SENTENCING ALTERNATIVES WORKGROUP PROPOSALS TO THE COMMISSION FOR RECOMMENDATIONS
REGARDING: PRETRIAL DIVERSION AND DEFERRED DISPOSITION
April 25, 2015

Background

The term "diversion" generally refers to a decision by police, prosecutor or judge to divert or re-direct an individual away from the traditional criminal court process. If an offender satisfies conditions specified for his or her diversion, then the authorities either forego, outright dismiss or reduce charges.

"Pretrial diversion" and "deferred disposition" are two different types of diversion models, as explained below. Nevertheless they have similar purposes, specifically:

- To provide criminal offenders with early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior and when there is an apparent connection between the offense charged and the need;

- To provide an alternative to prosecution for applicants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as a sufficient sanction to deter criminal conduct;

- To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses; or

- To provide assistance to criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems.

Pretrial Diversion

For reasons summarized below and discussed at greater length in its papers, the Sentencing Alternatives Workgroup proposes that the Commission

- **Recommend to the Legislature that it enact a statute creating the option of pretrial diversion for state prosecutors and express its support for its use because pretrial diversion is a Smart Justice tool that can allow the State of Alaska to conserve prosecutorial, judicial and correctional resources for more serious crimes; and**
- **Recommend to the Department of Law that it reverse its longstanding policy banning pre-trial diversion and promote its use in appropriate cases.**

"Pretrial diversion," as used here, refers to pre-booking or pre-plea agreements offered by a prosecutor. Pretrial diversion commences with a prosecutor's decision to offer a civil-type resolution to a person who has committed a criminal offense. The conditions do not include jail but certainly can include victim restitution, the payment of fines, the completion of community work service hours and other restorative justice type measures. The offer is made early in the case, prior to any plea. It is often in writing. The offer can be made prior to a court filing, at the time of a defendant's first appearance in court or shortly thereafter. The offer sets out the prosecutor's conditions for dismissal of the case and a deadline for satisfying the conditions. If the defendant accepts, he receives no discovery and rarely seeks the appointment of counsel. If the defendant completes the conditions, there are no court hearings and his case is dismissed. If he doesn't fulfill the conditions on time, the case proceeds as usual. Pre-trial diversion agreements are usually quite limited in duration because this model requires the prosecutor to maintain witnesses and evidence to prove the case at trial if the defendant does not satisfy the conditions

Historically, the tool of pretrial diversion has been used to intercept minor charges, first offenses, non-violent offenses and/or 'fix it' type offenses (like driving without insurance, driving with a suspended license, etc.). Many states also use diversion for need-specific populations such as the mentally ill or drug-dependent.

Alaska statutes are silent on the subject of pretrial diversion, thus neither forbidding nor permitting state prosecutors to offer it. However, the Department of Law has had a longstanding policy preventing its prosecutors from offering pretrial diversion, even though it had a successful pretrial diversion program from 1978 – 1986 in fifteen locations around the state, even though the Municipality of Anchorage has run a successful pretrial diversion program for at least the last thirty years, and even though forty-two states now provide some form of pretrial diversion alternatives to traditional criminal justice proceedings for persons charged with criminal offenses.[1]

While pretrial diversion is not an appropriate disposition for everyone or for every charge, well-administered programs should achieve a less-costly resolution of criminal proceedings by reducing the number of hearings, resources used for litigation (such as public defenders) and correctional resources (beds, probation officers). Diversion conditions can also promote accountability and achieve behavioral change while avoiding stigmatizing youthful and first offenders with unnecessarily punitive measures. Offenders make earlier payments of fines and restitution to victims when the payment has been made a condition of short-term pretrial agreements. Payment is more likely when offenders avoid incarceration and therefore experience less disruption of work opportunities and economic status. Finally, programs for individuals with serious mental health and substance use disorders can also prevent future criminality by providing an early intervention and diversion away from jail beds and into community-based services.

Pretrial diversion is nationally recognized as an important tool in the 'toolbox' of Smart Justice initiatives. Our laws and practices should reflect that.

Deferred Disposition

For reasons summarized below and discussed at greater length in its papers, the Sentencing Alternatives Workgroup also proposes that the Commission

- **Recommends to the Legislature that it repeal and replace AS 12.55.085 ("Suspended Imposition of Sentence") and AS 12.55.086 ("Imprisonment as a Condition of Suspended imposition of Sentence") with statutes for "Deferred Disposition" and "Imprisonment as a Condition of Deferred Disposition."**

In general, by a "deferred disposition," we mean that the final resolution of a criminal case will be delayed for a specific length of time so that a defendant has the opportunity to first perform all the conditions required of him by a sentencing court. Deferred dispositions generally involve more serious offenses and offenses with underlying behavioral issues where rehabilitative programming is indicated. It is used in criminal cases where pretrial diversion may not be appropriate, e.g. if the case is not a first offense, or a lengthier period of time is required to make restitution or complete treatment.

Depending on local law, a deferred disposition could be directed by a court, or it could be a bargained-for plea agreement between prosecutor and a defendant. Either way, a deferred disposition is only available if the defendant has pleaded guilty (or no contest) or is found guilty, thus obviating the need for a trial. If the defendant is successful, the outcome may be either the dismissal of a case, the substitution of a lesser charge for conviction or the imposition of a

[1] The most common type of diversion laws (in 38 states) are those that create programs, often targeted at criminogenic needs (e.g. unlawful drug use). Also, 14 states have laws authorizing local governments, prosecuting attorneys or state courts to create and operate diversion programs. Eleven states' laws authorize prosecutors to offer pretrial diversion, independent of any program.. Some states' laws expressly allow diversion for specific offenses, such as bad check charges.

more favorable sentence, again depending on the local law. If the defendant is unsuccessful, however, he will be convicted and sentenced.[2]

Deferred dispositions are in limited use in some of the state's 'specialty courts,' such as the Mental Health court. However, these courts are few in number, with tiny capacities, limited to a few urban locations and, in the absence of any statutory authorization, a defendant's enrollment presently requires the prosecutor's agreement. The enactment of a deferred disposition statute, in contrast, will allow any state court – rural or urban - to use this tool for the close supervision of any individual it believes is appropriate.

The Workgroup has utilized the deferred disposition model to propose a "Deferred Imposition of Sentence" (DIS) statute. *See Appendix A for proposed language*. Again, a DIS is a not a pre-plea arrangement, but a pre-sentencing arrangement. During the deferral period, the court supervises the defendant and may also order probation supervision. One possible DIS condition during the deferral period may require the defendant to serve some time in jail.[3] Non-compliance with DIS conditions results in a final judgment of conviction and the imposition of a sentence. A successful DIS results in the dismissal of the criminal case with no conviction.

The DIS has been proposed as a substitute for the existing SIS statute, AS 12.55.085. That statute provides for a similar deferral period, and a set-aside of conviction if the defendant completes all SIS conditions. The main difference between the SIS and the DIS is that the DIS allows a defendant to avoid the legal fact of conviction during the deferral period and afterwards. Even though the SIS statute was intended to given offenders -- typically first offenders and young adults -- the opportunity to 'clear' their records by following court conditions and not re-offending, the language of the statute To provide s no outcome: the defendant is considered "convicted" and thus suffers all of the consequences related to that conviction. Even if his conviction is later "set-aside," the defendant is still required to answer affirmatively and in perpetuity that he was convicted. An "SIS" outcome thus has had adverse effects on ex-offenders who seek employment, housing, educational and military opportunities because the statute requires an immediate adjudication of guilt and a conviction. Consequently the Workgroup proposes the repeal of the existing SIS statute and the passage of the DIS proposal.

A DIS statute could also broaden the category of offenders who may be eligible for a deferred disposition. (The current SIS statute categorically excludes many crimes.) While the Workgroup had consensus on the replacement of the SIS statute with the DIS model, it did not reach consensus as to exclusions.[4] Some workgroup members felt that the issue of exclusions should be left to the Commission itself. Some members felt the Legislature should be the arbiters of any exclusions since the process of statutory revision would yield that discussion regardless.

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[2] Some plea bargains specify the two possible outcomes – if successful, if unsuccessful - so that the defendant's plea is fully informed.

[3] See AS 12.55.086 and Workgroup substitute (attached).

[4] One member recommended that DIS only be available for non-violent offenders because of "concerns about DV and felony violent crimes being disposed in this manner." (Staff drafted some statutory language along these lines.) Another member expressed similar, and made two specific suggestions: (1) that deferral only be available for a person on the first occasion that a particular offense is charged, and (2) that the ACJC work first to make probation supervision available for violent misdemeanants before including them. Another member opined that cases involving mentally disordered defendants are particularly appropriate for a Deferred Disposition because treatment and not jail is most likely to reduce recidivism in that group. It should also be noted that one of the first requests for law changes made to the ACJC concerned an existing exclusion to the current SIS statute. On October 24, 2014, the Alaska Association of Defense Lawyers asked the ACJC to recommend the repeal of the SIS exclusion of those previously convicted of a misdemeanor assault or reckless endangerment.

Appendix A:
Current Statutes (SIS) and Proposed Substitutes (DIS)

CURRENT AS 12.55.085

Suspending imposition of sentence. (a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, AS 11.46.400, AS 11.61.125 - 11.61.128, or AS 11.66.110 - 11.66.135;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

PROPOSED ALTERNATIVE AS 12.55.085

Deferred Disposition. (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion and in any case, accept a guilty or no contest plea after advisement or record a guilty verdict but also defer the final judgment of guilt and disposition of sentence. The court may direct that the deferral continue for a period of time not exceeding the maximum term of the sentence that may be imposed or a period of one year, whichever is greater, upon the terms and conditions that the court determines, and shall place the person on any conditions of release, authorized pursuant to AS 12.30.011 through AS 12.30.020, or any conditions of probation, authorized pursuant to AS 12.55.100 - 102 as are appropriate to address public safety and the rehabilitation of the person. The court is authorized to place the person under the charge and supervision of a probation officer during the deferral period.

(b) At any time during the deferral term if the person released on conditions, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the arrest or rearrest of the person. The court may revoke and terminate bail if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon deferred disposition conditions is

(1) violating the conditions;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the deferred disposition conditions of release, the court may pronounce sentence at any time within the maximum period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of deferral revoke and sentence the person, or modify its order of deferred disposition conditions of release. The court may continue and/or extend the deferral period. When the person has entered a plea of guilty or no contest, the court may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on a deferred disposition release warrant it, terminate the deferral period, allow the person to withdraw the plea, and dismiss the charges against the person in the interests of justice. When the court or a jury has found the person guilty, the court may not allow the person to withdraw the plea, however the court may terminate the deferral period and dismiss the charges against the person in the interests of justice.

(e) Upon a finding of successful compliance with the conditions of the deferred disposition by the court, the court may dismiss the charges in the interest of justice and issue a certificate to that effect to the person. The public record will reflect that the person was charged with a crime and the charge was dismissed.

CURRENT AS 12.55.086

Imprisonment as a condition of suspended imposition of sentence. (a) When the imposition of sentence is suspended under AS 12.55.085, the court may require, as a special condition of probation, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(b) A defendant imprisoned under this section is entitled to a deduction from the term of imprisonment for good conduct under AS 33.20.010. Unless otherwise specified in the order of suspension of imposition of sentence, a defendant imprisoned under this section is eligible for parole if the term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If probation is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served."

PROPOSED ALTERNATIVE AS 12.55.086

Imprisonment as a condition of deferred disposition. (a) The court may require, as a special condition of deferred disposition, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

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(c) If the order of deferred disposition is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served."

APPENDIX B: WORKGROUP PAPERS

RELATING TO PRETRIAL DIVERSION

Recommendation to the Commission From the Sentencing Alternatives Workgroup
4-15-2015 Draft

Encourage the executive branch (Department of Law) to reverse its policy banning pre-trial diversion (PTD) and promote its use, in appropriate cases, as a matter of public policy. Enact a PTD statute creating this option, to secure the ability of the state of Alaska to conserve prosecutorial, judicial and correctional resources for more serious crimes as matter of law.

SUMMARY

The proposal would institutionalize PTD as a swift and inexpensive way of processing certain case types early in the life of a criminal case through civil type resolutions. PTD should prioritize restitution to alleged victims; promote accountability and behavioral change while avoiding stigmatizing youthful and first offenders with unnecessarily punitive measures and criminal convictions.

CURRENT LAW AND PROBLEM POSED

Alaska law does not provide PTD as a sentencing alternative. PTD could be done without statutory authorization. However, the Criminal Division of the Department of Law has an affirmative policy banning the use of PTD among state prosecutors. PTD is nationally recognized as an important tool in the 'toolbox' of Smart Justice initiatives. PTD programs, especially for individuals with serious mental health and substance use disorders, prevent future criminality by providing an early intervention and diversion away from jails and into community-based services. PTD can also promote speedy case processing of relatively minor crimes through civil type settlements. This would avoid a criminal conviction, the subsequent stigma and barriers to employment, housing, education and the military for youthful and first offenders; Henceforth, conserving prosecutorial and judicial resources for more serious crimes.

Alaska had a positive historical experience with PTD. In 1978, the state of Alaska began a pilot Pretrial Intervention program (PTI). It subsequently expanded to fifteen different locations but was closed in 1986. Ironically, the program was defunded in 1986 in the midst of an economic downturn as well as the national legislative trend at that time enacting lengthier prison terms, particularly for drug crimes. The PTI defunding also coincided with the opening of three new DOC institutions, causing the author of the Justice Center report to hypothesize there was little incentive to save correctional resources given the number of jail beds in the state at that time.

Since 1986, the Criminal Division of the Department of Law has not authorized the use of pretrial diversion among state prosecutors.

PROPOSED SOLUTION

The term "pretrial diversion," generally refers to a process which takes place early in a criminal case, before any plea or trial verdict, which avoids pretrial incarceration. It may even include cases in which criminal charges have not yet been filed. If the defendant is successful, the case is never filed or it is dismissed. If the defendant is not successful in completing the specified conditions, s/he is terminated from the program and the case proceeds, as with any other criminal case.

A study of nationwide pretrial diversion programs found that most offenders in them had been charged with nonviolent felony offenses (Ulrich, 2002). The most common types of these offenses were fraud,

larceny/theft (Ulrich, 2002), and drug-related offenses (Zlatic, Wilkerson, and McAllister, 2010). Eligibility requirements for pretrial diversion programs can differ depending on the jurisdiction in which they are run, but most have at least one requirement centered on the following: (a) prior criminal history, (b) current charge, (c) substance abuse history, (d) mental health history, (e) victim approval, (f) restitution repayment, and (g) arresting officer approval (NAPSA, 2009).

Many states have enacted PTD laws for special populations, such as individuals with serious mental and/or substance use disorders. These programs divert offenders from jail beds and a record of criminal conviction into community treatment. It should be noted here that the DOC is the largest provider, state or private, for people with mental disorders in Alaska. A snapshot of the ADOC's inmate population on June 30, 2012, showed that 65% were Alaska Mental Health Trust Authority beneficiaries, divided into five groups: (1) people with mental illness, (2) people with developmental disabilities, (3) people with chronic alcoholism and other substance abuse disorder, (4) people with Alzheimer's disease and related disorders, and (5) people with traumatic head injury resulting impermanent brain injury. Trust Beneficiaries are generally incarcerated for a longer period of time than are other offenders, are arrested more often, and remain incarcerated longer. Alaska Natives constitute a disproportionate share of the Trust Beneficiary population, representing over one-third of the total (38.5%). This boils down to the fact that 2/3 of the DOC's inmate population has a mental health, substance abuse or cognitive impairment problem. *See Recidivism Reduction Report, page 17.*

PTD provides an early intervention, an individualized plan addressing the root cause of the offense and supervision of the defendant's compliance with that plan.

PTD also motivates offenders to expedite the payment of fines and restitution in misdemeanor cases in ways that unsupervised probation after a conviction cannot. And PTD programs can be revenue generating. (Anchorage Municipal Code AS 0-8.05.060 authorizes PTD in certain case types. In 2011, this program, operated through the Municipal Prosecutor's office for many years, generated $381,000 in fines and administrative fees for the Municipality.)

Alaska previously experienced success with a PTD program in the late 1980's. The PTD program was evaluated by the University of Alaska, which reported that 1865 individuals had participated in the PTI program. 66% of them were referred to and participated in treatment programs. Half of those were treated for alcohol use. The participant's progress in these treatment programs played a role in whether they were favorably or unfavorably terminated from the PTI program. It concluded that the Alaska program could be considered as effective as other programs reported in the literature at that time, with 67.3% of PTI clients remaining crime free in the community for 2.5 – 5 years after referral to the program.

While the measure of recidivism (32.7) was slightly higher than elsewhere in 1988, the Justice Center report noted that 39% of Alaska PTI participants had felony charges and 36% had prior criminal records, unlike many other diversion programs offered only to first offenders with non-serious offenses. The PTI program had also successfully referred a broad spectrum of Alaska residents to the program, including a high proportion of Alaska Natives and for the most part had avoided net-widening, an undesired use of PTD to include more individuals than would have otherwise been prosecuted.

Other measures of success were restitution paid and community work service hours completed. Crime victims received a total of $435,981 in restitution through PTD and more than 65,000 hours of Community Work Service was provided to public or nonprofit agencies as a result of the program.

In January 2014, the Public Safety Transition working group for the Walker-Mallott Transition discussed pretrial diversion in its report at pages 17-18.

> Pretrial diversion – a voluntary alternative to traditional criminal justice processing – is currently prohibited by Department of Law policy, in part because the Department of Law does not have the resources and/or personnel to monitor the individuals in the program unless internal resources are reallocated….If successful, pretrial diversion can result in reducing court dockets (thereby conserving judicial resources for more serious offenses), and reducing offender recidivism by providing effective community-based rehabilitation, which may be less costly than the continued criminal prosecution and eventual incarceration.

The group recommended:

> Reallocate resources within the Department of Corrections to provide pre-trial monitoring and supervision of the individuals in the pre-trial diversion programs. In the alternative, the Department of Law should provide additional resources to monitor and oversee such programs in the form of personnel and funding.

In summary, there is strong evidence to show that PTD programs conserve prosecutorial, judicial and correctional resources for more serious crimes. They allow for relatively speedy and inexpensive criminal case processing through civil type resolutions. They promote offender accountability and behavioral change while avoiding the use of expensive jail beds. The executive branch should promote, as matter of policy, the use of PTD in appropriate cases.

Cases considered appropriate would be cases that are not sex offenses and that do not involve significant violence. The recommendation is that PTD not further, in any cases involving a crime victim, the prosecutor should be required to make reasonable efforts to notify and confer with the victim about the facts of the case, to prioritize any need for restitution as a condition of the diversion offer and discuss all of the PTD conditions before entering into an agreement.

There was one concern over whether a PTD program could include offenders charged with crimes involving domestic violence without impacting Alaska's ability to receive grants from the federal Violence Against Women Office.

CJC staff reviewed all eligibility criteria, certifications, and standard and non-standard assurances associated with all VAWA grants currently awarded to Alaska grantees and concluded that no conflict exists.

Alaska may not use VAWA Formula grant funds to offer "perpetrators the option of entering pre-trial diversion programs*" (see VAWA Formula Application pages 22-23).* It is also true that applicants for Arrest grants "may receive a deduction in points during the review process or may be eliminated from further consideration entirely" if they propose to use Arrest grant or Rural grant funds to offer pre-trial diversion programs *(see VAWA Arrest application pages 16-17).*

Since this recommendation does not contemplate using VAWA grants to fund a pre-trial diversion program, staff concluded that no conflict exists. Neither the VAWA Housing grant, the Sexual Assault Grant, the State Coalition grant, the Consolidated Youth grant, the Legal Assistance to Victims grant, nor the Coordinated Tribal Assistance Grant include any certifications, assurances, or eligibility restrictions related to a jurisdiction's decision to offer a pre-trial diversion program.

The Legislature should also enact a PTD statute creating this option, so that shifting executive policies will not undercut the ability of the state of Alaska to conserve prosecutorial, judicial and correctional resources for more serious crimes.

For a more detailed explanation of PTD, please see PRETRIAL DIVERSION Mary Geddes, staff, Criminal Justice Commission.

PROJECTED IMPACTS

The impacts projected include reducing the incarceration of non-violent offenders (a category of offenders that has dramatically increased in Alaska). PTD programs would motivate the payment of administrative fees, fines, restitution and the completion of rehabilitative programming. This in turn, would reduce the burden on the prosecutor to obtain and deliver police reports and other evidence to the defense. It would reduce the number of court appointments of counsel for indigent offenders. Addressing the issues underlying individual criminal behaviors would reduce the overall recidivism of PTD participants.

The prosecutor would experience a reallocation of resources compliance checks would be required in some cases. This work could be performed para-professionals. Prosecuting attorneys currently screen all cases and generally prepare a plea bargain offer to convey to defendants at their arraignment. The para-professional work of obtaining and delivering 'discovery' in these cases could be rechanneled into the compliance check process. It is possible that some unsuccessful PTD cases may not be able to be prosecuted due to the loss of witnesses and other evidence, especially if the diversion period were lengthy.

MG's PRETRIAL DIVERSION DISCUSSION PAPER

Questions for the Commission

As a matter of policy, should the Criminal Division once again consider the option of pretrial diversion for the disposition of at least some nonviolent crimes?

As a matter of law, should the Alaska Legislature expressly approve the option of pretrial diversion as an alternative to the traditional case processing of state criminal offenses?[1]

Introduction

In the 'toolbox' of Smart Justice initiatives, pretrial diversion (PTD) is one approach which can enhance public safety and provide justice.

Pretrial diversion can be authorized as matter of Executive Branch policy without legislative action. Three decades ago, the Alaska Department of Law did offer and supervise pretrial diversion. The Pretrial Intervention program (PTI), which began as a pilot program in 1978 and subsequently expanded to fifteen different locations, was shuttered in 1986. Since that time, the Criminal Division of the Department of Law has not authorized the use of pretrial diversion among state prosecutors.

Many states have seen fit to institutionalize pretrial diversion. At this time, more than 42 states' laws – ***but not Alaska's*** – recognize the option of pretrial diversion as an alternative to traditional criminal case processing.[2]

What is Pretrial Diversion?

Generally speaking, "diversion" reflects a decision by a police, prosecutor or judge to 'divert' or re-direct an individual case from the traditional criminal court process by either foregoing, outright dismissing or reducing charges. An offer of diversion is always conditional. It depends on the defendant's voluntary agreement, waiver of speedy trial rights and ultimately his or her performance of conditions.

When we use the term "pretrial diversion," we are usually specifying a process which takes place early, before any guilty plea or trial verdict and which avoids pretrial incarceration. It may include cases in which criminal charges have not yet been filed. If the defendant is successful, the case is never filed or it is dismissed. If the defendant is not successful in completing the specified conditions, he or she will be terminated from that program and the case will proceed, as usual, on a schedule for trial.

A study of nationwide pretrial diversion programs found that most offenders in them had been charged with nonviolent felony offenses (Ulrich, 2002). The most common types of these offenses were

[1] A state statute can either expressly allow PTD, limit it to some categories of eligible persons or offenses, or it can wholly ban it. Our statutes are silent, thus neither forbidding nor permitting PTD as an option in Alaska.

[2] A recent research summary by a BJA contractor – Camill etti -- states there are five type of pretrial diversion programs: Statewide Pretrial Diversion Programs, Prebooking Diversion Programs; Postbooking Diversion Programs; and Post-Plea Diversion Programs.

fraud, larceny/theft (Ulrich, 2002), and drug-related offenses (Zlatic, Wilkerson, and McAllister, 2010). Eligibility requirements for pretrial diversion programs can differ depending on the jurisdiction in which they are run, but most have at least one requirement centered on the following: (a) prior criminal history, (b) current charge, (c) substance abuse history, (d) mental health history, (e) victim approval, (f) restitution repayment, and (g) arresting officer approval (NAPSA, 2009).

Pretrial diversion programs help conserve prosecutorial, judicial and correctional resources for more serious crimes. PTD allows for relatively speedy and inexpensive case processing with civil type resolutions. The programs can promote accountability and achieve behavioral change while avoiding stigmatizing youthful and first offenders with unnecessarily punitive measures. Some have restorative justice components involving community members. In any event, pretrial diversion can expedite the payment of fines and restitution.

More and more states enact PTD laws for special populations, such as individuals with serious mental illnesses, and those individuals abusing drugs and alcohol. These legislatures seek to divert offenders from jail beds into community treatment. PTD proposes an early intervention, providing an individualized plan addressing the root cause of offense and supervision of the defendant's compliance with that plan.

The Present Need for Pretrial Diversion

As most recently detailed and discussed in the Recidivism Reduction Plan,[3] Alaska can't afford its current and extraordinarily high rates of incarceration and recidivism. Notably, the plan concludes:

- More nonviolent offenders are incarcerated than violent offenders;
- The percentage of incarcerated non-violent offenders is increasing, not decreasing;
- The daily average numbers of pretrial or unsentenced offenders has dramatically increased; and
- The time to disposition for unsentenced offenders seems high.

This information begs the question of why Alaska is not utilizing pretrial diversion, at the very least with respect to nonviolent offenders. While pretrial diversion is not an appropriate disposition for every offender or offense and not every offender will finish PTD, [4] well-administered PTD programs should achieve a less-costly resolution of criminal proceedings by reducing the number of court cases/proceedings/trials/appeals and resources used for litigation (e.g. public defenders). It should also result in fewer costs for DOC, by reducing the number of pretrial defendants in jail beds, and reducing the number of incarcerated nonviolent and drug-involved offenders in jail and on probation supervision.

There are other kinds of savings as well. Offenders make earlier payments of fines and restitution to victims when payment has been made a condition of pretrial agreements. Payment is more likely when offenders avoid incarceration and therefore experience less disruption of work opportunities and economic status.

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[3] 2015 Recidivism Reduction Plan, Cost Effective Solutions to Slow Prison Population Growth and Reduce Recidivism

[4] Pretrial diversion usually complements other Smart Justice strategies which may be better employed with different populations. Those other strategies may include 'therapeutic' or 'problem solving courts' and 'deferred sentencing.'

While incarceration will always be necessary for some offenders and offenses, the use of incarceration for everything and everybody has proved ineffective. Despite the high rate of incarceration, recidivism is high which means incarceration is not 'correcting' criminal or other antisocial behaviors among those who will return to our communities. National models have urged more incremental steps in imposing sanctions, and community based alternatives to incarceration.

How Does Pretrial Diversion Work?

Pretrial diversion is typically distinguished from other types of diversion by the question of who controls it. It is often, although not always, a prosecutor who runs a program and make the judgment calls. In contrast, with court-based programs, the judge is in charge.

Pretrial diversion only happens in an individual case if the prosecutor offers to divert AND the defendant accepts.[5] Pretrial diversion agreements can be oral or written. A prosecutor can simply tell a potential defendant what conditions must be met and by what date or (and more commonly) the prosecutor can require a written agreement specifying all the terms. While pretrial diversion agreements do not typically require an admission of guilt, they do require a participant's written waiver of his or her Speedy Trial rights. This waiver forecloses any later complaint that a person was disadvantaged by the delay resulting from the person's agreement to pretrial diversion.

The outcome of such an agreement depends entirely upon the offender. If the individual satisfies the conditions set by the prosecutor, then the prosecutor gives the bargained-for result and dismisses the case. Sometimes prosecutors may extend the time for completion of PTD conditions; sometimes not.

What Does A Pretrial Diversion ***Program*** Look Like?

Pretrial diversion programs are usually situated in a prosecutor's office or a probation office. Back in the 1980's, the Alaska Pretrial Intervention Program was situated in District Attorney's offices around the state. In Anchorage, the Pretrial Diversion Program is in the Municipal Prosecutor's offices. However, there are some states in which pretrial diversion programs are in an corrections agency, a court system or contracted out to community non-profits.[6]

Typically, PTD programs have personnel who screen pretrial cases and defendants in advance of court dates, formulate the specific conditions of Pretrial Diversion for each case, and actively monitor a participant's performance for the payment of fines and restitution, e.g. the obtaining of licenses or auto insurance, completion of Community Work Service hours, and participation in treatment. If conditions are met, the prosecutor moves to dismiss. If conditions are not met, the prosecutor takes what steps are required to get the case on the trial calendar.

Pretrial diversion programs have several components. Most use risk assessments to determine whether offenders are eligible for the program, while others use standardized eligibility criteria such that

[5] The offer of pretrial diversion may be made by the prosecutor to an unrepresented defendant. Any defendant who still seeks the opportunity to consult with a lawyer prior to accepting the agreement should be accommodated.

[6] Pretrial diversion programs feature: uniform eligibility criteria; a structured delivery of services and supervision; and dismissal or its equivalent of pending criminal charges upon successful completion of the required term and conditions of diversion. (NAPSA Performance Standards and Goals for Pretrial Diversion/ Intervention (2008)).

an offender and his or her charge must fit certain requirements Many also use assessments to determine the needs of offenders and appropriate treatment/service plans. Most pretrial diversion programs also include some type of supervision that accompanies treatment services Additionally, most require some sort of victim restitution, community service, and counseling. Depending on an offender's needs, programs also may include drug treatment or counseling, urinalysis, and programming for several types of traffic offenses

The National Experience with Pretrial Diversion Laws

According to the National Conference of State Legislatures, which compiled a survey of state pretrial diversion programs in 2013, and a subsequent study of state law changes in this areas during 2012-2014, forty-two states now provide pretrial diversion alternatives to traditional criminal justice proceedings for persons charged with criminal offenses.

The most common type of diversion *laws* (in 38 states) are those that create programs to address specific needs. Twenty-three states have programs that address substance and alcohol abuse. Nineteen states allow diversion for people identified as having a mental illnesses related to their criminal behavior. Eleven states allow diversion options for veterans or active military who have substance abuse or mental health needs stemming from combat experiences.

Depending on the state law, offenders may be 'diverted' (into treatment and programming) entirely away from the courts. Other states' diversion strategies include use of the courts and some of those court programs may require a guilty plea from the participants.

Instead of or, in addition to, *needs-specific* programming, at least 14 states' laws give broad authorization to local governments, prosecuting attorneys, or state courts to create and operate diversion programs. See e.g. Alabama H494, Act No. 2013-361, enacted 05/23/2013 (allowing any locality to establish a discretionary pretrial diversion program, setting forth basic operating procedures and program fees and distribution arrangements). See also Arkansas H 1470 Act No. 1340 enacted 04/18/2013 (authorizing local courts to establish pre-adjudication probation program which defendants enter without a guilty plea or before the court enters a judgment and pronounces a sentence).

There also are 11 states that do not require a specific diversion program be created in order for a prosecutor to be authorized to offer pretrial diversion.

Some states' laws allow diversion based on the offense charged, such as bad check charges.[7] Ten states authorize diversion for first-time worthless check offenders. Florida and Colorado allow diversion of offenses of prostitution, and Ohio and Pennsylvania more recently enacted laws allowing diversion for victims of human trafficking eligible for diversion. Ten states permit some domestic violence and child abuse offenses to be diverted. With respect to these laws, victims must agree to the diversion and participate in classes dealing with parenting and anger management.

According to a Bureau of Justice Assistance (BJA) Research Summary on Pretrial Diversion Programs,[8]

[7] Conversely, some laws disallow diversion depending on the offense charged.
[8] https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf

That there are several types of pretrial diversion programs demonstrates that different offenders may benefit from different programs or different components of programs. Each of the programs discussed above aims to divert offenders suffering from mental illness, alcohol and drug abuse, or co-occurring disorders from the traditional criminal justice system to treatment centers. Additionally, these programs aim to eliminate the factors that lead to an offender's criminal behavior.

Offenders who participate in pretrial diversion programs demonstrate positive outcomes when compared with eligible offenders who go through the traditional criminal justice system. Specifically, one study, by Broner, Mayrl, and Landsberg (2005),[9] has demonstrated that offenders in pretrial diversion programs are more likely to be in the community than in jail or treatment centers 12 months after their initial crime. These researchers also found that offenders in these programs spent less time in prison than did eligible offenders who did not participate in a pretrial diversion program. Compared with traditional criminal justice procedures, diversion programs also lead to positive mental health, substance abuse, and treatment outcomes for offenders (Broner, Mayrl, and Landsberg, 2005). Other research has found that the most positive outcomes occur when the offender is well matched with a mental health provider who has a good understanding of the offender's needs. The benefits also are maximized when an offender's caseworker has a small caseload and is able to be actively involved in the client's progress (Mire, Forsyth, and Hanser, 2007).[10]

The State of Alaska Experience with Pretrial Diversion

There are no Alaska statutes nor court rules that discuss pretrial diversion. However, as previously mentioned, three decades ago the State Department of Law ran the Pretrial Intervention (PTI), a program of pretrial diversion under the leadership of Patrick Conheady. A pilot program begun in 1978 was later expanded in 1981 by the Legislature to a statewide program in 13 different locations around the state: Anchorage, Barrow, Bethel, Dillingham, Fairbanks, Juneau, Kenai, Ketchikan, Kodiak, Nome Palmer and Sitka. The program was ended in 1986.

To be eligible for program referral, the defendant had to have been charged as an adult with a single offense and a first offender charged with a property crime in which no one was endangered, assaultive behavior in a family setting or possession, sales or distribution of a small quantity of a controlled substance. It appears that these initial program guidelines may have been changed to allow for more referrals.

Notably, the Department of Law had built an evaluation component into the PTI program in order to assure that it was operating in the best interest of the community, the victim and the defendant. It partnered with the Justice Center at UAA to develop standardized data entry and collection. Thus, extensive client and case information was routinely collected in a computerized data base. The Alaska Justice Statistical Analysis Unit at the UAA Justice Center ultimately obtained a federal grant, access to and use of the database and merged it with criminal history data from the Alaska Department of Public

[9] Broner, N., Mayrl, D.W., and Landsberg, G. (2005). Outcomes of mandated and nonmandated New York City jail diversion for offenders with alcohol, drug, and mental disorders. The Prison Journal 85(18). doi: 10.1177/0032885504274289

[10] Mire, S., Forsyth, C.J., and Hanser, R. (2007). Jail diversion: Addressing the needs of offenders with mental illness and cooccurring disorders. Journal of Offender Rehabilitation 45:19–31.

Safety so that recidivism factors could be included in the evaluation. Unfortunately, an analysis of program data was not completed until 2 years after the program had been closed down.[11]

The UAA report reflected that 1865 individuals had participated in the PTI program. 66% of them were referred to and participated in treatment programs. Half of that number were treated for alcohol use. The clients' progress in these treatment programs played a role in whether or not they were favorably or unfavorably terminated from the PTI program.

In addition to looking at the numbers of people who participated, their histories and the types of charges they faced, the UAA study also considered the various measures of recidivism for pretrial diversion programs. It concluded that the Alaska program could be considered as effective as other programs reported in the literature at that time, with 67.3% of PTI clients remaining crime free in the community for 2.5 – 5 years after referral to the program.

While the measure of recidivism (32.7) was slightly higher than elsewhere in 1988, the Justice Center report noted that 39% of Alaska PTI participants had had felony charges and 36% had prior criminal records, unlike many other diversion programs offered only to first offenders with nonserious offenses. The PTI program had also successfully referred a broad spectrum of Alaska residents to the program, including a high proportion of Alaska Natives, and for the most part had avoided net-widening, an undesired use of pretrial diversion to bring in more individuals than would have otherwise been prosecuted.

Other measures of success were restitution paid and community work service hours completed. Crime victims received a total of $435,981 in restitution through PTI, and more than 65,000 hours of Community Work Service was provided to public or nonprofit agencies as a result of the program.

The Anchorage Experience with Pretrial Diversion

It should be noted that a policy concerning state prosecutions does not preclude other governments, such as municipalities, from offering pretrial diversion in misdemeanor cases. The Municipality of Anchorage has offered pretrial diversion for at least thirty years. However, this leads to geographical disparities with individuals charged by Anchorage potentially eligible for pretrial diversion, but not individuals in other localities. The Municipality of Anchorage (MOA) has offered pretrial diversion program for at least thirty years.

The existing program is authorized by municipal code (8.05.060). As described to Commission members, the program aims to weed out low level offenses. The code states that pre-trial diversion is available for any criminal or traffic offense except for those specifically identified. Diversion is thus not currently available for crimes against persons, weapon crimes, crimes harmful to minors, gambling, prostitution, and offenses related to driving under the influence.

Defendants are offered the PTDP option independent of whether they are in custody or not. Whether a defendant is offered PTDP depends on multiple factors, such as criminal history. 70% of people

[11] The program was defunded in 1986 in the midst of an economic downturn as well as he national legislative trend at that time enacting lengthier prison terms, particularly for drug crimes. The PTI defunding also coincided with the opening of three new DOC institutions, causing the author of the Justice Center report to hypothesize there was little incentive to save correctional resources given the number of jail beds in the state at that time.

who are offered pretrial diversion by the MOA accept it. About 70% of people complete the program and obtain diversion.

The Municipality operates three kinds of diversion: pre-charge, pretrial, and deferred sentencing. Usually the agreements require the defendant to pay a fine or do community work service (CWS). Pretrial diversion participants are usually expected to complete their conditions within one month. CWS is not usually an option offered for thefts over $100 value since one hour of CWS equates to $6.25, and completion of the requisite number of hours would be hard to achieve within a month.

The MOA obtains fines from all three diversion programs. Municipal Prosecutor Seneca Theno estimates that the Municipality on average earns between $250,000 to $260,000 per year from the three programs; the totals vary from year to year depending on police and prosecutor staffing levels. In 2014, a year when both police and prosecutor staffing was reduced, all three diversion programs took in $133,000. In 2014, there were 350 PTD participants. At an average fine of $250 each, the program took in $87,500 in fines.

What are the Objections to Pretrial Diversion?

1. While many individual governments have already concluded that their pretrial diversion efforts have achieved lowered recidivism rates both among (1) those who participate but don't complete; and (2) those who do complete the diversion program,[12] one scholar opines there has not yet been a definitive *national* study of the effectiveness of pretrial-trial diversion programs.[13] Certainly if Alaska were to have a pretrial diversion program, it would be imperative that the program have data collection and program evaluation requirements, and follow such protocols, so that recidivism can be effectively measured.

2. Some prosecutors believe that their prosecutions are undermined by an offender's participation in pretrial diversion because of the delay necessary for the offender to complete the conditions for diversion. Prosecutors note that with the passage of time witnesses and victims may become unavailable, or the strength of the case may be otherwise diminished. While this is concededly something of a risk, it seems less so these days given the convenience of electronic storage and communication. Certainly, traditional case processing often involves lengthy pretrial delays during which absolutely nothing happens: no treatment and no work for incarcerated pretrial defendants, and no resolution for a victim.

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[12] See, e.g. Pretrial Diversion Today: Best and Promising Practices in the Field (2012).

[13] "There are many ways to implement pretrial diversion programs (e.g., Lattimore et al., 2003; Cowell, Broner, and Dupont, 2004), but there is consistent evidence (e.g., Broner, Mayrl, and Landsberg, 2005; Mire, Forsyth, and Hanser, 2007) that diversion programs result in positive outcomes for program participants. Despite these positive findings there still are gaps in the literature on the effects of pretrial diversion programs. These programs aim to reduce offenders' criminal behavior, but research has yet to empirically examine the success of this goal (Ulrich, 2002). To address this information gap, future research would need to randomly assign defendants to participate in the program and then compare their recidivism rates with those of offenders randomly selected to remain in the traditional criminal justice system. Similarly, research should examine the effect of pretrial diversion programs as a whole on offender outcomes, as opposed to the effect of individual components of these programs. Researchers may discover that pretrial diversion programs as a whole are more effective than any one component by itself."Research Summary: Pretrial Diversion Research Summary (Camillitti 2010).

3. A concern has been raised as to whether two Alaska appellate court decisions indicate that pretrial diversion agreements are unconstitutional or in other ways impermissible. The cases do not create any serious impediment to the re-institution of pretrial diversion. Certainly national models for pretrial diversion urge strong adherence to due process principles and it can be expected that Alaska can draw from other states' experiences in drafting legally -sufficient procedures for PTD agreements and for termination of that option if there is non-compliance. [14]

4. The final concern is, of course, the money needed to pay for any new government function. At the last ACJC Commission meeting, Deputy AG Svobodny noted that the Municipality has the ability to direct fines and fees collected through PTD to fund police and PTD personnel, but that Law or other state agencies do not have that option as any funds collected go into the General Fund. Obviously this would impact the political will of agency heads to take on PTD, especially int his climate.

<u>Recent Interest in Pretrial Diversion As An Option</u>

The following organizations indicated recently indicated interest in the option of pretrial diversion.

In February 2013, the State of Alaska Task Force on the Crimes of Human Trafficking, Promoting Prostitution and Sex Trafficking recommended a pretrial diversion programs for persons arrested for prostitution, stating "[a]lthough not all prostituted individuals are trafficked, it is likely that a large number of them are victims of trafficking. Instead of sending them to jail, a diversion program could provide a better opportunity to garner trust and eventually gain information on traffickers. Without a diversion program, these potential trafficking victims often end up back in the control of their traffickers as soon as they are released or while they are in jail."

In January 2014, the Public Safety Transition working group for the Walker-Mallott Transition discussed pretrial diversion in its report at pages 17-18.

> Pretrial diversion – a voluntary alternative to traditional criminal justice processing – is currently prohibited by Department of Law policy, in part because the Department of Law does not have

[14] In Stobaugh v State, 614 P.2d 767 (Alaska 1980), the Alaska Supreme Court considered a post-charge but pre-plea agreement made between a represented defendant and a District Attorney. The agreement required the defendant to make a extra-judicial confession as a *quid pro quo* for the promise of a deferred prosecution. Controversy arose after the defendant withdrew from the agreement and the DA used the confession as evidence at trial. While the Supreme Court found no constitutional error in the use of the confession in Stobaugh's case, it expressly disapproved the general practice of obtaining a defendant's confession outside of the court-supervised context of a plea proceeding (in which a court could determine the constitutional sufficiency of a defendant's waivers of 5th Amendment rights). The Court directed "that in the future the trial courts shall not accept confessions for [promises of] deferred prosecution, but shall instead proceed by means of the established suspended imposition of sentence procedure." The undersigned does not read this language as disapproving all types of diversionary and deferred sentencing agreements, only the particular practice presented here.

The other case mentioned is an unpublished case, Stevens v State, 1989 WL 1597100 (Alaska App. 1989). Stevens was a participant in the Alaska Pretrial Intervention Program. When he was terminated from PTI and prosecuted, he sought relief from the trial court, apparently arguing that his performance was sufficient. The appeals court found that the trial court properly applied contract law principles to the question, but had applied the wrong standard of proof, and the state would have to prove Stevens' breach by a preponderance of the evidence. .

> the resources and/or personnel to monitor the individuals in the program unless internal resources are reallocated….If successful, pretrial diversion can result in reducing court dockets (thereby conserving judicial resources for more serious offenses), and reducing offender recidivism by providing effective community-based rehabilitation, which may be less costly than the continued criminal
> prosecution and eventual incarceration.

The group recommended:

> Reallocate resources within the Department of Corrections to provide pre-trial monitoring and supervision of the individuals in the pre-trial diversion programs. In the alternative, the Department of Law should provide additional resources to monitor and oversee such programs in the form of personnel and funding.

SOURCES:

No Entry: A National Survey of Criminal Justice Diversion Programs and Interventions (TASC December 2013)
National Conference of State Legislatures: Pretrial Diversion: June 2013
National Conference of State Legislatures: State Pretrial Release Legislation (interactive web page)
Best and Most Promising Pretrial Diversion Practices in the Field (NAPSA 2012, PP)
The Evidence-Based Pretrial Diversion Model (NAPSA PP 2012)
Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice (Federal Probation Journal, June 4 2010)
Pretrial Diversion Programs Research Summary (Camilletti, 2010)
Pretrial Diversion in the 21st Century: A National Survey of Pretrial Diversion Programs and Practices (NAPSA 2009)
The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage (PJI 2007)
Promising Practices in Pretrial Diversion (NAPSA 2006)
Evaluation of the Alaska Pre-Trial Intervention Program (N.E. Schafer, Justice Center, UAA, 1988)

APPENDIX C: WORKGROUP PAPER

REGARDING SIS/DIS

SUBSTITUTION

RECOMMENDATION TO THE COMMISSION
FROM THE SENTENCING ALTERNATIVES WORKGROUP

Repeal and Replace AS 12.55.085 ("Suspended Imposition of Sentence") and AS 12.55.086 ("Imprisonment as a Condition of Suspended imposition of Sentence") with statutes for "Deferred Disposition" and "Imprisonment as a Condition of Deferred Disposition."

SUMMARY

The current statute, AS 12.55.085 (at page 4), providing for a suspended imposition of sentence (SIS) disposition and a set-aside of conviction, was intended to provide offenders -- typically first offenders and young adults -- with the opportunity to 'clear' their records by following court conditions and not re-offending.[1]

In practice, however, the statute does not accomplish that. An "SIS" outcome has had adverse effects on ex-offenders who seek employment, housing, educational and military opportunities because the statute requires a judicial adjudication of guilt and a conviction even after a successful probation "discharge" and a judicial "set aside."

In contrast, our recommended substitution of a deferred disposition model avoids the fact of conviction and thus the consequences that follow. A defendant is allowed to withdraw his or her guilty plea in most cases if he or she successfully completes the conditions of a deferred disposition, and criminal charges are entirely dismissed. Consequently the Workgroup has recommended the repeal of the existing SIS statute and the passage of the deferred disposition proposal (see page 5).

This proposed substitute for the SIS statute could also broaden the category of offenders who may be eligible for a deferred disposition. As explained below, the current SIS statute categorically excludes many crimes. Also, deferred dispositions presently are available to a very small number of defendants participating in specialty programs in urban locations. See discussion below in "The Issue of Exclusions" (see page 2-3).

A second statute, AS 12.55.086 (page 6), presently allows courts to include a term of imprisonment among those conditions for an SIS disposition. Our amended version (page 6) simply allows the same condition for a "deferred disposition."

CURRENT LAW AND RESULTING PROBLEM

An SIS disposition involves a defendant's plea of guilty or no contest, the court's acceptance of that plea, and the issuance of a written judgment showing a conviction but also the suspension or delay of sentencing for a specified period of time. Even though the defendant has not been sentenced, the judgment specifies that the defendant is on "probation" for a specific term.

If the defendant strictly complies with the conditions set by the court, the court will "set aside" the conviction after the defendant has been "discharged" from probation. (If he or she does not comply, the court may proceed to sentencing or simply allow the conviction to stand.) In SIS cases, a written judgment appears in the court file and the

[1] "[A] suspended imposition of sentence is a unique disposition: by providing for the eventual set-aside of a conviction, a suspended imposition of sentence offers the offender an incentive for reform and an opportunity to start anew with a clean slate. By its very nature, however, a suspended imposition of sentence is primarily meant to be a one-time opportunity for particularly deserving first offenders. It is a disposition ill-suited for repeated use with a persistent offender." Such a sentence "should be reserved for the most mitigated of cases." *State v. Huletz*, 838 P.2d 1257 (Alaska App.1992).

APSIN record indicates that the defendant was convicted of a crime, with a parenthetical that indicates either an "SIS set aside" or "SIS not set aside."

Although a set-aside limits some consequences of the conviction, it does not change the procedurally significant finding of guilt by a court. *See, e.g., State v. Platt*, Case S-1273, Opinion 6182 (Alaska, Oct. 26, 2007)(not reported)(footnotes omitted). Setting aside a conviction does not expunge it, which means that "[b]oth the conviction and the judgment setting it aside consequently remain in the public record." *Doe v. State*, 92 P.3d 398, 407 (Alaska 2004).

The fine legal distinctions of this 'unique' legal disposition are lost in the real world of employment, housing, educational and military application. Persons who receive SIS dispositions encounter barriers to entering employment, housing, education and the military because, in any application that asks whether the person has ever been convicted of a crime, s/he must answer yes – despite the SIS set aside. Convictions are a disqualifier for access to many of these opportunities.

SOLUTION

According to the National Conference of State Legislatures, 42 states now provide diversion alternatives including deferred disposition. Deferred disposition allows for a period of court supervision during which time the offender is expected to comply with conditions, including no new crimes. Conditions typically require the payment of restitution and fees. The court may also require treatment if the need has been established through assessment.

Deferred disposition programs all share the remaining features: no adjudication (judicial finding) of guilt, the setting of conditions and a definite term for the completion of those conditions, and ultimately a case dismissal if defendant complies with all conditions set by the court.[2]

Beyond those youthful and first-offenders who could benefit from a change or repeal of the SIS statute for reasons previously stated, there are other groups of defendants for which other states have approved deferred disposition procedures. This is because some defendants, such as the mentally ill who may otherwise cycle in and out of expensive jail beds, may be better rehabilitated in the community under the close supervision of a court.

Deferred disposition is currently in limited use in some of the state's 'specialty courts,' such as the Mental Health court. However, these courts are few in number, with tiny capacities, limited to a few urban locations, and in the absence of any statutory authorization a defendant's enrollment presently requires the prosecutor's agreement. The enactment of a deferred disposition statute, in contrast, will allow any state court – rural or urban - to use this tool for the close supervision of any individual it believes is appropriate.

THE ISSUE OF EXCLUSIONS

The SIS statute, **AS 12.55.085(f),** categorically excludes many crimes, among them murder, kidnapping, sexual assault and sexual abuse of minors.[3] The workgroup had consensus on recommending the replacement of the SIS statute with the Deferred Disposition model, but did not reach consensus on which specific exclusions to recommend.

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[2] While some deferred disposition models do not require the entry of a guilty or no contest plea, many (like the one proposed here) do.

[3] Persons presently excluded from receiving an SIS are persons convicted of:

- Assault 4 (misdemeanor)
- Sexual abuse of a minor in the fourth degree (misdemeanor)
- Reckless endangerment (misdemeanor)
- Indecent exposure (misdemeanor)
- Distribution of indecent materials to minors (class C felony)
- Sex trafficking (prostitution related, felony and misdemeanor)

Some workgroup members felt the Commission itself and/or the legislature should be the arbiters of any exclusions since the process of statutory revision would yield that discussion.

Others felt that violent crimes should be excluded. Others wondered if crimes involving domestic violence should be excluded because it might cost the State VAWA block grant money.[4]

Others opined that cases involving mentally disordered defendants are particularly appropriate for a Deferred Disposition, because treatment and not jail is most likely to reduce recidivism in that group.

It should be noted that one of the first requests for law changes made to the full Commission concerned an existing exclusion to the current SIS statute.[5]

PROJECTED IMPACTS

The Alaska Court System reports that, in calendar year 2014, a total of 1287 cases received an SIS disposition. Of this total, 566 (44%) convictions were set aside. With the additional and significant incentive provided through the deferred sentencing model, success rates for the first-offender and youthful offender populations may improve.

The deferred disposition model would operate similarly to the way the SIS model currently operates. The infrastructure is already in place for this model. However, an increase in the number of cases deferred, as opposed to those currently disposed of by SIS, may require more probation staffing.

Impacts to critical agencies may be a wash, as prosecutors, defense attorneys and the court are already processing these cases, just differently. Positive economic and community impacts of employment, housing, education and military opportunities for persons who received a deferred disposition vs. an SIS disposition would be expected.

Limiting categorical exclusions from a deferred disposition opportunity expands the ability of prosecutors and criminal offenders to avoid the use of jail beds for offenders who could be supervised to participate in rehabilitative services and compliance with conditions. Offenders who get treatment instead of jail may be less likely to re-offend than those who would have gone to jail or who would not have complied with conditions of probation.

- Any person who used a firearm in the criminal offense for which he is convicted, misdemeanor or felony
- Any felony if the person has a prior conviction for assault or reckless endangerment even if that conviction had been set aside.

[4] VAWA stands for the Violence Against Women Act. The concern is being investigated by AJC staff.

[5] On October 24, 2014, the Alaska Association of Defense Lawyers asked the ACJC to recommend the repeal of the SIS exclusion of those previously convicted of a misdemeanor assault or reckless endangerment because "[b]oth are crimes that a person can be convicted of because of reckless or negligent, rather than intentional, action. In the case of Assault in the Fourth Degree under AS 11.41.230(a)(3), the crime involves merely the reckless use of words, with no physical injury required. Upon a conviction a person could lose the ability to ever get an SIS again, even just because of reckless actions, or even only reckless words."

CURRENT AS 12.55.085

Suspending imposition of sentence. (a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, AS 11.46.400, AS 11.61.125 - 11.61.128, or AS 11.66.110 - 11.66.135;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

PROPOSED ALTERNATIVE AS 12.55.085

Deferred Disposition. (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion and in any case, accept a guilty or no contest plea after advisement or record a guilty verdict but also defer the final judgment of guilt and disposition of sentence. The court may direct that the deferral continue for a period of time not exceeding the maximum term of the sentence that may be imposed or a period of one year, whichever is greater, upon the terms and conditions that the court determines, and shall place the person on any conditions of release, authorized pursuant to AS 12.30.011 through AS 12.30.020, or any conditions of probation, authorized pursuant to AS 12.55.100 - 102 as are appropriate to address public safety and the rehabilitation of the person. The court is authorized to place the person under the charge and supervision of a probation officer during the deferral period.

(b) At any time during the deferral term if the person released on conditions, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the arrest or rearrest of the person. The court may revoke and terminate bail if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon deferred disposition conditions is

(1) violating the conditions;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the deferred disposition conditions of release, the court may pronounce sentence at any time within the maximum period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of deferral revoke and sentence the person, or modify its order of deferred disposition conditions of release. The court may continue and/or extend the deferral period. When the person has entered a plea of guilty or no contest, the court may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on a deferred disposition release warrant it, terminate the deferral period, allow the person to withdraw the plea, and dismiss the charges against the person in the interests of justice. When the court or a jury has found the person guilty, the court may not allow the person to withdraw the plea, however the court may terminate the deferral period and dismiss the charges against the person in the interests of justice.

(e) Upon a finding of successful compliance with the conditions of the deferred disposition by the court, the court may dismiss the charges in the interest of justice and issue a certificate to that effect to the person. The public record will reflect that the person was charged with a crime and the charge was dismissed.

CURRENT AS 12.55.086

Imprisonment as a condition of suspended imposition of sentence. (a) When the imposition of sentence is suspended under AS 12.55.085, the court may require, as a special condition of probation, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(b) A defendant imprisoned under this section is entitled to a deduction from the term of imprisonment for good conduct under AS 33.20.010. Unless otherwise specified in the order of suspension of imposition of sentence, a defendant imprisoned under this section is eligible for parole if the term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If probation is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served."

PROPOSED ALTERNATIVE AS 12.55.086

Imprisonment as a condition of deferred disposition. (a) The court may require, as a special condition of deferred disposition, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(b) A defendant imprisoned under this section is entitled to a deduction from the term of imprisonment for good conduct under AS 33.20.010. A defendant imprisoned under this section is eligible for parole if the term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If the order of deferred disposition is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served."