Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
June 9, 2016, 9-11 AM at the Brady Building with Teleconference

Commissioners Present:	Alex Bryner, Quinlan Steiner, Brenda Stanfill
Commissioners Absent:	Greg Razo, Trevor Stephens, Wes Keller, Craig Richards
Participants:	Rob Henderson (LAW); Taylor Winston and Catherine Hansen (OVR); Mike Schwaiger(PD), Doreen Schenkenberger (Partners for Progress); Ken Truitt (LEG)
Staff:	Mary Geddes, Teri Carns, Brian Brossmer

Materials provided in advance of meeting (attached and bookmarked):
Carns' Memo on Presumed Flat Time Sentences
Henderson Acceptance of Responsibility Memo
Stephens' Memo Discussing 3JP Statute Options
Stephens' 3JP Statute Options
Schwaiger's Memo discussing 3JP
Steiner's Treatment Mitigator

At 9:05 am the meeting got underway.

FLAT TIME SENTENCES

Teri Carns summarized her written analysis of 'presumed flat time' sentences as identified in the Felony Sentencing Study. (This memo was provided in advance of the meeting.) By 'presumed flat time' she means sentences in which there was no suspended time, and therefore no probation supervision. Quinlan Steiner thought that most 'flat time' dispositions occur in the parole revocation context, but Teri clarified that the Felony Study had looked only at initial sentences imposed.

One question had arisen with respect to this group: does the flat time group end up being supervised anyway by parole officers during their mandatory release (for good time credit)? The answer is probably not for most because those released on less than 23 months of good time (mandatory release) do not get formal parole supervision.

Teri Carns noted that the highest recidivism is within the first year out. Rob Henderson was concerned that individuals, particularly violent offenders, might not be supervised and wondered why this occurs (that individuals receive flat time sentences). Doreen Steinberger noted that Partners for Progress works with offenders during their first 6 months out and those are times of high need. Alex Bryner suggested that this might be an area for training for judges, i.e. that they should understand the implications of giving flat time sentences. Mary Geddes noted that in the non-sex context and under Alaska case law (Ayulie, Hull) defendants are allowed to decline suspended time/probation.

Steiner noted that research shows that "probation plus services" are effective in reducing recidivism but probation supervision by itself is not. If individuals aren't getting any programming, there is an argument that there is no reason to require supervision. Teri Carns volunteered to collect the pertinent research. Brenda Stanfill said she was interested in getting the research.

PROPOSED MITIGATOR FOR ACCEPTANCE OF RESPONSIBILITY

Rob Henderson explained his proposal modeled on the federal sentencing guideline. He said that he had that many cases resolve with a bargain. But a mitigator is not always available. A defendant's agreement to settle the case with a timely resolution could be credited as a mitigator. Speedy dispositions conserve resources and often benefit the victim.

Taylor Winston indicated she was interested in the concept, but wondered when it would be credited. Would a person obfuscate for years and then get credit? She was also concerned that no victim blaming be allowed.

Mary Geddes noted proving a mitigator allows a court to consider it, but the court remains free to impose a presumptive range sentence.

Quinlan Steiner stated that a person's plea may have little to do with a true acceptance of responsibility in a given case. Alex Bryner also noted that expressions of remorse can be false, and he wondered if they should be credited Rob Henderson noted that accepting responsibility is consistent with rehabilitation and the case law says so.

Quinlan was concerned that the mitigator might create an incentive to not provide timely discovery. He was not necessarily opposed to the mitigator but he wondered if it might create a coercive environment.

Mary Geddes suggested that those concerns (that constitutional rights cannot be abrogated) could be addressed by language like that in the commentary to the federal sentencing guidelines, but Quinlan doubted such could be provided because of the way the Alaska Statutes are typically drafted.

Rob Henderson acknowledged that subjective disputes about whether discovery is 'complete' can delay the resolution of cases, but maybe the mitigator would help move things along.

Brenda Stanfill suggested that a mitigator could be inappropriate if the victim has had to wait three years for the defendant to admit that he has done a crime. Quinlan Steiner stated that a defendant's admission to an act does not necessarily reach an admission to a specific crime. For example, a defendant may agree that he committed an assault but not necessarily an assault in the first degree. Steiner wouldn't blame a defendant for going to trial when an offense is overcharged.

Mary Geddes noted that there were two variations provided. The first is in the plea agreement context and is likely stipulated. The second is more wide open. Both require timeliness.

Taylor Winston is concerned with false expressions of remorse but she also agreed with Henderson's written analysis that to reach a plea agreement the parties often stipulate to an attempted act rather than the completed act, and that bothers many victims. She also thinks that in-court or other admissions by defendants and timely resolutions can be really helpful victims. She would not want judges to grant mitigators after a trial.

Alex Bryner said giving an easier sentence to someone who didn't exercise his rights isn't fair and could have a chilling effect. Ken Truitt said that he was now concerned with the constitutional questions raised.

Mary Geddes stated that the constitutionality of an acceptance mitigator has been exhaustively litigated. These choices, to plead or not to plead, to accept a plea bargain by its deadline or litigate a stop motion, may feel coercive to a defendant, but they are commonplace and not unconstitutional. The mitigator, if established, is advisory only. In the no plea agreement context, the judge doesn't have to give any benefit but evaluates acceptance relative to all other aspects of the case. The mitigator is consistent with restorative justice principles, with avoiding unnecessary delay, with encouraging positive acts.

Quinlan Steiner doesn't mind the concept of a mitigator for an early plea and where the judge decides, but thinks that a mitigator for a plea bargain may be unfairly coercive if requires a "timely" plea agreement.

Alex Bryner is unsure if there is any language with which he would feel comfortable. He is bothered by the idea that mere expressions of remorse could be credited and that entering into a plea agreement is considered a mitigating factor.

The group further discussed whether such a mitigator undercuts presumptive sentencing, or merely softens its edges, by providing greater discretion in circumstances where there is clear and convincing evidence of acceptance of responsibility.

Rob Henderson thinks there is value in making the system more transparent. Brenda Stanfill thinks that the most important aspect is timeliness of decision-making and avoidance of trial.

Mary Geddes asked if there is alternative language, please propose it as the group has only one more meeting. The m.o. of all ACJC Workgroups has been to make proposals by consensus decision-making, but if there is only a majority which supports a proposal, it may certainly be forwarded to the Commission.

REFORMS TO THE THREE JUDGE PANEL STATUTES

Mary Geddes noted that Trevor Stephens had proposed two options and Mike Schwaiger had also forwarded several ideas for statutory re-writes. Rob Henderson stated that he agrees with reforms that clarify the language but not necessarily that broaden the reach of the panel. He still wondered if 3 cases last year represents an underutilization or a proper utilization of the panel. He would like to know how often the panel is requested, and how often it is denied.

Brenda Stanfill asked what is the problem that needs fixing. Rob Henderson said that the statute can't be understood without referring to a very large body of case law.

Quinlan Steiner suggested that Rob Henderson, Mike Schwaiger and Trevor Stephens should review all proposals and see if they can at minimum clean up the language. Mike and Rob suggested that it could be a time-intensive undertaking. Mary Geddes noted that the Workgroup only has one scheduled meeting. Quinlan Steiner asked if that deadline was artificial and couldn't the time frame extend.

Brenda Stanfill noted that not all of the Workgroup members are attorneys. She asked if it is possible to get a crash course in the three judge panel. Mary Geddes indicated she would provide such orientation. Doreen Schenkenberger asked to be included

PUBLIC COMMENT: Prior to the meeting adjournment, time was allowed for additional public comment. None was offered. The meeting adjourned at 11:07 AM.

Memorandum

To: Presumptive Sentencing Subcommittee, ACJC

From: Teri Carns

Date: June 6, 2016

Re: Flat-time sentences in 2012-2013 cases

As part of its review of presumptive sentencing statutes and practices, the ACJC Presumptive Sentencing Subcommittee may wish to consider the relationships among imposed and suspended sentences, as well as looking at sentences with presumed flat-time – i.e., no time suspended and no probation, and those with no time to serve. Policy options for the subcommittee to consider are at the end of this memo.

Judicial Council staff reviewed the sentences imposed in cases included in the 2012 and 2013 sample (described in *Alaska Felony Sentencing Patterns: 2012 – 2013*)[1] to find patterns of sentencing related to imposed time, suspended time, and active time to serve. The analysis looked at time imposed and suspended in all cases in the sample, considering sexual and non-sexual offenses separately because of the statutory differences in the sentencing requirements and ranges. An additional analysis considered the 685 non-sexual cases with presumed flat-time.[2] The analysis considered associations among sentences and the variables of offense class and type, prior record, gender, ethnicity, court location, and attorney type.

Presumed flat-time sentences

In about one-quarter (685) of the 2012-2013 felony sentences, judges imposed time to serve, did not suspend any time, and did not impose a period of probation supervision to follow the offender's release.[3] Such sentences are known as "flat-time."

[1] *Alaska Felony Sentencing Patterns: 2012-2013*. Available from the Alaska Judicial Council.

[2] By law, all Sexual offenses in the sample had to have at least a minimum amount of suspended time, and a minimum amount of probation as part of every sentence. The presumptive sentencing ranges for Sexual offenses were set high enough that all Unclassified, Class A, and Class B offenders would have sentences with active time (unless the three-judge panel intervened). In a limited number of cases, it was possible for Class C Sexual offenders to have a sentence with no active time to serve.

[3] The Judicial Council relied on electronic court databases to determine whether probation supervision was required by the judge. If there was nothing entered in the data field for the probation term, the analysis presumed that no probation was required.

Table 1: Presumed flat-time sentences associated with variables

	% of offenders in Study with this variable	*% of offenders in study with this variable who were sentenced to presumed Flat-time*	*Expectation compared to actual*
One prior felony	17%	30%	Higher than expected
Two/more prior fel.	16%	34%	Higher than expected
Other prior records	about 22% each	about 12% each	Lower
			Lower
Trial guilty	6%	8%	Higher than expected
Age 16 - 20	11%	7%	Lower
Age 40+	25%	30%	Higher than expected
Anchorage	43%	47%	Higher than expected
Southcentral	23%	27%	Higher than expected
Southeast	9%	6%	Lower
Fairbanks	12%	9%	Lower
Rural	13%	11%	Lower
African American	9%	11%	Higher than expected
Alaska Native	29%	25%	Lower
Female	21%	15%	Lower
Male	79%	85%	Higher than expected
Class A	3%	6%	Higher than expected
“Other” off. type	8%	16%	Higher than expected

Table 1 shows that the likelihood of having a flat-time sentence was strongly associated with having a prior felony record, being convicted of a Class A offense, and being convicted of an "Other" offense,[4] It was also associated with, although less strikingly, several other variables: convicted at trial,[5] age 40 or older, being in Anchorage or Southcentral courts, being African-American, and being male.

The offenders sentenced to flat- time would typically be released from incarceration on "mandatory" parole[6] after serving two-thirds of their active time, assuming that they kept all of their "good-time credits."[7] They were supervised under the same policies as other parolees. The Dept. of Corrections policy is to supervise only offenders released on "mandatory" parole who had an active time to serve composite sentence of two years or more. Thus, some offenders with flat-time sentences would be released directly to the community without a period of formal supervision. Of the 685 offenders with presumed flat-time sentences, 259 (38%) had sentences of 23 months or less.[8]

Policy issues related to flat-time sentences

A majority of offenders who are released from incarceration have a period of supervision, whether probation or parole, during which they may receive assistance in re-entering, further treatment (substance abuse or mental health), and monitoring to assure that they abide by conditions crafted to protect victims and ensure public safety.[9] Other data show that the majority of recidivism occurs during the first twelve months following an offender's return to the community.[10] This suggests that although probation/parole supervision can appropriately be limited in time, it may be helpful to have some period of monitoring for most offenders returning to the community. People who are on flat-time sentences often have asked for no probation or judges have imposed it because they believe that the offender will not be successful at complying

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[4] Within the category of "Other" offenses, a majority of the offenders convicted of Escapes, Failure to appear, Failure to register as a sex offender, Promoting contraband, Tampering with physical evidence, Misconduct involving weapons, Selling alcohol without a license, and Unlawful evasion had flat-time sentences.

[5] This is probably because a higher proportion of Class A offenders were convicted after trial.

[6] Discretionary parole can be granted under limited circumstances. "Mandatory" parole is governed by different statutes and policies than probation. The Department of Corrections policy is "A prisoner who is not eligible for discretionary parole or has not been granted discretionary parole will be supervised on mandatory parole if the composite term of imprisonment the prisoner is serving is two (2) years or more." http://www.correct.state.ak.us/Parole/pdf/handbook.pdf. By implication, if the composite term is less than two years, the offender will not be supervised when released on mandatory parole.

[7] The amount of time actually required to be served would also depend on whether they were sentenced under a mandatory minimum statute, or under provisions that allowed the judge to limit release, or under "no parole" provisions. In addition, some part of the sentence might have been partly or entirely consecutive to another sentence. The sentences reported in this dataset were the sentence imposed on the single most serious charge of which the offender was convicted. It was not possible to include information about whether the sentence was concurrent or consecutive to another sentence.

[8] Thirty-two of the 259 offenders with sentences of 23 months or less were convicted of Class B or C Assaults.

[9] Seventy-six percent of the 2012-2013 felony offenders either had a term of probation following incarceration or were sentenced to an SIS with a probation term.

[10] See page 10, *Criminal Recidivism in Alaska*, published in 2007. http://www.ajc.state.ak.us/sites/default/files/imported/reports/1-07CriminalRecidivism.pdf.

with conditions of probation. This leaves the offender without potentially helpful resources, and the public without the possible protection provided by supervision.

Two policy options have been suggested.

- Additional training for attorneys and judges about the value of probation, and how to impose effective conditions, appropriately limited terms, and use community resources for people on probation. Judges and attorneys could have more information about treatment availability outside of the major communities, payment of restitution, community work service, working with victims' groups, collaboration with tribal councils for supervision of probation and reintegration into rural communities, and effective means of combining conditions so that probationers are not burdened with expectations that set them up for failure.

- A statutory change that would prevent offenders from rejecting the probation "contract"[11] could be considered. This would assure that most offenders would receive appropriate supervision.

[11] As defined in Court of Appeals case, *Hurd v State*, 107 P.3d 314 referencing *Auylie*.

MEMORANDUM

To: Susanne DiPietro **Date:** May 27, 2016

From: Robert Henderson **Subject:** Acceptance of Responsibility Mitigator

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The concept of providing defendants a benefit if they express genuine remorse and accept responsibility for their misconduct is a well-established principle in criminal jurisprudence. A mitigator along these lines would formalize this long-standing tradition and ensure that such consideration is applied in a fair and systematic manner.

One concept is to propose a new mitigator under AS 12.55.155(d), which would authorize the Court to deviate from the presumptive range when the defendant accepts responsibility through a plea agreement. Additionally, there is the proposal of a two-tiered mitigator – one that provides the Court the authority to *slightly* deviate from the presumptive range if the defendant accepts responsibility generally, and one that provides for a greater deviation if the defendant accepts responsibility through a "timely" plea agreement with the State.

The following is some proposed language regarding a two-tiered approach,

> AS 12.55.155(d)(22) "the defendant, prior to sentencing, clearly demonstrates an affirmative and timely acceptance of responsibility for the defendant's criminal conduct. Under this subsection, should the Court find, by clear and convincing evidence, that the defendant has a genuine remorse for his conduct and has accepted responsibility for his offense(s), the Court may impose a sentence below the presumptive range as long as the active term of imprisonment is not less than 50 percent of the low end of the presumptive range."[1]
>
> AS 12.55.155(d)(23) "the defendant clearly demonstrates acceptance of personal responsibility for the defendant's offense, as evidenced by entering into a timely plea agreement with the State of Alaska pursuant to Alaska Rule of Criminal Procedure 11(e)."

This sort of mitigator(s) has several benefits: first, it codifies a pre-existing, long-standing practice of providing defendants a benefit when they accept a plea agreement. A vast majority of cases are resolves pursuant to plea agreement. Currently, there is no mitigator that allows a court to depart from the presumptive range if the defendant enters into a plea agreement. As a result, the parties either use a different – and sometimes imprecise – mitigator to authorize the agreed

[1] The mathematical reduction contemplated in this proposed language is similar to the language found in AS 12.55.155(a)(2).

upon sentence, or the parties enter into a charge bargain (*i.e.*, the state agrees to reduce the charge to an offense with a lower presumptive range). Victims of crime would benefit in a transparent plea agreement that accurately reflects a defendant's conduct, but also recognizes a defendant's genuine remorse. As a corollary benefit, linking the mitigator to timeliness would encourage defendants to accept a plea agreement early on in the process. Such a mitigator is generally consistent with the *Chaney* criteria – *i.e.*, a defendant's denial of responsibility may suggest low prospects for rehabilitation. *Howell v. State*, 758 P.2d 103, 108 (Alaska App. 1988); *but see Lepley v. State*, 807 P.2d 1095, 1099-1100 (Alaska App. 1991) (noting that a defendant's genuine remorse and acceptance of responsibility is insufficient, by itself, to demonstrate the nonstatutory mitigator of 'exceptional prospects for rehabilitation').

This concept is based, in part, on the "acceptance of responsibility" sentence reduction contemplated in the Federal Sentencing Guidelines. Under U.S. Sentencing Guidelines Manual §3E1.1(a), a defendant is entitled to a "two-level"[2] reduction if the "defendant clearly demonstrates acceptance of responsibility for his offense". Further, under §3E1.1(b), the defendant may be entitled to an additional one-level reduction, if the defendant assists the government in the investigation or prosecution of his own misconduct[3] or by "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently".

The commentary to §3E1.1 is very helpful in understanding the applicability of the rule and its availability to defendants who accept responsibility. I have highlighted and included certain aspects of the commentary, which I believe are central to an effective application of this rule. *This mitigator(s), if not applied in a uniform manner, has the potential to undermine the presumptive sentencing structure*. I would recommend that if such a mitigator(s) were proposed, the statutory change must be accompanied by a similar commentary.

[2] A general discussion of the U.S. Sentencing Guidelines and the applicability of the "level" reductions is beyond the scope of this memorandum.

[3] It should be noted that Alaska law already has a mitigator that incorporates a similar concept: AS 12.55.155(d)(11) which provides for mitigation of a defendant's sentence if the defendant "after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense." However, the U.S. Sentencing Guidelines focuses on the defendant's steps to investigate his own misconduct, while the (d)(11) mitigator focuses on the defendant's steps to apprehend others.

Background: A statutory mitigator for a timely acceptance of responsibility recognizes legitimate societal interests.

1. In determining whether a defendant qualifies for the mitigator, appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction,;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This mitigator is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, ***a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.***

3. Entry of a plea of guilty prior to the commencement of trial ***combined*** with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. **A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.**

4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the

> defendant must have notified authorities of his intention to enter a plea of guilty at a ***sufficiently early point*** in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.
>
> Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108-21. The government should not withhold such a motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal.
>
> If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

The "acceptance of responsibly" reduction has received significant judicial review, and it has been found to be constitutional under the US Constitution. *See e.g.*, *United States v. Henry*, 883 F.2d 1010 (11th Cir 1989) (holding that the two-level reduction for acceptance of personal responsibility does not violate the Fifth or Sixth Amendments as it does not punish a defendant for exercising their right to trial, but instead formalizes and clarifies a tradition of extending leniency to defendants who accept responsibility); *United States v. McConaghy*, 23 F.3d 351 (11th Cir. 1994) (no violation of Sixth Amendment of effective assistance of counsel, as there is no ethical obligation to investigation all possible defenses and issues prior to advising client to accept responsibility for his misconduct); *Smith v. Phillips*, 979 F. Supp. 2d 320 (E.D.N.Y. 2013) (provision does violate the Eighth Amendment as it is not so shocking as to constitute cruel and unusual punishment); *United States v. Gonzalez*, 897 F.2d 1018, 1021 (9th Cir. 1990) (provision does not violate a defendant's privilege against self-incrimination under the Fifth Amendment).

Memo

To: Mary Geddes
ACJC Staff Attorney

From: Trevor Stephens

Re: 3-Judge Panel
Presumptive Sentencing Workgroup

Date: May 18, 2016

At the conclusion of the Presumptive Sentencing Workgroup meeting on May 13, I volunteered to put my proposed revisions to the Alaska presumptive sentencing statutes in statutory form. I have endeavored to do so, and am forwarding the results of that effort.

On a prefatory note, it appears to me that the Workgroup must decide whether we want to recommend to the ACJC that any major changes be made in the Alaska presumptive sentencing scheme. We have several options, including the following:

1) Not recommending changes to the present presumptive sentencing range framework and the use of aggravators and mitigators.

2) Recommending that the presumptive ranges be made guidelines rather than mandatory, similar to the federal sentencing guidelines.

3) Recommending that adjustments be made to the presumptive ranges, whether mandatory or guidelines.

4) Recommending that the current presumptive sentencing framework be maintained but allowing the sentencing court to not only make the type of manifest injustice finding(s) that would result in a referral to the three-judge sentencing panel under current law but also allow the sentencing court to impose a sentence that at present only the panel could impose.

At this point I am not advocating that the Workgroup take or not take any action except that if at the end of the day there continues to be a need for a three-judge panel to serve as the presumptive sentencing safety-valve initially intended by the Legislature then that we recommend changes to the three-judge panel statutes – AS 12.55.165 and AS 12.55.175. To that end, I have two proposals.

I am offering proposed changes to these statutes because, in my opinion, the present statutes are not clear and, as a result, have been the subject of appeals which, by virtue of the appeals process, has resulted in delayed final resolutions of the cases. I think that the decisions of the Alaska Court of Appeals in ***Luckart v. State***, 314 P.3d 1226 (Alaska App. 2013) and ***Collins v. State***, 287 P.3d 791 (Alaska App. 2012) demonstrate my point. I am not at all criticizing the decisions, but I am highlighting the complicated analysis employed by the Court in ***Collins*** and noting the Legislature's swift response to the holding in ***Collins*** (AS 12.55.165(c) and AS 12.55.175(f).[1] I also note that the Court of Appeals has repeatedly informed trial courts that close cases should be referred to the panel[2] but this has not resulted in a material increase in the number of referrals to the panel, which appears, at least in part, to be the result of attorneys and trial judges have difficulty with the statutory language. And the panel has difficulty over an extended period of time understanding and applying these statutes, as evidenced by the cases in which it has been reversed for employing the wrong analysis.[3]

Option 1

The first option (Option 1) is based on the proposal I submitted before the May 13 meeting. At present there are two ways for a case to come before the three-judge panel – a finding of manifest injustice if the defendant is sentenced within

[1] The Legislature also previously took action to undo the Court of Appeals' decision in ***State v. Price***, 740 P.2d 746 (Alaska App. 1987). ***See***, AS 12.55.175(e) and ***Garner v. State***, 266 P.3d 1045, 1048-49 (Alaska App. 2011).

[2] ***See, Harapat v. State***, 174 P.3d 249, 255 (Alaska App. 2007); ***Lloyd v. State***, 672 P.2d 152, 155-56 (Alaska App. 1983).

[3] ***See, Luckart***, 314 P.3d at 1238; ***Smith v. State***, 711 P.2d 561, 572 (Alaska App. 1985).

the presumptive sentencing range, whether or not adjusted for aggravators or mitigators and/or a finding that it would be manifestly unjust not to consider a relevant (non-statutory) mitigating factor. It was contemplated that the panel would identify non-statutory mitigators.[4] The panel has only identified 3 non-statutory mitigators, and the "exceptional" prospects for rehabilitation[5] non-statutory mitigator is the only one which is actually proposed.[6] There are limitations that apply to a referral for a non-statutory mitigator, most significantly that the panel can only give a non-statutory mitigator the weight that could be given to a statutory mitigator, so the mitigator could not result in a sentence for a serious felony going below one-half of the presumptive range if the low end of the range is more than 4 years.[7] Also, the Court of Appeals in ***Luckart*** found that the panel has the implicit authority to make a defendant eligible for discretionary parole under AS 12.55.175(c). The explicit authority for doing this, and related restrictions, are found at AS 12.55.175(e) – which also addresses the exceptional prospects for rehabilitation situation. The long and the short of these circumstances is that is appears to us that defendants will no longer rely on AS 12.55.175(e) and will instead fold an exceptional prospects for rehabilitation claim into a broader manifest unjust to sentence within the presumptive sentencing range argument under AS 12.55.175(c). So Option 1 is intended to recognize that reality, and also to make explicit the panel's authority with respect to discretionary parole.

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[4] ***See, Dancer v. State***, 715 P.2d 1174, 1178 (Alaska App. 1986).

[5] ***See, Smith***, 711 P.2d at 572 (actually, the Court of Appeals did so).

[6] The other two are the impact on immigrant status (***State v. Silvera***, 309 P.3d 1277, 1280-81, 1284-87 (Alaska App. 2013), which was, in effect, overturned by the Legislature (AS 12.55.165(d), AS 12.55.175(g); and exemplary post-offense conduct. ***See, State v. McKinney***, 946 P.2d 456, 457-58 (Alaska App. 1987) and ***Daniels v. State***, 339 P.3d 1027, 1031-32 (Alaska App. 2014).

[7] ***See, Garner***, 266 P.3d at 1048-49.

I have maintained the basic structure of the present statutes and attempted wherever possible to retain the present language – which has caused some drafting problems. I have underlined the major changes for ease of review.

With regards to AS 12.55.165 in Option 1, I note that:

- In section (a) I added specific reference to the discretionary parole basis of referral. I note that I do not know what the final legislation based on SB 91 has done with respect to parole so I do not know if this basis for referral will continue to be necessary.

- In section (a) I deleted the references to non-statutory mitigators and aggravators. There are just 2 grounds for referral under this Option – the discretionary parole situation and that that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for (statutory) aggravating or mitigating factors.

- In section (a) I also made the stylistic change of referencing the exceptions to section (a).

- In section (a) I also provided in the last sentence that if the parole situation is the only basis for the referral the trial court should go ahead and sentence the defendant. This will reduce the problems caused by the delay in having the panel address the matter and also will allow the panel to know the actual effects or allowing and not allowing discretionary parole.

- I did not make any changes to (b). We may want to discuss whether some or all of the listed aggravators should be deleted. I went through them and my thought at this point is that most make sense and would probably be difficult to convince the Legislature otherwise.

- Section (c) in the current statutes addresses sex offenses and is the Legislatures' response to ***Collins***. I have not changed the gist of the present statute in this regard but have modified the language to reflect

that the exceptional or extraordinary prospect for rehabilitation is not a stand-alone non-statutory mitigator basis for referral.

- Section (d) is basically current AS 12.55.165(d).

- I added section (e) because it is an accurate statement of the law and I think should be in the statute.[8]

With regards to AS 12.55.175 in Option 1, I note that:

- Section (a) is basically the present (a) with some, hopefully, clarifying language which reflects the current actual practice.

- Section (b) adds the specific reference to allowing the victim(s) in the case to address the panel – present (b) references victim testimony, and then only if the panel has allowed the record to be supplemented with other evidence. I think the change I propose is consistent with Article I § 24 of the Alaska Constitution. The next sentence makes explicit what is discussed in ***Luckart***, that the panel can only address the ground or grounds for the referral made by the trial judge, and does not independently review the record for other possible grounds. So, for example, if the trial judge only refers on the discretionary parole grounds the panel could not also consider the other possible ground (that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors). The last sentence makes explicit in the statute what the Court of Appeals held in ***Winther v. State***.[9]

- My intent in section (c) is to provide that such a manifest injustice finding would permit the panel to go below the presumptive range

[8] ***See, Totemoff v. State,*** 739 P.2d 769, 776 (Alaska App. 1987).

[9] 749 P.2d 1356, 1359 (Alaska App. 1988) (citing ***Kirby v. State***, 748 P.2d 757 (Alaska App. 1987) and ***Bond v. State***, 747 P.2d 546 (Alaska App. 1987)).

unencumbered by the 50% limit for presumptive sentences in excess of 4 years.

- Section (d) addresses the other basis for referral – the discretionary parole situation. I envision the panel, if it makes such a finding and does not make the other manifest injustice finding, simply ordering that the defendant is eligible for discretionary parole, with no need for a remand.

- Section (d) also includes concepts, based on existing AS 12.55.175(e), that allows the panel to place reasonable conditions and restrictions of the defendant's eligibility for discretionary parole. I am not strongly advocating for this provision but think it is an idea worth considering.

- Sections (e) and (f) basically keep in place current AS 12.55.175(f) and (g).

- Section (g) states the obvious.

- Section (h) is existing (d).

- I added (i) – may result in quicker sentencing and closure etc. I thought about adding a requirement that the sentencing judge must promptly conduct the sentencing on remand of that it must be done at the conclusion of the panel's hearing if the case is remanded but am not sure that the legislative branch can impose such a requirement on the judicial branch and I also thought that having to accommodate 4, rather than 3, judges' schedules in setting up the panel hearing may result in delays etc.

Option 2

Here I will highlight the differences from Option 1. The major difference is that I have kept non-statutory mitigators (and deleted the reference to non-statutory aggravators as none have been recognized or discussed and in practice the 3-judge panel has been a one-way process – to possibly reduce not possibly increase sentences) as a basis for referra.

Section (c) is the same as section (c) in Option 1.

Section (d) addresses the non-statutory mitigator basis for referral. I have continued the limitation discussed in ***Garner.*** I agree with the premise that a non-statutory mitigator should not be entitled to greater weight than a statutory mitigator. So if a statutory mitigator can only reduce a presumptive sentence above 4 years by 50% then the same should also be the case for a non-statutory mitigator.

I think that if we ultimately agree that we will not be recommending changes that will result in the end of the 3-judge panel and we agree to make revisions to the existing panel statutes and we agree on the basic concepts then we can look at whether there is a need for clearer proposed statutory language or we can make a recommendation that consists just of the concepts and does not include proposed statutory language.

OPTION 1

Sec. 12.55.165. Three-Judge Panel Referral. (a) If the defendant is subject to sentencing under AS 12.55.155(c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, or would occur as a result of the defendant not being eligible for discretionary parole under AS 33.16.090, or both, and that (b), (c), (d) and (e) of this section do not apply, the court shall enter written findings and conclusions and cause a record of the proceedings to be transmitted to the three-judge panel under AS 12.55.175. If the only basis for the referral to the three-judge panel is the finding that manifest injustice would occur as a result of the defendant not being eligible for discretionary parole under AS 33.16.090 the court shall sentence the defendant before transmitting the case to the three-judge panel.

(b) A court may not refer a case to the three-judge panel under (a) of this section if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

(c) A court may not refer a case to the three-judge panel under (a) of this section if the defendant is being sentenced for a sexual felony under AS 12.55.125(i) and the manifest injustice finding is based, in whole or in part, on the defendant's prospects for rehabilitation, unless the court finds that the defendant's prospects for rehabilitation are extraordinary and such a finding cannot be based solely on the defendant having a history free of unprosecuted, undocumented, or undetected sexual offenses.

(d) A court may not refer a case to the three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law.

(e) A court may not refer a case to the three-judge panel solely on the basis of a factor that the legislature considered and rejected as a statutory mitigator.

Sec. 12.55.175. Three-judge sentencing panel. (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. The chief justice shall designate three of the judges as the primary panel members and the remaining two judges as the first and second alternate members who would sit as members of the panel in the event of disqualification, recusal, disability, or the unavailability of a panel member in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165(a), the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the case. The panel may supplement the record with oral testimony and exhibits. The panel shall permit a victim to address the panel. The panel may only consider the basis for the referral stated in the written findings and conclusions required by AS 12.55.165(a). The panel is not bound by the referring court's evaluation of the facts or determinations of law.

(c) If the three-judge panel finds by clear and convincing evidence that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the panel shall sentence the defendant and may impose a jail sentence, including suspended jail time, below the presumptive range for the offense, and may impose orders, a term of probation, and probation conditions in accordance with applicable law.

(d) If the three-judge panel finds by clear and convincing evidence that manifest injustice would result from a defendant not being eligible for discretionary parole under AS 33.16.090, the panel shall order that the defendant shall be eligible for discretionary parole. The panel may require that the defendant complete appropriate rehabilitative programs if made reasonably available by the Department of Corrections before being eligible for discretionary parole under AS 33.16.090 and may order that the defendant serve a certain portion of the defendant's sentence before being eligible for discretionary parole.

(e) A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not establish, nor may the three-judge panel find under (c) of this section or any other provision of law, that manifest injustice would result based solely on the claim that the defendant, either singly or in combination, has

(1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

(f) A defendant being sentenced under AS 12.55.125(c), (d), (e), or (i) may not establish, nor may a three-judge panel find under (c) of this section or any other provision of law, that manifest injustice would result, in whole or in part, on the claim that the sentence may result in the classification of the defendant as deportable under federal immigration law.

(g) The three-judge panel shall remand the case to the referring judge for sentencing, except as provided in section (i), if the panel does not find that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors.

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

(i) The three-judge panel shall impose sentence, whether or not it has found manifest injustice, if the parties agree that the panel will do so.

OPTION 2

Sec. 12.55.165. Three-Judge Panel Referral. (a) If the defendant is subject to sentencing under AS 12.55.155(c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from: imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors; failure to consider a relevant mitigating factor not specifically included in AS 12.55.155; and/or the defendant not being eligible for discretionary parole under AS 33.16.090; and that (b), (c), (d) and (e) of this section do not apply, the court shall enter written findings and conclusions and cause a record of the proceedings to be transmitted to the three-judge panel under AS 12.55.175. If the only basis for the referral to the three-judge panel is the finding that manifest injustice would occur as a result of the defendant not being eligible for discretionary parole under AS 33.16.090 the court shall sentence the defendant before transmitting the case to the three-judge panel.

(b) A court may not refer a case to the three-judge panel under (a) of this section if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

(c) A court may not refer a case to the three-judge panel under (a) of this section if the defendant is being sentenced for a sexual felony under AS 12.55.125(i) and the manifest injustice finding is based, in whole or in part, on the defendant's prospects for rehabilitation, unless the court finds that the defendant's prospects for rehabilitation are extraordinary and such a finding cannot be based solely on the defendant having a history free of unprosecuted, undocumented, or undetected sexual offenses.

(d) A court may not refer a case to the three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law.

(e) A court may not refer a case to the three-judge panel solely on the basis of a factor that the legislature considered and rejected as a statutory mitigator.

Sec. 12.55.175. Three-judge sentencing panel. (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. The chief justice shall designate three of the judges as the primary panel members and the remaining two judges as the first and second alternate members who would sit as members of the panel in the event of disqualification, recusal, disability, or the unavailability of a panel member in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165(a), the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the case. The panel may supplement the record with oral testimony and exhibits. The panel shall permit a victim to address the panel. The panel may only consider the basis for the referral stated in the written findings and conclusions required by AS 12.55.165(a). The panel is not bound by the referring court's evaluation of the facts or determinations of law.

(c) If the three-judge panel finds by clear and convincing evidence that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the panel shall sentence the defendant and may impose any jail sentence which, including suspended jail time, may be up to and including the maximum term provided for the offense, and may impose orders, a term of probation, and probation conditions in accordance with applicable law.

(d) <u>If the three-judge panel finds by clear and convincing evidence that manifest injustice would result from failure to consider a relevant mitigating factor not specifically included in AS 12.55.155, the panel shall sentence the defendant and may impose any sentence that could have been imposed had a statutory mitigator been found</u>.

(e) If the three-judge panel finds by clear and convincing evidence that manifest injustice would result from a defendant not being eligible for discretionary parole under AS 33.16.090, the panel shall order that the defendant shall be eligible for discretionary parole. The panel may require that the defendant complete appropriate rehabilitative programs if made reasonably available by the Department of Corrections before being eligible for discretionary parole under AS 33.16.090 and may order that the defendant serve a certain portion of the defendant's sentence before being eligible for discretionary parole.

(f) A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not establish, nor may the three-judge panel find under (c), (d), or (e) of this section or any other provision of law, that manifest injustice would result based solely on the claim that the defendant, either singly or in combination, has

(1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

(g) A defendant being sentenced under AS 12.55.125(c), (d), (e), or (i) may not establish, nor may a three-judge panel find under (c), (d), or (e) of this section or any other provision of law, that manifest injustice would result, in whole or in part, on the claim that the sentence may result in the classification of the defendant as deportable under federal immigration law.

(h) The three-judge panel shall remand the case to the referring judge for sentencing, except as provided in section (j), if the panel does not find manifest injustice under section (c) or (d).

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

(j) The three-judge panel shall impose sentence, whether or not it has found manifest injustice, if the parties agree that the panel will do so.

STATE OF ALASKA
DEPARTMENT OF ADMINISTRATION

PUBLIC DEFENDER AGENCY

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To: Quinlan Steiner
Public Defender

Re: Amendment to statutes related to the three-judge sentencing panel.

From: Michael Schwaiger
Assistant Public Defender

Date: June 2, 2016

You have asked me to outline alternative amendments to the three-judge panel statutes for your proposal to the Alaska Criminal Justice Commission.

The three-judge panel was included in the presumptive-sentencing framework as a "safety valve" to prevent the framework from resulting in manifest injustice in individual cases. In *Dancer v. State*, the Alaska Court of Appeals relied in part on the important role of the panel in order to uphold the constitutionality of presumptive sentencing where a defendant claimed a right to individualized sentencing. But it is not clear that the panel still fulfills this role. The panel sentencing process is confusing, entails significant delays, and does not address several of the harshest aspects of modern Alaska sentencing law. At the same time, some aspects of the panel's discretion have become routine enough to permit courts the same discretion.

Below, I outline four possible statutory amendments that address these concerns.

Option 1: Abolish the panel and increase court sentencing discretion.

Option 2: Increase court sentencing discretion in extraordinary circumstances and refer "close cases" to the panel for increased sentencing discretion.

Option 3: Re-cast AS 12.55.155-175 to maintain the panel as a safety valve.

Option 4: Codify and clarify existing law.

Each option would require a harmonizing amendment of AS 33.16.090, which governs discretionary parole eligibility.

Option 1: Increase Court Sentencing Discretion without Panel Sentencing

AS 12.55.160 **Extraordinary Circumstances** is enacted 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 A PREPONDERANCE OF EVIDENCE THAT INJUSTICE WOULD RESULT FROM FAILURE TO CONSIDER RELEVANT MITIGATING FACTORS NOT SPECIFICALLY INCLUDED IN AS 12.55.155 OR FROM IMPOSITION OF A SENTENCE WITHIN THE PRESUMPTIVE RANGE, WHETHER OR NOT ADJUSTED FOR MITIGATING FACTORS, THE COURT MAY IN THE INTEREST OF JUSTICE GRANT DISCRETIONARY PAROLE ELIGIBILITY DURING ANY PORTION OF THE ACTIVE TERM OF IMPRISONMENT IMPOSED OR SENTENCE THE DEFENDANT TO ANY DEFINITE TERM OF IMPRISONMENT UP TO THE MAXIMUM TERM PROVIDED FOR THE OFFENSE, INCLUDING A SUSPENDED TERM OF IMPRISONMENT, OR TO ANY SENTENCE AUTHORIZED UNDER AS 12.55.015.

AS 12.55.165 **Extraordinary Circumstances** is REPEALED.

AS 12.55.175 **Three-judge sentencing panel** is REPEALED.

Option 2: Increase Court Sentencing Discretion with Panel Sentencing in Close Cases

AS 12.55.165 **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 A PREPONDERANCE OF EVIDENCE [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 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) 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 MITIGATING FACTORS NOT SPECIFICALLY INCLUDED IN AS 12.55.155 OR FROM IMPOSITION OF A SENTENCE WITHIN THE PRESUMPTIVE RANGE, WHETHER OR NOT ADJUSTED FOR MITIGATING FACTORS, THE COURT MAY IN THE INTEREST OF JUSTICE GRANT DISCRETIONARY PAROLE ELIGIBILITY DURING ANY PORTION OF THE ACTIVE TERM OF IMPRISONMENT IMPOSED OR SENTENCE THE DEFENDANT TO ANY DEFINITE TERM OF IMPRISONMENT UP TO THE MAXIMUM TERM PROVIDED FOR THE OFFENSE, INCLUDING A SUSPENDED TERM OF IMPRISONMENT, OR TO ANY SENTENCE AUTHORIZED UNDER AS 12.55.015.
(c)-(d) is REPEALED.

AS 12.55.175. **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. If the panel supplements the record, the panel shall permit the victim to testify before the panel. If the panel finds BY A PREPONDERANCE OF EVIDENCE that [MANIFEST] injustice would result from failure to consider relevant [AGGRAVATING OR] mitigating factors not specifically included in AS 12.55.155 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.
(e)-(g) is REPEALED

Option 3: *Re-cast the Panel Statutes*

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

(a) Except as provided in (e) of this section, if a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) [AND], THE COURT MAY IMPOSE ANY SENTENCE BELOW THE PRESUMPTIVE RANGE FOR FACTORS IN MITIGATION OR MAY INCREASE THE ACTIVE TERM OF IMPRISONMENT UP TO THE MAXIMUM TERM OF IMPRISONMENT FOR FACTORS IN AGGRAVATION.[1]

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 POST-OFFENSE BEHAVIOR;
(24) THE COLLATERAL CONSEQUENCES OF CONVICTION FOR THE DEFENDANT ARE INCONSISTENT WITH THE IMPOSITION OF A SUBSTANTIAL PERIOD OF IMPRISONMENT.

AS 12.55.165 **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 SENTENCES OR BARRING THE SUSPENDED IMPOSITION OF SENTENCE, 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*][2]

AS 12.55.175 **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, TO DETERMINE IF IT AGREES WITH THE SENTENCING COURT'S GROUNDS FOR REFERRAL TO THE PANEL. The panel may hear oral testimony to supplement the record before it. If the panel supplements the record, the panel shall permit the victim to testify before the panel. If the panel finds BY A PREPONDERANCE OF 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 SENTENCES OR BARRING THE SUSPENDED IMPOSITION OF SENTENCE, 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.

(c) The three-judge panel may in the interest of justice SUSPEND IMPOSITION OF SENTENCE, GRANT DISCRETIONARY PAROLE ELIGIBILITY DURING ANY PORTION OF THE ACTIVE TERM OF IMPRISONMENT IMPOSED, OR sentence the defendant to any definite term of imprisonment up to the maximum term provided for EACH [THE] offense, INCLUDING A SUSPENDED TERM OF IMPRISONMENT, or to any sentence authorized under AS 12.55.015.

(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*][3]

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[1] This would treat mitigators and aggravators equally by repealing limitations on discretion for mitigators.

[2] This provision is unnecessary if "extraordinary potential for rehabilitation" becomes a statutory mitigator.

[3] This provision is unnecessary if AS 12.55.155(a) is amended as suggested.

Option 4: Codify and Clarify Existing Law

AS 12.55.165 **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 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) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the MITIGATING FACTOR OF THE defendant's EXTRAORDINARY potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

AS 12.55.175 **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, TO DETERMINE IF IT AGREES WITH THE SENTENCING COURT'S GROUNDS FOR REFERRAL TO THE PANEL. The panel may hear oral testimony to supplement the record before it. If the panel supplements the record, the panel shall permit the victim to testify before the panel. If the panel finds BY A PREPONDERANCE OF EVIDENCE that manifest injustice would result from failure to consider relevant [AGGRAVATING OR] mitigating factors not specifically included in AS 12.55.155 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.

(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 OR sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense, INCLUDING A SUSPENDED TERM OF IMPRISONMENT, or to any sentence authorized under AS 12.55.015. EXCEPT AS PROVIDED IN (e), IF THE PANEL FINDS THAT MANIFEST INJUSTICE WOULD RESULT FROM FAILURE TO CONSIDER RELEVANT MITIGATING FACTORS NOT SPECIFICALLY INCLUDED IN AS 12.55.155, THE PANEL SHALL IMPOSE SENTENCE IN ACCORDANCE WITH AS 12.55.155(a) UNLESS THE PANEL ADDITIONALLY FINDS THAT MANIFEST INJUSTICE WOULD RESULT FROM IMPOSITION OF SENTENCE IN ACCORDANCE WITH AS 12.55.155(a).

(e) If the three-judge panel determines under (b) of this section that THE DEFENDANT HAS AN EXTRAORDINARY POTENTIAL FOR REHABILIATION AND THAT MANIFEST INJUSTICE WILL RESULT FROM IMPOSITION OF SENTENCE IN ACCORDANCE WITH AS 12.55.155(a) SOLELY BECAUSE OF THE DEFENDANT'S EXTRAORDINARY POTENTIAL FOR REHABILITATION [MANIFEST INJUSTICE WOULD RESULT FROM IMPOSITION OF A SENTENCE WITHIN THE PRESUMPTIVE RANGE AND THE PANEL ALSO FINDS THAT THE DEFENDANT HAS AN EXCEPTIONAL POTENTIAL FOR REHABILITATION AND THAT A SENTENCE OF LESS THAN THE PRESUMPTIVE RANGE SHOULD BE IMPOSED BECAUSE OF THE DEFENDANT'S EXCEPTIONAL POTENTIAL FOR REHABILITATION], the panel

(1) shall sentence the defendant [WITHIN THE PRESUMPTIVE RANGE REQUIRED UNDER AS 12.55.125 OR AS PERMITTED UNDER] IN ACCORDANCE WITH AS 12.55.155(a);

(3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the [SENTENCE] ACTIVE TERM OF IMPRISONMENT imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection.

PROPOSAL FROM QUINLAN STEINER

Amend A.S. 12.55.155("Factors in aggravation and mitigation") to read as follows:

(d)(17) The defendant, at the time of sentencing, has successfully completed a treatment program as defined in A.S. 12.55.027(f) that was begun after the offense was committed.

The mitigator currently reads:

(d) (17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028[i] that was begun after the offense was committed;

AS 12.55.027(f) , if amended by SB91, sec. 71, would read:

§ 12.55.027. Credit for time spent toward service of a sentence of imprisonment

(f) To qualify as a treatment program under this section, a program must

(1) be intended to address criminogenic traits or behaviors;

(2) provide measures of progress or completion; and

(3) require notification to the pretrial service office or probation officer if the person is discharged from the program for noncompliance

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[i] 28.35.028. Court-ordered treatment

(a) Notwithstanding another provision of law, with the consent of the state and the defendant, the court may elect to proceed in a criminal case under AS 04.16.200(b) or (e), AS 28.35.030, or 28.35.032, including the case of a defendant charged with violating the terms of probation, under the procedure provided in this section and order the defendant to complete a court-ordered treatment program. The state may not consent to a referral under this subsection unless the state has consulted with the victim and explained the process and consequences of the referral to the victim. A court may not elect to proceed under this section if the defendant has previously participated in a court-ordered treatment program under this section two or more times.

(b) Once the court elects to proceed under this section, the defendant shall enter a no contest or guilty plea to the offense or shall admit to a probation violation, as appropriate. The state and the defendant may enter into a plea agreement to determine the offense or offenses to which the defendant is required to plead. If the court accepts the agreement, the court shall enforce the terms of the agreement. The court shall enter a judgment of conviction for the offense or offenses for which the defendant has pleaded or an order finding that the defendant has violated probation, as appropriate. A judgment of conviction or an order finding a probation violation must set a schedule for payment of restitution owed by the defendant. In a judgment of conviction and on probation conditions that the court considers appropriate, the court may withhold pronouncement of a period of imprisonment or a fine to provide an incentive for the defendant to complete recommended treatment successfully. Imprisonment or a fine imposed by a court shall comply with AS 12.55 or any mandatory minimum or other sentencing provision applicable to the offense. However, notwithstanding Rule 35, Alaska Rules of Criminal Procedure, and any other provision of law, the court, at any time after the period when a reduction of sentence is normally available, may consider and reduce the defendant's sentence based on the defendant's compliance with the treatment plan; when reducing a sentence, the court (1) may not reduce the sentence below the mandatory minimum sentence for the offense unless the court finds that the defendant has successfully complied with and completed the treatment plan and that the treatment plan approximated the severity of the minimum period of imprisonment, and (2) may consider the defendant's compliance with the treatment plan as a mitigating factor allowing a reduction of a sentence under AS 12.55.155(a). A court entering an order finding the defendant has violated probation may withhold pronouncement of disposition to provide an incentive for the defendant to

complete the recommended treatment successfully. (c) If the defendant does not successfully complete the treatment plan imposed by the court under this section, the defendant's no contest or guilty plea or admission to a probation violation to the court shall stand, and the sentence previously imposed shall be executed or, if sentence has not yet been imposed, sentence shall be imposed by the court.
(d) Notwithstanding any other provision of law to the contrary, the judge, the state, the defendant, and the agencies involved in the defendant's treatment plan are entitled to information and reports bearing on the defendant's assessment, treatment, and progress. The victim is entitled to periodic reports on the defendant's progress and participation.
(e) In addition to other conditions authorized under AS 12.30 or AS 12.55, a court may impose the following conditions of bail or probation:
(1) require the defendant to submit to electronic monitoring;
(2) require the defendant to submit to house arrest.
(f) A court shall refer a defendant who is ordered to participate in a treatment program under this section to an alcohol safety action program developed and implemented or designated under AS 47.37.040(21) for screening, referral, and monitoring.
(g) In addition to other conditions authorized under AS 12.30, a court may require the defendant to take a drug or combination of drugs intended to prevent substance abuse.
(h) In this section,
(1) “court-ordered treatment program” or “treatment plan” means a treatment program for a person who consumes alcohol or drugs and that
(A) requires participation for at least 18 consecutive months;
(B) includes planning and treatment for alcohol or drug addiction;
(C) includes emphasis on personal responsibility;
(D) provides in-court recognition of progress and sanctions for relapses;
(E) requires payment of restitution to victims and completion of community work service;
(F) includes physician-approved treatment of physical addiction and treatment of the psychological causes of addiction;
(G) includes a monitoring program and physical placement or housing; and
(H) requires adherence to conditions of probation;
(2) “sentence” or “sentencing” includes a suspended imposition of sentence as authorized under AS 12.55.085.