Meeting Summary

Alaska Criminal Justice Commission
Sentencing Workgroup

May 12, 2017, 2-4pm
Denali Commission Conference Room, 510 L Street, Suite 410
Teleconference line 1-800-768-2983, access code 513 6755

Commissioners: Quinlan Steiner, Trevor Stephens, Brenda Stanfill, Alex Bryner

Participants: John Bernitz, Rob Henderson, Josie Garton, Cindy Strout, Jon Woodard, Kathy Hansen, Mike Schwaiger, Kaci Schroeder

Staff: Barbara Dunham

Revisions to law surrounding GBMI/NGI

Josie Garton and Rob Henderson are working on changes to the GBMI statute that would alter the consequences of a GBMI verdict. They should have something by the next meeting.

Modification of sentence for post-offense, pre-sentencing treatment

Barbara explained that the group had previously looked at a mitigator to be applied at sentencing for offenders who have completed treatment before sentencing. However some were concerned that this might incentivize delaying sentencing and would not be beneficial to victims. Quinlan Steiner had therefore circulated an alternative proposal to amend the Modification of Sentence statute as follows:

> **§ 12.55.088. Modification of sentence**
>
> (a) The court may modify or reduce a sentence by entering a written order under a motion made within 180 days of the original sentencing.
>
> **(b): Notwithstanding subsection a), the court may modify or reduce a sentence by entering a written order upon motion made at any time if the defendant has completed all court ordered rehabilitation programs.**
>
> [Renumber current subsections b) – h) to c) – i).]

Quinlan explained that under the current statute, motions to modify a sentence are rarely filed because there is seldom a reason to do so within the short timeframe of 180 days. This proposal will eliminate the 180-day barrier for some defendants. The Public Defender Agency sees a lot of applications for post-conviction relief (PCR) that do not actually qualify for relief under the statute, but really just seek a sentence modification. This is a way to reduce the volume of costly and time-consuming PCRs.

Quinlan said there had previously been talk of also requiring the offender to pay all fines and restitution, and he considered this, but didn't want eligibility to hinge on the ability to pay.

Rob asked whether this motion would be available in every case. Quinlan said it would. Rob wondered if there was any way to limit the application. Quinlan said that the motion wouldn't necessarily require a hearing; it could all be done on paper if the court denies the motion, but if the court is inclined to grant the motion it could order a hearing. Brenda Stanfill noted that there didn't seem to be a time limit to the motion and asked if that was correct. Quinlan said it was, but it would necessarily be limited to one use—public defenders would include that in their advice to clients.

Rob noted that the purpose of the current 180-day limit is closure, which has a benefit both to the direct victims of the crime and to society. Someone whose case was closed 10-15 years ago could theoretically submit such a motion. He was also concerned that there was no limit to the type of case eligible for the motion. He thought there might be a path forward here but was worried this proposal was too broad. He suggested limiting it to a certain time after completing the rehabilitation program.

Cindy Strout said that she might charge a private client up to $30,000 for a PCR given the time-intensive effort it takes, when really all the client wants is for the judge to take a look at their case again.

Quinlan noted that the law was changed to restrict the availability of the motion to 180 days because offenders were making repeated motions, but the time limit made the statute overly restrictive. No one contemplated the motion never being used. Rob said that it made sense to him to have the 180-day period as that would be enough time to correct any mistake in sentencing. He wondered why the legislature chose that time frame. Quinlan wasn't sure and agreed to look into it.

Brenda said she was still processing the proposal and was struggling with it as closure is very important to victims. She understood that it would not be granted automatically to victims. Would the victim be notified? Quinlan said not necessarily, and Josie added that if the court wanted to deny the motion, there would be no point, but if the court is actually considering granting the motion, it could seek input from the victim.

Quinlan noted that theories of rehabilitation were changing, and that there were evolutions in treatment that warranted addressing this concept. Brenda said she understood wanting to have a motivation to encourage people to get into treatment quickly for low-level crimes, but this might also be used by offenders who have committed higher-level crimes as a way to get their lengthy sentences reduced. She wondered if there should be parameters on the type of crime eligible for the motion.

Kathy Hansen pointed out that AS 12.55.090(b) already allows a probationer to modify his or her sentence. She thought it would not be fair to the victim if this motion were granted to someone still in jail. Brenda asked whether she wanted to consult about limiting the type of crime this might apply to. Kathy said that for her and OVR, this proposal was a nonstarter.

Judge Stephens thought there was some utility in the idea but shared the concerns of the victims' advocates. There is already an incentive to complete treatment in SB 91—the earned compliance credit to reduce time on probation/parole. Quinlan said that was true, but there is nothing in SB 91 that could reduce actual time spent in prison.

Quinlan said he would look into the reason behind the 180-day time bar and would set this on the next agenda.

Juvenile auto-waiver

Quinlan said he sent around the white paper from DJJ on rethinking the automatic waiver for juveniles as a starting point to think about possible revisions to this law. There is a growing body of data that outcomes are worse for youth waived into the adult system compared with those that stay in the juvenile system. There is also no graduated or dual system in Alaska—it is either one or the other. There has been some discussion on changing the auto-waiver in Alaska, and even on extending juvenile jurisdiction to age 26. He had no specific proposal but has secured the blessing of the full Commission to have this group take up the topic. He wanted to discuss the issue at this meeting and kick around some ideas. He introduced John Bernitz, the public defender for juvenile clients, who could answer any questions about how the juvenile system works.

John pointed out that Cindy Strout has also done a considerable amount of work for juvenile clients and was also authoritative in this area. He said he agreed with much of what was in the DJJ white paper. Among other things, the juvenile auto-waiver eliminates the system's ability to get juveniles who may be fully amenable to rehabilitation out of the adult system. A discretionary waiver system would allow the adult system to be reserved only for the worst juvenile offenders.

Rob noted that there were 19 youth in DJJ custody for Class A or unclassified felonies—were any of those youth age 16 or over? John and Cindy replied no, there was no way for a juvenile age 16 or over to avoid autowaiver unless the parties agree to a plea deal in which the juvenile is charged with a lesser felony (thereby avoiding triggering the auto-waiver provision).

Rob wondered where Alaska was at in comparison to other states. John replied that Alaska was behind the curve in this regard. Many other states do not have an automatic wavier and most states seem to be moving away from ideas like this. An Ohio court recently ruled that an automatic waiver provision with no safety valve was unconstitutional. There has been a lot of discussion in legal circles (including the US Supreme Court) about recent developments in neuroscience research on juveniles.

Cindy added that many studies have also shown that incarcerating kids in adult prisons actively makes them worse—especially if they are put in segregation for protective custody purposes. She believed DOC was trying to set up a youth unit. John added that DOC has been working to ensure that no youth are kept in isolation.

Rob asked what Quinlan's plan was. Quinlan said he was open to ideas—either it could be a new package of laws or it could be carve-outs in the current system. There just needed to be some way to get kids who can be rehabilitated out of the adult system. John suggested that whatever the ultimate proposal may be, it should make sense. Most developments in juvenile justice law are created in reaction to events. If the focus is truly to be on which individuals are amenable to rehabilitation, then there shouldn't be crime-specific exceptions.

Rob asked what data might be available, particularly in terms of the number of juveniles autowaived and their average sentences. Barbara explained that beyond the data in the DJJ white paper, AJC did not have that data readily available and this would likely require a file pull of some sort. John said that he had been compiling a database of juvenile cases that would answer those questions, although the database did contain confidential information. Rob said he would be interested to know the breakdown of charges, and also what other states do in this regard.

It was decided that John would put ideas together about reforming autowaiver, and anyone with comments or ideas can forward them to him. Cindy will look into what other states are doing in this area. Barbara will look for studies regarding the cost effectiveness of keeping juveniles in the juvenile system rather than in adult facilities. She will also ensure that someone from DHSS/DJJ such as Karen Forest will be looped in to perhaps join the next meeting.

Mandatory minimums for Second-Degree Murder/Vehicular Homicide

Quinlan had a proposal for an exception to the mandatory minimum sentence for second-degree murder in the cases of vehicular homicide. The mandatory minimum was increased for second-degree murder in SB 91 (one of the provisions that did not stem from a Commission recommendation). The mandatory minimum does not allow a judge any discretion at sentencing. If multiple people are killed in one crash caused by the defendant, and the defendant is convicted of vehicular homicide, the sentence must be consecutive for each death. During the legislative process there was a proposal to give judges discretion in this area but that proposal was lost in committee. Quinlan's proposal was as follows:

AS 12.55.127. Consecutive and concurrent terms of imprisonment

. . . .

(c) If the defendant is being sentenced for

(1) escape, the term of imprisonment shall be consecutive to the term for the underlying crime;

(2) two or more crimes under AS 11.41, a consecutive term of imprisonment shall be imposed for at least

(A) the mandatory minimum term under AS 12.55.125(a) for each additional crime that is murder in the first degree;

(B) **one-fourth of the mandatory minimum under AS 12.55.125 (b) for each additional crime that is murder in the second degree and the crime are based on a single act that resulted in death to more than one person.**

(**C**) the mandatory minimum term for each additional crime that is an unclassified felony governed by AS 12.55.125(b) **other than murder in the second degree under AS 12.55.127(c)(2)(B)**;

~~(C)~~**(D)** the presumptive term specified in AS 12.55.125(c) or the active term of imprisonment, whichever is less, for each additional crime that is

(i) manslaughter; or

(ii) kidnapping that is a class A felony;

~~(D)~~**(E)** two years or the active term of imprisonment, whichever is less, for each additional crime that is criminally negligent homicide;

~~(E)~~**(F)** one-fourth of the presumptive term under AS 12.55.125(c) or (i) for each additional crime that is sexual assault in the first degree under AS 11.41.410 or sexual abuse of a minor in the first degree under AS 11.41.434, or an attempt, solicitation, or conspiracy to commit those offenses; and

~~(F)~~**(G)** some additional term of imprisonment for each additional crime, or each additional attempt or solicitation to commit the offense, under AS 11.41.200--11.41.250, 11.41.420--11.41.432, 11.41.436--11.41.458, or 11.41.500--11.41.520.

. . . .

Quinlan said his proposal still restricts a judge's discretion in that the judge cannot impose a sentence lower than 1/4 of the mandatory minimum for consecutive crimes.

Rob noted that as proposed, this exception would apply to other forms of second-degree murder, not just vehicular homicide. Quinlan said that was true but this proposal was made with scenarios in mind where a 16-year-old who causes a crash that kills a carful of people would be sentenced to 60 years. There would be no discretion to get around that in the current scheme.

Rob noted that the proposal could also apply to someone who fires one bullet that kills three people. Rob said he has always thought vehicular homicide should be a separate crime—it's hard to explain why it is encompassed in second-degree murder. Quinlan said he wasn't opposed to getting at this idea in terms of the crime itself; his current proposal was just a way to get the ball rolling. His main concern is that where vehicular homicide was concerned, there was no gradation available for sentencing—it was either all or nothing.

Judge Stephens said he concurred that creating a separate vehicular homicide statute with a sentencing exception would be beneficial. Brenda agreed. Rob volunteered Kaci Schroeder to craft a proposal in this vein.

Three-judge panel

Mike Schwaiger explained that he had redrafted his proposal to reflect some objections to the previous version. The proposal which was not objected to was as follows (changes in CAPS):

AS 12.55.155(d) **Factors in aggravation and mitigation** is amended to read:

(22) THE DEFENDANT HAS AN EXTRAORDINARY POTENTIAL FOR REHABILITATION;

(23) THE DEFENDANT ENGAGED IN EXEMPLARY BEHAVIOR AFTER THE OFFENSE;

AS 12.55.165(a)-(b) **Extraordinary Circumstances** is amended to read:

(a) If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or

mitigating factors not specifically included in AS 12.55.155, FROM REQUIREMENTS FOR CONSECUTIVE SENTENCING, FROM RESTRICTIONS ON DISCRETIONARY PAROLE ELIGIBILITY, or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

(b) [REPEALED]

AS 12.55.175(b)-(e) **Three-judge sentencing panel** is amended to read:

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may [HEAR ORAL TESTIMONY TO] supplement the record before it AND [. IF THE PANEL SUPPLEMENTS THE RECORD, THE PANEL] shall permit the victim to ADDRESS [TESTIFY BEFORE] the panel. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155, FROM REQUIREMENTS FOR CONSECUTIVE SENTENCING, FROM RESTRICTIONS ON DISCRETIONARY PAROLE ELIGIBILITY, or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125 UNLESS THE PARTIES AGREE THAT THE PANEL MAY IMPOSE A SENTENCE AUTHORIZED BY LAW APART FROM THIS SECTION.

(c) The three-judge panel may in the interest of justice GRANT DISCRETIONARY PAROLE ELIGIBILITY DURING ANY PORTION OF THE ACTIVE TERM OF IMPRISONMENT IMPOSED, AND sentence the defendant to any definite term of imprisonment up to the maximum term provided for EACH [THE] offense or to any sentence authorized under AS 12.55.015. IF THE PARTIES AGREE THAT THE PANEL MAY IMPOSE SENTENCE AUTHORIZED BY LAW APART FROM THIS SECTION, THE PANEL SHALL IMPOSE SENTENCE IN ACCORDANCE WITH SENTENCING LAW GOVERNING ORDINARY SENTENCING COURTS.

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel.

(e) [REPEALED]

Mike explained that the additional mitigating factors were frequently litigated before the three-judge panel and there is plenty of appellate case law to explain how to interpret them. If they were added

to the list of statutory mitigators, they would not be grounds for referral to the panel. The panel's role would be expanded to consider sentences that may be manifestly unjust as a result of consecutive sentencing rules. The proposal also allows the victim to address the court (rather than testify), and allows the three-judge panel to sentence the defendant as usual if it declines to find manifest injustice exists. This latter provision would save time because often it can be a matter of months after a case is declined from the panel before the sentencing judge will be able to hear the case again.

Brenda noted that one of the proposed mitigators was for exemplary post-offense behavior and asked for an example. Judge Stephens explained that most referrals to the three-judge panel based on a non-statutory mitigator are for "extraordinary potential for rehabilitation." A few referrals are for "exemplary post-offense behavior." He gave an example of a stepfather who committed SAM and confessed before being caught and did everything he could do to make things better for the victim. It is rare—he has seen it once as a member of the panel and once as a sentencing judge.

Mike also gave the example of a recent Court of Appeals opinion on a DUI/assault case where the defendant reached out to the family of the victim to apologize, and engaged in public speaking to warn others of the dangers of drinking and driving. (The defendant's petition to the three-judge panel was rejected and the Court of Appeals upheld this decision.) Judge Stephens noted that the focus of the mitigator was on taking steps to help the victim.

Judge Stephens said he thought the proposal was a good idea. With regard to codifying the mitigators, there was nothing magical about the three-judge panel, and there is plenty of case law to guide the sentencing judge to address them directly.

Brenda wondered whether there was any input from OVR on this. Kathy said they hadn't had much opportunity to discuss it. Brenda said she would like to think things through and discuss the mitigators with OVR—she was concerned about victim notification. Rob said that Law would have a policy of consulting the victim either about sentencing by the three-judge panel or the mitigators.

Judge Stephens noted that one of the previous proposals that was dropped was to exclude non-statutory aggravating factors from the grounds for referral to the panel. He didn't think there were any cases that had been referred on these grounds previously. Rob explained that Law's objection was that with SB 91, there may now be some sentences that Law would perceive as too lenient for that particular case. Judge Stephens asked to clarify—would non-statutory mitigators still be treated the same way under this proposal? Mike said that they would.

The group agreed to delay a decision on this matter to see whether there could be any more agreement on some proposals. Mike agreed to include Taylor Winston at OVR in any emails.

Public comment

Jon Woodard commented on the proposal to amend the modification of sentence statute, and asked if that was the same as a Rule 35(b) motion. (It is.) He recalled that the 180-day time bar was added in the 90s. He has worked with a lot of inmates in law libraries and the like and many want to use Rule 35 or 86 to modify their sentence but are hit with the time bar. They typically can't finish treatment within 180 days because DOC moves to slowly to get them into treatment within that time. In some cases, offenders who were time barred could still have really meaningful and dramatic rehabilitation –himself included. Extending the motion period for people who complete treatment would create an incentive that

helps everyone. Opportunities like that would create a culture of rehabilitation—if one inmate successfully completed treatment and modified his sentence, then others would be inspired to do the same. Without such incentives, there can be a cycle of negativity about treatment and rehabilitation, with a prevailing attitude of "why bother."

Jon said that also tied into his comments about juvenile auto-waiver. He was a mentor for juvenile offenders in the adult system and saw some dramatic changes in some of them, good and bad. Administrative segregation for juvenile offenders was particularly terrible—he watched some guys starting out as juveniles "graduate" to adult offending.

Cindy pointed out that Jon's remark about creating a culture of rehabilitation was exemplified by Jon himself. She knew of several people inspired by Jon's progress.

Jon said he also saw this work with the Youth Offender Program, basically a high school for juveniles inside DOC custody. Offenders saw this program working and asked for an adult version, which was created—it is referred to as the "honor mod." If inmates file motions to modify their sentence, he thinks the judges will be able to tell who has truly been rehabilitated.

Josie, who had looked up rule 35 to answer Jon's question, noted that there was a discrepancy between the current motion to modify statute and Rule 35—the judge has no discretion to entertain successive motions under the rule, but does under the statute.

Next meeting

The next meeting was set for July 28 at 1:30.