Meeting Summary

Alaska Criminal Justice Commission
Sentencing Workgroup

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

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

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

Staff: Susanne DiPietro, Barbara Dunham

Revisions to law surrounding GBMI

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

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

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

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 She thought the language in the statute was probably based on outdated ideas about mental health.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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Juvenile auto-waiver

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DV Sentencing/Programming

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

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

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

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

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

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

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

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

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

Public comment

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

Next meeting

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

Meeting Summary

Alaska Criminal Justice Commission
Sentencing Workgroup

July 28, 2017, 1:30-3:30pm
Denali Commission Conference Room, 510 L Street, Suite 410
And Teleconference

Commissioners: Joel Bolger, Trevor Stephens

Participants: Doug Moody, Phil Shanahan, Tara Rich, Karen Forrest, Dennis Weston, Heidi Redick, Barb Murray, Matt Davidson, Kaci Schroeder, Rob Henderson, Heather Nobrega

Staff: Susanne DiPietro, Barbara Dunham

Juvenile waiver

Karen Forrest explained that the DJJ white paper on rethinking the automatic waiver had been brought to the Criminal Justice Working Group and to the legislature in the 2014 session, where the issue was also being pushed by a national group. The situation has changed since that paper was written: there has been a downward trend in keeping kids in juvenile custody [or in juvenile cases generally?], so DJJ has closed wings and removed hard beds from its facilities. There are also significant budget issues. She would be interested in hearing from DOC on the number of youth in DOC custody and the nature of their charges, as well as any issues with providing services and any outcome data.

Doug Moody said that the PDs were looking at the dual sentencing process—it is currently up to the DA whether to allow dual sentencing, but the PDs believe it should be up to the judge. There are very few of these cases so it is difficult to get data, but there indications that there are disparities in using dual sentencing among jurisdictions. It is used so infrequently in some places that people are unfamiliar with it. The PDs would also like to make dual sentencing available for juveniles subject to a discretionary waiver.

The PDs also suggested sealing the criminal case if a juvenile subject to dual sentencing successfully completes juvenile rehabilitation. (If the juvenile does not complete the rehabilitation, the criminal case would remain public.)

Rob Henderson asked Doug if the PDs were tracking data on juvenile offenders. Doug said Jon Bernitz was tracking them but there were very few because it was not used often. Susanne DiPietro asked if the Dept. of Law had this data; Rob did not think so. Karen said tracking down this data would be very important. DJJ had gone from over 300 to about 225 beds, and they have closed units- they are now at full capacity. Justice Bolger added that the legislature will also want to know data on the types of offenses committed. Doug suggested CourtView might hold this data; Justice Bolger said he would look into it.

The group discussed what data would need to be collected: those charged at age 16 or 17, with the crimes enumerated in 47.12.030, over the course of 5 years. It seemed likely that data would need to be cobbled together from several sources, especially given the varied practices in the different

jurisdictions. Karen said this might be an opportunity to reduce disparities. Heidi Redick said that it was also important to look at outcomes, and thought the 5-year period was appropriate because sometimes cases took a long time to resolve.

It was agreed that the representatives of the various agencies would ascertain what data they had on auto-waiver defendants. Barbara Dunham explained that the workgroup would be taking a break while staff worked on the annual report, and that there was no rush to get this done soon. Karen said she appreciated that—she would like time to run the numbers and thought that any proposal would have to be crafted carefully and with consensus, so that it did not have the same fate as the 2014 legislation which died quickly.

Three-judge panel

The group had reviewed the proposed statutory changes circulated by Mike Schwaiger at the last meeting; one page had the consensus proposals and one page had additional proposals. Kaci Schroeder said that the consensus proposals accurately reflected the points of agreement, and the Dept. of Law had no objections to that page. The consensus proposals included: adding two mitigators for extraordinary potential for rehabilitation and exemplary post-offense behavior, adding eligibility factors to send cases to the panel, adding a provision to allow the panel to act as a sentencing court if it does not find manifest injustice, and allowing the panel to grant discretionary parole eligibility.

Judge Stephens agreed he did not have any objection to these proposals; his goal was simplification of the statute which these proposals achieve.

Justice Bolger asked why the proposal did not make sentencing by the panel automatic (rather than by agreement of the parties) in cases where it does not find manifest injustice. Rob Henderson explained that the victim or a party might object, preferring that the original judge to hear the trial do the sentencing; victims or either party might have reasons for wanting either option. Doug Miller agreed.

Barbara asked whether the group wanted to send just the consensus proposals to the full Commission or to send the additional proposals as well. Rob said that Law had some concerns about the additional proposals. He asked Judge Stephens whether the consensus proposals addressed his concerns. Judge Stephens said they did; they should get the appropriate cases to the panel and address the current lack of clarity. This topic will be on the agenda for the fall judicial conference. The group agreed to send just the consensus proposals ("page 1") to the full Commission.

Vehicular Homicide

Rob Henderson said that Law was very close to a finished proposal but they had not had time to share it with the Public Defenders.

Revisions to law surrounding GBMI/NGI

Rob said that he and Josie Garton were still discussing this issue and they haven't come to any conclusions. He noted that DOC would also like to participate in the discussion, and that because GBMI is really its own issue, it would be worth taking the time to address separately later.

Motion to Modify

The proposal still on the table was to amend AS 12.55.088 to allow a motion to modify a sentence past the 180-day time limit if the defendant has completed all court-ordered rehabilitation programs.

Doug Moody explained that Quinlan Steiner had researched the question of why the law was changed to limit motions to modify a sentence to 180 days post-sentencing. The legislative history showed that the Department of Law was opposed to any time limit beyond 120 days. He was not sure where the 180-day limit came from, but the idea was to stem the tide of post-conviction rehabilitation motions. Justice Bolger asked if this was in 1995-1996. Doug said it was, and it was a time when many defendants filed repeated Rule 35 motions.

Susanne DiPietro asked if the legislation achieved its purpose. Doug said that it had in a sense, in that there were far fewer motions to modify, but there are still many PCRs filed. Phil Shanahan remarked that he was at OPA at the time this rule was passed, and the feeling among defenders was that six months was too short a time to prove anything had changed.

Susanne wondered what the interaction of the proposal would be with new administrative parole provisions and the new provisions for case planning for inmates. She also wondered what the criteria would be for granting such a motion—the *Cheney* factors? Phil said he would assume the *Cheney* factors would be used- it would be like the opposite of a PTRP. Doug said that defendants might prefer modifying the sentence to getting administrative parole. Judge Stevens said that these motions are something he rarely sees; he also noted that probation terms are cut in half now [if the defendant gets earned compliance credits] which might affect the defendant's preference.

Rob Henderson said this proposal raised concerns about victim's rights and indeterminate sentencing. He said he might be more comfortable with a mitigator because it would provide for greater finality.

Barbara Dunham asked whether the motion to modify proposal would cut down on PCR applications. Doug said it probably wouldn't; PCRs are not typically submitted on the basis of finishing programs and it is not really within the scope of the statute. Doug suggested a mitigator for someone who gets into treatment right away, with a limit on the time sentencing can be postponed. Susanne said a cap on the postponement would be better for victims.

Justice Bolger wondered whether there would be a need for another mitigator if the "extraordinary potential for rehabilitation" mitigator in the three-judge panel pack passed and defendants already had the possibility of administrative parole. Susanne noted that administrative parole was limited to certain offenses.

Doug suggested that the public defenders should continue this conversation with the Department of Law to come up with the best solution. Rob agreed and suggested including the Office of Victim's Rights in that conversation. The group agreed to table this discussion until there was a consensus proposal from those groups.

Public comment

Angela Hall asked that the workgroup take up the issue of offenders who were sentenced as juveniles or young adults to de facto life sentences in light of new research and new cases from the

Supreme Court on this issue. States such as Nevada and West Virginia have enacted laws that provide for parole review for these offenders. Teenagers who receive a 99-year sentence are not offered any hope. She would like to see the workgroup look into a recommendation that offenders sentenced as juveniles be granted parole review after 15 or 20 years.

Next meeting

The group tentatively set a single-issue meeting for August 11 at 1:30 to take up the vehicular homicide sentencing issue if Law and the PDs are able to confer in that time.

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.

Meeting Summary

Alaska Criminal Justice Commission
Sentencing Workgroup

March 24, 2017, 2-4pm
Denali Commission Conference Room, 510 L Street, Suite 410 and Teleconference

Commissioners present: Quinlan Steiner, Alex Bryner, Trevor Stephens

Participants: Josie Garton, Mike Schwaiger, Kathy Hansen, Rob Henderson, Adam Rutherford

Staff: Susanne DiPietro, Barbara Dunham

Revisions to law surrounding GBMI/NGI

Adam Rutherford from DOC gave an overview of the Department's Behavioral Health and GBMI processes. He explained that DOC is the largest behavioral health provider in the state. It is an imperfect system but he is proud of the program given its limited staff. DOC has two full-time psychiatrists and one ANP for the whole program. Like API, DOC also provides acute care, with 28 acute care beds for men and 18 for women. They also have 280 subacute beds.

On a snapshot day, 65% of inmates are Trust beneficiaries. 22% of inmates have a severe and persistent mental illness. Trust beneficiaries are more likely to be felons, more likely to serve longer sentences, and more likely to recidivate. The system is imperfect in terms of tracking; DOC welcomes any information on an inmate's mental health from family members or attorneys. They do get calls. Law enforcement personnel say they bring people to DOC custody because they know they can get services that way.

Mental health contacts by DOC personnel have increased by 61% over the past 9 years. There has not been a corresponding increase in staff or prison population. The increase might be attributable to increased drug use, and they seem to be seeing more mentally ill offenders entering custody. They are seeing an increase in comorbidity of substance abuse and mental illness in offenders. Adam has worked in the same field in other states and has noticed that a greater percentage of offenders enter custody with an untreated mental illness in Alaska than elsewhere. He suspected this was due to a lack of community resources.

The Institutional Discharge Project Plus (IDP+) program has a caseload of 90 felony offenders with severe and persistent mental illness. The program has two clinicians who help transition offenders to the community. The program also tracks recidivism and quality of life for program participants. The Assess Plan Identify Coordinate (APIC) program is also for offenders with severe and persistent mental illness. It brings treatment providers into DOC facilities to meet with offenders 90 days prior to release. DOC is getting the same program in place for offenders with substance abuse disorders through the reentry coalitions.

For treatment in prison, DOC focuses on evidence-based programs, including cognitive-behavioral therapy. Since they have only two psychiatrists, they don't have the ability to provide one-on-one therapy so they do more group work. Offenders diagnosed with FASD are typically housed in one of their subacute

units. They don't have a specific treatment plan for FASD clients but DOC intends to work with the Trust on that. They are starting to see more offenders with confirmed diagnoses.

DOC's GBMI policy is still under development. The GBMI population is just starting to be eligible for parole or furlough. They struggle to identify which offenders are GBMI—this information is not always relayed to Adam's team. They're developing a field for this in ACOMS. There are 12 total inmates who are GBMI in the system right now. They are in the middle of processing the first GBMI offender who is eligible for furlough.

The proposed hearing process for GBMI offenders right now is to hold a hearing of the GBMI Mental Health Review Committee (MHRC) 180 days before the offender is eligible for furlough or parole. The offender will be given 30 days' notice and may seek legal counsel. At the hearing DOC mental health staff will present evidence regarding whether continued treatment is required. The offender/legal counsel may also present evidence and question the mental health staff. The MHRC chair will forward the MHRC's decision to the Commissioner, who will then issue the final written decision.

Adam was not sure whether continued usage of medication was "continued treatment" for purposes of the GBMI parole/furlough determination. He was also not sure what the process would be if a GBMI offender were deemed ineligible for furlough/parole. The offender will be able to appeal the decision to the Commissioner.

There is no specialized treatment for GBMI inmates; as with all inmates with mental illness, DOC's primary goal is to stabilize them. Their housing will depend on their functioning but will likely be in one of the subacute beds. They may be released on the IDP+ program but may not, depending on the need.

There are plenty of non-GBMI inmates whose mental illness is as severe as GBMI inmates. Adam has noticed that the standards for when GBMI is used are not universal. Recently there was a case in Nome where a defendant was found GBMI for sleeping in other people's cars. He was sentenced to time served.

Adam also briefly touched on competency. They have worked out an agreement with API – about 90% of competency evaluations are done in the Anchorage Jail. Any restoration is done at API. DOC is in a bind with the pretrial population because they can't intervene with unsentenced inmates. Sometimes the misdemeanor offenders will stay in DOC custody awaiting an evaluation/being restored for longer than the sentence imposed.

Flow chart on competency, NGRI, and GBMI

Josie led the group through a PowerPoint explaining competency, insanity, and GBMI. Competency refers to the defendant's capacity to stand trial. If a defendant is found incompetent, the court may order that they be committed to see if they can be restored (the court must order this in felony cases). Typically the restoration period is 90 days; in some cases it will be extended to 6 months. Restoration can mean medication but it can also mean coaching as to procedure and the names of the judge, attorneys, etc.

Rob was curious to know the percentage of those initially found incompetent who were restored. Susanne suggested looking at motions but the group thought looking at orders would be better as not all motions for competency evaluations are granted. API might also have this data. Barbara will look into this.

The group discussed various problems with the GBMI statutes. The statute states that an inmate who is GBMI may not be released from DOC custody, meaning they can be held indefinitely, if the inmate is

receiving treatment. It is not clear what the statute means by receiving treatment—for example, an inmate could be taking medication and be stabilized, but the medication may count as "receiving treatment" and bar that inmate's release. This section of the statute has not been litigated; since (until recently) no GBMI inmates were yet eligible for release, the Court of Appeals has held that the issue was not yet ripe.

Another problem, as Adam had indicated, was that DOC did not have a mechanism to identify GBMI inmates. If an institutional PO comes across an inmate with a GBMI designation who would be eligible for release, they may just tell the inmate that he or she is ineligible and the inmate may just accept that. Josie knows of one case of a GBMI inmate whose mandatory parole date passed two years ago without any hearing.

Defense attorneys are also disincentivized from revealing a client's mental illness, even after trial, because they want to avoid the harsh consequences of a GBMI determination. Justice Bryner asked why this was the case if the jury had already found the defendant guilty. Josie explained that the case could be retried after an appeal, and that the attorney is usually also worried about any future case where this might come up. Essentially if a defendant's mental health has ever come up at trial, the defendant runs the risk of a GBMI finding at that trial or in future trials.

The group discussed options for reforming the statutes. One option was to amend the GBMI statute so that GBMI defendants are not treated more harshly than other inmates. Another option was to amend the NGI statute to bring it more in line with national standards so that it did not exclude virtually every defendant.

1. **Three-judge panel**
2. **Post-offense, pre-sentencing treatment mitigator First-time DUIs**
3. **Juvenile Waiver**
4. **Mandatory Minimums for Murder 2/Vehicular Homicide.**
5. **Public comment**
6. **Next meeting**

Meeting Summary

Alaska Criminal Justice Commission
Presumptive Sentencing Workgroup

January 27, 2017, 3-5pm
Denali Commission Conference Room, 510 L Street, Suite 410, and teleconference

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

Participants: Kaichen McRae, Kristy Becker, Rob Henderson, Josie Garton, Mike Schwaiger, Kathy Hansen

Staff: Susanne DiPietro, Barbara Dunham

GBMI/NGI

Drs. Kristy Becker and Kaichen McRae from API answered the group's questions about API's practices for those involved in the criminal justice system.

Dr. Becker introduced herself and explained that she was trained outside of Alaska and had used the M'Naughten test elsewhere; her practice is very different here where only one prong of the test is used – i.e. is the defendant able to form intent? (The second prong asks whether the defendant knew what they were doing was wrong.) Dr. Becker explained that API takes court-ordered evaluations from around the state—mostly the evaluations are for competency, but some are for culpability.

Neither Dr. Becker nor Dr. McRae had seen a GBMI evaluation, but their understanding is that the offender would be incarcerated indefinitely and would not be housed at API. Rob Henderson said that he thought they were supposed to be treated at API and then sent to DOC when stabilized. Josie Garton pointed out that the law just commits the offender to the custody of DOC. This was changed by executive order in the 1980s; previously it had been the custody of DHSS. Dr. Becker said she knows that DOC has two facilities for mentally ill offenders, Mike Mod in Anchorage and one in Hiland.

Rob asked whether API might have capacity to accept mentally ill offenders long-term. Dr. Becker said that historically API has accepted NGRI inmates, but there is no one at API with that status now. API has downsized from 100 beds to 80 and there is routinely a waitlist, including for the forensic unit which is capped at 10 beds. If there is no room in the forensic unit, inmates wait in DOC custody, with varying wait times—the maximum was 70 days, but it could be as little as one day.

Asked if it was better to treat individuals at API or DOC, Dr. Becker responded that the hospital is the more therapeutic environment. In an ideal world they could take in inmates to the forensic unit on a Monday or Tuesday on demand, which would give the inmate time to adjust to the unit with full staffing levels before the weekend.

Asked about civil commitment, Dr. McRae said that was a separate process. Patients are brought in for a 24-hour hold which can be extended for 72 hours. They can sign themselves in voluntarily; if they are not willing to be there the treatment team can decide to hold them if necessary. They can do a 30-day

commitment, and can get an order for a 90-180-day commitment. Most commitments are for 30 days; very few extend beyond 180 days.

Quinlan Steiner asked who files for civil commitment of a person after they are found not competent to stand trial. Dr. Becker said that the DAs will often file in felony cases, but not always for misdemeanor cases. They will see the same people cycle in and out of API on both the civil and criminal side. They will sometimes do evaluations for a joint filing under both standards. Incompetent defendants present a conundrum. As treatment providers, they are obligated to treat a person until they are made safe—their ethical obligation is to see their treatment through. But once a defendant is restored to competency, they are sent to trial whether treatment complete or not.

Josie remarked that a person who receives a verdict of GBMI or NGRI would necessarily have to be competent, but she imagined that someone who had that level of mental illness would need to be restored first. Dr. Becker confirmed this; she said that the Aurora shooter, for example, was restored to competency before being found guilty. If someone is not restorable, they'll never get to the culpability stage. In Alaska, if a defendant is restorable, there's not much point in doing a culpability analysis because the burden is so high—if they are competent to stand trial, they will almost always be culpable. People suffering from dementia or whose IQ is in the 30s or 40s can't be restored.

The only recent NGRI case she knew of concerned a defendant in an emergency state with pronounced confusion and disorientation—he didn't know who he was. He assaulted a nurse. There was no element of volition in his conduct. To be NGRI, the defendant has to have absolutely no intent or awareness of what they're doing. Most people do intend to engage in an act; the question is did they know that what they were doing was wrong.

Brenda Stanfill asked if there was any place for patients who are discharged from API to go to other than a shelter. Dr. McRae said that they always do discharge planning with patients. They will only go to a shelter if no assisted living facility (ALF) is available or the patient refuses to go to one. Josie asked if the assisted living facilities were private facilities. Dr. Becker said they were, for the most part. Juveniles and adults with developmental disabilities will get some money from the state. The chronically mentally ill often get blacklisted from the ALF or know they don't want to live there. There is no step-down facility from API that is locked or partly locked in Alaska. Brenda noted that if a patient has a mental health problem that is not a developmental disability, Medicaid doesn't cover the costs of an ALF.

Rob asked what API's process would be for treating someone who receives an NGRI verdict. Dr. Becker wasn't sure, because there has been no need to implement a protocol. Likely they would be treated at API, and if they completed treatment, would probably be given a stepdown program to follow, something like parole. Long-term hospitalization would be likely. Rob wondered what the process would be for low-level crimes. Dr. Becker said there weren't really any facilities for that in Alaska. Quinlan said there could theoretically be cases of a low-risk NGRI patient, who wouldn't necessarily need a facility.

Josie asked if the doctors knew how many NGRI patients there were before the law changed. Dr. Becker said her understanding was that there were about 15-20, and they were mostly charged with murder.

Regarding the UNLV report, Dr. Becker said she didn't agree with all of it but she did agree with the commentary on the NGRI statute. Also, the requirement of having two board-certified psychologists to do evaluations is impractical. Having a board certification in psychology is unusual; psychologists are licensed

but not board-certified. There are only 300 psychologists with board certification in the US and none in Alaska. Certification requires 5 years of practice. There are only 3 people who work for the state of Alaska who practice forensic psychiatry—Drs. Becker and McRae and one other. (There are more in private practice

Asked about average numbers of evaluations, Dr. Becker said that they will each typically do 2 or 3 competency evaluations each week, and their third psychologist does one every week or so. In total API does about 225 per year. They have done 9 or 10 culpability evaluations total.

The group next discussed how to proceed on this topic, and agreed to hear from someone at DOC and perhaps an administrator at API. The group discussed looking at the issue holistically, including competency—some thought it would be more palatable to the Commission/legislators if they were presented with a whole solution.

Brenda asked what the goal of any reform in this area would be. Quinlan suggested that returning NGRI to the M'Naughten standard and making the consequences less severe might be a good starting place—as well as getting at the more global question of why DOC is the state's biggest mental health provider. Josie suggested that simply eliminating the GBMI option would be a place to start as it wouldn't require expanding the capacity of API. Rob suggested removing the consequences for GBMI but keeping the designation so it would operate as a flag for mental illness. Brenda said the goal of any reform should be to get people to the right programming.

Kathy Hansen said that it was hard to talk to victims in cases where the defendant was declared not competent to stand trial, because of the potential that nothing would be done for that person to ensure they would not reoffend. Quinlan suggested looking into community-based services and the possibility of an outpatient civil commitment in the least restrictive setting.

Quinlan further suggested drafting a flow chart to outline the pressure points on DOC's capacity to handle mentally ill offenders and how they move through the system, along with the fiscal impact—the PDs will make this chart.

Josie will contact Adam Rutherford at DOC to see if he would be willing to speak to the group.

Presumptive sentencing

Justice Bryner had to leave the meeting at this point but said that he would like to revisit presumptive sentencing as a concept.

Three-judge panel

Mike Schwaiger led the group through the PDA's proposal for revising the three-judge panel statutes. He said it addressed an area of previous agreement—if the panel disagrees with the referral (i.e. disagrees that the case should have been sent to the panel), the parties can agree to having the panel impose a "regular" sentence at that hearing, rather than have the case return to the original judge for yet another sentencing hearing several months later.

Other parts of the proposal came from Mike's discussions with Judge Stephens. The proposed new mitigators are those that the three-judge panel has already indicated function as non-

statutory mitigators, and would allow parties to go around the requirement of going to the three-judge panel in cases where the mitigators apply. This would reduce the number of cases going to the panel. Judge Stephens noted that the proposals here would eliminate the need for AS 12. 55. 165(b) and .175(e).

(At this point Brenda had to leave but noted that she would take a look at these proposals with Taylor Winston/OVR.)

Mike explained that the proposal also removed language referring to aggravating factors and changed language to permit the victim to address the panel (rather than testify, the word used in the current version). Judge Stephens said that he had always treated that language as legislative oversight, and allowed victims to address the panel as they would in a normal sentencing hearing rather than make them provide sworn testimony subject to cross-examination. Kathy agreed that allowing the victim to simply address the panel rather than testify was better.

Mike explained that the proposal also inserts language into AS 12.55.175(b) about the panel's determination of whether it will take up the referral, and in .175(c) adds language to expand the panel's authority in imposing sentence.

Judge Stephens agreed that avoiding a third hearing was a good idea. By the time the panel has determined that it does not agree with the referral, the case has already had two hearings at the sentencing stage and all the available information has been presented. For the last two cases he referred, he told the parties that he will attend the hearing of the three-judge panel so that if the panel rejects the referral, he can sentence the defendant just afterward. Rob asked whether the sentencing should be done by the original judge in the case. Judge Stephens said that if the parties agree, there's no reason they should not be sentenced by the panel—but if the parties want to go back to the original sentencing judge, that's their prerogative.

Kathy said it would be better to have the victim address the court only one time. Victims hate the three-judge panel because it often involves three hearings and extensive delay.

The group agreed to take a look at the PDA's proposal and email Mike with any questions before the next meeting.

Post-offense, pre-sentencing treatment mitigator

The PDA had also submitted a proposal for a new motion to modify sentence, which would be the functional equivalent of the post-offense treatment mitigator the group had previously discussed. Quinlan said that he wanted to rethink this proposal and was going to redraft it. He welcomed the group to share their thoughts on this.

Rob said that he liked this proposal as a first cut. This is an issue that comes up a lot and the proposal was a creative way to think about it.

First-time DUIs

Barbara explained that at the Commission meeting earlier in the day, DOC Commissioner Williams had expressed consternation about the implementation of mandatory EM sentences for first-time DUI offenders. There are several problems with this: it is unclear what the appropriate sanction should be for someone who has violated the conditions of EM, it is difficult to monitor this population to know if they have complied with the EM requirement, and it is also difficult to monitor home confinement in areas where EM is unavailable. It also throws off their time accounting systems. The Commission agreed to refer this issue to the working group.

The group noted that it would have to think more about this but a few people offered first-take comments: Rob liked the idea of going back to a hard bed sentence; Susanne pointed out that 60% of first-time DUI offenders never reoffend and that DUI arrests have been going down; Quinlan said that some of the reduction in DUI arrests can be attributed to a shift in the culture—jail time was needed before to convince the public of the seriousness of the offense and to mount social pressure on people who drive drunk.

Public comment

There was no public comment.

Next meeting

The next meeting was set for March 24 at 2pm.

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

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

The group convened at 2:00 PM.

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

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

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

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

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

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

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

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

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

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

3. Post-offense, pre-sentencing treatment mitigator

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

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

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

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

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

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

4. Three-judge panel

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

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

5. Flat-timing

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

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

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

6. Sentencing implementation issues post-SB91

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

7. Next meeting

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

8. Public comment

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

The meeting ended at 4:00 PM.

Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
June 25, 2016, 9-11 AM at the Brady Building with Teleconference

Commissioners Present: Alex Bryner, Quinlan Steiner, Brenda Stanfill, Trevor Stephens, Greg Razo, Kris Sell
Commissioners Absent: Wes Keller
Participants: Rob Henderson (LAW); Catherine Hansen (OVR); Kaci Schroder; Mike Schwaiger(PD), Ken Truitt (LEG)
Staff: Mary Geddes, Brian Brossmer, Susanne DiPietro

The group convened at 9:00 AM.

The first topic was mitigators, specifically the proposed acceptance of responsibility mitigators.

Acceptance of Responsibility Mitigators.

All present agreed to the first variation, providing acceptance in the plea agreement context.

With respect to the second variation, providing a 50% floor in the non-plea context, both Greg Razo and Quinlan Steiner thought that there shouldn't be a floor. Rob Henderson and Alex Bryner like the floor. It was agreed that the 50% floor now provided by statute for lengthier sentences would still apply, and that we were only discussing the shorter sentences, like 'C's." Rob said that he would ponder the percentage in light of revised sentencing ranges. Susanne noted that the felony sentencing study for C felonies showed for all offenders a median sentence of 11 months active time.

Brenda Stanfill thought the mitigator is a good thing for expediting resolutions of cases, but she is still concerned that those who go to trial could get a benefit. Mary Geddes noted that she had practiced in federal court, where "acceptance of responsibility" is an advisory sentencing adjustment, and the adjustment was rarely available for anyone who went to trial. Cathy Hanson agreed that a mitigator is a good idea because speedy resolutions are generally better for victims, although it is possible that some some victims might be upset about reductions based on acceptance. Alex Bryner thinks a mitigator for acceptance allows too much discretion, is too subjective and encourages false expressions of remorse.

It was ultimately agreed that since all members but Alex Bryner had agreed to the mitigator (but not necessarily exactly to a floor for sentences where the floor if 4 years or less) the recommendations would be forwarded to the Commission. Alex's concerns would be reflected in the report.

Successfully Completed Treatment Mitigator: The next mitigator discussed was an amended mitigator for successful completion of evidence based treatment. This proposal would remove the offense exclusions and the limitation of crediting only that treatment received in the therapeutic context.

The major concern voiced by Trevor Stephens was that it would encourage pretrial continuances. This concern was shared by Cathy Hanson, Brenda Stanfill, and Rob Henderson. Brenda said she had no problem with pre-sentencing continuances to finish treatment. She would credit pre-sentence treatment received in Batterers Intervention by felony offenders in turning them around and avoiding recidivism.

There was agreement that as long as the mitigator can't be used to continue trial it should be recommended. Alex Bryner also asked that eligibility be conditioned on no recidivism (no relapse) prior to sentencing.

Cathy Hanson wondered if it was possible to get a list of state approved treatment programs in each courtroom so courts would know which programs are credible and which are not. Kris Sell asked if only rich people would get the benefit of this mitigator. The big problem is access to treatment. Trevor Stephens thinks that this mitigator will help even the playing field particularly for rural residents.

The group unanimously agreed to forward this proposal for an amended mitigator provided that it was made clear that pretrial delay was not to be accommodated, and that eligibility be conditioned on no recidivism prior to sentencing.

Mary Geddes said she would try to propose such language.

Three Judge Panel: Trevor Stephens presented a shortened revised list of changes to the three judge panel statute, following the latest round of emails between Kaci Schroeder, Mike Schwaiger and him. The changes are to AS 12.55.175 (c) and a deletion to 12.55.175(e). These changes will be further detailed in a report from the workgroup to be distributed by Mary Geddes.

Kaci Schroeder and Mike Schwaiger will continue working on other possible changes to the three judge panel related statutes.

Mary Geddes noted that she was continuing to look at the issue of 'flat-time' sentences and the pertinent law of probation. The Department of Law had done research on the topic in Sweezey v. State; Rob will review and follow up if there is interest.

When and if there are additional consensus proposals from the Department of Law and the PD to review, the Workgroup shall be reconvened. In the meantime, Mary will report on the group's recommendations.

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

The meeting ended at 11:00 AM.

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

---

[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

---

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.

---

[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

QUINLAN STEINER, PUBLIC DEFENDER

900 W 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: 907-334-4400
Fax: 907-334-4440

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]

---

[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

---

[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.

Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
May 13, 2016, 1-4:00 PM at the Brady Building with Teleconference
Atwood Building, 550 W. 7th Avenue, Rooms 102 and 104

Commissioners Present: Greg Razo, Alex Bryner, Quinlan Steiner, Trevor Stephens,
Commissioners Absent: Brenda Stanfill
Participants: Rob Henderson, Taylor Winston, Mike Schwaiger
Staff: Mary Geddes, Susie Dosik, Teri Carns, Giulia Kaufman, Susanne DiPietro, Brian Brossmer

Meeting materials provided in advance of the meeting:

Notes for Three Judge Panel Discussion
Teri Carns- Historical background of presumptive sentencing in Alaska; current questions
Susie Dosik - Presumptive Sentencing and Criminal Laws in Alaska
Background for Presumptive Sentencing Workgroup (Sentencing Topics and Comments)
AJC Executive Summary for Felony Sentencing Study

Dates set: This group will next meet on June 9 from 9-11 AM, and June 24, from 9-11 AM in the AG's offices.

AGREEMENTS FROM THIS MEETING

Keeping in mind that this group has only two 2-hour more meetings in which to finish its work, the Workgroup resolved to review any proposals :

- To reform the three judge panel statutes:
  - Trevor Stephens committed himself to drafting specific proposals to 'clean up' the statutory language.
  - Other members who had concerns and ideas (see below) should do the same and provide them ASAP for circulation:
    - E.g., changing 12.55.155, so that the list of aggravators and mitigators is a non-exclusive list of factors, which would eliminate the need for a three judge panel and additional hearing
    - E.g. streamlining the process to avoid unnecessary delays and hearings
    - E.g. broadening the role of the 3JP, e.g. to include relief from mand.-minimums and statutory exclusions from SIS
    - E.g. if sentencing judges could assume what has been 3JP's function, how to provide for appellate review of those functions
    -
- For new mitigators
  - Rob Henderson volunteered to draft on an acceptance of responsibility mitigator
  - Quinlan Steiner suggested that a broader treatment related mitigator Is needed.

Introduction: The meeting began at 1:00 PM. Mary Geddes reviewed the concept for the 2016 ACJC workgroups: ideally, a two-month intensive effort on a specific subject, culminating in a report to the full Commission with any pertinent recommendations. The plan for this workgroup is to fulfill the legislative mandate to review Alaska's sentencing laws and practices, including presumptive sentencing.

Teri Carns identified the materials provided for the meeting. She summarized her own memo, which provided the background on the development of Alaska's felony sentencing structure. Called a "presumptive sentencing" structure, Alaska has a unique structure, one that is actually a hybrid of: presumptive sentencing ranges for most felonies; minimum-mandatories for murder and kidnapping; and felony status for recidivist or repeat misdemeanor conduct. Originally the structure included more indeterminate sentencing, e.g. for B and C felony offenders; this feature went away because judicial discretion fell into disfavor. It was perceived that some disparities were attributed to looser sentencing structures; that and a 'tough on crime' climate led to more rigid sentencing structures. Beginning in the 00's, and as a result of the Supreme Court decisions in Blakely/Booker cases, there has been interest in doing away with minimum-mandatories (as they have been associated with racial disparities) and a reversion back to more advisory structures with guidelines used to provide boundaries for the exercise of discretion.

Susanne DiPietro explained that the various papers circulated by staff were intended to get the proverbial ball rolling in terms of identifying presumptive and other sentencing issues. Three ideas are suggested for purposes of today's discussion. Idea #1 Just as the federal system has done, convert the statutorily-mandated sentencing range(s) to an advisory sentencing range(s). This change would make the three-panel unnecessary. #2 Make changes to the language of the three judge panel statute, so as to eliminate the confusion of when it is necessary. #3 Consider adding a mitigating factor for acceptance of responsibility, perhaps a tiered one depending on when a plea was entered.

Advisory Systems: There were questions about how such a system might work, and for the sake of contrast how the federal system works. [i]

- What would be the quantum of evidence for going outside ranges?
- Would written findings be required?
- What type of appellate review would be allowed? [ii]
- Would an advisory sentencing structure make the three-judge panel unnecessary? (Likely yes)
- Would there be a spike in trials or appeals as a result of making such a change?

Teri Carns noted that in the past structural changes often lead to a 'spike' in the numbers but it seems only temporary. Local trial policies and personalities are often more important that statewide policy.

Commissioner Bryner noted that Alaska is the only state that provides for the review of sentences for excessiveness.

Mike Schwaiger asked if it isn't better to have a system that gives judges more discretion because those decisions are public and reviewable, compared to prosecutor's discretionary calls in the plea bargaining process?

Taylor Winston stated that, with respect to a proposal to increase judicial discretion, she would disagree with an increased amount of judicial discretion because there is very little information about judges out there. There is no public review of judges because there is no serious courtwatch program. On the other

hand there is a lot of public review of prosecutors' discretion. DiPietro said she disagreed: police officers, jurors, social workers, attorneys and court personnel are all surveyed and weigh in on retention in anonymous polling by the Judicial Council. It is the most substantive public review process of judges in the country; there is no comparable process for prosecutors.

Commissioner Razo stated, that given the very profound changes just made through SB91, recommending a structural shift from a statutory to advisory sentencing model seems untimely. He would be unwilling to recommend a fundamental shift in the sentencing system until he sees how the planned changes under SB91 are working. Commissioners Bryner also agreed it would be premature. Razo also stated that this would not preclude taking action with respect to the immediate three-judge panel question. Winston and Rob Henderson agreed with both observations. Commissioner Steiner also agreed, but only because he felt there was not enough time for the Commission to fully vet a change like that (from statutory to advisory sentencing ranges) before November. Steiner also expressed interest in having the group discuss other possible mitigators.

Three-Judge Panel: It was noted that the three-judge panel has a light load, only three cases a year. Commissioner Stephens said he thinks lawyers and judges fail to identify the panel as a resource.

Bryner stated that the lack of business for the three judge panel means that the lawyers find that that part of the system is too cumbersome and that they (their clients) would rather plea bargain. Mike Schwaiger indicated that that he thinks the low usage is due to sentencing bargaining being the prevailing practice. Steiner wondered if the low use is probably more attributable to the plea/trial split, and asked if all panel cases are trial cases. BTW, there are only 300 felony trial cases a year in Alaska.

Henderson asked how many times is the panel requested? How often is the panel referral denied? What would be its appropriate use? Bryner asked how much does the three judge panel cost? How much would we save if we got rid of it? Stephens said the court system doesn't currently have information as to how many times referral to the three judge panel is denied. According to Stephens, Susan Faulk is trying to capture the number of denials. He would estimate that the panel currently costs the court system approximately $15,000 a year. He doesn't know the attorney costs involved. Geddes noted that the more significant 'cost' may be nontangible, in terms of the delays involved.

Henderson stated that the low caseload (3 a year) could arguably reflect that the panel does serve the intended purpose, i.e. being only a safety valve for the extraordinary case. If the problem is a failing on the part of lawyers and judges to identify the panel as a resource, why isn't this simply a training issue?

Stephens agreed it is a training issue, that some training is in the works, but that the statute needs to be cleaned up. He thinks the three-judge panel really should have been developing (and publishing) a body of law, and that the panel really dropped the ball on this. The panel is starting to do this again. Nevertheless, at a minimum, the statutory language needs to be cleaned up.

Geddes asked if all parties were well served by a system that involves three sentencing hearings, and the delays attendant to that.

Stephens noted that the statute could be re-written so as to more effectively avoid delay. Stephens noted that he would be happy if the three-judge panel not merely weighed in on a mitigating or aggravating circumstance but proceeded to sentencing, in the interest of reducing the number of sentencing-related hearings. Participants pointed out that there could be instances where a trial judge would have superior

knowledge of the case, and changing the decision-maker would not be desirable. Henderson suggested that the law could be changed so as to allow the panel to sentence, if the parties agreed. Stephens was asked whether the panel's decision on whether to accept a case referral was a hearing on the record or just involved a document review. He explained that the decision to accept or not accept involves a full hearing by the panel.

Schwaiger wonders whether the use of the three judge panel could be statutorily broadened to include other contexts where there is manifest injustice, e.g. the use of mandatory minimums and SIS ineligibility. He also noted that the three-judge panel does serve an important function because there is no other route for clemency and the rate of appellate review doesn't always afford meaningful relief. DiPietro asked if there was opportunity to expand or change the role of the three-judge panel. Henderson suggested that the state might be going more often to the three-judge panel in the near future to ask for limitation of the new varieties of parole for a defendant, as permitted in SB91.

Winston noted that, as delays are hard on victims, a change which results in a greater usage of the three judge panel means more delays and costs. It also reduces truth in sentencing. Carns noted that all systems that tried truth in sentencing are reverting to greater use of judicial discretion.

Bryner asked whether the statute (12.55.155) couldn't be changed to a non-exclusive list of mitigating factors, which would eliminate the need for a three judge panel and additional hearings. The sentencing court should be allowed to consider the totality of circumstances. The standard of review for mitigating and aggravating factors could require clear and convincing evidence.

DiPietro asked why shouldn't the sentencing judge make the critical call, e.g. whether circumstances exist such that imposing a presumptive sentence would result in manifest injustice. Henderson noted that under state law the State could petition for review of the three judge panel decision as an interlocutory matter. The problem with cutting out the three judge panel is that the statute as presently written governing appeals does not allow the State a right of appeal for a sentence after the sentence is imposed, only to seek disapproval. Steiner suggested that there could be statutory fixes for this, such as allowing an appeal if the sentence is below a floor.

On the to-do list: Commissioner Steiner was asked to forward any ideas for reform of the three-judge panel. Stephens stated that he will also draft statutory language.

The group reviewed the list of other statutory changes which had been suggested.

Acceptance of responsibility mitigator: Henderson said that he was struck by the AJC sentencing study finding that there were so many sentences below the presumptive sentencing ranges. Rather than recommending any further changes to the ranges, he suggested there could be a new mitigator for acceptance of responsibility, especially in the Rule 11 context, when there are no other statutory mitigators. This could also be of use for open sentencing. It could allow the parties to reach a fair result on the charge, rather than resort to a charge bargain, e.g. using an attempt or lesser included offense. It could help resolve case/trial backlog if, as the feds do it, the mitigator was tied to the "timeliness" of plea.

Bryner asked if the mitigator would be available for a Cooksey(/Alford) plea,[iii] a circumstance in which the defendant seeks to plead no contest, rather than guilty. Steiner also wondered about those defendants who might agree that they committed an offense without agreeing that they deserve the presumptive sentence.

Geddes noted that the federal guidelines require a guilty plea, not a no contest plea, for the downwards adjustment of "acceptance of responsibility." The Guideline application notes identify ways that acceptance is manifested, including cooperation with the presentence investigation/report. The maximum three level benefit requires the government's agreement that the plea was timely so as to avoid preparation for trial. As there are rarely Alford pleas in the federal system, a defendant's statements concerning the offense are 'curated' by the attorney and often offered in writing so that the statement is sure to satisfy the criteria for "acceptance." Mitigation of the sentence can be denied if the admission of guilt is at equivocal. The federal system has a two-level tier, allowing for the maximum benefit ("super-acceptance') if the case resolution is early enough to avoid preparation for trial.

Geddes noted that the federal guidelines require a guilty plea, not a no contest plea, for the downwards adjustment of "acceptance of responsibility." The Guideline application notes identify ways that acceptance is manifested, including cooperation with the presentence investigation/report. As there are rarely Alford pleas in the federal system, a defendant's statements concerning the offense may be 'curated' by the attorney and offered in writing so that the statement is sure to satisfy the criteria for "acceptance." Mitigation of the sentence can be denied if the admission of guilt is at equivocal. The federal system has a two-level tier, allowing for the maximum benefit ("super-acceptance') if the case resolution is early enough to avoid preparation for trial. The maximum three level benefit requires the government's agreement. [iv]

Bryner suggested that such a sentence adjustment could be coercive, as it might be a trial penalty. Steiner indicated that when trial delays are due to late discovery, its not fair to penalize a defendant, and its difficult to tell your client to plead before trial when you continue to receive discovery right up to the time of trial.

DiPietro asked the group is there was interest in crafting a mitigator: perhaps one in the Rule 11 context and one outside of it. Winston agrees with the idea of allowing a mitigator for early or timely pleas. Henderson will draft a proposed mitigator for group review.

Other Ideas:

Treatment mitigator: It was also suggested that the group should review the current mitigator that potentially credits the defendant's participation in the limited Title 28 therapeutic court context. Steiner noted that this mitigator covers a really small number of people who are making gains in treatment and how only persons approved by the State can participate in therapeutic court. Steiner suggested using some of the SB91 language found in Claman's amendment for "evidence based" treatment to draft a broader mitigator.

Motions to Modify: Steiner indicated he is also interested in expanding motions to modify as a way to reduce the number of PCRs. This arises when people are directed to do treatment but accomplish it outside of the 6 months allowed for a motion to modify. Henderson asked if we could wait and see how the changes in SB91 (requiring shorter probation terms, early release) impacts caseload first.

Restitution: Winston asked about the payment of restitution. SB91 directs the Commission to work on this issue. DiPietro said the Commission will undertake this as a discrete effort. She also noted that if the victims have opted out of state collection then we don't have the data on whether they have gotten relief. Winston noted that we could at least look at that data (DOL Collections). She perceives that there is no

enforcement of non-payment of restitution. Henderson noted how restitution is incentivized in white collar cases. Steiner asked if the courts can compel defendants to give financial information. It was noted that they have to do that for indigent counsel appointment. Geddes noted that SB91 requires probation officers to themselves create and institute a restitution payment schedule for any defendant who has a restitution obligation.

Flat-timers: There was a brief discussion of flat-timers. Teri and Giulia are in the process of clarifying how many people get flat time sentences, with no suspended time and therefore no probation. Many of these offenders are higher level offenders; why is that? Henderson explained that, in the view of the prosecutors, when defendants who have previously failed on supervision, there is no reason to impose it again. Geddes noted that the research indicates it is exactly those individuals who need intensive supervision and that probation does reduce recidivism. Geddes also noted that the "probation as a contract" idea originates only in caselaw, and that premise could be rejected by the legislature. Probation is a type of sentence which can be more effective than incarceration. Defendants should not be able to opt out and choose a different sentence. At the next meeting, Teri and Giulia will report on their findings.

Public Comment: As It was the close of the meeting, a call for public comment was made. None was offered at this time.

---

[i] In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court ruled that its sentencing guidelines were advisory not mandatory. The Guidelines "should be the starting point and the initial benchmark," but a district court may impose a sentence within statutory limits based on appropriate consideration of all of the § 3553(a) factors. The sentence should be "sufficient, but not greater than necessary" to satisfy statutory sentencing purposes. Sentences are subject to appellate review for "reasonableness," Gall v. United States, 552 U.S. 38, 49–51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). "Reasonableness" review simply asks if whether the trial court abused its discretion. See Booker, 543 U.S., at 260–262. Procedural error is another basis for sentence review. For example, a failure to calculate the correct Guidelines range constitutes procedural error, as does treating the Guidelines as mandatory. Gall, 552 U.S., at 51, 128 S.Ct. 586.

[ii] Alaska Statute § 12.55.120 ("Appeal of sentence") provides that, with respect to felony sentences,

> (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding two years of unsuspended incarceration for a felony offense or exceeding 120 days for a misdemeanor offense may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive, unless the sentence was imposed in accordance with a plea agreement….
>
> (b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the court of appeals by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.
>
> …
>
> (f) The victim of the crime for which a defendant has been convicted and sentenced may file a petition for review in an appellate court of a sentence that is below the sentencing range for the crime.

The comparable federal provision, Section 3742 of Title 18 of the United States Code, for review of a sentence states:

> (a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

[iii] The term "*Cooksey* plea" refers to the circumstance in which a defendant pleads no contest, rather than guilty. This is a very frequent plea in Alaska state courts (and very rare now in the federal courts). In *North Carolina v. Alford*, 400 U.S. 25, 35 n.8, 91 S.Ct. 160, 166, 27 L.Ed.2d 162, 170 n.8 (1970), the United States Supreme Court stated: "The plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *Miller v. State*, 617 P.2d 516 (Alaska 1080)(holding that ot iwas error to require defendant to show that there was a reasonable basis for his plea of no contest).

[iv] United States Sentencing Guideline § 3E1.1 Acceptance of Responsibility reads:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating 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, decrease the offense level by 1 additional level.

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(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 adjustment 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 Public Law 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.

M E M O R A N D U M

TO: Presumptive Sentencing Subcommittee, ACJC

FROM: Teri Carns

DATE: May 6, 2016

RE: Historical background of presumptive sentencing in Alaska; current questions

- Until the late eighteenth century in the United States, there was no separate sentencing phase for felonies.[1] Sentencing was essentially a ministerial act for the trial judge who imposed the sentence of fines, corporal punishment, or death prescribed by statutes or common law. Points of discretion included:

- "Juries could factor sentencing consequences into their verdicts;
- Judges could recommend that the executive grant clemency (from the fixed sentences prescribed by statute);
- Judges could impose alternative punishments such as banishment to a penal colony or branding;
- Judges had wide discretion in misdemeanor cases."

Another source[2] notes that juries in the 1700s had almost prosecutorial powers, in the sense that they could choose to convict on a lesser charge, even if that charge had not been alleged. They could, for example, decide that a charge that carried the death penalty (and many did) was too harsh, and convict the defendant of a lesser offense that called for corporal

---

[1] Berman, et al, "Making Sentencing Sensible," *Ohio State Journal of Criminal Law*, Vol 4:37, 2006, pp. 60-61.

[2] Gertner, Nancy, "A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right?" *The Journal of Criminal Law & Criminology*, Vol. 100, No. 3, 2010, pp. 693 - 694. Gertner notes that not all sources agree about the role of juries, but the general parameters are well documented.

punishment or other penalties. The punishments specified by law for each offense included death, corporal punishment such as whipping or dunking, the stocks, or banishment.

In this context, prison was an institution reserved for political or religious transgressions, pretrial detention, or debt, and was never routinely used as punishment for or response to crime. Change began in the late 1700s, partly as a result of European influences on Pennsylvania Quaker law and practices,[3] and the widening influence of French thought throughout the new country. The primary components of the reforms focused on the rehabilitation of the offender. In practical terms, this included a classification system to separate more serious offenders from less serious offenders,[4] hard labor for those who could do it, and isolation in cells at night or (for some) at all times. Most communities already had jails for pre-trial detention and these were used, or modified as needed to hold people serving post-conviction sentences.[5]

From the early 19th century, to the mid-20th century, judges had broad discretion to decide the sentence of rehabilitation, with the role of the jury becoming limited to fact-finding.[6] There was little to no concern about the offenders' due process rights at the sentencing stage.[7] The new system of indeterminate sentencing with ranges set by legislatures, with very limited sentencing review, meant that judges' discretion operated with few boundaries or challenges. In a sense, though, the judges' choices were more limited, because they now involved mainly a choice of incarceration or no incarceration. Once the offender was incarcerated, the prisons and parole boards exercised even more discretion than the judges had. Judges were given very little training or guidance in how to decide what would be most therapeutic for an individual offender, nor did they have many options for treatments or alternative sanctions.[8]

Alaska's sentencing system in 1975

In 1975 when Alaska's Legislature began work on a new criminal code and sentencing structure, the state's sentencing system followed the model of most other states.[9] The presumption, in all sentencing systems in the United States for the past 200 years, has been that incarceration was the measure by which sentences were calculated. In Alaska, offenses were

---

[3] "Historical Origin of the Prison System in America," Harry Elmer Barnes, 1921, *Journal of Criminal Law and Criminology*,
Vol 2, Issue 1. http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1772&context=jclc

[4] Similar to the classification systems used for offenders today, in Alaska and elsewhere.

[5] *Id*., page 20. The solitary confinement part of the program was expensive, and not implemented in most places, which made the classification part of the plan also ineffective. To the extent that the solitary confinement part of the project was carried out, it was considered a "hopeless failure [that] led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement." The solitary confinement was replaced, for a while, by a system that required solitary confinement every night, and complete silence 24 hours a day.

[6] Barnes, *supra*, note 4.

[7] Barnes, *supra*, note 4.

[8] Barnes, *supra*, note 4.

[9] B. Cutler, *Sentencing in Alaska*. This was the first report about Alaska's sentencing practices. http://www.ajc.state.ak.us/sites/default/files/imported/reports/sent275.pdf

associated with sentence ranges measured in years of incarceration that provided very broad limits to judicial discretion.[10] Alaskan judges sentenced an offender to a specific term of years, or to no incarceration. Once an Alaskan offender was sentenced to incarceration, the state's parole board had wide discretion in deciding release from incarceration.[11]

In 1975, some offenses did have mandatory minimum sentences, especially heroin sales.[12] Except for the offenses with mandatory minimums, judges were allowed to suspend any portion of the sentences imposed.[13] Judges were allowed to suspend imposition or execution of sentences, and deferred prosecution was an option at the prosecutor's discretion and with judicial concurrence.

In the Judicial Council's 1975 report, *Sentencing in Alaska*, the system was characterized as in need of reform.[14] At that time, the legislature had begun to consider changes to reduce the inconsistencies in sentencing that resulted from:

- "The breadth and length of sentences authorized to the discretion of judges (many offenses carried a range of one to ten, fifteen, or twenty years); and

- Overlapping categories of crimes that could allow prosecutors to choose crimes with different sentence ranges despite similar circumstances (one example was that the penalty for concealing stolen property greatly exceeded the penalty for stealing the same property)."[15]

The legislature asked the Judicial Council to review sentences imposed between 1974 and 1976,[16] and to recommend a sentencing system to replace indeterminate sentencing. The

---

[10] The sentence range for 1st degree murder was 20 years to life (although the 20 years was not a mandatory minimum), the same as it is in 2016. Manslaughter and negligent homicide were categorized together at 1- 20 years. Robbery was 1 - 15, and Larceny from a Person was 1 - 5. Burglary 1 was 1 - 15 or 1 - 20, depending on the circumstances, and Burglary 2 was 1 - 5. Larceny, Embezzlement, and various fraud sentences mostly ranged from 1 - 10 years. *See also*, S. DiPietro, "The Development of Appellate Sentencing Law in Alaska, *Alaska Law Review*, 1991."Trial judges had discretion to choose both the type of sentence and, within extremely broad statutory minimums and maximums, the length of the sentence; but the statutes were silent as to what factors the judge should consider in pronouncing sentence." p. 268.

[11] *Sentencing in Alaska*, *supra* note 9, p. 27. A 1974 law required that the offender serve at least one-third of the sentence before begin considered for parole.

[12] Heroin sale had a minimum of 2 years for the first offense, 10 years for the second offense, and 20 years for the third offense. Sale to a minor (under 21) had a ten-year minimum for the first offense, 15 years for the second, and life for the third.

[13] Clarke, et al, *Alaska Felony Sentencing Patterns, 1977,* p.1, note 1.

[14] *Sentencing in Alaska*, *supra* note 9, http://www.ajc.state.ak.us/sites/default/files/imported/reports/sent275.pdf, page 20.

[15] *Id.*, *Sentencing in Alaska*.

[16] *Alaska Felony Sentencing Patterns: 1977*, *supra*, note 13, page v - vi. In this study, no disparities were found for Alaska Native offenders. The disparities shown were for African American offenders in property and drug offenses.

Council's sentencing study found that the identity of the sentencing judge was the single most important factor in predicting the sentence imposed. The Council also found that an offender's ethnicity was associated with longer sentences for some types of crime, all other factors being equal. After considering sentencing systems in use or proposed at the time – indeterminate sentencing, flat-time, mandatory minimums, and presumptive sentencing – the Council recommended that the legislature adopt a mix of presumptive sentencing for more serious offenders and offenses, and retain indeterminate sentencing for first felony offenders in less serious felony cases.[17]

The Alaska Criminal Code Commission's reasoning for adopting the Judicial Council proposal of presumptive sentencing was that "guided discretion was divided between the legislature, the judiciary, and the parole board."[18] The "presumptive" sentences for offenders were set to the amount that "the average defendant convicted of an offense should be sentenced to, absent the presence of legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances."[19] The indeterminate sentences for first offenders convicted of Class B or Class C felonies were chosen by judges and fit within broad sentencing ranges, similar to those used in the past.

In the years between about 1970 and 2000, many other states considered changes to their indeterminate sentencing systems. A 1995 report described the sentencing systems in place in all fifty states and the District of Columbia.[20] At that time, twenty states used determinate sentencing systems,[21] twenty-nine states used indeterminate sentencing,[22] and sixteen states used sentencing guidelines for some or all of their sentencing decisions. All of the states had mandatory minimums for some offenses.

In other Council sentencing studies during the 1970s, disparities were also found for Native offenders in some types of crime. *Interim Report of the Alaska Judicial Council on Findings of Apparent Racial Disparity in Sentencing,* 1979, http://www.ajc.state.ak.us/reports/sent79.pdf, page 1.

[17] Alaska Sentencing Commission, *1990 Annual Report to the Governor and the Alaska Legislature*, p. 11. Mandatory minimums for certain very serious offenses such as Kidnapping and Murders were part of the final sentencing structure chosen.

[18] *Id.*, page 11.

[19] Barry Stern, "Presumptive Sentencing in Alaska," *Alaska Law Review*, 1985. Vol 2:227, page 232, quoting from the *Alaska Senate Commentary . . .on the Alaska Revised Criminal Code*, 1978.

[20] https://www.ncjrs.gov/pdffiles/strsent.pdf, *National Assessment of Structured Sentencing*, pp. 20 - 21.

[21] Judges imposed a specific term of years that could be reduced only by good time or earned credits; no parole, and guidelines or other structures for guidance.

[22] Judges imposed a sentence of a range of years, with parole boards deciding how much time an offender actually served. Alaska and other states were classified as indeterminate sentencing states under these definitions despite the presence of presumptive sentencing for a variety of offenders because some sentences remained indeterminate, and parole boards still played role for some offenders.

Alaska sentencing from 1980 to 2016

The history of presumptive sentencing in Alaska has been summarized most recently in the Judicial Council's report, Alaska Felony Sentencing, 2012 - 2013.[23] In brief, the presumptive sentencing scheme that took effect in 1980 applied to all Unclassified Sexual felonies, all Class A convictions, and all repeat felony Class B and C offenders.[24] The unclassified offenses of Murder 1, Murder 2, Kidnapping, and Misconduct Involving a Controlled Substance 1 had mandatory minimums; the presumptive scheme did not apply. First felony B and C offenders were sentenced to a specific term within a minimum-maximum range set by statute, and were eligible for discretionary parole after serving at least one-third of their sentences. Within a few years, the Court of Appeals developed a body of law establishing benchmarks for sentencing the first felony B and C offenders.[25]

Following the *Blakely v. Washington* decision by the U. S. Supreme Court in 2004, Alaska's legislature adopted a system of presumptive ranges rather than a fixed presumptive term.[26] The ranges typically started at the earlier fixed term and were extended to a few years more than that. Aggravators that would take the sentence imposed beyond the top end of the new ranges were governed by *Blakely* requirements, meaning a jury decision on the aggravating factor(s) in many cases. The legislature also extended the presumptive ranges to all first B and C felony offenders, bringing all but a handful of Unclassified offenses into the presumptive sentencing structure. The decision to make almost all felony sentences presumptive greatly limited the use of discretionary parole. In 2006, the legislature revisited the Sexual offense charging and sentencing structure, and substantially increased penalties for all Sexual offenses.[27]

In 2016, Alaska operates under this system of presumptive ranges for all but the most serious felonies, with some mandatory minimums for specific offenses, and parole available under certain circumstances. About seventeen other states and the federal government use sentencing guidelines systems – many of which closely resemble Alaska's presumptive sentencing system but are more advisory or voluntary. The remaining states rely on combinations of mandatory minimum sentences, determinate sentences, and indeterminate sentences.

---

[23] *Alaska Felony Sentencing Patterns: 2012 – 2013*, available from the Judicial Council, Part 2 of the report, and Appendix B describe sentencing statutes, as well as offense descriptions that are tied to the implementation of the sentencing scheme. Available from Judicial Council.

[24] Drug offenses were sentenced under guidelines established by a Supreme Court Committee between 1980 and 1982; effective January 1, 1982, they also had presumptive sentences for all Class A offenses and for repeat felony offender Class B and C offenses. In 1983, the legislature re-classified most sexual offenses, and raised penalties for them substantially.

[25] S. DiPietro, "The Development of Appellate Sentencing Law in Alaska, *Alaska Law Review*, 1991, *supra* note 10, pp. 280, *et seq.*

[26] T. W. Carns, "Alaska's Responses to the Blakely Case," *Alaska Law Review*, 2007, Vol 24:1, pp. 7 – 9.

[27] *Alaska Felony Sentencing Patterns: 2012 – 2013*, *supra* note 23, page 17.

In considering whether Alaska's present system is the best one for Alaska, and in reviewing the other options available, the Presumptive Sentencing Subcommittee may wish to consider several factors:

- **Sentencing Goals (*Chaney* Criteria).** Alaska sentencing is structured by factors historically known as the *Chaney* criteria– rehabilitation, deterrence, isolation, community condemnation, and reaffirmation of societal norms,[28] which were incorporated into law with the 1978 changes to the criminal code.[29] Should these criteria continue to be considered by judges in sentencing? For example, deterrence of others (as opposed to deterrence of individuals) is now viewed in the scientific literature as largely ineffective as a correctional principle. If yes, is the present sentencing structure the best way to ensure that judges consider these criteria, and sentence in accordance with them?

- **Uniformity in Sentencing.** One of the main purposes of the adoption of presumptive sentencing by the legislature was to achieve uniformity in sentencing that would "eliminate unjustified disparity in sentences imposed on defendants convicted of similar offenses – disparity which is not related to legally relevant sentencing criteria."[30] Studies conducted over the years by the Alaska Judicial Council suggest that for the most part, the present sentencing system has provided the uniformity sought by the legislature, at least with respect to the ethnicity of offenders – an important consideration in light of the earlier findings of ethnic disparities. Could or should the current system be modified in any way to further encourage uniformity, given that some disparities still exist?[31]

- **Aggravators and Mitigators.** The present sentencing system permits some amount of discretion on the part of decision-makers to take into account aggravating and mitigating circumstances, and exceptional cases. One commentator described the role of discretion in sentencing systems as ". . . many discretionary choices affect sentencing well before the formal sentencing process begins. . . . Sentencing structures and rules should focus on making the exercise of discretion reasoned, transparent, and subject to review. Sentencing mechanisms should reveal and channel the inevitable exercise of discretion by various decision-makers," including prosecutors, attorneys, and judges.[32] Does Alaska's present system permit sufficient discretion combined with transparency and the opportunity for review? Does the present combination of aggravators, mitigators, and required sentencing ranges allow enough opportunities for sentences to differ in ways justified by the facts of each individual case?

---

[28] DiPietro, *supra*, note 10.
[29] Now codified at 12.55.005.
[30] Stern, *supra* note 19, page 228.
[31] See *Alaska Felony Sentencing Patterns: 2012 – 2013*, *supra* note 23, for a discussion of the limited disparities based on gender and ethnicity that were present in felony sentences in those years.
[32] Berman, et al, *supra* note 1, pp. 43 - 44.

- **Use of Mandatory Minimums, Ranges, and Parole.** Alaska's hybrid system already includes elements of all of the sentencing systems in place in the rest of the United States: some mandatory minimums, some elements of indeterminate sentencing systems (e.g., parole), and some elements of guidelines systems (a range within which the judge assigns a particular sentence). Is there a reason to shift the balance among these approaches, to make the system fairer, more uniform, more discretionary, or more effective?

- **Protection of Victims' Rights.** Do Alaska's laws and sentencing procedures protect the constitutional rights of victims sufficiently, or should different procedures be instituted to take these into account?

- **Advisory vs. <u>Mandatory.</u>** Should presumptive ranges continue to be mandatory? Making the existing sentencing system advisory would increase judicial discretion and limit the need for the legislature to account for every possible contingency. All parties would continue to have the legislative parameters established by the present sentencing system – ranges, aggravators and mitigators -- as guidance and structure, but all parties would have more discretion to tailor sentences to suit individual cases. Victims and the public would have the transparency and clarity of the existing laws for guidance; there would not be a need for a three-judge panel; and it is possible that the number of sentence appeals would be reduced. Several other states have made their guidelines advisory in response to the *Blakely* case, and the federal system did the same in response to *Booker*.[33] If sentencing ranges were to become advisory in Alaska, the system would need to be monitored to assure the absence of unwarranted disparities by ethnicity, location in the state, and other factors.

- **Three-Judge Panel.** The three-judge panel was established by the legislature to allow consideration of a different sentence in cases in which the trial court found that imposing a presumptive sentence would result in "manifest injustice,"[34] either because the presumptive sentence was too high or too low. Is the three-judge panel effective? Is it necessary? Should its responsibilities be carried out in some other way?

- **Use of Suspended Time**. Is the ratio of imposed time to active time (net time to serve after suspended time is subtracted) appropriate, or should there be more guidance for attorneys and judges about the appropriate amount of time to be suspended?

---

[33] Gertner, A Short History of American Sentencing, *supra* note 2. Page 707.

[34] Barry Stern, "Rethinking Manifest Injustice: Reflections upon the Decisions of the Three-Judge Sentencing Panel," *Alaska Law Review*, 1988, (Vol. 5:1) page 1.The Alaska Judicial Council has unpublished memos about the use of the three-judge panel, and other sources of information may also be available.

Part 2: Presumptive Sentencing and Criminal Laws in Alaska

A. Structure of Statutory Sentencing in 2012-2013

In Alaska, most sentences for felony offenses depended on two factors: the seriousness of the offense and any prior felony convictions of the offender. The seriousness of the offense is determined by the legislature's assignment of a "class" to the offense in the offense definition. Classes of felony crimes are, in order of seriousness, Class A, Class B, and Class C. The most serious felonies, such as Murder 1, Kidnapping, and Sexual Assault 1 remain "Unclassified." Classified offenses are subject to presumptive sentencing; most Unclassified offenses are not.[1]

Presumptive Sentences

In 2012-2013, under AS 12.55.125, the great majority of felony offenses were subject to presumptive sentencing. At the time the data were collected for this study, presumptive sentencing statutes set forth a "presumptive range" of incarceration for the typical offender who committed typical offenses for each class of offense and number of prior offenses of the offender.[2] The presumptive range fell within a much wider allowable statutory range. Presumptive ranges and statutory ranges were relatively narrow for less serious offenses and broader for more serious felonies. Most sex felonies were segregated out from other felonies and were given higher presumptive ranges. Table 2 provides the sentencing ranges in effect under AS 12.55.125 for this study, as well as other information.

Alaska judges had the authority to sentence a convicted offender to any term of incarceration within the presumptive range. To impose a sentence above the presumptive range, a jury (or in some circumstances a judge) must find a "factor in aggravation."[3] If an aggravator is found, a judge may impose any sentence upward to the maximum term allowed by statute. To impose a sentence below the presumptive range, a judge must find a "factor in mitigation." If a mitigator is found and the lower end of the presumptive sentencing range is up to 4 years, the judge may impose any sentence from the lower end of the presumptive range to zero. If a mitigator is found and the lower end of the sentencing range is greater than 4 years, the judge may depart downward from the lower end of the presumptive range by 50%. If both mitigating and aggravating circumstances are found, the judge may impose any term within both applicable boundaries.

[1] The exceptions are Sexual abuse of a minor 1, Sexual assault 1 and Sex trafficking 1 under AS 11.66.110(a)(2).
[2] Within Alaska's presumptive sentencing structure, prior felony conviction levels are: no prior felonies, one prior felony, or two or more prior felony convictions. See AS 12.55.125. To affect a sentence, in most cases the prior felony conviction had to have been within ten years of unconditional discharge from custody or probation on the prior offense. See 12.55.145.
[3] AS 12.55.155.

Additionally, the legislature designated certain circumstances that would subject an offender to enhanced presumptive ranges. These included, for example, enhanced penalties for a first felony offender convicted of a Class A felony who possessed a firearm, used a dangerous instrument, or caused serious physical injury or death.

Table 2: 2012-2013 Alaska Presumptive Sentencing Ranges Compared with Prior Terms

	First Felony	First Felony (special circumstances)	Second Felony	Sex Felony with a Prior Sex Felony	Third+ Felony	Sex Felony with Two Prior Sex Felonies	Max
Unclassified Sex Offense[i]	**20-30**[ii] (8)	**25-35**[iii] (10)	**30-40** (15)	**35-45** (20)	**40-60** (25)	**99** (30)	**99** (40)
Class A Sex[iv]	**15-30**[v] (5)	**25-35**[vi] (10)	**25-35** (10)	**30-40** (15)	**35-50** (15)	**99** (20)	**99** (30)
Class A	**5-8** (5)	**7-11**[vii] (7)	**10-14** (10)	n/a	**15-20** (15)	n/a	**20** (20)
Class B Sex[viii]	**5-15** (0)	n/a	**10-25** (5)	**15-30** (10)	**20-35** (10)	**99** (15)	**99** (20)
Class B	**1-3**[ix] (0)	**2-4**[x]	**4-7** (4)	n/a	**6-10** (6)	n/a	**10** (10)
Class C Sex[xi]	**2-12** (0)	n/a	**8-15** (2)	**12-20** (3)	**15-25** (3)	**99** (6)	**99** (10)
Class C	**0-2**[xii] (0)	**1-2**[xiii] (1)	**2-4** (2)	n/a	**3-5** (3)	n/a	**5** (5)

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

Numbers in bold are presumptive ranges established in 2005 for non-sex offenses and 2006 for sex offenses and effective in 2012-2013.

Number in parentheses are presumptive terms prior to 2005.

In 2005-2006, different presumptive ranges initially were established for Sex Offenses. These may be found in Table B-2 in Appendix B.

[i] Although described here as Unclassified, Class A, Class B, Class C categories for simplicity, AS 12.55.155(i) does not follow strict "Class" categories for sex offense sentences. The specific offenses are thus delineated for each category of penalty. This category includes: Sexual assault 1, Sexual abuse of a minor 1, Sex trafficking 1 under AS 11.66.110(a)(2).

[ii] The range is 20-30 if the victim is less than 13 years old and 25-35 if the victim is 13 years old or more.

[iii] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense.

[iv] See note i, above. This category includes: Unlawful exploitation of a minor under AS 11.41.455(c)(2), Online enticement of a minor under AS 11.41.452(e), Attempt, Conspiracy, or Solicitation to commit Sexual assault 1, Sexual abuse of a minor 1, or Sex trafficking 1 under AS 11.66.110(a)(2).

[v] The range is 15-30 if the victim is less than 13 years old and 20-30 if the victim is 13 years old or more.

[vi] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense.

[vii] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury or death during the commission of the offense, or knowingly directed the conduct at a peace officer or first responder who was engaged in official duties; and to manufacturing of methamphetamine offenses if knowing within presence of children.

[viii] See note i, above. This category includes: Sexual assault 2, Sexual abuse of a minor 2, Online enticement of a minor under AS 11.41.452(d), Unlawful exploitation of a minor under AS 11.41.455(c)(1), and Distribution of child pornography under AS 11.61.125(e)(2).

[ix] A suspended imposition of sentence (SIS) is available if an active term of imprisonment is imposed as a condition.

[x] The enhanced sentence applies to violations of AS 11.41.130 (Criminally negligent homicide) and the victim was a child under 16, and to manufacturing of methamphetamine offenses if reckless within presence of children.

[xi] See note i, above. This category includes Sexual assault 3, Incest, Indecent exposure 1, Possession of child pornography, Distribution of child pornography under AS 11.61.125(e)(1), or Attempt, Conspiracy, or Solicitation to commit Sexual assault 2, Sexual abuse of a minor 2, Unlawful exploitation of a minor, or Distribution of child pornography. The following Sex offenses are sentenced under typical Class C ranges under AS 12.55.125(e): Failure to register as a sex offender; Indecent viewing or photography (if the person viewed was a minor); Distribution of indecent material to minors; Sexual abuse of a minor in the third degree.

[xii] An SIS is available.

[xiii] Felony crimes in AS 08.54.720(a)(15). (Second offense, Waste or Hunt same day in air.)

For example:

Table 2: Sentence Ranges with Aggravator/Mitigator					
Offense/Priors	**Maximum**	**Presumptive range**	**+Aggravator**	**+Mitigator**	**+Both**
Class C - First felony conviction	5 years	0-2 years	up to 5 years	down to 0	0-5 years
Class B - Fourth felony conviction	10 years	6-10 years	up to 10 years	down to 3 years	3-10 years

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

If no mitigating factors were found, but the judge found imposition of a presumptive sentence would be manifestly unjust, the law allowed a judge to refer the case to a three-judge sentencing panel for consideration of an adjusted sentence.[4] Such a referral was exceptionally rare and did not affect any of the sentences in the 2012-13 dataset.

2. Non-Presumptive Sentences

Sentences for Unclassified offenses were not subject to presumptive sentencing.[5] These offenses instead were subject to statutory mandatory minimums and maximums. Within those boundaries, judges had broad sentencing discretion.

Table 3: Non-Presumptive Sentences (Mandatory Minimums)	
Offense	**Range**
Murder 1, Murder unborn child 11.41.150(a)(1)	20-99 years
Murder 1 (Attempt, Solicitation, Conspiracy), Kidnapping, Misconduct involving controlled substance 1 (MICS1)	5-99 years
Murder 2, Murder unborn child AS 11.41.150(a)(2)-(4)	10-99 years
Murder 2 if committed by a parent/guardian/authority figure who committed a crime in AS 11.41.200 – 11.41.530 against child under 16	20-99 years

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

In addition, some Murder 1 crimes carried a mandatory 99-year sentence.[6] Also, Alaska's "three strikes" law provided that a person convicted of an Unclassified or Class A felony who previously had been convicted of two or more "most serious felonies" was also subject to a mandatory 99-year sentence.[7] Forty-seven Unclassified felony convictions appeared in the data

[4] AS 12.55.165.
[5] Non-presumptive felony sentences may be found in AS 12.55.125(a)-(b).
[6] AS 12.55.125(a)(1)-(5).
[7] AS 12.55.125(l). "Most serious felonies" is defined in AS 12.55.185(10) and included: Arson 1, Sex trafficking 1 under AS 11.66.110(a)(2), Online enticement of a minor under AS 11.41.452(e), any Unclassified or Class A felony

set for this study.

Other Factors

Suspended Time

Another important aspect of sentencing in Alaska is the use of "suspended" time under AS 12.55.080.[8] When a judge imposed a presumptive sentence that included a term of incarceration, he or she was likely to impose part of that term as "active" time of incarceration to be served immediately, and to "suspend" part of the term, which would be spent on probation. If the defendant did not fulfill his or her obligations of probation, the judge could then revoke the probation and impose any part of the remaining sentence to be served incarcerated. If only part of the suspended time was imposed, the remainder would then be spent on probation again, and so on until the probationary term was successfully satisfied or all the time was served. This study did not examine whether or how much of offenders' suspended time was actually served. It does report on "active," "suspended," and total "imposed" time ordered by the judge.

Rule 11 Agreements

No sentencing report could be complete without some discussion of plea agreements. In 2012 and 2013, more than 96% percent of all felony cases in Alaska were resolved without trial.[9] Most of those are resolved by a plea agreement negotiated under authority of Rule 11 of the Alaska Criminal Rules of Procedure. Plea agreements can resolve cases with charge agreements (usually reductions or consolidation of charges) or with sentence agreements (agreeing on a certain sentence, or cap for a sentence), a sentence recommendation, or any combination. The court may accept the parties' agreement or reject it, but may not insert itself into the negotiations. Thus, if a sentence agreement is included in the plea agreement and accepted by the court, a judge's discretion is limited by the agreement. Sentence agreements, however, are negotiated with the expectation they will fall within the boundaries of statutorily set sentencing minimums and maximums for the offense of conviction. The prevalence of Rule 11 agreements, and particularly sentencing agreements, should be kept in mind when considering the findings in this report.

proscribed under AS 11.41, or any Attempt, Conspiracy to commit, or Criminal solicitation of an Unclassified felony proscribed under AS 11.41.

[8] Imprisonment may not be suspended under AS 12.55.080 below the low end of the presumptive range. AS 12.55.125(g)(1). Judges may not suspend time for non-presumptive sentences in AS 12.55.125 (a) or (b). AS 12.55.125(f).

[9] *Alaska Court System Annual Report FY 12* at 89 (3.5% for Superior Court Trial sites); *Alaska Court System Annual Report FY 13* at 91 (3.6%). Some cases had all charges dismissed or acquitted.

B. Historical Changes in Sentencing Law from 2000-2014

1. Presumptive Sentencing Ranges, Non-Sex Felonies

When the Alaska Legislature enacted presumptive sentencing in 1978, it set forth specific presumptive terms for classes of offenses and offenders, which could be increased by the finding of aggravators by a judge.[10] In 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*.[11] The court held because of the defendant's right to a jury trial, factors, which had the effect of increasing an offender's sentence, must be tried to a jury and found beyond a reasonable doubt.[12] As explained in the introduction to this report, *Blakely* had the effect of calling into doubt the legality of Alaska's presumptive sentencing scheme because Alaska law allowed a judge, not a jury, to make findings of aggravators that could increase a sentence.

The Alaska Legislature responded in 2005 by passing a bill amending the presumptive sentencing scheme to conform to the concerns presented by *Blakely*.[13]

The 2005 bill eliminated specific presumptive terms and established presumptive "ranges," instead allowing judges more upwards discretion without the finding of an aggravator by a jury.[14] The ranges typically started at the previous presumptive term (if there was one) and maxed out several years above that. Nevertheless, the legislature's stated intent was not to increase sentence lengths but to give judges greater discretion in sentencing while forestalling the need for jury findings in cases with aggravating circumstances.[15]

In addition to establishing the ranges, another significant effect of the bill was to bring Class B and Class C first felony offenses within the realm of presumptive sentencing. Before 2005, those offenders were sentenced non-presumptively but with consideration for presumptive sentencing terms, as established by case law.[16]

[10] Ch. 166, § 12, SLA 1978. For example, a presumptive "term" was 5 years for a first felony conviction on a Class A non-sex felony or 8 years on an Unclassified Sex felony.
[11] 542 U.S. 296 (2004).
[12] See id.at 304-305.
[13] Ch. 2 SLA 2005.
[14] For example, a presumptive "range" was now 5-8 years for a first felony conviction on a Class A felony.
[15] The bill stated directly "it is not the intent of this Act . . . to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather this Act is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the considerations set out in AS 12.55.005 and 12.55.015." Ch. 2, § 1, SLA 2005.
[16] See, e.g., *State v. Brinkley*, 681 P.2d 351, 357 (Alaska App. 1984).

Presumptive Sentencing Ranges: Sex Felonies

The 2005 bill established presumptive sentencing ranges for Sex felonies, but they were short-lived. In 2006, the legislature revisited felony Sex offense penalties and significantly increased them. As Table 2 indicates, from 2205-2006, the legislature doubled sentences for Sex felonies in some categories and increased them even more in others.

C. Changes in Statutory Crime Definitions and Classifications

Between 2000 and 2013, the legislature made a series of incremental changes to offense definitions and classifications in Title 11 of the Alaska Statutes. A comprehensive review of these changes, along with citations to the changes, is included in this report in Appendix B. Below is a brief summary of the types of changes the legislature enacted. Cumulatively, the changes reflect trends that increased both the scope and severity of felony liability. It should be noted the legislature significantly reduced the scope of liability significantly for only one offense: Misconduct involving weapons 3, a Class C offense, when it changed some affirmative defenses to restrict application of the offense. In contrast, the legislature acted more than eighty times in Title 11, and in Title 28 and Title 4, in ways that increased the scope and/or severity of felony liability.

1. New Offenses

The legislature created twenty new felony offenses in Title 11 between 2000 and 2013. These offenses included: Murder of an unborn child (Unclassified), Manslaughter of an unborn child (Class A), Criminally negligent homicide of an unborn child (Class B), Assault of an unborn child 1 (Class A), Assault of an unborn child 2 (Class B), Human trafficking 1 (Class A), Human trafficking 2 (Class B), Online enticement of a minor (enacted as Class C, later reclassified as Class A/B), Arson 3 (Class C), Criminally negligent burning 1 (Class C), Criminal mischief 3 (Class C), Criminal impersonation 1 (Class B), Aiding non-payment of support 1 (Class C), Unsworn falsification 1 (Class C), Failure to appear (Class C), Unlawful use of DNA samples (Class C), Terroristic threatening 1 (Class B), Terroristic threatening 2 (Class C), Impersonating a public servant 1 (Class C), and Distribution of indecent material to minors (Class C).

As indicated in Appendix A, these added offenses may not have had a big effect on the numbers of convicted felons. The most common of the new offenses in the dataset was Criminal mischief 3 with 59 convictions, which represented about 2% of all felony convictions in the dataset. The second most common was felony Failure to appear, with nine convictions, and the third most common was Unlawful evasion, with eight convictions. Many of the new offenses either were not represented in the 2012-13 data set, or had only one conviction. Although not often

represented in the dataset as convicted offenses, it is unknown what effect on prosecutorial charging and negotiation, or on convictions of misdemeanor offenses, these new felony offenses may have had.

Reclassification of Offenses

The legislature increased the severity of some felony conduct by straightforwardly reclassifying some offenses upwards. Examples included: Online enticement of a minor (reclassifying from Class C to Class B/A in 2001); Obtaining an access device or identification document by fraudulent means (reclassifying from Class A misdemeanor to Class C felony in 2000); Violating an order to submit to DNA testing (reclassifying from Class A misdemeanor to Class C felony in 2003); Sex trafficking 2 (reclassifying from Class C to Class B in 2007); and Sex trafficking 3 (reclassifying from Class A misdemeanor to Class C felony in 2007).

Again, these changes may not have had a large effect. Appendix A indicates only one of these offenses, Online enticement of a minor, appearing in the dataset as the single most serious charge of conviction and it appeared only once.

Reclassifying Conduct

The legislature also increased both the scope and the severity of felony liability by reclassifying the conduct including some in offenses. For example, in 2004, the legislature removed some types of conduct from Sexual abuse of a minor 4 (a Class A misdemeanor) and inserted it into the definition of Sexual abuse of a minor 3 (a Class C felony). It similarly removed the Theft of an access device from Theft 3 (a Class A misdemeanor) and inserted it into Theft 2 (a Class C felony). In some cases, the legislature created a new degree or subset of an offense and classified it above the previous range, and removed conduct previously classified at a lower level. For example, the legislature reclassified all intentional conduct into Criminal mischief 1 as a Class A felony, and renumbered the less serious conduct degrees accordingly. Similarly, when amending the definition of Deceptive business practices, the legislature reclassified all conduct constituting the offense that used the internet or a computer network as a Class C felony, leaving all other conduct classified as a Class A misdemeanor.

Expanding the Range of Prohibited Conduct

Perhaps the most common way the legislature added to the range of prohibited conduct was simply to add provisions to an existing offense definition. For example, the legislature added conduct of knowingly manufacturing or delivering a controlled substance, if person died as a result of its ingestion, to the definition of Manslaughter in 2006. Similarly, in 2001, it expanded the

definition of Vehicle theft by adding a provision that included the loss of use of the vehicle for seven days or more. It expanded the definition of Criminal use of a computer by adding the conduct of installing or using a keystroke logger or similar device or program in 2011. In 2012, it expanded the definition of Endangering the welfare of a child 1 by adding a provision extending Class C felony liability to a person who "recklessly fails to provide an adequate quantity of food or liquids to a child, causing protracted impairment of the child's health."

The legislature also increased the scope of felony liability by expanding the range of victims that trigger felony offenses. In some cases, it increased the number of possible victims by changing the age limits. For instance, the legislature changed the age of a child victim from under 10 to under 12 to trigger felony liability for Assault 3. Another example came in 2007 when the legislature amended Sex trafficking 1 to include causing persons to engage in prostitution if the person was under 18 (previously it had been under 16).

In one instance, the legislature acted to decrease the scope of liability for an offense when it amended Misconduct involving weapons 3. In 2010, the legislature repealed several sections and eliminated some affirmative defenses in favor of restricting the application of the offense, a Class C felony, to former felons who carried firearms and who had been pardoned, had their convictions set aside, or whose convictions were over 10 years in the past. Previously, the law provided they were subject to criminal liability until the person proved "affirmatively" they were not guilty due to the pardon, set-aside, or passage of time.

These examples are by no means exhaustive but serve to provide a sense of legislative action in this area.

Repeat Offender Provisions

Another way the legislature increased the scope and severity of felony liability was to enact repeat offender provisions. For some offenses, it imposed felony liability for conduct by repeat misdemeanants that would otherwise have been misdemeanor conduct. Perhaps the most well-known example of this came in 2008, when the legislature imposed Class C felony liability on offenders who committed the crime of Assault 4 (otherwise a Class A misdemeanor) and who had been convicted within the preceding ten years of other assaultive conduct that included physical contact or stalking. Another example came in 2005, when the legislature imposed felony liability for Indecent exposure 1 if the person had committed the offense of Indecent exposure 2 (a Class A misdemeanor) and had previously been convicted of Indecent exposure 1 or 2 and the present offense was committed in the presence of a person under 16. Another example came in 2008 for the new offense of Criminally negligent burning 1, when the legislature imposed Class C felony liability for the conduct of Criminally negligent burning 2 (otherwise a Class A misdemeanor) if

the person had previously been convicted two or more times within the preceding ten years for Arson or Criminally negligent burning. Also in 2008, the legislature provided for Class C felony liability for repeat offenders of Animal cruelty, otherwise a Class A misdemeanor.

Other ways the legislature used repeat offender provisions was to increase the severity of a classification of a felony offense if it was committed by a person who previously had been convicted. One example came in 2004, when the legislature created a Class A felony level for Distribution of child pornography for repeat offenders. Another example was when the legislature broadened date ranges to include more repeat offenses, such as in 2001 when the legislature made a significant change to felony DUI and Refusal to submit to a chemical test by changing the "look-back" for prior offenses that triggered felony liability. Previously, felony DUI/Refusal was triggered with two prior offenses in five years; it was lengthened to two prior offenses in ten years.

Limiting Defenses to Felony Offenses

In a few statutes, the legislature acted to increase the scope of liability by limiting affirmative defenses available to defendants. Examples included: limiting an affirmative defense to Custodial interference 2; eliminating the statute of limitations defenses for Sexual assault and Sexual abuse of a minor when the victim was under 21 at the time of the offense; and restricting the "mistake of age" defense in AS 11.41.445 for some Sex offenses that had an element of an age of the victim (such as Sexual abuse of a minor 3) by requiring the offender to have taken reasonable measures to verify the victim's age.

D. Summary

Some of the changes described here and in Appendix B to criminal definitions and classifications would have had the effect of "widening the net" and including more offenders into felony offense classifications. Those changes would have had no direct effect on this study's analysis and reporting on sentence lengths but could have affected how many offenders were convicted of felony offenses overall. Other changes that reclassified offenses from one felony class upwards to another, or that reclassified or redefined conduct, had the potential to impact sentence length for those offenders. Any comparison of sentence lengths reported in this study to those from previous studies should be considered in light of these legal changes.

BACKGROUND FOR PRESUMPTIVE SENTENCING WORKGROUP	
TOPICS	QUESTIONS AND COMMENTS

Presumptive Sentencing	• Reasons to keep presumptive sentencing
	  o Keeps disparity in check
	  o Keeps judges' unfettered discretion from being problematic
	• Revisit the Commission's recommendations to see what was enacted and what wasn't, e.g. readjustments of presumptive sentencing ranges. Look again at Majority Rec. 3.
	• Lets look at the costs to keep this system in place
	• Alternative: make presumptive sentencing structure advisory rather than mandatory
	• Criminal History: do lookbacks square with recidivism
	• Alternative: remove statutory floors for effect of mitigation
	• Consider statutory mitigator for acceptance of responsibility: reduction could be tiered and tied to timing of plea, could promote speedier resolution of cases
	• Rewrite existing statutory mitigator for participation in rehab program as existing language limits consideration to therapeutic court participation AS 12.55.155(d)(17)

Three Judge Panel	• Need to substantially overhaul
	• Options: Keep or kill? Expand or contract?
	  o 'Important to maintain to exceptional cases, as a safety valve'
	  o 'Downside is if panels act as super-legislators'
	• How often utilized: 1x in 2016; about 3 times a year
	• Recommendations: change statutory language because of the confusion sowed by Luckett II
	• Verbiage could be cleaned up: e.g. refer to 3 judge panel, if under the totality of the circumstances, a sentence even if adjusted for statutory aggravating and mitigating factors would result in manifest injustice
	• Lawyers may not understand law; panel is infrequently requested
	• There is unknown number of denials of requested referrals to 3JP
	• How often utilized ? 1x in 2016; about 3 times a year
	• Are there delays? 3JP 60-90 days after sentencing hearing

Non-presumptive/ Sentencing benchmarks	• What do we think about caselaw benchmarks relating to non-presumptive sentencing? (mention of Phelps, Page and Wentz)
Probation and Parole	• Should Presentence Report Investigators/writers be within court system, rather than DOC? Would judges get a better product? • How do we get defense attorneys and defendants to cooperate with the PSI/R process? • Does dual supervision (parole and probation) undermine effectiveness?
Motions to Modify	• When are they allowed? When are they appropriate?
Appellate Courts	• Delays are too great • Should there be more judges or a second panel of judges added to COA? • Sentencing appeals: what is the standard of review? Is it comparable to other courts' standards? • How about the ability to city to MOAs? • Should the court adopt a more summary form of decision, like orders for resolution of cases?
Trial Court Delay	• 'Culture of continuances' - need to incentivize to move cases along o Judges: '6 month rule for all but unclassifieds'; PJ could approve payment for exceptions outside of that rule o Allow credit/reduced sentence for early or timely pleas, with less credit for eve of trial pleas
Post-Conviction Relief	• 'Need to incentivize judges' to move cases along o '6 month rule for all but unclassifieds' and require PJ to review continuances beyond that time o 'Require written findings for continuances' • Should defendants be advised at sentencing of 1 year PCR window • This docket is out of control

NOTES FOR THREE JUDGE PANEL DISCUSSION

The Statute:

§ 12.55.165. Extraordinary circumstances

(a) If the defendant is subject to sentencing under AS 12.55.125, (d), (e), or (i) and the [sentencing] 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 defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155 is present.

(c) A court may not refer a case to a three-judge panel under (a) of this section if the defendant is being sentenced for a sexual felony under AS 12.55.125 and the request for the referral is 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.

(d) A court may not refer a case to a 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.

Problems

- Practitioners and judges don't understand the statute(s) or caselaw interpreting it
- 2nd Luckart decision sowed confusion about what 3 judge panel is authorized to do
- It's a reviewing court but its decisions aren't published
- Elongated and bifurcated sentencing process deprives defendants and victims of speedy proceedings
    - Where referral to 3JP is made and is accepted, there will be at least two sentencing hearings
    - When referral is made but case is not accepted, there will be at least two sentencing hearings
    - Majority of times, case does goes back to trial court for third hearing (imposition of sentence)
- Also inefficient: While case is in process (incl appeal), legislature can and has undone judicial determinations

Recommendations or Comments:

- Keep three-judge panel as a needed safety valve
- Any changes should minimize judges acting as super-legislatures
- The safety valve function of the 3JP has been so curtailed by statute (AS 12.55.175(e)) that no real value in maintaining 3JP
- Get rid of three-judge panel and let trial judges determine the question of manifest injustice, subject to appellate review
- Make changes which will promote a better understanding of the process and its availability: defense attorneys seem unaware; process is arguably underutilized with only three hearings held last year
- Determine what can be done to speed up the process – gaps in months between scheduling of IOS and three judge panel

Current members of the 3-Judge Panel recommend:

Option which allows the trial bench to refer a case to the Panel on 2 nonexclusive grounds, not requiring a finding of a non-statutory factor

1. That it would be manifestly unjust for that defendant to not be eligible for discretionary parole; or
2. That it would be manifestly unjust to sentence that defendant within the range required by the applicable presumptive sentencing statute, whether or not adjusted for any aggravators and mitigators that have been found.
    - The finding would presumably be based on the totality of the circumstances analysis, which could include circumstances that presently would prove a non-statutory factor.

From memo written by attorney Doug Miller (excerpted and summarized by MG):

Option 2 if Alaska still wants sentencing judge to determine discrete non-statutory factors, as opposed to utilizing a totality of circumstances analysis:

1. Allow sentencing courts to (1) determine new non-statutory factors and to find manifest injustice exists, thus allowing them to adjust the sentence, but also require
    - When sentencing courts recognize 'new' non-statutory factors, the factors should be identified by the court "in a particular form of words," since this is a quasi-legislative process.
    - Sentencing courts should also determine those findings of fact which are necessary in their view for the application of the non-statutory factor, just as they do for application of statutory factors.

    These requirements allow for appropriate appellate review.

2. Replace the three-judge panel with a new body whose sole function is to determine whether to recommend whether to recommend direct legislative recognition of discrete new factors in aggravation or mitigation.
    - Create a fast-track mechanism for the recommendations of the body to be referred immediately or at least very promptly to the appropriate legislative committees.
    - If the legislature adopts a new mitigating factor, the adoption be at least partially retroactive, so that those who have been recently sentenced may have an opportunity to make the appropriate arguments to the sentencing court, i.e., to prove by clear and convincing evidence the factual predicates identified as part of the new factor.

Right now the statute is not functional as a safety valve. The main thrust of the statute was to create a safety-valve for a relatively rigid system that removes much of the discretion that had traditionally been granted to sentencing courts. The safety valve is to open when a particular offender would, by normal operation of the system (regardless of whether this operation includes application of the statutory mitigating and aggravating factors set forth in AS 12.55.155(c) and (d)), receive a sentence that is manifestly unjust

*The existing three-judge-panel statute creates confusion, and requires courts to assume a quasi-legislative function to which they are not well-suited***.** It says, in part, that a case should be referred to the three judge panel if "manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155." But this requires a sentencing court to make a quasi-legislative finding, i.e. to identify a non-statutory aggravating or mitigating factor which is "relevant." This requires courts to articulate factors that might be good to have in the law, an uncomfortable thing for courts to have to do, and many of them are loath to do it absent guidance from the appellate courts which have not yet considered it.

The delays and inefficiencies in this process are unjust. Hypothetical Defendant 1 is being sentenced on a date certain. Counsel for Defendant 1 argues to the sentencing court that (1) this factor should be recognized, (2) the factual predicate for the factor, and (3) the lowest sentence that could legally be given without referral to the three-judge panel would be manifestly unjust, because of the presence of this factor in this case. If the hurdles described above are overcome and the sentencing court agrees to refer the case to the three-judge panel, there will be a delay of months before the panel itself rules on the case, and additional hearings may be required before the three-judge panel and the sentencing court. Even then, the matter is far from over, because the state is likely to appeal the panel's decision on a non-statutory factor. Resolution of that direct appeal (and the petition for hearing that would probably follow) will take years if current practices in the appellate courts are any guide. And, while there is a petition for hearing pending, the case may be stayed. And even if Defendant 1's lower sentence survives an appeal and a petition for hearing, by this time resistance may have manifested itself in the actual legislative body normally responsible for the recognition of factors in aggravation of mitigation at sentencing -- the Alaska Legislature. If the legislature rejects the premises that led to the recognition of the factor through the quasi-legislative process created by AS 12.55.165 and .175, it can enact language preventing the use of such a factor. Indeed, it did has done this very thing. And the legislature can do this retroactively, which will preclude relief even for Defendant 1.

OTHER RELEVANT STATUTES

§ 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. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability 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, 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 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 sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense 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) If the three-judge panel determines under (b) of this section that 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 AS 12.55.155;

(2) shall order the defendant under AS 12.55.015 to engage in appropriate programs of rehabilitation; and

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

(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 (b) of this section or any other provision of law, that manifest injustice would result from imposition of a sentence within the presumptive range 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 (b) of this section or any other provision of law, that manifest injustice would result from imposing a sentence within the presumptive range based, 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.

§ 33.16.090. Eligibility for discretionary parole and minimum terms to be served

(a) A prisoner sentenced to an active term of imprisonment of at least 181 days may, in the discretion of the board, be released on discretionary parole if the prisoner has served the amount of time specified under (b) of this section, except that

(1) a prisoner sentenced to one or more mandatory 99-year terms under AS 12.55.125(a) or one or more definite terms under AS 12.55.125(*l*) is not eligible for consideration for discretionary parole;

(2) a prisoner is not eligible for consideration of discretionary parole if made ineligible by order of a court under AS 12.55.115;

(3) a prisoner imprisoned under AS 12.55.086 is not eligible for discretionary parole unless the actual term of imprisonment is more than one year.

(b) A prisoner eligible under (a) of this section who is sentenced

(1) to a single sentence under AS 12.55.125(a) or (b) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a) or (b), one-third of the active term of imprisonment imposed, or any term set under AS 12.55.115, whichever is greatest;

(2) to a single sentence within or below a presumptive range set out in AS 12.55.125(c), (d)(2)--(4), (e)(3) and (4), or (i), and has not been allowed by the three-judge panel under AS 12.55.175 to be considered for discretionary parole release, may not be released on discretionary parole until the prisoner has served the term imposed, less good time earned under AS 33.20.010;

(3) to a single sentence under AS 12.55.125(c), (d)(2)--(4), (e)(3) and (4), or (i), and has been allowed by the three-judge panel under AS 12.55.175 to be considered for discretionary parole release during the second half of the sentence, may not be released on discretionary parole until

(A) the prisoner has served that portion of the active term of imprisonment required by the three-judge panel; and

(B) in addition to the factors set out in AS 33.16.100(a), the board determines that

(i) the prisoner has successfully completed all rehabilitation programs ordered by the three-judge panel that were made available to the prisoner; and

(ii) the prisoner would not constitute a danger to the public if released on parole;

(4) to a single enhanced sentence under AS 12.55.155(a) that is above the applicable presumptive range may not be released on discretionary parole until the prisoner has served the greater of the following:

(A) an amount of time, less good time earned under AS 33.20.010, equal to the upper end of the presumptive range plus one-fourth of the amount of time above the presumptive range; or

(B) any term set under AS 12.55.115;

(5) to a single sentence under any other provision of law may not be released on discretionary parole until the prisoner has served at least one-fourth of the active term of imprisonment, any mandatory minimum sentence imposed under any provision of law, or any term set under AS 12.55.115, whichever is greatest;

(6) to concurrent sentences may not be released on discretionary parole until the prisoner has served the greatest of

(A) any mandatory minimum sentence or sentences imposed under any provision of law;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1)--(5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed;

(7) to consecutive or partially consecutive sentences may not be released on discretionary parole until the prisoner has served the greatest of

(A) the composite total of any mandatory minimum sentence or sentences imposed under any provision of law, including AS 12.55.127;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1)--(5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed, plus one-quarter of the composite total of the active term of imprisonment imposed as consecutive or partially consecutive sentences imposed for all crimes other than the primary crime.

(c) As used in this section,

(1) “active term of imprisonment” has the meaning given in AS 12.55.127;

(2) “primary crime” has the meaning given in AS 12.55.127.

§ 12.55.155. Factors in aggravation and mitigation

(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

(1) the low end of the presumptive range is four years or less, 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;

(2) the low end of the presumptive range is more than four years, 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 for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation.

(b) Sentences under this section that are outside of the presumptive ranges set out in AS 12.55.125 shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;
(3) the defendant was the leader of a group of three or more persons who participated in the offense;
(4) the defendant employed a dangerous instrument in furtherance of the offense;
(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, consumption of alcohol or drugs, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;
(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;
(7) a prior felony conviction considered for the purpose of invoking a presumptive range under this chapter was of a more serious class of offense than the present offense;
(8) the defendant's prior criminal history includes conduct involving aggravated assaultive behavior, repeated instances of assaultive behavior, repeated instances of cruelty to animals proscribed under AS 11.61.140(a)(1) and (3)--(5), or a combination of assaultive behavior and cruelty to animals proscribed under AS 11.61.140(a)(1) and (3)--(5); in this paragraph, "aggravated assaultive behavior" means assault that is a felony under AS 11.41, or a similar provision in another jurisdiction;
(9) the defendant knew that the offense involved more than one victim;
(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;
(11) the defendant committed the offense under an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;
(12) the defendant was on release under AS 12.30 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;
(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, firefighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;
(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;
(15) the defendant has three or more prior felony convictions;
(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;
(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;
(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410--11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410--11.41.460 involving the same or another victim;

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time

of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;

(D) specified in AS 11.41 and was committed against a person with whom the defendant has a dating relationship or with whom the defendant has engaged in a sexual relationship; or

(E) specified in AS 11.41.434--11.41.458 or AS 11.61.128 and the defendant was 10 or more years older than the victim;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145(a)(1)(B);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and

(A) the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise; or

(B) at the time of the conduct resulting in the conviction, the defendant was caring for or assisting in the care of a child under 10 years of age;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

(27) the defendant, being 18 years of age or older,

(A) is legally accountable under AS 11.16.110(2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or

(B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant;

(28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant;

(29) the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang;

(30) the defendant is convicted of an offense specified in AS 11.41.410--11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in furtherance of the offense with the intent to make the victim incapacitated; in this paragraph, “incapacitated” has the meaning given in AS 11.41.470;

(31) the defendant's prior criminal history includes convictions for five or more crimes in this or another jurisdiction that are class A misdemeanors under the law of this state, or having elements similar to a class A misdemeanor; two or more convictions arising out of a single continuous episode are considered a single conviction; however, an offense is not a part of a continuous episode if committed while attempting to escape or resist arrest or if it is an assault on a

uniformed or otherwise clearly identified peace officer or correctional employee; notice and denial of convictions are governed by AS 12.55.145(b), (c), and (d);

(32) the offense is a violation of AS 11.41 or AS 11.46.400 and the offense occurred on school grounds, on a school bus, at a school-sponsored event, or in the administrative offices of a school district if students are educated at that office; in this paragraph,

(A) "school bus" has the meaning given in AS 11.71.900;

(B) "school district" has the meaning given in AS 47.07.063;

(C) "school grounds" has the meaning given in AS 11.71.900;

(33) the offense was a felony specified in AS 11.41.410--11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS; in this paragraph, "HIV" and "AIDS" have the meanings given in AS 18.15.310;

(34) the defendant committed the offense on, or to affect persons or property on, the premises of a recognized shelter or facility providing services to victims of domestic violence or sexual assault;

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200--11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410--11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) 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;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;
(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;
(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;
(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;
(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 that was begun after the offense was committed;
(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;
(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;
(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed

(A) as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this subparagraph, “fetal alcohol spectrum disorder” means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy; or

(B) as combat-related post-traumatic stress disorder or combat-related traumatic brain injury, the combat-related post-traumatic stress disorder or combat-related traumatic brain injury substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the combat-related post-traumatic stress disorder or combat-related traumatic brain injury, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this subparagraph, “combat-related post-traumatic stress disorder or combat-related traumatic brain injury” means post-traumatic stress disorder or traumatic brain injury resulting from combat with an enemy of the United States in the line of duty while on active duty as a member of the armed forces of the United States; nothing in this subparagraph is intended to limit the application of (18) of this subsection;

(21) the defendant, as a condition of release ordered by the court, successfully completed an alcohol and substance abuse monitoring program established under AS 47.38.020.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a sentence within the presumptive range under AS 12.55.125(c)(2), that factor may not be used to impose a sentence above the high end of the presumptive range. If a factor in mitigation is raised at trial as a

defense reducing the offense charged to a lesser included offense, that factor may not be used to impose a sentence below the low end of the presumptive range.

(f) If the state seeks to establish a factor in aggravation at sentencing

(1) under (c)(7), (8), (12), (15), (18)(B), (19), (20), (21), or (31) of this section, or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence; the factors in aggravation listed in this paragraph and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury; all findings must be set out with specificity;

(2) other than one listed in (1) of this subsection, the factor shall be presented to a trial jury under procedures set by the court, unless the defendant waives trial by jury, stipulates to the existence of the factor, or consents to have the factor proven under procedures set out in (1) of this subsection; a factor in aggravation presented to a jury is established if proved beyond a reasonable doubt; written notice of the intent to establish a factor in aggravation must be served on the defendant and filed with the court

(A) 20 days before trial, or at another time specified by the court;

(B) within 48 hours, or at a time specified by the court, if the court instructs the jury about the option to return a verdict for a lesser included offense; or

(C) five days before entering a plea that results in a finding of guilt, or at another time specified by the court.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

(i) In this section, “serious provocation” has the meaning given in AS 11.41.115(f).

Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
Thursday, February 18, 2016, 12:00 – 1:00 PM
Atwood Building, 550 W. 7th Avenue, Rooms 102 and 104

Commissioners Present: Greg Razo, Alex Bryner, Quinlan Steiner, Trevor Stephens, Brenda Stanfill.
Staff: Mary Geddes, Susie Dosik, Teri Carns, Giulia Kaufman, Susanne DiPietro.
Also attending: Rob Henderson (DOL), Taylor Winston (OVR).

The meeting began after 12:00 PM, the scheduled start time. It was noted that AG Richards was not able to attend but that Rob Henderson, a Chief Assistant Attorney General and the head of the Office of Special Prosecutions, was attending on his behalf.

There were two items on the agenda: a presentation from the Alaska Judicial Council staff who have been working on the Felony Sentencing Study, and workgroup plan of action.

Susanne DiPietro, the Judicial Council ED, noted that the Sentencing Study was completed but the Executive Summary was still being finalized. The complete report should be available for distribution very soon. Draft excerpts, principally the Executive Summary, from the Felony Sentencing Study were made available and discussed in this meeting.

Comr. Stanfill asked for relationship of the Felony Sentencing Study findings to JRI recommendations. Comr. Steiner noted that the JRI recommendations sought reduction in the sentencing ranges, changes that were justified by the research and the increase over time for all sentenced defendants in the length of time served but that Comr. Bryner had recommended looking at alternatives, i.e. different systems of sentencing. Bryner responded that our presumptive sentencing scheme is very unusual, actually unique, among the states and because of its unique features we should be careful with inferences drawn from the study.

Among the questions for this Workgroup (and the Commission ultimately): Should we maintain the presumptive sentencing structure? Noting that avoiding ethnic disparity in sentencing was a principal goal in designing PS originally; the question is whether that it still a goal? Are there other sentencing/correctional/reformation goals which it does not achieve? What does the research indicate in terms of effective sentencing measures? Should less serious crimes be treated differently in terms of the amount of discretion given to sentencing judges?

Mary at this time proposed that the group plan work for the May-June time frame, as the report will most certainly have been released and it will be past the crush of most legislative related work.

Susanne promised the Commission would soon have the full final report and it should be of assistance in these discussions. She particularly emphasized that if there are quantitative questions which have not been answered, then the AJC can do additional analysis. Susanne also

noted that the Felony Sentencing Study is certainly not the only source of information for an evaluation of the existing presumptive sentencing structure. Teri noted that the Pew data on the length of stay (LOS) is potentially of great use.

Susanne suggested that a chair be chosen and there be agreement as to the time frame and the scope of the group's work. Mary Geddes noted that the three-judge panel would certainly be a specific topic of discussion because so many individuals have already identified it as a problem. Brenda recommended that Comr. Steiner be chair of the subgroup.

Rob Henderson asked if it is possible to make comparisons between older, historical data and this study. Teri explained that the samples in the 1999 and the 2012-2012 studies were defined differently out of necessity because of the migration to using electronic case file information.

Susanne noted that ethnic disparities noted in the pre- presumptive sentencing years has been reduced by presumptive sentencing. But, Teri noted, ethnic/racial disparity still exists, but more in 'pockets.'

Rob asked if it is possible to exclude trial cases from the sample. [not sure this was answered] According to Teri, Alaska Court system reports indicate: "In 2012 and 2013, more than 96% percent of all felony cases in Alaska were resolved without trial" and "Most of those are resolved by a plea agreement negotiated under authority of Rule 11 of the Alaska Criminal Rules of Procedure."

Comr. Bryner at this point noted that presumptive sentencing was designed to deal with the inconsistent results of open sentencing, not a world in which the vast majority of cases were resolved by plea agreements. Subsequent case law interpreting the presumptive sentencing statutes similarly attempted to rein in judges' discretion, e.g. such as when a judge relied upon the existence of an aggravator as the basis for then imposing the statutory maximum sentence.

Teri clarified that the Felony Sentencing study was looked at convictions from a two year period (2011-2012) in which there was a general DOL ban on plea bargains, although charge bargains and other agreements (e.g. to a mitigator) were permitted. Rule 11s agreements were not noted in the electronic record. Furthermore the finding of an aggravator or mitigator (or both) was also not indicated in the electronic record. Since only the class A's conviction files in this study were viewed manually, the AJC study did not have that information for the vast majority of the cases (C's and B's).

Comr. Steiner asked about the data on drug sentences below the presumptive range, clearly reflecting the existence of a mitigator. In a world in which most charges were resolved by an agreement, he asked whether there is enough information to draw a useful conclusion. What if anything might it reflect about the DOL policy at the time, for example?

Comr. Stanfill referenced statutory ACJC goals (#2 and #3) in SB64 and asked whether staff could help frame the specific questions to be answered in this workgroup.[i] Comr. Razo moved the question and Comr. Bryner seconded; the motion passed unanimously.

All agreed that Commissioners will help inventory concerns about presumptive sentencing. Staff will be responsible for proposing an agenda with questions to be answered and will ensure that data and evidence is preeminent in considerations.

Additional public comment was sought. There being none offered at this time, the meeting was adjourned.

---

[i] AS 44.19.645 reads in pertinent part:
"(a) The commission shall evaluate the effect of sentencing laws and criminal justice practices on the criminal justice system to evaluate whether those sentencing laws and criminal justice practices provide for protection of the public, community condemnation of the offender, the rights of victims of crimes, the rights of the accused and the person convicted, restitution from the offender, and the principle of reformation. The commission shall make recommendations for improving criminal sentencing practices and criminal justice practices, including rehabilitation and restitution. In formulating its recommendations, the commission shall consider
(2) sentencing practices of the judiciary, including use of presumptive sentences; [and]
(3) means of promoting uniformity, proportionality, and accountability in sentencing;
…"