IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

WILLIAM DURYEA,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, and JOSEPH SCHMIDT, Commissioner of the Department of Corrections,

Defendants.

Case No. 3PA-10-01984CI

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTING IN PART AND DENYING IN PART MOTION FOR CROSS-SUMMARY JUDGMENT

The plaintiff, William Duryea, filed a Motion for Partial Summary Judgment seeking among other things, declaratory relief regarding the correct standard to be applied when determining whether a guilty but mentally ill (GBMI) prisoner is eligible for parole. The defendants, collectively referred to as the Department of Corrections (DOC), filed a Cross-Motion for Summary Judgment on the same issues presented in Duryea's motion. The court held oral argument on both motions on April 26, 2012. For the reasons stated below, Duryea's Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART and DOC's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

I. FACTS

A. Preliminary Facts

On May 21, 1993, Duryea was indicted for first degree murder. At his first trial in 1994, the jury convicted Duryea of second degree murder. Following the first trial, Duryea filed a motion for a new trial which the trial court granted. At the second trial in September 1997, the jury convicted Duryea of second degree murder and also returned with a special verdict of GBMI. At his sentencing in 1998, Duryea was sentenced to 50 years.

Duryea submitted a parole application in the fall of 2009. Since January 16, 2010, Duryea has been eligible for discretionary parole. In January 2010, Parole Officer Fritz declined to forward Duryea's parole application to the parole board. Parole Officer Fritz stated that Duryea was permanently ineligible for parole because he had been found GBMI and remained in treatment.

Duryea contacted the DOC on January 28, 2010, to express concern about the refusal to forward his parole application. Duryea requested an opportunity to be heard to determine whether he is dangerous. Duryea sent a follow up letter to the DOC on February 26, 2010.

On May 28, 2010, the DOC provided Duryea with notice that the DOC had decided on a procedure to consider his eligibility for parole under AS 12.47.050(d). The letter stated that Duryea would be examined by a DOC psychiatrist and an independent psychiatrist who would determine whether Duryea continued to require treatment for his mental disease or defect in order to make him not be dangerous to the public peace of safety under AS 12.47.050(b). The DOC provided notice that a hearing would be scheduled the week of June 14, 2010, where the opinions of those psychiatrists would be presented to a committee of three licensed DOC mental health officials, including one psychiatrist. The DOC informed Duryea that he would have the opportunity to present evidence regarding whether he required continued treatment. Finally, the letter concluded that the decision of the committee would be the final decision of the DOC as to whether Duryea required treatment under AS 12.47.050(b).

In response to an e-mail from Duryea's counsel, the DOC stated that it had already determined that Duryea requires continued treatment when it denied his request for parole on those grounds. Thus, DOC informed Duryea he would have the burden of proving that treatment is no longer required because he no longer suffers from a mental disease or defect that causes him to be dangerous to the public.

The week of the hearing, on June 14, 2010, Duryea made objections to DOC regarding the hearing and the procedures to be utilized. Specifically, Duryea objected to the undefined standards for panel decision-making; conflicting statements regarding the fundamental legal question; failure of the DOC to state grounds for opposing Duryea's parole eligibility; failure to provide basic discovery in a timely fashion; and failure to

provide proper notice to Duryea regarding the time and place of the proceeding and the officials on the panel. Duryea argued that without knowing the basis for the objections to his parole application, he would not be able to adequately prepare for the hearing.

Responding on June 15, 2010, the DOC continued the hearing to July 2, 2010. The DOC advised that the issue at the hearing would be whether Duryea suffers from a mental disease or defect that causes him to be dangerous to public peace or safety. In responding to Duryea's objection to the fact that the DOC had not provided him with the basis for its position that Duryea requires treatment, the DOC stated it had no obligation to explain its basis; the purpose of the hearing is to determine whether there is any reason to believe otherwise. Finally, the DOC conceded that while there were no written guidelines to govern the proceeding, the DOC had made efforts to tailor the proceedings to comply with the Alaska Administrative Procedures Act.

Accompanying the June 15th letter, the DOC provided Duryea with a Notice of Hearing. The notice indicated the time, date and location of the hearing. The notice stated that the hearing was to determine whether Duryea continued to require treatment because he suffered from a mental disease or defect that causes him to the dangerous to the public peace or safety.

B. Mental Health Review Committee

On July 21, 2010, Duryea appeared before the Mental Health Review Committee chaired by Laura Brooks, along with members Dwight Stallman and Teresa Warfield. Meg Zaletel and Thomas Stinson represented Duryea at the Mental Health Review Committee. Prosecutor James Fayette represented the State.

At the outset of the hearing, Chairwoman Brooks stated that the hearing was to determine whether Duryea continued to need mental health treatment.
She stated that the DOC had denied Duryea's application because he was receiving treatment for schizophrenia. Chairwoman Brooks stated that Duryea would have to show that he no longer required treatment in order to be eligible for parole. Duryea objected to the use of that standard but Chairwoman Brooks overruled the objection.

Duryea called two witnesses on his behalf: Faith Golden, a mental health clinician at Palmer Correctional Center, and Ralph Bagley, psychiatric nurse practitioner. The DOC called as a witness psychiatrist Dr. William Worrall.

Faith Golden testified about different mental health consultations she conducted with Duryea. Golden testified about the type of medication Duryea was taking and his progress at each mental health consultation. Golden also testified about whether she believed Duryea would remain medication compliant if left on his own.

Ralph Bagley testified about consultations with Duryea to assess his medication and mental health status. Bagley also testified about whether he believed Duryea would remain medication compliant.

Dr. William Worrall testified about the history of Duryea's diagnoses. Dr. Worrall also testified about whether he believed Duryea would remain medication complaint if left on his own. Dr. Worrall testified about efforts to reduce and/or eliminate Duryea's medication.

The Mental Health Review Committee issued a decision on August 3, 2010. The decision first noted that DOC had denied Duryea the opportunity to apply for discretionary parole because he was still receiving treatment for paranoid delusions. The decision stated the issue to be decided at the hearing was whether Duryea was receiving treatment for a mental disease or defect that caused him to be dangerous to the public safety or peace.

The decision found that Duryea suffered from a psychotic disorder. The decision found that Duryea's mental disease or defect had been somewhat controlled by medication but that he would have to be on medication for the rest of his life. The decision found that Duryea would not likely take his medication if he were released from an institutional setting. Finally, the decision found that Duryea would decompensate and become dangerous if his medications were discontinued.

The decision concluded that Duryea's mental disease or defect causes him to be a danger to the public peace and safety. Further, the decision concluded that Duryea currently requires treatment for his mental disease or defect. Finally, the decision concluded that because Duryea currently requires treatment, he is not eligible for parole.

Duryea appealed the decision of the Mental Health Review Committee to Joseph Schmidt, DOC Commissioner. The Commissioner agreed with the Mental Health Review Committee's interpretation of AS 12.50.050(d) in restricting Duryea's parole

eligibility because Duryea is still being treated for a mental disease that caused him to be dangerous to the public. The Commissioner denied Duryea's appeal.

II. ANALYSIS

A. Standard for Determining Whether a GBMI Defendant is Eligible for Parole

The relevant portions of the guilty but mentally ill statute read as follows:

> (b) The Department of Corrections shall provide mental health treatment to a defendant found guilty but mentally ill. *The treatment must continue until the defendant no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety.* Subject to (c) and (d) of this section, the Department of Corrections shall determine the course of treatment.
>
> (d) Notwithstanding any contrary provision of law, *a defendant receiving treatment under (b) of this section may not be released*
>
> > (1) on furlough under AS 33.30.101 - 33.30.131, except for treatment in a secure setting; or
> > (2) on parole.[1]

1. Case Law

There have been several cases to examine the parole requirements of the GBMI statute. The first case to look at these requirements was *Barrett v. State*.[2] In reviewing the GBMI statute, the court stated that once a GBMI finding is made, the person is "subjected to mental health treatment calculated to cure the mental illness or defect or to render the defendant less dangerous to the public."[3] The person may not be released "absent a finding that either the mental illness has been cured or that, despite the mental illness, the defendant is no longer dangerous."[4]

The defendant argued that the provision in AS 12.47.050 which denies a prisoner the opportunity for furloughs or releases on parole so long as he is mentally ill and a danger to the public, violates his right to equal protection.[5] In finding the provision constitutional, the court stated that "no responsible correctional official or parole board member would release a person into the community if he or she felt that that person was

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[1] AS 12.47.050 (emphasis added).
[2] 772 P.2d 559 (Alaska App. 1989).
[3] *Id.* at 572.
[4] *Id.* at 572-573.
[5] *Id.* at 573.

dangerous."[6] "The procedures at issue here simply require that a responsible trier of fact make an express finding regarding a particular defendant's mental illness and danger before the defendant can be released."[7] Finally, the court found that because the defendant asserted a relationship between his or her mental illness and the criminal behavior, the assertion justified treating these defendants differently.[8]

In *Guerrero v. State*, a memorandum opinion, a GBMI defendant challenged AS 12.47.050 on the ground that it contained no explicit procedure to determine eligibility for parole.[9] The court noted that "AS 12.47.050 contains no explicit procedure under which a prisoner might litigate whether he or she continues to suffer from mental illness or continues to be a danger to the public."[10] The court agreed with the defendant's concern stating that the defendant "must be provided some procedural mechanism to seek eligibility for parole or furlough by demonstrating his lack of continued dangerousness."[11] A defendant "must be given a procedural method to pursue a future claim that he is no longer dangerous on account of mental disease or defect."[12] However, the defendant was not yet eligible for parole so the court declined to address the exact contours of the hearing.[13]

Finally, in *Monroe v. State*, a GBMI defendant attacked the GBMI statute on the ground that he could "he may simply be deemed under 'treatment' within the meaning of AS 12.47.050, and consequently be presumed dangerous and denied eligibility for parole, as long as he continues to receive any form of medication for his schizophrenia, which is a lifelong condition."[14] The court agreed with the defendant's concern stating that the defendant "must be provided some procedural mechanism to seek eligibility for parole or furlough by demonstrating his lack of continued dangerousness."[15]

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[6] *Id.*
[7] *Id.* at 574.
[8] *Id.*
[9] 1992 WL 12153291, *6 (Alaska App. 1992).
[10] *Id.*
[11] *Id.*
[12] *Id.* at *7.
[13] *Id.*
[14] 847 P.2d 84, 90 n.4 (Alaska App. 1993).
[15] *Id.*

However, the court in *Monroe* declined to set forth the exact procedures because the defendant was not yet eligible for parole.[16] The court suggested that the Parole Board or DOC could promulgate regulations addressing the problem in the interim.[17] The court concluded that assuming no regulations were enacted by the time the defendant became eligible for parole, the defendant could ask the courts at that point to provide him a suitable procedural method to establish that he is no longer dangerous on account of mental disease or defect.[18]

2. Attorney General Opinion

Also helpful in determining whether a GBMI defendant receiving treatment is sufficient to deny parole eligibility is a 1986 Alaska Attorney General Opinion.[19] In determining how long treatment for a GBMI inmate should last, the opinion noted that "the treatment and restrictions placed upon the GBMI inmate need only last until a determination is made that the inmate is no longer dangerous to the public peace or safety."[20] However, a determination that an inmate is no longer dangerous to the public does not mean that treatment must cease.[21] Rather, "the disabilities associated with AS 12.47.050 may be removed upon determination that the inmate does not constitute a danger; he may then be 'treated' like any other prisoner in need of psychological or psychiatric treatment."[22]

The Attorney General Opinion also recognized that at the time there was no department policy whereby the GBMI inmate could receive a review of dangerousness.[23] The opinion cautioned that "without a 'dangerousness review' there could be GBMI inmates who, while behaviorally indistinguishable from the mentally ill offender in the general population, may be denied furlough or parole pursuant to AS 12.47.050(d)."[24] The opinion recommended that "specific consideration should also be given to providing

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 1986 Alaska Op. Atty. Gen. (Inf.) 417, *available at* 1986 WL 81249.
[20] *Id.* at *3.
[21] *Id.*
[22] *Id.*
[23] *Id.* at *5.
[24] *Id.*

for a periodic 'dangerousness review' by mental health professionals who have direct knowledge of the GBMI inmate's course of treatment and institutional record."[25]

3. Analysis

A finding that Duryea is receiving treatment for a mental disease or defect is insufficient to deny him the opportunity to seek parole. The Court of Appeals opinions addressing parole for a GBMI defendant indicate that the standard to be applied is whether a GBMI defendant is no longer dangerous on account of mental disease or defect.[26] The procedures under AS 12.47.050 require a GBMI defendant to show that either the mental illness has been cured or that, despite the mental illness, the defendant is no longer dangerous.[27]

In the present case, the Mental Health Review Committee made a finding that Duryea continued to receive treatment for a mental disease or defect. However, the Committee did not make any finding as to whether despite the mental disease, Duryea was no longer dangerous. The Committee presumed that because Duryea continued to receive treatment for a mental disease or defect, he was a danger to the public peace and safety. Such a presumption cannot justify denying Duryea the opportunity to seek parole. Duryea must be given the opportunity to present evidence that he is no longer dangerous despite his mental disease or defect.

The DOC's interpretation, that so long as a GBMI defendant is receiving treatment he or she is not eligible for parole, would categorically render some GBMI defendants forever ineligible for parole due to an incurable mental illness. This interpretation would deny a GBMI defendant the procedural mechanism to demonstrate his or her lack of dangerousness.

The court does not find that the Court of Appeals' rulings addressing these issues are dicta. In *Barrett*, *Guerrero* and *Monroe*, the defendants specifically challenged the parole procedures under AS 12.47.050. The Court of Appeals agreed with the defendants that there must be some procedural mechanism to determine parole eligibility. However, the Court of Appeals declined to address the specific contours of such mechanism because the defendants were not yet parole eligible. The holdings in those cases were

[25] *Id.*
[26] *See Barrett*, 772 P.2d at 574; *Guerrero*, 1992 WL 12153291 at *7; *Monroe*, 847 P.2d at 90 n.4.
[27] *Barrett*, 772 P.2d at 572-573.

central to the decision. The Court of Appeals' failure to specify the procedures does not render the holdings dicta.

The court finds the legislative history presented by the DOC is unpersuasive on this issue. Following the briefing on the summary judgment motions, DOC submitted supplemental briefing regarding the legislative history of AS 12.47.050. During the hearings reviewed, it was never clear which bills were being debated. The hearings addressed multiple bills and there is uncertainty as to when the provisions of AS 12.47.050 were actually being discussed. Second, the committee hearings did not provide a clear legislative intent as to the precise issue here: whether a GBMI defendant may be denied parole solely because he or she is receiving treatment for a mental disease or defect. It is unclear as to whether the legislature even contemplated such an issue occurring.

Finally, the court notes that it is not making a finding as to whether Duryea is currently a danger to the public peace or safety. That issue is not before the court.

B. The Definition of the Term "Dangerous"

Both parties differ as to the standard to be applied when determining whether a GBMI defendant is "dangerous" as set forth in the GBMI statute. The GBMI statute provides that "treatment must continue until the defendant no longer suffers from a mental disease or defect that causes the defendant to be *dangerous* to the public peace or safety."[28]

In *Barrett*, the court stated that in order to address the defendant's challenges to the GBMI statue, "it would be helpful to compare a person found not guilty by reason of insanity under AS 12.47.010 (thus invoking the provisions of AS 12.47.090) to a person found [GBMI] under AS 12.47.030 (thus invoking the provisions of AS 12.47.050)."[29] The court found that a person found not guilty by reason of insanity and a person found GBMI are "treated substantially the same."[30] The court noted that under both statutes, a person is subjected to mental health treatment calculated to cure the mental illness or defect or to render the defendant less dangerous to the public.[31] Under both statutes, a

[28] AS 12.47.050(b) (emphasis added).
[29] 772 P.2d at 571-572.
[30] *Id.* at 572.
[31] *Id.*

person may not be released absent a finding that either the mental illness has been cured or that, despite the mental illness, the defendant is no longer dangerous.[32]

When two statutes deal with the same or related subject matter, the court attempts to construe them as harmoniously as possible.[33] Statutes enacted at the same time and dealing with the same subject matter are determined to be *in pari materia* and are interpreted together.[34]

Both AS 12.47.050 and AS 12.47.090 were first enacted in 1982. Both statutes address a defendant's culpability due to a mental illness or defect. As the court stated in *Barrett*, a person found not guilty by reasons of insanity and a person found GBMI are "treated substantially the same."[35] Therefore, it is appropriate to interpret the statutes together.

The not guilty by reason of insanity statute defines "dangerous" as "a determination involving both the magnitude of the risk that the defendant will commit an act threatening the public peace or safety, as well as the magnitude of the harm that could be expected to result from this conduct."[36] Under the same statute, the definition of dangerous is used to determine whether a defendant may be released after having been cured of any mental illness that would cause the defendant to be dangerous to the public peace or safety.[37] Similarly, under the GBMI statute, a defendant may not be eligible for parole or furlough unless either the mental illness has been cured or that, despite the mental illness, the defendant is no longer dangerous.[38] Given that the standards for release are similar between the two statutes, the court finds that the definition of the term "dangerous" under the not guilty by reason of insanity statute shall equally apply under the GBMI statute. Therefore, in determining whether Duryea is dangerous, DOC shall apply the term dangerous as defined under AS 12.40.090(k)(1).

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[32] *Id.*
[33] *Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628, 633-634 (Alaska 1993).
[34] *Usibelli Coal Mine, Inc. v. State, Dept. of Natural Resources*, 921 P.2d 1134, 1146 (Alaska 1996).
[35] 772 P.2d at 572.
[36] AS 12.47.090(k)(1).
[37] AS 12.47.090(g).
[38] AS 12.47.050(d).

C. Equal Protection Claim

The Alaska Constitution guarantees the right to equal treatment stating that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[39]

In *Barrett*, the court denied the defendant's equal protection claim because the defendant had asserted a relationship between his mental state and criminal behavior and therefore that assertion justified treating him differently.[40] The defendant argued that the GBMI statute, which denies the opportunity for furloughs or releases on parole so long as the defendant is mentally ill and a danger to the public, violates his right to equal protection.[41] The court stated that "[n]o responsible correctional official or parole board member would release a person into the community if he or she felt that that person was dangerous."[42] The court continued, "[t]he procedures at issue here simply require that a responsible trier of fact make an express finding regarding a particular defendant's mental illness and danger before the defendant can be released into the community."[43] Since the defendant asserted that his mental illness affected his culpable mental state, the court found no equal protection violation.[44]

In *Monroe*, the court again denied a defendant's equal protection challenge under the GBMI statute. The defendant argued that because he would always require treatment from schizophrenia, and assuming that no "cure" would be discovered in the upcoming years, the GBMI statute would deny him any opportunity for release on parole.[45] Building on that premise, the defendant argued that he and other defendants found GBMI have been unfairly singled out for harsher treatment than defendants who are simply found guilty.[46] The court noted that the "parole restriction statute seeks to further a legitimate and substantial state interest: to protect society from offenders who pose a

[39] Alaska const. art. I, sec. 1.
[40] 772 P.2d at 574.
[41] *Id.* at 573.
[42] *Id.* (citing AS 33.16.100(a)(3) which limits discretionary parole to those who are not dangerous).
[43] *Id.* at 574.
[44] *Id.*
[45] *Monroe*, 847 P.2d at 89.
[46] *Id.*

continuing danger to the community."[47] Relying on its decision in *Barrett*, the court denied the defendant's equal protection claim.[48]

Duryea argues that the DOC's interpretation of the GBMI statute, that a GBMI prisoner can never be released in the absence of a complete cure of their mental illness, violates equal protection. He argues he was treated differently from other prisoners because the Mental Health Review Committee denied him parole consideration because he suffers from a mental illness.

Duryea's claim of equal protection mirrors the claims presented in *Barrett* and *Monroe.* Duryea argues that because he is receiving treatment for his mental illness, he is being treated more harshly than other prisoners. As a GBMI prisoner, Duryea is not similarly situated to other prisoners. Duryea has asserted a relationship between his mental illness and his criminal behavior. Therefore the DOC is justified in treating him differently. Duryea's claim fits within the decisions of *Barrett* and *Monroe* and there was no violation of equal protection.

D. Americans with Disabilities Act / Rehabilitation Act Claim

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[49] "Program or activity" includes "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government."[50] The 9th Circuit has interpreted this language as evincing Congress's intent to apply the Rehabilitation Act to "*any* program or activity receiving Federal financial assistance," including state prisons.[51]

Similarly, the Americans with Disabilities Act (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[52] The ADA defines a

[47] *Id.*
[48] *Id.*
[49] 29 USC 794(a).
[50] 29 USC 794(b).
[51] *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) (emphasis same).
[52] 42 USC 12132.

"public entity" as "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[53] The ADA's language "unmistakably includes State prisons and prisoners within its coverage."[54]

A "disability" is defined by the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[55] "Major life activities" include the operation of a major bodily function such as brain functions.[56] The regulations define "mental impairment" as "[a]ny mental or psychological disorder such as ...emotional or mental illness."[57]

Parole proceedings constitute an activity of a public entity that falls within the ADA's reach.[58] A parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities.[59] However, the ADA "does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability."[60]

To establish a claim of disability discrimination under the ADA or Rehabilitation Act,[61] the plaintiff must show that:

> (1) the plaintiff is an individual with a disability;
> (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities;
> (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
> (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[62]

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[53] 42 USC 12131(1).
[54] *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998).
[55] 42 USC 12102(1)(A).
[56] 42 USC 12102(2)(B).
[57] 28 CFR 35.104.
[58] *Thompson v. Davis*, 295 F.3d 890, 899 (9th Cir. 2002).
[59] *Id.* at 898.
[60] *Id.* at 898 n.4
[61] *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act").
[62] *Thompson*, 295 F.3d at 895.

The court finds that the DOC violated Duryea's rights under the ADA and Rehabilitation Act. First, Duryea is an individual with a disability. He suffers from a psychotic disorder, which at times has been diagnosed as schizophrenia, which limits his brain functions. Second, Duryea has been eligible for discretionary parole consideration, which is an activity of a public entity, since January 16, 2010, after having served part of his sentence.[63] Third, Duryea was denied participation in a parole proceeding, which is an activity of a public entity. Finally, Duryea was denied access to a parole proceeding specifically by reason of Duryea's disability.

The DOC correctly notes that it may consider an inmate's future dangerousness in denying a GBMI defendant parole consideration. However, in Duryea's situation, the DOC did not consider Duryea's dangerousness in denying him parole consideration. The DOC denied Duryea parole consideration simply because he was receiving treatment for a mental illness. The DOC may take into account Duryea's mental illness when assessing his future dangerousness. The DOC may not rely on Duryea's mental illness alone when considering whether he is eligible for parole consideration.

E. Principle of Reformation Claim

The Alaska Constitution provides that "criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation."[64] This provision includes a fundamental right to rehabilitation.[65] No Alaska court appears to have applied the principle of reformation to parole hearings. The focus has been on the sentencing hearings.

Duryea argues that the above-mentioned constitutional provision applies to sentencing, correctional policy, parole eligibility, parole conditions and furlough. He argues that the DOC violated his right to reformation by denying him parole because he was receiving treatment for a mental illness. The DOC argues that the only rehabilitative possibility Duryea is being denied is parole and that he still has other rehabilitative options.

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[63] *See* AS 33.16.090(a).
[64] Alaska Const., Art I, Sec. 12.
[65] *Brandon v. State, Dept. of Corrections*, 938 P.2d 1029, 1032 (Alaska 1997).

Although the DOC mistakenly denied Duryea parole consideration simply because he was receiving treatment, Duryea has not been denied the right to rehabilitation. Along with Duryea's conviction, he was found GBMI. By statute, DOC must provide mental health treatment to a defendant found GBMI.[66] The DOC is currently providing mental health treatment to Duryea. By denying Duryea parole consideration, the DOC did not dismiss the notion of rehabilitating Duryea. Instead, the DOC determined that rehabilitation efforts did not yet make Duryea eligible for parole. Duryea will continue to receive treatment while incarcerated and he has not argued that his treatment has been inadequate. Therefore, given that the DOC continues to provide Duryea with mental health treatment, the DOC has not denied him the right to rehabilitation simply by denying him initial parole consideration.

F. Due Process

Under the Alaska Constitution, no person shall be deprived of life, liberty, or property, without due process of law.[67] In reviewing parole procedures, the court applies the *Mathews v. Eldridge*[68] balancing test.[69] In order to determine what due process requires, three factors must be considered:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[70]

In order to assess the constitutional adequacy of the procedures available to Duryea, the procedures must first be identified.[71] At the time Duryea applied for parole, the DOC did not have in place any formal procedures regarding a GBMI inmate's eligibility for parole. As a result, the DOC operated under ad-hoc procedures.

Duryea requested a hearing challenging the determination that he was not eligible for parole. The DOC set up a hearing with the Mental Health Review Committee to

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[66] AS 12.47.050(b).
[67] Alaska Const. art. I, § 7.
[68] 424 U.S. 319 (1976).
[69] *Smith v. State, Dept. of Corrections*, 872 P.2d 1218, 1222 (Alaska 1994).
[70] *Id.* (quoting Mathews, 424 U.S. at 335)
[71] *See id.*

provide Duryea the opportunity to present evidence regarding whether he continued to receive treatment. The DOC stated that it had determined Duryea required treatment and therefore he would have the burden of proving that treatment is no longer required because he no longer suffers from a mental disease or defect that causes him to be dangerous to the public. Prior to the hearing, the DOC did not provide a basis as to why Duryea continued to require treatment.

1. Private Interest

Duryea asserts that GBMI defendants have a liberty interest in parole consideration. The DOC took no issue with Duryea's assertion that he has a liberty interest in parole consideration. The court finds that Duryea has a liberty interest in applying for discretionary parole given that he is statutorily eligible to apply for discretionary parole.

2. Risk of Erroneous Deprivation

Prior to the hearing, the correspondence from the DOC indicated that the issue to be determined at the hearing was whether Duryea continued to receive treatment for a mental disease or defect. Duryea had the burden to demonstrate that he no longer required the treatment. Duryea objected to the standard to be used at the hearing but DOC did not agree with his interpretation of AS 12.47.050. Thus, the issue of Duryea's dangerousness was not addressed.

A review of the transcript of the hearing also indicates that the hearing centered on Duryea's diagnosis, treatment and medication. The testimony addressed the types of medication Duryea was taking, the effectiveness of such medication and any side effects, and the current condition of Duryea's disorder. While there was testimony that addressed whether Duryea would remain medication compliant if left on his own and the possibility of decompensation, there was limited testimony about Duryea's dangerousness.

The Court of Appeals has held that a GBMI defendant "must be provided some procedural mechanism to seek eligibility for parole or furlough by demonstrating his lack of continued dangerousness."[72] The failure to hold a hearing regarding Duryea's dangerousness created a risk of erroneous deprivation of his interest in applying for discretionary parole. As the Court of Appeals has stated, a GBMI defendant is not

[72] *Monroe*, 847 P.2d at 90 n.4.

ineligible for parole simply because he or she is receiving treatment for a mental disease or defect. A GBMI defendant must also be given the opportunity to show that he or she is no longer dangerous despite mental disease or defect. The probable value of a hearing to address dangerousness is high given that a GBMI defendant may be eligible for parole despite receiving treatment.

3. Government's Interest

The DOC has an interest in preventing dangerous inmates from being release on discretionary parole. The DOC's interest would not be diminished by affording GBMI defendants a hearing to demonstrate their lack of dangerousness. The DOC's interest would actually be furthered by requiring hearings to determine whether a GBMI defendant is dangerous.

Although holding additional hearings for GBMI defendants would produce an additional administrative burden, the burden is minimal. First, discretionary parole is already limited to those who do not pose a risk to the public peace or safety.[73] The parole board must therefore already inquire into the dangerousness of an inmate who is eligible for parole. Second, thirty days prior to the expiration of a GBMI defendant's sentence, the DOC must make a determination as to whether there is good cause to believe that the defendant's mental illness causes the defendant to be dangerous to the public.[74] Assessing a GBMI defendant's dangerousness is already a process for which the DOC is responsible. Finally, the DOC has knowledge of when a GBMI defendant will first be eligible for parole and thus will be aware of the possibility to assess the GBMI defendant's dangerousness.

After a balancing of the *Mathews v. Eldridge* factors, the court finds that Duryea was denied the right to due process. The DOC's failure to hold a hearing to determine Duryea's dangerousness was a violation of due process.

IV. CONCLUSION

Based on the above, DOC shall permit Duryea to submit a parole application to the parole board. Prior to ruling on Duryea's parole application, the DOC shall hold a

[73] *See* AS 33.16.100(a)(3).
[74] *See* AS 12.47.050(e)(2).

hearing to allow Duryea to present evidence as to whether despite Duryea's mental disease or defect, he is no longer dangerous, as defined by AS 12.40.090(k)(1).

To summarize the claims presented in Duryea's motion, Duryea's claim as to the standard to be used in determining whether a GBMI defendant is eligible for parole is GRANTED. The standard to be used is whether a GBMI defendant, despite his or her mental disease or defect, is no longer dangerous. Duryea's motion as to the definition of "dangerous" to be applied is DENIED. The definition of "dangerous" to be used is defined by AS 12.40.090(k)(1).

Duryea's claim of equal protection is DENIED. The DOC did not violate Duryea's right to equal protection by denying him parole consideration. Duryea's claims under the ADA and Rehabilitation Act are GRANTED. The DOC's reliance on Duryea's mental disease or defect in denying him parole consideration was unlawful discrimination under the ADA and Rehabilitation Act.

Duryea's claim under the principle of reformation is DENIED. Duryea's right to rehabilitation was not denied because he was denied parole consideration. Finally, Duryea's claim of due process is GRANTED. The DOC's failure to provide Duryea with a procedural mechanism to assert his lack of dangerousness denied him due process.

The court finds Duryea to be the prevailing party as he is successful with regard to the main issues in this action; his ability to seek parole and the standard to be applied. Pursuant to Civil Rule 82(c), Duryea must file a motion for attorney's fees within ten (10) days the after the date shown in the clerk's certificate of distribution on the judgment.

This order on the summary judgment motions adjudicates all unresolved claims as to all parties. Therefore, pursuant to Civil Rule 56(c), Duryea shall file a proposed judgment within twenty (20) days of service of this order.

Dated at Palmer, Alaska on this 16 day of July 2012.

I certify that on 7/16/12 a copy of this order was mailed/faxed/hand-delivered to counsel at their address of record. AG Rabele Stenson

E. Griffeth, Judicial Assistant

Gregory L. Heath
Superior Court Judge