

RECOMMENDATION TO THE ALASKA STATE LEGISLATURE BY
THE ALASKA CRIMINAL JUSTICE COMMISSION
No. 5-2015, Approved, October 15, 2015

The Alaska Criminal Justice Commission recommends that the Legislature amend [AS 12.55.085](#) ("Suspended Imposition of Sentence"), [AS 12.55.086](#) ("Imprisonment as a Condition of Suspended imposition of Sentence") and [AS 33.05.080](#) ("Definitions") as described and for reasons given below. The proposed statutory language follows on pages 3-6.

- The conviction "set-aside" mechanism was intended to provide a clean slate for those who succeeded on probation after receiving a suspended imposition of sentence (SIS).ⁱ However, the "set-aside" mechanism has had limited beneficial effect. This is because
 - Due to lack of legislative history and binding principles of statutory construction, the Alaska courts had to assume that, unlike other states, the Legislature wanted the SIS/set aside to have only limited effect.ⁱⁱ Therefore even after the conviction "set-aside," the public record showing conviction remains.ⁱⁱⁱ
 - Research shows a "pernicious effect" from such records, e.g. an offender's ability to obtain meaningful employment is negatively impacted.^{iv} Unemployment^v and lack of stable housing^{vi} are criminogenic factors, increasing the risk of future recidivism.
 - The record of a past adjudication or conviction may also categorically disqualify an ex-offender from many job opportunities, contracts, housing and other forms of assistance.^{vii}
 - Also, judicial interpretation has also narrowed the class of offenders who may be considered for SIS.^{viii} As too many non-violent offenders and substance abusers are taking up costly prison beds, community-based supervision and treatment has been shown to be more effective than incarceration in reducing recidivism for some types of offenders, and incentives for good conduct motivate many offenders, a broader grant of judicial discretion is appropriate.
- The statutes as now written:
 - Permit a court to delay sentencing so as to impose court supervision and probation, and
 - Permits the court "set-aside" the conviction if conditions of probation were satisfied within the time set.
- The recommended amendments would:
 - Permit a court to delay adjudication and conviction so as to impose "pre-conviction" probation during that period of delay, and
 - Permits the court to dismiss ("dismissed-diverted without conviction") the case if the conditions of probation were satisfied within the time set.
 - Allows the use of the SIC mechanism in "any" case (not just for particularly deserving first-offenders) as long as the offense involved is not categorically precluded by existing exclusions
 - Also change the maximum probation terms allowed
 - For a felony, up to 5 years (instead of "maximum term")
 - For a misdemeanor, 2 years (instead of "1 year")
 - Remove references to fees which can not be lawfully imposed
 - Require courts to make written findings if the defendant had ever previously received an SIC
- Notably, no changes are proposed for
 - the procedural predicate, i.e. a defendant's plea of guilt/no contest or a guilty verdict
 - the offenses which are now categorically excluded
 - the substantive predicate, i.e. that there are circumstances in mitigation of punishment or that the ends of justice will be served which allow the court to provide the SIS/SIC
 - the statute which allows for the imposition of jail time as a condition of probation

Additional Comment by the Commission:

The Commission did not achieve consensus among its members as to whether it should include in its recommendation a Workgroup proposal for a statutory provision providing retroactive relief. The Workgroup proposal limited relief to that class of individuals who had received an SIS and conviction “set-aside” and whose request would be unopposed by the prosecutor. A number of Commissioners favored the Workgroup proposal for such relief.^{ix} Opposition to retroactive relief cited the potential for new administrative burdens and Law and Court fiscal impacts.

Date: October 15, 2105

The Alaska Criminal Commission :

Gregory Razo, Chair
Alexander O. Bryner
John Coghill (non-voting)
Gary Folger
Jeff Jessee
Wes Keller (non-voting)
Stephanie Rhoades
Craig Richards
Kris Sell
Brenda Stanfill
Quinlan Steiner
Trevor Stevens
Ronald Taylor

ⁱ See, e.g., *Mekiana v. State*, 707 P.2d 918, 921 (Alaska App.1985), rev'd on other grounds, 726 P.2d 189 (Alaska 1986).

ⁱⁱ *Journey v. State*, 895 P.2d 955, 958-959 (Alaska 1995).

ⁱⁱⁱ *Doe v. State*, 92 P.3d 398, 407 (Alaska 2004).

^{iv} *Journey v. State*, 895 P.2d 955, 958-959 (Alaska 1995).

^v See e.g. [Crime and Unemployment: What's the Link? March 2009 Fact Sheet](#).

^{vi} [Council of State Governments, various sources](#).

^{vii} See, e.g., *State v. Platt*, Case S-1273, Opinion 6182 (Alaska, Oct. 26, 2007)(not reported)

^{viii} See e.g. *State v. Huletz*, 838 P.2d 1257, 1259 (Alaska App. 1992) (“By its very nature... a suspended imposition of sentence is primarily meant to be a one-time opportunity for particularly deserving first-offenders.”).

^{ix} The Workgroup proposal included the following provision for limited retroactive relief.

**Section 3. The uncodified law of the State of Alaska is amended by adding a new section to read:*

APPLICABILITY. (a) Except as stated in (b) of this section, the new provisions of this Act applies to offenses committed before, on, or after its effective date if a plea of guilty or nolo contendere or a guilty verdict is entered on or after the effective date of this Act. This Act takes effect on July 1, 2016.

(b) An individual found guilty prior to the effective date of this act, whose case was discharged without imposition of sentence and whose conviction was set-aside under the former AS 12. 55.085(e), may request the court for the relief available under current law. The court may grant such relief only if the request for such relief is unopposed by the prosecutor. That charge(s) shall be treated as “dismissed-diverted without conviction” in accordance with the AS 12.55.085 (h)(1)-(3).

A BILL
FOR AN ACT ENTITLED

1 “An act relating to a suspended imposition of conviction and providing for an effective date.”

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA

3 *Section 1. AS 12.55.085 is amended to read

4 Sec. 12.55.085. Suspending imposition of conviction [SENTENCE].

5
6 (a) Except as provided in (f) of this section, if it appears in any case that there are circumstances
7 in mitigation of [THE] punishment, or that the ends of justice will be served, the court may, in its
8 discretion, suspend the imposition of conviction [SENTENCE AND MAY DIRECT THAT THE
9 SUSPENSION CONTINUE] for a period of time not to exceed two years for a misdemeanor
10 and five years for a felony [NOT EXCEEDING THE MAXIMUM TERM OF SENTENCE
11 THAT MAY BE IMPOSED OR A PERIOD OF ONE YEAR, WHICHEVER IS GREATER,] and
12 upon the terms and conditions that the court determines in accordance with paragraphs (b) and
13 (c) of this section, [AND SHALL PLACE THE PERSON ON PROBATION UNDER THE
14 CHARGE AND SUPERVISION OF THE PROBATION OFFICER OF THE COURT DURING
15 THE SUSPENSION.

16
17 (b) The court shall

18 (1) place the person on probation in accordance with AS 33.05.020(a), and as defined
19 in AS 33.05.080(3), with only those conditions that are necessary to address public
20 safety, promote the rehabilitation of the person, reduce the likelihood of his or her
21 recidivism, and provide restitution to the victim; and

22 (2) order the defendant to comply with release conditions as authorized under AS
23 12.30.011(a)(1)-(4), AS 12.30.016 and AS 12.30.027.

24
25 (c) The court may order the defendant to pay costs associated with participation in court
26 ordered treatment programs during the period of pre-conviction probation.

27
28 (d)[(b)] At any time during the pre-conviction probationary term [OF THE PERSON RELEASED
29 ON PROBATION], a probation officer may, without warrant or other process, rearrest the
30 defendant [PERSON] so placed in the officer's care and bring the defendant [PERSON] before the
31 court, or the court may, in its discretion, issue a warrant for the rearrest of the defendant [person].

1 **(e) The court may, at any time, revoke and terminate pre-conviction probation, convict, and**
2 **pronounce sentence subject to the limitation specified in AS 12.55.086(c), if the court finds**
3 **by a preponderance of the evidence that the defendant**

4 **(1) failed to complete the conditions of the suspended imposition of conviction within**
5 **the time specified;**

6 **(2) violated the conditions of the suspended imposition of conviction;**

7 **(3) has not substantially complied with all conditions during the period of pre-**
8 **conviction probation, or**

9 **(4) engaged in criminal practices.**

10 [(b)THE COURT MAY REVOKE AND TERMINATE THE PROBATION IF THE INTERESTS
11 OF JUSTICE REQUIRE, AND IF THE COURT, IN ITS JUDGMENT, HAS REASON TO
12 BELIEVE THAT THE PERSON PLACED ON PROBATION IS

13 (1) VIOLATING THE CONDITIONS OF PROBATION;

14 (2) ENGAGING IN CRIMINAL PRACTICES; OR

15 (3) VIOLATING AN ORDER OF THE COURT TO PARTICIPATE
16 IN OR COMPLY WITH THE TREATMENT PLAN OF A
17 REHABILITATION PROGRAM UNDER AS 12.55.015(A)(10).

18 (c) UPON REVOCATION AND TERMINATION OF THE PROBATION, THE COURT MAY
19 PRONOUNCE SENTENCE AT ANY TIME WITHIN THE MAXIMUM PROBATION PERIOD
20 AUTHORIZED BY THIS SECTION, SUBJECT TO THE LIMITATION SPECIFIED IN AS
21 12.55.086(c)]

22 **(f)** [(d)] The court may, at any time during the period of **pre-conviction** probation, [REVOKE OR]
23 modify its order [of] suspending [sion of] **the** imposition of **conviction** [SENTENCE]. It may at
24 any time, when the ends of justice will be served, and when the good conduct and reform of the
25 person held on **pre-conviction** probation warrant it, terminate the period of **pre-conviction**
26 probation and discharge the **defendant** [person] held. If the court has not revoked the order of
27 **pre-conviction** probation, [AND PRONOUNCED SENTENCE], the defendant shall, at the end
28 of the term of probation, be discharged by the court. [(e) UPON THE DISCHARGE BY
29 THE COURT WITHOUT IMPOSITION OF SENTENCE, THE COURT MAY SET ASIDE THE
30 CONVICTION AND ISSUE TO THE PERSON A CERTIFICATE TO THAT EFFECT.]

31
32 **(g)**[(f)] The court may not suspend the imposition of **conviction if** [SENTENCE OF A PERSON
33 WHO]

34 (1) **the present charge** is [CONVICTED OF] a violation of AS 11.41.100 - 11.41.220,
35 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
36 - 11.61.128, or AS 11.66.110 - 11.66.135;

37 (2) **the defendant used** [used] a firearm in the commission of the **present charge** [THE
38 CHARGE FOR WHICH THE PERSON IS CONVICTED];

1 (3) **the present charge** is [CONVICTED OF] a violation of AS 11.41.230 - 11.41.250 or
2 a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41
3 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to
4 an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of
5 this paragraph, a person shall be considered to have a prior conviction even if that conviction has
6 been set aside under **former AS 12.55.085 (e)** or under the equivalent provision of the laws of
7 another jurisdiction; or if

8 **(4) the defendant has been previously placed on pre-conviction probation under this**
9 **section unless the court makes written findings that there are specific circumstances in**
10 **mitigation and that the ends of justice will be served by an order under this section.**
11

12 **(h) Upon discharge by the court under (f) of this section,**

13 **(1) the charges against the person shall be listed as “dismissed-diverted**
14 **without conviction” and shall not constitute a criminal conviction and the court shall**
15 **issue to the person a certificate to that effect;**

16 **(2) the person shall not be required to list this disposition on any application**
17 **for employment, licensure, or otherwise unless required to do so by federal law;**

18 **(3) court records of the suspended imposition of conviction shall not be**
19 **introduced as evidence in any court in a civil, criminal, or other matter without the**
20 **consent of the person or an order of the court.**
21

22 *Sec. 2. Sec. 12.55.086 is amended to read:

23 **AS 12.55.086 Imprisonment as a condition of suspended imposition of conviction**
24 **[SENTENCE].**

25 (a) When the imposition of **conviction** [SENTENCE] is suspended under AS 12.55.085, the court
26 may require, as a special condition of **pre-conviction** probation, that the defendant serve a definite
27 term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment
28 that could have been imposed. [THE COURT MAY RECOMMEND THAT THE DEFENDANT
29 SERVE ALL OR PART OF THE TERM IN A CORRECTIONAL RESTITUTION CENTER.]

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

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

1 ***Section 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

2 **APPLICABILITY.** The new provisions of this Act applies to offenses committed before,
3 on, or after its effective date if a plea of guilty or nolo contendere or a guilty verdict is entered on
4 or after the effective date of this Act. This Act takes effect on July 1, 2016.

5 ***Section 4.** The uncodified law of the State of Alaska is amended by adding a new subsection (3)
6 to Sec. 35.05.080 (“Definitions”).

7 (3) “pre-conviction probation,” as authorized under AS 12.55.085, is a diversion procedure under
8 which the trial court may release a defendant subject to conditions imposed by the court and subject
9 to the supervision of the probation service as provided in this chapter. Pre-conviction probation is
10 permitted for the period during which the trial court has deferred the entry of a conviction.