Meeting Summary

Alaska Criminal Justice Commission
Sentencing Workgroup

March 1, 2018 9:30-11:30
Denali Commission Conference Room, 510 L Street, Suite 410
And Teleconference

Commissioners present: Joel Bolger, Greg Razo, Trevor Stephens, Sean Case, Brenda Stanfill

Participants: Josie Garton, Chanta Bullock, Laura Brooks, Rob Henderson

Staff: Susanne DiPietro, Barbara Dunham

Revisions to law surrounding GBMI

Josie Garton summarized last year's discussions on the Guilty But Mentally Ill (GBMI) and Not Guilty By Reason of Insanity (NGI) statutes. The proposal to amend these statutes stemmed from the UNLV report which recommended broad revisions to Alaska's mental health statutes. Over the course of the last year this group narrowed its focus to just looking at the disposition statute for GBMI offenders. Under that statute, GBMI offenders may not be released on furlough or parole if they are receiving treatment. They are therefore spending a much longer time in custody than a similarly situated defendant who is not GBMI.

Josie explained that the statute passed in 1982 and no GBMI offenders have been released in that time. As it is interpreted now, the statute conflates the idea of dangerousness with the need for treatment. There is no formal review process to assess the dangerousness of GBMI offenders when they become eligible for furlough and parole. The proposal she had distributed for today's meeting would put a review process in statute.

Justice Bolger asked to clarify that the proposal would have no effect on the trial courts or the sentencing process. Josie said that was correct. An offender may be dangerous at sentencing but not dangerous once they are eligible for release. The relevant time to assess dangerousness would be at a review process close in time to when the offender is eligible for release.

Sean Case asked who currently determines dangerousness. Josie said that if the offender is still receiving treatment, they are considered dangerous for DOC's purposes. There was no review process until about four years ago when a few inmates challenged DOC's policy. DOC now has an ad-hoc process in place. Its policy is that receiving treatment includes being on medication, so if an offender is on medication, they will not be released. She thought the language in the statute was probably based on outdated ideas about mental health. We know now that many people with mental illness will need medication for life.

Laura Brooks from DOC said that Josie's assessment was correct. The statute (AS 12.47.050) requires DOC to provide treatment to GBMI offenders "until the defendant no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public."

Josie noted that the statute seemed to have been drafted hastily, and that the legislators had intended that some kind of parole process be put in place. Justice Bolger said he remembered that that was the case, and that this statute was intended to be a humanitarian alternative. He also agreed that it was probably based on outdated ideas about mental health. He wondered what Laura thought about the proposed changes to the statute.

Laura said that Josie was right that DOC's current approach is ad-hoc. They have been trying to formalize their procedures, but DOC would appreciate some guidance in this area. She also noted that there have been countless people released from DOC custody who are not GBMI offenders but who are mentally ill and may be just as dangerous as a GBMI offender.

Josie thought the questions presented by this problem were (1) should there be a review process to assess the present dangerousness of GBMI offenders once they are eligible for parole and (2) what should that process look like. She walked the group through her proposed changes to the statute:

Amend AS 12.47.050(d): Notwithstanding any contrary provision of law, *if the Commissioner of Corrections determines, by clear and convincing evidence, that the defendant suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety* a defendant *found guilty but mentally ill* ~~receiving treatment under (b) of this section~~ may not be released

(1) on furlough under AS 33.30.10-33.30.131, except for treatment in a secure setting; or
(2) on parole.
(3) Not less than 60 days before a defendant found guilty but mentally ill is eligible for parole under AS 33.16.089, AS 33.16.090 or AS 33.20.040 or furlough under AS 33.30.101, the commissioner of corrections shall determine, following a hearing, whether the defendant is ineligible for release under this subsection.
(4) If the commissioner determines that the defendant is ineligible for release under this subsection, the commissioner shall conduct a subsequent hearing under (3) of this subsection within one year of the first parole or furlough eligibility date.

Amend AS 12.47.050(e): Not less than 30 days before the expiration of the sentence of a defendant found guilty but mentally ill, the commissioner of corrections shall file a petition under AS 47.30.700 for a screening investigation to determine the need for further treatment of the defendant if

~~(1) the defendant is still receiving treatment under (b) of this section; and~~
(2) the commissioner has good cause to believe that the defendant is suffering from a mental illness *and is likely to cause serious harm to self or others;* ~~that causes the defendant to be dangerous to the public peace or safety;~~ in this paragraph, "mental illness" *and "likely to cause serious harm to self or others"* have~~s~~ the meaning given in AS 47.30.915.

Greg asked how the hearing would work. Josie said DOC would have to work out the logistical details but the proposed change to subsection (d) would create a new administrative process setting a standard and burden of proof for DOC. She assumed this process would be triggered if DOC believed someone should not be released, and she expected that it would involve looking at evidence of the offender's offense, the course of treatment since sentencing, and present behavior.

Susanne DiPietro asked why clear and convincing evidence was the chosen standard. Josie said that in order to be released on mandatory parole, the offender would have had to not lose good time.

The proposal assumes that if the offender is eligible for mandatory parole they would have behaved well enough to warrant a higher standard of proof that they were dangerous. If the offender is eligible for mandatory parole, the offender has a liberty interest in being released; denying the offender release should require a higher standard.

Susanne asked whether the parole board makes these kinds of determinations. Laura said that they ask her department (Health and Rehabilitation Services) for inmate information, for example a summary of an inmate's mental status. She said the parole board makes safety and dangerousness determinations every day, and they'll use her department's assessment of the inmate's current behavior.

Josie related that there was a case in the Valley where a GBMI offender who was sentenced to a 20-year term asked for discretionary parole. Ultimately, a court said the parole board had to take his application. The board then considered the application and determined the offender was too dangerous to release.

Laura asked Josie what the intent was for proposed subsection (4). Would there only be one subsequent hearing, or would it be annual? Josie said the idea was to have an annual review. Laura suggested making that explicit. She thought that part wasn't clear but the rest was. She and other DOC staff had reviewed the proposal and agreed it would help provide guidance.

Justice Bolger asked how this process related to the NGI process. Josie said that if a defendant is found NGI, they are entitled to a hearing immediately thereafter where it is their burden to prove they are not dangerous. If they are found to be dangerous, they are committed and will go to API. This is all in theory since no one is found NGI anymore. NGI patients are entitled to a yearly review of their commitment status in trial court. The commitment doesn't have to be secure- it's possible the patient may be held in the community.

Susanne asked what was involved in the change to subsection (e) of the statute. Josie said this was for defendants who had served their entire sentence and could no longer be held in DOC custody, and for whom civil commitment proceedings should be initiated. The current standard mirrors the GBMI standard, but it makes more sense to use the civil commitment standard. Laura said that if an inmate was required to be released but a clear risk to the public, DOC's process was to contact Emergency Services and have them civilly committed and transferred right from DOC to API.

Greg said that this proposal made sense, particularly since it appeared there were GBMI cases that were unresolved. Judge Stephens agreed. Sean Case said he liked the proposal; it sounded like some needed aspects got left off the table in 1982 and this would remedy that. Justice Bolger said he agreed with the general idea.

Rob Henderson said that he and Josie had been discussing this for a while. He agreed there should be a procedure, but had asked the lawyers for DOC and DHSS to review this specific procedure before signing off on it. He hadn't yet heard back from them. Greg asked if they will have had enough time to review it by the next plenary meeting. Rob said they should. Greg said in that case, he thought the group should just move the proposal forward to the full commission. There was no objection to moving the proposal forward.

Susanne explained that staff had been trying to offer more in-depth presentations for complicated proposals such as this, and asked if Josie would be willing to do this presentation. Josie said she could.

Juvenile auto-waiver

Barbara Dunham explained that this group had held some preliminary discussions on juvenile auto-waiver cases last year. The group had discussed the fact that there was no safety valve provision for the auto-waiver statutes, and Alaska was somewhat behind the national curve on this. The group had wanted to gather more data about auto-waiver offenders so know what the potential impacts of changing the auto-waiver statute might be. Justice Bolger had compiled data from the court system for this meeting.

Justice Bolger said he had to run a few CourtView searches to get the data, and he also sent his data to Heather Nobrega and John Bernitz to get their help. The data set includes all cases where the offender was under age 18 on the date of the offense and the offense was an unclassified, class A or class B felony. The search parameters didn't track the auto-waiver statute exactly, but the felonies that showed up in the results are all found in that statute. He also assumed that if they were under 18 at the time of the offense that the charges were properly filed in adult court pursuant to the statute.

Justice Bolger said that it struck him that often juveniles who are put in adult prison don't do well on release, and some of the offenders on this list could be looking at sentences of five years or less. The more serious charges could warrant longer sentences, but some first-time defendants convicted of a class A felony could be looking at a sentence of five to ten years. He didn't have any conclusions to offer but was just interested in defining the scope of the issue at hand. He also noted that the total number of cases was less than 150, and it wouldn't be hard to do a case file review to get additional information.

Josie Garton said that John Bernitz has been trying to compile his own list of auto-waiver cases since the law changed in 1996. He was happy to see this list. She wondered if it was possible to get the same information on cases since 1996. Susanne said it might be possible but the query might miss some of the pre-conversion cases.

Rob noted that the average seemed to be about 25-30 cases per year; he noted this was not a lot of cases in the grand scheme of things. Susanne said it might seem like a lot of cases to DJJ if they have to house another 25 juveniles per year. Barbara noted that perhaps not all cases would go back to DJJ depending on what kind of proposal the group came up with.

Rob wondered if the Judicial Council staff could break down the list provided by Justice Bolger even more—separating out cases where the defendant was sentenced to 7 years or more. That would be relevant if the thought was to extend DJJ's jurisdiction to age 25. Susanne said that staff would need to request sentencing information from DPS.

Josie said it was important to note that some of these cases would also be likely to receive a discretionary waiver.

Rob wondered if there was a reverse waiver process. Josie said that there was no real reverse waiver process, but if a juvenile was auto-waived into adult court and convicted of a non-auto-waiver offense, the case would go back to DJJ. Justice Bolger noted that a case that started as an auto-waiver case would mean the juvenile would be treated as an adult and taken to an adult facility even if they don't remain there—there is harm in that alone.

Rob wondered if DJJ and DOC could agree that DJJ could house those convicted in auto-waiver cases. Laura said that DOC has about 13 such people in custody right now—they have no way to transfer those people to DJJ. Rob thought that that was a limitation that should be part of the conversation.

Barbara noted that she had intended to research the question of whether there are differences in recidivism measures for those in juvenile custody and those in adult custody. She said she would look into that for the next meeting. Rob said it would also be good to get a compendium of best practices and statutory schemes from other states. Josie said that was something John Bernitz was working on. Susanne suggested the ABA might have some research on that too.

Josie and Rob agreed that discussions on this topic would likely involve raising age DJJ's jurisdiction. Rob said it might also include looking at a reverse waiver provision or modifying DOC's housing authority to house auto-waiver defendants at DJJ. Josie noted that the auto-waiver statute said that the juvenile "shall be held as an adult" so if changing housing for those defendants was on the table it would likely involve changing that part of the statute.

Justice Bolger asked whether the idea would be to extend DJJ's jurisdiction generally or just to cases where supervision needed to be extended to age 25. Rob said he was thinking that it would be just an extension of jurisdiction in these cases and would not alter DJJ's jurisdiction as it pertains to charging. Justice Bolger said he was interested in looking at Class A felonies and SA/SAM 2s—a potential change could include a reverse waiver provision plus extension of DJJ's age jurisdiction for those cases.

Rob said he was also interested in looking at the potential effect of cohousing 16- and 17-year-olds with 21- to 25-year-olds.

Josie said it would also be worth looking at who among the auto-waiver population might also be subject to a discretionary waiver. Rob noted that discretionary waivers are very rare; he could think of two cases over the last few years.

Barbara agreed to work on the research topics identified and to ensure that a DHSS representative would be able to attend the next meeting.

DV Sentencing/Programming

Barbara explained that at the last plenary Commission meeting, the Commission heard two proposals for sentencing in DV cases that were referred to this working group. One was to create a mandatory 99-year mandatory minimum sentence for people who kill their spouses and the other was to create a one-year mandatory minimum sentence for violating a DV protective order. She also explained that the Commission was interested in looking at the issue of DV offending more broadly and that Quinlan Steiner and Brenda Stanfill were headed to Juneau next week to speak with CDVSA representatives at their summit. They would report back to the workgroup at the next meeting, and the workgroup would hold off on taking any action before then.

Josie asked to clarify whether the proposed minimum sentence for violating a DV protective order was intended to apply to all respondents of a DVPO or just spouses or romantic partners. Susanne said the thought the intent was that it would apply to the latter group only. The idea behind the proposal was that the yearlong sentence would give the victim in that case time to make a clean break from the defendant.

Josie asked whether the proposal for the mandatory 99-year sentence was intended to apply to sentencing in first-degree murder cases. Susanne said she wasn't sure, but the idea was to make it comparable to the sentence enhancement for killing a police officer, which would apply to first-degree murder.

Justice Bolger said he had some reservations about that proposal because there is a wide variety of discretionary factors to consider in such cases. In the case of killing a police officer, it is a narrow concept and the act is typically a brazen one manifesting an extreme indifference to human life. But there may be a variety of situations that apply to the killing of a spouse. A person may be convicted of first-degree murder despite having an imperfect defense, such as a case where a wife who has been abused for many years kills her husband but is unable to prove self-defense or battered women's syndrome. Susanne noted that it was clear from the proposal that it was intended to apply to husbands who kill their wives.

Rob noted that there is a sentencing aggravator for DV cases. He said he would be interested in the average sentence for first-degree murder DV cases. Susanne thought there probably wouldn't be many, and staff could look into it. Judge Stephens said there would probably be a small enough number that staff could pull the individual cases to see if the aggravator had been sought or applied at sentencing. Justice Bolger added that it would also be possible to pull the complaint to find out the specific circumstances for the case.

Susanne suggested that the search parameters would be all cases where the initial charge was first-degree murder, then looking at whether the defendant was convicted of that charge and any other information. She said staff could prepare a memo, but the Commission only has data going back about a year and a half, which might not yield a large enough sample size. Justice Bolger said he might be able to get additional data if it turns out the Commission did not have enough to go on.

Rob wondered how other states approach the DVPO violation issue. Susanne suggested that the federal VAWA office may have a clearinghouse of some sort.

Brenda said that she would prefer to take a holistic approach to looking at the problem of domestic violence. She said that victim's advocates would likely push back on the DVPO proposal because often those who violate DVPOs are actually the victims. Susanne added that the proposal could also have a chilling effect and affect the victims' willingness to report violations.

Brenda said that increasing criminalization of DV hasn't really helped the problem. Essentially you can't really force someone to stop loving another person. The important thing was to have funding and resources available for victims to get into housing and employment so that they can make a clean break when they are ready. She added that there are also very dangerous offenders who don't ever serve time, and that was one area where improved sentencing practices could help. But there was no easy fix. She is going to work with the Council to see what their solutions are and she wanted to work on a comprehensive approach to this problem. It will take some time, but there is already a good group of people working on this. They may need the Commission's help with research. She thought it would probably be a six-month process.

Public comment

There was an opportunity for public comment but none was offered.

Next meeting

The group agreed to next meet in May. Barbara would send out a Doodle poll and ensure the participation of someone from DHSS.