

Sec. 12.55.155. Factors in aggravation and mitigation.

(a) Except as provided in (e) of this section, if a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) and

(1) the low end of the presumptive range is four years or less, the court may impose any sentence below the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation;

(2) the low end of the presumptive range is more than four years, the court may impose a sentence below the presumptive range as long as the active term of imprisonment is not less than 50 percent of the low end of the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation.

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

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

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

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, consumption of alcohol or drugs, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking a presumptive range under this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated assaultive behavior, repeated instances of assaultive behavior, repeated instances of cruelty to animals proscribed under AS 11.61.140(a)(1) and (3) - (5), or a combination of assaultive behavior and cruelty to animals proscribed under AS 11.61.140(a)(1) and (3) - (5); in this paragraph, "aggravated assaultive behavior" means assault that is a felony under AS 11.41, or a similar provision in another jurisdiction;

- (9) the defendant knew that the offense involved more than one victim;
- (10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;
- (11) the defendant committed the offense under an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;
- (12) the defendant was on release under AS 12.30 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;
- (13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, firefighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;
- (14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;
- (15) the defendant has three or more prior felony convictions;
- (16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;
- (17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;
- (18) the offense was a felony
 - (A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;
 - (B) specified in AS 11.41.410 - 11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim;
 - (C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;
 - (D) specified in AS 11.41 and was committed against a person with whom the defendant has a dating relationship or with whom the defendant has engaged in a sexual relationship; or
 - (E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128 and the defendant was 10 or more years older than the victim;
- (19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

while attempting to escape or resist arrest or if it is an assault on a uniformed or otherwise clearly identified peace officer or correctional employee; notice and denial of convictions are governed by AS 12.55.145(b) - (d);

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

- (A) "school bus" has the meaning given in AS 11.71.900;
- (B) "school district" has the meaning given in AS 47.07.063;
- (C) "school grounds" has the meaning given in AS 11.71.900;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

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

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

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;

(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;

(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed

(A) as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the

ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this subparagraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy; or

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

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

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

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

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

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

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

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

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

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

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

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

