Alaska FASD Partnership

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SB 151 - Inclusion of FASD as a Mitigating Factor

This legislative session, Senator Kevin Meyer (Anchorage) worked with the Alaska FASD Partnership, the Department of Law, and the Courts to craft a bill that would address the large number of people affected by fetal alcohol spectrum disorders (FASD) in the state's criminal justice system. SB 151 is an "Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

The Partnership approached Senator Meyer when a workgroup of the Partnership, FASD and the Legal System, determined the mitigating factor to be one of their top priorities. Other priorities of the workgroup include expanding screening in Corrections, training for professionals in the justice system, and improving services for individuals with FASD transitioning from Corrections and juvenile detention, such as case management, assistance with housing, employment, and treatment.

The Need for SB 151

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions.

In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission, that "the legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder."[1]

A draft resolution proposed by the American Bar Association (ABA) Commission on Youth At Risk, for consideration at this year's annual ABA meeting, reads: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to ... work with medical, mental health, and FASD disability experts to promote ... applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

Overview of SB 151

SB 151 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed [an] offense while suffering from a condition diagnosed 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

[1] Alaska Criminal Justice Assessment Commission (2000). *Final Report.* Retrieved October 12, 2010 from www.hss.ajc.state.ak.us/reports/CJAC Final 2004.pdf, at p.71.

demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151 defines a fetal alcohol spectrum disorder in the subsection on mitigating factors as "a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy."

The legislation:

1) does not *require* a judge to use the mitigating factor;
2) does not automatically adjust a presumptive sentence; the defendant would have to prove by *clear and convincing evidence* 1) that he or she has a fetal alcohol spectrum disorder and 2) that the condition "significantly affected the defendant's conduct" before the judicial officer can consider the possibility of adjusting the presumptive sentence; and
3) is not a "get out of jail free" card, but an attempt to be "smarter" within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

What is a mitigating factor?

A mitigating factor, in law, is any information or evidence presented to the court regarding the defendant or the circumstances of the crime that might result in reduced charges or a lesser sentence.

The economic benefits of SB 151

A 2009 study by the Institute of Social and Economic Research (ISER) at the University of Alaska Anchorage, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, showed that strategically expanding intervention and prevention programs can reduce crime, keep more Alaskans out of prison, and save the state substantial costs.

The cost of incarceration in an Alaskan prison is about $136 per day. Over the course of five to ten years, an inmate is expected to cost the state close to $250,000-$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management (a recommended alternative intervention for people with FASD) is about $48 per day. If electronic monitoring ($21 per day) and probation/parole ($7 per day) are added, the total cost per day is about $76. Implementing one or all three of these interventions could save the state up to $21,900 per offender, per year.[2]

SB 151 provides justice for a vulnerable population and represents a better investment of our state's resources. With appropriate supports, people with FASD can live successfully in the community as contributing citizens, while at the same time providing jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists.

A move toward "Smart Justice"

Alaska's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and greater rehabilitative results for offenders. While some offenders are clearly dangerous and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders,

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[2] Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf. *Note:* Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

treatment programs inside the prison combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

Senator Meyer noted that "studies have repeatedly shown that repeat offenders with FASD and other impaired brain functions are more likely to stop committing crimes when they are given the same support as people with other mental illnesses, which can include therapeutic courts, housing and employment assistance, case management, counseling and rehabilitation. The potential benefits to society, through decreased crime and costs, are tremendous."

In Chief Justice Carpeneti's address to the Alaska State Legislature this year, he suggested that the justice system needs to consider the cost of its actions on the system's resources, on public safety, and on the potential of all citizens. He asked legislators to include the judiciary in tailoring prison or treatment sentences to offenders.

"In practice, it means making criminal justice decisions that reserve our most costly response to crime – prison time – for those cases where less costly alternatives will not effectively protect the public or rehabilitate the perpetrator," Chief Justice Carpeneti said. "There is a better way. We need to move from anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results."