. Josie replied that about 15-20 per year were GBMI but many more could fall into that category. Greg suggested more information was needed on this. Taylor Winston suggested having someone from API and from DOC talk to the group. Rob asked whether it might be worthwhile to form a separate workgroup just for this one issue.

Quinlan Steiner suggested that there were really two different questions- one, whether to make any legal changes (i.e. reinstitute NGI) or whether to make any changes to how mentally ill defendants are treated (i.e. change the consequences for GBMI verdicts or discard GBMI). The threshold question is whether the group is interested in tackling this issue at all. There were no objections to tackling the issue, and the group agreed to learn more about it.

The group generally agreed that it would be useful to hear from representatives from DOC (to know how GBMI and mentally ill offenders are treated) and API (to understand their capacity and how they would be affected by changing the laws). Barbara will reach out to both organizations. Barbara will also provide the group with the Behavioral Health Workgroup's recommendations to see what they have discussed.

3. Post-offense, pre-sentencing treatment mitigator

This mitigator had previously been discussed, but no recommendation was made. Quinlan Steiner asked for a reminder as to why this was. Rob Henderson explained that there had been no agreement, and the hang-up was that some were concerned that it would incentivize delay. Quinlan noted that there was a difference between pretrial and presentence delay. Taylor Winston stated that victims have a constitutional right to a speedy case disposition. Quinlan didn't think that applied to presentence delay. Rob said the concern was that defendants would ask for continuances both pretrial and presentencing. Brenda Stanfill also said delay was a concern but pointed out that some batterer's intervention programs were only 30-45 days which would not be much of a delay.

Trevor Stephens noted that defendants are already incentivized to do this to get *Nygren* credit. He also pointed out that judges will think long and hard about whether to grant this mitigator, and that not all cases would involve a victim (felony DUI, for example). He also thought that an effective treatment program for alcohol and drug offenders would be much longer than 30-45 days—6 months at least. Dunnington Babb asked whether the group could agree on a length of delay that would disqualify use of the mitigator.

Alex Bryner asked whether the mitigator could be applied in anticipation of and conditioned on program completion, as a sort of suspended sentence. Josie Garton suggested the same idea could be applied using a post-sentencing sentence reduction mechanism. Quinlan thought that there could be an extension for motions to modify in this instance—currently the period in which motions to modify are allowed is relatively short, which leads defendants who might want to file such a motion to file PCRs instead.

Quinlan asked whether the mitigator was off the table and whether the group was more interested in pursuing a motion to modify. Brenda Stanfill said she would actually prefer to have a non-plea mitigator, because Rule 11 agreements often leave out victims, and victims are more likely to participate at the sentencing phase. Alex asked whether the proposed acceptance of responsibility mitigator could cover treatment completion. Josie said that it could probably be stretched to cover that

but there is value in specificity; if the other mitigator was used to reward treatment completion it might not be applied uniformly.

Quinlan suggested he would have someone at the PDA draft two alternative proposals: a mitigator for completed treatment and a special motion to modify. The group agreed.

4. Three-judge panel

The discussion started with a disagreement on whether there had been a disagreement on this topic. Trevor Stephens thought the group had come to an agreement on a small fix. Quinlan Steiner said that he and others didn't want to proceed piecemeal in this area and would rather redo the statutes completely. Trevor said that he was willing to do either, so long as something was done—there was a new decision just last week from the Court of Appeals which has added to the three-judge panel confusion. [*Fulling v. State*, for reference] He thought that the legislature and the Court of Appeals had envisioned that the panel would get more use than it has.

There was no opposition from anyone in the group to rewriting the statute entirely. It was agreed that a small group would collaborate on this and then circulate a draft of the rewritten statute. Quinlan volunteered Mike Schwaiger of the PDA, Rob Henderson volunteered Kaci Schroeder from Law, and Trevor volunteered himself.

5. Flat-timing

This issue had been discussed before with no real movement in any direction. Rob Henderson noted this was not a constitutional issue and that a way to prevent flat-timing would be to expand AS 12.55.125(o), which prohibits flat-timing for sex offenders, to all felony offenders. Josie Garton noted that there was an appellate decision forthcoming on this topic. Barbara noted that SB 91 was designed in part to focus on probation and that if felony offenders were flat-timing that might affect the projected savings and recidivism reduction rates.

Brenda Stanfill said that she had brought this up previously because she thought victims would prefer defendants to have supervision once released from prison. Taylor Winston thought that there would not be a lot of utility in forcing people to probation who didn't want it because they would just violate probation and serve the remainder of their sentence anyway. Dunnington Babb said that most people who choose to flat-time would be high risk offenders likely to fail on probation, so the effect may not be that great. Rob said that he had just heard about a case where a first-time felon charged with a C felony didn't want probation, so pled to both the C felony and a violation/PTRP at the same time to get jail time.

The group agreed to table the discussion for now. Brenda said she would raise the issue again in the future if she thought it needed attention.

6. Sentencing implementation issues post-SB91

Barbara asked whether any of the agencies had experienced any issues with SB91's new sentencing ranges. The group generally agreed that it was too soon to tell if there were any real issues other than acclimating to the revised statutes.

7. Next meeting

The next meeting will be at 2pm on January 25th, location TBD.

8. Public comment

There was opportunity for public comment, but no additional comments were made.

The meeting ended at 4:00 PM.